No.

In the Supreme Court of the United States

EMILY KOLLARITSCH, ET AL.,
PETITIONERS

v.

MICHIGAN STATE UNIVERSITY BOARD OF TRUSTEES

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Davis* v. *Monroe County Board of Education*, 526 U.S. 629, 633 (1999), this Court held that recipients of federal education funding may be held liable in damages under Title IX for their deliberate indifference to student-on-student sexual harassment. In accordance with the plain language of Title IX, *Davis* clarified that "[i]f a funding recipient does not engage in harassment directly, it may not be liable for damages unless its deliberate indifference 'subjects' its students to harassment"—*i.e.*, "'cause[s them] to undergo' harassment or 'make[s] them liable or vulnerable' to it." *Id.* at 644-645 (citations omitted and original alterations adopted). The question presented is:

Whether, as the Sixth and Eighth Circuits hold, in disagreement with the First, Tenth, and Eleventh Circuits, *Davis*'s "vulnerability" prong requires plaintiffs to prove additional, post-notice sexual harassment in order to state a claim for damages under Title IX.

PARTIES TO THE PROCEEDINGS

Emily Kollaritsch, Shayna Gross, and Jane Roe 1 were appellees in the court of appeals. Michigan State University Board of Trustees and Denise Maybank were appellants.

RELATED PROCEEDINGS

1. *Kollaritsch* v. *Michigan State Univ. Bd. of Trs.*, No. 1:15-cv-1191 (W.D. Mich.). On November 2, 2017, the district court granted in part and denied in part defendants' motion to dismiss.

2. *Kollaritsch* v. *Michigan State Univ. Bd. of Trs.*, No. 18-1715 (6th Cir.). On December 12, 2019, the court of appeals reversed the district court's order denying the defendants' motion to dismiss and remanded for entry of judgment dismissing the claims.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-31a) is reported at 944 F.3d 613. The opinion of the district court (App., *infra*, 41a-73a) is reported at 298 F. Supp. 3d 1089. The district court's order granting a motion for certificate of appealability for interlocutory appeal (App., *infra*, 32a-40a) is reported at 285 F. Supp. 3d 1028.

JURISDICTION

The judgment of the court of appeals was entered on December 12, 2019 (App., *infra*, 1a). A petition for rehearing en banc was denied on February 3, 2020 (App., *infra*, 74a-75a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

20 U.S.C. § 1681(a) provides in relevant part: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

INTRODUCTION

Petitioners Emily Kollaritsch, Shayna Gross, and Jane Roe 1 are former Michigan State University ("MSU") students. App., *infra*, 41a. In 2015, Compl. 25, petitioners sued in federal court alleging that MSU did not adequately respond to their reports of student-on-student sexual assault, App., *infra*, 41a. Petitioners

assert that MSU's inadequate response amounted to deliberate indifference, which left them vulnerable to further harassment and deprived them of educational opportunities in violation of Title IX. *Id.* at 50a.

A victim of "student-on-student sexual harassment" has a cause of action under Title IX against a school that receives federal funding. See *Davis* v. *Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 647-648 (1999). A school "may be liable for 'subjecting' [its] students to discrimination" when it is "deliberately indifferent to known acts of student-on-student sexual harassment and the harasser is under the school's disciplinary authority." *Id.* at 646-647 (alterations adopted). To be liable for damages, the school must act with deliberate indifference that either "cause[s] students to undergo harassment" or "make[s] them liable or vulnerable to it." *Id.* at 645 (citations and internal quotations omitted and original alterations adopted).

In the decision below, the Sixth Circuit reversed the district court's denial of MSU's motion to dismiss petitioners' Title IX claims. App., *infra*, 3a, 24a. The Sixth Circuit held that under *Davis*'s framework a plaintiff can state a Title IX claim against a school only if the school's deliberate indifference causes the victim to be subjected to post-notice harassment. *Id.* at 3a. Other forms of harm resulting from the deliberate indifference that deprive a victim of her educational

opportunities are insufficient to give rise to liability. *Ibid.*[1]

The decision below deepens a circuit split on an important question: whether a Title IX student-on-student harassment claim requires post-notice harassment. Two circuits have held that post-notice harassment is required; three circuits have held that it is not. This Court should grant certiorari to reverse the decision below and resolve the circuit conflict.

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[1] This case concerns only so-called "post-assault" or "post-harassment" claims, in which the victim sues the school for its deliberate indifference in responding to her own notice that another student or school employee has sexually assaulted or harassed her. "Pre-assault" or "pre-harassment" claims, by contrast, concern whether the school's deliberate indifference in responding to prior, known incidents of sexual assault or harassment led to a later assault or harassment against (usually) a different victim, see, *e.g.*, *Doe* v. *School Bd. of Broward Cty.*, 604 F.3d 1248, 1254-1263 (11th Cir. 2010) (discussing Title IX liability standards when school knew of prior harassment against two other students and teacher harassed a third student), or whether a school maintains a policy of indifference to a known, general risk of sexual misconduct on campus, see, *e.g.*, *Simpson* v. *University of Colo. Boulder*, 500 F.3d 1170, 1178 (10th Cir. 2007) (holding that "official policy [representing] deliberate indifference to providing adequate training or guidance that is obviously necessary for implementation of a specific program" can violate Title IX). An individual case can involve both pre- and post-assault claims. See, *e.g.*, *Williams* v. *Board of Regents of Univ. Sys. of Ga.*, 477 F.3d 1282, 1294 (11th Cir. 2007) (describing situation involving two pre-assault and one post-assault claim).

STATEMENT

A. Legal Background

Title IX of the Education Amendments of 1972 prohibits sex discrimination in any education program or activity that receives federal funds. See 20 U.S.C. § 1681 *et seq*. Title IX's central provision provides that "[n]o 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." *Id.* § 1681(a). In enacting Title IX, Congress used broad, sweeping language to both "avoid the use of federal resources to support discriminatory practices" and "to provide individual citizens effective protection against those practices." *Cannon* v. *University of Chi.*, 441 U.S. 677, 704 (1979). Title IX is thus enforceable through both administrative action, see 20 U.S.C. § 1682, and a private right of action, see *Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167, 173 (2005) ("More than 25 years ago, in *Cannon v. University of Chicago*, we held that Title IX implies a private right of action to enforce its prohibition on intentional sex discrimination. In subsequent cases, we have defined the contours of that right of action.") (citation omitted).

