No. 22-123

In the Supreme Court of the United States

UNIVERSITY OF TOLEDO,

Petitioner,

v.

JAYCEE WAMER,

Respondent.

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

Brief of *Amici Curiae* States of Utah, Alabama, Florida, Louisiana, Mississippi, Montana, Nebraska, South Carolina, and Texas in Support of Petitioner

SEAN D. REYES
Utah Attorney General
MELISSA HOLYOAK
Utah Solicitor General
Counsel of Record
KYLE J. KAISER
GREG HEWITT
Assistant Attorneys General
350 N. State Street, Suite 230
P.O. Box 142320
Salt Lake City, UT 84114-2320
Telephone: (801) 538-9600
Email: melissaholyoak@agutah.gov

Counsel for *Amici Curiae*

QUESTION PRESENTED

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

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INTEREST OF AMICI CURIAE[1]

This case raises important questions about the scope of an educational institution's liability under the right of action implied in Title IX of the Education Amendments of 1972—20 U.S.C. § 1681(a). *Amici* are states that have a significant role in the education of millions of students in public primary, secondary, and post-secondary educational institutions. They are also states that have a significant—and constitutionally protected—interest in ensuring that any conditions accompanying federal education funding are clear and unambiguous. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). Throughout the country, courts of appeals have come to different conclusions on whether the scope of the implied right of action under Title IX encompasses damages flowing from harassment occurring before the institution was on notice of the harassment, but when no post-notice harassment occurred. This conflict arises based on differing interpretations of this Court's conclusion in *Davis v. Monroe County Board of Education*, that an educational institution may be liable for deliberate indifference to harassment that "make [students] liable or vulnerable to" harassment. 526 U.S. 629, 645 (1999). *Amici* States have an interest in the consistent application of the law. They also have an interest in understanding the specific conditions created by Title IX—Spending Clause legislation—when accepting federal funds. This interest is particularly important when dealing with the administration of schools, an

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[1] *Amici* notified the parties of the intention to file this brief ten days in advance, and *Amici* submit this brief pursuant to Sup. Ct. Rule 37.4.

area in which states have broad sovereign authority and intense local interest.

This case gives the Court an excellent opportunity to resolve the confusion, provide much needed uniform guidance for the entire country, and concretely lay out the terms of the contract between the states and federal government when accepting Title IX funds.

SUMMARY OF ARGUMENT

The implied right of action under Title IX only subjects an educational institution to liability if it has actual knowledge of discrimination or harassment on the basis of sex in the institution's programs and it remained deliberately indifferent to the discrimination. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290–91 (1998). Yet courts of appeals have split on the issue of whether an educational institution may be liable for damages flowing from harassment that occurred before the educational institution was on notice of the harassment on the grounds that the institution made the plaintiff more "vulnerable to" harassment, even though the plaintiff was not subjected to any post-notice harassment.

Some courts of appeals have concluded that a student must be subjected to further harassment for an educational institution to be liable under Title IX. Other courts of appeals have concluded that if circumstances exist that make the student "more vulnerable" to any harassment post-notice, the institution may be liable, even if the student was not actually subjected to any post-notice harassment.

And still another approach—adopted by the Sixth Circuit below—creates a hybrid model with differing standards depending on whether the harasser was an

employee or a student. This distinction is meaningless. The differences between those circumstances have been carefully synthesized by this Court in *Gebser* and *Davis* such that the harm flowing from harassment should be identical and students subjected to the harassment are similarly situated. The Sixth Circuit's analysis is misguided and creates dangerous precedent for Title IX litigation.

The Court should grant certiorari in this case to resolve the circuit conflicts, correct the Sixth Circuit's hybrid approach, and create a single standard that applies to cases where no post-notice harassment is alleged, regardless of the harasser.

Clarification of the standard is critically important to the States. There are over 22,000 Title IX educational institutions serving tens of millions of students across the nation. Guidance from the Court will permit the States' institutions to understand the scope of their obligations and potential liability.

