

No. 21-13379

**IN THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT**

JANE DOE,
Plaintiff-Appellant,

v.

GWINNETT COUNTY SCHOOL DISTRICT,
Defendant-Appellee.

**BRIEF FOR AMERICAN CIVIL LIBERTIES UNION,
GWINNETT STOPP, AND 14 OTHER CIVIL RIGHTS,
STUDENTS' RIGHTS, AND ANTI-VIOLENCE
ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF
PLAINTIFF-APPELLANT**

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Jane Doe v. Gwinnett County School District
No. 21-13379

**CERTIFICATE OF INTERESTED PERSONS AND
CORPORATE DISCLOSURE STATEMENT**

Amici Curiae provide the following Certificate of Interested Persons and Corporate Disclosure Statement pursuant to Eleventh Circuit Rules 26.1-1, 28-1(b), and 29-2. In addition to the persons and entities identified in the Certificate of Interested Persons and Corporate Disclosure Statement in the Brief of Plaintiff-Appellant, the following are known to have an interest in the outcome of the case:

1. American Civil Liberties Union, Amicus Curiae
2. Atlanta Women for Equality, Amicus Curiae
3. End Rape On Campus, Amicus Curiae
4. Florida Council Against Sexual Violence, Amicus Curiae
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9. Know Your IX, Amicus Curiae
10. Legal Momentum, Amicus Curiae
11. National Alliance to End Sexual Violence, Amicus Curiae
12. National Center for Youth Law, Amicus Curiae

13. National Crittenton, Amicus Curiae
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20. Victim Rights Law Center, Amicus Curiae
21. Young, Sean, Attorney for Amici Curiae

Amici Curiae are not publicly traded. Amici Curiae are not aware of any publicly traded company or corporation that has an interest in the outcome of the case or appeal.

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STATEMENT OF INTEREST OF *AMICI*¹

Amici curiae respectfully submit this brief in support of Plaintiff-Appellant. *Amici* are 16 civil rights, students' rights, and anti-violence organizations that engage in advocacy related to sexual harassment and school discipline. Their names and profiles are included as an appendix.

Amici have a strong interest in ensuring that Title IX is appropriately enforced to hold schools accountable for their responses to sexual harassment. Punishing students who report sexual harassment for violating school conduct codes contravenes Title IX and undermines its core purpose of protecting access to education. Such punishment chills reporting of sexual harassment, fails to support survivors of sexual violence and prevent harassment, and particularly harms students of color.

With the consent of both parties, *amici* submit this brief to aid the Court in evaluating whether the district court should have permitted Jane Doe to proceed to trial with her Title IX claims.

¹ No counsel for a party authored this brief in whole or in part, and no one other than *amici* and their counsel made any monetary contribution toward this brief's preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

All too often, K-12 schools punish students who come forward to report that they have been sexually harassed.² This contravenes Title IX of the Education Amendments of 1972 (“Title IX”), which prohibits schools both from unreasonable responses to sexual harassment and from retaliating against students who report that they have been sexually harassed. *Davis*, 526 U.S. at 630; *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 171 (2005). These protections are essential to Title IX’s anti-discrimination scheme. Without them, students who have been sexually harassed will be deterred from coming forward. When schools punish survivors of sexual harassment, they chill reporting, compound trauma, perpetuate injustice, and increase the frequency of sexual harassment in our schools.

Despite Title IX’s guarantees, when Jane Doe, then a sixteen-year-old high school sophomore, reported to her teachers and school administrators at Defendant-Appellee’s Peachtree Ridge High School (“Peachtree”) that she had been sexually assaulted on campus by another student—who forcibly kissed her, orally raped her, and masturbated in front of her without her consent in a confined room at school—

² The term “sexual harassment” includes sexual assault. *See e.g., Davis Next Friend LaShonda D v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 634 (1999) (referring to sexual batteries as “sexual harassment”); *Meritor Sav. Bank FSP v. Vinson*, 477 U.S. 57, 60 (1986) (referring to sexual assaults and forcible rapes as “sexual harassment”).

the school responded by punishing her twice. First, they suspended her for one week even before holding a disciplinary hearing to decide whether she had violated the school's code of conduct, which forbids oral sex without requiring a finding that the sexual contact was welcomed.³ Second, they extended her suspension after determining, following a questionable proceeding, that she had violated the school's prohibition on oral sex—again without any finding that she had welcomed the sexual contact.

Unfortunately, wholly deficient and punitive responses to sexual harassment like Peachtree's here are not atypical. Sexual harassment is as common in high school as it is in college, but K-12 schools are particularly poor at addressing it. Across the country, and contrary to the protections of Title IX, K-12 schools frequently respond to sexual harassment complaints by punishing the reporting student for a purported conduct violation.

Students like Jane Doe who experience and then report sexual harassment should be supported by their schools—not punished. Indeed, that is what Title IX requires. To fulfill Title IX's mandate of equal access, schools must allow survivors of sexual harassment to come forward without fear of being sanctioned. In Jane's

³ See Plaintiff-Appellant Brief at 8 n. 3 (explaining that, under civil rights law, sexual harassment claims are assessed based on whether the conduct was unwelcome, and noting that Gwinnett County School District's sexual harassment policy uses a "welcomeness" standard).

case, however, contrary to Title IX's mandate, Jane's school responded to her reporting a sexual assault by punishing her, even though the school never determined that she had engaged in sexual conduct on campus of her own volition—as opposed to being raped. What is more, Peachtree suspended Jane for longer than it suspended her assailant. Plaintiff-Appellant Brief at 27. Punishing students who report sexual harassment for engaging in the sexual conduct underlying their report creates an unfair and dangerous result that Title IX does not countenance.

The threat such actions pose to educational access is plain. Punishing students who report having been sexually harassed but are unable to (or not given a chance to) convince school administrators that the sexual contact was unwelcome deprives survivors of educational opportunities, exacerbates trauma and distress, and chills other students from reporting sexual violence. This creates a perverse cycle whereby school administrators who punish, shun, or shame survivors not only harm those students but also silence future students from reporting sexual harassment. Such punishments directly interfere with survivors' educational rights, denying students like Jane Doe who are suspended important instructional time, and often driving survivors to take leaves of absence, transfer schools (also like Jane Doe), or drop out altogether. These punitive responses are especially troubling because they are disproportionately meted out against students of color like Jane and thus compound existing educational inequities.