Under *Davis* v. *Monroe County Board of Education*, 526 U.S. 629 (1999), and its progeny, a school's deliberate indifference to student-on-student sexual harassment "constitute[s] intentional discrimination on the basis of sex." *Jackson*, 544 U.S. at 182 (citing *Davis*, 526 U.S. at 650). Thus, when a funding recipient is "deliberately indifferent to sexual

harassment," thereby "depriv[ing] the victims of access to the educational opportunities or benefits provided by the school," the funding recipient is liable under Title IX. *Davis*, 526 U.S. at 650. To be deemed deliberately indifferent, the funding recipient's response or lack thereof must be "clearly unreasonable in light of the known circumstances." *Id.* at 648.

Davis's private right of action is also limited by a causation requirement. For purposes of Title IX liability, the funding recipient's deliberate indifference must cause the plaintiff's harm. *Davis*, 526 U.S. at 640-641. But a funding recipient need not "engage in harassment directly." *Id.* at 644. Instead, the recipient may be held liable if its deliberate indifference either "'cause[s] students to undergo' harassment or 'make[s] them liable or vulnerable' to it." *Id.* at 645 (citation omitted).

Courts have struggled with *Davis*'s causation requirement. At issue here is whether this Court meant what it said: a funding recipient is liable for student-on-student sexual harassment when its deliberate indifference *either* causes the plaintiffs to undergo additional harassment *or* makes them vulnerable to further harassment.

B. Factual Background

"[T]he allegations in this case are troubling." App., *infra*, 25a (Thapar, J., concurring). In October 2011, John Doe 1, a male student living in the same dormitory as petitioner Kollaritsch, sexually assaulted her on two separate occasions. *Id.* at 46a,

83a.[2] Kollaritsch reported the assaults to both MSU Police and the Title IX Coordinator. *Id.* at 43a, 46a-47a. MSU conducted a six-month investigation. *Id.* at 46a. During that time, the school took no action to protect Kollaritsch from John Doe 1. *Ibid.*

Rather, while the investigation was ongoing, Kollaritsch encountered John Doe 1 on multiple occasions in her dormitory and in the cafeteria. App., *infra*, 84a. Several of the encounters resulted in panic attacks, which forced her to leave the building. *Ibid.* Fearing further harassment, Kollaritsch often slept in her friends' rooms instead of in her own dormitory. *Ibid.*

When MSU finally completed the investigation, eighty days after the school's policy required, it concluded that John Doe 1 had violated MSU's Sexual Harassment Policy. App., *infra*, 84a. But it took MSU another three months to place John Doe 1 on probationary status and issue a no-contact order. *Id.* at 85a. Even still, MSU allowed John Doe 1 to continue residing in Kollaritsch's dormitory building. *Id.* at 84a. Soon thereafter, John Doe 1 violated the no-contact order and began "stalking, harassing, and intimidating Kollaritsch." *Id.* at 86a. Kollaritsch encountered John Doe 1 on at least nine occasions in the two months following the issuance of the no-contact order. *Ibid.* She reported John Doe 1's

[2] This case comes before this Court at the motion to dismiss stage. Thus, all facts alleged in the complaint are viewed in the light most favorable to petitioners.

retaliatory harassment to MSU officials. *Id.* at 87a. MSU, however, took no steps to protect Kollaritsch.

Feeling unprotected by MSU, Kollaritsch filed a formal retaliation complaint and also sought a Personal Protection Order ("PPO") from state court. App., *infra*, 87a. The state court granted Kollaritsch a PPO the next day. *Id.* at 47a. It also later denied John Doe 1's motion to terminate the order, finding that Kollaritsch was in "reasonable danger." *Id.* at 87a-88a. MSU later concluded, however, that John Doe 1's subsequent conduct had not violated the school's Code of Conduct. *Id.* at 47a. Frustrated with MSU's dismissive treatment and fearful for her safety on campus, Kollaritsch took a leave of absence, and then another. *Id.* at 90a. Throughout the experience, she suffered a drop in her GPA. *Ibid.*

In February 2014, petitioner Shayna Gross reported to MSU that she had been sexually assaulted by John Doe 1, the same student who had earlier assaulted Kollaritsch. App., *infra*, 49a. MSU took eight months to complete its third investigation of John Doe 1, five months longer than its own policy required. *Id.* at 82a, 105a. MSU concluded he had sexually assaulted Gross. *Id.* at 49a-50a. Three months later, MSU held a disciplinary hearing for the assault and expelled John Doe 1. *Ibid.* The school upheld the decision after John Doe 1's first appeal. *Id.* at 50a. But after his second appeal, MSU set aside the expulsion and elected to hire an outside law firm to conduct a new investigation, despite there being no basis for such a procedure in its policies. App., *infra*, 50a, 106a. That firm concluded that even though John

Doe 1 lacked credibility, there was insufficient evidence to determine that the sexual relations between Gross and John Doe 1 were non-consensual. *Id.* at 50a, 106a-107a. Throughout the entire fifteen-month investigation period, MSU permitted John Doe 1 to remain on campus without restriction. *Id.* at 49a-50a. Enduring immense stress throughout this prolonged process, Gross withdrew from extracurricular activities and was unable to maintain her academic schedule. *Id.* at 108a. As a result of these effects of MSU's inaction, Gross was forced to register with the Resource Center for Persons with Disabilities. *Ibid.*

In a separate incident, MSU student Jane Roe 1 was sexually assaulted by fellow classmate John Doe 2 in November 2013. App., *infra*, 47a. Jane Roe 1 immediately reported the assault to MSU police and later filed a formal complaint with the school's Title IX Coordinator. *Ibid.* MSU investigated for nine months, six months longer than permitted by the school's policies. *Id.* at 47a-48a, 82a. Throughout the investigation, Jane Roe 1 and her mother called the school's Title IX Coordinator seeking updates. *Id.* at 48a. Two months after Jane Roe 1 filed her complaint, her mother was informed that John Doe 2 had not yet been interviewed. *Id.* at 47a-48a. While the investigation was pending, he remained on campus without restriction. *Id.* at 95a. MSU ultimately concluded there was insufficient evidence that John Doe 2 had violated MSU's Sexual Harassment Policy. *Id.* at 48a.

C. Court Proceedings

1. Petitioners filed suit alleging discrimination on the basis of gender in violation of 20 U.S.C. § 1681 (Title IX), violations of civil rights under 42 U.S.C. § 1983, and violations of Michigan's Elliott-Larsen Civil Rights Act.[3] App., *infra*, 41a. Relevant here, petitioners alleged that MSU's deliberate indifference to their multiple reports of sexual assaults left them vulnerable to further harassment and deprived them of educational opportunities in violation of Title IX. *Id.* at 50a, 55a-56a, 58a.