Indeed, the right of action at issue flows from an educational institution's obligations under Title IX—a piece of legislation enacted under Congress's Spending Clause power. Restrictions on a state's sovereign authority imposed by Spending Clause legislation must be clearly defined for a State (or local educational institution) to understand the terms of the bargain to be able to decide whether or not to accept the federal funds and its accompanying conditions. This is particularly true in Spending Clause legislation regulating the administration of education because states have a primary sovereign interest in—and statutory and constitutional obligations to—educate its citizenry. The Court has

the opportunity to provide the explicit terms and conditions of that bargain in this case.

ARGUMENT

I. This Court should end the split among (and within) the circuits regarding whether an educational institution is subject to Title IX liability if a student notifies the institution of harassment and then does not experience subsequent harassment.

Title IX provides "[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) (emphasis added). Title IX provides no private right of action itself, but merely a federal agency enforcement remedy. *See* 20 U.S.C. § 1682. However, this Court has implied a private right of action under the statute for discrimination in an institution's programs or activities, *see Cannon v. University of Chicago*, 441 U.S. 677, 709 (1979), including a remedy for damages, *see Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 65 (1992). And, the Court recognized an implied remedy when an educational institution is deliberately indifferent to known harassment by an employee, *Gebser v. Lago Vista Ind. Sch. Dist.,* 524 U.S. 274, 290–91 (1998), and when an institution is deliberately indifferent to severe, pervasive, and objectively offensive harassment by a student, when the educational institution has control over the context and over the harasser, *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 645–47 (1999).

This Court has emphasized, however, that Title IX liability is limited. An educational institution is not

liable under the doctrine of *respondeat superior* for the harassing acts of its employees or agents, nor can liability be based on "constructive notice" of harassment. *Gebser*, 524 U.S. at 285. The deliberate indifference standard is an "exceedingly high" one. *Id*. at 304 (Stevens, J., dissenting).

Under this framework, courts have struggled to determine an educational institution's liability when students claim they were "subjected to" discrimination. Circuits differ in how the "subjected to" language should be interpreted within the context of deliberate indifference claims brought against schools under Title IX. *See* Zachary Cormier, *Is Vulnerability Enough? Analyzing the Jurisdictional Divide on the Requirement for Post-Notice Harassment in Title IX Litigation*, 29 Yale J.L. & Feminism 1, 3 (2017).

This Court provided some guidance in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999). In *Davis*, the Court drew upon multiple dictionaries and interpreted "subjected to" to mean that a plaintiff qualifies for a Title IX cause of action only if a school's "deliberate indifference . . . at a minimum, causes students to undergo harassment or make them liable or ***vulnerable*** to it." 526 U.S. at 645 (cleaned up) (emphasis added); *see also* Cormier, *supra*, at 4.

In turn, circuits have divided over how the ruling in *Davis* should be interpreted, wrestling with the "vulnerability-based component." Cormier, *supra,* at 4. Some circuits require that a plaintiff allege and prove that a school's deliberate indifference caused the student to undergo harassment or left the student vulnerable to harassment after the school was put on notice of the harassment. Other circuits do not require a plaintiff to allege and prove such post-notice

harassment, allowing institutions to be liable for damages flowing from sexual harassment of which they were not aware.

Some circuits seemingly apply both standards. The Sixth Circuit, in this case below, departed from its prior precedent requiring post-notice harassment, concluding that no post-notice harassment is required when the original harasser is an employee of the educational institution. The Tenth Circuit likewise has seemingly applied both standards. The Court should grant certiorari to resolve this conflict.

