No. 15-50558

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ADRIAN SALAZAR,

Plaintiff-Appellee,
v.

SOUTH SAN ANTONIO INDEPENDENT SCHOOL DISTRICT,

Defendant-Appellant

On Appeal from the United States District Court
for the Western District of Texas – San Antonio Division

BRIEF OF AMICI CURIAE NATIONAL SCHOOL BOARDS ASSOCIATION AND THE TEXAS ASSOCIATION OF SCHOOL BOARDS LEGAL ASSISTANCE FUND IN SUPPORT OF DEFENDANT-APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that, in addition to those persons listed in the briefs previously filed by the parties to this appeal, the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. National School Boards Association, Alexandria, Virginia – *Amicus Curiae,* Alexandria, Virginia

2. Texas Association of School Boards Legal Assistance Fund (including the Texas Association of School Boards, Texas Association of School Administrators, and the Texas Council of School Attorneys) – *Amicus Curiae,* Austin, Texas

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STATEMENT OF INTEREST OF AMICI CURIAE AND AUTHORITY TO FILE BRIEF[1]

The National School Boards Association ("NSBA") is a non-profit organization of state associations of school boards throughout the United States and the Board of Education of the U.S. Virgin Islands. Through its state associations, NSBA represents more than 90,000 of the nation's school board members who, in turn, govern approximately 13,600 local school districts that serve nearly 50 million public school students, which is approximately 90 percent of the elementary and secondary students in the nation. The Texas Association of School Boards (TASB) is a Texas non-profit corporation whose voluntary membership consists of the 1,036 school boards in the State of Texas. TASB's mission is to promote educational excellence for Texas school children through advocacy, leadership, and high quality services to school districts. TASB established the Legal Assistance Fund (LAF) under a Trust Agreement nearly three decades ago. The purpose of the LAF is to assist parties whose positions are aligned with the interests of Texas school districts by advocating through litigation for issues or causes that generally affect or will affect the public schools of Texas. Nearly 800 Texas school districts are members of the LAF. The LAF's board of trustees is governed by nine members representing TASB, the Texas Association

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All parties have consented to the filing of this brief. Additionally, no attorney for any party has authored this brief in whole or in part, and no person or entity other than Amici and their counsel have made any monetary contribution to the preparation or submission of this brief.

of School Administrators, and the Texas Council of School Attorneys. NSBA's and TASB's amicus briefs have been cited by the United States Supreme Court and this Court in numerous cases involving education and students. *See, e.g.*, *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999); *Morgan v. Swanson*, 755 F.3d 757 (5th Cir. 2014); *Doe v. Covington County Sch. Dist.*, 675 F.3d 849 (5th Cir. 2012).

Amici have submitted this brief because of the substantial impact that this Court's eventual ruling will have on the operation of schools that are subject to Title IX of the Education Amendments of 1972, 20 U.S.C. §1681. Although the Supreme Court has held that "knowledge of the wrongdoer himself is not pertinent to the analuuc3nef n4b§8(t)s

of mentoring relationships between educators and students which are associated with academic achievement and which are a protective factor against abuse. By addressing the real-world impact that a strict liability standard will have on the

judgment based solely on the knowledge of the perpetrator, the district court has, in effect, retroactively amended the Title IX contract with an untenable condition that will be financially devastating for schools and that ultimately will undermine Title IX's commendable policy objectives.

According to the U.S. Department of Education, in 2011, the average school district received just 10.16 percent of its revenue from federal sources.[2] A large portion of these federal dollars – approximately $12.6 billion in 2013 – is spent on special education for students with disabilities.[3] Other noteworthy federal education grant programs include the National School Lunch Program, the National School Breakfast Program, English language acquisition programs, and migrant education programs.[4]

When a school district accepts federal aid, it "weighs the benefits and burdens before accepting the funds." *Guardians Ass'n v. Civil Serv. Comm'n of N.Y.*, 463 U.S. 582, 596 (1983).

criminal acts of school supervisors, many school districts will conclude that the burden significantly outweighs the benefits. Surely Congress did not intend to discourage schools from participating in these programs. *Cf. id.* at 603, n. 24 (the "salutary deterrent effect of a compensatory remedy" may be "outweighed by the possibility that such a remedy would dissuade potential recipients from participating in important federal programs"); *see also Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 656 (1999) (Kennedy, J., dissenting) ("Without doubt, the scope of potential damages liability is one of the most significant factors a school would consider in deciding whether to receive federal funds").

