No. _____

In the Supreme Court of the United States

CYPRESS-FAIRBANKS INDEPENDENT SCHOOL DISTRICT
Petitioner,

v.

JANE ROE,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Since its landmark decision in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), the Court has not provided school districts with any guidance on the contours of their potential Title IX liability for student-on-student harassment. And although the *Davis* Court intentionally imposed a demanding liability standard, the federal courts of appeals are divided on what satisfies a plaintiff's burden. Some hold that a school's deliberate indifference to known peer harassment must cause the plaintiff to undergo further harassment. Others merely consider whether the school's indifference made the plaintiff "more vulnerable" to speculative (or even non-existent) future harassment. The decision below—in which the Fifth Circuit reversed summary judgment in favor of a school district on claims stemming from injuries suffered by a high school student during a consensual sexual encounter with her long-term boyfriend—implicates this division among the circuits, and materially conflicts with *Davis*. The questions presented are:

1. Whether and to what extent a Title IX plaintiff must prove that a school's deliberate indifference to known peer harassment caused them to undergo further harassment.

2. Whether a plaintiff's mere vulnerability to further peer harassment confers Article III standing.

3. Whether, under *Davis*, courts may consider the "totality of the circumstances," as opposed to only the "*known* circumstances," when evaluating deliberate indifference.

4. Whether identifying the lack of evidence on an essential element of the plaintiff's claim preserves a no-evidence ground for summary judgment.

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The Fifth Circuit's opinion [Pet. App. 1a–25a] is reported at 53 F.4th 334 (5th Cir. 2022). The district court's amended memorandum opinion and order granting summary judgment [Pet. App. 26a–70a][1] and final judgment [Pet. App. 72a] are unreported.

JURISDICTION

The court of appeals entered its judgment on November 14, 2022, and denied a timely petition for rehearing on June 12, 2023. [Pet. App. 71a]. On August 28, 2023, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including September 25, 2023. Petitioner invokes the Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

> 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).

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . .

U.S. CONST. Art. III, § 2, cl. 1.

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[1]The district court withdrew its original memorandum opinion to remove references to Jane Roe's real name.

INTRODUCTION

An estimated 49 million students currently attend the Nation's 13,000+ public school districts. Nearly twenty-five years ago, a slim majority of the Court held that Title IX provides an implied private right of action against these school districts for student-on-student sexual harassment. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633, 645 (1999) (O'Connor, J., joined by Stevens, Souter, Ginsburg, and Breyer, JJ.).[2] Despite the majority's efforts to narrowly limit liability to circumstances where the school district "acts with deliberate indifference to known acts of harassment in its programs or activities" and where the harassment "take[s] place in a context subject to the school district's control" and "is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit," *see id.*, its ruling did not merely open the proverbial floodgates—it ushered in a tidal wave of Title IX peer harassment litigation that has drastically expanded the circumstances under which student misconduct gives rise to school district liability. This case perfectly illustrates that unfortunate truth.

But the questions presented cannot be properly examined without first understanding the controversies surrounding the *Davis* opinion itself. First and foremost, the remaining members of the *Davis* Court disputed the entire foundation of the majority's decision because "Title IX does not by its terms create any private cause of action whatsoever, much less define the

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[2]One year before *Davis*, the Court held that a Title IX plaintiff can recover damages for *teacher*-on-student sexual harassment under certain circumstances. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 277 (1998).

circumstances in which money damages are available," as historically required when imposing civil liability pursuant to Spending Clause legislation. *Id.* at 655–57 (Kennedy, J., joined by Rehnquist, C.J., and Scalia and Thomas, JJ., dissenting). From the dissent's perspective, the majority not only manufactured an unintended cause of action, it also "eviscerate[d] the clear-notice safeguard" of Spending Clause jurisprudence in the process. *Id.*

On the merits of the newly-implied claim, the dissent questioned the majority's interpretation of what it means to be "subjected to discrimination under any education program or activity" in violation of Title IX. *See* 20 U.S.C. § 1681(a). Noting that Congress defined "program or activity" as "all of the operations of" a funding recipient, *see id.* at § 1687, the dissent challenged the majority's conclusion that a school violates Title IX simply by failing to respond appropriately to known peer harassment:

> The mere word "subjected" cannot bear the weight of the majority's argument . . . Under the most natural reading of this provision, discrimination violates Title IX only if it is authorized by, or in accordance with, the actions, activities, or policies of the grant recipient. This reading reflects the common legal usage of the term "under" to mean pursuant to, in accordance with, or as authorized or provided by.

Davis, 526 U.S. 659–60 (citations omitted). According to the dissent, the statute's plain language forecloses liability for peer harassment that merely happens to occur in a "context subject to the school district's control;" instead, "[t]he discrimination must actually be 'controlled by'—that is, be authorized by, pursuant to, or in accordance with, school policy or actions." *Id.* at

660. The dissent's interpretation harmonized Title IX's requirement that discrimination occur "under" a school's "operations" with the fact that the "term 'operations' connotes active and affirmative participation by the grant recipient, not merely inaction or failure to respond." *Id.*

Turning to more pragmatic concerns, the dissent accused the majority of attempting to transform Title IX into a "Federal Student Civility Code," *id.* at 684, and worried that "[t]he only certainty flowing from the majority's decision is that scarce resources will be diverted from educating our children and that many school districts, desperate to avoid Title IX peer harassment suits, will adopt whatever federal code of student conduct and discipline the Department of Education sees fit to impose upon them." *Id.* at 657–58.[3] Ultimately, the dissent predicted (accurately, as it turns out) that "[t]he private cause of action the Court creates will . . . embroil schools and courts in endless litigation over what qualifies as peer sexual harassment and what constitutes a reasonable response." *Id.* at 684.

