No. 95-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

DEBRA ROWINSKY, for herself and as next friend of "JANE DOE" and "JANET DOE," her minor children, and for all those similarly situated,

Petitioner,

—v.—

BRYAN INDEPENDENT SCHOOL DISTRICT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICI CURIAE* NOW LEGAL DEFENSE AND EDUCATION FUND NATIONAL WOMEN'S LAW CENTER (Additional *Amici* Listed on Inside Cover) IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

Amici curiae are organizations strongly committed to achieving equality for women, each with an abiding interest in ensuring the sound interpretation and application of the provisions contained in Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681-1688 ("Title IX") that protect students against sexual harassment in schools. Descriptions of the individual organizations are set forth in the attached appendix.[1]

REASONS FOR GRANTING THE PETITION

In a decision that subverts Title IX's important purpose of "provid[ing] women with solid legal protection as they seek education and training for later careers," Cannon v. University of Chicago, 441 U.S. 677, 704 n.36 (1979), the court below effectively immunized educational institutions from liability for failing to remedy a hostile environment for students created by persistent and egregious sexual harassment inflicted by other students. Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006 (5th Cir. 1996). By permitting peer sexual harassment claims only when a plaintiff proves that the school responded to sexual harassment claims differently based on sex, id. at 1016, the ruling sharply conflicts both with other circuit court precedents with respect to the standard under which schools will be held liable for peer sexual harassment, and with the standard for proving intentional discrimination and recovering monetary damages for such claims under Title IX. Moreover, the decision below misconstrues this

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[1] The parties' written consent to the filing of this brief have been filed with the Court.

Court's precedents establishing standards for assessing sexual harassment claims, raising important issues regarding Title IX's promise of equal educational opportunity.

I. THIS COURT SHOULD GRANT THE PETITION FOR CERTIORARI TO RESOLVE THE SPLIT IN THE CIRCUITS AND CLARIFY TITLE IX'S APPLICATION TO HOSTILE ENVIRONMENT SEXUAL HARASSMENT AMONG STUDENTS

A. The Fifth Circuit Decision Conflicts with Decisions in Other Circuits and Adds to the Confusion in the Lower Courts

In 1992, this Court held that Title IX permits an award of monetary damages for intentional discrimination based on sex. See Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 74-75 (1992). Specifically, it held that when a teacher sexually harasses a student, the school[2] discriminates on the basis of sex in violation of Title IX and may be subject to liability for compensatory damages. Id. In the wake of Franklin, courts have agreed that Title IX prohibits both quid pro quo and hostile environment teacher-student harassment and have applied agency principles used in analyzing Title VII of the Civil Rights Act of 1964 ("Title VII") claims of supervisor harassment to assess schools' liability for the harassment.[3]

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[2] As used in this brief, the term "school" denotes only those educational institutions receiving federal financial assistance and thus subject to Title IX's prohibitions.

[3] See, e.g., Bolon v. Rolla Pub. Schs., 1996 U.S. Dist. LEXIS 2778 (E.D. Mo.), appeal granted, 1996 U.S. Dist. LEXIS 2776 (E.D. Mo. 1996); Oona R.-S v. Santa Rosa City Schs., 890 F. Supp. 1452, 1467 n.13 (N.D. Cal. 1995); Hastings v. Hancock, 842 F. Supp. 1315, 1318 (D. Kan. 1993); Patricia H. v. Berkeley Unified Sch. Dist., 830 F. Supp.

Since Franklin, however, courts have divided over whether an educational institution is liable for failing to remedy hostile environment peer sexual harassment about which it knew or should have known. The Rowinsky decision reflects the two principal conflicts among courts addressing peer sexual harassment claims after Franklin: (1) whether the Title IX requirement that schools maintain a nondiscriminatory environment for students includes a duty to respond to and remedy a hostile environment created by students; and (2) whether Franklin's standard for intentional discrimination in Title IX damages claims imposes a requirement that plaintiffs alleging peer sexual harassment present additional proof of discriminatory intent or motive on the part of the school.

1. Courts Are Divided Over Whether Title IX Imposes a Duty to Remedy Hostile Environment Peer Sexual Harassment of Which Schools Knew or Should Have Known

The first question -- whether Title IX imposes an obligation on schools to take prompt and appropriate corrective action to stop hostile environment peer sexual harassment -- has divided federal circuit courts. In Davis v. Monroe County Board of Education, 74 F.3d 1186, 1194-95 (11th Cir. 1996), the first appellate court to address this issue held that an educational institution may be found in noncompliance with Title IX for failing to respond adequately to sexual harassment carried out by students if it had actual or constructive knowledge of the harassment.

In that case, the Eleventh Circuit Court of Appeals adapted and applied the five-part test commonly used in

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1288, 1290-91 (N.D. Cal. 1993).

analyzing claims under Title VII for a hostile environment created by a co-worker in an employment context. Under Davis, a school is liable for a sexually hostile environment created by a fellow student if: (1) the victim is a member of a protected group; (2) she was subject to unwelcome sexual harassment; (3) the harassment experienced was based on sex; (4) the harassment affected the conditions of her education; and (5) the school knew or should have known of the harassment and failed to take "prompt remedial action." Id. (citing Henson v. City of Dundee, 682 F.2d 897, 905 (11th Cir. 1982)).

Borrowing from the employment context, the Davis court reasoned that the first four elements establish a prima facie case of intentional sex discrimination, while the fifth establishes the basis for holding the school liable for that discrimination. 74 F.3d at 1194. Concluding that co-worker harassment under Title VII is analogous to peer harassment under Title IX, the court applied the well-established Title VII rule to conclude that a school may be liable for failing to respond properly to a student-created hostile environment of which it knew or should have known.

