No.

In the Supreme Court of the United States

LISA RYAN FITZGERALD AND ROBERT FITZGERALD,

Petitioners,

v.

BARNSTABLE SCHOOL COMMITTEE AND RUSSELL DEVER,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a), has been interpreted to provide an implied private right of action for sex discrimination by federally funded educational institutions. Section 1983 of Title 42 of the United States Code creates an express remedy for violations of the U.S. Constitution. Three courts of appeals have held that Title IX's implied remedy does not foreclose Section 1983 claims to enforce the Constitution's prohibition against invidious sex discrimination. In contrast, four circuits, including the First Circuit in this case, have held that Title IX's implied right of action is the exclusive remedy for sex discrimination by federally funded educational institutions. The question presented is:

Whether Title IX's implied right of action precludes Section 1983 constitutional claims to remedy sex discrimination by federally funded educational institutions.

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OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-25a) is reported at 504 F.3d 165. The opinion of the district court regarding Title IX (App., *infra*, 26a-41a) is reported at 456 F. Supp. 2d 255. The oral opinion of the district court regarding 42 U.S.C. § 1983 (App., *infra*, 42a-63a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 5, 2007. On December 27, 2007, Justice Souter extended the time for filing the petition for a writ of certiorari to March 3, 2008. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1983 of Title 42 of the United States Code provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress * * *.

Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-88, provides in pertinent part:

> No 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 * * *.

Id. at § 1681(a).

STATEMENT

Victims of sex discrimination by federally funded educational institutions frequently advance claims under both Title IX and Section 1983. While some circuits permit these plaintiffs to vindicate both the statutory rights created by Title IX (by bringing an action directly under that statute) and their constitutional rights (by bringing suit under Section 1983), other courts, like the First Circuit in this case, do not. These courts hold that Title IX is the *exclusive* remedy for sex discrimination by federally funded schools, barring plaintiffs from asserting meritorious constitutional claims under Section 1983.

This rule is insupportable. It is premised on the proposition that Congress meant to foreclose recourse to Section 1983 when it enacted Title IX, even though the latter statute contains *no* express private remedies and was intended to *expand* existing prohibitions against sex discrimination. The First Circuit's rule expressly conflicts with the holdings of three other courts of appeals, expanding a longstanding and widely acknowledged conflict among the circuits on an important and frequently litigated question. And it undermines both the specific goals of Title IX and the broader federal policy opposing invidious discrimination on the basis of sex. Accordingly, further review is warranted.

A. Statutory Background

Section 1983 creates an omnibus tool for the enforcement of federal statutory and constitutional rights, implementing "Congress' desire that the federal civil rights laws be given a uniform application within each State." *Felder* v. *Casey*, 487 U.S. 131, 153 (1988). Of particular relevance here, Section 1983 may be used to challenge violations of the Fourteenth Amendment's guarantee of equal protection. See, *e.g.*, *Forrester* v. *White*, 484 U.S. 219 (1988). Once plaintiffs asserting an equal protection challenge have demonstrated sex-based action on the part of the state, a heavy burden falls on the government to justify that action. See *United States* v. *Virginia* (*VMI*), 518 U.S. 515, 531 (1996) ("Parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive' justification for that action.").

Title IX offers more limited remedies for persons who have been denied benefits and opportunities on the basis of sex by federally funded educational institutions. The statute provides that no person may "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" on the basis of sex. 20 U.S.C. § 1681(a). The text of the statute does not establish a private right of action for aggrieved individuals; the only express remedy provided by Title IX is denial of federal funds for the offending institution. See *id*. § 1682. This Court, however, has held that the statute creates an implied right of action for individuals to bring suit to enforce Title IX's prohibition on sex discrimination. See *Cannon* v. *Univ. of Chi.*, 441 U.S. 677 (1979). Such suits may seek both injunctive re-

lief and monetary damages. *Franklin* v. *Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992).

As compared with equal protection claims brought under Section 1983, however, Title IX claims are subject to "very real limitations." *Davis* v. *Monroe County Bd. of Educ.*, 526 U.S. 629, 652 (1999). In the context of peer-on-peer sexual harassment, for example, Title IX plaintiffs must show that the defendant school had actual notice of the discriminatory acts and that it responded with "deliberate indifference." *Id*. at 633. Further, "damages are available only where the behavior is so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect." *Id.* at 652. Thus, while Title IX and equal protection claims may overlap in many cases of school sexual harassment, certain forms of discriminatory conduct may violate the Equal Protection Clause but not be actionable under Title IX. See, *e.g., Rasnick* v. *Dickenson County Sch. Bd*., 333 F. Supp. 2d 560 (W.D. Va. 2004) (dismissing Title IX claims but allowing some Section 1983 claims to go forward).

B. Factual Background[1]

For six months during the 2000-2001 school year, Jacqueline Fitzgerald suffered repeated sexual harassment—which the court below itself characterized as "grotesque"—at the hands of an older schoolmate. App., *infra*, 1a. At the time, Jacqueline was a kindergartener at Hyannis West Elementary School in

[1] Petitioners believe that the description of the factual background by the court below disregards significant aspects of the record. For purposes of this petition, however, petitioners accept the First Circuit's characterization of the relevant events.

Hyannis, Massachusetts. Approximately two to three times a week during this period, Jacqueline wore a dress or skirt to school. *Id*. at 2a. Each time she did so, Briton Oleson, a third grader at her school, brutally harassed her during the bus ride to Hyannis West. While on the bus, Oleson would force Jacqueline to lift her skirt, pull down her underwear, and spread her legs. *Id*. at 3a. Oleson and other students on the bus would then ridicule and laugh at Jacqueline. Compl. & Jury Demand at 7, *Fitzgerald* v. *Barnstable Sch. Comm.*, No. 02-10604-REK (D. Mass. Apr. 2, 2002).

