No. 22-2454

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JANE DOE,
Plaintiff-Appellant,

v.

BOARD OF REGENTS OF THE
UNIVERSITY OF WISCONSIN SYSTEM,
Defendant-Appellee.

On Appeal from the United States District Court
for the Western District of Wisconsin
Case No. 3:20-cv-856
The Honorable William M. Conley

REPLY BRIEF OF PLAINTIFF-APPELLANT JANE DOE

John Clune
Christopher Ford
Lucy Walker
HUTCHINSON BLACK AND COOK, LLC
921 Walnut Street, Suite 200
Boulder, CO 80302
(303) 442-6514
clune@hbcboulder.com
ford@hbcboulder.com
walker@hbcboulder.com

Alexandra Z. Brodsky
Adele P. Kimmel
Mollie Berkowitz
PUBLIC JUSTICE
1620 L Street NW, Suite 630
Washington, DC 20036
(202) 797-8600
abrodsky@publicjustice.net
akimmel@publicjustice.net
mberkowitz@publicjustice.net

Counsel for Plaintiff-Appellant
Additional Counsel on Inside Cover

Robert Theine Pledl
DAVIS & PLEDL S.C.
1433 N. Water Street, Suite 400
Milwaukee, WI 53202
(414) 488-1354
rtp@davisandpledl.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Regulations

Other Authorities

INTRODUCTION

The University's brief is most notable for what it doesn't dispute. The University doesn't deny Jane presented evidence showing that, after Player 1 raped her, she missed classes, avoided parts of campus, went home on weekends, and was otherwise deprived of educational opportunities. It doesn't contest the district court's holding that a jury could find the University decided to readmit Player 1 because of pressure from donors and football fans. And it doesn't even attempt to distinguish binding case law that a rapist's presence may create a hostile environment for the victim. Yet the University contends that a jury could not find it liable under Title IX. In doing so, the University misstates both the law and the record.

ARGUMENT

I. A jury could find Jane experienced sufficiently serious harassment to deprive her of educational opportunities and benefits.

A. Jane was subjected to severe and pervasive harassment.

The University doesn't dispute that Jane was subjected to severe sexual harassment. But it says (at 33-34) that the harassment wasn't

pervasive, relying on cases that held a single act of sexual harassment is not actionable. Those cases are inapposite for two reasons.

First, Jane was sexually assaulted multiple times and nonconsensually photographed between those assaults. OpeningBr.8-9. This case is like *Williams*, in which the Eleventh Circuit held that a student who was repeatedly raped over two hours, in a "a continuous series of events," was subjected to severe and pervasive harassment. *Williams v. Bd. of Regents of Univ. Sys. of Ga.,* 477 F.3d 1282, 1297-98 (11th Cir. 2007). As the Eleventh Circuit explained, multiple assaults occurring over a single night are "markedly" different "from the rarely actionable, theoretical single incident mentioned in *Davis* and *Hawkins*." *Id.* at 1298.[1]

Second, as explained previously, Jane was subjected to a post-assault hostile environment when she was forced to share a campus with Player 1 without meaningful protections. OpeningBr.35-40. She was, reasonably, "terrified" that she might encounter Player 1 on campus and he

[1] Some courts have held that a single rape may be severe and pervasive. *E.g.*, *Doe v. Fairfax Cnty. Sch. Bd.*, 1 F.4th 257, 274 (4th Cir. 2021), *cert. denied*, 143 S.Ct. 442 (2022); *Fitzgerald v. Barnstable Sch. Comm.*, 504 F.3d 165, 172-73 (1st Cir. 2007), *rev'd and remanded on other grounds,* 555 U.S. 246 (2009). But the facts of this case don't present that question.

might hurt her. *Id.* 20. Player 1 had repeatedly assaulted her, then tried to physically contact and intimidate her on campus, violating a no-contact order. *Id.*[2] Although the University's campus is large, Jane knew there was a real risk she would encounter Player 1 at central facilities, like the student union, and other parts of campus popular with athletes. R.98 at 114:2-115:16; R.156 ¶¶ 4, 11; *see also Farmer v. Kan. State Univ.*, 918 F.3d 1094, 1105 (10th Cir. 2019) (holding victims' fear of encountering their rapists on KSU's campus was "objectively reasonable"); *About K-State*, Kansas State University, https://perma.cc/MQU2-T7VN (last visited January 24, 2023) (noting KSU's "campus encompasses more than 2,320 acres").

Indeed, the University itself found that Player 1's presence on campus subjected Jane to a hostile environment. OpeningBr.37-38. And this Court has held a rapist's presence can create a hostile environment for the victim, even if they don't encounter each other. *Lapka v. Chertoff*, 517 F.3d 974, 980, 984 (7th Cir. 2008); OpeningBr.36, 38.

[2] Jane's evidence that Player 1 violated the no-contact order isn't "inadmissible hearsay," AnsweringBr.28. The record includes Jane and another witness's descriptions of the encounter. R.98 at 151:9-14; R.148 ¶¶ 7-8; R.156 ¶ 9. And Jane cited the University's own statement of facts. OpeningBr.11 (citing R.124 ¶ 181).

The University asserts that, for the "severe and pervasive" analysis, the Court should consider only the sexual assaults and ignore the broader sexually hostile environment. AnsweringBr.34; *see also id.* 24-27. That cannot be reconciled with *Lapka*, which specifically cited office visits by the rapist and his brother, and the resulting hostile environment, in holding the harassment was sufficiently severe or pervasive to satisfy *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986). *See* 517 F.3d at 983-84. The University doesn't acknowledge *Lapka*, let alone attempt to distinguish it, thus forfeiting any argument that it doesn't apply.