Because punishing students who report sexual harassment for the very sexual contact reported constitutes deliberate indifference and retaliation under Title IX, the district court's grant of summary judgment against Jane Doe should be reversed.

BACKGROUND

Title IX provides, in relevant part, that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” 28 U.S.C. § 1681(a). The Supreme Court has stressed that “discrimination” under Title IX should be construed broadly. *See, e.g., Jackson*, 544 U.S. at 174; *North Haven Bd. of Educ v. Bell*, 456 U.S. 512, 521 (1982) (“There is no doubt that if we are to give Title IX the scope that its origins dictate, we must accord it a sweep as broad as its language.”). Title IX was enacted to accomplish two related objectives: to avoid the use of federal resources to support discriminatory practices, and to provide individual citizens effective protection against those practices. *See Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979).

This statutory mandate encompasses two separate but related prohibitions at issue in this case. First, Title IX prohibits funding recipients from responding with deliberate indifference to acts of student-on-student harassment. *Davis*, 526 U.S. at 630. A school is deliberately indifferent when its “response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances.” *Id.*

Second, Title IX prohibits funding recipients from retaliating against individuals who report sexual harassment, given that encouraging reporting of sexual harassment “is integral to Title IX enforcement.” *Jackson*, 544 U.S. at 180. As the Supreme Court has emphasized, “if retaliation were not prohibited, Title IX’s enforcement scheme would unravel.” *Id.*

Notably, Title IX’s prohibition on retaliation does not turn on the merits of the underlying report. *See, e.g., Benson v. Little Rock Hilton Inn*, 742 F.2d 414, 416-17 (8th Cir. 1984) (observing that the merits are “irrelevant” for the purposes of a retaliation claim); *Liese v. Indian River Cnty. Hosp. Dist.*, 701 F.3d 334, 355 n. 16 (11th Cir. 2012) (addressing a retaliation claim without reaching the merits of a Title IX suit). Thus, a retaliation claim under Title IX may exist even if a report of sexual harassment does not result in a finding of sexual harassment.

Title IX has long required schools to assist students who report sexual harassment. *See, e.g., U.S. Dep’t of Educ., Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* 17 (Jan. 2001), <https://tinyurl.com/2p8urvje> (explaining that schools may be required to “provide tutoring; make tuition adjustments; offer reimbursement for professional counseling; or take other measures” to address the effects of harassment). Further confirming this obligation, Title IX regulations issued in 2020 require schools to adopt supportive measures for students who report sexual harassment “to restore or

preserve equal access to the [school's] education program or activity” and “protect the safety of all parties or the [school's] educational environment or deter sexual harassment.” U.S. Dep’t of Educ., *Questions and Answers on the Title IX Regulations on Sexual Harassment*, Question 33 (July 2021), <https://tinyurl.com/2p96yh2t> (citing 34 C.F.R. §§ 106.30(a), 106.44(a)). Examples of such measures include “counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures.” *Id.*

Schools must provide such support regardless of whether a formal complaint is filed and, critically, regardless of whether the allegation of harassment is ultimately able to be substantiated. *Revised Sexual Harassment Guidance* at 15; *Questions and Answers*, Questions 18, 32. Requiring schools to assist students even when they are unable or choose not to substantiate their claims is essential given that sexual harassment often does not result in sufficient evidence to prove the offense occurred. *See Doe v. Sch. Bd. of Broward Cnty., Fla.*, 604 F.3d 1248, 1262 (11th Cir. 2010) (“[I]nconclusive investigations are common, especially when alleged harassment occurs behind closed doors.”).

ARGUMENT

Peachtree Ridge High School contravened Title IX in two ways in its treatment of Jane Doe: responding to her sexual harassment complaint with deliberate indifference, and retaliating against her by punishing her for the very sexual contact that gave rise to her claim. As explained further below, and as Jane's case demonstrates, punishing students for the sexual contact underlying their reported sexual harassment complaint is contrary to the core purposes and protections of Title IX.

I. K-12 Schools Too Frequently Punish Students Reporting Harassment for the Reported Sexual Contact.

Sexual violence in higher education settings has received significant public attention in recent years, and, along with that attention, some reform. *See, e.g.*, *It's On Us, Our Story*, <https://tinyurl.com/yer4cb6p> (explaining that the White House's 2014 initiative has grown into the nation's largest nonprofit program dedicated to college sexual assault prevention and survivor support).

Far less attention has been paid, however, to sexual violence among younger students, despite its prevalence. *See, e.g.*, Erica L. Green, *'It's Like the Wild West': Sexual Assault Victims Struggle in K-12 Schools*, N.Y. Times (May 11, 2019), <https://tinyurl.com/2p8tftpju> (noting that "[t]hough colleges get the attention," K-12 schools are substantially behind colleges in responding to sexual harassment). According to a 2009 Department of Justice survey, nearly 20% of 14- to 17-year-old

girls have experienced a sexual assault. Nora Caplan-Bricker, *My School Punished Me*, Slate (Sept. 19, 2016, 8:44 PM), <https://tinyurl.com/26st77m3>; see also Corrine M. Williams et al., *Victimization and Perpetration of Unwanted Sexual Activities Among High School Students: Frequency and Correlates*, 20 *Violence Against Women* 1239, 1248-49 (2014) (22.6% of high school girls and 13.6% of high school boys reported experiencing an unwanted sexual activity). A 2015 survey found that 56% of teenage girls and 40% of teenage boys had experienced some form of sexual harassment. Nat'l Sexual Violence Res. Ctr., *Teenagers and Sexual Violence 2* (2018), <https://tinyurl.com/ybxpr5av>.