In February 2001, after six months of this abuse, Jacqueline reported the sexual harassment to her parents. *Id*. at 2a. They immediately telephoned the school and a meeting was arranged to discuss the incidents. *Ibid*. After talking with the principal of the school, Jacqueline identified Oleson as the boy who had been harassing her. *Id*. at 3a.

The school did not have a written policy establishing a response to peer-on-peer sexual harassment. App., *infra*, 52a. As part of their ad hoc response to the harassment allegations, school officials interviewed Oleson and other students on Jacqueline's bus. *Id.* at 3a. Police also began an investigation but determined that "there was insufficient evidence to proceed *criminally* against [Oleson]." *Ibid*. (emphasis added). The school ultimately decided not to take disciplinary action against Oleson. *Ibid*.

Instead, school officials' "primary suggestion" to address the harassment was an offer to place Jacqueline on a different bus; alternatively, they suggested segregating Jacqueline and the other kindergartners

from the older students on the bus. *Id*. at 3a-4a. Petitioners rejected both of these options because they required a change of behavior by, and effectively punished, the female victim rather than the male harasser. *Id*. at 4a. Petitioners requested a remedy that would not put the onus of avoiding harassment on Jacqueline: they proposed that the school either transfer Oleson to a different bus or place an adult monitor on the bus to ensure that no harassment occurred. *Ibid*. The district court found that "[a] bus monitor could easily have prevented this harassment." *Id*. at 41a. But the school refused to implement either option (*id*. at 4a), though it admittedly had the resources to do so (Dep. of Russell J. Dever, Ed.D., at 60, *Fitzgerald* v. *Barnstable Comm. Dist.*, No. 02-10604-REK (D. Mass. Jan. 27, 2006)).

The impact of the harassment on Jacqueline continued even after the abuse was brought to the attention of the school. She regularly encountered Oleson in the school hallways and was directed by a teacher to give him a "high five" in gym class. App., *infra*, 4a. As a consequence of the harassment, Jacqueline stopped using the public school bus, did not participate in gym class, and began suffering from "an atypical number of absences." *Id*. at 29a. Both the district court and the court of appeals characterized the harassment as "severe" and "pervasive." *Id*. at 8a, 35a-37a.

C. Proceedings in the District Court[2]

After the school district failed to implement a meaningful, non-discriminatory response to the harassment, petitioners filed suit in the United States District Court for the District of Massachusetts. Petitioners sought injunctive relief, as well as compensatory and punitive damages. They alleged violations of Title IX, the U.S. Constitution, and Massachusetts state law. In particular, petitioners argued that Jacqueline had "a clearly established right under state and federal statutory and constitutional law to equal access to all benefits and privileges of a public education, and a right to be free of sexual harassment in school." Compl. & Jury Demand at 13, *Fitzgerald* v. *Barnstable Sch. Comm.*, No. 02-10604-REK (D. Mass. Apr. 2, 2002). Accordingly, in their Section 1983 claim, petitioners alleged that respondents violated both the Equal Protection Clause and Title IX. *Id*. at 12-13.

The district court declined to reach the merits of petitioners' Section 1983 claim. Instead, it granted respondents' motion to dismiss that claim under Fed. R. Civ. P. 12(b)(6) on the ground that Section 1983 claims alleging either equal protection constitutional violations or Title IX statutory violations are foreclosed by the Title IX remedial scheme. App., *infra*,

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[2] The published district court opinion is captioned *Hunter ex rel. Hunter* v. *Barnstable School Committee* because the court employed pseudonyms. See App., *infra*, 26a n.1. The parties abandoned the use of pseudonyms in the court of appeals. *Id*. at 2a n.1.

60a.[3] The district court subsequently granted summary judgment for respondents on petitioners' Title IX claim.

As a consequence of the ruling on the motion to dismiss, petitioners were precluded from advancing and developing their equal protection claim, including those elements of the constitutional claim that differ from the theory of Title IX liability. Had the court not foreclosed recourse to Section 1983, petitioners could have addressed at least two respects in which their equal protection theories are distinct from their Title IX claim.

First, petitioners allege that the school discriminated on the basis of sex both in the course of the investigation and in the proposed remedy. See Br. for Plaintiffs-Appellants at 9, *Fitzgerald* v. *Barnstable Sch. Comm.*, 504 F.3d 165 (1st Cir. 2007) (No. 06-2596) (claiming that respondents "treated Briton Oleson, the male perpetrator, deferentially, and certainly more favorably than it treated the female minor plaintiff"). This theory may not state a Title IX violation because it may not establish that "the harassment deprived [respondent] of educational opportunities or benefits." App., *infra*, 7a (citing *Davis*, 526 U.S. at 643). There is, however, no such requirement for constitutional equal protection claims; investigations or remedies that are discriminatory may trigger a constitutional violation regardless of whether the student's educational opportunities were

[3] At the same time, the court dismissed petitioners' state law claims. App., *infra*, 60a. Those claims were not pursued on appeal. *Id*. at 5a.

disrupted.[4] *Second*, under a Section 1983 equal protection theory, petitioners could have established that respondents had a practice or policy of being more responsive to complaints of bullying lodged by male victims than to claims of harassment advanced by female victims.[5]

D. The Court of Appeals' Decision

The court of appeals affirmed. App., *infra*, 1a-25a. The court rejected petitioners' Title IX claim upon concluding that the school district's response to the harassment did not demonstrate deliberate indifference. *Id.* at 5a-16a.[6] The court also held that Section 1983 could not be used to assert a violation of either Title IX or the Equal Protection Clause. *Id*. at 16a-25a. Relying on this Court's decision in *Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n*, 453 U.S. 1 (1981), and pointing to the Court's holding in *Cannon* that Title IX creates

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[4] See *Nabozny* v. *Podlesny*, 92 F.3d 446, 453 (7th Cir. 1996) ("The gravamen of equal protection lies not in the fact of deprivation of a right but in the invidious classification of persons aggrieved by the state's action."); *Doe* v. *Londonderry Sch. Dist.*, 970 F. Supp. 64, 77 (D.N.H. 1997) ("To prevail on an equal protection claim, the plaintiffs must show that the [school district] treated Jane's complaints differently than the complaints of boys." (citing *Soto* v. *Flores*, 103 F.3d 1056, 1067 (1st Cir. 1997))).

