No. 17-56342

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NICOLE RAMSER, AN INDIVIDUAL,
PLAINTIFF-APPELLANT

v.

UNIVERSITY OF SAN DIEGO, A CALIFORNIA CORPORATION,
DEFENDANT-APPELLEE.

APPEAL FROM FINAL ORDERS OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CASE NO. 15-CV-2018-CAB DHB
HONORABLE CATHY ANN BENCIVENGO, PRESIDING

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT NICOLE RAMSER

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The California Women's Law Center, Legal Voice, the Women's Law Project, Gender Justice, and the Southwest Women's Law Center hereby submit the accompanying brief *amici curiae* in support of Appellant Nicole Ramser. This case involves the standard by which district courts should decide summary judgment motions in Title IX cases, particularly in determining whether a school is entitled to summary judgment that it was not deliberately indifferent to a claim of sexual harassment. *Amici* are legal centers who desire to appear and be heard in support of Appellant by filing a single *amicus curiae* brief. *Amici* are uniquely situated to provide assistance to this Court given the nature of its organizations and the work that each organization does. The brief argues that the district court incorrectly failed to consider the totality of the circumstances in granting summary judgment for Appellee University of San Diego ("USD").

Federal Rule of Appellate Procedure 29(a) specifies that a nongovernmental *amicus curiae* "may file a brief only by leave of court or if the brief states that all parties have consented to its filing." FRAP 29(a). Ninth Circuit Rule 29-3 provides "[a] motion for leave to file an *amicus* brief shall state that movant endeavored to obtain the consent of all parties to the filing of the brief before moving the Court for permission to file the proposed brief." 9th Circuit Rule 29-3. The Circuit Advisory Note explains: "FRAP 29(a) permits the timely filing of an *amicus curiae* brief without leave of the Court if all parties consent to the filing of

the brief; obtaining such consent relieves the Court of the need to consider a motion." 9th Cir. Adv. Note to Rule 29-3.

Amici sought and received the consent of all parties to file their *amicus curiae* brief. Specifically, after obtaining the affirmative consent of Appellant Nicole Ramser, *amici* sought consent from USD for the filing of the proposed *amicus curiae* brief. USD's counsel responded: "USD consents to the filing." Therefore, this Court is relieved of the need to consider a motion for leave to file.

April 30, 2018

Respectfully submitted,

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BRIEF OF THE CALIFORNIA WOMEN'S LAW CENTER, LEGAL VOICE, THE WOMEN'S LAW PROJECT, GENDER JUSTICE, AND THE SOUTHWEST WOMEN'S LAW CENTER IN SUPPORT OF PLAINTIFF-APPELLANT NICOLE RAMSER

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CORPORATE DISCLOSURE STATEMENT

The California Women's Law Center is a non-profit organization. It does not have a parent corporation or issue publicly-traded securities.

Legal Voice is a non-profit organization. It does not have a parent corporation or issue publicly-traded securities.

The Women's Law Project is a non-profit organization. It does not have a parent corporation or issue publicly-traded securities.

Gender Justice is a non-profit organization. It does not have a parent corporation or issue publicly-traded securities.

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IDENTITY AND INTERESTS OF *AMICI*

The California Women's Law Center ("CWLC") is a statewide, nonprofit law and policy center dedicated to advancing the civil rights of women and girls. Since its inception in 1989, CWLC has placed a particular emphasis on eradicating all forms of discrimination and violence against women. One of CWLC's core missions is to identify and fight Title IX violations, including advocating on behalf of students who have experienced sexual assault and harassment on their college campuses. CWLC is an expert in Title IX compliance and enforcement and serves as a primary resource center in the state for girls, parents, coaches, school officials, and policymakers.

Legal Voice is a regional non-profit public interest organization that works to advance the legal rights of all women and girls in the Pacific Northwest. Since its founding in 1978 (as the Northwest Women's Law Center), Legal Voice has engaged in impact litigation, legislative advocacy, and education about legal rights. Legal Voice's work includes advancing gender equity in education, including addressing campus sexual violence, bullying, and discrimination in athletics. In addition, Legal Voice has long advocated on behalf of sexual assault survivors before courts and state legislatures. As a regional expert on gender discrimination and gender-based violence, Legal Voice has participated as counsel and as *amicus*

curiae in numerous cases involving gender equity in education throughout the Northwest and the country.

The Women's Law Project ("WLP") is a nonprofit public interest law firm with offices in Philadelphia and Pittsburgh, Pennsylvania. The WLP's mission is to create a more just and equitable society by advancing the rights and status of women throughout their lives. To meet these goals, the WLP engages in high-impact litigation, policy advocacy, public education, and individual counseling. WLP is committed to ending violence against women and children and to safeguarding the legal rights of women and children who experience sexual abuse, including within our schools. WLP provides counseling to victims of violence through its telephone counseling service, engages in public policy advocacy work to improve the response of educational institutions to sexual violence, and serves as counsel to victims of sexual violence in school. It is essential that schools respond appropriately to sexual harassment and that courts hold them accountable under the law.

Gender Justice is a non-profit legal advocacy organization based in the Midwest that eliminates gender barriers through impact litigation, policy advocacy, and education. As part of its mission, Gender Justice helps courts, employers, schools, and the public better understand the root causes of gender discrimination and to eliminate its harmful effects to ensure equality of opportunity for all. The

organization has an interest in advocating for gender equity in education, including preventing and redressing campus sexual violence. As part of its impact litigation program, Gender Justice acts as counsel in cases enforcing Title IX, providing direct representation to individuals facing discrimination in schools and participates as *amicus curiae* in cases that involve gender equity in education

The Southwest Women's Law Center (the "Law Center") is a non-profit policy and advocacy law center that focuses on advancing positive outcomes for women and their families and advocating for equal rights for women and members of the LGTB community. The Law Center worked to help ensure that all individuals are treated with respect regardless of sex or gender. Accordingly, the Law Center is uniquely qualified to comment on, and inform the Court about the impact of its decision in this case.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

