

Nos. 17-2445, 18-1715

IN THE
**United States Court of Appeals
for the Sixth Circuit**

EMILY KOLLARITSCH; SHAYNA GROSS; JANE ROE 1; JANE ROE 2,

Plaintiffs-Appellees,

v.

MICHIGAN STATE UNIVERSITY BOARD OF TRUSTEES; DENISE MAYBANK, in her individual and official capacity as Vice President for Student Affairs,

Defendants-Appellants,

and

LOU ANNA K. SIMON, in her individual and official capacity as President of the Michigan State University; KAPPA SIGMA FRATERNITY; JUNE PIERCE YOUATT; PAULETTE GRANBERRY RUSSELL; DELTA PSI,

Defendants.

On Appeal from the United States District Court for the
Western District of Michigan

**AMICUS BRIEF OF THE NATIONAL WOMEN'S LAW CENTER IN
SUPPORT OF APPELLEES**

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CORPORATE DISCLOSURE STATEMENT

No *amici* have parent corporations or are publicly-held companies.

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STATEMENT OF *AMICI CURIAE*

National Women's Law Center (NWLC) is a non-profit legal advocacy organization dedicated to the advancement and protection of women's legal rights and opportunities since its founding in 1972. Because equal access to education in an environment free of sexual harassment is essential to full equality, NWLC seeks to ensure that no individual is denied educational opportunities based on sex and that all individuals enjoy the full protection against sex discrimination promised by federal law.

Amici are a collection of civil rights groups and public interest organizations committed to preventing, combating, and redressing sexual harassment in schools. NWLC and other *amici* therefore have an interest in helping this Court understand the necessity of protecting student-victims of sexual harassment through enforcement of Title IX. Descriptions of the other *amici* are included in Appendix A.

No party or its counsel authored this brief in whole or part, and no person or entity other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief.

INTRODUCTION

This case is about three young women—Emily Kollaritsch, Jane Roe 1, and Shayna Gross—who reported sexual assaults by male students while they were at Michigan State University (“MSU”).¹ But, as plaintiffs allege, the University failed to conduct prompt investigations; failed to provide the young women with any services, academic accommodations, or safety plans to allow them to continue to attend classes and activities without fear of running into their assailants; and failed to provide the victims with a fair process by refusing to inform them of their rights to participate in hearings or appeals. In fact, plaintiffs assert that MSU told these survivors that what happened “was not that bad.”²

Because of MSU’s inadequate response, each woman feared for her safety. None of them could leave her dorm room without facing the ever-present threat of running into her assailant on campus, or worse—further victimization at a University that seemed to care nothing for her safety or bodily autonomy. Understandably, these women withdrew into themselves. They avoided social events, stopped going to class, and left their social circles. Their grades slipped.

¹ The fourth plaintiff’s Title IX claim was dismissed by the district court.

² Given the posture of this case—an interlocutory appeal from a denial of a motion to dismiss Plaintiffs’ claims—this Court must accept Plaintiffs’ factual allegations as true. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (holding that at motion to dismiss stage the court must accept allegations in complaint as true and draw all inferences in favor of plaintiffs).

They missed work. As the district court correctly held, these facts are more than sufficient to state a claim that MSU was deliberately indifferent to known sexual harassment (which includes sexual assault) that interfered with Plaintiffs' ability to access educational opportunities, in violation of Title IX.

In this interlocutory appeal, however, MSU remarkably argues that it can only be held liable under Title IX if its deliberate indifference caused the young women to be sexually assaulted or harassed *again*. This perverse argument distorts the Supreme Court's holding in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), and if accepted, would subject students to the very discrimination that Title IX was enacted to combat. MSU's argument also runs counter to the very text and purpose of Title IX, which was passed to ensure that no student is denied educational opportunities on the basis of sex. That is precisely why Title IX requires schools to address the hostile educational environment that results from sexual harassment and assault. Plaintiffs have sufficiently alleged that MSU failed to do so here.

Nor does MSU's argument on appeal make sense as a matter of policy. Sexual assault is prevalent in schools across the country and interferes with students' ability to access and benefit from educational opportunities. The highly traumatic nature of sexual assault and the effects it has on its victims causes a hostile educational environment where survivors fear for their safety and often stop

attending classes and activities or leave school altogether. Title IX requires schools to address the hostile educational environment and injuries caused by sexual harassment and assault, even if the victim is not further harassed or assaulted. When a school fails to do so, as MSU did here, it exacerbates the harms that Title IX seeks to prevent. Thus, the district court correctly held that plaintiffs pled sufficient facts to state Title IX claims because MSU was deliberately indifferent to their reported sexual assaults and the resulting hostile educational environment that denied them educational opportunities.

ARGUMENT

I. MSU's Argument That It Is Not Liable Because Plaintiffs Did Not Suffer Further Assaults or Harassment Must Be Rejected.

When Plaintiffs reported their sexual assaults, MSU failed to take reasonable steps to investigate promptly, ensure their safety, and address the traumatic toll the assaults took on the victims as they sought to continue their education on the same campus as their alleged assailants. MSU's failures caused significant distress for these young women, who experienced academic and social problems because they feared for their safety. MSU now insists that it should avoid liability because Plaintiffs were by chance—not owing to any responsive action by MSU—not sexually assaulted a second time. MSU's argument is based on an incorrect reading of the Supreme Court's decision in *Davis*, and would sanction indifference and

inaction rather than incentivize the proactive measures necessary to comply with Title IX.