[5] See *Doe* v. *Beaumont Ind. Sch. Dist.*, 8 F. Supp. 2d 596 (E.D. Tex. 1998) (discussing pattern and practice constitutional claims in context of school sexual harassment equal protection claims).

[6] Although petitioners believe that this holding was deeply flawed in several significant respects, they do not challenge it in this petition.

an implied private right of action, the First Circuit saw "no problem in holding [S]ection 1983 actions [to enforce Title IX], including [S]ection 1983 actions against individuals, precluded by Title IX, even though such a holding would deprive plaintiffs of the right to seek relief against the individuals alleged to have been responsible for conduct violative of Title IX." App., *infra*, 21a.

Of particular importance here, the court went on to hold that Title IX also precludes the use of Section 1983 to allege that sexual harassment in schools violates the Constitution's Equal Protection Clause. In the First Circuit's view, "Congress saw Title IX as the sole means of vindicating the constitutional right to be free from gender discrimination perpetrated by educational institutions—and that is true whether suit is brought against the educational institution itself or the flesh-and-blood decisionmakers who conceived and carried out the institution's response." App., *infra*, 24a. Relying on *Smith* v. *Robinson*, 468 U.S. 992 (1984), the court accordingly held that petitioners' "equal protection claims are also precluded." App., *infra*, 24a.

REASONS FOR GRANTING THE PETITION

After rejecting petitioners' Title IX claim, the court of appeals proceeded to deny their constitutional claim—*not* because that claim lacks merit, but because the court believed that Title IX forecloses use of Section 1983 to assert *any* constitutional claim alleging sex discrimination by federally funded educational institutions. This holding is perverse. The First Circuit reasoned that recourse to Section 1983 is precluded by what it characterized as Title IX's

comprehensive remedial scheme. But Title IX offers *no* express private remedies at all. Even assuming that Congress anticipated the subsequent recognition of private Title IX remedies by this Court, it is hardly likely that Congress intended those remedies—the contours of which it did not describe or define—to bar constitutional suits under Section 1983. Indeed, the holding below turns Title IX on its head: that statute was intended to expand, not to contract, protections for victims of discrimination on the basis of sex.

It therefore should come as no surprise that the First Circuit's approach is not universally followed. Three circuits have reached the same conclusion as the First Circuit. But three other courts of appeals have expressly rejected the First Circuit's rule, holding that Title IX does not preclude the use of Section 1983 to bring constitutional claims against schools, even if those claims are virtually identical to ones also asserted under Title IX. Because this conflict involves an important and recurring issue, and because the approach taken by the First Circuit departs from this Court's precedents, further review is warranted.

A. There Is A Square Conflict Among The Courts Of Appeals Regarding The Question Presented.

As the court below recognized, the courts of appeals are irreconcilably divided on the question whether Title IX precludes constitutional claims brought under Section 1983 that arise out of sex discrimination by federally funded educational institutions. App., *infra*, 18a-19a. Three circuits have held that a plaintiff *may* pursue Section 1983 constitu-

tional claims in school-place sex discrimination suits. But in identical circumstances, four other circuits—including the court below—have held that Title IX forecloses Section 1983 constitutional claims alleging such discrimination. This Court should grant certiorari to resolve this long-standing and widely acknowledged conflict in the courts of appeals.

1. The Sixth, Eighth, and Tenth Circuits have held that Title IX does not preempt Section 1983 constitutional claims against schools. There is no doubt that, had petitioners brought suit in one of these circuits, they would have been permitted to pursue their Section 1983 constitutional claim.

In *Communities for Equity* v. *Michigan High School Athletic Ass'n*, 459 F.3d 676 (6th Cir. 2006), *cert. denied*, 127 S. Ct. 1912 (2007), the Sixth Circuit extensively examined this Court's precedents and concluded that Title IX does not foreclose Section 1983 constitutional claims, holding that a plaintiff may "invoke[] [Section] 1983 not as a vehicle to enforce the substantive federal law found in Title IX, but as a vehicle to recover for alleged violations of the Equal Protection Clause of the Fourteenth Amendment." *Id.* at 684. Moreover, the court determined that Title IX would not preclude Section 1983 constitutional claims "even if we were to hold that * * * Title IX claims are 'virtually identical' to * * * claims brought pursuant to [Section] 1983." *Id.* at 685. The lack of an express private cause of action in Title IX, the court reasoned, demonstrates that Title IX does not create a comprehensive or "carefully tailored remed[y]" sufficient to preclude Section 1983 constitutional claims. *Id*. at 691. In reaching this conclusion, the Sixth Circuit expressly rejected the contrary holdings of other courts of appeals. *Id.*

at 689. See also *Lillard* v. *Shelby County Bd. of Educ.*, 76 F.3d 716 (6th Cir. 1996) (holding that Title IX does not preclude Section 1983 constitutional claims arising from school sexual harassment).

