GIVING *DAVIS* ITS DUE: WHY THE TENTH CIRCUIT HAS THE WINNING APPROACH IN TITLE IX'S DELIBERATE INDIFFERENCE CONTROVERSY

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ABSTRACT

Civil claims under Title IX are an increasingly effective legal mechanism for addressing sexual harassment and discrimination in educational settings. Because a private right to action under Title IX was only established by the Supreme Court in 1992, Title IX jurisprudence is often subject to conflicting and varied interpretations, leading to inconsistencies in how it is applied across different jurisdictions. This Article addresses one such conflict—whether plaintiffs who experience sex discrimination must plead that an educational institution's failure to address such harassment led them to experience further harassment, or if a plaintiff's vulnerability to further harassment is sufficient under Title IX. After reviewing the history and intent of Title IX, as well as the recent development of a circuit split on this issue between the Tenth and Sixth Circuits, this Article argues for the adoption of the Tenth Circuit standard, which permits plaintiffs to plead further harassment or vulnerability to further harassment. This standard is most consistent with the plain language of Title IX and the policy considerations that led to Title IX's adoption, and this approach best protects students from ongoing discrimination in their educational environment.

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INTRODUCTION

In the last few decades, our society's response to complaints of sexual assault and sexual violence has shifted. While these issues were once relegated to shameful whispers and reputational stigma, the incredible work of the #MeToo movement, Times Up, and countless other activist organizations has brought sexual violence into the light and continues to demand safer communities, workplaces, and educational experiences for women across the country.[1]

Buttressing these collective efforts are a myriad of laws and statutes promising women equality in public spaces and the right to be free from sex-based discrimination.[2] Within the educational realm, Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq*, has increasingly been recognized as an important means of providing redress for young women who experience discrimination in K–12 educational settings, as well as on university campuses.[3] Applicable wherever an educa-

1. *See* Lesley Wexler, Jennifer K. Robbennolt & Colleen Murphy, *#MeToo, Time's up, and Theories of Justice*, 2019 U. ILL. L. REV. 45, 47, 51–53, 110 (2019).

2. *#MeToo, Time's up and the Legislation Behind the Movement*, BILLTRACK50 (Feb. 15, 2018), https://btfgatsby.revivedesignstudios.com/blog/social-issues/civil-rights/metoo-times-up-and-the-legislation-behind-the-movement/.

3. *See, e.g.*, Lee Green, *Nine Ways Title IX Protects High School Students*, NAT'L FED'N OF STATE HIGH SCH. ASS'NS (May 15, 2018), https://www.nfhs.org/articles/nine-ways-title-ix-protects-high-school-students/. The Authors recognize that Title IX applies to all genders and that survivors

tional institution receives federal funding, Title IX provides a private right of action for individual plaintiffs who have experienced discrimination by an educational institution or its employees, including in instances where students are subjected to discrimination by virtue of a school's failure to respond to known discrimination or harassment by a third party.[4]

For many, Title IX conjures ideas of equality in sports and the right to an equal opportunity to participate in extracurricular activities traditionally offered exclusively, or at least disproportionately, to male students. Only in the last two decades has Title IX emerged as an effective means of combating sexual violence.[5] As a result, despite some measure of guidance by several significant U.S. Supreme Court decisions, Title IX jurisprudence remains enigmatic at times; different and often conflicting interpretations of the statute continue to emerge within the lower courts.[6]

This Article addresses one such controversy, one in which the Tenth Circuit has taken on a significant role. A circuit split has emerged between the Tenth Circuit and Sixth Circuit in the context of claims based on a school's failure to respond to known harassment.[7] Specifically, the question is (a) whether plaintiffs bringing Title IX claims must show that after their initial reports placing the school on notice of assault, harassment, or both, they continued to experience acts of harassment, or (b) whether it is sufficient for plaintiffs to allege that the school's deliberate indifference simply made them vulnerable to further harassment.[8] While the disagreement of the courts hinges on the interpretation of one small phrase[9] set forth by the Supreme Court, the implications of these differing interpretations are enormous, and resolution of the circuit split will

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of sexual harassment and assault are not exclusively female. However, because a significant majority of survivors are female, this Article refers to "women" and uses the pronouns "she" and "her."

4. *See, e.g.*, Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 281, 290 (1998).

5. *See* Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60, 75 (1992) (concluding that Title IX protections include sexual harassment and abuse as a form of sex discrimination).

6. *See, e.g.*, *Current Circuit Splits*, 14 SETON HALL CIR. REV. 91, 104–05 (2017) (describing a split between the Fifth and Seventh Circuits and the First, Third, and Fourth Circuits regarding whether Title IX provides a remedy to individuals alleging employment discrimination on the basis of sex in federally funded educational institutions).

7. *See* Farmer v. Kan. State Univ., 918 F.3d 1094, 1109 (10th Cir. 2019); Kollaritsch v. Mich. State Univ. Bd. of Trs., 944 F.3d 613, 623–24 (6th Cir. 2019).

8. *Farmer*, 918 F.3d at 1106; *Kollaritsch*, 944 F.3d at 623–24.

9. Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 644–45 (1999) ("If a funding recipient does not engage in harassment directly, it may not be liable for damages unless its deliberate indifference 'subject[s]' its students to harassment. That is, the deliberate indifference must, at a minimum, '*cause [students] to undergo*' harassment or '*make them liable or vulnerable*' to it." (emphasis added) (quoting *Subject*, RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (Unabridged ed. 1966))).

likely impact the willingness of plaintiffs to bring Title IX claims for decades to come.[10]

To provide context for the close evaluation of this circuit split, this Article begins by providing background on the legislative intent that drove the passage of Title IX, including the hope that it would serve to eliminate a broad swath of discriminatory behaviors within educational institutions.[11] The Article then turns to the early Supreme Court interpretations of the statute that established a private right of action for damages under Title IX and articulated the standards plaintiffs must meet in bringing such claims.[12] In particular, the Article focuses on the Supreme Court's language in *Davis v. Monroe County Board of Education*,[13] which requires that when a school does not engage in harassment directly, Title IX plaintiffs must show that the school's deliberate indifference to third-party harassment "'cause[d] [students] to undergo' harassment or '[made] them liable or vulnerable' to it."[14] Although the language may appear straightforward, courts have struggled since 1999 to reach a consensus on how it should be interpreted, for reasons described below.[15]

The remainder of the Article focuses on the circuit split that has emerged between the Tenth Circuit and the Sixth Circuit and why, in the context of both the statutory purposes and current events, the Tenth Circuit's approach should be adopted by the majority of the circuit courts, or by the Supreme Court, moving forward. The Article will look closely at the reasoning behind the Tenth Circuit's decision in *Farmer v. Kansas State University*[16] as well as the Sixth Circuit's reasoning in *Kollaritsch v. Michigan State University Board of Trustees*,[17] examining the ways these opinions are consistent and inconsistent with the purpose and intent of Title IX.[18] In light of principles of legal and statutory interpretation, as well as the practical implications of the two decisions for victims of sexual violence, the Article argues the Tenth Circuit's approach conforms

10. As discussed below, the phrase at issue is the language in *Davis* indicating that plaintiffs must be made "liable or vulnerable" to further harassment. *Id.* at 645.

11. *See infra* Part I.

12. *See, e.g.*, Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 281, 290 (1998); Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60, 75 (1992); Cannon v. Univ. of Chi., 441 U.S. 677, 716–17 (1979).

13. 526 U.S. 629 (1999).

14. *Id.* at 645.

15. *Compare* Farmer v. Kan. State Univ., 918 F.3d 1094, 1103 (10th Cir. 2019) ("Davis, then, clearly indicates that Plaintiffs can state a viable Title IX claim by alleging alternatively either that KSU's deliberate indifference to their reports of rape caused Plaintiffs 'to undergo harassment or ma[d]e them liable or vulnerable' to it." (emphasis omitted) (quoting *Davis*, 526 U.S. at 645)), *with* Kollaritsch v. Mich. State Univ. Bd. of Trs., 944 F.3d 613, 623–24 (6th Cir. 2019) ("We hold that the plaintiff must plead, and ultimately prove . . . some further incident of actionable sexual harassment, that the further actionable harassment would not have happened but for the objective unreasonableness (deliberate indifference) of the school's response, and that the Title IX injury is attributable to the post-actual-knowledge further harassment.").

16. 918 F.3d 1094 (10th Cir. 2019).

17. 944 F.3d 613 (6th Cir. 2019).

18. *See* 20 U.S.C. § 1681 (2018).

best with the legislative intent that drove the adoption of Title IX and the legal analysis of the Supreme Court in *Davis*. This approach best ensures female students are broadly protected from sex discrimination during their pursuit of an education, whether in primary school or at college.

