No. _____

In the Supreme Court of the United States

ABIGAIL ROSS,

Petitioner,

v.

UNIVERSITY OF TULSA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

A) Are school personnel that are responsible for both receiving and investigating reports of campus sexual assault for a school's Title IX proceedings considered "appropriate persons" for the purpose of actual notice under *Gebser et al. v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998)?

B) Does a interpretation that only those school employees that have complete and final authority to take corrective action constitute "appropriate persons" violate this Court's reasoning in *Gebser*?

C) Did this Court in *Gebser* intend to restrict the definition of "appropriate persons" to only those with final disciplinary authority, there by permitting a school to use "gatekeepers" to receive and investigate reports of sexual violence while avoiding putting the school on "actual notice" under Title IX.

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The United States Court of Appeals for the Tenth Circuit's decision affirming the United States District Court for the Northern District of Oklahoma's grant of summary judgment to defendants (App. A) is available at *Ross v. Univ. of Tulsa*, 859 F.3d 1280 (10th Cir. 2017). The Tenth Circuit's denial of Petitioner Abigail Ross's petition for rehearing *en banc* on August 7, 2017 (App. C) is unpublished. The District Court's decision granting summary judgment to defendants (App. B) is available at *Ross v. Univ. of Tulsa*, 180 F. Supp. 3d 951 (N.D. Okla. 2016).

JURISDICTIONAL STATEMENT

Ms. Ross seeks review by this Court of the judgment of the United States Court of Appeals for the Tenth Circuit, issued on June 20, 2017. App. A. The Tenth Circuit denied Ms. Ross's petition for rehearing *en banc* on August 8, 2017. App. C. On November 2, 2017, this Court granted Petitioner's request for an extension of time to and including January 4, 2018. Ms. Ross invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTE INVOLVED IN THIS CASE

Ms. Ross initially filed her case as a private cause of action under Title IX, 20 U.S.C. §§ 1681-88, as recognized by this Court in *Davis, Next Friend LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999), alleging violations of the statute's prohibition against discrimination on the basis of gender. The text of Title IX is set out in full in App. E.

STATEMENT OF THE CASE

Petitioner Abigail Ross ("Ms. Ross") is a former student at the University of Tulsa ("TU"). Ms. Ross filed this Title IX lawsuit against TU in the United States District Court for the Northern District of Oklahoma after she was raped by a TU mens basketball player on January 27, 2014. Jurisdiction was proper in federal court under 28 U.S.C. § 1331 as the question was one of federal law under Title IX of the Educational Amendments of 1972. 20 U.S.C. § 1681.

Ms. Ross subsequently learned that TU's campus police ("Campus Security") had long known of a prior sexual assault by the same student-athlete but had failed to pursue the report after minimal inquiry. Over eighteen months prior to Ms. Ross's rape, two football players had reported to Campus Security that their friend, J.M., had been raped by the same basketball player. After receiving the initial report, Campus Security interviewed J.M. later that same day who confirmed the report from the football players. When J.M. expressed her reluctance about moving forward against the high profile athlete, Campus Security closed their investigation without documenting the report and then threw away the written statement that J.M. had completed in their offices. Campus Security officer Bryan Underwood then promptly communicated J.M.'s report of rape to his supervisor, Campus Security Patrol Captain Paul Downe, who in turn then relayed the information to the Director of Campus Security, Joe Timmons.

TU's Dean of Students, Yolanda Taylor, testified that Campus Security was charged by TU with the

responsibility of conducting all "investigations into sexual assault allegations at the University of Tulsa." According to Ms. Taylor, she and the Campus Security Director worked as a team on behalf of TU in responding to reports of sexual violence. Additionally, TU's own Sexual Violence Policy designated Campus Security as one of the four entities to which students were instructed to report any sexual misconduct. As Taylor testified, the Title IX office at TU did not actively play a role in the school's disciplinary process. The only two offices responsible for the disciplinary process at TU were the Dean of Students office where Dean Taylor worked and Campus Security.

