

No.

In the Supreme Court of the United States

EMILY KOLLARITSCH, ET AL.,
PETITIONER

v.

MICHIGAN STATE UNIVERSITY BOARD OF TRUSTEES
RESPONDENT

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

**BRIEF OF AMICUS CURIAE
NATIONAL CENTER FOR VICTIMS OF CRIME IN
SUPPORT OF PETITIONER**

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BRIEF OF *AMICUS CURIAE*
NATIONAL CENTER FOR VICTIMS OF CRIME

**STATEMENT OF INTEREST OF
*AMICUS CURIAE***

The National Center for Victims of Crime (NCVC), a nonprofit organization, is a leading resource and advocacy organization for victims of crime. The mission of NCVC is to forge a national commitment to help victims rebuild their lives. Dedicated to serving individuals, families, and communities, NCVC, among other efforts, advocates for laws and public policies that secure rights and protections for crime victims. To that end, NCVC has filed *amicus curiae* briefs in cases across the country to advance the rights and interests of crime victims. As an advocate for victims' rights, NCVC has a profound interest in this case. Amicus submits this brief in support of Petitioner's Petition for Writ of Certiorari.¹

¹ Pursuant to this Court's Rule 37.2, all parties with counsel listed on the docket have consented to the filing of this brief. Counsel of record for all listed parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

STATEMENT OF THE LEGAL ISSUES, CASE AND FACTS

NCVC as Amicus Curiae adopts and incorporates by reference the statement of the legal issues, the case and facts as set forth in the Petitioner's Petition.

INTRODUCTION

As new students head to college, “meet new friends, purchase their textbooks and cross the sunny campus for the first time, none will imagine that they will suffer violence over their four years. But for [many students], [sexual violence] will become a reality during their time on campus. For too many, the colleges they will have grown to love and trust will do little to protect them.” Dana Bolger, *Where Rape Gets a Pass*, NY DAILY NEWS, July 06, 2014, <https://www.nydailynews.com/opinion/rape-pass-article-1.1854420>.

Sexual violence on college campuses in the United States is pervasive. One in five women and one in sixteen men are sexually assaulted while in college. *Campus Sexual Assault*, NAT'L SEXUAL VIOLENCE RESOURCE CTR., https://www.nsvrc.org/sites/default/files/publications_nsvrc_factsheet_media_packet_campus-sexual-assault.pdf (last visited Aug. 03, 2020). “These assaults are overwhelmingly perpetrated by people known to the victim, such as friends, classmates, hallmates, and dates.” Emma Ellman-Golan, *Saving Title IX: Designing More Equitable and Efficient Investigation Procedures*, 116 MICH. L. REV. 155, 156 (2017). Available at: <http://repository.law.umich.edu/mlr/vol116/iss1/4>. Compared to other crimes, sexual violence is more prevalent at college. *Campus Sexual Violence: Statistics*, RAPE, ABUSE & INCEST NA-

TIONAL NETWORK, <https://www.rainn.org/statistics/campus-sexual-violence> (last visited Aug. 03, 2020). For example, college women are twice as likely to be sexually assaulted than robbed. *Id.* Some studies have suggested that these figures are underestimates. Lisa Fedina, Jennifer Lynne Holmes and Bethany Backes, “How Prevalent Is Campus Sexual Assault in the United States?” *NIJ Journal* 277 (2016): 26-30, available at <http://nij.gov/journals/277/pages/campus-sexual-assault.aspx>. “Despite the discrepancies, the studies [...] – even those with lower estimates – all point to the same troubling truth: A substantial proportion of college students are sexually assaulted.” *Id.*

Different victims react to sexual violence differently. *A Guide for Friends and Family of Sexual Violence Survivors*, PA. COALITION AGAINST RAPE, https://www.nsvrc.org/sites/default/files/2017-10/friends_and_family_guide_final.pdf (last visited Aug. 03, 2020). Victims may “suffer short- and long-term health problems, such as sexually transmitted infections, depression, anxiety, eating disorders, chronic illness and post-traumatic stress disorder.” Fedina, Holmes and Backes *NIJ Journal* 277, 26-30 (2016). Student-victims “who have been sexually assaulted are [also] more likely to engage in risky behaviors [...] have lowered academic achievement, and they may be at greater risk for revictimization.” *Id.* at 1-2.

