No. 06-2596
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

LISA RYAN FITZGERALD and ROBERT FITZGERALD,
as next friends of their minor child, Jacqueline Fitzgerald,

Plaintiffs-Appellants

v.

BARNSTABLE SCHOOL COMMITTEE; and DR. RUSSELL DEVER,

Defendants-Appellees

Appeal from the United States District Court
for the District of Massachusetts

Brief *Amicus Curiae* of American Civil Liberties Union, American Civil Liberties Union of Massachusetts, Crittenton Women's Union, Equal Rights Advocates, Jane Doe, Inc., Legal Momentum, Massachusetts Society for the Prevention of Cruelty to Children, Dr. Nan Stein, National Partnership on Women & Families, National Women's Law Center, Sargent Shriver National Center on Poverty Law, Women's Bar Association of Massachusetts, and Women's Law Project in support of Plaintiffs-Appellants and in support of reversal

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Emily J. Martin
Lenora M. Lapidus
American Civil Liberties Union Fdn.
Women's Rights Project
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2615

Sarah R. Wunsch
First Circuit No. 28628
ACLU Fdn. of Massachusetts
211 Congress Street
Boston, MA 02110
(617) 482-3170, ext. 323

Attorneys for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the *amici curiae* listed below[1] hereby certify that they have no parent corporations and there is no publicly held corporation that owns 10% or more of their stock:

American Civil Liberties Union
American Civil Liberties Union of Massachusetts
Crittenton Women's Union
Equal Rights Advocates
Jane Doe, Inc.
Legal Momentum
Massachusetts Society for the Prevention of Cruelty to Children
National Partnership on Women & Families
National Women's Law Center
Sargent Shriver National Center on Poverty Law
Women's Bar Association of Massachusetts
Women's Law Project

[1] One of the amici, Dr. Nan Stein, is an individual not required to make this disclosure.

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INTEREST OF *AMICI*

Amici are women's and civil rights organizations with a strong interest in preventing discrimination in education on the basis of sex, whether such discrimination occurs at the hands of school officials or peers. Individual statements of interest are set out in Addendum A.

INTRODUCTION

Five-year old Jacqueline Fitzgerald was subjected to severe sexual harassment at the hands of an older students for months on her school bus. When her parents at last learned of the harassment and immediately informed appropriate school officials, Barnstable School Committee (BSC) did almost nothing to remedy the situation. It did not remove the harasser from the school bus, reprimand him for his past actions, or instruct him to stay away from Jacqueline in the future. It did not place a monitor on the bus or notify staff of the incident. Three weeks after receiving notice of the incident, school officials did propose transferring Jacqueline to a different bus, but bus reassignments were used as a form of discipline in the school district; the proposed reassignment thus was in effect a proposed punishment for Jacqueline. As a result, the Fitzgeralds were forced to remove Jacqueline from the bus for her own safety. Later, when her harasser repeatedly appeared in Jacqueline's gym class without reprimand or

restriction, the Fitzgeralds were also forced to remove Jacqueline from her gym class. The experience deeply traumatized Jacqueline; six years later she continues to suffer post-traumatic stress disorder that has depressed her academic performance and ability to participate in school.

The district court concluded that no jury could find the school liable for maintaining a sexually hostile environment because, as a matter of law, BSC's response to the harassment was not unreasonable given that Jacqueline was not subjected to further sexual harassment by her peer after officials learned about the harassment. This conclusion ignores the school's role in placing before the Fitzgeralds the stark choice of pulling their daughter out of school district programs or exposing her to further harassment. It ignores the hostile environment that the school district created and perpetuated through its dismissive response to Jacqueline's allegations. Moreover, it contravenes established civil rights law, which recognizes that schools deny girls and women equal opportunity when they show deliberate indifference to known harassment. If affirmed, the district court's decision could insulate schools from liability for peer-on-peer harassment and assaults in a wide range of cases.

The district court also dismissed the Fitzgeralds' constitutional and statutory claims brought pursuant to 42 U.S.C. § 1983, ruling that Title IX precluded resort

to this mechanism. In so ruling, the district court again imposed an improperly restrictive interpretation on Title IX's guarantees. Congress intended Title IX to expand, not limit, plaintiffs' abilities to seek appropriate remedies for discrimination on the basis of sex. The district court erred in reading Title IX to close the door on § 1983 claims, and this error threatens to leave plaintiffs unable to enforce the unique guarantees of the Equal Protection Clause.

The decisions below undermine Title IX's promise of equal educational opportunity and should be reversed.

I. Plaintiffs Presented Sufficient Evidence to Go to the Jury on Whether BSC Was Deliberately Indifferent to a Sexually Hostile Educational Environment.

The Supreme Court has made clear that Title IX imposes liability when a school's deliberate indifference to known harassment of a plaintiff results in denial of educational opportunities to that plaintiff. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 634, 653-54 (1999) (student stated a Title IX claim when school knew she was harassed by peer and failed to address that harassment); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998) (Title IX provides damages remedy when school officials have actual knowledge of sexual harassment and respond with deliberate indifference). The evidence shows just

such deliberate indifference may have compromised Jacqueline Fitzgerald's access to equal educational opportunities. The district court erred in refusing to let this question go to a jury and granting summary judgment to Defendant BSC on Plaintiffs' Title IX claim.

There is no dispute that BSC officials with the authority to institute corrective measures had the actual notice of Briton Oleson's harassment of Jacqueline Fitzgerald that Title IX requires as a condition of liability. *See Gebser*, 524 U.S. at 277. On February 14, 2001, the Fitzgeralds informed the principal of Hyannis West Elementary School that Jacqueline had been forced by another student to lift her skirt and expose herself on the school bus every time she had worn a dress for the past five months. On February 16, they informed the principal that on these occasions, Jacqueline had also been forced to pull down her underwear and spread her legs.

