No. 20-10

In The Supreme Court of the United States

EMILY KOLLARITSCH, ET AL.,
Petitioners,

V.

MICHIGAN STATE UNIVERSITY BOARD OF TRUSTEES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a school can be held liable for money damages under the narrow, implied Title IX cause of action that this Court recognized in *Davis ex rel. LaShonda D. v. Monroe County Board of Education*, 526 U.S. 629 (1999), where the plaintiff does not allege that the school's purportedly inadequate response to peer-on-peer harassment "subjected" the plaintiff to actionable harassment. 20 U.S.C. § 1681(a).

RULE 29.6 STATEMENT

Respondent Michigan State University Board of Trustees is an entity of the State of Michigan, and is not a subsidiary or affiliate of a publicly owned corporation.

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INTRODUCTION

Petitioners seek a broad expansion of the non-textual, implied cause of action in Title IX of the Education Amendments of 1972, a cause of action that this Court created in *Cannon v. University of Chicago*, 441 U.S. 677 (1979), and narrowly expanded in *Davis ex rel. LaShonda D. v. Monroe County Board of Education*, 526 U.S. 629 (1999). According to Petitioners, a school should now be held liable under this implied cause of action even if the school's claimed insufficient response to an alleged incident of sexual misconduct did not thereafter "subject[ ]" the plaintiff to "discrimination," 20 U.S.C. § 1681(a); that is, did not cause the plaintiff to suffer actionable harassment.

This Court should deny the Petition because Petitioners' alleged circuit split on the Question Presented is exceedingly shallow, making this an issue calling out for further development in the courts of appeals. The Sixth Circuit below concluded that Title IX does not permit a damages action against a school whose allegedly insufficient response does not thereafter cause the plaintiff to suffer actionable harassment. This holding is consistent with the abbreviated, thinly reasoned decisions of two other courts of appeals. And there is no well-entrenched split because the *only* appellate decision to have squarely reached a contrary holding, *Farmer v. Kansas State University*, 918 F.3d 1094 (10th Cir. 2019), created an intracircuit split that may well resolve itself en banc. The issue is actively percolating in the lower courts, and this Court should not prematurely terminate that further development in the caselaw.

On the merits, as the panel majority and Judge Thapar persuasively explained below, Title IX's text, this Court's decision in *Davis*, and statutory context all mandate the conclusion that a school does not "subject" a student to "discrimination," 20 U.S.C. § 1681(a), when the student suffers no actionable harassment caused by the school's claimed deliberate indifference. Petitioners' contrary arguments focus myopically on a context-free mischaracterization of one sentence in *Davis*, improperly treating that sentence as if it were the statutory text itself. Further, Petitioners' position will lead to perverse, catch-22 consequences that Congress did not create. Adopting Petitioners' view will force a school to suspend or expel an accused student immediately upon receiving a Title IX complaint, lest the school face an expensive lawsuit under Petitioners' inadequate-response theory. Yet, upon taking such immediate steps against the accused, the school would set itself up for a lawsuit by the accused for violation of due-process rights, or an enforcement action under a recently issued rule by the Department of Education.

This Court should deny the Petition.

STATEMENT

A. This Court has interpreted Title IX to contain a narrow, implied private right of action against schools that "subject[ ]" students to "discrimination." 20 U.S.C. § 1681(a).

1. Title IX provides, in relevant part: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Congress enacted Title IX under its spending authority, and the statute's purposes are not compensatory. Rather, Congress enacted Title IX "to avoid the use of federal resources to support discriminatory practices," and thereby "to provide individual citizens effective protection against those practices." *Cannon*, 441 U.S. at 704. Primary enforcement responsibility for Title IX thus falls not to private citizens in damages actions, but to federal agencies distributing education funding. These agencies are "authorized and directed to effectuate the provisions of" Title IX "by issuing rules, regulations, or orders of general applicability" that are consistent with the statute's "objectives." 20 U.S.C. § 1682. Agencies may enforce compliance with Title IX through "any . . . means authorized by law," including "termination" of federal funding. *Id.*

2. In *Cannon*, this Court interpreted Title IX's legislative history to create a private right of action, even though the statutory text did not contain one. 441 U.S. at 694–98. *Cannon* left open what remedies were available under this implied right of action and, then, in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), this Court held that a Title IX plaintiff could recover money damages.

This Court later expanded Title IX's implied private right of action to cases in which a school, although it did not itself engage in actionable discrimination, nevertheless had actual knowledge of, and was deliberately indifferent to, a teacher's harassment of a student. In *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998), this Court held that a school district could not be held liable "unless an official of the school district who at a minimum has authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to, the teacher's misconduct." *Id.* at 277. Importantly, *Gebser* expressly declined to impose liability on schools under principles of constructive notice or *respondeat superior*. *Id*. at 285.