The Eighth Circuit has likewise held that a plaintiff alleging sexual harassment in a school may pursue Section 1983 constitutional claims in addition to Title IX remedies. *Crawford* v. *Davis*, 109 F.3d 1281, 1283-84 (8th Cir. 1997). Like the Sixth Circuit, the Eighth Circuit found that the lack of an express private right of action indicates that Title IX is not a "sufficiently comprehensive remedial scheme" to foreclose constitutional claims raised under Section 1983. *Id*. at 1284. Rather, the court determined that Title IX's limited remedial mechanism is "a far cry from the 'unusually elaborate enforcement provisions' of the statutes" where preclusion of Section 1983 remedies is appropriate. *Ibid*. (quoting *Sea Clammers*, 453 U.S. at 13). And like the Sixth Circuit, the Eighth Circuit held that Title IX does not bar a plaintiff from pursuing a Section 1983 constitutional claim "even if the same set of facts also gives rise to a cause of action for the violation of statutory rights." *Ibid.*

The Tenth Circuit agrees. *Seamons* v. *Snow*, 84 F.3d 1226, 1233-34 (10th Cir. 1996). Guided by the Sixth Circuit's opinion in *Lillard*, the Tenth Circuit held that "Title IX does not have a comprehensive enforcement scheme, and thus, there is no indication in Title IX that Congress intended to foreclose a Title IX plaintiff from bringing a [Section] 1983 action." *Id*. at 1234. The Tenth Circuit also pointed to the critical differences between Title IX claims and Section 1983 constitutional claims, noting that "constitutional rights * * * have contours distinct from * * *

statutory claim[s]." *Id.* at 1233 (quoting *Lillard*, 76 F.3d at 723).

2. In contrast to these courts, the First, Second, Third, and Seventh Circuits have held that Title IX *does* foreclose constitutional claims brought under Section 1983 arising from the same incident that prompted suit under Title IX. In this case, the First Circuit held that Title IX's remedial scheme—principally the implied private right of action recognized by this Court in *Cannon*—"indicates that Congress saw Title IX as the sole means of vindicating the constitutional right to be free from gender discrimination perpetrated by education institutions." App., *infra*, 24a. The First Circuit accordingly ruled that petitioners' equal protection claims brought under Section 1983 are foreclosed by Title IX. *Ibid*. In doing so, the First Circuit expressly rejected the contrary holdings of the Sixth and Eighth Circuits, opining that "there is some support for that thesis * * * [that Section 1983 suits are not precluded, but] we are not persuaded that this view is correct." *Id*. at 18a.

Similarly, the Second Circuit has held that, although a plaintiff "has a constitutional right to an educational environment free of sexual harassment, * * * Title IX provides the exclusive remedial avenue." *Bruneau* v. *S. Kortright Cent. Sch. Dist.*, 163 F.3d 749, 758 (2d Cir. 1998). The Second Circuit, as did the First Circuit in this case, relied on the implied private right of action recognized by this Court in *Cannon* to find that Title IX provides a comprehensive remedy that precludes Section 1983 constitutional claims. *Ibid.* Like the court below, however, the Second Circuit acknowledged its disagreement with the Sixth, Eighth, and Tenth Circuits, stating

that "[w]e recognize that some of our sister circuits consider the implied private right of action as outside the statutory enforcement scheme." *Id.* at 756.

The Seventh Circuit has similarly concluded that constitutional claims are foreclosed by Title IX: "Congress saw Title IX as the device for redressing any grievance arising from a violation of federal civil rights by an educational institution. Through the establishment of this statutory regime, Congress effectively superseded a cause of action under [Section] 1983 that was based on constitutional principles of equal protection." *Waid* v. *Merrill Area Pub. Sch.*, 91 F.3d 857, 863 (7th Cir. 1996).

The Third Circuit has reached the same result, holding that "constitutional claims are 'subsumed' in [T]itle IX." *Williams* v. *Sch. Dist. of Bethlehem*, *Pa.*, 998 F.2d 168, 176 (3d Cir. 1993). See also *Pfeiffer* v. *Marion Ctr. Area Sch. Dist.*, 917 F.2d 779, 789 (3d Cir. 1990).

3. In addition, the circuit split at issue here is often noted by district courts in circuits that have not yet addressed the issue, further demonstrating the frequency with which this question arises. See, *e.g.*, *Brust* v. *Regents of Univ. of Cal.*, No. 07-1488, 2007 WL 4365521, at *4 (E.D. Cal. Dec. 12, 2007) ("There is presently a split in circuit authority as to whether Title IX subsumes a claim under [Section] 1983."); *Mansourian* v. *Regents of Univ. of Cal.*, No. 03-02591, 2007 WL 3046034, at *14-15 (E.D. Cal. Oct. 18, 2007) (same); *Drews* v. *Joint Sch. Dist. No. 393*, No. 04-388, 2006 WL 851118, at *6-7 (D. Idaho Mar. 29, 2006) (noting circuit split); *Mandsager* v. *Univ. of N.C.*, 269 F. Supp. 2d 662, 677 (M.D.N.C. 2003) (same); *Hackett* v. *Fulton County Sch. Dist.*, 238 F. Supp. 2d 1330, 1353-54 (N.D. Ga. 2002) (same);

Jennings v. *Univ. of N.C.*, 240 F. Supp. 2d 492, 500 (M.D.N.C. 2002) ("The circuits that have addressed this issue are split."); *Henkle* v. *Gregory*, 150 F. Supp. 2d 1067, 1073 (D. Nev. 2001) ("The circuits that have looked at the enforceability of Title IX through [Section] 1983 are equally split.").