In the district court, the Honorable Judge Terrence Kern explained, consistent with this Court's holdings, that for TU to be liable a jury would have to find that: 1) an "appropriate person" at the school had actual notice of the reported rape of J.M., 2) TU was deliberately indifferent to the report of J.M's rape, and 3) the deliberate indifference caused Ms. Ross' assault or made Ms. Ross more vulnerable to the assault. Judge Kern found that given the facts of the case, a jury could conclude that "appropriate persons" at TU had actual notice of a prior instance of sexual assault[1]. Judge Kern found that Campus Security were "appropriate persons" under Title IX who had the

[1] Judge Kern nonetheless granted TU's Motion for Summary Judgement on other grounds, finding in relevant part that no reasonable jury could find TU deliberately indifferent to J.M.'s report of rape. On appeal, the Tenth Circuit reversed this holding, finding that a reasonable jury could indeed find that TU was deliberately indifferent for the lack of response to a prior report of rape by the same student athlete.

authority to institute corrective measures for three distinct reasons. First, TU's Sexual Violence Policy directed students to Campus Security to begin the disciplinary process for a report of sexual violence, thus giving Campus Security the delegated authority and responsibility to initiate TU's corrective action processes. Second, the evidence presented by Dean Taylor further showed that Campus Security was also the office to which TU employees were required to report any instances of sexual misconduct. Thus, the entire university community was directed to Campus Security to initiate any corrective measures for sexual misconduct. Dean Taylor testified that the Campus Security Director worked in tandem with her in addressing, *and resolving*, sexual misconduct on campus. As Judge Kern stated, J.M.'s report:

> [w]as not made to a low-level university employee, to an unrelated off-campus entity, or even to a professor or counselor. The report was made to TU's version of law enforcement, which works directly with Taylor's office to investigate and combat campus violence and properly report instances of campus violence to the federal government. TU has created a system whereby [Campus Security] plays an integral role in receiving reporting and instituting corrective Title IX processes as they relate to sexual violence . . . .

Ross I, 180 F. Supp. 3d at 967 . Third, Judge Kern found that the evidence could be interpreted by a jury as creating an equitable expectation by students and their parents that reporting to Campus Security would trigger TU's disciplinary and corrective processes. To

allow TU to create this expectation while failing to ensure that such reports were handled appropriately under TU's Title IX policies would allow TU to shield itself from liability. In total, Judge Kern concluded that a reasonable jury could find that the reports to Campus Security constituted actual notice to appropriate persons under Title IX.

On appeal, the Tenth Circuit reversed the District Court's holding that a reasonable jury could find that Campus Security were "appropriate persons" under Title IX.[2] First, the Tenth Circuit held that to find that Campus Security officers were "appropriate persons" was tantamount to vicarious liability as this Court addressed in *Gebser*. Second, the Tenth Circuit determined that no reasonable jury could find Campus Security's role in investigating and resolving reports of sexual assault (including investigating the report of J.M.'s rape) constituted "instituting corrective action" sufficient to make them appropriate persons. Finally, the Tenth Circuit concluded, without discussion, that the fact that TU has expressly designated Campus Security as the individuals to whom students and faculty should report sexual misconduct to begin the corrective process had no bearing on whether the security department were appropriate persons.

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[2] Though the Tenth Circuit acknowledged that Judge Kern concluded "that a reasonable fact finder could regard two high-ranking campus-security officers as appropriate persons: Security Director Joe Timmons and Patrol Captain Paul Downe," the court did not address this finding nor did it make a determination that the finding of facts was clearly erroneous as required. *See Anderson v. City of Bessemer City, N.C.,* 470 U.S. 564, 573 (1985) ("Finding of facts shall not be set aside unless clearly erroneous . . . .").

REASONS FOR GRANTING THE PETITION

A. The Tenth Circuit's Decision Decides an Important Point of Federal Law under Title IX that Confounds and Restricts Relevant Decisions of this Court

By holding that not even those school officials charged with receiving and investigating reports of sexual misconduct are appropriate persons for notice of gender based harassment under Title IX, the Tenth Circuit constructed a rule where no school official can be an "appropriate person" absent complete and final authority to complete a school's disciplinary measures. In so doing, the Tenth Circuit not only put a restriction on an important question of federal law, but also turned a landmark Title IX decision by this Court on its head, severely curtailing the rights granted therein.