On February 9, 2014, Appellant Nicole Ramser, a student at the University of San Diego ("USD") was drugged and raped by a 27-year-old student, Ricky Laielli, in her campus dormitory. [ER9 p.146:16-147:9; ER50 p.836-837]. Ms. Ramser immediately reported the assault to USD's Department of Public Safety ("DPS") officer, Officer Matthew Skillings, and asked that he contact the police. [*Id*.; ER9 p.147:16-24; ER10 p.164:11-24]. Officer Skillings refused to do so and attempted to dissuade Ms. Ramser from calling the police herself. [ER9p.147:16-24]. Instead, following its "Campus Assault Resources Education" or "CARE" policy, USD personnel contacted a volunteer student "advocate," Maggie Wilhelm, who arrived at the hospital and also attempted to dissuade Ms. Ramser from involving the police. [ER21 p.499:1-18; ER9 p. 148:1-5]. In the meantime, three DPS officers visited the crime scene, asked Mr. Laeilli if he and Ms. Ramser had had "consensual sex," failed to take any official statements, failed to preserve any evidence of the drugging, and gave Mr. Laielli a ride back to his residence off campus. [ER16 p.323:4-366:10; ER47; ER45 p.820-22]. In the days and weeks following the assault, USD gave Mr. Laeilli preferential treatment over Ms. Ramser, offering him significant accommodations and freedom to be on USD's campus with Ms. Ramser. [ER15 p.289:11-291:13; ER75 p.1019-120; ER51

p.838; ER18 p.400:6-401:1; ER18 p.413:22-414:11; ER18 p.438:8-441:5; ER27 p.601]

The lower court found that all of these facts, and others discussed in Appellant's brief and below, were either undisputed or construed them in favor of Ms. Ramser. However, in granting summary judgment in favor of USD on the issue of whether the university was "deliberately indifferent" to Ms. Ramser's sexual assault, the court determined that each of USD's failures, *on its own*, did not rise to the requisite level of indifference. This analysis was contrary to the law, as the lower court failed to take into account the record *as a whole* in order to determine whether USD's response was clearly unreasonable. Because Ms. Ramser presented sufficient evidence of USD's deliberate indifference, summary judgment should have been denied.

The lower court's opinion is indicative of a need for guidance from this Court regarding the proper "deliberate indifference" analysis in the Title IX context. As it has done in the Section 1983 context, this Court should find that the "deliberate indifference" question is a fact-intensive inquiry that should generally be left to a jury because it requires consideration of the totality of the circumstances underlying a school's response to a complaint of sexual harassment or assault. Such a holding would further the stated goals of Title IX by encouraging a holistic approach to protecting victims of sexual harassment and

assault, incentivizing universities to implement more stringent sexual assault prevention mechanisms, and encouraging schools to make all options available to students in the aftermath of sexual harassment or assault, including the option to immediately contact the police. Title IX was enacted to protect individuals like Ms. Ramser from discriminatory practices—not to protect public universities from liability for doing the bare minimum to prevent sexual assault on their campuses. Affirming the lower court's defective opinion here would embolden USD and other universities to do just that.

ARGUMENT

I. WHETHER USD WAS "DELIBERATELY INDIFFERENT" TO MS. RAMSER'S SEXUAL ASSAULT IS A FACT-INTENSIVE INQUIRY REQUIRING AN ANALYSIS OF THE TOTALITY OF CIRCUMSTANCES THAT SHOULD GENERALLY BE LEFT TO THE JURY

a. The deliberate indifference question requires a fact-intensive, reasonableness inquiry involving complex state-of-mind issues, and should normally be reserved for a jury.

Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance[.]" 20 U.S.C. § 1681(a). There is no question that student-on-student harassment can rise to the level of "discrimination" for purposes of Title IX. *Davis*

Next Friend LaShonda D. v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 639 (1999). In that context, a school such as USD can be liable for money damages under Title IX if it was "deliberately indifferent" to known acts of harassment; in other words, where the school's response to the harassment was clearly unreasonable in light of the known circumstances. *Id*. at 648-49.

There is no single set of factual circumstances that constitutes "deliberate indifference" in the Title IX context. *See Doe A. v. Green*, 298 F. Supp. 2d 1025, 1035 (D. Nev. 2004). Courts "that have dealt with the question of deliberate indifference . . . address such a broad spectrum of conduct and responses by school districts, and such a diversity of court analyses, that the guidance they offer is, at best, general." *Doe ex rel. Farley, Piazza & Assocs. v. Gladstone Sch. Dist.*, No. 3:10-CV-01172-JE, 2012 WL 2049173, at *9 (D. Or. June 6, 2012). For this reason, district courts have recognized that the deliberate indifference question is particularly unsuitable for resolution at the summary judgment stage. *See Roe ex rel. Callahan v. Gustine Unified Sch. Dist.*, 678 F. Supp. 2d 1008, 1038 (E.D. Cal. 2009) ("the deliberate indifference . . . standard does not lend itself well to a determination by the Court on summary judgment. . . ." (internal quotations omitted)); *Lilah R. ex rel. Elena A. v. Smith*, No. C 11-01860 MEJ, 2011 WL 2976805, at *5 (N.D. Cal. July 22, 2011) (whether a school was deliberately indifferent "is often a question for the jury[] . . . ." (internal quotations omitted)).

While this Court has not specifically opined on the suitability of the deliberate indifference determination for summary judgment in the Title IX context, its observations regarding this same standard in the Section 1983 context are instructive. Specifically, because the Title IX deliberate indifference standard was adopted from Section 1983 jurisprudence, the Supreme Court as well as this Court often turn to those cases in interpreting the standard. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290-91 (1998) (noting that considerations "comparable" to those underlying Title IX violations "led to our adoption of a deliberate indifference standard for claims under § 1983 …"); *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 69 (1992) (looking to Section 1983 in holding that private plaintiffs could seek monetary damages against a school under Title IX for intentional discrimination); *Doe v. Willits Unified Sch. Dist.*, 473 F. App'x 775, 776 (9th Cir. 2012) (relying on Section 1983 case law in discussing the deliberate indifference standard under Title IX).