B. Jane was deprived of educational opportunities and benefits.

1. The University is wrong that a student cannot prove an educational deprivation absent evidence of a decline in grades. *See* OpeningBr.33-34. *Davis* observed that the victim's "grades provide[d] necessary evidence of a potential link between her education and [the] misconduct." *Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 652 (1999). According to the University, that means worse grades are "necessary" to establish an educational deprivation. AnsweringBr.35. Not so. Under *Davis*, what's necessary is "evidence of a potential link," and a drop in grades is one way to prove that link. 526 U.S. at 652. By

analogy, an apple might provide necessary sustenance to a starving person, but that doesn't mean apples are the only food that could do the job.

Indeed, *Davis* made clear that other kinds of educational injuries—including exclusion from facilities like an "athletic field"—may suffice. *Id.* at 651. Title IX's plain text requires the broader view: it forbids students from being "excluded from participation in" or "denied the benefits of … an education program or activity," categories that encompass more than falling grades. 20 U.S.C. § 1681(a). It's also just commonsense that a student can miss out on educational experiences—academic, extracurricular, or social—even if her grades don't suffer. Some forms of discrimination Congress was most concerned about when passing Title IX, such as women's exclusion from male-dominated majors and advanced coursework, would not cause lower GPAs. *See* OpeningBr.5-6.

No wonder, then, that other appellate courts have roundly rejected the University's misreading. *Id.* 34 (discussing cases); *see also, e.g.*, *Williams*, 477 F.3d at 1298-99 (holding victim experienced educational deprivation when she left school after rape, and therefore had no post-assault grades). The University's cited cases are consistent with this consensus. They merely demonstrate that a student who cannot point to *any*

educational deprivation won't have a claim. *See Jauquet v. Green Bay Area Cath. Educ., Inc.*, 996 F.3d 802, 810 (7th Cir. 2021); *Gabrielle M. v. Park Forest-Chi. Heights, Il. Sch. Dist. 163*, 315 F.3d 817, 823 (7th Cir. 2003). And, despite its quibbling about the record, the University does not and could not argue that Jane hasn't provided evidence of educational deprivations.[3]

Plus, Jane was only able to maintain her grades by taking an easier courseload. R.156 ¶ 13; R.100 at 180:9-21. So, even if a change in "academic status" were necessary for a Title IX claim, *Jauquet*, 996 F.3d at 810, Jane could satisfy that requirement.

2. The University also says (at 38) that Jane's educational deprivations don't count because they are attributable to Player 1's presence on campus rather than the harassment. That's a distinction without a difference. Jane avoided campus facilities and events *because Player 1 had raped her* and she feared he would hurt her again. OpeningBr.20-21. Her

[3] The University criticizes Jane for citing a declaration, AnsweringBr.37, but her deposition and interrogatory responses establish the same facts, R.98 at 114:2-115:16; R.98-1 at 7-8. The University also misrepresents the record. For example, Jane testified that she dropped a philosophy course due to Player 1's readmission, not—as the University claims (at 38)—because she got into another class. R.98 at 156:14-158:10.

educational injuries are directly caused by the original harassment, as well as the subsequent hostile environment. The same is true of all the other victims who established cognizable deprivations when they missed classes and avoided parts of campus to avoid their assailants. *See id.* 39 (collecting cases.) Regardless, even if the University were right on the law, Jane could satisfy its requirement: she left school shortly after the rapes, cutting short her semester on campus. S.A.27.

3. Finally, the University is wrong that Jane's injuries are presented with insufficient detail. *See* AnsweringBr.39-40. Jane has provided evidence of specific ways her education suffered. These include the period she left campus after the rape, the particular parts of campus she avoided, her frequent trips home to avoid Player 1, and changes to her courseload. OpeningBr.9, 21-22, 29-30. Those are the kinds of injuries that this Court and others have held can give rise to a Title IX claim. *Id.* 27-29. And much of the detail the University insists Jane failed to provide—such as how many weekends she left campus—is in the record. *See* R. 98 at 149:15-25 (establishing Jane went home "[o]ver ten times" during the "fall of 2019").

Besides, the University presents no authority or reasoning as to why the specific details it demands are necessary for Jane to establish a dispute of material fact. All the University offers is a "cf." cite to *Gabrielle M.*, 315 F.3d at 822, where a plaintiff needed to explain "when, where, or how often" she was harassed. AnsweringBr.39. But that was required to establish the harassment was pervasive and within the school's control, not to satisfy some general rule about the specificity of summary judgment evidence.