In *Gebser*, this Court considered a case where a teacher repeatedly sexually assaulted a high school student. 524 U.S. at 278. No other school official was aware of the sexual misconduct at the time, yet the plaintiff sought to impute the offending teacher's own knowledge of his actions to the school in order to hold the school liable for the conduct that occurred. *Id.* at 279. This Court understandably rejected this theory on the grounds that it was essentially a form of vicarious liability inconsistent with the purpose and framework of Title IX. *Id.* at 285. More particularly, this Court noted that Title IX created a contract between schools and the federal government under which schools promised not to discriminate in exchange for federal funds. *Id.* at 286. A necessary component under this contractual relationship was that schools be provided with "an opportunity for voluntary compliance" with

Title IX before liability or administrative action could be imposed. *Id.* at 289. Thus, if the knowledge and actions of an offending teacher were imputed to a school, despite a lack of knowledge by any other employees or officials, a school would lack the opportunity to comply with Title IX by remedying the bad acts within its control. *Id.* This Court held that to avoid such concerns, an appropriate person or "official" of the educational institution, with "authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf," must have actual knowledge of the discrimination. *Id.* at 290.

The Tenth Circuit decision abandoned the "voluntary compliance" construct from *Gebser* and instead requires that individuals must have the authority to impose final corrective action in order to be considered appropriate persons—a reading that is neither set forth in *Gebser*, nor keeps with the holdings of this Court.

Nothing within *Gebser* limits appropriate persons to only those one or two employees at a school that have full authority to *complete* corrective measures and to require such frustrates the intent of this Court in *Gebser*. As the Tenth Circuit correctly acknowledged in *Murrell v. Sch. Dist. No. 1, Denver, Colo.*, schools contain "layers of different officials" who potentially constitute appropriate persons, based on the nature of their duties and responsibilities, and school districts may assign different duties to different positions, or eliminate certain positions altogether. 186 F.3d 1238, 1247-48 (10th Cir. 1999). In the university context, these bureaucratic layers of administration are even

more pronounced than in the K-12 school scenario at issue in *Murrell*, and the sheer size of many university communities, including TU, often makes it nearly impossible for students to access such high-level administrators. Unlike in the K-12 school settings, where students and parents have easier access to the principal's office, college students are regularly directed to report complaints of sexual misconduct to campus police, student conduct offices, and other officials who are more identifiable to the students and are trained in Title IX response and related victim services.

The Tenth Circuit's decision to hold that officially designated individuals are not appropriate persons because they do not have the complete and final authority shackles this Court's ruling in *Gebser* and will allow subordinate yet designated Title IX officials to ignore reports of violence with impunity. In examining the "appropriate person" standard, other circuits have cautioned against the setting of the bar for reporting so high up the "bureaucratic ladder" that the private cause of action under Title IX is undermined or eliminated. *See, e.g., Doe v. School Bd. of Broward Cnty., Fla.*, 604 F.3d 1248, 1255, 1257 (11th Cir. 2011) (even without final authority to terminate the offending teacher, principal was an appropriate person where he had the responsibility and authority "to conduct the first on-site investigation," to decide whether "to request formal investigation or proceed informally", and to "determine that a complaint is meritless and requires no further inquiry."); *Williams v. Bd of Regents of Univ. Sys. of Ga.*, 477 F.3d 1282, 1294-95 (11th Cir. 2007) (in context of student athlete's sexual assault, athletic director was appropriate person

despite not having final authority to impose corrective action)[3]; *Murrell*, 186 F.3d at 1248 (concluding teachers may have been appropriate persons "if they exercised control over the harasser and the context in which the harassment occurred," given that if a student is complaining about a fellow student's actions "'during school hours and on school grounds,' teachers may well possess the requisite control necessary to take corrective action . . . .")(internal citation omitted).

Furthermore, *Gebser* does not restrict the type of actions that would constitute "corrective measures" to those involved with *disciplinary* measures nor does it suggest that corrective measures must entail the ability to impose final disciplinary action. To hold such would be to require students to report to individuals so high in the institution that no average student would have the ability to access them; and although the *Gebser* opinion itself does not define "institute," the plain meaning of the term includes "to originate and get established" and "to set going." *See* "institute." Merriam-Webster Online Dictionary, https://www.merriam-webster.com (July 3, 2017). Such a plain read of "institute" accomplishes both the goal of the *Gebser's* "voluntary compliance" requirement as well the purpose of affording students subjected to harassment the right to private action as afforded by this Court in *Davis*.

