No. 22-___

In the Supreme Court of the United States

UNIVERSITY OF TOLEDO,

Petitioner,

v.

JAYCEE WAMER,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Can schools be held liable under Title IX for sexual harassment that ceased before they were notified that it happened?

LIST OF PARTIES

The petitioner is the University of Toledo.

The respondent is Jaycee Wamer.

LIST OF DIRECTLY RELATED PROCEEDINGS

1. *Wamer v. University of Toledo*, 20-4219 (6th Cir.) (judgment entered March 2, 2022)

2. *Wamer v. University of Toledo*, No. 20-cv-942 (N.D. Ohio) (judgment entered Oct. 16, 2020)

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INTRODUCTION

This case presents the same question as *Fairfax County School Board v. Doe*, 142 S. Ct. 2704 (2022) (calling for the views of the Solicitor General). Specifically: Can schools be held liable under Title IX for sexual harassment that ceased before they were notified that it happened?

The answer is no. Title IX forbids schools that receive federal funds from "subject[ing]" their students to "discrimination" "on the basis of sex." 20 U.S.C. §1681(a). Everyone agrees that "sexual harassment can constitute discrimination on the basis of sex." *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 283 (1998) (citation omitted). Thus, everyone agrees that schools may be liable under Title IX *for subjecting* their students to sexual harassment.

The italicized words, however, are critically important. Schools are liable only for discrimination to which they "subject" their students. Put differently, Title IX makes schools liable for their own conduct—not for the conduct of others. This means that schools cannot be held vicariously liable under Title IX for sexual harassment. *Id.* at 285, 287–89. Instead, they can be held liable for harassment only if they caused it through their own deliberate indifference. *Id.* at 290–91.

From this, it follows that schools cannot be held liable for harassment that occurs *before* they are put on notice of the offender's misconduct. Again, schools can be held liable for harassment only if it results from their own deliberate indifference. *See id.* at 287–91. Thus, a plaintiff alleging harassment cannot prevail by showing only that she was harassed—she must show that the school "failed to end or prevent[] the

harassment." *Doe v. Fairfax Cnty. Sch. Bd.*, 10 F.4th 406, 415 (4th Cir. 2021) (Wilkinson, J., dissenting from the denial of rehearing *en banc*) (internal parenthesis omitted). And schools cannot fail to end or prevent harassment until they know it is occurring. In any event, Congress can impose liability through conditions attached to Spending Clause statutes only if it does so clearly. Because Title IX does not *clearly* make schools liable for harassment they did not know about, it must be interpreted to require post-notice harassment. *Kollaritsch v. Michigan State Univ. Bd. of Trs.*, 944 F.3d 613, 628-29 (6th Cir. 2019) (Thapar, J., concurring).

Notwithstanding all this, the Sixth Circuit held that schools can be held liable under Title IX if their failure to act created an "objectively reasonable fear" of further harassment, regardless of whether further harassment ever occurred. That ruling contradicts *Gebser*. It implicates the always-important question of when state-run schools can be held liable for money damages under a Spending Clause statute. And it deepens a circuit split. The question here, the Sixth Circuit acknowledged, has "divided" the "circuits." Pet.App.9a. Some courts have held that post-notice harassment is an essential element of Title IX harassment claims. *K.T. v. Culver-Stockton Coll.*, 865 F.3d 1054, 1058 (8th Cir. 2017); *Escue v. N. Okla. Coll.*, 450 F.3d 1146, 1153–54, 1156 (10th Cir. 2006); *Reese v. Jefferson Sch. Dist. No. 14J*, 208 F.3d 736, 740 (9th Cir. 2000). Others have held that post-notice harassment *is not* an essential element of a Title IX claim. *Doe v. Fairfax Cnty. Sch. Bd.*, 1 F.4th 257, 273–74 (4th Cir. 2021); *Farmer v. Kan. State Univ.*, 918 F.3d 1094, 1097–98 (10th Cir. 2019); *Williams v. Bd. of Regents of Univ. Sys. of Georgia*, 477 F.3d 1282, 1296 (11th

Cir. 2007). And the Sixth Circuit, in the decision below, adopted a hybrid rule, under which plaintiffs alleging harassment by other students must allege post-notice harassment while plaintiffs alleging harassment by school employees need not. *See* Pet.App.2a.

As noted above, this Court has already shown interest in another petition that involves the same issue. *Fairfax*, 142 S. Ct. 2704. The Court should grant certiorari in both cases. In fact, this case is a perfect companion case for that one: while this case involves allegations of harassment by a school employee, *Fairfax* involves allegations of harassment by a fellow student. By granting both cases, the Court could establish that plaintiffs must allege and plead post-notice harassment, and that they must do so *without regard* to whether the alleged harasser was a student or a school employee.

OPINIONS BELOW

The Sixth Circuit's opinion is published at *Wamer v. University of Toledo*, 27 F.4th 461 (6th Cir. 2022), and reproduced at Pet.App.1a. The District Court's decision is online at *Wamer v. University of Toledo*, No. 20-cv-942, 2020 WL 6119419 (N.D. Ohio Oct. 16, 2020), and reproduced at Pet.App.24a.

