No. 20-10

IN THE

Supreme Court of the United States

EMILY KOLLARITSCH, *et al.*,

Petitioners,

—v.—

MICHIGAN STATE UNIVERSITY BOARD OF TRUSTEES, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR *AMICI CURIAE* PUBLIC JUSTICE, THE CALIFORNIA WOMEN'S LAW CENTER, EQUAL RIGHTS ADVOCATES, KNOW YOUR IX, AND THE WOMEN'S LAW PROJECT IN SUPPORT OF PETITIONERS

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Public Justice is a national legal advocacy organization dedicated to protecting civil, consumer, and workers' rights, as well as environmental sustainability and access to the courts. In its civil rights program, Public Justice has long focused on ensuring that educational institutions comply with the Constitution and anti-discrimination laws, including Title IX. Public Justice works to secure educational equity and safe campuses for students through lawsuits designed to enforce Title IX. For example, Public Justice often represents students denied equal educational opportunities because of gender-based harassment or sexual violence suffered at school. In Public Justice's experience, holding schools accountable under Title IX is critically important to protecting students against discriminatory practices and to ensuring that students can obtain their education in a safe environment, free from sexual harassment.

The California Women's Law Center ("CWLC")'s mission is to break down barriers and advance the potential of women and girls through transformative litigation, policy advocacy, and education. A vital part of CWLC's mission is fighting for women's and girls' access to equal educational opportunities by ensuring that access to education is not impeded by gender discrimination. CWLC strongly believes that young women and girls deserve the right to an education free from sexual harassment and violence. CWLC therefore

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[1] All parties have consented to the filing of this brief. Amici affirm that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief. The parties were notified ten days prior to the due date of this brief of the intention to file.

has a strong interest in ensuring effective enforcement of Title IX's protections in education through appropriate regulation and standards that advance Title IX's purpose of ensuring equal access to education and educational opportunities.

Equal Rights Advocates ("ERA") is a national civil rights advocacy organization dedicated to protecting and expanding economic and educational access and opportunities for women and girls. In service of its mission, ERA litigates class actions and other high-impact cases on issues of gender discrimination in employment and education. ERA has a long history of pursuing equality and justice for women and girls under Title IX through advocacy, legislative efforts, and litigation. ERA has served as counsel in numerous class and individual cases involving the interpretation of Title IX in the athletics and sexual harassment contexts. ERA also provides advice and counseling to hundreds of individuals each year through a telephone advice and counseling helpline, and has participated as amicus curiae in scores of state and federal cases involving the interpretation and application of procedural and substantive laws affecting the ability of students to obtain and enforce their equal rights under Title IX. In 2018, ERA launched its Ending Sexual Violence in Education Initiative, which includes the development of a groundbreaking national pro bono network of attorneys to assist survivors of sexual violence in education.

Know Your IX is a survivor- and youth-led project of Advocates for Youth that works to end gender violence and discrimination in schools. Know Your IX accomplishes its mission through: educating college and high school students in the United States about their legal rights to a safe education free from sexual

harassment and violence; training, organizing, and supporting student survivor activists in challenging their educational institutions to address violence and discrimination; and advocating for policy change at the campus, state, and federal levels to ensure meaningful systematic action to end gender violence. Know Your IX has long worked to ensure all young people know their rights to an education free from violence so that no student is unfairly denied their right to learn.

The Women's Law Project ("WLP") is a Pennsylvania-based nonprofit public interest legal advocacy organization that seeks to advance the legal, social, and economic status of all people regardless of gender. To that end, WLP engages in impact litigation and policy advocacy, public education, and individual counseling. Founded in 1974, WLP prioritizes program activities and litigation on behalf of people who are marginalized across multiple identities and disadvantaged by multiple systems of oppression. Throughout its history, WLP has played a leading role in the struggle to eliminate discrimination based on sex, including working to end violence against women and girls and to safeguard the legal rights of students who experience sexual misconduct and violence in our schools and universities. To this end, WLP engages in public policy advocacy to improve the response of educational institutions to sexual violence and counsels and represents students who have been subjected to sexual misconduct on our campuses and in our schools.