The district court denied in relevant part respondents' motion to dismiss.[4] With respect to petitioners' Title IX claim, the district court held that the allegations were sufficient to state a claim based on MSU's responses to Kollaritsch, Shayna Gross, and Jane Roe 1's sexual assaults. App., *infra*, 54a-57a. Specifically, the district court concluded that MSU's "reactions to victims' reports were inadequate, leaving each plaintiff vulnerable on campus and causing deprivation of her educational opportunities." *Id.* at 50a. Petitioners' allegations were therefore "sufficient to plead the deliberate indifference element." *Id.* at

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[3] Petitioners brought a Title IX claim only against defendant Michigan State University Board of Trustees, which is referred to as "MSU" throughout this petition. Petitioners brought other claims against defendants Denise Maybank (Vice President for Student Affairs), Lou Anna Simon (President), and June Pierce Youatt (Provost), which are not relevant here. See App., *infra*, 41a-44a.

[4] Although not relevant here, plaintiff Jane Roe 2's Title IX claim was dismissed. She did not appeal. See App., *infra*, 4a-5a, 71a.

54a; see also *id.* at 55a, 57a. "MSU's deliberate indifference," moreover, "deprived [petitioners] of educational opportunities" in violation of Title IX because it left petitioners "vulnerable on campus" to further harassment. *Id.* at 50a, 55a. The court held that the link between MSU's deliberate indifference and petitioners' deprivation of educational opportunities satisfied Title IX's causation requirement. *Id.* at 55a-56a, 58a.

Soon after the court's denial of the motion to dismiss, respondent moved to certify for interlocutory appeal under 28 U.S.C. § 1292(b) the question whether, to state a viable Title IX claim, plaintiffs must plead that the institution's deliberate indifference led to further, post-notice harassment. App., *infra*, 32a-34a. The district court granted the motion. *Id.* at 32a.

2. The Sixth Circuit reversed the district court's order and remanded for entry of a final judgment dismissing petitioners' Title IX claims. App., *infra*, 3a-4a.

The Sixth Circuit disagreed with the district court's causation analysis, reasoning that "*Davis* does not link the deliberate indifference directly to the [Title IX] injury"—loss of educational opportunity. App., *infra*, 12a. Instead, it "requires a showing that the school's 'deliberate indifference "subjected" its students to *harassment*.'" *Ibid.* (quoting *Davis*, 526 U.S. at 644).

The court did recognize that *Davis* permits a school to be liable for student-on-student harassment if the school's deliberate indifference either "cause[s]

students to undergo harassment" or "make[s] them liable or vulnerable to it." App., *infra*, 13a. Yet based on its analysis of causation, the court held "that a student-victim plaintiff must plead, and ultimately prove, that the school had actual knowledge of actionable sexual harassment and that the school's deliberate indifference to it resulted in further actionable sexual harassment against the student-victim, which [in turn] caused the Title IX injuries." *Id.* at 3a.

The court rejected the argument that *Davis*'s "vulnerability" prong means that other post-notice harms depriving victims of educational benefits and resulting from the school's deliberate indifference are actionable. App., *infra*, 15a. Rather, the court concluded that the "caused to undergo" prong imposes liability for a school's affirmative acts that lead to post-notice harassment, while the "vulnerability" prong imposes liability for the school's omissions that lead to further harassment. *Id.* at 13a-14a (citing 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)). Under the court's interpretation of *Davis*, "[b]ecause none of the plaintiffs in this case suffered any actionable sexual harassment *after* the school's response, they * * * [could not] meet the causation element." *Id.* at 3a.

Judge Thapar joined the majority in full but wrote separately to explain why the Sixth Circuit was adopting its approach on a question that "has divided

our sister circuits." App., *infra*, 25a.[5] Judge Thapar devoted the majority of his analysis to Title IX's text. He reasoned that the phrase "subjected to discrimination" in § 1681(a) requires that a student actually experience sexual harassment caused by the school's deliberate indifference to state a viable claim. *Id.* at 27a-29a. He also argued that because Title IX was enacted under the Spending Clause, any ambiguities in the statute that would expose a state to liability ought to be construed narrowly. *Id.* at 29a.

The court of appeals subsequently denied a petition for rehearing en banc. App., *infra*, 74a.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Squarely Implicates A Conflict Among The Courts Of Appeals

The decision below deepens a clear split in the courts of appeals over whether, after notifying the school that another student or employee has sexually assaulted or harassed her, a plaintiff must suffer a subsequent incident in order to bring a *Davis* claim. The First, Tenth, and Eleventh Circuits hold that a school can be liable under *Davis* so long as its deliberate indifference subjects the student to further sex discrimination in the form of *either* subsequent sexual harassment *or* vulnerability to sexual harassment.

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[5] Judge Rogers also concurred, expressing concern over the majority's wading into a separate issue not certified for appeal. App., *infra*, 31a (arguing that what constituted actual notice was "not at issue, and in particular was not an issue discussed by the parties on appeal").

The Sixth and Eighth Circuits, by contrast, hold that a plaintiff can pursue a *Davis* claim only if the student suffers subsequent sexual harassment as a result of the school's deliberately indifferent response to her prior harassment. Had petitioners attended school in the First, Tenth, or Eleventh Circuits, their complaint would have stated a *Davis* claim. But because they attended school in the Sixth Circuit, their lawsuit cannot proceed. The Court should grant certiorari to resolve this clear split.

Federal courts and scholars alike have expressly acknowledged that the circuits are split on this important question. See, *e.g.*, App., *infra*, 25a (Thapar, J., concurring) ("[T]he question here has divided our sister circuits."); Hannah Brenner, *A Title IX Conundrum: Are Campus Visitors Protected from Sexual Assault?*, 104 Iowa L. Rev. 93, 118 (2018) ("There is a split among circuit courts regarding whether a private cause of action can exist against an institution when there is no post-notice harassment of the student.") (internal quotation marks and citation omitted); 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, 4 (2017) (noting circuit split).

Given the courts of appeals' disagreement over "what [*Davis*'s causation] requirement entails," only this Court's review can provide uniformity and clear guidance nationwide. App., *infra*, 26a (Thapar, J., concurring). This "wide jurisdictional split" necessitates, and is ripe for, this Court's review. Brenner, 104 Iowa L. Rev. at 119.