The *Davis* majority responded to these criticisms by emphasizing the narrowness of its ruling, and by stressing that Title IX does not require funding recipients to purge their schools of "actionable peer harassment" or agree to particular remedial demands. *Id.* at 644–49. The majority also agreed that "courts should refrain from second-guessing the disciplinary decisions made by school officials," *id.*, and cautioned that Title IX civil liability should be limited to remedying

[3]The dissent considered "[t]his federal control of the discipline of our Nation's schoolchildren" to be "contrary to our traditions and inconsistent with the sensible administration of our schools." *Id.* at 658.

serious behavior that has the "*systemic* effect of denying the [plaintiff] equal access to an educational program or activity." *Id.* at 652 (emphasis added). In terms of what behavior might rise to that level, the majority specifically distinguished single incidents of peer harassment from the type of systemic discrimination that it understood Title IX to prohibit:

> Although, in theory, a single instance of sufficiently severe one-on-one peer harassment could be said to have such an effect, 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 harassment.

Id. at 652–53. According to the majority, "[b]y limiting private damages actions to cases having a *systemic* effect on educational programs or activities, we reconcile the general principle that Title IX prohibits official indifference to known peer sexual harassment with the practical realities of responding to student behavior, realities that Congress could not have meant to be ignored." *Id.* (emphasis added).

Davis was both the first—and *last*—time this Court provided schools with any guidance on the contours of their potential liability for peer harassment. Over the last quarter-century, lower courts have adopted myriad standards for assessing Title IX liability in this context. In some cases (such as this one), liability has been expanded far beyond what the *Davis* Court—or Congress—ever could have intended.

Several circuit courts require a plaintiff to show that the school's alleged indifference to known peer harassment actually caused them to undergo further harassment. *See, e.g.*, *Kollaritsch v. Mich. State Univ. Bd. of Trustees*, 944 F.3d 613, 623–24 (6th Cir. 2019), *cert. denied*, 141 S. Ct. 554 (2020); *Shank v. Carleton Coll.*, 993 F.3d 567 (8th Cir. 2021); *K.T. v. Culver-Stockton Coll.*, 865 F.3d 1054, 1057–58 (8th Cir. 2017); *Reese v. Jefferson Sch. Dist. No. 14J*, 208 F.3d 736, 740 (9th Cir. 2000); *but see Doe on behalf of Doe #2 v. Metro. Gov't of Nashville & Davidson Cnty, Tenn.*, 35 F.4th 459 (6th Cir. 2022), *cert. denied*, 143 S. Ct. 574 (2023) (declining to extend *Kollaritsch*'s same-victim requirement to high school setting in cases where plaintiff alleges that multiple students experienced sex-based harassment).

Meanwhile, other circuit courts broadly impose Title IX liability based on single incidents of *pre-notice* peer harassment, and have also allowed plaintiffs to sue schools for allegedly making them "more vulnerable" to future, speculative harassment. *See, e.g.*, *Fitzgerald v. Barnstable Sch. Comm.*, 504 F.3d 165, 171 (1st Cir. 2007), *rev'd and remanded on other grounds*, 555 U.S. 246 (2009); *Doe v. Fairfax Cnty. Sch. Bd.*, 1 F.4th 257, 273–74 (4th Cir. 2021), *cert. denied*, 143 S. Ct. 442 (2022); *Farmer v. Kan. State Univ.*, 918 F.3d 1094, 1104 (10th Cir. 2019); *Williams v. Bd. of Regents of Univ. Sys. of Ga.*, 477 F.3d 1282, 1295–96 (11th Cir. 2007).

The conclusion that Title IX liability encompasses a mere vulnerability to future harassment stems from an arguably mistaken and out-of-context reading of a single definitional phrase in *Davis*. Reminiscent of how lower courts "latched on" to the "*de minimis* cost" language in *Trans World Airlines, Inc. v. Hardison*,

432 U.S. 63 (1977)—resulting in the near-elimination of Title VII protections for religious accommodations[4]—several lower courts premise their peer harassment liability standard on *Davis*'s *one* passing reference to *one* definition of the term "subject." *Davis*, 526 U.S. at 644–45 (noting sources that define "subject" as "to cause to undergo the action of something specified; expose" or "to make liable *or more vulnerable*; lay open; expose" or "to cause to undergo or submit to: make submit to a particular action or effect: expose") (emphasis added).

But regardless of the reason, this expansion of Title IX liability seemingly ignores traditional Article III standing requirements. *See TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2210–11 (2021) (mere risk of future harm does not confer standing). It also appears contrary to the overall language and spirit of *Davis*, both of which demonstrate the Court's intentional imposition of a rigorous liability standard of narrow applicability. *Davis*, 526 U.S. at 644–45 (noting the limited circumstances under which a school district will be found to have "'*expose[d]*' its students to harassment or '*cause[d]*' them to undergo it 'under'" the school's programs) (emphasis added); *id.* at 642–43 (noting that, in *Gebser*, the Court limited potential liability to where a school "*remain[ed]* deliberately indifferent" to known acts of teacher-on-student harassment, such that its own acts or omissions "*caused*" the "*discrimination*") (emphasis added); *id.* at 653 ("Peer harassment, in particular, is less likely to [violate Title IX] than is teacher-student harassment."). In other words, context matters.

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[4]The Court eventually corrected the decades-old misinterpretation of *Hardison* in *Groff v. DeJoy*, 143 S. Ct. 2279 (2023).

Whether the "mere vulnerability" approach satisfies Article III standing requirements—and comports with the Court's admonishments in *Davis*—are important questions that need to be resolved. If the continued existence of *actionable* peer harassment cannot, in and of itself, violate Title IX, then when and how can the mere possibility that post-notice peer harassment *might* occur trigger Title IX liability? How can a school avoid such a speculative risk absent expelling students accused of sexual misconduct (along with all of their friends)? Does it matter whether the school has actual notice of further harassment—real or imagined? Can a single incident of peer harassment truly trigger Title IX liability, regardless of the "known circumstances"?

What is the standard?

In the absence of a clear answer to this lingering question, the fears expressed by the dissenting justices in *Davis* have undoubtedly come true:

> The majority's opinion purports to be narrow, but the limiting principles it proposes are illusory. The fence the Court has built is made of little sticks, and it cannot contain the avalanche of liability now set in motion.

Davis, 526 U.S. at 657.