II. The district court was correct that a jury could find the University's response was clearly unreasonable.

1. The University is wrong that "[d]eliberate indifference means … 'the school learned of a problem and did nothing.'" AnsweringBr.41-42 (citation omitted). Appeals courts have unanimously and squarely rejected that position, holding that a school may not avoid a finding of deliberate indifference simply because "it did not just do 'nothing.'" *Hall v. Millersville Univ.*, 22 F.4th 397, 411 (3d Cir. 2022); *see also, e.g.*, *Doe v. Sch. Bd. of Broward Cnty.*, 604 F.3d 1248, 1259-60 (11th Cir. 2010) (holding a school may be liable even if it "took *some* action in response to [the] sexual harassment allegations"); *Vance v. Spencer Cnty. Pub. Sch. Dist.*, 231 F.3d 253, 260 (6th Cir. 2000) (same); *S.B. v. Bd. of Educ. of Harford*

Cnty., 819 F.3d 69, 77 (4th Cir. 2016) (similar). That makes sense because a school may be clearly unreasonable even if it does "something," such as if it knew its response was insufficient to ameliorate the hostile environment. *Zeno v. Pine Plains Cent. Sch. Dist.*, 702 F.3d 655, 669-70 (2d Cir. 2012); *Vance*, 231 F.3d at 262; *see also Hall*, 22 F.4th at 411 (holding a jury could find a school was deliberately indifferent even though it took some action); *Fairfax*, 1 F.4th at 271-73 & 273 n.11 (same).

The University cites two cases that noted a school had avoided the clearest example of liability: doing "nothing." But neither held that was dispositive. *See Jauquet*, 996 F.3d at 809; *Johnson v. Ne. Sch. Corp.*, 972 F.3d 905, 912 (7th Cir. 2020). And the University's proposed rule cannot be squared with this Court's treatment of § 1983 deliberate indifference claims. For example, a § 1983 "plaintiffs receipt of *some* medical care does not automatically defeat a claim of deliberate indifference." *Edwards v. Snyder*, 478 F.3d 827, 831 (7th Cir. 2007); *see also Petties v. Carter*, 836 F.3d 722, 729-31 (7th Cir. 2016) (en banc) (similar).

Consistent with its misstatement of the law, the University complains (at 55) that Jane won't give it credit for its initial response to the rapes—its "something." But, as the district court held, the thoroughness

and fairness of the first thirteen months of the University's response—through its investigation, hearing, and appeals—only underscores how unreasonable the University was to rush to toss its finding and the protection that came with it. A.13.[4]

2. The University doesn't deny a jury could conclude it reversed its finding on Player 1's responsibility, and revoked its remedy, to appease donors and fans. *See* AnsweringBr.53-54. Instead, the University says that its motivation, in a vacuum, "cannot be the basis of Title IX liability if [its response] is not deliberately indifferent." *Id.* 54. But Jane doesn't argue that the University's motivations alone give rise to liability. Rather, its reasons are inextricably intertwined with its deliberately indifferent course of action—which, the University itself notes, must be considered as a whole, *id.* 55.

Here, the one-sided nature of the proceeding, like its other flaws, was a symptom of a larger problem: the University had no need to hear from Jane because it wasn't trying to discover the truth. *See*

[4] The district court did not, as the University says (at 46), say the school's full course of conduct was "prompt[ ]" and "fulsome." The district court said that about the University's initial response only, and sharply criticized its later reversal. A.10-13.

OpeningBr.41-42. The University's focus on press clips and donations illuminates that the reversal process did not just happen to exclude Jane or happen to be rushed. The University did not just accidentally forget to justify its decision based on any specific new evidence. (Even now, the University is unable to identify precisely what "new" evidence changed its decision. *See* AnsweringBr.45.) Rather, these features were inherent to the sham process designed to get the University the answer its donors and fans demanded—despite the cost to Jane, who no longer mattered to the school.[5]

Readmitting a student found responsible for sexual assault because that's what donors and sports fans want is clearly unreasonable,

---

[5] The only specific evidence the University says was persuasive is Complainant 1's statement. AnsweringBr.45. As explained, that statement wasn't new; it supported Jane's account, not Player 1's; and a jury could believe it is a post hoc justification. OpeningBr.42-43.

A jury could also find Blank upholding the "sexual harassment" finding and pretending Player 1 had been "suspended" for that offense further demonstrates her decision wasn't evidence-based. Contrary to the University's telling (at 14), the school never found Player 1 responsible for photographing Jane. S.A.19-20. Instead, the University found him responsible for "sexual harassment" based on the post-assault hostile environment. S.A.29. Yet, after clearing Player 1 of the assaults, Blank maintained the harassment finding, justifying it on the photographs, and spun his reinstatement as a modification of his expulsion to a completed "suspension" for harassment. R.94-6 at 5.

especially when the school has specifically found the victim will suffer a hostile environment as a result, OpeningBr.37-38. It is no more permissible than a school ignoring the results of its investigation, or refusing to conduct one, because administrators like the accused harasser, or because he pays more tuition, or because he might sue, or because the coin landed on "heads" rather than "tails." *See, e.g.*, *Fairfax*, 1 F.4th at 272-73 (holding school was deliberately indifferent for "tr[ying] to sweep the [harassment] reports under the rug so as not to cause trouble for … one of their star students"); *cf. Ricci v. DeStefano*, 557 U.S. 557, 585 (2009) (holding defendant wasn't excused from following law because it believed its actions were necessary to avoid lawsuits by other workers).

In these circumstances, a school is not liable for a bad motive absent deliberate indifference. Rather, a school's reasons for acting as it did inform the court's consideration of whether that response was clearly unreasonable. *See, e.g.*, *Wamer v. Univ. of Toledo*, 27 F.4th 461, 472 (6th Cir. 2022) (explaining whether school's "decision to close its … investigation … was clearly unreasonable depends on … why it decided to close the investigation"), *cert. denied,* 143 S.Ct. 444 (2022); *Roe v. Cypress-Fairbanks Indep. Sch. Dist.*, 53 F.4th 334, 347 (5th Cir. 2022) (explaining

a school would be deliberately indifferent if the reason it halted its investigation was prosecutors' decision not to press charges); *see also infra* p. 29 (explaining deliberate indifference to sexual harassment is sex-based discrimination).