Several other circuit courts, while not directly addressing the issue, have aligned themselves with the Davis court in applying Franklin to such peer sexual harassment cases. These courts have assumed that, like Title VII, Title IX requires schools to respond appropriately to known hostile environment harassment by students or other third parties. See Murray v. New York Univ. College of Dentistry, 57 F.3d 243, 248-50 (2d Cir. 1995) (discussing Title VII standards in analyzing Title IX sexual harassment claim); Brown v. Hot, Sexy and Safer Prods., Inc., 68 F.3d 525, 540 (1st Cir. 1995) (applying Title VII principles to Title IX hostile environment sexual harassment

claim), cert. denied, 116 S. Ct. 1044 (1996); cf. Clyde K. v. Puyallup Sch. Dist., 35 F.3d 1396, 1402 (9th Cir. 1994) ("school officials might reasonably be concerned about liability for failing to remedy peer sexual harassment that exposes female students to a hostile educational environment"). See also Bosley v. Kearney R-1 Sch. Dist., 904 F. Supp. 1006, 1023 (W.D. Mo. 1995) (denying defendant school's motion for summary judgment because school may be liable for peer sexual harassment); Doe v. Petaluma City Sch. Dist., 830 F. Supp. 1560, 1576 (N.D. Cal. 1993) (noting that schools may be liable for failing to remedy hostile environments created by peer harassment of which they knew or should have known).

In direct conflict with Davis, the Rowinsky court reached the opposite conclusion, i.e., that a school is not liable for failing to address peer sexual harassment properly unless its response to the harassment treats male and female harassment victims differently. 80 F.3d at 1025. Rejecting the universally applied standard holding employers liable for sexual harassment by non-agents about which it "knew or should have known,"[4] the Rowinsky court concluded that there must be an act of discrimination by the school itself -- beyond condoning the sexual harassment by students -- in order to sustain a school's liability for peer sexual harassment. Accordingly, the court dismissed the eighth-grade students' claims that their school's persistent failure to take steps to stop other students' repeated sexual assaults, touching and harassment violated Title IX. See also Brzonkala v. Virginia Polytechnic & State Univ., No. 95-1358-R at 12 (W.D. Va. May 7, 1996) (refusing to hold

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[4] See, e.g., Hirschfeld v. New Mexico Corrections Dep't, 916 F.2d 572, 577 (10th Cir. 1990); Hall v. Allis-Chalmers Corp., 797 F.2d 1417, 1421-22 (7th Cir. 1986); Henson v. City of Dundee, 682 F.2d 897, 905 (11th Cir. 1982); see also infra nn. 7, 8.

school liable for peer sexual assault because plaintiff presented no evidence that school's response indicated anti-female bias) (copy of decision lodged separately with the Court); Garza v. Galena Park Indep. Sch. Dist., 914 F. Supp. 1437, 1438 (S.D. Tex. 1994) (dismissing hostile environment Title IX claim against school because allegations that school knowingly failed to take appropriate corrective action would not be enough to state a Title IX claim).

The absence of guidance from this Court concerning schools' liability for peer sexual harassment has led to mixed results in other circuits as well. For example, in Seamons v. Snow, 1996 WL 233483 (May 8, 1996), the Tenth Circuit Court of Appeals simultaneously applied incongruous elements of the Davis and Rowinsky approaches to reach a thoroughly confusing result. The Seamons court nominally adopted the five-part test delineated in Davis; however it interpreted the requirement that the conduct be based on sex to apply to the school's response rather than to the underlying harassment. 1996 WL 233483 at *11-*12. Imposing this requirement, the court refused to hold the school liable for its ineffective response to an incident in which a high school male was sexually harassed by his peers because, according to the court, nothing the school did was "sexual" or "based on sex." Id. at *12. Thus, while citing Davis, the Seamons court apparently adopted the analytical framework applied in Rowinsky. Similarly inconsistent decisions inevitably will result absent this Court's guidance.

2. Courts Also Disagree Over the Meaning of "Intentional Discrimination" in Peer Sexual Harassment Cases

The decision below contributes to a split in the circuits over the type of proof required to show "intentional discrimination" under Franklin. In Franklin, this Court explained that damages are available under Title IX for intentional discrimination. 503 U.S. at 74-75. Courts considering peer sexual harassment cases have adopted two divergent approaches to interpreting this term.

According to one line of cases, typified by the Eleventh Circuit's opinion in Davis, a school's failure to respond to complaints of hostile environment harassment by students establishes liability for damages under Title IX. Davis, 74 F.3d at 793; accord Rowinsky, 80 F.3d at 1025 (Dennis, J., dissenting); see also Murray, 57 F.3d at 248-49 (presuming that damages could be awarded under Title IX if school had notice of harassment by a non-agent third party but failed to remedy the situation, regardless of the school's discriminatory intent or motive); Bosley, 904 F. Supp. at 1022 (finding intentional discrimination from evidence that school knowingly failed to take appropriate remedial action despite notice of the unwelcome harassment); Oona R.-S. v. Santa Rosa City Schs., 890 F. Supp. 1452, 1469 (N.D. Cal. 1995) (finding evidence of intentional discrimination in school officials' refusal to take action to address peer sexual harassment complaints).

This approach correctly recognizes that proof of hostile environment sexual harassment establishes intentional discrimination because sexual harassment is facially disparate treatment and therefore always is a form of intentional discrimination. See Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 n.3 (3d Cir. 1990).