SUMMARY OF ARGUMENT

The issue in this case is whether liability for a school's deliberate indifference to known sexual harassment turns on the school's own intentional

conduct, as this Court repeatedly has held, or on the post-notice conduct of the harasser. The decision below concluded that even if a school's deliberate indifference to harassment subjects a victim to discriminatory lack of access to education, the school cannot be held liable unless a harasser also decides to subject the victim to yet another act of harassment. Because this decision contravenes this Court's precedent, fundamental principles of tort law, and both the language and purpose of Title IX, this Court should grant certiorari to reverse the decision below.

Petitioners are three former students of Michigan State University ("MSU") who sued the university in federal district court for violating Title IX's mandate of equal access to education. Petitioners alleged that MSU's responses to their reports of student-on-student sexual harassment were so clearly unreasonable that they amounted to deliberate indifference. Because of MSU's alleged deliberate indifference, Petitioner Emily Kollaritsch feared for her safety to the point that she took leaves of absence and failed to take classes, Petitioner Jane Roe 1 felt sufficiently unsafe on campus that she missed classes, and Petitioner Shayna Gross stopped participating in extracurricular activities.

Schools that receive federal funding "may be liable for 'subject[ing]' their students to discrimination where the recipient is deliberately indifferent to known acts of student-on-student sexual harassment" by a harasser under the school's disciplinary authority. *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 646-47 (1999). For a school to be liable for damages, its deliberate indifference must either "'cause [students] to undergo' harassment or 'make them liable or vulnerable' to it." *Id.* at 645 (quoting Random House Dictionary of the English Language

1415 (1966)). The district court found that Petitioners had stated a facially sufficient claim against MSU under this standard. The Sixth Circuit reversed, concluding that to state a claim under *Davis*, a victim must also allege that the school's deliberate indifference caused additional post-notice harassment. The decision below recognized that the relevant injury here is not post-notice actionable harassment but the lack of equal access to education. But rather than connect the school's action to that injury, it determined a student may state a claim only if she also is subjected to a separate tort: further actionable harassment by a third party. Educational injuries caused directly by the school's deliberate indifference to harassment are insufficient to state a claim.

The decision below misstates both the holding and reasoning of *Davis*. It forces a Title IX analysis into the framework of a traditional tort, and then contravenes basic tort law. Most importantly, if upheld, the decision below would deny innumerable students relief to which they are entitled under *Davis* and immunize schools for their own actionable conduct. When a school has made no reasonable response to known sexual harassment, victims are left on their own to protect themselves, often by withdrawing from classes and other educational opportunities in an attempt to avoid the harasser. Perversely, a student may escape further actionable harassment *because* she has been compelled by the school's deliberate indifference to avoid the educational opportunities offered by the school. Because the decision below undermines Title IX and upends *Davis*, it should be reversed.

ARGUMENT

I. The Decision Below Contravenes Davis By Eliminating The "Vulnerability" Prong And Failing To Premise An Institution's Liability On Its Own Intentional Conduct.

The Sixth Circuit granted an interlocutory appeal in this case to determine the purely legal issue of "whether a plaintiff must plead further acts of discrimination to allege deliberate indifference to peer-on-peer harassment under Title IX." *Kollaritsch v. Michigan State Univ. Bd. of Trs.*, 944 F.3d 613, 619 (6th Cir. 2019). But this Court's decision in *Davis v. Monroe County Board of Education* has already answered that question in the negative, as the Tenth Circuit stated in *Farmer v. Kansas State University*, 918 F.3d 1094, 1103 (10th Cir. 2019) ("*Davis*, then, clearly indicates that Plaintiffs can state a viable Title IX claim by alleging alternatively *either* that KSU's deliberate indifference to their reports of rape caused Plaintiffs '"to undergo" harassment *or* "ma[d]e them liable or vulnerable" to it.'" (quoting *Davis*, 526 U.S. at 645)).