In *Davis*, this Court—by a 5-4 majority—held that Title IX's implied private right of action is available in the narrow category of cases in which a school was deliberately indifferent to student-on-student harassment, and thereby caused the plaintiffs to suffer actionable harassment. The plaintiff in *Davis* alleged that her daughter was "the victim of a prolonged pattern of sexual harassment" by one of her elementary-school classmates. 526 U.S. at 633. The harasser eventually pleaded guilty to sexual battery for his misconduct. *Id*. at 634. Multiple teachers and the principal of the school had been informed of the harassment multiple times over a period of months, but "made no effort whatsoever either to investigate or to put an end to the harassment," including when the harassment occurred under one teacher's direct supervision, thus allowing the harassment to continue. *Id*. at 633–34, 654. The school also allegedly was

aware of harassment by the same student against multiple other students. *Id.* at 635. This Court held that schools "could be liable in damages only where their own deliberate indifference effectively 'cause[d]' the discrimination." *Id.* at 642–43 (alteration in original). Thus, a school "may not be liable for damages unless its deliberate indifference 'subjects' its students to harassment." *Id.* at 644–45 (quoting 20 U.S.C. § 1681(a)). "That is, the deliberate indifference must, at a minimum, 'cause [students] to undergo' harassment or 'make them liable or vulnerable' to it." *Id.* (alteration in original) (quoting Random House Dictionary of the English Language 1415 (1966); Webster's Third New International Dictionary of the English Language 2275 (1961)).

Justice Kennedy's sharp dissent, in turn, criticized the majority for ignoring "the language of Title IX itself" and creating "a sweeping legal duty—divorced from agency principles—for schools to remedy third-party discrimination against students." *Id.* at 668 (Kennedy, J., dissenting).

B. Petitioners are three former MSU students who allege that they were sexually assaulted by other MSU students, and reported the incident to MSU, but, in their view, MSU did not take sufficiently responsive action. Notably, each Petitioner declines to allege that she suffered actionable harassment as a result of MSU's claimed insufficiently responsive action. Petitioners sued MSU and several individual

MSU employees, alleging, as relevant here, violations of Title IX.

Emily Kollaritsch alleges that MSU failed to respond adequately to her report that John Doe 1 attempted to rape her and sexually assaulted her, but does not allege that MSU's response subjected her to actionable harassment. App. 83a–90a. Ms. Kollaritsch alleges that John Doe 1 assaulted her in October 2011, and that she reported the alleged assaults to the MSU Police Department about three months later, which in turn reported them to MSU. App. 83a. MSU's investigation concluded that John Doe 1 violated MSU's sexual harassment policy. App. 84a–85a. MSU sanctioned John Doe 1 with a no-contact order and probationary status, among other disciplinary actions. App. 85a. Ms. Kollaritsch alleges that John Doe 1 thereafter violated the no-contact order by "stalk[ing], harass[ing,] and/or intimidat[ing]" her "on at least nine occasions" following his sanctioning. App. 86a. However, as the Sixth Circuit noted, the complaint suggests that these encounters consisted merely of Ms. Kollaritsch and John Doe 1's mutual presence at the same location. App. 16a–17a; App. 84a ("John Doe [1] and Kollaritsch lived in the same dormitory and frequented the same cafeteria and public areas around the dormitory."); *id.* ("On more than one instance, Kollaritsch encountered John Doe [1] at a dormitory cafeteria."). MSU found that the evidence did not support Ms. Kollaritsch's subsequent retaliation complaint. App. 88a.

Shayna Gross alleges that MSU failed to investigate adequately her claim that John Doe 1 sexually

assaulted her as well, but does not allege that MSU's response subjected her to actionable harassment. App. 18a. Ms. Gross alleges that John Doe 1 assaulted her in February 2013, and she reported this alleged assault to MSU one year later. App. 104a. MSU's investigation found that John Doe 1 committed sexual assault, and MSU expelled him. App. 18a. MSU denied his first appeal, App. 105a–06a, but, following his second appeal, retained a law firm to reinvestigate Gross's allegation, which found insufficient evidence of assault, App. 18a. Ms. Gross does not allege that she suffered harassment following her report, or that she had any contact whatsoever with John Doe 1 thereafter. App. 18a. Ms. Gross alleges only that John Doe 1 was permitted to stay on campus during the pendency of the investigation, where she "could have encountered him at any time," but does not allege that she actually saw him. App. 107a.

Finally, Jane Roe 1 alleges that MSU failed to respond adequately to her report that John Doe 2 sexually assaulted her, but does not allege that MSU's response subjected her to actionable harassment. App. 91a. John Doe 2 allegedly assaulted Jane Roe 1 on November 1, 2013, and Jane Roe 1 reported the alleged assault almost four months later. *Id*. MSU's investigation found insufficient evidence to support Jane Roe 1's claim. App. 19a. John Doe 2 withdrew from MSU by April 2014, and Jane Roe 1 does not allege that he harassed her again, that he ever returned to campus, or that she ever saw him again. *Id.*; App. 92a. She alleges that his "mere presence . . . on campus" after she "made her report to MSU . . . created a

hostile environment . . . and made her vulnerable to further harassment." App. 95a.

C. The district court denied, in relevant part, MSU's motion to dismiss, allowing certain Title IX claims to proceed. App. 41a–73a. Although the district court did not discuss the Question Presented at length, it found that Petitioners adequately alleged that MSU left them vulnerable to harassment and caused them to be deprived of educational opportunities. App. 50a. The district court thereafter granted MSU's request to certify its order for interlocutory appeal under 28 U.S.C. § 1292(b). App. 32a–40a.

