RECORD NO. 19-2203

In The
United States Court of Appeals
For The Fourth Circuit

JANE DOE,

Plaintiff – Appellant,

v.

FAIRFAX COUNTY SCHOOL BOARD,

Defendant – Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA AT ALEXANDRIA

BRIEF OF APPELLANT

Linda M. Correia
Lauren A. Khouri
CORREIA & PUTH, LLC
1400 Sixteenth Street, NW, Suite 450
Washington, DC 20036
(202) 602-6500

Counsel for Appellant

John R. Ates
ATES LAW FIRM, PC
100 West Pennsylvania Avenue
Ground Floor, Suite 100-G
Towson, Maryland 21204
(410) 842-0567

Counsel for Appellant

Adele P. Kimmel
Alexandra Brodsky
PUBLIC JUSTICE, PC
1620 L Street, NW, Suite 630
Washington, DC 20036
(202) 797-8600

Counsel for Appellant

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦ www.thelexgroup.com

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 19-2203 Caption: Jane Doe v. Fairfax County School Board

Pursuant to FRAP 26.1 and Local Rule 26.1,

Jane Doe
(name of party/amicus)

who is appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Lauren A. Khouri Date: 10/31/19

Counsel for: Appellant Jane Doe

CERTIFICATE OF SERVICE

****

I certify that on 10/31/19 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

All users registered:
Sona Rewari
Stuart Raphael
HUNTON ANDREWS KURTH, LLP
srewari@huntonak.com
sraphael@huntonak.com

/s/ Lauren A. Khouri (signature) 10/31/19 (date)

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INTRODUCTION

If there were ever a case that warranted a new trial, this is it. Not only was there no evidence to support the jury's verdict, but it was the result of known juror confusion that the district court was required, but failed, to remedy. The district court also permitted the Defendant's spoliation of relevant evidence to prejudice the Plaintiff. Compounding these errors, the court applied the wrong legal standards to the Plaintiff's motion for a new trial, which, at a minimum, warrants remand for reconsideration under the correct legal standards.

This is a civil rights case against Fairfax County School Board (the "School Board" or "Board") for failing to take appropriate action in response to reports that Appellant Jane Doe, was sexually assaulted on a bus by an older student, "Jack Smith," while they were traveling for a school-sponsored band trip. Doe filed suit against the School Board under Title IX of the Education Amendments of 1972 ("Title IX"). Schools may be liable under Title IX when they act with deliberate indifference to reports of student-on-student sexual harassment, including sexual assault. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 647, 650 (1999).[1]

[1] Like the district court's jury instructions, all references to the "sexual harassment" alleged in this case include Doe's allegations of sexual assault.

Doe asserts that the School Board acted with deliberate indifference to her and others' reports about the sexual assault by, among other things: failing to offer or provide any assistance while she was on the multi-day band trip with her assailant, despite her visible distress; making crude jokes about the sexual assault; and conducting a cursory investigation after the trip where school officials interrogated her with victim-blaming questions about what she was wearing and why she did not scream, discouraged her from reporting the incident to police, and told her she might be disciplined for what happened. After Doe filed suit, the School Board destroyed or lost evidence of reports to school officials about the alleged sexual assault, despite being required by law to preserve that evidence.

Under Title IX, when a school has "actual knowledge" of an allegation of student-on-student sexual harassment, it must take action to address it. *Davis*, 526 U.S. at 648-49. At the heart of this appeal is whether the School Board had "actual knowledge" of allegations that Smith sexually assaulted Doe. There is undisputed evidence that it did. During trial, the jury heard that numerous people reported the bus incident and Doe's distress to the School Board during or soon after the trip. The School Board agreed that Doe reported she did not consent to the sexual activity on the bus, and the School Board's counsel stated at trial that the Board "isn't denying that there was an *alleged* sexual assault; [it's] denying that there *was* a sexual assault." J.A. 2288 (emphasis added).

The undisputed reports by Doe and her mother alone demonstrate that the School Board, through Assistant Principal Jennifer Hogan, knew of an allegation of sexual assault. Where, as here, a school board official receives reports of sexual activity described as "sexual assault" or "nonconsensual," she certainly has actual knowledge of an *allegation* of sexual assault. This is true regardless of whether the official subjectively understood the meaning of the words used to describe the sexual activity, believed the reports, or ultimately concluded that a sexual assault had not occurred.

The jury issued a special verdict, finding that Smith had sexually harassed Doe and that the harassment had been so severe, pervasive, and offensive that it deprived Doe of educational opportunities. Contrary to *all* objective evidence, however, the jury found that the Board did not have "actual knowledge" of the sexual harassment allegations. The district court's denial of Doe's motion for a new trial was an abuse of discretion.

The jury's no-actual-knowledge finding was based on the district court's failure to provide clarifying instructions required to remedy the jury's expressed confusion over the court's instruction on "actual knowledge"—a critical element of Doe's Title IX claim. There can be no doubt that the district court's instructions confused the jury. This is clear both from questions the jury asked about "actual knowledge" during trial and a juror's comments about it post-trial.

During deliberations, the jury asked three separate questions about "actual knowledge." In response to its first question, the court told the jury to give these words their "ordinary meaning." J.A. 3299. However, the jury continued to struggle with the concept, asking two more questions—one of which the court never answered. The question left unanswered by the court was whether "actual knowledge" is a "compilation of information about an event" or the "conclusion decided based on information provided." J.A. 3295. In other words, the jury was asking what evidence it could consider to determine if the Board had actual knowledge: evidence of all the reports school officials had *received* or evidence of school officials' *conclusion* from those reports. The district court's failure to provide a clarifying instruction on this crucial question left the jury confused and is reversible error.

A juror's post-trial comments further demonstrate the confusion. Within hours of the jury's verdict, a juror was quoted in a news article about the jury's post-verdict meeting with the judge. J.A. 3390. The juror said that, after hearing the judge's post-verdict explanation of the evidence the jury could have considered to find Doe had met her burden of proving actual knowledge, he knew he had made a mistake and would have voted "yes" for actual knowledge. The juror stated, "I know for a fact I made the wrong choice." J.A. 3391.

The jury's verdict resulted in a miscarriage of justice, yet another reason the court should have granted Doe's motion for a new trial. It was obvious post-verdict that the jury's finding of no-actual-knowledge was wrong and the result of the court's confusing instructions. It was also clear that the court had erroneously permitted the School Board's spoliation of documents showing its "actual knowledge" of the assault allegations to prejudice Doe, by failing to instruct the jury on how to assess the Board's spoliation.

Each of these errors constitutes an abuse of discretion warranting reversal of the district court's denial of a new trial. At a minimum, however, this Court should remand for reconsideration of Doe's motion because the district court applied the wrong legal standards to her motion. Instead of using its own independent judgment to weigh the evidence and determine whether the jury's verdict was clearly unsupported, the court tried to "divine" how the jury might have weighed the evidence to reach its no-actual-knowledge finding. J.A. 3370-72. The court also erroneously relied on school officials' subjective understanding of reports about the bus incident, instead of relying on objective evidence that those reports constituted allegations of sexual assault. *Id.*

JURISDICTIONAL STATEMENT

The district court had jurisdiction over this action under 28 U.S.C. § 1331. After denying Doe's motion for a new trial on September 27, 2019, J.A. 3370, and her motion for reconsideration on October 23, 2019, J.A. 3405, the district court entered final judgment in favor of the School Board, J.A. 3375. Doe timely filed her notice of appeal on October 24, 2019. J.A. 3406. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Did the district court abuse its discretion by applying the wrong legal standards to Doe's motion for a new trial, where it (a) attempted to divine how the jury might have weighed the evidence and assessed witness credibility, rather than exercise its own independent judgment to do the same, and (b) relied on school officials' subjective understanding, rather than objective evidence, of whether reports about nonconsensual sexual activity constituted allegations of sexual assault?

2. Did the district court abuse its discretion in denying Doe's motion for a new trial, and failing to find the jury's special verdict that the School Board lacked "actual knowledge" of the alleged sexual harassment was unsupported by the evidence, where one of the School Board's own witnesses testified that (a) Doe told her the sexual activity with Smith was not consensual, (b) Doe's mother told her that

Smith had sexually assaulted Doe, and (c) she conducted an inquiry in response to Doe and others' reports to determine whether Smith had sexually assaulted Doe?

3. Did the district court abuse its discretion in denying Doe's motion for a new trial and failing to find the jury's verdict was a miscarriage of justice, where it was obvious from the jury's unsupported no-actual-knowledge finding, the jury's questions during trial, and a juror's post-verdict comments that Doe was prejudiced by (a) the court's failure to instruct the jury on how to assess the School Board's spoliation of documents reflecting the Board's "actual knowledge" of the sexual harassment allegations, and (b) the court's failure to provide clarifying instructions required to remedy known jury confusion over the court's "actual knowledge" instructions?

