No. _____

In The
Supreme Court of the United States

METROPOLITAN GOVERNMENT OF NASHVILLE and DAVIDSON COUNTY, TENNESSEE,

Petitioner,

v.

JOHN DOE AND JANE DOE #1 ON BEHALF OF THEIR MINOR CHILD JANE DOE #2 and SALLY DOE ON BEHALF OF HER MINOR CHILD SALLY DOE #2,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In a peer-on-peer harassment Title IX claim, under what circumstances can a school district be liable when a plaintiff relies on the harassment of others to satisfy the actual knowledge element?

2. Must a Title IX plaintiff prove further actionable harassment that is caused by the school's deliberate indifference, or is it sufficient that the plaintiff was left vulnerable to a possibility of harassment?

3. Did the Sixth Circuit err when it reversed the District Court on Respondents' "after" claims under Title IX where neither Jane nor Sally Doe experienced any further actionable harassment once the school district had actual notice, and where the district responded to Sally Doe's complaint in an objectively reasonable manner by involving the police and officering social and emotional supports?

PARTIES TO THE PROCEEDING

Petitioner, The Metropolitan Government of Nashville and Davidson County d/b/a Metropolitan Nashville Public Schools ("MNPS"), was the Defendant-Appellee in the Court of Appeals.

Respondents, John Doe and Jane Doe #1 on behalf of their minor child Jane Doe #2 ("Jane Doe"), were Plaintiffs-Appellants in the Court of Appeals.

Respondent, Sally Doe on behalf of her minor child Sally Doe #2 ("Sally Doe"), was one of the Plaintiffs-Appellants in the Court of Appeals.

STATEMENT OF RELATED PROCEEDINGS

- *John Doe and Jane Doe #1 on behalf of their minor child, Jane Doe #2 v. Metro. Gov't Nashville & Davidson Cnty.*, No. 20-6225 (6th Cir.) (opinion and judgment entered on May 19, 2022; *en banc* denied on August 5, 2022.)
- *Sally Doe on behalf of her minor child, Sally Doe # 1 v. Metro. Gov't Nashville & Davidson Cnty.*, No. 20-6228 (6th Cir.) (consolidated with No. 20-6225, opinion and judgment entered on May 19, 2022; *en banc* denied on August 5, 2022.)
- *T.C. on behalf of her minor child, S.C. v. Metro. Gov't Nashville & Davidson Cnty.*, No. 3:17-cv-01098 (M.D. Tenn.) (designated as lead case; consolidated with 3:17-cv-01159 and 3:17-cv-01209; summary judgment opinions issued on May 6, 2019, and September 25, 2020.)

STATEMENT OF RELATED PROCEEDINGS – Continued

- *John Doe and Jane Doe #1 on behalf of their minor child, Jane Doe #2 v. Metro. Gov't Nashville & Davidson Cnty., TN*, No. 3:17-cv-01159 (M.D. Tenn.) (judgment entered on September 29, 2020.)
- *Sally Doe on behalf of her minor child, Sally Doe # 1 v. Metro. Gov't Nashville & Davidson Cnty.*, No. 3:17-cv-01209 (M.D. Tenn.) (judgment entered on September 29, 2020.)
- *In re Metro. Gov't Nashville & Davidson Cnty.*, No. 19-0508 (6th Cir.) (remand order entered January 24, 2020.)

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PETITION FOR A WRIT OF CERTIORARI

Since recognizing an implied right of action under Title IX based on peer-on-peer gender harassment over twenty years ago in *Davis v. Monroe Cnty. Bd. of Ed.*, 526 U.S. 629 (1999), this Court has remained silent on the limits of such an action even while the circuits below have worked to expand those limits. The framework set forth in *Davis* requires a plaintiff to prove: (1) severe, pervasive, and objectively unreasonable gender-based harassment; (2) actual notice to appropriate school officials; (3) deliberate indifference by those officials; and (4) causation. *Id.* at 650. This case presents the opportunity for the Court to resolve circuit splits on two of those four elements: actual notice and causation.

Congress enacted Title IX based on its authority in the Spending Clause. *Davis*, 526 U.S. at 640. Title IX declares that no one "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). As this Court has taught us, "[L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." *Pennhurst State Sch. & Hospital v. Halderman*, 451 U.S. 1, 17 (1981). "[P]rivate damages actions are available only where recipients of federal funding had adequate notice that they could be liable for the conduct at issue." *Id.* at 640.

Stated differently, parties to a contract should understand the terms of that contract. That premise forms the foundation of this Court's jurisprudence about implied rights of action that spring from the Spending Clause. *Pennhurst*, 451 U.S. at 17. "That contractual framework distinguishes Title IX from Title VII, which is framed in terms not of a condition but of an outright prohibition." *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287 (1998).

As part of the contract, in limited circumstances, Title IX may be enforced through a judicially implied private right of action for teacher-on-student harassment or peer-on-peer harassment. *Gebser*, 524 U.S. at 286-87 (recognizing a private right of action for teacher on student harassment); *Davis*, 526 U.S. at 629. The Title IX contract has never required schools to eliminate gender-based harassment by students from its schools. *Davis*, 526 U.S. at 648 ("We stress that our conclusion here – that recipients may be liable for their deliberate indifference to known acts of peer sexual harassment – does not mean that recipients can avoid liability only by purging their schools of actionable peer harassment. . . .")

The requirements for actual knowledge, deliberate indifference, and causation are intended to limit the circumstances where a school can be liable for money damages. *Davis*, 526 U.S. at 644 (" . . . both the 'deliberate indifference' standard and the language of Title IX narrowly circumscribe the set of parties whose known acts of sexual harassment can trigger some duty to respond on the part of funding recipients.").

