

17-3207, 17-3208

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IN THE  
**United States Court of Appeals**  
**FOR THE TENTH CIRCUIT**

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TESSA FARMER,

—v.—

*Plaintiff-Appellee,*

KANSAS STATE UNIVERSITY,

*Defendant-Appellant.*

SARA WECKHORST,

—v.—

*Plaintiff-Appellee,*

KANSAS STATE UNIVERSITY,

*Defendant-Appellant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS  
HONORABLE JULIE A. ROBINSON  
NOS. 2:16-CV-02255-JAR-GEB, 2:16-CV-02256-JAR-GEB

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**BRIEF OF *AMICI CURIAE* IN SUPPORT OF APPELLEES  
SARA WECKHORST AND TESSA FARMER ON BEHALF OF  
THE NATIONAL WOMEN’S LAW CENTER, ET AL.**

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**CORPORATE DISCLOSURE STATEMENT**

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

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**STATEMENT OF *AMICI CURIAE***

The National Women’s Law Center (NWLC) is a non-profit legal advocacy organization dedicated to the advancement and protection of women’s legal rights and opportunities since its founding in 1972. Because equal access to education is essential to women’s full equality, NWLC seeks to protect women’s and girls’ rights to an educational environment free of sexual harassment.

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

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

## **INTRODUCTION AND SUMMARY OF THE ARGUMENT**

This case is about Kansas State University’s (“K-State”) refusal to investigate the sexual assaults and resulting hostile educational environment suffered by two of its female students who were raped by K-State male students during fraternity events. The students, Tessa Farmer and Sara Weckhorst, reported their rapes and the attendant hostile educational environment to University officials—including their constant fear of the accused students, harassment they faced from other students about the rapes, and their academic difficulties that ensued as a result of the rapes. But K-State took no action in response to their reports because the rapes occurred “off-campus” at a fraternity house, despite its clear obligation under Title IX to address sexual violence that creates a hostile environment on campus, even if perpetrated outside the school’s grounds.<sup>1</sup> As the district court correctly held, these facts are more than sufficient to state a claim that K-State was deliberately indifferent to known sexual harassment that interfered with the two students’ ability to access educational opportunities, in violation of Title IX.

On appeal, K-State—relying on an incorrect reading of the Supreme Court’s decision in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999)—

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<sup>1</sup> The district court found the female students sufficiently alleged K-State had substantial control over the Fraternity and the alleged assailants. JA 495; 1131. This finding is not on appeal.

argues that the district court erred in allowing Ms. Farmer and Ms. Weckhorst to proceed with their Title IX claims because they did not allege that the school's deliberate indifference to their rapes caused them to be harassed by their assailants *again*. This argument is specious, and if accepted, would subject students to the very discrimination that Title IX was enacted to combat. Sexual harassment, which includes sexual violence, plagues students in schools at every level across the country, interfering with their ability to learn and continue their education. Title IX was passed to ensure that no student is denied access to educational opportunities on the basis of sex, which is why schools are required to address the hostile educational environment that sexual violence creates for its victims. Ms. Farmer and Ms. Weckhorst have sufficiently alleged that K-State failed to do so here. Accordingly, the district court's decision should be affirmed.

### **ARGUMENT**

#### **I. K-State's Argument that It Is Not Liable Because Appellees Did Not Suffer Further Assaults or Harassment Must Be Rejected**

When presented with Ms. Weckhorst and Ms. Farmer's horrific accounts of rape, K-State refused to investigate the reports, discipline the assailants, or take any meaningful steps to address the traumatic toll the assault took on the victims as they sought to continue their education on the same campus as their assailants. Joint Appendix ("JA") 17, 480-83; 1113-19. Seeking now to shift the inquiry away from its own failures, K-State insists that it should be absolved of Title IX

liability merely because Ms. Farmer and Ms. Weckhorst were by chance—not owing to any responsive action by K-State—not raped or harassed a second time by their assailants. Their argument is based on a legally incorrect reading of the Supreme Court’s decision in *Davis*, and would sanction indifference and inaction rather than incentivize the proactive measures necessary to preserve the protections Title IX affords.