4. Did the district court abuse its discretion by failing to respond to a jury question about, and resolve known jury confusion over, the court's "actual knowledge instruction" and the evidence the jury could consider to decide whether the School Board had "actual knowledge" of the sexual harassment allegations?

STATEMENT OF THE CASE

A. Title IX

Title IX provides, "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 program or activity receiving Federal financial assistance."

20 U.S.C. § 1681(a). Victims of student-on-student sexual harassment may seek damages for Title IX violations from recipients of federal funds, like the School Board. *Davis*, 526 U.S. at 653. Damages are available if the victim establishes that: (1) she was subjected to sexual harassment that was so severe, pervasive, and objectively offensive that it effectively deprived her of equal access to educational opportunities or benefits provided by the school; (2) the school, through an "appropriate person," had actual knowledge of the alleged sexual harassment; and (3) the school acted with deliberate indifference to the harassment. *Id*. at 633, 650; *Gebser v. Lago Vista Indep. Sch. Dist*., 524 U.S. 274, 290 (1998). Actual knowledge" requires only that the school official know of an *allegation* of sexual harassment, not that the sexual harassment in fact occurred. *See, e.g.*, *Jennings v. Univ. of North Carolina*, 482 F.3d 686, 700 (4th Cir. 2007) (en banc) (actual knowledge established by student's allegation where school did not investigate or otherwise substantiate it); *Doe v. Galster*, 768 F.3d 611, 614 (7th Cir. 2014) ("To have actual knowledge of an incident, school officials must have witnessed it or *received a report of it*.") (emphasis added).

Regarding prong (2), an "appropriate person" is, "at a minimum, an official of the recipient entity with authority to take corrective action to end the discrimination." *Gebser*, 524 U.S. at 290. In this case, the district court instructed the jury that Oakton High School Principal John Banbury, Assistant Principal

Jennifer Hogan, and Assistant Principal Michelle Taylor were "appropriate persons" whose knowledge could be imputed to the School Board. J.A. 3317. Under Title IX, if any one of them had actual knowledge of the alleged sexual harassment, so did the School Board. *See, e.g.*, *Jennings*, 482 F.3d at 700 (actual knowledge established based on report to one senior administrator). As Doe explains in Section II below, the undisputed evidence establishes Hogan's actual knowledge, without needing to assess the evidence reflecting Taylor and Banbury's knowledge.

B. The Assault, School Response, and Educational Impact

a. The Sexual Assault

At trial, the jury found that Smith had sexually harassed Doe. J.A. 3324. In 2017, Doe was an Oakton High School junior and member of the school's symphonic band, which had been invited to perform in Indiana. J.A. 3309. Doe testified that, on March 8, 2017, on a bus traveling to Indiana, she was sexually assaulted by an older student, "Jack Smith." J.A. 1709:23-1712:2. While covered by a blanket, Smith repeatedly touched Doe's breasts and genitals despite her efforts to block him physically, and repeatedly put her hand on his penis after she moved it away. *Id.*; J.A. 2515. Doe was "so shocked and scared," she later wrote, "that [she] did not know what to say or do." *Id*.

b. The School's Response to Learning of Sexual Assault Allegations

Soon after the bus incident, Doe separately told two friends. J.A. 1713:10-14, 1720:9-13. They in turn told parents and teachers who rapidly elevated reports of "forced" and "not consensual" sexual touching to school officials. J.A. 383:22-386:5, 424:3-11. The school took no action while Doe was still on the five-day school trip, although Doe told the band director that she was not sleeping or eating. J.A. 1726:3-19. Instead, senior administrators joked about the reported incident. Principal Banbury, in an email to Assistant Principal Taylor made a "joke" comparing inches of snow on the ground to Smith's erect penis under the blanket. J.A. 2494; 994:19-995:13.

Assistant Principal Hogan testified that, by the Sunday night after the assault, she knew she was dealing with the "possibility" of "a potential sexual assault" because "Jane Doe might not have wanted to be a full participant." J.A. 1186:19-1188:10. To learn the "details first" before coming to a conclusion, she conducted a limited investigation. J.A. 1189:4-19. Hogan called Doe into her office on Monday, March 13, 2017, for an interview. J.A. 1193:6-11, 1670:3-7. Doe's handwritten statement described the assault:

> I moved my hand away but he moved my hand back onto his genitals. I was so shocked and scared that I did not know what to say or do. He then started to move his hands towards me and I tried to block him but he still put his hands up my shirt and down my pants.

J.A. 2515. Hogan's notes capture Doe telling her she "tried to block it." J.A. 2517. When Wally Baranyk, a school security official who was present for part of the interview, asked Doe if the sexual activity had been consensual, Hogan testified, and memorialized in her notes, that Doe's response was "I don't think it was consensual." J.A. 2518. Hogan took that to mean that Doe "didn't want to be a participant" and that it "means a lack of consent" for the sexual act. J.A. 1207:21-1208:4.

The school officials' conduct during the meeting deeply upset Doe. Rather than offer support, Hogan told Doe, an honors student, that she might be disciplined for having sexual contact on a school trip. J.A. 1453:21-1454:14. Doe remembered the administrators' tones were "angry" and "menacing." J.A. 1747:24. Doe testified that Baranyk asked her what she was wearing and why she had not screamed during the assault. J.A. 1745:4-1748:1. According to Doe, when she answered that she had been embarrassed, Baranyk asked her, "Well, how do you feel now?" *Id.* Doe remembered Baranyk discouraging her from taking legal action, standing over her, yelling, and telling her that "there was really nothing [she] could do, that the most that [she] could charge Jack Smith was . . . with battery. He told [her] the school wasn't liable for anything." J.A. 1745:7-17.

The administrators also interviewed Smith. Baranyk testified that "the goal of th[e interview] was to establish facts that perhaps could lead to a criminal offense or sexual harassment pursuant to the student handbook." J.A. 2030:14-22. Hogan

testified that she and Baranyk characterized the allegations to Smith as "some serious accusations about the sexual activity and that it was not wanted by the other student." J.A. 1273:3-6. They asked Smith whether the sexual touching involved "force." J.A. 1267:4-8. At trial, Smith confirmed that he knew the administrators were "looking into a possible nonconsensual sexual touching." J.A. 1394:17-20.

After these two interviews, without speaking to most of the witnesses Doe, Smith, and teachers had identified, Hogan spoke with Banbury, the principal, about "whether this was or wasn't a sexual assault." J.A. 1291:14-20; *see* J.A. 2522. Hogan concluded that "the evidence that we had didn't show that we could call it a sexual assault." *Id.*; *see also* J.A. 1221:4-10. Hogan testified that she was acting pursuant to her training on the School Board's sexual harassment policies and she could only find Smith responsible if she believed "51 percent or higher that [the sexual harassment] occurred." J.A. 1222:19-23; 1283:22-1285:5.

After meeting with Doe, Assistant Principals Hogan and Taylor continued to receive reports that Smith had sexually assaulted Doe. Both Hogan and Doe's mother testified that, when the two met, Doe's mother referred to the incident as a "sexual assault." J.A. 1299:2-7, 1613:9-12. Hogan did not express surprise that the allegation concerned sexual assault; she simply explained that the school had already decided Doe had not been "sexually assault[ed]." J.A. 1299:8-10.

Another parent emailed Assistant Principal Taylor on March 17, 2017 and told her that she had learned of a "non-consenting sexual act between [Doe] and a student on the Indiana trip." J.A. 2526. An Oakton counselor forwarded Taylor an email from a student with the subject line "Need to Report Peer Pressure and Sexual Harassment." J.A. 2523-24. In that message, the student described the assault on the band trip. *Id*. The counselor twice forwarded the email to Taylor without response, so he forwarded it to Hogan, too. *Id*. Another Oakton High student, Brianna Murphy, wrote in a statement shared with Hogan that "Smith had caused – had reached for [Doe's] hand and had made her touch his genitalia without any consent from her." J.A. 574:18-575:5.

i. The Educational Impact of the Assault

A jury ultimately found that the sexual harassment "effectively deprived Ms. Doe of equal access to the educational opportunities or benefits provided by the School Board." J.A. 3324. In the aftermath of the assault, the School Board failed to provide Doe with the support and accommodations she needed to participate fully in school. Her grades dropped. J.A. 2524-43. Her absences grew. *Id*. She withdrew from classroom discussions. J.A. 617:15-25; 1755:2-10. She saw Smith around school and avoided a hallway where she might run into him. J.A.1754:3-7. Doe and Smith shared a band class, but Hogan provided only two options: To avoid Smith, Doe chose to sit in a small, windowless practice room during their shared band class,

listening to the band practicing without her, rather than the only other option offered—drop the class altogether. *E.g.* J.A. 1614:2-1615:3; 1753:21-1755:21.

