IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 23-1400
23-1463

ADRIANNA WADSWORTH,
Plaintiff-Appellee/Cross-Appellant,

v.

CHUCK NGUYEN
Defendant-Appellant/Cross-Appellee

MSAD 40/RSU 40; ANDREW CAVANAUGH
Defendants/Cross-Appellees.

On Appeal from the United States District Court
for the District of Maine

BRIEF OF PUBLIC JUSTICE AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLEE/CROSS-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* states that it has no parent corporation, is not owned in whole or in part by any publicly held corporation, and is not itself a publicly held company.

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STATEMENT OF AMICUS CURIAE

Public Justice is a national public interest advocacy organization that has, for decades, litigated and advocated on behalf of individuals who have experienced discrimination. Its Students' Civil Rights Project is dedicated to protecting students' rights to learn and thrive in school free from harassment and other forms of discrimination based on their race or sex. From its significant experience, Public Justice recognizes that judicial enforcement of Title IX and § 1983 consistent with those statutes' full breadth and promise is crucial to protecting those rights.[1]

[1] Consistent with Federal Rule of Appellate Procedure 29(a)(4)(E), *Amicus*' counsel authored this brief. No party's counsel authored this brief in whole or in part, and no party beyond *amicus* contributed any money toward the brief. Defendants MSAD 40/RSU 40 and Nguyen have consented to the filing of this brief. Defendant Cavanaugh did not provide a final response to *amicus*'s request for consent.

INTRODUCTION

Starting in Adrianna Wadsworth's junior year of high school, Principal Andrew Cavanaugh singled her out for almost daily sexual harassment that bore all the signs of "grooming"[2] for sexual abuse: he called her pet names, told her she was "pretty" and "sexy," and called her a "Playboy bunny" and his "scandalous stepdaughter," while he pried for details about her sex life, asked if she took naked pictures of herself, asked for pictures of her in a bikini, urged her to go on birth control, took her to the doctor to obtain it, and repeatedly pressured her to move in with him.

Assistant Principal ("A.P.") Tamara Philbrook—an official designated to receive and investigate reports of sexual harassment—witnessed much of Cavanaugh's behavior but failed to investigate or take meaningful steps to stop it. Instead, she actively avoided learning more about it: while Wadsworth was complaining about Cavanaugh's misconduct to a social worker, A.P. Philbrook walked out of the meeting mid-conversation. Due to Cavanaugh's unchecked harassment,

[2] School Resource Officer Christopher Spear testified that Cavanaugh's conduct amounted to "grooming" for sexual contact. App. 770, 772, 777. As this Court has recognized, "[c]hild sexual abuse is often effectuated following a period of 'grooming' and the sexualization of the relationship." *United States v. Perez-Rodriguez*, 13 F.4th 1, 14 (1st Cir. 2021) (citation omitted); Georgia Winters et al., *Validation of the Sexual Grooming Model of Child Sexual Abusers*, J. Child Sexual Abuse 2-8 (2020), https://calio.org/wp-content/uploads/2021/01/Validation-of-the-Sexual-Grooming-Model-of-Child-Sexual-Abusers.pdf.

Wadsworth developed anxiety and depression and would cry on the way to and from school.

The district court erred in dismissing Wadsworth's federal claims on summary judgment. *Amicus* submits this brief to emphasize three key points. ***First***, the district court correctly concluded that A.P. Philbrook was an "appropriate person"—one with "authority to take corrective action" concerning the harassment—because the school district's own policies gave her the responsibility to investigate reports of sexual harassment; Title IX does not require notice to an official with authority to discipline the harasser to trigger a school's obligation to investigate the harassment in the first instance. ***Second***, A.P. Philbrook had actual knowledge under Title IX because she knew facts showing a substantial risk of harassment or, at minimum, was willfully blind to it. ***Third***, Principal Cavanaugh is not entitled to qualified immunity: students have a clearly established right to be free from sexual harassment by school employees, even when it does not involve physical touching, "hostility, or direct sexual advances." *Contra* Wadsworth's Addendum ("Add.") A309.

Enforcing Title IX and the Equal Protection Clause to their full extent is especially critical in this context: sexual abuse by school staff has severe and well-documented impacts on children. As the Supreme Court has recognized, "a student suffers extraordinary harm when subjected to sexual harassment and abuse by a teacher." *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292 (1998). Children

who are sexually abused not only lose trust in adults and authority figures, but also suffer physical ailments, drop out of school, and develop substance use disorders at higher rates than their peers. *See*, *e.g.*, Charol Shakeshaft, *Educator Sexual Abuse*, Hofstra Horizons 10, 12 (2003).[3] Title IX and § 1983 promise effective protection from these practices—but only if courts faithfully apply them as broadly as intended.

