No. 13-1206

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JOAN ROE,

Appellant,

v.

ST. LOUIS UNIVERSITY,

Appellee.

On Appeal from the United States District Court for the
Eastern District of Missouri, Eastern Division
No. 4:08CV1474 HEA

BRIEF FOR NATIONAL WOMEN'S LAW CENTER AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT'S BRIEF URGING REVERSAL

Fatima Goss Graves
Counsel of Record
Neena K. Chaudhry
Devi M. Rao
NATIONAL WOMEN'S LAW CENTER
11 Dupont Circle, N.W., Suite 800
Washington, D.C. 20036
(202) 588-5180

Counsel for Amicus Curiae
National Women's Law Center

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INTEREST OF AMICUS CURIAE

The National Women's Law Center (NWLC) is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and opportunities and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, NWLC has worked to secure equal opportunity in education. This includes not only the right to an educational environment that is free from all forms of discrimination and harassment, but also access to effective means of enforcing that right and remedying such conduct. NWLC has played a leading role in the passage and enforcement of federal civil rights laws and in numerous amicus briefs involving sex and race discrimination in education before the United States Supreme Court, federal courts of appeals, and state courts.

NWLC files this brief with the consent of all parties.[1]

BACKGROUND AND SUMMARY OF ARGUMENT

Appellant Joan Roe, a female student at Appellee Saint Louis University (SLU), alleges that she reported to SLU that she was raped by a fellow student at an off-campus party held at a privately-owned apartment building. After learning of her rape, SLU acted with deliberate indifference, rendering SLU liable in

[1] No party, counsel for a party, or person, other than NWLC and its attorneys, authored this brief in whole or in part, or made a monetary contribution intended to fund preparation or submission of this brief.

damages under Title IX. But the district court dismissed her suit, holding that because the alleged incident occurred at an off-campus location that was not owned by SLU, the university did not exercise control over the context in which the harassment occurred.

That holding was erroneous—A student's right to be free from sex discrimination does not end at the geographical campus boundary. As the Supreme Court recognized in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), if a school has disciplinary control over a harasser, it can be liable under Title IX for its deliberate indifference to known harassment.

Davis's control requirement means a recipient must exercise control over both the harasser and the context in which the harassment occurred. One way to satisfy the control requirement is to show that the harasser is under the school's disciplinary authority. This disciplinary control inquiry is not a simple on- versus off-campus question. Rather, courts have acknowledged that off-campus harassment by students is within Title IX's reach and that schools maintain disciplinary authority over students for some off-campus conduct. Indeed, like the majority of colleges and universities, SLU prohibits sexual assault and holds itself out as having disciplinary authority over its students' off-campus behavior. Because SLU maintained disciplinary authority over the harasser and the

harassment at issue, the location of the alleged rape is no bar to SLU's liability under Title IX.

ARGUMENT

I. THE DISTRICT COURT ERRED IN HOLDING THAT PRIVATE, OFF-CAMPUS LOCATIONS CAN NEVER BE UNDER A SCHOOL'S "CONTROL" FOR PURPOSES OF TITLE IX LIABILITY.

A. The Supreme Court Has Held That Schools Can Be Liable if They Maintain Disciplinary Control Over the Harasser.

Title IX's proscription against sex-based discrimination is expansive and states simply: "No person in the United States shall, on the basis of sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a); *see North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982) (stating that the statute should receive "a sweep as broad as its language"). The Supreme Court has recognized an implied private right of action under Title IX, *see Cannon v. Univ. of Chi.*, 441 U.S. 677, 717 (1979), and has held that money damages are available in such suits, *see Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 76 (1992).

In *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), the Supreme Court held that a recipient institution may be liable for money damages for deliberate indifference to known student-on-student harassment. *Id.* at 646-47. Sexual assault is a form of sexual harassment, which is prohibited by Title IX. *See*

Franklin, 503 U.S. 60. In setting forth the contours of a school's liability in money damages[2] for student-on-student sexual harassment, the Court in *Davis* focused in relevant part on whether the harassment was within the recipient's "control." *See* 526 U.S. 629. The Court concluded 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.