Given this state of confusion, it is unsurprising that district courts in these circuits have also given divergent answers to the question. Compare *Hackett*, 238 F. Supp. 2d at 1353 (N.D. Ga.) (holding that Section 1983 constitutional claims are not preempted by Title IX), *Mandsager*, 269 F. Supp. 2d at 677 (M.D.N.C.) (same), *Carroll K.* v. *Fayette County Bd. of Ed.*, 19 F. Supp. 2d 618, 622-23 (S.D. W. Va. 1998) (same), and *Alston* v. *Va. High Sch. League, Inc.*, 176 F.R.D. 220, 223-24 (W.D. Va. 1997) (same), with *Brust*, 2007 WL 4365521, at *4 (E.D. Cal.) (holding that Section 1983 constitutional claims are preempted), *Drews*, 2006 WL 851118, at *6 (D. Idaho) (same), and *Henkle*, 150 F. Supp. 2d at 1073 (D. Nev.) (same).

Even within the circuits that have taken a side in this dispute, district courts routinely recognize the circuit split and the lack of clarity in prevailing federal law. See, *e.g.*, *Baumgardt* v. *Wausau Sch. Dist. Bd. of Ed.*, 475 F. Supp. 2d 800, 805 (W.D. Wis. 2007) ("A number of courts of appeals have concluded that Title IX has no preemptive effect on constitutional claims brought under [Section] 1983 * * *. However, the Court of Appeals for the Seventh Circuit has taken a different tack * * *."); *Moore* v. *Marion Comm. Sch. Bd. of Ed.*, No. 04-483, 2006 WL 2051687, at *9 n.5 (N.D. Ind. July 19, 2006) ("The Sixth, Eighth, and Tenth Circuits have allowed [Section] 1983 constitutional rights claims to proceed in-

dependent of Title IX claims."); *Jones* v. *Ind. Area Sch. Dist.*, 397 F. Supp. 2d 628, 646-47 (W.D. Pa. 2005) ("There is a split of authority on this issue."); *DiSalvio* v. *Lower Merion High Sch. Dist.*, 158 F. Supp. 2d 553, 558 n.5 (E.D. Pa. 2001) ("The Courts of Appeals have been unable to reach a consensus on this issue."); *Morlock* v. *W. Cent. Educ. Dist.*, 46 F. Supp. 2d 892, 913 & n.11 (D. Minn. 1999) ("[T]he circuit courts presently are split on this issue * * *."); *Kemether* v. *Pa. Interscholastic Athletic Ass'n*, 15 F. Supp. 2d 740, 756 (E.D. Pa. 1998) (noting that the reasoning of contrary circuits "is not without force"). Resolution of the question here will bring clarity to the district courts that often encounter this issue.

Against this backdrop, the question of whether Title IX precludes constitutional claims of sex discrimination is ripe for review. The conflict in the courts of appeals is long-standing and widespread, and the opposing arguments have been thoroughly considered. Courts on both sides of the conflict acknowledge that the question is significant. Consideration by this Court therefore is warranted.

B. This Case Involves A Frequently Litigated Issue Of Substantial Importance.

As the scope of the conflict in the courts of appeals suggests, the issue presented here involves a matter of considerable importance, both practically and doctrinally. It is a frequently litigated issue involving the meaning and interaction of two significant federal statutes. In addition, the conflict in the lower courts is producing substantial confusion about the scope of Title IX preclusion and the relevance of judicially-implied causes of action to suits brought under Section 1983. And holdings like the one below threaten to frustrate our nation's long-standing pol-

icy against discrimination on the basis of sex. For these reasons as well, further review is warranted.

1. As the decisions cited above illustrate, the outcome of a substantial number of school sex discrimination cases each year depends on the resolution of the question presented. To remedy such discrimination by federally funded schools, plaintiffs frequently allege constitutional claims under Section 1983, along with statutory claims under Title IX. Plaintiffs' constitutional claims are regularly adjudicated in circuits that have held that Title IX does not preclude suits under Section 1983. See, *e.g.*, *Rost ex rel. K.C.* v. *Steamboat Springs RE-2 Sch. Dist.*, 511 F.3d 1114 (10th Cir. 2008); *Henderson* v. *Walled Lake Consol. Sch.*, 469 F.3d 479 (6th Cir. 2006); *Gossett* v. *Okla. ex rel. Bd. of Regents for Langston Univ.*, 245 F.3d 1172 (10th Cir. 2001). In circuits that have not yet squarely addressed the question presented here, courts often assume that Section 1983 suits advancing constitutional claims are appropriate. Thus, in those circuits, too, courts frequently adjudicate Section 1983 claims for violations of constitutional rights alongside Title IX claims. See, *e.g.*, *Jennings* v. *Univ. of N.C.*, 482 F.3d 686 (4th Cir. 2007); *Rasnick* v. *Dickenson County Sch. Bd.*, 333 F. Supp. 2d 560 (W.D. Va. 2004).

That victims of sex discrimination commonly raise claims under both Section 1983 and Title IX is no surprise given the substantial practical benefits of litigating under Section 1983. One such benefit relates to whom plaintiffs can sue. Plaintiffs may not sue individual school officials under Title IX, notwithstanding the private right of action implied by the Court in *Cannon*. See, *e.g.*, *Smith* v. *Metro. Sch. Dist. Perry Twp.*, 128 F.3d 1014, 1019-20 (7th Cir.

1997), *cert. denied*, 524 U.S. 951 (1998); *Lipsett* v. *Univ. of P.R.*, 864 F.2d 881, 901 (1st Cir. 1988). In contrast, individuals may be sued under Section 1983 so long as they were acting "under color of law" when they violated plaintiffs' federal rights. 42 U.S.C. § 1983.[7] The advantages of litigating under Section 1983 suggest that the number of cases in which courts must consider whether Title IX precludes constitutional Section 1983 claims will continue to grow.