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[3] Though the Tenth Circuit indicated that it was leaving open the question of whether campus security might constitute appropriate persons in other factual scenarios, it gives no indication as to how campus security, or other officials beyond the highest level of administrators might ever have the authority necessary to meet the Tenth Circuit's elevated standard.

Under the *Gebser* analysis, additional measures such as investigating a Title IX complaint, providing a student with a security escort on campus, or issuing a no-contract directive between two students may constitute corrective action, and yet the Tenth Circuit's decision effectively restricts the scope of "corrective action" to only those complete and final disciplinary actions. Indeed, *Murrell* also supports a broader reading of "corrective measures," to include any actions "that would end the abuse," including concrete tasks such as curtailing privileges or providing additional supervision. *Murrell*, 186 F.3d at 1247-48. Under the language of *Murrell* and *Gebser*, a reasonable jury could find that simple measures such as providing a student with a security escort on campus or a no-contact directive between two students may constitute corrective action. Courts outside of the Tenth Circuit have similarly held as much with even less official responsibility than in *Ross II*. *See Doe v. Russell Cnty. Sch. Bd.,* 2017 WL 1374279 (W.D. Va. April 13, 2017) (holding that *Gebser* did not limit corrective measures to any specific action and that the authority to investigate misconduct or report to superiors could imply the authority to initiate corrective measures); *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1099 (D. Minn. 2000) (holding that employees such as teachers who "ordinarily maintain at least some level of disciplinary control over their students" could reasonably be inferred to be appropriate persons under *Gebser*); *Thompson v. Indep. Sch. Dist. No. I-1 of Stephens Cnty, Okla.,* 2013 WL 1915058 (W.D. Okla. May 8, 2013) (Under *Gebser*, employees who are encouraged to report sexual misconduct to higher administrators could reasonably be found to be appropriate persons).

Nor should this Court's concern with vicarious liability, as expressed in *Gebser*, be so grossly expanded to include the very departments charged with investigating sexual assault on a school's campus. *Gebser* was concerned with ensuring that a teacher's own knowledge of his misconduct was not imputed to school without any opportunity for the school to redress, or even learn of, such acts of misconduct. But the concerns in *Gebser* cannot apply where the notice to the school was given directly to the office designated to investigate Title IX complaints. This Court's vicarious liability concerns were clearly not intended to permit school's to establish "gatekeepers" that are charged with responding to reports of sexual assault but lack sufficient authority for schools to ever be subjected to a private right of action for their deliberate indifference. Rather, *Gebser's* vicarious liability concern originated from a desire to protect schools such as Lago Vista High School that never had the opportunity to comply with Title IX at all.

To the contrary, where the very department that a school has designated to both receive and then investigate reports of sexual violence, actually receives and investigates a report of sexual violence, albeit insufficiently, the school has every opportunity to voluntarily comply with Title IX and should be held responsible when it fails to do so.

B. The Tenth Circuit's Decision Creates a Blueprint for Title IX Immunity and Non-Compliance

This new appropriate person analysis has far-reaching negative implications for both enforcement of Title IX as well as prevention of sexual misconduct at schools of all levels across the country.

1. Under the Tenth Circuit's Opinion, Schools Can Now Largely Insulate Themselves From Title IX Liability

The Tenth Circuit's ruling that designating specific employees as Title IX responders does not make those employees appropriate persons under Title IX effectively creates a framework for schools and universities to insulate themselves from Title IX liability. Because schools are only liable for their own deliberate indifference when appropriate persons are on notice, this ruling effectively allows schools to circumvent liability by directing students and employees who are victims of sexual violence to a liability black hole, i.e., campus officials who lack complete and final disciplinary authority. Under this framework, educational institutions can simply permit their Title IX responders to close or otherwise abandon investigations as TU's Campus Security did here. Lacking final disciplinary authority, such an approach would effectively insulate the school from any civil accountability no matter how egregious their deliberate indifference.

Moreover, because all but the very top-level school officials will fail to meet the Tenth Circuit's test for appropriate persons, schools can designate a wide

range of campus officials with responsibility for receiving and investigating reports of sexual violence, who could then ensure either routinely or on a case by case basis that their highest administrators never have the knowledge or awareness of the reported sexual violence necessary to constitute actual notice. Campus security, student services officials, athletic administrators, and even those within high level administrative offices can now learn of sexual assaults on their campuses, summarily close such investigations as TU did here, and subject their students to an increased risk of harm with impunity. This decision permits a "gatekeeping" function whereby the very employees necessary to a school's Title IX response, and to whom victims are told to report, have the discretionary ability to close or suppress reports of rape while insulating themselves from any viable right to private action.