First, the actual knowledge element requires that "an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of the discrimination in the recipient's programs and fails to respond." *Gebser*, 524 U.S. at 290; *see also Davis*, 526 U.S. at 650 (relying on *Gebser* in acknowledging a claim for damages for peer-on-peer harassment). "As a general matter, it does not appear that Congress contemplated unlimited recovery in damages against a funding recipient where the recipient is unaware of discrimination in its programs." *Gebser*, 524 U.S. at 285.

Several courts of appeals permit a plaintiff to rely on harassment of other students to prove actual notice before the plaintiff's incident occurs. Litigants and courts call these "before" claims – though the same strict Title IX requirements still apply. The question then becomes, what notice is required for a "before" claim? The Tenth, Eighth, and Eleventh Circuits require specific knowledge of a risk of sexual harassment, such as harassment in a particular program or previous harassment by the same perpetrator, before imposing liability. *Simpson v. Univ. of Colorado*, 500 F.3d 1170, 1180 (10th Cir. 2007) (finding actual notice where sexual assaults were rampant during the football team's recruiting events); *K.T. v. Culver-Stockton Coll.*, 865 F.3d 1054, 1058 (8th Cir. 2017) (affirming dismissal absent actual knowledge and noting that plaintiff "makes no factual allegations that the college was aware of invited high-school aged recruits, visitors

or College students being assaulted in similar circumstances, or that the College was aware of any prior allegations of sexual assault by [the same alleged perpetrator]"); *Williams v. Bd. of Regents of the Univ. Sys. of Georgia*, 441 F.3d 1287, 1298 (11th Cir. 2006), *vacated*, 477 F.3d 1282 (11th Cir. 2007) (finding actual knowledge because the school officials that recruited the student perpetrator knew of his previous sexual misconduct).

In contrast, the Sixth and Ninth Circuits have stretched actual knowledge to encompass a general knowledge that students of all ages will engage in harassing behaviors leading to a "heightened risk" that sexual harassment may occur. *Karasek v. Regents of the Univ. of California*, 956 F.3d 1093, 1112 (9th Cir. 2020) (defining the elements of a "before" claim to require: 1) a showing of deliberate indifference to *reports* of harassment; 2) which creates a heightened risk of sexual harassment that was known or obvious; 3) in any context subject to the school's control; and 4) results in severe, pervasive, and objectively offensive harassment to the plaintiff); *Doe*, App. 11 (adopting the *Karasek* test). Resolving this circuit split is necessary to prevent collapsing the actual knowledge standard into a constructive, generalized notice standard in the Sixth and Ninth Circuits.

Second, in interpreting the same language from *Davis* that a school's deliberate indifference to a student's harassment must "subject [the student] to or make vulnerable to" harassment, the courts of appeals have staked out contradictory positions. On one end of

the spectrum, liability is imposed only if the school's deliberate indifference causes further actionable harassment. *Kollaritsch v. Mich. State Univ. Bd. of Trustees*, 944 F.3d 613 (6th Cir. 2019). On the other end, liability can be imposed if the possibility of further harassment exists. *Farmer v. Kansas State Univ.*, 918 F.3d 1094, 1097 (10th Cir. 2019). Here, the Sixth Circuit – without disturbing *Kollaritsch* – held that further actionable harassment is not required when the plaintiff is a high school student.

The Court should resolve these circuit splits and clarify two fundamental elements of a Title IX claim: actual notice and causation. These circuit splits render the contract between the federal government and schools ambiguous, and outcomes in such cases now depend on the circuit in which students are educated. This Court should grant certiorari, reject the Sixth's Circuit expansive approach taken in this case, and reinstate the District Court's grant of summary judgment.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 35 F.4th 459 (6th Cir. 2022); it is reproduced in the appendix ("App.") at App. 1-32.

The district court's opinion is available at *T.C. on behalf of her minor child S.C. v. Metro. Gov't Nashville & Davidson Cnty.*, 2020 WL 5797978 (M.D. Tenn. Sept. 25, 2020); it is also reproduced at App. 121-95.

Before that decision, the Sixth Circuit granted MNPS's request for an interlocutory appeal. A motions panel vacated and remanded the district court's previous denial of summary judgment to MNPS. Those opinions are *In re Metro. Gov't of Nashville & Davidson Cnty.*, 2020 WL 13283436 (6th Cir. 2020), and *T.C. on behalf of her minor child S.C. et al. v. Metro. Gov't of Nashville & Davidson Cnty.*, 378 F.Supp.3d 651 (M.D. Tenn. 2019), and are reproduced at App. 96-98, 37-95, respectively. The district court's opinion granting a certificate of appealability is available at No. 3:17-CV-01098, 2019 WL 13128592 (M.D. Tenn. Jun. 11, 2019) and reproduced at App. 99-120.

JURISDICTION

The U.S. District Court for the Middle District of Tennessee had subject matter jurisdiction over this matter because it involved a federal question. 28 U.S.C. § 1331. The Sixth Circuit Court of Appeals had jurisdiction over the appeal because it was an appeal from a final decision by the District Court. 28 U.S.C. § 1291.

The Court of Appeals entered its judgment on May 19, 2022. (App. 33-34.) It denied MNPS's petition for a rehearing *en banc* on August 5, 2022. (App. 199-200.) This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

20 U.S.C. § 1681(a) ("Title IX") states:

> 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.

STATEMENT OF THE CASE

Respondents' cases are based on the same troubling circumstances: students engaging in, and videoing, sexual activity on school grounds and then sharing those videos with peers. But those events are not the result of MNPS's deliberate indifference. MNPS had no notice that either Sally or Jane Doe were at risk of being sexually harassed. Plus, neither Sally nor Jane Doe suffered from actionable harassment after MNPS had notice of their specific situations. The facts here are representative of the challenge that students and high school administrators alike face in responding to a new, often harsh, reality: students can document and share in real-time every moment of their lives with smartphones that they carry in their pockets.

