No. 24-12547-FF

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

C.W., by and through his next friend MARY DOE,

Plaintiff-Appellant

v.

STEVE SMITH and PIEDMONT CITY SCHOOL DISTRICT,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PLAINTIFF-APPELLANT ON THE ISSUE ADDRESSED HEREIN

LISA BROWN
General Counsel
U.S. Department of Education
Office of the General Counsel
400 Maryland Ave., S.W.
Washington, D.C. 20202-0001

KRISTEN CLARKE
Assistant Attorney General

ELIZABETH PARR HECKER
JASON LEE
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 305-1915

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In accordance with Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, the United States as amicus curiae certifies that, in addition to those identified in the brief filed by plaintiff-appellant, the following persons may have an interest in the outcome of this case:

1. Brown, Lisa, U.S. Department of Education, Office of the General Counsel, counsel for the United States;
2. Clarke, Kristen, U.S. Department of Justice, Civil Rights Division, counsel for the United States;
3. Hecker, Elizabeth P., U.S. Department of Justice, Civil Rights Division, counsel for the United States;
4. Lee, Jason, U.S. Department of Justice, Civil Rights Division, counsel for the United States.

The United States certifies that no publicly traded company or corporation has an interest in the outcome of this appeal.

s/ Jason Lee
JASON LEE
Attorney

Date: November 7, 2024

TABLE OF CONTENTS

PAGE

TABLE OF CITATIONS

CASES: **PAGE**

CASES (continued): **PAGE**

CASES (continued): **PAGE**

CASES (continued): **PAGE**

STATUTES:

REGULATION:

RULES: **PAGE**

INTEREST OF THE UNITED STATES

The United States has a substantial interest in this appeal, which involves the proper application of Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. 1681 *et seq.*, to a student's allegations of sex-based harassment. Title IX prohibits sex discrimination in federally funded education programs and activities. 20 U.S.C. 1681(a). The Department of Justice coordinates the implementation and enforcement of Title IX across federal executive agencies, Exec. Order No. 12,250, 3 C.F.R. 298 (1980 comp.); enforces Title IX administratively against recipients of funding from the Department, *see* 20 U.S.C. 1682; and enforces the statute in federal court against recipients of funding from any federal agency, *see ibid.* Other federal agencies providing financial assistance for education programs or activities—most significantly, the Department of Education—likewise administratively enforce Title IX with respect to their funding recipients. *See, e.g.*, 20 U.S.C. 1682.

The United States files this brief under Federal Rule of Appellate Procedure 29(a)(2).

STATEMENT OF THE ISSUE

Whether the district court erred in finding that a student did not sufficiently allege discrimination "on the basis of sex" in violation of Title IX where players on his high school football team subjected him to repeated and unwelcome sexual contact; referred to him using offensive, sex-based terms; attempted to sexually assault him; and when he resisted, physically assaulted him.

STATEMENT OF THE CASE

A. Factual Background[1]

1. For "years," members of the Piedmont High School football team maintained an "'initiation' practice" of "keying" new freshman players. Doc. 38, at 3-4.[2] This involved "forcing a car or truck key into a player's anus and twisting it." Doc. 38, at 3. Players engaged in this "'keying' ritual . . . at least once per year." Doc. 38, at 4.

---

[1] Because this appeal arises from an order granting a motion to dismiss, the facts alleged in the operative complaint (Doc. 38) are taken as true and construed in the light most favorable to C.W. *See Williams v. Board of Regents of Univ. Sys. of Ga.*, 477 F.3d 1282, 1291 (11th Cir. 2007).

[2] "Doc. __, at __" refers to the docket entry and page number of documents filed on the district court's docket, No. 1:23cv368 (N.D. Ala.). "Op. __" refers to the district court's Memorandum Opinion (Doc. 47).

Both the Piedmont City School District and Piedmont High School Head Football Coach Steve Smith were aware of this "long-standing practice." Doc. 38, at 3-4. In September 2020, a former Piedmont High School football player and two students were "charged with third-degree assault for pinning down a junior member of the[] football team and inserting a key into his anus." Doc. 38, at 4. The target of that assault, an eighth-grade student, filed suit against the school district under Title IX and against Coach Smith under 42 U.S.C. 1983. *See* Doc. 38, at 4; *see also* Complaint at 11-13, *Doe v. Smith*, No. 1:20-cv-1906-ACA (N.D. Ala. Dec. 1, 2020). The parties later stipulated to dismissal of the action. *See* Joint Stipulation of Dismissal, *Doe*, No. 1:20-cv-1906-ACA (Jan. 7, 2022). Since then, "nothing [has been] done to protect" new players from being "keyed" by upperclassmen. Doc. 38, at 4.

2. C.W. joined the Piedmont High School football team as a 15-year-old freshman in August 2022. Doc. 38, at 5. Within his first two weeks, C.W. experienced unwanted sexual conduct and contact from more senior members of the team. Doc. 38, at 5-6. One player, J.P., approached C.W. in the boys' locker room and pulled him over to another player "who had his pants down and was exposing himself."