A. Some decisions of the Sixth, Eighth, Ninth, and Tenth Circuits require allegations of post-notice harassment.

Some decisions of the courts of appeals require plaintiffs to show they had to "undergo" or were made "vulnerable to" an actual act of harassment that occurred after an educational institution was put on notice of the risk of harassment, to state a Title IX claim. For example, in *Kollaritch v. Michigan State University Board of Trustees*, 944 F.3d 613 (6th Cir. 2019), the Sixth Circuit confronted the issue of whether "student-victims' subjective dissatisfaction with the school's response" that was allegedly "inadequate, caus[ing] them physical and emotional harm, and consequently deny[ing] them educational opportunities" stated a claim under the implied Title IX cause of action. *Id*. at 618. The plaintiffs in that case, citing *Davis*, claimed that the university's inadequate response to complaints of sexual assault made them "vulnerable to" future harassment, which meant that they could state a Title IX claim for damages resulting from the response, but flowing from the pre-notice harassment. *Id*. at 622; *see also id*.

at 623–24 (articulating plaintiffs' arguments that a single, severe, sexual assault—occurring before any notice or response—could trigger Title IX liability). The Sixth Circuit rejected that argument.

Instead, it construed *Davis* to mean that there were "two possible ways that the school's 'clearly unreasonable' response could lead to further harassment . . .." *Id*. at 623. First, a school might take a "detrimental action" that "foment[s] or instigat[es] further harassment." *Id*. Or the school's response might be "an insufficient action (or no action at all)" that makes the "victim vulnerable to, meaning unprotected from, further harassment." *Id*. Thus, the point of *Davis's* "vulnerable to" language "was not an attempt at creating broad liability for damages for the *possibility* of harassment, but rather an effort to ensure that a student who experiences post-notice harassment may obtain damages regardless of whether the harassment resulted from" institutional action or inaction. *Id*. (quoting Cormier, *supra,* at 23–24).

Importantly, the court noted that *Davis* links vulnerability to *harassment*, not to *injury*. *Kollaritch*, 944 F.3d at 622. In other words, an institution is subject to liability when its deliberate indifference makes a student "vulnerable to" some subsequent harassment, not some subsequent injury that plaintiff alleges is a consequence of the pre-notice harassment. *Id*. at 622.

Decisions from other courts of appeals also require, or mention, the need for post-notice harassment for plaintiffs to state a Title IX claim.

The Eighth Circuit in *K.T. v. Culver-Stockton* held that a non-student plaintiff cannot maintain a Title

IX claim for failing to investigate and offer medical services to her because there was "no causal nexus between [the institution's] inaction and [the victim's] experiencing sexual harassment." 865 F.3d 1054, 1058 (8th Cir. 2017). While the allegations "link[ed] the College's inaction with emotional trauma [the victim] claim[ed] she experienced following the assault," the complaint failed to allege that the college subjected the victim to harassment. *Id*.

The Ninth Circuit also recognizes that post-notice harassment is required to prevail in a Title IX claim. *See Reese v. Jefferson Sch. Dist. No. 14J*, 208 F.3d 736, 739 (9th Cir. 2000). In *Reese*, the Court relied on *Davis* and held that the school district in question did not exhibit the deliberate indifference that would subject it to Title IX liability. *Id.* at 740. Because no "harassment occurred after the school district learned of the plaintiffs' allegations," it reasoned the school district could not have "subjected" the plaintiffs to harassment. *Id*. (cleaned up).

And in *Escue v. Northern Oklahoma College*, 450 F.3d 1146, 1154–55 (10th Cir. 2006), the Tenth Circuit upheld summary judgment on a Title IX claim made by a student against a professor, even though the college had some knowledge of prior instances of the professor's misconduct. In concluding the school was not deliberately indifferent, it noted that the student did "not allege that further sexual harassment occurred as a result of [the college's] deliberate indifference." *Id*. at 1155. Even though the professor attempted to contact her after the college was on notice of the previous harassment, the "incident did not lead to . . . further sexual harassment." *Id*. at 1156. Accordingly, for these and other reasons, the court affirmed summary judgment. *Id.* at 1159.

B. Some decisions from the First, Fourth, Tenth, and Eleventh Circuits do not require allegations of post-notice harassment.

Conversely, other courts of appeals—or even panels from the same courts—disagree that a plaintiff must allege post-notice harassment to state a Title IX claim.