MNPS educates 80,000 students from kindergarten through high school at over one hundred schools. MNPS official policy prohibits sexual harassment and discrimination. (Bullying, Cyber Bullying, Discrimination,

Intimidation, Harassment, and Hazing, SP 6.11, No. 3:17-CV-01098, Doc. No. 75-1.) That policy includes definitions of discrimination and harassment. (*Id.*) It also sets forth the investigatory procedures that MNPS expects its school administrators to follow. (*Id.*) It also directs the school principal to "take prompt and effective steps reasonably calculated to end such conduct, prevent such conduct from recurring, eliminate any hostile environment, and remedy its effect as appropriate. (*Id.*)

In compliance with Title IX, MNPS employed a Title IX coordinator and required extensive training about Title IX. Further, to the extent that student behaviors warranted discipline, the MNPS discipline matrix set forth the consequences.

The underlying facts in both Jane and Sally Doe are similar. They attended different MNPS high schools. They both engaged in sexual activity that was video-recorded and shared. Before the school learned about the sexual activity or the video, the videos had been shared multiple times. (App. 3-5.)

The day after Jane Doe notified school officials of the sexual activity and sharing of the video, she left MNPS and enrolled in a new school. (App. 3.)

Sally Doe remained at her high school, and the school administration offered social/emotional supports. This included frequent touchpoints and supporting Sally's decision to move to homeschool. Sally recounted some name calling related to the sharing of the video, but she identified no further actionable

harassment or that anyone known to MNPS teased her. (App. 4, 5, 31-32.)

Like all schools, despite the existence of policies and training, the Sixth Circuit found misbehavior occurred throughout MNPS. The prior disciplinary actions taken by MNPS serve as a continued acknowledgment "that children may regularly interact in a manner that would be unacceptable among adults . . . students often engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it." *Davis*, 526 U.S. at 651-52.

To prove their "before" claim, Respondents cited disciplinary actions taken from the 2012-2013 school year through the 2016-2017 school year coded as "sexual harassment," "inappropriate sexual behavior/contact," or "sexual assault." (App. 9.) The evidence included only the discipline that MNPS imposed, without any context. Notably, "inappropriate sexual behavior" and "inappropriate sexual contact" referred only to *consensual* sexual behavior. Nonetheless, both Jane Doe and Sally Doe relied on the aggregate numbers to establish "notice" to school officials to support their "before" claims.

Initially, these discipline numbers persuaded the district court into denying summary judgment to MNPS on the "before" claim. The district court opined that "[w]hile it may be true that MNPS did not, for the most part, have warning about the specific students addressed in these cases or the specific acts that would occurs, those facts are relevant to the adequacy of the

school district's preventative actions, not whether it was on sufficient notice of the risk of harassment to give rise to an obligation not to be deliberately indifferent." (App. 156.) It further found that "the risk at issue in this case is an obvious and inevitable danger, given the ages of the students involved and the realities of media and communication technology in this decade." (*Id.* at 152.)

In granting MNPS's certificate of appealability, the district court acknowledged that this was a developing area of the law and that "reasonable legal minds may differ." *T.C. on behalf of S.C. v. Metro Gov't of Nashville & Davidson Cnty.*, No. 3:17-CV-01098, 2019 WL 13128592, at *4 (M.D. Tenn. June 11, 2019). The Sixth Circuit granted MNPS's permission to appeal, vacated the district court's summary judgment order, and remanded the case in light of the decision in *Kollaritsch*.

In *Kollaritsch*, the Sixth Circuit meticulously analyzed the *Davis* opinion. 944 F.3d at 620-24. In parsing out the *Davis* formula, the *Kollaritsch* court concluded that a school must have actual knowledge of actionable harassment and that the school's deliberate indifference to it resulted in further actionable harassment of the student-victim. *Id.* at 620. In defining the knowledge required, the court noted that this Court in *Gebser* rejected an imputed-knowledge standard and that "'deliberate indifference' means that the defendant both knew and consciously disregarded the known risk to the victim." *Id.* at 621. It further concluded that *Davis* did not link the deliberate indifference directly to the injury (*i.e.*, deprivation of access to educational

opportunities), but instead required that the deliberate indifference subjected the students to *harassment*. *Id.* at 622. Therefore, under *Davis*, a Title IX plaintiff must establish further actionable harassment caused by the school's detrimental action or inaction. *Id.* at 623.

On remand, the district court faithfully applied the *Kollaritsch* decision and granted MNPS summary judgment on the before claims and Jane Doe's after claim. *T.C. on behalf of her minor child, S.C. v. Metro Gov't of Nashville & Davidson Cnty.*, 2020 WL 5797978, at *16 (M.D. Tenn. Sept. 25, 2020). It did not disturb its previous grant of summary judgment to MNPS on Sally Doe's after claims.

In an abrupt about face, however, the Sixth Circuit did the following:

1. Adopted the Ninth Circuit's "heightened risk" standard set forth in *Karasek*.

2. Concluded that a district-wide, generalized knowledge of sexually inappropriate behavior in the district (whether consensual or nonconsensual) is sufficient to put officials on "actual notice" under Title IX of "sexual harassment."

3. Concluded that the same victim requirement only applies to Title IX challenges at universities, not high schools.

4. Second-guessed school officials' decisions to respond to Sally Doe's complaint by involving the police and offering social/

> emotional supports to cope with any aftermath.

(App. 7-17.) This petition followed.

REASONS FOR GRANTING THE PETITION

I. WHEN A PLAINTIFF RELIES ON THE PRIOR HARASSMENT OF OTHER STUDENTS TO PROVE ACTUAL NOTICE, THE CIRCUITS ARE SPLIT ON THE SPECIFICITY OF THE NOTICE REQUIRED.

In the Title IX context, this Court has only addressed cases that evaluate a school's response to harassment of a single student. In those cases, the inquiry focuses on what school officials knew about the harassment, how it relates to the plaintiff, and the school system's subsequent response. There is no principled reason for expanding the notice inquiry when a plaintiff relies on the harassment of others.