Specifically, MSU attempts to add an element to the framework set forth by the Supreme Court in *Davis* by arguing that Plaintiffs have to show that they suffered further harassment after they reported their sexual assaults to MSU. While at least one Plaintiff did in fact suffer further retaliatory harassment to which MSU was again deliberately indifferent, the Supreme Court's opinion in *Davis* does not require that students be harassed or assaulted again after an initial incident to trigger a school's duty to address the hostile educational environment that results. The law requires a reasonable response to the *first* report of harassment or assault.

In *Davis*, the Supreme Court made clear that schools subject students to discrimination under Title IX, and open themselves up to monetary liability, when the following elements are established: (1) the sexual harassment is severe, pervasive, and objectively offensive such that it deprives the plaintiff of access to educational opportunities or benefits provided by the school; (2) the funding recipient had actual knowledge of the sexual harassment; and (3) the funding recipient was deliberately indifferent to the harassment—in other words, its response to the harassment was clearly unreasonable in light of the known circumstances. 526 U.S. at 633, 649-50.

The critical focus of the *Davis* inquiry is whether the school took reasonable steps in response to a reported incident of harassment or assault, not whether the survivor was assaulted or harassed a second time. The language in *Davis* on which MSU relies—that a school’s deliberate indifference must “cause [students] to undergo harassment or make them liable or vulnerable to it”—naturally reads as referring to two separate categories, only one of which is necessary: (i) harassment that a student has in fact undergone, or (ii) future harassment to which the student is “liable or vulnerable.” The First Circuit agreed when it rejected a lower court decision accepting the erroneous argument MSU advances in this case. To explain its reversal, the First Circuit wrote that, in *Davis*, “the Court 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.” *Fitzgerald v. Barnstable Sch. Comm.*, 504 F.3d 165, 172 (1st Cir. 2007), *rev’d and remanded on other grounds*, 555 U.S. 246 (2009) (emphasis added). Thus, a student need not be harassed again for a school to be liable for its deliberate indifference if the school made her “vulnerable or liable” to future harm. *See also Takla v. Regents of the Univ. of California*, No. 15-CV-04418, 2015 WL 6755190, at *4 (C.D. Cal. Nov. 2, 2015) (“Given that the phrase, ‘cause [students] to undergo’ harassment already contains an element of causation and that the phrase, ‘make liable and vulnerable’

would be redundant if construed to require further harassment, the Court is not persuaded that [the university's] interpretation is correct.”).

The clear meaning of the *Davis* line in question is further illuminated by the surrounding text discussing the range of misconduct for which a school can be liable when it has not engaged in harassment directly. *Davis* does not require Plaintiffs to prove anything apart from deliberate indifference to known peer harassment (which includes sexual assault) that creates a hostile educational environment. As the Court stated in explaining the language on which MSU relies: “We . . . conclude that recipients of federal funding may be liable for ‘subject[ing]’ their students to discrimination where the recipient is deliberately indifferent to known acts of student-on-student sexual harassment and the harasser is under the school’s disciplinary authority.” *Davis*, 526 U.S. at 646-47.

In addition, the Court in *Davis* stated with respect to Title IX: “The statute makes clear that, whatever else it prohibits, students must not be denied access to educational benefits and opportunities on the basis of gender.” *Davis*, 526 U.S. at 650. Thus, while a school is certainly liable in money damages if its deliberate indifference to known harassment causes further harassment, that is not the only situation in which a school is liable. A school is also liable for damages under Title IX if it fails to address a hostile educational environment resulting from a single known assault, because that hostile environment denies its victim education

opportunities on the basis of gender. MSU's failure to take reasonable action in response to the reported sexual assaults is precisely the sort of "deliberate indifferen[ce] to known . . . sexual harassment" that subjects students to discrimination. Thus, Plaintiffs need allege nothing more.

MSU's contrary position requires a tortured reading of "liable or vulnerable" in clear conflict with the surrounding text and *Davis*'s overarching approach. Not surprisingly, numerous courts have rejected the argument MSU advances, correctly holding that a victim need not be sexually assaulted again as a result of a school's deliberate indifference to establish liability under Title IX. *See, e.g., Fitzgerald*, 504 F.3d at 172 (stating that single instance of peer-on-peer harassment can form basis for Title IX liability if incident is serious enough and institution's response, after learning of it, unreasonable enough to have effect of denying access to educational program or activity); *Williams v. Bd. of Regents of Univ. Sys. of Georgia*, 477 F.3d 1282, 1297 (11th Cir. 2007) (holding school may be liable under Title IX where university fails to timely respond to sexual assault, even if student withdraws from school as a result and so experiences no further harassment); *Wells v. Hense*, 235 F. Supp. 3d 1, 8 (D.D.C. 2017) ("Title IX does not require that a defendants' deliberate indifference lead to subsequent actionable harassment."); *Doe v. Baylor Univ.*, 240 F. Supp. 3d 646, 660 (W.D. Tex. 2017), motion to certify appeal denied, No. 6:16-CV-173-RP, 2017 U.S. Dist. LEXIS