The Supreme Court has held that a school district incurs liability under Title IX when in the face of such actual notice it is "deliberately indifferent" to a hostile educational environment—that is, where its "response to [] harassment or lack thereof is clearly unreasonable in light of the known circumstances." *Davis*, 526 U.S. at 648Conversely, if a school "takes timely and reasonable measures to end

the harassment, it is not liable under Title IX for prior harassment." *Wills v. Brown Univ.*, 184 F.3d 20, 26 (1st Cir. 1999).

The district court erred in refusing to consider whether BSC's response to the reports of Jacqueline's harassment constituted deliberate indifference. Its conclusion as a matter of law that a school cannot be deliberately indifferent if harassment of a specifically sexual nature does not recur after the school district receives notice of a hostile educational environment contravenes Supreme Court and lower court precedent. Viewing the evidence in the light most favorable to Plaintiffs (the non-moving parties), BSC's failure to take meaningful steps to address Jacqueline's harassment and prevent its recurrence exemplifies precisely the deliberate indifference that exposes a school district to Title IX liability. Because BSC failed to discipline Oleson or take any other action to prevent him from again harassing Jacqueline and failed to make any efforts to address Jacqueline's trauma, Jacqueline was immediately forced off the school bus and eventually out of her gym class.[2] BSC's deliberate indifference to the hostile

[2] BSC's proposal three weeks after receiving notice of the harassment that Jacqueline be assigned to a different bus is insufficient to support any conclusion that BSC was not deliberately indifferent. BSC customarily utilized the reassignment of students to different busses as a form of punishment. Courts, including this one, have recognized that deliberately indifferent responses to sexual harassment include responses that punish or burden on the victim, rather than the perpetrator. *E.g.*, *Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881, 907 (1st Cir. 1988) (defendant could be found deliberately indifferent for responding to complaints of

environment that threatened Jacqueline caused the denial of equal educational opportunities to Jacqueline on the basis of her sex—the precise harm Title IX was designed to prevent. The district court's conclusion that BSC's response to the allegations of sexual harassment was necessarily reasonable because, as a result of the Fitzgeralds' removal of their daughter from various educational contexts, these specific sexually harassing incidents did not recur, constitutes an unwarranted departure from established law.

Specifically, the district court's conclusion that "no evidence exists that Barnstable's reaction effectively 'caused' [Jacqueline] to suffer additional sexual harassment," Mem. at 18, too narrowly construes the harm against which Title IX protects. Title IX does not merely address incidents of sexual harassment *per se*. Rather, Title IX more broadly protects against the denial of educational opportunities on the basis of sex, promising that "[n]o person in the United States

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peer harassment by placing plaintiff on probation, while taking no disciplinary action against harassers); *Murrell v. Sch. Dist. No. 1*, 186 F.3d 1238 (10th Cir. 1999) (claim of deliberate indifference stated where school district responded to allegation of peer sexual harassment by suspending victim); *Patricia H. v. Berkeley Unified Sch. Dist.*, 830 F. Supp. 1288, 1297 (N.D. Cal. 1993) (school district could be liable under Title IX when it responded to complaints of traumatizing effects of harasser's continued presence by suggesting victims transfer to another school district); *Doe I v. Dallas Ind. Sch. Dist.*, No. CIV.A.3:01-CV-1092-R, 2002 WL 1592694, at *6 (N.D. Tex. July 16, 2002) (deliberate indifference could be found when school district responded to complaint of peer sexual assault in physical education class by removing victim, from class) unpublished opinion, attached in Addendum B.

shall, on the basis of sex be excluded from participation in, [or] be denied the benefits of . . . any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Moreover, as the Supreme Court has repeatedly affirmed, courts are bound to "accord Title IX a sweep as broad as its language." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005); *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982). When a school district refuses to conduct a meaningful investigation into allegations of sexual harassment, to discipline the perpetrator, or to adopt reasonably available steps to prevent this harassment from recurring, and when this deliberate indifference to harassment leads the victim to withdraw from portions of the educational program in order to protect herself from her harasser in the face of the district's indifference, the district has excluded a student from participating in an educational program or activity on the basis of her sex, even if it did not cause the discrete incidents of sexual harassment themselves. It has caused a harm that Title IX explicitly protects against.

For this reason, a defendant's response to the harassment of a plaintiff is absolutely relevant to determining whether a defendant has been deliberately indifferent, even when this response does not cause further incidents of specifically sexual harassment. The law in this Circuit is not to the contrary. In *Wills v. Brown*

University, 184 F.3d 20 (1st Cir. 1999), the question was raised whether a school could incur Title IX liability based on its reactions to a plaintiff's allegations of sexual harassment by a professor, when the professor made no further sexual contact with the student after the school received notice of the harassment, but the school's lack of remedial steps meant that the student was repeatedly brought into contact with the professor and was forced to drop a course required for her major in order to avoid him. This Court, however, did not reach that question, concluding that the plaintiff had waived this argument because she presented it for the first time in her reply brief on appeal. *Id.* at 27. Because of this waiver, this Court explicitly concluded it "need not decide" whether the theory was available to the plaintiff under Title IX. *Id.* *Wills* thus does not speak directly to the question presented in this case.

Wills does, however, cast important light on the relevant issue when it states:

> [E]vidence of an inadequate response is pertinent to show fault and causation where the plaintiff is claiming that she was harassed or continued to be harassed *after* the inadequate response. . . . There is no mechanical rule that makes such evidence relevant or irrelevant in the abstract: relevance depends on the facts and the theory of the case being pressed.

Id. at 26-27. In this case, the theory being expressed is that BSC's deliberate indifference to Jacqueline's harassment was an important cause and element of a hostile environment that continued after BSC received notice of the harassment.

While, because of the protective measures instituted by her parents, Jacqueline was not again forced to expose herself, BSC's inaction, including its failure to take steps to prevent the recurrence of such harassment, to discipline the perpetrator, or to address Jacqueline's trauma, contributed to and caused an ongoing environment of hostility to Jacqueline on the basis of her sex. BSC's deliberate indifference sent the unmistakable message that Oleson could continue to harass her with impunity and that BSC would take no steps to ensure her safety. This hostile environment, which BSC assisted in creating, continued after February 14, 2001, and drove Jacqueline off the school bus and out of her gym class, thus "effectively bar[ring]" her "access to an educational opportunity or benefit." *Davis*, 526 U.S. at 633. It also traumatized her to such an extent that her grades fell and she found it difficult to fully participate in other educational opportunities. *See id.* at 654 (plaintiff stated a cause of action under Title IX when she alleged a "concrete, negative effect" on her ability to receive an education, as evidenced by falling grades and a suicide threat).