I. TITLE IX: A BRIEF HISTORY

A year after the Supreme Court brought the force of the Equal Protection Clause to bear on arbitrary gender distinctions,[19] and a year before that same Court affirmed a woman's right to terminate her pregnancy,[20] Congress passed Title IX of the Education Amendments of 1972, just as states began considering ratification of the Equal Rights Amendment.[21] Title IX, which prohibits educational institutions receiving federal financial assistance from discriminating on the basis of sex, was enacted at the height of second-wave feminism, during a historic push to enshrine gender equity in law and institutions.[22] Once primarily known for placing female scholar-athletes on equal footing with their male counterparts, Title IX has also become a powerful means of addressing gender discrimination in the form of sexual harassment and assault at educational institutions across the country.[23]

The relevant statutory text is brief in phrasing but broad in scope: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[24]

Because "federal financial assistance" includes receiving funds from federal student financial aid programs, Title IX applies to K–12 schools and school districts as well as nearly all U.S. colleges and universities—both public and private.[25] In 1971, Congresswoman Patsy Mink, an early author and champion of Title IX, explained:

> Millions of women pay taxes into the Federal treasury and we collectively resent that these funds should be used for the support of institutions to which we are denied equal access . . . . If we really believe in equality, we must begin to insist that our institutions of higher learn-

19. *See* Reed v. Reed, 404 U.S. 71, 76 (1971).

20. *See* Roe v. Wade, 410 U.S. 113, 154 (1973).

21. 20 U.S.C. §§ 1681–88.

22. *See* Sarah T. Partlow Lefevre, *Second Wave Feminism*, *in* THE SAGE ENCYCLOPEDIA OF COMMUNICATION RESEARCH METHODS 1579, 1579–80, 1582–83 (Mike Allen ed., 2017).

23. *See Title IX Frequently Asked Questions*, NCAA, http://www.ncaa.org/about/resources/inclusion/title-ix-frequently-asked-questions (last visited Dec. 26, 2020) ("[I]t is the application of Title IX to athletics that has gained the greatest public visibility . . . ."); *Title IX and Sexual Violence in Schools*, ACLU, https://www.aclu.org/title-ix-and-sexual-violence-schools (last visited Dec. 26, 2020).

24. 20 U.S.C. § 1681(a).

25. *See Title IX and Sex Discrimination*, U.S. DEP'T OF EDUC., https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html (last updated Jan. 20, 2020); *Title IX Frequently Asked Questions*, *supra* note 23.

> ing practice it or not come to the Federal Government for financial support.[26]

Senator Birch Bayh, Title IX's chief Senate sponsor, introduced the legislation noting that "the impact of this amendment would be far-reaching," offering women "an equal chance to attend the schools of their choice, to develop the skills they want, and to apply those skills with the knowledge that they will have a fair chance to secure the jobs of their choice with equal pay for equal work."[27] Senator Bayh's remarks clearly situate Title IX within the larger push for women to achieve their full educational and professional potential. Moving beyond tokenism, he emphasized that women's mere presence on campus was not enough; equality meant full participation and the opportunity to engage meaningfully in one's education.[28] Anything less, he recognized, hurt not only women's schooling but their future careers and economic horizons as well.[29] Thus, schools allowing discrimination or placing additional obstacles in the way of women's ability to get the most out of their education—to "develop the skills they want"—runs counter to the spirit and intent of Title IX and its broad directive to ensure a national policy that prohibits sex-based discrimination in education.[30]

II. "A SWEEP AS BROAD AS ITS LANGUAGE": TITLE IX IN THE SUPREME COURT

It is in this spirit that the Supreme Court recognized schools' failures to address sexual harassment and sexual assault as actionable sex discrimination prohibited under Title IX. In 1979, the Court found a judicially-implied private right of action in Title IX, acknowledging that the statute "sought to accomplish two related, but nevertheless somewhat different, objectives. First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices."[31] This legal conclusion acknowledges a more practical reality: while Title IX targets schools as potentially discriminatory actors, the consequences of that discrimination are borne by individuals whose advocacy on their own behalf is essential. Moreover, the statutory text's focus on ensuring that "[n]o person . . . shall, on the basis of sex, . . . be subjected to discrimination" clearly centers the potential victim of discrimination and her needs.[32]

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26. 117 CONG. REC. 39,252 (1971).
27. 118 CONG. REC. 5,808 (1972).
28. *See id.*
29. *See id.*
30. *Id.*
31. Cannon v. Univ. of Chic., 441 U.S. 677, 704 (1979).
32. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 296 (1998) (Stevens, J., dissenting) (quoting 20 U.S.C. § 1681(a)).

In 1992, the Court further strengthened Title IX enforcement when it unanimously held in *Franklin v. Gwinnett County Public Schools*[33] that victims may seek monetary damages to remedy a violation of rights—there, a Georgia school district failed to respond to plaintiff's sexual assault at the hands of her high school teacher despite knowledge of the abuse.[34] The court in *Franklin* both acknowledged teacher-on-student harassment as a form of sex-based discrimination under Title IX and spoke plainly about the financial consequences of inaction in the face of such discrimination: "Congress surely did not intend for federal moneys to be expended to support the intentional actions it sought by statute to proscribe."[35] Justice Stevens's dissent in *Gebser v. Lago Vista Independent School District*,[36] a later teacher-on-student harassment case, echoed this notion that Title IX tasks schools with "an affirmative undertaking that is more significant than a mere promise to obey the law."[37] Past decisions, he noted, gave the far-reaching statute "a sweep as broad as its language."[38]

III. *DAVIS* AND THE MODERN TITLE IX STANDARD

The broad sweep of Title IX finally encompassed student-on-student harassment with the 1999 Supreme Court case *Davis v. Monroe County Board of Education*.[39] There, the Court held that a plaintiff seeking damages stemming from harassment by a fellow student must establish that:

> [T]he funding recipient act[ed] with deliberate indifference to known acts of harassment in its programs or activities . . . . [And] that such an action will lie only for harassment that is so severe, pervasive, and objectively offensive that it effectively bar[red] the victim's access to an educational opportunity or benefit.[40]

Specifically, plaintiff's daughter suffered such severe and prolonged harassment at the hands of a fifth grade classmate that her grades dropped, and her fear that she "didn't know how much longer" she could keep her assailant at bay led her to write a suicide note.[41] As she suffered for months on end, the school did nothing about her complaints other than allowing her to move to a different seat in class and verbally reprimanding the perpetrator.[42] Such "deliberate indifference," the court

33. 503 U.S. 60 (1992).
34. *Id.* at 63–64.
35. *Id.* at 75.
36. 524 U.S. 274 (1998).
37. *Id.* at 297 (Stevens, J., dissenting).
38. *Id.* at 296 (internal quotations omitted) (quoting North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 521 (1982)).
39. 526 U.S. 629 (1999).
40. *Id.* at 633.
41. *Id.* at 634.
42. *Id.* at 635.

found, was unacceptable in light of the "concrete, negative effect" on the victim's "ability to receive an education."[43] Significantly, the *Davis* court further elaborated on its deliberate indifference requirement: "If a funding recipient does not engage in harassment directly, it may not be liable for damages unless its deliberate indifference 'subject[s]' its students to harassment. That is, the deliberate indifference must, at a minimum, 'cause [students] to undergo' harassment or 'make them liable or vulnerable' to it.[44]

In the years since *Davis*, lower courts have adopted divergent interpretations of this standard, ultimately creating a conflict over whether Title IX requires a student to undergo additional harassment as a result of her school's indifference. This split over how much suffering the law requires young women to undergo before the impact on their education is cognizable goes to the very heart of Title IX—a piece of legislation enacted to move women forward, not hold them back.

IV. *SUBJECTED* TO INTERPRETATION – COURTS DIFFER ON *DAVIS* CRITERIA

Some circuits, looking to the language in *Davis*, have held that vulnerability to further harassment is sufficient for Title IX liability and that victims need not actually undergo further harassment due to a school's deliberate indifference.[45] In 2007, the First Circuit adopted this view in *Fitzgerald v. Barnstable School Committee*,[46] a case brought by the parents of kindergartener Jacqueline Fitzgerald.[47] Plaintiffs' daughter alleged that an older student was bullying her into lifting her skirt and spreading her legs on the school bus.[48] Her school conducted an investigation but took no disciplinary action against the other student, offering only to move the victim to a different bus.[49] While plaintiffs stopped the skirt-lifting by driving their child to school, she continued to encounter the bully throughout the school year and was at one point required to interact with him in gym class; she subsequently stopped attending that class altogether.[50] The district court held that the school was not liable as "a Title IX defendant could not be found deliberately indifferent as long as the plaintiff was not subjected to any acts of severe, pervasive, and objectively offensive harassment *after* the defendant first acquired actual

43. *Id.* at 653–54.

44. *Id.* at 644–45 (first quoting *Subject*, RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (Unabridged ed. 1966); then quoting *Subject*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1961)) (providing definitions of "subject").

45. *See, e.g.*, Fitzgerald v. Barnstable Sch. Comm., 504 F.3d 165, 171 (1st Cir. 2007), *cert. granted*, 553 U.S. 1093 (2008), *rev'd*, 555 U.S. 246 (2009).

46. 504 F.3d 165 (1st Cir. 2007), *cert. granted*, 553 U.S. 1093 (2008), *rev'd*, 555 U.S. 246 (2009).

47. *Id.* at 169.

48. *Id.*

49. *Id.* at 169–70.