Doc. 38, at 5. J.P. "force[d] C.W. to look at [the other player's] private parts and call[ed] [C.W.] 'gay.'" Doc. 38, at 5-6. J.P. knew C.W. was heterosexual but engaged in such behavior to make C.W. "feel like less of a man." Doc. 38, at 6. Around the same time, another player subjected C.W. to further "emasculating behavior" by "grabb[ing] his chest . . . around his nipple and twist[ing]." Doc. 38, at 6.

The following week, Coach Smith instructed C.W. and four senior players to go to the field house to work out, while Smith and other players watched game footage in a separate classroom. Doc. 38, at 6. While in the field house locker room, the four older players described to C.W. the incident alleged in *Doe v. Smith* and characterized the keying "ritual" as one that "was only directed at male freshman football players." Doc. 38, at 6. Then, while holding "a handful of keys," one of the students told C.W., "we are going to key you." Doc. 38, at 6-7.

C.W. responded, "no I am good on that," and "fearfully walked to another side of the locker room." Doc. 38, at 7. But the players followed, "talking amongst themselves loudly about . . . gay sex." Doc. 38, at 7. Then, with one individual still holding "keys in his hand," the players "surrounded [C.W.], preventing him from exiting the space,"

and "told him they were going [to] hold him down" and "sexually assault[] him with keys" in order to "initiate" and "emasculate him." Doc. 38, at 7. C.W. "attempted to escape" by "tackl[ing]" a player who had been blocking the door. Doc. 38, at 7. But his escape failed and, "outnumbered four to one," C.W. was "beaten up by the involved students." Doc. 38, at 7.

Afterwards, C.W. told his mother what had happened, and she filed a police report. Doc. 38, at 7. The next morning, the school principal called C.W. to his office, and C.W. told the principal and Coach Smith about the players' attempted sexual assault. Doc. 38, at 8. Coach Smith responded that C.W. was "taking it too seriously." Doc. 38, at 8. Later, at a team meeting, Coach Smith alluded to C.W.'s assault and attempted sodomization. He told the players that they "should not make fun of people that are easily offended" because "soft people look for reasons to be mad." Doc. 38, at 8. Looking at C.W., Coach Smith remarked, "I am speaking in code." Doc. 38, at 8.

Following the meeting, players on the football team "taunted C.W." and "slapp[ed] his butt as they walked by him in the locker room." Doc. 38, at 8. They ridiculed C.W. for "'chicken[ing] out' of the

ritual" and reporting the incident to school officials, calling him a "pussy." Doc. 38, at 8. A player also "slapped [C.W.'s] butt in a classroom." Doc. 38, at 8.

Despite C.W.'s report about the attempted "keying," school officials took "no action[]" to safeguard "players' safety from sexual assault." Doc. 38, at 10. Meanwhile, C.W. became "unable to enjoy attending Piedmont High School, or effectively participate in the football team without fear of his teammates." Doc. 38, at 9. Ultimately, C.W. transferred out of the school district. Doc. 38, at 9.

B. Procedural Background

C.W. filed suit under Title IX and sought damages against the Piedmont City School District. *See* Doc. 1. He alleged that district officials had actual notice of football players' "habit and practice of continuously and repeatedly harassing and sexually assaulting students" but had responded "with deliberate indifference." Doc. 38, at 10. This deliberately indifferent response allegedly resulted in C.W.'s assault, "which caused personal injury," "severe emotional distress," and the "deni[al] [of] educational opportunities and access." Doc. 38, at 11. The district court dismissed C.W.'s claim under Federal Rule of

Civil Procedure 12(b)(6) (Op. 6-17), holding that he had failed to plead discrimination "on the basis of sex," 20 U.S.C. 1681(a).

As its primary basis for dismissing C.W.'s claim, the court held that "C.W.'s pleaded facts create the reasonable inference that keying and similar acts of hazing occurred on the basis of [his] status as a freshman football player, not on the basis of [his] biological sex." Op. 9-10. The court acknowledged C.W.'s allegations that "the older football players did not key or slap female athletes on the butt." Op. 10. However, the court concluded that this fact, in and of itself, provided no basis for inferring differential treatment based on sex because "females don't play football or use the football locker room and thus do not subject themselves to football locker room initiation and discipline." Op. 10. The court thus found that C.W.'s allegations failed to demonstrate the type of "anti-male bias" that the court held "C.W. must prove" under Title IX. Op. 2, 10-11.

Next, the district court discounted C.W.'s allegations that his teammates had "performed, simulated, or mentioned multiple sex-related acts to 'emasculate C.W,'" stating that "Congress did not cover one man teasing another man about his level of masculinity when it

wrote Title IX." Op. 11, 13. The court also discussed three "factors" the Supreme Court identified in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), as being potentially indicative of "same-sex sexual harassment" under Title VII: sexual desire, hostility towards members of the same sex, and unequal treatment of men and women (*see* Op. 14). It found that C.W.'s allegations implicated none of those factors, warranting dismissal. Op. 14.

