No. 21-968

IN THE

Supreme Court of the United States

FAIRFAX COUNTY SCHOOL BOARD,

Petitioner,

v.

JANE DOE,

Respondent.

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

BRIEF OF INDEPENDENT WOMEN'S LAW CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE* [*]

Independent Women's Law Center ("IWLC") is a project of Independent Women's Forum ("IWF"), a nonprofit, non-partisan 501(c)(3) organization founded by women to foster education and debate about legal, social, and economic issues. IWF promotes policies that advance women's interests by expanding freedom, encouraging personal responsibility, and limiting the reach of government. IWLC supports this mission by advocating—in the courts, before administrative agencies, in Congress, and in the media—for equal opportunity, individual liberty, and the continued legal relevance of biological sex.

As an organization devoted to defending the rights of women and girls and to increasing opportunity for all Americans, IWLC submits that the expanded view of third-party liability adopted by some lower courts (including the Fourth Circuit in this case) has contributed to the creation of a regime that benefits no one—least of all the victims of sexual harassment.

IWLC cautioned the Court in an *amicus* brief in *Davis* v. *Monroe County Board of Education*, 526 U.S. 629 (1999), that schools and administrative agencies would have difficulty successfully navigating a vague

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[*] Pursuant to this Court's Rule 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus* or its counsel made a monetary contribution to this brief 's preparation or submission. Counsel of record for all parties received timely notice and have consented to the filing of this brief.

and amorphous regime of third-party liability for student-on-student harassment.[1] Today, more than twenty years after this Court issued its decision in *Davis*, the problems that were predicted have become manifest. It is for this reason that IWLC submits this *amicus* brief urging the Court to grant the petition and clarify the scope of third-party liability for student-on-student harassment under *Davis*.

[1] Brief of *Amicus Curiae* Independent Women's Forum in Support of The Respondents, *Davis* v. *Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999), No. 97-843, 1998 WL 855519, available at https://bit.ly/3gt9SAa.

SUMMARY OF ARGUMENT

Sexual harassment is abhorrent—and perpetrators should face the full consequences of their actions. This case, however, isn't about the consequences that harassers should face for their actions. It's about the circumstances that permit victim-students to hold schools legally responsible for the actions of other students. Here, the Fourth Circuit held that under this Court's decision in *Davis* v. *Monroe County Board of Education*, 526 U.S. 629 (1999), a school can be held liable under Title IX for alleged student-on-student misconduct that the school did not cause and responded to in good faith. By stretching *Davis* to permit liability under such circumstance, the Fourth Circuit exacerbated an entrenched circuit split on the important, recurring question of *Davis*'s reach. This would be reason enough to grant the petition. But the Fourth Circuit's holding also sets a troubling precedent that, if permitted to stand, will saddle schools at all levels of the educational system with excessive, unnecessary litigation and compliance costs; jeopardize due process and free speech rights of students; and do all of this without achieving any meaningful improvement in protecting students from sexual harassment or assisting survivors.

In 1999, a fractured Court held in *Davis* that schools may be liable for damages under Title IX for their *own* deliberate indifference to student-on-student sexual harassment. But the *Davis* majority envisioned this holding would apply rarely and only in the egregious circumstances where a school's failure to address sexual harassment is systemic or itself an example of sex discrimination. See 526 U.S. at 653

(noting that the opinion "limit[s] private damages actions to cases having a systemic effect on educational programs or activities").

Despite the narrowness of *Davis*'s holding, however, some courts (including the court below) have massively expanded its reach to allow liability for failing to take immediate action against an accused perpetrator in response to *any* allegation of sexual harassment. The result has been the rise of a vast, administrative bureaucracy at schools and a broken and ineffective system.

This case is the perfect vehicle for clarifying *Davis*, resolving the conflict over its scope, and alleviating the negative consequences of its expansion by the lower courts. The Court should grant the petition and reverse the judgment below.

ARGUMENT

I. Widespread Contravention Of *Davis*'s Strict Limits Has Created A Broken System That Benefits No One.

Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq*., safeguards any "person in the United States" 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). Although Congress expressly authorized only administrative enforcement for Title IX, this Court recognized an implied cause of action under Title IX for damages. *Cannon* v. *Univ. of Chi.*, 441 U.S. 677, 717 (1979); *Franklin* v. *Gwinnett Cty. Pub. Schs.*, 503 U.S. 60, 76 (1992). In defining the contours of that cause of action, however, the Court has emphasized that Title IX's text and purpose limit liability to cases where the school's own misconduct *caused* the sex-based discrimination.

In *Gebser* v. *Lago Vista Independent School District*, 524 U.S. 274 (1998), the Court held that a school board may be liable for a teacher's sexual harassment of a student if an official with authority to address the harassment acts with deliberate indifference to the known harassment. That deliberate indifference, the Court emphasized, must amount to "an official decision by the [school] not to remedy the violation." *Id.* at 290.