(stating that the intentional nature of sexual harassment "should be recognized as a matter of course"); Henson, 682 F.2d at 901-02 (recognizing sexual harassment as disparate treatment that "intentionally single[s] out" a woman because of her sex); Jones v. Kansas Army Ammunitions Plant, 147 F.R.D. 248, 252 (D. Kan. 1993) ("Federal laws prohibiting racial and sexual harassment are wholly uninterested in the perpetrator's intent. Victims need establish neither fault nor the discriminatory intent of their supervisors and/or co-workers."); see also International Union v. Johnson Controls, Inc., 499 U.S. 187, 199-200 (1991) (disparate treatment depends on the terms of the discrimination, not the motive behind it); Erebia v. Chrysler Plastic Prods. Corp., 772 F.2d 1250, 1258 (6th Cir. 1985) (holding that "an employer intends discrimination where he condones racial harassment of employees"), cert. denied, 475 U.S. 1015 (1986). This Court has treated sexual harassment as intentional discrimination by presuming that damages are available in sexual harassment cases brought under the Civil Rights Act of 1991, 42 U.S.C. § 1981a(a)(1) (1992), which like Franklin permits compensatory damages only in cases of intentional discrimination. See Landgraf v. USI Film Prods., 511 U.S. 244, 263-64 (1994).

Because Franklin's intentional discrimination requirement simply denotes disparate treatment as opposed to disparate impact or unintentional discrimination, a school that knowingly fails to correct a hostile environment created by students commits intentional discrimination and is liable for damages. See Pandazides v. Virginia Bd. of Educ., 13 F.3d 823, 830 n.9 (4th Cir. 1994) (applying Franklin to a claim under section 504 of the Rehabilitation Act, to hold that intentional discrimination under Franklin simply denotes disparate treatment and "does not establish a higher burden of proof"); see also Alexander v. Choate, 469 U.S. 287, 293-94 (1985) (equating unintentional discrimination

with disparate impact and intentional discrimination with disparate treatment).

However, other court decisions, typified by Rowinsky, have misapprehended the meaning of intentional discrimination, requiring a plaintiff to prove subjective discriminatory motive on the part of a school in order to obtain damages for a school's knowing failure to respond to peer sexual harassment.[5] See Rowinsky, 80 F.3d at 1016; Seamons, 1996 WL 10699, at *12 (dismissing claim because plaintiff did not allege the school's acts were motivated by an intent to discriminate on the basis of sex); Brzonkala, No. 95-1358-R, at 7 (plaintiff must allege intentional discrimination and causal connection between the outcome and the bias; bias must be a motivating factor); Petaluma, 830 F. Supp. at 1576 (N.D. Cal. 1993) (holding that proof of a school's failure to respond appropriately to known peer harassment alone is insufficient to prove intentional discrimination although it would be circumstantial evidence of intent), motion for reconsideration of intent standard pending (argued April 26,

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[5] Not confined solely to the sexual harassment arena, the conflation of "intentional discrimination" with "evil motive" has been further exacerbated by a recent district court decision interpreting Franklin's intentional discrimination language in the context of a non-sexual harassment Title IX athletics case. In Pederson v. Louisiana State Univ., 912 F. Supp. 892 (M.D. La. 1996), the court, misconstruing Franklin, refused to find that the school's actions in denying women equal athletic opportunity under Title IX were "intentional." Rather, the court excused the school's actions as based in "arrogant ignorance, confusion about the practical requirements of the law, and a remarkably outdated view of women and athletics which created the byproduct of resistance to change." Id. at 918-19. Such misapprehension of Franklin's language is strong evidence that this Court should grant certiorari and provide necessary guidance to lower courts.

1996, N.D. Cal.). This approach defies Franklin and well-established employment discrimination law.

B. The Decision Below Conflicts with Prior Decisions of this Court

Despite this Court's mandate to "give [Title IX] the scope its origins dictate [and to] accord it a sweep as broad as its language," North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 521 (1982), the Rowinsky court imposed a limitation on Title IX that departs from the statute's language, its legislative history, and the line of cases interpreting it. This Court consistently has construed Title IX broadly to effectuate the statute's remedial purpose, notwithstanding the absence of explicit statutory language. See Franklin 503 U.S. at 74-75 (prohibiting sexual harassment); North Haven, 456 U.S. at 521, 530 (applying Title IX to cases of employment discrimination in education); Cannon, 441 U.S. at 677 (implying private cause of action). The Rowinsky court contradicts these holdings by relying on the absence of explicit statutory language to frustrate Title IX actions for a school's knowing failure to respond to peer sexual harassment. Rowinsky, 80 F.3d at 1011-13.

The court below further contravened this Court's precedents, which counsel courts to look to Title VII to define substantive discrimination under Title IX and related civil rights statutes. In Franklin, this Court correctly relied on Title VII authority and principles in analyzing sexual harassment under Title IX. 503 U.S. at 75.[6] This Court

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[6] Courts also apply Title VII standards as a matter of course in Title IX employment cases, which construe the same statutory language at issue in peer sexual harassment cases. See, e.g., Preston v. Commonwealth of Virginia, 31 F.3d 203, 207 (4th Cir. 1994) ("Title VII,

also has recognized that Title VII principles should define the contours of the antidiscrimination prohibition in Title VI of the Civil Rights Act of 1964 ("Title VI"), Title IX's legislative antecedent. See Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 592 (1983) (concluding that although the language of Title VI is ambiguous, it is "surely subject to the construction given the antidiscrimination proscription of Title VII").

Nowhere in Title VII law does the proposition adopted by the Rowinsky court exist -- that employers are liable for sexual harassment only if they handle complaints by female employees differently than those by male employees due to the employer's subjective motive to discriminate. Had the court below applied Title VII standards in accordance with this Court's precedents, it inevitably would have concluded that educational institutions are liable for failing to respond to peer sexual harassment of which they knew or had reason to know. It is beyond cavil that an employer may be held liable for failing to remedy a hostile environment created by its supervisory or non-supervisory employees[7] or

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and the judicial interpretations of it, provide a persuasive body of standards to which we may look in shaping the contours of a private right of action under Title IX"); Lipsett v. University of Puerto Rico, 864 F.2d 881, 896-97 (1st Cir. 1988) (applying Title VII to Title IX sexual harassment case because it is the "most appropriate analogue when defining Title IX's substantive standards") (quotations omitted); Mabry v. State Bd. of Community Colleges, 813 F.2d 311, 316 (10th Cir. 1987) (same); Moire v. Temple Univ. Sch. of Medicine, 613 F. Supp. 1360, 1366 n.2 (E.D. Pa. 1985) (finding Title VII standards "equally applicable" to Title IX in sexual harassment case), aff'd, 800 F.2d 1136 (3d Cir. 1986).

