No. 20-10

In the Supreme Court of the United States

EMILY KOLLARITSCH, ET AL.,
PETITIONERS

v.

MICHIGAN STATE UNIVERSITY BOARD OF TRUSTEES

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

REPLY BRIEF FOR PETITIONERS

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I. The Conflict Is Deep And Will Not Resolve Itself

Respondent's (MSU's) claim that "there is no well-entrenched split," Br. in Opp. 1, is belied not just by Judge Thapar's concurrence, see Pet. App. 25a ("[T]he question here has divided our sister circuits."), and academic commentators, see Pet. 13 (quoting acknowledgement of split), but most powerfully by MSU's counsel himself. In arguing that the D.C. District should certify this same question for interlocutory review, he noted—even before the Sixth Circuit issued its opinion in this case—that it is "clear that there is a circuit split on the question" and that "there is a split among circuits." Def.'s Reply Mem. of Law in Supp. of Its Mot. for Recons. Or, Alternatively, for Certification for Interlocutory Appeal, *Doe 1* v. *Howard Univ.*, No. 1:17-cv-00870, 2019 WL 4411932 (D.D.C. Aug. 30, 2019). Counsel's view of the split should not turn, as it appears to, on whether he is seeking or opposing review.

In any event, MSU mischaracterizes three of the five circuits involved in the split.[1] First, although it

[1] It also claims that the Ninth Circuit has joined its side. Br. in Opp. 11-12. Although petitioners happily accept MSU's reading of *Reese* v. *Jefferson School District No. 14J*, 208 F.3d 736 (9th Cir. 2000), insofar as it deepens the split, making it 3-3, that reading is mistaken. As the case makes clear, the school district did not receive notice of harassment until after "the school year had ended," *id.* at 740, and only two days before the plaintiffs "graduated and received diplomas," *id.* at 738. It simply had no opportunity to deny the plaintiffs any educational opportunities. District courts in the circuit read *Reese* this way. See, *e.g.*, *Takla*

concedes that "the Tenth Circuit's decision in *Farmer* [v. *Kansas State University*] has squarely adopted the approach that Petitioners urge," it argues that that decision is suspect because it "create[d] an intracircuit conflict that the Tenth Circuit may well address en banc." Br. in Opp. 12. Both its analysis and prediction fail.

As the Tenth Circuit itself extensively discussed in *Farmer*, that case does not stand in conflict with the two prior Tenth Circuit cases respondent cites. It noted:

> In each [prior] case, [we] upheld the district court's summary judgment determination that the Title IX plaintiff had failed to present sufficient evidence for a reasonable jury to find that the funding recipient was deliberately indifferent. * * * Neither case held that a Title IX plaintiff was required to allege subsequent actual incidents of sexual harassment had occurred following the school's inadequate response to the victim's complaint.

918 F.3d 1094, 1106 (2019). The court simply had no occasion to consider whether post-notice harassment

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v. *Regents of the Univ. of Cal.*, No. 2:15-cv-04418, 2015 WL 6755190, at *5 n.3 (C.D. Cal. Nov. 2, 2015) (noting that "Reese does not specifically address Davis' vulnerability prong[and, 'b]y th[e] time [the school received notice], the school year had ended.' In other words, even if the school had done nothing, plaintiffs could not have been subjected to further harassment nor be made vulnerable to it.") (quoting *Reese*, 208 F.3d at 740); *Karasek* v. *Regents of the Univ. of Cal.*, No. 15-cv-03717, 2015 WL 8527338, at *10 n.9 (N.D. Cal. Dec. 11, 2015) (similar).

was required in the earlier cases since it held in both that there was no deliberate indifference.[2]

The Tenth Circuit has, moreover, shown no interest in revisiting the issue en banc and "resolving" the split. Although the university in *Farmer* sought rehearing en banc, arguing that the decision "Deepens A Circuit Split," Appellant's Pet. for Panel Reh'g and Reh'g En Banc at 9, *Farmer*, 918 F.3d 1094 (Nos. 17-3207 & 17-3208), "no judge in regular active service on the court requested that the court be polled," Order Den. Reh'g, *Farmer*, 918 F.3d 1904 (Nos. 17-3207 & 17-3208) (Apr. 22, 2019). So much for MSU's hope that the split will resolve itself.