50. *Id.* at 170.

knowledge of the offending conduct," and plaintiffs' daughter's subsequent encounters with the bully did not rise to the level of harassment.[51]

The First Circuit, however, disagreed. It took issue with the district court's reasoning, concluding, "its formulation of the law overly distills the rule set forth by the *Davis* Court. [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."[52] The court found that the victim's continued, albeit minimal, post-notice interactions with her harasser could render her more vulnerable to harassment, satisfying the latter half of *Davis*'s *subjects* definition.[53]

> This broader formulation clearly sweeps more situations than the district court acknowledged within the zone of potential Title IX liability. Under it, a single instance of peer-on-peer harassment theoretically might form a basis for Title IX liability if that incident were vile enough and the institution's response, after learning of it, unreasonable enough to have the combined systemic effect of denying access to a scholastic program or activity.[54]

The plaintiff's Title IX claim ultimately failed when the court found the school's response was not deliberately indifferent.[55] However, the First Circuit's adoption of its "broader formulation" approach notably contemplates a legal universe in which schools must respond to the first known instance of harassment—not wait for more.

The Eleventh Circuit took an even more expansive view of what it means to *subject* students to harassment in the case of Tiffany Williams, a University of Georgia (UGA) student who was assaulted by several of the school's basketball players.[56] After the assault, one of the players called Williams repeatedly.[57] She reported her assault and subsequent harassment to the university and the police and subsequently withdrew from school.[58] The university waited months to conduct a disciplinary hearing—at which point two of the alleged perpetrators were no longer students—and declined to impose any discipline.[59]

In finding that Williams had adequately alleged deliberate indifference by the university, the Eleventh Circuit held that although Williams withdrew from school the day after her assault, "UGA continued to sub-

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51. *Id.* at 172 (citing Hunter *ex rel.* Hunter v. Barnstable Sch. Comm., 456 F. Supp. 2d 255, 263–64 (D. Mass. 2006)).
52. *Id.* (quoting Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 645 (1999)).
53. *See id.* at 172–73.
54. *Id.* (citation omitted) (citing Wills v. Brown Univ., 184 F.3d 20, 27 (1st Cir. 1999)).
55. *Id.* at 173–75.
56. Williams v. Bd. of Regents of Univ. Sys. of Ga, 477 F.3d 1282, 1288 (11th Cir. 2007).
57. *Id.* at 1289.
58. *Id.*
59. *Id.*

ject her to discrimination" when it "failed to take any precautions that would prevent future attacks from [her assailants] or like-minded hooligans should Williams have decided to return."[60] In essence, the *Williams v. Board of Regents of University System of Georgia*[61] court evaluated a student's vulnerability in light of the assumption that she might reenroll, making actions like failing to discipline her assailants a form of deliberate indifference that could make her more vulnerable to future incidents.[62]

While this approach is far-reaching, it is also commonsense; a significant number of college dropouts eventually return to finish their degrees.[63] Sexual assault survivors in particular experience specific barriers to completing their education, such as the continued presence of the perpetrator or a lack of institutional support.[64] It is logical that, absent these barriers, they would return—if schools provide a safe environment for them in which to do so.

Other courts have seemed to suggest a more restrictive approach, requiring victims to have suffered actual harassment after a school's deliberately indifferent response. For example, in *Reese v. Jefferson School District No. 14J*,[65] the Ninth Circuit hinted at such a position.[66] In this case, a group of high school girls was suspended for throwing water balloons at boys; they argued their actions were retaliation for harassment by the boys and sued their school district over the earlier alleged harassment.[67] In holding that the girls failed to allege deliberate indifference by their school, the Ninth Circuit found that the girls had not provided notice of alleged harassment until late in the school year, and "[t]here [was] no evidence that any harassment occurred after the school district learned of the plaintiffs' allegations."[68] Implicit in this conclusion: post-notice harassment, not just vulnerability, is necessary for deliberate indifference.

In contrast to *Fitzgerald*, the Middle District of Tennessee confronted another case of school bus harassment and reached a very different outcome.[69] An autistic middle school student was sexually assaulted on

60. *Id.* at 1297.
61. 477 F.3d 1282 (11th Cir. 2007).
62. *See id.* at 1297.
63. *See* SHAPIRO, D., RYU, M., HUIE, F. & LIU, Q., NAT'L STUDENT CLEARINGHOUSE RSCH. CTR., SIGNATURE REP. 17, SOME COLLEGE, NO DEGREE: A 2019 SNAPSHOT FOR THE NATION AND 50 STATES 1 (2019).
64. Kristen Lombardi, *A Lack of Consequences for Sexual Assault*, CTR. FOR PUB. INTEGRITY, https://publicintegrity.org/education/a-lack-of-consequences-for-sexual-assault/ (July 14, 2014, 4:50 PM).
65. 208 F.3d 736 (9th Cir. 2000).
66. *See id.* at 740.
67. *Id.* at 738.
68. *Id.* at 740.
69. *See* Staehling *ex rel.* Staehling v. Metro. Gov't of Nashville & Davidson Cnty., No. 3:07-0797, 2008 WL 4279839, at *4–13 (M.D. Tenn. Sept. 12, 2008).

the school bus by a fellow special education student.[70] As in *Fitzgerald*, the abuse stopped after her parents reported the assault to the school—this time because the school removed the perpetrator from the bus.[71] However, plaintiffs disputed that the school took any other significant action in response to the assault and brought a Title IX claim, alleging that the school's failure to adequately investigate and take remedial measures, such as ensuring bus safety, constituted deliberate indifference.[72]

Rather than evaluating plaintiffs' daughter's vulnerability to further abuse based on the school's inaction, the court reasoned that "a school is not liable under Title IX if no harassment occurs after a school receives notice of the harassment."[73] Plaintiffs' Title IX claim did not survive summary judgment, as the court concluded that their daughter had not been subjected to post-notice sexual harassment.[74]

It is against this backdrop of uncertainty as to exactly how the *subjected* standard in *Davis* should be applied that a definitive circuit split has emerged. Two recent decisions directly address the intent of *Davis*—and in direct opposition: a Tenth Circuit holding in *Farmer* and a Sixth Circuit holding in *Kollaritsch*.

V. TITLE IX IN THE TENTH CIRCUIT

The Tenth Circuit has long been home to groundbreaking opinions concerning the application of Title IX to student reports of sexual harassment and sexual assault. After a lengthy history of adhering closely to the holding in *Davis* without many affirmative steps further, the Tenth Circuit took a stand in its *Farmer* holding.[75]

Prior to its groundbreaking decision in *Farmer*, the Tenth Circuit examined the "vulnerable to" harassment issue in several key cases.[76] Previous Tenth Circuit decisions hinted at the requirement of a victim's being exposed to something more than simply being made vulnerable to further harassment—an interpretation that would later be solidified in *Farmer*.[77]

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70. *Id.* at *1.
71. *Id.* at *12.
72. *Id.* at *11.
73. *Id.* (first citing Rost *ex rel.* K.C. v. Steamboat Springs RE-2 Sch. Dist., 511 F.3d 1114, 1123 (10th Cir. 2008); then citing Reese v. Jefferson Sch. Dist. No. 14J, 208 F.3d 736, 740 (9th Cir. 2000); and then citing Ross v. Corp. of Mercer Univ., 506 F. Supp. 2d 1325, 1346 (M.D. Ga. 2007)).
74. *Id.* at *11–12.
75. *See, e.g.*, Farmer v. Kan. State Univ., 918 F.3d 1094 (10th Cir. 2019) (holding that student's vulnerability to harassment is sufficient for showing of institution's deliberate indifference).
76. *See* discussion *infra* Sections V.A–C.
77. *Farmer*, 918 F.3d at 1104–05.

A. Murrell v. School District No. 1, Denver, Colorado

The first of these decisions was *Murrell v. School District No. 1, Denver, Colorado*,[78] decided in 1999.[79] In *Murrell*, a mother filed suit against a Denver, Colorado school district following multiple instances of student-on-student sexual harassment and assault of her daughter, a student with cerebral palsy and developmental disabilities that required special-education services.[80] The mother notified the school about the assaults, but the school denied that the assaults could have happened and failed to perform any investigation.[81] When her daughter returned to school, she was immediately battered again by the same student and harassed by others who had learned of the sexual assaults.[82]

In reversing the district court's dismissal on Title IX grounds, the Tenth Circuit did not take up the question of whether a plaintiff must allege more than vulnerability to further harassment.[83] However, the court appeared to base its holding, at least in part, on the severe circumstances of the case, noting that, following the assaults, plaintiff's daughter became such a danger to herself that she required hospitalization and that the school suspended plaintiff's daughter when plaintiff requested an investigation into the assaults.[84] The *Murrell* court also took into consideration the fact that plaintiff's daughter ultimately became homebound as a result of her experience at school, and thus plaintiff's daughter had been "totally deprived" of educational benefits as a result of the school district's deliberate indifference.[85]

Given that plaintiff's daughter was immediately subjected to further harassment and assaults upon her return to school,[86] and the proximity in time between *Murrell* and *Davis*,[87] it is perhaps unsurprising that the Tenth Circuit did not take up the vulnerability analysis. However, this left the door open for later decisions to further explore the language set forth in *Davis*.