The First Circuit does not require a plaintiff to allege and prove post-notice harassment to prevail under Title IX. *See Fitzgerald v. Barnstable Sch. Comm.*, 504 F.3d 165, 172 (1st Cir. 2007*), rev'd on other grounds*, 555 U.S. 246 (2009). In *Fitzgerald*, the Court found a post-notice harassment requirement inconsistent with the language in *Davis*. *Id.* at 172. Instead, the court interpreted *Davis* to mean that a school may be held liable for deliberate indifference if its inaction makes a student more vulnerable to harassment regardless of whether the student experienced further harassment. *Id*. at 172–73.

The Fourth Circuit also does not require a plaintiff to allege and prove post-notice harassment to prevail under Title IX. *See Doe v. Fairfax Cnty. Sch. Bd*., 1 F.4th 257 (4th Cir. 2021)*, pet. for cert. filed* (Jan. 6, 2022). In *Fairfax County*, the Court interpreted the language in *Davis* to mean a school could be liable for deliberate indifference not only if its inaction causes the student to undergo harassment, but also if its deliberate indifference "'make[s] [the student] liable or vulnerable' to harassment." *Id*. at 273 (quoting *Davis*, 526 U.S. at 645).

Judge Niemeyer dissented from the panel's holding. *Id*. at 277 (Neimeyer, J., dissenting). He concluded that "[t]o have liability, the school had to

receive knowledge of conduct *such that the school's indifference to the known conduct actually caused the harassment* that denied the student the benefits of the educational programs or activities of the school." *Id.* at 278 (emphasis in original). A petition for rehearing *en banc* was filed in the case, and the *en banc* court voted 9–6 to deny rehearing. *Doe v. Fairfax Cnty. Sch. Bd.*, 10 F.4th 406, 406 (4th Cir 2021) (mem. ord.). Judge Neimeyer and Judge Wilkinson authored dissents from the denial. Judge Wilkinson concluded that "state sovereignty" was "lightly and casually breached" in the panel opinion, "contribut[ing] to the dramatic loss of control that states and localities are able to exercise over their own school systems." *Id.* at 413–14 (Wilkinson, J., dissenting from the denial of reh'g *en banc*).

The Tenth Circuit, departing from its earlier language in *Escue*, concluded in *Farmer v. Kansas State University*, 918 F.3d 1094, 1103 (10th Cir. 2019), that a plaintiff need not show post-notice actionable harassment to state a Title IX claim. In *Farmer*, university students were sexually assaulted off-campus, beyond the control of the university. Plaintiffs alleged that the university's refusal to protect them from their assaulters—who were also university students—while they were on campus caused them panic, stress, and anxiety; caused them to avoid going to campus or using resources; and caused their grades to plummet and their decreased involvement in campus-related organizations. *Id.* at 1100–01.

Even though the plaintiffs had not actually suffered any on-campus harassment after their complaints, the court concluded that they could maintain a Title IX action against the university. The

court reasoned that *Davis's* "vulnerable to" phrase is an alternative to an allegation that a plaintiff must "undergo" harassment and "sweeps broader than requiring actual harassment to have occurred." *Id*. at 1103 (citations omitted). It then concluded that the harm experienced by the university's inaction in response to a previous sexual assault could be considered "deliberate indifference to known student-on-student sexual harassment occurring in its programs and activities" that subjected the university to Title IX liability. *Id*. at 1104.

Farmer dismissed *Escue's* holding as a product of its procedural posture. *Id.* at 1106. *Escue* was decided at the summary judgment stage and thus *Farmer* reasoned that *Escue* was only looking to post-notice harassment "for the purpose of illuminating whether the funding recipient had been clearly unreasonable." *Id.*

The Eleventh Circuit made a similar distinction. It held that "a Title IX plaintiff at the motion to dismiss stage must allege that the Title IX recipient's deliberate indifference to the initial discrimination subjected the plaintiff to further discrimination." *Williams v. Bd. of Regents of Univ. Sys. of Ga.*, 477 F.3d 1282, 1296 (11th Cir. 2007). But the court further held that in "extreme" cases such as *Williams*, a university may be held liable under Title IX in the absence of the plaintiff alleging and proving post-notice harassment. *Id.* at 1299.