In the Section 1983 context, "before a local government entity may be held liable for failing to act to preserve a constitutional right, plaintiff must demonstrate that the official policy 'evidences a 'deliberate indifference'' to his constitutional rights." *Oviatt v. Pearce*, 954 F.2d 1470, 1477-78 (9th Cir. 1992) (quoting *City of Canton, Ohio v. Harris*, 489 U.S. 378, 388-89 (1989)). In *Oviatt*, this Court held that "[w]hether a local government entity has displayed a policy of deliberate

indifference is generally a question for the jury." 954 F.2d at 1478; *see also Blair v. City of Pomona*, 223 F.3d 1074, 1079 (9th Cir. 2000) (noting that whether the official practice at issue "amounted to at least deliberate indifference to [the plaintiff's] constitutional rights" is "ordinarily to be determined by a jury …").

Other circuits agree. *See, e.g.*, *Armstrong v. Squadrito*, 152 F.3d 564, 577 (7th Cir. 1998) ("[T]he question of whether the defendants' conduct constituted deliberate indifference is a classic issue for the fact finder," and the question "is a factual mainstay of actions under § 1983" that should not receive consideration as a question of law); *Torraco v. Maloney*, 923 F.2d 231, 234 (1st Cir. 1991) ("A state-of-mind issue such as the existence of deliberate indifference usually presents a jury question.").

Because the determination of deliberate indifference is a fact-intensive inquiry requiring an analysis of the conduct of numerous actors, and often involving determinations of motive and credibility, this Court has not hesitated to reverse summary judgment findings that a government entity was not deliberately indifferent to violation of a plaintiff's constitutional right. *Long v. Cty. of Los Angeles*, 442 F.3d 1178, 1190–91 (9th Cir. 2006) (summary judgment reversed where the plaintiff "presented sufficient probative evidence to create a triable issue regarding whether the County's policy deficiencies constituted deliberate indifference"); *Berry v. Baca*, 379 F.3d 764, 769 (9th Cir. 2004) (reversing

summary judgment because the Court could not "determine whether the County's implementation of its policies is in fact reasonably efficient based solely on the defendants' self-serving declarations"); *Blair*, 223 F.3d at 1079-81 (holding fact issues precluded summary judgment where record showed acts by several members of defendant police department and different interpretations of those members' knowledge and intent); *Grenning v. Miller-Stout*, 739 F.3d 1235, 1239-41 (9th Cir. 2014) (holding that fact issues precluded summary judgment where record showed several possible motives for placing plaintiff into a segregated cell, including motives unreasonable under the circumstances).

Accordingly, the *amici* ask this Court to find that the Title IX deliberate indifference question requires a fact-intensive inquiry that should generally be left for the jury. This holding would not conflict with the Supreme Court's holding in *Davis* that "[i]n an appropriate case, there is no reason why courts, on a motion to dismiss, for summary judgment, or for a directed verdict, could not identify a response as not 'clearly unreasonable' as a matter of law." 526 U.S. at 648. Rather, this Court's holding would recognize that the deliberate indifference standard does not easily lend itself to determination at the summary judgment stage, but would not preclude district courts from granting summary judgment where the school's response, as a whole and considering the totality of the circumstances, was not clearly unreasonable.

b. Courts must consider the totality of circumstances when determining whether a school was deliberately indifferent to harassment.

Long standing principles of summary judgment provide that in determining summary judgment, the court must consider the record as a whole. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) ("Where the record taken *as a whole* could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'") (emphasis added). Where the issue to be decided on summary judgment in a Title IX case is whether a school was deliberately indifferent to harassment, the district court must consider the *entirety* of the school's conduct in response to a harassment complaint, in light of *all* of "the known circumstances." *See Davis*, 526 U.S. at 630 (holding that "funding recipients are deemed 'deliberately indifferent' to acts of student-on-student harassment only where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances.")

While appellate courts have not yet explicitly promulgated a "totality of the circumstances" standard for determining deliberate indifference in the Title IX context, this Court has impliedly done so. *See, e.g., Doe v. Willits Unified Sch. Dist.*, 473 F. App'x at 776 (considering all of the school administrator's actions in determining whether the school's response to a harassment complaint was deliberately indifferent); *Oden v. Northern Marianas College*, 440 F.3d 1085, 1089

(9th Cir. 2006) (holding that district court's grant of summary judgment was proper only after considering the school's response to a sexual harassment complaint in its entirety, including the facts that counselors were assigned to the plaintiff who assisted her in filing a formal complaint; that the professor was instructed not to have any contact with the plaintiff; and that the school held a hearing that resulted in significant discipline for the professor).

These cases demonstrate that courts must consider all of the facts making up the school's response to known harassment as a whole, and then determine whether the plaintiff has put forth sufficient evidence to create a triable issue of fact regarding whether the response was unreasonable. They cannot—as the lower court did here—grant summary judgment for the defendant on the basis that none of the facts, *alone*, establish that the school's response was reasonable.

Courts explicitly require the "totality of the circumstances" approach in other related contexts. In determining whether an employer can be held liable under Title VII for hostile environment sexual harassment, "a court must look to the totality of the circumstances in the particular factual context in which the claim arises." *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1489 (9th Cir. 1993); *Craig v. M&O Agencies, Inc.*, 496 F.3d 1047, 1055 (9th Cir. 2007) ("[o]bjective hostility is determined by examining the totality of the circumstances and whether a reasonable person with the same characteristics as the victim would perceive the

workplace as hostile") (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 20-21 (1993)).[1] In *Pappas v. J.S.B. Holdings, Inc.*, the district court denied summary judgment on a Title VII claim based on this standard, noting that while "none of the incidents underlying the alleged harassment were particularly severe, they do not need to be to defeat summary judgment. . . ." 392 F. Supp. 2d 1095, 1105 (D. Ariz. 2005). The court concluded that "a reasonable juror, viewing the evidence in Pappas' favor, could credit Pappas' general allegation that she received fairly constant abuse for a period of six months and find that the incidents and derogatory comments, *viewed in their totality*, were sufficiently pervasive and that they unreasonably interfered with Pappas' ability to do her job." *Id.* (emphasis added).