Which brings us squarely to the issues presented in this case. The Fifth Circuit below adopted a deliberate indifference test that directly conflicts with *Davis* because the court evaluated the District's response to Roe's alleged assault in light of the "totality of the circumstances," without regard to the District's actual knowledge. The Fifth Circuit then rejected the argument that the District's alleged indifference must

have caused Roe to undergo further actionable harassment, and effectively imposed strict liability on the District for "failing to prevent" post-assault harassment—misconduct of which the District had no actual knowledge, and some of which occurred in a context over which the District indisputably had no control. [Pet. App. 13a–20a].

Meanwhile, the Fifth Circuit excused Roe's lack of evidence of causation, and contravened this Court's binding precedent in the process by impermissibly shifting Roe's summary judgment burden to the District. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The District moved for no-evidence summary judgment on certain elements of Roe's claim, and even though Roe never attempted to offer any evidence to satisfy those elements—and even though she never even attempted to argue otherwise on appeal—the Fifth Circuit, in a footnote, faulted the *District* for not saying *more* about Roe's undisputed lack of evidence. [Pet. App. 16a, n.5].

The radical and inconsistent expansion of Title IX liability for student-on-student harassment presents important and recurring issues of federal law that warrant this Court's review. The lower courts' diverging approaches to Title IX liability in this context have significant practical effects for federal funding recipients. The Court should grant certiorari, resolve the conflicts among the circuits, and reverse the Fifth Circuit's misapplication of Title IX to an unfortunate case of consensual sexual experimentation gone wrong.

STATEMENT OF THE CASE

The consequences of young and inexperienced individuals engaging in sexual activity can be tragic, and this case is no exception. At just 14 years old, Jane Roe suffered terrible injuries during a consensual sexual encounter with her then-boyfriend of several years (15-year-old John Doe), and then learned in the hospital that she was already five weeks pregnant with his child. The gravity of Roe's experience should not be overlooked, minimized, or dismissed. But Title IX liability does not turn on sad facts alone, and school districts are not able—nor should courts find that they are required—to generally police every young dating relationship to ensure that nothing bad happens.

A. Roe's Relationship with Doe

Jane Roe transferred to the Cypress-Fairbanks Independent School District in sixth grade. As the third largest school district in Texas, Cy-Fair ISD has 91 campuses and more than 117,000 students. The District's policies prohibit sex-based discrimination and harassment against students, and contain a general complaint procedure for resolving claims of discrimination or harassment and for appealing adverse determinations. The District provides information on its policies to students and parents online and in a student handbook. [Pet. App. 29a–30a].

In seventh grade, Roe met and began dating a fellow student, John Doe. The two dated on and off during seventh and eighth grades, and continued their relationship during their freshman year of high school. Roe struggled academically throughout the relationship. [Pet. App. 30a].

In her lawsuit, Roe vaguely described Doe as "controlling, emotionally and sometimes physically abusive." When asked about this allegation during her deposition, Roe testified that Doe would (i) make negative comments about her makeup; (ii) give her his hoodie to wear if her clothes were too revealing; and (iii) hold onto her until she hugged or kissed him goodbye. But with respect to the allegation of physical abuse, Roe testified that Doe never punched, slapped, or hit her. [Pet. App. 30a–31a; ROA.15, 941–44].

Roe's lawsuit also alleged that she and Doe argued frequently in the hallways and that Doe often left large visible "hickies" on her neck; but, during her deposition, Roe could not identify a single District employee who witnessed anything. Instead, she speculated that an assistant principal *may* have seen her argue with Doe on *one* occasion, and that a teacher *possibly* noticed some of their arguments. [ROA.15, 944–48, 983–88].

Roe and Doe began having sex during their freshman year of high school and, according to Roe, most of their sexual activity occurred while hiding in school stairwells.[5] They were never caught, and the District undisputedly did not know that Roe and Doe were sexually active—at school or otherwise. [Pet. App. 31a; ROA.884–85, 948–50].

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[5]The opinion below contains a footnote incorrectly stating, without explanation, that "Roe has presented evidence that it was well-known to both Cypress Creek students and employees that students would regularly engage in sexual activity in the stairwells." [Pet. App. 3a, n.1]. The basis for this statement remains unclear because, as the district court detailed in its decision, Roe offered *no* evidence that *any* District employee (much less an "appropriate school official") was aware of *any* sexual activity in *any* stairwell. [Pet. App. 57a–63a].

Roe's mother did not approve of the relationship. In December 2013, she and Roe got into a physical argument about Doe, after which Roe made several superficial cuts on her arm "to make [her] mom feel bad." Roe received psychiatric treatment, but neither she nor her mother shared the details underlying this altercation with the District. [Pet. App. 30a–32a].

On March 4, 2014, Roe and her mother met with District employees, including assistant principals Carol Gibson and Rashad Godbolt, to discuss Roe's academic struggles. Roe testified that she did not speak during this meeting and could only recall that her mother generally expressed her disagreement with Roe's relationship with Doe, and her desire to keep them apart. Gibson recalled having a meeting with Roe's mother where she complained that Roe spent too much time with Doe and was too easily influenced by him, but she did not recall any complaints about Doe being abusive, aggressive, or possessive. Godbolt similarly recalled Roe's mother expressing concerns about Roe and Doe spending too much time together, but left the meeting with the impression that Roe's mother disapproved of the interracial aspect of the relationship (as opposed to Doe posing any kind of threat). Although no one recalls her saying it, Roe's mother testified that she told everyone: "[Doe]'s going to end up hurting [Roe] one day."

Either way, the meeting concluded with Roe being instructed to attend after-school tutorials and to stay away from Doe. Godbolt also contacted Doe and instructed him to stay away from Roe, and called Doe's mother to discuss the concerns. [Pet. App. 32a; ROA.1038–46, 1089–90, 1167–71, 1368–69].

B. The Alleged Assault

On March 10, 2014, Roe intentionally disregarded the school's stay-away instructions and met up with Doe at dismissal time. Doe walked Roe to after-school tutorials, but she stayed for only a few minutes before leaving to reunite with Doe in a stairwell to "kiss and fool around." Roe testified that she went into the stairwell voluntarily, and that she consented to Doe penetrating her with his fingers. Then:

> I mean, with us fooling around, he, basically, was fingering me. And that's when it just turned into his whole hand in a fist, and to where I was lifted up off the ground.
>
> …
>
> I remember this clear as day, because it was, "Wow, my whole hand was in you," is what he said to me. That's the first thing I heard.