2. The question presented here has caused much confusion in the lower courts regarding the meaning and interaction of Title IX and Section 1983. One source of uncertainty concerns the scope of Title IX preclusion in those circuits that have held that Title IX forecloses Section 1983 claims. In the Second Circuit, for example, district courts are divided on whether the preclusion bar affects only Section 1983 claims against educational institutions, or whether it

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[7] Although the First Circuit stated that its decision below "should not be read to imply that a plaintiff may *never* bring a constitutionally-based [S]ection 1983 action against an employee of an educational institution concurrently with the prosecution of a Title IX action" (App., *infra*, 24a), the court held that Title IX is "the sole means of vindicating the constitutional right to be free from gender discrimination perpetrated by educational institutions—and that is true whether suit is brought against the educational institution itself *or the flesh-and-blood decisionmakers who conceived and carried out the institution's response*" (*ibid*. (emphasis added)). The scope of the relief against individual defendants permitted by the court below therefore is narrowly circumscribed, with liability possible only when "a plaintiff alleges that an individual defendant is guilty of committing an independent wrong, separate and apart from the wrong asserted against the educational institution." *Ibid*.

also reaches Section 1983 claims against individual school officials. Compare *Zamora* v. *N. Salem Cent. Sch. Dist.*, 414 F. Supp. 2d 418, 426 (S.D.N.Y. 2006) (finding Section 1983 claims against individual school officials precluded by Title IX), with *Hayut* v. *State Univ. of N.Y.*, 127 F. Supp. 2d 333, 338-40 (N.D.N.Y. 2000) (finding no Title IX preclusion of Section 1983 claims against individual defendants), and *Norris* v. *Norwalk Pub. Sch.*, 124 F. Supp. 2d 791, 798-800 (D. Conn. 2000) (same). Similarly, at least one district court in the Third Circuit, while acknowledging circuit precedent holding that "a [Section] 1983 action based on a violation of constitutional rights would be subsumed by Title IX if the plaintiff brings a Title IX claim as well," allowed a constitutional claim to proceed when the plaintiff brought *only* a Section 1983 claim and did not state a cause of action arising under Title IX. *DiSalvio*, 158 F. Supp. 2d at 558. Resolving the question presented here will clarify which types of Section 1983 claims are available to plaintiffs who suffer sex discrimination at the hands of federally funded schools and their officials.

Another source of confusion lies in the relationship between judicially implied causes of action and statutory preclusion of Section 1983 claims. Whether a private right of action should be implied and whether the statutory scheme precludes Section 1983 claims are both matters of congressional intent. But courts of appeals are divided on the fundamental question—which transcends the Title IX context—of how to determine whether "Congress intended" a statutory scheme to be "exclusive" (*Smith* v. *Robinson*, 468 U.S. at 1009) where, as here, the remedy asserted to reflect a preclusive congressional intent has itself been implied by the courts. See, *supra*, 11-17.

By resolving the question presented here, this Court will provide much needed guidance to lower courts on how to untangle these competing standards of congressional intent.

3. The need for review is especially acute because the First Circuit's rule that Title IX is "the sole means of vindicating the constitutional right to be free from gender discrimination perpetrated by educational institutions" (App., *infra*, 24a), may have the effect—as it did in this case—of denying plaintiffs *any* remedy for certain constitutional violations. Although they overlap in significant respects, Title IX is not coextensive with the Equal Protection Clause; the latter prohibits invidious forms of sex discrimination that the former does not. In holding that Title IX is the only remedy for sex discrimination perpetrated by federally funded educational institutions, the decision of the court below (and of the other circuits with which it agrees) leaves no way to challenge an entire category of constitutional violations.

The range of constitutional violations left unremedied is particularly broad in the context of peer-on-peer sexual harassment. In *Davis* v. *Monroe County Board of Education*, 526 U.S. 629 (1999), the Court concluded that federally funded schools "are properly held liable in damages only where they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is *so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school*." *Id*. at 650 (emphasis added). In many cases, however, schools—or school officials—may take actions that constitute sex discrimination under the Equal Protection Clause but do not rise to a level that deprives

the victim of access to an education. See *Nabozny* v. *Podlesny*, 92 F.3d 446, 453 (7th Cir. 1996) ("The gravamen of equal protection lies not in the fact of deprivation of a right but in the invidious classification of persons aggrieved by the state's action." (internal quotation marks omitted)); Deborah L. Brake, *School Liability for Peer Sexual Harassment After* Davis*: Shifting from Intent to Discrimination in Discrimination Law*, 12 Hastings Women's L.J. 5, 8-9 (2001).

For example, a school district would violate the Equal Protection Clause, but not necessarily Title IX, if it treated sexual harassment of boys differently than sexual harassment of girls, or if it treated bullying of boys differently than harassment of girls. See, *e.g.*, *Nabozny*, 92 F.3d at 449 (equal protection claim alleging that school officials treated male and female victims of battery and sexual harassment differently); *Baggett* v. *Burnet Consol. Sch. Dist.*, No. 06-572, 2007 WL 2823277 (W.D. Tex. Sept. 25, 2007) (equal protection claim alleging that male students received better treatment by school district when they had problems with a faculty member); *Doe* v. *Londonderry Sch. Dist.*, 970 F. Supp. 64 (D.N.H. 1997) (equal protection claim alleging that the school district treated girls' complaints differently than boys' complaints). In these circumstances, the school has treated students differently based on sex and therefore might have violated the constitutional right to equal protection of the laws. See *United States* v. *Virginia* (*VMI*), 518 U.S. 515, 532-33 (1996). But since the school offered *some* response to the misconduct, a court might well find that the school's action was not "clearly unreasonable" or did not

"cause[] the student to undergo harassment, ma[k]e her more vulnerable to it, or ma[k]e her more likely to experience it." App., *infra*, 7a (citation omitted). That is just what the First Circuit held in rejecting petitioners' Title IX claim here. Likewise, a school district would violate the Equal Protection Clause, but not necessarily Title IX, if it consistently took a more favorable view of the credibility of male harassers than of female victims or otherwise treated male harassers more favorably than female victims in investigating allegations of harassment. Yet, as we explain above, the First Circuit's rule of preclusion categorically barred petitioners from asserting and pressing such claims.