In *Davis*, this Court considered whether a recipient of federal funds' deliberate indifference to known acts of student-on-student harassment amounts to an intentional violation of Title IX. *Davi*s, 526 U.S. at 643. The Court held that it can, if the deliberate indifference "subjects" its students to harassment, meaning the deliberate indifference "must, at a minimum, 'cause [students] to undergo' harassment or 'make them liable or vulnerable' to it." *Id.* at 645 (quoting Random House Dictionary of the English Language 1415 (1966)).

The *Davis* Court emphasized that "a recipient of federal funds may be liable in damages under Title IX *only for its own misconduct*. The recipient itself must 'exclud[e] [persons] from participation in, . . . den[y] [persons] the benefits of, or . . . subjec[t] [persons] to discrimination under' its 'program[s] or activit[ies]' in order to be liable under Title IX." *Davis*, 526 U.S. at 640-41 (emphasis added). The Court found that, contrary to the defendants' arguments, the plaintiff had stated a claim because she was seeking to hold the recipient liable not for the harasser's conduct, but for "its *own* decision to remain idle in the face of known student-on-student harassment in its schools." *Id.* at 641.

As Petitioner describes, the decision below misapprehends *Davis* by ignoring the plain language of the disjunctive "or" in its holding, which makes clear that liability for deliberate indifference arises either if it makes a student "liable or vulnerable" to subsequent harassment, *or* if it "cause[s them] to undergo" it. Petition at 26.

The Sixth Circuit attempts to explain away the "vulnerability" prong rather than give *Davis*'s language its plain meaning. It reasons that instead of the natural distinction between "cause to undergo" and "make liable or vulnerable to," the Court was articulating a distinction between omission and commission—describing two alternate ways a school's deliberate indifference might cause a student to undergo further harassment. But there is no basis, in the *Davis* decision or logic, for this distinction. First, as Petitioner notes, direct acts of harassment by the fund recipient are explicitly excluded from the purview of *Davis* altogether. *Davis* concerns sexual harassment committed by a third party, for which a school is not vicariously liable. Its potential liability derives from

its own actions in response to that harassment, not from *committing* it. *Davis*, 526 U.S. at 640-41. If the "cause to undergo" prong really did require an affirmative "detrimental action" that "foment[s] or instigat[es] further harassment," such as the example in Judge Thapar's concurrence of a school sending discriminatory emails, it would not state a *Davis* claim at all. *See* Petition at 26-27. Second, there is nothing in the ordinary meaning of "cause to undergo" and "make liable or vulnerable to" that equates the former with action and the latter with inaction. For example, a school might be described as rendering a student "liable or vulnerable to" harassment if it takes certain affirmative acts, such as assigning a student to a class taught by the teacher who has abused him. The Sixth Circuit simply superimposed a different and unrelated distinction over that already drawn by *Davis.*

Beyond misapprehending the language of the holding, the decision below turns the very foundation of *Davi*s on its head. The premise of *Davis* is that a fund recipient is liable "only for its own misconduct," which in that case consisted of "its *own* decision to remain idle in the face of known student-on-student harassment in its schools." *Davis*, 526 U.S. at 640-41*; see also Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1989) (liability is premised on "an official decision by the recipient not to remedy the violation"). Yet the Sixth Circuit's incorrect rule premises a school's liability on the further misconduct of a separate actor: the harasser. In *Farmer*, the Tenth Circuit found that an allegation of post-notice actionable harassment was not required when a plaintiff alleged "liability [that] stems directly from [the school's] *own* conduct, its *own* deliberate indifference." 918 F.3d at 1104 (emphasis added). This result is mandated by *Davis*.

II. The Decision Below Contravenes Fundamental Tort Law Principles Of Causation By Unlinking The Relevant Conduct From The Relevant Injury.