JURISDICTIONAL STATEMENT

The District Court had jurisdiction over this case under 28 U.S.C. §1331. The Sixth Circuit had jurisdiction under 28 U.S.C. §1291. The Sixth Circuit issued its opinion and judgment on March 2, 2022. On May 10, 2022, the Sixth Circuit entered an order denying rehearing and rehearing *en banc*. This petition timely invokes this Court's jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

20 U.S.C. §1681(a) states:

> "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."

STATEMENT

1. The Constitution vests Congress with the power to "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." Art. 1, § 8, cl. 1. This clause—the Spending Clause—empowers Congress to spend money and to "attach conditions on the receipt of federal funds." *S. Dakota v. Dole*, 483 U.S. 203, 206 (1987) (quotation omitted).

Among Congress's powers, the power to spend is unique. Typically, the "Federal Government" has only the "limited powers" that the Constitution expressly confers upon it. *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). But this Court has interpreted the Spending Clause "to authorize expenditure of public moneys for public purposes" beyond "the direct grants of legislative power found in the Constitution." *United States v. Butler*, 297 U.S. 1, 66 (1936). "Thus, objectives not thought to be within Article I's 'enumerated legislative fields,' may nevertheless be attained through the use of the spending power and the conditional grant of federal funds." *Dole*, 483 U.S. at 207 (citation omitted). And while Congress cannot commandeer the States to achieve its ends, it may enlist their aid through conditions attached to funding offers.

Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 296 (2006).

With this unique power comes unique constraints. Because the Spending Clause allows Congress to achieve through offers of funds what it cannot pursue through direct regulation, conditions attached to funding offers are valid only if the recipient voluntarily agrees to them. *Id.*; *Butler*, 297 U.S. at 70–71. And for a recipient to agree to a condition voluntarily, the recipient must be able to "ascertain" the obligations the condition imposes and the consequences of failing to satisfy those obligations. *Arlington*, 548 U.S. at 296. Thus, spending conditions are enforceable only to the extent they are clear. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

Congress exercised its spending power when it passed the Education Amendments Act in 1972. The Act imposes numerous rules on schools that accept federal funds. 20 U.S.C. §§1681–88; *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287 (1998). One such rule appears in Title IX of the amendments. 20 U.S.C. §1681. It says: "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."

Congress assigned the enforcement of Title IX to a federal agency. §1682; *Gebser*, 524 U.S. at 280. It authorized the agency to withhold federal funds from non-compliant schools. §1682. But it barred the agency from doing so unless the agency "'has advised the appropriate person'" "'of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means.'" *Gebser*, 524

U.S. at 280 (quoting §1682). Universities ensure their compliance with Title IX by maintaining Title IX offices. Those offices receive and investigate claims of sexual harassment. *See, e.g.*, *Kesterson v. Kent State Univ.*, 967 F.3d 519, 523 (6th Cir. 2020) (*per curiam*); *Doe v. Univ. of Kentucky*, 959 F.3d 246, 248 (6th Cir. 2020).

Title IX, as originally enacted, contained no private cause of action. That is, Congress never expressly empowered students to sue covered institutions for Title IX violations. This Court created a private cause of action anyway. The "history of Title IX," the Court held, "plainly indicate[d] that Congress intended to create such a remedy." *Cannon v. Univ. of Chicago*, 441 U.S. 677, 695 (1979). And Congress, this Court later held, ratified that interpretation by expressly abrogating the States' sovereign immunity for Title IX claims. *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 72 (1992); *id.* at 76–78 (Scalia, J., concurring in the judgment). In so doing, Congress left it "beyond dispute that private individuals may sue to enforce" Title IX. *Cummings v. Premier Rehab Keller, P.L.L.C.*, 142 S. Ct. 1562, 1569 (2022) (quotation omitted). It also confirmed that Title IX's private cause of action includes the right to recover money damages. *Franklin,* 503 U.S. at 72 (majority op.); *id.* at 76–78 (Scalia, J., concurring in the judgment). Thus, if a school that receives federal funds "subject[s]" a student to "discrimination on the basis of sex," the student can sue the school to recover money damages.

2. "[S]exual harassment can constitute discrimination on the basis of sex" and thus violate Title IX. *Gebser*, 524 U.S. at 283 (citation omitted). In what circumstances may a school be held liable under Title

IX for sexual harassment? Three of this Court's decisions shed light on this question.

Franklin set the stage. 503 U.S. 60. There, the Court implicitly approved of using Title IX to recover damages due to sexual harassment by a teacher. It focused on the broader question whether damages were available at all in a private right of action. *Id.* at 62–63. Answering yes, it allowed a plaintiff who was harassed by a teacher to pursue a claim for damages. *Id.* at 63–64, 76. But it did not "purport to define the contours" of harassment-based Title IX claims. *Gebser*, 524 U.S. at 281.