A. Three Circuits Hold That A School Is Liable Under *Davis* If Its Deliberate Indifference Causes Either Further Sexual Harassment Or Vulnerability To Further Harassment

The First, Tenth, and Eleventh Circuits hold that a victim need not be sexually harassed further in order to bring a *Davis* claim against a school for its deliberately indifferent response to a prior incident of sexual harassment. See *Farmer* v. *Kansas State Univ.*, 918 F.3d 1094, 1103 (10th Cir. 2019) ("*Davis* * * * clearly indicates that Plaintiffs can state a viable Title IX claim by alleging alternatively *either* that [the school's] deliberate indifference to their reports of rape caused Plaintiffs '"to undergo" harassment *or* "ma[d]e them liable or vulnerable" to it.'") (quoting *Davis*, 526 U.S. at 645); *Fitzgerald* v. *Barnstable Sch. Comm.*, 504 F.3d 165, 171 (1st Cir. 2007) ("[T]he institution's deliberate indifference must, at a minimum, have caused the student to undergo harassment, made her more vulnerable to it, or made her more likely to experience it."); *Williams* v. *Board of Regents of Univ. Sys. of Ga.*, 477 F.3d 1282, 1296-1297 (11th Cir. 2007) ("Based on the *Davis* Court's language, we hold that a Title IX plaintiff * * * must allege that the Title IX recipient's deliberate indifference to the initial discrimination subjected the plaintiff to further discrimination," which includes "effectively denying [a student] an opportunity to continue to attend [the school]" without further harassment.).

The Tenth Circuit, in *Farmer* v. *Kansas State University*, most fully explained why a school may be liable

under Title IX if it subjects a student *either* to subsequent sexual harassment *or* to vulnerability to sexual harassment. 918 F.3d at 1103. Most importantly, the Tenth Circuit explained that "[t]he Supreme Court, in *Davis*, has already answered the legal question presented here": *Davis* "clearly indicates" that an institution is liable under Title IX if its deliberately indifferent response to sexual harassment caused students "'*to undergo' harassment or 'ma[d]e them liable or vulnerable' to it*." *Ibid.* (quoting *Davis*, 526 U.S. at 644-645); see also *Fitzgerald*, 504 F.3d at 172 (concluding that the district court's ruling that victims may only bring a *Davis* claim if they suffer post-notice harassment "overly distill[ed] the rule set forth by the *Davis* Court" because *Davis*'s language "clearly sweeps more situations than the district court acknowledged within the zone of potential Title IX liability").

The Tenth Circuit also held that requiring post-notice harassment would give no effect to *Davis*'s vulnerability prong and thereby render it superfluous. The court reasoned that under *Davis*, a school's "deliberate indifference must, at a minimum, 'cause students to undergo' harassment *or* make them 'liable or vulnerable to' sexual harassment." *Farmer*, 918 F.3d at 1104 (quoting *Davis*, 526 U.S. at 645). Thus, a reading that allows a victim to bring a Title IX claim when a school's deliberate indifference caused *either* further harassment *or* vulnerability to harassment "give[s] effect to each part of [*Davis*'s] sentence." *Ibid.* The Tenth Circuit reasoned that a reading like the Sixth Circuit's,

that permits liability only when there is further harassment, "simply ignores *Davis*'s clear alternative language." *Ibid.*

Lastly, the Tenth Circuit argued its interpretation achieved Title IX's central purpose—protecting students from sex discrimination. *Farmer*, 918 F.3d at 1104 (citing *Cannon* v. *University of Chi.*, 441 U.S. 677, 704 (1979)). The Tenth Circuit explained that a rule such as the Sixth Circuit's "runs counter to the goals of Title IX and is not convincing" because "a student must be harassed or assaulted a second time before the school's clearly unreasonable response to the initial incident becomes actionable, irrespective of the deficiency of the school's response, the impact on the student, and the other circumstances of the case." *Ibid.* (quoting *Karasek* v. *Regents of Univ. of Cal.*, No. 15-cv-03717-WHO, 2015 WL 8527338, at *12 (N.D. Cal. Dec. 11, 2015)).

B. Two Circuits Hold That A School Is Liable Under *Davis* Only If Its Deliberate Indifference Causes Further Sexual Harassment

The Sixth and Eighth Circuits have a narrow view of *Davis*. To state a *Davis* claim in those circuits, a victim must show that the school's deliberate indifference subjected them to a subsequent incident of sexual assault or harassment. See App., *infra*, 15a ("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.") (emphasis added); *K.T.* v. *Culver-Stockton Coll.*, 865 F.3d 1054, 1058 (8th Cir. 2017) ("At most, these allegations link the College's inaction with emotional trauma [the plaintiff] claims she experienced following the assault. The complaint does not, however, allege that Culver-Stockton's purported indifference 'subjected [the plaintiff] to harassment.'") (quoting *Davis*, 526 U.S. at 644).

The Sixth Circuit has most fully argued why *Davis*'s "vulnerability" prong should not impose liability for discrimination other than actual harassment. App., *infra*, 13a-15a. Although recognizing that the "vulnerability" prong must have a different meaning than the "cause to undergo" prong, it read the former as merely imposing liability for *omissions* that lead to further harassment and the latter as making a school liable for acts of *commission* that do so. *Id.* at 14a-15a (citing Cormier, 29 Yale J.L. & Feminism at 23-24).

The Sixth Circuit also grounded its decision in a particular theory of causation. It recognized that both *injury* and *causation* are elements of "a deliberate-indifference-based intentional tort," App., *infra*, 10a, and, relying on *Davis*, held that a Title IX *injury* is "the deprivation of 'access to the educational opportunities or benefits provided by the school,'" *id.* at 11a (citing *Davis*, 526 U.S. at 650). But in describing *causation*, the Sixth Circuit held that only Title IX injuries that are "attributable to * * * *further* harassment" count.

Id. at 12a. Under this two-step approach to causation, a school is not necessarily liable if its deliberate indifference causes a Title IX injury. *Ibid.* Only when its deliberate indifference causes another incident of assault or harassment, which in turn deprives the victim of access to educational benefits and opportunities, is it liable. *Ibid.*

II. The Decision Below Misinterprets *Davis*, Contravenes Basic Principles Of Tort Law, And Leads To Absurd Consequences

In *Davis* v. *Monroe County Board of Education*, 526 U.S. 629, 633 (1999), this Court held that recipients of federal education funding may be held liable in damages under Title IX for their deliberate indifference to student-on-student sexual harassment. An institution's response, or lack thereof, is deliberately indifferent when it is "clearly unreasonable in light of the known circumstances." *Id.* at 648.