Yet this is the likely consequence of the standard imposed by the district court. Under the court's ruling, no matter how vigilant a school is in providing anti-harassment training and complying with the mandates of Title IX, it will always be liable if the perpetrator is a school supervisor acting surreptitiously and alone. A single adverse judgment easily could exceed a district's annual federal funding or cause a financial crisis that impacts critical school services.[5]

Of the more than 1,000 school districts in the State of Texas, more than 75 percent of them enroll fewer than 1,600 students and receive a proportionately

[5] *See, e.g., Gebser*, 524 U.S. at 290 (noting that the defendant school district had received less than $120,000.00 in federal aid); *Canutillo*, 101 F.3d at 400 (even if school districts are vigilant in attempting to guard against abuse, strict liability creates an unreasonable risk of "potential financial ruin" for districts).

smaller share of federal dollars.[6] For example, Lago Vista ISD, the school district in *Gebser*, received just $617,112.00 in federal aid in 2012.[7] A $4.5 million judgment not only would exceed Lago Vista ISD's annual federal funding, it would wipe out most of the district's budget for teacher salaries.[8] Although South San Antonio ISD, with 10,000 students, receives more federal dollars than Lago Vista ISD, 89.7 percent of its students are economically disadvantaged, and a substantial portion its federal dollars are used to provide important services to students in need.[9]

The financial implications for schools are even greater in situations in which the perpetrator harms more than one student and each student asserts a separate claim. *See, e.g.*, *Canutillo Indep. Sch. Dist. v. Nat'l Union Fire Ins. Co.*, 99 F.3d 695 (5th Cir. 1996) (teacher allegedly molested five second-grade girls). Nor are the risks eliminated by the potential availability of insurance. Since the 1980s, when insurers received a large number of clergy-related sex abuse claims, insurance has become more expensive with higher premiums, higher deductibles, and intensive underwriting, and exclusions from coverage remain broad. *See generally*

Claims," 17 CONN. INS. L.J. 355, 357-58, 397-97 (2011); *see e.g.*, *Canutillo*, 99 F.3d at 708 (holding that insurer had no duty to defend school district against Title IX claims; coverage was required only when school officials were acting "in the performance of duties" and "no person commits assault and battery in the performance of his duties"); *TIG Ins. Co. v. San Antonio YMCA*, 172 S.W.3d 652, 661 (Tex. App. – San Antonio 2005, no pet.) (holding that counselor's abuse of six children was considered a single "sexual abuse occurrence," thus limiting coverage available under the policy). If liability were to turn on the acts of the wrongdoer, as opposed to a school's lack of care in responding to a wrongdoer, then insurance, already a scarce resource, would become "even harder to obtain." *John R. v. Oakland Unified Sch. Dist.*, 48 Cal.3d 438, 451, 769 P.2d 948, 956 (1989) (applying California law); *Bratton v. Calkins*, 870 P.2d 981, 987 (Wash. App. 1994, review den.) (accord).

The legislative record indicates that "Congress did not view Title IX as the kind of legislation that could generate expansive liability." *Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648, 668 n. 4 (5th Cir. 1997); *see also Cannon v. University of Chicago*, 441 U.S. 677, 709-710 (1979) (observing that Congress had considered and rejected the academic community's argument that a private right of action would lead to costly or burdensome litigation against schools). In *Cannon*, the Supreme Court concluded that a cut-off of federal funds by the Department of

II. Under *Gebser*

employee's "independent" discriminatory actions). Under *Gebser*, damages may be avoided "*even if the harm ultimately was not averted*." *Doe v. Dallas Indep. Sch. Dist.*, 220 F.3d 380, 385, 388 (5th Cir. 2000) (citation omitted) (affirming summary judgment because principal's "ineffective response," leading to "tragic" consequences for abused child, was not deliberately indifferent) (emphasis added).