Some commentators have convincingly argued that courts should not shoehorn Title IX and other civil rights laws into common law tort analysis. The traditional elements of tort law may not align with those laws' purposes and "tortification" may foreclose accurate, nuanced analysis of these statutes. Sandra F. Sperino, *Let's Pretend Discrimination is a Tort*, 75 OHIO ST. L.J. 1107, 1109 (2014); *see also* Charles A. Sullivan, *Tortifying Employment Discrimination*, 92 B.U. L. REV. 1431 (2012). Regardless, assuming courts should apply *Davis* in a manner that avoids violence to basic tort law principles, the Sixth Circuit erred by inserting the need to plead and prove a separate injury by a separate tortfeasor into its analysis of "causation."

The basic elements of a Title IX claim under *Davis* are not in dispute: A school may be held liable when (1) a student is subjected to severe, pervasive, and objectively offensive harassment; (2) the school had actual knowledge of that harassment; (3) the school was deliberately indifferent to that harassment; and (4) the student was deprived of access to educational opportunities or benefits provided by the school. *See Davis*, 526 U.S. at 650. Viewed in traditional tort terms, a recipient of federal funding has a duty of non-discrimination. 20 U.S.C. § 1681(a). *Davis* holds that it breaches that duty if it is deliberately indifferent in the face of known severe, pervasive, and objectively offensive student-on-student harassment. *Davis*, 526 U.S. at 633. Crucially, as the Sixth Circuit acknowledges, "'[i]njury' in this Title IX context means the deprivation of 'access to the educational

opportunities or benefits provided by the school.'" *Kollaritsch*, 944 F.3d at 622 (quoting *Davis*, 526 U.S. at 650).

The correct question in a case like Petitioners', then, is whether the defendant's deliberate indifference to sexual harassment (its breach) caused the plaintiff's educational deprivation (her injury). There is no need for further sexual harassment, which simply is not, as the Sixth Circuit acknowledges, the injury in question. Rather, "the breach of duty is causally linked to the injury *through* the 'cause to undergo' and 'vulnerability' prongs." Petition at 30; *see also infra* pp. 13-21 (explaining how vulnerability to sexual harassment deprives victims of educational opportunities).

Eschewing this clear application of tort principles, the Sixth Circuit inserted an additional step into the causal link between the recipient's breach and the plaintiff's injury. The court recognized, as it must, that the relevant injury here is deprivation of access to education. But, by its telling, this injury cannot be "caused" by "a deliberate-indifference intentional tort by the school." Instead, the injury requires a separate tort committed by a separate tortfeasor: additional "'actionable harassment' by a student" post-notice. *Kollaritsch*, 944 F.3d at 619-20. By unlinking the school's act and the plaintiff's injury, the Sixth Circuit's rule contravenes traditional tort principles and *Davis*, which makes clear that a fund recipient's liability depends on its own intentional conduct, not third parties'. *See* Petition at 30-31.

In doing so, the Sixth Circuit rejected the First, Tenth, and Eleventh Circuits' conclusion, which reads *Davis* and tort law in harmony: A school may be liable if its deliberate indifference to known harassment

causes the victim's lost access to educational opportunities or benefits, whether or not the plaintiff experiences additional post-notice harassment. Petitioner Kollaritsch, for example, may not allege additional actionable sexual harassment by John Doe after she reported his conduct to MSU.[2] But she does allege that the school's clearly unreasonable response to her complaints of harassment—including, among other things, taking no action when John Doe violated a "no-contact" order issued by the school—left her exposed and vulnerable such that the school's failure to enforce the no-contact order effectively barred her access to educational activities. *Kollaritsch v. Michigan State Univ. Bd. Of Trs.*, 944 F.3d 613 (6th Cir. 2019); *Kollaritsch v. Michigan State Univ. Bd. Of Trs.*, 298 F. Supp. 3d 1089 (S.D. Mich. 2017). This is sufficient to state a claim under *Davis*.