[ROA.909]. Roe and Doe left the stairwell together and went to a restroom, where Roe threw away a piece of clothing because it was covered in blood. Roe concluded that she was bleeding, not because of a "brutal assault," but because Doe "popped her cherry." Doe then walked Roe to the front of the school, where she used Doe's phone to call for a ride home. [Pet. App. 33a; ROA.911–15].

Later that night, when Roe realized that the bleeding had not stopped, she told her mother what happened in the stairwell and her mother took her to a local emergency room. Roe told hospital personnel that she had "allowed [Doe] to put his entire hand into her vagina while at the school," and that "she was not assaulted but agreed to the act." [Pet. App. 4a, 33a–34a; ROA.1295–96].

The Fifth Circuit speculated about why 14-year-old Roe might have lied to protect Doe [Pet. App. 5a], but no speculation was necessary because 21-year-old Roe explained herself at her deposition. The reason Roe reported that everything was consensual was because *she believed* that Doe did not intend to hurt her. Her opinion changed when he began seeing someone else. [ROA.933]. Regardless, as explained below, the information gathered by the District at the time led it to conclude that this was an unfortunate incident of consensual sexual experimentation gone wrong.

C. The District's Investigations

At around 10:30 p.m., Roe's mother asked hospital staff to contact the District's police department. Two District police officers arrived within 10–15 minutes. Roe told them that she and Doe had been fooling around in a stairwell; that Doe had placed his entire hand inside her vagina; and that, once they stopped, she told Doe that his hand hurt her and he stated "he was sorry." The police officers returned to the hospital later that night to obtain information from the hospital's sexual assault forensic examination. Hospital staff did not provide the officers with copies of the photographs taken during that examination, but the police report reflects that officers knew Roe's injuries required surgery. [Pet. App. 34a–35a; ROA.854–56, 1054–55, 1196–1205, 1212–31, 1297–1303].[6]

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[6]The opinion below incorrectly states that police spoke to Roe at 3:30 a.m., when she had just woken up from surgery and was still under the effects of anesthesia. [Pet. App. 4a]. The police report reflects that officers spoke to Roe "[u]pon arrival," which was around 10:30 p.m., and several hours *before* Roe underwent surgery. Roe never controverted this evidence. In fact, Roe testified that she could not remember any of her conversations in the hospital. [ROA.1216–17].

Officers next reviewed surveillance footage from the school. The only video footage of Roe and Doe that they found was from dismissal time, and showed them embracing against the wall for several minutes before walking down the hallway together, laughing and embracing. [ROA.852, 857, 1382].

Because the District's police department was relatively new, it referred its investigation to the Harris County Sheriff's Office (HCSO). HCSO (i) subpoenaed Roe's hospital records, (ii) obtained documents and surveillance footage from the District, and (iii) interviewed both Roe and her mother multiple times. The district attorney ultimately refused to accept criminal charges against Doe because "the act was consensual between the complainant and suspect." [Pet. App. 34a–35a; ROA.858–59, 870, 1206–12, 1242–48, 1253–58, 1333, 1382].

Meanwhile, Roe's mother also reported the alleged assault to assistant principal Carol Gibson. Gibson investigated, with some assistance from Rashad Godbolt. Although Roe maintains that they never spoke to her directly (and otherwise complains about what they did or did not do to investigate), it is undisputed that they: (i) reviewed surveillance footage; (ii) interviewed Doe—the only other witness to the incident—who stated that he had penetrated Roe with three fingers during a consensual sexual encounter; (iii) again instructed Doe to have no further contact with Roe; and (iv) asked Roe's mother for information relating to the incident, including copies of any police reports. [Pet. App. 35a; ROA.1074–76, 1091–99, 1100, 1134–36, 1174–77, 1180–84, 1121–22, 1382].

Based on the information she had[7] (including her understanding that both Doe *and* Roe were claiming the incident was consensual, and the surveillance video from that day showing them happily walking arm-in-arm), Gibson concluded that Roe had been accidentally injured during a consensual sexual encounter. Gibson spoke with District police officers about their findings to see if they had any evidence to contradict her decision. They did not. Ultimately, because she felt sorry for Roe and did not want to discipline her on top of everything else she was going through, Gibson decided not to discipline either student for violating the District's student code of conduct. Roe did not appeal the outcome of the investigation, although she had the right to do so under District policy. [ROA.640, 642–47, 1102–04, 1107–15, 1188].[8]

D. Roe's Limited Interactions with Doe and the District's Response

Roe did not return to school for the remainder of the school year, and the District provided homebound services. Over the next few years, Roe went back and forth between her family in Houston and Indiana, and she spent very little time in the District. She withdrew from the District in April 2016. [Pet. App. 38a–39a; ROA.631, 875–76, 888–96, 1122–23].

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[7]While at the hospital, Roe learned that she was five weeks pregnant. No one informed the District of the pregnancy or its subsequent termination. [Pet. 35a].

[8]Roe claims that the District's indifference caused it to reach the wrong conclusion about what happened, but HCSO did everything Roe claimed the District should have done to investigate, and the district attorney had all the information Roe claimed Gibson should have gathered—and yet, the result was the same.

Roe testified that her post-incident interactions with Doe were extremely limited. On one occasion, Roe's mother and stepfather saw Doe at his place of employment and cursed *at him* and called him a rapist. The next day at school, Roe *went up to Doe* and *called him* the "B word." Doe allegedly responded to these taunts by saying that he had a "tool" for Roe's stepfather. Roe reported Doe's statement to Godbolt. Godbolt immediately instructed Roe to stay away from Doe, and then called Doe into his office for a lengthy conversation. Godbolt also contacted Roe's mother to discuss the incident. Otherwise, Roe and Doe never had any classes together, and Roe testified that she and Doe had no other interactions at school. [Pet. App. 37a; ROA.935–36, 954–59, 1062–64].

E. Unreported Post-Notice Incidents

Roe testified during her deposition that (i) a "group of black girls" with "ghetto names" confronted her in the bathroom and expressed their displeasure with Roe's interracial relationship with Doe; and (ii) some of Doe's friends started group chats about Roe and made negative comments on her social media posts. But Roe admitted that she did not report these incidents to anyone at the District, and she offered no evidence that these incidents rose to the level of severe and pervasive sex-based harassment (despite the District moving for summary judgment on that basis).