Second, a school district may not be held liable unless it has had a *meaningful opportunity* to respond to the discrimination about which it has been notified. The opportunity for corrective action is central to *Gebser's* holding and is an essential term of the Title IX contract. *Gebser* repeatedly refers to the recipient's "opportunity for voluntary compliance," its "willing[ness] to institute prompt corrective measures," and the "opportunity to rectify any violation." *Gebser*, 524 U.S. at 289-90 (citations omitted). In this case, the district court focused narrowly on whether an appropriate person had authority to take corrective action in some general sense. (ROA.978-980.) The court did not consider

(describing "an official *who is advised of a Title IX violation* [and] refuses to take action to bring the recipient into compliance") (emphasis added).

Gebser contemplates that the opportunity for voluntary compliance will take place under conditions that are roughly "comparable" to those in an administrative enforcement setting. *Gebser*, 524 U.S. at 290 ("It would be unsound, we think, for a statute's *express* system of enforcement to require notice to the recipient and an opportunity to come into voluntary compliance while a judicially *implied* system of enforcement permits substantial liability without regard to the recipient's knowledge") (emphasis in the original). At the least, the "appropriate person" should have the ability, means, and opportunity to actually implement corrective action.

With administrative enforcement, the first step is a written notice, which is typically sent to the district superintendent. The allegations are outlined in detail, leaving little room for interpretation about the matters to be resolved. The opportunity for investigation, dialogue, and conciliation may take weeks, months, or even years, and the superintendent invariably will confer with the school board and other district officials regarding the investigation and resolution of the matter within the district. It is the rare case that does not involve the coordination of multiple departments. Thereafter, OCR will determine whether "the school has taken immediate and effective corrective action responsive to the harassment,

including effective actions to end the harassment."[10] If the district agrees to corrective action, the case is over, subject to possible future monitoring for compliance.[11] This approach is used even when violations are found "*because, even if OCR identifies a violation, Title IX requires OCR to attempt to secure voluntary compliance. Thus, because a school will have the opportunity to take reasonable corrective action before OCR issues a formal finding of violation, a school does not risk losing its Federal funding solely because discrimination occurred*."[12]

Nothing in *Gebser* authorizes courts to *diminish* the recipient's opportunity for voluntary compliance merely because damages are at stake rather than loss of federal funds. Here, South San Antonio ISD cannot objectively be viewed as having had a meaningful opportunity to remedy the misconduct when the only person in the entire school district with knowledge of the misconduct was the campus-level administrator who was engaged in the misconduct and was highly motivated to conceal it.

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[10] U.S. Department of Education, Office for Civil Rights, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (2001) at 14-15 (hereinafter "2001 Guidance"), *available at* www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf. (last visited 9/20/15).

[11] *Id.*

[12] *Id*. at 15 (emphasis added). In 2013-2014, OCR resolved 90 complaints related to sexual harassment in K-12 and post-secondary schools. *See* U.S. Department of Education, Office for Civil Rights, PROTECTING CIVIL RIGHTS, ADVANCING EQUITY: REPORT TO THE PRESIDENT AND SECRETARY OF EDUCATION FY 2013-2014 at 28 (2015), *available at* www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2013-14.pdf (last visited 9/20/15).

individuals are not deterred by the criminal law or school policies and cannot be relied upon to report their own wrongdoing.

In sum, liability under *Gebser* is not permitted unless the recipient has received a meaningful opportunity to take corrective action but has refused that opportunity. When the only person with knowledge of the sexual harassment is the perpetrator, this opportunity realistically does not exist; therefore, liability is precluded as a matter of law. The district court erred in holding to the contrary.

