No. 23-332

---

In The

# Supreme Court of the United States

---

CYPRESS-FAIRBANKS INDEPENDENT SCHOOL DISTRICT,

*Petitioner,*

v.

JANE ROE,

*Respondent.*

---

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

---

## RESPONDENT'S BRIEF IN OPPOSITION

---


ALEXANDRA Z. BRODSKY
MOLLIE BERKOWITZ
ADELE P. KIMMEL
PUBLIC JUSTICE
1620 L Street NW
Suite 630
Washington, DC 20036
(202) 797-8600

SHEILA P. HADDOCK
*Counsel of Record*
THE ZALKIN LAW FIRM, P.C.
10590 W Ocean Air Drive
Suite 125
San Diego, CA 92130
(858) 259-3011
sheila@zalkin.com

*Counsel for Respondent*


---


COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

## COUNTERSTATEMENT OF QUESTIONS PRESENTED

Title IX of the Education Amendments of 1972 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] private damages action may lie against [a] school board in cases of student-on-student harassment . . . where the funding recipient acts with deliberate indifference to known . . . harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit." *Davis ex rel. LaShonda D.* v. *Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633 (1999). The questions presented are:

1. If a high school is deliberately indifferent to reported sexual harassment of a student, and that deliberate indifference "exclude[s the student] from participation in" or "denie[s her] the benefits of" the school's programming, 20 U.S.C. § 1681(a), is the school liable under Title IX, or must the student also experience additional sexual harassment after reporting, as the plaintiff did here?

2. Did the Fifth Circuit correctly apply Title IX and waiver case law to the unique facts and procedural history of this case?

TABLE OF CONTENTS

| | Page |
|---|---|
| COUNTERSTATEMENT OF QUESTIONS PRESENTED | i |
| TABLE OF AUTHORITIES | iii |
| INTRODUCTION | 1 |
| STATEMENT OF THE CASE | 2 |
| I. Factual Background | 2 |
| II. Proceedings Below | 5 |
| REASONS FOR DENYING THE PETITION | 7 |
| I. THE FIRST QUESTION PRESENTED IS UNWORTHY OF THIS COURT'S REVIEW | 7 |
| A. This Case is an Unsuitable Vehicle for Review Because it Does Not Present the Question the District Presses | 7 |
| B. This Case Does Not Implicate a Circuit Split | 10 |
| C. The District's Proposed Rule is Wrong | 13 |
| II. THE REMAINING QUESTION, SEEKING ERROR CORRECTION, IS UNWORTHY OF THIS COURT'S REVIEW | 16 |
| CONCLUSION | 20 |

## TABLE OF AUTHORITIES

Page

FEDERAL CASES

*Celotex Corp.* v. *Catrett*,
477 U.S. 317 (1986) ....................................................20

*Davis ex rel. LaShonda D.* v.
*Monroe Cnty. Bd. of Educ.*,
526 U.S. 629 (1999) ........................ 6, 9, 13-15, 18, 19

*Doe ex rel. Doe #2* v. *Metro. Gov't of*
*Nashville & Davidson Cnty.*,
35 F.4th 459 (6th Cir. 2022) ...................................10

*Doe* v. *Bd. of Trs. of the Neb. State Colls.*,
78 F.4th 419 (8th Cir. 2023) ...................................12

*Doe* v. *Fairfax Cnty. Sch. Bd.*,
1 F.4th 257 (4th Cir. 2021) .....................................10

*Fairfax Cnty. Sch. Bd.* v. *Doe*,
143 S. Ct. 442 (2022) ...............................................16

*Farmer* v. *Kan. State Univ.*,
918 F.3d 1094 (10th Cir. 2019)..............10-12, 14, 15

*Fitzgerald* v. *Barnstable Sch. Comm.*,
504 F.3d 165 (1st Cir. 2007) ...................................10

*Hall* v. *Millersville Univ.*,
22 F.4th 397 (3d Cir. 2022).....................................14

*Jackson* v. *Birmingham Bd. of Educ.*,
544 U.S. 167 (2005) .................................................13

*K.T.* v. *Culver-Stockton Coll.*,
865 F.3d 1054 (8th Cir. 2017).................................12