Finally, the court noted a perceived "split" among federal courts regarding the viability of Title IX claims involving "sex-related sports hazing." Op. 14-15. It construed this "split" as evidence that "Title IX [does] not unambiguously prohibit same-sex acts of sports hazing or speech that challenges masculinity," thus also warranting dismissal under the Constitution's Spending Clause. Op. 14, 16.

The district court thus held that C.W.'s allegations failed to evince sex discrimination and dismissed his Title IX claim without addressing the other required elements for relief. *See* Op. 8. C.W. timely appealed. Doc. 49.

SUMMARY OF ARGUMENT

The district court erred in dismissing C.W.'s Title IX claim because his allegations are more than sufficient to plead a claim for sex discrimination. Courts have made clear that unwelcome sexual conduct and offensive, sexually suggestive language, if sufficiently severe and pervasive, constitute discrimination based on sex that is cognizable under Title IX for private-damages claims. This is true regardless of the sex of the harasser and the plaintiff. Here, C.W. alleged that his harassers subjected him to multiple forms of sexualized conduct, including attempted sexual assault, and ridiculed him using sex-based terms when doing so.

The district court therefore erred in holding that C.W. failed to allege discrimination based on sex. The court failed to recognize that even if C.W.'s harassers targeted him because he was a freshman football player, C.W. sufficiently alleged that his sex was still a but-for cause of the harassment. With that causal requirement satisfied, C.W. did not need to allege differential treatment of men and women as a group, or to plead that his harassers were motivated by "anti-male bias." Op. 13. Moreover, contrary to the court's suggestions, neither

Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998), nor the Spending Clause provided a basis for dismissing C.W.'s sex-discrimination claim.

This Court should reverse.

ARGUMENT

C.W.'s complaint sufficiently alleged that he experienced discrimination on the basis of sex.

A. C.W.'s allegations, taken as true, sufficiently plead sex discrimination in violation of Title IX.

C.W.'s operative complaint—which describes unwelcome sexual conduct, repeated use of sex-based epithets, and attempted sexual assault by C.W.'s harassers—sufficiently alleged that C.W. suffered discrimination on the basis of sex.

1. Title IX states that "[n]o 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." 20 U.S.C. 1681(a). As the Supreme Court has emphasized, "to give [Title IX] the scope that its origins dictate," courts "must accord it a sweep as broad as its language." *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982) (alteration in original; citation omitted). Courts interpret Title

IX's prohibition on sex discrimination consistently with a similar prohibition in Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*[3] *See, e.g.*, *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 75 (1992) (citing Title VII case law when analyzing Title IX); *see also A.P. v. Fayette Cnty. Sch. Dist.*, No. 21-12562, 2023 WL 4174070, at *9 (11th Cir. June 26, 2023); *Bowers v. Board of Regents of Univ. Sys. of Ga.*, 509 F. App'x 906, 910 (11th Cir. 2013) ("We apply Title VII case law to assess Bowers's Title IX claim.").

Under Title IX, a recipient of federal funding may be liable in a private-damages action when it responds "with deliberate indifference to known acts of [sex-based] harassment in its programs or activities." *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633 (1999). Such liability does not arise "for simple acts of teasing and name-calling among school children . . . even where these comments target differences in gender." *Id.* at 652. Rather, the question of "[w]hether gender-oriented conduct" amounts to unlawful sex discrimination under

[3] Title VII bars covered employers from "discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." 42 U.S.C. 2000e-2(a)(1).

Title IX "depends on a constellation of surrounding circumstances, expectations, and relationships." *Id.* at 651 (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998)). This includes "the social context in which particular behavior occurs and is experienced by its target." *Oncale*, 523 U.S. at 81.

Under such a contextual analysis, allegations of unwelcome sexual conduct and offensive, sex-based language can suffice to plead discrimination based on sex. This Court sitting en banc has explained that "words and conduct that are sufficiently gender-specific" can establish sex discrimination. *Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798, 811 (11th Cir. 2010) (en banc). So, too, can acts of sexual harassment and sexual assault. *See Sonoiki v. Harvard Univ.*, 37 F.4th 691, 697 n.3 (1st Cir. 2022); *see also Carmichael v. Galbraith*, 574 F. App'x 286, 290 (5th Cir. 2014) (under similar factual circumstances, explaining that "uninvited contact with the private parts of either the victim's or harasser's body has often been held to constitute sexual harassment under Title IX"); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1065 (9th Cir. 2002) (explaining that "[p]hysical sexual assault

has routinely been prohibited as sexual harassment under Title VII" and collecting cases).

