# SUPREME COURT OF THE UNITED STATES

No. 96–1866

ALIDA STAR GEBSER AND ALIDA JEAN MCCULLOUGH, PETITIONERS *v.* LAGO VISTA INDEPENDENT SCHOOL DISTRICT

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

[June 22, 1998]

JUSTICE STEVENS, with whom JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

The question that the petition for certiorari asks us to address is whether the Lago Vista Independent School District (respondent) is liable in damages for a violation of Title IX of the Education Amendments of 1972, 20 U. S. C. §1681 *et seq*. (Title IX). The Court provides us with a negative answer to that question because respondent did not have actual notice of, and was not deliberately indifferent to, the odious misconduct of one of its teachers. As a basis for its decision, the majority relies heavily on the notion that because the private cause of action under Title IX is "judicially implied," the Court has "a measure of latitude" to use its own judgment in shaping a remedial scheme. See *ante*, at 8. This assertion of lawmaking authority is not faithful either to our precedents or to our duty to interpret, rather than to revise, congressional commands. Moreover, the majority's policy judgment about the appropriate remedy in this case thwarts the purposes of Title IX.

I

It is important to emphasize that in *Cannon* v. *Univer-*

*sity of Chicago,* 441 U. S. 677 (1979), the Court confronted a question of statutory construction. The decision represented our considered judgment about the intent of the Congress that enacted Title IX in 1972. After noting that Title IX had been patterned after Title VI of the Civil Rights Act of 1964, which had been interpreted to include a private right of action, we concluded that Congress intended to authorize the same private enforcement of Title IX. 441 U. S., at 694–698; see also *id.*, at 703 ("We have no doubt that Congress intended to create Title IX remedies comparable to those available under Title VI and that it understood Title VI as authorizing an implied private cause of action for victims of the prohibited discrimination").[1] As long as the intent of Congress is clear, an implicit command has the same legal force as one that is explicit. The fact that a statute does not authorize a particular remedy "in so many words is no more significant

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[1]We explained: "In 1972 when Title IX was enacted, the critical language in Title VI had already been construed as creating a private remedy. . . . It is always appropriate to assume that our elected representatives, like other citizens, know the law; in this case, because of their repeated references to Title VI and its modes of enforcement, we are especially justified in presuming both that those representatives were aware of the prior interpretation of Title VI and that that interpretation reflects their intent with respect to Title IX." 441 U. S., at 696–698. We also observed that "during the period between the enactment of Title VI in 1964 and the enactment of Title IX in 1972, this Court had consistently found implied remedies– often in cases much less clear than this. It was *after* 1972 that this Court decided *Cort* v. *Ash* [422 U. S. 66 (1975)] and the other cases cited by the Court of Appeals in support of its strict construction of the remedial aspect of the statute. We, of course, adhere to the strict approach followed in our recent cases, but our evaluation of congressional action in 1972 must take into account its contemporary legal contest. In sum, it is not only appropriate but also realistic to presume that Congress was thoroughly familiar with these unusually important precedents from this and other federal courts and that it expected its enactment to be interpreted in conformity with them." *Id.*, at 698–699 (footnotes omitted).

than the fact that it does not in terms authorize execution to issue on a judgment recovered under [the statute]." *Deckert* v. *Independence Shares Corp.*, 311 U. S. 282, 288 (1940).[2]

In *Franklin* v. *Gwinnett County Public Schools*, 503 U. S. 60 (1992), we unanimously concluded that Title IX authorized a high school student who had been sexually harassed by a sports coach/teacher to recover damages from the school district. That conclusion was supported by two considerations. In his opinion for the Court, Justice White first relied on the presumption that Congress intends to authorize "all appropriate remedies" unless it expressly indicates otherwise. *Id.*, at 66.[3] He then noted that two amendments[4] to Title IX enacted after the deci-

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[2]In *Consolidated Rail Corporation* v. *Darrone*, 465 U. S. 624 (1984), we unanimously concluded that comparable language in the statute prohibiting discrimination against the handicapped by federal grant recipients authorized a private right of action for the recovery of back-pay. That decision, like *Cannon*, relied on the fact that the comparable language in Title VI had authorized a private remedy. See *id.*, at 626, 635.