Under the logic of *Wills*, BSC's deliberate indifference is therefore crucially relevant to this case, because this deliberate indifference *caused* the harm to Jacqueline that Title IX was designed to prevent. *Cf. Williams v. Board of Regents*, 477 F. 3d. 1282 (11th Cir. 2007), 2007 U.S. App. Lexis 2945 ("[A] Title IX

plaintiff . . . must allege that the Title IX recipient's deliberate indifference to the initial discrimination subjected the plaintiff to further discrimination."). *Id* at *24-25. Indeed, the dissenting judge in *Wills*, who would have found no waiver, concluded that just such a claim was available under Title IX. 184 F.3d at 37-38, 42 (Lipez, J. dissenting) (jury should have been permitted to consider whether continuing presence of harasser and response of plaintiff to harassment constituted hostile environment that denied plaintiff an educational benefit on the basis of her sex). Plaintiffs introduced evidence that BSC's deliberately indifferent response to Jacqueline's sexual harassment caused and resulted in her exclusion from educational opportunities on the basis of her sex, and thus violated Title IX. This question should have been permitted to go to the jury.

The reasoning of the Supreme Court and sister circuits requires this conclusion. As the Supreme Court stated in *Davis*, "[Title IX] makes clear that, whatever else it prohibits, students must not be denied access to educational benefits and opportunities on the basis of gender." 526 U.S. at 650. Explaining that while "the most obvious example of student-on-student sexual harassment capable of triggering a damages claim [against a school district] would thus involve the overt, physical deprivation of access to school resources," the Court made clear that "[i]t is not necessary, however, to show physical exclusion to

demonstrate that students have been deprived by the actions of another student or students of an educational opportunity on the basis of sex." *Id.* Given that exclusion from an educational resource or opportunity is the paradigmatic example of injury under Title IX, when a school district's deliberate indifference to sexual harassment causes such exclusion, the school district violates Title IX and is properly held liable in damages. In such an instance, the school district's "own deliberate indifference effectively caused the discrimination." *Id.* at 642-643. Because discrimination prohibited by Title IX comes in multiple forms, it is legally insufficient to conclude that a district's response could not have been deliberately indifferent so long as it did not subject the student to further discrimination in the particular form of harassment of a specifically sexual nature.

The Eleventh Circuit made this reasoning even more explicit in its recently issued opinion *Cf. Williams v. Board of Regents*, supra, 477 F.3d 1282 which involved the rape of a University of Georgia student by three student athletes. The court concluded that the plaintiff had alleged sufficient facts that the University's was deliberately indifferent to the assault when it failed to perform a thorough investigation and failed to promptly conduct a disciplinary hearing to determine whether to sanction the assailants. 2007 U.S. App. LEXIS 2945 at *25-28. Crucially, the Eleventh Circuit concluded that because the plaintiff withdrew from

school in the wake of the attacks, she had alleged facts that if proved would be sufficient to show that the University's deliberate indifference was the cause of further discrimination against the plaintiff "in the form of effectively denying [her] an opportunity to continue to attend UGA." *Id *28.* ("Although UGA and UGAA neither formally forced Williams to leave nor banned her from returning, the discrimination in which they engaged or they allowed to occur on campus caused Williams to withdraw and not return . . . [and thus] effectively barred her access to an educational opportunity or benefit."). *Id.* The court thus allowed her Title IX claims to proceed, explaining:

> In light of the harrowing ordeal that Williams faced on January 14 [the date of the alleged rape], her decision to withdraw from UGA was reasonable and expected. Viewing the evidence in the light most favorable to Williams, UGA failed to take any precautions that would prevent future attacks from Cole, Thomas, Brandon Williams, or like-minded hooligans should Williams have decided to return to UGA, either by, for example, removing from student housing or suspending the alleged assailants, or implementing a more protective sexual harassment policy to deal with future incidents. Considering what had already occurred, UGA's failure was inexplicable and discriminatory.

Id. The Eleventh Circuit's reasoning follows the logic set out in *Wills* and demonstrates its applicability to the present case; when a deliberately indifferent response to sexual assault or sexual harassment has the reasonable and expected effect of forcing a student out of participation in an educational program or activity, Title IX has been violated. *See also Murrell v. School District No. 1*, 186

F.3d 1238, 1247-49 (10th Cir. 1999) (school's inadequate response *after* the plaintiff was sexually assaulted was deliberate indifference to the existence of a sexually hostile environment, despite absence of repetition of sexually harassing behavior by the male classmate, and deprived plaintiff of educational opportunities in violation of Title IX).

The Fourth Circuit, too, has recognized that when a student experiences a single severe incident of peer sexual assault and a university has notice of this assault, but fails to take any steps to remedy it, the student may succeed in a claim of hostile environment sexual harassment against the university based on the university's inadequate response to the incident, when the assault and response lead to the student dropping out of classes. *Brzonkala v. Virginia Polytechnic and State University*, 132 F.3d 949, 959-61 (4th Cir. 1997).[3]

District court decisions also demonstrate that a school's deliberate indifference to sexual harassment can cause discriminatory harm in violation of Title IX, even in the absence of repetition of sexual overtures or assault. For instance in the recent decision *Doe v. Derby Bd. of Educ.*, 451 F. Supp. 2d 438 (D.

[3] That portion of the Fourth Circuit's opinion addressing plaintiff's claims against her attackers under the Violence Against Women Act was ultimately reversed by the Supreme Court, *United States v. Morrison*, 529 U.S. 598 (2000). The portion of the Fourth Circuit's decision addressing Title IX, however, was not.