Including because K-12 students and administrators are generally unfamiliar with their respective rights and obligations under Title IX, however, few of those assaults are reported and treated by schools as sexual assault. See Green, *supra* (“[K-12 schools] have been found to have no rules at all for dealing with sexual misconduct” and are “often unaware of their obligations under federal law.”); Lauren F. Lichty et al., *Sexual Harassment Policies in K-12 Schools*, 78 *J. of Sch. Health* 607, 607 (2008) (of 748 K-12 schools, only 14% had sexual harassment policies available online and most failed to include half of the components required by Title IX). K-12 school districts across the United States reported only about 9,700 incidents of sexual assault, rape, or attempted rape during the 2015-16 academic year—many fewer than would be expected given the overall prevalence of sexual

violence in this age group. Tyler Kingkade, *K-12 Schools Keep Mishandling Sexual Assault Complaints. Will New Title IX Regulations Help?* U.S. News (May 25, 2020, 4:32 AM), <https://tinyurl.com/589jspbv>; *see also* U.S. Gov't Accountability Off., *K-12 Education: Students' Experiences with Bullying, Hate Speech, Hate Crimes, and Victimization in Schools* 23 (Nov. 2021), <https://tinyurl.com/2f88fdjy> (reporting similar data in 2017-18); *id.* at 1 (acknowledging that sexual assault is “generally underreported to authorities”).

Defendant-Appellee Gwinnett County School District exemplifies this pattern of underreporting. Year after year, the District—which in 2020 served 177,394 students across 141 schools—has reported *zero* incidents of sexual assault and *zero* incidents of sexual harassment to the federal government.⁴ Given that nearly 20% of teenage girls experience a sexual assault and 56% of teenage girls (and 40% of teenage boys) experience some form of sexual harassment, it is implausible that none occurred within the District's student population.

The failure of K-12 schools and school districts to appropriately address sexual harassment is widespread. In May 2020, 137 K-12 school districts across 37 states and the District of Columbia—including Gwinnett County School District—were under investigation by the U.S. Department of Education for mishandling Title

⁴ *See* Civ. Rts Data Collection, Gwinnett County (2017), <https://tinyurl.com/whf5axs9>; *id.* (2015), <https://tinyurl.com/nb8e92c4>; *id.* (2013), <https://tinyurl.com/nccta4a9>.

IX sexual-violence complaints. Mark Keierleber, *The Younger Victims of Sexual Violence in School*, *The Atlantic* (Aug. 10, 2017), <https://tinyurl.com/3f22xyus>; see also Kingkade, *K-12 Schools*, *supra* (observing that hundreds of lawsuits are filed every year against K-12 schools for mishandling sexual assault complaints).

One notable failing of K-12 schools under Title IX is that—as exemplified by Jane’s case—they regularly punish students who report sexual harassment. Such punishments are particularly troubling when, as here, they are imposed based on the very conduct that has been reported as sexual harassment. Recent examples of this perverse approach include:

At a high school in New York, an intellectually disabled tenth-grade girl was forced by two boys to engage in oral sex while five other boys watched. One of the boys was arrested and charged for assault, but the girl was nonetheless suspended for having “consensual” sex on school grounds. Kate Taylor, *Schools Punished Teenagers for Being Victims of Sexual Assault, Complaints Say*, *N.Y. Times* (June 7, 2016), <https://tinyurl.com/2p9awbf2>.

In Piscataway, New Jersey, a school gave a girl who reported having been assaulted on a school bus a ten-day suspension for “disorderly conduct” where the only disorderly conduct alleged was the sexual activity itself. Compl. at 2, 7-9, *S.P. v. Piscataway Twp. Sch. Dist.*, No. 2:18-cv-10037 (D.N.J. 2018). The assailant in that case ultimately pled guilty to the assault. *Id.* at 11.

At Carol City High School in Miami-Dade County, a girl found crying in a hallway by a teacher said that she thought she had been raped by three boys in a school bathroom. Later that day the school decided the incident was consensual and suspended the girl for ten days for having violated the school's rules against "inappropriate sexual behavior" on campus. She went on to spend several weeks at home, and ultimately transferred to a different school. Tyler Kingkade, *Schools Keep Punishing Girls – Especially Girls of Color – Who Report Sexual Assaults, and the Trump Administration's Title IX Reforms Won't Stop It*, *The 74* (Aug. 6, 2019), <https://tinyurl.com/2p8u5p3b>.

At Blake High School in Tampa, Florida, a student in her junior year reported to her school and the police that another student had raped her. The school decided it could not substantiate her allegations and suspended her for five days for having sex on campus. Two years later, another student reported that the same boy had raped her. Again, the school suspended the girl who reported the assault. She eventually left the district. The assailant was charged for the second assault and pled guilty to felony battery. Bethany Barnes, *'Tampa teens wanted their school to protect them. Instead, they say, it got worse.'*, *Tampa Bay Times*, (Dec. 12, 2021), <https://tinyurl.com/ycknmyaa>.

In Michigan, a first-year high school student reported that she was sexually assaulted by an older male classmate in his car in the school parking lot. The

assistant principal to whom the student reported the assault testified that she did not refer the incident to the school's Title IX coordinator because she had immediately decided the girl was lying. Instead, the school expelled the female student for being in the parking lot during class hours and engaging in sexual activity on school grounds. By contrast, the assailant, a star athlete, received a suspension. As a result of the female student's expulsion, she lost credit for classes she later had to repeat, forcing her to complete her sophomore year online and enroll in an alternative school for students with disciplinary issues. *Id.*; Mary Ann Georgeantopoulos, *A Teen Says She Was Expelled from School After a "Star Athlete" Sexually Assaulted Her*, BuzzFeed News (Feb. 8, 2017, 4:03 PM), <https://tinyurl.com/5n6kas6k>.