Similarly, in *Farmer*, the plaintiffs adequately alleged a pattern of deliberate indifference by the school to allegations of rape that made them "more vulnerable to rape because it sends a message to fraternity members that students can rape other students with no fear of school disciplinary action." 918 F.3d at 1101. Because the school allowed the alleged assailants to remain on campus, the plaintiffs lived in a state of fear that effectively prevented them from participating in classes or other activities. "In short, they allege[d] that [the school] created such an adverse environment for learning for them by its

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[2] Applying its new rule, the Sixth Circuit held that Kollaritsch did not allege actionable post-notice harassment. *See Kollaritsch*, 944 F.3d at 624. Based on Kollaritsch's pleadings, though, this is not obvious; she alleged that, after she reported her assailant to MSU, he "violated the no-contact order and began stalking, harassing, and otherwise intimidating Kollaritsch." *Kollaritsch*, 298 F. Supp. 3d at 1098.

dismissive treatment of their complaints of rape that it was that environment that reasonably prevented them from accessing the educational opportunities available to other students." *Farmer*, 918 F.3d at 1106.

Likewise, in *Williams v. Board of Regents of University System of Georgia*, 477 F.3d 1282, 1298 (11th Cir. 2007), the court concluded that the plaintiff had adequately pled deprivation to educational opportunities. After the plaintiff reported sexual assaults to the university that she and her assailants attended, "the response to her complaints did nothing to assuage her concerns of a future attack should she return to [campus]." *Id.* As a result, the student victim decided to drop out of school to protect herself from further violence. *Id.* The university's deliberate indifference in the wake of her report, then, undoubtedly deprived her of educational opportunities. That her assailants had no further opportunity to sexually assault her was no credit to the school's response, but rather a result of a victim's decision to forfeit her opportunity to learn precisely because of the university's deliberate indifference. The Sixth Circuit's erroneous decision would deprive these plaintiffs, and all others similarly situated, of their valid claims.

III. A School's Deliberate Indifference To Known Harassment Deprives Students Of Access To Educational Opportunities Regardless Of Actionable Post-Notice Harassment.

The Sixth Circuit misapplied the *Davis* standard by determining that a school's deliberate indifference cannot deprive a student of equal access to education unless the victim suffers another post-notice act of

actionable harassment. But in addition to misunderstanding the legal standard, this view is factually wrong. The vulnerability engendered by a school's deliberate indifference to known sexual harassment, including sexual assault, can preclude a victim from access to educational opportunities. The prevalence and severity of such educational harms in the wake of violence make clear both the error and the high stakes of the Sixth Circuit's ruling.

A. Sexual Harassment In Schools Is A Widespread Problem.

Sexual harassment is prevalent at all levels of education. In grades seven through twelve, 56% of girls and 40% of boys are sexually harassed in any given school year. Catherine Hill & Holly Kearl, *Crossing the Line: Sexual Harassment at School*, AAUW 11 (2011), https://www.aauw.org/app/uploads/2020/03/Crossing-the-Line-Sexual-Harassment-at-School.pdf. More than one in five girls ages fourteen to eighteen are kissed or touched without their consent. National Women's Law Center, *Let Her Learn: Stopping School Pushout for Girls Who Have Suffered Harassment and Sexual Violence* 1 (Apr. 2017), https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2017/04/final_nwlc_Gates_HarassmentViolence.pdf.