*Karasek* v. *Regents of Univ. of Cal.*,
956 F.3d 1093 (9th Cir. 2020).................................11

TABLE OF AUTHORITIES—Continued

Page

*Kollaritsch* v. *Mich. State Univ. Bd. of Trs.*,
141 S. Ct. 554 (2020) ....................16

*Kollaritsch* v. *Mich. State Univ. Bd. of Trs.*,
944 F.3d 613 (6th Cir. 2019) ....................11, 19

*McCormick ex rel. McCormick* v.
*Sch. Dist. of Mamaroneck*,
370 F.3d 275 (2d Cir. 2004) ....................15

*Metro. Gov't of Nashville & Davidson Cnty.* v. *Doe*,
143 S. Ct. 574 (2023) ....................16

*Reese* v. *Jefferson Sch. Dist. No. 14J*,
208 F.3d 736 (9th Cir. 2000) ....................11

*Scott* v. *Harris*,
550 U.S. 372 (2007) ....................3

*Shank* v. *Carleton Coll.*,
993 F.3d 567 (8th Cir. 2021) ....................12

*Univ. of Toledo* v. *Wamer*,
143 S. Ct. 444 (2022) ....................16

*Wamer* v. *Univ. of Toledo*,
27 F.4th 461 (6th Cir. 2022) ....................10, 15

*Williams* v. *Bd. of Regents of Univ. Sys. of Ga.*,
477 F.3d 1282 (11th Cir. 2007) ....................10

STATUTES AND REGULATIONS

20 U.S.C. § 1681(a) ....................13, 14

34 C.F.R. § 106.30(a) ....................5

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES

Stephen M. Shapiro et al., *Supreme Court Practice* (11th ed. 2019) ....................8

Emily Suski, *Subverting Title IX*, 105 Minn. L. Rev. 2259 (2021) ....................15

Webster's Third New International Dictionary (1993) ....................14

## INTRODUCTION

Cypress-Fairbanks Independent School District would prefer not to face a trial in this Title IX case, and would like this Court to save it from that fate. But its petition is riddled with fatal vehicle problems—and those are just the start of the District's troubles.

The District identifies only one substantive legal question: whether Title IX imposes liability for educational injuries caused by a school's deliberate indifference to reported sexual harassment even if the student does not experience additional harassment post-notice. But the parties did not brief that issue below and the appeals court did not reach it. That is no surprise given that the question has no effect on this case: Here, the plaintiff *did* experience additional harassment after the District brushed off her earlier report of sexual assault. Besides, this case does not implicate a circuit split and the District's position is wrong. And this Court has repeatedly and recently denied petitions posing the same question.

The other questions the District identifies are, remarkably, even less cert-worthy. All boil down to a request for this Court to reverse the Fifth Circuit on case-specific issues as unimportant as whether the District really forfeited an argument. This is not a court of error correction and there is no error to correct. The Court should deny the petition.

## STATEMENT OF THE CASE

### I. Factual Background

Jane Roe and John Doe began to date in middle school. Pet. App. 2a. When the two began their freshman year at Cypress Creek High School, a school within the District, John became increasingly abusive and controlling toward Jane. *Ibid.* If Jane looked at anyone besides John, he would grab her arm. *Ibid.* If John believed Jane's clothing was too revealing, he would make her wear his jacket. *Ibid.* He left "large hickies on her neck" to "mark his territory." *Ibid.* He discouraged her from participating in sports and other extracurricular activities and tracked her location, isolating her from her friends and family. *Ibid.*

Concerned, Jane's mother repeatedly contacted school administrators. *Id.* at 3a. She told them that John was "controlling, emotionally abusive[,] and possibly physically abusive" toward Jane. *Ibid.* She "pleaded with the school to change [Jane's] schedule to keep her away from [John]," explaining that she feared John would "end up hurting [Jane]." *Ibid.* The school refused. *Ibid*. All the while, Jane's grades declined. *Id.* at 2a.