Next came *Gebser*. 524 U.S. 274. There, the Court reaffirmed *Franklin*'s unstated premise: a teacher's sexual harassment of a student qualifies as "discrimination on the basis of sex" under Title IX. *Id.* at 283, 291–93. But the Court held that a private plaintiff cannot recover money damages from a school for sexual harassment the school did not know about. *Id.* at 285. The Court thus declined the plaintiff's invitation to adopt a vicarious-liability standard—a standard that would make a school automatically liable for its employees' Title IX violations. *Id.* at 287–88. Instead, the Court adopted a deliberate-indifference standard, modeled on the standard governing whether a city can be liable for its employees' constitutional violations. *Id.* at 290–91; *see Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 691–95 (1978). Against the backdrop of the Spending Clause's clarity requirement, the Court reasoned that the statute's implied remedy should not exceed its express remedy (the withholding of funds), which does not kick in unless a decisionmaker for the school has "actual notice" of the harassment and "an opportunity to take action to end the harassment or to limit further harassment."

Gebser, 524 U.S. at 288–90. Thus, under *Gebser*, a student who suffers sexual harassment has no claim for money damages against her school unless: (1) the school had "actual notice" of the harassment; (2) the school remained deliberately indifferent to the harassment; and (3) the school's failure to act "cause[d]" the harassment. *Id.* at 290–91; *Fairfax*, 10 F.4th at 415 (Wilkinson, J., dissenting from the denial of rehearing *en banc*).

The final case in the trilogy is *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999). There, the Court held that Title IX's private right of action extends to claims alleging peer-peer harassment. *Id.* at 633. But *Davis* also held that only severe and pervasive peer-peer harassment is actionable. *Id.* at 633. Further, *Davis* provided a deeper discussion on what it means for a school to "subject" a student to discrimination under the statute. Looking to dictionary definitions of the term, it explained that the school's "deliberate indifference must, at a minimum, 'cause [students] to undergo' harassment or 'make them liable or vulnerable' to it." *Id.* at 644–45 (citation omitted).

3. The just-discussed background informs this case.

Erik Tyger, a lecturer at the University of Toledo, sexually harassed one of his students, Jaycee Wamer. (Because the case is still at the motion-to-dismiss stage, this brief assumes the truth of the facts alleged.) In May 2018, the University's Title IX office received a report that Tyger had repeatedly touched Wamer's leg and "said 'nasty stuff' to her." R.1, Compl., PageID#5. (All record citations refer to the District Court record, which is available on PACER.)

The report came from another of Wamer's professors, and Wamer filed her own report soon after. *Id.* at PageID#5–6. After the University received these reports, it opened an investigation. *See id.* at PageID#6. As part of that investigation, it asked Wamer whether she would be comfortable talking to the Title IX office in person. *Id.* She said no. *Id.* After three weeks, the University closed the investigation and declined to take action against Tyger at that time. *Id.*

The outcome of the investigation distressed Wamer. She "had an increasingly difficult time concentrating on her studies and feared visiting campus and attending in-person courses." *Id.* at PageID#7. She "changed her major, avoided coming to campus, and began enrolling in online classes to ensure that she would not come into contact with Tyger." *Id.*

In October, Wamer met with a senior faculty member whom she told about the harassment. *Id.* The faculty member reported Wamer's concerns to the Title IX office, which investigated anew. *Id.* After three weeks, the University suspended Tyger and barred him from campus. *Id.*

The University terminated Tyger in April. *Id.* at PageID#8. And, after a hearing, it found that Tyger had "used his position of power and authority to initiate unwelcome physical contact, behaved in a sexual manner towards a student enrolled in his class and … behaved unprofessionally." *Id.*

Wamer then sued the University, seeking money damages under Title IX. The District Court dismissed her complaint for failure to state a claim. Pet.App. 24a–33a. In doing so, it relied on an earlier Sixth Circuit decision, *Kollaritsch v. Michigan State University Board of Trustees*, 944 F.3d 613 (6th Cir. 2019). *See*

Pet.App.29a–31a. Because the opinions in *Kollaritsch* discuss in detail the issues this petition presents, the decision merits a short discussion here.

Kollaritsch involved claims by several women who had suffered sexual harassment by their peers. 944 F.3d at 618. Each woman reported the harassment to the university. *Id.* at 624–25. Once the women reported the harassment, it stopped. *Id.* Yet each woman felt dissatisfied with the way the university handled her claim. And each alleged that the inadequate response inflicted emotional and physical harm on her and denied her educational opportunities. *Id.* The case presented the question whether the women's claims could proceed, notwithstanding the fact that the harassment stopped once the school was put on notice. *Id.* at 623–24.

The Sixth Circuit ruled that the claims failed as a matter of law. It explained that this Court's Title IX cases require a plaintiff to allege two torts: actionable sexual harassment by a third party and deliberate indifference by the school. *Id.* at 620–21. Thus, before liability can attach, a plaintiff seeking relief for harassment must show that the school's unreasonable response to known harassment caused "further harassment" that deprived the student of educational opportunities. *Id.* at 623–24. So, if the harassment stops after the student reports it, the student's Title IX claim necessarily fails.