Similarly, "the long-established principle of California negligence law [is] that the reasonableness of a peace officer's conduct must be determined in light of the totality of circumstances." *Hayes v. Cty. of San Diego*, 57 Cal. 4th 622, 632 (2013). The totality of circumstances analysis extends to even "preshooting conduct." *Id.*

And in the context of claims brought under the California Fair Employment and Housing Act ("FEHA"), the California Supreme Court has held that in determining whether sexual harassment in the workplace was sufficiently

[1] Courts have consistently recognized that Title VII jurisprudence provides guidance for interpretation of Title IX. *Franklin v. Gwinett Cty. Public Schools*, 503 U.S. 60, 75 (1992); *Oona v. McCaffrey*, 143 F.3d 473, 476 (9th Cir. 1998).

pervasive so as to create an abusive working environment, "a trial court must review and base its summary judgment determination on the totality of evidence in the record, including any relevant discriminatory remarks." *Reid v. Google, Inc.*, 50 Cal. 4th 512, 541 (2010); *Nasser v. AT&T Corp.*, 307 F. App'x 103, 104 (9th Cir. 2009) (recognizing and applying the "totality of the circumstances" standard in FEHA case). While "stray remarks may not have strong probative value when viewed in isolation, they may corroborate direct evidence of discrimination or gain significance in conjunction with other circumstantial evidence." *Reid*, 50 Cal. 4th at 541. The court also noted that a "totality of circumstances analysis successfully winnows out cases 'too weak to raise a rational inference that discrimination occurred.'" *Id*.

For these reasons, in the Title IX context, courts should be required to weigh all of the facts as a whole—rather than each fact in isolation—before making a determination that a school's response to a harassment complaint was clearly unreasonable.

c. Because this question is fact-intensive and normally one for a jury, summary judgment should be denied when a plaintiff presents some evidence of deliberate indifference.

A Title IX claim should be permitted to go to the jury where "the plaintiff advanced some evidence" of deliberate indifference. *Roe ex rel. Callahan*, 678 F. Supp. 2d at 1038; *Davis*, 526 U.S. at 648-49; *J.K. v. Arizona Bd. of Regents*, No.

CV06-916-PHX-MHM, 2008 WL 4446712, at *16 (D. Ariz. Sept. 30, 2008) (finding that where the plaintiff presents some evidence in support of her claim that the school was unreasonable, "then the determination of whether [the College's] response was *clearly* unreasonable in light of the known circumstances should be left to the fact-finder") (emphasis in original).

Well-reasoned trial court decisions within this Circuit have denied summary judgment in light of such evidence, considered along with all of the known circumstances. In *Roe ex rel. Callahan*, the court considered all the known circumstances in totality, rather than each fact in isolation, before denying the school district's summary judgment motion on deliberate indifference where plaintiff alleged that he was assaulted by several upper class teammates while he attended a high school football camp. 678 F. Supp. 2d at 1036–39. These known facts included: (1) that the school coach was aware of the assailants' prior disciplinary problems; (2) that a number of students brought air mattress pumps to the camp; (3) that many of the assault occurred in an area supervised by school coaches; (4) that five assailants openly chased their victims; and (5) that their victims attempted to evade capture and openly struggled. *Id.* Only after stating all of these facts, and considering them as a whole, did the court reach its conclusion to deny summary judgment.

Similarly, in *Doe ex rel. Farley*, the district court denied defendants' motion for summary judgment as to plaintiff's Title IX claim in light of the all the known circumstances, including that defendants were aware that misconduct had escalated over the course of the year, of "repeated misconduct by certain students," and that there was evidence "that the Defendants' responses to reported misconduct were inconsistent with the District's written policy and with the severity of the alleged offenses." 2012 WL 2049173, at *9. The court found that the plaintiff had "produced sufficient evidence from which a trier of fact could conclude that the District was 'deliberately indifferent' to student-on-student racial harassment. . . ." *Id*.

Additionally, in *Douglas v. Stalmach*, the court rejected the defendant's argument that it was not deliberately indifferent because it had "investigated and responded to every report made against [the alleged harasser] and provided verbal coaching, written direction, and levied serious discipline when they learned he was texting a student." No. 213CV02326RFBPAL, 2016 WL 4479538, at *7–8 (D. Nev. Aug. 24, 2016), *on reconsideration in part*, No. 213CV02326RFBPAL, 2017 WL 1100893 (D. Nev. Mar. 21, 2017). The court reasoned that a reasonable juror could find that the defendant "failed to maintain a method of tracking information . . . that would have alerted" the school district to the harasser's history with female students, that the defendant "transferred [the harasser] to other schools within the

district rather than disciplining him," and that the defendant failed to conduct a thorough investigation into complaints against" the harasser. *Id*. Based on these reasonable conclusions, the district court denied defendant's motion for summary judgment as to the plaintiff's Title IX claim. *Id*.

II. SUMMARY JUDGMENT SHOULD HAVE BEEN DENIED BECAUSE MS. RAMSER PRESENTED EVIDENCE THAT USD'S RESPONSE WAS UNREASONABLE IN LIGHT OF KNOWN CIRCUMSTANCES

Here, Ms. Ramser presented overwhelming evidence that USD was deliberately indifferent to her sexual assault which should have precluded summary judgment. Rather than considering the totality of this evidence, the lower court analyzed each fact one at a time, finding each time that each *individual* instance did not rise to the level of deliberate indifference. [ER7 p.97-118]. The court also ignored several pieces of key evidence that should have been considered along with the rest of the factual record. *Id*. Such analysis was contrary to the law.

a. USD's Delay in Contacting the Police and Attempts to Dissuade Ms. Ramser from Involving the Authorities

While the parties disputed the precise time that USD became aware of Ms. Ramser's claim that she had been raped, the lower court viewed the evidence in favor of Ms. Ramser and accepted as true that USD did not contact the police for nearly three hours after being on notice of the assault, despite Ms. Ramser's

requests to do so. [ER7 p.109]. The court then found that "[e]ven if Skillings or Lee could have and should have called the SDPD sooner . . . there is no evidence that their failure to do so was anything other than negligent or careless." *Id.* In its analysis, the lower court assumed that the only wrongdoing involved in the delay was the fact that it potentially violated two Memorandums of Understanding between USD and the San Diego Police Department, which made clear that the police department was the primary reporting and investigating agency for violent crimes, including forcible rape. The court then disposed of this fact on the grounds that a school district's violation of such regulations "does not establish the requisite … deliberate indifference." *Id.* (citing *Gebser*, 524 U.S. at 291-92). By simply dismissing USD's hours-long delay in contacting the police, the lower court failed to factor it into a totality of the circumstances determination.