Less than a week after one of Jane's mom's reports, John sexually assaulted Jane at school. *Id.* at 3a. What began as consensual sexual activity in a school stairwell—a common spot for students to fool around—turned violent when, without warning, John "shoved his whole fist" into Jane's vagina with such force that

he lifted her off the ground. *Id.* at 2a-4a & 3a n.1. Jane began bleeding profusely. *Id.* at 3a.[1]

Jane returned home after the assault. *Id.* at 4a. Still in pain several hours later, she told her mother about the attack. *Id.* at 3a-4a. Jane's mother took her to the emergency room. *Id.* at 4a. The hospital admitted her, called the police, summoned a nurse to conduct a sexual assault examination, and conducted emergency surgery to remove a hematoma and repair a vaginal laceration. *Ibid.*; App. Ct. Doc. 25-2 at 12. During the course of her weeklong hospital stay, Jane underwent a second surgery to remove necrotic tissue and the hospital discovered she was pregnant. Pet. App. 4a-5a; App. Ct. Doc. 25-2 at 13.

The day after the assault, Jane's mother called an assistant principal at Cypress Creek and told her about the assault. Pet. App. 6a. The assistant principal did not ask any questions or indicate that she would investigate. *Ibid.* Indeed, no one from the District conducted any investigation whatsoever into the reported assault. *Id.* at 6a, 19a. According to its own witnesses, the only action that any District administrators took

---

[1] The District contends that the assault was consensual, citing, for example, a medical record reflecting Jane may not have identified the attack as nonconsensual when interviewed while under the effects of anesthesia. Pet. 10, 15-16. But Jane's statements to her mother, and her later statements to police, among other evidence, support her contention that she did not consent to John shoving his fist into her vagina. Pet. App. 4a-6a. And, on summary judgment, courts view the record in the light most favorable to the non-moving party—here, Jane. *E.g.*, *Scott* v. *Harris*, 550 U.S. 372, 378 (2007).

to protect Jane's education was to tell John to stay away from Jane. *Id.* at 6a. School officials did not even bother keeping abreast of the ongoing law enforcement investigation. *Id.* at 7a.

Jane did not return to Cypress Creek for the remainder of the school year. *Ibid*. Instead, she attempted to complete coursework at home without any instruction. *Ibid.* Jane's mother requested that the District provide Jane counseling but was told that the District "does not do that." *Ibid.* Jane failed multiple classes. *Ibid.*

The following school year, Jane returned to Cypress Creek. *Ibid.* She frequently saw John there. *Ibid.* Once, he threatened to "com[e] for" her and her family with a gun. *Id.* at 7a-8a. Other students joined in the taunting, harassing Jane at school and on social media about the assault and pregnancy. *Id.* at 8a. Classmates confronted Jane in person and accused her of trying to get John arrested by falsely accusing him of rape. *Ibid.* They called her a "baby killer," "scum," and "a horrible human being," and tagged her in a picture of a dead fetus. *Ibid.* They told her to kill herself. *Ibid.*

As a result of this harassment, Jane attempted suicide in June 2015. *Id*. at 8a. She survived. *Ibid.* Jane then decided to transfer to a school near her father's home in Indiana to get away from the abuse. *Ibid.* But Jane missed the rest of her family and, partway through her junior year, moved back to her mother's home and re-enrolled at Cypress Creek. *Ibid.*

Prior to Jane's re-enrollment, Jane's mother repeatedly reached out to the District, requesting that Jane not share any classes with John. *Ibid.* But school officials refused to accommodate this request or to offer any other resources to help Jane as she returned to Cypress Creek. *Ibid.* Predictably, Jane struggled when she re-enrolled. *Ibid.* A school employee encouraged Jane's mother to withdraw Jane from the school to avoid truancy charges. *Id.* at 8a. She did so, and Jane left not only Cyress Creek, but school altogether—for good. *Id.* at 8a-9a.

## II. Proceedings Below

Jane sued the District under Title IX, among other statutes. Pet. App. 2a. She argued that the District had caused her sexual assault due to its deliberate indifference to the heightened risk of sexual harassment that Jane faced—what the court called her "pre-assault" claim. *Id.* at 2a, 13a.[2] She also pressed a "post-assault" claim that, after she was assaulted at school, the District was deliberately indifferent to her report. *Id.* at 2a, 15a.