This Court and others routinely have sustained claims under Title IX's implied cause of action based on allegations of "severe, pervasive, and objectively offensive" sex-based conduct. *Davis*, 526 U.S. at 653. In *Davis*, the Supreme Court found a viable Title IX claim where a student subjected a classmate to "numerous acts of objectively offensive touching," "sexually suggestive" conduct, and "verbal" harassment. 526 U.S. at 634, 653-654. Similarly, in *Doe v. School Board of Broward County*, 604 F.3d 1248 (11th Cir. 2010), this Court reversed the district court's grant of summary judgment for the defendant on the plaintiff-student's Title IX claim where a teacher made "sexually suggestive comments" to students and touched them inappropriately. *Id.* at 1250-1252, 1260-1262; *see also, e.g.*, *Williams v. Board of Regents of Univ. Sys. of Ga.*, 477 F.3d 1282, 1288, 1296, 1299, 1303 (11th Cir. 2007) (reversing dismissal of Title IX claim where school failed to inform student-athletes about its sexual harassment policy, and to supervise student-athletes, ultimately resulting in the student-plaintiff's rape by multiple student-athletes); *Simpson v. University of Colo. Boulder*, 500

F.3d 1170, 1178, 1180, 1185 (10th Cir. 2007) (reversing summary judgment for defendants on Title IX claim where defendants failed to prevent recurrence of sexual assault of high school athletic recruits by older student-athletes).

These principles apply with equal force in the same-sex harassment context. In *Oncale*, the Supreme Court reversed the entry of summary judgment in favor of an employer in a Title VII sexual-harassment case where a male employee in an all-male workplace had been "forcibly subjected to sex-related, humiliating actions" by his male coworkers, including "physical[] assault[] [of the plaintiff] in a sexual manner" and threats he would be "rape[d]." 523 U.S. at 77, 82. The Court explained that "nothing in Title VII . . . bars a claim of discrimination 'because of . . . sex' merely because the plaintiff and the defendant . . . are of the same sex," and that there is "no justification" for "excluding same-sex harassment claims from the coverage of Title VII." *Id.* at 79 (second set of ellipses in original). Likewise, in *EEOC v. Boh Brothers Construction Co.*, 731 F.3d 444 (5th Cir. 2013) (en banc), the en banc Fifth Circuit found sufficient evidence of discriminatory sexual harassment under Title VII where a male supervisor of an all-

male crew "mocked" the male plaintiff; subjected him to "sexualized acts," including "instances of simulated anal sex" and exposure of the supervisor's genitals; and referred to the plaintiff using "sex-based epithets." *Id.* at 449, 457, 459; *see also Schmedding v. Tnemec Co.*, 187 F.3d 862, 865 (8th Cir. 1999) (finding sufficient indicia of sex discrimination under Title VII where male and female coworkers sexually harassed a male employee, including by "patt[ing] [him] on the buttocks," "call[ing] [him] names such as 'homo,'" and "subject[ing] [him] to the exhibition of sexually inappropriate behavior by others including unbuttoning of clothing").

Every circuit court to consider the matter has concluded that, like Title VII, Title IX protects students against sexual harassment by members of the same sex. *See, e.g.*, *Sanches v. Carollton Farmers Branch Indep. Sch. Dist.*, 647 F.3d 156, 165 (5th Cir. 2011); *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 66 (1st Cir. 2002).

Indeed, the Fifth Circuit applied these principles in a strikingly similar case. Like the appeal here, *Carmichael* involved allegations of same-sex peer sexual harassment inflicted by members of a school football team. 574 F. App'x at 288. Among other harassing conduct, players in that

case stripped the plaintiff nude, tied him up, and put him in a trash can "while calling him 'fag,' 'queer,' and 'homo.'" *Ibid.* Concluding that the plaintiff's allegations evinced "pervasive harassment of a sexual character," the Fifth Circuit reversed the dismissal of his Title IX claim. *Id.* at 290.

2. Here, a reasonable factfinder could conclude that, if proven, C.W.'s allegations support a finding that he experienced discrimination based on sex. Among other things, a teammate forced him to look at another player's exposed genitalia, and a different teammate groped his chest and twisted his nipple. *See* pp. 3-4, *supra*. More disturbingly, a group of players attempted to anally penetrate C.W. with a set of car keys in the field house locker room. *See* pp. 4-5, *supra*. C.W. managed to avoid being sodomized, but as retribution for his refusal to submit to the team's keying "ritual," the players "beat[] [him] up." Doc. 38, at 6-7. This conduct did not end after C.W. told school officials about the attack. Rather, even after C.W. reported the attempted sexual assault, players "slapp[ed] his butt as they walked by him in the locker room," and another player "slapped his butt in a classroom." Doc. 38, at 8.

Courts have upheld sex-discrimination claims in cases involving similar forms of harassing conduct. *See, e.g.*, *Boh Bros.*, 731 F.3d at 459 (finding sex discrimination under Title VII where, on multiple occasions, a male coworker "exposed his genitals" to the male plaintiff and "hump[ed]" him from behind); *Schmedding*, 187 F.3d at 865 (same where an employee was, among other things, "subject to the exhibition of sexually inappropriate behavior by others" and "patted on the buttocks"); *Montgomery v. Independent Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1093 (D. Minn. 2000) (same under Title IX where a schoolmate subjected a student "to acts of pretended anal rape"); *Doe v. Hamilton Cnty. Bd. of Educ.*, 329 F. Supp. 3d 543, 559-561 (E.D. Tenn. 2018) (same where basketball teammates penetrated the plaintiff's anus with a pool cue).