65498 (W.D. Tex. May 1, 2017) (“[T]he discriminatory harm can include the harm faced by student-victims who are rendered vulnerable to future harassment”); *Spencer v. Univ. N.M. Bd. of Regents*, No. 15-CV-00141, 2016 WL 10592223, at *16 (D.N.M. Jan. 11, 2016) (“In the context of Title IX, ‘there is no “one free rape” rule’; and a victim does not have to be raped twice before the school is required to respond appropriately.”) (citation omitted); *Karasek v. Regents of the Univ. of California*, No. 15-CV-03717, 2015 WL 8527338, at *12 (N.D. Cal. Dec. 11, 2015) (citing and joining cases that “recognize that it is possible for a plaintiff to bring a Title IX claim against an educational institution even in the absence of any further affirmative acts of harassment by the alleged harasser or other students or faculty”); *Takla*, 2015 WL 6755190, at *4 (“[P]lacing undue emphasis on whether further harassment actually occurred . . . would penalize a sexual harassment victim who takes steps to avoid the offending environment . . .”).

Vulnerability to harassment, per *Davis*, is discrimination enough under Title IX. When a sexual assault victim is afraid to leave her dormitory because she risks encountering her assailant on campus, or being assaulted or harassed a second time, and a university ignores her plight, the university is deliberately indifferent to a “hostile environment that effectively deprive[s] [the survivor] of the educational opportunities or benefits provided by the school.” *Doe v. Derby Bd. of Educ.*, 451 F. Supp. 438, 444 (D. Conn. 2006) (quoting *Kelly v. Yale Univ.*, No. 01-CV-1591,

2003 WL 1563424, at *3 (D. Conn. Mar. 26, 2003)). To hold otherwise would turn Title IX on its head and add insult to injury by telling survivors of sexual assault that their school may ignore the resulting hostile educational environment with impunity unless they happen to be assaulted or harassed again. Quite simply, “[i]n the context of Title IX, there is no ‘one free rape’ rule.” *Spencer*, 2016 WL 10592223, at *16 (internal quotations omitted).

Additionally, the cases MSU relies on to argue otherwise are inapposite. First, none of the Sixth Circuit cases that MSU cites address the question before this Court. As the district correctly found, neither *M.D. v. Bowling Green Independent School District*, 709 F. App’x 775 (6th Cir. 2017) nor *Noble v. Branch Intermediate School District*, No. 4:01-cv-58, 2002 U.S. Dist. LEXIS 19600, at *67 (W.D. Mich. Oct. 9, 2002), *aff’d*, 112 F. App’x 507 (6th Cir. 2004), addresses, let alone supports, the argument MSU propounds about needing to show further harassment. Rather, this Court held that the schools in those cases were not deliberately indifferent given that they took immediate action after learning of the sexual assaults to investigate, impose sanctions against the perpetrators, and address the resulting hostile educational environment. *See also Stiles v. Grainger Cty. Bd. of Educ.*, 819 F.3d 834 (6th Cir. 2016) (finding no deliberate indifference where school district investigated promptly and thoroughly, disciplined students, and took “proactive steps to reduce opportunities for future harassment”);

Thompson v. Ohio State Univ., 639 F. App'x 333 (6th Cir. 2016) (finding no deliberate indifference where school investigated racial discrimination complaint and addressed errors plaintiff raised with findings); *Pahssen v. Merrill Cmty. Sch. Dist.*, 668 F.3d 356 (6th Cir. 2012) (finding no deliberate indifference where school expelled student accused of sexual assault one month after assault).

Second, MSU's reliance on other circuit court decisions also fails because they turn on the schools' deliberate indifference to the hostile educational environment, and any mention of the fact that there was no further harassment is dicta and simply used to support the court's finding that the actions taken by the school were effective and thus not clearly unreasonable. In fact, *Williams v. Board of Regents of University System of Georgia*, 477 F.3d 1282 (11th Cir. 2007), actually supports Plaintiffs' claims here. In that case, the court allowed the plaintiff's Title IX claim to proceed, holding that the university acted with deliberate indifference in waiting almost 11 months to take corrective action in response to her reported rape and sexual assault by fellow students, and failing to take any precautions that would prevent future attacks from the plaintiff's assailants, even though the plaintiff herself withdrew from the university the day after she was raped and therefore did not experience further harassment. The court held that the university's deliberate indifference "subjected the plaintiff to discrimination." *Id.* at 1293 (emphasis added). See also *Bernard v. East*

Stroudsburg Univ., No. 3:09-cv-00525, 2014 WL 1454913, at *23 (M.D. Penn. Apr. 14, 2014), *aff'd* 700 Fed. App'x. 159, 163 n.3 (3d Cir. 2017) (no deliberate indifference where university conducted investigation promptly and suspended school official accused of sexual harassment); *Escue v. Northern OK College*, 450 F.3d 1146, 1155 (10th Cir. 2006) (finding no deliberate indifference where university removed plaintiff from harassing environment, immediately questioned two peers and harasser, and determined to prevent harasser from teaching any other classes after semester ended); *Reese v. Jefferson Sch. Dist. No. 14J*, 208 F.3d 736 (9th Cir. 2000) (finding, without addressing *Davis*' vulnerability language, no deliberate indifference because school year had ended by time students reported harassment, and noting only in dicta that no further harassment occurred).

II. As the District Court Properly Concluded, Plaintiffs Adequately Pleaded a Hostile Educational Environment that Denied Them the Benefits of an Education at MSU.