Gebser involved a teacher who made sexually inappropriate statements to the plaintiff-student and other students in his classes. 524 U.S. at 277-78. Eventually, the teacher's relationship with the plaintiff-student became sexual. *Id.* Other students complained to the high school's principal about his comments, but the plaintiff-student did not disclose their relationship or complain about the comments. After police caught the teacher and plaintiff-student engaged in intercourse, the school district fired the teacher. *Id.* at 278. The plaintiff-student and her mother filed suit against

the district alleging a claim under Title IX. There were no facts that would support that any school official knew about the sexual relationship between the teacher and plaintiff-student before the police caught them. Thus, the case squarely presented the issue of what level of notice to impose: actual or constructive. *Id.* at 281-82, 291.

"The number of reported cases involving sexual harassment of students in schools confirms that harassment unfortunately is an all-too-common aspect of the educational experience." *Id.* at 292. Against this backdrop, the Court turned to the enforcement scheme for Title IX. Building off the enforcement scheme that required actual notice, an opportunity to cure any violation, and a determination that the funding recipient does not intend to comply, this Court adopted the "actual knowledge" standard. *Id.* at 288-90.

"A central purpose of requiring notice of the violation 'to the appropriate person' and an opportunity for voluntary compliance before administrative enforcement proceedings can commence is to avoid diverting education funding from beneficial uses where a recipient was unaware of discrimination in its programs and is willing to institute prompt corrective measures." *Id.* at 289.

The Court quickly disposed of the plaintiff-student's claim because the school did not have actual knowledge of any harassment directed at the plaintiff. Not unlike the Respondents' allegations here, the only complaints of misconduct involved other students and

dissimilar behavior. The plaintiff-student could not use those un-related, significantly less severe reports of her classmates to satisfy the actual notice standard. *Id.* at 291.

The following year, in a case involving student-on-student harassment, this Court adopted the standard set forth in *Gebser* for peer-on-peer harassment claims. *Davis*, 526 U.S. at 647. *Davis* involved allegations that a fifth-grade male student targeted a female classmate for months with lewd comments and inappropriate touching. *Id.* at 633-35. During the intervening months, the parent regularly contacted the teachers regarding the harassment. Also, multiple students, including the plaintiff-student, tried to inform the principal. *Id.* at 635.

This Court emphasized that schools were not now under a mandate to purge their schools of actionable peer harassment. *Id.* at 648.

As Title IX settlements grew,[1] the limits of liability have been routinely tested. And the courts of appeals

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[1] In 2016, the University of Tennessee paid eight plaintiffs $2.48 million dollars to resolve their Title IX claims. https://archive.knoxnews.com/news/local/ut-settles-title-ix-lawsuit-for-248-million-36cfb409-2921-4d9c-e053-0100007f0d02-385623781.html/ (plaintiffs alleged prior sexual harassment within the football program). The Colorado School for the Deaf and the Blind settled a Title IX claim for $1.4 million dollars. https://gazette.com/crime/1-4-million-settlement-finalized-in-sex-assaults-at-colorado-school-for-the-deaf-and/article_0f107dda-06f4-5570-9740-ad04909b9c20.html (plaintiffs alleged that school responded with deliberate indifference to their sexual assaults). And although this Court's decision in *Cummings v. Premier Rehab Keller, P.L.L.C.*, ___ U.S.

are taking divergent paths on the notice required when a plaintiff relies on the harassment of others.

A. THE SIXTH AND THE NINTH CIRCUITS HAVE EXPANDED "ACTUAL KNOWLEDGE" TO REQUIRE ONLY A GENERALIZED KNOWLEDGE THAT HARASSMENT HAS BEEN REPORTED.

The Ninth and Sixth Circuits stand alone in allowing actual notice untethered to any particular program or assailant to establish Title IX liability, as well as the mere *reporting* of sexual assaults being sufficient. Under this formulation, a school can be liable for "creating a heightened risk of sexual harassment that was known or obvious in a context subject to the school's control." *Karasek*, 956 F.3d at 1112; App. 11.

In these Circuits, "the calculus shifts" away from requiring actual knowledge when a plaintiff hinges their claim on an "official policy." *Id.* at 1112. In these instances, a plaintiff need not show actual knowledge, only a "policy" of deliberate indifference that created a heightened risk *in any context under the school's control*. *Id.* at 1112.

___, 142 S. Ct. 1562 (2022), prohibits emotional distress damages, the costs of litigating these cases is extremely high. In the companion case to Jane and Sally Doe, *S.C.*, plaintiffs' counsel requested $640,000 in attorney's fees. *S.C. v. Metro. Gov't of Nashville & Davidson County, Tennessee*, *d/b/a Metro. Nashville Pub. Schs.*, 3:17-CV-01098, Doc. No. 190 (M.D. Tenn.).

Karasek's "heightened risk" standard is created out of whole cloth and bears no relationship to *Gebser* or *Davis*. Indeed, it directly enables what this Court warned against in *Gebser*. Now, only in the Sixth and Ninth Circuits, "[a]llegations that [a school] had actual knowledge or acted with deliberate indifference to a particular incident of harassment are unnecessary to sustain. . . ." a Title IX claim. *Karasek*, 956 F.3d 1112. *Compare Gebser*, 524 U.S. at 291 (refusing to impose liability when the only notice was general). Stated differently, constructive notice is now sufficient to hold a school liable.

Taking the Ninth Circuit's lead, the Sixth Circuit adopted the *Karasek* formulation. In doing so, the Sixth Circuit stated that "MNPS was aware of issues with sexual harassment in the school system well before the two students reported their incidents. Many of these incidents involved photos or videos." (App. at 13.)