Even more egregiously, the lower court did not even consider the fact that USD personnel attempted to *dissuade* Ms. Ramser from calling or cooperating with the police. *Id*. Ms. Ramser presented evidence that not one but at least *three* USD personnel discouraged her calling or cooperating with the police: first, Officer Skillings refused to call the police, despite her request in the garage [ER9 p.147:16-24; ER10 p.164:11-24]; second, CARE advocate Wilhelm discouraged Ms. Ramser from calling the police at the hospital [ER9 ¶7]; and third, Assistant Dean Izmirian discouraged her from cooperating with the police during the police

investigation. [ER9 ¶18]. The court acknowledged the majority of these facts, noted that they were "largely undisputed, but to the extent there is a dispute, the Court construes the evidence in favor of Plaintiff." *See, e.g.*, [ER7 p.98]; ("Plaintiff, Laplante, and Goldman all state that Plaintiff asked Skillings to call the police … Plaintiff and Goldman state that Skillings initially responded by attempting to dissuade her from involving the police") [*Id.* at 99]; ("Plaintiff and Goldman state [CARE advocate] Wilhelm attempted to dissuade Plaintiff from contacting the police") [*Id.* at 100].[2] However, the court did not take into account any of these facts in its ultimate determination regarding USD's response to Ms. Ramser's sexual assault.

The lower court dismissed this conduct as merely "careless" or "negligent." However, a reasonable jury could have found that USD's affirmative, purposeful conduct amounted to "an official decision by [USD] not to remedy the violation." *See Davis*, 526 U.S. at 642. Thus, USD's repeated attempts to discourage Ms. Ramser from contacting the police, and the resulting hours-long delay before they were eventually called, should have been considered by the lower court in determining whether USD was deliberately indifferent to Ms. Ramser's report of sexual assault.

[2] The lower court erred by failing to consider Ms. Ramser's evidence that Assistant Dean Izmirian discouraged Ms. Ramser from cooperating with the police. [ER7 p.97-118].

b. USD's Deficient Investigation and Contamination of Evidence

Ms. Ramser presented evidence, accepted by the lower court at the summary judgment stage, that USD personnel visited Ms. Ramser's dorm room shortly after the report and questioned the alleged rapist, Mr. Laielli. [ER48; ER45 pp.821, 823; ER55 p.917:3-918:4; ER46; ER15 pp.284:2-24]. Despite being aware that Ms. Ramser had been raped, the first DPS officer to arrive, Officer Baker, asked Mr. Laielli only what Ms. Ramser had to drink that evening. [ER16 gen'ly p.320:3-366:23; ER47]. Approximately thirty minutes later, two other DPS officers and the Community Director arrived—all of whom were also aware of the sexual assault claim. [ER48; ER45 pp.821, 823; ER55 p.917:3-918:4; ER46]. Officer Skillings asked Mr. Laeilli if he and Ms. Ramser had had consensual sex that night. [ER15 p.289:11-291:13; ER75 p.1019-120]. The officers took no photographs of the living room and kitchen, and failed to preserve any of the alcohol, drinks, or glasses at the scene. The officers also failed to cordon off the scene and take official statements from any of the residents or Mr. Laielli. [ER16 gen'ly p.320:3-366:23; ER47; ER15 p.300:6-23; ER75 pp.1014, 1019-20, 1023]. Then Officer Skillings gave Mr. Laielli a ride back to his residence off campus. [ER15 p.289:11-291:13].

The lower court acknowledged this evidence, but dismissed it, first stating that one of the three DPS officers was unaware of the rape claim "when he first

entered the room." [ER7 p.108] However, the undisputed evidence showed that Officer Baker *was* aware of the rape because (1) Baker knew that Ms. Ramser had been drugged and (2) Baker heard the dispatched requests for the CARE advocate and knew CARE advocates were only called for sexual assault victims. [ER47; ER16 pp. pp.337:9-17, 323:20-324:24, 346-48; ER15 p.284:2-24; ER45]. The lower court then held "[t]hat the officers did not follow police procedures or were otherwise inept or ineffective in looking for evidence related to Plaintiff's assault is at most evidence of negligence or carelessness." [ER7 p.108] (citing *Sanches v. Carrollton-Farmers Branch Indep. Sch. Dist.*, 647 F.3d 156, 168 (5th Cir. 2011) for the point that "[i]neffective responses, however, are not necessarily clearly unreasonable.").