Under Title IX, schools must take action to address sexual assault and the hostile environment it creates, including the specific effects on the victim's access to educational opportunities. As explained in the preceding section, courts have recognized that the risk that a student may encounter her alleged rapist on campus can, by itself, constitute a hostile environment. This is not surprising—a student who fears for her safety on campus is unlikely to realize the full benefits of her education.

In this case, when Plaintiffs reported their sexual assaults to MSU, the University took no steps to ensure Plaintiffs' safety and provide them with necessary accommodations and services. Rather, the University did nothing for months on end, allowing the assailants to remain on campus or return to campus. (Am. Com. ¶¶ 33; 35; 51; 55; 90; 98.) This lack of action by MSU constituted deliberate indifference to known harassment, and it exacerbated the harms that Plaintiffs faced and created a hostile environment that denied them the benefits of an education. In addition to the trauma from the assaults, Plaintiffs were forced to continue their educations, fearful and unprotected, on the same campus as their rapists. Plaintiffs stopped going to class, their GPAs dropped, they withdrew from social events and clubs, and they missed work. (Am. Com. ¶¶ 68; 91; 109.) These facts are more than sufficient to state a claim for deliberate indifference under Title IX.

MSU's inaction stands in stark contrast to how other schools have responded in similar circumstances—including establishing response and grievance procedures, providing mental health counseling and academic support, and instituting informal measures to keep victims separate from their alleged assailants. *See* Alexandra Brodsky, *Against Taking Rape "Seriously": The Case Against Mandatory Referral Laws for Campus Gender Violence*, 53 Harv. C.R.-C.L. L. Rev. 131, 134-35 (Mar. 30, 2018). A review of the case law also reveals how

schools *are* able to take action in response to reports of sexual assault. For example, in *Rost v. Steamboat Springs RE-2 School District*, 511 F. 3d 1114 (10th Cir. 2008), while the school’s response was by no means exemplary, the Tenth Circuit nevertheless found that the school was not deliberately indifferent when it “promptly commenced an extensive investigation” and worked with the plaintiff’s mother “to find safe educational alternatives for” the minor victim, including private tutoring. *Id.* at 1124. As the Court there wrote, “[t]his is not a situation where the school district learned of a problem and did nothing,” *id.* at 1121-22, as MSU did in this case.

These cases demonstrate the wide variety of remedial steps schools can and should, at a minimum, take in order to ensure that students are not denied equal access to educational opportunities as a result of sexual assault, as Title IX requires. But schools need not engage in a guessing game: the steps taken by the schools in the above cases are consistent with express guidance on Title IX and sexual harassment issued by the Department of Education in 1997 and 2001. This guidance highlights those “actions that schools should take to prevent sexual harassment or to address it effectively if it does occur.” *See* Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 66 Fed. Reg. 5512, at 2 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> (“2001

Guidance”); Office for Civil Rights, *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 62 Fed. Reg. 12034, 12042 (Mar. 13, 1997) (“1997 Guidance”). For example, a school should explain the avenues for informal and formal action, counsel or warn the harasser, and/or make any necessary arrangements separating the harasser from the victim. 2001 Guidance at 15-16. According to OCR, “[r]esponsive measures . . . should be designed to minimize, as much as possible, the burden on the student who was harassed.” *Id.* at 16.

As recently as November 2017, OCR concluded that the State University of New York violated Title IX by failing to conduct an investigation after receiving information about an off-campus sexual assault and failing to address the effects of the assault on the victim’s education. *See* Andrew Kreighbaum, *Title IX Failures*, Inside Higher Ed. (January 19, 2018), <https://www.insidehighered.com/news/2018/01/19/feds-find-buffalo-state-failed-investigate-alleged-sexual-assault-created-hostile> (providing PDF copy of letter from Timothy Blanchard, OCR, to Katherine S. Conway-Turner, President of Buffalo State, State University of New York dated November 2, 2017, regarding Case No. 02-15-2085). Importantly, that the victim was not harassed again after her report did not absolve the school of responsibility, as MSU erroneously argues should be the case. OCR described the types of steps the university should have

taken not only to prevent future harm but also to address the educational impact of the reported assault, which the school had a duty to remediate regardless of whether the victim faced additional harassment. These included “counseling, extensions of time or other course-related adjustments, modifications of work or class schedules, campus escort services, restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of campus, and other similar accommodations.” *Id.*

MSU’s failure to take any steps to prevent future harm to Plaintiffs or to address the educational impact of the reported assaults on the Plaintiffs, despite their repeated requests for help, reflects deliberate indifference in violation of Title IX.

III. Title IX’s Requirement that Schools Address Sexual Harassment Is Essential to Ensuring a Safe Learning Environment Free of Sex Discrimination.

A. Sexual Assault Is Prevalent in Schools Across the Country and Interferes with Students’ Access to Educational Opportunities.