The district court granted the District's motion for summary judgment on both claims, and Jane appealed. *Id.* at 2a. On appeal, the Fifth Circuit unanimously

[2] All references to "sexual harassment" alleged in this case include Jane's allegations of sexual assault and dating violence. *See*, *e.g.*, 34 C.F.R. § 106.30(a) (defining "sexual harassment" to include sexual assault and dating violence).

affirmed the dismissal of the pre-assault claim but reinstated Jane's post-assault claim. *Ibid*.

The only element of Jane's post-assault claim at issue on appeal was whether the District acted with deliberate indifference to the harassment Jane suffered. *Id.* at 13a, 15a. The court held that a jury could say yes: The "totality of the circumstances"—including the District's inaction when confronted with years of serious harassment—were "sufficient to raise a fact issue as to deliberate indifference." *Id.* at 13a, 17a. In reaching this conclusion, the court explained the District "produce[d] virtually no documentation of its alleged investigation," meaning that a jury could conclude that the District conducted no investigation at all. *Id.* at 19a-20a. The court further explained that, based on the information available, "the District's response pales in comparison to the prior investigations that [the Fifth Circuit has] held to be sufficient under Title IX." *Id.* at 20a-21a (citing *Sanches* v. *Carrollton-Farmers Branch Indep. Sch. Dist.*, 647 F.3d 156, 160-63 (5th Cir. 2011); *I.F.* v. *Lewisville Indep. Sch. Dist.*, 915 F.3d 360, 377 (5th Cir. 2019); *K.S.* v. *Nw. Indep. Sch. Dist.*, 689 F. App'x, 780, 784-85 (5th Cir. 2017)).

In reversing the district court, the Fifth Circuit noted an open question that it had yet to resolve: whether a plaintiff can establish a claim based on her school's deliberate indifference to "a 'single instance of sufficiently severe one-on-one peer harassment,'" or whether she must establish a pattern of repeated harassment that continued after she provided the school notice. *Id.* at 14a (quoting *Davis*, 526 U.S. at 652-53).

But the court declined to reach the question because "the District did not raise this issue in its brief nor did the district court consider it," and Jane would prevail on appeal under whichever rule the court might have adopted. *Ibid*.

The District filed a petition for rehearing en banc, which the Fifth Circuit denied. *Id.* at 71a. The mandate issued the same day. App. Ct. Doc. 97.

## REASONS FOR DENYING THE PETITION

### I. THE FIRST QUESTION PRESENTED IS UNWORTHY OF THIS COURT'S REVIEW.

The District asks this Court to take up the question the Fifth Circuit declined to answer: whether every Title IX plaintiff must suffer post-notice harassment. Therein lies the problem. This case is an unsuitable vehicle because the appeals court rightly did not reach the issue, which has no effect on the outcome of the case. Besides, this case does not implicate a circuit split and the District's proposed rule is legally wrong.

#### A. This Case is an Unsuitable Vehicle for Review Because it Does Not Present the Question the District Presses.

The petition's first and fatal problem is that this case simply does not implicate the question presented. The Fifth Circuit expressly declined to address the question because, it explained, the District had not

briefed it, the trial court had not addressed it, and the answer would have no effect on the outcome of the case. Pet. App. 14a-15a. After all, Jane was subject to "further harassment" after the "brutal sexual assault" the District failed to address. *Ibid*. Accordingly, "a reasonable jury could" find for Jane "no matter on which side of the" question the Fifth Circuit fell. *Ibid*. This Court should not grant certiorari to address a forfeited question with no relevance to the case at hand. *See* Stephen M. Shapiro et al., *Supreme Court Practice* § 4-18 (11th ed. 2019) (explaining this Court is disinclined to grant certiorari in cases where "resolution of [the question presented] is irrelevant to the ultimate outcome of the case").

The District acknowledges that the Fifth Circuit, by its own account, has not taken a position on this question. Pet. 27 ("The Fifth Circuit below attempted to skirt this [putative] circuit split. . . ."). Nonetheless, the District suggests that the court below secretly did take a position. *Ibid.* Neither argument holds water.

*First*, the District says the Fifth Circuit "solely analyzed the issue as one of pervasiveness, rather than a causation requirement." *Ibid.* (citing Pet. App. 15a). But whether the Fifth Circuit framed the question correctly does not change the plain fact that the court did not resolve it.