3. The University similarly defends each individual flaw in its process in a vacuum, ignoring how those flaws fit into its broader, clearly unreasonable response. That's the wrong analysis: "[i]t's the totality of an institution's 'response to the harassment' that" determines whether it was deliberately indifferent, "not a fraction of the response, placed in a vacuum and under a microscope." AnsweringBr.55 (citations omitted).

Take the University's argument (at 51) that the brevity of the reversal process wasn't, on its own, deliberately indifferent. Sure. But the district court held the thirteen-day reversal was so rushed, especially in comparison to the previous stages of the school's response, that—in combination with other evidence—a jury could find the decision wasn't based on facts or reason. A.13.

The University fares no better with its argument (at 51-52) that it didn't violate Title IX because state law didn't require the Chancellor to include Jane in the petition process. Compliance with a state regulation

doesn't excuse compliance with a federal statute. *Quinones v. City of Evanston*, 58 F.3d 275, 277 (7th Cir. 1995). (Notably, when Wisconsin later amended its regulations to better comport with Title IX, it required the University to allow student complainants to reply to any readmission petition. *See* 785B Wis. Admin. Reg. CR 20-062 (May 31, 2021), https://perma.cc/Y4QJ-SG44.) And, once again, the University ignores how its exclusion of Jane fits into the central problem with its response to Player 1's petition for readmission: the University knew the result it wanted, and Jane could only get in its way.

Similarly, the University's refusal to provide Jane with reasonable safety measures cannot be understood in a vacuum. The problem is not merely that Jane would have preferred additional remedies. Rather, a jury could find that the University knew that Player 1 had raped Jane, knew that he posed an ongoing threat to her education, knew he had violated the no-contact order—and yet permitted him to return to campus without any additional safety measures because clearing him looked better. *See* OpeningBr.11-21. Indeed, a jury could determine Player 1 posed an even greater risk to Jane than he had before his "expulsion." He now knew the University was committed to his impunity, and he was no

longer subject to court-ordered bond conditions forbidding him from contacting Jane, R.124 ¶¶ 134-38.[6]

The University insists its no-contact order must have been reasonable because Jane didn't encounter Player 1 when he returned. But a jury could find Jane avoided contact due to her own self-protective measures—which came at the cost of her education—rather than the University's limited measures. *See* OpeningBr.21-22; *see also Kelly v. Yale Univ.*, No. Civ.A. 3:01-CV-1591, 2003 WL 1563424, at *4 (D. Conn. Mar. 26, 2003) (explaining that student's self-protective measures, rather than school's response, prevented further harassment); *Takla v. Regents of the Univ. of Cal.*, No. 2:15-CV-04418-CAS, 2015 WL 6755190, at *5 (C.D. Cal. Nov. 2, 2015) (warning "undue emphasis" on further harassment would "penalize" victims for protecting themselves); *cf. Williams*, 477 F.3d at 1297 (holding student could state Title IX claim when she never encountered assailants again because she left school due to university's failure to protect her from further harassment).

[6] The University congratulates itself for listening to Jane's safety concerns at a meeting, AnsweringBr.46, but provided no solutions in response, OpeningBr.21.

4. Viewing the University's response as a whole, its cases are clearly distinguishable. They show a school that diligently investigates and addresses sexual harassment won't be deliberately indifferent just because it fails to share the results with the victim promptly. *Doe v. Galster*, 768 F.3d 611, 621 (7th Cir. 2014); *Karasek v. Regents of Univ. of Cal.*, 956 F.3d 1093, 1109 (9th Cir. 2020). And if a school provides a reasonable, age-appropriate remedy, it won't be liable just because the victim desired a different outcome, *Jauquet*, 996 F.3d at 809; *see also Galster*, 768 F.3d at 621 (holding school that expelled harassers didn't have to provide safety plan during summer vacation)—especially if the victim refuses to participate in the school's investigation, and so the school can't confirm the allegation, *Johnson*, 972 F.3d at 912-13.[7] But none of these cases excuse the University's fundamentally biased response.

5. Throughout its brief, the University misrepresents its actions and their consequences. For example, it says it informed Jane about Player 1's petition when it didn't. *Compare* AnsweringBr.13 *with* OpeningBr.14. And, notably, in its factual summary, the University suggests

[7] The University accuses Jane of withholding information, but she never possessed the forensic nurse exam the University requested, R.156 ¶ 14.

(at 13) that Jane's participation in the petition review process wouldn't have influenced its decision. A jury might agree Jane couldn't have convinced the University to leave the finding intact, but only because its conclusion was predetermined. Besides, Jane *has* identified information she would have provided, and which a jury could believe might have swayed a reasoned decisionmaker. This includes a urine alcohol test—of which Jane's attorney first learned at the criminal trial—taken by Jane at the hospital after the assaults. R.148 ¶¶ 12, 21.

Jane and her lawyer also could have corrected the Chancellor's critical misunderstanding of the disciplinary offense at issue. The Chancellor believed the offense turned on whether Player 1 had "reason to believe he had consent." R.94 at 207:5-6. But that belief was only relevant to the school's rule against second degree sexual assault, not third degree. S.A.15. And the University had only found Player 1 responsible for the latter. S.A.28-29. Jane could also have noted that, because Player 1 had only been criminally tried for an offense against Jane analogous to second degree sexual assault, the University's initial findings were consistent with the jury's verdict, even putting aside the different evidentiary standards. *See* OpeningBr.13 & n.3.