C. The Sixth Circuit below splintered the split by creating a hybrid approach based on a meaningless distinction of whether the harasser is an employee or a student.

In this case, the Sixth Circuit disregarded (by ineffectively distinguishing) its prior precedent and held that allegations of post-notice harassment were not required to state a Title IX claim if the pre-notice harasser is a teacher instead of a student. Pet. App. 20a. Wamer alleged harassment by her communications instructor, but there were no allegations of harassment after Wamer's complaint to her university's Title IX Office. Pet. App. 2a, 6a.

The Sixth Circuit recognized that there was no post-notice harassment but carved out *Kollaritch's* application from cases of teacher-student harassment. Pet. App. 15a. The court relied on language from *Davis*— "causing" students to undergo harassment is more easily demonstrated when the offender is an agent of the recipient—to imply a higher standard for establishing the requisite culpability in peer harassment situations. Pet. App. 18a. "[W]hile a school quite obviously 'subjects' its students to harassment and discrimination when it fails to respond to harassment by its agent (a teacher or professor), a school can only be seen to be responsible for the impacts of student-on student harassment in more limited circumstances." *Id*. The court thus concluded that for "policy reasons," cases involving student-teacher harassment should have a "less stringent standard" and need not allege post-notice discrimination. Pet. App. 18a, 20a.

But the court's policy intuition—and its legal reasoning—are lacking. Harassment is not *worse*

simply because it comes from a school employee. Pet. App. 18a. Indeed, damages are available for student-student harassment only if it is sufficiently "severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect." *Davis*, 526 U.S. at 652. And the injuries alleged by plaintiffs when there is no post-notice harassment—risk of encountering or interacting with a harasser—are the same whether the pre-notice harasser is a student or a teacher. *Compare Farmer*, 918 F.3d at 1100–01, *with* Pet. App. 26a.

Nor can the Sixth Circuit's contrasting standards of liability rest on the fact that the harassment comes from the school's "agent." Pet. App. 18a. The *Gebser* Court previously considered and rejected the agency theories of respondent superior and vicarious liability. 524 U.S. at 285. Instead, *Gebser* created the deliberate indifference standard, which was logically the same standard adopted in *Davis* for student-student harassment. *Id*. at 290; *see also Davis*, 526 U.S. at 643. While *Davis* implemented a *severity* requirement for peer harassment, it did not give courts broad authority to create a lenient and divergent standard for teacher-student harassment when a school has "authority to take remedial action." *Davis*, 526 U.S. at 644.

Any possible benefit of having a separate scope of liability for teacher-student harassment is considerably outweighed by the problems associated with separate standards. The private right of action for money damages under Title IX is an implied cause of action. *Franklin v. Gwinnett Cnty. Pub. Sch*., 503 U.S. 60, 65 (1992). Congress did not provide an express remedial right to sue, and one did not exist

until the Court created one; *see also Davis*, 526 U.S. at 685 (Kennedy, J., dissenting) ("Whether the Court ever should have embarked on this endeavor [of defining the implied causes of action] under a Spending Clause statute is open to question.").

A judicially implied right of action will now have two distinct standards for liability. This will lead to additional interpretations, circuit splits, and confusion of the appropriate Title IX requirements. The ambiguity places yet another burden on educational institutions that are trying to balance educating students, providing a safe environment, and adhering to the already existing regulations. Perhaps most importantly, the ambiguity prevents an educational institution from being on clear notice of its potential liability, as is required for Spending Clause legislation.

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The Court should grant the petition to correct the Sixth Circuit's creation of two separate standards for liability for post-notice conduct that depend on the identity of the pre-notice harasser. This case is an excellent vehicle to both correct the Sixth Circuit's course and resolve the circuit split on whether plaintiff must allege post-notice harassment. Wamer did not allege any post-notice harassment and the outcome of this case differs depending on which standard is correct. Pet. App. 9a. The legal issue is well preserved and at the heart of the Sixth Circuit's opinion. Pet. App. 20a. Taking this case along with *Fairfax County* will allow the Court to decide whether, or to what degree, post-notice harassment is required for a plaintiff to state a Title IX claim.