Specifically, K-State attempts to add an element to the framework set forth by the Supreme Court in *Davis* by arguing that Ms. Farmer and Ms. Weckhorst have to show that they suffered further harassment after they reported their respective rapes to K-State. But K-State misapprehends the Court’s opinion in *Davis*, which certainly does not require that students be harassed or raped again after an initial sexual assault to trigger a school’s duty to address the hostile educational environment that results.

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

response to the harassment was clearly unreasonable in light of the known circumstances. *Id.* at 633, 649-50.

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



phrase, ‘make liable and vulnerable’ would be redundant if construed to require further harassment, the Court is not persuaded that [the university’s] interpretation is correct.”).

The clear meaning of the *Davis* line in question is further illuminated by the surrounding text discussing the range of misconduct for which a school can be liable when it has not engaged in harassment directly. *Davis* does not require plaintiffs to prove anything apart from deliberate indifference to known peer harassment (which includes sexual assault) that creates a hostile educational environment. As the Court stated in explaining the language on which K-State relies: “We . . . conclude that recipients of federal funding may be liable for ‘subject[ing]’ their students to discrimination where the recipient is deliberately indifferent to known acts of student-on-student sexual harassment and the harasser is under the school’s disciplinary authority.” *Davis*, 526 U.S. at 646-47. K-State’s refusal to take any action in response to the reported rapes is precisely the sort of “deliberate indifferen[ce] to known . . . sexual harassment” that subjects students to discrimination. Thus, Appellees need allege nothing more.

K-State’s contrary position requires a tortured reading of “liable or vulnerable” in clear conflict with the surrounding text and *Davis*’s overarching approach. Not surprisingly, numerous courts have rejected exactly the reading K-State proposes, correctly holding that a student-victim does not have to face further

harassment as a result of a school's deliberate indifference in order to establish liability under Title IX. *See, e.g., Fitzgerald*, 504 F.3d at 172 (citing and ultimately endorsing cases that conclude that a single incident of pre-notice harassment may be enough for Title IX liability); *Williams v. Bd. of Regents of Univ. Sys. of Georgia*, 477 F.3d 1282, 1297 (11th Cir. 2007) (holding school may be liable under Title IX where university fails to timely respond to sexual assault, even if student withdraws from school as a result and so experiences no further harassment); *Wells v. Hense*, 235 F. Supp. 3d 1, 8 (D.D.C. 2017) ("Title IX does not require that a defendants' deliberate indifference lead to subsequent actionable harassment."); *Doe v. Baylor Univ.*, 240 F. Supp. 3d 646, 660 (W.D. Tex. 2017), *motion to certify appeal denied*, No. 6:16-CV-173-RP, 2017 U.S. Dist. LEXIS 65498 (W.D. Tex. May 1, 2017) ("[T]he discriminatory harm can include the harm faced by student-victims who are rendered vulnerable to future harassment . . ."); *Spencer v. Univ. N.M. Bd. of Regents*, No. 15-CV-00141, 2016 WL 10592223, at \*16 (D.N.M. Jan. 11, 2016); *Karasek v. Regents of the Univ. of California*, No. 15-CV-03717, 2015 WL 8527338, at \*12 (N.D. Cal. Dec. 11, 2015) (citing and joining cases that "recognize that it is possible for a plaintiff to bring a Title IX claim against an educational institution even in the absence of any further affirmative acts of harassment by the alleged harasser or other students or faculty"); *Takla*, 2015 WL 6755190, at \*4 ("[P]lacing undue emphasis on whether

further harassment actually occurred . . . would penalize a sexual harassment victim who takes steps to avoid the offending environment . . .”).

