

No. 20-216

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In the  
Supreme Court of the United States

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PRIANKA BOSE,  
*Petitioner,*

v.

RHODES COLLEGE AND  
ROBERTO DE LA SALUD BEA, ET AL.,  
*Respondents.*

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ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

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**BRIEF OF LEGAL MOMENTUM, THE WOMEN'S  
LEGAL DEFENSE AND EDUCATION FUND, AND  
OTHER WOMEN'S RIGHTS AND CIVIL RIGHTS  
ORGANIZATIONS AS AMICI CURIAE IN SUPPORT  
OF PETITIONER**

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**OTHER AUTHORITIES**

118 Cong. Rec. 5803 (1972).....	5
Stephen J. Aguilar & Clare Baek, <i>Sexual harassment in academe is underreported, especially by students in the life and physical sciences</i> , PLoS ONE (15)(3): e0230312 (Mar. 10, 2020), <a href="https://doi.org/10.1371/journal.pone.0230312">https://doi.org/10.1371/journal.pone.0230312</a> .....	13
Lauren M. Aycock, et al., <i>Sexual harassment reported by undergraduate female physicists</i> , Physical Review Physics Education Research (2019), <a href="https://journals.aps.org/prper/pdf/10.1103/PhysRevPhysEducRes.15.010121">https://journals.aps.org/prper/pdf/10.1103/PhysRevPhysEducRes.15.010121</a> .....	13

**TABLE OF AUTHORITIES—Continued**

	<b>Page(s)</b>
Tom Bartlett & Nell Gluckman, <i>She Left Harvard. He Got To Stay</i> , Chronicle of Higher Education (Feb. 27, 2018), .....	15
David Cantor et al., Ass’n of Am. Univs., <i>Report on the AAU Campus Climate Survey on Sexual Assault and Misconduct</i> (rev. Jan. 17, 2020), <a href="https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/Revised%20Aggregate%20report%20%20and%20appendices%201-7_(01-16-2020_FINAL).pdf">https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/Revised%20Aggregate%20report%20%20and%20appendices%201-7_(01-16-2020_FINAL).pdf</a> .....	12
Colleen Flaherty, <i>Putting Harassers on Notice</i> , Inside Higher Ed (Oct. 15, 2015), <a href="https://www.insidehighered.com/news/2015/10/15/berkeley-astronomer-resigns-over-sexual-harassment-investigation">https://www.insidehighered.com/news/2015/10/15/berkeley-astronomer-resigns-over-sexual-harassment-investigation</a> .....	15
Joey Garrison, <i>Harvard bans ex-professor after finding ‘unwelcome sexual conduct’ spanned four decades</i> , USA Today (May 11, 2019), <a href="https://www.usatoday.com/story/news/nation/2019/05/09/harvard-university-professor-jorge-dominguez-sexual-harassment-misconduct-metoo-title-ix/1154497001/">https://www.usatoday.com/story/news/nation/2019/05/09/harvard-university-professor-jorge-dominguez-sexual-harassment-misconduct-metoo-title-ix/1154497001/</a> .....	15

## TABLE OF AUTHORITIES—Continued

	Page(s)
Harvard University, <i>Harvard College Handbook for Students: The Administrative Board of Harvard College</i> , <a href="https://handbook.fas.harvard.edu/book/administrative-board-harvard-college">https://handbook.fas.harvard.edu/book/administrative-board-harvard-college</a> (last visited Sept. 21, 2020) .....	9
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Office for Civil Rights, Dep’t of Educ., <i>Sexual Harassment Guidance</i> (Mar. 13, 1997), <a href="https://www2.ed.gov/about/offices/list/ocr/docs/sexhar00.html">https://www2.ed.gov/about/offices/            list/ocr/docs/sexhar00.html</a> .....	14
Rhodes College Title IX—Sex/Gender Discrimination and Sexual Misconduct Policy, Section IV: Formal Grievance Process, <a href="https://handbook.rhodes.edu/title-ix-sexgender-discrimination-and-sexual-misconduct-policy/formal-grievance-policy/section-iv">https://handbook.rhodes.edu/            title-ix-sexgender-discrimination-and-            sexual-misconduct-policy/formal-            grievance-policy/section-iv</a> (last visited Sept. 21, 2020) .....	8, 9
Edward N. Stoner II & Kathy L. Cerminara, <i>Harnessing the “Spirit of            Insubordination”: A Model Student            Disciplinary Code</i> , 17 <i>J. of College &amp;            Univ. Law</i> 89 (1990) .....	9
Vivian Wang, <i>Columbia Professor Retires in            Settlement of Sexual Harassment            Lawsuit</i> , <i>N.Y. Times</i> (Dec. 18, 2017).....	16