III. The University had control over the on-campus hostile environment, did not move for summary judgment on the control element, and is wrong on the law.

1. The University argues (at 23-33) that a jury couldn't find for Jane because the school lacked substantial control over the "context" of the assaults. But, as previously explained, Jane experienced an on-campus sexually hostile environment, OpeningBr.35-40, and the University concedes a school has control over its own grounds, AnsweringBr.30. The University's position that only the assaults—and not the broader hostile environment—count is irreconcilable with *Lapka*, *supra* pp. 3-4, and the logic of "a claim for 'hostile environment' harassment," *Meritor*, 477 U.S. at 67; *see also Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993) (explaining claim for a "discriminatorily abusive … environment").

2. Regardless, the University did not move for summary judgment on this basis. In its opening brief below, the University never argued that it lacked control over the events in the apartment and that Jane's claim failed as a result. *See generally* R.125. Only in its reply did the University

press the control issue it raises now. R.167 at 12-18. Unsurprisingly, the district court didn't address this last-minute argument. A.1-21.[8]

The University might protest that the district court missed footnote 114 on page 55 of its opening brief, which asserted "[a]n off-campus sexual assault … cannot give rise to a Title IX claim." R.125 at 55 n.114. But "[a] footnote does not preserve an issue for review." *Moriarty ex rel. Loc. Union No. 727 v. Svec*, 429 F.3d 710, 722 (7th Cir. 2005). So, an "argument … made only in a footnote in [an] opening brief and … not developed fully until the reply" is "waived." *Bakalis v. Golembeski*, 35 F.3d 318, 326 n.8 (7th Cir. 1994). This two-sentence footnote is particularly insufficient. It leaves untouched the fact-specific question of whether the University exercised control. *See infra* p. 21 (discussing fact-specific nature of inquiry). And it suggests only that the University can't be liable for failing to *prevent* the assaults—which Jane has never contended it is.

The University's delay is fatal for two related reasons, one general and one specific to summary judgment. First, "it is well-established that

[8] The University's opening brief was consistent with it motion to dismiss, in which the University argued it lacked control over online harassment Jane faced by Player 1's supporters, but didn't argue it lacked control over the assaults or photographing. R.28 at 24-25.

arguments raised for the first time in a reply brief are waived" or forfeited. *Shlay v. Montgomery*, 802 F.2d 918, 922 n.2 (7th Cir. 1986). Accordingly, an "argument … raised for the first time in [a district court] reply brief … will not be considered" on appeal. *Sims v. Mulcahy*, 902 F.2d 524, 536 (7th Cir. 1990).

Second, the University failed to fulfill its "initial burden of identifying th[is] basis for seeking summary judgment." *Costello v. Grundon*, 651 F.3d 614, 635 (7th Cir. 2011). "[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If a movant fails to do so, the burden doesn't shift to the nonmovant to introduce evidence and establish a dispute of fact as to that unidentified ground. *Costello*, 651 F.3d at 635 (citing cases). Accordingly, this Court will not affirm a grant of summary judgment on an "alternative bas[i]s … not raised in the district court until the filing of the reply." *Id.* at 637.

This result is necessary as a matter of both doctrine and basic fairness. Without notice of the movant's basis for seeking summary judgment, the nonmovant is deprived of the opportunity not only to advance

a counterargument but to develop the record, *see id.* at 635, which the parties may not supplement on appeal, *United States v. Banks*, 405 F.3d 559, 567 (7th Cir. 2005). "Thus, it would be unfair to affirm summary judgment on" a ground first identified in reply. *Costello*, 651 F.3d at 635-37.

Jane's case illustrates that unfairness. As the U.S. Department of Education has recognized, "whether … a sexual harassment incident between two students that occurs in an off-campus apartment … is a situation over which the recipient exercise substantial control" is a "fact specific" question. 85 Fed. Reg. 30,026, 30,093 (May 19, 2020); *see also Hall*, 22 F.4th at 409 (explaining control turns on specific facts, not categorical distinctions). And because the University didn't identify this putative ground for summary judgment until its reply, Jane had no chance to present evidence relevant to this fact-specific issue. The University's control argument is therefore foreclosed.

3. The unpreserved argument is also wrong. *Davis*'s "control" requirement derives from its holding that a school could only be responsible for its *own* failure to intervene; it would not be vicariously liable for the student-harassers' misconduct. 526 U.S. at 640-41. Toward that end,

Davis explained that a school's liability depended, in part, on its "control over the context in which the harassment occurs" and, "[m]ore importantly," its "control over the harasser." *Id.* at 646. If the school lacked the control necessary to address the harassment, it could not be responsible for its failure to do so. *See Doe–2 v. McLean Cnty. Unit Dist. No. 5 Bd. of Dirs.*, 593 F.3d 507, 512-13 (7th Cir. 2010) (holding defendant lacked control over different school where former teacher later worked because defendant lacked "authority to take remedial action").

"The location at which the … harassment occurs is certainly part of a court's calculus in examining context—but it is not dispositive." *DeGroote v. Ariz. Bd. of Regents*, No. CV-18-00310-PHX, 2020 WL 10357074, at *8 (D. Ariz. Feb. 7, 2020). After all, the Court chose the term "context," not "location." *Davis*, 526 U.S. at 645-46. And the one term *Davis* used synonymously with "context" is "environment," *id.* at 644—a term that evokes "conditions" or "circumstances" defined by more than simple geographic boundaries, *Environment*, Merriam-Webster, https://www.merriam-webster.com/dictionary/environment.