The Sixth Circuit granted MSU's request for interlocutory appeal and reversed.

The Sixth Circuit recognized at the outset that the *Davis* cause of action has "two separate components, comprising separate-but-related torts by separate-and-*un*related tortfeasors: (1) 'actionable harassment' by a student,; and (2) a deliberate-indifference intentional tort by the school." App. 6a (citations omitted). Actionable harassment under *Davis* refers to harassment that is "severe," "pervasive," and "objectively offensive." App. 7a (citing *Davis*, 526 U.S. at 651). Pervasiveness "means 'systemic' or 'widespread,'" meaning "*multiple* instances of harassment; one incident of harassment is not enough." App. 8a. As *Davis* recognized, it is "'unlikely that Congress would have thought'" that a school could be liable for "'a single instance of sufficiently severe one-on-one peer harassment.'" App. 8a–9a (emphasis omitted) (quoting *Davis*, 526 U.S. at 652–53). The harassment must also

be "objectively offensive": "[t]he victim's perceptions are not determinative," and instead offensiveness "'is to be judged by reference to a reasonable child at whom the comments were made.'" App. 9a–10a (citation omitted).

Based on *Davis* and Title IX's statutory text, the Sixth Circuit held that a Title IX plaintiff must allege that the school's unreasonable response caused the plaintiff to suffer actionable harassment. App. 12a–13a. The Sixth Circuit recognized that the injury under Title IX is "deprivation of 'access to the educational opportunities or benefits provided by the school.'" App. 11a (quoting *Davis*, 526 U.S. at 650). But *Davis* did "not link the deliberate indifference directly to the *injury* (i.e., it does *not* speak of subjecting students to *injury*)." App. 12a. Instead, "*Davis* requires a showing that the school's deliberate indifference 'subject[ed]' its students to *harassment*, necessarily meaning further actionable harassment." *Id.* (alteration in original; citations omitted).

The Sixth Circuit rejected Petitioners' argument that *Davis*' "isolated phrase *make them vulnerable* means that post-actual knowledge *further* harassment is not necessary." App. 13a. Petitioners' arguments misread *Davis* "as a whole," *id.*, which merely recognized two ways that a school's deliberate indifference could lead to further harassment. The school's response "might (1) be a detrimental action, thus fomenting or instigating further harassment, or it might (2) be an insufficient action (or no action at all), thus making the victim vulnerable to, meaning unprotected from, further harassment." App. 14a.

Because Petitioners had not adequately pleaded post-notice actionable harassment, their Title IX claims failed.

Judge Thapar joined the court's opinion in full and wrote a separate concurrence. In his view, the question was whether MSU "'subjected' the plaintiffs to 'discrimination' (as those terms are used in Title IX)." App. 25a (Thapar, J., concurring). To be "subjected to" discrimination, he reasoned, means that the discrimination actually happened. App. 27a. The proper reading of *Davis* and of Title IX, then, is that a school can be liable if its deliberate indifference either directly causes a student to experience harassment, or indirectly causes her to experience harassment after leaving her vulnerable. *Id*. Either scenario would "subject[ ]" a student to harassment. App. 28a. This reading also drew support from Title IX's passage pursuant to Congress's spending power, which required any ambiguity to be resolved in favor of a narrow reading of Title IX. App. 29a. (Judge Rogers, in turn, issued a short concurrence on an issue not relevant to the present Petition. App. 31a.)

REASONS FOR DENYING THE PETITION

I. The Question Presented Implicates Only A Shallow Split Of Authority That May Resolve Itself Because The Only Appellate Decision Adopting Petitioners' View Created An Intracircuit Conflict

The Petition purports to present a 3-2 circuit split, Pet. 3, but that greatly overstates the current division

in the law. The Sixth Circuit's decision here is consistent with the results in abbreviated decisions from the Eighth and Ninth Circuits. Meanwhile, the *only* decision that has squarely adopted Petitioners' view opened an intracircuit split within the Tenth Circuit, which that court may well resolve en banc. After all, the painstaking Sixth Circuit decision here provides the first comprehensive discussion of the Question Presented, and will present the Tenth Circuit with a powerful opportunity to bring consistency to its own caselaw, while also coming into line with the Eighth and Ninth Circuits' decisions. And, contrary to Petitioners' claims, neither the First nor Eleventh Circuits have squarely resolved the Question Presented. As a result, given this uncertain, still-developing state of the law, there is no reason for this Court to take on an issue that is still percolating and may well resolve itself without this Court's intervention.

A. The Sixth Circuit's decision below resolved the Question Presented, and did so consistently with abbreviated decisions by the Eighth and Ninth Circuits. As explained above, *see supra*, p. 8, the Sixth Circuit held that a school can be liable for deliberate indifference to peer-on-peer sexual harassment only if "[t]he school's response" is "clearly unreasonable *and* lead[s] to further harassment." App. 12a. The Eighth Circuit, for its part, rejected a Title IX claim where the school's "purported indifference" to a student recruit's assault while visiting campus allegedly caused her serious distress, but did not "subject[ ] [the plaintiff] to harassment." *K.T. v. Culver-Stockton Coll.*, 865 F.3d 1054, 1058 (8th Cir. 2017). The Eighth Circuit did not offer any further analysis of the Question Presented.