The sex-based "taunt[s]" by C.W.'s teammates constitute another part of the constellation of circumstances that factfinders must consider under *Davis*, and here, they bolster C.W.'s argument that he suffered harassment based on sex. Doc. 38, at 8. As this Court has explained, a harasser's use of "gender-specific" terms can supply "evidence [of] sex-based harassment." *Beckford v. Department of Corr.*, 605 F.3d 951, 960

(11th Cir. 2010); *see Jensen v. Potter*, 435 F.3d 444, 454 (3d Cir. 2006) (explaining that "[w]hen harassment is facially sexual," including through the use of "sexually derogatory language, an inference of sex-based intent will usually arise" (internal quotation marks and citation omitted)); *see also Jennings v. University of North Carolina*, 482 F.3d 686, 695-696 (4th Cir. 2007); *Doe*, 329 F. Supp. 3d at 559-560. And C.W.'s teammates allegedly employed such sex-based language here. When a player forced C.W. to look at a teammate's genitalia, the player disparaged C.W. as "gay." Doc. 38, at 5-6. When a group of players sought to "key" C.W., they referenced the "gay sex" to which they were about to subject him. Doc. 38, at 7. And when mocking C.W. for having "'chicken[ed] out' of the [keying] ritual," teammates derided him as a "pussy." Doc. 38, at 8. This facially and intentionally sex-based language offers additional evidence of sex discrimination on which a factfinder could reasonably rely.

B. None of the district court's reasons for reaching a contrary conclusion withstands scrutiny.

The district court offered a variety of reasons for its conclusion that C.W.'s allegations failed to evince sex discrimination, but none is persuasive.

1. First, the district court concluded that because "[o]nly freshman joining the football team were hazed," C.W. experienced harassment "on the basis of [his] status as a freshman football player, [and] not on the basis of [his] biological sex." Doc. 38 at 9-10 (emphasis omitted). This conclusion rests on a flawed causal analysis, wrongly assuming that Title IX prohibits discriminatory action only when sex is the *sole* cause of the conduct.

a. Title IX's prohibition against discrimination "on the basis of sex," 20 U.S.C. 1681(a), applies a causal standard that is no more stringent than but-for causation. In *Bostock v. Clayton County*, 590 U.S. 644 (2020), the Supreme Court explained that Title VII's use of the phrase "because of . . . sex," 42 U.S.C. 2000e-2(a)(1), "incorporates the simple and traditional standard of but-for causation," *Bostock*, 590 U.S. at 656 (internal quotation marks and citation omitted). The Court explained that "a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause." *Ibid.*

Title IX's "on the basis of sex" language, 20 U.S.C. 1681(a), is legally indistinguishable from Title VII's "because of . . . sex" language.

The Supreme Court has long used the phrase "on the basis of" interchangeably with Title VII's "because of" language when discussing Title VII's causation standard. *See, e.g.*, *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986) (explaining that, under Title VII, "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex" (alteration in original)); *City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 715 (1978) (holding that the city "discriminate[d] on the basis of sex" in violation of Title VII). The Court continued that practice in *Bostock*, using the phrase "on the basis of" throughout the opinion when describing Title VII's "because of" standard. *See, e.g.*, 590 U.S. at 650 ("[I]n Title VII, Congress outlawed discrimination in the workplace on the basis of . . . sex."). Unsurprisingly, then, multiple appellate courts have applied but-for causation in Title IX cases. *See, e.g.*, *Radwan v. Manuel*, 55 F.4th 101, 130-132 (2d Cir. 2022); *Sheppard v. Visitors of Va. State Univ.*, 993 F.3d 230, 236-237 (4th Cir. 2021); *Doe v. Columbia Coll. Chi.*, 933 F.3d 849, 857 (7th Cir. 2019).

b. Here, the district court found that a "more likely expla[nation]" for senior players subjecting C.W. to "keying and similar acts of hazing" was his "status as a freshman football player." Op. 9-10 (citation omitted). And it held that this explanation foreclosed C.W. from "plead[ing] a plausible claim of sex discrimination." Op. 10.