[7] See, e.g., Henson, 682 F.2d at 901-02; see also Fleenor v. Hewitt Soap Co., 81 F.3d 48, 49 (6th Cir. 1996); Hirschfeld v. New Mexico Corrections Dep't, 916 F.2d 572, 577 & n.5 (10th Cir. 1990).

its customers[8] without any inquiry into the employer's discriminatory intent or motive. Under Title IX, an educational institution has the duty to provide its students with a non-discriminatory environment, just as Title VII mandates that an employer must provide such an environment for its workers. Cf. Franklin, 112 S. Ct. at 1037. See also Patricia H. v Berkeley Unified Sch. Dist., 830 F. Supp. 1288, 1292-93 (N.D. Cal. 1993) (recognizing that any "distinctions between the school environment and the workplace serve only to emphasize the need for zealous protection against sex discrimination in the schools"). By requiring a higher standard of liability for remedying peer sexual harassment in schools than is applied in the workplace, the Rowinsky decision creates sui generis a poorly-crafted standard that departs from both well-established sexual harassment law and Title IX precedents.

C. The Decision Below Would Undermine Enforcement of Title IX and Related Anti-discrimination Statutes

Requiring proof of a school's discriminatory motive in failing to correct a hostile environment undermines Title IX's promise of equal educational opportunity. If the decision below is allowed to stand, a school could escape liability for knowingly permitting a hostile environment to flourish unless the school responded differently to male and female victims of harassment or unless the plaintiff had proof of the school's subjective anti-female bias. Ironically, a school district maintaining a strict policy of equal tolerance for sexual harassment against boys and girls would be invulnerable to Title IX liability under Rowinsky.

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[8] See, e.g., Menchaca v. Rose Records, Inc., 67 Fair Empl. Prac. Cas. (BNA) 1334, 1336-67 (N.D. Ill. 1995); Otis v. Wyse, 1994 U.S. Dist. LEXIS 15172 at *17 (D. Kan. 1994); Sparks v. Regional Medical Ctr., 792 F. Supp. 735, 738 n.2, 746 (N.D. Ala. 1992).

The holding below similarly undermines Title IX's existing regulatory scheme, which requires recipients to ensure equity in their programs even when third parties cause the discrimination. See, e.g., 34 C.F.R. § 106.31(d) (1995) (holding recipients liable for discrimination in any educational program, even if the recipient does not itself commit the discriminatory act); 34 C.F.R. § 106.32(c) (1995) (requiring recipients to take reasonable action to ensure non-discrimination in housing opportunities even with respect to housing provided by third-parties).

The Rowinsky approach stands in stark contrast to the Department of Education's longstanding interpretation of Title IX.[9] The Department of Education's Office for Civil Rights ("OCR") consistently has construed Title IX to hold schools liable for their knowing failure to respond to sexual harassment perpetrated by students. See, e.g., Letter of Findings by Kenneth A. Mines, Regional Civil Rights Director, Region V (April 23, 1993), Docket No. 05-92-1174 (lodged with the Court under separate cover).

In addition, the decision below will undermine the enforcement of Title VI, which is Title IX's legislative

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[9] As the agency charged by Congress with responsibility for enforcing Title IX, the Department of Education's Office for Civil Rights ("OCR") has broad authority to regulate federally-funded educational programs or activities under the statute. Courts should "accord[] great deference to the interpretation, particularly when it is longstanding, of the agency charged with the statute's administration." North Haven, 456 U.S. at 522 n.12 (1982). Accordingly, courts frequently have deferred to OCR's Letters of Findings. See Petaluma, 830 F. Supp. at 1573; Patricia H., 830 F. Supp. at 1291 n.3; see also Roberts v. Colorado State Bd. of Agric., 998 F.2d 824, 830 (10th Cir.), cert. denied, 114 S. Ct. 580 (1993); Garrett v. Board of Educ., 775 F. Supp. 1004, 1009-10 & n.9 (E.D. Mich. 1991).

antecedent, and Section 504 of the Rehabilitation Act, which mirrors Title IX. Regulatory schemes under both statutes hold recipients liable for failing to correct discriminatory conditions created by third parties. See 34 C.F.R. § 100.4(a)(2) (1995), 45 C.F.R. § 80.4(a)(2) (1995) (requiring recipient to ensure nondiscrimination by transferee of government's real property under Title VI); 34 C.F.R. § 104.11(a)(4) (1995), 45 C.F.R. § 84.11(a)(4) (1995) (prohibiting recipients from participating in contracts with employment agencies or labor unions if such participation effects any discrimination on those protected by § 504); 34 C.F.R. § 104.33(b)(3) (1995), 45 C.F.R. § 84.33(b)(3) (1995) (prohibiting placement of disabled students in schools or programs run by third-parties without ensuring that no discrimination prohibited by § 504 occurs); see also Miller v. Spicer, 822 F. Supp. 158, 164 (D. Del. 1993) (permitting liability against hospital under § 504 for non-employee doctor's discrimination against patient).