The Ninth Circuit also rejected a Title IX claim in which there was "no evidence that any harassment occurred after the school district learned of the plaintiffs' allegations," and therefore "the school district cannot be deemed to have 'subjected' the plaintiffs to the harassment." *Reese v. Jefferson Sch. Dist. No. 14J*, 208 F.3d 736, 740 (9th Cir. 2000). *Reese* similarly did not analyze or discus the Question Presented in any depth.

B. Only the Tenth Circuit's decision in *Farmer* has squarely adopted the approach that Petitioners urge, and that decision creates an intracircuit conflict that the Tenth Circuit may well address en banc. After all, *Farmer* involved especially egregious allegations against the university, which allegations may explain the Tenth Circuit's departure from its prior caselaw. Further, *Farmer* predates the Sixth Circuit decision in the present case, which provided the first comprehensive roadmap as to how the Tenth Circuit can resolve this issue in a manner consistent with other courts of appeals and prior Tenth Circuit caselaw.

In *Farmer*, the Tenth Circuit held that alleged vulnerability to sexual harassment was sufficient to state a Title IX claim, consistent with Petitioners' position here. The plaintiffs alleged that the university failed to take action in response to reports of sexual assault and rape at off-campus fraternities, other than to advise the plaintiffs to report the assaults to the *student-run* Interfraternity Council. *Farmer*, 918 F.3d at 1099–1101. Moreover, school officials allegedly compounded the problem by releasing one plaintiff's "'highly sensitive, private information, including

her full name and a detailed description of the multiple rapes, to student peers on the [Interfraternity Council] board'" without her consent. *Id.* at 1100–01 (citation omitted).

In holding that the university could be held liable under these circumstances, without the plaintiff showing that the university's actions caused them to suffer actionable harassment, the Tenth Circuit relied heavily on *Davis*' statement that a school's deliberate indifference must have "caused Plaintiffs 'to undergo' harassment or 'ma[d]e them liable or vulnerable' to it." *Id.* at 1103 (emphasis omitted; alteration in original) (quoting *Davis*, 526 U.S. at 645). A plaintiff must be able to sue for vulnerability to harassment that never occurred, the court concluded, to "give effect to each part of that sentence." *Id.* at 1104. The school's alleged deliberate indifference, the court held, made the plaintiffs vulnerable to harassment by allowing their alleged assailants to continue attending school "unchecked." *Id.* at 1097.

Notably, in two cases decided before *Farmer*, the Tenth Circuit rejected Title IX claims where the plaintiffs failed to show post-notice actionable harassment. In *Escue v. Northern Oklahoma College*, 450 F.3d 1146 (10th Cir. 2006), the Tenth Circuit affirmed summary judgment against a Title IX plaintiff who alleged that a professor inappropriately touched her and made sexual comments to her, but did not allege further harassment after she reported this grave misconduct to the college. *Id.* at 1150. Contrasting those allegations with a case in which a student "was subjected to years of harassment by his peers" despite the

school's awareness, the Tenth Circuit explained that the plaintiff did not claim that the college's "response . . . was ineffective such that she was further harassed." *Id.* at 1155–56. Similarly, in *Rost ex rel. K.C. v. Steamboat Springs RE-2 School District*, 511 F.3d 1114 (10th Cir. 2008), the Tenth Circuit affirmed summary judgment for a school in part because the plaintiff did "not contend that further sexual harassment occurred as a result of the district's deliberate indifference after" it had notice of the harassment. *Id.* at 1123.

Farmer unpersuasively sought to distinguish *Escue* and *Rost* on the basis that those cases were decided on summary judgment, *Farmer*, 918 F.3d at 1106, which is a procedural distinction that is legally irrelevant to the proper resolution of the Question Presented. *Farmer* also faulted *Escue* and *Rost* for not discussing the issue in dispute here in sufficient detail, such that *Farmer* thought it possible to read those cases as turning on whether the schools were deliberately indifferent at all. *Id.* at 1106–07. But both *Escue* and *Rost* discussed *Davis*' requirement that a school's deliberate indifference must cause a student thereafter to undergo harassment, and reached a conclusion inconsistent with *Farmer*'s on the Question Presented. *Escue*, 450 F.3d at 1155; *Rost*, 511 F.3d at 1123.

Courts and commentators have noted that *Farmer* and *Escue* differed as to the proper resolution of the Question Presented. Judge Thapar, on whose observation of a circuit split Petitioners rely, Pet. 11–12, recognized that *Farmer* and *Escue* fell on opposite

sides of any division. App. 26a. The district court below also recognized that its decision was contrary to *Escue*. App. 39a. And commentators have noted that, at least before the Sixth Circuit's decision here, *Escue* "provid[ed] the leading rationale for requiring actual, post-notice sexual harassment in order to support Title IX liability." Zachary Cormier, *Is Vulnerability Enough? Analyzing the Jurisdictional Divide on the Requirement for Post-Notice Harassment in Title IX Litigation*, 29 Yale J.L. & Feminism 1, 18 (2017).