This conclusion fundamentally misunderstands but-for causation. Even if C.W.'s status as a freshman football player was *one* but-for cause of his teammates' harassment, a factfinder could reasonably determine that his sex was *yet another* but-for cause. As the Supreme Court has explained, a factor is a but-for cause of a particular result when the result "'would not have occurred' in the absence of" the factor. *Burrage v. United States*, 571 U.S. 204, 211 (2014) (citation omitted); *see also Bostock*, 590 U.S. at 656 (But-for causation "is established whenever a particular outcome would not have happened 'but for' the purported cause." (citation omitted)). This is true even if "multiple" but-for causes "combine[]" to produce a result. *Burrage*, 571 U.S. at 211. As the Supreme Court has made clear, "[o]ften, events have multiple but-for causes," and "a defendant cannot avoid liability just by citing some *other* factor that contributed to" the allegedly discriminatory

action. *Bostock*, 590 U.S. at 656. Rather, "[s]o long as the plaintiff's sex was one but-for cause of that decision, that is enough" to carry the plaintiff's causal burden. *Ibid.*

Accordingly, even if C.W.'s status as a freshman football player was one but-for causal factor at play, a factfinder could still reasonably conclude—based on the types of sexualized harassment and sex-based language C.W. has alleged—that C.W.'s sex was also a but-for cause of his harassment, *see* pp. 16-18, *supra*. Indeed, C.W. specifically alleged that the football team's "keying" ritual "was only directed at *male* freshman football players." Doc. 38, at 4, 6 (emphasis added). In other words, C.W.'s teammates allegedly sought to humiliate him through anal penetration not simply because he was a "freshman football player" (Op. 9), but a "*male* freshman football player[]" (Doc. 38, at 6 (emphasis added)). *See Manhart*, 435 U.S. at 711 (explaining that but-for causation exists when "the evidence shows 'treatment of a person in a manner which but for that person's sex would be different'" (citation omitted)).

c. Moreover, a factfinder could reasonably conclude that the particular types of sexualized harassment in which C.W.'s teammates

engaged buttress this conclusion. "As courts have recognized, sexual harassment of men can take different forms than sexual harassment of women, and may play on stereotypes of masculinity or use sexualized conduct to assert dominance in ways specific to male-on-male interactions." *Graham v. Cha Cha Matcha, Inc.*, No. 23 Civ. 9911 (PAE), 2024 WL 3540324, at *7 (S.D.N.Y. July 25, 2024).

The district court in *Doe v. Hamilton County Board of Education* reached a similar conclusion in a case involving a high school basketball team that was "rife with bullying and hazing." 329 F. Supp. 3d at 551. During a team trip, older players followed a freshman teammate into his bedroom, held him down, and "anally penetrated [him] with the narrow end of a pool cue." *Id.* at 551, 553. The *Doe* court explained that "[s]exually exploitive hazing" seeks to "feminiz[e] and homosexualiz[e] recruits to establish and reaffirm their position at the bottom of the team's heteromasculine hierarchy." *Id.* at 561 (citation omitted). And consequently, "a jury c[an] reasonably infer" that "sexual assaults in hazing" are "motivated by an undercurrent of social dynamics that has a basis in the victim's gender." *Ibid.* The court thus held that the freshman-player's allegations sufficed to "create a factual inference that

the team's hazing amounted to sexual harassment contemplated by Title IX, meaning it was carried out 'on the basis of' [his] . . . sex." *Id.* at 560.[4]

Here, C.W. alleged that his teammates inflicted and sought to inflict on him forms of harassment designed to effeminize and subordinate him, including twisting his nipple, slapping him on the butt, and attempting to penetrate him sexually. A reasonable factfinder could find such actions emasculating, "insult[ing]," and "belittl[ing]" to a male victim because "[they] impl[y] that the male object of ridicule is a lesser man"—one who, in the athletic context here, "may not belong" on the school's football team. *Reeves*, 594 F.3d at 813. A factfinder could thus reasonably conclude that but for the fact that C.W. is male, other players on the football team would not have subjected him to such sex-

[4] Neither *Seamons v. Snow*, 84 F.3d 1226 (10th Cir. 1996), nor *Humphries v. Pennsylvania State University*, 492 F. Supp. 3d 393 (M.D. Pa. 2020), provides a basis for analyzing sex discrimination under Title IX differently. *See* Doc. 28, at 6, 10-11 (citing *Seamons*); Op. 15 (citing *Humphries*). *Seamons* predated both *Davis* and *Oncale*, and the Tenth Circuit has since limited the decision to its facts. *See Doe v. School Dist. No. 1*, 970 F.3d 1300, 1310 (10th Cir. 2020). And in *Humphries*, the district court emphasized that the plaintiff "ha[d] not alleged that he was subject[ed] to [harassment] because of sex," and it declined to find sex discrimination based on the mere fact that the harassment had been "sexual in nature." 492 F. Supp. 3d at 402.

based harassment, which was allegedly intended to demean him and "diminish his masculinity" in the eyes of his teammates. Doc. 38, at 6.