B. Escue v. Northern Oklahoma College

The second landmark Title IX opinion to shape the vulnerability analysis in the Tenth Circuit came approximately seven years after *Murrell*. In *Escue v. Northern Oklahoma College*,[88] plaintiff filed suit against Northern Oklahoma College (NOC), alleging that her professor had

78. 186 F.3d 1238 (10th Cir. 1999).
79. *Id.* at 1243.
80. *See id.* at 1242–43.
81. *Id.* at 1244.
82. *Id.*
83. *See id.* at 1246, 1249.
84. *Id.* at 1248–49.
85. *Id.* at 1249.
86. *Id.* at 1244.
87. *Id.* at 1245.
88. 450 F.3d 1146 (10th Cir. 2006).

touched her inappropriately and made inappropriate sexual comments towards her.[89] Before the Tenth Circuit, plaintiff argued that NOC was deliberately indifferent to her allegations of harassment, which deprived her of educational opportunities.[90]

The Tenth Circuit ultimately concluded that NOC's response to Ms. Escue's allegations was not "clearly unreasonable."[91] In so holding, the court detailed the actions NOC took to prevent further harassment: removing plaintiff from her professor's classes, questioning two students about plaintiff's allegations, and permanently ending her professor's tenure at the end of the semester.[92] The Tenth Circuit quoted *Davis* to underscore its finding that NOC was not deliberately indifferent,[93] and stated the following:

> Significantly, we note that Ms. Escue does not allege that further sexual harassment occurred as a result of NOC's deliberate indifference . . . . At no point does she allege that NOC's response to her allegations was ineffective such that she was further harassed. Although [her harasser] attempted to contact her once the day that she reported her allegations to [NOC], he was unsuccessful and this incident did not lead to sexual harassment. Summary judgment on these facts is therefore appropriate, as Ms. Escue has not shown that NOC's response was clearly unreasonable nor has she shown that it led to further sexual harassment.[94]

Based on this language, it appeared that the Tenth Circuit might require something more than vulnerability to further harassment.

C. Rost ex rel. K.C. v. Steamboat Springs RE-2 School District

Not long after *Escue*, the Tenth Circuit decided *Rost ex rel. K.C. v. Steamboat Springs RE-2 School District*.[95] In that case, plaintiff filed suit against Steamboat Springs School District RE-2 following years of sexual abuse of her daughter at the hands of several of her classmates.[96] When her daughter disclosed to a school counselor that classmates had coerced her into sexual conduct, the counselor told the school resource officer and principal.[97] Because the principal determined that none of the incidents occurred on school grounds and had occurred before the students matriculated to the high school, he had the school resource officer

89. *Id.* at 1149.
90. *Id.* at 1152–53.
91. *Id.* at 1155.
92. *Id.*
93. *Id.* ("The Supreme Court has stated that 'the deliberate indifference must, at a minimum, cause students to undergo harassment or make them liable or vulnerable to it.'" (quoting Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 644–45 (1999))).
94. *Id.* at 1155–56.
95. 511 F.3d 1114 (10th Cir. 2008).
96. *Id.* at 1117.
97. *Id.* at 1117–18.

investigate the reports.[98] The school resource officer interviewed some of the students involved, but his investigation was slowed by plaintiff's refusal to allow her daughter to communicate further about the incidents on the advice of counsel; after listening to the officer's report, the district attorney refused to prosecute.[99] A few weeks after reporting the sexual abuse, plaintiff's daughter suffered a series of psychotic episodes, likely resulting from the trauma.[100]

In considering whether the school district was deliberately indifferent to plaintiff's daughter's reports of sexual harassment, the Tenth Circuit appeared to base its decision at least in part on its finding that, following the reports, plaintiff's daughter was not actually subjected to further harassment.[101] Notably, though the Tenth Circuit's reasoning clearly referenced the fact that no further harassment occurred, the court did acknowledge that its "sister circuits have rejected a strict causation analysis which would absolve a district of Title IX liability if no discrimination occurs after a school district receives notice of discrimination."[102] Thus, because the school's response "did not cause [plaintiff's daughter] to undergo harassment or make her liable or vulnerable to it," the school district was not deliberately indifferent.[103] More specifically, the court held that the district "took steps to prevent further harassment" by trying to find safe educational alternatives for plaintiff's daughter, and plaintiff's rejection of those alternatives had no bearing on whether the district's response was appropriate.[104]

VI. VULNERABILITY IS SUFFICIENT: *FARMER V. KANSAS STATE UNIVERSITY*

In *Farmer*, the Tenth Circuit finally addressed the vulnerability question and determined that, under the plain language of *Davis*, "Plaintiffs can state a viable Title IX claim by alleging alternatively either that [the school's] deliberate indifference to their reports of rape caused Plaintiffs 'to undergo' harassment or 'ma[d]e them liable or vulnerable' to it."[105]

A. Facts and Procedural History

The Tenth Circuit's analysis came about largely because defendant, Kansas State University (KSU) forced the analysis. Two plaintiffs filed

98. *Id.* at 1118.
99. *Id.*
100. *Id.*
101. *Id.* at 1123 (citing Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 644–45 (1999)).
102. *Id.* (first citing Fitzgerald v. Barnstable Sch. Comm., 504 F.3d 165, 172 (1st Cir. 2007); and then citing Williams v. Bd. of Regents of the Univ. Sys. of Ga., 477 F.3d 1282, 1297 (11th Cir. 2007)).
103. *Id.* (citing *Davis*, 526 U.S. at 645).
104. *Id.* at 1124.
105. Farmer v. Kan. State Univ., 918 F.3d 1094, 1103 (10th Cir. 2019) (emphasis omitted) (quoting *Davis*, 526 U.S. at 645).

suit against KSU under theories of Title IX post-assault indifference.[106] Both plaintiffs alleged that they had been sexually assaulted by classmates at KSU and that, after reporting their rapes to KSU, the university failed to investigate or take action to hold the student-assailants responsible.[107] As a result, both plaintiffs' educations were negatively impacted, including a lost sense of security on campus, panic attacks, depression, plummeting grades, and lost scholarships.[108]

KSU filed a motion to dismiss the Title IX claims in each case, which the district court denied in both instances.[109] In rejecting KSU's arguments, the district court concluded:

> [T]he courts in *Escue* and *Rost* did not state that further harassment was a requirement that all Title IX claimants must establish, but simply noted the absence of further harassment, and in *Escue* explained that it was "significant" to its determination on deliberate indifference. Declining to impose a strict further harassment requirement is consistent with *Davis*, in which the Court explained that funding recipients "may be held liable for 'subjecting' their students to discrimination where the recipient is deliberately indifferent to known acts of student-on-student sexual harassment."[110]

Accordingly, the district court determined that, where the other required elements under Title IX were clearly alleged, it was "not inclined to require that the plaintiff additionally allege that post-report assault or harassment actually occurred," so long as the school's deliberate indifference made the plaintiff "'liable or vulnerable to' further harassment pursuant to *Davis*."[111]

Following the denial of its motions to dismiss, the district court granted KSU's request for interlocutory appeal to the Tenth Circuit pursuant to 28 U.S.C. § 1292(b)[112] to determine the following "controlling questions of law":

> (1) [W]hether Plaintiff was required to allege, as a distinct element of her Title IX claim, that KSU's deliberate indifference caused her to suffer actual further harassment, rather than alleging that Defendant's

106. *Id.* at 1099–1101.

107. Weckhorst v. Kan. State Univ., 241 F. Supp. 3d 1154, 1159–60 (D. Kan. 2017); Farmer v. Kan. State Univ., No. 16-CV-2256-JAR-GEB, 2017 WL 980460, at *3–4 (D. Kan. Mar. 14, 2017).

108. *Weckhorst*, 241 F. Supp. 3d at 1163–64; *Farmer*, 2017 WL 980460, at *5.

109. *Weckhorst*, 241 F. Supp. 3d at 1159–60; *Farmer*, 2017 WL 980460, at *3–4.

110. *Weckhorst*, 241 F. Supp. 3d at 1174 (quoting *Davis*, 526 U.S. at 646–47).

111. *Id.* at 1175; *Farmer*, 2017 WL 980460, at *13.