Finally, the decision below stands in stark contrast to OCR's interpretation of Title VI to prohibit racial harassment in schools. Contrary to Rowinsky, OCR's investigative guidance holds recipients liable for discriminatory conduct causing a racially hostile environment of which it knew or should have known, "regardless of the identity of the person(s) committing the harassment--a teacher, a student, the grounds crew, a cafeteria worker, neighborhood teenagers, a visiting baseball team, a guest speaker, parents, or others." Racial Incidents and Harassment at Educational Institutions, 59 Fed. Reg. 11,448, 11,450 (1994) (emphasis added); see also Township High Sch. Dist. No. 214, OCR Case No. 05-82-1097 (cited in Racial Incidents, 59 Fed. Reg. at 11,453) (Title VI violated where school failed to take adequate steps to correct repeated racial harassment by students, of which employees were aware); Defiance

College, OCR Case No. 05-90-2024 (cited in Racial Incidents, 59 Fed. Reg. at 11,451) (violation occurred where college was aware of repeated and patently offensive verbal and physical racial harassment committed by students).

II. THE COURT SHOULD GRANT THE PETITION TO FURTHER THE IMPORTANT NATIONAL INTEREST IN ENDING SEXUAL HARASSMENT IN EDUCATION

The Rowinsky decision conflicts with well-established public policy rationales, endorsed by many courts, that underscore the importance of recognizing and curbing peer sexual harassment in schools. Just as this Court has recognized the need for employers to stem the harm that results from sexual harassment at work, courts nationwide have recognized that strong measures are needed to curb the same, if not greater, harm caused by peer sexual harassment in schools.

This Court's most recent decision on sexual harassment acknowledged the need for prompt and immediate action to curb sexual harassment. As the Court stated, sexual harassment can create environments "so heavily polluted with discrimination as to destroy completely the emotional and psychological stability" of affected workers. See Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 371 (1993) (quotations omitted).[10]

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[10] The harmful effects of sexual harassment at work have been well documented. See, e.g., Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1505, 1507, 1524-27 (M.D. Fla. 1991); Barbara A. Gutek & Mary T. Koss, Changed Women and Changed Organizations: Consequences of and Coping with Sexual Harassment, 42 J. of Vocational Beh. 28, 31-35 (1993); Sally J. Kaplan, Consequences of Sexual

Sexual harassment hurts schoolchildren even more than adult workers. As the Eleventh Circuit Court of Appeals recently recognized:

> The damage caused by sexual harassment also is arguably greater in the classroom than in the workplace, because the harassment has a greater and longer lasting impact on its young victims, and institutionalizes sexual harassment as accepted behavior. Moreover, as economically difficult as it may be for adults to leave a hostile workplace, it is virtually impossible for children to leave their assigned school.

Davis, 74 F.3d at 1193.

Similarly, the Ninth Circuit Court of Appeals recognized that "[g]iven the extremely harmful effects sexual harassment can have on young female students, public officials have an especially compelling duty not to tolerate it in the classrooms and hallways of our schools." Clyde K., 35 F.3d at 1401-02. Accord Oona R.-S., 890 F. Supp. at 1469; Bosley, 904 F. Supp. at 1020; Patricia H., 830 F. Supp. at 1292-93. Commentators agree that schools should take active steps to prevent and stop sexual harassment in order to avoid its attendant harms.[11]

Harassment in the Workplace, 6 Affilia 50, 53 (1991); Peggy Crull, Stress Effects of Sexual Harassment on the Job: Implications for Counseling, 52 Am. J. Orthopsychiatry 539, 541 (1982).

[11] See Ronna Greff Schneider, Sexual Harassment and Higher Education, 65 Tex. L. Rev. 525, 551 (1987); Carrie N. Baker, Proposed Title IX Guidelines on Sex-Based Harassment of Students, 43 Emory L.J. 271, 290-93 (1994).

Three recent national surveys exploring the frequency and severity of sexual harassment in schools,[12] as well as its adverse impact on students, confirm the wisdom of requiring schools to take steps to stop peer sexual harassment. They reveal that sexual harassment in schools, including peer sexual harassment, imposes serious educational, emotional, and physical consequences on students that operate as a barrier to full and equal participation in education. As a threshold matter, the surveys expose the prevalence of sexual harassment, most of which takes the form of hostile environment harassment. See Hostile Hallways at 7-8 (85% of girls have experienced sexual harassment, and of those girls, 65% were touched, grabbed, or pinched in a sexual way; and 66% experienced at least one form of harassment "often" or "occasionally"); Secrets in Public at 2 (83% of girls were touched, pinched or grabbed; and 39% of girls were sexually harassed at school on a daily basis in the last year); Secondary Schools at 17 (83% of girl students had been sexually harassed). Peer harassment is the most common form of sexual harassment. See Hostile Hallways at 11 (of the students who have been harassed, four out of five were harassed by a fellow student); Secrets in Public at 6 (of the girls who were sexually harassed, 96% were harassed by peers).

Sexual harassment has a devastating effect on girls' educational, emotional, and physical development. For

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[12] See Nan Stein, et al., Secrets in Public: Sexual Harassment in Our Schools (1993) [hereinafter Secrets in Public]; AAUW Educational Foundation, Hostile Hallways: The AAUW Survey on Sexual Harassment in America's Schools (1993) [hereinafter Hostile Hallways]; Valerie Lee, et al., The Culture of Sexual Harassment in Secondary Schools, Am. Educ. Res. J. (publication forthcoming 1996) [hereinafter Secondary Schools].

example, studies show that 33% of girls who suffered sexual harassment say they do not want to attend school; 32% report not wanting to talk as much in class; 28% find it harder to pay attention in school; and 18% report thinking about changing schools. See Hostile Hallways at 15-16. Sexually offensive hostile environments may reduce female students' class participation, and may even cause women to drop out of classes entirely. Bernice R. Sandler, The Chilly Classroom Climate: A Guide to Improve the Education of Women, 15-17, 19 (Nat'l Ass'n for Women in Educ. 1996). In addition, 64% of the girls who have been harassed report suffering from embarrassment; 52% of them report feeling self-conscious; 43% of them feel less sure or less confident about themselves; and 30% of them doubt whether they can ever have a happy romantic relationship. See Hostile Hallways at 16-17.