In accordance with the plain language of Title IX, *Davis* clarified that "[i]f a funding recipient does not engage in harassment directly, it may not be liable for damages unless its deliberate indifference 'subjects' its students to harassment"—*i.e.* it "'cause[s] students to undergo' harassment or 'make[s] them liable or vulnerable' to it." *Davis*, 526 U.S. at 644-645.

The *Davis* Court thus recognized three types of institutional action that can give rise to Title IX liability: (1) direct harassment of students;[6] (2) deliberate indif-

[6] This type of action was not at issue in *Davis*. See *Davis*, 526 U.S. at 644 (considering only situations where "a funding recipient

ference which "causes students to undergo" harassment; and (3) deliberate indifference which "makes students liable or vulnerable" to harassment. *Davis*'s two deliberate indifference prongs—"cause to undergo" and "vulnerability"—set forth alternative paths to liability based on an institution's clearly unreasonable response to reports of student-on-student harassment.

The "cause to undergo" prong requires proof of post-notice harassment; the "vulnerability" prong does not. A rule requiring subsequent harassment in *all* cases, as the Sixth and Eighth Circuits hold, misinterprets *Davis*, contravenes basic principles of tort law, and leads to absurd consequences.

A. *Davis*'s "Vulnerability" Prong Does Not Require Post-Notice Harassment

1. Requiring Post-Notice Harassment In All Cases Renders *Davis*'s "Vulnerability" Prong Superfluous

Davis articulated two ways in which a school's "deliberate indifference 'subjects' its students to harassment": "[T]he deliberate indifference must, at a minimum, 'cause students to undergo' harassment or 'make them liable or vulnerable' to it." *Davis*, 526 U.S. at 644-

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does not engage in harassment directly"). Previous cases had already recognized a cause of action against institutions for direct harassment. See *Franklin* v. *Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 73 (1992) (recognizing availability of a damages remedy in a private suit to enforce Title IX); *Cannon* v. *University of Chi.*, 441 U.S. 677, 717 (1979) (recognizing a private cause of action implied in Title IX).

645 (citations omitted). The Court's use of the disjunctive "or" makes clear that these two prongs—"cause to undergo" *or* "make liable or vulnerable to"—must have two distinct meanings. See *Loughrin* v. *United States*, 134 S. Ct. 2384, 2390 (2014) (The "ordinary use [of 'or'] is almost always disjunctive, that is, the words it connects are to be given separate meanings.") (quoting *United States* v. *Woods*, 571 U.S. 31, 45 (2013)). *Davis* thus refers to two discrete categories, either of which can establish that an institution has "subject[ed] its students to harassment." See *Farmer* v. *Kansas State Univ.*, 918 F.3d 1094, 1104 (10th Cir. 2019) (referring to *Davis*'s "clear alternative language" as requiring courts to "give effect to each part of that sentence.").

Each of these alternatives must be interpreted according to its natural, ordinary meaning. See Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 69 (2012) ("The ordinary-meaning rule is the most fundamental semantic rule of interpretation."). The "cause to undergo" prong is naturally understood to require subsequent harassment—one cannot cause another person to undergo something if that thing never occurs. But it is just as clear that the "vulnerability" prong does *not* require subsequent harassment.

Definitions of "vulnerable" demonstrate that vulnerability requires only a potential for harm, not actual harm. Dictionaries define the word to mean "*capable* of being wounded" or "*open* to attack or damage." Webster's Third New International Dictionary 2566-2567 (1976) (emphasis added); accord Random House Dictionary of the English Language 2134 (2d ed. 1987)

(defining "vulnerable" to mean "susceptible to being wounded or hurt").

These definitions accord with the common-sense intuition that vulnerability does not require subsequent harm. A golfer caught in a thunderstorm is *vulnerable* to being struck by lightning even though it may never *actually* strike him. Similarly, a patient who is *vulnerable* to infection may never *actually* become infected—he is merely "open" or "susceptible" to it.

Davis thus creates two alternative paths to liability for an institution's deliberate indifference to student-on-student sexual harassment: (1) if that deliberate indifference actually results in subsequent harassment or (2) if it makes a student vulnerable to future harassment, regardless of whether harassment actually occurs.

A contrary rule requiring actual subsequent harassment in *all* cases collapses *Davis*'s two prongs, disregarding the plain meaning of "vulnerable" and rendering the latter prong entirely superfluous.[7] Such a reading violates the fundamental principle that "every word and every provision is to be given effect" and "[n]one should be ignored." Scalia & Garner 174; accord *United States ex rel. Eisenstein* v. *City of New*

[7] The presumption against superfluity is an interpretive canon which reflects "ordinary principles that laymen as well as lawyers use to interpret communications." Caleb Nelson, *What is Textualism?*, 91 Va. L. Rev. 347, 383 (2005). The canons are not reserved only for statutory interpretation. See, *e.g.*, *Florida* v. *Jardines*, 569 U.S. 1, 11 (2013) (applying one such canon to interpret language from a previous Supreme Court decision).

York, 556 U.S. 928, 933 (2009) (noting that "well-established principles * * * require statutes to be construed in a manner that gives effect to all of their provisions").

2. The Text And Purpose Of Title IX Support The Natural Reading Of *Davis*'s Two Prongs

Title IX provides that "[n]o 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). Giving *Davis*'s two prongs their plain meaning is entirely consistent with the text and purpose of that statute; a contrary rule requiring post-notice harassment in all cases is not.

This Court framed the cause of action in *Davis* with explicit attention to the text of Title IX. Recognizing that "[t]he language of Title IX * * * cabins the range of misconduct that the statute proscribes," the Court limited *Davis* relief only to instances in which a school's deliberate indifference "'subjects' its students to harassment." *Davis*, 526 U.S. at 644. To give content to that requirement, the *Davis* Court turned to dictionary definitions of "subject"—both the "cause to undergo" and the "vulnerability" prongs were lifted verbatim from a contemporaneous dictionary. *Id.* at 645 (citing Random House Dictionary of the English Language 1415 (1966) (defining "subject" to mean "to cause to undergo the action of something specified" or "to make liable or vulnerable")). By incorporating both of these definitions, the Court recognized that *either*

subsequent harassment *or* vulnerability to further harassment can "subject[students] to discrimination," 20 U.S.C. § 1681(a), within the meaning of Title IX.

Davis's two prongs thus stem directly from the text of Title IX. By collapsing these prongs into a single requirement of post-notice harassment, the Sixth Circuit nullified *Davis*'s careful and deliberate attention to the statute's text.