Judge Thapar joined the Sixth Circuit's decision in full, but he also concurred to address a related issue. As he saw it, the requirement of alleging further, post-notice harassment followed inescapably from the words in Title IX, this Court's interpretation of those words, and the Spending Clause's clarity

requirement. Title IX, he noted, bars schools from "subject[ing]" a student to "discrimination." 20 U.S.C. §1681(a); *Kollaritsch*, 944 F.3d at 629 (Thapar, J., concurring). Because "sexual harassment can constitute discrimination on the basis of sex," *Gebser*, 524 U.S. at 283, a school becomes liable when it "'subjects' its students to harassment," *Davis*, 526 U.S. at 644 (alterations accepted). But a school only "subjects" a student to harassment when further harassment actually occurs. After all, he reasoned, "we wouldn't say that the school had 'subjected' its students to harassment if the students never experienced any harassment as a result of the school's conduct. To be 'subjected' to a harm, as a matter of ordinary English, requires that you experience that harm." *Kollaritsch*, 944 F.3d at 628–29 (Thapar, J., concurring). Judge Thapar therefore expressly rejected the view that a student must allege only "that the school's deliberate indifference made harassment more likely," *not* that the school's conduct "actually led to any harassment." *Id.* at 628. Judge Thapar further explained that, "even if there were any ambiguity" on this score, the clarity requirement applicable to Spending Clause legislation would require adopting "the less expansive reading of Title IX." *Id.* at 629.

Back to this case. The panel reversed the District Court's judgment dismissing the case. It acknowledged that "Wamer did not allege any post-notice harassment." Pet.App.9a. It also acknowledged that *Kollaritsch* requires Title IX plaintiffs seeking relief for harassment to allege and prove post-notice harassment. Pet.App.9a–11a. But the panel distinguished *Kollaritsch*; it stressed that *Kollaritsch* involved peer-peer harassment, while Wamer alleged teacher-student harassment. And it concluded, without much in

the way of an explanation, that "the *Kollaritsch* test is not applicable to claims of deliberate indifference to teacher-student harassment." Pet.App.2a. In that context, the panel held, a different rule applies. Specifically, a Title IX plaintiff may prevail by proving that she experienced "an objectively reasonable fear of further harassment [that] caused [her] to take specific reasonable actions to avoid harassment, which deprived [her] of the educational opportunities available to other students." Pet.App.20a.

Thus, according to the Sixth Circuit, plaintiffs who suffer harassment that the school "did not cause" and "could not prevent or foresee," *Fairfax*, 10 F.4th at 414 (Wilkinson, J., dissenting from the denial of rehearing *en banc*), can still recover as long as they prove "an objectively reasonable fear of further harassment," Pet.App.20a. Applying this standard, the panel determined that Wamer had stated a claim for relief and reversed the District Court's contrary determination. Pet.App.2a.

The University petitioned for both panel rehearing and *en banc* rehearing. The Sixth Circuit denied both requests. Pet.App.34a. The University then timely filed this petition.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit's decision deepened a circuit split on an issue of great importance to the States and to schools across the country. This is an ideal vehicle for resolving that split. The Court should grant the University's petition for a writ of certiorari.

I. The decision below deepened an existing circuit split.

The circuits are sharply divided, in cases where plaintiffs seek redress for sexual harassment under Title IX, regarding what plaintiffs must allege and prove. Pet.App.9a. Some courts have held that students "must allege that the school's deliberate indifference actually led to harassment, not that it only made such harassment more likely." *Kollaritsch v. Michigan State Univ. Bd. of Trustees*, 944 F.3d 613, 628 (6th Cir. 2019) (Thapar, J., concurring) (collecting cases). Other courts have held that students "must allege only that the school's deliberate indifference made harassment more likely, not that it actually led to any harassment." *Id.* (collecting cases).

The decision below acknowledged that split. Pet. App.10a–11a. And it adopted a middle-ground position. It acknowledged that Sixth Circuit precedent requires Title IX plaintiffs to allege and prove post-notice harassment in the context of peer-peer harassment. Pet.App.11a–12a (citing *Kollaritsch*, 27 F.4th 613). But it held that Title IX plaintiffs *need not* allege and prove post-notice harassment in cases where a school employee is accused of harassing the student. Pet.App.20a. The Sixth Circuit thus deepened a preexisting split.

A. The Eighth and Ninth Circuits require proof of post-notice harassment.

In the Eighth and Ninth Circuits, Title IX plaintiffs alleging harassment must always allege and prove post-notice harassment to prevail under Title IX.

1. Recall what this Court said in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999). It reaffirmed that students who suffer harassment may sue their schools under Title IX. But it made clear that schools can be held liable only if their own "deliberate indifference" caused the harassment. *Id.* at 644–45. And it held that a school exhibits deliberate indifference only if it "'cause[s] [students] to undergo' harassment or 'make[s] them liable or vulnerable' to it." *Id.* (citation omitted).

Relying on this language, the Eighth Circuit held that schools cannot be held liable under Title IX for harassment they had no direct ability to prevent. *Shrum ex rel. Kelly v. Kluck*, 249 F.3d 773, 781–82 (8th Cir. 2001). And, based on that decision, the Eighth Circuit has held that plaintiffs seeking relief for harassment under Title IX must allege and prove that they were harassed *after* the school received notice of the harassment. *See K.T. v. Culver-Stockton Coll.*, 865 F.3d 1054, 1058 (8th Cir. 2017).