For the reasons explained below and in Wadsworth's brief, this Court should reverse the grant of summary judgment for Defendants.

ARGUMENT

I. The Assistant Principals were Appropriate Persons under Title IX

A. School Officials are Appropriate Persons When the School Designates Them to Collect and Investigate Title IX Complaints

Title IX triggers a school's obligation to respond to sexual harassment when the facts give "actual notice" to an "official . . . with authority to take corrective action to end the discrimination." *Gebser*, 524 U.S. at 288, 290. Whether an official has such authority is a "factual inquiry" that depends on the duties the school delegates to them. *Santiago v. Puerto Rico*, 655 F.3d 61, 74 (1st Cir. 2011); *Doe v. Sch. Bd. of Broward Cnty.*, 604 F.3d 1248, 1256-57 (11th Cir. 2010) (holding official was appropriate person because the school "express[ly] delegat[ed] . . . authority . . . to take corrective measures in response to sexual harassment complaints" to him).

[3] https://www.hofstra.edu/pdf/orsp_shakeshaft_spring03.pdf.

The Supreme Court has never suggested that a school official must have the power to discipline the harasser to be an appropriate person. Just the opposite. The purpose of requiring notice to an appropriate person is to give the school "an opportunity to come into voluntary compliance" with Title IX. *Gebser*, 524 U.S. at 289. Schools need not impose discipline to do so; other corrective actions may suffice. *Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 648 (1999); *see*, *e.g.*, *Fitzgerald v. Barnstable Sch. Comm*., 504 F.3d 165, 174 (1st Cir. 2007), *rev'd on other grounds*, 555 U.S. 246 (2009) (holding that reasonable investigation and interim measures to separate plaintiff from accused harasser were enough). It would make little sense to require notice to an official empowered to impose discipline to trigger a school's obligation to take appropriate remedial action *other than* discipline. Indeed, federal regulations make clear that a school's Title IX Coordinator—perhaps the quintessentially "appropriate" person under Title IX—need only be authorized to collect and coordinate a response to reports of harassment on behalf of the institution. 34 C.F.R. § 106.8. The regulations do not require the Title IX Coordinator have the authority to discipline those accused of harassment. *See id.*

Critically here, an administrator designated by the school to collect and investigate reports of harassment is an appropriate person even if she does not have authority to discipline the perpetrator herself. For example, in *Doe v. School Board of Broward County*, the Eleventh Circuit held that where the defendant school's

policies gave a principal discretion to "conduct the first on-site investigation" or to decline to investigate, he had authority to take corrective measures and therefore was an appropriate person. 604 F.3d at 1256-57. This was true even though he had no authority to suspend, reassign, or terminate the offending teacher. *Id.* at 1257. Courts around the country have reached similar conclusions. *See*, *e.g.*, *Kesterson v. Kent State Univ.*, 967 F.3d 519, 527-28 (6th Cir. 2020) (holding university deputy Title IX coordinator was appropriate person as to coach's and student's misconduct, even though she was not coach's supervisor, because she had the power to officially investigate the harassment); *Jennings v. Univ. of N.C.*, 482 F.3d 686, 700 (4th Cir. 2007) (holding that university assistant chancellor was appropriate person even though she did not supervise perpetrator-coach because she was "responsible for fielding sexual harassment complaints"); *Wilborn v. S. Union State Cmty. Coll.*, 720 F. Supp. 2d 1274, 1306 (M.D. Ala. 2010) (holding that case manager was an appropriate person with respect to instructor's harassment of student because the case manager had authority to receive complaints and "report them to [school] officials endowed with the power to fire or discipline," even though he "lacked the power to fire or discipline the alleged preparators"); *Yog v. Tex. S. Univ.*, No. H-08-3034, 2010 WL 4053706, at *4 (S.D. Tex. Oct. 14, 2010) (holding that "notice given to any employee . . . designated to respond to harassment complaints is sufficient to satisfy Title IX's notice requirements" and collecting cases).

B. The District Designated Assistant Principals to Collect and Investigate Title IX Complaints and Take Other Corrective Measures

Here, the school district (the "District") gave the assistant principals the responsibility to collect and investigate reports of sexual harassment. The superintendent identified them as his "designees" under the District's sexual harassment policy. Add. A089. This means that the assistant principals were among a few high-level officials who had authority that typical teachers lacked: the responsibility to conduct official investigations into potential sexual harassment by other staff members. *Id.* District policy also gave assistant principals the power to "take interim remedial measures" to address the harassment, including "ordering no contact between individuals." App. 1324. They could also decide *not* to investigate—and to "pursue an informal resolution" of the harassment with agreement of the parties. *Id.* A jury could therefore reasonably conclude they were appropriate persons under Title IX.