It could be the case that evidence that school personnel did not follow official police procedures at the scene of a sexual assault, *alone*, would not show that the school's response to the complaint was clearly unreasonable. However, that USD personnel failed to preserve any evidence or take statements, that USD personnel asked the alleged assailant if he and Ms. Ramser had had "consensual sex," and that USD personnel drove the alleged assailant home and continued to offer him preferential treatment, *when considered together and along with the other evidence summarized herein and in Ms. Ramser's brief*, would allow a

reasonable jury to find that USD was deliberately indifferent to Ms. Ramser's claim.

c. USD's Preferential Treatment of the Alleged Assailant

The undisputed evidence considered by the trial court shows that USD held a Critical Incident Response Team ("CIRT") meeting on February 10, 2014, the Monday after the assault. [ER18 p.400:16-401:1; ER7 p.101:7-13]. The CIRT issued "no contact" letters to Ms. Ramser, her friends, her roommates, and Mr. Laielli. [ER61 p.941-942; ER18 p.404:7-406:10; ER77 p.1045]. The facially discriminatory nature of the "no contact" letters demonstrates USD's deliberate indifference to Ms. Ramser's claim. Ms. Ramser and her friends were restricted from discussing the incident with each other—a restriction that did not apply to Mr. Laielli. [ER61 p.941-942; ER7 p.101]. Furthermore, three days after issuing the "no contact letters," USD repeatedly reduced Mr. Laielli's restrictions to allow him greater access to campus. *Id.*

The CIRT also designated Karen Briggs, the USD Assistant Vice President and Chief Human Resources Officer, as the Title IX coordinator. [ER18 p.400:6-401:1; ER7 p.101:7-13]. Ms. Briggs met with Mr. Laielli that same day to offer him accommodations but did not meet with Ms. Ramser until February 20, 2014, *over a week later*. [ER51 p.838; ER18 p.413:22-414:11; ER27 p.601; ER18 p.438:8-441:5]. USD argued that Ms. Ramser had indicated to her CARE advocate

that she did not want to talk to the Title IX coordinator and that the CARE advocate told Ms. Briggs this on February 10, 2014 at the CIRT meeting. However, Ms. Ramser disputes this, supported by the fact that the CARE advocate did not indicate on the CARE check list that she had discussed Ms. Ramser's Title IX rights with her at the hospital. [ER22 p.508; ER18 p.389:16-25; ER77 p.1044-1047; ER9¶¶14, 28]. Thus, construing the evidence in favor of Ms. Ramser, USD's CARE advocate failed to advise Ms. Ramser of her Title IX rights and the Title IX coordinator did not contact Ms. Ramser for over a week after she had contacted the alleged assailant.

The undisputed evidence demonstrates that USD consistently offered the alleged assailant preferential treatment: USD officers drove Mr. Laielli home the night of the assault [ER15 p.289:11-291:13; ER75 p.1019-120], offered him accommodations over a week before Ms. Ramser was contacted by the Title IX coordinator [ER51 p.838; ER18 p.413:22-414:11; ER27 p.601; ER18 p.438:8-441:5], and issued him a less restrictive "no contact" letter. [ER18 p.400:6-401:1; ER7p.101:7-13]. Considered in the light of all the known evidence, a reasonable jury could find that USD was deliberately indifferent to Ms. Ramser's claim. Considered in light of all the known facts, it is consistent with a pattern of deliberate indifference to Ms. Ramser's claim.

d. USD's CARE Policy

USD's CARE policy provides that when a student makes a sexual assault allegation, USD must call a CARE advocate—a volunteer USD student—to speak with the victim. [ER15 pp.280:5-282:8, 291:3-13, 262:19-266:24, 288:25-289:10; ER15 pp.263:22-267:7, 288:11-291:13, 284:18-24]. The CARE advocate then indicates to USD whether the victim wishes to involve the police. *Id*. The CARE policy "checklist" does not include any information about calling the police. [ER22 p.508; ER18 p.389:16-25; ER77 p.1044-1047; ER9 ¶¶14, 28]. Here, the court found that USD's Community Director called a CARE advocate, who met with Ms. Ramser at the hospital and "reviewed the CARE process and completed a CARE report." [ER7 p.100]. However, as set forth above, Ms. Ramser's CARE advocate did not advise Ms. Ramser of her Title IX rights as required by law *and* by USD's CARE policy. [ER22 p.508:16-25; ER77 p.1044-1047; ER9 ¶¶14, 28]. Even worse, the CARE advocate attempted to dissuade Ms. Ramser from involving the police. [ER10 ¶7; ER9 ¶7].

Although none of the above facts were disputed by USD, the court failed to consider either (1) the adequacy of the CARE policy, or (2) USD's compliance with the policy in Ms. Ramser's case in determining that USD's response to Ms. Ramser's report of sexual assault was reasonable. The fact that this policy gives USD first access to sexual assault victims, allowing USD to influence the student's

decision to involve the police, as well as the fact that the policy was not even followed in Ms. Ramser's case, should have been considered by the court as part of judging whether USD was deliberately indifferent to Ms. Ramser's report of sexual assault.

e. Numerous Violations of the Dear Colleague Letter

The Dear Colleague Letter ("DCL") was in effect when Ms. Ramser reported the assault to USD in 2014.[3] It provided guidance to schools in addressing sexual assault allegations. The Department of Education's Office of Civil Rights wrote the letter to "explain[] that the requirements of Title IX pertaining to sexual harassment also cover sexual violence, and lay[] out the specific Title IX requirements applicable to sexual violence." Office for Civil Rights, U.S. Dep't of Educ., *Dear Colleague Letter: Sexual Violence*, (2011), https://obamawhitehouse.archives.gov/sites/default/files/dear_colleague_sexual_violence.pdf (last visited Jan. 10, 2018). The DCL is a "significant guidance document" under the Office of Management and Budget's Final Bulletin for Agency Good Guidance Practices. See *id*. at 1 n.1; 72 Fed. Reg. 3432.

[3] The DCL was withdrawn by the United States Department of Education in September 2017. *See* Office for Civil Rights, U.S. Dep't of Educ., *Dear Colleague Letter*, (2017), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf (last visited Feb. 6, 2018).