**TABLE OF AUTHORITIES—Continued**

	<b>Page(s)</b>
Delese Wear & Julie Aultman, <i>Sexual Harassment in Academic Medicine: Persistence, Non-Reporting, and Institutional Response</i> , Medical Education Online 10:10 (2005), <a href="https://www.researchgate.net/publication/255615956_Sexual_Harassment_in_Academic_Medicine_Persistence_Non-Reporting_and_Institutional_Response/link/0a85e53b47ad48bac1000000/download">https://www.researchgate.net/publication/255615956_Sexual_Harassment_in_Academic_Medicine_Persistence_Non-Reporting_and_Institutional_Response/link/0a85e53b47ad48bac1000000/download</a> .....	12, 14
Joan C. Williams & Kate Massinger, <i>How Women Are Harassed Out of Science</i> , The Atlantic (July 25, 2016) .....	12
Yale University, <i>Grievance Procedure and Disciplinary Procedure</i> , <a href="https://gsas.yale.edu/sites/default/files/page-files/gsas_grievance_and_disciplinary_procedures.pdf">https://gsas.yale.edu/sites/default/files/page-files/gsas_grievance_and_disciplinary_procedures.pdf</a> (last visited Sept. 21, 2020) .....	9



## INTEREST OF AMICI CURIAE<sup>1</sup>

Legal Momentum, the Women’s Legal Defense and Education Fund, is the nation’s first and oldest national non-profit organization dedicated to advancing gender equality through the law. For fifty years, Legal Momentum has worked to secure equal rights for women and girls through impact litigation, legislative advocacy, education, and direct representation of clients, advocating for equal opportunity in education and an end to all forms of gender-based violence. As one of the original authors of the Violence Against Women Act, Legal Momentum continues to be a leader in efforts to strengthen the response to domestic violence and sexual assault.

Since its founding, Legal Momentum has been at the forefront of efforts to tackle sex discrimination and sexual harassment in the workplace under Title VII. Building upon this expertise, Legal Momentum is dedicated to ensuring that all students have access to equal educational opportunities, free from sexual violence and harassment. Legal Momentum has been involved in key Title IX litigation, contributing as amicus curiae in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992); *Gebser v. Lago Vista Ind. School District*, 524 U.S. 274 (1998); and *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999). And Legal Momentum continues to lead efforts to advance effective enforcement of Title IX to

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<sup>1</sup> The parties have consented in writing to the filing of this brief, and received timely notice of the intent to file. No counsel for a party authored this brief in whole or in part; and no such counsel, any party, or any other person or entity—other than amici curiae and their counsel—made a monetary contribution intended to fund the preparation or submission of this brief.

ensure that students are not deprived of educational opportunity on the basis of their sex.

This brief is also joined by seven additional organizations listed in the attached Addendum. These organizations are similarly dedicated to advancing equality and gender justice, preventing sex discrimination in our schools, and eliminating sexual harassment and retaliation to ensure that students have meaningful protections against deprivation of educational opportunity based on gender.

Because the Sixth Circuit's ruling eliminates protections for students facing egregious deprivations of educational opportunity stemming from faculty sexual harassment and retaliation, amici have a strong interest in ensuring that this ruling does not stand. Amici also have an interest in ensuring that the Sixth Circuit's ruling does not roll back this Court's established protections against sexual harassment.

## **INTRODUCTION AND SUMMARY OF ARGUMENT**

Title IX seeks, above all, to prevent students' exclusion from educational opportunity on the basis of sex. *See* 20 U.S.C. § 1681. Such exclusion is exactly what petitioner Prianka Bose suffered in this case: Rhodes College expelled Bose based on forged evidence manufactured by a professor in retaliation for rejecting his advances. But for Bose's sex, she would not have been expelled. And if Bose's professor had himself approved Bose's expulsion there would be no dispute that the school had violated Title IX. Yet the Sixth Circuit held, as a matter of law, that Bose's total exclusion from Rhodes College's programs was not actionable because the school's Honor Council and

Appeals Committee—which carried out the expulsion—did not *themselves* harbor “any discriminatory motive against Bose.” Pet. App. 9a.