*Second*, the District notes that the Fifth Circuit "expressly rejected the argument that [Jane] was required to show that the District's deliberate indifference subjected her to further *actionable* harassment."

*Ibid.* (emphasis added) (citing Pet. App. 15a). That, however, is a separate issue.

As the District itself explains, what constitutes actionable harassment and whether a school's deliberate indifference must cause further harassment are distinct questions. *Id.* at 27 n.12. The first goes to how bad the harassment must be, *see Davis*, 526 U.S. at 650; the second goes to when the harassment must occur. Addressing the first issue, this Court has explained that harassment is actionable under Title IX only if it is so severe, pervasive, and objectively offensive as to deprive the victim of educational opportunities or benefits. *Ibid*. All the Fifth Circuit held below is that, even if some harassment must occur after the school receives notice, that later harassment need not independently meet Title IX's high standard for actionability. Pet. App. 15a.

That rule leaves the appeals court free to adopt a post-notice harassment requirement in a later case. If the Fifth Circuit does so, a plaintiff would need to prove that the harassment she experienced was severe, pervasive, and objectively offensive, and that she experienced additional sexual harassment after providing her school notice. But she would not need to show that the post-notice harassment, on its own, was severe, pervasive, and objectively offensive.

If confronted with a case that turns on the first question presented, the Fifth Circuit may need to take a position in the future. But the court rightly did not

do so in this case, rendering it an entirely inappropriate vehicle.

### B. This Case Does Not Implicate a Circuit Split.

Even if this case implicated the question identified by the District, it would not implicate a circuit split.

The First, Fourth, Tenth, and Eleventh Circuits have held a plaintiff may establish a Title IX claim if a school's deliberate indifference causes educational injuries, regardless of whether it also causes additional sexual harassment. *Doe* v. *Fairfax Cnty. Sch. Bd.*, 1 F.4th 257, 274 (4th Cir. 2021), *cert. denied*, 143 S. Ct. 442 (2022); *Farmer* v. *Kan. State Univ.*, 918 F.3d 1094, 1103, 1106 (10th Cir. 2019); *Williams* v. *Bd. of Regents of Univ. Sys. of Ga.*, 477 F.3d 1282, 1296 (11th Cir. 2007); *Fitzgerald* v. *Barnstable Sch. Comm.*, 504 F.3d 165, 172-73 (1st Cir. 2007), *rev'd and remanded on other grounds*, 555 U.S. 246 (2009).

The Sixth Circuit has adopted the same rule for cases concerning high schools—like Jane's—and for cases of staff-on-student sexual harassment. *Doe ex rel. Doe #2* v. *Metro. Gov't of Nashville & Davidson Cnty.*, 35 F.4th 459, 467-68 (6th Cir. 2022) (holding earlier case requiring further harassment "does not apply to . . . high school[s]"), *cert. denied*, 143 S. Ct. 574 (2023); *Wamer* v. *Univ. of Toledo*, 27 F.4th 461, 463 (6th Cir. 2022) (same, for staff-on-student harassment cases), *cert. denied*, 143 S. Ct. 444 (2022). That court requires post-notice harassment only in cases of peer

harassment in higher education. *See Kollaritsch* v. *Mich. State Univ. Bd. of Trs.*, 944 F.3d 613, 623-24 (6th Cir. 2019), *cert. denied*, 141 S. Ct. 554 (2020). So, while the Fifth Circuit might be right that there is a circuit split related to the first question presented, Pet. App. 14a, Jane's case does not implicate that shallow split. Jane would be entitled to proceed on her post-assault claim against the District in any circuit that has addressed the first question presented.

Attempting to engineer a broader disagreement, the District misstates the law in the circuits. For instance, the District says that the Ninth Circuit has adopted its favored rule. Pet. 23-24. However, in a 2020 case against a university, the Ninth Circuit declined to "express [an] opinion on the circuit split," *Karasek* v. *Regents of Univ. of Cal.*, 956 F.3d 1093, 1106 n.2 (9th Cir. 2020)—an option that would not have been available if, as the District maintains, the court had already decided the question. The earlier Ninth Circuit opinion the District cites concerned harassment about which a high school learned after the end of the victim-plaintiffs' senior year. *Reese* v. *Jefferson Sch. Dist. No. 14J*, 208 F.3d 736, 738 (9th Cir. 2000). Because the students were done with school by the time of their report, they neither experienced further harassment nor were they vulnerable to it. *Id.* at 740. As a result, the court did not need to resolve the question the District presents here. *See Farmer*, 918 F.3d at 1108 (distinguishing *Reese*).