MNPS operates approximately 125 schools with school enrollments between several hundred and several thousand students per school. Importantly, if a student in a three-thousand-person high school is disciplined for sexually harassing another student through inappropriate touch coupled with gender-based insults, and then never engages in that behavior again, MNPS could not be held liable under Title IX to the student that was harassed. And if that same scenario repeats itself throughout the district, MNPS could not be liable for its specific response to any incident because its individualized responses were not clearly unreasonable. Nonetheless, *Karasek* permits those same

reasonable responses (borne out by the school's disciplinary records) to satisfy the actual knowledge requirement for future cases. It is nonsensical that reasonable, disciplinary responses to individual acts of harassment can lead to Title IX liability.

At no point during this litigation have the Respondents, the district court, or the Sixth Circuit found that MNPS acted clearly unreasonably in using discipline. Indeed, the only way to do that would be to review each individual, past disciplinary file to examine its circumstances. No such review has occurred in this case. Furthermore, there is no evidence that in any of the specific incidents, MNPS's discipline did not stop the behavior, that discipline was "clearly unreasonable," or that MNPS was otherwise "deliberatively indifferent" to harassment.

No common thread binds any of the prior incidents that Respondents and the Sixth Circuit relied on to establish actual notice. All that can be said is that "[t]he number of reported cases involving sexual harassment of students in schools confirms that harassment unfortunately is an all too common aspect of the educational experience." *Gebser*, 524 U.S. at 292.

Allowing a plaintiff to recover monetary damages based solely on a generalized risk of being more susceptible to sexual harassment is a breach of the Title IX contract. Under the *Karasek* formulation, a school district or university could be held liable for a single incident of sexual harassment of *any student-victim* because it "knew" of a heightened risk based on previous

reports (and student discipline) of harassment. That is of course an absurd result. Both *Gebser* and *Davis* recognized that students of all ages act contrary to societal expectations at times. That reality is what led this Court to require actual knowledge instead of just general, or constructive, knowledge.

To permit the Sixth and Ninth Circuits' formulation of actual notice to stand will effectively require schools to purge misbehavior from their campuses. It will also divert significant funding from education – which is not the goal of Title IX – and direct it towards litigation. This Court should grant review and re-establish that actual knowledge requires specific knowledge.

B. THREE OTHER CIRCUITS REQUIRE ACTUAL KNOWLEDGE OF HARASSMENT THAT OCCURS IN A SPECIFIC PROGRAM OR A KNOWN RISK THAT A PARTICULAR STUDENT WILL HARASS OTHER STUDENTS.

The Eighth, Tenth, and Eleventh Circuits are faithful to this Court's mandate that "[r]equiring actual, as opposed to constructive, knowledge [of the alleged sexual harassment] imposes a greater evidentiary burden on a Title IX claimant [than a Title VII claimant]." *Hayut v. State University of New York*, 352 F.3d 733, 750 (2d Cir. 2003); *see also Abramova v. Albert Einstein Coll. of Medicine of Yeshiva University*, 278 F. App'x 30, 31 (2d Cir. 2008). They also hold that "actual

knowledge" amounts to more than a generalized knowledge that students have acted inappropriately.[2]

In *Simpson v. University of Colorado*, the Tenth Circuit reversed a grant of summary judgment to the school because the record established that the school's football recruiting program centered around showing prospective student-athletes a "good time." 500 F.3d at 1180. A "good time" meant sex – both consensual and non-consensual. The opinion contains many pages detailing sexual assaults, warnings, empty gestures, a pervasive culture of tolerance, and encouragement of showing recruits a "good time" to maintain a competitive advantage. *Id.* at 1080-85. Weaving together this

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[2] MNPS's request for an interlocutory appeal was granted because the district court's initial summary judgment decision relied on unrelated generalized misconduct and was out of step with the rest of country. *See*, *e.g.*, *Ross v. Corp. of Mercer Univ.*, 506 F.Supp.2d 1325, 1356 (M.D. Ga. 2007) (past incidents alone – without any evidence of deliberate indifference on the school's part – are not enough to trigger Title IX liability); *Doe v. Bibb Cnty. Sch. Dist.*, 83 F.Supp.3d 1300, 1307-08 (M.D. Ga. 2015), *aff'd*, 688 F. App'x 791 (11th Cir. 2017) (citing, among other cases, *Schaefer v. Las Cruces Pub. Sch. Dist.*, 716 F.Supp.2d 1052, 1081 (D.N.M. 2010) ("The Defendants had actual knowledge of three prior incidents of sexual assault by different assailants against different victims, but the most that can be said about the sexual assault to which AS was a victim – the only assault for which the Schaefers seek a remedy – is that the Defendants were put on notice that it was a possibility."); *T.Z. v. City of New York*, 635 F.Supp.2d 152, 170 (E.D.N.Y.) ("The school cannot be held liable to plaintiff under Title IX for the assault against C.G. under a theory that it knew of past assaults, given that the school's knowledge was generalized, and there was no specific threat posed to C.G. or posed by her assailants."), *rev'd in part on reconsideration*, 634 F.Supp.2d 263 (E.D.N.Y.2009)).

Court's decisions in *Gebser* and *Davis*, the Tenth Circuit turned to municipal liability caselaw.

Relying on *City of Canton v. Harris*, 489 U.S. 378 (1989), and *Bd. of Cnty. Commissioners of Bryan Cnty., Okla. v. Brown*, 520 U.S. 397 (1997), the Tenth Circuit limited "before claims" to "a policy of deliberate indifference to providing adequate training or guidance that is obviously necessary for implementation of a *specific program or policy of the recipient*." *Simpson*, 500 F.3d at 1178 (emphasis added). The facts established in *Simpson* satisfied the Tenth Circuit's formulation because university officials knew of the prior sexual assaults during recruiting events yet continued to encourage the events without any changes.