Contrary to the District's argument below, *Santiago v. Puerto Rico* is entirely consistent with this conclusion. In holding that the school principal lacked authority to take corrective action against an independent contractor (a bus driver), this Court explained that when "the alleged harasser is not a person subject to the principal's customary disciplinary authority, the principal *may* not qualify as an appropriate person." 655 at 74 (emphasis added). This is uncontroversial: an official certainly has the power to take corrective action if they can discipline the harasser; and if a school official lacks such authority, she *might* not be an appropriate person. Even without

disciplinary authority, however, a school official would still be an appropriate person if she could take *other* official steps to address the harassment—such as collecting and investigating complaints or deciding on interim measures like no-contact orders. That is why the Court in *Santiago* did not end its analysis by concluding that the principal lacked disciplinary authority: it reviewed the complaint and found the plaintiff had not alleged any other facts to show "that the principal . . . had the authority" to take other "corrective action against the bus driver." *Id.*

Here, in contrast, the superintendent himself testified that he authorized assistant principals to take official steps calculated to stop sexual harassment by staff. App. A089-090, A118. As the district court found, this was sufficient to survive summary judgment on the "appropriate person" issue. *Id.* at A118-120.

C. A Narrower Rule Would Undermine Title IX's Purpose

Requiring a high school student sexually harassed by a principal to report the harassment to the superintendent—an official who often does not even work at her school—would contradict the Supreme Court's repeated admonition to read Title IX broadly to achieve both its purposes. Title IX seeks "not only to prevent the use of federal dollars to support discriminatory practices, but also 'to provide individual citizens effective protection against those practices.'" *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 180 (2005) (citation omitted). This protection comes through Title IX's enforcement scheme, which "depends on individual reporting because

individuals and agencies may not bring suit . . . unless the recipient has received 'actual notice' of the discrimination." *Id.* at 181 (quoting *Gebser,* 524 U.S. at 288, 289-90). "If recipients were able to avoid such notice . . . the statute's enforcement scheme would be subverted." *Id.* As the Court explained, "[w]e should not assume that Congress left such a gap in its scheme." *Id.*

Jackson's logic applies here. The District's proposed rule would gut Title IX's enforcement scheme and create perverse incentives for schools to leave reports of harassment unaddressed. That enforcement scheme requires schools to designate a "Title IX Coordinator" to collect reports of sexual harassment and coordinate a response. 34 C.F.R. § 106.8(a). The Title IX Coordinator typically has the authority to investigate reports and initiate the school's Title IX process, but they often lack the power to discipline the perpetrator themselves. *See, e.g.*, Bates College, Equal Opportunity, Non-Discrimination, and Anti-Harassment Policy §§ VII.C., XI.E. (directing students to make reports of sexual harassment to the Title IX coordinator, and specifying that the Title IX coordinator *may not* serve as a hearing officer who determines discipline);[4] Bangor School Department, Nondiscrimination and Affirmative Action § II.C. (similar).[5] Under the District's proposed rule, then, at many

[4] https://www.bates.edu/here-to-help/policies/equal-opportunity-policy/.

[5] https://www.bangorschools.net/wp-content/uploads/2022/10/AC-Pol-Nondiscrimination-Affirmative-Action-10-26-22-1.pdf.

schools, not even a Title IX Coordinator would be an appropriate person under Title IX, contrary to what other courts have held. *See Kesterson*, 967 F.3d at 527-28 (explaining that university's deputy Title IX coordinator was an appropriate person).

This means that even a formal complaint pursuant to many schools' Title IX procedures would not be enough to trigger that school's statutory obligation to investigate. And schools could avoid liability by maintaining policies that steer students to inappropriate officials who let complaints die on the vine. Allowing schools to funnel complaints into such unaccountable processes would frustrate the statute's goal to ensure "effective protection" against harassment. *Jackson*, 544 U.S. at 180; *cf. Doe v. Fairfax Cnty. Sch. Bd.*, 1 F.4th 257, 267 (4th Cir. 2021) (rejecting an interpretation of Title IX that would have made it harder to establish actual notice because it would have "create[d] perverse incentives" for schools to bury their heads in the sand). If schools bore no accountability when the officials designated to field and investigate Title IX complaints ignore reports or bungle investigations, they would have little incentive to ensure their Title IX grievance process works.