The District misreads the Eighth Circuit, too. *See* Pet. 23-24. That court has not adopted a position on the

question presented. The two higher education cases the District cites do not confront the question posed here because, in both, the plaintiffs' claims failed regardless of whether further harassment was required. One victim was not vulnerable to further harassment because she did not attend the defendant-college at which she was sexually assaulted. *K.T.* v. *Culver-Stockton Coll.*, 865 F.3d 1054, 1056 (8th Cir. 2017); *see also Farmer*, 918 F.3d at 1108 (distinguishing *K.T.*). Another asserted only that her school caused her post-notice "emotional trauma." *Shank* v. *Carleton Coll.*, 993 F.3d 567, 575-76 (8th Cir. 2021). And in the latter case, the Eighth Circuit recognized that the college's delay in moving the plaintiff to a new dorm after learning that she had been raped by a floormate 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.* at 576. That injury, absent further harassment, would have sufficed. *See ibid.*[3]

---

[3] In a subsequent higher education case the District rightly does not count toward the putative split, the Eighth Circuit reiterated that a Title IX plaintiff must demonstrate her school's deliberate indifference cause a "cognizable harm" beyond mere "emotional trauma," but did not define the scope of such harms. *Doe* v. *Bd. of Trs. of the Neb. State Colls.*, 78 F.4th 419, 424 (8th Cir. 2023) (citation omitted).

### C. The District's Proposed Rule is Wrong.

The District's substantive position is foreclosed by the statutory text and this Court's precedent. A plaintiff may state a claim under Title IX if her school's deliberate indifference to sexual harassment deprives her of educational opportunities or benefits even if she does not experience post-notice harassment.

Title IX identifies three categories of violations that may give rise to a claim: "No person in the United States shall, on the basis of sex, [1] be excluded from participation in, [2] be denied the benefits of, or [3] be subjected to discrimination under any education program or activity. . . ." 20 U.S.C. § 1681(a). "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.

In *Davis ex rel. LaShonda D.* v. *Monroe County Board of Education*, this Court emphasized that a plaintiff states a claim against a school not for the third-party's underlying harassment but rather based on the defendant's "own misconduct . . . in the face of known student-on-student harassment" *Id.* at 640-41. That "deliberate indifference to sexual harassment of a student . . . constitutes 'discrimination' 'on the basis of sex' " forbidden by Title IX. *Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167, 174 (2005) (quoting *Davis*, 526 U.S. at 643). Thus, a school may be liable "for deliberate indifference that results in a student being excluded from participation in, being denied the benefits

of, or being subjected to discrimination under its programs." *Hall* v. *Millersville Univ.*, 22 F.4th 397, 409 n.4 (3d Cir. 2022).

Consistent with the text, *Davis* explained a school can be liable for its own deliberate indifference that "cause[s] students to undergo harassment or make[s] them liable or vulnerable to it." 526 U.S. at 645 (cleaned up). In using the disjunctive, *Davis* "clearly indicates that [p]laintiffs can state a viable Title IX claim by alleging alternatively *either* that [the defendant]'s deliberate indifference to their reports of rape caused [p]laintiffs 'to undergo' [additional] harassment *or* 'made them liable or vulnerable' to it." *Farmer*, 918 F.3d at 1103 (cleaned up) (quoting *Davis*, 526 U.S. at 645). Vulnerability requires only a potential for harassment. *E.g.*, *Vulnerable*, Webster's Third New International Dictionary 2566-67 (1993) (defining "vulnerable" to mean "*capable* of being wounded" or "*open* to attack or damage"(emphases added)). A school may be liable, then, when its deliberate indifference "make[s]" a plaintiff "vulnerable" to abuse, regardless of whether further harassment actually occurs. *E.g.*, *Farmer*, 918 F.3d at 1103-04.