Conn. 2006), the court denied a school district's motion for summary judgment in a case presenting the question whether the district had been deliberately indifferent in violation of Title IX after receiving notice of a student's rape by another student. Although the assailant did not sexually harass the victim after the district received notice of the assault, the court noted that "[the assailant] was permitted to continue attending school in the same building as [the plaintiff] after the assault, leaving open the constant potential for interactions between them." *Id.* at 444. Given evidence that the plaintiff in fact saw the assailant many times over the course of the year, and found these interactions very difficult, "even absent actual post-assault harassment by [the assailant], the fact that he and plaintiff attended school together could be found to constitute pervasive, severe, and objectively offensive harassment," the court reasoned, particularly where the plaintiff later transferred to escape her assailant's presence. *Id.* at 444-445. The court concluded that given these facts, a jury could find that the school district's discipline of the assailant was so inadequate as to constitute deliberate indifference, as was its failure to "reduce [plaintiff's] vulnerability to traumatic interactions with her attacker or to otherwise reach out to her to offer protection." *Id.* at 447-48; *see also Patricia H. v. Berkeley Unified Sch. Dist.*, 830 F. Supp. 1288, 1296-97 (N.D. Cal. 1993) (finding jury question whether hostile environment existed where continued presence of teacher

arguably caused students to avoid taking classes in building where teacher taught and to transfer to other schools); *Kelly v. Yale Univ.*, No. Civ.A. 3:01-CV-1591, 2003 WL 1563424 at *3-5(D. Conn. March 26, 2003)(unpublished, attached at Addendum C) (denying motion to dismiss when plaintiff alleged a single incident of sexual assault by a classmate, university failed to take steps to protect victim after receiving notice of the assault, and as a result plaintiff moved out of dormitory and stopped attending classes to protect herself, though no further harassment by assailant occurred); *Doe I v. Dallas Ind. Sch. Dist.*, Civ.A.3:01-CV-1092-R, 2002 WL 1592694, at *5-6 (N.D. Tex. July 16, 2002) (Addendum B) (denying motion to dismiss when five-year-old plaintiff alleged a single incident of sexual assault by classmate, school responded by removing plaintiff from the physical education class she shared with assailant, and plaintiff experienced depression and inability to fully utilize educational opportunities as a result).

The district court's legal conclusion absolving BSC of liability because Oleson did not again force Jacqueline to expose herself represents a clear departure from established law in its crabbed interpretation of causation and discrimination. Plaintiffs have properly raised a jury question as to whether BSC's response to the allegations of harassment constituted deliberate indifference that subjected Jacqueline to a hostile environment and had the effect of denying her access to

educational opportunities on the basis of her sex.

II. TITLE IX IS NOT A COMPREHENSIVE REMEDIAL SCHEME SUFFICIENT TO PRECLUDE 42 U.S.C. § 1983 CLAIMS.

Plaintiffs brought claims against BSC and Dr. Russell Dever, BSC's Superintendent, pursuant to 42 U.S.C. § 1983, alleging that their response to Oleson's sexual harassment of Jacqueline violated both the Equal Protection Clause of the 14th Amendment and Title IX itself. A5 (9/9/2004). Judge Keeton dismissed these § 1983 claims, finding them precluded by Title IX. See A9, Docket #48, transcript at 23. This dismissal was in error. Both the Fitzgeralds' Equal Protection claim and their Title IX claim pursuant to § 1983 should be permitted to proceed, for Title IX's remedies "complement, rather than supplant, [those available under] § 1983." *See City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 122 (2005).

A. Plaintiffs' Constitutional Claim Is Distinct from Their Title IX Claim and Therefore Is Not Precluded.

For more than a century, § 1983 "has stood as an independent safeguard against deprivations of federal constitutional and statutory rights." *Smith v. Robinson*, 468 U.S. 992, 1012 (1984). Given the important role § 1983 plays in ensuring that constitutional guarantees are fulfilled, it is not surprising that only once, in *Smith v. Robinson*, has the Supreme Court ever found preclusion of § 1983

to enforce a *constitutional* right. 468 U.S. at 992. In that instance, moreover, the Court's decision was promptly reversed by Congress. P.L. 99-372, 1986 U.S. Code Cong. & Admin. News (100 Stat. 796), codified at 20 U.S.C. § 1415(l).

In *Smith*, the Supreme Court set forth a two-prong test to decide whether constitutional claims arising out of the same facts as statutory violations could be litigated under § 1983: (1) Are the statutory and constitutional claims "virtually identical?" and (2) Did "Congress intend[][that the [statute] be the exclusive avenue through which a plaintiff may assert those claims[?]" 468 U.S. at 1009. In order for a constitutional claim under § 1983 to be precluded, both prongs of the *Smith* test must be satisfied. *Id;* s*ee also Communities for Equity v. Michigan H.S.A.A.*, 459 F.3d 676, 685 (6th Cir. 2006). Title IX satisfies neither prong of the *Smith* test.

1. Plaintiffs' Equal Protection claims are not "virtually identical" to their Title IX claims and thus should not be precluded.

The Fitzgeralds' Equal Protection claims are distinct from their Title IX claims. Moreover, the protections against sex discrimination that Title IX and the Equal Protection Clause provide differ markedly in their scope. The situation here is thus very different from that in *Smith*. In that case, the plaintiffs brought an Equal Protection claim, seeking to obtain publicly-financed special education; the Supreme Court, however, held that the Education of the Handicapped Act

("EHA"), 20 U.S.C. § 1400 *et seq.*, was the exclusive avenue through which plaintiffs could proceed. The Court determined that the statutory claims and the constitutional Equal Protection claims were "virtually identical" because the EHA, like § 1983 itself, was designed specifically as a vehicle for individuals to protect their constitutional rights, concluding that "[t]he EHA is a comprehensive scheme set up by Congress to aid the States in complying with their constitutional obligations to provide public education for handicapped children." *Smith,* 486 U.S. at 1009. The EHA was, like § 1983, a means of asserting equal protection rights and therefore "the [§1983] equal protection claim added nothing to petitioners' claims under the EHA." *Id.* at n. 12.