As Bose’s petition explains, the Sixth Circuit’s artificial severance between the sex-biased actions of Bose’s professor and their intended outcome—Bose’s expulsion—cannot be squared with Title IX’s text and purpose, with background principles of causation, or with the decisions of other circuits. *See* Pet. 12-25. Worse, the Sixth Circuit’s holding will have wide-ranging and deeply damaging effects. Many, if not most, colleges and universities utilize the sort of multi-layer disciplinary boards that recommended Bose’s expulsion here. Holding that these structures automatically immunize a school’s disciplinary decisions from scrutiny under Title IX—even when the school has been warned that disciplinary charges are based on sex-biased or retaliatory accusations—will prevent victims across the country from seeking redress. This problem is not merely theoretical. Research reveals that retaliation is pervasive, with multiple instances in which a harassing teacher or professor falsely leveled charges to punish or discredit a victim—instances that would, under the Sixth Circuit’s holding, have escaped scrutiny entirely.

That result is deeply worrisome on its face and would undermine the basic protections of Title IX. But its effects will be magnified by the existing realities of higher education. Harassment is all too common in colleges and universities, especially damaging when carried out by professors and teachers, and particularly prevalent in the disciplines of science, technology, engineering, and mathematics (STEM). Many students already hesitate to report harassment for fear of retaliation. And they have

good reason: As reports show, prominent professors often escape real consequences, while students who report harassment face the sort of debilitating harm to their academic careers that Bose endured in this case. The Sixth Circuit’s decision, which will sharply reduce a school’s incentive to scrutinize a professor’s disciplinary accusations, will embolden the worst actors in universities, offering free reign to retaliate without consequence.

This Court’s review is urgently needed.

## ARGUMENT

### I. THE SIXTH CIRCUIT’S HOLDING EVISCERATES CORE TITLE IX PROTECTIONS AGAINST SEXUAL HARASSMENT

The Sixth Circuit’s decision in this case strikes at the core of Title IX’s protections. In ruling that a school’s decision to expel a student based on sex-biased and retaliatory charges cannot be remedied under Title IX, the court of appeals shielded from scrutiny the most consequential actions that a school can take against a student—and did so whenever the school’s decision is ultimately approved by a committee or individual that does not itself harbor discriminatory intent. Because severe disciplinary punishments are nearly *always* effected by honor councils or faculty committees, the Sixth Circuit’s ruling will have implications far beyond this case, ensuring that wronged students cannot seek a remedy for even the most egregious misuse of the disciplinary process to carry out sex discrimination, harassment, and retaliation.

**A. The Sixth Circuit’s Decision Immunizes Schools For Even The Most Severe Wrongful Deprivations Of Educational Opportunity**

The Sixth Circuit’s holding undermines the central purpose of Title IX, which at its heart is a civil rights statute designed to ensure that students are not deprived of educational opportunity on the basis of sex. *See* 20 U.S.C. § 1681(a). Congress in passing Title IX made clear that the statute was intended to combat “the continuation of corrosive and unjustified discrimination” in educational institutions. 118 Cong. Rec. 5803 (1972) (statement of Sen. Birch Bayh). The statute’s protections are aimed at individual victims as well as institutional change: “Congress enacted Title IX not only to prevent the use of federal dollars to support discriminatory practices, but also ‘to provide individual citizens effective protection against those practices.’” *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 180 (2005) (quoting *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979)). And, as this Court has long recognized, Title IX’s central promise fully “appl[ies] when a teacher sexually harasses and abuses a student.” *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 75 (1992); *see also Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 281-82 (1998).<sup>2</sup>

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<sup>2</sup> The Department of Education agrees. In 1997, for instance, the Department made clear that “due to the power that a professor or teacher has over a student, sexually based conduct by that person toward a student is more likely to create a hostile environment than similar conduct by another student.” 62 Fed. Reg. 12,034, 12,041 (Mar. 13, 1997). And by 2001, the Department recognized “longstanding legal authority