The Tenth Circuit's decision threatens to become a blueprint for circumventing the very purpose for which Title IX was enacted: providing individual citizens with effective protection against sexual harassment and discrimination. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979). It likewise constitutes a means of simply delegating around the private right of action granted by this Court in *Davis* that will make it virtually impossible, in many circumstances, for a sexual assault victim to judicially address even the most grievous and deliberate failures by his or her school.

In *Davis*, this Court extended the *Gebser* theory of liability to cases of student-on-student sexual harassment in educational institutions, and

determined that "recipients of federal funding may be liable for subjecting 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. Under the Tenth Circuit's holding, this right to a private action for a failure to address student-on-student harassment will be so severely restricted that victims will have no means of redressing deliberate indifference by their educational institutions as long as the institutions ensure that the highest-level officials, as appropriate persons, have no knowledge of the harassment and, therefore, no obligation to respond. Thus, the critical civil rights granted by this Court in *Gebser* and *Davis*, nearly two decades ago, can now be thwarted by a simple delegation of responsibility for receiving and investigating reports of sexual misconduct, effectively gutting the right to private action afforded by *Davis*. *See S.R. v. Hilldale Indep. Sch. Dist. No. I-29 of Muskogee Cnty., Okla.*, 2008 WL 2185420 (E.D. Okla. May 23, 2008) (holding that where students are likely to direct complaints to a principal and not the superintendent or school board, a finding that the principal is not an appropriate person "rewards inaction on the principal's part . . . the principal need only keep the complaint to himself, i.e., not pass it on to the superintendent or the school board, and an 'appropriate person' has thus never been notified. The court declines to approve such potential self-immunization from Title IX liability.")

2. The Tenth Circuit's Decision Will Have a Chilling Effect on Reporting of Sexual Assault and Sexual Harassment

Title IX is inherently a civil rights statute. It was enacted to combat "the continuation of corrosive and unjustified discrimination against women" in the American educational system, and to create a "strong and comprehensive measure [as] needed if we are to provide women with solid legal protection as they seek education and training for later careers . . . ." 118 Cong. Rec. 5803 (1972) (statement of Sen. Bayh). "Private lawsuits have played an important role in Title IX enforcement" *Nat'l Wrestling Coaches Ass'n v. U.S. Dept. of Educ.*, 263 F. Supp. 2d 82 (D. D.C. 2003) (citing *Gender Equity: Men's and Women's Participation in Higher Education*, General Accounting Office, GAO 01-128 at 5 (December 2000).

Title IX's private right of action is one of the primary and most effective means of enforcing the civil rights contained within the statute. Until recently, schools have historically avoided responding to reports of sexual assault, which has led to more men and women on campus being subjected to sexual abuse, and students dropping out of school due to institutional deliberate indifference. Victims and parents of child victims of sexual violence at all levels must have the right and the ability to enforce the protections of Title IX, especially when their schools do not. Where schools are permitted to "self-immunize" themselves from liability due to inaction and indifference, many students will no longer report their abuse at all.

As this Court is no doubt well aware, men and women throughout the country continue to face hurdles

in reporting sexual harassment and sexual assault. Although recent strides have been made, progress hinges on schools meaningfully responding to those students who do come forward. Much of that improved response from institutions has come directly from schools being held liable by their students and faculty where the school deliberately violates Title IX. The unintended consequence of the Tenth Circuit's opinion is that where schools can avoid responding to campus rape without any risk of judicial oversight, their own students' faith in the school responding as needed, along with their encouragement to report, will fade and more students will revert back to the days where rape victims simply abandoned their education and went home. Simply put, without legitimate access to the rights afforded by this Court in *Gebser* and *Davis*, the gender equity promise of Title IX is broken.

These issues of exceptional importance justify review by this Court.

CONCLUSION

For the reasons set forth above, Ms. Ross respectfully requests that this Court grant a writ of certiorari.

Dated this 4th day of January, 2018.

Respectfully submitted,

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