Additionally, during the summer of 2015, several people reportedly posted very cruel things about Roe on social media, after which Roe attempted to overdose on Benadryl. But, again, Roe admitted that she did not report any of this to the District, and, in response to the District's motion for summary judgment (which stated that Roe had no evidence that the Dis-

trict had any control over any summertime or off-campus social media activities), Roe did not attempt to offer any evidence suggesting otherwise. [ROA.960–79, 1285–87].

Roe also alleged that her English teacher "harassed" her by mentioning that she had "dropped out" of school the year before, but Roe admitted that this comment was made in the context of a discussion about her grades, and that she did not know whether the teacher knew anything about the alleged assault. [ROA.968–70]. Roe did not offer any evidence suggesting that this alleged comment constituted discrimination "on the basis of sex," or that she reported it to anyone at the District.

F. The Lower Court Decisions

In 2018, Roe sued the District, alleging that its deliberate indifference to known harassment placed her at a heightened risk of dating violence and sexual assault (the "pre-assault claims"), and that the District responded to the alleged assault with deliberate indifference (the "post-assault claims"). The district court granted summary judgment in favor of the District on all of Roe's claims. [Pet. App. 26a–70a].

With respect to Roe's post-assault claims, the district court acknowledged the existence of certain factual disputes, but thoroughly addressed why they were not material to the question of deliberate indifference. [Pet. App. 67a–70a]. Based on the undisputed facts alone, the court determined as a matter of law that the District's response to the alleged assault was not clearly unreasonable under the known circumstances.

Roe repackaged her pre-assault claims on appeal. Instead of directly arguing that the District's alleged

pre-assault indifference placed her at a heightened risk of dating violence and sexual assault, Roe invited the Fifth Circuit to consider any pre-assault issues as part of the "known circumstances" against which the court judged the reasonableness of the District's response to the alleged assault. The Fifth Circuit accepted the invitation; but, at the same time, the court also held that Roe's pre-assault arguments amounted to nothing more than "constructive notice by another name." [Pet. App. 11a–13a].

In other words, the Fifth Circuit found that the District did not have pre-assault knowledge "of a substantial risk of *Roe's* sexual assault." [Pet. App. 12a (emphasis original)]. But it then proceeded to evaluate the District's response to the alleged assault in light of the "totality of the circumstances"—including the very same pre-assault issues of which the District did not have actual knowledge. [Pet. App. 13a–24a]. The court also considered post-assault incidents that Roe admittedly never reported to the District—*i.e.,* the alleged "in-person and cyber-attacks" by Doe and his friends. [Pet. App. 13a].

Against this backdrop of *unknown* circumstances, the Fifth Circuit faulted the District for "failing to prevent" post-assault misconduct. [Pet. App. 13a]. The Fifth Circuit also faulted the District for failing to "ensure" that Roe and Doe did not share classes or lunch [*see* Pet. App. 16a], even though Roe and Doe, in fact, never shared any classes and even though no incidents ever occurred during lunch.

Further, with respect to the Fifth Circuit's consideration of the post-assault social media activity, the court did not acknowledge that Roe never attempted to prove (or argue on appeal) that the District had any control over the alleged harassers or the context in

which the alleged harassment occurred. This omission is critical because, when the District moved for summary judgment, it argued that Roe had no evidence that the District's response to the alleged assault subjected her to any discrimination, much less sex-based harassment that was severe, pervasive, and objectively offensive, and that occurred in a context over which the District had substantial control. [ROA.328, 338–40, 348–50]. Roe did not brief these issues in her summary judgment response [*see* ROA.497], and her appellate brief did not argue the nature, extent, or context of any alleged post-assault harassment that supposedly evidenced the District's deliberate indifference. Meanwhile, the District's appellate brief specifically addressed the factual and legal merits of Roe's post-assault deliberate indifference claims. Yet, the Fifth Circuit faulted the *District* for Roe's evidentiary shortcomings, finding—in a footnote— that the District waived its arguments by not saying more about Roe's lack of evidence. [Pet. App. 16a, n.5].

Ultimately, the Fifth Circuit affirmed summary judgment in favor of the District on Roe's pre-assault heightened risk claims, but found that the "totality of the [unknown and factually unsupported] circumstances" created a fact issue as to whether the District responded to the alleged assault with deliberate indifference.

The District moved for *en banc* rehearing, which the Fifth Circuit denied. [Pet. App. 71a].

REASONS FOR GRANTING THE PETITION

I. The Courts of Appeals are Deeply Divided on What Triggers Title IX Liability for Student-on-Student Harassment.

Title IX protects students 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). Since deciding that the statute provides a private right of action against school districts that respond with deliberate indifference to known acts of severe, pervasive, and objectively offensive student-on-student harassment in their programs or activities, *see Davis*, 526 U.S. at 633, the Court has not provided lower courts—or schools—with any guidance on how to interpret this "high standard" that only applies in "certain limited circumstances." *Id.* at 643. After almost twenty-five years of figuring it out for themselves, the courts of appeals have crafted conflicting liability standards for deciding when a school district "subjects" students to discrimination *in the form of peer harassment* in violation of Title IX.[9]

One side of the divide is best illustrated by the Sixth Circuit's opinion in *Kollaritsch v. Michigan State University Board of Trustees*, 944 F.3d 613 (6th Cir. 2019), *cert. denied*, 141 S. Ct. 554 (2020). There, the Sixth Circuit considered "whether a plaintiff must

[9]The specific issue addressed in *Davis* (and the specific Title IX claim raised in this case) is whether the existence of student-on-student harassment evidences an official decision by the school to intentionally engage in illegal sex-based discrimination. Roe did not appeal the district court's dismissal of her gender discrimination/equal protection claims brought under 42 U.S.C. § 1983. [Pet. App. 26a, n.1].

plead further acts of discrimination to allege deliberate indifference to peer-on-peer harassment." *Id.* at 619. In doing so, the Sixth Circuit carefully parsed each element of the *Davis* test before addressing the Court's statement that a school's deliberate indifference "must, at a minimum, cause students to undergo harassment or make them liable or vulnerable to it":

> A plain and correct reading of that two-part causation statement, particularly when read in conformity with the overall opinion, reveals that the two alternatives are actually two possible ways that the school's "clearly unreasonable" response could lead to further harassment: that 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 more vulnerable to, meaning unprotected from, further harassment.