The harm of sexual harassment does not result from the aftermath of the incident itself. Rather, the emotional, physical and educational harm to students who are sexually harassed, as well as the prevalence of sexually harassing conduct, is exacerbated by schools' failure adequately to respond to the problem. See Stefanie H. Roth, Sex Discrimination 101: Developing a Title IX Analysis for Sexual Harassment in Education, 23 J.L. & Educ. 459, 466-69 (1994).[13]

Schools are not helpless in the face of these dramatic and sobering statistics. In fact, studies show that schools' prompt and effective attention to the problem can reduce

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[13] See also JoAnn Strauss, Peer Sexual Harassment of High School Students: A Reasonable Student Standard and an Affirmative Duty Imposed on Educational Institutions, 10 Law & Ineq. J. 163, 177 (1992) (linking schools' failure to take action against sexually harassing behavior with students' uncertainty about what conduct is prohibited).

both the incidence and the devastating effects of sexual harassment. Appropriate training for teachers and other school personnel enables them to address peer sexual harassment and to respond effectively when they witness incidents, and leads to heightened awareness by both students and teachers.[14] A sexual harassment program that includes training for students helps reduce sexual harassment as well.[15]

Studies also show that schools' actions, including adopting and implementing a clear sexual harassment policy and grievance procedure, can reduce the incidence of sexual harassment. See Elizabeth A. Williams, et al., Impact of a University Policy on the Sexual Harassment of Female Students, 63 J. Higher Educ. 50, 57, 59, 62-63 (1992) (finding that continuing and intensive sexual harassment education increased awareness and reduced sexual

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[14] See Helena K. Dolan, The Fourth R--Respect: Combatting Peer Sexual Harassment in the Public Schools, 63 Fordham L. Rev. 215, 243 (1992) (citing DeNeen L. Brown, Schools Get Tough on Unwanted Touching: 'Boys Will Be Boys' Is No Defense as Girls Become Aware of Rights, Wash. Post, June 28, 1992, at A1).

[15] Two separate studies of undergraduate students reveal that male students who participated in sexual harassment training programs became increasingly aware of what constitutes sexual harassment and became more sensitive to students who were harassed. See Douglas D. Smith, The Efficacy of a Selected Training Program on Changing Perceptions of Sexual Harassment (1993) (unpublished Ph.D. dissertation, University of Northern Colorado) (on file at NOW LDEF); Kathleen Beauvais, Workshops to Combat Sexual Harassment: A Case Study of Changing Attitudes, 12 Signs 130, 130-45 (1986). See also Nan M. Higginson, Addressing Sexual Harassment in the Classroom, Educ. Leadership, Nov. 1993, at 93, 93-96; Robert Shoop & Debra L. Edwards, How to Stop Sexual Harassment in Our Schools: A Handbook and Curriculum Guide 142-48 (1994) (training programs in Minnesota and Nebraska increased awareness and reduced sexual harassment in schools).

sexual harassment in schools). Holding schools liable for the consequences of peer sexual harassment provides a compelling incentive for schools to take these critical steps. See Strauss, supra, at 178; Baker, supra, at 307; Jollee Faber, Expanding Title IX of the Education Amendments of 1972 To Prohibit Student to Student Sexual Harassment, 2 UCLA Women's L.J. 85, 91 (1992).

These studies confirm what courts increasingly have recognized and what the Rowinsky decision rejects, that schools must take prompt and effective remedial action to stop peer sexual harassment in order to ensure equal educational opportunities for both boys and girls.

CONCLUSION

For the above stated reasons, amici curiae urge the Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

American Association of University Women

The American Association of University Women (AAUW) has worked since 1881 to promote equity and education for all women and girls. AAUW's 162,000 members are women and men college graduates committed to ensuring equal educational opportunity for all. Vigorous enforcement of Title IX is a priority issue for AAUW, which has urged its members to take action on the findings of *Hostile Hallways: The AAUW Survey on Sexual Harassment in America's Schools*. Released by the AAUW Educational Foundation in 1993, *Hostile Hallways* documented that sexual harassment is a daily occurrence in public schools and that it has severely negative effects on the education of both female and male students.

American Jewish Congress

The American Jewish Congress is an organization of American Jews dedicated to the fight against all forms of discrimination, prejudice and inequality. Its Commission for Women's Equality is an activist leaders' group of Jewish women and men whose goal is to pursue vigorously full equal rights for women within a Jewish context.

Because sexual harassment in the school setting, whether instigated by teachers or fellow students, prevents students from taking full advantage of educational opportunities and constitutes a form of sex discrimination, the American Jewish Congress Commission for Women's Equality believes that schools must be held liable for failing to take prompt and effective action to curb such harassment.

California Women's Law Center

The California Women's Law Center (CWLC) is a private, nonprofit public interest law center specializing in the civil rights of women and girls. The California Women's Law Center was established in 1989 to address the comprehensive civil rights of women and girls in the following priority areas: Sex Discrimination, including sex discrimination in education, Reproductive Rights, Family Law, Violence Against Women and Child Care.

Since its inception, the CWLC has placed a strong emphasis on advancing the rights of women and girls in education, particularly the issues of discrimination because of sexual harassment. The issues raised in this case will have an enormous impact on the rights of girls to receive an education free of the terrible consequences of harassment. Thus, this case raises questions within the expertise and concern of the California Women's Law Center. Therefore, the California Women's Law Center has the requisite interest and expertise to be heard by the Court in this appeal.

Connecticut Women's Education and Legal Fund, Inc.

