

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**

—◆—
RESPONDENT'S SUPPLEMENTAL BRIEF

—◆—
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SUPPLEMENTAL BRIEF

The first question presented in this case is whether a school may be liable if it “is deliberately indifferent to reported sexual harassment of a student, and that deliberate indifference ‘exclude[s the student] from participation in’ or ‘denie[s her] the benefits of’ the school’s programming, 20 U.S.C. § 1681(a), . . . or [whether] the student [must] also experience additional sexual harassment after reporting.” BIO i. Fairfax County School Board says post-notice harassment is required; Jane Doe says it is not, and the court below agreed. At the time Jane Doe filed her opposition brief, only one federal court of appeals, the Sixth Circuit, had adopted the Board’s position. *Id.* at 15-18. Now the Sixth Circuit has reversed course with respect to high school students like Jane. *Doe & Doe #1 ex rel. Doe #2 v. Metro. Gov. of Nashville & Davidson Cnty.*, Nos. 20-6225/6228, 2022 WL 1573848, at *6-7 (6th Cir. May 19, 2022). The shallow circuit split has disappeared.

As previously explained, the Fourth Circuit’s holding in this case aligned with the position adopted by the First, Tenth, and Eleventh Circuits. *See Farmer v. Kan. State Univ.*, 918 F.3d 1094, 1103, 1106 (10th Cir. 2019); *Fitzgerald v. Barnstable Sch. Comm.*, 504 F.3d 165, 171 (1st Cir. 2007), *rev’d and remanded on other grounds*, 555 U.S. 246 (2009); *Williams v. Bd. of Regents of Univ. Sys. of Ga.*, 477 F.3d 1282, 1296 (11th Cir. 2007). In 2019, the Sixth Circuit chose a different rule in *Kollaritsch v. Michigan State University Board of*

Trustees, 944 F.3d 613, 623-24 (6th Cir. 2019), *cert. denied*, 141 S. Ct. 554 (2020).

Since then, the Sixth Circuit has twice limited *Kollaritsch*'s reach. First, in March of this year, it refused to apply *Kollaritsch* in a teacher-on-student harassment case, instead explicitly adopting the logic of the Tenth and Eleventh Circuits. *Wamer v. Univ. of Toledo*, 27 F.4th 461, 469-71 (6th Cir. 2022). Then, on May 19, the Sixth Circuit held that *Kollaritsch* applies only to cases against colleges and universities, not those against high schools, like Jane's. *Metro. Gov.*, *supra*, at *6-7 (holding "*Kollaritsch* . . . does not apply to students in high school").¹

This means that, even under the Sixth Circuit's interpretation of Title IX, Jane is entitled to a new trial. With respect to high school students, there is no circuit split on the "further harassment" question. The Sixth Circuit's repeated efforts to cabin *Kollaritsch* also suggest the remaining circuit split concerning colleges and universities may soon resolve itself.



¹ The same opinion clarified that *Kollaritsch* also does not apply to pre-assault claims, *id.* at *3-5, *7, which are not at issue here.

CONCLUSION

For the foregoing reasons, and the reasons put forth previously in Jane's opposition brief, the Court should deny the petition for a writ for certiorari.

Respectfully submitted,

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June 2, 2022