III. Current legal standards advance the policy objectives of Title IX by providing an incentive for schools to offer training programs aimed at the prevention of child sex abuse and harassment. A strict liability standard that permits large damages claims will impair these critical prevention efforts and ultimately will undermine Congress's policy objectives.

During the four decades of Title IX's existence, congressional policy has emphasized prevention as the primary means of advancing the policies embodied by Title IX. Prevention as a congressional policy choice permeates related federal statutes that address child sex abuse and exploitation.[13] The benefits of prevention cannot be gainsaid. During the period from 1992 through 2010, a period marked

[13] *See, e.g.*, U.S. Department of Justice, THE NATIONAL STRATEGY FOR CHILD EXPLOITATION PREVENTION AND INTERDICTION: A REPORT TO C

by numerous advances in child abuse research and training protocols, the nation experienced statistically significant declines in incidents of child sexual abuse.[14] Although prevention itself is costly, it is less costly than the secondary effects associated with investigating and responding to abuse.[15] The liability standard imposed by the district court diverts substantial resources away from these critical prevention efforts and undermines congressional policy.

Without question, child abuse is one of the country's "most serious concerns."[16] In 2012, children's protection agencies nationally received an estimated 3.4 million referrals, 9.3 percent of which involved allegations of sexual abuse.[17] Based on research occurring over the last three decades, federal policy increasingly has stressed collaboration among all levels of government: federal, state, and local.[18]

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[14] U.S. Department of Health & Human Services, Children's Bureau, CHILD MALTREATMENT 2012 at 92 (2012) *available at* http://www.acf.hhs.gov/sites/default/files/cb/cm2012.pdf (last visited 9/24/15) [hereinafter "CHILD MALTREATMENT"].

[15] In a 2012 study sponsored by the Centers for Disease for Control and Prevention, researchers found that the national economic burden of child abuse, including sexual abuse, is $124 billion and thus rivals diabetes and stroke as a serious public health concern. *See* X. Fang, et al, *The Economic Burden of Child Maltreatment in the United States and Implications for Prevention*, CHILD ABUSE & NEGLECT, Vol. 36, p. 161 (Feb. 2012), *available at* www.sciencedirect.com/science/article/pii/S0145213411003140. The study quantified these costs, including the costs associated with law enforcement and criminal justice, medical and mental health, and special education services. The economic burden is "substantial" and weighs heavily in favor of a public policy that favors prevention. *Id*. at 160-161.

[16] CHILD MALTREATMENT at 1.

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Although school districts are an important partner in the protection of students, neither Title IX nor its legislative history indicates that Congress intended the statute to serve as a vehicle for providing compensation to students who are injured by educators acting under a cloak of secrecy. Unlike Title VII, which "aims centrally to compensate victims of discrimination" through make-whole remedies, Title IX "focuses more on 'protecting' individuals from discriminatory practices carried out by recipients of federal funds" and to prevent recipients from using those funds in a discriminatory manner. *Gebser*, 504 U.S. at 287 and 292 (citations and quotations omitted); *see also Cannon*, 441 U.S. at 704 ("First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices."); 117 CONG. REC. 30399, 30412 (1971) (Comments of Sen. Bayh) ("It does not do any good to pass out hundreds of millions dollars if we do not see that the money is applied equitably to over half our citizens."). At the time of enactment, congressional drafters were focused broadly on practices affecting equal opportunity and access, such as admissions policies. *See Davis*, 526 U.S. at 663 (Kennedy, J., dissenting) (explaining that, when Title IX was first enacted, "the concept of sexual harassment as gender discrimination had not been recognized or considered by the courts").[19]

[19] The legislative record is bereft of references to child sex abuse or sexual

Consistent with Title IX's objective of access to institutions and protection against discriminatory practices, Congress encourages voluntary compliance through the administrative enforcement process. *See* 20 U.S.C § 1682. Toward that end, the Department of Education has focused on the prevention of discrimination by requiring schools to adopt and disseminate anti-discrimination grievance procedures and to appoint Title IX coordinators to manage schools' compliance efforts. *See* 34 C.F.R. §§ 106.08(a), 106.9.