The Eighth Circuit requires post-notice harassment in both peer-peer cases and teacher-student cases. *See, e.g.*, *id.* (peer); *Podrebarac v. Minot State Univ.,* 835 F. App'x 163, 164 (8th Cir. 2021) (teacher); *Plamp v. Mitchell Sch. Dist. No. 17-2*, 565 F.3d 450, 456–57 (8th Cir. 2009) (teacher); *see also, e.g.*, *Shank v. Carleton College*, 993 F.3d 567, 576 (8th Cir. 2021) (peer). That makes sense, as there is no plausible basis for distinguishing between the two contexts. Again, a school violates Title IX *only if* it "subject[s]" a student to discrimination. 20 U.S.C. §1681(a). One might conclude, as the Eighth Circuit has, that a school "subjects" a student to sexual harassment only if the student experiences harassment after the school is put on notice. Or one might conclude that post-

notice harassment is irrelevant. *See below* 16–19. But there is no plausible argument that the same words in the same statute impose different requirements pertaining to post-notice harassment depending on whether a school employee or another student did the harassing.

2. The Ninth Circuit has also recognized that post-notice harassment is necessary for a Title IX claim. *Reese v. Jefferson Sch. Dist. No. 14J*, 208 F.3d 736, 739 (9th Cir. 2000). In *Reese*, a high school punished four female students for going into the boys' bathroom and throwing water balloons at male students. *Id.* at 737–38. During a disciplinary meeting, the female students tried to justify the balloon barrage by alleging (for the first time) that the boys previously had harassed them. The high school stood by its decision. So the female students sued the school under Title IX, seeking damages from the boys' harassment and the school's disciplinary decision. *Id.* at 738.

The Ninth Circuit rejected their claims on the ground that they had failed to show any post-notice harassment. It recognized that, under *Davis*, a school subjects a student to discrimination when its deliberate indifference "'cause[s] students to undergo harassment or make[s] them liable or vulnerable to it.'" *Reese*, 208 F.3d at 739 (quoting *Davis*, 526 U.S. at 644–45). But because no "harassment occurred after the school district learned of the plaintiffs' allegations," the school district could not "be deemed to have 'subjected' the female students to the harassment." *Id.* at 740 (alterations accepted; quotation omitted).

The Ninth Circuit has not yet had occasion to apply its rule to the teacher-student context. But again,

there is no plausible basis for applying a different rule in that context.

3. In sum, the Eighth and Ninth Circuits both require Title IX plaintiffs to plead and prove post-notice harassment. Wamer, everyone agrees, alleged no such thing. Accordingly, while the Sixth Circuit reversed the District Court's dismissal of her claim, the Eighth and Ninth Circuits would have affirmed.

B. The First, Fourth, and Eleventh Circuits do not require plaintiffs to plead and prove post-notice harassment.

In sharp contrast to the Eighth and Ninth Circuits, the First, Fourth, and Eleventh Circuits do not require Title IX plaintiffs to plead and prove post-notice harassment.

1. In *Fitzgerald v. Barnstable School Committee*, 504 F.3d 165 (1st Cir. 2007), *rev'd on other grounds*, 555 U.S. 246 (2009), the First Circuit rejected a post-notice-harassment requirement as inconsistent with language in *Davis*. There, a kindergarten student told her parents that an older boy had repeatedly bullied her into raising her skirt, pulling down her underwear, and spreading her legs during bus rides. *Id.* at 169. The parents reported the alleged abuse to the school, which investigated. *Id.* In the meantime, the girl stopped riding the bus to school. *Id.* at 170. The school investigated the girl's claims, but found them inconclusive. *Id.* at 169–70. Because her parents drove her to school, the harassment stopped. *Id.* at 172. This led the district court to dismiss the claim. Echoing the reasoning of the Eighth and Ninth Circuits, the district court concluded that "Title IX liability only attaches after an institution receives actual

notice of harassment and the institution subsequently 'causes' the victim to be subjected to additional harassment." *Id.* at 172.

The First Circuit disagreed, concluding that plaintiffs need not show any post-notice harassment. *Davis*, the court explained, "stated that funding recipients may run afoul of Title IX not merely by 'caus[ing]' students to undergo harassment but also by '*mak[ing] them liable or vulnerable' to it*." *Id.* (quoting *Davis*, 526 U.S. at 645) (emphasis added). And it interpreted this to mean that schools may be liable if their inaction makes students vulnerable to harassment, *regardless* of whether the students experience such harassment. As a result, the court reasoned, plaintiffs need not allege or prove post-notice harassment. *See id.* at 172–73.

2. The Fourth Circuit has also interpreted this Court's decision in *Davis* to permit recovery without allegations or proof of post-notice harassment. *Doe v. Fairfax Cnty. Sch. Bd.*, 1 F.4th 257 (4th Cir. 2021). In *Fairfax*, two students touched one another sexually on a bus during a field trip. *Id.* at 261. Doe's friends informed the teachers what happened, but the school waited until the students returned to school to investigate. *Id.* Doe then reported that the other student had forced her hand onto his genitals and had touched her without her consent. *Id.* at 261–62. Although Doe experienced no further sexual harassment, the Fourth Circuit held that she could still potentially recover, and remanded the case for a new trial. *Id.* at 263. It reasoned that "Title IX liability based on student-on-student harassment is not necessarily limited to cases where such harassment occurs after the school receives notice and is caused by the school's own post-notice conduct." *Id.* at 273 (alterations accepted;

internal quotation marks omitted). The reason? "In *Davis*, the Supreme Court explained that an educational institution could be liable under Title IX not only where its deliberate indifference 'cause[s] [students] to undergo' harassment,' but also where such indifference 'make[s] them liable or vulnerable' to harassment.'" *Id.* (some internal quotation marks omitted)