As a consequence, the First Circuit's rule, if left undisturbed, will have important, negative implications for antidiscrimination law. Though our nation has made significant strides in confronting the "long and unfortunate history of sex discrimination" (*VMI*, 518 U.S. at 531 (quoting *Frontiero* v. *Richardson*, 411 U.S. 677, 684 (1973))), discrimination on the basis of sex remains a serious problem in our schools. And though sex discrimination in education comes in various forms, it often arises, as it did in this case, in the context of sexual harassment. According to a national survey of public school students, "eight in 10 students experience some form of sexual harassment at some time during their school lives." Am. Ass'n of Univ. Women Educ. Found., *Hostile Hallways: Bullying, Teasing, and Sexual Harassment at School* 3 (2001), *available at* http://www.aauw.org/research/upload/hostilehallways.pdf. The painful reality is that the circumstances of this case are not exceptional. By limiting the availability of constitutional

remedies for such misconduct, the decision below significantly undermines the national policy against discrimination on the basis of sex.

C. The First Circuit Erred In Holding That Title IX Forecloses Section 1983 Claims Alleging Constitutional Violations.

Review also is warranted because the First Circuit plainly erred in holding that Congress intended Title IX to preclude use of Section 1983 to enforce rights created by the U.S. Constitution. As a general matter, recourse to Section 1983 to enforce federal rights (either statutory or constitutional) is foreclosed only when the comprehensive nature of an alternative enforcement mechanism suggests "Congress intended that [the alternative remedial scheme] be the exclusive avenue through which a plaintiff may assert those claims." *Smith* v. *Robinson*, 468 U.S. 992, 1009 (1984). See also *City of Rancho Palos Verdes* v. *Abrams*, 544 U.S. 113, 120 (2005); *Middlesex County Sewerage Auth.* v. *Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 20 (1981). Even then, another federal law will be found to bar invocation of Section 1983 to enforce the Constitution only when the constitutional claims are "virtually identical" to the rights established by that other statute. *Smith*, 468 U.S. at 1009. See also *Cmtys. for Equity* v. *Mich. High Sch. Athletic Ass'n*, 459 F.3d 676, 685 (6th Cir. 2006). But neither of these prerequisites for preclusion is present here. The contrary holding below departs from this Court's precedents, confuses an important area of federal law, and frustrates the manifest congressional intent behind Title IX.

1. In determining whether Congress meant to preclude recourse to Section 1983, the Court has looked principally to whether Congress created an alternative remedial regime that is "sufficiently comprehensive" to demonstrate a congressional intent that it serve as the exclusive remedy in a given area. *Sea Clammers*, 453 U.S. at 20. See also *Rancho Palos Verdes*, 544 U.S. at 120; *Smith*, 468 U.S. at 1009. This inquiry turns on whether Congress imposed limits on recovery that would be "circumvent[ed]" by a Section 1983 action (*Smith*, 468 U.S. at 1012; see also *Rancho Palos Verdes*, 544 U.S. at 126), and whether the alternative statutory remedy is so "elaborate" (*Sea Clammers*, 453 U.S. at 14) or "carefully tailored" (*Smith*, 468 U.S. at 1012) that it effectively occupies the field and leaves no room for Section 1983. When making this determination, the Court has shown a special reluctance to preclude the use of Section 1983 to enforce the Constitution; it is one thing to conclude that Congress meant to foreclose invocation of Section 1983 to remedy violations of statutory rights that Congress itself created, and quite another to find that "Congress intended to abandon the rights and remedies set forth in Fourteenth Amendment equal protection jurisprudence." *Cmtys. for Equity*, 459 F.3d at 684.

In fact, the Court has held only once that another federal statute precludes use of Section 1983 to assert a constitutional claim, and that decision itself demonstrates the narrow scope of preclusion in such a setting. In *Smith*, the Court held that "[b]oth the provisions of the [Education of the Handicapped Act (EHA)] and its legislative history indicate that Congress intended handicapped children with constitu-

tional claims to a free appropriate public education to pursue those claims through the carefully tailored administrative and judicial mechanism set out in the statute." 468 U.S. at 1009. Although emphasizing that "[w]e do not lightly conclude that Congress intended to preclude reliance on [Section] 1983 as a remedy for a substantial equal protection claim" (*id.* at 1012), the Court concluded:

> In light of the comprehensive nature of the procedures and guarantees set out in the EHA and Congress' express efforts to place on local and state educational agencies the primary responsibility for developing a plan to accommodate the needs of each individual handicapped child, we find it difficult to believe that Congress also meant to leave undisturbed the ability of a handicapped child to go directly to court with an equal protection claim to a free appropriate public education. Not only would such a result render superfluous most of the detailed protections outlined in the statute, but, more important, it would also run counter to Congress' view that the needs of handicapped children are best accommodated by having the parents and the local education agency work together to formulate an individualized plan for each handicapped child's education. No federal district court presented with a constitutional claim to a public education can duplicate that process.

Id. at 1011-12 (footnote omitted).