112. The statute provides in relevant part:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

28 U.S.C. § 1292(b) (2018).

> post-assault deliberate indifference made her "liable or vulnerable to" harassment; and (2) if Plaintiff is required to plead actual further harassment, whether her allegations of deprivation of access to educational opportunities satisfy this pleading requirement.[113]

B. Holding

The Tenth Circuit began its analysis by noting that "[t]he Supreme Court has already answered [this] legal question," quoting *Davis* for the proposition that a funding recipient under Title IX's "deliberate indifference must, at a minimum, cause students to undergo harassment or make them liable or vulnerable to it."[114] The court determined that in these cases, the plaintiffs sufficiently alleged that KSU's deliberate indifference made them vulnerable to further harassment, for it allowed the plaintiffs' student-assailants to continue attending KSU without ramifications.[115]

In concluding that a plaintiff need not experience a subsequent sexual assault or further harassment prior to bringing suit, so long as she was made vulnerable to such harassment,[116] the *Farmer* court relied primarily on *Davis*, reasoning that *Davis* "clearly indicates that Plaintiffs can state a viable Title IX claim by alleging alternatively either that KSU's deliberate indifference to their reports of rape caused Plaintiffs 'to undergo' harassment or 'ma[d]e them liable or vulnerable' to it."[117] The court reasoned that KSU's argument—that a plaintiff must state that she underwent actual further harassment before a viable claim ripens—"simply ignores *Davis*'s clear alternative language" providing that the "deliberate indifference must . . . 'cause students to undergo' harassment or make them 'liable or vulnerable to' sexual harassment."[118] The *Farmer* court further noted that this alternative pleading requirement is consistent with Title IX's objectives, including protecting students against discrimination.[119]

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113. Farmer v. Kan. State Univ., 918 F.3d 1094, 1102 (10th Cir. 2019).

114. *Id.* at 1097 (emphasis omitted) (internal quotations omitted) (quoting *Davis*, 526 U.S. at 644–45).

115. *Id.*

116. *Id.* at 1103–05.

117. *Id.* at 1103 (emphasis omitted) (quoting *Davis*, 526 U.S. at 645).

118. *Id.* at 1104 (emphasis omitted) (quoting *Davis*, 526 U.S. at 645).

119. *Id.* (citing Cannon v. Univ. of Chi., 441 U.S. 677, 704 (1979)). The *Farmer* court also quoted *Karasek v. Regents of the University of California* for the proposition that:

> The alternative offered by the University—i.e., that a student must be harassed or assaulted a second time before the school's clearly unreasonable response to the initial incident becomes actionable, irrespective of the deficiency of the school's response, the impact on the student, and the other circumstances of the case—runs counter to the goals of Title IX and is not convincing.

Karasek v. Regents of the Univ. of Cal., No. 15-cv-03717-WHO, 2015 WL 8527338, at *12 (N.D. Cal. Dec. 11, 2015). As set forth more fully below, the Tenth Circuit's interpretation, which mirrors that of *Karasek* and other circuits, better fits the purpose of Title IX and the Supreme Court's holding in *Davis*. *See infra* Part IX.

In an effort to address concerns that the vulnerability language would expose schools to expanded liability, as the Sixth Circuit would later argue,[120] the Tenth Circuit placed a significant guardrail on its holding by requiring that a plaintiff's alleged fear or vulnerability must be "objectively reasonable."[121] Thus, plaintiffs merely alleging that a school's deliberate indifference left them vulnerable is insufficient—plaintiffs must allege evidence to show that their fear is an objectively reasonable one.[122] Here, the plaintiffs alleged "that the fear of running into their student-rapists caused them, among other things, to struggle in school, lose a scholarship, withdraw from activities KSU offers its students, and avoid going anywhere on campus without being accompanied by friends or sorority sisters."[123] The Tenth Circuit concluded that "[f]uture cases will undoubtedly be asked to draw lines on when a victim's fear of further sexual harassment is sufficient to deprive that student of educational opportunities," but given the "horrific circumstances alleged here," this was not an issue the Tenth Circuit needed to reach.[124]

VII. FURTHER HARASSMENT IS REQUIRED: *KOLLARITSCH V. MICHIGAN STATE UNIVERSITY BOARD OF TRUSTEES*

Nine months after the Tenth Circuit's *Farmer* opinion, the Sixth Circuit reached a dramatically different decision in *Kollaritsch*.[125] As in *Farmer*, *Kollaritsch* presented a Title IX fact pattern involving student-on-student assault and harassment, requiring analysis under the *Davis* test.[126]

A. Facts and Procedural History

In 2017, four female students brought an action against Michigan State University, alleging that "they were sexually harassed or assaulted by other students while they were students at [the university]."[127] Each reported their experiences to the university, which, according to their

120. See *infra* Part VII, for an analysis of *Kollaritsch v. Michigan State University Board of Trustees*, 944 F.3d 613 (6th Cir. 2019) and its requirement that a plaintiff allege actual further harassment before a colorable Title IX claim arises.

121. *Farmer*, 918 F.3d at 1105.

122. *Id.* at 1104–05.

123. *Id.* at 1105.

124. *Id.* Future plaintiffs would be well-advised to take heed of the court's reasoning underpinning their conclusions that the plaintiffs in this case met their pleading requirements:

> Plaintiffs' allegations are quite specific and reasonable under the circumstances. Plaintiffs allege more than a general fear of running into their assailants. They allege that their fears have forced them to take very specific actions that deprived them of the educational opportunities offered to other students. In addition, they have alleged a pervasive atmosphere of fear at KSU of sexual assault caused by KSU's inadequate action in these cases.

Id.

125. *Kollaritsch*, 944 F.3d at 618–24.

126. *Id.*

127. Kollaritsch v. Mich. State Univ. Bd. of Trs., 298 F. Supp. 3d 1089, 1096 (W.D. Mich. 2017), *rev'd and remanded*, 944 F.3d 613 (6th Cir. 2019).

lawsuit, failed to adequately respond.[128] After the district court refused to dismiss the plaintiffs' Title IX claims, the university sought an interlocutory appeal to address the question of "whether a plaintiff must plead further acts of discrimination to allege deliberate indifference to peer-on-peer harassment under Title IX."[129]

B. Holding

In *Kollaritsch*, the Sixth Circuit acknowledged that the test in *Davis* was the proper analysis of the Title IX claims.[130] Unlike the Tenth Circuit in *Farmer* (and the Sixth Circuit itself in a number of prior actions),[131] however, the *Kollaritsch* court determined that the *Davis* formula "clearly has two separate components, comprising separate-but-related torts by-separate-and-*un*related tortfeasors: (1) 'actionable harassment' by a student; and (2) a deliberate-indifference intentional tort by the school."[132] In so doing, the Sixth Circuit attempted to map traditional tort principles onto an already complicated area of law. Under common law tort application, the Sixth Circuit determined that the "deliberate-indifference-based intentional tort" required "(1) knowledge, (2) an act, (3) injury, and (4) causation."[133] The *Kollaritsch* court found—consistent with *Davis*—that in order to meet the first two elements, the defendant-school must have "had 'actual knowledge' of an incident of actionable sexual harassment that prompted or should have prompted a response," (knowledge) and the school's response must have been "clearly unreasonable in light of the known circumstances" (the act).[134] The *Kollaritsch* court also held the injury required in a Title IX context was "the deprivation of 'access to the educational opportunities or benefits provided by the school,'"[135] a requirement also lifted verbatim from *Davis*.[136]

As to causation, although the *Kollaritsch* court determined that the act must cause the injury, consistent with established tort principles, it proceeded to insert an additional, new, and seemingly unrelated requirement into the causation analysis.[137] Rather than requiring simply that the

128. *Id.*
129. *Kollaritsch*, 944 F.3d at 619.
130. *See id.* at 618.
131. *See* Gordon v. Traverse City Area Pub. Schs., 686 F. App'x 315, 323 (6th Cir. 2017); Stiles *ex rel.* D.S. v. Grainger Cnty., Tenn., 819 F.3d 834, 848 (6th Cir. 2016); Pahssen v. Merrill Cmty. Sch. Dist., 668 F.3d 356, 362 (6th Cir. 2012); Patterson v. Hudson Area Schs., 551 F.3d 438, 444–45 (6th Cir. 2009), *abrogated by* Foster v. Bd. of Regents of Univ. of Mich., No. 19-1314, 2020 WL 7294759 (6th Cir. Dec. 11, 2020); Vance v. Spencer Cnty. Pub. Sch. Dist., 231 F.3d 253, 258–59 (6th Cir. 2000); Soper v. Hoben, 195 F.3d 845, 854 (6th Cir. 1999).
132. *Kollaritsch*, 944 F.3d at 619–20 (citation omitted) (citing Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 643, 651–52 (1999)).
133. *Id.* at 621.
134. *Id.* (first citing *Davis*, 526 U.S. at 650; and then quoting *Davis*, 526 U.S. at 648).
135. *Id.* at 622 (quoting *Davis*, 526 U.S. at 650).
136. *Davis*, 526 U.S. at 650.
137. *See Kollaritsch*, 944 F.3d at 622.

plaintiff show that a school's unreasonable response (the act) resulted in deprivation of access to educational opportunities (the injury), the Sixth Circuit concluded that the injury must be "attributable to the post-actual-knowledge further harassment, which would not have happened but for the clear unreasonableness of the school's response."[138] The *Kollaritsch* court, therefore, determined that for a school to be liable under a deliberate indifference intentional tort, a plaintiff's injury in the form of lost educational opportunities had to be a result of both a school's deliberate indifference *and* further actionable harassment of the student-victim.[139] Faced with the disjunctive language in *Davis* which suggested no further harassment was required, the Sixth Circuit explained that under its analysis, the Supreme Court was not suggesting that plaintiffs must either experience further harassment or be made vulnerable to it, but that further harassment could occur by virtue of wrongful conduct by "*commission* (directly causing further harassment) [or] *omission* (creating vulnerability that leads to further harassment)."[140] Because the victim-plaintiffs in *Kollaritsch* did not allege that their respective encounters with their assailants on campus *after* the original assaults and school actions had taken place were sexual, severe, pervasive, or objectively offensive, no further harassment had been suffered, and there was no actionable Title IX claim against the university.[141]

Judge Thapar echoed this sentiment in his concurring opinion.[142] Judge Thapar joined with the majority's decision in full and offered further rationale to support the majority's adding further harassment as an element for an actionable deliberate indifference Title IX claim.[143] Relying on the majority's finding that *Davis* requires a showing that a student was subjected to further harassment, either by commission or through omission, Judge Thapar explained that schools can cause harassment directly by sending disparaging emails or cause harassment by omission by failing to respond appropriately.[144] In either scenario, the concurrence argued, the victims could not be said to have been subjected to harass-

138. *Id.* (citing *Davis*, 526 U.S. at 644). Because "*Davis* [did] not link the [defendant school's] deliberate indifference directly to the injury," that is, the deprivation of access to educational opportunities, but rather linked the "school's 'deliberate indifference'" to the plaintiff-student's "harassment," that this "necessarily mean[t] further actionable harassment." *Id.* (citing *Davis*, 526 U.S. at 644).