C. Document Destruction

The Board destroyed or lost the critical documents created during its brief investigation into Smith's assault of Doe. Five months after this lawsuit was filed, a senior administrator wiped clean the security office computer, deleting all its data, including some records related to the sexual assault. J.A. 1423:4-25. The Board destroyed or lost notes taken by Baranyk during his meetings with Doe's friend and the teacher to whom the friend had first reported, as well as written contemporaneous statements by Smith, Doe, and their classmate Murphy. J.A. 1429:19-25. Fortunately, Doe's mother had retained a copy of Doe's written statement. J.A. 1612:5-21. All of these documents should have been saved in a secure central database. Just a few years before Doe reported, the School Board had created a Bullying and Harassment Management System ("BHMS") to track allegations of bullying and harassment to resolve another sexual harassment complaint filed with the U.S. Department of Education Office for Civil Rights. J.A. 2613, 702:2-25, 2632. Yet reports of Doe's sexual assault were not recorded in BHMS. J.A. 720:22-721:8.

D. Pretrial Litigation

On May 23, 2018, Doe brought this Title IX action against the School Board, asserting that her school responded to reports of her sexual assault with deliberate indifference. J.A. 34. After discovery, the School Board moved for summary judgment on the bases that the school was not deliberately indifferent to Doe's report of sexual assault and Doe was not barred from an educational opportunity or benefit. On June 10, 2019, the district court denied the Board's motion for summary judgment and scheduled trial. J.A. 80.

Soon after, the magistrate judge granted Doe's motion for sanctions against the Board for spoliating evidence. J.A. 81. "Spoliation refers to the destruction or material alteration of evidence or to the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *Silvestri v. GMC*, 271 F.3d 583, 590 (4th Cir. 2001). Sanctions for spoliation may include an instruction that jurors may assume the destroyed information is adverse to the spoliating party. *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995). The magistrate found that the Board had a duty to preserve the destroyed documents and that the failure to preserve the highly relevant documents was culpable negligence. J.A. 97. It also ruled that the court would instruct the jury that it "may consider such evidence to infer that those documents would be detrimental to defendant's case and that it may consider such evidence when assessing defendant's intent and knowledge." *Id.*

The district court upheld the magistrate judge's imposition of sanctions, but withheld ruling on the form of a spoliation instruction until the close of trial. J.A. 250.

E. The Trial

On July 29, 2019, a jury sat to hear Doe's Title IX claim. Among other key trial evidence was Hogan and Doe's testimony that Doe had filed her written report with Hogan and had, in her interview, spoken of trying to block Smith from sexually touching her. *See* J.A. 2515-17. Doe's mother testified that she told Hogan her daughter had been "sexually assaul[ted]," which Hogan confirmed. J.A. 1613:9-12. When asked directly if she had understood, after the first part of Doe's interview, that Doe was reporting sexual harassment, Hogan said she did not hear an "indication that [Doe] had been sexually assaulted." J.A. 1258:2-8. But Hogan testified that by the end of that interview, Hogan understood Doe alleged non-consensual and unwanted sexual touching. J.A. 1208:2-6.

During trial, each time a student, parent, or teacher testified that he or she told an assistant principal, teacher, or school security official that Doe was sexually assaulted, the School Board requested—and the court gave—a limiting instruction, notifying the jury that the evidence was hearsay, but was admissible to show "actual notice" or "notice" to the Board. For example, regarding one student's testimony that she had reported the assault to band director "Dr. V," the judge instructed:

> The question asks for what's called hearsay, which is what someone else told me versus what the person said themselves or witnessed a conversation in person. But this is what she told Mr. V, and it's offered – it's an out-of-court statement. *It's offered to, to provide evidence of notice to the Fairfax County School Board*, the officials, the school officials, about the fact that there had been allegations of -- well, she'll tell you what Mr. V – what she told Mr. V. So it's not offered for the truth of it, the statement; *it's offered as a form of notice or reporting to the school* what Ms. Staub had heard. All right. And you should keep in mind that *ultimately you'll be getting an instruction that talks about what actual notice the School Board has to receive before it's legally on notice and must act . . . .*

382:25-383:20 (emphasis added). The court gave a similar instruction multiple times throughout the trial, referring to the Board's "notice" of alleged sexual harassment nine times and other times providing a shorthand version of the instruction. *See, e.g.*, J.A. 385:6-9; 419:4-8; 508:4-6; 547:10-12; 572:3-8; 578:5-8; 611:15-19; 1459:11-1460:25; 473:16-18. The court never referred to "actual knowledge" when providing a limiting instruction.

After six days of trial, the School Board filed a motion for judgment as a matter of law, again asserting that Doe could not prove deliberate indifference or a deprivation of an educational opportunity. J.A. 3183. The court denied the motion. J.A. 1888:17-25. The court ultimately declined to provide a spoliation instruction because it found that Doe had not suffered sufficient prejudice. J.A. 2317:7-22; 2320:11-15.

The court also adopted the Board's jury instruction defining Doe's burden to prove the Board had actual knowledge of alleged sexual harassment. J.A. 3315. That

instruction read: "A school board has actual knowledge of student-on-student sexual harassment only if an 'appropriate person' employed by the school board has actual knowledge of the harassing conduct." *Id*. The court included no reference to "actual notice," the term it had used throughout trial. Nor did it use another term or phrase to connect the testimony the judge explained was admitted for purposes of "actual notice" to the "actual knowledge" jury instruction.

Doe feared that, without a clear instruction, the jury might wrongly believe actual knowledge turned on whether the School Board knew the harassment had in fact occurred and not, as the law requires, that it knew of an *allegation* of harassment. J.A. 1909. Doe's concerns stemmed, in part, from the School Board's repeated statements that senior school officials needed to "actually kn[ow] that this was a sexual assault." J.A. 361:9-13; *see also* 306:20-25; 1908:4-9.

Doe's concerns about juror confusion regarding "actual knowledge" proved justified. On the second day of deliberations, the jury asked three questions about "actual knowledge." The jury's first note on actual knowledge asked, ". . . can there be greater clarification regarding what 'actual knowledge' means?" J.A. 3294. In response, the court instructed the jury to "give the words their ordinary meaning." J.A. 2454:2-17.

That response did not resolve the jury's confusion. The jury posed two more questions:

> [2] Can Question 3 [of the special verdict, concerning actual knowledge,] be answered affirmatively without implying that sexual harassment was "known" by the School Board? Question 4 posits that "sexual harassment" is known, even though Question 3 asks re: actual knowledge of "alleged sexual harassment." J.A. 3295.
>
> [3] We continue to have questions re: actual knowledge. Is actual knowledge: A. A compilation of information about an event. Or . . . B. The conclusion decided based on information provided. *Id*.

Doe argued that the court should answer the jury's third "specific question" by using the jury's own framing: "Actual knowledge" could be established based on the "compilation of information about an event," not the school's "conclusion" about the veracity of that information. J.A. 2469:19-2471:2. Instead, the court did not answer the jury's third question *at all*. It answered the jury's second question by stating, in part, "Question 3 can be answered affirmatively if you find by a preponderance of the evidence that the School Board had actual knowledge of an allegation or allegations that on the March 8, 2017 bus trip Jack Smith sexually harassed Jane Doe." J.A. 3300.

Shortly afterwards, the jury returned its verdict for the Board, finding that Smith sexually harassed Doe, and that the harassment had been so severe, pervasive, and offensive to deprive Doe of equal access to an education, but that the Board did not have actual knowledge of an allegation of sexual harassment. J.A. 3324. The jury did not decide the question of the Board's deliberate indifference.

F. Post-Trial

i. Juror statements

Within hours of the jury's verdict, a juror was quoted in a news article stating that, after discussing the meaning of actual knowledge in a post-verdict conference with the judge, he knew he made a mistake and should have voted "yes" for actual knowledge. J.A. 3390.[2] He told another newspaper that "[w]hen the jury briefly met with the judge after rendering its verdict . . . [the judge] gave a broader interpretation of actual knowledge that suggested the school board only needed to be aware that a sexual harassment complaint had been made." J.A. 3399. "[The juror] says the judge's new explanation left him 'a wreck' and had another juror 'sobbing.'" *Id*.

ii. Motions for a new trial and reconsideration

Doe filed a motion for new trial on August 20, 2019, on the basis that the jury's verdict was against the clear weight of the evidence and a miscarriage of justice. *See* J.A. 3331. She also argued the court had erred in failing to provide a mandatory helpful response to juror confusion over the meaning of "actual knowledge," and in failing to provide the jury with a spoliation instruction. *Id.*; J.A. 3376-3402. On a motion for a new trial, a trial judge must independently weigh the evidence in determining whether the verdict is supported by the record. *Williams v.*

[2] Below, the School Board moved unsuccessfully to strike the juror's post-verdict statements to news media. *See* J.A. 3403-3405.