II. *Amici* States have significant sovereignty interests in seeing the split resolved.

As Judge Wilkinson noted, *Fairfax County* (and this case) could "ultimately resolve[] an issue of great importance to school districts across our country." *Fairfax Cnty. Sch. Bd.*, 10 F.4th at 414 n.1 (Wilkinson, J., dissenting from denial of reh'g *en banc*). *Amici* States agree.

Issues about the scope of Title IX's implied right of action—and the scope of Title IX generally—are critically important to the States. Title IX recipients include approximately 17,600 local school districts and over 5,000 postsecondary institutions.[2] Public schools serve more than 50 million American students.[3] The education of these students is a "fundamental obligation" of state governments, *Ambach v. Norwick*, 441 U.S. 68, 76 (1979) (citation and quotation marks omitted), and the operation of schools and public universities is of utmost importance to state governments. *See, e.g.*, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 30 (1973).

Sexual harassment and discrimination in schools remains a crisis. In a 2019 survey, "13% of college and graduate students report nonconsensual sexual

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[2] *Title IX and Sex Discrimination*, U.S. Dep't of Educ., https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html (last updated Aug. 2021).

[3] *Digest of Education Statistics Table 105.20*, Nat'l Ctr. for Educ. Stat., https://nces.ed.gov/programs/digest/d18/tables/dt18_105.20.asp (last visited Sept. 6, 2022).

contact by physical force or inability to consent . . .."[4] Large universities report hundreds of Title IX complaints per year, but a significant portion are closed for non-participation.[5] Title IX rules recognize that individuals react differently to sexual harassment and respects the autonomy of students at postsecondary institution to decide when to report. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026, 30033–34 (May 19, 2020) (codified at 34 C.F.R. pt. 106).

In this case, for example, Wamer was not comfortable with returning to campus for an interview and the investigation was closed. Pet. App. 3a-4a. The investigation was reopened after Wamer met with another faculty member who filed a complaint, and the instructor was placed on administrative leave and subsequently terminated. Pet. App. 4a-5a. Wamer

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[4] Charlotte Huff, *A crisis of campus sexual assault*, 53 Monitor on Psych. no. 3, 26 (Apr. 1, 2022), https://www.apa.org/monitor/2022/04/news-campus-sexual-assault.

[5] *See, e.g.*, Mich. State Univ. Off. for C.R. and Title IX, *Annual Report Academic Year 2018-2019*, Mich. State Univ., at 4-6, https://civilrights.msu.edu/_assets/documents/122019_Title%20IX%20Annual%20Report_Final2.pdf (last visited Sept. 6, 2022) (over 60% of the 1,142 incidents related to relationship violence and sexual misconduct were closed for non-participation); Title IX Off., Univ. Compliance Servs., *Executive Summary: Chief Executive Report 2020-2021*, The Univ. of Tex. at Austin, at 3–6, https://live-utexas-title-ix.pantheonsite.io/sites/default/files/documents/executive-summary-2021-ceo-report.pdf (last visited Sept. 6, 2022) (stating nearly 10% of 1,415 total reports were not formally investigated because complainant did not file formal complaint or wish to provide additional information, and 19% of formal complaints were dismissed because complainant opted not to participate).

does not allege any post-notice harassment, but that the university is liable for damages because its response was inadequate. Pet. App. 9a.

Because of the Sixth Circuit's holding in *Wamer* and the existing circuit split, educational institutions that have accepted federal funds are unaware of their liability and duties under Title IX. Educational institutions across the country do not know whether they can be liable for damages flowing from harassment that occurs before actual notice if the plaintiff asserts non-harassment injury caused by an investigation or institutional action that the plaintiff believes is inadequate. And *Wamer* adds additional uncertainty with its creation of different standards for teacher-student harassment and student-student harassment. Pet. App. 19a-20a.