The Connecticut Women's Education and Legal Fund, Inc. (CWEALF), is a non-profit women's rights organization incorporated in 1973. We have over 1,400 members. Our mission is to work through legal and public policy strategies and community education to end sex discrimination and to empower all women to be full and equal participants in society. We seek to join this brief as amicus curiae because we believe that sexual harassment in schools, including peer to peer harassment, creates a barrier to student learning and equal educational opportunities.

Equal Rights Advocates

Now in its twenty-second year, Equal Rights Advocates (ERA) is one of the country's oldest women's law centers. ERA is dedicated to empowerment of women through the establishment of their economic, social, and political equality. Beginning in 1974 as a teaching law firm specializing in issues of sex-based discrimination, ERA has evolved into a legal organization with a multifaceted approach to addressing women's issues including litigation, advice and counseling, public education and public policy initiatives. Since its early days, ERA has worked to end sexual harassment. ERA represented the plaintiff in the first case in the Ninth Circuit to find sexual harassment a violation of Title VII, Miller v. Bank of America, 600 F.2d 211 (9th Cir. 1979). More recently, ERA filed an amicus brief before the United States Supreme Court in Harris v. Forklift Sys., Inc., 114 S. Ct. 367 (1993). ERA has continued its efforts to eradicate sexual harassment through litigation, public policy initiative, and counseling hundreds of individual women on their legal rights.

ERA currently is co-counsel in Doe v. Petaluma, No. C-93-0123 (CW) (N.D. Cal), a student-on-student sexual harassment case raising many of the same issues as those before the Court here of the scope of Title IX's prohibition of sexual harassment in the schools. ERA has appeared as amicus in numerous cases concerning girls' rights to be free from sexual harassment and sexual discrimination in the schools, including Franklin v. Gwinett Country Pub. Sch. Dist., 112 S. Ct. 1028 (1992) and Patricia H. v. Berkeley Unified Sch. Dist., 830 F. Supp. 1288 (N.D. Cal. 1993).

Jewish Women International

Jewish Women International was founded in 1987 as B'nai B'rith Women by a group of Jewish women who sought

to improve the quality of life for women in their communities. Now an organization of over 50,000 women in the United States and Canada, JWI continues to speak out on issues that affect women -- in their communities, families, and in society. JWI advocates for adequate, just, and harassment-free educational opportunities for all.

Lambda Legal Defense and Education Fund, Inc.

Lambda Legal Defense and Education Fund (Lambda), is a national organization committed to achieving full recognition of the civil rights of lesbians, gay men and people with HIV/AIDS, through impact litigation, education and public policy work. Founded in 1973, Lambda is the oldest and largest legal organization dedicated to these goals. Lambda is specifically interested in the issue raised by this case because lesbian, gay, and HIV-infected schoolchildren have themselves been the targets of peer harassment in public schools. Lambda is counsel in Nabozny v. Podlesny, 95-3634, an appeal pending in the Seventh Circuit that is the first federal appellate challenge based on a school's denial of equal protection and due process in its response to anti-gay peer harassment. Lambda has an interest in the issue in this case because of our related efforts to create the obligation to provide lesbian and gay children with a safe environment in which to get their education, and to teach children to respect others.

National Association for Girls and Women in Sport

The National Association for Girls and Women in Sport (NAGWS) is a non-profit, education based organization designed to serve the needs of administrators, teachers, coaches, officials, leaders, parents, students, media, and participants of sport programs for girls and women. NAGWS began in 1899 and continues today as one of twelve

associations composing the American Alliance for Health, Physical Education, Recreation and Dance. A nationally focused membership of 5,500 (25,000 Alliance members), NAGWS is the only professional based organization devoted exclusively to providing opportunities for girls and women in sport-related disciplines and careers.

As part of the NAGWS mission, advocacy for gender equity and respect for girls and women is a primary issue. The fact that our members work in the hallways and gymnasiums of schools provides our organization with a great personal concern and commitment to eradicate sexual harassment in schools.

National Association of Social Workers

The National Association of Social Workers, Inc. (NASW), a nonprofit professional association with over 150,000 members, is the largest association of social workers in the world. NASW is devoted to promoting the quality and effectiveness of social work practice, to advancing the knowledge base of the social work profession, and to improving the quality of life through utilization of social work knowledge and skills. NASW believes that our nation's schools should provide a physically and emotionally safe environment for all children. NASW's school social worker section is particularly concerned about the harmful effects of sexual harassment and sex discrimination among peer groups in the schools.

National Center for Lesbian Rights

Founded in 1977, the National Center for Lesbian Rights (NCLR), is a national public interest law organization that advocates, through litigation and education, for women and men who confront discrimination on the basis of their sexual

orientation. NCLR's Youth Project provides the only national legal program for lesbian, gay, bisexual, and gender nonconforming youth. NCLR is particularly dedicated to combating discrimination on the basis of gender and sexual orientation in public schools, and to ensuring that all students have an equal opportunity to learn in an environment of safety and respect.

National Education Association

The National Education Association (NEA) is a nationwide employee organization with approximately 2.2 million members, the vast majority of whom are employed by public school districts, colleges and universities. NEA is strongly committed to ending gender discrimination by educational institutions, including sexual harassment, and, to this end, firmly supports the vigorous enforcement of Title IX.

National Organization for Women Foundation

The National Organization for Women Foundation is a 501(c)(3) organization devoted to furthering women's rights through education and litigation. NOW Foundation is affiliated with the National Organization for Women, the largest feminist organization in the United States, with a membership of over 250,000 women and men in more than 600 chapters in all 50 states and the District of Columbia. Since its inception in 1986, a major goal of NOW Foundation has been to ensure equality and fair treatment for girls and women, particularly including freedom from sexual harasssment in schools and on the job. We have a strong interest in the proper application and enforcement of Title IX to prevent peer sexual harassment.