This rule makes sense because continuing harassment is not necessary for a school's deliberate indifference to "exclude[ ]" victims, "den[y]" them the recipient's "benefits," or otherwise "subject[ them] to discrimination." 20 U.S.C. § 1681(a). That is especially clear in cases like this one where a "student is put in the position of choosing to forgo 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 or abuse." *Wamer*, 27 F.4th at 471.

The District is wrong that this consensus rule somehow runs afoul of Article III standing requirements. Pet. 7. Harassment, of course, is not the only injury in fact that can give to standing. *See*, *e.g.*, *McCormick ex rel. McCormick* v. *Sch. Dist. of Mamaroneck*, 370 F.3d 275, 284-85 (2d Cir. 2004) (holding threatened denial of students' opportunity to participate in school sports established their standing). If a school's deliberate indifference does not cause further harassment, the plaintiff will need to show it caused another injury cognizable under Title IX, such as a deprivation of educational opportunities. *See*, *e.g.*, *Wamer*, 27 F.4th at 471; *Farmer*, 918 F.3d at 1105. And that injury will also establish standing.

Plus, contrary to the District's handwringing, its preferred rule is not necessary to cabin schools' liability appropriately. This Court has already done so by adopting a "high bar" for damages, Pet. App. 11a: A school may be liable only if it has actual knowledge and if its response is deliberately indifferent, among other conditions, *Davis*, 526 U.S. at 643-52. Accordingly, even though courts have adjudicated *Davis* claims absent a "further harassment" requirement for decades now, plaintiffs find it exceedingly difficult to succeed. *See*, *e.g.*, Emily Suski, *Subverting Title IX*, 105 Minn. L. Rev. 2259, 2266-78 (2021).

* * *

Given the consensus among the circuits, the problems with the District's contrary position, and the stakes of the question, it is unsurprising that this Court has repeatedly and recently denied petitions presenting the same question—and in cases without this one's fatal vehicle problems. In the last two years, the Court has denied three petitions on this issue. *See Metro. Gov't of Nashville & Davidson Cnty.* v. *Doe*, 143 S. Ct. 574 (2023); *Univ. of Toledo* v. *Wamer*, 143 S. Ct. 444 (2022); *Fairfax Cnty. Sch. Bd.* v. *Doe*, 143 S. Ct. 442 (2022). And the Court took the same approach in 2020. *See Kollaritsch* v. *Mich. State Univ. Bd. of Trs.*, 141 S. Ct. 554 (2020). Here, too, the Court should deny certiorari on this first question presented.

## II. THE REMAINING QUESTION, SEEKING ERROR CORRECTION, IS UNWORTHY OF THIS COURT'S REVIEW.

The District also asks this Court to review the Fifth Circuit's application of Title IX and waiver law to the unique facts and procedural history of this case. These requests for error correction do not warrant review, especially since there is no error to correct.

1. The District complains that, "[e]ven setting aside" the first question presented, the Fifth Circuit reached the wrong result under this Court's Title IX precedent. Pet. 28-30. The District rightfully does not contend the appeals court's putative errors implicate a circuit split. *See ibid.* Nor does it identify any other

reason why the Court should indulge this request for error correction. *See ibid.*

Besides, the Fifth Circuit opinion is right. As it explains in detail, a jury could find the District failed to investigate the assault or implement basic measures to protect Jane in its aftermath—and that, as a result, Jane experienced further sexual harassment and dropped out of school. Pet. App. 13a-25a. And a jury could agree those failures constitute deliberate indifference. *Id.* at 19a. The District's counter-arguments are unavailing.

*First*, contrary to the District's insistence, there is nothing wrong with the Fifth Circuit considering, in its assessment of the District's response, officials' knowledge that John had abused Jane for years before the assault. The District contends that, in doing so, the appeals court ran afoul of a supposed holding elsewhere in its opinion: that the "the District's alleged knowledge of the 'pre-assault abusive relationship'" did not give the District actual notice of the risk he would assault her at school. Pet. 28-29 (quoting Pet. App. 13a). But the Fifth Circuit held no such thing. It never discussed the District's knowledge of John's earlier abuse in its analysis of whether the District had actual notice prior to the assault in the stairwell. *See* Pet. App. 12a-13a. That is unsurprising, since Jane

never argued that abuse put the school on warning of the assault. *See* App. Ct. Doc. 21 at 20-30.[4]

Regardless, if the District's version of the opinion was accurate, it would be consistent. Even if the earlier abuse did not provide actual notice that the in-school assault would occur, it still provided the District context for Jane's sexual assault report, underscoring the threat John posed. That context—part of the "known circumstances"—could bear upon the jury's determination of whether the District's response was "clearly unreasonable." *See Davis*, 526 U.S. at 648-49.