A school may exercise substantial control over a context by regulating what happens in that environment. *See, e.g.*, *Feminist Majority*

Found. v Hurley, 911 F.3d 674, 687-89 (4th Cir. 2018) (explaining school had substantial control because it could have "exercised control in … ways that might have corrected the hostile environment"). *Davis* connected "control over context" to Title IX's text, 526 U.S. at 645, which forbids, among other things, "discrimination *under* any education program or activity," 20 U.S.C. § 1681(a) (emphasis added). The Court then adopted a series of dictionary definitions of "under" that all boil down to regulatory authority: "'in or into a condition of subjection, regulation, or subordination'; 'subject to the guidance and instruction of[,]' … 'subject to the authority, direction, or supervision of.'" *Davis*, 526 U.S. at 645 (citations omitted).

One common way schools exercise their regulatory authority is through discipline. *Davis* acknowledged this in summarizing its holding: "We thus 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*." *Id.* at 646-47 (emphasis added). In formulating the liability standard this way, with the last clause standing for the "control" requirement the Court had

explained above, *Davis* made clear that disciplinary authority may provide a school with control over both the harasser and the context of the harassment. *See Doe–2*, 593 F.3d at 512-13 (explaining control turns on "authority to take remedial action").

Courts also look at other indicia of a "nexus between the out-of-school conduct and the school." *See Rost v. Steamboat Springs RE-2 Sch. Dist.*, 511 F.3d 1114, 1121 n.1 (10th Cir. 2008). These include the location of the conduct and the likelihood it would affect the learning environment. *See, e.g.*, *Hurley,* 911 F.3d at 687 (holding university controlled context of harassment "within the immediate vicinity of … campus" concerning "events occurring on campus and specifically target[ing] … students"); *cf. Chen ex rel. Chen v. Albany Unified Sch. Dist.*, 56 F.4th 708, 720-23 (9th Cir. 2022) (determining "the relation between the … context of the [harassing] speech and the school" indicated "nexus" for First Amendment purposes).

Accordingly, the federal agencies responsible for enforcing Title IX have been clear that a school may exercise control that "arises off campus," including in an "off-campus apartment." 85 Fed. Reg. at 30,093; *see also, e.g.*, Brief of the United States as Amicus Curiae at 8-11, *Brown v.*

State of Ariz., No. 20-15568 (9th Cir. Aug. 8, 2022), https://www.justice.gov/crt/case-document/file/1524916/download (explaining schools may exercise control over off-campus apartments through regulatory authority); Letter from Adele Rapport, U.S. Dep't Educ., to Janice K. Jackson, Chicago Pub. Schs. Dist. #299 at 4-10, 33-34 (Sept. 12, 2019), https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/05151178-a.pdf (finding district violated Title IX in failing to address off-campus harassment). That view is consonant with Title VII precedent requiring employers to address some employee-on-employee harassment that occurs outside work. *E.g.*, *Lapka*, 517 F.3d at 983; *Dowd v. United Steel Workers of Am., Loc. No. 286*, 253 F.3d 1093, 1101-02 (8th Cir. 2001); *Ferris v. Delta Air Lines Inc.*, 277 F.3d 128, 136-37 (2d Cir. 2001).

Here, despite Jane's inability to develop the relevant record, there is evidence the University exercised control over the context of the initial sexual assaults. That's true whether the relevant context is the apartment—surrounded by University buildings[9]—or the environment of

[9] *See* R.113-10 at 3 (identifying apartment address as 1216 Spring Street); *1216 Spring Street*, Google Maps, https://perma.cc/6ACY-HTQT

student life that extended to the "immediate vicinity of … campus," *Hurley,* 911 F.3d at 687. The University unquestionably exercised disciplinary authority over the area surrounding its campus, including the apartment. The University's written policies provide the school may investigate and discipline conduct that endangers other students, constitutes a criminal offense, or otherwise "adversely affects a substantial university interest." R.103-2 at 2. And the University exercised its disciplinary authority over the events in the apartment by investigating them and initially sanctioning Player 1. OpeningBr.10-12. Plus, there was a clear nexus between the school and the context of the harassment. A jury could find, then, that the University exercised control over the context of the harassment.

(last visited Jan. 24, 2023) (showing apartment's location between North Charter and North Orchard); *Campus Map*, University of Wisconsin-Madison, https://perma.cc/AKP6-54FG (last visited Jan. 24, 2023) (illustrating location of campus buildings).

IV. A jury could find the University liable because its deliberate indifference caused Jane to suffer a hostile environment and to be deprived of educational opportunities and benefits.

The University contends that it cannot be liable for its deliberate indifference because, it says, Jane wasn't sexually harassed again after reporting. As explained, Jane was subjected to a sexually hostile environment after the University received notice. OpeningBr.35-39. So, a jury could find for Jane even if post-notice harassment were necessary.

