No. 22-123

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Title IX provides, in relevant part, that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). A school engages in sex discrimination under Title IX if a school official with "authority to institute corrective measures on the [school's] behalf has actual notice" that a teacher sexually harassed a student and the school "is deliberately indifferent to the teacher's misconduct." *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 277 (1998).

The question presented is:

If a school is deliberately indifferent to a student's report of sexual harassment by a teacher, and the school's failure to act forces the student to forego educational opportunities in order to avoid additional harassment, is the school liable under Title IX for the impact of its deliberate indifference on the student's educational access?

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INTRODUCTION

In the decision below, the Sixth Circuit concluded that respondent Jaycee Wamer stated a Title IX deliberate indifference claim against the University of Toledo by plausibly alleging that: (1) she notified the University's Title IX office that she had been sexually harassed by one of her teachers; (2) that office prematurely abandoned its investigation without taking any measures to prevent further harassment; (3) the University's failure to take action made Wamer vulnerable to additional harassment by the teacher, thereby forcing Wamer to take "reasonable steps, including switching majors and enrolling primarily in online classes, to avoid encountering" the teacher; and (4) those steps "detracted from her educational experience." Pet. App. 20a.

Under these circumstances, the Sixth Circuit held, the University may be held liable under Title IX for the educational deprivation caused by its own discriminatory conduct in failing to adequately respond to Wamer's sexual harassment complaint. Pet. App. 19a. This is because Title IX "shields [students] from being 'excluded from participation in' or 'denied the benefits of' a [school's] 'education program or activity' on the basis of gender." Pet. App. 18a (quoting *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 631 (1999)). Where, as here, a school's deliberate indifference to reported sexual harassment by a teacher puts the student "in the position of choosing to forego an educational opportunity in order to avoid contact with the harasser, or to continue attempting to receive the educational experience tainted with the fear of further harassment," the school has denied the student "the

benefits of [its] educational program or activity on the basis of gender." Pet. App. 18a-19a.

The University offers no good reason for this Court to review the Sixth Circuit's careful application of Title IX's text and the Court's precedent to the facts of this case. Indeed, unable to identify any error in the Sixth Circuit's reasoning, the University instead seeks this Court's review by miscasting the decision as exposing schools to liability "for sexual harassment that ceased before they were notified that it happened." Pet. 1. The Sixth Circuit said nothing of the sort. It held only that the University may be held liable for the educational deprivation caused by its *own* misconduct in failing to timely address Wamer's sexual harassment complaint, which forced Wamer to forego educational opportunities in order to protect herself from further harassment by her teacher. Pet. App. 20a. That educational deprivation occurred *after* the University received notice of the harassment and was directly attributable to the University's *post-notice* deliberate indifference to Wamer's complaint. *Id.*

The disconnect between the petition's arguments and the Sixth Circuit's actual holding is reason alone to deny review. But equally fatal to the petition is the University's failure to identify a single circuit that endorses its view that a school's deliberate indifference to known teacher-on-student harassment gives rise to Title IX liability only if the perpetrator harasses the student again post-notice, and not if the school's deliberate indifference causes the student to forego educational opportunities in order to avoid further harassment. The University argues otherwise only by

misconstruing decisions from other circuits just as it misconstrues the decision below.

The only circuit that has ever required post-notice harassment for a Title IX deliberate indifference claim in *any* context is the Sixth Circuit in a peer harassment case, *Kollaritsch v. Michigan State University Board of Trustees*, 944 F.3d 613 (6th Cir. 2019)—the same circuit that in this case *rejected* a post-notice harassment requirement for teacher-on-student harassment claims. Although *Kollaritsch*'s reasoning is dubious even in the peer harassment context, the distinction drawn by the Sixth Circuit is consistent with this Court's caselaw establishing that peer harassment and teacher-on-student harassment are different in legally significant ways. And even if that were not true, an intra-circuit split counsels *against* this Court's review.

Review is further unwarranted because the decision below is correct. Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). A school's deliberate indifference to known sexual harassment by a teacher directly "violates Title IX's plain terms" and itself constitutes sex-based discrimination. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 174 (2005). It naturally follows that, where a school's deliberate indifference to known sexual harassment forces a student to withdraw from educational activities in order to avoid additional harassment, the school's deliberate indifference has caused her to be "excluded from

participation" in violation of Title IX. 20 U.S.C. § 1681(a).