Nichols, 266 F.2d 389, 392 (4th Cir. 1959). The district court denied Doe's motion on September 27, 2019, writing, in relevant part:

> Vice Principals Taylor and Hogan both testified that while what they heard might have been interpreted to constitute an allegation of sexual assault they did not believe that it did. . . . The jury therefore had conflicting evidence of whether the officials were aware of allegations of sexual assault. The Court has no way to divine what evidence the jury believed was more credible or the weight that the jury gave to specific evidence. As a result, the existence of evidence supporting the jury's verdict prevents the Court from ordering a new trial.

J.A. 3372. The court also rejected Doe's assertions of a miscarriage of justice and errors in the jury instructions. *Id*. Doe filed a motion to reconsider her motion for a new trial on October 11, 2019, to highlight Fourth Circuit precedent that directs the court to independently weigh the evidence, not "divine" the jury's deliberations, and to highlight the court's erroneous understanding of actual knowledge. J.A. 3376-3402. The court denied the motion on October 23, 2019. J.A. 3405.

Doe timely noticed this appeal on October 24, 2019. J.A. 3406. She now asks this Court to vacate the judgment below, reverse the district court's denial of her motion for a new trial, and remand for a new trial. Alternatively, Doe asks this Court to remand for reconsideration of her motion for a new trial under the correct legal standards.

SUMMARY OF ARGUMENT

The district court abused its discretion in denying Doe's motion for a new trial because it applied two incorrect legal standards to that motion. First, the court failed

to exercise its independent judgment and weigh the evidence to determine whether the verdict was sufficiently supported by the record, as required by law. Instead, it deferred to the jury's verdict because it could not "divine" what evidence the jurors found most persuasive, an error of law.

Second, the district court applied the wrong legal standard to evaluating evidence of the School Board's "actual knowledge" of allegations that Smith sexually assaulted Doe. The court erred in requiring school administrators to subjectively understand the nature of the allegations reported in order to have "actual knowledge." Under Title IX, whether a report constitutes "actual knowledge" turns on its objective contents, not whether the official receiving the report subjectively understood it to allege sexual harassment.

Because the court applied the wrong legal standards to Doe's motion for a new trial, Doe is entitled to remand for reconsideration of her motion under the correct legal standards. Remand for reconsideration may be unnecessary, however, because the district court made additional errors entitling Doe to a new trial.

The district court also abused its discretion in denying Doe's motion for a new trial because no evidence supports the jury's verdict that the School Board lacked actual knowledge of allegations that Smith sexually harassed Doe. The undisputed evidence of reports by Doe and her mother show that the School Board, through Assistant Principal Hogan, had actual knowledge of sexual harassment allegations.

It is undisputed that Doe told Hogan she did not "consent" to the sexual activity, tried to "block" Smith from touching her, and "was so shocked and scared" by Smith's actions that she "did not know what to say or do." J.A. 2515. It is also undisputed that Doe's mother reported the incident to Hogan as a "sexual assault." J.A. 1299:2-7, 1613:9-12. In addition, the fact that Hogan conducted an investigation to determine whether Smith had, in fact, sexually harassed Smith clearly shows she had actual knowledge of the *allegation*—which is all that is required under Title IX. Knowledge of an *allegation* of sexual harassment is "actual knowledge," regardless of whether the school official receiving the report subjectively understood the report to allege harassment, believed the report, or ultimately concluded that sexual harassment had not occurred.

The district court also abused its discretion in denying a new trial because the verdict resulted in a miscarriage of justice. Not only was it obvious post-verdict that the jury's no-actual-knowledge verdict was wrong, but it was clear that the district court's failure to instruct the jury on spoliation prejudiced Doe because it permitted the School Board to profit from destroying or losing contemporaneous documents contrary to the verdict. If available at trial, those records would have independently proven the School Board's actual knowledge of the sexual harassment allegations. In the absence of those documents or a spoliation instruction, the jury returned a verdict for the Board, casting doubt on the integrity of the trial.

The verdict was also a miscarriage of justice because it was borne from jury confusion over the court's "actual knowledge" instruction that the court knew about but failed to remedy. This is evident from questions the jury asked during trial and one juror's post-verdict comments. At trial, the jury repeatedly sought clarification of the court's actual knowledge instructions. Nonetheless, the court did not provide a helpful response; indeed, it ignored one question completely. Where, as here, a jury expresses confusion on a central issue in the case, the court must provide a concrete, clarifying response. A juror's post-verdict comments further confirmed the jury's confusion about "actual knowledge." After hearing the judge's explanation of the term at a post-verdict conference, a juror was quoted in a news article saying he made a mistake and would have voted "yes" on the School Board's actual knowledge. The resulting jury verdict was a clear miscarriage of justice that the district court was obligated to cure by granting Doe's motion for a new trial.

Finally, Doe is entitled to a new trial even absent a miscarriage of justice, because the district court abused its discretion in failing to provide the concrete instructions required to cure known jury confusion over the court's "actual knowledge" instructions. Here, the court offered no response at all to a question seeking clarification of the evidence the jury could consider to determine if the School Board had actual knowledge of the alleged sexual harassment. It is reversible

error to fail to give instructions that, while facially correct in stating the law, do not relate the evidence to the law.

STANDARD OF REVIEW

A court of appeals reviews a district court's denial of a motion for a new trial for abuse of discretion. *Knussman v. Maryland*, 272 F.3d 625, 639 (4th Cir. 2001).

Where a district court makes an error of law, it "necessarily abuse[s] its discretion." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990). Accordingly, where a district court applies the wrong legal standard in assessing a motion for a new trial, this Court will reverse and remand for reconsideration under the correct legal standard. *Gill v. Rollins Protective Servs. Co.*, 773 F.2d 592, 595 (4th Cir. 1985), *amended on other grounds by* 788 F.2d 1042 (4th Cir. 1986); *Williams*, 266 F.2d at 393.

This Court will also reverse a district court's denial of a motion for a new trial for an error of fact. *Williams*, 266 F.2d at 392. Where, as here, a motion for a new trial was not preceded by a Rule 50 motion for judgment as a matter of law, the Court must reverse and order a new trial when there is no evidence to support the verdict. *Minter v. Wells Fargo Bank, N.A.*, 762 F.3d 339, 348 (4th Cir. 2014).

A court of appeals reviews a challenged jury instruction for abuse of discretion. *Noel v. Artson*, 641 F.3d 580, 586 (4th Cir. 2011).

ARGUMENT

I. The District Court Denied Doe's Motion for a New Trial Based on Legal Errors, Thereby Abusing its Discretion.

A. The District Court Failed to Exercise its Own Independent Judgment in Determining Whether the Verdict Was Supported by the Evidence.

Under Rule 59 of the Federal Rules of Civil Procedure, a district court must grant a new trial if "(1) the verdict is against the clear weight of the evidence, or (2) is based upon evidence which is false, or (3) will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict." *Knussman*, 272 F.3d at 639. In considering a motion for a new trial based on the sufficiency of the evidence, the district court must not view the evidence in the light most favorable to the verdict, but instead must exercise its "own independent judgment after a weighing of all the evidence and any other pertinent factors." *Williams*, 266 F.2d at 392; *see also Poynter v. Ratcliff*, 874 F.2d 219, 223 (4th Cir. 1989) (trial judge weighs evidence and considers credibility of witnesses on motion for new trial, unlike directed verdict motion). The court's exercise of this power does not undermine the right of trial by jury, "but is one of the historic safeguards of that right." *Williams*, 266 F.2d at 393.

Here, the district court did not exercise its independent judgment and weigh the evidence to determine whether to grant Doe's motion for a new trial. Instead, it

stated it would not grant a new trial because it could not "divine what evidence the jury believed was more credible or the weight that the jury gave the specific evidence." J.A. 3372. The court applied a standard more akin to the one used for a motion for judgment as a matter of law—for which a judge must view the evidence in the light most favorable to the verdict—than the standard applicable to a motion for a new trial. *See Poynter*, 874 F.2d at 222-23. In short, the court deferred to the jury's view of the evidence.

The court was not permitted to do this. When considering a motion for a new trial, the court should not be attempting to "divine" the jury's views of the evidence and witnesses. Rather, the court must independently "weigh the evidence and consider the credibility of the witnesses." *Poynter*, 874 F.2d at 223. By failing to conduct an independent review of the evidence, the court applied the wrong legal standard to Doe's motion for a new trial. Such errors require remand for reconsideration of the motion under the correct standard. *See Williams*, 266 F.2d at 393; *see also Ellis v. Int'l Playtex, Inc.*, 745 F.2d 292, 298 (4th Cir. 1984).