Ms. Ramser presented evidence demonstrating that USD violated the DCL in the following ways:

1) USD's response was not immediate, effective, prompt, impartial or thorough [ER16 pp. 320:3-366:23; ER47; ER15 p.300:6-23; ER75 pp.1014, 1019-20, 1023; ER77 p.1045-46];

2) USD did not promptly investigate [ER33 p.644:10- 652:23; §D.1-5; ER33 pp.651:3-25, 652:4-6; ER33 p.652:4-23; 651:3-21; ER32 p.637; ER33 p.653:13-657:5; ER33 pp.651:13-21; ER79 p.1060:19-1066; ER80 pp.1074:23-1085:17; ER35 pp.680:18-701:22, 710:16-712:1; ER79 p.1060 {83:10-84:24}];

3) USD did not timely notify the police [ER9 p.147 ¶11-¶14; ER46 p. 825];

4) USD did not inform Ms. Ramser of her right to file a Title IX complaint [ER9¶¶14, 28; ER22 p.508; ER18 p.389:16-25; ER77 p.1044-1047];

5) USD tried to dissuade Ms. Ramser from calling or cooperating with the police three times [ER 63, ER64];

6) USD waited to investigate until after the police investigation was over [ER7 p.21];

7) USD did not give Ms. Ramser and Mr. Laielli similar time and access to information [ER18 p.400:6-401:1; ER7p.101:7-13];

8) USD did not maintain adequate documentation of the Critical Issues Hearing [ER79 pp.1058-60, gen'ly 1060:19-1066:6; ER80 pp.1073, gen'ly 1074:23-1085:17; ER37 pp.759:2-16,753:3-12, 750:2-763:17];[4]

9) USD took 110 days to hold the Critical Issues Hearing [ER9 ¶24; ER73 p.1003; ER44 p.812];

10) USD did not take immediate action to eliminate the hostile environment as evidenced by the fact that they drove Mr. Laielli home, allowed him access to campus and ignored Ms. Ramser's reports that he was following her [ER9 ¶¶24, 25, 30, ER61 p.941-942; ER7 p.101; ER7 p.101:7-13; ER75 p.1019-120];

11) USD did not ensure that Ms. Ramser was informed of her Title IX rights, including her right to file a complaint with the police [ER9 p.147:16-24; ER10 p.164:11-24; ER77 p.1049]; and

12) USD told Ms. Ramser not to use an escort [ER9 ¶20; ER52 pp.849{34:2-12}, 859{74:4-77:11}; ER77 p.1049].

District courts have acknowledged that "[a]dherence to the DCL might be good policy, but failure to adhere, standing alone, does not constitute deliberate indifference." *Moore v. Regents of the Univ. of California*, 2016 WL 4917103, at

[4] An administrative student conduct hearing under USD's Student Code of Rights and Responsibilities.

*3 (N.D. Cal. Sept. 15, 2016). However, considered in the context of all known circumstances, USD's failure to adhere to the DCL—indeed, numerous violations of the DCL—should have been considered as relevant evidence of USD's deliberate indifference.

f. All of the Undisputed Facts, Considered in Totality, Precluded Summary Judgment for USD on Deliberate Indifference

As set forth below, the lower court accepted the bulk of Ms. Ramser's evidence as true, yet dismissed several categories of facts as insufficient *on their own* to characterize USD's response as clearly unreasonable:

	Individual Facts Dismissed by the Lower Court	**Specific Facts that the Lower Court Found Either "Undisputed" or Construed in Favor of Ms. Ramser**
1	USD's delay in contacting the police	• USD delayed nearly three hours before calling the police. [ER46 p. 825].
2	Attempts to dissuade Ms. Ramser from calling the police	• Officer Skillings refused to call the police despite Ms. Ramser's request in the garage. [ER9 p.147:16-24; ER10 p.164:11-24; ER77 p.1049]. • CARE advocate discouraged Ms. Ramser from calling the police at the hospital (in compliance with CARE policy). [ER10 ¶7; ER9 ¶7].

		• Assistant Dean Izmirian discouraged Ms. Ramser from cooperating with the police. [ER9 ¶18; ER28 p.604:19-608:17].
3	Deficient investigation and contamination of evidence	• USD personnel failed to preserve any evidence or cordon off the crime scene. [ER16 p.320:3-366:23; ER47; ER15 p.300:6-23]. • USD personnel did not take any witness statements. [ER16 p. 353-54; ER47]. • USD personnel asked the alleged assailant if he and Ms. Ramser had "consensual sex." [ER15 p.289:11-291:13; ER75 p.1019-120].
4	USD's Preferential Treatment of the Alleged Assailant	• USD personnel drove Mr. Laielli home the night of the assault. [ER15 p.289:11-291:13; ER75 p.1019-120]. • Title IX coordinator met with Mr. Laielli and offered him accommodations over a week before Ms. Ramser was contacted by the Title IX coordinator. [ER51 p.838; ER18 pp.413:22-414:11; ER18 p.438:8-441:5].

		• USD issued him a less restricted "no contact" letter. [ER61 p.941-942; ER18 p.404:7-406:10].
5	CARE Policy	• The CARE policy does not include information on calling the police [ER22 p.508-509; ER18 p.389:16-25; ER9 ¶¶14, 28]. • USD did not adhere to the CARE policy because it failed to advise Ms. Ramser of her Title IX rights. [ER22 p.508-509; ER18 p.389:16-25; ER9 ¶¶14, 28].
6	Violations of the "Dear Colleague Letter"	• USD failed to respond immediately, effectively, promptly, impartially or thoroughly as required by the DCL. Among other things, it failed to contact authorities on time and to inform Ms. Ramser of her right to file a Title IX complaint. [ER9¶¶14, 28; ER22 p.508; ER18 p.389:16-25; ER77 p.1044-1047]. USD also dissuaded Ms. Ramser on three occasions from contacting or cooperating with

		authorities, and it gave preferential treatment to Ms. Ramser's assailant. [ER9 ¶¶11, 14, 15, 24; ER72 p.1003; ER44 p.812; ER15 p.289:11-291:13; ER75 p.1019-120; ER51 p.838; ER18 p.400:6-401:1; ER18 p.413:22-414:11].