As for higher education, there is little doubt that "sexual harassment remains a persistent problem in academia—a chronic stressor that profoundly and negatively affects the lives of college women" and studies have found that "sexual harassment can affect students' global perceptions of their academic experience." Marisela Huerta et al., *Sex and Power in the Academy: Modeling Sexual Harassment in the Lives of College Women*, 32 PERSONALITY AND SOCIAL

PSYCHOLOGY BULLETIN 616, 618, 626 (2006). During college, 62% of women and 61% of men experience sexual harassment. Catherine Hill & Elena Silva, *Drawing the Line: Sexual Harassment on Campus*, AAUW 17 (2005), https://www.aauw.org/app/uploads/2020/02/AAUW-Drawing-the-line.pdf. College-aged women are the most vulnerable to rape and sexual assault. Bureau of Justice Statistics, *Rape and Sexual Assault Victimization Among College-Age Females, 1995-2013*, U.S. DEP'T JUST. 3-4 (Dec. 2014), https://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf. According to a survey conducted by the Association of American Universities (the "AAU") in 2015, the incidence of sexual assault and sexual misconduct by physical force, threats of physical force, or incapacitation of undergraduate women was 23.1%. David Cantor et al., *Report on the AAU Climate Survey on Sexual Assault and Sexual Misconduct*, WESTAT 13-14 (2015), https://www.aau.edu/sites/default/files/%40%20Files/Climate%20Survey/AAU_Campus_Climate_Survey_12_14_15.pdf. The AAU also found that, by senior year of college, 26.1% of women and 29.5% of students identifying as transgender, genderqueer, or another identification not specified reported nonconsensual sexual contact through completed penetration or sexual touching by physical force or incapacitation. *Id.* at 23.

Historically marginalized and underrepresented groups are more likely to experience sexual harassment than their peers. More than half of lesbian, gay, bisexual, transgender, or queer students ages thirteen to twenty-one are sexually harassed at school. Joseph G. Kosciw et al., *The 2017 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools*, GLSEN 26 (2018),

https://www.glsen.org/sites/default/files/2019-12/Full_NSCS_Report_English_2017.pdf. Nearly one in four transgender and gender-nonconforming students are sexually assaulted during college. Cantor, *supra*, at 13-14. And students with disabilities are 2.9 times more likely than their peers to be sexually assaulted. National Women's Law Center, *Let Her Learn: Stopping School Pushout for Girls With Disabilities* 7 (Apr. 2017), https://nwlc.org/resources/stopping-school-pushout-for-girls-with-disabilities.

B. Schools Can Act To Ensure Students Can Learn In The Wake Of Sexual Harassment.

Following notice of sexual harassment, schools can provide a range of services and accommodations "to remediate the on-campus hostile environment that deprives the plaintiff of educational opportunities." Peter Baumann, *Deliberate Indifference: How to Fix Title IX Campus Sex-Assault Jurisprudence*, 106 GEO. L. J. 1139, 1158 (Apr. 2018). Perhaps most important, they can take steps to eliminate contact between the student victim and harasser. If both are students, the school can review their respective schedules to ensure they are assigned to different classes and meal periods. *See M.D. v. Bowling Green Indep. Sch. Dist.*, No. 1:15-CV-00014-GNS-HBB, 2017 WL 390280, at *6 (W.D. Ky. Jan. 27, 2017). Administrators can also ensure the two students do not share a dormitory. *See* Kathryn J. Holland and Lilia M. Cortina, *"It Happens to Girls All the Time": Examining Sexual Assault Survivors' Reasons for Not Using Campus Supports*, 59 AM. J. COMMUNITY PSYCHOL 50, 52 (2017). Where needed, schools can assign escorts to accompany victims to ensure their safety. *See S.B. ex rel. A.L. v. Bd. of Educ. of Harford Cty.*, 819 F.3d 69, 77 (4th Cir. 2016). Of course, schools can also investigate the

incident, convene a disciplinary hearing, and, where appropriate, impose sanctions on the harassers. *See id.*; *Doe v. Univ. of the Pac.*, No. civ S-09-764 FCD/KJN, 2010 WL 5135360, at *1 (E.D. Cal. Dec. 8, 2010). And they can institute "no-contact" orders to prevent contact between the parties. *See Pearson v. Logan Univ.*, 937 F.3d 1119, 1125–26 (8th Cir. 2019), *reh'g denied* (Oct. 10, 2019).[3]

Courts accord schools considerable "flexibility" in choosing exactly how to handle a sexual harassment report. *Davis*, 626 U.S. at 648. A victim does not have the right to the exact remedy of her choosing. *Id.* But there is no question that, in designing a response that is not "clearly unreasonable," *id.*, schools have at their disposal a number of ways to help victims feel safe.