The contrast with Title IX is manifest. The EHA created an express, privately "enforceable substan-

tive right to a free appropriate public education" that was "detailed" and "comprehensive." *Smith*, 468 U.S. at 1010-11. But far from creating a "comprehensive" private remedy, "Title IX does not by its terms create *any* private cause of action whatsoever * * *. The only private cause of action under Title IX is judicially implied." *Davis* v. *Monroe County Bd. of Educ.*, 526 U.S. 629, 656 (1999) (emphasis added).[8] And while the Court in *Cannon* implied a private right of action from Title IX, that it did so actually "gives strength to the argument that Congress did not intend for termination of federal funds—the only remedy explicitly authorized by Title IX—to serve as a comprehensive or exclusive remedy." *Cmtys. for Equity*, 459 F.3d at 690. See Beth B. Burke, Note, *To Preclude or Not To Preclude?: Section 1983 Claims Surviving Title IX's Onslaught*, 78 Wash. U. L.Q. 1487, 1517 (2000); Michael A. Zwiebelman, Comment, *Why Title IX Does Not Preclude Section 1983 Claims*, 65 U. Chi. L. Rev. 1465, 1481-1482 (1998).

Indeed, it is hard to imagine that Congress intended Title IX to preclude invocation of Section 1983 while leaving it to the courts through the implication of a private remedy to establish the contours of and limits on the Title IX private right of action.

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[8] Even the administrative mechanism created by Title IX is far less comprehensive than the one available under the EHA. Only federal departments or agencies that provide financial assistance to a school may bring a Title IX enforcement action, and the sole remedy for a violation is the withholding of federal funds. 20 U.S.C. § 1682. This is in stark contrast to the EHA, which establishes detailed state administrative mechanisms that students and their parents may invoke to enforce the federal right. See 20 U.S.C. §§ 1414 & 1415; *Smith*, 468 U.S. at 1011.

After all, the *Sea Clammers* test demands "specific evidence" that Congress intended to preclude a Section 1983 remedy. *Wright* v. *Roanoke Redev. & Hous. Auth.*, 479 U.S. 418, 423 (1987). But "[q]uite obviously, the search for what was Congress' *remedial* intent as to a right whose very existence Congress did not expressly acknowledge is unlikely to succeed." *Franklin* v. *Gwinnett County Pub. Sch.*, 503 U.S. 60, 76 (1992) (Scalia, J., concurring in the judgment). For this reason, the Sixth, Eighth, and Tenth Circuits have held that defendants arguing that Title IX has a preclusive effect cannot meet their burden of "show[ing] 'by express provision or other specific evidence from the statute itself that Congress intended to foreclose * * * private enforcement [under Section 1983].'" *Wilder* v. *Va. Hosp. Ass'n*, 496 U.S. 498, 520-21 (1990) (quoting *Wright*, 479 U.S. at 423). See also *Cmtys. for Equity*, 459 F.3d at 690-91; *Crawford*, 109 F.3d at 1284; *Seamons*, 84 F.3d at 1233-34. That conclusion is correct.[9]

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[9] In this respect, Title IX is analogous to the Boren Amendment examined by the Court in *Wright*. In that case, the Court allowed Section 1983 claims to proceed; it drew a contrast with *Smith* and *Sea Clammers*, where "the statutes at issue themselves provided for private judicial remedies, thereby evidencing congressional intent to supplant the [Section] 1983 remedy." *Wright*, 479 U.S. at 427. This was so even though courts had recognized an implied private cause of action for plaintiffs advancing claims like those arising under the Boren Amendment. *Wilder*, 496 U.S. at 516-17, 522 n.19 (discussing *Wright*). See also *Blessing* v. *Freestone*, 520 U.S. 329, 348 (1997) (finding no preclusion of Section 1983 action to enforce Title IV-D of the Social Security Act because, "[u]nlike the federal programs at issue in [*Sea Clammers* and *Smith*], Title IV-D contains no pri-

2. The First Circuit also erred in its application of the other *Smith* factor by concluding that "plaintiffs' equal protection claim is virtually identical to their claim under Title IX." App., *infra*, 23a. While there undoubtedly is overlap between Title IX and equal protection claims advanced in the context of school sexual harassment, we have noted that the rights afforded under the Equal Protection Clause are more extensive in some respects than those established by Title IX. See, *supra*, 21-24. And as we also have explained, the ruling of both courts below that Title IX altogether precludes the assertion of constitutional claims under Section 1983 made it impossible for petitioners to elaborate upon their constitutional theory.

Accordingly, if Title IX were held to preclude all constitutional claims in the field of school sexual harassment, certain constitutional violations would be left without a remedy.[10] The First Circuit's error is therefore particularly clear, for Congress could not

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vate remedy-either judicial or administrative-through which aggrieved persons can seek redress").

[10] The First Circuit opined that the Title IX and Section 1983 constitutional claims in this case are "virtually identical" because petitioners "offer no theory of liability under the Equal Protection Clause other than the defendants' supposed failure to take adequate actions to prevent and/or remediate the peer-on-peer harassment that Jacqueline experienced." App., *infra*, 23a. This reasoning is incorrect. To be sure, the Section 1983 and Title IX claims here arise out of a common nucleus of operative fact. But the categorical holdings of both courts below that constitutional claims are precluded made it impossible for petitioners to establish the ways in which the elements of the claims differ. See, *supra*, 8-9.

have intended Title IX to preclude equal protection claims that are not actionable under the statute. Because an equal protection claim brought under Section 1983 may vindicate certain rights regarding school-place sexual harassment that are not actionable under Title IX, the Title IX statutory rights are not "virtually identical" to their constitutional counterparts. The decision below risks leaving significant constitutional rights without a remedy. This Court should correct that holding.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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