This is true in the peer harassment context for the reasons identified in the Brief in Opposition and Brief for the United States as Amicus Curiae in *Fairfax County School Board v. Doe*, No. 21-968. But it is especially true in the teacher-on-student harassment context. This Court has repeatedly emphasized that the deliberate indifference standard is lower when the harasser is the victim's teacher rather than a fellow student, and for good reason: "The relationship between the harasser and the victim necessarily affects the extent to which the misconduct can be said to breach Title IX's guarantee of equal access to educational benefits and to have a systemic effect on a program or activity." *Davis*, 526 U.S. at 653.

The Court should deny the petition.

STATEMENT OF THE CASE

I. Factual Background

Respondent Jaycee Wamer was an undergraduate at the University of Toledo majoring in Communications. Pet. App. 2a. In May 2018, she was working on her final project in instructor Eric Tyger's class when Tyger approached her from behind and wrapped his arm around her, resting his arm on her chest while touching her hair. *Id.*

After Wamer had completed her project, she asked Tyger if she could use the printer in his office to print it. *Id.* Once the two had entered his office, Tyger sat between Wamer and the printer and then proceeded

to ask her about her job at a state park; he recounted that he had previously worked at the same park and "would go into empty rooms to f*** women." Pet. App. 3a, 25a. Because Tyger had positioned himself in front of the printer, Wamer had to reach across his lap to use the printer. Pet. App. 2a-3a. As she did so, he placed his hand on the middle of Wamer's thigh, bent his head against her, told her she smelled good, and asked what kind of perfume she used. *Id.*

That evening and the following day, Tyger sent Wamer three text messages. Pet. App. 3a. The first said that she had "better come visit [him] again." *Id.* (alteration in original). The next asked for details about her work schedule, and the third said, "Or don't answer me. It's cool." *Id.* Wamer did not respond. *Id.*

Two days after the office incident, Wamer contacted another faculty member, Kevin O'Korn, and reported that Tyger "had made unwelcome sexual advances toward her." *Id.* Both Wamer and O'Korn submitted complaints regarding Tyger's conduct to the University's Office of Title IX and Compliance that day. *Id.*

The Title IX office subsequently contacted Wamer and asked whether she was "comfortable" attending a face-to-face interview on campus regarding the incident. *Id.* Wamer answered that she would not be comfortable attending the in-person interview, because she was afraid of coming into contact with Tyger on campus or suffering retribution for reporting. Pet. App. 3a-4a. The office had previously informed Wamer that it would continue the investigation even if she did not participate in an in-person interview,

and it never gave Wamer any reason to believe otherwise. *Id.* Further, Wamer gave no indication that she did not want to pursue her complaint or that she would not otherwise participate in the investigation (which she certainly would have done, including an in-person interview, had she been told it was necessary for the investigation to continue). Pet. App. 4a. But just three weeks after Wamer and O'Korn submitted their complaints, the office closed the investigation and informed Wamer, without explanation, that it would take no action against Tyger. *Id.*

As a result of the University's inaction, Wamer continued to fear coming to campus and had an increasingly difficult time concentrating on her studies. Pet. App. 4a, 26a. She changed her major, avoided coming to campus, and enrolled in online classes to minimize her risk of encountering Tyger. Pet. App. 4a.

Five months later, in October 2018, Wamer met with a senior faculty member, Deloris Drummond, to discuss Tyger's harassment. *Id.* Drummond reported Wamer's complaint to the chair of the University's Communications Department and filed her own complaint with the Title IX office regarding Tyger's misconduct. *Id.*

In November 2018, the University reopened its investigation into Tyger. Pet. App. 4a-5a. It placed Tyger on administrative leave and prohibited him from coming to campus based on allegations that he had "engaged in inappropriate conduct of a sexual nature toward a student." Pet. App. 5a. While on administrative leave, Tyger attempted to speak with Wamer on campus and then outed her as the student who had

reported him, publicizing her grade in his class and accusing her of lying. Pet. App. 5a, 27a.

Over a year after Wamer's initial complaint, the University held a disciplinary hearing in which it found that Tyger had engaged in sexual misconduct. Pet. App. 27a. The University terminated Tyger's employment. *Id.*

II. District Court Proceedings

Following Tyger's termination, Wamer sued the University under Title IX. Pet. App. 5a. She alleged that the University was deliberately indifferent to Tyger's sexual harassment following the initial reports by Wamer and O'Korn in May 2018, and that this deliberate indifference "unreasonably interfered with Wamer's participation in and enjoyment of the benefits of [the University's] educational programs and activities." Pet. App. 5a, 27a.