Vulnerability to harassment, per *Davis*, is discrimination enough. The presence of the alleged harasser on campus and the accompanying risk that the survivor might encounter her attacker and face further harm creates a “hostile environment that effectively deprive[s] [the survivor] of the educational opportunities or benefits provided by the school.” *Doe v. Derby Bd. of Educ.*, 451 F. Supp. 438, 444 (D. Conn. 2006) (quoting *Kelly v. Yale Univ.*, No. 01-CV-1591, 2003 WL 1563424, at \*3 (D. Conn. Mar. 26, 2003)). Quite simply, “[i]n the context of Title IX, there is no ‘one free rape’ rule.” *Spencer*, 2016 WL 10592223, at \*16 (internal quotations omitted).

*Davis* and its progeny do not require a student to endure further harassment or assaults before she can bring a Title IX claim against a university for its deliberate indifference to an initial sexual assault. The law requires a reasonable response to the *first* reported sexual assault.

## **II. Appellees Sufficiently Pled a Hostile Environment that K-State Was Obligated to Remediate Under Title IX**

Under Title IX, schools must take action to address sexual assault and the hostile environment it creates, including the specific effects on the victim’s access to educational opportunities. In the instant case, K-State did nothing to respond to the initial rapes or the resulting hostile educational environment that Ms. Farmer

and Ms. Weckhorst suffered—the quintessential example of acting with “deliberate indifference to known harassment,” in violation of Title IX.

K-State’s deliberate indifference exacerbated the harms Ms. Farmer and Ms. Weckhorst faced. As courts have recognized, the risk that a student may encounter her rapist on campus can, in itself, constitute a hostile environment. *See, e.g., Kelly*, 2003 WL 1563424, at \*3. Because K-State failed to take any action in response to their reports, Ms. Farmer and Ms. Weckhorst were forced to continue their educations, unprotected, on the same campus as their rapists. In addition to the trauma from the assaults, then, Appellees’ risk and fear of encountering their assailants on campus created a hostile educational environment that precluded them from equal access to the benefits of their education. JA 17, 623-24. The young women clearly pled that they missed class and struggled with grades, suffered from severe depression, withdrew from school-activities, and engaged in self-destructive behavior. *Id.* at 24-27, 629-30, 637-41. One lost her scholarship, *Id.* at 638; the other slit her wrists. *Id.* at 24. But still K-State did nothing in response—a clear violation of Title IX.

K-State’s inaction stands in stark contrast to how other schools have responded in similar circumstances—including establishing response and grievance procedures, providing mental health counseling and academic support, and instituting informal measures to keep victims separate from their assailants.

See Alexandra Brodsky, *Against Taking Rape “Seriously”: The Case Against Mandatory Referral Laws for Campus Gender Violence*, 53 Harv. C.R.-C.L. L. Rev. 101, 104-05 (forthcoming February 2018). A review of the case law also reveals how schools *are* able to take action in response to reports of sexual assault. For example, in *Rost v. Steamboat Springs RE-2 School District*, 511 F. 3d 1114 (10th Cir. 2008), while the school’s response was by no means exemplary, the Tenth Circuit nevertheless found that the school was not deliberately indifferent when it “promptly commenced an extensive investigation” and worked with the plaintiff’s mother “to find safe educational alternatives for” the minor victim, including private tutoring. *Id.* at 1124. As the Court there wrote, “[t]his is not a situation where the school district learned of a problem and did nothing,” *Id.* at 1121-22, as K-State did in the instant case.