Due to documented barriers to reporting and successful prosecution, many victims cannot rely on the criminal justice system for redress.

“Many victims of sexual violence don’t want to turn to the criminal justice system: they may fear skepticism and abuse from police, prosecutors, or juries; they may not want to go through the ordeal of a long trial; they may fear retaliation from their assailant, who will most likely not end up prosecuted, let alone convicted; and they may be hesitant to send their assailants to prison. But even survivors who *do* report to the police are often abandoned by the system. Only a quarter of all reported rapes lead to an arrest, only a fifth lead to prosecution, and only half of those prosecutions result in felony convictions.” *Sexual Assault on Campus*, CTR. FOR PUB. INTEGRITY (Mar. 26, 2015, 5:55 PM) <https://publicintegrity.org/education/barriers-curb-reporting-on-campus-sexual-assault/>.

Thus, “For most campus survivors [...], their school may be their only resource for justice and safety.” *Why Schools Handle Sexual Violence Reports*, KNOW YOUR IX, <https://www.knowyourix.org/issues/schools-handle-sexual-violence-reports/> (last visited Aug. 03, 2020). Yet, “[f]or many college students who allege they’ve been raped each year, disappointment [from the institutional response] may indeed be the norm.” Student-victims who report sexual violence “routinely say they face a host of institutional barriers in pursuing the on-campus remedies meant to keep colleges and universities safe [...]” Barriers faced by student-victims include disbelief by administration and failure “to provide access to a professional victim’s advocate to guide students through a complicated and intimidating process.” *Sexual Assault on Campus*, *supra*.

“Some of the most fundamental obstacles to students pursuing sexual assault complaints are also illegal,” due to institutional failures to provide effective Title IX. Remedies. *Id.* “40% of colleges and universities report[] not investigating a single sexual assault in the previous five years.” *NAT’L SEXUAL VIOLENCE RE-SOURCE CTR.*, *supra*.

Title IX is meant to ensure that “all students[...]have equal access to education” by requiring schools “to prevent and respond to reports of sexual violence.” *Id.* Yet, many schools continue to violate Title IX. “At multiple schools, officials ignore complaints of sexual harassment. They prevent prompt and equitable resolution of complaints by placing significant administrative burdens in front of students or staff members who s[seek] to report an incident.” Ellman-Golan, *supra* at 157-158. For example, some schools were found to have “improperly encourage[d] rape victims to attend mediation with alleged rapists. They discourage[d] students from filing complaints by insinuating that an investigation would be too disruptive to the students’ lives. They fail[ed] to protect students against retaliation [..]. They [give] preferential treatment to accused-student athletes.” *Id.*

Many student-victims who are met with such discouragement from the school lost educational opportunities when they “transferred or withdrew from their schools, while their alleged attackers were almost uniformly unpunished.” *Jones*, *supra*. For student-victims “who believe that their college stood in the way of pursuing a sexual assault complaint, the experience of dealing with the school can be traumatizing.” *Id.* “They feel like someone they

trusted their lives with has betrayed them [...] It's as life-altering – if not more so – than the rape or sexual assault itself.” *Id.*

Michigan State University (“MSU”) in this case failed its student, Ms. Kollaritsch, in many of the ways listed above, and thereby violated her Title IX right of equal access to education. MSU took nearly seven months to complete its investigation of Ms. Kollaritsch’s report of sexual assault, during which it implemented no measures to protect Ms. Kollaritsch from retaliation. Even after seven months of investigation, MSU took an additional two or more months to issue even a no-contact order against her alleged assailant. The university then failed to enforce its own order. It allowed the alleged assailant to continue living in the same dormitory as Ms. Kollaritsch and to violate the no-contact order on at least nine occasions without consequence.

Eventually, the alleged assailant was accused of assaulting another victim, leading to another delayed and inadequate investigation with no effective protective measures. The abysmal response from MSU cost all three Petitioners equal access to education, including a loss of time in class, loss of participation in campus life, the need for academic accommodations, ongoing and debilitating fear, and most significantly, continued vulnerability to retaliation or potential repeated sexual assault. MSU, a funding recipient, acted in a manner “deliberately indifferent to sexual harassment,” thereby “depriv[ing] the victims of access to the education opportunities or benefits

provided by the school,” and accordingly is liable under Title IX. *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 648 (1999).