The University moved to dismiss for failure to state a claim. Pet. App. 24a. The district court granted the motion, holding that Wamer could not prevail on her claim under the Sixth Circuit's decision in *Kollaritsch v. Michigan State University Board of Trustees*, 944 F.3d 613 (6th Cir. 2019), a peer harassment case holding that at least one incident of "post-notice harassment" is necessary to state a Title IX deliberate indifference claim. Pet. App. 30a-32a (quoting *Kollaritsch*, 944 F.3d at 623). The district court held that Wamer's claim failed because she had not alleged that the University's "action post-notice was detrimental in that it resulted in harassment or that the Univer-

sity's insufficient action made [Wamer] more vulnerable to, meaning unprotected from, further harassment." Pet. App. 31a-32a.

III. Court of Appeals Proceedings

The Sixth Circuit reversed, holding that *Kollaritsch*'s post-notice harassment requirement applied only to Title IX claims arising from peer harassment and did not extend to claims arising from teacher-on-student harassment. *See* Pet. App. 9a-16a.

The court of appeals then held, as a matter of first impression, that Title IX does not require post-notice harassment for claims arising from a school's deliberate indifference to teacher-on-student harassment. Pet. App. 16a-19a. The court explained that Title IX provides that no person "be excluded from participation in" or "be denied the benefits of . . . any education program or activity" based on sex. Pet. App. 16a (quoting 20 U.S.C. § 1681(a)). And it noted this Court's recognition in *Davis* that "[t]he relationship between the harasser and the victim necessarily affects the extent to which the misconduct can be said to breach Title IX's guarantee of equal access to educational benefits and to have a systemic effect on a program or activity." Pet. App. 18a-19a (alteration in original) (quoting *Davis v. Monroe Cty. Bd. of Educ.,* 526 U.S. 629, 653 (1999)). In particular, "[w]hen a teacher sexually harasses a student, it can more easily be presumed that the harassment would 'undermine[] and detract[] from [the student's] educational experience' because teachers are at the core of a student's access to and experience of education," such that the "stu-

dent's ability to benefit from the educational experience provided by the school is often undermined unless the school steps in to remedy the situation." Pet. App. 19a.

The court of appeals thus concluded that a school's deliberate indifference to teacher-on-student harassment "cause[s] discrimination" when, "following the school's unreasonable response," either "the plaintiff experienced an additional instance of harassment" or "an objectively reasonable fear of further harassment caused the plaintiff to take specific reasonable actions to avoid harassment, which deprived the plaintiff of the educational opportunities available to other students." Pet. App. 20a.

Applying that standard, the court held that Wamer stated a claim for deliberate indifference because the University "was made aware of the harassment and prematurely closed its investigation after three weeks without taking any measures against her harasser," forcing Wamer to take "reasonable steps, including switching majors and enrolling primarily in online classes, to avoid encountering her harasser, which undoubtedly detracted from her educational experience." *Id.*

The University sought rehearing en banc, which the Sixth Circuit denied on May 10, 2022, without any judge calling for a vote. Pet. App. 34a.

REASONS FOR DENYING THE PETITION

I. The Petition Rests on a Mischaracterization of the Decision Below.

The petition fails at the outset because it rests entirely on the false premise that the decision below allows plaintiffs to hold schools liable "for sexual harassment that ceased before they were notified that it happened." Pet. 1. The Sixth Circuit said nothing of the sort. It held only that the University may be held liable for the educational deprivation caused by its own misconduct in failing to timely address Wamer's sexual harassment complaint, which forced Wamer to forego educational opportunities in order to protect herself from further harassment by her teacher. Pet. App. 20a. That educational deprivation occurred *after* the University received notice of the harassment and was directly attributable the University's *post-notice* deliberate indifference to Wamer's complaint. *Id.*

As the Sixth Circuit explained, Wamer plausibly alleged that: (1) she reported her teacher's sexual harassment to the University's Title IX office; (2) that office prematurely abandoned its investigation without taking any measures to prevent further harassment; (3) the University's failure to take action made Wamer vulnerable to additional harassment by the teacher, thereby forcing Wamer to take "reasonable steps, including switching majors and enrolling primarily in online classes, to avoid encountering" the teacher; and (4) those steps "detracted from her educational experience." *Id.* Wamer also alleged facts sufficient to establish that "her fear of further harassment was objectively reasonable, and that her post-

harassment actions resulting in the deprivation of educational opportunities were reasonably taken to avoid further harassment." *Id.*