C. Contrary to Petitioners' arguments, Pet. 14–15, neither the First Circuit nor the Eleventh Circuit have squarely resolved the Question Presented.

In *Fitzgerald v. Barnstable School Committee*, 504 F.3d 165 (1st Cir. 2007), the First Circuit did state that the plaintiff "theoretically could" plead a Title IX claim without alleging actionable, post-notice harassment, *if* "post-notice interactions between the victim and the harasser have been alleged." *Id.* at 173. But as the First Circuit itself recognized, this admitted dicta was only "theoretical[ ]" because the court affirmed on the alternative basis that the school district's response was not deliberately indifferent. *Id.* at 173–74. Furthermore, this Court overturned *Fitzgerald* on other grounds, 555 U.S. 246 (2009), and no district court within the First Circuit has relied on *Fitzgerald* to hold that a Title IX plaintiff need not allege post-notice actionable harassment, *see T.K. v. Town of Barnstable*, No. 17-cv-11781-DJC, 2020 U.S. Dist. LEXIS 104987, at *10, *15 (D. Mass. June 15, 2020) (citing *Fitzgerald* but rejecting Title IX claim, in part because even if school had actual knowledge

of plaintiff's sexual assault, plaintiff failed to allege that "the bullying and incidents that occurred following the sexual assault were sex-based harassment").

The Eleventh Circuit's decision in *Williams v. Board of Regents of University System of Georgia*, 477 F.3d 1282 (11th Cir. 2007), likewise did not decide squarely the Question Presented here. There, the Eleventh Circuit held, consistent with *Davis*, that a plaintiff "must allege that the Title IX recipient's deliberate indifference to the initial discrimination subjected the plaintiff to *further* discrimination." *Id*. at 1296 (emphasis added). The Eleventh Circuit permitted the claim to proceed because the school had recruited, admitted, and failed to supervise a student-athlete whom the university knew "*previously* had disciplinary and criminal problems, particularly those involving harassment of women, at other colleges," and the university's deliberate indifference *thereafter* plausibly led to the plaintiff's assault. *Id*. at 1289–90, 1295–96 (emphasis added). Given the facts in the case, the Eleventh Circuit had no reason to decide the Question Presented, which turns on whether alleged deliberate indifference must cause the plaintiff to suffer actionable harassment.

II. The Sixth Circuit Correctly Resolved The Question Presented In MSU's Favor

Title IX safeguards any "person in the United States" from being "*subjected to discrimination* under any education program or activity receiving Federal financial assistance" "on the basis of sex." 20 U.S.C.

§ 1681(a) (emphasis added). In *Davis*, this Court narrowly held that a school could be liable for its deliberate indifference to "severe, pervasive, and objectively offensive" acts of peer-on-peer sexual harassment only if "its deliberate indifference 'subject[s]' its students to harassment." 526 U.S. at 644–45, 50. The Sixth Circuit, in turn, held below that a school can only be liable under Title IX if its deliberate indifference subjected a plaintiff to actionable harassment. Below, MSU: (A) provides context for the limited private-right of action that this Court created in *Cannon* and then narrowly expanded in *Davis*; (B) explains why Title IX's text, context, and principles of federalism mandate the Sixth Circuit's holding that, under *Davis*, a university can only be liable if its alleged deliberate indifference actually subjects the plaintiff to actionable harassment; and then (C) shows why the contrary arguments that Petitioners and their *amici* raise do not lead to a different conclusion.

A. The implied right of action that this Court created in *Cannon*, and then narrowly expanded in *Davis*, is exceedingly limited, consistent with the principle that "[c]oncerns with the judicial creation of a private cause of action caution against its expansion." *Janus Capital Grp., Inc. v. First Derivative Traders*, 564 U.S. 135, 142 (2011) (alteration in original).

This Court recognized Title IX's private right of action in an era, and under a legal standard, that departs from this Court's current, statutory-text-focused approach. *Cannon*, which first recognized this implied right of action, prioritized legislative history over statutory text. Despite the fact that Congress

had not included a private right of action in the text, this Court believed that Congress subjectively "intended to create such a remedy." 441 U.S. at 695. *Cannon*'s analysis reflects an earlier time, when this Court freely inferred the existence of private rights of action in statutes based on presumed legislative intent, not statutory text. *See, e.g.*, *J. I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964) ("[I]t is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose."). This Court has now rejected that approach. *See Alexander v. Sandoval*, 532 U.S. 275, 286–87 (2001) ("[A] cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute."); Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 317 (2012) ("[A] private right of action cannot be found to be 'implied' unless the implication is both clear and is based on the text of the statute—not exclusively on its purpose."). In fact, although he joined the *Cannon* majority, then-Justice Rehnquist cautioned that the decision was a relic of a bygone era, and urged the Court to be "extremely reluctant" to infer a cause of action "absent such specificity on the part of" Congress. 441 U.S. at 718 (Rehnquist, J., concurring).