Moreover, the overwhelming majority of federal appellate courts agree a plaintiff may state a claim under Title IX if her school's deliberate indifference to sexual harassment deprives her of educational opportunities, even if she doesn't experience further harassment. *See Fairfax*, 1 F.4th at 274 (4th Cir. 2021); *Farmer*, 918 F.3d at 1103, 1106 (10th Cir. 2019); *Fitzgerald*, 504 F.3d at 171 (1st Cir. 2007); *Williams*, 477 F.3d at 1296 (11th Cir. 2007); *see also Doe ex rel. Doe #2 v. Metro. Gov't of Nashville & Davidson Cnty.*, 35 F.4th 459, 467-68 (6th Cir. 2022) (adopting same rule for cases brought by high school students), *cert. denied*, 2023 WL 124074 (2023); *Wamer*, 27 F.4th at 463 (6th Cir. 2022) (adopting majority view for teacher-on-student harassment).

So does the federal government, which enforces Title IX. Brief of the United States as Amicus Curiae at 7-12, *Fairfax Cnty. Sch. Bd. v. Doe*, No. 21-968 (Sept. 27, 2022), https://www.justice.gov/sites/default/files/briefs/2022/11/16/fairfax_county_9.26.22.pdf; *see also* 34 C.F.R. § 106.44(a) (adopting Title IX liability standard without requiring post-notice harassment).

1. Analysis of any statute begins with the text. *Bostock v. Clayton Cnty.,* 140 S.Ct. 1731, 1738 (2020). Title IX is no exception. The Supreme Court has repeatedly instructed that Title IX must be "accord[ed] … a sweep as broad as its language." *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982).

Title IX identifies three categories of violations that may give rise to a claim: "No person in the United States shall, on the basis of sex, [1] be excluded from participation in, [2] be denied the benefits of, or [3] be subjected to discrimination under any education program or activity … ." 20 U.S.C. § 1681(a). "The statute makes clear that, whatever else it prohibits, students must not be denied access to educational benefits and opportunities on the basis of gender." *Davis*, 526 U.S. at 650.

Davis emphasized that a plaintiff states a claim against a school not for the third-party's underlying harassment but rather based on the defendant's "own misconduct … in the face of known student-on-student harassment" *Id.* at 640-41. That "deliberate indifference to sexual harassment of a student … constitutes 'discrimination' 'on the basis of sex'" forbidden by Title IX. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 174 (2005) (quoting *Davis*, 526 U.S. at 643). Thus, a school may be liable "for deliberate indifference that results in a student being excluded from participation in, being denied the benefits of, or being subjected to discrimination under its programs." *Hall*, 22 F.4th at 409 n.4.

2. Consistent with the text, *Davis* explained a school can be liable for its own deliberate indifference that "cause[s] students to undergo harassment or make[s] them liable or vulnerable to it." 526 U.S. at 645 (cleaned up). In using the disjunctive, *Davis* "clearly indicates that Plaintiffs can state a viable Title IX claim by alleging alternatively *either* that [the defendant]'s deliberate indifference to their reports of rape caused Plaintiffs 'to undergo' [additional] harassment *or* 'made them liable or vulnerable' to it." *Farmer*, 918 F.3d at 1103 (cleaned up) (quoting *Davis*, 526 U.S. at 645). Vulnerability requires only a potential for harassment.

E.g., *Vulnerable*, Webster's Third New International Dictionary 2566-67 (1993) (defining "vulnerable" to mean "*capable* of being wounded" or "*open* to attack or damage" (emphases added)). A school may be liable, then, when its deliberate indifference "make[s]" the plaintiff "vulnerable" to abuse, regardless of whether further harassment actually occurs. *E.g.*, *Farmer*, 918 F.3d at 1103-04.

This rule makes sense because continuing harassment is not necessary for a school's deliberate indifference to "exclude[]" victims, "den[y]" them the recipient's "benefits," or otherwise "subject[them] to discrimination." 20 U.S.C. § 1681(a). That's especially clear in cases like this one where a "student is put in the position of choosing to forego an educational opportunity in order to avoid contact with the harasser, or to continue attempting to receive the educational experience tainted with the fear of further harassment or abuse." *Wamer*, 27 F.4th at 471.

This terrible bind is illustrated by the many cases in which federal appellate courts recognized that a plaintiff could make out a Title IX claim because her school's deliberate indifference "forced [her] to take very specific actions that deprived [her] of educational opportunities" to avoid further abuse. *Farmer*, 918 F.3d at 1105. These include a Tenth

Circuit case where victims missed class and withdrew from school activities to avoid their rapists, *id.*; a Fourth Circuit case where a student stopped participating in band class to avoid sitting by her assailant, *Fairfax,* 1 F.4th at 276; a Sixth Circuit case where a student changed majors to avoid her harassing professor, *Wamer*, 27 F.4th at 471; and Sixth and Eleventh Circuit cases where victims left the defendant-schools altogether, *Metro. Gov't*, 35 F.4th at 462; *Williams*, 477 F.3d at 1297. Jane's case is just like these: she was forced to miss classes, change her academic course, and otherwise withdraw from campus life because the University's deliberate indifference left her vulnerable to further harassment. OpeningBr.27-31.

In each of the cases, students protected themselves from further discrete acts of harassment, but the school's inaction nonetheless "excluded [them] from" and "denied [them] the benefits of" the University. 20 U.S.C. § 1681(a). So, they could establish Title IX claims. While this Court hasn't addressed the issue squarely, it recognizes that schools must not only "stop" harassment, but also "cure" it—acknowledging unaddressed past harassment can have ongoing, discriminatory effects on

students' educations. *Netherlands Ins. Co. v. Macomb Cmty. Unit Sch. Dist. No. 185*, 8 F.4th 505, 508 (7th Cir. 2021).