At a middle school in rural South Carolina, an eighth-grade girl reported that three boys had sexually assaulted her in a school bathroom. Within hours of the report and prior to any Title IX investigation, she was suspended for sexual misconduct and for being in the boys' restroom. Less than two months later, a different girl at the same school reported that she had been raped in the girls' restroom by one of the same assailants. That girl was expelled the same day for having sex in the restroom. Kingkade, *Schools Keep Punishing, supra*.⁴

⁴ In addition to these examples of formal suspensions and expulsions, schools also employ other means to punish students. For instance, an eighth-grade girl at Brooklyn, New York's Spring Creek Community School was dragged into an alleyway near campus by a fellow student, who forced her to perform oral and anal sex, secretly videotaped the assault, and shared the video online. After the video

These examples are not outliers. According to a recent survey from Know Your IX, a survivor- and youth-led project of Advocates for Youth that aims to empower students to end sexual and dating violence in their schools, of K-12 and higher education students who experienced sexual harassment, 15% of survivors who reported their assaults to their schools faced or were threatened with punishment in connection with their report. Sarah Nesbitt & Sage Carson, *The Cost of Reporting: Perpetrator Retaliation, Institutional Betrayal, and Student Survivor Pushout* 15, Know Your IX (2021), <https://tinyurl.com/2wph5cjp> (“Cost of Reporting”). These cases thus demonstrate a broader trend: many K-12 schools choose to punish instead of support students who report sexual harassment.⁵

went viral, the girl reported to the principal that she had been raped. The principal told the girl to “stay away” from school while they addressed the situation, because her presence would just “make things worse.” Just days later, the principal told the girl and her mother that she would be transferred to another school, a process that required her to miss nearly a month of school. Katie J.M. Baker, *Sent Home from Middle School After Reporting a Rape*, BuzzFeed News (Mar. 14, 2016, 10:05 PM), <https://tinyurl.com/4ed24w2k>.

⁵ The phenomenon of punishing students who report being sexually harassed also exists in higher education, particularly at schools with strict conduct codes. See, e.g., Whitney Evans, *Brigham Young Students Claim University Punished Rape Victims for Reporting*, NPR (Apr. 27, 2016, 4:37 PM), <https://tinyurl.com/2p9eu9xx>; Hannah Dreyfus, “*The Liberty Way*”: *How Liberty University Discourages and Dismisses Students’ Reports of Sexual Assaults*, ProPublica (Oct. 24, 2021, 7:22 PM), <https://tinyurl.com/yy24jmnu>.

II. Punishing Students Who Report Sexual Harassment Violates Title IX and Its Core Purposes.

Punishing students who report sexual harassment for the very sexual contact they have reported—particularly, as here, with no finding that the contact was welcomed—is deliberately indifferent and retaliatory under Title IX. Were the approach taken here by Defendant-Appellee permissible under Title IX, the consequence would be that every student who reports sexual harassment experienced at school may be suspended as a result. Such an outcome cannot be squared with Title IX’s protections against deliberate indifference and retaliation, which prohibit the type of unreasonable and retaliatory response to sexual assault at issue in this case. Indeed, the type of punishment here violates the core purpose of Title IX: protecting educational opportunities for those encountering discrimination on the basis of sex.

A. Punishing Students Who Report Harassment Deprives Them of Educational Opportunity.

Title IX’s entire point is to prevent sex-based discrimination from depriving a student of educational opportunity. *See* 28 U.S.C. § 1681(a). Experiencing sexual assault can have a significant adverse impact on a survivor’s education. Reporting an assault often compounds those harms because, as Jane experienced, schools’ responses are too frequently inadequate and traumatizing instead of helpful. Given the heavy costs that survivors already bear from experiencing and reporting sexual

assault, it is unsurprising that a school's *punishment* of a survivor for the reported conduct adds to the devastating toll—the exact opposite of Title IX's intended protection.

The punishment itself disrupts a survivor's education. When, as in Jane Doe's case, punishment is meted out in the form of suspension (or worse), the student survivor is deprived of critical classroom time. School suspensions also have cascading impacts, as they alienate students from the school community and correlate negatively with students' academic performance. *See* Susan Dominus, *An Effective but Exhausting Alternative to High-School Suspensions*, N.Y. Times Magazine (Sept. 7, 2016), <https://tinyurl.com/2uu8s2sa>. Studies have shown that suspended students are more likely to drop out of school or enter the criminal legal system. *Id.*

Indeed, students who are punished after reporting sexual harassment are far more likely to experience a “substantial disruption” in their educations. Cost of Reporting at 1. In a survey of student survivors, about 40% of students who reported their assaults to their schools took a leave of absence, transferred, or dropped out after seeking help from their school. *Id.* That number increased significantly to 62.5% among students who faced or were threatened with punishment by their schools after reporting. *Id.* at 15. This is a staggering result—nearly two-thirds of

the students who are punished after reporting sexual assault are driven either out of their classrooms or out of their schools.

Jane Doe's experience followed this disturbing pattern. The assault and Peachtree's punitive response grievously undermined Jane's education. Between the two suspensions Jane received as punishment for reporting her sexual assault and the days she missed due to her fear of seeing her assailant and enduring the harassment of her peers, Jane missed over a month of school.⁶ Plaintiff-Appellant Brief at 38. When she was repeatedly harassed by her peers upon returning to school after her suspensions, the only options that Gwinnett County School District presented to her to continue her schooling required her to drop classes, miss part of the school day, or leave the district altogether. *Id.* Jane initially accepted a modified school day, but when the harassment continued, leaving her "too scared to go back to [Peachtree]," she transferred to Gwinnett Online Campus School. *Id.*; Doc. 188. She ultimately left the entire district. Plaintiff-Appellant Brief at 38.

B. Punishing Students Who Report Harassment Traumatizes Them.

Title IX also requires that schools undertake supportive measures for students who report harassment. *See* 34 C.F.R. § 106.44(a). Like Jane Doe, more than 40%

⁶ Missing roughly fifteen days of school in a single year between eighth and twelfth grade correlates with a seven-fold increase in the likelihood of dropping out. *See Chronic Absenteeism in the Nation's Schs.*, U.S. Dep't of Educ. (2019), <https://tinyurl.com/2p9e2mhj>.

of the survivors surveyed by Know Your IX disclosed that they suffered from post-traumatic stress disorder (“PTSD”)—not only due to the violence but also to their schools’ responses to that violence. *See Cost of Reporting* at 11-12.⁷ Punishing students who report sexual violence is contrary to this mandate of support and sends a message to survivors that their schools see *them* as a problem, undeserving of care, and that they must bear the brunt of protecting themselves. That burden compounds the hypervigilance that many student survivors already tend to display in response to their assaults, which detracts from their ability to focus on their studies and intensifies PTSD, anxiety, and depression. *See e.g., Nader Amir et al., Temporal Allocation of Attention Toward Threat in Individuals with Posttraumatic Stress Symptoms*, 23 *J. of Anxiety Disorders*, at 8 (Dec. 2009).

