In the United States Court of Appeals
for the Sixth Circuit

CASE NO. 18-04200

LAUREN KESTERSON,

Plaintiff-Appellant,

V.

KENT STATE UNIVERSITY; KAREN LINDER, INDIVIDUALLY; AND ERIC OAKLEY, IN HIS OFFICIAL CAPACITY

Defendants-Appellees.

On appeal from the United States District Court
for the Northern District of Ohio
Case No. 5:16-cv-00298, Hon. Sara Lioi

BRIEF OF THE NATIONAL WOMEN'S LAW CENTER *ET AL.* AS *AMICI CURIAE* IN SUPPORT OF APPELLANT AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Sixth Circuit Rule 26.1, the National Women's Law Center states that it is a non-profit organization, that it has no parent corporation, and that no publicly held corporation owns ten percent or more of its stock because it has no stock.

Pursuant to Sixth Circuit Rule 26.1 the other *amici* are—

- American Association of University Women
- California Women's Law Center
- Chicago Alliance Against Sexual Exploitation
- Equal Rights Advocates
- Feminist Majority Foundation
- Gender Justice
- In Our Own Voice: National Black Women's Reproductive Justice Agenda
- Kentucky Association of Sexual Assault Programs, Inc.
- KWH Law Center
- MANA, A National Latina Organization
- National Association of Social Workers (NASW)

- National Crittenton
- National LGBTQ Task Force
- National Organization for Women Foundation
- National Partnership for Women & Families
- North Carolina Coalition Against Sexual Assault
- People For the American Way Foundation
- Sexuality Information and Education Council of the United States (SIECUS)
- SisterReach
- Southwest Women's Law Center
- SurvJustice
- The Clearinghouse on Women's Issues
- The Women's Law Center of Maryland
- Union for Reform Judaism
- Central Conference of American Rabbis
- Women of Reform Judaism
- Men of Reform Judaism
- Women Lawyers On Guard Inc.
- Women's Bar Association of the District of Columbia

- Women's Bar Association of the State of New York ("WBASNY")
- WV FREE

The other *amici* similarly have no disclosures to make under Federal Rule of Appellate Procedure 26.1 or Sixth Circuit Rule 26.1.

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INTEREST OF *AMICI CURIAE*[1]

The National Women's Law Center (NWLC) is dedicated to the advancement and protection of women's and girls' legal rights and the right of all persons to be free from sex discrimination. Founded the same year that Congress enacted Title IX of the Education Amendments of 1972, the Center has worked to secure equal opportunity in education for women and girls through enforcement of Title IX, the Constitution, and other laws prohibiting sex discrimination. This work includes a deep commitment to eradicating sexual harassment, including sexual assault, as a barrier to educational success. To that end, the Center regularly files amicus briefs—including before this Court, other U.S. Courts of Appeals, and the U.S. Supreme Court—to provide relevant expertise regarding issues of sex discrimination in education.

The Center has been deeply involved in the effort to ensure that courts interpret the language of Title IX broadly, as Congress intended, to prohibit sex discrimination in education. The Center served as counsel

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel have made any monetary contributions intended to fund the preparation or submission of this brief.

to the Petitioners in the landmark cases *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005)—which established that retaliation against a person because that person has complained of sex discrimination is a form of intentional sex discrimination encompassed by Title IX's private cause of action—and *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999)—which established that an educational institution is liable in damages for deliberate indifference to student-on-student sexual harassment of which it had actual knowledge. The Center therefore has a keen interest in courts enforcing Title IX's protections in accordance with the Supreme Court's guidance so that no one is subject to sex discrimination under federally funded education programs.

Descriptions of the other *amici* are included in an appendix to this brief. All *Amici* have a strong interest in the issues presented by this case and respectfully submit this brief in support of Plaintiff-Appellant urging reversal.

SUMMARY OF ARGUMENT

Lauren Kesterson, a Division I scholarship softball player, was raped by her coach Karen Linder's son during her freshman year. When Lauren finally got the courage to report her rape to Coach Linder at the

end of her sophomore year, her coach did not report it to the Title IX office as was required by school policy or take other action to help Lauren, and instead asked Lauren not to tell anyone. She then retaliated against Lauren and required her to attend mandatory team events at her home, despite Lauren's objections to seeing Linder's son. So, Lauren reported her rape to four other school officials—two assistant coaches, her academic counselor, and the executive director of the Office of Sexual and Relationship Violence Support Services—to no avail. Pl. Resp. Mot. Summ. J. 7, ECF No. 173. In addition to the physical and emotional harm to which she was subjected, Lauren suffered academically and athletically.

Despite Lauren's reporting her rape to five different school officials in an attempt to get help, the district court held that the University did not have "actual knowledge" of her rape, and thus had no duty to respond, until she finally reported her rape to the Title IX office over a year later. *Amici* respectfully submit that the district court erred because it did not apply the correct "actual knowledge" test.

The Supreme Court has held that in employee-on-student sexual harassment cases, a school official with authority to take corrective

action—an "appropriate person"—must be notified of the incident before the school is liable in damages. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998). While the Court in *Gebser* did not address who counts as an "appropriate person," it made clear the reason behind the test: not to impute a teacher's knowledge of his own misconduct to the school without any opportunity for the school to even learn of, let alone redress, such misconduct. As the Supreme Court recognized—by not including the "appropriate person" test in the student-on-student sexual harassment case it decided the following year—the concerns in *Gebser* do not apply in peer harassment cases where a student directly notifies a school official, as is the case here. *See Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999).