Under these circumstances, the Sixth Circuit held, the University may be held liable under Title IX for the educational deprivation caused by its *own* discriminatory conduct in failing to adequately respond to Wamer's sexual harassment complaint. Pet. App. 19a. This is because Title IX "shields [students] from being 'excluded from participation in' or 'denied the benefits of' a [school's] 'education program or activity' on the basis of gender." Pet. App. 18a (quoting *Davis*, 526 U.S. at 651). Where, as here, a school's deliberate indifference to reported sexual harassment by a teacher puts the student "in the position of choosing to forego an educational opportunity in order to avoid contact with the harasser, or to continue attempting to receive the educational experience tainted with the fear of further harassment," the school has denied the student "the benefits of [its] 'education program or activity' on the basis of gender." Pet. App. 18a-19a (quoting *Davis*, 526 U.S. at 651).

In short, nothing in the Sixth Circuit's decision suggests that the University's liability rests on the pre-notice sexual harassment rather than the educational injuries caused by its own post-notice deliberate indifference to Warner's complaint. The disconnect between the University's petition and the actual holding of the Sixth Circuit below is reason alone to deny review: The question presented by the petition is not presented by this case.

Notably, even in the peer harassment context, none of the decisions the University characterizes as permitting liability for pre-notice sexual harassment actually do so. In *Fitzgerald v. Barnstable School Committee*, 504 F.3d 165 (1st Cir. 2007), the First Circuit held that a single instance of peer harassment can lead to Title IX liability only if "the institution's response, *after* learning of it, [is] unreasonable enough *to have the combined systemic effect of denying access to a scholastic program or activity*." *Id.* at 172-73 (emphasis added). In other words, the school's liability arises from the *post*-notice educational deprivation caused by the school's *post*-notice deliberate indifference. *See id.* at 173 (identifying the school's failure to prevent the "post-notice interactions between the victim and the harasser" as the educational harm potentially giving rise to Title IX liability).

In *Doe v. Fairfax County School Board,* 1 F.4th 257 (4th Cir. 2021), the Fourth Circuit explained that it was adopting the same position as the First Circuit: Where a school's post-notice deliberate indifference leaves the victim unable "to fully participate in or to benefit from the educational opportunities provided by their school," the victim is "'denied access to educational benefits and opportunities on the basis of gender'—which Title IX clearly prohibits." *Id.* at 274 (quoting *Davis*, 526 U.S. at 650). The Fourth Circuit specifically tied the school's Title IX liability to educational injuries suffered by the plaintiff *after* the school knew about and failed to address her sexual assault by another student: The plaintiff "felt so terrified of [the assailant] that she altered her behavior in school and limited her participation in band activities to avoid him," including sitting in "a small, windowless

practice room away from her bandmates" and missing the band's end-of-year concert. *Id.* at 276.

Likewise, in *Williams v. Board of Regents of the University System of Georgia*, 477 F.3d 1282 (11th Cir. 2007), the Eleventh Circuit allowed a student rape victim's Title IX claim to proceed because her allegations sufficed to establish that the university's deliberate indifference to her sexual assault report "effectively den[ied] [her] an opportunity to continue to attend" the university. *Id.* at 1297. Although the plaintiff withdrew from classes the day after she was gang raped by several male students, the court of appeals explained that her initial withdrawal was "reasonable and expected" given the traumatic ordeal, and that the university's liability arose from its "fail[ure] to take any precautions that would prevent future attacks" by the assailants if the plaintiff returned to school. *Id.* In other words, here, yet again, the school's Title IX liability arose from post-notice educational injuries caused by the school's own discriminatory conduct in unreasonably failing to take any steps to provide a safe educational environment after learning of the assault.

II. The Decision Below Does Not Implicate Any Circuit Split.

Even putting aside the petition's strawman problems, review is unwarranted because the University fails to identify a single circuit that has endorsed its view of Title IX liability in the teacher-on-student harassment context.

No court of appeals has ever required post-notice harassment to establish a deliberate indifference teacher-on-student harassment claim. To the contrary, with the exception of the Sixth Circuit in the peer harassment context (discussed further below), every court of appeals to consider the issue—with respect to either peer harassment *or* teacher-on-student harassment—has concluded that *Davis* means what it says: A school "subjects" a student to sex-based discrimination under Title IX if the school's deliberate indifference "cause[s] [her] to undergo harassment *or* make[s] [her] liable or vulnerable to it," thereby depriving the student of "equal access to [the] institution's resources and opportunities," *Davis*, 526 U.S. at 644-45 (emphasis added) (internal quotation marks omitted), regardless of whether any post-notice harassment occurs. *See Fitzgerald*, 504 F.3d at 171; *Fairfax Cty. Sch. Bd.*, 1 F.4th at 273-74; *Farmer v. Kan. St. Univ.*, 918 F.3d 1094, 1103-04 (10th Cir. 2019); *Williams*, 477 F.3d at 1296; *see also* Pet. App. 1a-23a.