After learning of her second suspension, Jane made the following statement about the psychological harm and trauma caused by her school’s decision to punish

⁷ For example, survivors who reported their assaults endured extensive victim-blaming by school officials during the investigation and hearing processes that followed. One respondent to the survey commented:

The insensitive response from my school added a whole other trauma on top of the actual sexual assault. I was diagnosed with PTSD, but a large portion of my continued PTSD treatment has to do with the shame inflicted upon me by my high school. It’s hard to deal with people of authority, like school administrators, telling you that your truth isn’t enough, or that what happened wasn’t ‘bad enough’ for my perpetrator to face any disciplinary action.

Cost of Reporting at 13.

her instead of protect her:

Do you know how hard it is? How much I have to repeat my story over and over and over, and that's just so hard. And then at the end, I get suspended for this. It just—like, it doesn't make any sense. . . . I didn't ask to get sexually assaulted. I didn't ask to get suspended. It's just not fair. My parents have spent so much money to get an attorney and everything. And then you guys are going to do this to me, do this to our family. You don't know how emotional it is at home. I have nightmares every night. I have nightmares of my own boyfriend date raping me. I feel like nobody can protect me, no one believes me.

Doe v. Gwinnett Cnty. Sch. Dist., No. 1:18-C-05278-SCJ, 2021 WL 4531082, at *4 (N.D. Ga. Sept. 1, 2021). Echoing Jane's sentiment, a sophomore at a Texas high school who recently received an in-school suspension after reporting she was groped on the school bus commented, "It was very hurtful. I felt, like, I lost. I had nothing else to do." Meredith Yeomans, *'I Felt Like I Lost,' Student Says of Response to Alleged Sexual Assault That Sparked Protest*, NBC 5 Dallas Fort Worth (Nov. 22, 2021), <https://tinyurl.com/2ypzhn6t>. See also Barnes, *supra* (reporting the experiences of twenty-two current and former students at a high school that repeatedly punished students who raised sexual harassment complaints, who described feeling like "no one would protect them at school").

For Jane and other students, being punished by their schools after reporting that they were sexually harassed incites a feeling of institutional betrayal, destroying student trust in the school. See Monika N. Lind et al., *Isn't High School Bad Enough Already? Rates of Gender Harassment And Institutional Betrayal in High School*

and Their Association with Trauma-Related Symptoms, 15 PLoS ONE (2020), <https://tinyurl.com/2p88mth3>; Carly P. Smith & Jennifer J. Freyd, *Institutional Betrayal*, 69 Am. Psychol. 575, 577 (2014); *see generally* Serena M. Wilcox, *Political Intersectionality and Black Girls' #MeToo Movement in Public K-12 Schools*, 7 J. of Black Sexuality & Relationships 1, 24 (Jan. 2021) (explaining that “the act of complaining for the victim feels like harassment all over again”). As Jane stated after learning of her second suspension:

I just feel betrayed by the school. Like, I used to like Peachtree Ridge but I hate it. I thought Peachtree Ridge was all about protecting kids and putting the kids first. But, like, now I see that's not the case. And like, you can tell that, like, this whole thing, they're just trying to cover this up so the school doesn't look bad. What about other girls that go to Peachtree Ridge? This is a bad example. I don't want any girls to have to go through this, ever.

Gwinnett, 2021 WL 4531082, at *4.

By punishing survivors, schools also stigmatize them with their peers. After Jane was twice suspended by her school, she was subjected to harassment from her peers, who referred to her as a “slut,” a “whore,” a “liar,” and a “psycho”—characterizations they fortified by noting the school's treatment of her and her assailant. Compl. at 12 ¶ 46; Plaintiff-Appellant Brief at 11.

C. Punishing Students Who Report Harassment Chills Sexual Harassment Reporting.

Title IX exists to combat sex discrimination in schools by allowing it to be effectively redressed once identified. *See, e.g., Revised Sexual Harassment*

Guidance at 15 (describing “immediate and appropriate steps” a school must take upon “notice of possible sexual harassment”). Yet punishing students for engaging in the very conduct giving rise to a report of sexual harassment chills students from reporting, which permits sexual harassment in school to continue unchecked. As Jane observed, “[w]hen people find out about this and girls do get sexually assaulted, they’re not going to want to come forward and tell someone, because they’re going to be scared they’re going to get suspended and they have to go through all of this.” *Gwinnett*, 2021 WL 4531082, at *4. Another high school survivor similarly explained that her perpetrator harassed and assaulted many other girls at her school, but after they saw what happened to her as a result of reporting an assault, they decided not to come forward. *See Cost of Reporting* at 14. Likewise, at Liberty University, ten students indicated they did not report rapes because they observed that other students had been punished for making such reports. *See Dreyfus, supra*. Simply put, students who feel their schools are more likely to punish than protect them will not report sexual harassment—again, directly contrary to the goals of Title IX.

When schools mishandle reports of sexual violence and punish students who report, and especially (as here) when they punish reporting students without making an informed determination about whether the sexual contact was unwelcome, they

violate Title IX and its core purposes. Such punishment directly interferes with the education and well-being of reporting students and creates an environment of fear that jeopardizes health, safety, and education.

III. Punishments for Reporting Sexual Harassment Disproportionately Impact Black Students Like Jane Doe.

Girls of color, particularly Black girls, face unique harms and challenges from school punishment stemming from the reporting of sexual harassment. As a Black and Asian student, Jane was particularly susceptible to unfair discipline from her school.