Worse, under the District's proposed rule, Title IX would give students little real protection in cases where the highest on-site school official harasses a student: in such cases, there would be *no* appropriate person at school to whom a student could turn. *See* Add. at A119 (explaining that if assistant principals are not appropriate persons, students would need to report harassment to "the Superintendent,

who is less frequently present in any specific school"). This would lead to a perverse result. Officials with supervisory authority—like principals, superintendents, and college administrators—can leverage it to facilitate abuse and suppress reports. Yet, the District's proposed rule would ensure that the *more* power the perpetrator wields, the *less* Title IX protects students against their abuse.

Title IX is not so toothless. When an administrator entrusted to receive and investigate reports of discrimination and implement interim measures has actual notice of harassment, Title IX requires the school to act—no matter how powerful the perpetrator. Here, A.P. Philbrook was just such a person, and the district court was correct to conclude that any notice to her was notice to the District.

II. The District Had Actual Notice of Principal Cavanaugh's Harassment

A reasonable jury could also find that A.P. Philbrook had actual notice of the harassment, and the district court erred in concluding otherwise.

A. Assistant Principal Philbrook Had Actual Notice Because She Knew of a Substantial Risk of Sexual Harassment

The majority of circuits have held that an appropriate person has actual notice under Title IX when she knows of a "substantial risk" of sexual harassment at school. *Forth v. Laramie Cnty. Sch. Dist. No. 1*, 85 F.4th 1044, 1054 (10th Cir. 2023); *Roe v. Cypress-Fairbanks Indep. Sch. Dist.*, 53 F.4th 334, 341 (5th Cir. 2022) ("[T]he school must have actual knowledge that harassment has occurred, is occurring, or that there is a 'substantial risk'" that it would occur. (citation omitted)); *C. K. v.*

Wrye, 751 F. App'x 179, 184 (3d Cir. 2018) ("It is sufficient if the school district had actual knowledge that a teacher 'posed a substantial risk of harassing students[.]'" (citation omitted)); *K.T. v. Culver-Stockton Coll.*, 865 F.3d 1054, 1058 (8th Cir. 2017) (same); *Broward Cnty.*, 604 F.3d at 1259 (same); *Williams ex rel. Hart v. Paint Valley Loc. Sch. Dist.*, 400 F.3d 360, 368 (6th Cir. 2005) (same).

This standard is consistent with the deliberate indifference standard that this Court has applied under Title IX. In *Porto v. Town of Tewksbury*, for example, the Court held that an official shows deliberate indifference when he or she "disregard[s] a *known or obvious* consequence of his [or her] action' or inaction." 488 F.3d 67, 73 (1st Cir. 2007) (quoting *Bd. of the Cnty. Comm'rs v. Brown,* 520 U.S. 397, 410 (1997)). In doing so, this Court (like the Supreme Court) applied the same "deliberate indifference" standard developed in cases under 42 U.S.C. § 1983. *Id.*; *see Davis*, 526 U.S. at 642 (explaining that, under Title IX, the Court "employ[ed] the 'deliberate indifference' theory already used to establish municipal liability under . . . § 1983" (citation omitted)). An official meets that standard not only when he fails to respond to misconduct of which he already knows, but also when he fails to take adequate steps prevent a "'highly predictable'" violation—or ignores "a high degree of risk." *Porto*, 488 F.3d at 73, 74 (quoting *Young v. City of Providence,* 404 F.3d 4, 28 (1st Cir. 2005)). Thus, a plaintiff may show "deliberate indifference" if she shows "(1) that the officials had knowledge of facts, from which (2) the official[s] [could]

draw the inference (3) that a *substantial risk* of serious harm exist[ed]." *Parker v. Landry*, 935 F.3d 9, 15 (1st Cir. 2019) (citation omitted) (emphasis added).[6]

The Tenth Circuit has applied this standard to hold a reasonable jury could find a school administrator had actual notice under Title IX based on less glaring signs of harassment than A.P. Philbrook saw here. In *Forth*, a secondary school student alleged that her teacher sexually abused her. 85 F.4th at 1047. Although no one knew about the sexual abuse itself, school officials had actual notice of a substantial risk of such abuse because they received reports of behavior that was "sufficiently similar to the underlying sexual harassment." *Id.* at 1059. There, as here:

- The teacher spent an unusual amount of time with the plaintiff—including "when she should have been in other classes," *Forth*, 85 F.4th at 1057, 1061, just as Cavanaugh frequently pulled Wadsworth out of class over the objections and expressed concerns of her teachers. Add. A073-074.