[3]"In *Marbury* v. *Madison*, Cranch 137, 163 (1803), for example, Chief Justice Marshall observed that our Government 'has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.' This principle originated in the English common law, and Blackstone described it as 'a general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded.' 3 W. Blackstone, Commentaries 23 (1783). See also *Ashby* v. *White*, 1 Salk. 19, 21, 87 Eng. Rep. 808, 816 (Q. B. 1702) ('If a statute gives a right, the common law will give a remedy to maintain that right . . .')." *Franklin* v. *Gwinnett County Public Schools*, 503 U. S., at 66–67; see also *id.*, at 67 ("'A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied, according to a doctrine of the common law'") (quoting *Texas & Pacific R. Co.* v. *Rigsby*, 241 U. S. 33, 39 (1916)).

[4]See Rehabilitation Act Amendments of 1986, 100 Stat. 1845, 42

sion in *Cannon* had validated *Cannon*'s holding and supported the conclusion that "Congress did not intend to limit the remedies available in a suit brought under Title IX." 503 U. S., at 72. JUSTICE SCALIA, concurring in the judgment, agreed that Congress' amendment of Title IX to eliminate the States' Eleventh Amendment immunity, see 42 U. S. C. §2000d–7(a)(1), must be read "not only 'as a validation of *Cannon*'s holding,' *ante*, at 72, but also as an implicit acknowledgment that damages are available." 503 U. S., at 78.

Because these constructions of the statute have been accepted by Congress and are unchallenged here, they have the same legal effect as if the private cause of action seeking damages had been explicitly, rather than implicitly, authorized by Congress. We should therefore seek guidance from the text of the statute and settled legal principles rather than from our views about sound policy.

II

We have already noted that the text of Title IX should be accorded "'a sweep as broad as its language.'" *North Haven Bd. of Ed.* v. *Bell*, 456 U. S. 512, 521 (1982) (quoting *United States* v. *Price*, 383 U. S. 787 (1966)). That sweep is broad indeed. "No person . . . shall, on the basis of sex, . . . be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." 20 U. S. C. §1681(a). As Judge Rovner has correctly observed, the use of passive verbs in Title IX, focusing on the victim of the discrimination rather than the particular wrongdoer, gives this statute broader coverage than Title VII. See *Smith* v. *Metropolitan School Dist. Perry Twp.*, 128 F. 3d 1014, 1047 (CA7 1997) (dis-

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U. S. C. §2000d–7 (abrogating the States' Eleventh Amendment immunity); Civil Rights Restoration Act of 1987, 102 Stat. 28, 20 U. S. C. §1687 (defining "program or activity" broadly).

senting opinion).[5] Moreover, because respondent assumed the statutory duty set out in Title IX as part of its consideration for the receipt of federal funds, that duty constitutes an affirmative undertaking that is more significant than a mere promise to obey the law.

Both of these considerations are reflected in our decision in *Franklin*. Explaining why Title IX is violated when a teacher sexually abuses a student, we wrote:

> "Unquestionably, Title IX placed on the Gwinnett County Public Schools the duty not to discriminate on the basis of sex, and 'when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor "discriminate[s]" on the basis of sex.' *Meritor Sav. Bank, FSB* v. *Vinson*, 477 U. S. 57, 64 (1986). We believe the same rule should apply when a teacher sexually harasses and abuses a student. *Congress surely did not intend for federal moneys to be expended to support the intentional actions it sought by statute to proscribe.*" 503 U. S., at 75 (emphasis added).