This Circuit and many other circuits agree and have not imposed the "appropriate person" requirement in peer harassment cases. *See, e.g.*, *Horner v. Ky. High Sch. Athletic Ass'n*, 206 F.3d 685, 692 (6th Cir. 2000) (holding *Davis* liability is triggered when "school officials are aware of the misconduct but do nothing to stop it, despite [their] ability to exercise control over the situation"). And courts across the country have held that actual knowledge of peer harassment by a wide range of school

employees, including coaches, is sufficient to trigger the school's duty to respond.

Imposing the "appropriate person" test in student-on-student sexual harassment cases, as the district court did here, misunderstands the rationale behind it and undermines the mission of Title IX—to protect students from sex discrimination in education—by creating barriers for students to report harassment and learn in a safe environment.

Amici therefore ask this Court to clarify that in student-on-student sexual harassment cases, the question is whether the school received actual notice based on the actual knowledge of any of its employees—not whether the student notified an "appropriate person," who in Kent State's view here was apparently only the Title IX coordinator. Educational institutions must develop sensible policies that protect students from peer sexual harassment and create multiple and meaningful reporting pathways. Only then can institutions both keep their students safe and avoid liability.

Even if this Court decides that an "appropriate person" must have actual notice in a peer harassment case, there is ample evidence that multiple employees properly considered "appropriate persons" had notice

of Lauren Kesterson's rape—including her varsity women's softball coach, Karen Linder, who was also required under University's own written policy to report Kesterson's sexual assault to the Title IX office "as quickly as possible." R.164-8, KSU Policy Index, PageID#4463; R.147, Nielsen Dep., PageID#2046; R.153, Barton Dep., PageID#2372.

ARGUMENT

I. THE "APPROPRIATE PERSON" TEST IS NOT APPLICABLE TO STUDENT-ON-STUDENT HARASSMENT CASES.

A. In peer harassment cases, persons capable of providing the school with actual knowledge are not limited to school employees with authority to address and correct the harassment.

The Supreme Court has held that in cases of employee-on-student sexual harassment, an institution has actual knowledge if "an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge." *Gebser*, 524 U.S. at 290. The Supreme Court in *Gebser* referred to this type of school official as an "appropriate person," but did not decide who counts as such a person. *Id.* at 290.

Shortly after deciding *Gebser*, the Supreme Court decided a student-on-student sexual harassment case and made no mention of the

"appropriate person" test or the requirement that a school official have the ability to institute corrective measures. *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999). This makes sense given the reasons behind the test. The Supreme Court in *Gebser* was concerned about imputing a teacher's knowledge of his own misconduct to the school without an opportunity for the school to know about and address it. But the concerns in *Gebser* do not apply in peer harassment cases where a student directly notifies a school official, as is the case here. It is a far different thing to protect a school from Title IX liability where a varsity coach (and someone required to report to the Title IX office under Kent State's own policies) knew about sexual harassment of one student by another and did nothing.

The Supreme Court's omission of the "appropriate person" requirement for student-on-student harassment claims also makes sense because school employees, such as coaches, are "best position[ed] to vindicate the rights of their students because they are better able to identify discrimination and bring it to the attention of administrators." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 181 (2005). Courts should not obviate the "actual knowledge" that schools have about

incidents of sexual harassment by disqualifying reports to employees—such as varsity sports coaches—most naturally positioned to receive them.

Not including an "appropriate person" requirement in peer harassment cases thus helps create reporting structures that fulfill the purpose of Title IX—it lets students know that they can report sex discrimination to a wide range of school employees and expect their reports to be taken seriously, and it puts school officials on notice that they need to take seriously their responsibilities to report and remedy peer sexual harassment.

B. This Circuit has followed *Davis* and not required that an "appropriate person" have actual knowledge in student-on-student sexual harassment cases.

The overwhelming majority of panels in the Sixth Circuit have held that the critical question in student-on-student harassment cases is whether the schools had actual knowledge of the harassment—not which employee had actual knowledge. Shortly after the Supreme Court's decision in *Davis*, this Circuit decided *Soper v. Hoben,* explaining the elements of a Title IX student-on-student harassment claim. 195 F. 3d 845, 854 (6th Cir. 1999). In *Soper*, the court followed *Davis* and did not

limit the class of school employees who could have actual knowledge of student-on-student sexual harassment for purposes of establishing a Title IX claim. *See id.* (not applying an "appropriate person" test or requiring actual knowledge by an employee with the "authority to take corrective action").

On *Soper*'s heels the Circuit decided *Vance v. Spencer County Public School District*, another student-on-student sexual harassment case which followed *Davis* in determining actual knowledge. 231 F.3d 253, 259 (6th Cir. 2000). Indeed, subsequent Sixth Circuit cases continued to cite the broad *Davis* standard, which focuses on whether the school had notice and not the specifics of who at the school had notice, often simply by citing directly to *Soper* or *Vance*. *See, e.g.*, *Pahssen v. Merrill Cmty. Sch. Dist.*, 668 F.3d 356, 362–63 (6th Cir. 2012); *Patterson v. Hudson Area Sch.*, 551 F.3d 438, 444–46 (6th Cir. 2009). As recently as 2012, this Circuit declined to import *Gebser's* "appropriate person" or "authority to take corrective action" requirements into a peer harassment case. *See Pahssen*, 668 F.3d at 362.

In light of the Sixth Circuit's controlling precedent correctly and exclusively applying the *Davis* standard as far back as 1999, this Court

should adhere to these holdings rather than import *Gebser*'s appropriate person test into peer harassment cases. *See Salmi v. Sec'y of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985) ("A panel … cannot overrule the decision of another panel.").