139. *Id.*

140. *Id.* at 623.

141. *Id.* at 624–25. The Sixth Circuit's departure from the analysis undertaken by other circuits was less surprising in context. The decision followed, and cited, the 2016 decision *Thompson v. Ohio State University*, a Title VI action for deliberate indifference to racial discrimination. Thompson v. Ohio State Univ., 639 F. App'x 333, 334 (6th Cir. 2016). As in *Kollaritsch*, the Sixth Circuit in *Thompson* found that the victim-plaintiff had not alleged any "further harassment or discrimination" subsequent to the allegedly inadequate efforts by the university. *Id.* at 343–44. And as in *Kollaritsch*, the requirement for subsequent harassment was something new in the Title VI arena.

142. *Kollaritsch*, 944 F.3d at 630 (Thapar, J., concurring).

143. *Id.* at 627–29.

144. *Id.* at 628.

ment unless the harassment actually occurred.[145] The problem with Judge Thapar's illustration is that causing harassment directly takes the school's conduct outside of the purview of *Davis* entirely. That is, the standard set forth in *Davis* explicitly addresses circumstances where the school does not *itself* engage in harassment, but rather where the school is deliberately indifferent to the harassment of another.[146] Thus, the alternative explanation of *Davis* offered by the Sixth Circuit is inconsistent with the Supreme Court's focus only on circumstances where a university has no part in the *commission* of the harassment itself.

In sum, the majority opinion and concurrences in *Kollaritsch* reflected an intent to take a narrow reading of Title IX, as opposed to the broad scope articulated by the Tenth Circuit in *Farmer*. Relying on Justice Kennedy's dissent in *Davis* and Title IX's enaction under the Spending Clause, the Sixth Circuit cautioned against expanding liability under Title IX and argued that any ambiguity must be construed in favor of state actors to avoid imposing "more sweeping liability than Title IX requires."[147] Likewise, the *Kollaritsch* court's invocation of tort principles to deny the applicability of Title IX to the claims raised by the victim-plaintiffs did more than merely restrict who can plead a deliberate indifference claim. By explicitly adopting tort theories of recoverability, the Sixth Circuit in *Kollaritsch* attempted to reconstitute Title IX's broad mandate of equal opportunity in education to a narrow, strict construction of causation and harm that has no basis in the statute itself.[148]

VIII. WHERE DO WE GO FROM HERE?

The split between the Sixth Circuit and the Tenth Circuit as to what constitutes being *subjected* to further harassment creates a largely irreconcilable difference in the interpretation of the language set forth in *Davis*. Because the courts' reasonings were so fundamentally different, it is

145. *Id.* at 628–29.

146. *See* Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 639 (1999).

147. *Kollaritsch*, 944 F.3d at 629 (Thapar, J., concurring) (quoting *Davis*, 526 U.S. at 652). The Sixth Circuit in *Kollaritsch* argued that Title IX's enactment under the Spending Clause meant that while states agreed to comply with the obligations imposed by Title IX for federal funding, compliance could not be imposed on them if it was ambiguous what exactly was being expected of them. *Id.* Likewise, the Sixth Circuit concluded with Kennedy's recital of the long-held rallying cry of the opposition to Title IX itself: "Particularly prescient here is the *Davis* dissent's comment that '[o]ne student's demand for a quick response to her harassment complaint will conflict with the alleged harasser's demand for due process,'" putting the school in a position where it is "beset with litigation from every side." *Id.* at 627 (Kennedy, J., dissenting) (quoting *Davis*, 526 U.S. at 682).

148. In the months since the *Kollaritsch* opinion, this narrowing has been evident in subsequent decisions out of the Sixth Circuit. *See, e.g.*, Doe v. Univ. of Ky., 959 F.3d 246, 248, 251 (6th Cir. 2020) (citing *Kollaritsch*, 944 F.3d at 622–24 when it stated that a student who brought a Title IX action against her school, alleging deliberate indifference to student-on-student sexual harassment, had to show "that a school's clearly unreasonable response subjected the student to further actionable harassment"); Meng Huang v. Ohio State Univ., No. 2:19-cv-1976, 2020 WL 531935, at *1, *9, *12 (S.D. Ohio Feb. 3, 2020) (holding that the victim-plaintiff in a teacher-on-student sexual harassment Title IX deliberate-indifference action failed to allege further harassment subsequent to the plaintiff's reports to the university and granted the university's motion to dismiss).

unlikely that a common ground will be reached between the two. Rather, it is likely that courts throughout the country will continue to stake their positions at either end of the spectrum. It may be that uniformity emerges among additional circuits and district courts as to the preferred interpretation, giving Title IX plaintiffs some sense of predictability as to the legal standards likely to be applied to their claims. Or a patchwork approach may develop, propelled by the increasingly ideological nature of the judiciary, leaving plaintiffs at the geographical mercy of the court in which they, or their school, reside.[149]

Within the Tenth Circuit, the controlling power of stare decisis is likely to generate increasing uniformity among the district courts as they consider the question of whether further actionable harassment is required. Although a petition for writ of certiorari was filed by the plaintiff in *Kollaritsch*, certiorari was denied.[150] Accordingly, there will be no further Supreme Court review at this stage and *Farmer* will remain the precedential decision within the Tenth Circuit.

Indeed, the District of Colorado has already addressed the question of whether to adopt the *Farmer* or the *Kollaritsch* approach. In *Doe v. Brighton School District 27J*,[151] the plaintiff was raped by a fellow classmate.[152] For almost a week after the rape was reported, the school did not offer the plaintiff any accommodation to protect her from her rapist while at school, and as a result, she faced intimidation from her rapist and his friends.[153] She alleged that she lived in fear of going to school and suffered from such serious stress that she came home in hives.[154] In response to her Title IX lawsuit, the school district filed a motion to dismiss, arguing that the plaintiff had not adequately alleged that the district's deliberate indifference caused her to undergo additional harassment.[155] While the defendant argued in favor of the District of Colorado adopting the *Kollaritsch* approach, the plaintiff advocated for an approach dictated by the precedent of *Farmer*.[156] Judge Martinez concluded that he would follow *Farmer*'s pleading standard, which he summarized as requiring the plaintiff to allege that his or her vulnerability to further harassment required her "to take very specific actions that deprived [her] of the educational opportunities offered to other students,"

149. *See, e.g.*, Petition for Writ of Certiorari, *Kollaritsch*, 944 F.3d 613 (6th Cir. 2020), *cert. denied*, No. 20-10, 2020 WL 6037223 (Oct. 13, 2020) (requesting the U.S. Supreme Court to resolve the circuit split as to what constitutes "vulnerability" to further sexual harassment).

150. Kollaritsch v. Mich. State Univ. Bd. of Trs., 141 S. Ct. 554 (2020) (mem.) (denying the petition for a writ of certiorari).

151. No. 19-cv-0950-WJM-NRN, 2020 WL 886193 (D. Colo. Mar. 2, 2020).

152. *Id.* at *1.

153. *Id.* at *1–3.

154. *Id.* at *2.

155. *See id.* at *5.

156. *Id.* at *4–5, *7.

and that any fear be "objectively reasonable."[157] Rather than simply relying on stare decisis, Judge Martinez stated that "the *Farmer* decision is better-reasoned and legally sounder [than] the Sixth Circuit's approach to this issue."[158]

The *Brighton School District* decision did not discuss at length why it considered *Farmer* the better reasoned of the two, nor did it expound on *Farmer* to provide further clarity to the Tenth Circuit's decision. It is clear that certain aspects of the *Farmer* standard remain unresolved and that questions will continue to arise as lower courts, and perhaps sister circuits, flesh out the nuance of what constitutes sufficient pleading of vulnerability to future harassment. In particular, it remains unclear how courts will determine when a plaintiff's fear is objectively reasonable or unreasonable. Nor is it clear how plaintiffs will adequately meet the *Farmer* standard in factual circumstances such as those set forth in *Williams*, where the plaintiff immediately leaves the school and has no clear plans to return.