Id. at 623 (citations omitted); *see also* 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, 23 (2017) ("The *Davis* Court described wrongful conduct of both *commission* [directly causing further harassment] and *omission* [creating vulnerability that leads to further harassment]. The definition presumes that post-notice harassment *has* taken place; vulnerability is simply an alternative pathway to liability for harassment, not a freestanding alternative ground for liability.").

Based on its understanding of *Davis*, the Sixth Circuit concluded that Title IX liability for peer harass-

ment requires evidence that the school's alleged indifference to known actionable harassment caused the plaintiff to undergo further actionable harassment:

> We hold that the plaintiff must plead, and ultimately prove, an incident of actionable sexual harassment, the school's actual knowledge of it, some further incident of actionable sexual harassment, that the further actionable harassment would not have happened but for the objective unreasonableness (deliberate indifference) of the school's response, and that the Title IX injury is attributable to the post-actual knowledge further harassment.

Kollaritsch, 944 F.3d at 623–24.[10] The Eighth and Ninth Circuits utilize a similar liability standard. *See Shank v. Carleton Coll.*, 993 F.3d 567, 576 (8th Cir. 2021) ("[A] Title IX plaintiff must demonstrate a 'causal nexus' between the college's conduct and the student's experience of sexual harassment. Linking the college's actions or inactions to emotional trauma the plaintiff experienced in the wake of sexual harassment or assault, even if proven, is not enough.") (citations omitted); *K.T. v. Culver-Stockton Coll.*, 865 F.3d 1054, 1057–58 (8th Cir. 2017) (affirming dismissal of peer harassment claim where plaintiff failed to plausibly allege that the school's indifference caused her

[10]In *Doe on behalf of Doe #2*, the Sixth Circuit clarified that, given the different levels of supervision in high schools and universities, a high school student can make out a claim of deliberate indifference to sex-based harassment *where a plaintiff asserts that sex-based harassment happened to more than one student*. The Sixth Circuit therefore declined to extend *Kollaritsch*'s same-victim requirement to the high school setting. 35 F.4th at 468. The Sixth Circuit did not, however, generally limit *Kollaritsch* to the university setting and, in this case, Roe lacked any evidence of systemic sexual harassment within the District.

assault or otherwise subjected her to further harassment); *Reese v. Jefferson Sch. Dist. No. 14J*, 208 F.3d 736, 740 (9th Cir. 2000) ("The school district was not deliberately indifferent to sexual harassment of which it had actual knowledge in such a way as to cause the plaintiffs to undergo harassment or make them liable or vulnerable to it . . . There is no evidence that any harassment occurred after the school district learned of the plaintiffs' allegations . . . [And a single threat by another student] did not put the school district on actual notice that worse and ongoing alleged harassment was being committed by the male students, or that the plaintiffs were being harassed so severely as to be deprived of educational benefits.") (cleaned up).

On the other side of the spectrum, certain circuits hold that Title IX liability attaches in cases where a school's alleged indifference simply made the plaintiff "more vulnerable" to future harassment—even where no further harassment ever materializes. For example, in *Doe v. Fairfax County School Board*, 1 F.4th 257, 273 (4th Cir. 2021), *cert. denied*, 143 S. Ct. 442 (2022), the Fourth Circuit held that "Title IX liability based on student-on-student harassment is not necessarily limited to cases where such harassment occurs after the school receives notice and is caused by the school's own post-notice conduct." (citations and quotations omitted). The Fourth Circuit premised its conclusion on the fact that "other courts have found (or countenanced the possibility of finding) Title IX liability even though the plaintiff alleged only a single incident of pre-notice harassment." *Id.* (citing *Fitzgerald v. Barnstable Sch. Comm.*, 504 F.3d 165, 173 (1st Cir. 2007), *rev'd and remanded on other grounds*, 555 U.S. 246 (2009)); *but see Fitzgerald*, 504 F.3d at 172 ("To the extent that it held that harassment cannot be 'caused' if that harassment never occurs, the district

court was on sound footing."). The Tenth and Eleventh Circuits also fall on this side of the circuit split. *Farmer v. Kan. State Univ.*, 918 F.3d 1094, 1104 (10th Cir. 2019) ("Plaintiffs can state a viable Title IX claim for student-on-student harassment by alleging that the funding recipient's deliberate indifference caused them to be 'vulnerable to' further harassment without requiring an allegation of subsequent actual sexual harassment.");[11] *Williams v. Bd. of Regents of Univ. Sys. of Ga.*, 477 F.3d 1282, 1296–97 (11th Cir. 2007) (concluding that post-notice vulnerability to further harassment may constitute discrimination, even in the absence of future harassment).

These decisions blur the *Davis* Court's distinction between systemic discrimination, which may trigger Title IX liability, and single incidents of peer harassment, which should not trigger Title IX liability. *See, e.g., Fitzgerald*, 504 F.3d at 173 ("[A] single instance of peer-on-peer harassment theoretically might form a basis for Title IX liability if that incident were vile enough and the institution's response, after learning of it, unreasonable enough to have the combined systemic effect of denying access to a scholastic program or activity."); *but see Davis*, 526 U.S. at 652–53 ("Although, in theory, a single instance of sufficiently severe one-on-one peer harassment could be said to have such an effect, we think it unlikely that Congress would have thought such behavior sufficient to rise to this level . . . .").

They also obviate traditional Article III requirements, given that a speculative risk of future harm is

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[11] *But see Escue v. Northern Okla. Coll.*, 450 F.3d 1146, 1155–56 (10th Cir. 2006) (citing *Davis*, and noting that the plaintiff "does not allege that further sexual harassment occurred as a result of NOC's deliberate indifference").

generally insufficient to confer standing. *TransUnion*, 141 S. Ct. at 2210–13; *see also, e.g.*, *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016) ("Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.") (citations and quotations omitted); *Clapper v. Amnesty Int'l, USA*, 568 U.S. 398, 402 (2013) ("[R]espondents cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not c*ertainly impending*.") (emphasis added); *but see, e.g.*, *Doe v. Morgan State Univ.*, 544 F. Supp. 3d 563, 577 (D. Md. 2021) ("If an educational institution may be liable solely because its deliberate indifference made a student more vulnerable to harassment . . . then there can be no requirement for additional harassment under *Davis*.")