Likewise, in *M.D. v. Bowling Green Independent School District*, No. 15-CV-00014, 2017 WL 390280 (6th Cir. 2017), a case relied upon by K-State, *see* App. Br. at 35, the plaintiff alleged her grades declined and she suffered from heightened anxiety, stress, and depression. *Bowling Green*, 2017 WL 390280, at \*4. The school responded to the student-victim’s complaint by immediately conducting an investigation, which ultimately led to its decision to remove the perpetrator. *Id.* at \*6. Even after the perpetrator returned to the school the next year, the school “took proactive steps” to prevent future contact. *Id.* For example,

the school compared the students' class schedules to make sure they would not share any classes together, instructed the perpetrator not to contact the plaintiff, and monitored the hallways to ensure there was no contact between the two students. *Id.*

These cases demonstrate the wide variety of remedial steps schools can and should, at a minimum, take in order to ensure that students are not denied equal access to educational opportunities as a result of sexual assault, as Title IX requires. But schools need not engage in a guessing game: the steps taken by the schools in the above cases are consistent with express guidance on Title IX and sexual harassment issued by the Department of Education in 1997 and 2001. This guidance highlights those “actions that schools should take to prevent sexual harassment or to address it effectively if it does occur.” *See* Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 66 Fed. Reg. 5512, at 2 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> (“2001 Guidance”); Office for Civil Rights, *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 62 Fed. Reg. 12034, 12042 (Mar. 13, 1997) (“1997 Guidance”). For example, a school should explain the avenues for informal and formal action, counsel or warn the harasser, or make any necessary arrangements separating the harasser from the victim. 2001

Guidance at 15-16. According to OCR, “[r]esponsive measures . . . should be designed to minimize, as much as possible, the burden on the student who was harassed.” *Id.* at 16.

While schools have flexibility to craft a reasonable response, total inaction is clearly insufficient to satisfy Title IX. Indeed, as recently as November 2017, OCR concluded that the State University of New York violated Title IX by failing to conduct an investigation after receiving information about an off-campus sexual assault and failing to address the effects of the assault on the victim’s education. *See* Andrew Kreighbaum, *Title IX Failures*, Inside Higher Ed. (January 19, 2018), <https://www.insidehighered.com/news/2018/01/19/feds-find-buffalo-state-failed-investigate-alleged-sexual-assault-created-hostile> (providing PDF copy of letter from Timothy Blanchard, OCR, to Katherine S. Conway-Turner, President of Buffalo State, State University of New York dated November 2, 2017 regarding Case No. 02-15-2085). Importantly, that the victim was not harassed again after her report did not absolve the school of responsibility, as K-State erroneously argues should be the case. OCR described the types of steps the university should have taken not only to prevent future harm but also to address the educational impact of the reported assault, which the school had a duty to remediate regardless of whether the victim faced additional harassment. These included “counseling, extensions of time or other course-related adjustments, modifications of work or

class schedules, campus escort services, restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of campus, and other similar accommodations.” *Id.*

K-State’s refusal to take a single step to address the rapes and hostile educational environment faced by two of its students, despite their multiple pleas for help, reflects deliberate indifference to their plight. Under *Davis*, this is precisely the case “of a school making no effort whatsoever either to investigate or to put an end to harassment.” *C.R.K. v. U.S.D. 260*, 176 F. Supp. 2d 1145, 1166-67 (D. Kan. 2001) (internal quotations omitted).

### **III. Title IX’s Requirement that Schools Address Sexual Violence Is Essential to Ensuring a Safe Learning Environment**

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

At stake in the instant case are the educations of students across the country. Despite criminal prohibitions as well as civil rights protections, sexual assault remains prevalent in schools, causing lasting harm to students and interfering with their ability to benefit from educational opportunities. Numerous studies report that at least one in five women suffer sexual assault or attempted sexual assault in college. *See generally* Christopher P. Krebs, et al., *The Campus Sexual Assault (CSA) Study*, Nat’l Inst. Just. (2007), <https://www.ncjrs.gov/pdffiles1/nij/grants>



/221153.pdf; Mary P. Koss, et al., *The Scope of Rape: Incidence and Prevalence of Sexual Aggression and Victimization in a National Sample of Higher Education Student*, 55 *Journal of Consulting & Clinical Psychology* No. 2, 162 (1987); see also Dana Bolger, *Gender Violence Costs: Schools' Financial Obligations Under Title IX*, 125 *Yale L.J.* 2106, 2109 (May 2016); Carol E. Jordan, et al., *An Exploration of Sexual Victimization and Academic Performance Among College Women*, 38 *Univ. of Ky. Office for Policy Studies on Violence Against Women Pub'ns* 1, 3 (2014) (citing additional studies).