- The teacher allowed a student to repeatedly touch his face and hands, which the "jury could reasonably infer . . . alerted officials that [he] may have a propensity" for the physical abuse alleged there, *Forth*, 85 F.4th at 1060—just as Cavanaugh's unwelcome sexual pet names and compliments (calling Wadsworth "pretty" and "top shelf") suggested he had a propensity for the verbal sexual harassment alleged here. Add. A059; App. 158.

- The teacher said he planned to adopt the plaintiff, just as Cavanaugh asked Wadsworth to move in with him. *Forth*, 85 F.4th at 1063; Add. A067.

[6] Although his Court has suggested in *dicta* that the appropriate person must "have had actual knowledge of the harassment," it has not decided a case on that ground. *Santiago*, 655 F.3d at 73. In *Santiago*, the plaintiff did not sufficiently allege the appropriate person had actual knowledge of *anything*: she only alleged she "tried to contact the principal but was unable to do so." *Id.* at 74. In other words, the school did not know about facts that showed a substantial risk of sexual harassment. *See id.*

- A school administrator implied she suspected the teacher may be in a sexually inappropriate relationship with the plaintiff and had crossed "boundaries," *Forth*, 85 F.4th at 1064-65, just as A.P. Philbrook implied that Cavanaugh's relationship with Cavanaugh appeared "on the surface" to be sexual and that he was "crossing boundaries." App. 764-65.

Indeed, A.P. Philbrook knew even more about Cavanaugh's inappropriate relationship with Wadsworth than the school official in *Forth*: she knew that Wadsworth was driving Cavanaugh's car, and she knew Cavanaugh's wife referred to Wadsworth as Cavanaugh's "side something," suggesting their relationship was sexual. *Id*. And others who knew the same information inferred that Cavanaugh may be sexually interested in Wadsworth: when Officer Spear learned what A.P. Philbrook knew, he wrote an email to his chief titled "Pervert Principal." *Id.* at 1313.

Here as in *Forth*, a reasonable jury could conclude these facts collectively raised a "substantial risk" of sexual harassment. 85 F.4th at 1054-55, 1066.

B. In the Alternative, Assistant Principal Philbrook Had Actual Notice Because She was Willfully Blind to the Harassment

At minimum, however, a jury could find that A.P. Philbrook had actual knowledge based on a theory of willful blindness: *i.e.*, that she knew facts showing a high probability of sexual harassment and deliberately avoided confirming it.

As this Court has repeatedly made clear, "the law treats 'persons who [willfully] . . . blind themselves to direct proof of critical facts' as having 'actual knowledge of those facts.'" *United States v. Valbrun*, 877 F.3d 440, 445 (1st Cir.

2017) (quoting *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 766 (2011)). This is no less true under Title IX: as the Seventh Circuit and other courts have recognized, if a reasonable jury could find that a "school official buried his head in the sand to avoid acquiring knowledge of past or ongoing misconduct . . . the jury may infer actual knowledge based on the official's willful blindness to the objective reality in front of him." *C.S. v. Madison Metro. Sch. Dist.*, 34 F.4th 536, 545 (7th Cir. 2022); *see also Doe v. Sch. Bd. of Miami-Dade Cnty.*, 403 F. Supp. 3d 1241, 1259 n.14 (S.D. Fla. 2019) (collecting decisions to reach the same conclusion).

The principle that willful blindness is equivalent to actual knowledge has deep roots. It is "well established in criminal law," which often "require[s] proof that a defendant acted knowingly or willfully." *Global-Tech*, 563 U.S. at 766. Despite that high standard of culpability, a defendant is deemed to have acted with the requisite state of mind if they "deliberately shield[ed] themselves from clear evidence of critical facts that are strongly suggested by the circumstances." *Id.* This is for two reasons: (1) "that defendants who behave in this manner are just as culpable as those who have actual knowledge" and (2) "persons who know enough to blind themselves to direct proof of critical facts in effect have actual knowledge of those facts." *Id.* On these grounds, the Model Penal Code and almost "every Court of Appeals" have "embraced willful blindness" and applied it "to a wide range of criminal statutes." *Id.* at 767-68; *see also* General Requirements of Culpability, Model Penal Code

§ 2.02(7) ("When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist."). That includes this circuit, where it is well-established that "willful blindness serves as an alternative theory on which the government may prove knowledge." *United States v. Perez-Melendez*, 599 F.3d 31, 41 (1st Cir. 2010); *Valbrun*, 877 F.3d at 445 (same).