*Franklin* therefore stands for the proposition that sexual

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[5] "Unlike Title VII . . . , which focuses on the discriminator, making it unlawful for an employer to engage in certain prohibited practices (*see* 42 U. S. C. §2000e–2(a)), Title IX is drafted from the perspective of the person discriminated against. That statute names no actor, but using passive verbs, focuses on the setting in which the discrimination occurred. In effect, the statute asks but a single question– whether an individual was subjected to discrimination *under* a covered program or activity. . . . And because Title IX as drafted includes no actor at all, it necessarily follows that the statute also would not reference 'agents' of that non-existent actor." *Smith* v. *Metropolitan School Dist. Perry Twp.*, 128 F. 3d 1014, 1047 (CA7 1997) (Rovner, J., dissenting); see also *Cannon* v. *University of Chicago*, 441 U. S. 677, 691–693 (1977) (recognizing that Congress drafted Title IX "with an unmistakable focus on the benefited class," and did not "writ[e] it simply as a ban on discriminatory conduct by recipients of federal funds or as a prohibition against the disbursement of public funds to educational institutions engaged in discriminatory practices").

harassment of a student by her teacher violates the duty– assumed by the school district in exchange for federal funds– not to discriminate on the basis of sex, and that a student may recover damages from a school district for such a violation.

Although the opinion the Court announces today is not entirely clear, it does not purport to overrule *Franklin*. See *ante*, at 5 ("*Franklin* thereby establishes that a school district can be held liable in damages in cases involving a teacher's sexual harassment of a student"). Moreover, I do not understand the Court to question the conclusion that an intentional violation of Title IX, of the type we recognized in *Franklin*,[6] has been alleged in this case.[7] During her freshman and sophomore years of high school, petitioner Alida Star Gebser was repeatedly subjected to sexual abuse by her teacher, Frank Waldrop, whom she had met in the eighth grade when she joined his high school

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[6] As the Court notes, the student in *Franklin*– unlike the student in this case– alleged that school administrators knew about the harassment but failed to act. See *ante*, at 5; *Franklin* v. *Gwinnett County Schools*, 503 U. S. 60, 64 (1984). The *Franklin* opinion does not suggest, however, that that allegation was relevant to its holding that the school district could be liable in damages for an intentional violation of Title IX as a result of teacher-student harassment.

[7] Cf. Brief for Respondent 9 ("It is important to bear in mind that the question in this case is not whether school districts are somehow 'responsible' for violations of Title IX and for failure to comply with administrative procedures. The issue is in what circumstances a school district may be compelled to answer *in damages* for a violation of Title IX or its implementing regulations"); *id.*, at 13 ("In sum, the manner in which Title IX is phrased simply determines that a violation of the statute may occur whenever a person is discriminated against on the basis of sex, regardless of the school district's knowledge of the discrimination. But nothing in the language of the statute indicates that a school district must respond in damages for every such violation, regardless of its own knowledge or culpability"). But see *id.*, at 19 ("[T]here is no evidence that Lago Vista committed an intentional violation of Title IX").

book discussion group. Waldrop's conduct was surely intentional and it occurred during, and as a part of, a curriculum activity in which he wielded authority over Gebser that had been delegated to him by respondent. Moreover, it is undisputed that the activity was subsidized, in part, with federal moneys.

The Court nevertheless holds that the law does not provide a damages remedy for the Title IX violation alleged in this case because no official of the school district with "authority to institute corrective measures on the district's behalf" had actual notice of Waldrop's misconduct. *Ante*, at 1. That holding is at odds with settled principles of agency law,[8] under which the district is responsible for Waldrop's misconduct because "he was aided in accomplishing the tort by the existence of the agency relation." Restatement (Second) of Agency, §219(2)(d) (1957).[9] This case presents a paradigmatic example of a tort that was made possible, that was effected, and that was repeated

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[8] The Court's holding is also questionable as a factual matter. Waldrop himself surely had ample authority to maintain order in the classes that he conducted. Indeed, that is a routine part of every teacher's responsibilities. If petitioner had been the victim of sexually harassing conduct by other students during those classes, surely the teacher would have had ample authority to take corrective measures. The fact that he did not prevent his own harassment of petitioner is the consequence of his lack of will, not his lack of authority.