The Eighth and Eleventh Circuits align with the Tenth Circuit's limited use of the harassment of others to establish actual notice. The Eighth Circuit has refused to let a case proceed past the motion to dismiss stage when the complaint did not contain any allegations of prior knowledge of harassment previously committed by the same perpetrator or previous reports of sexual harassment against the same student-victim. *K.T.*, 865 F.3d at 1058; *Ostranger v. Duggan*, 341 F.3d 745, 751 (8th Cir. 2003). Indeed, under Eighth Circuit precedent, even a link between organizational members, such as a fraternity, committing sexual assaults in various locations is not sufficient to satisfy the actual knowledge requirement. *Ostranger*, 341 F.3d at 751. Similarly, the Eleventh Circuit has only recognized a "before" claim when the university had notice of prior sexual assaults by the assailant. *Williams v.*

Bd. of Regents of the Univ. Sys. of Ga., 477 F.3d 1282, 1293-94 (11th Cir. 2007). Taken together, these cases represent that actual knowledge only springs from notice that the plaintiff was likely to be sexually harassed because of 1) prior sexual assaults in a specific program or 2) prior sexual harassment by the same perpetrator. That is fundamentally different than the generalized notice standard articulated by the Sixth and Ninth Circuits.

The Ninth and Sixth Circuits' caselaw on actual notice cannot be harmonized with the Tenth, Eighth, and Eleventh Circuits'. The Ninth and Sixth Circuits maintain the dystopian legal landscape that the *Davis* dissent theorized would occur where schools are held liable for every misdeed.[3] And in the Tenth, Eighth, and Eleventh Circuits, schools are only responsible for their actions and not those of the students they educate.

Only this Court can resolve the conflict, clarifying what notice is required to succeed on a Title IX claim.

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[3] The detrimental impact of the Sixth and Ninth Circuits' approach cannot be overstated. If the Sixth Circuit's opinion is permitted to stand, school districts, colleges, and universities across the circuit will be liable under Title IX for every incident of sexual harassment that occurs because they have disciplinary records involving sexual harassment. Surely, this Court never intended to create an implied right of action that sentences a school to never ending liability. Granting certiorari is the only action that can prevent that result in the Sixth and Ninth Circuits.

II. COURTS OF APPEALS ARE SPLIT ON WHETHER A TITLE IX PLAINTIFF MUST PROVE ADDITIONAL HARASSMENT OR WHETHER MERE VULNERABILITY TO HYPOTHETICAL HARASSMENT WILL SUFFICE.

The Court's guidance is also needed to clarify the causation element in a Title IX claim.

When the Court expanded liability to include peer-on-peer harassment, it caveated that "[schools] may not be liable for damages unless its deliberate indifference 'subject[s]' its students to harassment. That is, the deliberate indifference must, at a minimum, 'cause [students] to undergo' harassment or 'make them liable or vulnerable to it.'" *Davis*, 526 U.S. at 645.

Mindful of the potential repercussions, this Court in *Davis* sought to calm the fears of unlimited liability for unacceptable student behavior at all levels. It reassured funding recipients, such as MNPS, that expanding the private right of action to peer-on-peer harassment "does not mean that recipients can avoid liability only by purging their schools of actionable peer harassment or that administrators must engage in a particular disciplinary action." *Id.* at 648.

It noted that the reasonableness of the response may vary depending on the setting. *Id.* at 649. It did not establish different requirements for causation depending on the educational setting.

The Court did not decide if the plaintiff-student in *Davis* could prove deliberate indifference. *Id.* at 649. The plaintiff-student could, however, potentially satisfy the "subjected to" requirement if the school did not respond at all while the harassment continued. *Id.* at 649. "[P]etitioner's ability to state a cognizable claim here depends equally on the alleged persistence and severity of G.F.'s actions, not to mention the Board's alleged knowledge and deliberate indifference." *Id.* at 652.

Additional harassment of the plaintiff-student was a necessary showing because "we think it unlikely that Congress would have thought such behavior sufficient to rise to this level in light of the inevitability of student misconduct and the amount of litigation that would be invited by entertaining claims of official indifference to a single instance of one-on-one peer harassments." *Id.* at 652-53.

Interpreting the *Davis* language – subject to or make vulnerable – the Tenth and Sixth Circuits have reached diametrically opposed positions.[4]

The Tenth Circuit found that the statement "cause students to undergo harassment *or make them liable or vulnerable to it*" conclusively determined that Title IX did not require further harassment once the school had notice of the additional harassment. *Farmer*, 918 F.3d at 1097 (emphasis in original). Under Tenth

[4] The Ninth Circuit has acknowledged the circuit split on causation, but has not yet weighed in. *Karasek*, 952 F.3d at 1106 n.2.

Circuit precedent, the fear of encountering a student attacker – so long as that fear is objectively reasonable – is sufficient to establish causation under Title IX.[5] *Id.* at 1105.

The Sixth Circuit requires that a plaintiff-student prove that the school's deliberate indifference caused further actionable sexual harassment. *Kollaritsch*, 944 F.3d at 618. In reaching this conclusion, it parsed the traditional three element test and relied exclusively on *Davis*. *Id.* at 619-23. "[T]he *Davis* formula clearly 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." *Id.* at 619-20 (citations omitted).

The actionable harassment acts as the trigger, but the deliberate indifference intentional tort is the catalyst for liability. Establishing deliberate indifference requires: 1) knowledge; 2) an act; 3) injury; and 4) causation. *Id.* at 621. "An 'Act' means a response by the school that was 'clearly unreasonable in light of the known circumstances.'" *Id.* at 621 (citing *Davis*, 526 U.S. at 648). Importantly, 'injury' is not the sexual

[5] It is hard to imagine a scenario where it would not be objectively reasonable for a victim of severe, pervasive, and objectively unreasonable harassment to fear seeing his or her harasser. While it may appear that the objectively reasonable requirement imposes a hurdle to liability, as a practical matter, that requirement will be easily satisfied.

harassment. It is being denied educational opportunities. *Id.* at 622.