3. According to the University, even though "a recipient's deliberate indifference to sexual harassment of a student … constitutes 'discrimination' 'on the basis of sex,'" *Jackson*, 544 U.S. at 174 (citation omitted), and even though the University's deliberate indifference injured Jane in ways expressly forbidden by Title IX's text, she cannot make out a claim because (in its erroneous view) she wasn't sexually harassed post-notice. The University would rewrite Title IX as a harassment tort under which the only cognizable violation is further harassment. But rewriting statutes is Congress's job, not the University's. *See Bostock*, 140 S.Ct. at 1738. And Title IX is an education civil rights law, so an educational deprivation is "the relevant harm." AnsweringBr.58.

The University also tries to rewrite *Davis*. It insists (at 58) that "caus[ing] students to undergo harassment" and "mak[ing] them liable or vulnerable to it" are two "paths leading to further sexual harassment"—that is, two ways to "cause … harassment." That reading wrongly collapses *Davis*'s two prongs, rendering the latter superfluous. *See Farmer*, 918 F.3d at 1104 (explaining courts "must give effect to each part of that

sentence"). And while the University muses (at 57) about the meaning of the word "subjected"—ignoring Title IX's first two clauses—*Davis* has already defined the term to encompass making a student "vulnerable to" further harassment, 526 U.S. at 645. The University would also turn *Davis* on its head. *Davis*'s premise is that a funding recipient is liable "only for its own misconduct." 526 U.S. at 640. Yet the University would premise a school's liability on the later misconduct of a separate actor: the harasser. *See Farmer*, 918 F.3d at 1104.

Tellingly, disagreement among the circuits is less pronounced than the University contends. The only appellate court to have ever taken the University's new position—the Sixth Circuit, *Kollaritsch v. Michigan State Univ. Bd. of Trs.*, 944 F.3d 613, 623-24 (6th Cir. 2019)—has since limited that rule to a subset of Title IX harassment cases. *Metro. Gov't*, 35 F.4th at 468 ("*Kollaritsch* … does not apply to … high schools"); *Wamer*, 27 F.4th at 463 (declining to extend *Kollaritsch* to teacher-on-student harassment); *see also Farmer*, 918 F.3d at 1108 (distinguishing the University's Eighth and Ninth Circuit cases); *Karasek*, 956 F.3d at 1106 n.2 (9th Cir. 2020) (declining to "express [an] opinion on the circuit split").

That Title IX is a Spending Clause statute doesn't change the answer. The Spending Clause doesn't require that every potential violation be "specifically identified and proscribed in advance." *Bennett v. Ky. Dep't of Educ.*, 470 U.S. 656, 666 (1985). And "the text of Title IX gives recipients notice that intentional discrimination will result in liability." *Hall*, 22 F.4th at 404. "It is for this reason that the Supreme Court has, throughout its Title IX jurisprudence, rejected arguments that *Pennhurst* bars a particular plaintiff's cause of action after finding that a funding recipient's conduct constituted an intentional violation of Title IX." *Id.*; *see also Jackson*, 544 U.S. at 182-83 (similar).

"For example, even though the statute does not mention sexual harassment, the [Supreme] Court has held that Title IX proscribes harassment with sufficient clarity to satisfy *Pennhurst*'s notice requirement and serve as a basis for a damages action." *Parker v. Franklin Cnty. Cmty. Sch. Corp.*, 667 F.3d 910, 921 (7th Cir. 2012). The same goes for Title IX's prohibition on retaliation. *Jackson*, 544 U.S. at 182. And the Court held recipients had sufficient notice they could be liable for those forms of discrimination despite disagreement among lower courts, *id.* at 173; *Davis*,

526 U.S. at 637-38, foreclosing the University's argument that a circuit split bars liability.

Here, the University had even clearer notice than the schools in *Davis* and *Jackson*: it already knows Title IX prohibits "intentional sex discrimination in the form of a recipient's deliberate indifference to … sexual harassment." *Jackson*, 544 U.S. at 173; *see also* Off. for Civil Rights, U.S. Dep't of Educ., *Dear Colleague Letter: Harassment and Bullying* 2-3, 6-7 (Oct. 26, 2010), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf (requiring schools to remedy effects of past harassment).

CONCLUSION

For the reasons explained, the Court should reverse the judgment below and remand for further proceedings.

January 24, 2023

Respectfully submitted,

/s/ *Alexandra Z. Brodsky*
Alexandra Z. Brodsky
Adele P. Kimmel
Mollie Berkowitz
PUBLIC JUSTICE
1620 L Street NW
Suite 630
Washington, DC 20036
(202) 797-8600
abrodsky@publicjustice.net
akimmel@publicjustice.net
mberkowitz@publicjustice.net

John Clune
Christopher Ford
Lucy Walker
HUTCHINSON BLACK AND COOK, LLC
921 Walnut Street
Suite 200
Boulder, CO 80302
(303) 442-6514
clune@hbcboulder.com
ford@hbcboulder.com
walker@hbcboulder.com

Robert Theine Pledl
DAVIS & PLEDL S.C.
1433 N. Water Street
Suite 400
Milwaukee, WI 53202
(414) 488-1354
rtp@davisandpledl.com

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Circuit Rule 32(c) because it contains 6,999 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and Circuit Rule 32(b) and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office 365 in 14-point Century Schoolbook font.

Dated: January 24, 2023

/s/ Alexandra Z. Brodsky
Alexandra Z. Brodsky
Counsel for Plaintiff-Appellant