While more data is needed on sexual assault in elementary and secondary schools, a National Women's Law Center (NWLC) 2017 national survey<sup>2</sup> found that more than 1 in 5 girls ages 14-18 were sexually assaulted. In addition, a recent investigative study by the Associated Press revealed about 17,000 official reports of sex assaults by K-12 students between Fall 2011 and Spring 2015. See Robin McDowell, et al., *Hidden Horror of School Sex Assaults Revealed by AP*, *The Associated Press* (May 1, 2017), <https://www.ap.org/explore/schoolhouse-sex-assault/hidden-horror-of-school-sex-assaults-revealed-by-ap.html>. And that number does not fully capture the extent of the problem due to the known vast

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<sup>2</sup> See Kayla Patrick and Neena Chaudhry, National Women's Law Center, *Let Her Learn: Stopping School Pushout for Girls Who Have Suffered Harassment and Sexual Violence* 1 (2017), <https://nwlc.org/resources/stopping-school-pushout-for-girls-who-have-suffered-harassment-and-sexual-violence/>.

underreporting of sexual assault, as well as lack of data collection by states and the federal government.

Apart from its prevalence, the existing literature on sexual assault confirms the obvious: that these experiences are highly traumatic and negatively affect a student's ability to access the benefits of education. Bolger, *supra*, at 2111.

Studies show student-victims often fear encountering their perpetrators and thus employ a number of strategies to avoid them, including skipping classes, avoiding shared spaces, hiding in dorm rooms, and transferring or dropping out of college.

Bolger, *supra*, at 2109-10; Jordan, *supra*, at 5-6; see Office for Civil Rights, *Dear Colleague Letter* (Apr. 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>. One study about the effects of sexual assault and rape on the academic performance of college women revealed that rape survivors saw a significant drop in their GPAs following the attack: 14.3% of women raped during their first semester of college ended that semester with a GPA below 2.5, compared to 6% of women who were not raped. Jordan, *supra*, at 18-19 (noting that GPA did not predict being a victim).<sup>3</sup>

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<sup>3</sup> The research also showed that although experiencing sexual assault in the first semester predicted lower GPA at the end of the semester but not at the end of the following semester. The researchers provide two possible explanations – that the women's lives stabilized or women dropped out due to decline in grades.

Equally significant are the emotional and mental distress and monetary harms that student-victims suffer following a sexual assault. Many suffer from depression, post-traumatic stress disorder, eating disorders, anxiety attacks, flashbacks, nightmares, and attempts at suicide or self-harm. Bolger, *supra*, at 2109-10; Jordan, *supra*, at 5-6.<sup>4</sup> These traumatic emotional tolls exacerbate the monetary harms: Student-victims are forced to bear not only medical costs, but the long-term, career-affecting costs associated with decreased academic performance—including withdrawal of scholarship or financial aid packages, academic probation, and expulsion. For example, one undergraduate described how after her school “grossly mishandled” her case, she took three years off from school; lost \$30,000 in tuition when she transferred schools; spent an extra \$2,000 to live off-campus; and spent over \$7,000 over three years on counseling. Bolger, *supra*, at 2115-18.<sup>5</sup>

**B. Title IX Protects Students from Being Denied Access to Educational Opportunities as a Result of Sexual Violence**

The well-documented deleterious educational impact of sexual assault underscores why Title IX requires schools to take action to address it—not merely

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<sup>4</sup> A survey conducted by the NWLC further revealed problems with concentration, behavior, and physical altercations among school-age girls as a result of experiencing sexual violence or harassment. *See* Patrick and Chaudry, *supra*, at 8.