As Bose’s petition cogently explains, the facts in this case fit squarely into Title IX’s framework. Bose’s professor, stung by her rejection of his harassment and fearful for his reputation,<sup>3</sup> falsely accused Bose of cheating and manufactured evidence against her. *See* Pet. 5-7 (discussing fabricated evidence); C.A. Rec. 1382, 1401, 1414, 1425, 1430-36. Rhodes College’s Honor Council and Faculty Appeals Committee, in turn, carried out the professor’s intentions by expelling Bose—despite having been warned by Bose that her rejection of the professor was the “reason . . . why this is happening” and that this was “not the first time that an ego-hurt professor would harm a student.” C.A. App’x 72; Pet. 8. Indeed, the Faculty Appeals Committee did not even “*attempt* to determine” whether Bose’s allegations of retaliation were correct. Pet. 9 (emphasis added) (quoting C.A. Rec. 1019).

Those facts undoubtedly state a Title IX violation. It is difficult to imagine a more total “exclu[sion] from participation in” educational opportunity than expulsion. Not only does an expulsion entirely deprive a student of educational opportunity at the school from which she was expelled, but it frequently results in loss of *future* opportunity as well, as the stain of expulsion continues to follow the student throughout her educational career. In this case, for

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establishing that sexual harassment of students can be a form of sex discrimination covered by Title IX.” Office for Civil Rights, U.S. Dep’t of Educ., *Revised Sexual Harassment Guidance: Harassment of Students By School Employees, Other Students, or Third Parties* at i (2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

<sup>3</sup> *See* C.A. App’x 66 (“Do you think I’m going to put in jeopardy my tenure because of you?”).

instance, Ms. Bose was not only dismissed from Rhodes College, but her highly competitive early admission to medical school was rescinded. Pet. 9. Unsurprisingly, then, the Department of Education has made clear that a Title IX violation occurs where a teacher files “charges against an individual for code of conduct violations” in order to interfere with rights or privileges secured by Title IX. 34 C.F.R. § 106.71(a).

Yet the Sixth Circuit held that a school’s expulsion decision—even when based on accusations and evidence that it has been warned are intended as harassment or retaliation—remains immune from Title IX scrutiny so long as the retaliatory accuser is distinct from the body approving the expulsion. *See* Pet. App. 13a (holding that Bose’s claim fails for lack of “evidence of any discriminatory motive on Rhodes’ part”). This artificial severance of an abuser’s motivation from the institution that ultimately carries out the intended results of that abuser’s actions leaves students with no recourse: Under the Sixth Circuit’s logic, Bose could not seek a remedy from her abuser because that abuser was not responsible for the student’s expulsion (and individuals cannot be held liable under Title IX); and she could not seek a remedy from the school because the school and its committees lacked the requisite intent. *Cf. Staub v. Proctor Hosp.*, 562 U.S. 411, 420 (2011) (rejecting as “implausible” an interpretation of the Uniformed Services Employment and Reemployment Rights Act under which “if an employer isolates a personnel official from an employee’s supervisors, vests the decision to take adverse employment actions in that official, and asks that official to review the employee’s personnel file

before taking the adverse action, then the employer will be effectively shielded from discriminatory acts and recommendations of supervisors that were designed and intended to produce the adverse action”).

A ruling that leaves students with no recourse to correct the most severe deprivation of educational opportunity based on sex cannot stand under the plain meaning of Title IX.

**B. The Sixth Circuit’s Ruling Will Immunize Disciplinary Decisions At Nearly Every College And University In The Nation**

The Sixth Circuit’s ruling is egregious on its own terms. But the consequences of that decision go far beyond the bounds of this case. The decision’s logic extends to any instance in which a third party—whether an honor council, a faculty committee, or a dean—carries out a harasser’s intended retaliation against a student, but does not itself have an improper motive. And that, in turn, would mean that *every* major disciplinary decision is immune from Title IX scrutiny. Professors and instructors who engage in harassment, after all, rarely have personal authority to take the most severe disciplinary action against students. Instead, life-altering decisions such as suspension and expulsion are almost always entrusted to councils and committees like the ones who expelled Bose. *See, e.g.*, Rhodes College Title IX—Sex/Gender Discrimination and Sexual Misconduct Policy, Section IV: Formal Grievance



Process<sup>4</sup>; Harvard University, *Harvard College Handbook for Students: The Administrative Board of Harvard College* (describing authority of Harvard's Administrative Board to order disciplinary actions)<sup>5</sup>; Yale University, *Grievance Procedure and Disciplinary Procedure* (describing procedures of Yale Graduate School Committee on Regulations and Discipline)<sup>6</sup>; Edward N. Stoner II & Kathy L. Cerminara, *Harnessing the "Spirit of Insubordination": A Model Student Disciplinary Code*, 17 J. of College & Univ. Law 89, 96-98, 110-21 (1990) (describing model university disciplinary process consisting of "judicial body" and appellate board).