As above, the sex-based language that C.W.'s harassers used further supports such a conclusion. Multiple courts have found sufficient evidence of sex discrimination where the harassing conduct at issue included the use of "sex-based epithets . . . directed at [the plaintiff's] masculinity." *Boh Bros.*, 731 F.3d at 457; *see also Barrett v. Pennsylvania Steel Co.*, No. 2:14-CV-01103, 2014 WL 3572888, at *3 (E.D. Pa. July 21, 2014) (same where coworkers used "Mary," "pussy," and "feminine names and pronouns" when referring to the male employee (citation omitted)); *EEOC v. Grief Bros. Corp.*, No. 02-CV-468S, 2004 WL 2202641, at *14 (W.D.N.Y. Sept. 30, 2004) (same where the plaintiff was "subjected to taunts disparaging his masculinity"). C.W.'s harassers allegedly employed such language for that purpose here, using terms like "gay" and "pussy" as slurs to undermine C.W.'s masculinity. Doc. 38, at 5-8. A jury could sensibly conclude that, but

for the fact that C.W. is male, his teammates would not have harassed him using such feminized pejoratives.[5]

2. Relatedly, the district court deemed C.W.'s allegations insufficient because they involved no "differential treatment of males and females." Op. 13. But as this Court explained in the Title VII context, "[a] plaintiff's failure to produce a comparator does not necessarily doom" a claim of sex discrimination. *Lewis v. City of Union City*, 934 F.3d 1169, 1185 (11th Cir. 2019) (citation omitted). The analysis of sex discrimination under Title IX, like that under Title VII, simply asks whether the plaintiff has been subjected, on the basis of sex, to "differences in treatment that injure" the individual. *Muldrow v. City of St. Louis*, 601 U.S. 346, 347 (2024) (citation omitted). Even at the summary-judgment stage, use of a comparator to show differential

[5] Citing *Adams v. School Board of St. Johns County*, 57 F.4th 791 (11th Cir. 2022) (en banc), the district court also discounted C.W.'s allegations about emasculation on the basis that "Congress did not cover one man teasing another man about his level of masculinity when it wrote Title IX." Op. 13. But the sexual harassment alleged here involves far more than mere "teasing." And *Adams*, which rejected a Title IX challenge to a school-bathroom policy that prohibited transgender students from accessing restrooms consistent with their gender identity and did not involve sexual-harassment claims, 57 F.4th at 811-815, has nothing to do—legally or factually—with this case.

treatment is simply "one method" by which a plaintiff may make that showing. *Tynes v. Florida Dep't of Juv. Just.*, 88 F.4th 939, 946 (11th Cir. 2023) (citation omitted), *cert. denied*, No. 23-1235 (Oct. 7, 2024). Another method is to provide a "convincing mosaic of circumstantial evidence that would allow a jury to infer" discrimination based on sex. *Ibid.* (citation omitted). Title VII plaintiffs have successfully made such a showing in single-sex work environments. *See, e.g.*, *Boh Bros.*, 731 F.3d at 459; *see also Oncale*, 523 U.S. at 80-81 (explaining that a same-sex harassment plaintiff may "offer direct [comparative] evidence" *or* evidence of harassment in "sex-specific and derogatory terms"). So, too, have Title IX plaintiffs alleging same-sex sexual harassment. *See, e.g.*, *Carmichael*, 574 F. App'x at 290; *Doe*, 329 F. Supp. 3d at 562. Here, at the Rule 12(b)(6) stage, a factfinder could reasonably conclude, without resort to inferences, that C.W. sufficiently pleaded that he suffered discrimination on the basis of sex given the inherently sex-based harassment and explicitly sex-based epithets in which C.W.'s harassers allegedly engaged.

3. Relatedly, the district court held that "anti-male bias" was a "fact [that] C.W. must prove" under Title IX, and that he had failed in

that task. Op. 2, 10-11. This was error. Under Title IX, as under Title VII, "it's irrelevant what . . . might motivate" a discriminatory practice. *Bostock*, 590 U.S. at 664. All C.W. needed to allege is that "the harassment would not have taken place but for his sex," *ibid.*, and he sufficiently did so, *see* pp. 16-18, 22-26, *supra*. Indeed, none of same-sex sexual-harassment cases discussed above required the plaintiff to show that "anti-male bias" motivated the harassment at issue. *See Oncale*, 523 U.S. at 78-82; *Carmichael*, 574 F. App'x at 290; *Boh Bros.*, 731 F.3d at 453-460; *Doe*, 329 F. Supp. 3d at 557-562; *see also Oncale*, 523 U.S. at 79-80 (explaining that Title VII's prohibition against sexual harassment "extend[s] to sexual harassment of any kind that meets the statutory requirements").

4. The district court also deemed C.W.'s allegations deficient because they did not implicate any of the three "factors" the Supreme Court identified in *Oncale* as being potentially indicative of same-sex sexual harassment: sexual desire, hostility towards members of the same sex, and unequal treatment of men and women. Op. 14 (citing *Oncale*, 523 U.S. at 80-81). But *Oncale* did not in any way suggest that these factors are the *exclusive* means by which a plaintiff can establish

same-sex sex discrimination. Rather, *Oncale* frames them as three of *many* circumstances that may establish sex discrimination—indeed, its use of the phrase "for example" when discussing the factors makes that clear. *See* 523 U.S. at 80. Other courts of appeals have flatly rejected the suggestion that *Oncale* limited the circumstances that could constitute actionable same-sex harassment. *See, e.g.*, *Boh Bros.*, 731 F.3d at 455 & n.6 (explaining that "[e]very circuit to squarely consider the issue has held that the *Oncale* categories are illustrative, not exhaustive"); *see also Roberts v. Glenn Indus. Grp., Inc.*, 998 F.3d 111, 119 (4th Cir. 2021); *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005); *Pedroza v. Cintas Corp. No. 2*, 397 F.3d 1063, 1068 (8th Cir. 2005); *Shepherd v. Slater Steels Corp.*, 168 F.3d 998, 1009 (7th Cir. 1999). This Court should do the same.