[9] The Court suggests that agency principles are inapplicable to this case because Title IX does not expressly refer to an "agent," as Title VII does. See *ante*, at 7 (citing 42 U. S. C. §2000e(b)). Title IX's focus on the protected class rather than the fund recipient fully explains the statute's failure to mention "agents" of the recipient, however. See n. 5, *supra*. Moreover, in *Meritor Savings Bank, FSB* v. *Vinson*, 477 U. S. 57 (1986), we viewed Title VII's reference to an "agent" as a *limitation* on the liability of the employer: "Congress' decision to define 'employer' to include any 'agent' of an employer, 42 U. S. C. §2000e(b), surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible." *Id.*, at 72 (citations omitted).

over a prolonged period because of the powerful influence that Waldrop had over Gebser by reason of the authority that his employer, the school district, had delegated to him. As a secondary school teacher, Waldrop exercised even greater authority and control over his students than employers and supervisors exercise over their employees. His gross misuse of that authority allowed him to abuse his young student's trust.[10]

Reliance on the principle set out in §219(2)(b) of the Restatement comports with the relevant agency's interpretation of Title IX. The United States Department of Education, through its Office for Civil Rights, recently issued a policy "Guidance" stating that a school district is liable under Title IX if one of its teachers "was aided in carrying out the sexual harassment of students by his or her position of authority with the institution." Dept. of Ed., Office for Civil Rights, Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12034, 12039 (1997). As the agency charged with administering and enforcing Title IX, see 20 U. S. C. §1682, the Department of Education has a special interest in ensuring that federal funds are not used in contravention of Title IX's mandate. It is

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[10] For example, Waldrop first sexually abused Gebser when he visited her house on the pretense of giving her a book that she needed for a school project. See App. 54a (deposition of Star Gebser). Gebser, then a high school freshman, stated that she "was terrified": "He was the main teacher at the school with whom I had discussions, and I didn't know what to do." *Id.*, at 56a. Gebser was the only student to attend Waldrop's summer advanced placement course, and the two often had sexual intercourse during the time allotted for the class. See *id.*, at 60a. Gebser stated that she declined to report the sexual relationship because "if I was to blow the whistle on that, then I wouldn't be able to have this person as a teacher anymore." *Id.*, at 62a. She also stated that Waldrop "was the person in Lago administration . . . who I most trusted, and he was the one that I would have been making the complaint against." *Id.*, at. 63a.

therefore significant that the Department's interpretation of the statute wholly supports the conclusion that respondent is liable in damages for Waldrop's sexual abuse of his student, which was made possible only by Waldrop's affirmative misuse of his authority as her teacher.

The reason why the common law imposes liability on the principal in such circumstances is the same as the reason why Congress included the prohibition against discrimination on the basis of sex in Title IX: to induce school boards to adopt and enforce practices that will minimize the danger that vulnerable students will be exposed to such odious behavior. The rule that the Court has crafted creates the opposite incentive. As long as school boards can insulate themselves from knowledge about this sort of conduct, they can claim immunity from damages liability.[11] Indeed, the rule that the Court adopts would preclude a damages remedy even if every teacher at the school knew about the harassment but did not have "authority to institute corrective measures on the district's behalf." *Ante*, at 1. It is not my function to determine whether this newly fashioned rule is wiser than the established common-law rule. It is proper, however, to suggest that the Court bears the burden of justifying its rather dramatic departure from settled law, and to explain why its opinion fails to shoulder that burden.

III

The Court advances several reasons why it would "frus-

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[11] The Court concludes that its holding "does not affect any right of recovery that an individual may have against a school district as a matter of state law or against the teacher in his individual capacity under state law or under 42 U. S. C. §1983." *Ante*, at 17. In this case, of course, the District Court denied petitioner's §1983 claim on summary judgment, and it is undisputed that the Texas Tort Claims Act, Tex. Civ. Prac. & Rem. Code Ann. §101.051 (1997), immunizes school districts from tort liability in cases like this one.

trate the purposes" of Title IX to allow recovery against a school district that does not have actual notice of a teacher's sexual harassment of a student. *Ante*, at 9. As the Court acknowledges, however, the two principal purposes that motivated the enactment of Title IX were: (1) "'to avoid the use of federal resources to support discriminatory practices'"; and (2) "'to provide individual citizens effective protection against those practices.'" *Ante*, at 10 (quoting *Cannon*, 441 U. S., at 704). It seems quite obvious that both of those purposes would be served– not frustrated– by providing a damages remedy in a case of this kind. To the extent that the Court's reasons for its policy choice have any merit, they suggest that no damages should ever be awarded in a Title IX case– in other words, that our unanimous holding in *Franklin* should be repudiated.