Under Title IX, by contrast, the scope of a litigant's rights differs in important respects from the scope of her rights under constitutional law. Specifically, a violation of the Constitution may occur even when there has been no violation of Title IX, as in the context of state-sponsored single-sex colleges. *See*, *e.g.*, *United States v. Virginia*, 518 U.S. 515 (1996) (male-only military academy unconstitutional); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (female-only nursing school violates Equal Protection Clause). No Title IX claim could have been brought in these cases because of Title IX's statutory exception for public undergraduate institutions with historically single-sex

admissions policies. 20 U.S.C. § 1681(a)(4), (5). Thus, if Title IX were held to preclude the use of § 1983 to challenge unconstitutional sex discrimination, these violations would go unredressed. Likewise, Title IX exempts sports involving bodily contact from certain non-discrimination requirements. 34 C.F.R. § 106.41. Yet such claims are cognizable under the Constitution. *See, e.g.*, *Saint v. Nebraska Sch. Activities Ass'n.*, 684 F. Supp. 626 (D. Neb. 1988); *Lantz v. Ambach*, 620 F. Supp. 663 (S.D.N.Y. 1985).

Moreover, and particularly relevant here, the standards for proving liability in damages for sexual harassment differ under Title IX and the Equal Protection Clause. As set out above, to prove BCS's liability for damages under Title IX, the Fitzgeralds were required to show that an appropriate school official had actual knowledge of harassment, *see Gebser*, 524 U.S. at 277; that the harassment was sufficiently severe to deprive the victim of equal access to opportunities; and that the school's response to notice of the harassment demonstrated "deliberate indifference." *Davis*, 526 U.S. at 633, 648. In contrast, when a plaintiff alleges liability of an official for sexual harassment in violation of the Equal Protection Clause, the plaintiff must show that the official was notified "either actually or constructively" of the harassment and that the official's behavior "could be characterized as supervisory encouragement, condonation, or acquiescence *or*

gross negligence amounting to deliberate indifference." *Lipsett v. Univ. of Puerto Rico*, *supra* 864 F.2d at 902; *see generally Pontarelli v. Stone*, 930 F.2d 104, 113-14 (1st Cir. 1991) (hostile environment claim cognizable under the Equal Protection Clause). Thus, in contrast to Title IX, a plaintiff may establish liability for constitutional violations by establishing that the supervisor knew *or should have known* about the harassment. In many sexual harassment cases, the difference between constructive and actual notice will be the difference between the success or failure of the plaintiff's claims. Moreover, this Court's statement in *Lipsett* that either a showing of encouragement, condonation, or acquiescence *or* deliberate indifference establishes liability under § 1983 may be more forgiving than Title IX's deliberate indifference rule.

Title IX and Equal Protection claims also are not virtually identical in their scope because they provide redress against different classes of defendants. This Court has previously determined that Title IX provides no remedy against individuals. *Lipsett*, 864 F.2d at 901. A refusal to permit § 1983 suits would effectively immunize individual state actors from liability, given the absence of redress against individuals under Title IX. *See Delgado v. Stegall*, 367 F.3d 668, 674 (7th Cir. 2004), *Doe v. D'Agostino*, 367 F. Supp. 2d 157, 171 (D. Mass. 2005).

Thus, the dismissal of the Fitzgeralds' § 1983 claims meant the dismissal of Superintendent Dever as a Defendant in this case.

In addition, Title IX applies only to recipients of federal funds. Whether an entity is a state actor under § 1983 is an inquiry entirely different from whether it is a recipient under Title IX. *See Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288, 297-298 (2001). An entity can potentially be a state actor bound by the Constitution without being a federal funds recipient bound by Title IX. Indeed, a school district could in theory attempt to avoid Title IX liability by declining to accept any federal funding. It could not, however, evade its obligation to provide equal protection of the law. Treating Title IX as the only available mechanism for addressing sex discrimination in education would inappropriately immunize these potential defendants from constitutional claims under § 1983.

Accordingly, because the scope and the reach of Title IX and constitutional claims under §1983 are very different, the two claims cannot be considered "virtually identical," even if the violations arise out of the same set of facts. *Compare Smith*, 468 U.S. at 1009 n.12 (stating that §1983 claim "added nothing to petitioners' claims"). Thus, preclusion of an Equal Protection § 1983 claim is inappropriate.

2. Title IX does not demonstrate intent to preclude concurrent constitutional claims under § 1983.

Even if this Court were to find claims under Title IX and the Equal Protection Clause against sex discrimination to be virtually identical, the Equal Protection claims still must be allowed because no showing can be made that Congress intended for Title IX to preclude them. *See Smith*, 468 U.S. at 1009. Such intent can be demonstrated either expressly in the words of the statute, or through the creation of such a comprehensive remedial statutory scheme that allowing a § 1983 claim would be inconsistent with that scheme, by permitting an end-run around these statutory remedies. *Id.* at 1012-13; *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 20 (1981); *Abrams*, 544 U.S. at 121. It is Defendants' burden to demonstrate Congressional intent to preclude. *Blessing v. Freestone*, 520 U.S. 329, 346 (1997). They cannot do so in this case.

Nothing whatsoever within Title IX's language expressly precludes § 1983 claims. Therefore, if this Court reaches this question, it must consider whether preclusion is implied by a comprehensive remedial statutory scheme inconsistent with permitting a § 1983 claim. In *Sea Clammers*, the Supreme Court found that because the two federal statutes at issue "contain[ed] unusually elaborate enforcement provisions," that the plaintiffs were precluded from relying on § 1983

to enforce these statutes and thus avoiding the statutes' specific enforcement requirements.[4] 453 U.S. at 13-15. Specifically, the statutes at issue explicitly extended broad powers to the Administrator of the Environmental Protection Agency ("EPA") and individual states to dispense both civil and criminal penalties; allowed private citizens to initiate civil suits for injunctive relief to enforce the statutes; and permitted "any interested person" to "seek judicial review … of various particular actions by the [EPA] Administrator" after first complying with explicit notice and filing procedures. *Id.* at 13-14. The plaintiffs in *Sea Clammers* had failed to comply with these procedures and pursuant to § 1983 were seeking not only injunctive relief expressly permitted under the statutes, but also half a billion dollars in compensatory and punitive damages not so authorized. *Id.* at 5, 14. In holding that the statutes preempted related suits under § 1983, the Supreme Court explained that its motive was to prevent plaintiffs from skirting detailed statutory procedures by running into court with a § 1983 action: *Id.* at 20.