In *Davis*, the Court extended *Gebser* to allow liability for student-on-student harassment. 526 U.S. at 644–45, 650. But the Court cabined that liability in three important ways. First, the Court held that the alleged sexual harassment must be "systemic"—"so

severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities." *Id.* at 651–52. Second, the Court made clear that the school's response when it learns about the harassment must be "clearly unreasonable in light of the known circumstances." *Id.* at 647–48. Third, the Court stressed that the school's deliberate indifference must *cause* the harassment. See *id.* at 642–43.

The Court underscored that a school can be held liable only for "its own misconduct," and its response to student-on-student harassment must itself "amount[] to an intentional violation of Title IX." *Davis*, 526 U.S. at 640, 643. As a result, schools "could be liable in damages" for student-on-student sexual harassment "only where their own deliberate indifference effectively 'cause[d]' the discrimination." *Id.* at 642–43 (alteration in original) (quoting *Gebser*, 524 U.S. at 291). These "very real limitations," the Court stressed, would blunt the threat of "sweeping liability." *Id.* at 652.

In dissent, Justice Kennedy, writing for himself and Chief Justice Rehnquist, Justice Scalia, and Justice Thomas, issued a warning that has proved prescient. The Court's holding would, Justice Kennedy warned, unleash an "avalanche of liability" on schools across the country. *Davis*, 526 U.S. at 657 (Kennedy, J., dissenting). "[T]he limiting principles [the Court] proposes are illusory," wrote Justice Kennedy, and "[t]he only certainty flowing from the majority's decision is that scarce resources will be diverted from educating our children." *Ibid.*; see also Br. of *Amicus*

Curiae Independent Women's Forum in Support of Respondents, *Davis* v. *Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999) (highlighting diversion of educational resources that would result from expanding Title IX liability).

The majority's decision, Justice Kennedy feared, would "embroil schools and courts in endless litigation over what qualifies as peer sexual harassment and what constitutes a reasonable response"—and "[t]he cost of defending against peer sexual harassment suits alone could overwhelm many school districts." *Davis*, 526 U.S. at 680, 684 (Kennedy, J., dissenting).

This is exactly what has come to pass. The Fourth Circuit's decision in this case exemplifies Justice Kennedy's concerns about "the futility of the Court's attempt to hedge its holding" in *Davis* "with words of limitation for future cases." *Id.* at 686. Indeed, the decision below ignores those limitations altogether. See Pet. 14–17.

The *Davis* holding was clear: To create liability for the school, the harassment of one student by another must be severe and pervasive. 526 U.S. at 652–53. And the Court disavowed any "characterization" of its decision that would "mislead courts to impose more sweeping liability" than Title IX requires. *Id.* at 652. The Fourth Circuit did not even acknowledge these limitations, presenting an ideal opportunity for the Court to restore a proper understanding of the scope of liability under Title IX and alleviate the serious consequences that have flowed from judicial expansion of that liability in direct contravention of *Davis*.

II. The Time Has Come For This Court To Resolve The Scope Of Title IX Liability Under *Davis*.

The Fourth Circuit's decision exemplifies the failure of some courts to take seriously the limitations imposed by *Davis* on its implied cause of action under Title IX for student-on-student harassment. The regrettable result is a system that serves neither the victim nor the school, to say nothing of the interests of due process and free speech.

Just as Justice Kennedy predicted in his *Davis* dissent, schools across the nation have faced a flood of litigation—taking time and resources away from their core mission of educating students. See *Davis*, 526 U.S. at 684 (Kennedy, J., dissenting). Unsurprisingly, schools frequently settle these cases, because "[t]he cost of defending against peer sexual harassment suits alone could overwhelm many school districts." *Id.* at 680; see also Michelle R. Smith, *A Look At Student-on-Student Sex Abuse Verdicts, Settlements*, Associated Press (May 22, 2017), https://bit.ly/32NpjQq (collecting cases).

Also not surprisingly, Title IX compliance bureaucracies have grown exponentially. The Association of Title IX Administrators claims 8,000 active members in its ranks. Association of Title IX Administrators, www.atixa.org (last visited Feb. 2, 2022). At Yale University, in 2016, "nearly 30 faculty and staff members work[ed] part time or full time in support of Title IX efforts, and twice as many faculty and staff members and students volunteer[ed] as advisers and committee members." Anemona Hartocollis, *Colleges Spending Millions to Deal With Sexual Misconduct Complaints*, N.Y. Times (Mar. 29, 2016), https://nyti.ms/3s6OqWK.