The University argues that the Eighth, Ninth, and Tenth Circuits have held otherwise, but only by misconstruing the caselaw.

Eighth Circuit. The University begins its Eighth Circuit discussion by citing *Shrum ex rel. Kelly v. Kluck*, 249 F.3d 773 (8th Cir. 2001), for the unremarkable and inapposite proposition that schools "cannot be held liable under Title IX for harassment they had no direct ability to prevent." Pet. 14. As explained in Part I, the decision below does not suggest otherwise. The Sixth Circuit held only that the University can be

held liable for educational deprivations caused by its own deliberate indifference in responding to Wamer's report that she had been sexually harassed by a teacher.

The Eighth Circuit has never addressed whether post-notice harassment is necessary to support a Title IX deliberate indifference claim in this context—i.e., where the school's post-notice failure to address teacher-on-student harassment forced the student to forego educational opportunities in order to avoid additional harassment. In each of the Eighth Circuit cases cited by the University, the plaintiff's Title IX claim failed based on other elements of the deliberate indifference test.

In *Plamp v. Mitchell School District No. 17-2*, 565 F.3d 450 (8th Cir. 2009), the plaintiff alleged that her high school was liable under Title IX for failing to take actions that would have prevented a teacher from battering her. *Id.* at 453. The Eighth Circuit affirmed judgment in favor of the school on the ground that no one at the school with "authority to address the alleged discrimination and to institute corrective measures" had actual knowledge of the teacher's misconduct toward the plaintiff or anyone else. *Id.* at 456-57. The plaintiff did not allege that the school deprived her of educational opportunities by failing to adequately address the harassment *after* it received notice of the battery; to the contrary—and in stark contrast to this case—as soon as the school received notice of the incident, the superintendent "immediately suspended [the teacher] and refused to allow

him on school property without a police escort." *Id.* at 454.

In *Podrebarac v. Minot State University*, 835 F. App'x 163 (8th Cir. 2021), a college graduate asserted a Title IX claim against the university based on a non-consensual sexual relationship she had with one of her professors. *Id.* at 164. The plaintiff did not claim that she experienced an educational deprivation because the school failed to respond to the harassment after it received notice; rather, it was "undisputed" that the plaintiff "did not tell anyone in a position of authority at [the university] about" the harassment until her attorney contacted the school "nearly a year after she graduated." *Id.* The Eighth Circuit thus affirmed summary judgment for the school on the ground that "actual knowledge" was "missing" from the plaintiff's claim. *Id.*

The claim in *K.T. v. Culver-Stockton College*, 865 F.3d 1054 (8th Cir. 2017), failed because the plaintiff did not allege any educational deprivation attributable to the school's deliberate indifference. The plaintiff was a high school student on a college campus visit who was assaulted by a student at the college. She alleged that the college failed to conduct an investigation or provide resources for her after the assault to assist with her emotional trauma. *Id.* at 1056. But nothing connected the college's after-the-fact failures to any educational deprivation; rather, "[a]t most these allegations link[ed] the College's inaction with emotional trauma [the plaintiff] claim[ed] she experienced following the assault." *Id.* at 1058. The Eighth

Circuit had no reason to consider whether the school's deliberate indifference forced the plaintiff to forego educational opportunities to avoid future harassment, as she was only a visitor to campus.

Finally, in *Shank v. Carleton College*, 993 F.3d 567 (8th Cir. 2021), the plaintiff failed to show deliberate indifference at all. The plaintiff was a college student who was sexually assaulted by two different peers on her campus. *Id.* at 569. When she reported those assaults, the college conducted an investigation and provided the plaintiff with a variety of remedial actions. *Id.* at 570-71. The Eighth Circuit held that the college's remedial actions were not clearly unreasonable and therefore did not constitute deliberate indifference, nor did they deprive the plaintiff of "access to the educational opportunities or benefits provided by the school." *Id.* at 576. And with regard to one possible exception to the school's diligence—its delay in moving the plaintiff to a new dorm—the court noted that the school's failure *would* have given rise to Title IX liability if the plaintiff had "offered evidence to support the conclusion that the college's shortcoming in this regard deprived her of . . . educational opportunities." *Id.*