Sadly, despite criminal prohibitions as well as civil rights protections, sexual assault remains prevalent in schools, causing lasting harm to students and interfering with their ability to benefit from educational opportunities. Numerous studies report that at least one in five women suffers sexual assault or attempted sexual assault in college. *See, e.g.,* Christopher Krebs et al., *Campus Climate Survey Validation Study Final Technical Report* 73, 74 (Jan. 2016), available at

<https://www.bjs.gov/content/pub/pdf/ccsvsftr.pdf>; *Poll: One in 5 women say they have been sexually assaulted in college*, THE WASHINGTON POST (June 12, 2015), available at <https://www.washingtonpost.com/graphics/local/sexual-assault-poll/>; David Cantor et al., *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct* 13 (Sept. 2015), available at <https://www.aau.edu/key-issues/aau-climate-survey-sexual-assault-and-sexual-misconduct-2015>; see also Dana Bolger, *Gender Violence Costs: Schools' Financial Obligations Under Title IX*, 125 Yale L.J. 2106, 2109 (May 2016); Carol E. Jordan, et al., *An Exploration of Sexual Victimization and Academic Performance Among College Women*, 38 Univ. of Ky. Office for Policy Studies on Violence Against Women Pub'ns 1, 3 (2014) (citing additional studies).

While more data is needed on sexual assault in elementary and secondary schools, a National Women's Law Center (NWLC) 2017 national survey³ found that more than 1 in 5 girls ages 14-18 were sexually assaulted. In addition, the most recent Civil Rights Data Collection by the Department of Education's Office for Civil Rights revealed public schools and school districts reported 11,200 incidents of sexual assault, including rape, during the 2015-2016 school year. Office for Civil Rights, *2015–16 Civil Rights Data Collection: School Climate and Safety* 2

³ See Kayla Patrick and Neena Chaudhry, National Women's Law Center, *Let Her Learn: Stopping School Pushout for Girls Who Have Suffered Harassment and Sexual Violence* 1 (2017), <https://nwlc.org/resources/stopping-school-pushout-for-girls-who-have-suffered-harassment-and-sexual-violence/>.

(Apr. 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/school-climate-and-safety.pdf>. And that number does not fully capture the extent of the problem due to the known vast underreporting of sexual assault, as well as lack of data for K-12 private schools.

Social science research also confirms the obvious: sexual assault is highly traumatic and negatively affects a student's ability to access the benefits of education. Bolger, *supra*, at 2111. Studies show student-victims often fear encountering their perpetrators and thus employ a number of strategies to avoid them, including skipping classes, avoiding shared spaces, hiding in dorm rooms, and transferring or dropping out of college. Bolger, *supra*, at 2109-10; Jordan, *supra*, at 5-6; see Office for Civil Rights, *Dear Colleague Letter* (Apr. 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>. One study about the effects of sexual assault, including rape, on the academic performance of college women revealed that rape survivors saw a significant drop in their GPAs following the attack: 14.3% of women raped during their first semester of college ended that semester with a GPA below 2.5, compared to 6% of women who were not raped. Jordan, *supra*, at 18-19.⁴

⁴ The research also showed that experiencing sexual assault in the first semester predicted lower GPA at the end of the semester but not at the end of the following semester. The researchers provide two possible explanations—that the women's lives stabilized or women dropped out due to decline in grades.

Equally significant are the emotional and mental distress and monetary harms that student-victims suffer following a sexual assault. Many suffer from depression, post-traumatic stress disorder, eating disorders, anxiety attacks, flashbacks, nightmares, and attempts at suicide or self-harm. Bolger, *supra*, at 2109-10; Jordan, *supra*, at 5-6.⁵ These traumatic emotional tolls exacerbate the monetary harms: Student-victims are forced to bear not only medical costs, but the long-term, career-affecting costs associated with decreased academic performance—including withdrawal of scholarship or financial aid packages, additional tuition necessary to retake a course, academic probation, and expulsion. For example, one undergraduate described how after her school “grossly mishandled” her case, she took three years off from school; lost \$30,000 in tuition when she transferred schools; spent an extra \$2,000 to live off-campus; and spent over \$7,000 over three years on counseling.⁶ Bolger, *supra*, at 2115-18.

⁵ A survey conducted by the NWLC further revealed problems with concentration, behavior, and physical altercations among school-age girls as a result of experiencing sexual harassment, including sexual violence. *See* Patrick and Chaudhry, *supra*, at 8.

⁶ Another survivor reported incurring an additional \$100,000 in expenses after her assault. *Id.* at 2116-17.

B. Title IX Protects Students from Being Denied Access to Educational Opportunities as a Result of Sexual Harassment and Assault.

The well-documented deleterious educational impact of sexual assault underscores why Title IX requires schools to take action to address it—not merely to prevent reoccurrence but to remediate the discriminatory effects of past violence, as MSU failed to do. Title IX protects students from being denied access to the benefits of education on the basis of their sex, benefits that are stripped from student-victims of peer sexual assault when a school fails to take appropriate corrective action in response to the hostile environment that results. *See Davis*, 526 U.S. at 653; *Cohen v. Brown Univ.*, 991 F.2d 888, 894 (1st Cir. 1993); *C.R.K. v. U.S.D. 260*, 176 F. Supp. 2d at 1163; *Doe v. Oyster River*, 992 F. Supp. 467, 475 (D.N.H. 1997); *S.S. v. Alexander*, 177 P.3d 724, 744 (Wash. Ct. App. 2011).

By its very language, Title IX seeks to address the consequences of sex-based discrimination in educational settings—whether it be exclusion from participation, denial of benefits, or any other form of discrimination in a federally funded educational program or activity. 20 U.S.C. § 1681(a). The Supreme Court has expansively interpreted Title IX consistent with this basic premise, noting that courts “must accord Title IX a sweep as broad as its language.” *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 520-21 (1982). *See also Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173 (2005) (“In all of these cases, we relied on the text of

Title IX, which . . . broadly prohibits a funding recipient from subjecting any person to ‘discrimination’ ‘on the basis of sex.’”).