<sup>5</sup> Another survivor reported incurring an additional \$100,000 in expenses after her assault. *Id.* at 2116-17.

to prevent reoccurrence but to remediate the discriminatory effects of past violence, as K-State failed to do. Title IX protects students from being denied access to the benefits of education on the basis of their sex, benefits that are stripped from student-victims of peer sexual assault when a school fails to take appropriate corrective action in response to the hostile environment that results. *See Davis*, 526 U.S. at 653; *Cohen v. Brown Univ.*, 991 F.2d 888, 894 (1st Cir. 1993); *C.R.K.*, 176 F. Supp. 2d at 1163; *Doe v. Oyster River*, 992 F. Supp. 467, 475 (D.N.H. 1997); *S.S. v. Alexander*, 177 P.3d 724, 744 (Wash. Ct. App. 2011).

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

The Department of Education’s Title IX regulations also require a funding recipient, upon a finding of discrimination, to take remedial action to overcome the

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

Consistent with the statute, regulations, and the Supreme Court’s decision in *Davis*, courts have held that sexual violence inherently creates a hostile environment and inflicts educational harms that schools are required to address. *M.D. v. Bowling Green Indep. Sch. Dist.*, 2017 WL 390280, at \*4 (“[S]exual assault constitutes one of the most severe forms of sexual harassment imaginable and has the potential to be so traumatic that the victim is effectively denied equal access to the education opportunities or benefits provided by the school”); *Thomas v. Bd. of Trs. of the Nebraska State Colls.*, No. 12-CV-412, 2014 WL 12577381, at \*4 (D. Neb. Mar. 31, 2014) (“Sexual assault is, by its very nature, the sort of thing that can be expected to interfere with a student’s ability to function at school.”);

*see also Tubbs v. Stony Brook Univ.*, No. 15-CV-0517, 2016 WL 8650463, at \*6 (S.D.N.Y. Mar. 4, 2016) (citing cases).

The highly traumatic nature of sexual assault and the well-documented effects it has on victims are precisely what denies victims equal access to the benefits of their education. Even if the victim is not further harassed, the university has a responsibility to address the discriminatory injuries already caused. When a school does *nothing* in response to a student's report of sexual assault, as K-State did here, it exacerbates the precise harms Title IX seeks to prevent and frustrates the statute's very purpose: to eliminate sex-based discrimination and remediate its effects. *See* 34 C.F.R. § 106.1; 2001 Guidance at i; *see also* Office for Civil Rights, *Dear Colleague Letter* (Jan. 25, 2006), <https://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html> (increasing the awareness of sexual harassment and reiterating that “[p]reventing and remedying sexual harassment in schools is essential to ensuring a safe environment in which students can learn”).

### **CONCLUSION**

For the foregoing reasons, the district court's decisions should be affirmed.

Dated: February 9, 2018

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I hereby certify that with respect to the foregoing:

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**APPENDIX: INTERESTS OF *AMICI CURIAE***

The **SurvJustice, Inc.** (“SurvJustice”) is a national not-for-profit organization that increases the prospect of justice for survivors by holding both perpetrators and enablers of sexual violence accountable. SurvJustice does this by providing effective legal assistance to survivors that enforce their rights in campus, criminal and civil systems of justice. SurvJustice also provides policy advocacy and institutional training to changemakers working within their communities to better prevent and address sexual violence. By working on these fronts, SurvJustice aims to decrease the prevalence of sexual violence throughout the country.

In 1881, the **American Association of University Women** (AAUW) was founded by like-minded women who had defied society’s conventions by earning college degrees. Since then it has worked to increase women’s access to 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.

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

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

The **National Council of Jewish Women** (NCJW) is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW's Resolutions state that NCJW resolves to work for "Laws, policies, programs, and services that protect every woman from harassment, discrimination, and violence." Consistent with our Principles and Resolutions, NCJW joins this brief.