As a general matter, K-12 schools disproportionately subject Black girls to punishment. See Sonja C. Tonnesen, *“Hit It And Quit It”: Responses to Black Girls’ Victimization in School*, 28 Berkeley J. Gender L. & Just. 1, 4 (2013); see also U.S. Dep’t of Educ., *Civil Rights Data Collection Data Snapshot: School Discipline* (Mar. 2014), <https://tinyurl.com/5n8r5j7b>. Nationwide, Black girls are 5.5 times more likely to be suspended and more than four times more likely to be arrested in school than white girls. See Adaku Onyeka-Crawford et al., *Stopping Pushout for: Girls of Color* 13, Nat’l Women’s Law Ctr. (Apr. 17, 2017), <https://tinyurl.com/2p9fmbms>.⁸ These inequities are a major reason Black girls are

⁸ See also Leah A. Hill, *Disturbing Disparities: Black Girls and the School-to-Prison Pipeline*, 87 Fordham L. Rev. 11, 58–59 (2018); Monique W. Morris, *Pushout: The Criminalization of Black Girls in Schools*, New Press (2016); Erica L. Green et al., *‘A Battle for the Souls of Black Girls’*, N.Y. Times, (Oct. 1, 2020),

the fastest growing population in the juvenile legal system. See Francine T. Sherman, *Justice for Girls: Are We Making Progress?*, 59 U.C.L.A. L. Rev. 1584, 1617 (2012); see also Girls for Gender Equity, *Policy Brief: School Policing Disparities for Black Girls* 6, <https://tinyurl.com/yckzajrv> (“Black female students [in New York City] represented nearly 60% of all juvenile reports received among girls, a slightly higher disparity as compared to Black male students at 52%.”).

This trend is especially pronounced in school districts in the southern United States. A 2015 report revealed that in the 2011-12 school year, although Black students comprised 24% of the student population in southern states, Black girls accounted for 56% of girls suspended and 45% of girls expelled. Edward J. Smith & Shaun R. Harper, *Disproportionate Impact of K-12 School Suspension and Expulsion on Black Students in Southern States* 1, Univ. of Pa. (2015), <https://tinyurl.com/2p8wmjyv>. In Gwinnett County School District that year, Black students comprised just 29.7% of enrolled students but received 46.5% of suspensions. *Id.* at 21.

In addition to being disproportionately subject to school discipline generally, Black girls likely face heightened risk of punishment following reports of sexual

<https://tinyurl.com/2vt8k56e> (reporting that Black girls are over five times more likely to be suspended from school, seven times more likely to receive multiple out-of-school suspensions, and three times more likely to receive referrals to law enforcement than white girls); Amir Whitaker et al., *Cops and No Counselors* 5, Am. Civil Liberties Union (2015), <https://tinyurl.com/2p9ejwck>.

assault because of biases about Black girls rooted in both race and gender discrimination. First, while “traditional” views of femininity encourage girls to be passive and modest, stereotypes of Black girls portray them as “loud, confrontational, assertive, and provocative,” and in need of greater social correction. Leticia Smith-Evans et al., *Unlocking Opportunity for African American Girls* 6, NAACP LDF & Nat’l Women’s Law Ctr. (2014), <https://tinyurl.com/2p9hyxme> (“Unlocking Opportunity”); *see also* Edward W. Morris, “Ladies” or “Loudies,” 38 *Youth & Soc’y* 490, 506 (2007) (“Perceptions of the loudness and aggressiveness of Black girls translated into discipline aimed at curbing this behavior.”). Additionally, “Black girls who physically defend themselves against their harassers” are “often misidentif[ied] . . . as the aggressors, a phenomenon that can be linked to findings on implicit bias that Black girls and women are perceived as more masculine than girls and women of other races.” Tonnesen, *supra* at 5; *see also* Kimberlé Williams Crenshaw et al., *Black Girls Matter: Pushed Out, Overpoliced and Underprotected*, Afr. Amer, Pol’y Forum & Ctr. for Intersectionality & Soc. Policy Studies (2015), <https://tinyurl.com/2p8wwvuf>; Hill, *supra* at 61 (noting that Black girls who are victims of sexual harassment or bullying are “seen as aggressive when they are really just standing up for themselves” because of intersecting race and sex stereotypes).

Black girls of all ages are also perceived as needing less support and protection and knowing more about sex and other “adult topics”—a phenomenon

known as the “adultification bias.” Rebecca Epstein et al., *Girlhood Interrupted: The Erasure of Black Girls’ Childhood*, Georgetown L. Ctr. on Poverty & Inequality (2017), <https://tinyurl.com/33deh27b>. “Adultification contributes to a false narrative that Black youths’ transgressions are intentional and malicious, instead of the result of immature decision-making—a key characteristic of childhood.” *Id.* at 6. One manifestation of adultification bias is the sexualization of Black girls, whereby adults view Black girls as encouraging sexual harassment through the way they dress and act. Jennifer M. Wilmot, et al, *Policy as Punishment and Distraction*, 35 Educ. Pol’y 348, 350 (2021). Similarly, a study of one school revealed many of its teachers described the schools’ Black female students as “too sexually mature.” Morris, *supra* at 506.

These insidious racial and sex stereotypes both put Black girls at greater risk of sexual harassment and abuse in the first place and make them less likely to be believed when they report it. *See, e.g.*, Wilmot, *supra* at 348 (“[E]ducator response and school policy create a nexus of subjugation that determines Black girls’ experiences are imagined, rather than material.”).⁹ Such biases can lead school officials to believe that sexual harassment of Black girls is warranted or expected, and thus to dismiss reports of sexual harassment as “just teasing and not that

⁹ *See also* maya finoh & jasmine Sankofa, *The Legal System Has Failed Black Girls, Women, and Non-Binary Survivors of Violence*, Am. Civil Liberties Union (Jan. 28, 2019), <https://tinyurl.com/3f3yn566>; *Unlocking Opportunity* at 25–26.

serious,” *id.* at 351, or to “assign [Black survivors] blame for the misconduct reported,” Scott Michelman & Rebecca Ojserkis, *Punished for Reporting Sexual Harassment*, Am. Civil Liberties Union (Sept. 29, 2020), <https://tinyurl.com/52av9xze>.¹⁰