SUMMARY OF THE ARGUMENT

Under Title IX, doing nothing, while appearing busy, is an unacceptable response to a complaint of student on student sexual assault or harassment on college campuses. Lengthy investigations without adequate interim protections against retaliation, leaving student reporters vulnerable to further harassment, may often severely impair the students’ educational opportunities whether or not further harassment actually occurs. When such severe impairment of access to educational opportunity occurs as a result of a university’s deliberate indifference to known harassment, a Title IX claim exists. Both multi-jurisdictional caselaw and well-accepted social science underscore that a delayed investigation with inadequate protective measures violates Title IX, whether or not retaliation or further harassment by the alleged student harasser actually occurs.

ARGUMENT

I. Inadequate University Response To A Report Of Sexual Assault, Including Unreasonable Delay In the Response and A Failure to Provide Adequate Interim Protective Measures Against Retaliation or Further Harassment Is Actionable Under Title IX.

Federal law provides that no person in the United States shall “on the basis of sex,” be “excluded from partic-

ipation in,” “denied the benefits of,” or “be subjected to discrimination under” “any educational program or activity” receiving federal funds. 20 U.S.C. §1681(a) (“Title IX”). In *Davis*, this Court held that schools receiving federal funds could be liable in damages under certain circumstances where one student had sexually harassed another, with sexual assault being included as one form of sexual harassment. *Davis*, 526 U.S. at 648. The liability would be based on the conduct of the school receiving federal funds, not the harassing student as such. In particular, the fund recipient school could be liable “where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances” and where the sexual harassment is “so severe, pervasive, and objectively offensive,” and “so undermines and detracts from the victims' educational experience,” that “the victim-students are effectively denied equal access to an institution's resources and opportunities.” *Davis*, 526 U.S. at 648, 651. The school could be liable where its “deliberate indifference” to sexual harassment would “cause” students to “undergo” harassment or “make them liable or vulnerable to it.” *Id.* at 645.

In a university context, damage liability for a university's Title IX violation requires proof: 1) that the university, or the relevant program within the university, receives federal funds and hence is subject to Title IX; 2) that an “appropriate person,” that being a university or program official with authority to take corrective action, had “actual knowledge” of the harassment or discrimination; 3) that the recipient university or program acted with “deliberate indifference” to “known” acts of harassment” and 4) that the discrimination resulting from the recipient's action or

inaction was “so severe, pervasive and objectively offensive” that it “effectively bars the victim’s access to an educational opportunity or benefit.” *Williams v. Board of Regents*, 477 F.3d 1282, 1293 (11th Cir. 2007).

Under *Williams*, a university recipient’s inadequate and delayed response to a student complaint of student on student sexual assault, particularly where the university fails to take reasonably necessary interim protective measures to guard against retaliation or potential further harassment by the accused assailant, can constitute deliberate indifference by the university that “effectively” bars the complainant’s access to the “educational opportunity or benefit” of continued schooling without fear of further harassment or retaliation and thereby subjects the student complainant to “further discrimination” severe and pervasive enough to be actionable under Title IX. *Williams*, 477 F.3d at 1296, 1298 (Eleven-month delay after Williams’ report of sexual assault by fellow students in taking university disciplinary action against the alleged assailants, with no interim protective measures such as removal of the alleged assailants from university housing, could be actionable deliberate indifference under Title IX). *See also Kelly v. Yale Univ.*, 2003 U.S. Dist. LEXIS 4543, *12, 2003 WL 1563424 (D. Conn. Mar. 26, 2003)(a reasonable jury could find that Yale’s ineffective “response, or lack thereof,” left Kelly “‘liable or vulnerable’ to [the perpetrator’s] harassment” within the meaning of *Davis* so that Yale’s failure to provide Kelly with accommodations “was clearly unreasonable given all the circumstances of

which it was aware.”);