Davis does not link the deliberate indifference directly to the injury; *Davis* requires a showing that the school's deliberate indifference "subject[ed] its students to *harassment*," necessarily meaning further actionable harassment. *Id.* (citing *Davis*, 526 U.S. at 644).

And while it may appear that this case now aligns with the Tenth Circuit, it does not. The Sixth Circuit, again, finds itself an outlier, by creating two different causation standards depending on whether the funding recipient educates students in a K-12 setting or a university setting. (App. at 17 ("[W]e decline to extend *Kollaritsch's* same-victim requirement to a Title IX claim in a high school setting."))[6] In essence, the *Doe* Court created an additional circuit split. No other circuit imposes different causation standards based on the school setting.[7]

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[6] Interpreting *Davis*, which involved an elementary school student, the Sixth Circuit formulated the same victim requirement in *Kollaritsch*, 944 F.3d at 622. It then refused to impose the requirement here because of the authority schools exercise over high schoolers. *Doe*, 35 F.4th at 468 (citing *Davis*, 526 U.S. at 646). By the Sixth Circuit's logic, high schools must have more control over teenagers than elementary schools do over children. Moreover, that provision in *Davis* is supposed to give schools latitude in responding, not hamstring them.

[7] Jane Doe cannot satisfy either standard because she left school the day after informing her high school's administrative staff. Accordingly, she did not suffer any additional harassment at MNPS. Also, by leaving school, she could not have been vulnerable to any harassment that was within MNPS's control. To hold

Indeed, it is antithetical to an implied right of action under the Spending Clause, Title IX, and *Davis* that two different causation standards apply based on the school setting. In return for federal funding, schools must not subject their students to gender-based discrimination, lest the school be liable for money damages. In articulating the requirements to establish a peer-on-peer harassment claim, in a case involving a fifth-grade student, this Court enunciated that a school must "at a minimum, 'cause [students] to undergo' harassment or 'make them liable or vulnerable to it.'" *Id.* at 645. Nothing in that opinion hints that the phrase "cause students to undergo harassment" applies to university students and that the phrase "make them vulnerable to it" applies to K-12 students.

And while the Tenth and Sixth Circuits have set the bookends of this debate in recent years, this split has been forming since *Davis*. *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, 3 (2017) (exploring the circuit split on causation and advocating that an implied right of action requires that the deliberate indifference actually cause post notice harassment). Review is needed to resolve the circuit split on the appropriate causation standard and the

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MNPS liable in these circumstances would be to require an immediate response instead of one that is not clearly unreasonable.

Sixth Circuit's further split that causation depends on whom the school educates.[8]

III. THE SIXTH CIRCUIT'S OPINION – WHICH WRONGLY APPLIES *DAVIS* AND EXPANDS CAUSATION AND ACTUAL KNOWLEDGE BEYOND THEIR INTENDED PARAMETERS – CONSTITUTES A PERFECT VEHICLE FOR RESOLVING THESE CIRCUIT SPLITS.

The Sixth Circuit's decision second guesses school officials' decisions and substitutes the judgment of federal courts for educators. The proper functioning of schools depends on affording school officials significant discretion to address the problems they face. *Wood v. Strickland*, 420 U.S. 308, 326 (1975) ("The system of public education that has evolved in this Nation relies necessarily upon the discretion and judgment of school administrators and school board members and § 1983 was not intended to be a vehicle for federal court correction of errors in the exercise of that discretion which do not rise to the level of violations of specific

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[8] The Solicitor General tries to spin the *Doe* decision as being aligned with other circuits because no circuit requires post-knowledge harassment for K-12 students. *See Fairfax Cnty. Sch. Bd. v. Jane Doe*, Doc. No. 21-968, *Brief for the United States as Amicus Curie* p. 14. Respectfully, this misses the point. No circuit other than the Sixth changes the elements of a Title IX claim based on the plaintiff's age. To do so is nonsensical and inconsistent with the concept of the Spending Clause creating contracts. Contracts do not get interpreted differently based on who the signatories are.

constitutional guarantees."), *abrogated on other grounds*, *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

For the "before" claim, the Sixth Circuit did not rely on any official policy of MNPS. Nor did it rely on MNPS officials encouraging sexual harassment, like the administrators in *Simpson*. The court made no attempt to ferret out what the possible deliberate indifference could be.

Instead, as discussed above, the court relied on evidence of prior disciplinary actions at MNPS that addressed a whole host of behaviors. The court was apparently under the impression that all "inappropriate sexual behavior" whether engaged in by kindergarteners or highschoolers, or whether the behavior was consensual or nonconsensual, all amounted to "sexual harassment" under Title IX. (*E.g.*, App. 9 ("Many of those incidents involved students taking and/or distributing sexually explicit photographs *of themselves* or other students." (emphasis added)). The Sixth Circuit recounted that MNPS had issued discipline involving 950 instances of sexual harassment, 1200 instances of inappropriate sexual behavior, 45 instances of sexual assault, and 218 instances of inappropriate sexual contact over a five-year period, from the 2012-13 school year through the 2016-17 school year. *Id.* "What to make of those numbers, however, is less than clear." *Id.* at 28 (Guy, J., dissenting). Based on these figures alone, without any context for each incident, the Sixth Circuit inexplicably concluded that MNPS was "well aware" of *sexual harassment*. *Id.* at 13. That, of course, distorts the facts. MNPS was not

"well aware" that sexual harassment went unchecked (in fact, it did not).[9]

This Court has never addressed a "before" claim, but it did equate deliberate indifference under Title IX to deliberate indifference under Section 1983 in *Gebser*, 524 U.S. at 290-91. In the municipal liability framework under Section 1983, MNPS's disciplinary numbers, without any expert analysis at all, would be meaningless. To establish municipal liability requires a pattern of similar constitutional violations. *Connick v. Thompson*, 563 U.S. 51, 62 (2011). Such a pattern cannot be established here. Again, implicitly acknowledging the shortfalls of Respondents' proof, the Sixth Circuit resorted to conflating voluntary sharing explicit content with the involuntary sharing that occurred here. Voluntary conduct, even if against the school's discipline code, does not establish a pattern of severe, pervasive, and objectively offensive conduct that Title IX imposes an obligation on the school to respond to.