The disproportionate school discipline levied on girls of color is especially destructive because Black girls are more likely than their peers to be sexually assaulted and therefore more often in need of a legally compliant, supportive environment. Whereas nearly 20% of teenage girls report experiencing sexual assault, *see* Caplan-Bricker, *supra*, a study focused on the sexual victimization of Black girls found that 60% of Black girls had been assaulted by age eighteen. Tonnesen, *supra* at 4; *see also* *Unlocking Opportunity* at 24 (citing survey finding that 56% of school-aged Black girls reported experiencing sexual harassment). Black girls are also the largest racial group that reports sexual harassment by adult school employees. *See* Wilcox, *supra* at 22. These numbers indicate schools should

¹⁰ Such biases are also “likely enhanced in the context of under-resourced schools in disadvantaged neighborhoods where overburdened teachers and administrators have wide discretion and little time to make decisions about infractions of school rules,” and where few resources are likely to be dedicated to Title IX compliance. Tonnesen, *supra* at 2, 6. “These problems with Title IX suggest a possible disparate impact on African American girls and young women who are most likely to attend heavily policed schools with heightened enforcement of Zero Tolerance rules against Black students.” *Id.* at 6; *see also* Valeria M. Pelet del Toro, *Let Black Girls Learn: Perceptions of Black Femininity and Zero-Tolerance Policies in Schools*, 87 *Rev. Jur. U.P.R.* 55, 57 (2018).

provide additional support to girls of color—not disproportionately punish them, compounding educational inequities.

IV. Jane Doe’s School Could and Should Have Adopted and Applied a Policy Supporting Students Who Report Sexual Harassment, in Compliance with Title IX.

Rather than punish all incidents of student sexual contact on campus, Peachtree had multiple options for adopting and applying a Title IX-compliant policy. First, the school could have required a finding that the sexual contact was welcome before imposing any punishment. Such a policy would ensure that all students reporting sexual assault are not automatically subject to discipline.

Peachtree also could have adopted an amnesty policy protecting students who report sexual harassment from punishment for a code of conduct violation, even if the underlying conduct would ordinarily be punished in a non-reporting context. Title IX affords schools discretion to adopt such “amnesty” policies. *See Questions and Answers*, Question 62. Multiple colleges have done so, and K-12 schools should as well. *See e.g.*, Univ. of Ala., *Title IX and Sexual Misconduct Policy* 13 (Oct. 2020), <https://tinyurl.com/2p9x5cua>; Univ. of Ga., *Sexual Misconduct Policy*, <https://tinyurl.com/yckm34nz>. Such policies advance Title IX compliance and empower students to come forward when they experience sexual harassment without fear of discipline.

CONCLUSION

Punishing K-12 students who report sexual misconduct for the very sexual contact reported violates Title IX and results in cascading harms for survivors of sexual harassment and the larger school community. Here, Jane Doe presented facts showing her school's deliberate indifference and retaliation in response to her sexual assault, in contravention of Title IX. The decision below should be reversed.

Dated: December 15, 2021

Respectfully submitted,

/s/ Kathleen Hartnett

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the word limit of Federal Rule of Appellate Procedure 32(a) because, excluding the portions of the brief exempted by Federal Rule of Appellate Procedure 32(f) and 11th Circuit Rule 32-4, this brief contains 6,494 words.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Word Version 2102 in 14-point Times New Roman

Dated: December 15, 2021

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CERTIFICATE OF SERVICE

I certify that, on December 15, 2021, this brief was filed using the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served electronically via that system.

/s/ Kathleen Hartnett

Kathleen Hartnett

Counsel for Amici Curiae

APPENDIX – LIST OF *AMICI*

The American Civil Liberties Union (“ACLU”) is a nationwide, nonprofit, nonpartisan organization with nearly 2 million members and supporters dedicated to the principles of liberty and equality embodied in the Constitution and our nation’s civil rights laws. Through its Women’s Rights Project, co-founded in 1972 by Ruth Bader Ginsburg, the ACLU is a leader in the effort to ensure the full equality of women and girls in society. The ACLU has engaged in litigation and policy advocacy throughout the country challenging unfair school discipline and advocating for the educational rights of survivors of gender-based violence and harassment.

Atlanta Women for Equality is a nonprofit legal aid organization dedicated to helping women students assert their legal rights to equitable treatment and equal opportunities and to shaping our education system according to true standards of gender equity. Atlanta Women for Equality accomplishes this mission by providing free legal representation to women facing gender discrimination in the educational environment—in particular campus sexual violence—and by protecting and expanding their legal protections and educational opportunities through public policy advocacy.

End Rape On Campus (“EROC”) is a national organization dedicated to ending campus sexual violence by providing support to survivors and their

communities, prevention through education, and policy reform on the campus, local, state and federal levels. Since its founding, EROC has engaged and equipped over 50,000 students, survivors, and advocates with the tools and practices to navigate campus policy processes and hold their institutions accountable. EROC has also partnered with more than 100 college campuses in 23 states for prevention education and policy advocates workshops, testified in over six states, and assisted in crafting legislation in five states and two federal bills.

The Florida Council Against Sexual Violence (“FCASV”) is a nonprofit, federally recognized anti-sexual violence agency serving the state of Florida. FCASV represents the interests of Florida’s thirty-one certified sexual assault programs that provide advocacy, crisis intervention and therapeutic services to victims and survivors of sexual violence. FCASV envisions a world free of sexual violence in which men and women together assure that all human beings are treated with dignity and respect for their physical, emotional, intellectual, and spiritual integrity. FCASV serves as the statewide resource in Florida on best practices for responding to victims and survivors of sexual violence, providing training and technical assistance to community and system-based agencies as well as legislative advocacy toward improving policy for victims and survivors. In addition to overseeing the certification of Florida’s sexual assault programs and providing

training and technical assistance, FCASV provides advocacy and therapy services in Key West and direct civil legal representation for survivors throughout the state.