C. Many Circuits and district courts recognize that actual knowledge of harassment by a wide variety of school employees—including coaches—is sufficient to trigger a school's duty to respond.

Many Circuits, including this Circuit, and district courts recognize that knowledge of harassment by a wide range of school employees, including athletics officials such as coaches, constitutes "actual knowledge" for purposes of Title IX damages liability. Those decisions are consistent with the Supreme Court's position in its most recent Title IX case, *Jackson v. Birmingham*, that "coaches … are often in the best position to vindicate the rights of their students because they are better able to identify discrimination and bring it to the attention of administrators." 544 U.S. at 181.

Notably, this Circuit has recognized actual knowledge by a basketball coach as sufficient to impose Title IX liability. *Mathis v. Wayne Cty. Bd. of Educ.*, No. 1:09-0034, 2011 WL 3320966, at *1-*2 (M.D. Tenn. Aug. 2, 2011) , aff'd, 496 F. App'x 513 (6th Cir. 2012) (focusing on

actual knowledge by basketball coach rather than actual knowledge by higher-ranked defendants, school principal and director of schools).

Many other circuit court decisions from across the country have also cited *Davis*—and mentioned neither *Gebser* nor an "appropriate person" test—in describing the actual knowledge requirement. Alternatively, even when Courts have erroneously imported *Gebser*'s "appropriate person" test (or a similar test) into student-on-student harassment cases, they have adopted a variety of flexible and practical approaches, resulting in outcomes nearly identical to what *Davis* requires.

The First Circuit, for example, has cited *Davis* for the "actual knowledge" standard without citing *Gebser* or making any mention of the appropriate person" requirement. *See Porto v. Town of Tewksbury*, 488 F.3d 67, 70-73 (1st Cir. 2007) (citing *Davis*). Under that framework, a district court in the First Circuit found that reports of sexual harassment made to a school counselor, which were passed on to a school principal, amounted to actual knowledge on behalf of the entire school district. *See Brodeur v. Claremont Sch. Dist.*, 626 F. Supp. 2d 195, 207 (D.N.H. 2009).

The Second Circuit, in the analogous racial harassment context, has held that knowledge by teachers, faculty, staff, and school principals

all constitute actual knowledge on the part of a school. *See Zeno v. Pine Plains Cent. Sch. Dist.*, 702 F.3d 655, 666-68 (2d Cir. 2012) (finding school district had actual knowledge where faculty and staff members received and reported numerous incidents to school principal).

The Fifth Circuit has held—without mentioning *Gebser* or the "appropriate person" test—that knowledge on the part of a school counselor gives rise to "actual knowledge" on the part of the school. *See I.F. v. Lewisville Indep. Sch. Dist.*, 915 F.3d 360, 368, 372 (5th Cir. 2019) (school counselor); *Doe ex rel. Doe v. Dallas Indep. Sch. Dist.*, 220 F.3d 380, 384 (5th Cir. 2000) (explaining that "neither the Supreme Court nor this court" has decided which school employees can receive actual notice). Consistent with this broad approach, a district court in the Fifth Circuit has held that knowledge by members of an athletic department—"[s]pecifically, football coaches and staff"—constitutes actual knowledge on behalf of a school. *Hernandez v. Baylor Univ.*, 274 F. Supp. 3d 602, 612 (W.D. Tex. 2017).

The Seventh Circuit has also said—relying exclusively on *Davis* without mentioning *Gebser* or the "appropriate person" test—that the relevant question is whether "school officials have actual notice of sexual

harassment." *Gabrielle M. v. Park Forest-Chicago Heights, IL. Sch. Dist.* 315 F.3d 817, 824 (7th Cir. 2003); *see also Doe v. Galster*, 768 F.3d 611, 617 (7th Cir. 2014) (relying only on *Davis*, stating that actual knowledge turns on what "school administrators" knew). Consistent with this approach, the Seventh Circuit has suggested that a school could have actual knowledge if its basketball coach knows about student-on-student sexual harassment. *See Davis v. Carmel Clay Sch.*, 570 F. App'x 602, 606–07 (7th Cir. 2014).

These decisions all recognize that when a school official has actual knowledge of sexual harassment, that triggers a school's duty to respond. They reject the reasoning of the district court here—that imputing knowledge to a school when an employee has actual knowledge of student-on-student sexual harassment is akin to imposing vicarious liability on that school—and instead view it as a straightforward application of the Supreme Court's holding in *Davis* that a school actually knows what its officials actually know.

Even the courts that have erroneously imported *Gebser*'s "appropriate person" test into student-on-student harassment cases adopt a wide variety of approaches, some of which are nearly identical to

the standard *Davis* announced. The Eighth Circuit, for example, has adopted a flexible understanding of what it means for a school official to be an "appropriate person," holding that courts cannot "fashion a bright-line rule as to what job titles and positions automatically mark an individual as having sufficient authority or control for the purposes of Title IX liability." *Plamp v. Mitchell Sch. Dist. No. 17-2*, 565 F.3d 450, 457 (8th Cir. 2009). Similarly, the Fourth Circuit, in a decision applying the "appropriate person" test, stated that a school has actual knowledge whenever "school district officials" have "actual knowledge of the discriminatory conduct in question." *Baynard v. Malone*, 268 F.3d 228, 237–38 (4th Cir. 2001).