Second, respondent misreads the Eleventh Circuit case, *Williams* v. *Board of Regents of the University System of Georgia*, 477 F.3d 1282 (2007). As respondent quotes, *Williams* did hold that "*further* [post-notice] *discrimination*" was required, Br. in Opp. 16 (quoting *Williams*, 477 F.3d at 1296) (second emphasis added), but it nowhere held that only actionable harassment counted. It held, in fact, that the university could be liable because its "deliberate indifference was followed by further discrimination, this time in the form of effectively denying Williams an opportunity to

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[2] Respondent's reading of *Farmer* would also surprise district courts within the circuit, which have held that "[i]n the Tenth Circuit, a plaintiff is not required to prove further sexual harassment after reporting" and noted the split with the Sixth Circuit. *E.g.*, *Doe ex rel. Doe* v. *Brighton Sch. Dist. 27J*, No. 19-cv-0950, 2020 WL 886193, at *6 (D. Colo. Feb. 24, 2020) (citing *Farmer*, 918 F.3d at 1104).

continue to attend" the university, 477 F.3d at 1297—exactly the same type of discrimination claimed here.

MSU's reading of *Williams* also mistakenly conflates its two very different types of claims. As explained in the petition, *Williams* involved both pre- and post-assault claims. See Pet. 3 n.1 (explaining *Williams* "involved two pre-assault and one post-assault claim"). With respect to the pre-assault claims, *Williams* held quite reasonably that subsequent harassment was *sufficient* to establish liability. See 477 F.3d at 1296 (holding plaintiff "meets the Title IX standard [for these claims] through her allegations regarding the January 14 incident"). With respect to the post-assault claim, however, it held that subsequent actionable harassment was not *necessary*, see *id.* at 1296-1297 (holding that defendant "acted with deliberate difference *again* when it responded to the January 14 incident," after which plaintiff immediately withdrew and so was not subjected to further harassment but was "effectively den[ied] an opportunity to continue to attend" the university) (emphasis added).[3]

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[3] District courts in the Eleventh Circuit take this view of *Williams*. See, *e.g.*, *Doe* v. *Bibb Cnty. Sch. Dist.*, 126 F. Supp. 3d 1366, 1380 (M.D. Ga. 2015) ("[I]t is clear after *Williams* that * * * the funding recipient's deliberate indifference must subject[the student] to 'further discrimination.' It is also clear that, while the 'further discrimination' may be sexual harassment * * * , this need not be the case."); *Kinsman* v. *Florida State Univ. Bd. of Trs.*, No. 4:15cv235, 2015 WL 11110848, at *4 (N.D. Fla. Aug. 12, 2015) (applying *Williams* and finding that "the *possibility* of further encounters between a rape victim and her attacker could create an environment sufficiently hostile to deprive the victim

Third, MSU concedes that the First Circuit held in *Fitzgerald* v. *Barnstable School Committee*, 504 F.3d 165 (2007), that a complaint alleging post-notice interactions between the victim and harasser but no actionable harassment, just as in this case, could survive a motion to dismiss. Br. in Opp. 15. It then seeks to undercut that concession, however, by arguing the First Circuit's statement represents at most "admitted dicta * * * because the court affirmed on [an] alternative basis" and is otherwise without precedential value because "this Court overturned *Fitzgerald* on other grounds." *Ibid*.

Where to begin? Nowhere did the First Circuit describe its holding as "dicta," let alone "admit[]" so. That would be very odd, indeed. This Court has long recognized that "[i]t cannot be said that a case is not authority on one point because, although that point was properly presented and decided * * * , something else was found in the end which disposed of the whole matter." *Florida Cent. R.R.* v. *Schutte*, 103 U.S. 118, 143 (1880). To hold otherwise would be nonsensical. Any opinion resting on alternative grounds would, in respondent's view, have no precedential authority

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of access to educational opportunities provided by a university") (quotation omitted and emphasis added). So too does the primary commentator on whom respondent and the Sixth Circuit relied. See 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, 17 (2017) (describing *Williams* as holding "that post-notice vulnerability, even in the absence of actual harassment, can form the basis of a Title IX claim").

since each alternative holding would make all the others technically "unnecessary" to the decision.