Nationally, a circuit split will continue to exist between *Farmer* and *Kollaritsch* until other courts coalesce around a preferred approach, or the issue is ultimately resolved by the Supreme Court. It has not been lost on other courts in recent decisions that the current circuit split is a significant one that is likely ripe for review. In *Karasek v. Regents of the University of California*,[159] for example, the Ninth Circuit skirted directly addressing the question of what causes a plaintiff to undergo further harassment, but noted the existing circuit split between the Sixth and Tenth Circuits.[160]

IX. ENSURING LEGAL FRAMEWORKS CONSISTENT WITH THE PURPOSE AND INTENT OF TITLE IX BY ADOPTING THE TENTH CIRCUIT APPROACH

As circuit courts continue considering this issue, and should the Supreme Court consider it, it is important to ensure the developing case law is consistent with the language and intent of Title IX. This Article proposes that following the Tenth Circuit's approach in *Farmer* best effectuates this purpose and is the best path forward for three reasons. First, the *Farmer* approach is most consistent with standards of legal interpretation and the plain language in *Davis*. Second, the *Farmer* approach best protects the policy goals that were envisioned by Congress, including the intent to provide broad protection from sexual discrimination. Third, this approach is the most logical approach in practice and ensures that victims are not forced to subject themselves to additional harassment.

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157. *Id.* at *7 (internal quotations omitted) (quoting Farmer v. Kan. State Univ., 918 F.3d 1094, 1105 (10th Cir. 2019)).
158. *Id.*
159. 948 F.3d 1150 (9th Cir. 2020).
160. *Id.* at 1162 n.2.

A. Legal

First and foremost, the Tenth Circuit's approach is supported by the fundamental principles of legal interpretation. Where a select word or phrase appears ambiguous, such words must be interpreted through the lens of the full text.[161] In *Davis*, the Supreme Court specifically defined *subjecting* students to harassment as "caus[ing] [students] to undergo" harassment or "mak[ing] them liable or vulnerable to it."[162] This definition is provided by the Court within the context of considering student-on-student harassment and a theory of liability premised on a school's deliberate indifference to such harassment.[163] This is significant because the conduct being considered is not direct discriminatory acts by an educational institution itself, but rather secondary discrimination resulting from the failure to respond appropriately to the discriminatory acts of another. As the Court itself stated, "[i]f a funding recipient does not engage in harassment directly, it may not be liable for damages unless its deliberate indifference 'subject[s]' its students to harassment."[164] As such, when the *Davis* Court defined *subjected* as "caus[ing]" or "mak[ing] . . . vulnerable" to future harassment, it was not referencing the school itself causing the harassment, as that would place the conduct at issue outside of the purview of the *Davis* test entirely, but that the institution's deliberate indifference caused further harm or made students vulnerable to further harassment.[165] The *Kollaritsch* decision ignored this broader context by suggesting that the *Davis* definition of *subjected* was intended to address either direct action by a school that causes harassment or a failure to take action thereby subjecting a student to further harassment.[166]

Moreover, the Tenth Circuit's approach adopts an interpretation that ensures that language within the *Davis* decision is not rendered superflu-

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161. *See, e.g.*, United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988) ("Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . .").

162. Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 645 (1999) (internal quotations omitted) (quoting *Subject*, RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (Unabridged ed. 1966)).

163. *Id.* at 641, 644–45.

164. *Id.* at 644.

165. *Id.* at 645. This is the inherent problem with Zachary Cormier's argument in *Is Vulnerability Enough? Analyzing the Jurisdictional Divide on the Requirement for Post-Notice Harassment in Title IX Litigation*, 29 YALE J.L. & FEMINISM 1 (2017). Mr. Cormier posits that if viewed in the context of the entire phrase, the first segment of the *Davis* Court's definition, "'cause [students] to undergo' harassment," should be viewed as a "causation trigger" and the second definition "'make them liable or vulnerable' to it" should be viewed as the "vulnerability trigger" but that both definitions require affirmative discriminatory conduct by the educational institution. *Id.* at 23 (emphasis omitted) (quoting *Davis*, 526 U.S. at 645). That is, he argues that the phrase should be read to mean that an institution subjects a student to harassment where it takes action that causes the student to experience further harassment or fails to take action which leads to further harassment. *Id.* But this contextual argument, ironically, ignores the broader context of the test in which the element of *subjected to* is situated.

166. *See* Kollaritsch v. Mich. State Univ. Bd. of Trs., 944 F.3d 613, 623 (6th Cir. 2019).

ous. As the Tenth Circuit and other courts have noted, the *Davis* test specifically uses the disjunctive "or" in defining what it means to be *subjected* to harassment.[167] Reading the components of the Supreme Court's decision as requiring the school's deliberate indifference to cause additional harassment would render the Court's disjunctive approach as superfluous. Although the Sixth Circuit attempted to circumvent this issue by proposing that *Davis* intended to suggest that an educational institution can either cause further harassment or fail to take action in a way that causes further harassment, this is a distinction without difference.[168] In either situation, the institution's deliberate indifference has not made a student more vulnerable to harassment, it has caused actual harassment, an approach that fails to give any meaning to *Davis*'s use of the alternative more vulnerable definition.

Finally, the Tenth Circuit's approach is also most consistent with the Supreme Court's language that "at a minimum" students must be made liable or vulnerable to sexual harassment.[169] This language suggests that the Supreme Court deliberately set a low threshold for what constitutes being *subjected to* additional harassment. Interpreting *Davis* as requiring plaintiffs to plead specific, actual acts of harassment to satisfy this standard would be inconsistent with the "at a minimum" language.

By contrast, the *Kollaritsch* decision ignored these fundamental approaches to interpretations of legal precedent by interjecting unique tort requirements into the plain language of Title IX.[170] The Sixth Circuit's approach attempted to convert the broad liability of Title IX into the highly specific elements of a "deliberate indifference intentional tort."[171] This is problematic for several reasons. First, it is not at all clear that Title IX can, or should, map cleanly onto the traditional elements of a common law tort claim. Certainly nothing within the statute explicitly suggests that this should be the case.[172] Second, even if the application of tort law was appropriate in this context, the Sixth Circuit wrongly applied the very principles it attempted to impose, as discussed above.[173] Under the Sixth Circuit's tort approach, the analysis should address whether the school (1) had actual knowledge of harassment, (2) to which it responded with deliberate indifference, (3) which caused a student to experience, (4) a deprivation of access to education.[174] This approach, though reductionist, tracks closely with the language of *Davis*. And un-

167. *See, e.g.*, Farmer v. Kan. State Univ., 918 F.3d 1094, 1103 (10th Cir. 2019).
168. *Kollaritsch*, 944 F.3d at 623.
169. *Davis*, 526 U.S. at 645.
170. *See Kollaritsch*, 944 F.3d at 619–20.
171. *Id.* at 620.
172. *See Civil Rights Law—Title IX—Sixth Circuit Requires Further Harassment in Deliberate Indifference Claims.*—Kollaritsch v. Michigan State University Board of Trustees, *944 F.3d 613 (6th Cir. 2019)*, 133 HARV. L. REV. 2611, 2615–17 (2020).
173. *Id.* at 2617.
174. *See id.* at 2618.

der such a tort analysis, it is clear that deliberate indifference to harassment could result in impact to educational opportunities because it causes a student to experience further harassment *or* because it makes a student vulnerable to additional harassment such that her educational experience is fundamentally altered. To avoid such an outcome, the Sixth Circuit imposed an unrelated and previously unmentioned element into its novel tort claim.[175] Not only must a school's deliberate indifference result in impact to educational opportunities, but according to the Sixth Circuit, that causation must result solely from "further actionable harassment."[176] But actionable is not present anywhere in the statute or the language of *Davis*,[177] and the Sixth Circuit's need to engage in such gymnastics emphasizes how poorly this tort claim approach fits.

B. Policy

Interpreting *Davis*'s requirements consistent with *Farmer* also best effectuates the purpose and policy of Title IX, ensuring that the judiciary gives effect to the intent of Congress and upholds the principle of legislative supremacy.[178] To the extent that the statute and directive of the Supreme Court can even be considered ambiguous, which, as argued above, it does not appear to be, the tenets of purposivism also support the adoption of the *Farmer* approach.[179] Purposivism is guided by the principle that "legislation is a purposive act, and judges should construe statutes to execute that legislative purpose," and that, to the extent that a text is ambiguous, it should be interpreted "in a way that is faithful to Congress's purposes."[180] Here, the purpose of Title IX is broad; Congress wanted to prevent federal funds from being used to support discriminatory practices and it wanted to provide individuals "effective protection against those practices."[181] The Supreme Court recognized the extent of the protections that Congress sought to provide, directing courts "that the text of Title IX should be accorded 'a sweep as broad as its language.'"[182]

The *Farmer* approach recognizes the breadth of the Supreme Court's directive, which aimed to encompass as much potentially dis-

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175. *See id.*

176. *Kollaritsch*, 944 F.3d at 622.

177. *See* 20 U.S.C. § 1681(a) (2018); Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 640–54 (1999).