That is precisely what this Court did in *Williams* when the trial judge applied the wrong legal standard to a motion for a new trial. There, the defendants moved for a new trial under Rule 59, arguing that the jury's damages award was excessive based on the clear weight of the evidence. *Williams*, 266 F.2d at 390. In denying that

motion, the trial judge considered the evidence in the light most favorable to the prevailing party. *Id*. at 392. On appeal, this Court held that the trial judge had "committed an error of law in that he has applied the wrong standard in his consideration and disposition of defendants' motion." *Id*. Rather than review the evidence in the light most favorable to the verdict, he should have "exercis[ed] his own independent judgment after a weighing of all the evidence and any other pertinent factors in determining whether the verdict was against the clear weight of the evidence or would result in a miscarriage of justice." *Id*. at 393. Without assessing the merits of the defendant-appellant's motion, this Court remanded for reconsideration with clear instructions to the district court to apply the correct legal standard. *Id*.

Likewise, in *Gill*, this Court remanded for reconsideration of a motion for a new trial because the district court had not independently evaluated the evidence. 773 F.2d at 595. The trial judge's deference to the jury's verdict was "clearly at odds with the *duty* of a trial judge on a motion for a new trial to weigh the evidence and the credibility of the witnesses." *Id*. (emphasis in original). "Although the grant or denial of such a motion may be reversed only upon a showing of abuse of discretion," this Court explained, "the application of the wrong standard in

considering a motion for a new trial is plainly just such an abuse of discretion." *Id.*[3]

In short, this Court has "not hesitated to reverse a judgment when a lower court has abused its discretion and applied the wrong standard in reviewing a motion for a new trial." *Ellis*, 745 F.2d at 298. The Court should do the same here. On remand, Doe will have an opportunity, for the first time, to have the district court review the evidence under the correct legal standard and determine whether a new trial is warranted under Rule 59.

B. The District Court Assessed Evidence of "Actual Knowledge" Under the Wrong Legal Standard.

The district court also erred as a matter of law in treating evidence of administrators' subjective interpretation of reports about the alleged sexual assault as evidence suggesting the School Board lacked actual knowledge of the allegations. It is well established that a school board has "actual knowledge" when an appropriate

[3] On a similar set of facts, the Third Circuit did the same in *Magee v. Gen. Motors Corp.*, 213 F.2d 899 (3d Cir. 1954). There, as here, the trial judge "denied the motion for a new trial upon the ground that he was not free to reweigh the evidence or set aside the verdict because the jury might have drawn different inferences or conclusions or the court might have thought another result more reasonable, but must take the view of the evidence most favorable to the plaintiff." *Id.* at 900. The Third Circuit explained that "[t]he case must, therefore, go back to the district court for reconsideration of the motion for a new trial in the light of the court's view of the weight of the evidence and all other relevant factors." *Id.*

school official receives a report *alleging* sexual assault, not when the official subjectively believes the report to be true.

i. Title IX's actual knowledge standard requires a school's objective knowledge of a sexual harassment allegation.

To establish the School Board's actual knowledge, Doe was required to show that an appropriate person received a report *alleging* that Smith had sexually harassed her, not that the official knew the alleged sexual harassment had in fact occurred. *See, e.g.*, *Galster*, 768 F.3d at 614 ("To have actual knowledge of an incident, school officials must have witnessed it *or received a report of it*.") (emphasis added); *Doe v. Sch. Bd. of Broward Cnty.*, 604 F.3d 1248, 1255 (11th Cir. 2010) (actual knowledge of two victims' sexual assaults undisputed where victims filed complaints); *Jennings*, 482 F.3d at 700 (actual knowledge established by student's allegation where school did not investigate or otherwise substantiate it); *Vance v. Spencer Cnty. Pub. Sch. Dist.*, 231 F.3d 253, 259 (6th Cir. 2000) (actual knowledge undisputed when plaintiff and mother reported harassment to school officials, filed complaint with Title IX coordinator); *Murrell v. Sch. Dist. No. 1*, 186 F.3d 1238, 1247 (10th Cir. 1999) (school had actual knowledge even where principal believed that reported sexual assaults were consensual sexual conduct); *Soper v. Hoben*, 195 F.3d 845, 855 (6th Cir. 1999) (actual knowledge established where student's mother reported sexual assault); *Weckhorst v. Kan. State Univ.*, 241 F.

Supp. 3d 1154, 1165 (D. Kan. 2017) (actual knowledge established where student reported sexual assault); *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1095 (D. Minn. 2000) (actual knowledge undisputed when plaintiff reported several harassing incidents to various school officials); *Morlock v. W. Cent. Educ. Dist.*, 46 F. Supp. 2d 892, 908 (D. Minn. 1999) (same).[4] As explained below, a school board cannot "lose" its actual knowledge of an allegation by determining—correctly or incorrectly—that the allegation is unsubstantiated. *See infra* at 34-35.

Whether a report triggers actual knowledge turns on its contents, not whether the official receiving the report subjectively understood the report to allege sexual harassment. For example, in *Jennings v. University of North Carolina*, this Court held en banc that a jury could conclude the college had actual knowledge of a sexually hostile environment based on a victim's report of her soccer coach's "sexual comments about his players when the team was together" and "her intense feelings of discomfort and humiliation." 482 F.3d at 700. This Court paid no mind to whether the administrator who received the report subjectively recognized it as an allegation of sexual harassment, rather than a complaint of a different nature. Nor do other

[4] In response to one of the jury's three questions about actual knowledge, the district court similarly explained, "If the school board had actual knowledge of such an *allegation or allegations*, then it knew of the sexual harassment of Jane Doe on the March 8, 2017 bus trip . . . ." J.A. 3300 (emphasis added); *see also* J.A. 3322 ("[Y]ou may consider that testimony as evidence of actual knowledge of the *alleged* sexual harassment by the School Board.") (emphasis added).

appeals courts, or district courts within this circuit, in their post-*Gebser* analyses of actual knowledge. *See, e.g.*, *Murrell*, 186 F.3d at 1247; *Galster*, 768 F.3d at 617-18; *Doe v. Bd. of Educ. of Prince George's Cnty.*, 888 F. Supp. 2d 659, 667 (D. Md. 2012); *Mandsager v. Univ. of N.C. at Greensboro*, 269 F. Supp. 2d 662, 675 (M.D.N.C. 2003).

Any other rule would lead to absurd results. To require that school officials not only receive reports of sexual harassment, but subjectively understand the nature of those reports, would not further *Gebser*'s goal of giving schools "an opportunity to take action." *See Gebser*, 524 U.S. at 289. Instead, it would encourage schools to promote ignorance among their staff so appropriate persons would not recognize sexual harassment. For example, if an official's subjective view of a report were a defense to actual knowledge, a school could avoid liability where its Title IX coordinator wrongly believed that only girls can be sexually harassed, so ignored reports from boys, or that sexual violence cannot occur within a relationship, and so dismissed complaints of that type. Although the actual knowledge standard "is not satisfied by knowledge that something might be happening and could be uncovered by further investigation," the Seventh Circuit has explained, "[s]chool administrators certainly cannot escape liability by putting their heads in the sand." *Galster*, 768 F.3d at 617-18.

Rather than reward poor training, courts regularly hold that schools may be liable under Title IX for acting with deliberate indifference to sexual harassment where administrators wrongly believe reports do not implicate sexual harassment. One court, for example, held a school could be liable where the assistant principal refused to address harassment stemming from classmates' unauthorized circulation of the plaintiffs-students' explicit video based on his mistaken belief that, because the sexual contact in the video appeared consensual, no harassment was at issue. *T.C. ex rel. S.C. v. Metro. Gov't of Nashville*, 378 F. Supp. 3d 651, 682 (M.D. Tenn. 2019). Another court concluded that a school could be deliberately indifferent where it "failed to accurately categorize student complaints, thereby authorizing administrators to bypass [the district]'s Title IX policy." *Doe v. Pennridge Sch. Dist.*, No. 17-3570, 2019 WL 2011069, at *12 (E.D. Pa. May 7, 2019). And the Tenth Circuit held that a school could be liable where its principal wrongly treated a report of sexual assault as a report of consensual sex. *Murrell*, 186 F.3d at 1247.

Similarly, in the context of a Title VII workplace harassment suit, this Court has identified a supervisor's "fail[ure] to characterize [an employee's] complaints as containing allegations of sexual harassment" as part of the employer's failure to respond to her reports, not evidence that it did not know of the harassment. *Smith v. First Union Nat'l Bank*, 202 F.3d 234, 246 (4th Cir. 2000). If a school's assistant principal did not recognize a report of "sexual assault" or "nonconsensual" sexual

activity as a report of sexual assault, that is hardly evidence that the school did not have actual knowledge. Indeed, it is evidence of the school's deliberate indifference.

In short, the law is clear that actual knowledge requires only that an appropriate person receive an allegation of sexual harassment, not that the person subjectively understand the nature of the allegation.

ii. The district court erred in requiring administrators to subjectively understand the nature of a report to have "actual knowledge."