The Department of Education’s Title IX regulations also require a funding recipient, upon a finding of discrimination, to take remedial action to overcome the effects of discrimination. *See* 34 C.F.R. § 106.3. In addition, the regulations require schools to maintain grievance procedures that (1) include the “investigation of any complaint” that alleges sex discrimination; and (2) provide for a “prompt and equitable resolution of . . . complaints.” 34 C.F.R. § 106.8. The regulations specifically impose affirmative steps on schools to address the educational impact of sex discrimination. *See* 34 C.F.R. § 106.3; *id.* § 106.1 (“The purpose of this part is to effectuate title IX . . . which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving Federal financial assistance.”).

Consistent with the statute, regulations, and the Supreme Court’s decision in *Davis*, courts have held that sexual assault inherently creates a hostile environment and inflicts educational harms that schools are required to address. *M.D. v. Bowling Green Indep. Sch. Dist.*, 2017 WL 390280, at *4 (“[S]exual assault constitutes one of the most severe forms of sexual harassment imaginable and has the potential to be so traumatic that the victim is effectively denied equal access to the education opportunities or benefits provided by the school”); *Thomas v. Bd. of*

Trustees of the Nebraska State Colls., No. 12-CV-412, 2014 WL 12577381, at *4 (D. Neb. Mar. 31, 2014) (“Sexual assault is, by its very nature, the sort of thing that can be expected to interfere with a student’s ability to function at school.”); *see also Tubbs v. Stony Brook Univ.*, No. 15-CV-0517, 2016 WL 8650463, at *6 (S.D.N.Y. Mar. 4, 2016) (citing cases).

The highly traumatic nature of sexual assault and the well-documented effects it has on victims are precisely what denies victims equal access to the benefits of their education. Even if the victim is not further harassed, the university has a responsibility to address the discriminatory injuries already caused. When a school fails to do so, as MSU did here, it exacerbates the precise harms Title IX seeks to prevent and frustrates the statute’s very purpose: to eliminate sex-based discrimination and remediate its effects. *See* 34 C.F.R. § 106.1; 2001 Guidance at i; *see also* Office for Civil Rights, *Dear Colleague Letter* (Jan. 25, 2006), <https://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html> (increasing the awareness of sexual harassment and reiterating that “[p]reventing and remedying sexual harassment in schools is essential to ensuring a safe environment in which students can learn”).

CONCLUSION

For the foregoing reasons, the district court’s decision should be affirmed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This document complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because this brief contains 5,124 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 6th. Cir. R. 32(b)(1).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. 32(a)(6) because this brief has been prepared in a proportionally space typeface using Microsoft Word 2010 in 14 point Times New Roman.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 8th, 2018, the foregoing Amicus Curiae Brief for The National Womens's Law Center *et al.*, was filed electronically through the Court's CM/ECF system, which sent electronic notification to the counsel of record.

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APPENDIX A

List of *Amici Curiae*

Advocates for Youth

Advocates for Youth is a national reproductive and sexual health/rights organization that centers on the needs and voices of young people, while empowering youth to be advocates on the issues that affect their lives. Know Your IX is a survivor- and youth-led project of Advocates for Youth that aims to empower students to end sexual and dating violence in their schools. Know Your IX envisions a world in which all students have equal access to education, which cannot be accomplished while students are facing severe and pervasive cyber harassment that has made them feel unsafe on campus.

American Association of University Women (AAUW)

American Association of University Women (“AAUW”) was founded in 1881 by like-minded women who had challenged society’s conventions by earning college degrees. Since then it has worked to increase women’s access to higher education and equal employment opportunities. Today, AAUW has more than 170,000 members and supporters, 1,000 branches, and 800 college and university partners nationwide. AAUW plays a major role in mobilizing advocates nationwide on AAUW’s priority issues to advance gender equity. In adherence with its member-adopted Public Policy Priorities, AAUW supports equitable educational climates free of harassment, bullying, and sexual assault, and vigorous enforcement of Title IX and all other civil rights laws pertaining to education.

American Civil Liberties Union and American Civil Liberties Union of Michigan

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 1.6 million members dedicated to the principles of liberty and equality embodied in the U.S. Constitution. Through its Women’s Rights Project, founded in 1972 by Ruth Bader Ginsburg, the ACLU has taken a leading role in recent years advocating for the rights of survivors of gender-based violence. The ACLU has sought to strengthen governments’ and schools’ responses to gender-based violence and the remedies available to victims and survivors. The ACLU of Michigan is a state affiliate of the ACLU.

Atlanta Women for Equality

Atlanta Women for Equality, Inc. is a 501(c)(3) nonprofit legal aid organization dedicated to shaping our schools according to true standards of equality and

empowering women and girls to assert their rights to equal treatment. We accomplish this mission by providing free legal advocacy for women and girls facing gender discrimination including sexual harassment and assault at school, and by protecting and expanding educational opportunities through policy advocacy.