Numerous studies delineate the deleterious impact on student complainants’ access to education caused by unreasonable delay in responding to sexual assault reports, particularly where the university fails to take reasonable and common sense interim protective measures such as assigning the alleged assailant to different housing and classes or imposition of a no contact order. First, student survivors of sexual assault have been shown to face a wide complex of challenging mental health issues making their continued participation in university educational programming difficult or problematic. Kelsey M. McGregor, *Raped a Second Time: The Mental Health Impact of Campus Sexual Assault Investigation and Adjudication*, 18 QUINNIPIAC HEALTH L. J. 401, 414 (2016). “Survivors are three times more likely to suffer from depression; six times more likely to suffer from post-traumatic stress disorder (‘PTSD’); thirteen times more likely to abuse alcohol; twenty-six times more likely to abuse drugs; and four times more likely to contemplate suicide.” *Id.* Furthermore, “[m]any rape survivors are diagnosed with rape trauma syndrome (RTS), a specific type of PTSD that includes disruptions to normal physical, cognitive, and interpersonal behavior.” *Id.* RTS symptoms include fear, depression, anxiety, social maladjustment, and sexual dysfunction. *Id.*

“Add to [these mental health impacts of assault] an abusive, prolonged, and invasive investigation and adjudication process, and it is no wonder that students feel ‘raped a second time’ by their school’s procedures.” *Id.* The mental health challenges faced by student-survivors become especially acute when perpetrators remain on campus without

restriction and continue to be a tangible part of the victim's social and academic life. *Id.* Complainants having to share the same campus and living space with their accused assailants compounds the initial trauma of sexual assault. Kathryn M. Reardon, *Acquaintance Rape at Private Colleges and Universities: Providing for Victims' Educational and Civil Rights*, 38 SUFFOLK U. L. REV. 395, 410 (2005). Students "may continue to live in fear after an assault when their abuser may live in the same residence hall or attend the same classes." *The Challenge of Title IX Responses to Campus Relationship and Intimate Partner Violence: The 2015 Whitepaper*, ASSOCIATION OF TITLE IX ADMINISTRATORS, <https://cdn.atixa.org/website-media/atixa.org/wp-content/uploads/2015/02/12193857/Challenge-of-TIX-with-Author-Photos.pdf>, at 4, (last visited Aug. 04, 2020). Students' predictable routines (i.e., class schedule, extracurricular activities, on-campus-job, housing, and parking) may make it easier for their [assailant] to predict and/or track their movements." *Id.* "In attempts to avoid run-ins with their assailants, victims typically limit their exposure by missing classes, ceasing participating in social and extracurricular activities, and confining themselves to areas of campus where they feel safe." Reardon, *supra*. "Run-ins are not just emotionally troubling, but are *dangerous* and are certain to create further harm and lend to hostile campus work environment." *Id.*

Fear of seeing the assailant again on campus during and after the investigation is only strengthened by the realization that the vast majority of college campus rapes are committed by repeat offenders. Jeremy Bauer-Wolf, *Repeat Rapists on Campus*, INSIDE HIGHER ED (April 12, 2019), <https://www.insidehighered.com/news/2019/04/12/study-repeat-rapists-committing-vast-majority-sexual-crimes>.

“[A]bout two-thirds of college rapists are repeat offenders, who account for the great majority of rapes (over 90%), and [...] about one-fourth of college rapists admit to committing rapes over multiple years of college.” *Repeat Rape by College Men*, Jim Hopper, <https://www.jimhopper.com/repeat-rape-by-college-men/> (last visited Aug. 04, 2020). In one study, “researchers documented approximately 2,071 sexual assaults – of those, roughly 950 assaults, or about 46% of the incidents, were committed by students who admitted to raping *10 or more times*.” Bauer-Wolf, *supra*. (emphasis added).

Title IX is intended to protect students against these very ongoing injuries. Title IX charges schools to stop *immediately* any ongoing harassment and to *prevent recurrence*. Reardon, *supra* at 410. (emphasis added). Accordingly, at a minimum, colleges have a clear duty to investigate every claim of sexual harassment and to provide and enforce, “interim precautions” to protect student-victims *during* the investigation and *before* a formal decision is made. *Id.* Reasonable interim precautions include issuing and enforcing a stay away or no-contact order to ensure that the sexual predator does not contact or go within a certain distance of the victim and making arrangements that the assailant not attend classes with the victim. *Id.* In doing so, schools ensure that student complainants are able to continue their education “without constant and pervasive threats to [their] physical safety and emotional stability.” *Id.* at 410-411. “[S]chools can [...] strike a balance between providing victims with the protections they need (and comporting with federal requirements under Title IX) while ensuring that accused students are afforded basic fairness.” *Id.* at 411.