Title IX's statutory language does not set out "unusually elaborate enforcement provisions," and thus the *Sea Clammers* analysis is inapposite. The sole method of enforcement set out in the statute is an administrative scheme delegated to agency discretion that can result in cutting off federal funding to the

[4] *Sea Clammers* did not address the very different question of preclusion of *constitutional* claims pursuant to § 1983, which is presented here.

educational institution, with no express provisions addressing a private right of action. *See* 20 U.S.C. § 1682. The statutory language does not even address how or whether individuals might file a complaint. An individual cannot force or require the government to handle the claim pursuant to the administrative procedure set out in the statute. Likewise, the complainant is unable to demand that the Department seek a specific remedy tailored to that individual through the statute's express administrative process. This is a far cry from the elaborate provisions at issue in *Sea Clammers*.

The Supreme Court in *Cannon v. University of Chicago*, 441 U.S. 677, 683 (1979), held that in addition to the explicit statutory administrative enforcement scheme, an implied private right of action exists under Title IX. But the existence of the implied private right of action does not change the *Sea Clammers* analysis, for two reasons. First, the Supreme Court's analysis of whether a statute's comprehensive remedial scheme precludes recourse to § 1983 addresses express statutory remedies, not implied remedies. *See, e.g.*, *Sea Clammers*, 453 U.S. at 14-15 ("[I]t is an elemental canon of statutory construction that where a statute *expressly* provides a particular remedy or remedies, a court must be chary of reading others into it.") (emphasis added, internal quotation marks omitted); *Communities. for Equity*, 459 F.3d at 690 ("The Supreme Court has made clear that

the question of what Congress intended is an inquiry focused on the statute itself."). Only such express remedies have ever been held by the Supreme Court to preclude reliance on § 1983. Second, the Supreme Court's own interpretation of Title IX recognizes that Congress did not intend to restrict or limit remedies for discrimination through its passage. In *Cannon*, the Supreme Court explained that an implied private right of action under Title IX was necessary to achieve the statute's fundamental purposes. 441 U.S. at 704-8. It has since noted, "With respect to Title IX, … the private right of action is judicially implied, and there is thus no legislative expression of the scope of available remedies …." *Gebser*, 524 U.S. at 283-84 (internal citation omitted). In other words, the Supreme Court has recognized that the remedial scheme set out in the statute is noncomprehensive and that the sole express remedy enumerated in that statute – the termination of federal funds – was not intended by Congress to be an exclusive remedy. This logic compels the conclusion that the remedial scheme set out in the statute also was not intended to preclude enforcement of the statute pursuant to § 1983. *See Communities for Equity*, 459 F.3d at 690; *Crawford v. David*, 109 F.3d 1281,1284 (8th Circuit 1997) ; *Seamons v. Snow*, 84 F.3d 1226, 1233-34 (10th Circuit 1996).

3. **Other Courts of Appeals have recognized that Title IX does not preclude claims under the Equal Protection Clause.**

This Court has previously recognized that a plaintiff may simultaneously pursue Title IX claims and § 1983 Equal Protection claims based on the same set of facts, thus implicitly finding no claim preclusion. *Lipsett*, 864 F.2d at 901-02. Of the Courts of Appeals that have spoken directly to the issue, the majority have held that § 1983 constitutional claims are not precluded by Title IX. *See Communities for Equity*, 459 F.3d at 685; *Crawford*, 109 F.3d at 1284; *Seamons,* 84 F.3d at 1234. In *Doe v. Old Rochester Regional School District*, 56 F. Supp. 2d 114, 120 (D. Mass. 1999), a trial court in this Circuit followed suit, holding that Title IX is insufficiently comprehensive to preempt § 1983 constitutional claims. While the Seventh Circuit has found Title IX to preclude § 1983 constitutional claims against educational institutions, *Waid v. Merrill Area Pub. Sch.*, 91 F.3d 857, 862 (7th Cir. 1996), it agrees with the Sixth, Eighth, and Tenth Circuits that § 1983 constitutional claims against individuals are not preempted. *Delgado*, 367 F.3d at 674. *See also Doe*, 367 F. Supp. 2d at 171.[5]

[5] Only the Third Circuit has expressly found Title IX to preclude *all* related constitutional claims under § 1983. *Pfeiffer v. Marion Ctr. Area Sch. Dist.*, 917 F.2d 779, 789 (3d Cir. 1990). This decision has been criticized for its conclusory analysis. *See Lillard v. Shelby County Bd. of Educ.*, 76 F.3d 716, 723-724 (6th Cir. 1996). The Second Circuit held that Title IX precludes § 1983 constitutional claims against school districts, but did not address the extent to

B. BSC Cannot Provide Evidence Sufficient To Defeat The Presumption That Title IX Rights Are Enforceable Under § 1983.

Once a statute is deemed to create a right, there arises a presumption that those rights are enforceable under § 1983. *Abrams*, 544 U.S. at 119-21 (2005); *Sea Clammers*, 453 U.S. at 19. A defendant may defeat that presumption only by "demonstrat[ing] by express provision or other specific evidence from the statute itself that Congress intended to foreclose such private enforcement [under § 1983]." *Wright v. Roanoke Redev. & Hous. Auth.*, 479 U.S. 418, 423 (1987). As set out in detail in Part II.A.2, *supra*, Title IX's statutory language and its minimal and incomplete enforcement provisions set out no such comprehensive scheme. In the absence of such a comprehensive scheme, there is no indication that Congress intended to preclude individuals from relying on alternative mechanisms to enforce Title IX's guarantees.