"[W]illful blindness may support a finding of actual knowledge" in "civil cases," too. *Unicolors, Inc. v. H&M Hennes & Mauritz, L. P.*, 595 U.S. 178, 187 (2022). For example, a defendant can be liable for "inducing" a third party to commit patent infringement only if the defendant knew that the induced acts would infringe the patent: that is, actual knowledge is required. *Global-Tech*, 563 U.S. at 764-65. Nevertheless, based on "the long history of willful blindness and its wide acceptance in the Federal Judiciary," the Supreme Court has held that willful blindness satisfies that actual knowledge requirement. *Id.* at 768. The Court has reached the same conclusion whenever the issue has arisen, no matter what statute the case involves. *See Unicolors*, 595 U.S. at 187 (recognizing that willful blindness may show actual knowledge under the Copyright Act); *Intel Corp. Inv. Pol'y Comm. v. Sulyma*, 140 S. Ct. 768, 779 (2020) (same under ERISA); *Bullock v. BankChampaign, N.A.*, 569 U.S. 267, 274 (2013) (same under the Bankruptcy Code).

A reasonable jury could find willful blindness here. A factfinder can infer willful blindless from "evidence that red flags existed that the defendant consciously avoided investigating." *Valbrun*, 877 F.3d at 446. Wadsworth presented such evidence here. "Philbrook was present on numerous occasions where Mr. Cavanaugh was speaking to [her] in an inappropriate manner" and knew about Cavanaugh's "grooming behavior," as Wadsworth and Officer Spear testified. App. 480, 772. Philbrook heard Cavanaugh tell Wadsworth she was a "top shelf and pretty girl" who could take anyone she wanted to prom, *id.* at 455, and Philbrook knew teachers raised concerns that Cavanaugh often gave Wadsworth special treatment and pulled her out of class. *Id.* at 1254, 1319. Philbrook knew Cavanaugh had asked Wadsworth to move in with him, and she knew Cavanaugh's wife spoke about her husband's relationship with Wadsworth as if it was sexual. *Id.* at 765. And Philbrook was in the meeting when Wadsworth told the school social worker (Defendant Nguyen) that Cavanaugh's comments and texts made her uncomfortable and confused about the "nature of [her] relationship" with him. *Id.* at 473, 481. Knowing all this, Philbrook acknowledged that it "certainly" appeared that Cavanaugh's relationship with Wadsworth was "sexual in nature" and that he was "crossing boundaries." *Id.* at 764-65 (testifying that Philbrook remarked that while she didn't "think anything sexual in nature has happened . . . it certainly doesn't look good on the surface.").

Yet, the record suggests A.P. Philbrook took conscious steps to avoid confirming that Cavanaugh's conduct was in fact what she admitted it appeared to be. When Wadsworth was reporting Cavanaugh's misconduct to the social worker, A.P. Philbrook walked out of the room mid-conversation, even though she was responsible for fielding complaints of sexual harassment. *Id*. at 481. Thus, a reasonable jury could easily find that she deliberately avoided confirming what she knew was highly likely: that Cavanaugh was sexually harassing Wadsworth.

The cases on which the district court relied for its contrary conclusion are not analogous. In one, the Eighth Circuit held that school officials did not have actual notice where they heard the plaintiff frequently visited the teacher's floor, she once went to his classroom during lunch, they were once absent on the same day, and that he tied her shoelaces and took her phone from her pocket in the hallway. *KD v. Douglas Cnty. Sch. Dist. No. 001*, 1 F.4th 591, 598-99 (8th Cir. 2021). What A.P. Philbrook knew—including Cavanaugh's repeated flirtatious comments, pet names, and requests that Wadsworth move in with him—was far more alarming than that, as her own admissions to Officer Spear confirm. *See supra* p. 14, 17. In another case, the school only received a report that the teacher bought alcohol for some students (not the necessarily the plaintiff), an "unidentified art teacher's possible vague report of overly familiar behavior," and mere "rumors" that the teacher was dating the student. *Doe v. Bradshaw*, 203 F. Supp. 3d 168, 185-86 (D. Mass. 2016). But A.P.

Philbrook knew more than just "rumors": she heard many of Cavanaugh's comments herself and learned other facts from both Wadsworth and Cavanaugh themselves.[7]

The district court thus erred in dismissing Wadsworth's Title IX claim.