Public enforcement of Title IX confirms that an institutional response leading to vulnerability to future harassment falls within the statute's ambit. Cf. *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944) ("Good administration * * * require[s] that the standards of public enforcement and those for determining private rights shall be at variance only where justified by very good reasons."). The Department of Education's Office for Civil Rights (OCR) routinely determines that institutions have violated Title IX without requiring any findings of post-notice harassment. See U.S. Dep't of Educ. Office for Civil Rights, *Dear Colleague Letter: Harassment and Bullying* 2-3, 6-7 (Oct. 26, 2010), https://tinyurl.com/y7d8ubgb. As OCR has explained, a school can violate Title IX merely by failing to "take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile environment and its effects, and prevent the harassment from recurring." *Ibid.*

Interpretations of other substantively identical federal civil rights laws also support giving *Davis* its plain meaning. Title VII of the Civil Rights Act of 1964, for example, has been interpreted to hold employers liable for their inadequate response to known instances of co-

worker sexual harassment without requiring a showing of additional harassment. See, *e.g.*, *Nichols* v. *Azteca Rest. Enters., Inc.*, 256 F.3d 864, 876 & n.12 (9th Cir. 2001) (holding an employer liable for "fail[ing] to meet its remedial obligations" following notice of several employees' past sexual harassment of a coworker); *Fuller* v. *City of Oakland*, 47 F.3d 1522, 1529 (9th Cir. 1995) ("[An] employer's failure to act will [not] be acceptable if harassment stops. * * * We refuse to make liability for ratification of past harassment turn on the fortuity of whether the harasser, as he did here, voluntarily elects to cease his activities.").

The purpose of Title IX further counsels against the Sixth's Circuit's unnatural reading of *Davis*. Title IX "makes clear that, whatever else it prohibits, students must not be denied access to educational benefits and opportunities on the basis of gender." *Davis*, 526 U.S. at 650. The *Davis* Court correctly recognized that vulnerability to further harassment can and does deprive students of educational benefits, whether or not further harassment actually occurs. Institutional indifference to allegations of sexual assault can create "a pervasive atmosphere of fear" which forces victims "to take very specific actions that deprive[] them of the educational opportunities offered to other students." *Farmer*, 918 F.3d at 1105 (collecting similar cases); see also, *e.g.*, *Williams* v. *Board of Regents of Univ. Sys. of Ga.*, 477 F.3d 1282, 1299 (11th Cir. 2007) (finding that the defendants' "failure [to expel the victim's assailants] prevented [the victim] from returning to the university to continue her education").

The facts of this very case illustrate the ways in which heightened vulnerability to harassment can deprive a student-victim of educational benefits and opportunities. Respondent MSU's failure to protect petitioner Kollaritsch from her assailant rendered her vulnerable to further harassment. See App., *infra*, 83a-84a. As a result, she suffered panic attacks, avoided the school's dormitories and cafeteria, experienced a drop in her GPA, and took multiple leaves of absence from school. *Id.* at 84a, 90a; see also *id.* at 95a, 108a (relating similar harms suffered by petitioners Gross and Jane Roe 1). In short, by rendering petitioners vulnerable to future harassment, MSU deprived them of the educational benefits and opportunities promised to all students by Title IX.

Both the text and purpose of Title IX thus strongly support the natural reading of *Davis*'s two prongs. A school that turns a blind eye to harassment and thereby deprives a student of educational benefits and opportunities violates Title IX *either* if the student undergoes subsequent harassment *or* if the student is made vulnerable to further harassment.

3. The Sixth Circuit's Construction Of *Davis* Is Fatally Flawed

Instead of giving *Davis*'s "vulnerability" prong its plain meaning, the Sixth Circuit advanced multiple flawed arguments as to why vulnerability should require subsequent assault or harassment.

First, the Sixth Circuit contended that "make them liable or vulnerable to it" in *Davis* should be read to

mean "make them liable or vulnerable to [future harassment which actually occurs]." See App., *infra*, 13a-14a (citing 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)). According to the Sixth Circuit, the actual future occurrence implied by the "cause to undergo" prong somehow carries over to the "vulnerability" prong despite the disjunctive "or" making them separate. App., *infra*, 13a. This interpretation not only stretches the content of the word "it" beyond all logic; it entirely disregards the ordinary meanings of both "vulnerable" and "or."

Second, rather than embracing the natural distinction between *Davis*'s two prongs, the Sixth Circuit instead advanced an unsound distinction based on commission versus omission. The court argued that the "cause to undergo" prong refers to an affirmative "detrimental action" that "foment[s] or instigat[es] further harassment," whereas the "vulnerability" prong refers only to "an insufficient action (or no action at all)" which results in future harassment. See App., *infra*, 14a. Judge Thapar's concurrence offers an illustration of this distinction: a school "sen[ding] disparaging emails to just its female students" would be covered by the "cause to undergo" prong, whereas a school's inaction in response to reports of harassment would fall under the "vulnerability" prong. *Id.* at 27a.

The problem with this reading is that *Davis* explicitly excluded direct harassment from its cause of action. That is, *Davis*'s two prongs are only implicated "[i]f a funding recipient *does not engage in harassment*

directly." *Davis*, 526 U.S. at 644 (emphasis added); see note 6, *supra*. The direct harassment envisioned in Judge Thapar's "disparaging emails" hypothetical thus falls entirely outside *Davis*'s purview. Under the Sixth Circuit's reading, then, *every* true *Davis* claim would necessarily fall under the "vulnerability" prong; the "cause to undergo" prong would disappear from the analysis and become superfluous. The decision below thus stretched the "vulnerability" prong so far that it swallowed the entire *Davis* cause of action.

Third, the Sixth Circuit's slippery slope argument reflects a misunderstanding of *Davis*'s many requirements. See pp. 4-5, *supra* (describing elements of *Davis* claim). Judge Thapar feared that crediting the plain meaning of the "vulnerability" prong would, for instance, impose liability for "allowing a bar to open on campus." App., *infra*, 29a-30a (Thapar, J., concurring). But a *Davis* plaintiff must show far more than just vulnerability to future harassment. The "vulnerability" prong is only *one* of the elements required to establish institutional liability under *Davis*. See *Davis*, 526 U.S. at 650 (stating that a *Davis* plaintiff must prove that she suffered "severe, pervasive, and objectively offensive" sexual harassment, that the school had "actual knowledge" of it, and that she was deprived of "educational opportunities or benefits"). Clearly then, the fear of "transform[ing Title IX] into a kind of strict-liability statute for hypothetical * * * harassment," Cormier, 29 Yale J.L. & Feminism at 25, is not only overblown, it fails to recognize the many elements necessary to state a *Davis* claim.