This conclusion is strengthened by the fact that enforcement of Title IX pursuant to § 1983 does not permit plaintiffs to evade any procedural requirements or limitations set out in Title IX's own enforcement provisions, precisely because

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which individual defendants may be held liable under § 1983. *Bruneau ex rel. Schofield v. Kortright Cent. Sch. Dist.*, 163 F.3d 749, 758 (2d Cir. 1998). At least one trial court in the Second Circuit has found that constitutional § 1983 claims against individual defendants remain available, *Hayut v. State Univ. of New York*, 127 F. Supp. 2d 333, 340 (N.D.N.Y. 2000), and the Second Circuit did not dispute this conclusion. *Hayut v. State Univ. of N.Y.*, 352 F.3d 733 (2d Cir. 2003).

Title IX's express enforcement provisions do not include any such requirements or limitations. Title IX sets out no exhaustion requirement, nor any notice provisions. Pursuant to the implied private right of action, individuals who believe that they have been discriminated against may file suit in federal court immediately. Thus, the Supreme Court's articulated concern that individuals might use § 1983 to bypass administrative procedures that Congress intended to be mandatory, *e.g.*, *Smith*, 468 U.S. at 1012, does not arise in this context. Similarly, relying on § 1983 to enforce Title IX's requirements does not subvert any congressional determination that successful Title IX plaintiffs should not obtain attorneys' fees from school district defendants, for the simple reason that Congress has expressly provided for attorneys' fees for successful Title IX plaintiffs. 42 U.S.C. § 1988. The Supreme Court's expressed concern that individuals might use § 1983 as a way of burdening certain categories of defendants with attorneys' fees contrary to congressional intent therefore has no relevance to Title IX. *See Abrams*, 544 U.S. at 122-24; *Smith*, 468 U.S. at 1005.

Consistent with this analysis, the Fifth, Sixth, and Eighth Circuits have refused to preclude suit under § 1983 for Title IX violations. *See Crawford*, 109 F.3d at 1284 (8th Cir. 1997); *Lillard v. Shelby Bd. Of Ed.* 76 F.3d 716, 723 (6th Cir.

1996); *Lakoski v. James,* 66 F.3d 751, 755 (5th Cir. 1995).[6] The rationale shared by those courts is that the remedial scheme of Title IX cannot be deemed sufficiently comprehensive because its sole enumerated remedy is the termination of federal funds. *Crawford*, 109 F.3d at 1284; *Lillard*, 76 F.3d at 723; *Lakoski*, 66 F.3d at 754-55. Although this Court has not spoken to this issue, at least one trial judge in this Circuit has followed the Fifth, Sixth, and Eighth Circuits. *See Doe v. Old Rochester Regional School District*, 56 F. Supp. 2d 114, 120 (D. Mass. 1999).

Because the Fitzgeralds' Equal Protection claims are distinct from their § 1983 claims and because Title IX does not set out a comprehensive remedial scheme indicating an intent to close off other enforcement mechanisms, the district court erred when it dismissed Plaintiffs' § 1983 claims.

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[6] The Second, Tenth, and Eleventh Circuits have specifically held Title IX to be the exclusive remedy for violations of that statute. 2007 U.S. App. LEXIS at *36, *Bruneau*, 163 F.3d at 756; *Seamons*, 84 F.3d at 1234 n.8. The Tenth Circuit's statement is dicta, set out in a footnote without analysis. *Seamons*, 84 F.3d at 1234 n.8. The Eleventh Circuit stated that use of § 1983 "would permit an end run around Title IX's explicit language limiting liability to funding recipients," *Williams*,*supra*, at *36, but provided no citation to this language, perhaps because Title IX nowhere addresses damages liability. Only the Second Circuit addressed this question at any length, reasoning that the implied private right of action created a comprehensive remedial scheme indicating a congressional intent to foreclose alternative remedies. *Bruneau*, 163 F.3d at 756. For the reasons set out II.A.2 above, we believe this analysis overlooks the Supreme Court's consistent emphasis on express statutory provisions in determining whether Congress intended to foreclose alternative mechanisms and draws precisely the wrong lesson from the existence of Title IX's implied private right of action.

CONCLUSION

For these reasons, *amici* urge this Court to reverse the grant of summary judgment for the Defendants.

Respectfully submitted,

Emily J. Martin
Lenora M. Lapidus
American Civil Liberties Union Fdn.
Women's Rights Project
125 Broad Street, 18th
New York, NY 10004
(212) 549-2615
emartin@aclu.org

_____
Sarah R. Wunsch, First Circuit No. 28628
ACLU Foundation of Massachusetts
211 Congress Street, Third Floor
Boston, MA 02110
617-482-3170, ext. 323
wunsch@aclum.org

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,929 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using version 11 of WordPerfect in 14 point, Times New Roman font.

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Sarah R. Wunsch
Attorney for *Amici Curiae*

Dated: March 23, 2007

ADDENDUM TABLE OF CONTENTS

ADDENDUM A

STATEMENTS OF INTEREST OF AMICI

The **American Civil Liberties Union (ACLU)** is a nationwide, nonprofit, nonpartisan organization of almost 600,000 members, dedicated to preserving the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The **ACLU of Massachusetts (ACLUM)** is the local affiliate of the ACLU in Massachusetts, and has over 20,000 members and supporters. Through its Women's Rights Project (founded in 1972 by Ruth Bader Ginsburg), the ACLU has long sought to ensure that the law provides individuals with meaningful protection from harassment and other forms of discrimination on the basis of gender. In particular, the ACLU has battled the invidious effects of discrimination in education, including sexual harassment, given that the proper role of education is to provide opportunities to overcome disadvantage and stereotypes. Discrimination that serves to undermine this vital role and close down opportunity is especially pernicious.

Crittenton Women's Union (CWU) is a Massachusetts charitable organization whose mission is to "transform the course of low-income women's lives so that they can attain economic independence and create better futures for themselves and their families." CWU has a strong interest in ensuring equal access for girls and women to the educational resources they need to fulfill their potential.