Even more importantly, by "detach[ing] the meaning of the 'vulnerable' term in *Davis* from actual harassment," these courts "alter the substance of Title IX itself and transform it into a kind of strict-liability statute for hypothetical or potential harassment." Cormier, 29 YALE J.L. & FEMINISM at 25. Strict liability "is inconsistent with the Title IX contract." *Doe v. Lago Vista Indep. Sch. Dist.*, 106 F.3d 1223, 1225 (5th Cir. 1997), *aff'd sub. nom. Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998) (citations and quotations omitted). It is also inconsistent with this Court's prior acknowledgment that, before Title IX liability is imposed, schools should be given an opportunity to remedy sexual harassment *once they know about it*:

> [A] central purpose of requiring notice of the violation "to the appropriate person" and an opportunity for voluntary compliance before ad-

> ministrative 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 . . . It would be unsound, we think, for a statute's *express* system of enforcement to require notice to the recipient and an opportunity to come into voluntary compliance while a judicially *implied* system of enforcement permits substantial liability without regard to the recipient's knowledge . . . .

Gebser, 524 U.S. at 289. How, then, can Title IX liability attach in cases of student-on-student harassment where no further actionable harassment occurs *after* the school receives notice of the issue?

The Fifth Circuit below attempted to skirt this circuit split by claiming that Roe satisfied either standard, but the court (1) solely analyzed the issue as one of pervasiveness, rather than a causation requirement;[12] and, regardless, (2) expressly rejected the argument that Roe was required to show that the District's deliberate indifference subjected her to further actionable harassment, and reversed summary judgment in favor of the District despite Roe's lack of evidence. [Pet. App. 15a]. Accordingly, the Fifth Circuit very much entered the fray, and joined the First,

[12]These issues are distinct. Under *Davis*, harassment is not actionable under Title IX unless it is, among other things, "pervasive"—meaning "systemic" or "widespread." *Davis*, 526 U.S. at 652–53. Separately, to violate Title IX, a school district's alleged indifference must "*subject*[ ] its students to *harassment*." *Id.* at 644 (emphasis added).

Fourth, and Eleventh Circuits (and certain Tenth Circuit panels) in expanding the *Davis* Court's liability standard for peer harassment.

Thousands of public school districts—and millions of public school students—would benefit from the Court's resolution of this important issue.

II. The Fifth Circuit's Title IX Liability Standard Conflicts with *Davis*.

Even setting aside the circuit split, review is warranted because the Fifth Circuit's decision below conflicts with *Davis* in several material respects. Most notably, the Fifth Circuit eliminated the "known circumstances" component of the deliberate indifference test. *See Davis*, 526 U.S. at 648.

The Fifth Circuit instead evaluated the reasonableness of the District's response to Roe's reported assault in light of the "totality of the circumstances, including the District's lack of investigation, awareness of the pre-assault abusive relationship, failure to prevent in-person and cyber-attacks from Doe and other students post-assault, and failure to provide any academic or other support to Roe." [*See* Pet. App. 13a].[13] But, in response to Roe's pre-assault allegations—including the District's alleged knowledge of the "pre-assault abusive relationship"—the Fifth Circuit expressly found that "[a]t most, these arguments show only constructive knowledge by another name," and

[13]Meanwhile, the Fifth Circuit's analysis ignored undisputed facts relating to everything the District *did* do in response to Roe's alleged assault. The district court, on the other hand, did consider those undisputed facts, and found that, even when viewed in the light most favorable to Roe, they foreclosed a finding of deliberate indifference as a matter of law—regardless of other immaterial fact issues.

held that "Roe is unable to create a genuine issue of material fact about whether the District is liable for pre-assault deliberate indifference." [Pet. App. 13a]. Constructive knowledge is not actual knowledge and cannot give rise to Title IX liability. *Davis*, 526 U.S. at 650.

Additionally, Roe admittedly never reported any post-assault "in-person and cyber-attacks," or any other post-assault harassment (actionable or otherwise),[14] so these events also fall outside the universe of "known circumstances" that can be considered under *Davis*. The Fifth Circuit implicitly recognized this fact by instead faulting the District for "failing to prevent" these issues from happening in the first place. But that rationale is akin to strict liability—particularly when divorced from Title IX's actual knowledge *and* causation requirements—and conflicts with *Davis* by impermissibly requiring schools to remedy and eliminate even the *possibility* of actionable peer harassment. *See id.* at 648. Indeed, if Title IX does not require school districts to purge their schools of "actionable peer harassment" or "ensure that students conform their conduct to certain rules," how can Title IX fault them for "failing to prevent" students from

[14]Roe testified that, other than Doe's "tool" comment, the only alleged post-notice harassment that took place on school property involved a single exchange between her and "a group of black girls" with "ghetto names" who "didn't like that [Roe] was white, and [Doe] wasn't." *But see Davis*, 526 U.S. at 652 ("Damages are not available for simple acts of teasing and name-calling among school children."). With respect to the "tool" comment itself, even if that somehow rose to the level of severe or pervasive *sex-based* harassment, the undisputed evidence showed that the assistant principal immediately addressed the situation, and Roe testified that she and Doe had no other interactions at school.

posting hurtful things on social media *over the summer*, when they have no control over the situation (and do not even know about it)? *See Doe v. Bd. of Trustees of the Neb. State Colls.*, 78 F.4th 419, 424 (8th Cir. 2023) ("Title IX requires a school to be in a position to control the situation, know of it, and still exhibit indifference.") (citing *Gebser*, 524 U.S. at 289).

The Fifth Circuit's overall "should have known" and "should have done" approach resembles the type of negligence standard this Court specifically rejected in both *Gebser* and *Davis*. *See Davis*, 526 U.S. at 642–43; *Gebser*, 524 U.S. at 288–90. The Fifth Circuit's decision should be reversed.