Similarly, respondent confuses the precedential effect of judgments reversed on other grounds and ones vacated. The former *do* retain precedential authority for any holdings not reversed; the latter retain no precedential authority at all. See, *e.g.*, *Central Pines Land Co.* v. *United States*, 274 F.3d 881, 893 n.57 (5th Cir. 2001) (distinguishing cases reversed on other grounds, which retain precedential value, from those vacated, which do not); *Durning* v. *Citibank, N.A.*, 950 F.2d 1419, 1424 n.2 (9th Cir. 1991) (same).

II. MSU Mistakes The Merits

MSU concedes much of petitioners' merits argument—in particular that (1) *Davis*'s "'cause to undergo' and 'vulnerability' [prongs] are two paths by which a school's deliberate indifference might lead to" liability, Br. in Opp. 27, and (2) that "[g]olfers caught in a thunderstorm may well be *vulnerable* to lightning without ever getting struck," *id.* at 25, thus satisfying this Court's own definition of what types of discrimination can establish Title IX liability.

It also does not contest other arguments by petitioners, particularly (1) that the Sixth Circuit's reading of the act/omission distinction onto *Davis*'s "cause to undergo" and "vulnerability" prongs violates *Davis*'s specific exclusion of direct harassment claims from its purview, see Pet. 26-27; (2) that the holding below leads to absurd consequences and perverse incentives, see Pet. 31-33; and (3) that the Sixth Circuit's reading of *Davis* and the statute effectively makes all

"post-assault claims * * * a type of pre-assault claim under which a school is liable for its failure to prevent harassment to a victim rather than [for] its failure to respond appropriately to a victim's report of past harassment," Pet. 28.

The arguments it does muster against the petition fail to persuade. First, MSU continuously incants that post-notice harassment is necessary because Title IX is "limited" and should be "narrowly" construed. See, *e.g.*, Br. in Opp. 17 (repeating these words five times on a single page). This Court, however, has rejected both arguments. See, *e.g.*, *Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167, 173 (2005) ("[T]he text of Title IX * * * *broadly* prohibits * * * 'discrimination.'") (emphasis added; citation omitted); *id.* at 179 ("The statute is *broadly* worded.") (emphasis added).

Second, the reading MSU proposes of the statutory "text" does not reflect the text at all. The text prohibits any federally funded educational institution from "subject[ing any person] to *discrimination*" "on the basis of sex." 20 U.S.C. § 1681(a) (emphasis added). *Davis* explained, in turn, that an institution can "subject[students] to discrimination" in two ways: by "'caus[ing them] to undergo' harassment or 'mak[ing] them liable or vulnerable' to it." 526 U.S. 629, 644-645 (1999) (citation omitted). MSU repeatedly confuses the statutory prohibition, no "discrimination," with *Davis*'s illustration of how such discrimination can be shown: through causing students to undergo harassment or making them liable or vulnerable to it. But, of course, an institution can "discriminat[e]" after being notified of sexual assault by failing to respond to it and

thus placing the victim in such continuing fear of future assault that she reasonably feels she must withdraw from the institution. That is just an example of what making "liable" or "vulnerable" to harassment means—and what occurred here.

Third, MSU claims that petitioners "base much of their argument on a statute-like parsing of a single sentence from *Davis*, while giving no cogent meaning to the actual statutory text." Br. in Opp. 23. But any criticism here is misdirected. It was this Court, not petitioners, that used that sentence to explain what Title IX requires. And it is MSU's strained reading of it, not petitioners', that "not only stretches the content of the word 'it' beyond all logic[, but also] entirely disregards the ordinary meanings of both 'vulnerable' and 'or.'" Pet. 26. As interpretive method, MSU's approach jumps far beyond "statute-like parsing," let alone common sense.

Fourth, MSU's acknowledgment of petitioners' argument that the Sixth Circuit's ruling contravenes basic principles of tort law fails to address it. Petitioners have never claimed that Title IX's private right of action creates "a negligence action for [a] school's handling of a sexual harassment complaint." Br. in Opp. 27. This is a straw man. Rather, petitioners point out that, *as the Sixth Circuit itself noted*, its reading of *Davis* divorces causation from injury, thus contravening one of the fundamental principles of tort. The court stated:

> "Causation" [in tort ordinarily] means the "Act" caused the "Injury[.]" * * * Importantly, *Davis* does not link the deliberate indifference directly to the

> injury (i.e., it does *not* speak of subjecting students to *injury*); *Davis* [instead] requires a showing that the school's "deliberate indifference 'subject[ed]' its students to *harassment*," necessarily meaning further actionable harassment.