In this case, MSU not only delayed its investigation without a cogent reason for months, it failed to take any of the reasonable interim measures outlined above as necessary to prevent or deter retaliation or further harassment. MSU even failed to enforce its own belated no-contact order despite at least nine reported violations. MSU's failures left Ms. Kollaritsch vulnerable to further harassment and retaliation and effectively deprived her of normal participation in her MSU education. Under *Williams, Davis, and Kelly*, MSU's failures more than suffice to demonstrate deliberate indifference.

II. A Rule Requiring Post-Notice Harassment For All Title IX Claims Creates Perverse Incentives For Universities and Contradicts The Intent Of Title IX.

The Sixth Circuit below required allegation and proof of "some further incident of actionable sexual harassment," beyond the initially reported and inadequately addressed sexual assault, before a university could be deemed deliberately indifferent under Title IX and *Davis*. *Kollaritsch v. Michigan State University Board of Trustees*, 944 F.3d 613, 623 (6th Cir. 2019). The Sixth Circuit would thus allow relief only for students who have been assaulted or harassed by the same perpetrator at least twice – at least once before and at least once after reporting. The court below would allow a school with impunity to keep an assailant on campus with unlimited access to the reporting student's housing and classes and with no interim protective measures despite the obvious danger of further harassment or retal-

iation. Title IX does not protect schools that ignore the sexual harassment of their students, and it certainly does not allow “one free rape.” *S.S. v. Alexander*, 177 P.3d 724, 741 (Wash. App. Div. 1 2008).

The court in *Takla v. Regents of the U. of California*, 2015 U.S. Dist. LEXIS 150587, *14, 2015 WL 6755190 (C.D. Cal. Nov. 2, 2015), specifically rejected UCLA’s argument in that case that a second or further act of sexual harassment was required to find deliberate indifference under *Davis*, holding that “the phrase ‘make liable and vulnerable’ [as used in *Davis*]” would be redundant if construed to require further harassment [...].” *See also Kelly v. Yale*, 2003 U.S. Dist. LEXIS 4543 at *12 (“Although Kelly was not subjected to further harassment by Nolan, it was her departure from her classes and her dormitory, not any immediate action taken by Yale, that assured that outcome. Therefore, a reasonable jury could find that Yale’s response, or lack thereof, rendered Kelly “liable or vulnerable” to Nolan’s harassment ... and that Yale’s failure to provide Kelly with accommodations, either academic or residential, immediately following Nolan’s assault of her, was clearly unreasonable given all the circumstances of which it was aware.”).

Given the adverse psychological effects on student complainants caused by reasonable fears of retaliation or further harassment and the consequent impairment of their ability to continue their education, as documented above, an unreasonably delayed and deliberately indifferent response to a report of sexual assault can itself “effectively” bar the student from access to continued education and thereby itself result in severe and pervasive discrimination

under Title IX. As explained in *Davis* and *Takla*, leaving a student complainant “vulnerable” to retaliatory action or further harassment deprives the student of the opportunity to concentrate on her education as she should just as effectively as a further act of harassment would.

The court below misconstrued the import of the reference in *Davis* to leaving a student complainant “vulnerable” to harassment, holding that it applied only to cases where university inaction led to an actual second assault or act of harassment. *Kollaritsch*, 944 F.3d at 623. This misreading of *Davis* ignores the deprivation of educational opportunities and resulting Title IX discrimination caused by the delay in response and inadequate interim protective measures themselves. Furthermore, a “one bite rule” construction of Title IX also ignores situations in which the statistically frequent repeat offenders actually do engage in further acts of sexual harassment but to a different on campus victim, as occurred in this very case.

In addition to being inconsistent with a reasonable construction of *Davis*, a mandatory “one-bite” rule creates perverse incentives for the university. If the university, no matter how unreasonable its action or inaction may otherwise be, can be liable only if a particular student assailant assaults a particular victim at least twice, universities will have an incentive to ignore complaints rather than to respond to them and thereby claim not to have had notice of a previous assault. The school thus has an incentive to make reporting more challenging and the disciplinary process even more discouraging for student complainants than it already is, in order to discourage reports. No reasonable

interpretation of Title IX should allow such a destructive and counterproductive “one bite” rule.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court grant he petition for writ of certiorari.

Respectfully submitted,

A handwritten signature in black ink that reads "Rebecca J. Roe". The signature is written in a cursive, flowing style.

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