Ninth Circuit. The Ninth Circuit is equally unhelpful to the University. As recently as 2020, the Ninth Circuit declined to "express [an] opinion" on whether Title IX deliberate indifference claims require post-notice harassment. *Karasek v. Regents of Univ. of Cal.*, 956 F.3d 1092, 1106 n.2 (9th Cir. 2020). And in the sole Ninth Circuit case the University cites

to support its purported split, *see* Pet. 15, the school did not learn about male students' harassment of female students until a week after all the students finished their senior year classes. *See Reese v. Jefferson Sch. Dist. No. 14J*, 208 F.3d 736, 738 (9th Cir. 2000). The Ninth Circuit explained that the female students' Title IX claim failed because the school year had already ended by the time the school learned of the harassment, so any deliberate indifference to the misconduct could not be "deemed to have 'subjected' the plaintiffs to the harassment." *Id.* at 740. Not a word in *Reese* suggests that if the school had learned about the harassment earlier in the year and declined to remedy it, thereby causing the female students to forego educational opportunities in order to avoid additional harassment, the school would not be liable under Title IX for the educational deprivation resulting from its deliberate indifference.

Tenth Circuit. The University acknowledges that the Tenth Circuit squarely rejected a post-notice harassment requirement in *Farmer v. Kansas State University*, 918 F.3d 1094 (10th Cir. 2019), but nonetheless asserts an intra-circuit split based on a Tenth Circuit decision from 13 years earlier, *Escue v. Northern Oklahoma College*, 450 F.3d 1146 (10th Cir. 2006). *See* Pet. 19-20. The Tenth Circuit itself has discredited the University's characterization of its caselaw.

In *Farmer*, the Tenth Circuit held that the student plaintiffs had sufficiently stated a claim under Title IX when they alleged that the university's "deliberate

indifference to their reports of rape made them vulnerable to harassment" and that "the fear of running into their student-rapists caused them" to "take very specific actions that deprived them of . . . educational opportunities," though no post-notice harassment had occurred. *Id.* at 1104-05.

In reaching that conclusion, the Tenth Circuit explained that its prior decision in *Escue* did not require post-notice harassment. *Farmer*, 918 F.3d at 1106-07. In *Escue*, after a student reported that she had been sexually harassed by her professor, the school transferred the student out of the professor's class and then terminated his employment, thus ensuring that the student had no further contact with the professor. *Escue*, 450 F.3d at 1150. As *Farmer* explains, *Escue* looked to the cessation of the harassing behavior after the school had taken these decisive actions as one indication that the school's response was not "clearly unreasonable" and therefore did not evince deliberate indifference. *Farmer*, 918 F.3d at 1106. But "[n]othing in [the *Escue*] opinion held or even suggested that a complaining student would have to show subsequent offending conduct as a causation element." *Id.* at 1107.

Ultimately, the only circuit that has ever required post-notice harassment for a Title IX deliberate indifference claim is the Sixth Circuit in a peer harassment case, *Kollaritsch*, 944 F.3d 613—the same circuit that in this case *rejected* a post-notice harassment requirement for teacher-on-student harassment claims. Although *Kollaritsch*'s reasoning is dubious

even in the peer harassment context, the distinction drawn by the Sixth Circuit is consistent with this Court's caselaw establishing that peer harassment and teacher-on-student harassment are different in legally significant ways. *See infra* Part III. And even if that were not true, an intra-circuit split counsels *against* this Court's review. *See, e.g., Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

In any event, the Sixth Circuit is already moving toward alignment with the other circuits, as it recently diminished *Kollaritsch* even further. In *Doe v. Metropolitan Government of Nashville & Davidson County*, 35 F.4th 459 (6th Cir. 2022), the Sixth Circuit explained that *Kollaritsch* focused on the absence of post-notice harassment only because, under the specific circumstances of that case, "the adequacy of the university's response could not be assessed unless the students suffered further harm." *Id.* at 464. Most significantly, it held that *Kollaritsch*'s post-notice harassment requirement does not apply to Title IX claims arising in a high school setting, *id.* at 468, thereby eliminating the peer harassment circuit split asserted in the pending *Fairfax County* petition, No. 21-968.

III. The Decision Below Is Correct.

The decision below is additionally unworthy of review because it comports with Title IX's text and this Court's precedent.

Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). This Court has recognized that teacher-on-student sexual harassment is a form of "intentional discrimination" "on the basis of sex." *Franklin v. Gwinnett Cty. Pub. Schs.*, 503 U.S. 60, 74-75 (1992). Although a school cannot be held vicariously liable for sexual harassment perpetrated by its agents, *see Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 288, 290-91 (1998), a school's deliberate indifference to known sexual harassment by a teacher directly "violates Title IX's plain terms" and itself constitutes sex-based discrimination, *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 174 (2005). *See also Gebser*, 524 U.S. at 290 (recognizing that a damages remedy may lie under Title IX where "an official who . . . has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination . . . and fails adequately to respond").

It naturally follows that, where a school's deliberate indifference to known sexual harassment forces a student to withdraw from educational activities in order to avoid additional harassment, the school's deliberate indifference has caused her to be "excluded from participation" in violation of Title IX. 20 U.S.C. § 1681(a). This is true in the peer harassment context for the reasons identified in the Brief in Opposition and Brief for the United States as Amicus Curiae in

Fairfax County, No. 21-968.[1] But it is especially true in the context of teacher-on-student harassment. This Court has repeatedly emphasized that the deliberate indifference standard is lower when the harasser is the victim's teacher rather than a fellow student.

As *Davis* explains, the identity of the harasser "necessarily affects the extent to which the misconduct can be said to breach Title IX's guarantee of

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[1] The *Fairfax County* petition is unworthy of the Court's review for the myriad reasons identified by the respondent and the Solicitor General. That case is a poor vehicle, as the petitioner never raised the post-notice harassment issue in its briefing and conceded at oral argument that Title IX deliberate indifference liability does *not* require post-notice harassment. *See* Brief for Respondent ("*Fairfax* BIO") at 11-13, *Fairfax Cty. Sch. Bd. v. Doe*, No. 21-968 (U.S. Apr. 8, 2022); Brief for the United States ("*Fairfax* S.G. Br.") at 16-17, *Fairfax Cty. Sch. Bd. v. Doe*, No. 21-968 (U.S. Sept. 27, 2022). The case also does not implicate any circuit split, because the only court that has ever required post-notice harassment to state a Title IX deliberate indifference claim in the peer harassment context has since clarified that this requirement does not extend to high school students. *See Doe v. Metro. Gov't of Nashville & Davidson Cty.*, 35 F.4th 459, 468 (6th Cir. 2022) (distinguishing *Kollaritsch*); *see also Fairfax* S.G. Br. 14; Respondent's Supplemental Brief at 2, *Fairfax Cty. Sch. Bd. v. Doe*, No. 21-968 (U.S. June 2, 2022). And as discussed at pp. 21-22, the Fourth Circuit's decision in *Fairfax County* was correct, as nothing in Title IX's text or this Court's precedent interpreting that text requires a showing of post-notice harassment to establish deliberate indifference. *See also Fairfax* BIO 18-28; *Fairfax* S.G. Br. 7-12.

Should the Court nonetheless grant that petition, Wamer believes it would be helpful for the Court to review this case in tandem given the potentially important legal differences between peer harassment and teacher-on-student harassment.

equal access to educational benefits and to have a systemic effect on a program or activity," and teacher-on-student harassment is generally more likely to constitute a breach. 526 U.S. at 653. Indeed, "a student suffers extraordinary harm when subjected to sexual harassment and abuse by a teacher," and such misconduct "undermines the basic purposes of the educational system." *Gebser*, 524 U.S. at 292.

Moreover, because "[d]eliberate indifference makes sense as a theory of direct liability under Title IX only where the [school] has some control over the alleged harassment," the school's liability is limited "to circumstances wherein the [school] exercises substantial control over both the harasser and the context in which the known harassment occurs." *Davis*, 526 U.S. at 644-45. "[T]hese conditions are satisfied most easily and most obviously when the offender is an agent of the [school]." *Id.* at 645.

This case is illustrative. Because the University took no action in response to Wamer's initial report that her teacher was sexually harassing her, Wamer could only protect herself from additional harassment by withdrawing from her chosen major, switching to online classes, and avoiding campus, despite the many educational benefits that accompany participating in a university campus setting. Thus, it was the University's deliberate indifference to her harassment that resulted in a deprivation of educational benefits to Wamer; had the University responded adequately in the first instance to the professor's misconduct, Wamer would have been able to continue participating fully in the campus community.