C. Without School Intervention, Victims' Access To Educational Opportunities Suffers.

When a school fails to provide reasonable protections and accommodations in the wake of sexual harassment, victims' educations suffer. This is particularly true when a school does not take even minimally reasonable steps to separate victims from their assailants. Such deliberate indifference presents students with an impossible choice: attend school and risk further harassment, or give up classes, activities, and other opportunities, to stay safe. Understandably, but tragically, many victims choose the latter. As a result, they miss opportunities to learn and their GPAs plummet. Deliberate indifference to known sexual harassment, then, demonstrably leads to

[3] MSU provided such an order here, but Kollaritsch alleges it did not enforce the order despite her assailant's repeated violations. *See* Petition at 6-7.

concrete educational injuries, regardless of whether the victim is ever sexually harassed again.

For obvious reasons, sexual harassment victims often fear their harassers and seek to avoid any further contact. Lilia M. Cortina et al., *Sexual Harassment and Assault: Chilling the Climate for Women in Academia*, 22 PSYCHOLOGY OF WOMEN QUARTERLY 419, 436 (1998); Erica van Roosmalen & Susan A. McDaniel, *Sexual Harassment in Academia: A Hazard to Women's Health*, 28 WOMEN & HEALTH 33, 44 (1998). Survivors may find any such encounters deeply upsetting and even terrifying, regardless of whether the further harassment to which they are vulnerable actually occurs. Kollaritsch's allegations make as much clear: Each time she came across her assailant in their shared dormitory's cafeteria, she "experienced a panic attack, and was forced to leave the building, often crying, lightheaded, and significantly distraught." *Kollaritsch*, 944 F.3d at 624; *see also Kelly v. Yale Univ.*, No. 3:01-CV-1591, 2003 WL 1563424, at *3-5 (D. Conn., Mar. 26, 2003) (holding "further encounters, of any sort, between a rape victim and her attacker" create a hostile environment for the survivor); Anonymous, *On Assault Narratives*, YALE DAILY NEWS (Feb. 1, 2012), https://yaledailynews.com/blog/2012/02/01/anonymous-on-assault-narratives/ (describing a victim's "dizzying nausea" when "running into [her] assailant" at campus parties).

As explained above, schools can implement reasonable steps to prevent or reduce the likelihood of these encounters. But if they do not, survivors must develop their own strategies to avoid potentially hostile situations. *See* van Roosmalen & McDaniel, *supra*, at 48. These often come at the cost of victims' learning. Many skip classes or change educational programs to avoid their harassers. *Id.*; *see also* Hill &

Kearl, *supra*, at 30. Some avoid particular buildings or places on campus. Hill & Silva, *supra*, at 3. Students harassed by professors drop out of work and research opportunities to avoid further victimization. van Roosmalen & McDaniel, *supra*, at 48.

These same patterns emerge in the Title IX cases brought by student victims. One plaintiff in *Farmer*—the Tenth Circuit opinion with which *Kollaritsch* conflicts—reported her rape but the school refused to take any action in response. "[L]iving in fear that she would run into her attacker," she "missed classes, struggled in school," and "withdrew from [school] activities in which she had previously taken a leadership role." 918 F.3d at 1099-100. The other *Farmer* plaintiff, another victim ignored by the school, "only use[d] campus resources like the library when she [was] joined by friends or her . . . sorority sisters, and otherwise stayed home to avoid being alone in a campus setting." *Id.* at 1101. In *Kelly v. Yale University*, a student victim was forced to withdraw from her classes and consequently graduated late when the defendant denied her repeated requests for academic and housing accommodations that would allow her to avoid her assailant, with whom she shared a class and dormitory. 2003 WL 1563424, at *2. Another student victim stopped eating lunch because her school assigned her and the boy who had sexually assaulted her to the same lunch period. *Doe ex rel. Doe v. Coventry Bd. of Educ.*, 630 F. Supp. 2d 226, 233 (D. Conn. 2009). After a high school refused to develop a plan to separate a student from her harassers, the victim enrolled in its alternative cyber-schooling program, which did not offer advanced coursework equivalent to that in which she had previously enrolled. *Goodwin v. Pennridge Sch. Dist.*, 389 F. Supp. 3d 304, 319 (E.D. Pa. 2019). And Kollaritsch