District courts applying the "appropriate person" test have also held that knowledge on the part of school athletic officials, such as coaches, constitutes actual knowledge. The discussion in *Doe v. Hamilton County Board of Education* is instructive. *See* 329 F. Supp. 3d 543, 564-66 (E.D. Tenn. 2018). The court in that case held that, even under *Gebser*'s "appropriate person" analysis, a high school basketball coach is an "appropriate person" because the coach "unquestionably had the authority to address, correct, and prevent student-on-student sexual

harassment." *Id.* at 565. Other courts have reached similar conclusions about football coaches based on materially similar analyses. *See*, *e.g.*, *Roe ex rel. Callahan v. Gustine Unified Sch. Dist.*, 678 F. Supp. 2d 1008, 1033–34 (E.D. Cal. 2009) (football coach was "appropriate person" because he "was admittedly responsible for the athletes 'on and off the field.'").

The Tenth and Eleventh Circuits are essentially alone in their exceedingly narrow view of actual knowledge endorsed by the district court below—a view that should be rejected as inconsistent with the purpose and intent of Title IX. The Tenth Circuit held that campus security officers were not appropriate persons—even though the university had designated campus security as a proper recipient of sexual-harassment reports and university policy required campus security officers to automatically report harassment to the office of student affairs. *Ross v. Univ. of Tulsa*, 859 F.3d 1280, 1289-90 (10th Cir. 2017). And the Eleventh Circuit held that a teacher's aide "was not high enough on the chain-of-command" to be an appropriate person, even though the aide had authority to devise a plan to address the harassment, which ultimately resulted in the plaintiff being harmed further. *Hill v.*

Cundiff, 797 F.3d 948, 971 (11th Cir. 2015).[2] These opinions failed to consider compelling facts supporting actual knowledge, are in the minority and inconsistent with Title IX's purpose, and should not guide this Court's decision.

D. Imposing an "appropriate person" test in student-on-student sexual harassment cases is contrary to the purpose of Title IX and erects additional barriers to reporting harassment.

Applying the "appropriate person" test to peer harassment cases is inconsistent with Title IX's purpose of protecting individuals from sex discrimination in education, because it permits the very employees necessary to a school's Title IX response, and to whom victims are told to report, to suppress reports of rape while insulating the school from damages liability. It cannot be that the critical civil rights granted by the Supreme Court in *Davis* nearly two decades ago can be thwarted by a simple delegation of responsibility for receiving reports of sexual

[2] Despite the Eleventh Circuit's demanding test, even *Hill*—which the district court below cited—recognizes that an assistant principal is an "appropriate person" whose actual knowledge binds the school for Title IX purposes. Here, Linder, as a varsity coach, was arguably closer to the position of an assistant principal than that of a teacher's aide.

misconduct. As one court aptly stated when discussing how students are likely to report harassment to their principals:

> a finding that the principal is not an appropriate person "rewards inaction on the principal's part … the principal need only keep the complaint to himself, i.e., not pass it on to the superintendent or the school board, and an 'appropriate person' has thus never been notified. The court declines to approve such potential self-immunization from Title IX liability."

S.R. v. Hilldale Indep. Sch. Dist. No. 1-29 of Muskogee Cty., Okla., 2008 WL 2185420 (E.D. Okla. May 23, 2008).

The "appropriate person" test, especially as understood and applied by the district court below, is also problematic given the reality of the power structure within educational institutions. The "actual knowledge" standard articulated by the Supreme Court for peer harassment cases, which does not require a student to report to an "appropriate person," helps holds institutions accountable under Title IX by encouraging them to create response systems and policies to respond to harassment, thus lowering barriers to reporting. Given the many barriers to students coming forward, allowing multiple avenues for complaints is critical. *See, e.g.*, Merle H. Weiner, *A Principled and Legal Approach to Title IX Reporting*, 85 TENN. L. REV. 71, 99–100 (2017) (collecting studies and concluding "[a]ny policy that decreases the number of disclosures to the

university is problematic. For the survivor, her silence increases the chance that she will be isolated and without support.").

Imposing a requirement where a school is not obligated to respond unless a student reports to an "appropriate person" does precisely the opposite. It encourages institutions to create liability black holes—i.e., campus officials who lack the authority to take corrective action and therefore never count as "appropriate persons" for purposes of monetary liability.

As it is, schools contain layers of different officials who may all have responsibility to take action to address peer sexual harassment, based on the nature of their duties and responsibilities. School districts may assign different duties to different positions, or eliminate certain positions altogether, meaning that official job titles (such as "campus security guard" or "counselor") are a poor proxy for the level of responsibility and autonomy a particular job entails. In the university context, these bureaucratic layers of administration are even more pronounced than in K-12 schools, and the sheer size of many university communities, including Kent State, often makes it nearly impossible for students to access high level administrators. College students are

regularly directed to report complaints of sexual misconduct to campus police, student conduct offices, and other employees who are more identifiable to the students and are trained in Title IX response and related victim services.

Under the district court's test, victims of peer sexual harassment would be forced to navigate a school's complex administrative hierarchy and, in the end, independently determine who at the school has sufficient corrective or institutional authority to constitute an "appropriate person." Victims would not even be able to rely on the university's own representation about which officials to report to. At a school where individual administrators are not held to have authority to take corrective actions, it is possible that no school administrator at all would meet the district court's test for an "appropriate person."