Since the enactment of Title IX, the responsibilities of school districts and other educational institutions have grown exponentially as have their financial obligations. In 1997, the Department of Education issued its first policy guidance on sexual harassment for primary and secondary schools.[20] A revised guidance followed four years later.[21] These advisories presented new recommendations regarding policies, training, and investigations. In 2010, 2011, 2014, and 2015, several years after Michael Alcoser had departed South San Antonio ISD, the Department of Education issued additional advisories or guidance documents with

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harassment. *See generally* J. Todd, *Title IX of the 1972 Education Amendments: Preventing Sex Discrimination in Public Schools*, 53 TEX. L. REV. 103, 105 (Dec. 1974) (noting the "paucity

detailed recommendations for student-on-student harassment, training, curricula, investigation, discipline, and administration.[22] The Department also began using the phrase "sexual violence" in addition to sexual harassment and sexual discrimination to describe the prohibitions of Title IX.[23] The theme that connects these developments is prevention.

Prevention has long been the focus of other child-protection statutes as well. For example, two years after the passage of Title IX, Congress enacted the Child Abuse Prevention and Treatment Act (CAPTA), 42 U.S.C. § 5101, specifically aimed at supporting states in the prevention of child abuse. CAPTA, as amended, authorizes federal funding for grants to states to support prevention, investigation, and handling of cases of child maltreatment, including child sexual abuse.[24] One of CAPTA's most enduring reforms was to require the states, as a condition of receiving federal funds, to implement a state law for mandatory reporting of suspected child abuse or neglect. *See* 42 U.S.C. § 5106a(b)(2)(B). Today, all 50

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[22] U.S. Department of Education, April 4, 2011, Dear Colleague Letter, *available at* http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf; U.S. Department of Education, *Questions and Answers on Title IX and Sexual Violence*, April 29, 2014, *available at* http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf [hereinafter Title IX Q&A]; U.S. Department of Education, April 24, 2015, Dear Colleague Letter, *available at* http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201504-title-ix-coordinators.pdf.; U.S. Department of Education, Oct. 26, 2010, Dear Colleague Letter, *available at* www2.ed.gov/about/offices/ list/ocr/letters/colleague-201010.html.

[23] *See, e.g.*, Title IX Q&A, question J-4.

[24] *See* CHILD MALTREATMENT at 1, 74-75.

states have statutes that mandate the reporting of suspected child abuse and that criminalize the failure to report.[25] *See, e.g.*, TEXAS FAMILY CODE § 261.101.

The implementation of these reporting statutes led to training programs for school employees regarding the signs of child sex abuse and other forms of abuse. Thus, long before the risk of civil liability, the public schools were at the forefront of child protection efforts. Today, although most acts of child sex abuse are perpetrated by the child's family members and friends,[26] school staff predominate as the primary source of reports to law enforcement.[27]

In addition to these federal prevention efforts and recommendations, the states also have imposed their own sex-abuse prevention curricula requirements[28]

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[25] For a list of statutes, see U.S. Dre

and educator and student training standards.[29] The states also require rigorous background checks and criminal history screening for employees.[30] *See, e.g.*, TEX. E

experience in successful adolescent development and may reduce behavioral problems and produce higher academic achievement.[33]

Although many educational activities take place in groups, students respond

128 F.3d at 1031 (when considering whether to impose strict liability, courts generally consider whether it will give employers an incentive to change their activity; "it should be apparent" that strict liability should not apply under Title IX "because no plausible alteration of the activity creating the liability (educating students) is possible"); *Mary KK v. Jack LL*, 611 N.Y.S.2d 347, 203 A.D. 840 (1994) (describing one-on-one interactions as an "integral part of the educational process").

Current law provides the proper balance between pedagogy and vigilant child protection. Erosion of the *Gebser* standard by allowing strict liability for sexually harassing conduct by school supervisors would adversely impact the educational process and would divert funds away from harassment prevention programs and other school programs. This erosion is not warranted by case law, the statute, or public policy and should be rejected.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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