Pet. App. 12a (citations omitted). The Sixth Circuit itself understood, in other words, that its reading of *Davis* violates ordinary principles of tort causation.

Fifth, respondent mistakenly claims that because Title VII and Title IX are "fundamentally different," Br. in Opp. 26, the former can never shed light on the latter. In *Davis* itself, however, this Court repeatedly borrowed doctrine from Title VII to define the contours of Title IX liability. See, *e.g.*, 526 U.S. at 651 (citing *Meritor Savings Bank* v. *Vinson*, 477 U.S. 57, 67 (1986), as sole authority for *Davis*'s central holding that "a plaintiff must establish sexual harassment of students that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities").

Sixth, MSU's Spending Clause argument is wide of the mark. This Court has squarely rejected any suggestion "that ambiguities in [Spending Clause statutes] should invariably be resolved against the Federal Government." *Bennett* v. *Kentucky Dep't of Educ.*, 470 U.S. 656, 669 (1985). Congress need not, moreover, speak with unusual clarity or exhaustively list each type of offending conduct when imposing liability under the Spending Clause. See, *e.g.*, *Jackson*, 544 U.S. at 183 (finding no need to "specifically identif[y]

and proscrib[e] each condition in" Title IX) (alterations adopted). Instead, this Court requires only that Spending Clause legislation give the recipient of federal funds "notice that it will be liable for a monetary award." *Gebser* v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287 (1998) (quoting *Franklin* v. *Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 74 (1992)). *Davis* itself, in fact, in addressing a similar Spending Clause challenge, gave funding recipients ample notice that post-notice denial of educational opportunities unaccompanied by actionable harassment can lead to liability. This Court "conclude[d there] that recipients of 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 and the harasser is under the school's disciplinary authority." 526 U.S. at 646-647.

Seventh, MSU should have no fear that "[p]etitioners' approach would * * * open schools up to liability for myriad, everyday decisions[, like r]educing Title IX staff or campus security[, or] deciding to permit alcohol use on campus." Br. in Opp. 20-21. It points to no cases imposing such liability. And courts have, in fact, rejected it. See, *e.g.*, *Shank* v. *Carleton Coll.*, 232 F. Supp. 3d 1100, 1109 (D. Minn. 2017) (holding that "[t]olerating students' misuse of alcohol—even with knowledge that such misuse increases the risk of harmful behaviors such as sexual assault"—is not actionable). That is because "deliberate indifference" is a high bar. It requires knowledge of past actionable assault or harassment and conscious "disregard[of] excessive risk to * * * health or safety." *Farmer* v.

Brennan, 511 U.S. 825, 837 (1994). So long as the school's response is not "clearly unreasonable," no liability can attach. *Davis*, 526 U.S. at 648.

For this same reason, MSU needlessly worries that "[s]ubjecting schools to damages liability for a complainant's vulnerability to harassment would force schools into [a] rush to judgment" against those the complainant accuses. Br. in Opp. 28. *Davis* forecloses any such fear. It imposes liability only when the funding "recipient's response * * * is clearly unreasonable in light of the known circumstances." 526 U.S. at 648. It specifically rejected, moreover, claims that "nothing short of expulsion of every student accused of misconduct * * * would protect school systems from liability or damages"; held that "[s]chool administrators will continue to enjoy the flexibility they require"; and specifically noted that "it would be entirely reasonable for a school to refrain from a form of disciplinary action that would expose it to constitutional or statutory claims." *Id*. at 648-649.

III. MSU's Vehicle Argument Misunderstands The Central Issue

MSU argues that the case is a poor vehicle because "vulnerability must consist of something greater than a[n assaulter or harasser's] mere presence (or even potential presence) on campus after the allegation." Br. in Opp. 29. The case, though, concerns well-founded fear of further assault resulting from the school's failure to respond adequately to, in one case, the victim's attempted rape and later sexual assault by an identified attacker. Fear alone can deny the victim equal access to educational opportunities, exactly what Title

IX bars. The vehicle "problem" MSU sees, in other words, is actually a vehicle advantage. The case would allow this Court to cleanly decide an issue of pure law. The case MSU believes would be a better vehicle, by contrast, would be inevitably fact-bound, requiring this Court to decide whether and how much "more" is required when fear itself should suffice.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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