The high burden put upon Title IX plaintiffs in *Davis* ensures that school districts are not financially crippled merely because K-12 kids are still maturing,

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[9] The fact that these were all *disciplinary* actions should have been a strong indication to the court that these incidents did not involve "deliberate indifference" on the part of MNPS at all. The court improperly cited these out-of-context disciplinary numbers as constituting sufficient "notice" of "sexual harassment," even where the incidents were coded as "sexually inappropriate," without any analysis as to whether they involved consensual or nonconsensual behavior, or involved "harassment" at all.

going through the difficult process of learning what is appropriate and inappropriate and how to treat themselves and one another. The Sixth Circuit's contortion of *Davis* imposes strict liability on MNPS – and, frankly, all school systems – solely because MNPS did not purge its two high schools of all teasing and questionable behavior after it had notice of the events at issue. Other than a generalized notion that teasing, or even bullying, could (and likely would) happen after the posting of an explicit video, there are no facts that school administrators had any knowledge that particular students posed a threat to Sally or Jane Doe. Indeed, despite Jane Doe having left school immediately after the school had notice, the Sixth Circuit revived her claim. And, the Sixth Circuit offered up alternative actions that the school could have taken to "remedy the violation" in Sally Doe's case. (App. at 14-15.) This misapplies *Davis*, which requires that MNPS respond in a manner that is not clearly unreasonable – not that it *remedy* the harassment. Review is warranted because this case presents the opportunity to examine both actual knowledge and causation. On both elements, the Sixth Circuit adopted the more expansive interpretation of the implied right of action.

For these reasons, this case provides the Court with the perfect opportunity to bring clarity to the law. Title IX never contemplated a world where the school day does not end. It also never contemplated a de facto demand that schools purge peer-on-peer harassment. Yet, that is effectively now the law in the Sixth Circuit. In today's world, due in some part to the pandemic,

kindergartners and grad students are equally proficient in technology. Yet for all of technology's benefits, there are significant drawbacks. The ubiquitous nature of cell phones means that an insult is never far away. It also means that harassment can be documented, shared, discussed, and harm inflicted before a school even knows what happened.

After more than 20 years, this Court should seize this opportunity to remind the courts of appeals that Title IX does not require a school to cure society's evils and that a school's bank account is not the remedy for harassment by its students. To be clear, MNPS is not minimizing what occurred. Jane and Sally Doe's circumstances are shocking and regrettable. But it is an impossible ask to expect school districts to put the proverbial genie back in the bottle after learning weeks after an incident that arguably unwanted sexual activity was recorded and distributed electronically. And as a result of these dangerous and widespread circuit splits, a school's inability to put the genie back in the bottle now creates liability.[10]

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[10] This is particularly perilous given that the law on a school's ability to regulate student speech on the internet is an emerging area. *Mahanoy Area Sch. Dist. v. B.L.*, ___ U.S. ___, 141 S. Ct. 2038, 2056-59 (2021) (noting that while the extremes of what speech can and cannot be regulated, significant litigation has arisen about the middle ground, which includes bullying and harassment of students) ("If today's decision teaches any lesson, it must be that the regulation of many types of off-premises student speech raises serious First Amendment concerns, and school officials should proceed cautiously before venturing into

In return for federal funding, schools must respond without deliberate indifference to known acts of sexual harassment. That is what MNPS did in all of the prior harassment incidents on which the Respondents rely. While educating 80,000 students, MNPS used its student discipline code to modify the behavior of students that was as varied as the students themselves. Students used inappropriate language, viewed lewd images, engaged in consensual kissing or touching, or unwanted harassment. And in the record before this Court, *each time* MNPS issued student discipline. There is no pattern or link between the previous, varied incidents and the Respondents here. There is no evidence that they had been previously harassed, that they had participated in any program or activity with a history of harassment, or that the perpetrators of the harassment were serial harassers.

This case should have involved a straightforward application of *Davis*– not the creation of new law and yet another circuit split. Once this Court clarifies the law, the application will not be difficult, which makes this an ideal vehicle for review.

As noted by Judge Guy in his dissent in our case, the Sixth Circuit's decision will significantly enlarge school district liability and that "the urge to want to blame someone for failing to prevent the sexual misconduct . . . cannot justify supplanting or side-stepping

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this territory.") (Alito, J., concurring). This cannot be what Congress envisioned when it adopted Title IX.

what is required to hold a school district liable under Title IX." (App. at 19.) (Guy J., dissenting).

This potential for expansive liability is not limited to Title IX cases. It extends to claims under each of the antidiscrimination statutes enacted under the spending clause. This includes claims under the Rehabilitation Act that prohibits funding recipients from discriminating based on disability, 29 U.S.C. § 794, as well as claims under Title VI, which prohibits "any program or activity receiving Federal financial assistance" from discriminating based on "race, color, or national origin." 42 U.S.C. § 2000d. Given the far-reaching implications, this Court should grant review.

CONCLUSION

In both *Gebser*, 524 U.S. at 280, and *Davis*, 526 U.S. at 637-38, this Court granted certiorari to define the damages remedy available under Title IX and to settle differences among the courts of appeals. For those very same reasons, review is warranted here.

The courts of appeals are divided on both the actual knowledge and causation elements. Resolving these splits is critically important to school systems, universities, and students alike. The decision at issue here affects not only Title IX jurisprudence but several antidiscrimination laws that rely on this Court's formulation of the implied right of action. Accordingly, this case is an ideal vehicle for review because it

presents both issues with a fully developed factual record. Accordingly, MNPS requests that certiorari be granted.

Respectfully submitted,

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