The district court did not use the settled legal standard on actual knowledge to assess Doe's motion for a new trial based on the insufficiency of the evidence. Instead, it created a new requirement for actual knowledge absent from the jury instructions and the case law. The record is undisputed: Hogan, an "appropriate person," interviewed Doe, read Doe's written statement, and received a report of "sexual assault" from Doe's mother. *See, e.g.*, J.A. 2515, 1299:2-7, 1613:9-12; *see also infra* pages 36-43. Yet the district court upheld the actual knowledge verdict on the basis that the jury might have credited school officials' testimony that they "did not believe that the information [reported] included allegations of a sexual assault." J.A. 3372. The court characterized Hogan's testimony as explaining that "while what [she] heard might have been interpreted to constitute an allegation of sexual assault [she] did not believe that it did." *Id*. There, the court may have been referencing Hogan's statement that, after the first half of Doe's interview, she did not hear an

"indication that [Doe] had been sexually assaulted." J.A. 1258:2-8.[5] Because of this testimony, the district court stated, "[t]he jury therefore had conflicting evidence of whether the officials were aware of the allegations of a sexual assault." J.A. 3372.

But Title IX requires only that an appropriate person receive an allegation of sexual harassment. Hogan's attested failure to understand the sexual harassment reports she received has no bearing on the undisputed, objective evidence that she did, in fact, receive them. In deciding otherwise, the district court applied an erroneous actual knowledge standard: administrators must not only receive a report of sexual harassment but must subjectively understand the nature of that report. That additional condition is not only absent from the jury instructions but is just plain wrong under Title IX. Accordingly, this Court should remand for reconsideration under the correct legal standard for assessing evidence of actual knowledge. *See Williams*, 266 F.2d at 391; *cf. Chesapeake Paper Prods. Co. v. Stone & Webster Eng'g Corp.*, 51 F.3d 1229, 1238 (4th Cir. 1995) (considering whether trial court erred as a matter of law in applying subjective rather than objective theory of contracts on motion for new trial).

[5] By the end of the interview, however, Hogan recognized Doe's allegation as non-consensual and unwanted sexual touching. J.A. 1299:2-6.

II. A New Trial Is Required Because No Evidence Supports the Jury's Verdict That the School Board Lacked Actual Knowledge of Smith's Alleged Sexual Harassment of Doe.

A court of appeals must remand for a new trial if there is no evidence to support the jury's verdict. *See Minter*, 762 F.3d at 348. This is such a case. The evidence incontrovertibly shows that the School Board, through Assistant Principal Hogan, had actual knowledge of Smith's alleged sexual harassment of Doe. Hogan's own testimony confirms this, as do her contemporaneous notes, the written report she received from Doe, the investigation she conducted, and the testimony of other witnesses. No evidence supports the jury's verdict to the contrary. The School Board even admitted to the district court that it "isn't denying that there was an *alleged* sexual assault; [it's] denying that there *was* a sexual assault." J.A. 2288 (emphasis added). Because there is no evidence that Hogan lacked actual knowledge of an allegation of sexual harassment, and her knowledge alone was sufficient to establish the School Board's, this Court should remand for a new trial. *See Minter*, 762 F.3d at 348.

A. Doe's Report Establishes Hogan's Actual Knowledge.

No party disputes the indisputable: On Monday, March 13, 2017, Doe wrote a statement at Assistant Principal Hogan's request, which was published to the jury at trial. J.A. 2515. There, Doe wrote that, on the bus to Indianapolis, she had tried to "block" Smith from touching her "up [her] shirt and down [her] pants," but he did so anyway. *Id.* He also put her hand on his penis multiple times despite her efforts

to remove it. *Id.* "I was so shocked and scared that I did not know what to say or do," she wrote. *Id*. Hogan testified that a security officer, Baranyk, asked Doe if the touching was consensual, and Doe replied—as memorialized in Hogan's notes—"I don't think it was consensual." J.A. 1207:21-1208:1; 2516. Hogan acknowledged Doe's reply to mean exactly that: Doe did not "want to be a participant" in the sexual contact, which was characterized by "a lack of consent." J.A. 1208:2-6. The jury heard no testimony that cast this account into question.

It does not take a law degree to recognize Doe's report, as relayed by Hogan at trial, as one of sexual harassment. The allegations Doe relayed squarely fit both legal and School Board definitions of sexual harassment. J.A. 3408. The Supreme Court has explained that "[t]he gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.'" *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 68 (1986).[6] The U.S. Department of Education uses a similar definition:

[6] This Court "look[s] to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance in evaluating a claim brought under Title IX." *Jennings*, 482 F.3d at 695; *see also Preston v. Virginia ex rel. New River Cmty. Coll.*, 31 F.3d 203, 207 (4th Cir. 1994) ("Title VII, and the judicial interpretations of it, provide a persuasive body of standards to which we may look in shaping the contours of a private right of action under Title IX.").

In particular, in analyzing whether a student was subjected to sexual harassment under Title IX, courts have looked to precedent under Title VII. *See, e.g.*, *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 75 (1992) (citing *Meritor* to support holding that teacher's sexual harassment of student was actionable under Title IX); *Jennings*, 482 F.3d at 695 (citing Title VII harassment cases in concluding alleged conduct constituted sexual harassment).

"Sexual harassment is unwelcome conduct of a sexual nature. Sexual harassment can include unwelcome sexual advances . . . or physical conduct of a sexual nature." U.S. Dep't of Educ., Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* 2 (Jan. 2001), https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf. The School Board's definition incorporates this unwelcomeness standard, defining "sexual harassment" as "[h]arassment that includes unwelcome sexual advances . . . and other inappropriate . . . physical conduct of a sexual nature that creates an intimidating, hostile, or offensive environment." J.A. 2931.

Doe's report left no doubt that Smith's groping was unwelcome. She explained that she tried to block Smith from touching her, the contact was not "consensual," and she "was so shocked and scared that she did not know what to say or do." J.A. 2515. The jury acknowledged as much when it found that Smith had, in fact, sexually harassed Doe. J.A. 3324. Hogan did, too, when she testified that, if Smith had persisted in touching Doe after she tried to stop him, he would have committed a sexual assault. J.A. 1319:2-9. As a matter of law, Doe's report to Hogan constituted an allegation of sexual harassment.[7]

[7] Though Hogan's subjective understanding of Doe's reports is irrelevant, Hogan's own testimony belies any claim that she did not recognize Doe's allegation of sexual harassment. For example, Hogan testified that, after her full interview with Doe, she understood that: (a) Doe alleged she had been sexually touched with "a lack of consent," and (b) if Doe were to press charges, she would do so for "sexual harassment." *See, e.g.*, J.A. 1208:2-6, 1213:11-16, 1299:2-7, 1613:9-12.

B. Doe's Mother's Report Also Establishes Hogan's Actual Knowledge.

Doe's mother's report about the bus incident could not have been clearer. Doe's parents met with Hogan the same week Doe submitted her written statement. As Doe's mother and Hogan both testified, in that meeting, Doe's mother told Hogan that the incident Doe had reported was a "sexual assault." J.A. 1299:2-7; 1613:9-12. This is the clearest report of a sexual assault a school can receive.[8] An administrator does not need to consult a handbook, draw any inference, or pursue any further investigation to understand that a report of "sexual assault" is a report of sexual assault. And a report of sexual assault to an appropriate person establishes actual knowledge.

Doe's mother's report would have been sufficient for actual knowledge, but Hogan's response demonstrated she already knew of the sexual harassment allegation: Hogan, by her own account, replied to Doe's mother that the school had already determined Doe had not been "sexually assault[ed]." J.A. 1299:8-10. The School Board argued that Hogan's cursory investigation and conclusion was evidence that it was not deliberately indifferent to the reports—but the jury never reached that question. Nevertheless, the school's conclusion about its inability to

[8] Hogan received yet another report that explicitly described the bus incident as sexual harassment: A school counselor forwarded her and Taylor emails from a concerned student describing the incident with the subject line "Need to Report Peer Pressure and Sexual Harassment." J.A. 2523-2524.

substantiate the report does not negate its actual knowledge of the *allegation*. An administrator's belief that a reported sexual assault was, instead, consensual does not erase her knowledge of the allegation.

In *Murrell v. School District Number 1*, the Tenth Circuit held that a school board had actual knowledge when the alleged victim's mother "telephoned [the principal] to discuss [a classmate's] harassing conduct." *Murrell*, 186 F.3d at 1247. The principal later "suggested that the sexual conduct was consensual" and suspended the alleged victim. *Id.* The Tenth Circuit presented the principal's statement as part of the school's unresponsiveness to the report, not evidence that it did not have actual knowledge. *Id.*; *see also J.M. ex rel. Morris v. Hilldale Indep. Sch. Dist. No. 1-29*, 397 F. App'x 445, 453 (10th Cir. 2010) (finding school's "assertions . . . that [the assistant principal] did not believe [the reporting student's] allegations . . . are insufficient alone to establish that the district did not have actual notice"); *Doe v. Forest Hills Sch. Dist.*, No. 1:13-cv-428, 2015 WL 9906260, at *11 (W.D. Mich. Mar. 31, 2015) (defendant's failure to substantiate reported harassment does not mean the school did not have actual knowledge).[9] After all, as the jury was instructed here, actual knowledge requires that a school know of an *allegation* of

[9] Similarly, if Hogan failed to recognize that Doe and her mother had reported allegations of sexual harassment, her ignorance is part of the Board's deliberate indifference to the reports, not evidence that the Board lacked knowledge of the allegations.

sexual harassment, not that it knows the sexual harassment in fact occurred. J.A. 3300; *see also Jennings*, 482 F.3d at 700.