First, the Court observes that at the time Title IX was enacted, "the principal civil rights statutes containing an express right of action did not provide for recovery of monetary damages at all." *Ante*, at 10. *Franklin*, however, forecloses this reevaluation of legislative intent; in that case, we "evaluate[d] the state of the law when the Legislature passed Title IX," 503 U. S., at 71, and concluded that "the same contextual approach used to justify an implied right of action more than amply demonstrates the lack of any legislative intent to abandon the traditional presumption in favor of all available remedies," *id.*, at 72. The Court also suggests that the fact that Congress has imposed a ceiling on the amount of damages that may be recovered in Title VII cases, see 42 U. S. C. §1981a, is somehow relevant to the question whether any damages at all may be awarded in a Title IX case. *Ante*, at 10. The short answer to this creative argument is that the Title VII ceiling does not have any bearing on when damages may be recovered from a defendant in a Title IX case. Moreover, this case does not present any issue concerning

the amount of any possible damages award.[12]

Second, the Court suggests that the school district did not have fair notice when it accepted federal funding that it might be held liable "for a monetary award'" under Title IX. *Ante*, at 11 (quoting *Franklin*, 503 U. S., at 74). The Court cannot mean, however, that respondent was not on notice that sexual harassment of a student by a teacher constitutes an "intentional" violation of Title IX for which damages are available, because we so held shortly before Waldrop began abusing Gebser. See *id.*, at 74–75. Given the fact that our holding in *Franklin* was unanimous, it is not unreasonable to assume that it could have been foreseen by counsel for the recipients of Title IX funds. Moreover, the nondiscrimination requirement set out in Title IX is clear, and this Court held that sexual harassment constitutes intentional sex discrimination long before the sexual abuse in this case began. See *Meritor,* 477 U. S., at 64. Normally, of course, we presume that the citizen has knowledge of the law.

The majority nevertheless takes the position that a school district that accepts federal funds under Title IX should not be held liable in damages for an intentional violation of that statute if the district itself "was unaware of the discrimination." *Ante*, at 12. The Court reasons that because administrative proceedings to terminate funding cannot be commenced until after the grant recipi-

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[12] The lower courts are not powerless to control the size of damages verdicts. See n. 18, *infra*. Courts retain the power to order a remittitur, for example. In addition, the size of a jury verdict presumably would depend on several factors, at least some of which a school district could control. For example, one important factor might be whether the district had adopted and disseminated an effective policy on sexual harassment. See also 1997 policy Guidance, 62 Fed. Reg. 12048, n. 35 ("[A] school's immediate and appropriate remedial actions are relevant in determining the nature and extent of the damages suffered by a plaintiff").

ent has received notice of its noncompliance and the agency determines that voluntary compliance is not possible, see 20 U. S. C. §1682, there should be no damages liability unless the grant recipient has actual notice of the violation (and thus an opportunity to end the harassment). See *ante*, at 12–14.

The fact that Congress has specified a particular administrative procedure to be followed when a subsidy is to be terminated, however, does not illuminate the question of what the victim of discrimination on the basis of sex must prove in order to recover damages in an implied private right of action. Indeed, in *Franklin*, 503 U. S., at 64, n. 3, we noted that the Department of Education's Office of Civil Rights had declined to terminate federal funding of the school district at issue– despite its finding that a Title IX violation had occurred– because "the district had come into compliance with Title IX" after the harassment at issue. See *ante*, at 13. That fact did not affect the Court's analysis, much less persuade the Court that a damages remedy was unavailable. Cf. *Cannon*, 441 U. S., at 711 ("The fact that other provisions of a complex statutory scheme create express remedies has not been accepted as a sufficient reason for refusing to imply an otherwise appropriate remedy under a separate section").