Given the difficulty of defining a cause of action that Congress did not itself create, this Court has since properly interpreted Title IX's implied private right of action narrowly. Thus, in *Gebser*, this Court held that a school district could not be held liable "unless an official of the school district who at a minimum has authority to institute corrective measures on the

district's behalf has actual notice of, and is deliberately indifferent to, the teacher's misconduct," while expressly declining to impose liability on schools under theories of constructive notice or *respondeat superior*. 524 U.S. at 277.

Most relevant here, in *Davis*, this Court narrowly recognized that schools "could be liable in damages" for peer-on-peer sexual harassment "only where their own deliberate indifference effectively 'cause[d]' the discrimination." 526 U.S. at 642–43 (alteration in original). "The language of Title IX itself—particularly when viewed in conjunction with the requirement that the recipient have notice of Title IX's prohibitions to be liable for damages—also cabins the range of misconduct that the statute proscribes." *Id.* at 644. That is why a school "may not be liable for damages unless its deliberate indifference 'subjects' its students to harassment." *Id.* at 644–45 (quoting 20 U.S.C. § 1681(a)). This Court made clear that actionable harassment must be "widespread"; a single incident is generally not enough. *Id.* at 652–54.

B. The statutory text, context, and principles of federalism all support the Sixth Circuit's holding that *Davis* permits liability only where the school's alleged indifference causes the plaintiff to suffer actionable harassment.

The Sixth Circuit's holding here follows from the statutory text. As this Court explained in *Davis*, quoting 20 U.S.C. § 1681(a), a school "may not be liable for damages unless its deliberate indifference '*subject[s]*' its students to harassment." *Davis*, 526 U.S. at 644

(emphasis added) (quoting 20 U.S.C. § 1681(a)). The statutory phrase "subjected to discrimination," 20 U.S.C. § 1681(a), is most naturally read to require that harassment occur after the schools' allegedly insufficient action because, as a matter of common usage, to be "subjected" to a violation requires that violation to have happened thereafter. Scalia & Garner, Reading Law, *supra*, at 69 ("Words are to be understood in their ordinary, everyday meanings . . . ."); *id.* at 140 ("Words are to be given the meaning that proper grammar and usage would assign them."). "[S]exual harassment," in turn, "is 'discrimination' in the school context under Title IX." *Davis*, 526 U.S. at 650. In this case, for example, none of the Petitioners alleged that they suffered any actionable harassment *after* they informed MSU of the alleged sexual harassment that they suffered. *See supra*, pp. 5–7.

The Sixth Circuit's holding also more closely accords with Title IX's statutory context. This Court has consistently held that Congress did not intend schools to be liable in damages under Title IX except for their own intentional gender discrimination. *See Davis*, 526 U.S. at 641–42; *Gebser*, 524 U.S. at 277; *Franklin*, 503 U.S. at 75. *Davis* went to great lengths to emphasize just how narrow its cause of action was, denying that its decision would require schools to "'remedy' peer harassment," or "'ensure[ ] that . . . students conform their conduct to' certain rules," because "Title IX imposes no such requirements." 526 U.S. at 648–49 (alterations in original; citations omitted). Yet, Petitioners' approach would hold schools liable for failing to "remedy" peer harassment and

would open schools up to liability for myriad, everyday decisions. Reducing Title IX staff or campus security because of budgetary constraints, deciding to permit alcohol use on campus, or any number of other decisions might, in some sense, increase a student's relative vulnerability to sexual harassment. That would expose schools to the flood of litigation that *Davis* expressly rejected. *Id*. at 652–53.

Petitioners' theory would also expose schools to lawsuits from both sides of a sexual harassment complaint. Under Petitioners' approach, schools would have little choice but to expel immediately, or at least indefinitely suspend, a student accused of harassment the moment it receives a complaint, lest the accuser fear interacting with the respondent. But a quick expulsion would likely incite a lawsuit from the respondent, who would allege that the school violated his due process and Title IX rights. Recent decisions have held, as a matter of constitutional due process, that a public university student facing suspension or expulsion for misconduct is entitled to a live hearing with cross-examination of the complainant when credibility is at issue. *See Doe v. Baum*, 903 F.3d 575, 581–85 (6th Cir. 2018). And a recent Department of Education rule imposes a live-hearing and cross-examination obligation on colleges and universities, as a claimed requirement under Title IX. 85 Fed. Reg. 30,026, 30,053–54 (May 19, 2020), *codified at* 34 C.F.R. § 106.45(b)(6). As Judge Sutton has observed in a related context, the day is coming when two different juries find a school liable for "coming and going over the same incident": for failing to adequately protect a sexual harassment complainant in one case,

and for violating the respondent's procedural rights in another. *Foster v. Bd. of Regents*, 952 F.3d 765, 794 (6th Cir. 2020) (Sutton, J., dissenting), *reh'g en banc granted,* 958 F.3d 540 (6th Cir. May 15, 2020). Petitioners' position would make the coming of such a day an unavoidable, imminent reality.