C. Hogan's Responses to the Reports Demonstrate Her Actual Knowledge.

The fact that Hogan conducted an investigation to determine whether Smith had sexually assaulted Doe unquestionably shows she had actual knowledge of the allegation. *See Doe ex rel. Watson v. Russell Cnty. Sch. Bd.*, 292 F. Supp. 3d 690, 708 (W.D. Va. 2018) (holding actual notice evidenced by complaints and "the resulting . . . investigations").

Hogan testified that she first learned from Assistant Principal Taylor that there was "a possibility" that a sexual assault had occurred on the bus, and that "Doe might not have wanted to be a full participant" in the sexual activity, though she needed "details first" before coming to a conclusion. J.A. 1186:14-1189:19. Accordingly, Hogan and Baranyk interviewed both Doe and Smith about the reported incident. J.A. 1195:3-10; 1204:24-1205:3. The administrators used the standard process employed for sexual harassment investigations. J.A. 1166:5-1167:18. Hogan testified that, during Doe's interview, the administrators asked her whether the contact was "consensual," and whether it had been "forceful," J.A. 1207:21-1208:1—questions designed to determine whether a sexual assault occurred. Baranyk testified that "the goal of th[e interview] was to establish facts that perhaps could lead to a criminal offense or sexual harassment pursuant to the student

handbook." J.A. 2030:14-22. Hogan testified that when Baranyk spoke to Doe about the possibility of "press[ing] charges," he was referring to possible charges for "sexual harassment." J.A. 1213:11-16.

Hogan also testified that she and Baranyk characterized the allegations to Smith as "some serious accusations about the sexual activity and that it was not wanted by the other student." J.A. 1273:3-6. They asked Smith whether the sexual touching involved "force." J.A. 1267:4-8. At trial, Smith confirmed that he knew the administrators were "looking into a possible nonconsensual sexual touching." J.A. 1291:17-20.

After the interviews, Hogan spoke with Banbury, the principal, and the two discussed "whether this was or wasn't a sexual assault." J.A. 1291:14-20. The administrators concluded that "the evidence that we had didn't show that we could call it a sexual assault." *Id.*; *see also* J.A. 1221:4-10. As Hogan explained, "[t]o show it's a sexual assault you have to be—you have to have the evidence more than it happened than it not. And I don't think I had that. I still do not think I had 51 percent or higher that this occurred." J.A. 1222:19-23; *see also* J.A. 1283:11-1284:9. (The jury, employing the same standard of evidence, found that Smith had, in fact, sexually harassed Doe. J.A. 3324.) In Hogan's eyes, Doe's allegation turned on the one detail Smith denied: that Doe had tried to "stop him" by blocking Smith and pulling her hand away from his genitals. J.A. 1289:14-19; 1314:17-1315:10.

Because the two students' accounts differed on that matter, Hogan believed she "didn't have the evidence to show 51 percent to say, yes, this was a sexual assault." J.A. 1285:6-12.

None of this evidence regarding the School Board's investigation was disputed at trial. Whether the School Board responded adequately to the alleged sexual assault is an open question for the jury to address in a new trial. Whether Hogan knew of the allegation she investigated is not. *All* of the evidence demonstrates that an appropriate person employed by the School Board had actual knowledge of the alleged sexual harassment. *None* supports the jury's special verdict on actual knowledge.

III. The District Court Abused its Discretion in Denying a New Trial Because the Jury's Verdict Was a Miscarriage of Justice.

A. Doe Suffered a Miscarriage of Justice Because, by Failing to Instruct the Jury on Spoliation, the District Court Improperly Allowed the School Board's Spoliation of "Actual Knowledge" Evidence to Prejudice Her.

The district court's decision not to provide a spoliation instruction resulted in a clear miscarriage of justice: The School Board profited from destroying or losing documents contrary to the verdict. If those records had been available at trial, they would have proven the School Board had actual knowledge of the sexual assault allegations. If the court had issued a spoliation instruction, the jury would have known it could make an adverse inference from the documents' absence. Without

either the documents or a spoliation instruction, the jury returned a verdict in the Board's favor, casting doubt on the integrity of the proceeding.

Both the magistrate judge and trial court found that (1) the School Board had control over evidence it had an obligation to preserve but did not, (2) the destruction was done with a culpable state of mind, and (3) the evidence was relevant to Doe's claims. J.A. 81-97, 250, 2304-05. Among the spoliated evidence was a written statement submitted to Hogan by Brianna Murphy, who testified at trial that she had written that Smith "had reached for [Doe's] hand and had made her touch his genitalia without any consent from her." J.A. 572:11-575:5. The School Board also spoliated notes from security officer Baranyk's interview with teacher Laura Kelly, who testified that she told Baranyk "a friend of [Kachroo's] had been forced to do hand stuff with another student while on the bus." J.A. 549:1-551:17.

During the charging conference, the court issued a jury instruction that would have informed the jury that the Board had an obligation to maintain relevant material and had lost or destroyed documents plainly relevant to the case, but that it was leaving it to the jury to decide whether the loss or destruction was willful:

> The evidence that's been presented paints a picture of the jury could find easily that the county demonstrated no respect for its own policies and procedures, didn't implement the BHMS system, used a computer to take down the statements and then didn't preserve that information, and tried to clean up the computer and then just throw it out and -- because it didn't work anymore, that the file was never preserved and was lost, and so there's significant evidence from which a jury could find that they did that willfully.

> I'm not saying that they will. I'm leaving it up to them to determine whether that conduct rises to a level of willfulness.

J.A. 2307:13-24.[10] The court later withdrew its spoliation jury instruction; the court did not alter its holding that the School Board controlled the lost or destroyed documents, had an obligation to maintain them, or that the documents were relevant, but instead found that "spoliation instructions are to be given only under circumstances that really require it because of the prejudice that's been suffered." J.A. 2317:7-16.

The manifest injustice to Doe became obvious when the jury found that the School Board did not have "actual knowledge of an allegation or allegations of sexual harassment." J.A. 3324. The verdict showed that the district court had wrongly assumed Doe was not prejudiced by the School Board's spoliation. Although the jury saw and heard overwhelming, uncontradicted evidence that the School Board had actual knowledge, *see supra* at 9-14, Murphy's spoliated statement *alone* would have established the School Board's actual knowledge of an allegation of sexual assault.

The School Board's disregard for its legal and ethical responsibilities to preserve evidence, then, accrued to its benefit—exactly the outcome a spoliation

[10] "'[W]illful conduct' does not necessarily require bad faith. Rather, 'willful conduct' in this context simply means not accidental. *Callahan v. Pac. Cycle, Inc.*, 756 F. App'x 216, 227 (4th Cir. 2018).

instruction is meant to prevent. That profit from lawlessness is a miscarriage of justice. With the benefit of hindsight, the district court had the opportunity and responsibility to correct that miscarriage of justice by ordering a new trial.

B. Doe Suffered a Miscarriage of Justice Because the District Court Failed to Give the Jury Clarifying Instructions Required to Remedy Known Confusion About the Court's Actual Knowledge Instructions.

The district court's post-trial failure to cure obvious jury confusion over its actual knowledge instructions resulted in a clear miscarriage of justice warranting a new trial. The miscarriage of justice was apparent from the jury's unfounded no-actual-knowledge verdict. *See supra* at 36-43. It was also apparent from both the jury's expressed confusion over the court's actual knowledge instructions during trial and a juror's post-verdict comments about the confusing instructions.

Trial courts have a well-established duty to respond when a jury expresses difficulty and confusion with instructions on a central issue in the case. *Price v. Glosson Motor Lines, Inc.*, 509 F.2d 1033, 1037-38 (4th Cir. 1975). Indeed, a "helpful response is mandatory" in such circumstances. *Id*. at 1037. As the Supreme Court has explained:

> Discharge of the jury's responsibility for drawing appropriate conclusions from the testimony depended on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria. When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy.

Bollenbach v. United States, 326 U.S. 607, 612-13 (1946). When a court fails to provide this required guidance to a jury, it is prejudicial error that may result in a miscarriage of justice. *See, e.g.*, *Burkett v. U.S. Postal Serv.*, 32 F. Supp. 2d 877, 881 (N.D. W. Va. 1999) (granting motion for new trial where failure to give instruction was prejudicial error and likely caused juror confusion, resulting in miscarriage of justice).