Narrowing the scope of officials whose knowledge "counts" for Title IX purposes makes proper reporting much more difficult—and for some, impossible. Despite their legal obligation to designate a Title IX coordinator,[3] many schools do not comply, and even if they have a

[3] Regulations promulgated by the Department of Education's Office for Civil Rights require every recipient of federal funds to "designate at least

coordinator, they do not publicize who that person is, such that many students are not aware of their school's Title IX office at all. *See* Catherine Hill & Elena Silva, *Drawing the Line: Sexual Harassment on Campus* 34 (2005), http://bit.ly/2ETejSt. And restricting institutional accountability to instances where students report to specific, high ranking officials would incentivize schools to make it even more difficult for students to access these officials. The most protective policy for universities would be to restrict the pool of school officials who are authorized to take "corrective measures" in order to shrink the set of "appropriate persons," and to encourage students to report sexual harassment to everyone *but* the Title IX coordinator, the only official whose knowledge would count for liability purposes. After all, designated reporters are essential for providing redress for victims on the one hand, but expose the institution to liability on the other. Schools could insulate themselves from liability by creating opaque reporting structures and

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one employee to coordinate its efforts to comply with and carry out its responsibilities" under Title IX. 34 C.F.R. § 106.8. This official is generally referred to as the "Title IX Coordinator." *See* U.S. Dep't of Educ., OCR, *Dear Colleague Letter on Title IX Coordinators* (Apr. 24, 2015), http://bit.ly/2MaR6ky.

encouraging officials to ignore reports—the way Kent State officials ignored Kesterson's reports. These subversions of Title IX protections, in turn, would subject students to an increased risk of harm.

Victims will be left unprotected if notifying school officials who have both the ability to take corrective measures and the duty to do so is not considered sufficient notice to a school under Title IX. Restricting the responsibility to respond to only those highest on the bureaucratic ladder will at best allow other school employees to ignore reports of violence with impunity, and at worst incentivize schools to insulate themselves from liability by discouraging employees from responding. Title IX protections should not ring so hollow.

II. KENT STATE HAD ACTUAL KNOWLEDGE BECAUSE COACH LINDER—A UNIVERSITY OFFICIAL REQUIRED TO REPORT KESTERSON'S RAPE TO THE TITLE IX OFFICE—WAS AN APPROPRIATE PERSON WITH AUTHORITY TO TAKE CORRECTIVE MEASURES.

Even if this Circuit applies *Gebser*'s "appropriate person" test for employee-on-student harassment in this context of student-on-student assault, Linder was an "appropriate person" whose knowledge of Kesterson's rape gave rise to "actual knowledge" on the part of Kent State University.

Nothing in *Gebser* limits appropriate persons to only those one or two employees at a school who have full authority to *complete* corrective measures, and to require otherwise frustrates the intent of this Court in *Gebser*. Furthermore, *Gebser* does not restrict the type of actions that would constitute "corrective measures" to *disciplinary* measures, nor does it suggest that corrective measures must entail the ability to impose final disciplinary action. To hold otherwise would require students to report to individuals so high in the institution that no average student would have the ability to access them (and at some institutions, such authority may not exist in any single individual).

Contrary to the district court's view that "corrective action" is limited to disciplinary action, courts across the country have correctly read *Gebser* to mean that many types of additional measures can constitute corrective action. As the Tenth Circuit has held, corrective action includes any actions "that would end the abuse." *Murrell v. Sch. Dist. No. 1, Denver, Colo.*, 186 F.3d 1238, 1247 (10th Cir. 1999). One district court has held that *Gebser* did not limit corrective measures to any specific action, and that corrective action included reporting to superiors, investigating the misconduct, providing a security escort on

campus, or imposing a no-contact directive. *See Doe v. Russell Cty. Sch. Bd.,* 2017 WL 1374279 (W.D. Va. April 13, 2017). Another has held that under *Gebser,* employees who are encouraged to report sexual misconduct to higher administrators could reasonably be found to be appropriate persons. *See Thompson v. Indep. Sch. Dist. No. I-1 of Stephens Cty., Okla.,* 2013 WL 1915058 (W.D. Okla. May 8, 2013). Still another has explained that teachers who "ordinarily maintain at least some level of disciplinary control over their students" can be appropriate persons under *Gebser*. *Montgomery v. Indep. Sch. Dist. No. 709,* 109 F. Supp. 2d 1081, 1099 (D. Minn. 2000).

Here, Kent State clearly had actual knowledge under the "appropriate person" test. As an initial matter, Kesterson was not required to show that she followed any specific procedure, or reported to any specific person. *See Doe v. Miami Univ.*, 882 F.3d at 591. Furthermore, Kesterson reported the rape to Linder, who was an "appropriate person" for numerous reasons.

First, Linder was required to forward Kesterson's report to the Title IX coordinator or deputy coordinator "as quickly as possible" under Kent State's written policies. R.164-8, KSU Policy Index, PageID#4463; R.147,

Nielsen Dep., PageID#2046; R.153, Barton Dep., PageID#2372. Once a university charges an employee with the responsibility to get a report into the hands of the Title IX coordinator, any report to that employee is the same as reporting to the Title IX coordinator. For example, if a victim reports her rape to the Title IX officer's assistant—with assurances that the report will be passed on to the Title IX coordinator—the University cannot escape Title IX liability simply by blaming the Assistant. The same holds true for any other university employee who is required to forward reports to the Title IX coordinator.

Second, Linder was a varsity sports coach at Kent State and therefore had a duty to address the harassment—either directly or by informing other administrators—by virtue of her high position at the university. *Mathis*, 2011 WL 3320966, at *1-*2, *aff'd*, 496 F. App'x 513 (imposing liability based on actual knowledge by basketball coach rather than by higher-ranked school employees).