Finally, as Judge Thapar explained, App. 29a, the Sixth Circuit's decision follows from principles of federalism, given that Congress enacted Title IX pursuant to its spending power. When Congress attaches conditions to receipt of federal funds, "it 'must do so unambiguously'" so that the "the States" may "exercise their choice knowingly, cognizant of the consequences of their participation.'" *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). To give adequate notice, "'Congress [must] speak with a clear voice,'" and in Title IX, Congress made clear that an institution may be liable "only for its own misconduct." *Davis*, 526 U.S. at 640 (quoting *Pennhurst*, 451 U.S. at 17). Title IX offers schools federal funding in exchange for their promise not to discriminate on the basis of sex, effectively creating a contract between the government and the school. *Gebser*, 524 U.S. at 286. If there were any ambiguity about whether a school violates Title IX by making a student vulnerable to sexual harassment, "that very ambiguity would require" the Court "to adopt the less expansive reading of Title IX." App. 29a (Thapar, J., concurring); *see also Davis*, 526 U.S. at 640.

C. Petitioners advance several arguments for their preferred expansion of *Davis*, but none are persuasive.

First, Petitioners base much of their argument on a statute-like parsing of a single sentence from *Davis*, Pet. 19–22, while giving no cogent meaning to the actual statutory text. *Davis* permitted liability for peer-on-peer harassment only if the school's "deliberate indifference 'subjects' its students to harassment," which means that the school "'cause[s] [students] to undergo' harassment *or* 'make[s] them liable or vulnerable' to it." 526 U.S. at 644–45 (emphasis added; first and third alterations added). Petitioners contend that the Court's use of "or" must have created "two discrete categories" of liability, while invoking various canons of *statutory* construction to analyze a sentence in one of this Court's opinions. Pet. 20–21. But this Court has cautioned against interpreting judicial opinions as though they were statutes, explaining that it is "generally undesirable, where holdings of the Court are not at issue, to dissect the sentences of the United States Reports as though they were the United States Code." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993). "[T]he language of an opinion is not always to be parsed as though we were dealing with language of a statute." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979).

Further, this Court's caselaw makes clear that this single sentence in *Davis* should be understood in light of the facts that were before the Court, and there was no doubt that the plaintiff in *Davis* alleged extensive actionable harassment *after* the school had actual

notice. 526 U.S. at 633–34. Thus, the school in *Davis* subjected the student to further harassment by its deliberately indifferent decision not to take any meaningful action to stop it. *Davis* had nothing to do with whether a school could be liable in damages for failing to make a student feel less vulnerable to harassment that never occurs.

Even more importantly, Petitioners' interpretation of *Davis*' single sentence gives no cogent meaning to *Davis*' discussion of the actual text of Title IX: "subjected to discrimination." While Petitioners appear to claim that rendering someone vulnerable to harassment somehow "subject[s]" them to "discrimination," Pet. 22–23, that is contrary to the statute's text and plain usage. Surely, a person is not actually "subjected to discrimination" under the statute if the school's claimed insufficiently responsive action does not *actually* cause the student to suffer actionable harassment. App. 27a–29a (Thapar, J., concurring). For example, in the present case, neither Ms. Gross nor Jane Roe 1 had any further contact with their alleged assaulters after they informed MSU of the incidents, App. 91a–92a, 107a, and Ms. Kollaritsch's interactions allegedly involved "liv[ing] in the same dormitory and frequent[ing] the same cafeteria and public areas around the dormitory," App. 84a

Petitioners' focus on a dictionary definition of "vulnerable," a word not actually found in the statutory text, Pet. 20–21, misses the mark for much the same reason. *Davis* explained that schools can only be liable if they "*subject*[ ]" their students "to harassment." 526 U.S. at 645 (emphasis added). The Sixth Circuit's

decision below recognizes that a school could subject a student to harassment by acts of omission or commission, through action or inaction, by causing it or making a student vulnerable to it. *Davis* itself is an example of how this Court expected that to operate, because the school there failed to investigate or end extensive, ongoing harassment of which it had actual knowledge, thereby leaving the plaintiff "vulnerable to her harasser," who continued actually to harass her. App. 26a–27a (Thapar, J., concurring).

Put another way, as the Sixth Circuit observed, App. 13a, Petitioners' argument relies on a false premise: that the only way to reconcile *Davis*' reference to "cause to undergo" or "make vulnerable to" is between further harassment or no further harassment. That is not correct, as Petitioners' own analogy, Pet. 21, illustrates. Golfers caught in a thunderstorm may well be *vulnerable* to lightning without ever getting struck, but it would be strange to say that they were "subjected" to a lightning strike that never happened. Again, "subjected," unlike "vulnerable," is the word that appears in Title IX itself. *See Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1738 (2020) ("After all, only the words on the page constitute the law adopted by Congress and approved by the President.").

Second, Petitioners' reliance on the Department of Education's enforcement of Title IX fails to recognize the difference between private damages actions and agency enforcement efforts. Private damages actions serve as a remedy for intentional violations, while the Department endeavors to make schools aware of po-

tential Title IX violations, so that schools can voluntarily correct them without the Department "pursuing fund termination or other enforcement mechanisms," as recognized in since-withdrawn guidance. *See* U.S. Dep't of Educ. Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (Jan. 19, 2001), https://tinyurl.com/y6njx7ur. Even the Dear Colleague Letter on which Petitioners rely recognizes that the legal standards it discussed apply in agency enforcement proceedings and court cases involving injunctive relief, not to lawsuits for damages. U.S. Dep't of Educ. Office for Civil Rights, *Dear Colleague Letter: Harassment and Bullying* 1 n.6 (Oct. 26, 2010), *available at* https://tinyurl.com/y7d8ubgb.