A similar story is playing out at Harvard, which has "50 full-time and part-time Title IX coordinators across 13 schools." *Ibid*. As Title IX coordinators earn between "$50,000 to $150,000 a year," costs mount quickly. *Ibid*. At the University of California at Berkeley, for example, "Title IX spending [rose] by at least $2 million" from 2013 to 2016. *Ibid.*

But cost is only half the story. By pressuring schools to make spur-of-the-moment decisions about students accused of sexual harassment (so as to avoid liability to harassment claimants), lower-court expansion of *Davis* has spurred litigation against schools by accused students alleging due process violations. See Greta Anderson, *Students Look to Federal Courts to Challenge Title IX Proceedings*, Inside Higher Ed (Oct. 3, 2019), https://bit.ly/341ZrAI. From 2011 to 2019, "more than 500 accused students have filed lawsuits against their college or university," over "340 of [which were] brought in federal court." Samantha Harris & K.C. Johnson, *Campus Courts in Court: The Rise in Judicial Involvement in Campus Sexual Misconduct Adjudications*, 22 N.Y.U. J. Legis. & Pub. Pol'y 49, 49 (2019).

Of these cases, "colleges have been on the losing end of more than 90 federal decisions, with more than 70 additional lawsuits settled by the school prior to any decision." *Ibid.* As one court noted, school administrators may be "motivated to favor the accusing female over the accused male, so as to protect themselves and the University from accusations that they had failed to protect female students from sexual assault." *Doe* v. *Columbia Univ.*, 831 F.3d 46, 57 (2d Cir. 2016); see also Harris & Johnson, *Campus Courts in*

Court, 22 N.Y.U. J. Legis. & Pub. Pol'y at 64 & n.82 (collecting cases).

Schools thus find themselves in an untenable position. They face liability "coming and going over the same incident—by insufficiently protecting the rights of the victim in one case and by insufficiently protecting the rights of the accused in the other." *Foster* v. *Bd. of Regents of Univ. of Michigan*, 952 F.3d 765, 794 (6th Cir.) (Sutton, J., dissenting), reh'g en banc granted, 958 F.3d 540, on reh'g en banc, 982 F.3d 960 (6th Cir. 2020). As Justice Kennedy predicted, schools today are "beset with litigation from every side." *Davis*, 526 U.S. at 682 (Kennedy, J., dissenting); see also *id.* at 680 ("The number of potential lawsuits against our schools is staggering."). Millions of dollars are being spent "on all sides of the issue," creating "a cottage industry" of lawyers and consultants who profit from the pain and suffering of victims and the falsely accused alike. See Anemona Hartocollis, *Colleges Spending Millions to Deal with Sexual Misconduct Complaints*, N.Y. Times (Mar. 29, 2016), https://nyti.ms/3s6OqWK.

This unfortunate state of affairs poses a threat not only to due process rights and college budgets, but also to freedom of speech. It is increasingly common that "a student's claim that the school should remedy a sexually hostile environment will conflict with the alleged harasser's claim that his speech, even if offensive, is protected by the First Amendment." *Davis*, 526 U.S. at 683 (Kennedy, J., dissenting). In one instance, a student newspaper was "slapped with disciplinary measures" after publishing a satirical article drawing attention to "how many people don't take male sexual assault seriously." Kaitlin DeWulf, *An*

Unintended Consequence of Title IX, Student Press Law Center (Oct. 7, 2016), https://bit.ly/345cTE7. The newspaper's faculty adviser was forced to resign, and the paper was placed on probation for two years, such that "if the publication put out another problematic article, it could be removed as a student publication altogether." *Ibid.* The university took these actions because it believed it "was legally required by Title IX statutes to act." *Ibid.*

The academic freedom of professors, too, is at stake. See American Association of University Professors, *The History, Uses, and Abuses of Title IX* (June 2016), https://bit.ly/3gcw7Kh. One professor found herself under investigation for violating Title IX when two students complained about an article she wrote criticizing the expansive definition of sexual harassment under Title IX as inadvertently detrimental to women. Laura Kipnis, *My Title IX Inquisition*, Chron. Higher Educ. (May 29, 2015), https://bit.ly/3LfgqAD. When one of her fellow faculty members spoke out on her behalf, arguing that the investigation was a threat to academic freedom, he too was accused of violating Title IX. Robert Carle, *The Strange Career of Title IX*, National Association of Scholars (Nov. 4, 2016), https://bit.ly/3IV3eyx.

The increased pressure on schools to avoid expansive Title IX liability for student-on-student harassment or assault—and the negative publicity it can bring—redounds to the detriment of victims, too, as managing the risks of litigation can detract from focusing on the needs of survivors. See Jennifer C. Braceras, *Straight Talk for College Women*, Wall St. J. (Sept. 11, 2017), https://on.wsj.com/3GmwCfJ. All stakeholders in the current flawed system—students,

faculty, and administrators alike—would benefit from this Court's intervention now to resolve the conflict, clear up the uncertainty, and confirm the limits on liability placed by *Davis*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 7, 2022