The Sixth Circuit's decision will thus have wide-ranging (and devastating) impacts. Indeed, even a brief search reveals examples of egregious conduct that would, under the Sixth Circuit's ruling, have evaded any meaningful remedy.

In *Doe v. Mercy Catholic Medical Center*, for instance, a medical resident brought suit under Title IX for retaliation after rejecting the sexual advances of a supervising physician. 850 F.3d 545, 550-67 (3d Cir. 2017). She alleged that the physician retaliated against her by, among other things, reporting her to

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<sup>4</sup> Available at <https://handbook.rhodes.edu/title-ix-sexgender-discrimination-and-sexual-misconduct-policy/formal-grievance-policy/section-iv> (last visited Sept. 21, 2020).

<sup>5</sup> Available at <https://handbook.fas.harvard.edu/book/administrative-board-harvard-college> (last visited Sept. 21, 2020).

<sup>6</sup> Available at [https://gsas.yale.edu/sites/default/files/page-files/gsas\\_grievance\\_and\\_disciplinary\\_procedures.pdf](https://gsas.yale.edu/sites/default/files/page-files/gsas_grievance_and_disciplinary_procedures.pdf) (last visited Sept. 21, 2020).

human resources, reporting false information about her examination performance, and eventually obtaining her removal from the medical residency. *Id.* at 550-51; *see id.* at 564 (vacating district court's dismissal of retaliation claim). Yet under the Sixth Circuit's ruling, none of this would be actionable because the resident's expulsion was effectuated by an "appeals committee," and there was no allegation that the committee *itself* harbored sex-biased motivations. *Id.* at 551.

Similarly, in *Papelino v. Albany College of Pharmacy of Union University*, a student claimed that he faced trumped-up charges after he rebuffed and reported harassment by his medicinal chemistry professor. 633 F.3d 81, 86 (2d Cir. 2011); *see id.* at 85-86 (describing harassment). Much like this case, after the student threatened to report the professor's sexual advances and unwanted touching, the professor's "attitude changed," and manufactured evidence and accusations of cheating followed. *Id.* at 86. The school's Honor Code Panel found the student guilty, the school's Appellate Board declined to overturn the ruling, and the student was expelled. *Id.* at 86-87; *see Pet.* 10-11 (discussing Second Circuit's finding of sufficient causal link between accusations and expulsion). Yet once again, the involvement of those disciplinary bodies means that under the Sixth Circuit's ruling, no remedy would be available for this egregious behavior. *See Pet. App.* 14a.

The Department of Education has recognized that similar stories are all too common, justifying one recent rulemaking in part on hearing "from individuals who faced retaliation for filing complaints," including "lost scholarships due to rebuffing sexual advances from teachers." 85 Fed.

Reg. 30,026, 30,057 (May 19, 2020); *see also* Pet. 16 & n.3. And, of course, there are many more students who face similar retaliation but hesitate to report it—and thus whose stories are never known. *Infra* 13-14.

In sum, under the Sixth Circuit’s ruling, nearly any disciplinary decision, at nearly every university in America, will be immune from scrutiny under Title IX—even if that decision results in a student’s total exclusion from a school’s educational programs, is based entirely on sexual harassment or retaliation, and the committee which carries out the disciplinary decision *knows* all of this. That result cannot stand.

## **II. THE SIXTH CIRCUIT’S HOLDING WILL FRUSTRATE MUCH-NEEDED EFFORTS TO DETER HARASSMENT AND RETALIATION IN ACADEMIA AND HOLD OFFENDERS ACCOUNTABLE**

These consequences would be troubling in any context. But they are especially harmful in the context of higher education. As has been well documented, sexual harassment is unfortunately common in academia; particularly pervasive in the STEM disciplines; and exceptionally damaging when committed by faculty against students. By foreclosing a Title IX remedy when professors engage in harassment or retaliation via honor councils, faculty committees, or any of the other bodies commonly charged with carrying out disciplinary actions, the Sixth Circuit’s decision will only embolden harassers, perpetuate sexual harassment on campus, and intensify a sense of impunity among bad actors.