Here, the jury was clearly confused about the court's instructions on "actual knowledge." The court's initial instruction was abstract and tautological, providing only that, "[a] school board has actual knowledge of student-on-student harassment only if an 'appropriate person' employed by the school board has actual knowledge . . . ." J.A. 3315. During deliberations, the jury sent the court three questions seeking guidance on the issue of "actual knowledge"—a central element of Doe's Title IX claim. The last of these questions highlighted the fundamental confusion that produced the jury's unfounded verdict: The jury asked the court whether actual knowledge was "A. A compilation of information about an event. Or . . . B. The conclusion decided based on information provided." J.A. 3315. As a matter of law, the answer is simple: A. The School Board did not need to conclude that Doe had, in fact, been sexually assaulted to have actual knowledge of the *allegation*. *See supra* at 26-33. In short, the School Board could have actual

knowledge of the sexual assault allegations based on "[a] compilation of information about [the] event."

The jury never understood this because the district court did not respond to the jury's question at all, let alone answer "A" or "B." At bottom, the jury was asking what evidence it could consider to determine if the Board had actual knowledge of the alleged sexual harassment: evidence of the compilation of reports school officials had *received* about the harassment or evidence of school officials' *conclusion* from those reports. The court's failure to provide a concrete, clarifying instruction on this central issue is reversible error.

"[A]bstract instructions that are not adjusted to the facts of a particular case may confuse the jury. [I]t has been held plain error for a [trial court] to fail to relate the evidence to the law." *United States v. Holley*, 502 F.2d 273, 276 (4th Cir. 1974); *see also Lachman v. Penn. Greyhound Lines*, 160 F.2d 496, 501 (4th Cir. 1947) (reversing trial court where instruction included facially correct statement of law, but "did not discuss this abstract statement in connection with the facts of the case and the charge as given was misleading and prejudicial to the plaintiff"); *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251 (1940) (failure to instruct jury on important issue is well-recognized error justifying new trial). Here, the district court's error paved the way for the jury's unfounded verdict, resulting in a miscarriage of justice and meriting a new trial.

Although the jury's confusion over the court's actual knowledge instructions was evident upon receipt of the verdict, it was elevated when a juror spoke with local media within hours of the verdict. He was quoted saying he knew he should have voted "yes" after hearing the judge's explanation, at a post-verdict conference, of the evidence the jury could have considered for actual knowledge. J.A. 3391. The juror also stated, "I know for a fact I made the wrong choice." *Id*. He told another newspaper that "[w]hen the jury briefly met with the judge after rendering its verdict . . . he gave a broader interpretation of actual knowledge that suggested the school board only needed to be aware that a sexual harassment complaint had been made." J.A. 3399. "[The juror] says the judge's new explanation left him 'a wreck' and had another juror 'sobbing.'" *Id*. The juror's post-verdict comments underscore what the court should have gleaned from the unfounded verdict and the jury's expressed confusion at trial about the actual knowledge instruction. J.A. 3378, 3390.

The root of the jury's confusion about the evidence it could consider for "actual knowledge" may well have been the significant mismatch between the court's terminology during trial and the court's instructions at the close of evidence. Throughout trial, the court repeatedly instructed the jury about evidence of reports to school officials admissible to show "actual notice" or "notice" to the School Board. *See, e.g.*, J.A. 382:25-383:20. The court also promised the jury an

"instruction that talks about what actual notice the School Board has to receive before it's legally on notice and must act." *Id*. At no point did the court instruct the jury on evidence of reports to school officials admissible to show "actual knowledge." Nor did the court instruct the jury on the connection between "actual notice" and "actual knowledge," despite Doe's repeated requests that the court give such an instruction for consistency and clarity. *See*, *e.g.*, J.A. 378:5-14, 1406:24-1407:7; 1896:5-24 (referring to Kevin O'Malley, Jay E. Grenig, & Hon. William C. Lee, 3 FEDERAL JURY PRACTICE AND INSTRUCTIONS § 177:36 (6th ed. 2011; Supp. Aug. 2018) (instruction relating "actual knowledge" to "actual notice).

The district court's refusal to instruct the jury on "actual notice" was the result of its erroneous belief that Supreme Court and Fourth Circuit precedent prohibited this. J.A. 3346:14-22. However, the very precedent on which the court relied refers to "actual notice" when describing the liability standard's knowledge requirement. *See Gebser*, 524 U.S. at 277 (school district must have "actual notice" of sexual misconduct); *Baynard v. Malone*, 268 F.3d 228, 238 n.8 (4th Cir. 2001) ("the 'actual notice' prong").

There can be no doubt that the jury's finding of no-actual-knowledge was the result of jury confusion over the court's instructions and the court's failure to provide required clarification. In the face of a verdict premised on confusing jury instructions, Doe suffered a miscarriage of justice. The district court had an

obligation to cure that grave wrong by granting Doe's Rule 59 motion. Thus, this Court should reverse the court's denial of her motion and remand for a new trial.

IV. The District Court Abused its Discretion by Failing to Provide Clarifying Instructions Required to Remedy Known Jury Confusion Over the Court's "Actual Knowledge" Instruction.

Separate from appealing the court's denial of her motion for a new trial to cure the miscarriage of justice caused by unremedied juror confusion, Doe directly appeals the court's denial of her requests to clarify its "actual knowledge" instructions. Before the verdict, Doe challenged the court's failure to provide a helpful, concrete response to address the jury's confusion over the "actual knowledge" instruction and the kinds of evidence it could consider to determine whether the School Board had actual knowledge of the sexual assault allegations. *See* J.A. 2469:19-2470:2.

"The test of adequacy of instructions . . . is simply the practical one of whether the instructions construed as a whole, and in light of the whole record, adequately informed the jury of the controlling legal principles without misleading or confusing the jury to the prejudice of the objecting party." *Spell v. McDaniel*, 824 F.2d 1380, 1395 (4th Cir. 1987). The court's actual knowledge instructions failed this test, for the reasons explained in Section III.B. In short, the court knew from the jury's questions at trial that the jury was confused about the court's actual knowledge instructions, but the court nevertheless failed to give the concrete guidance required

to allay that confusion and to ensure the jury understood what evidence it could consider to determine whether the Board knew about the sexual assault allegations. *See supra* at 46-50.

The court's failure to give the jury a concrete, clarifying instruction on the central issue of actual knowledge is reversible error. *See Price*, 509 F.2d at 1037-38; *Holley*, 502 F.2d at 276. This error clearly prejudiced Doe, as it resulted in an unfavorable verdict contrary to the legal definition of "actual knowledge." *See supra* at 36-43. Doe is, therefore, entitled to a new trial. *See Montgomery Ward & Co.*, 311 U.S. at 251 (failure to instruct jury on important issue is well-recognized error justifying new trial); *Lachman*, 160 F.2d at 501 (reversing trial court where instruction failed to address facially correct statement of law in connection with facts of case and, thus, was misleading and prejudicial).

CONCLUSION

For the reasons stated above, this Court should vacate the judgment below, reverse the district court's denial of Appellant Doe's motion for a new trial, and remand for a new trial. Reversal and remand will ensure that a jury reaches a verdict based on clear instructions and that Doe is not prejudiced by the School Board's spoliation of evidence. Alternatively, at a minimum, this Court should remand for reconsideration of Doe's motion for a new trial under the correct legal standards.

REQUEST FOR ORAL ARGUMENT

Pursuant to Fed. R. App. Proc. 34(a)(2), Doe requests the Court allow oral argument. This case presents a compelling factual record with important legal issues. Doe respectfully submits that the Court's decisional process would be significantly aided by oral argument.

Respectfully Submitted,

/s/ Lauren A. Khouri
Linda M. Correia
Lauren A. Khouri
CORREIA & PUTH, LLC
1400 Sixteenth Street, NW, Suite 450
Washington, DC 20036
(202) 602-6500

Adele P. Kimmel
Alexandra Brodsky
PUBLIC JUSTICE, PC
1620 L Street, NW, Suite 630
Washington, DC 20036
(202) 797-8600

John R. Ates
ATES LAW FIRM, PC
100 West Pennsylvania Avenue
Ground Floor, Suite 100-G
Towson, Maryland 21204
(410) 842-0567

Counsel for Appellant

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Dated: February 7, 2020

/s/ Lauren A. Khouri
Counsel for Appellant

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 7th day of February, 2020, I caused this Brief of Appellant and Joint Appendix to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

Stuart A. Raphael
Sona Rewari
HUNTON ANDREWS KURTH, LLP
2200 Pennsylvania Avenue, NW
Washington, DC 20037
(202) 419-2021

Counsel for Appellee

I further certify that on this 7th day of February, 2020, I caused a copy of the Exhibit Volume of the Joint Appendix to be served, via UPS Ground Transportation, upon counsel for the Appellee, at the above address.

/s/ Lauren A. Khouri
Counsel for Appellant