Requiring many educational institutions to speculate on their potential liability runs afoul to the clear notice requirement of Spending Clause legislation. *Cummings v. Premier Rehab Keller, P.L.L.C.*, 142 S. Ct. 1562, 1570, *reh'g denied*, 142 S. Ct. 2853 (2022) ("Recipients cannot 'knowingly accept' the deal with the Federal Government unless they 'would clearly understand . . . the obligations' that would come along with doing so." (quoting *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006)). Title IX is a statute with its basis in Congress's Spending Clause power, U.S. Const. art. 1 § 8, cl. 1, and the private right of action for its violation has been implied by this Court. *See Franklin*, 503 U.S. at 65.

When Congress enacts a law under the Spending Clause, the law creates a contract between the funding recipient and the federal government.

Pennhurst, 451 U.S. at 17. "[I]n return for federal funds, the States agree to comply with federally imposed conditions." *Id.* But to adhere with the established principles of contract law, the terms must be clear and unambiguous. *Id.*

Without clear notice of the conditions attached to federal funds, State cannot "guard against excessive federal intrusion into state affairs and be vigilant in policing the boundaries of federal power." *Davis*, 526 U.S. at 655 (Kennedy, J., dissenting). Title IX's and the private right of action flowing from it—is an "expansion of the federal regulatory presence" in local education. *Fairfax Cnty. Sch. Bd.*, 10 F.4th at 420 (4th Cir. 2021) (Wilkinson, J., dissenting from denial of reh'g *en banc*).

Education is an area in which "States have historically been sovereign." *United States v. Lopez*, 514 U.S. 549, 564 (1995). Public colleges and universities are considered "arms of the state" for purposes of the application of the Eleventh Amendment. *See, e.g.*, *Watson v. Univ. of Utah Med. Ctr.*, 75 F.3d 569, 574–75 (10th Cir. 1996). State interests in primary and secondary schools are just as strong. The Utah Constitution, for example, guarantees "a public education system, which shall be open to all children of the state; and . . . a higher education system, [both of which to] be free of sectarian control." Utah Const. art. X, § 1. And the "general control and supervision of the public education system" in Utah is "vested in a State Board of Education." Utah Const. art. X, § 3.

But *Wamer's* holding further threatens the States' independent sovereignty in education with "the dramatic loss of control that states and localities are

able to exercise over their own school systems." *Fairfax Cnty. Sch. Bd.*, 10 F.4th at 413–14 (4th Cir. 2021) (Wilkinson, J., dissenting from denial of reh'g *en banc*). Clarification of the States' Title IX contractual obligations will prevent a "casual breach" of state sovereignty and the resulting deluge. *See id.*

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The ambiguity created by *Wamer* and the circuit split is contrary to principles of contract law and the Spending Clause. The terms are not clear, as evidenced by the lack of agreement of federal circuit courts. And it remains ambiguous whether educational institutions face varying liability depending on the harasser. Without clarity from the Supreme Court, these institutions that have contracted for federal funds do not have clear notice of the terms of their agreement under Title IX.

States must understand their obligations. The Court should grant the petition and clarify the standard.

CONCLUSION

The Court should grant University of Toledo's petition for writ of certiorari to the Sixth Circuit.

Respectfully submitted.

SEAN D. REYES
Utah Attorney General
MELISSA HOLYOAK
Utah Solicitor General
Counsel of Record
KYLE J. KAISER
GREG HEWITT
Assistant Attorneys General
350 N. State Street, Suite 230
P.O. Box 142320
Salt Lake City, UT 84114-2320
Telephone: (801) 538-9600
melissaholyoak@agutah.gov

Counsel for *Amici Curiae*

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Additional Counsel

STEVE MARSHALL
Attorney General
State of Alabama

ASHLEY MOODY
Attorney General
State of Florida

JEFF LANDRY
Attorney General
State of Louisiana

LYNN FITCH
Attorney General
State of Mississippi

AUSTIN KNUDSEN
Attorney General
State of Montana

DOUGLAS J. PETERSON
Attorney General
State of Nebraska

ALAN WILSON
Attorney General
State of South Carolina

KEN PAXTON
Attorney General
State of Texas