The **Girls, Inc.** is a nonprofit organization that inspires girls to be strong, smart, and bold, through direct service and advocacy. Over 80 local Girls Inc. affiliates provide primarily after-school and summer programming to approximately 150,000 girls ages 5-18 in the U.S. and Canada. Our comprehensive approach to whole girl development equips girls to navigate gender, economic, and social barriers and grow up healthy, educated, and independent. Informed by girls and their families, we also advocate for policies and practices to advance the rights and opportunities of girls and young women. Combatting sexual harassment and assault is a top priority for Girls Inc. because of its prevalence and harmful effect on students' ability to learn and thrive at all levels of education. We work to ensure schools comply with Title IX so that

survivors do not have to confront a discriminatory, hostile environment in violation of their civil rights.

The **Service Employees International Union** (SEIU) represents nearly 2 million employees in health care, property services, and public services, including more than 50,000 faculty and graduate student workers at colleges and universities across the United States. SEIU is deeply committed to advancing gender equality, and ensuring that all campus workers and students can learn and work with dignity.

The **Public Justice, P.C.** is a national public interest law firm that pursues high impact lawsuits to combat social and economic injustice, protect the Earth's sustainability, and challenge predatory corporate conduct and government abuses. Public Justice has long worked to secure educational equity for students through lawsuits designed to enforce their rights under the Constitution and anti-discrimination laws, including Title IX. For example, Public Justice has represented students in numerous cases seeking gender equity in interscholastic and intercollegiate sports, as well as students who were denied equal educational opportunities because of gender-based harassment or sexual violence suffered at school. In Public Justice's experience, holding schools accountable under Title IX is critically important to protecting students against discriminatory practices that deprive them of equal access to education.

The **American Civil Liberties Union Foundation of Kansas (ACLU-KS)** is a nonprofit, nonpartisan organization with over 9,000 members in Kansas and is an affiliate of the national ACLU. ACLU-KS has a longstanding commitment to protecting the civil rights and civil liberties of Kansas women and students. Since its founding, ACLU-KS has challenged educational inequities in Kansas schools through organizing, advocacy, and litigation, either as direct counsel or *amicus curiae*. In addition, ACLU-KS has frequently participated in cases concerning gender equity.

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.

The **Hadassah, the Women's Zionist Organization of America, Inc.**, founded in 1912, is the largest Jewish and women's membership organization in the United States, with over 330,000 members, associates, and supporters nationwide. While traditionally known for its role in developing and supporting health care and other initiatives in Israel, Hadassah has a proud history of



protecting the rights of women and the Jewish community in the United States.

Hadassah supports the right of each individual to study and work in an environment that prohibits sexual assault and harassment.

The **American Federation of Teachers** (AFT), an affiliate of the AFL-CIO, was founded in 1916 and today represents approximately 1.7 million members who are employed across the nation. Many of AFT's members work in educational institutions subject to Title IX. The AFT has a longstanding history of fighting for gender equity and justice and against discrimination and harassment. AFT believes robust Title IX enforcement is necessary to create safe campuses for staff and students, and to provide a path for survivors of sexual assault and harassment to seek redress. AFT thus has a strong interest in maintaining the integrity of Title IX processes to address and prevent harassment and to ensure that educational institutions do not respond to harassment with deliberate indifference.

The **Break the Cycle** is an innovative national nonprofit organization whose mission is to engage, educate, and empower youth to build lives and communities free from domestic and dating violence. Founded in 1996, Break the Cycle is the nation's first organization to provide law-based domestic violence services exclusively to young people, ages 12 to 24. Our domestic violence prevention and early intervention services include education, outreach, and peer leadership opportunities nation-wide, as well as comprehensive, free legal services for young

victims of abuse in Washington, DC. Break the Cycle works on both a national and local level to provide youth with resources they need to end dating abuse and to educate teachers, parents, social service providers, and other caring adults about dating abuse, domestic violence, healthy relationships and the legal options of young victims. Break the Cycle also provides technical assistance and training to criminal justice professionals, teachers, advocates, judges, medical professionals, and other caring adults. Break the Cycle is an active participant in the national and local community of advocates working to shape public policies around dating abuse, domestic violence, sexual assault and stalking.