5. Finally, the district court erred in concluding that Title IX provides insufficient notice under the Spending Clause that "same-sex acts of sports hazing or speech that challenges masculinity" may violate the statute as unlawful sex discrimination. Op. 16.

a. The Spending Clause grants Congress "broad power . . . to set the terms on which it disburses federal funds." *Cummings v. Premier*

Rehab Keller, P.L.L.C., 596 U.S. 212, 216 (2022). To ensure recipients have "adequate notice" that, by accepting federal funds, they may be liable for damages when engaging in certain prohibited conduct, the Supreme Court has required that "Congress speak with a clear voice" when imposing funding conditions. *Davis*, 526 U.S. at 640 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)).

Congress speaks with a sufficiently clear voice when a statute unambiguously prohibits certain conduct, even if the covered conduct can take different forms. As the Supreme Court emphasized, the Spending Clause does not require that every potential violation of a statute be "specifically identified and proscribed in advance." *Bennett v. Kentucky Dep't of Educ.*, 470 U.S. 656, 666 (1985). Rather, as this Court has explained, where "a spending condition has a clear and actionable prohibition of discrimination, it does not matter that the manner of that discrimination can vary widely." *Benning v. Georgia*, 391 F.3d 1299, 1306 (11th Cir. 2004).

b. Title IX provides adequate notice under the Spending Clause that *all* forms of intentional sex discrimination are impermissible in covered education programs and activities in the absence of an

applicable statutory exception. Under the statute, funding recipients may not discriminate "on the basis of sex" in "any education program or activity receiving Federal financial assistance." 20 U.S.C. 1681(a); *see also ibid.* (listing exceptions not relevant here). Given this broad proscription, the Supreme Court has rejected Spending Clause objections to damages liability "throughout its Title IX jurisprudence" where the "funding recipient's conduct constituted an intentional violation of Title IX." *Hall v. Millersville Univ.*, 22 F.4th 397, 404 (3d Cir. 2022).

For example, the Supreme Court held in *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005), that the Spending Clause posed no obstacle to damages liability where funding recipients retaliated because of complaints about sex discrimination, even though the statute does not specifically mention retaliation. *See id.* at 181-184. Likewise, in *Davis*, the Court rejected Spending Clause arguments where funding recipients had responded with deliberate indifference to known acts of student-on-student sexual harassment—which, like this case, included multiple instances of verbal harassment and offensive

touching—even though the statute does not specifically mention peer sexual harassment, either. *See* 526 U.S. at 640-653.

c. Title IX also provided sufficient notice to funding recipients that it reaches same-sex peer harassment—simply labeling such conduct as "same-sex acts of sports hazing" as the district court did (Op. 16) does not change this outcome. *Davis* forecloses any suggestion that Title IX fails to provide constitutionally adequate notice that it prohibits the types of physical and verbal sexual harassment at issue here. *See* pp. 3-5, 13, *supra*. And Title IX's prohibition against discrimination "on the basis of sex," 20 U.S.C. 1681(a), protects men *and* women, just as Title VII's materially identical prohibition does, *see Carmichael*, 574 F. App'x at 290 ("[I]t is settled law that '[s]ame-sex sexual harassment is actionable under [T]itle IX.'" (second alteration in original; citation omitted)); *see also Oncale*, 523 U.S. at 78-79 (finding "no justification in the statutory language . . . for a categorical rule excluding same-sex harassment claims from the coverage of Title VII"); *cf. Jackson*, 544 U.S. at 179 n.3, 184 (reversing the dismissal of a Title IX claim brought by a male teacher). The district court thus erred in its Spending Clause analysis because this interpretation of Title IX is one

that funding recipients would have been "[]able to ascertain." *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) (citation omitted).

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's ruling and hold that C.W.'s allegations suffice to establish discrimination on the basis of sex.

Respectfully submitted,

LISA BROWN
General Counsel
U.S. Department of Education
Office of the General Counsel
400 Maryland Ave., S.W.
Washington, D.C. 20202-0001

KRISTEN CLARKE
Assistant Attorney General

s/ Jason Lee
ELIZABETH PARR HECKER
JASON LEE
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 305-1915

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B)(i) because it contains 6494 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it was prepared in Century Schoolbook 14-point font using Microsoft Word for Microsoft 365.

s/ Jason Lee
JASON LEE
Attorney

Date: November 7, 2024