Third, Linder was Kesterson's softball coach specifically, which meant she had control over Kesterson's schedule, training, and scholarship, and could therefore provide many remedies that constitute corrective action within the meaning of *Gebser*. Linder was responsible

for oversight of Kesterson's tutoring and counseling, for addressing any violations of the student code of conduct brought to her by Kesterson or other student-athletes, and many other facets of Kesterson's daily life. At a minimum, Linder had the authority to help Kesterson in her official capacity as Kesterson's coach, making her an appropriate person under *Gebser*.

Any one of those factors standing alone would have been sufficient under *Gebser* for Linder's actual knowledge of the assault to be imputed to Kent State. The fact that all three are present only serves to highlight the district court's error.

In sum, even if this Court applies the "appropriate person" test for employee-on-student cases to this student-on-student case, it is clear that the district court erred in its decision. If a varsity softball coach is not an "appropriate person" to whom a student—and varsity softball player—can report peer sexual harassment, then it is unclear whether any university official at Kent State is an "appropriate person."

CONCLUSION

Lauren Kesterson suffered the trauma of rape and then mustered the courage to report it to her school. Since that time she has been failed

repeatedly by those whom she should be able to trust—her coach who did not report her rape to the Title IX office, as she admitted she should have, and then retaliated against her; the four other school employees who also did not help her; and the district court, which held that despite her reporting the rape to five school officials, she did not provide the University sufficient notice to trigger a duty to respond until she reported her rape to the Title IX office over a year later. The decision below, if allowed to stand, would subvert the intent of Title IX and penalize a young woman who was brave enough to come forward and ask her school to allow her to learn in a safe environment. *Amici* ask this Court not to fail Lauren Kesterson again.

June 4, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief of *amici curiae* was filed electronically on June 4, 2019 and will, therefore, be served electronically upon all counsel.

s/ *Andrew Tutt*
Andrew T. Tutt

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(a)(4) and 32(g), the undersigned counsel for *amicus curiae* certifies that this brief:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because this brief contains 5,134 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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. P. 32(a)(6) because this brief has been prepared using Microsoft Office Word and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

s/ *Andrew Tutt*
Andrew T. Tutt

APPENDIX—LIST OF SIGNATORIES

American Association of University Women

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 through research, advocacy, and philanthropy. 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 Program, 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.

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.

Chicago Alliance Against Sexual Exploitation

The Chicago Alliance Against Sexual Exploitation (CAASE) is an Illinois-based not-for-profit that opposes sexual harm by directly addressing the culture, institutions and individuals that perpetrate, profit from, or support such harms. CAASE engages in direct legal services, prevention education, community engagement, and policy reform. CAASE's legal department provides free legal services to survivors of sexual harm, including sexual assault and prostitution. On behalf of its individual clients and in support of its overall mission, CAASE is interested in

seeing that federal and state laws and precedent related to sexual assault and prostitution are appropriately interpreted and applied so as to further—and not undermine—efforts to hold perpetrators of sexual assault and trafficking appropriately accountable for their actions.

Equal Rights Advocates

Equal Rights Advocates (ERA) is a national non-profit legal organization dedicated to protecting and expanding economic and educational access and opportunities for women and girls. In service of its mission, ERA litigates class actions and other high-impact cases on issues of gender discrimination in employment and education. ERA has a long history of pursuing equality and justice for women and girls under Title IX through advocacy, legislative efforts and litigation. ERA has served as counsel in numerous class and individual cases involving the interpretation of Title IX in the athletics and sexual harassment contexts. ERA also provides advice and counseling to hundreds of individuals each year through a telephone advice and counseling hotline and has participated as amicus curiae in scores of state and federal cases involving the interpretation and application of procedural and substantive laws affecting the ability of students to obtain and enforce their equal rights under the law.

Feminist Majority Foundation

The Feminist Majority Foundation (FMF) is a non-profit organization with offices in Arlington, VA and Los Angeles, CA. FMF is dedicated to eliminating sex discrimination and to the promotion of gender equality and women's empowerment. The FMF programs focus on advancing the legal, social, economic, education, and political equality of women with men, countering the backlash to women's advancement, and recruiting and training young feminists to encourage future leadership for the feminist movement. To carry out these aims, FMF engages in research and public policy development, public education programs, litigation, grassroots organizing efforts, and leadership training programs. The FMF conducts research on and supports the broad coverage and full implementation of Title IX to protect people from sex discrimination.

Gender Justice

Gender Justice is a nonprofit legal and policy advocacy organization based in the Midwest that is committed to the eradication of gender barriers through impact litigation, policy advocacy, and education. As part of its litigation program, Gender Justice represents individuals and provides legal advocacy as amicus curiae in cases involving issues of gender discrimination. Gender Justice has an interest in ensuring that Title IX protections are available to all students and that the "actual notice" requirement does not serve as a barrier to justice.

In Our Own Voice: National Black Women's Reproductive Justice Agenda

In Our Own Voice: National Black Women's Reproductive Justice Agenda is a national-state partnership with eight Black women's Reproductive Justice organizations: The Afiya Center, Black Women for Wellness, Black Women's Health Imperative, New Voices for Reproductive Justice, SisterLove, Inc., SisterReach, SPARK Reproductive Justice NOW, and Women with a Vision. In Our Own Voice is a national Reproductive Justice organization focused on lifting up the voices of Black women leaders on national, regional, and state policies that impact the lives of Black women and girls.