Fairfax remains pending. Six judges dissented from the denial of *en banc* rehearing, with at least one judge suggesting that this Court should review the issue. *Fairfax*, 10 F.4th at 422 (Niemeyer, J., dissenting from the denial of rehearing *en banc*). The school petitioned for a writ of certiorari. *Fairfax Cnty. Sch. Bd. v. Doe*, No. 21-968. And this Court has called for the views of the Solicitor General. 142 S. Ct. 2704 (2022). As explained later, *see below* 27–28, this case would make an ideal companion case for *Fairfax* because this case involves alleged teacher-student harassment.

3. The Eleventh Circuit has held that, in "extreme" cases, a university may be liable under Title IX even when no post-notice harassment occurs. *Williams v. Bd. of Regents of Univ. Sys. of Georgia*, 477 F.3d 1282, 1299 (11th Cir. 2007). In *Williams*, three student-athletes conspired to rape a female student, and the school waited eight months after her report to conduct a disciplinary hearing. *Id.* at 1288–89. Because the victim withdrew from the university right after filing her complaint, no further harassment occurred. *Id.* at 1297. The lack of post-notice harassment did not bar her claim, however, because her choice to withdraw was "reasonable and expected." *Id.*

4. In sum, the First and Fourth Circuits would have resolved this case in precisely the same way as

the Sixth Circuit—though they would resolve cases involving peer-peer harassment differently. *Compare Fitzgerald*, 504 F.3d at 172–73 & *Doe*, 1 F.4th at 273–74 *with Kollaritsch*, 944 F.3d at 623–24. The Eleventh Circuit might also have resolved the appeal in the same way, depending on whether it deemed the allegations in this case "extreme." 477 F.3d at 1297.

C. The Tenth Circuit has issued inconsistent decisions on both sides of the split.

The Tenth Circuit has issued a pair of decisions on this issue that are "difficult to reconcile." *Fairfax*, No. 21-968, Pet. for Writ of Cert. at 20 n.2. In *Escue v. Northern Oklahoma College*, a female college student reported that one of her professors "touched her inappropriately without her consent on multiple occasions and made numerous sexual comments." 450 F.3d 1146, 1149 (10th Cir. 2006). The college permitted the student to transfer to a different class while it investigated. The student and the professor had no further contact. *Id.* at 1150. After the investigation, the college fired the professor. *Id.* The student sued the college, alleging (among other things) that its response had been inadequate. *Id.* at 1151. The college replied both that its response was "not 'clearly unreasonable in light of the known circumstances' and" that "its response to the harassment did not 'cause [Ms. Escue] to undergo harassment or make [her] vulnerable to it.'" *Id.* at 1155 (quoting *Davis*, 526 at 644–45). The Tenth Circuit agreed on both fronts. It explained that her claim failed because she had not shown that the university's response was clearly unreasonable or that its response "led to further sexual harassment. *Id.* at 1156.

Thirteen years later, a different panel of the Tenth Circuit went in a different direction. *Farmer v. Kan. State Univ.*, 918 F.3d 1094 (10th Cir. 2019). In *Farmer*, two Kansas State University students were raped by fellow students at fraternity events. *Id.* at 1099–1100. When the students reported the rapes, university staff told them that the university would not investigate the individual assailants, but would at most investigate the fraternity chapter more generally. *Id.* at 1099–1100. Although neither student suffered further harassment, each student suffered lasting mental health consequences that affected her educational opportunities. *Id.* at 1099–1101. Before the Tenth Circuit, Kansas State argued that the students' claims failed as a matter of law because they alleged no "actual further harassment" following their notifying the university. *Id.* at 1102. The Tenth Circuit disagreed. It held that further harassment was unnecessary; it sufficed that the students feared running into the rapists and that this fear affected their studies. *Id.* at 1105.

The centerpiece of the Tenth Circuit's analysis was the now-familiar line from *Davis*: "the deliberate indifference must, at a minimum, 'cause students to undergo' harassment *or 'make them liable or vulnerable' to it*." *Id.* at 1103 (quoting *Davis* 526 U.S. at 644–45) (underlining deleted, emphasis added). Invoking rules of statutory interpretation, the court explained that lower courts "must give effect to each part of that sentence." *Id.* at 1104. Thus, it concluded that *Davis* recognized two "clear alternative[s]" for liability: a school's deliberate indifference could cause further harassment *or* it could make a student more vulnerable to harassment. *Id.* The Tenth Circuit interpreted this disjunctive phrasing to mean that schools can

make students more vulnerable to harassment without causing subsequent harassment. *Id.* On that basis, it held that plaintiffs need not allege and prove post-notice harassment.

In sum, without saying so expressly, the Tenth Circuit has sided with the Eighth and Ninth Circuits in some cases. But it has sided with the First, Fourth, and Eleventh Circuits in others.