Girls for Gender Equity (“GGE”) works nationally as an intergenerational nonprofit organization to center cis and trans-Black girls, gender-expansive, and non-binary youth of color through policy, advocacy, direct service, and culture shift work to achieve gender and racial equity through a Black feminist lens. GGE serves hundreds of young people, in particular girls of color and gender non-conforming young people of color between the ages of 12-24, who work to end experiences of gender-based violence and school pushout. For 20 years, GGE has worked to highlight the ways in which cis and trans-Black girls and non-binary young people of color are ignored and/or criminalized for naming the harm done to them in school and their communities, especially as it pertains to sexual harassment and sexual assault.

The Gwinnett Parent Coalition to Dismantle the School to Prison Pipeline (“Gwinnett SToPP”) is a parent-driven community-centered organization focused on reversing the School to Prison Pipeline trend in Gwinnett County, Georgia. Gwinnett SToPP accomplishes its mission by increasing public awareness of the injustice that all children face within the educational system as it relates to the pipeline and by promoting policy changes through data accountability and fact-based incident reporting.

Know Your IX is a survivor- and youth-led project of Advocates for Youth, a nonprofit organization, that aims to empower students to end sexual and dating violence in their schools. Know Your IX envisions a world in which all students can pursue their civil right to education free from violence and harassment. Know Your IX recognizes that gender violence is both a cause of inequity and a consequence of it, and believes that women, transgender, and gender non-conforming students will not have equality in education or opportunity until the violence ends. Know Your IX draws upon the civil rights law Title IX as an alternative to the criminal legal system—one that is more just and responsive to the educational, emotional, financial, and stigmatic harms of violence

Legal Momentum, the Women’s Legal Defense and Education Fund, is the first and longest-serving legal advocacy organization advancing gender equality. For more than 50 years, Legal Momentum has utilized impact litigation, legislative advocacy, and education initiatives to fight against sex discrimination and promote equity in education. The organization has contributed as amicus curiae in key Title IX litigation, including *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992); *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998); and *Davis ex rel. LaShonda D. v. Monroe County Board of Education*, 526 U.S. 629 (1999).

The National Alliance to End Sexual Violence (“NAESV”) is a nonprofit organization serving as the voice in Washington for the 56 state and territorial sexual assault coalitions and 1,300 rape crisis centers working to end sexual violence and support survivors. The rape crisis centers in NAESV’s network see every day the widespread and devastating impacts of sexual assault upon survivors, including student survivors. NAESV opposes any impediments to survivors feeling safe to come forward, receive services, and seek justice.

The National Center for Youth Law (“NCYL”) is a nonprofit organization that works to build a future in which every child thrives and has a full and fair opportunity to achieve the future they envision for themselves. For five decades, NCYL has worked to protect the rights of low-income children and to ensure that they have the resources, support, and opportunities they need. NCYL has worked to reduce the use of exclusionary discipline and protect the educational opportunities of students, including victims of sexual harassment. NCYL uses litigation, legislative advocacy, and other strategies to ensure that all youth receive a high-quality education.

National Crittenton is a national advocacy organization that works with at-risk and criminal justice system-involved girls, young women, and their families. National Crittenton envisions a world in which all girls, young women, and gender-

expansive young people can achieve their potential and live unapologetic, liberated lives without fear of violence or injustice.

The National Network to End Domestic Violence (“NNEDV”) is a nonprofit organization incorporated in the District of Columbia to end domestic violence. As a network of the 56 state and territorial domestic violence and dual domestic violence and sexual assault coalitions and their over 2,000 member programs, NNEDV serves as the national voice of millions of women, children and men victimized by domestic violence, and their advocates. NNEDV works with federal, state, and local policy makers and domestic violence advocates throughout the nation to identify and promote policies and best practices to advance victim safety, and is deeply concerned about the safety of survivors of sexual violence at their education institutions. NNEDV believes that schools should take their legal obligation and responsibility to respond to sexual violence seriously and that Title IX should provide protections and justice to student survivors of abuse free from fear of retaliation.

The National Organization for Women (“NOW”) Foundation is a nonprofit organization affiliated with the National Organization for Women, the largest grassroots feminist activist organization in the United States with chapters in every state and the District of Columbia. NOW Foundation is a strong supporter of Title IX, a civil rights act. Effectively addressing sexual harassment and assault

against students is a necessary means to assuring equal education opportunities for all students.

National Women’s Law Center (“NWLC”) is a nonprofit legal advocacy organization dedicated to advancing and protecting the legal rights of women and girls and all people to be free from sex discrimination, including sexual harassment and assault. Since 1972, NWLC has engaged in policy advocacy and participated as counsel or amicus curiae in a range of cases to secure equal opportunity in education, workplace justice, income security, child care, and reproductive rights and health, with particular attention to women and girls who face multiple and intersecting forms of discrimination. NWLC has participated as counsel or amicus curiae in a range of cases to secure the equal treatment of women and girls under the law.

Stop Sexual Assault in Schools (“SSAIS”) is a nonpartisan, nonprofit organization dedicated to proactively addressing the issue of sexual harassment and discrimination that impacts K-12 students and schools. SSAIS provides students, schools, and other organizations with free resources so that the right to an equal education is not compromised by sexual harassment, sexual assault, or gender discrimination. SSAIS frequently assists K-12 students and their families whose schools have mishandled reported sexual harassment, and has developed educational tools such as instructional videos to educate students and their families about their Title IX rights.

The Victim Rights Law Center (“VRLC”) is a nonprofit organization dedicated to serving the legal needs of sexual assault victims, particularly adolescents and young adults. VRLC represents over 1,000 sexual assault survivors each year in the areas of education, immigration, privacy, employment, housing and helping victims of sexual assault obtain protection orders to stabilize their lives and create a safe and healthy environment in which to live, study and work. Following a sexual assault, many of VRLC’s K-12 clients face challenges accessing their education. This is attributed to a multitude of reasons, among them an inadequate and often harmful response from the school district. VRLC understands the importance of helping young survivors find their own justice, while at the same time ensuring their own dignity, privacy, and safety.