Third, Petitioners' claim that Title IX should be interpreted like Title VII, Pet. 23–24, is unpersuasive because the two statutes are fundamentally different. Title VII contains an express cause of action for damages. 42 U.S.C. § 2000e-5(f). Title VII and Title IX also further different objectives. "Title VII applies to all employers without regard to federal funding and aims broadly to eradicate discrimination throughout the economy," and to "compensate victims of discrimination." *Gebser*, 524 U.S. at 286–87 (citation omitted). Title IX's primary goal is not compensatory, but to "'protect[ ]' individuals from discriminatory practices carried out by recipients of federal funds." *Id*. at 287. Further, Title VII prohibits "employer[s]" from engaging in employment discrimination, and defines "employer" to include "any agent." 42 U.S.C. §§ 2000e-2(a), 2000e(b); *Gebser*, 524 U.S. at 283.

Thus, under Title VII, employers may be vicariously liable for their employees' misconduct in certain circumstances. *Gebser*, 524 U.S. at 282. Title IX does not permit vicarious liability against schools.

Fourth, Petitioners' and their *amici*'s argument that the Sixth Circuit's decision contravenes basic principles of tort law fails. Pet. 28–31; Public Justice Br. 9–11. Title IX and *Davis* did not create a general tort for student victims of sexual harassment. As this Court has repeatedly held, Title IX's implied cause of action provides a remedy for intentional gender discrimination *by a school itself*, not a negligence cause of action for the school's handling of a sexual harassment complaint. *See Gebser*, 524 U.S. at 290 ("The premise, in other words, is an official decision by the recipient not to remedy the violation."). Petitioners' claim that the decision below decouples Title IX's breach from its injury, Pet. 29–30, ignores *Davis* and Title IX's actual text. *Davis* did not speak of a school's deliberate indifference subjecting a student to a deprivation of educational benefits, but to *harassment*. *Davis*' discussion of "cause to undergo" and "vulnerability" are two paths by which a school's deliberate indifference might lead to that harassment.

Finally, Petitioners' and their *amici*'s policy arguments fail to recognize schools' competing obligations when resolving sexual harassment complaints. Schools must balance a complainant's interest in prompt resolution of their complaint with the procedural rights of the respondent. *Compare* Nat'l Ctr. for Victims of Crime Br. 11 ("Complainants having to share the same campus and living space with their

accused assailants compounds the initial trauma of sexual assault."), *with Baum*, 903 F.3d 575 (requiring respondent be provided a live hearing with cross-examination), *and* 34 C.F.R. § 106.45(b)(iv) (requiring that schools presume "that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process"). Subjecting schools to damages liability for a complainant's vulnerability to harassment would force schools into the very rush to judgment that recent case law and Title IX regulations prohibit. *See supra*, pp. 17–18.

Petitioners and their *amici* discuss sexual harassment and its effects on victims. Pet. 33–36; Public Justice Br. 13–15; Nat'l Ctr. for Victims of Crime Br. 12–13. There is no doubt that sexual harassment on campus, and in society more generally, is a significant problem. Victims of sexual harassment and assault should be able to hold their assailants responsible through civil tort actions and referrals for criminal prosecutions. And schools should and do devote significant resources to combating this grave problem. MSU is deeply committed to creating a safe environment for all students and to addressing claims of sexual harassment and assault, and has expended substantial resources to fight this problem. But this Court has not imposed the kind of expansive, *respondeat superior* liability that Petitioners urge.

III. The Petition Presents A Poor Vehicle For Deciding The Question Presented

This case is also a poor vehicle, even if the Court is inclined to consider the Question Presented. Even if vulnerability to harassment that never occurs could, in some instances, be deemed actionable under *Davis*, such vulnerability must consist of something greater than a respondent's mere presence (or even potential presence) on campus after the allegation. Here, Jane Roe 1 does not allege John Doe 2 ever returned to campus after withdrawing or that she ever saw him again. App. 91a–92a. Likewise, Ms. Gross does not allege that she had any contact with John Doe 1 after her alleged assault. App. 107a (alleging only that Ms. Gross "could have encountered [John Doe 1] at any time"). And while Ms. Kollaritsch alleged in conclusory fashion that John Doe 1 stalked or intimidated her after she reported her alleged assault, the complaint suggests "that these [encounters]" consisted "merely [of] their mutual presence at the same location." App. 17a (Batchelder, J.). The complaint alleges only that John Doe 1 "and Kollaritsch lived in the same dormitory and frequented the same cafeteria and public areas around the dormitory." App. 84a. Imposing Title IX liability based on such allegations would make schools potentially liable—to the accuser, accused, or both—in virtually every instance of claimed sexual harassment, regardless of what choice the school makes. *See supra*, p. 19.

CONCLUSION

This Court should deny the Petition.

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