Equal Rights Advocates (ERA) is a San Francisco-based women's rights organization whose mission is to secure and protect equal rights and economic opportunities for women and girl through litigation and advocacy. Founded in 1974, ERA has litigated historically important gender-based discrimination cases, including *Geduldig v. Aiello*, 417 U.S. 484 (1974), *Richmond Unified School District v.* Berg, 434 U.S. 158 (1977), *Doe v. Petaluma City Sch. Dist.,* 830 F. Supp. 1560 (N.D. Cal 1993), *reconsid. granted,* 949 F. Supp. 1415 (N.D. Cal. 1996), and *Dukes v. Wal-Mart,* 474 F3d 1214 (9th Cir 2007). ERA routinely provides information and representation to female students who are denied equal educational opportunity guaranteed them under Title IX. The organization has participated as amicus curiae in both federal and state cases where equality of opportunity for women and girls is at stake.

Jane Doe Inc.(JDI) is the Massachusetts Coalition Against Sexual Assault and Domestic Violence. JDI is a statewide non-profit membership coalition of over 60 community based non-profit organizations that provide crisis and other direct services to victims of sexual assault and domestic violence and their children. JDI works at the state and national level to improve public policy and practice related to protecting and ensuring the liberty of victims and survivors throughout the Commonwealth of Massachusetts. Jane Doe Inc. is extremely concerned with the prevention of harassment, successful strategies to intervene and interrupt acts of

harassment, and the changing conditions that allow harassment to both occur and to continue. Specifically, JDI's interest in this appeal is with sexual harassment against a child in a school environment and the school's understanding of and responsibility for taking action to protect a child victim of sexual harassment.

Legal Momentum advances the rights of women and girls by using the power of the law and creating innovative public policy. It is the nation's oldest legal advocacy organization devoted to women's rights. Legal Momentum, then known as **NOW Legal Defense**, pioneered the implementation of Title IX with PEER, its nationwide Project on Equal Education Rights, from 1974-1992. It was co-counsel in *Doe v. Petaluma City School District*, 949 F. Supp. 1415 (N.D. Cal. 1996), the first case to recognize that a school's failure to respond to peer sexual harassment may violate Title IX, and has appeared as amicus in numerous cases concerning the right to be free from sexual harassment and sex discrimination in education, including *Davis v. Monroe County Board of Education*, 526 U.S. 648 (1999) and *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992).

Since its incorporation in 1878, the **Massachusetts Society for the Prevention of Cruelty to Children** has been working to strengthen families and prevent child abuse. This includes promoting the development of safe and supportive environments in which children can learn and grow. Preventing the devastating emotional and educational consequences of sexual harassment of

children in school is key to such efforts and must focus both on ending the harassing acts and requiring schools to respond appropriately to reports. Each has significant implications for the welfare of the targeted child and for the entire school.

Dr. Nan D. Stein is Senior Research Scientist at the Center for Research on Women, Wellesley Centers for Women, located at Wellesley College. She is a nationally recognized expert in student-to-student sexual harassment in schools. For over 29 years, Dr. Stein has conducted research into prevalence and prevention efforts, written several nationally recognized curricula on the subject, served as an expert witness in numerous Federal lawsuits on sexual harassment/Title IX in k-12 schools, and written extensively in the educational, legal and mainstream press about sexual harassment in schools. She has also conducted scores of training sessions and/or given keynote addresses for school personnel throughout the country and to education officials in the state and federal government about sexual harassment in schools. She is particularly concerned that the district court's ruling in this case would allow schools to ignore sexual harassment, especially when the aggrieved child is young, dismissing those claims when an older child's claim might have been treated with more legitimacy.

The **National Partnership for Women & Families** is a national advocacy organization founded in 1971 that develops and promotes public policies to help

women achieve equal opportunity, access to quality health care, and economic security for themselves and their families. The National Partnership has a longstanding commitment to equal opportunity for women and to monitoring the enforcement of anti-discrimination laws. The National Partnership has devoted significant resources to combating sex and race discrimination in education and has filed numerous briefs amicus curiae in the U.S. Supreme Court and federal circuit courts of appeals to advance women's opportunities in education.

The **National Women's Law Center ("Center")** is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, the Center has worked to secure equal opportunities in education for girls and women through full enforcement of Title IX of the Education Amendments of 1972. The Center has provided assistance or participated as counsel or *amicus curiae* in a range of cases to secure the equal treatment of women under the law, including successfully arguing before the Supreme Court that Title IX requires schools to address student-to-student sexual harassment in *Davis v. Monroe County Board of Education*.

The **Sargent Shriver National Center on Poverty Law (Shriver Center)** champions economic opportunity through fair laws and policies so that people can move out of poverty permanently. Our methods blend advocacy, communication,

and strategic leadership on issues affecting people living in poverty. National in scope, the Shriver Center's work extends from the Beltway to state capitols and into communities building strategic alliances. Through its Women's Law and Policy Project, the Shriver Center works on issues related to education, sexual harassment, and other forms of violence against women and girls. Access to safe and quality education is the surest path out of poverty and toward economic well-being. The Shriver Center has a strong interest in the eradication of sexual harassment and sex discrimination in schools because they deny women and girls equal educational opportunities.

The **Women's Bar Association (**WBA) is a professional association of over 1,300 attorneys, judges, and policy makers in Massachusetts dedicated to advancing and protecting the interests of women and children in the legal system and in society. The WBA has actively advocated and worked on issues concerning equal access to educational opportunity for girls and women, including submitting amicus briefs in matters involving the treatment of girls and women in educational settings. WBA views the issues presented in this case as going to the core of equal educational opportunity for girls and women.

The **Women's Law Project (WLP)** is a non-profit public interest legal center with offices in Philadelphia and Pittsburgh, Pennsylvania. Founded in 1974, the WLP works to abolish discrimination and injustice and to advance the legal and

economic status of women through litigation, public policy development, public education and individual counseling. The WLP is committed to ending sexual abuse and harassment of women and children and to safeguarding the legal rights of women and children who experience sexual abuse. Toward that end, the WLP is interested in insuring a proper remedy for students who are subject to sexual harassment.