III. Principal Cavanaugh is Not Entitled to Qualified Immunity

The district court also erred when it held that Principal Cavanaugh was entitled to qualified immunity on Wadsworth's Equal Protection claim under § 1983. For purposes of qualified immunity, "the salient question is whether the state of the law at the time of the alleged violation gave the defendant fair warning that his particular conduct was unconstitutional." *Barton v. Clancy*, 632 F.3d 9, 22 (1st Cir. 2011) (citation omitted). That "fair warning" may come from either "controlling authority" or "a robust consensus" of "persuasive authority," *French v. Merrill*, 15 F.4th 116, 126 (1st Cir. 2021), so "a court should use its full knowledge of its own and other relevant precedents," *Barton,* 632 F.3d at 22. It does not demand a case "directly on point." *French,* 15 F.4th at 126; *accord Irish v. Fowler*, 979 F.3d 65, 76 (1st Cir. 2020) ("[C]ases involving materially similar facts are not necessary to a

[7] The other cases cited by the district court are similarly inapposite. *See Doe v. Flaherty*, 623 F.3d 577, 585 (8th Cir. 2010) (finding that three text messages to *other* students—asking one if she was drunk, telling another to "tell your mom I love her," and telling another she "look[ed] good today"—did not put school on notice of a risk of physical sexual abuse); *Escue v. N. Okla. Coll.*, 450 F.3d 1146, 1154-55 (10th Cir. 2006) (holding knowledge of teacher's consensual dates with older non-traditional students near his own age and a single incident of inappropriate touching and comments "nearly a decade" earlier did not suggest a "substantial risk of abuse").

finding that the law was clearly established."). Instead, "general statements of the law may give fair and clear warning to officers so long as, in the light of the pre-existing law, the unlawfulness of their conduct is apparent." *French*, 15 F.4th at 126-27 (cleaned up).

Students have a clearly established constitutional right to receive a public education free from sexual harassment by school employees. *See Lipsett v. Univ. of P.R.*, 864 F.2d 881, 898 (1st Cir. 1988); *see also*, *e.g.*, *Sampson v. Cnty. of Los Angeles*, 974 F.3d 1012, 1024 (9th Cir. 2020) ("The right under the Equal Protection Clause to be free from sexual harassment by public officials in the workplace and school contexts is clearly established by our prior case law."); *Sh.A. ex rel. J.A. v. Tucumcari Mun. Schs.*, 321 F.3d 1285, 1289 (10th Cir. 2003) ("[S]exual harassment which gives rise to a violation of equal protection in the employment context will also do so in the teacher-on-student context."); *infra* 22-24 (citing additional cases in other circuits). Such harassment need not involve physical touching, "hostility[,] or direct sexual advances" to be actionable. *Contra* Add. A309. Rather, both this Court's case law and a robust consensus of persuasive authority gave Principal Cavanaugh clear notice that his conduct violated the Equal Protection Clause.

A. Under First Circuit Precedent, Verbal Sexual Harassment Clearly Violates the Constitution Without Direct Sexual Advances or Hostility

As this Court held over thirty years ago, a state actor's verbal sexual harassment of a student violates the Equal Protection Clause when it is "severe or pervasive." *Lipsett*, 865 F.2d at 898. In *Lipsett*, a medical student met that standard because, like Principal Cavanaugh, her supervisors at a teaching hospital subjected her to sexualized nicknames, invocations of Playboy, and repeated sexualized remarks about her body and appearance. *Compare id.* at 888, 905 (describing how the harassers used "sexually charged nicknames," displayed Playboy magazines in common areas, and made "continual remarks about her body") *with* Add. A241, A243-45, A306 (describing how Cavanaugh used "pet names" for Wadsworth such as "'cupcake,' 'princess,' and 'ladytime,'" referring to her menstrual cycle, told her she looked "sexy" and "like a Playboy bunny," asked for photos of her in a bikini, asked for details about her sex life, and "commented on the length of [her] skirt"). The similar harassment in *Lipsett* was actionable even though the plaintiff was an adult, not a minor high school student like Wadsworth. *Lipsett* thus gave Cavanaugh "fair warning" that verbal sexual harassment of a student was unlawful even absent physical contact. *French*, 15 F.4th at 126.