These facts, considered as a whole and under the totality of the circumstances, precluded the district court from granting summary judgment in favor of USD. *See, e.g.*, *Doe ex rel. Doe v. Derby Bd. of Educ.*, 451 F. Supp. 2d 438, 447–48 (D. Conn. 2006) (summary judgment denied where board delayed a month or more to discipline assailant, assailant was allowed to continue attending classes on campus with plaintiff, board did not consider expulsion, and school did not reach out to plaintiff to offer her protection from encounters with assailant); *Doe v. Forest Hills Sch. Dist.*, 2015 WL 9906260, at *10 (W.D. Mich. Mar. 31, 2015) (summary judgment denied where school's investigation was delayed and limited in scope based on evidence that the school did not suspend the assailant until after he plead guilty to state charges, delayed its investigation and did not close the matter until nearly a year after the assault, and failed to interview plaintiff's friends); *Doe v. Autauga Cty. Bd. of Educ.*, 2007 WL 3287347, at *6 (M.D. Ala. Nov. 5, 2007) (summary judgment denied where there was evidence that the school "muted" its response to "minimize negative publicity").

III. UPHOLDING THE DISTRICT COURT'S RULING WOULD FAIL TO DETER CONDUCT TITLE IX WAS DESIGNED TO PREVENT

Congress passed Title IX to eliminate sex-based discrimination in education and effectively protect victims of discrimination, and the Supreme Court has instructed that it should receive "a sweep as broad as its language." *Board of Educ. v. Bell*, 456 U.S. 512, 521 (1982). In enacting Title IX, Congress specifically recognized the need to combat "the continuation of corrosive and unjustified discrimination against women in the American educational system." 118 Cong. Rec. 5803 (1972) (remarks of Senator Bayh). Today, 46 years after Title IX was passed, the statute plays a pivotal role in ensuring that educational institutions prevent and remedy sexual harassment and sexual assault of students. Critical to this role is ensuring that students are encouraged, rather than discouraged, from reporting incidents of sexual harassment and violence.

"Title IX provides that no person 'shall, on the basis of sex . . . be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.'" *Oden v. N. Marianas College*, 440 F.3d at 1088 (quoting 20 U.S.C. § 1681(a)). "Congress enacted Title IX in 1972 with two principal objectives in mind: to avoid the use of federal resources to support discriminatory practices and to provide individual citizens effective protection against those practices." *Gebser*, 524 U.S. at 286 (1998) (internal

quotation marks and brackets omitted). "[W]hereas Title VII aims centrally to compensate victims of discrimination, Title IX focuses more on 'protecting' individuals from discriminatory practices carried out by recipients of federal funds." *Id.* at 287.

Requiring a court to consider the totality of circumstances under the deliberate indifference inquiry furthers Title IX's goals. It deters universities from focusing on only isolated, individual acts to protect the victim and encourages them to take a holistic, victim-centered approach. This approach is more likely to bring about systemic, sustainable change within the university, which in turn will do more to eliminate sex-based discrimination and protect victims. Indeed, the Centers for Disease Control Prevention advocates a holistic or comprehensive approach as the most effective way to prevent sexual violence on college campuses. *See* Jenny Dills et al., *Sexual Violence on Campus: Strategies for Prevention*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Nov. 2016), https://www.cdc.gov/violenceprevention/pdf/campussvprevention.pdf.

Requiring a court to normally reserve the deliberate indifference inquiry for a jury also furthers Title IX's goals. First, the requirement makes it more likely that a university will face a costly jury trial and thus incentivizes universities to implement more stringent sexual assault correction and prevention mechanisms, and work harder to root out discrimination. Second, the requirement encourages

courts to take extra care when engaging in the deliberate indifference inquiries by calling for the court to recognize the complex, fact-intensive issues at play. This, in turn, safeguards victims' procedural and substantive rights under Title IX.

Finally, if the district court's ruling is permitted to stand, schools will not be encouraged to inform victims of sexual assault of all of their available options, including the option to immediately contact the police. Such delays in contacting the police, when requested by the victim, are incredibly significant given that speaking to the police immediately after a sexual assault ensures that the victim can, among other things, submit to a sexual assault forensic exam to preserve DNA evidence. The DNA may be kept in a national database, making it more likely that the perpetrator can be linked to a future assault or crime. *See* Rape, Abuse & Incest National Network, *What is a Rape Kit?*, https://rainn.org/articles/rape-kit (last visited February 5, 2018). As set forth above, here the undisputed facts in the record showed that USD waited hours before contacting the police, despite Ms. Ramser's requests that they do so, actively discouraged Ms. Ramser from contacting the police, and followed a policy under which the first responder to a sexual assault victim is a USD representative. That USD was able to obtain summary judgment despite the evidentiary record will likely have the effect of discouraging other schools from contacting the criminal authorities in response to a

complaint of sexual assault, turning the aim of Title IX—to protect individuals from sexual harassment and assault—on its head.

This, in turn, could lead to the under-reporting of sexual harassment and sexual assault on college campuses. Under-reporting of sexual assaults to the police is already a national issue, with one government study noting that *65%* of sexual assaults are not reported to police. U.S. Department of Justice, Bureau of Justice Statistics, *Victimizations Not Reported to Police, 2006-2010*, https://www.bjs.gov/content/pub/pdf/vnrp0610.pdf (last visited February 5, 2018). Reporting sexual assaults also increases the quality and effectiveness of a university's sexual assault prevention mechanisms. *See* Western Michigan University, *Reporting a Sexual Assault*, https://wmich.edu/healthcenter/healthpromotion/prevention/reporting (last visited February 5, 2018). And, as recent events have demonstrated, victims of sexual harassment and sexual assault are more likely to come forward when other victims do not remain in the shadows. Accurate reporting of sexual harassment and assault on college campuses is crucial to harassment and assault.

CONCLUSION

For the reasons stated in this brief and in support of the reasons offered in Appellant's opening brief, CWLC, Legal Voice, WLP, Gender Justice, and the

Southwest Women's Law Center respectfully request that the judgment of the district court be reversed.

April 30, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7), the undersigned counsel for the CWLC, Legal Voice, WLP, Gender Justice, and the Southwest Women's Law Center certifies that this brief:

(i) complies with the type-volume limitation of Rule 29(d) because it contains 6982 words, including footnotes and excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2013 and is set in Times New Roman font in a size equivalent to 14 points or larger.

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CERTIFICATE OF SERVICE

Counsel for *amici curiae* certify that they electronically filed the foregoing brief with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit through the CM/ECF system on April 30, 2018, which will automatically serve all parties.

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