Finally, the Sixth Circuit's requirement of post-notice harassment in all cases effectively does away with the whole category of post-assault claims. They become, under its logic, a type of pre-assault claim under which a school is liable for its failure to prevent harassment to a victim rather than its failure to respond appropriately to a victim's report of past harassment. See note 1, *supra* (explaining difference between pre- and post-assault *Davis* claims). That is, by requiring the victim to undergo further harassment by the same person after having given the school notice of prior harassment, the Sixth Circuit is treating every post-assault claim as a pre-assault claim—just one involving the identical victim. In *Davis* itself, however, this Court recognized Title IX liability for free-standing post-harassment claims. *Davis*, 526 U.S. at 633-635 (describing claim for inadequate response to notice of harassment). Since then, courts have repeatedly recognized that failure to prevent and failure to respond after the fact represent two independent sources of Title IX liability. See, *e.g.*, *Farmer*, 918 F.3d at 1108 n.5; *Williams*, 477 F.3d at 1296.

B. The Sixth Circuit's Interpretation Of *Davis* Contravenes Basic Principles Of Tort Law

Title IX and *Davis* together create a federal statutory tort claim for victims of student-on-student sexual harassment. See App., *infra*, 6a (asserting that the *Davis* formula includes "a deliberate-indifference intentional tort by the school"); cf. *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 264 (1989) (O'Connor, J., concurring in the judgment) (stating that Title VII created a

"statutory employment 'tort'"). "[W]hen Congress creates a federal tort[,] it adopts the background of general tort law." *Staub* v. *Proctor Hosp.*, 562 U.S. 411, 417 (2011). As such, "[a]bsent an indication to the contrary in the statute itself," *University of Tex. Sw. Med. Ctr.* v. *Nassar*, 570 U.S. 338, 347 (2013), courts must assume that *Davis*'s cause of action complies with basic principles of tort law.

Those basic principles include the four familiar elements of a tort claim: duty, breach, causation, and injury. Cf. W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 30 (5th ed. 1984); Restatement (Second) of Torts §§ 281, 430 (Am. Law Inst. 1965). *Davis*'s cause of action neatly maps onto these elements. Title IX imposes a duty of non-discrimination on recipients of federal education funding, 20 U.S.C. § 1681(a), and *Davis* confirms that deliberate indifference to known instances of student-on-student harassment breaches that duty, see *Davis*, 526 U.S. at 633. *Davis* further clarifies, as the Sixth Circuit acknowledged, that the relevant injury is a deprivation of educational benefits and opportunities. See App., *infra*, 11a ("'Injury' in this Title IX context means the deprivation of 'access to the educational opportunities or benefits provided by the school.'"); *Davis*, 526 U.S. at 650.

The dispute in this case concerns the element of causation: how must an institution's deliberate indifference to student-on-student harassment be linked to the injury? Tort law makes clear that "[w]hen the law grants persons the right to compensation for injury from wrongful conduct, there must be some demon-

strated connection, some link, between the injury sustained and the wrong alleged." *Nassar*, 570 U.S. at 342; see also Restatement (Second) of Torts § 430 (Am. Law Inst. 1965).

The Sixth Circuit's reading of *Davis* disregards this basic principle of causation. Rather than linking the breach of duty (the school's deliberate indifference) to the injury itself (deprivation of educational benefits), the court instead required proof of an entirely different and more specific injury: further sexual assault or harassment. App., *infra*, 12a (stating that *Davis* is satisfied only if "the injury is attributable to the post-actual-knowledge *further* harassment"). In short, the Sixth Circuit required that the statutory injury be intermediated in a particular and narrow way. Nothing in the statute suggests such an arbitrary requirement. Indeed, the Sixth Circuit itself recognized the strangeness of this understanding of *Davis*. It acknowledged that, in its reading, "*Davis* does not link the deliberate indifference directly to the injury." *Ibid.* The decision below thus contravenes both the statute and the "default rules" of tort law that Title IX is "presumed to have incorporated." *Nassar*, 570 U.S. at 347.

Rather than inserting an additional element into *Davis*'s cause of action and distorting traditional principles of tort causation, courts should simply give effect to *Davis*'s plain language. In a *Davis* tort, the breach of duty is causally linked to the injury *through* the "cause to undergo" and "vulnerability" prongs. Those alternatives serve as two paths of causation, connecting a school's clearly unreasonable response to

the deprivation of a student's educational benefits and opportunities.

As such, a plaintiff can establish liability under *Davis* by showing that a school's deliberately indifferent response to known instances of actionable harassment (the breach of duty) caused a deprivation of educational opportunities (the injury) *either* by demonstrating that the school's inadequate response led to subsequent harassment *or* that it created vulnerability to further harassment. Indeed, this is precisely how the district court analyzed this case. See App., *infra*, 52a-53a ("The funding recipient's deliberate indifference must cause the deprivation of educational opportunities and benefits."); see also *id.* at 55a-56a, 58a (holding that each petitioner had "alleged sufficient facts to show that MSU's deliberate indifference deprived [her] of educational opportunities").

The deprivation of educational benefits suffered by petitioners in this case, see p. 5-9, *supra*, is precisely the injury that both Title IX and *Davis* seek to address. Yet the Sixth Circuit's strained interpretation of *Davis* substitutes an entirely different injury, in contravention of both *Davis*'s plain language and elementary principles of tort law.

C. A Rule Requiring Post-Notice Harassment For All *Davis* Claims Leads To Absurd Consequences And Perverse Incentives

The decision below impermissibly narrows the availability of *Davis* post-assault relief to only those plaintiffs who have been assaulted or harassed by the same person at least twice—at least once before and at

least once after having given notice to the school. Such a rule leads to absurd consequences and perverse incentives.

The Sixth Circuit's construction of *Davis*, for example, not only forecloses post-assault liability when a school's deliberate indifference results in vulnerability to harassment—it also excludes situations in which further harassment does actually occur, just not to the same victim. In this very case, petitioner Kollaritsch reported multiple assaults by John Doe 1 to respondent, and over a year later, this same male student assaulted petitioner Gross. App., *infra*, 46a-47a, 49a. Respondent's inadequate response to Kollaritsch's reports of assault not only left her vulnerable to further sexual harassment, it actually resulted in subsequent harassment of Gross. But because John Doe 1 did not assault *Kollaritsch* again, she is unable to recover for respondent's deliberate indifference under the Sixth Circuit's rule.