NOW Legal Defense and Education Fund

NOW Legal Defense and Education Fund (NOW LDEF) is a leading national non-profit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was founded in 1970 by leaders of the National Organization for Women. A major goal of NOW LDEF is eliminating barriers that deny women and girls equal opportunity, such as sexual harassment. For years, NOW LDEF has fought for educational equity for girls. In April 1993, NOW LDEF and the Wellesley College Center for Research on Women released the results of a survey on sexual harassment in schools that they conducted through Seventeen magazine. NOW LDEF currently is co-counsel in Doe v. Petaluma, 830 F. Supp. 1560 (N.D. Cal. 1993), a peer sexual harassment case raising many of the same issues concerning the scope of Title IX's prohibition of sexual harassment in the schools before the Court here. NOW LDEF has appeared as amicus in numerous cases concerning girls' rights to be free from sexual harassment and sex discrimination in the schools, including Franklin v. Gwinnett County Pub. Sch., 112 S. Ct. 1028 (1992), and Davis v. Monroe County Bd. of Educ., 74 F.3d 1186 (11th Cir. 1996).

National Women's Law Center

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 its inception in 1972, the Center has worked continuously to ensure equal educational opportunities for girls and women through legislative and

administrative advocacy, public education and litigation to enforce Title IX. The Center has been a leader in advocating for the full enforcement of Title IX, and has actively participated in Congressional efforts to amend the Act and every Supreme Court case interpreting Title IX, including filing the lead amicus brief in Franklin v. Gwinnett County Pub. Sch., 112 S. Ct. 1028 (1992). The Center was co-counsel in Davis v. Monroe County Bd. of Educ., 74 F.3d 1186 (11th Cir. 1996), a peer sexual harassment case involving similar issues of Title IX's application to sexual harassment in schools. In addition, the Center has played a major role in shaping the law of sex discrimination and sexual harassment in the workplace under Title VII, participating as amicus in every Title VII sex discrimination case in the Supreme Court, including Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), and Harris v. Forklift Sys., Inc., 114 S. Ct. 367 (1993), and in numerous sexual harassment cases in the lower courts. The Center has a deep and abiding interest in ensuring that women and girls have access to a school environment that is free from sexual harassment and abuse.

Northwest Women's Law Center

The Northwest Women's Law Center (NWLC) is a non-profit public interest organization that works to advance the legal rights of all women through litigation, education, legislation and the provision of legal information and referral services. Founded in 1978, the NWLC has been dedicated to challenging barriers to gender equality in education with a focus on the barriers created by sexual harassment. Toward that end, the NWLC has participated in cases throughout the country to ensure the availability of legal remedies for victims of sexual harassment. The NWLC also conducts sexual harassment in education workshops, produces legal rights education materials on the issue, and has led numerous legislative efforts to protect and advance the legal rights and

remedies available to victims of sexual harassment in school. The NWLC has a strong interest in the present case in ensuring that Title IX of the Education Amendments of 1971 is interpreted to provide the fullest possible protection to students against sexual harassment in school.

Puerto Rican Legal Defense and Education Fund

The Puerto Rican Legal Defense and Education Fund (PRLDEF), is a national civil rights litigation organization founded in 1972. Its mission is to further and protect the civil rights of Puerto Ricans and other Latinos. PRLDEF has brought many lawsuits under the various federal civil rights acts to protect Latino women. The decision by the Fifth Circuit in this matter undercuts PRLDEF's efforts on behalf of Latinas.

Women Employed

Women Employed is a national organization of working women, based in Chicago, with a membership of 2,000. Since 1973, the organization has assisted thousands of working women with problems of sex discrimination. Women Employed works to empower women to improve their economic status and to remove barriers to economic equity through advocacy, direct service and public education.

Women's International League for Peace and Freedom

The Women's International League for Peace and Freedom (WILPF) was founded in 1915 as a nation-wide grassroots organization. Currently we have more than 100 branches in communities across the country, comprising a membership of approximately 10,000. WILPF's mission is to work to create an environment of political, economic, social and psychological freedom for all members of the human

community, so that true peace can be enjoyed by all. As such, the case of Rowinsky v. Bryan Independent School District is of deep concern to us. The environment created for Jane and Janet Rowinsky in their school is not only violent and intimidating, but that violence and intimidation have a chilling effect on their right to an equal education. We feel strongly that the rights of the girlchild need to be asserted in this situation, because it is legally appropriate to do so and in order to bring the U.S. in line with international documents such as the U.N. Convention to End All Forms of Discrimination Against Women and the Platform for Action.

Women's Law Center of Maryland, Inc.

The Women's Law Center of Maryland, Inc., is an advocacy organization whose membership consists of attorneys and judges in the State of Maryland. In existence since 1971, the goal of the Women's Law Center is to promote the legal rights of women through litigation, legislation and education. The Women's Law Center has an interest in the elimination of all forms of discrimination, and has been particularly involved with cases of sexual harassment.

Women's Law Project

The Women's Law Project (WLP) is a non-profit, feminist legal advocacy organization located in Philadelphia. Founded in 1974, WLP works to abolish discrimination and injustice and to advance the legal and economic status of women and their families through litigation, public education, and individual counseling. During the past twenty-two years, WLP's activities have included extensive work in the area of sex discrimination in education. WLP has a strong interest in the availability of strong and effective remedies for peer

sexual harassment under Title IX of the Education Amendments of 1972.

Women's Legal Defense Fund

Established almost 25 years ago, the Women's Legal Defense Fund is a national advocacy organization that works on behalf of women and their families. WLDF promotes public policies to ensure equal opportunity and economic security for women, especially low income women and women of color. The Fund has a longstanding commitment to equal opportunity for women and to monitoring the enforcement of antidiscrimination laws. WLDF has devoted significant resources to combating sex and race discrimination in education and has filed numerous briefs amicus curiae in the Supreme Court to advance women's opportunities in education.