Break the Cycle

Break the Cycle is an innovative national nonprofit organization whose mission is to engage, educate, and empower youth to build lives and communities free from domestic and dating violence. Founded in 1996, Break the Cycle is the nation's first organization to provide law-based domestic violence services exclusively to young people, ages 12 to 24. Our domestic violence prevention and early intervention services include education, outreach, and peer leadership opportunities nation-wide, as well as comprehensive, free legal services for young victims of abuse in Washington, DC. Break the Cycle works on both a national and local level to provide youth with resources they need to end dating abuse and to educate teachers, parents, social service providers, and other caring adults about dating abuse, domestic violence, healthy relationships and the legal options of young victims. Break the Cycle also provides technical assistance and training to criminal justice professionals, teachers, advocates, judges, medical professionals, and other caring adults. Break the Cycle is an active participant in the national and local community of advocates working to shape public policies around dating abuse, domestic violence, sexual assault and stalking.

California Women's Law Center

The California Women's Law Center (CWLC) breaks down barriers and advances the potential of women and girls through transformative litigation, policy advocacy, and education. CWLC places particular focus on campus sexual assault, violence against women, gender discrimination, and women's health. CWLC is a leader in the fight to end sexual assault on college campuses and provides resources to students and their advocates to prevent campus sexual assaults and secure justice for survivors.

Champion Women

Champion Women provides legal advocacy for girls and women in sports. Focus areas include equal play, such as traditional Title IX compliance in school athletic departments, sexual harassment, abuse and assault, as well as employment, pregnancy and LGBT discrimination.

Equal Rights Advocates

Equal Rights Advocates (ERA) is a national civil rights advocacy organization dedicated to protecting and expanding economic and educational access and opportunities for women and girls. Since its founding in 1974, ERA has led efforts to combat discrimination and advance gender equity in education and employment by litigating high-impact cases, engaging in policy reform and legislative advocacy campaigns, conducting community education and outreach, and providing free legal assistance to individuals experiencing unfair treatment at work and in school through our national Advice & Counseling program. ERA has filed hundreds of suits and appeared as amicus curiae in numerous cases to defend and advance the right to an educational environment free of sexual harassment and to ensure that all individuals enjoy the full protection of laws against sex discrimination, including Title IX of the Education Amendments of 1972.

FORGE, Inc.

FORGE, Inc. is a national transgender anti-violence organization that provides training, technical assistance, and publications to assist victim service providers better serve trans/non-binary survivors of crime. We have a special focus on sexual violence survivors. Sexual assault and harassment play very significant roles in curtailing trans/non-binary individuals' access to public services, including a college education.

Girls Inc.

Girls Inc. is a nonprofit organization that inspires girls to be strong, smart, and bold, through direct service and advocacy. Over 80 local Girls Inc. affiliates provide primarily after-school and summer programming to over 152,000 girls ages 5-18 in the U.S. and Canada. Our comprehensive approach to whole girl development equips girls to navigate gender, economic, and social barriers and grow up healthy, educated, and independent. Informed by girls and their families, we also advocate for policies and practices to advance the rights and opportunities of girls and young women. Combatting sexual harassment and assault is a top priority for Girls Inc. because of its prevalence and harmful effect on students' ability to learn and thrive at all levels of education. We work to ensure schools comply with Title IX so that survivors do not have to confront a discriminatory, hostile environment in violation of their civil rights.

Hadassah, The Women's Zionist Organization of America, Inc

Hadassah, the Women's Zionist Organization of America, Inc., founded in 1912, is the largest Jewish and women's membership organization in the United States, with over 330,000 Members, Associates, and supporters nationwide. While

traditionally known for its role in developing and supporting health care and other initiatives in Israel, Hadassah has a proud history of protecting the rights of women and the Jewish community in the United States. Hadassah supports the right of each individual to study and work in an environment that prohibits sexual assault and harassment.

Lawyers Club of San Diego

Lawyers Club of San Diego is a 1,300+ member legal association established in 1972 with the mission “to advance the status of women in the law and society.” In addition to presenting educational programs and engaging in advocacy, Lawyers Club participates in litigation as amicus curiae where the issues concern the advancement of status of women in the law and society. Lawyers Club joins this amicus brief because a woman’s ability to pursue higher education free of sexual harassment, sexual assault, or gender-based discrimination directly impacts her ability to succeed in her studies and advance her status in law and society.

Legal Momentum, the Women’s Legal Defense and Education Fund

Legal Momentum, the Women’s Legal Defense and Education Fund, is the nation’s oldest legal advocacy organization for women, www.legalmomentum.org. Legal Momentum advances the rights of all women and girls by using the power of the law and creating innovative public policy. Among its core priority areas of work, Legal Momentum has long advocated for educational equity for girls and women. For example, we have advocated for sports equity in schools, opposed sex segregation, sexual harassment, bullying, and sexual violence in schools. We also provide resources, referrals, and representation to survivors of sexual violence at school. Legal Momentum joins this brief out of concern that the District Court’s unnecessarily limited interpretation of Title IX jeopardizes the safety and equality of students.

National Alliance to End Sexual Violence

The National Alliance to End Sexual Violence (NAESV) is the voice in Washington for the 56 state and territorial sexual assault coalitions and 1300 rape crisis centers working to end sexual violence and support survivors. The rape crisis centers in NAESV’s network see every day the widespread and devastating impacts of sexual assault upon survivors including university students. We oppose any impediments to survivors feeling safe to come forward, receive services, and seek justice.