In one recent study, more than one in four undergraduate women reported being subjected to nonconsensual sexual contact, nearly one in five

students reported suffering sexually harassing behavior with severe effects, and 24% of graduate and professional women who were sexually harassed reported that the harassment was perpetrated by a faculty member or instructor. David Cantor, et al., Ass'n of Am. Univs., *Report on the AAU Campus Climate Survey on Sexual Assault and Misconduct* at ix, xiii, A7-5 (rev. Jan. 17, 2020).<sup>7</sup>

The situation is particularly dire within the male-dominated STEM disciplines. In those fields, as much as 43% of female graduate students and 50% of female medical students reported suffering sexual harassment from faculty or staff. National Academies of Sciences, Engineering, and Medicine, *Sexual Harassment of Women: Climate, Culture, and Consequences in Academic Sciences, Engineering, and Medicine* 1 (Paula A. Johnson et al. eds., 2018) (“National Academies Report”)<sup>8</sup>; *see also* Joan C. Williams & Kate Massinger, *How Women Are Harassed Out of Science*, *The Atlantic* (July 25, 2016). Similarly, in one survey of undergraduate women

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<sup>7</sup> Available at [https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/Revised%20Aggregate%20report%20%20and%20appendices%201-7\\_\(01-16-2020\\_FINAL\).pdf](https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/Revised%20Aggregate%20report%20%20and%20appendices%201-7_(01-16-2020_FINAL).pdf).

<sup>8</sup> Available at <https://www.nap.edu/download/24994>. Even these numbers may be underestimates, as “many women label only the most serious behaviors as sexual harassment,” with “other ‘less serious’ behaviors accepted as normative and routine.” Delese Wear & Julie Aultman, *Sexual Harassment in Academic Medicine: Persistence, Non-Reporting, and Institutional Response*, *Medical Education Online* 10:10 at 5 (2005), [https://www.researchgate.net/publication/255615956\\_Sexual\\_Harassment\\_in\\_Academic\\_Medicine\\_Persistence\\_Non-Reporting\\_and\\_Institutional\\_Response/link/0a85e53b47ad48bac1000000/download](https://www.researchgate.net/publication/255615956_Sexual_Harassment_in_Academic_Medicine_Persistence_Non-Reporting_and_Institutional_Response/link/0a85e53b47ad48bac1000000/download).

studying physics, approximately three quarters of participants reported being subjected to some form of sexual harassment. Lauren M. Aycocock, et al., *Sexual harassment reported by undergraduate female physicists*, 15 *Physical Review Physics Education Research* 010121-1 (2019).<sup>9</sup>

This harassment has severe and ongoing effects. Individuals “who experience sexual harassment in post-secondary settings suffer mental, psychological, physical, academic, and work-related consequences—including lower GPA for students.” Stephen J. Aguilar & Clare Baek, *Sexual harassment in academe is underreported, especially by students in the life and physical sciences*, *PLoS ONE* (15)(3): e0230312 at 1 (Mar. 10, 2020).<sup>10</sup> For instance, female medical students “who experienced any sexual harassment by faculty or staff, compared with those who had not, reported significantly worse physical . . . and mental health outcomes.” National Academies Report 281.

Many students, moreover, hesitate to report faculty harassment because they fear precisely the sort of retaliation perpetrated in this case. One study found that students were 1.6 times more likely to decline to report their harassment when the harassment was committed by faculty—with even greater reporting disparities in the sciences. Aguilar & Baek, *supra*, at 1 (abstract). And victims are particularly unlikely to come forward “when the perpetrator is a prominent scientist.” *Id.* at 2. Similarly, a study of medical students reported a

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<sup>9</sup> Available at <https://journals.aps.org/prper/pdf/10.1103/PhysRevPhysEducRes.15.010121>.

<sup>10</sup> Available at <https://doi.org/10.1371/journal.pone.0230312>.