herself avoided MSU's dormitories and cafeteria out of fear that she would encounter her assailant. Petition at 25.

Other survivors drop out of school altogether to avoid their harassers when their schools fail to provide accommodations and protections. In *Williams*, for example, the plaintiff left the University of Georgia because the university's response to her reported sexual assaults gave her no faith that it would keep her safe in the future. 477 F.3d at 1298. Similarly, in *Albiez v. Kaminski*, the plaintiff withdrew from school after her university responded in a clearly unreasonable manner to her report of sexual assault. No. 09-CV-1127, 2010 WL 2465502, at *6 (E.D. Wis. June 14, 2010).

This is, unfortunately, a common story. Student victims of sexual harassment drop out of school at disproportionately high rates. According to one 2015 study, over one-third of sexually victimized college students dropped out of school. Cecilia Mengo & Beverly M. Black, *Violence Victimization on a College Campus: Impact on GPA and School Dropout*, 18 J. OF COLLEGE STUDENT RETENTION: RESEARCH, THEORY & PRACTICE 234, 244 (2015); *see also* Cortina et al., *supra*, at 433 (finding female undergraduate and graduate students who were harassed were less likely to return to their universities than those who were not harassed).

Victims who do remain in school experience "greater disengagement from the academic environment, which in turn relates to performance decline (i.e. lower grades)." Huerta et al., *supra*, at 624; *see also* Carol E. Jordan et al., *An Exploration of Sexual Victimization and Academic Performance Among College Women*, 15 TRAUMA, VIOLENCE, & ABUSE 191,

193 (2014) (identifying relationships between sexual violence, academic disengagement, and decreased academic performance). As explained above, sexual harassment victims often miss classes to avoid their assailants, *see* van Roosmalen & McDaniel, *supra*, at 48, and they often have trouble studying, *see* Hill & Kearl, *supra*, at 30. Perhaps unsurprisingly, their academic and extracurricular performances suffer as a result—a prime example of a Title IX injury. *See Jennings v. Univ. of N. Carolina*, 482 F.3d 686, 700 (4th Cir. 2007). One study found that women who were sexually assaulted during their first semester of college ended the year with lower GPAs than women who were not sexually victimized. *See* Jordan et al. *supra*, at 191. 14.3% of women in that study who experienced a rape in their first semester of college ended the year with a GPA below 2.5. *Id.* at 196.

This data echoes the claim of one of the *Farmer* plaintiffs, whose grades "plummeted" such that "she lost her academic scholarship." *Farmer*, 918 F.3d at 1101. Kollaritsch's GPA dropped, too, during the time she spent at MSU afraid of further harassment. Petition at 7. Her story, one of those at the heart of this case, represents those of so many student victims.

* * *

These injuries demonstrate two things. First, they show the significant educational injuries that student victims may experience as a result of their schools' deliberate indifference, regardless of whether they face further harassment. Second, they make clear the stakes of the question presented in this case. If the Sixth Circuit's rule is allowed to remain law, students who lose their chance to learn and thrive in school as a result of their schools' failure to address sexual harassment will have no remedy. Such a result is

contrary to *Davis*, which holds an institution liable for causing precisely this injury by its deliberate indifference.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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