Reproductive Justice is a framework rooted in the human right to control our bodies, our sexuality, our gender, and our reproduction. Reproductive Justice will be achieved when all people, of all immigration statuses, have the economic, social, and political power and resources to define and make decisions about our bodies, health, sexuality, families, and communities in all areas of our lives with dignity and self-determination. Robust Title IX protections are essential to ensuring this right.

Kentucky Association of Sexual Assault Programs, Inc.

The Kentucky Association of Sexual Assault Programs (KASAP) is a nonprofit state coalition made up of Kentucky's 13 regional rape crisis centers. KASAP's mission is to speak with a unified voice against sexual victimization. Since 1990, KASAP has provided technical assistance and

training on sexual assault issues to rape crisis programs and community partners, advocated for policy improvements, and promoted primary prevention efforts. KASAP engages on a range of topics, including Title IX, the right to education without sex discrimination. KASAP has recently educated legislators on bill language that could negatively impact campus sexual assault survivors. Additionally, our regional rape crisis centers have created partnerships with their local universities due to a tremendous need expressed by survivors. Two programs currently offer weekly on-campus support, including therapy. As the coalition, KASAP receives calls from campus sexual assault survivors when they are seeking guidance and referrals. It is evident that the harms from sex discrimination have long-term negative effects, even ending a student's educational opportunities. KASAP supports a person's right to education without sex discrimination and has an interest in securing those rights.

KWH Law Center

KWH Law Center for Social Justice and Change is a non-profit Law Center focused on advancing economic opportunities for women and girls in the South and Southwest. We strongly support the application of Title IX in bridging the gender equity gap for women and girls at every level of education, and for providing all other protections afforded under the law. We work to ensure that women have equal access to the full range of protections offered by Title IX. Accordingly, the Law Center is uniquely qualified to comment on the decision to be rendered in Kesterson v. Kent State University particularly as it relates to the interpretation, application or implementation of Title IX.

MANA, A National Latina Organization

Founded in 1974, today, MANA, A National Latina Organization® (MANA) is a national grassroots membership organization with chapters, individual members and affiliates across the country. From community education and leadership development, to coalition building and advocacy, MANA represents the interests of Latina women, youth and families on issues that impact our communities. MANA is the leading national Latina voice on major issues in the public sphere, particularly

in the areas of education, health and well-being, financial literacy, equal and civil rights, privacy, and immigration reform.

National Association of Social Workers (NASW)

The National Association of Social Workers (NASW), founded in 1955, is the largest association of professional social workers in the United States with over 120,000 members in 55 chapters. NASW develops policy statements on issues of importance to the social work profession. NASW supports policy advocacy at the local, state, and national levels to promote assistance for victims of crime and to facilitate their safety and recovery from criminal victimization.

National Crittenton

National Crittenton (NC) is a nonprofit national advocacy organization whose mission is to catalyze social and systems change for girls, young women and gender nonconforming youth impacted by chronic adversity, violence, and injustice. Since it was founded in 1883, it has advanced the rights, needs and potential of all girls and young women across systems and fields including educational institutions. Regardless of the setting, there is nothing more fundamental than the ability to be safe and to grieve when ones rights have been violated.

As such, National Crittenton is honored to join The National Women's Law Center and Arnold & Porter Kaye Scholer LLP in the amicus brief in the Sixth Circuit case, Kesterson v. Kent State University, which is being filed in support of the plaintiff in an appeal of the negative Title IX decision.

Girls, young women and women in the United States are all too often victimized sexually and physically and then penalized for speaking out. It's time to break this cycle of re-victimization.

National LGBTQ Task Force

Since 1973, the National LGBTQ Task Force has worked to build power, take action, and create change to achieve freedom and justice for lesbian,

gay, bisexual, transgender, and queer (LGBTQ) people and our families. As a progressive social justice organization, the Task Force works toward a society that values and respects the diversity of human expression and identity and achieves equity for all.

National Organization for Women Foundation

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 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 develops and promotes policies that help achieve fairness in the workplace, reproductive health and rights, quality health care for all, and policies that protect and help women and men as they manage the demands of work and family. Since its founding in 1971, the National Partnership has worked to advance equal opportunities and fairness through several means, including by taking a leading role in the passage of the Title IX of the Education Amendments of 1972, the Pregnancy Discrimination Act of 1978 and the Family and Medical Leave Act of 1993 and by challenging discriminatory practices, particularly those on the basis of sex, in the courts.

North Carolina Coalition Against Sexual Assault

The North Carolina Coalition Against Sexual Assault (NCCASA) is an inclusive, statewide alliance working to end sexual violence through

education, advocacy, and legislation. We work to eradicate sexual violence through local and statewide advocacy, advising our rape crisis centers, and representing survivors in campus Title IX cases.

People For the American Way Foundation

People For the American Way Foundation (PFAWF) is a nonpartisan civic organization established to promote and protect civil and constitutional rights, including equality and non-discrimination for all. Founded in 1981 by a group of civic, educational, and religious leaders, PFAWF now has hundreds of thousands of members nationwide. Over its history, PFAWF has conducted extensive education, outreach, litigation, and other activities to promote these values. PFAWF strongly supports the principle that sex discrimination, including sexual harassment and assault, is illegal under federal law, and that effective enforcement of Title IX is crucial for women at colleges and universities across the country.