*Second*, the District also wrongly claims the appeals court erred because Jane did not report all the post-notice harassment she experienced to District officials. *See* Pet. 29-30. By its own account, the District did know about some of that later harassment. *See id.* at 29 n.14. And, as the petition acknowledges, the Fifth Circuit held a jury could determine the District failed to prevent this harassment by responding in a clearly unreasonable manner to the prior assault in the stairway. *See id.* at 29. The District's potential liability, then, depends on its knowledge of the assault, not its knowledge of the later abuse.

Oddly, the District appears to take issue with the idea that a school could ever be liable under Title IX for failing to prevent sexual harassment—fault it characterizes as "akin to strict liability." *Ibid*. That

[4] The District misleadingly draws the reference to the "pre-assault abusive relationship" from a different section of the opinion, *see* Pet. App. 13a.

confounding position flies straight in the face of this Court's Title IX cases, *e.g.*, *Davis*, 526 U.S. at 641-45, as well as the District's own argument that a school can *only* be liable if its deliberate indifference causes further harassment, *see* Pet. 25-27.[5]

2. The District also contends the Fifth Circuit was wrong that the District forfeited an argument about Title IX's "control" requirement by failing to develop it sufficiently. *Id.* at 30-31. The District makes no attempt to argue the question implicates any disagreement among the courts or is otherwise a matter of concern beyond the narrow scope of this case. *See ibid.* And this issue had no impact on Jane's suit, either, because the Fifth Circuit determined the District's forfeited argument was meritless. Pet. App. 16a n.5 (holding that, "[i]n any event, [Jane] has presented competent summary judgment evidence" on the forfeited issue). It is hard to imagine a less cert-worthy question.

Plus, once again, the Fifth Circuit was right. On appeal, the District conclusorily asserted, in one clause of one sentence, that it lacked control over some of the post-notice harassment Jane suffered. *See* App. Ct.

---

[5] Perhaps the District meant to argue a school may only be liable if its deliberate indifference to known sexual harassment causes further harassment, and the school is then deliberately indifferent to that later harassment as well. That position makes no sense, finds no support in *Davis* or the text of Title IX, and is contrary to the rule of the one appeals court to adopt a further harassment rule in any circumstance, *see Kollaritsch*, 944 F.3d at 623-24.

Doc. 25-2 at 19. The District failed to advance any argument or even cite a case in support of that contention. *See ibid.* Nor did the District develop that argument in its trial court briefing. *See* Dist. Ct. Doc. 33 at 23. The appeals court was correct, then, that "[t]he District forfeit[ed] th[is] argument[ ] by failing to adequately brief" it. Pet. App. 16a n.5.

The District contends this conclusion is inconsistent with *Celotex Corp.* v. *Catrett*, 477 U.S. 317 (1986). But that case has no bearing here. *Celotex* held that, if a party moves for summary judgment on an identified issue and neither party provides any relevant evidence, the court should grant the motion. *See id.* at 322-23. But *Celotex* did not obviate a movant's "initial responsibility of informing the district court of the basis for its motion," *id.* at 323, or otherwise excuse movants from the ordinary rules of forfeiture.

## CONCLUSION

The Court should deny the petition for a writ for certiorari.

Respectfully submitted,

SHEILA P. HADDOCK
*Counsel of Record*
THE ZALKIN LAW FIRM, P.C.
10590 W Ocean Air Drive
Suite 125
San Diego, CA 92130
(858) 259-3011
sheila@zalkin.com

Alexandra Z. Brodsky
Mollie Berkowitz
Adele P. Kimmel
Public Justice
1620 L Street NW
Suite 630
Washington, DC 20036
(202) 797-8600

*Counsel for Respondent*

January 5, 2024