In short, the Sixth and Eighth Circuits' rule tacitly licenses institutional deliberate indifference in all but the narrowest of circumstances, immunizing institutions for turning a blind eye to misconduct unless the same victim is made to suffer another instance of assault or harassment. With such a low threat of liability in any given case, this post-notice harassment requirement invites institutions to do the easiest thing in response to notice of sexual assault—nothing at all. See Hannah Brenner, *A Title IX Conundrum: Are Campus Visitors Protected from Sexual Assault?*, 104 Iowa L. Rev. 93, 119 (2018) ("[*Davis* suggests that] colleges and universities have little to fear if they fail to take

protection of that [Title IX] right seriously."). Moreover, such a rule "incentivize[s] institutions to 'bury their heads in the sand' rather than actively prevent rights violations, lest they accrue the kind of knowledge that might trigger liability." Karen M. Tani, *An Administrative Right to Be Free from Sexual Violence? Title IX Enforcement in Historical and Institutional Perspective*, 66 Duke L.J. 1847, 1861-1862 (2017).

These perverse incentives run counter to what Congress intended in Title IX and what this Court sought to effectuate in *Davis*. The decision below thus neutralizes *Davis* as a tool for enforcing the protections of Title IX, to the detriment of student-victims of sexual assault.

III. This Case Presents An Issue Of National Importance In An Ideal Vehicle

This case concerns the contours and extent of institutional liability for sex discrimination under Title IX. Given th broad applicability of Title IX, the prevalence of sexual assault and harassment in covered institutions, and the serious harms they cause, the question presented is of national importance.

Title IX affects tens of millions of people. According to the National Center for Education Statistics, more than 105,000 educational institutions—accounting for at least 75% of all schools—receive federal funds.[8] With 50.8 million students enrolled in public elemen-

[8] U.S. Dep't of Educ., Nat'l Ctr. for Educ. Statistics, *Fast Facts—Educational Institutions* (2019), https://tinyurl.com/zort7df.

tary, middle, and high schools and 19.9 million students enrolled in colleges and universities, approximately 70.7 million students are currently enrolled in institutions subject to Title IX[9]—more than one-fifth of the entire population of the United States.[10]

Sexual assault and harassment occur often in schools covered by Title IX. In the 2013-2014 school year (the most recent for which full data is available), Title IX institutions reported receiving nearly 60,000 complaints of sexual harassment.[11] As research shows, however, many schools underreport sexual assault and harassment[12] and, as a result, these numbers underestimate the problem. "Nearly two thirds of college students," for example, "experience sexual harassment" and approximately 25% of college women and 15% of college men are victims of rape during their time in college.[13] And although these victims report at

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[9] U.S. Dep't of Educ., Nat'l Ctr. for Educ. Statistics, *Fast Facts—Back to School Statistics* (2019), https://tinyurl.com/btqc2lm.

[10] The population of the United States is approximately 330 million people. U.S. Census Bureau, *U.S. and World Population Clock*, https://www.census.gov/popclock/ (last visited Apr. 22, 2020).

[11] U.S. Dep't of Educ., Civil Rights Data Collection, *2013-14 State and National Estimations*, https://tinyurl.com/yyfuw8de (last visited Apr. 22, 2020) (compiling 2013-2014 allegations of harassment or bullying on the basis of sex).

[12] Am. Ass'n of Univ. Women, *An Underreported Problem: Campus Sexual Misconduct*, https://tinyurl.com/y78794z8 (last visited April 20, 2020).

[13] Nat'l Sexual Violence Res. Ctr., *Statistics*, https://www.nsvrc.org/node/4737 (last visited Apr. 20, 2020).

least 28% of the most serious instances of sexual assault to schools,[14] 89% of colleges reported no rapes and 79% of public schools reported no incidents of sexual harassment or bullying in the 2015-2016 school year.[15]

Reports of sexual assault and harassment, moreover, often result in litigation or administrative complaints. A 2015 study determined that more than 25% of Title IX reports resulted in either a lawsuit or a complaint filed with the Department of Education Office for Civil Rights (OCR).[16] In March 2020, the OCR was investigating 1,317 sex discrimination complaints—of which 302 involved sexual violence, 234 sexual harassment, and 108 denial of benefits of the educational institution.[17] These suits and complaints often result in *Davis* claims, potentially raising the question presented in this case.

Sexual harassment, including sexual assault, also has a profound effect on victims. Research links it to

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[14] Ass'n of Am. Univs., *AAU Climate Survey on Sexual Assault and Sexual Misconduct (2015),* (Sept. 3, 2015), https://tinyurl.com/y7hvk
58b.

[15] Am. Ass'n of Univ. Women, *An Underreported Problem: Campus Sexual Misconduct*, https://tinyurl.com/y78794z8 (last visited April 20, 2020).

[16] United Educators, *Confronting Campus Sexual Assault: An Examination of Higher Education Claims* 14 (2015), https://tinyurl.com/wfywmz6.

[17] U.S. Dep't of Educ. Office for Civil Rights, *Pending Cases Currently Under Investigation at Elementary-Secondary and Post-Secondary Schools as of March 31, 2020 7:30am Search*, https://tinyurl.com/uwfvll8.

many persistent mental health, physical health, and educational problems. It can cause, for example, increased psychological distress, including lowered self-esteem, negative body image, and self-blame,[18] as well as nausea, loss of appetite, and disturbed eating.[19] And it can lead to lower grades, skipping classes, changing schools, being disciplined by school authorities, difficulty paying attention in class, speaking less in class, and difficulty studying.[20]

This case presents an ideal vehicle for deciding the scope of *Davis* liability. It squarely presents a single issue of pure law unclouded by any procedural, factual, or jurisdictional disputes. Five courts of appeals have decided the issue and split as evenly as possible over it. There is no reason for further percolation.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[18] Melanie S. Harned & Louise F. Fitzgerald, *Understanding a Link Between Sexual Harassment and Eating Disorder Symptoms: A Mediational Analysis*, 70 J. Consulting & Clinical Psychol. 1170, 1175-1176 (2002).

[19] Jim Duffy et al., *Psychological Consequences for High School Students of Having Been Sexually Harassed*, 50 Sex Roles 811, 814 (2004); Harned & Fitzgerald, 70 J. Consulting & Clinical Psychol. at 1175.

[20] Duffy, 50 Sex Roles at 813.

Respectfully submitted.

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