The **Stop Sexual Assault in Schools** (SSAIS) is a national 501(c)(3) nonprofit organization. We proactively address the epidemic of traumatic sexual harassment impacting our nation's students. We provide students, K-12 schools, and organizations resources so that the right to an equal education is not compromised by sexual harassment, sexual assault, and gender discrimination. Any narrowing of Title IX protections negatively affects the students, families, and communities that we support with our educational programs, and diminishes our effectiveness to implement our mission.

The **Colorado Women's Bar Association** (CWBA) is an organization of over 1,200 Colorado attorneys, judges, legal professionals, and law students founded in 1978 and dedicated to promoting women in the legal profession and the

interests of women generally. The CWBA has an interest in this case because its members, their clients, and other women in Colorado are committed to protecting access to justice for sexual assault victims and equal educational opportunities for women.

The **End Rape On Campus** (EROC) is a national nonprofit organization committed to ending campus sexual violence through directly supporting survivors and their communities, preventing violence through education, and reforming policies on the campus, local, state, and federal levels. EROC is survivor-centered and survivor-led, and regularly assists sexual assault survivors in filing federal Title IX complaints with the U.S. Department Education's Office for Civil Right when their rights are violated.

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

The **Legal Voice** is a progressive feminist organization using the power of the law to make change in the Northwest. We use that power structure to dismantle sexism and oppression, specifically advocating for our region's most marginalized communities.

The **Women Lawyers On Guard Inc.** is a national non-partisan 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.

The **Equal Rights Advocates** (ERA) is a national civil rights advocacy organization dedicated to protecting and expanding economic and educational access and opportunities for women and girls. Since its founding in 1974, ERA has led efforts to combat sex discrimination and advance gender equality by litigating high-impact cases, engaging in policy reform and legislative advocacy campaigns, conducting community education and outreach, and providing free legal assistance to individuals experiencing unfair treatment at work and in school through our national Advice & Counseling program. ERA has filed hundreds of suits and appeared as *amicus curiae* in numerous cases to defend and enforce students' civil rights in state and federal courts, including before the United States Supreme Court.

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

The **Women's Institute for Freedom of the Press** ("WIFP"), founded in 1972, is a nonprofit organization dedicated to media democracy and expanding women's voices and agency. WIFP also focuses on groups and individuals who are not fully represented in the nation's media ownership and decision-making. This includes women of color in particular as well as workers, those in poverty, and the exploited. To right inequities, everyone needs a voice in a democracy.

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.

**The Women's Law Center of Maryland** 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 *amicus* in this consolidated appeal 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.

The mission of the **PRBB Foundation** is to empower women to be a positive force in shaping their families, communities and environment. This cannot happen if women are disempowered by harassment, violence, lack of access to education and lack of access to proper health care. We find it illegal and unconscionable for Kansas State University to violate the language of Title IX that schools must remedy a hostile environment created by a sexual assault to ensure victims can continue to learn in the wake of violence. Kansas State University is currently refusing to do this in regard to the rapes of Sara Weckhorst and Tessa Farmer.

The **Amara Legal Center** provides free legal services to survivors of human trafficking in Washington, DC.

The **National Alliance to End Sexual Violence** (NAESV) is the voice in Washington for the 56 state and territorial sexual assault coalitions and 1,300 rape crisis centers working to end sexual violence and support survivors. The rape crisis centers in NAESV's network see every day the widespread and devastating impacts of sexual assault upon survivors. We oppose any impediments to survivors feeling safe to come forward, receive services, and seek justice.

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