The University asserts that *Gebser* sets forth a three-part test for deliberate indifference claims, in which a student who has been sexually harassed at school "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." Pet. 8 (quoting *Gebser*, 524 U.S. at 290-91; *Doe v. Fairfax Cty. Sch. Bd.*, 1 F.4th 406, 415 (4th Cir. 2021) (Wilkinson, J., dissenting from the denial of rehearing en banc)).

But this purported third element is found nowhere in *Gebser*. Instead, the University appears to be attributing to this Court a requirement found in the dissent from denial of rehearing en banc in *Fairfax County*. *Gebser* states only that a Title IX deliberate indifference claim requires that "an official who . . . has authority to address the alleged discrimination and to institute corrective measures on the [school's] behalf has actual knowledge of discrimination in the [school's] programs and fails adequately to respond." 524 U.S.at 290. Nowhere in the opinion does the Court suggest that the school's failure to adequately respond to teacher-on-student harassment must result in additional harassment rather than some other educational injury.

The University's recitation of previously rejected Spending Clause arguments fares no better. This Court has held that it is appropriate to limit money damages for violations of statutes enacted pursuant to the Spending Clause "when the alleged violation was *unintentional*." *Franklin*, 503 U.S. at 74 (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S.

1, 28-29 (1981)). This is because, in the case of an unintentional violation, "the receiving entity of federal funds lacks notice that it will be liable for a monetary award." *Id.* (citing *Pennhurst*, 451 U.S. at 17). But "[t]his notice problem does not arise in a case such as this, in which intentional discrimination is alleged." *Id.* at 74-75 (referring to deliberate indifference to teacher-on-student harassment as "intentional discrimination"); *see also Davis*, 526 U.S. at 640-42 ("*Pennhurst* does not bar a private damages action under Title IX where the funding recipient engages in intentional conduct that violates the clear terms of the statute.").

The Spending Clause does not require every potential violation to be "specifically identified and proscribed in advance." *Bennett v. Ky. Dep't of Educ.*, 470 U.S. 656, 666 (1985). As the Court recently observed in *Cummings v. Premier Rehab Keller, P.L.L.C.*, 142 S. Ct. 1562 (2022), the pertinent question is whether the University, "at the time it 'engaged in the process of deciding whether [to] accept' federal dollars, [would] have been aware that it would face" liability under these circumstances—i.e., if the school responded to a report of teacher-on-student harassment with deliberate indifference. *Id.* at 1570-71.

Decades of caselaw authorize damages for intentional sex discrimination under Title IX, including cases from this Court authorizing a private cause of action and permitting damages for a school's deliberate indifference to teacher-on-student harassment. *See Jackson*, 544 U.S. at 182; *Davis*, 526 U.S. at 649-50. These cases put the University on notice that its

deliberate indifference to a teacher 's sexual harassment of a student could render it liable for damages under Title IX.

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The Sixth Circuit correctly found that Wamer plausibly alleged every element of a Title IX deliberate indifference claim: Wamer and a faculty member informed the University's Title IX office that Tyger had sexually harassed Wamer, Pet. App. 20a, providing "actual knowledge of discrimination" to "an official who . . . has authority to address the alleged discrimination and to institute corrective measures," *Gebser*, 524 U.S. at 290.

The office then closed its investigation with no action after just three weeks without notifying Wamer that it did so because, when asked by the office representative if she would be "comfortable" attending an on-campus interview about the harassment, Wamer answered no. Pet. App. 3a-4a, 20a. A reasonable factfinder could conclude that these allegations, if proven, establish that the University "fail[ed] adequately to respond," *Gebser*, 524 U.S. at 290, particularly given that the University's subsequent investigation a year later confirmed that Tyger had sexually harassed Wamer and that his misconduct warranted terminating his employment, Pet. App. 21a-22a. Wamer's allegations further establish that this "clearly unreasonable" inaction made Wamer "liable or vulnerable to" harassment in the interim, *Davis*, 526 U.S. at 645, forcing her to choose between risking future encoun-

ters with Tyger or foregoing educational opportunities by changing her major, switching to online classes, and avoiding being on-campus, Pet. App. 20a.

The University's "official decision . . . not to remedy" the discrimination Wamer experienced, *Gebser*, 524 U.S. at 290, thus deprived Wamer "of access to the educational opportunities or benefits provided by the school," *Davis*, 526 U.S. at 650, rendering the University liable under Title IX for Wamer's educational injuries.

The University fails to identify any error in the Sixth Circuit's careful application of *Gebser*, *Davis*, and Title IX's text to find a viable Title IX deliberate indifference claim on these facts.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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