D. The Sixth Circuit adopted a novel, hybrid position.

The Sixth Circuit below deepened the split by adopting a hybrid position that no other circuit has embraced. The opinion leaves intact the Circuit's pre-existing rule regarding peer-peer harassment; in cases alleging *that* form of harassment, plaintiffs must prove post-notice harassment. *See* Pet.App.10a–12a; *accord Kollaritsch*, 944 F.3d at 623–24. But a different rule governs cases alleging discrimination by school employees. In that context, plaintiffs *need not* prove post-notice harassment. Pet.App.20a.

This distinction is novel because it makes absolutely no sense. The Sixth Circuit tried to justify it by claiming that the verb "subject" in Title IX has a more capacious meaning in the context of teacher-harassment claims than it does in the context of peer-harassment claims. Under this logic, post-notice harassment forms an element of the latter theory but not of the former. But the Circuit did not, and could not conceivably, justify that *ad hoc* distinction.

* * *

The circuits are sharply split regarding the question whether Title IX plaintiffs seeking redress for harassment must allege and prove post-notice

harassment. Here, there "is no question that Wamer did not allege any post-notice harassment." Pet.App. 9a. As a result, this case comes out differently depending on which approach is correct. Therefore, this petition squarely presents the circuit split.

II. The questions presented are important.

A. This issue matters to schools and students.

This issue qualifies as one of "'exceptional' importance." *Fairfaix*, 10 F.4th at 414 (Wilkinson, J., dissenting from the denial of rehearing *en banc*) (quoting Appellate Rule 35). Over 5,000 universities accept Title IX funds. U.S. Dep't of Educ., Office for Civil Rights, Title IX and Sex Discrimination (rev. Aug. 2021), https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html. Tens of thousands of primary schools do as well. *Id.* The Sixth Circuit's decision imposes liability on those many thousands of schools for incidents of sexual harassment they "did not cause" and "could not prevent or foresee." *Fairfax*, 10 F.4th at 414 (Wilkinson, J., dissenting from the denial of rehearing *en banc*). That represents a "startling expansion of the statute," and threatens to divert significant resources away from schools across the country. *Id.* This Court should take this case and decide whether the statute really requires that startling expansion.

Even if the Court ultimately agrees with the Sixth Circuit, this case would be no less important. For if that circuit is right, then the Eighth and Ninth Circuits (and sometimes the Tenth Circuit) have erroneously constructed barriers that prevent victims of sexual harassment from recovering damages to which they are entitled. Whether the schools or the students are reading the statute correctly, the answer should

not change depending on the circuit in which a school is located.

B. The question presented allows this Court to clarify the principles governing the interpretation of its holdings.

This case also presents an opportunity for the Court to correct a persistent misimpression among the lower courts about the proper way to interpret this Court's decisions.

The circuits that require no allegations or evidence of post-notice harassment often rely on the presumption against surplusage. In particular, they point to the following passage from *Davis*: "deliberate indifference must, at a minimum, 'cause [students] to undergo' harassment or 'make them liable or vulnerable'" to it. 526 U.S. at 644–45 (citation omitted). These courts insist that, because of the presumption against surplusage, they "must give effect to each part of that sentence." *Farmer*, 918 F.3d at 1104. And that, the thinking goes, means reading *Davis* to permit liability for conduct that makes plaintiffs "liable or vulnerable" to harassment even if the conduct does not *cause* any harassment. *Id.* Thus, even though the plaintiff in *Davis* alleged post-notice harassment, 526 U.S. at 634, these courts read *Davis* to have held that schools might be liable even in the absence of such harassment.

That is not how courts should read opinions. "This Court has long stressed that '"the language of an opinion is not always to be parsed as though [one] were dealing with the language of a statute."' *Brown v. Davenport*, 142 S. Ct. 1510, 1528 (2022) (alteration accepted) (quoting *Reiter v. Sonotone Corp.*, 442 U.S.

330, 341 (1979)). Unlike statutes, "[j]udicial opinions … resolve only the situations presented for decision." *Planned Parenthood of Indiana & Kentucky, Inc. v. Comm'r of Indiana State Dep't of Health*, 917 F.3d 532, 536 (7th Cir. 2018) (Easterbrook, J., dissenting from the denial of rehearing *en banc*). So lower courts should not "extract[]" sentences from this Court's decisions and use them to "justify an outcome inconsistent with this Court's reasoning and judgments and with Congress's instructions." *Davenport*, 142 S. Ct. at 1528. Nor should they "exalt[] … this Court's every passing remark" to the level of a "lawful congressional command." *Id.*

As the treatment of *Davis* shows, this message has yet to sink in. *Davis* "had no reason to pass on" whether Title IX claims require post-notice harassment. *Id.* Yet some courts have elevated a "stray comment[]" in that opinion to the level of a "congressional command" in order to justify imposing Title IX liability even in cases, like this one, where the harassment ceased once the school learned about it. *Id.*

This mistake takes on a constitutional dimension in Spending Clause cases. For it assumes that stray language in this Court's decisions, rather than the language in a statute, can provide the clarity States need. That would violate the "separation of powers" principles that undergird this Court's Spending Clause jurisprudence. *Cummings v. Premier Rehab Keller, P.L.L.C.*, 142 S. Ct. 1562, 1576–77 (2022) (Kavanaugh, J., concurring). That jurisprudence demands that "*Congress*," not this Court, "speak with a clear voice." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (emphasis added).