“strong sentiment . . . that reporting harassment is futile and indeed may have repercussions to the student.” Delese Wear & Julie Aultman, *Sexual Harassment in Academic Medicine: Persistence, Non-Reporting, and Institutional Response*, Medical Education Online 10:10 at 5 (2005).<sup>11</sup> As one student explained, “What are you going to do? Tell the clerkship director? Then that person is going to be called into his office and that person is going to get slapped on the wrist and then your grade is going to suffer.” *Id.*

In issuing guidance and regulations to address what the Department of Education’s Office for Civil Rights has deemed a “high priority,” Office for Civil Rights, Dep’t of Educ., *Sexual Harassment Guidance* (Mar. 13, 1997),<sup>12</sup> the Department has recognized the reality of these problematic trends. In 1997, for instance, the Department made clear that “due to the power that a professor or teacher has over a student, sexually based conduct by that person toward a student is more likely to create a hostile environment than similar conduct by another student.” 62 Fed. Reg. 12,034, 12,041 (Mar. 13, 1997). And a student’s “failure to immediately complain,” may “merely reflect a fear of retaliation or a fear that the complainant may not be believed rather than that the alleged harassment did not occur.” *Id.*

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<sup>11</sup> Available at [https://www.researchgate.net/publication/255615956\\_Sexual\\_Harassment\\_in\\_Academic\\_Medicine\\_Persistence\\_Non-Reporting\\_and\\_Institutional\\_Response/link/0a85e53b47ad48bac1000000/download](https://www.researchgate.net/publication/255615956_Sexual_Harassment_in_Academic_Medicine_Persistence_Non-Reporting_and_Institutional_Response/link/0a85e53b47ad48bac1000000/download).

<sup>12</sup> Available at <https://www2.ed.gov/about/offices/list/ocr/docs/sexhar00.html>.

Moreover, even when victims *do* come forward, they are frequently ignored—particularly when reporting harassment by prominent professors. One star astronomer at the University of California, Berkeley, for instance, was reported by four women for severe sexual harassment, including unwanted kissing, groping, and massaging. See Colleen Flaherty, *Putting Harassers on Notice*, Inside Higher Ed (Oct. 15, 2015).<sup>13</sup> Yet the University did not seek to fire him, instead placing him on probation and extracting a promise not to repeat the behavior. *Id.* It was only after widespread condemnation from his colleagues that he was forced to resign. *Id.* Similarly, a Harvard professor was found responsible for “serious misconduct in the 1980s,” and had a decades-long pattern of sexual harassment, yet nonetheless was not dismissed until 2019—indeed the professor was steadily promoted to vice provost for international affairs. See Tom Bartlett & Nell Gluckman, *She Left Harvard. He Got To Stay*, Chronicle of Higher Education (Feb. 27, 2018); Joey Garrison, *Harvard bans ex-professor after finding ‘unwelcome sexual conduct’ spanned four decades*, USA Today (May 11, 2019)<sup>14</sup>; see also National Academies Report 52 (“Higher education environments are perceived as permissive environments in part because when targets report,

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<sup>13</sup> Available at <https://www.insidehighered.com/news/2015/10/15/berkeley-astronomer-resigns-over-sexual-harassment-investigation>.

<sup>14</sup> Available at <https://www.usatoday.com/story/news/nation/2019/05/09/harvard-university-professor-jorge-dominguez-sexual-harassment-misconduct-metoo-title-ix/1154497001/>.

they are either retaliated against or nothing happens to the perpetrator.” (footnote omitted)).

Instead of taking action, colleges and universities regularly reward abusive faculty with silence, ongoing public accolades, tacit support, and even promotion.<sup>15</sup> And even when harassing professors are let go, schools often provide positive referrals for their next position in academia, referring them on with no mention of a disciplinary reason for their departure—a practice so commonplace it is known as “pass the prof.” As a result, professors are often given free rein to continue abusing more students and faculty members.

Instances of retaliation, too, are disturbingly common. Recently, for example, a professor who was ultimately found to have sexually assaulted a drunk student hired private investigators to question, intimidate, and undermine his accusers. See Katherine Mangan, *Professor Who Complained of Vigilante Justice Is Found Responsible for Harassment*, *Chronicle of Higher Education* (Sept. 25, 2018).