Sexuality Information and Education Council of the United States (SIECUS)

The Sexuality Information and Education Council of the United States (SIECUS) has served as the national voice for sex education, sexual health, and sexual rights for 55 years. SIECUS views comprehensive sexuality education as a vehicle for social change and asserts that sexuality is a fundamental part of being human, one worthy of dignity and respect. SIECUS advocates for the rights of all people to accurate information and the full spectrum of sexual and reproductive health services. SIECUS envisions an equitable nation where all people receive comprehensive sexuality education and quality health services that affirm their identities, thereby promoting their lifelong health and well-being.

SisterReach

SisterReach, founded October 2011, is a Memphis, TN based grassroots 501c3 non-profit supporting the reproductive autonomy of women and teens of color, poor and rural women, LGBT+ gender non-conforming

people and their families through the framework of Reproductive Justice. Our mission is to empower our base to lead healthy lives, raise healthy families and live in healthy communities.

Southwest Women's Law Center

The Southwest Women's Law Center was established in 2005 to create greater opportunities for women and girls in New Mexico so that they may fulfill their personal and economic potential. To be free from student on student sexual violence and harassment in educational institutions is integral to those goals.

SurvJustice

SurvJustice is a legal nonprofit organization based in Washington D.C. dedicated to providing justice to survivors of sexual and intimate partner violence. We accomplish this through policy advocacy that creates victims' rights, institutional and awareness trainings that develops norms around implementation of victims' rights, and legal assistance that enforces victims' rights to hold both perpetrators and enablers of sexual violence accountable in school, campus, criminal, and civil systems. By working on these fronts, SurvJustice is creating accountability that decreases 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.

The Clearinghouse on Women's Issues

The mission of the Clearinghouse on Women's Issues is to: Provide information on issues relating to women, including discrimination on the basis of gender, age, ethnicity, marital status or sexual orientation with particular emphasis on public policies that affect the economic, educational, health and legal status of women; cooperate and exchange information with organizations working to improve the status of women; and take action and positions compatible with our mission.

In furtherance of CWI's mission of providing nondiscriminatory educational opportunities that are free of gender bias consistent with statutory and regulatory requirements of Title IX, including anti-sexual harassment, CWI signs on to the amicus brief of the National Women's Law Center in the matter of Kesterson v. Kent State University.

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 Kesterton v. Kent State University 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, particularly in the educational setting.

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, 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 preventing and addressing sexual violence, rooted in the principle of the holiness present in every human being.

Women Lawyers On Guard Inc.

Women Lawyers On Guard Inc. is a national non- partisan, non-profit organization harnessing the power of lawyers and the law in coordination

with other non-profit organizations to preserve, protect, and defend the democratic values of equality, justice, and opportunity for all.

Women's Bar Association of the District of Columbia

Founded in 1917, the Women's Bar Association of the District of Columbia (WBA) is one of the oldest and largest voluntary bar associations in metropolitan Washington, DC. Today, as in 1917, we continue to pursue our mission of maintaining the honor and integrity of the profession; promoting the administration of justice; advancing and protecting the interests of women lawyers; promoting their mutual improvement; and encouraging a spirit of friendship among our members. The WBA believes that protecting women's rights under Title IX to be free from discrimination by educational institutions is consistent with the WBA's mission.

Women's Bar Association of the State of New York ("WBASNY")

The Women's Bar Association of the State of New York ("WBASNY") is the second largest statewide bar association in New York and one of the largest women's bar associations in the United States. Its more 4,200 members in its twenty chapters across New York State include esteemed jurists, academics, and attorneys who practice in every area of the law, including appellate, education, employment, ERISA, health, reproductive rights, constitutional, commercial, criminal, and civil rights. WBASNY is dedicated to fair and equal administration of justice. WBASNY has participated as an amicus curia in state and federal cases at every level, including those involving civil rights, sex discrimination, sexual assault, and sexual harassment, and it stands as a vanguard for the equal rights of women, minorities, LGBT, and all persons.

WBASNY's affiliated organizations consist of twenty regional chapters, some of which are separately incorporated, plus nine IRC 501(c)(3) charitable corporations that are foundations and/or legal clinics. Its earliest current chapter was founded in 1918, a year before women's right to vote was ratified in the United States. The current affiliates are: Chapters – Adirondack Women's Bar Association; The Bronx Women's Bar Association, Inc.; Brooklyn Women's Bar Association, Inc.; Capital

District Women's Bar Association; Central New York Women's Bar Association; Del-Chen-O Women's Bar Association, Finger Lakes Women's Bar Association; Greater Rochester Association for Women Attorneys; Mid-Hudson Women's Bar Association; Mid-York Women's Bar Association; Nassau County Women's Bar Association; New York Women's Bar Association; Queens County Women's Bar Association; Rockland County Women's Bar Association; Staten Island Women's Bar Association; The Suffolk County Women's Bar Association; Thousand Islands Women's Bar Association; Westchester Women's Bar Association; Western New York Women's Bar Association; and Women's Bar Association of Orange and Sullivan Counties. Charitable Foundations & Legal Clinic – Women's Bar Association of the State of New York Foundation, Inc.; Brooklyn Women's Bar Foundation, Inc.; Capital District Women's Bar Association Legal Project Inc.; Nassau County Women's Bar Association Foundation, Inc.; New York Women's Bar Association Foundation, Inc.; Queens County Women's Bar Foundation; Westchester Women's Bar Association Foundation, Inc.; and The Women's Bar Association of Orange and Sullivan Counties Foundation, Inc. (No members of WBASNY or its affiliates who are judges or court personnel participated in WBASNY's amicus curia vote in this matter.)

WV FREE

WV FREE advocates for reproductive health rights and justice. We believe in the rights of all people to live with dignity and in healthy and safe environments.