All in all, if the rule that courts "don't read precedents like statutes" applies anywhere, *Preterm-Cleveland v. McCloud*, 994 F.3d 512, 536 (6th Cir. 2021) (*en banc*) (Sutton, J., concurring) (quotation omitted), it applies in cases about Spending Clause statutes. And if that rule means anything, it means that the presumption against surplusage does not apply to this Court's passing remarks on issues not before it. This Court should make that clear.

III. This case is an ideal vehicle for resolving the split, especially if it is argued alongside *Fairfax*.

This case is an attractive vehicle for addressing the questions presented for four reasons.

First, this case comes to the Court following the District Court's granting of the University's motion to dismiss for failure to state a claim. That means the record is small and there is no chance the Court will get bogged down in disputes over facts. *Davis*, this Court's most recent case in this area, arose in the same posture. *Davis*, 526 U.S. at 633.

Second, this case squarely presents the question whether a school can be liable under Title IX based on harassment that occurred before it received notice of the misconduct. As the Sixth Circuit put it: "There is no question that Wamer did not allege any post-notice harassment." Pet.App.9a. The Sixth Circuit thoroughly discussed the issue, addressing several of the cases involved in the split, and still concluded that Wamer's claim could proceed.

Third, the Sixth Circuit erred. Its holding—that a school may be liable under Title IX even if its own conduct does not cause harassment—contravenes this

Court's precedent on Title IX, the text of the statute, and Spending Clause principles.

Consider first the precedent. *Gebser* held that a school can be liable for money damages arising from a teacher's sexual harassment of a student only when the school's own deliberate indifference to known acts of harassment "was the cause of the violation." *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 291 (1998). That means that a school's deliberate indifference must have been "the cause [of] … the harassment." *Fairfax*, 10 F.4th at 415 (Wilkinson, J., dissenting from the denial of *en banc* rehearing) (internal quotations and citation omitted); *accord id.* at 421 (Niemeyer, J., dissenting from the denial of *en banc* rehearing). Because a school's deliberate indifference cannot cause harassment that occurred before the school exhibited deliberate indifference, *Gebser* requires proof of post-notice harassment. In holding otherwise, the Sixth Circuit contradicted *Gebser*.

The Circuit's decision fares no better under Title IX's text than it does under *Gebser*. The statute bars schools from "subject[ing]" their students to "discrimination." 20 U.S.C. §1681(a). Because "sexual harassment can constitute discrimination on the basis of sex," *Gebser*, 524 U.S. at 283, the statute bars schools from "subject[ing]" their students to sexual harassment. But "we wouldn't say that the school had 'subjected' its students to harassment," *Kollaritsch*, 944 F.3d at 628 (Thapar, J., concurring), simply by causing them to experience an "objectively reasonable fear" of harassment. Instead, a school subjects a student to harassment only when it does something to cause harassment. And no school can cause harassment that it never had any reason to suspect was

occurring. Therefore, plaintiffs must allege (and ultimately prove) post-notice harassment.

At the very least, it is not clear from the statutory text that schools can be held liable for harassment that stopped before they received notice it was happening. *Fairfax*, 10 F.4th at 414–15 (Wilkinson, J., dissenting from the denial of rehearing *en banc*); *Escue*, 450 F.3d at 1155. Because Title IX is Spending Clause legislation, and because it does not clearly impose liability for pre-notice harassment, it cannot be read to impose such liability at all. *Cummings*, 142 S. Ct. at 1571; *Davis*, 526 U.S. at 640; *Gebser*, 524 U.S. at 287–88.

Fourth, this Court has already shown interest in a pending petition that presents the same question presented here. As mentioned already, this Court in May called for the views of the Solicitor General in *Fairfax*, 142 S. Ct. 2704. That petition presents the question whether "a funding recipient may be liable in damages in a private action under *Davis* when the recipient's response did not itself cause any harassment actionable under Title IX," *id.*, Pet. for Writ of Cert. at i, which is just another way to frame the question presented by this petition.

This Court should grant the two petitions and hear argument in both cases. The arguments in the two cases likely will overlap to a large degree, and this Court should reverse in each case. But *Fairfax* involves peer-peer harassment, whereas this case involves teacher-student harassment. Taking both cases would allow this Court to give full airing to the Sixth Circuit's view that different standards should apply in the two settings. So hearing both cases would allow the Court to resolve two issues at once. In

contrast, holding this case for *Fairfax* would do little good: *even if* the Court grants certiorari in *Fairfax* and holds that Title IX plaintiffs must prove post-notice harassment, and *even if* it were to respond to such a ruling by vacating and remanding the Sixth Circuit's decision below, the Sixth Circuit would remain free to continue recognizing the atextual distinction between peer-peer and teacher-student cases. Rather than allowing that confusion to linger, the Court should resolve it when resolving the broader question of what Title IX plaintiffs must prove to prevail.

CONCLUSION

The Court should grant the petition for certiorari and reverse.

Respectfully submitted,

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