178. *See* United States v. Am. Trucking Ass'ns, 310 U.S. 534, 542–43 (1940); *see also* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 533 (1947) ("[T]he function in construing a statute is to ascertain the meaning of words used by the legislature. To go beyond it is to usurp a power which our democracy has lodged in its elected legislature.").

179. ROBERT A. KATZMANN, JUDGING STATUTES 31 (2014).

180. *Id.*

181. Cannon v. Univ. of Chi., 441 U.S. 677, 704 (1979); *see also* 118 CONG. REC. 5,806–07 (1972) (Senator Birch Bayh stating: "The amendment we are debating is a strong and comprehensive measure which I believe is needed if we are to provide women with solid legal protection as they seek education and training for later careers . . . . As a matter of principle . . . .").

182. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 296 (1998) (Stevens, J., dissenting) (quoting N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 521 (1982)).

criminatory conduct as possible, rather than requiring schools to take action only in the most limited circumstances when a plaintiff can allege that she has alleged additional specific actionable harassment as a result of a school's deliberate indifference, or a deliberate-indifference intentional tort. In *Farmer*, the Tenth Circuit recognized that there are a myriad of ways that a student can be subjected to harassment in an educational program, and the Supreme Court's interpretation of *subjected* as including both "to cause" and "to make . . . vulnerable," was an effort to include as much of that harassment within the protections of Title IX as possible.[183] By contrast, the reductionist approach of the Sixth Circuit in *Kollaritsch*, which seeks to collapse the Supreme Court's broad descriptors into one narrow requirement that a plaintiff show she was subjected to actionable, specific additional harassment, is inconsistent with the broad congressional intent of Title IX.[184]

While the Sixth Circuit noted that private causes of action require a high standard to be met, the Supreme Court has long taken that standard into consideration—finding the sweep of Title IX to be broad even within the context of private remedies and monetary damages.[185] In requiring actual, rather than constructive, knowledge of harassment by defendants and directing that defendants' conduct must be clearly unreasonable for a private action to lie, the Supreme Court has ensured that these high standards are maintained.[186] An unduly narrow definition of *subjected to* discrimination need not be applied to ensure that educational institutions escape overly burdensome liability standards, and it is inconsistent with the antidiscriminatory purpose of the statute.

Finally, keeping the definition of potential discrimination that a student may be subjected to as broad as possible is also consistent with the true focus of Title IX, which is on educational institutional compliance and ensuring a discrimination-free educational environment, not the exact nature of the harassment perpetuated by the third parties within the institution's control. The crux of liability is whether the educational institution, with actual knowledge of harassment, chooses to remain idle and deliberately indifferent to such harassment.[187] Rather than focusing on the conduct of the institution, the *Kollaritsch* approach centers the inquiry on the third-party student committing the harassment—that student must decide to harass again in order for a school or university to be lia-

183. *See* Farmer v. Kan. State Univ., 918 F.3d 1094, 1103 (10th Cir. 2019).

184. *See* Kollaritsch v. Mich. State Univ. Bd. of Trs., 944 F.3d 613, 618 (6th Cir. 2019).

185. *See, e.g.*, Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 183 (2005); *Gebser*, 524 U.S. at 292–93.

186. The Supreme Court has issued several opinions placing boundaries on the reach of Title IX, while notably choosing not to do so in the context of the *subjected to* analysis in *Davis*. For example, in *Gebser*, the Supreme Court rejected the application of vicarious liability to Title IX, finding that institutions are responsible only for their own deliberate indifference. *See Gebser*, 524 U.S. at 288.

187. *See id.* at 290.

ble, even when that institution has already responded with deliberate indifference to an original report of harassment.[188] Such an approach fundamentally undermines the very purpose of Title IX: to protect students from all forms of sex discrimination in institutional settings.[189]

While the plaintiff must show that the school's deliberate indifference caused her to experience some type of damage in the form of impact to educational opportunity, denying liability where that damage takes the form of being made vulnerable to further harassment only discourages broad institutional compliance and encourages universities to unduly scrutinize their students' claims of discrimination.

C. Practice and Ethics

Finally, any court considering the intent of the Supreme Court in defining *subjected* in *Davis* must assume that the Court understood the practical consequences of its interpretive efforts at the time it was evaluating Title IX.[190] If the goal of Title IX is ultimately to ensure an end to discrimination within educational environments, it is most certainly antithetical to that goal to require a student to continue to subject herself to additional harassment in order to be afforded the protections provided by Title IX. Such a requirement has the opposite effect of ending discriminatory experiences at school—it *increases* discrimination by asking a plaintiff to show that she was first subjected to actionable harassment to which a school was deliberately indifferent and then subjected to additional actionable harassment after the initial abuse. As one can easily imagine, after experiencing a rape, assault, or sexual harassment in a school environment, many students chose to leave that environment to escape the psychological impacts of a traumatic event or to ensure that they are not subjected to further abuse.[191] This is itself "discrimination under any education[al] program or activity," as the victim navigates the fear of further harassment within her educational experience or is required to bear the consequences of her lost educational opportunities.[192] The *Farmer* approach recognizes it as such, acknowledging that the fear

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188. *See Kollaritsch*, 944 F.3d at 624–25.

189. *See* Farmer v. Kan. State Univ., 918 F.3d 1094, 1098 (10th Cir. 2019).

190. *See, e.g.*, Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073, 1107 (1992) (noting that "practical considerations play an important role in the [Supreme] Court's statutory cases").

191. *See* Cecilia Mengo & Beverly M. Black, *Violence Victimization on a College Campus: Impact on GPA and School Dropout*, 18 J. COLL. STUDENT RETENTION: RSCH., THEORY & PRAC. 234, 244 (2015) (finding that students who experience sexual violence were more likely to leave school compared with students who experienced physical or verbal violence); Sharyn Potter, Rebecca Howard, Sharon Murphy & Mary M. Moynihan, *Long-Term Impacts of College Sexual Assaults on Women Survivors' Educational and Career Attainments*, 66 J. AM. COLL. HEALTH 496, 499, 502 (2018) (finding that only 35.8% of study participants who experienced a college sexual assault completed their degree without disruption, and 67% reported a negative impact on academic performance).

192. Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 173 (2005) (quoting 20 U.S.C. § 1681(a) (2018)).

of further harassment can be almost as damaging as the harassment itself.[193]

By contrast, under the Sixth Circuit's approach, this vulnerability is not enough.[194] Instead, plaintiffs must willingly continue at the same educational institution where the trauma occurred and actively put themselves in harm's way so that they can be subjected to the additional harassment that *Kollaritsch* would require. For example, in a situation where a female student who is raped by a fellow classmate reports the rape, but the school does nothing, the student would be required to continue to go to school with her rapist and deliberately subject herself to retraumatization and further harassment by that rapist to establish a claim for civil damages under Title IX. Even more disturbingly, if a small child is sexually assaulted by a fellow student but the school does nothing to address the assault, the parents would be placed in the unconscionable position to have their young child continue attending school with the assailant if they wanted to seek private action against the school for its obvious failures under Title IX. If they acted, as most parents would, to protect their child from any future harassment by removing their child from the school environment, they would also forgo any right to a Title IX claim, despite the school's clear deliberate indifference.[195]

As multiple courts have noted, this would be a perverse distortion of Title IX.[196] Rather than offering students the protection of the federal government to prevent ongoing discrimination and ensure environments free of harassment, this interpretation of Title IX would require students to actually subject themselves to additional harassment and discrimination to assert their statutory rights. Certainly, this cannot be what legislators intended in enacting the statute, nor the Supreme Court in interpreting it. Preserving the most inherent antidiscriminatory principles of Title IX necessitates following the *Farmer* approach.

CONCLUSION

The passage of Title IX was a historical moment in our nation's collective effort to combat sexual discrimination in educational institutions and ensure that female students have equal access to the educational opportunities that they seek. The purpose of Title IX was broad, and the Supreme Court's interpretations of Title IX have consistently recognized the breadth of the protections that should be afforded to female students.[197] While a circuit split currently exists between *Farmer* and *Kollaritsch* as to whether the *subjected* language of *Davis* permits plaintiffs

193. *Farmer*, 918 F.3d at 1105.
194. Kollaritsch v. Mich. State Univ. Bd. of Trs., 944 F.3d 613, 624–25 (6th Cir. 2019).
195. *See id.*
196. *See, e.g.*, *Farmer*, 918 F.3d at 1104; Karasek v. Regents of the Univ. of Cal., No. 15-cv-03717-WHO, 2015 WL 8527338, at *12 (N.D. Cal. Dec. 11, 2015).
197. *See, e.g.*, Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 287 (1998).

to plead vulnerability to harassment, or if additional specific actionable harassment is required, this Article argues that the broad mandate of Title IX should prevail.[198] Whether looking to the plain language meaning in *Davis*, the policies and purposes behind Title IX, or the practical implications of Title IX jurisprudence, the Tenth Circuit's approach to vulnerability in *Farmer* best ensures the protection of women on campus and at school and continues to hold educational institutions accountable when they fail to provide such protection under law.

198. *See supra* Parts VI, VII.