National Asian Pacific American Women's Forum (NAPAWF)

The National Asian Pacific American Women's Forum (NAPAWF) is the only national, multi-issue Asian American and Pacific Islander (AAPI) women's organization in the country. NAPAWF's mission is to build a movement to advance social justice and human rights for AAPI women and girls. NAPAWF approaches all of its work through a reproductive justice framework that seeks for all members of the AAPI community to have the economic, social, and political power to make their own decisions regarding their bodies, families, and communities. Our work includes addressing sexual assault and violence against AAPI women and advocating for the adoption of policies and laws that protect AAPI survivors of violence and ensure their dignity, rights, safety and health.

National Organization for Women (NOW)

The National Organization for Women (NOW) Foundation is a 501 (c)(3) entity affiliated with the National Organization for Women, the largest grassroots feminist activist organization in the United States with chapters in every state and the District of Columbia. NOW Foundation is committed to advancing women's rights and works to assure that women are treated fairly and equally under the law. For more than three decades, the Foundation has advocated for girls' and women's right to equal education opportunity under the Title IX of the Education Amendments of 1972. An important part of that advocacy is seeking an end to sex-based discrimination, harassment and violence at educational institutions.

National Partnership for Women & Families

The National Partnership for Women & Families (formerly the Women's Legal Defense Fund) is a national advocacy organization that promotes fairness in the workplace, reproductive health and rights, quality health care for all, and policies that help women and men meet the dual demands of their jobs and families. Since its founding in 1971, the National Partnership has worked to advance women's equal employment opportunities and health through several means, including by challenging discriminatory employment practices in the courts. The National Partnership has fought for decades to combat sex discrimination and to ensure that all people are afforded protections against discrimination under federal law.

SurvJustice, Inc.

SurvJustice is a D.C.-based national nonprofit organization that increases the prospect of justice for all survivors through legal assistance, policy advocacy, and institutional training. Our legal assistance enforces victims' rights to hold both perpetrators and enablers of sexual violence accountable in campus, criminal, and civil systems. Our policy advocacy creates victims' rights to improve systems of

justice, and our institutional trainings help develop norms to better prevent and address sexual violence. By working on these fronts, SurvJustice creates accountability that serves to decrease the prevalence of campus sexual violence throughout the United States. Founded in 2014, it is still the only national organization that provides legal assistance to survivors in campus hearings across the country.

Temperance Legal Group PLLC

Karen Truszkowski, President, represents several Plaintiffs in similar cases with MSU.

The Women's Law Center of Maryland

The Women's Law Center of Maryland, Inc. is a nonprofit, public interest, membership organization of attorneys and community members with a mission of improving and protecting the legal rights of women. Established in 1971, the Women's Law Center achieves its mission through direct legal representation, research, policy analysis, legislative initiatives, education and implementation of innovative legal-services programs to pave the way for systematic change. The Women's Law Center is participating as an amicus in *Kollaritsch v. Michigan State Univer. Bd. Of Trustees* because in particular, the Women's Law Center seeks to ensure the physical safety, economic security, and autonomy of women, and that cannot be achieved unless all parties take responsibility in ending sexual violence against women and ensuring a woman's right to access educational opportunities.

Union for Reform Judaism, Central Conference of American Rabbis, Women of Reform Judaism and Men of Reform Judaism

The Union for Reform Judaism, whose 900 congregations across North America include 1.5 million Reform Jews, the Central Conference of American Rabbis (CCAR), whose membership includes more than 2,000 Reform rabbis, the Women of Reform Judaism which represents more than 65,000 women in nearly 500 women's groups, and the Men of Reform Judaism come to this issue out of our longstanding commitment to addressing gender-based violence, rooted in the principle of the holiness present in every human being.

Women Lawyers Association of Los Angeles

WLALA is a nonprofit organization comprised primarily of lawyers and judges in Los Angeles County. Founded in 1919, WLALA is dedicated to promoting the full participation of women lawyers and judges in the legal profession, maintaining the integrity of our legal system by advocating principles of fairness and equality, and

improving the status of women in our society. WLALA has participated as an amicus in cases involving discrimination and harassment before many federal District Courts, Courts of Appeals, and the U.S. Supreme Court. WLALA believes that bar associations have a special obligation to protect the core guarantees of our Constitution to secure equal opportunity for women and girls through the full enforcement of law prohibiting discrimination and harassment.

Women Lawyers On Guard Inc.

Women Lawyers On Guard Inc. (“WLG”) is a national non-partisan non-profit organization harnessing the power of lawyers and the law in coordination with other organizations to preserve, protect, and defend the democratic values of equality, justice, and opportunity for all.

Women’s Law Project

The Women’s Law Project (WLP) is a nonprofit public interest law firm with offices in Philadelphia and Pittsburgh, Pennsylvania. The WLP’s mission is to create a more just and equitable society by advancing the rights and status of women throughout their lives. WLP is committed to ending violence against women and girls and to safeguarding the legal rights of women and girls who experience sexual abuse, including within our schools and universities. To this end, WLP provides counseling to victims of violence through its telephone counseling service, engages in public policy advocacy work to improve the response of educational institutions to sexual violence, and serves as counsel to students who have been subjected to sexual misconduct on our campuses and in our schools. It is essential that schools respond appropriately to sexual harassment and that courts hold them accountable under the applicable law.