III. The Fifth Circuit's Waiver Analysis is Contrary to this Court's Binding Precedent.

The Fifth Circuit's reliance on Roe's allegations of post-assault cyber-bullying as evidence sufficient to create a fact issue as to deliberate indifference is particularly problematic given that Roe never attempted to prove that the District had any control over the harassers or the context in which the harassment occurred.

This omission should have eliminated any off-campus or summertime social media activity from the deliberate indifference equation because, when the District moved for summary judgment, it specifically argued that Roe had no evidence of any post-assault sex-based harassment that was severe, pervasive, and objectively offensive, and that occurred in a context over which the District had substantial control (*i.e.*, no evidence that the District's alleged indifference subjected her to harassment, as required by *Davis*). [ROA.328, 338–40, 348–50]. Roe's summary judg-

ment response did not attempt to show that the District had any control over these social media activities [*see* ROA.497], and her appellate brief did not argue the nature, extent, or context of any alleged post-assault harassment. Meanwhile, the District's brief specifically addressed the factual and legal merits of Roe's post-assault harassment claims, and continued to argue Roe's inability to satisfy *Davis*'s causation requirement.

Rather than acknowledge Roe's evidentiary shortcomings, the Fifth Circuit instead found that the District waived its arguments by not saying *more* about Roe's lack of evidence. [Pet. App. 16a, n.5]. The panel's effort to side-step Roe's evidentiary failures cannot be reconciled with this Court's binding precedent holding that a summary judgment movant is not required to negate an opponent's claim. *See Celotex Corp.*, 477 U.S. at 323; *see also, e.g.*, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) ("[W]hen a properly supported motion for summary judgment is made, the adverse party must set forth specific facts showing that there is a genuine issue for trial" and "the trial judge shall then grant summary judgment if there is no genuine issue as to any material fact and if the moving party is entitled to judgment as a matter of law."); *Boudreaux v. Swift Transp. Co., Inc.*, 402 F.3d 536, 545 (5th Cir. 2005) (summary judgment movant "is not required to present evidence proving the absence of a material fact issue; rather, the moving party may meet its burden by simply pointing to an absence of evidence to support the nonmoving party's case")

The Fifth Circuit disregarded binding precedent in order to manufacture a fact dispute where one did not legitimately exist. Its decision should be reversed.

IV. This Case Involves Recurring Issues of Exceptional Importance and Warrants Review.

The issues in this case impact millions of public school students and thousands of public school districts (and countless other educational institutions that receive federal funds) across the United States. The lack of clarity and consistency on these important issues has prompted Title IX litigants to seek this Court's intervention at least three times in as many years. *See Kollaritsch v. Mich. State Univ. Bd. of Trustees*, 944 F.3d 613 (6th Cir. 2019), *cert. denied*, 141 S. Ct. 554 (2020); *Doe v. Fairfax Cnty. Sch. Bd.*, 1 F.4th 257 (4th Cir. 2021), *cert. denied*, 143 S. Ct. 442 (2022); *Doe on behalf of Doe #2 v. Metro. Gov't of Nashville & Davidson Cnty, Tenn.*, 35 F.4th 459 (6th Cir. 2022), *cert. denied*, 143 S. Ct. 574 (2023).

"[I]f Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981); *see also Cummings v. Premier Rehab Keller, PLLC*, 142 S. Ct. 1562 (2022). Title IX itself does not create a cause of action against school districts for student-on-student harassment, and *Davis* and its lower-court progeny raise far more questions than answers as to the contours of potential liability.

If Title IX does not require plaintiffs to show that a school district's alleged indifference *caused* them to experience further *actionable* harassment—as courts within the First, Fourth, Fifth, Tenth, and Eleventh Circuit have held—then Title IX does, in fact, require schools to guarantee an environment free from even unforeseeable peer harassment. And regardless of the ever-increasing number of Title IX lawsuits brought

by *respondents* who claim that they were unfairly accused of and disciplined for sexual misconduct, school administrators who desire to avoid Title IX liability will have no choice but to take swift disciplinary action against every student accused of sexual misconduct—and every friend of such student who *might*, in *theory*, do *something* negative towards the complainant (even if not severe, pervasive, or objectively offensive harassment). This is especially true given that school administrators are not professional investigators and have extremely limited resources. Knowing that savvy litigants, lawyers, and federal judges will inevitably second-guess whatever decision they make, school administrators will err on the side of treating Title IX as a "Federal Student Civility Code," and this will all but guarantee the downfall of the Nation's traditional approach to local control over school districts. *See Epperson v. State of Ark.*, 393 U.S. 97, 104 (1968) ("Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint . . . By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values."); *Milliken v. Bradley*, 418 U.S. 717, 741–42 (1974) ("No single tradition in public education is more deeply rooted than local control over the operation of schools . . . .").

Furthermore, if Title IX plaintiffs are *not* required to show further actionable harassment, then schools need additional guidance on the contours of their potential liability arising from student-on-student harassment. *Davis* only speaks to situations in which a

school district's alleged indifference "subjects its students to *harassment*." *Davis*, 526 U.S. at 644 (emphasis added). Consequently, that is the *only* implied right of action stemming from peer harassment that this Court has found under Title IX.

Either way, this case presents an opportunity for the Court to ensure uniformity for both school districts and students, and to stem the "avalanche of liability" that the dissenting justices in *Davis* were wise to fear.

V. This Case is an Ideal Vehicle to Resolve the Questions Presented.

The Fifth Circuit has now widened the split between the courts of appeals on the issue of Title IX liability stemming from peer harassment. Despite the Fifth Circuit's efforts to manufacture a fact issue sufficient to defeat summary judgment, the record in this case is well-developed and demonstrates a lack of any disputed issues of material fact as to the relevant issues in this case. Indeed, the district court properly characterized this case as one involving a "single incident of sexual assault on a school campus," and, after carefully evaluating the undisputed evidence, found that "[n]o reasonable jury could conclude that the school's responsiveness was clearly unreasonable under the circumstances." [*See* Pet. App. 67a–71a].

Utilizing proper evidentiary and legal standards, this case is well-suited for resolving the important issues presented.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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