The Sixth Circuit’s ruling will only exacerbate this institutional impulse towards shielding professors, and will embolden harassing faculty members by

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<sup>15</sup> At Columbia University, for instance, a graduate student brought suit against a renowned history professor for sexual harassment and retaliation—kissing and groping her repeatedly and then insulting her to other faculty members after she refused his advances. He was nonetheless allowed to retire as part of a settlement with the school—and despite other women coming forward with complaints, he retained access to campus and kept his Columbia-owned faculty apartment. Vivian Wang, *Columbia Professor Retires in Settlement of Sexual Harassment Lawsuit*, *N.Y. Times* (Dec. 18, 2017).



reducing the incentive of disciplinary boards to scrutinize retaliatory accusations. Consider a faculty appeals board investigating whether to expel a student based on a star professor's accusations of cheating. The board has every practical incentive to believe their colleague's accusation, rather than to seriously investigate the student's claim that the cheating charge was intended to punish the student for rejecting the professor's harassment. And that appeals board would have even *less* motivation to take the student's explanation seriously if the board's decision to expel her is categorically immune from liability under Title IX. By contrast, if universities are held accountable in these circumstances, they will be incentivized to root out misbehavior and closely scrutinize disciplinary accusations to ensure that their students are not denied educational opportunities on the basis of sex.

This Court has previously recognized the crucial role that such practical concerns play in Title IX jurisprudence, holding that Title IX's private right of action encompasses retaliation claims in part because “[w]ithout protection from retaliation, individuals who witness discrimination would likely not report it . . . and the underlying discrimination would go unremedied.” *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 180–81 (2005). The Sixth Circuit's holding in this case would have precisely the effects of which *Jackson* warned—a result all the more egregious because it lacks any justification in text or case law. This Court's review is needed.

**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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*Counsel for Amicus Curiae Legal Momentum*

September 24, 2020

**ADDENDUM**

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**LIST OF *AMICI CURIAE*****American Association of University Women  
("AAUW")**

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 to advance gender equity. In adherence to 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.

**Champion Women**

Champion Women is a non-profit educational organization providing legal advocacy for girls and women in sports. Focus areas include Title IX compliance in athletics, including participation; scholarships and treatment; sexual harassment; abuse and assault; employment; pregnancy; and LGBT discrimination. Title IX is vital to women's educational trajectory, and maintaining strong Title IX case law and ensuring that students have a remedy for sexual harassment, violence,

and abuse, is a core function of Champion Women.

**The National Center for Lesbian Rights (NCLR)**

NCLR is a national organization committed to protecting and advancing the rights of lesbian, gay, bisexual, and transgender people through impact litigation, public-policy advocacy, public education, direct legal services, and collaboration with other social justice organizations and activists.

**The National Organization for Women (NOW) Foundation**

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 equal education opportunities for girls and women and to ending sexual discrimination, sexual harassment, sexual assault, and retaliation against survivors, among other objectives.

**National Women's Political Caucus (NWPC)**

National Women's Political Caucus is a multi-partisan grassroots organization dedicated to increasing women's participation in the political process. NWPC recruits, trains and supports pro-choice women candidates for elected and appointed offices at all levels of government. Since the organization's founding in 1971, NWPC has remained dedicated to achieving equality for women. NWPC has a

strong awareness of the importance of Title IX protections for victims of sexual harassment and has a keen interest in the outcome of this litigation.

**Women Lawyers On Guard Inc. (WLG)**

WLG 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. WLG has participated as amicus curiae in a range of cases before this Court and other federal courts to secure the equal treatment of women under the law and to challenge sex discrimination and gender-based violence and harassment.

**The Women's Law Project (WLP)**

WLP is a Pennsylvania-based nonprofit public interest legal advocacy organization that seeks to advance the legal, social, and economic status of all people, regardless of gender. To that end, WLP engages in impact litigation and policy advocacy, public education, and individual counseling. Founded in 1974, WLP prioritizes program activities and litigation on behalf of those who are marginalized across multiple identities and disadvantaged by multiple systems of oppression. Throughout its history, WLP has played a leading role in the struggle to eliminate discrimination based on sex, including working to end violence against women and girls and to safeguard the legal rights of students who experience sexual

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misconduct and violence in schools and universities. To this end, WLP engages in public-policy advocacy to improve the response of educational institutions to sexual violence. The organization also counsels and represents students who have been subjected to sexual misconduct on campuses and in schools. WLP believes it is essential that schools respond appropriately to sexual harassment and that courts hold them accountable under the law.