The majority's inappropriate reliance on Title IX's administrative enforcement scheme to limit the availability of a damages remedy leads the Court to require not only actual knowledge on the part of "an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf," but also that official's "refus[al] to take action," or "deliberate indifference" toward the harassment. *Ante*, at 14–15.[13] Presumably, few Title IX plaintiffs who have

[13]The only decisions the Court cites to support its adoption of such a stringent standard are cases arising under a quite different statute, 42

been victims of intentional discrimination will be able to recover damages under this exceedingly high standard. The Court fails to recognize that its holding will virtually "render inutile causes of action authorized by Congress through a decision that *no* remedy is available." *Franklin*, 503 U. S., at 74.

IV

We are not presented with any question concerning the affirmative defenses that might eliminate or mitigate the recovery of damages for a Title IX violation. It has been argued, for example, that a school district that has adopted and vigorously enforced a policy that is designed to prevent sexual harassment and redress the harms that such conduct may produce should be exonerated from damages liability.[14] The Secretary of Education has promulgated regulations directing grant recipients to adopt such policies and disseminate them to students.[15] A rule providing an affirmative defense for districts that adopt and publish such policies pursuant to the regulations would not likely be helpful to respondent, however, because it is not at all clear whether respondent adopted any such policy,[16] and there is no evidence that such a

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U. S. C. §1983. See *ante*, at 15.

[14] See Brief for National Education Association as *Amicus Curiae* 15 (proposing affirmative defense "that the entity had adopted and has implemented an effective prevention and compliance program").

[15] The school district must "adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints" of discrimination. 34 CFR §106.8(b) (1997). The district also must inform students and their parents of Title IX's antidiscrimination requirement. §106.9.

[16] Factual questions remain with respect to whether respondent had an adequate antidiscrimination policy. Compare App. 44a–45a (affidavit of superintendent/Title IX coordinator Virginia Collier) (stating that the district had a policy) with Plaintiffs' Motion for Partial Summary Judgment, Record 332; *id.*, Exh. 2 (Collier deposition), at 42, 44 (stating that the district had no formal policy).

policy was made available to students, as required by regulation.[17]

A theme that seems to underlie the Court's opinion is a concern that holding a school district liable in damages might deprive it of the benefit of the federal subsidy– that the damages remedy is somehow more onerous than a possible termination of the federal grant. See, *e.g.*, *ante*, at 14 (stating that "an award of damages in a particular case might well exceed a recipient's level of federal funding"). It is possible, of course, that in some cases the recoverable damages, in either a Title IX action or a state-law tort action, would exceed the amount of a federal grant.[18] That is surely not relevant to the question whether the school district or the injured student should bear the risk of harm– a risk against which the district, but not the student, can insure. It is not clear to me why the well-settled rules of law that impose responsibility on the principal for the misconduct of its agents should not apply in this case. As a matter of policy, the Court ranks protection of the school district's purse above the protec-

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[17] The district's superintendent stated that she did not remember if any handbook alerting students to grievance procedures was disseminated to students. App. 72a–73a (Collier deposition). Moreover, Gebser herself stated: "If I had known at the beginning what I was supposed to do when a teacher starts making sexual advances towards me, I probably would have reported it. I was bewildered and terrified and I had no idea where to go from where I was." *Id.*, at 64a.

[18] *Amici curiae* National School Boards Association and the New Jersey School Boards Association point to a $1.4 million verdict in a recent Title IX case. See Brief for National School Boards Association et al. as *Amici Curiae* 5, and n. 4 (citing *Canutillo Independent School Dist.* v. *Leija*, 101 F. 3d 393 (CA5 1996), cert. denied, 520 U. S. ___ (1997)); see also Brief for TASB Legal Assistance Fund et al. as *Amici Curiae* 23 (same). Significantly, however, the District Judge in that case refused to enter a judgment on that verdict; the judge instead ordered a new trial on damages, limited to medical and mental health treatment and special education expenses. See 887 F. Supp. 947, 957 (WD Tex. 1995), rev'd, 101 F. 3d 393 (CA5 1996).

tion of immature high school students that those rules would provide. Because those students are members of the class for whose special benefit Congress enacted Title IX, that policy choice is not faithful to the intent of the policymaking branch of our Government.

I respectfully dissent.