It is equally clear that repeated sexualized comments need not involve direct sexual advances or hostility to constitute unconstitutional sex discrimination. As *Lipsett* teaches, the standards for proving sex discrimination under the Equal

Protection Clause are the same as under Title VII, so this Court "draw[s] upon the substantial body of case law developed under Title VII" to assess sexual harassment claims under § 1983. 864 F.2d at 896 (footnote omitted). And that case law makes clear that the existence of a hostile environment "does not depend on any particular kind of conduct." *Billings v. Town of Grafton,* 515 F.3d 39, 48 (1st Cir. 2008). Sex-based behavior or comments—even if not "overtly sexual"—may constitute sex discrimination even without touching, direct sexual advances, or hostility toward the plaintiff. *Xiaoyan Tang v. Citizens Bank*, *N.A.*, 821 F.3d 206, 212, 216, 218 (1st Cir. 2016) (holding that supervisor's "suggestive" comments about his au pairs' swimsuits and references to the plaintiff's "ass" created a hostile environment); *Billings*, 515 F.3d at 41, 48 (holding a jury could reasonably conclude that supervisor's repeated stares at employee's breasts created a hostile environment); *White v. N.H. Dep't of Corrs.*, 221 F.3d 254, 260 (1st Cir. 2000) (holding a jury could reasonably conclude that repeated "sexual conversations and jokes" created a hostile environment).

Controlling precedent thus made clear that Cavanaugh's conduct violated the Equal Protection Clause.

B. A Robust Consensus of Persuasive Authority Confirms that Principal Cavanaugh Violated Wadsworth's Right to Equal Protection

The decisions of other circuits confirm this conclusion. Every circuit to address the issue has held that verbal sexual harassment of a student by a school

employee violates clearly established constitutional law without physical contact, direct sexual advances, or hostility. In *Hayut v. State University of New York*, for example, as in this case, a professor created a hostile environment when he repeatedly referred to his student by sexualized nicknames, including "'Monica,' in light of her supposed physical resemblance to Monica Lewinsky." 352 F.3d 733, 738-39, 745 (2d Cir. 2003). While he never touched, propositioned, or showed hostility toward her, the Second Circuit nonetheless concluded that these "comments were sufficiently pervasive to create a hostile environment" for the adult plaintiff because they were "sexually-charged and designed by [the professor] to convey certain images about [her]." *Id.* at 746-47. Likewise, Cavanaugh's comments—that Wadsworth was "sexy" and looked like a "Playboy bunny"—and his requests for revealing photos and details about Wadsworth's sex life clearly sexualized her, and they justify an inference that his pressure on her to obtain birth control and move in with him also had a sexual element. In *Hayut*, the court denied qualified immunity and sent the case to trial. *Id.* at 749. The Court should do the same here.

Other circuits have denied school officials qualified immunity based on similar conduct. *See Doe v. Hutchinson*, 728 F. App'x 829, 830-31, 835 (10th Cir. 2018) (holding that teacher who routinely "spoke to and about female students in sexualized terms" was not entitled to qualified immunity, even though he did not touch the plaintiff, because "any reasonable high school teacher would have understood that

[his words] created a hostile environment"); *Young v. Pleasant Valley Sch. Dist.*, 601 F. App'x 132, 134, 136 (3d Cir. 2015) (holding that teacher's repeated references to "sexually explicit content and depictions" in class that "could make a reasonable female teenager feel uncomfortable" violated the Equal Protection Clause, even without engaging in physical contact or expressing hostility toward female students); *Jennings*, 482 F.3d at 692-93, 701 (holding that coach's repeated inquiries into his players' sex lives constituted "sexual harassment" that "was sufficiently severe or pervasive to interfere with her educational activities"—even without physical harassment, sexual propositions, or hostility); *Jenkins v. Univ. of Minn.*, 838 F.3d 938, 942, 947 (8th Cir. 2016) (holding that professor who made "sexually explicit jokes," inquired into student's dating life, "invited [her] on social outings," "complimented her physical appearance," and suggested a romantic relationship violated clearly established law and was not entitled to qualified immunity, even though his behavior was "void of any physical conduct").

Regardless of whether any single case is precisely on point, these decisions make clear that neither sexual advances nor hostility is required for verbal sexual harassment to violate the Equal Protection Clause. And combined with common sense, the factual "parallels are close enough to have afforded [Cavanaugh] fair and clear warning" that he could not subject his minor student to repeatedly sexualized comments, questions about her sex life, and pressure to obtain birth control and

move in with him without violating the Constitution. *Alfano v. Lynch*, 847 F.3d 71, 77 (1st Cir. 2017) (denying qualified immunity even without a case on point).

Qualified immunity cannot bar liability here.

CONCLUSION

The Court should reverse the grants of summary judgment on Wadsworth's federal claims against the Defendants.

December 7, 2023 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Federal Rules of Appellate Procedure 32(a)(7)(B) and 29(a)(5) because it contains 6,037 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office 365 in 14-point Times New Roman font.

Dated: December 7, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on December 7, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: December 7, 2023

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