The *Davis* plaintiffs satisfied the "control" requirement because the harassment occurred during school hours and on school grounds; there was no question then that the harasser was under the school's disciplinary authority. *See id*. at 646. But the Supreme Court did not hold or even imply that this was the *only* way of meeting the control requirement. To the contrary, as courts have recognized, the *Davis* requirement that a school have control may be met when a nexus exists between the harassment and the campus environment. Thus, the

[2] There is a distinct standard for administrative enforcement by the U.S. Department of Education's Office for Civil Rights and in court cases where plaintiffs are seeking injunctive relief. *See* U.S. Department of Education, Office for Civil Rights, Dear Colleague Letter: Sexual Violence 4 (Apr. 4, 2011), *available at* http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf; *Davis*, 526 U.S. at 645 (addressing "a recipient's *damages liability*" (emphasis added)). Because Appellant Roe brought a suit for damages, this brief will focus on the *Davis* standard for damages liability, which provides that a recipient may be liable if it "acts with deliberate indifference to known acts of harassment in its programs or activities . . . that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit." *Id.* at 633.

district court's inquiry—which began and ended with an examination of who owned the building where the assault occurred—erroneously concluded that Title IX did not apply to Roe's off-campus assault.

B. Since *Davis*, Courts and the U.S. Department of Education Have Acknowledged That Schools May Be Liable Under Title IX for Off-Campus Harassment.

Since *Davis*, both courts and the U.S. Department of Education's Office for Civil Rights (OCR) have recognized that *where* the conduct occurred is a relevant but not a determinative factor for institutional liability under Title IX. For example, one court found that a school district may be liable under Title IX for student-on-student harassment and assaults that occurred at a football camp held at a high school in a different school district, observing that *Davis*'s control element can be met *either* through "proof that the misconduct occurred 'during school hours and on school grounds' *or* when the 'harasser is under the school's disciplinary authority.'" *Roe ex rel. Callahan v. Gustine Unified Sch. Dist.*, 678 F. Supp. 2d 1008, 1025 (E.D. Cal. 2009) (quoting *Davis*, 526 U.S. at 646) (emphasis added).

Similarly, another court focused on the connection between the off-campus conduct and the hostile environment at the institution. Denying a recipient's motion for summary judgment on a student's claims of teacher-on-student harassment, much of which occurred off campus, the court observed that "*Davis*

did not limit the circumstances in which institutional liability will lie to harassment occurring during school hours and on school grounds, but found merely that such conditions give rise to an inference of control by and therefore liability of the institution." *Crandell v. N.Y. Coll. of Osteopathic Med.*, 87 F. Supp. 2d 304, 316 n.130 (S.D.N.Y. 2000). In other words, "[t]hat the misconduct took place during school hours and on school grounds was found by the Court to be a sufficient, not a necessary, condition for liability." *Id.* In that case, because the plaintiff alleged "a nexus between the off campus misconduct and a hostile environment at the institution," the court considered the entirety of the alleged harassment. *See id.* at 316; *see also Rost ex rel. K.C. v. Steamboat Springs RE-2 Sch. Dist.*, 511 F.3d 1114, 1121 n.1 (10th Cir. 2008) ("We do not suggest that harassment occurring off school grounds cannot as a matter of law create liability under Title IX. *Davis* suggests that there must be some nexus between the out-of-school conduct and the school."); *Rouse v. Duke Univ.*, ___ F. Supp. 2d___, 2012 WL 6681786, at *5 (M.D.N.C. Dec. 21, 2012) ("[T]he Court assumes without deciding that an educational institution's response to an off-campus rape by an unaffiliated third party may trigger Title IX institutional liability."); *accord C.R.K. v. U.S.D. 260*, 176 F. Supp. 2d 1145, 1164 (D. Kan. 2001) (addressing whether school's response to off-campus assault was deliberately indifferent under Title IX).

Nor was geography a determinative factor in *Simpson v. University of Colorado*, 500 F.3d 1170 (10th Cir. 2007), where the Tenth Circuit imposed Title IX liability on a university for maintaining policies regarding its football recruiting program that resulted in sexual assaults at an off-campus party. In that case, the court had no problem holding that a reasonable jury could have awarded damages for the school's role in the off-campus sexual assaults.

Courts have likewise considered knowledge of, and response to, off-campus conduct in assessing whether a school was deliberately indifferent to a hostile environment on campus. In *Doe ex rel. Pahssen v. Merrill Community School District*, 610 F. Supp. 2d 789 (E.D. Mich. 2009), for example, the court determined that the assailant's disciplinary record and prior conduct at another school district and toward other individuals—which his current school knew about—must be considered in evaluating whether the school's response to a hostile environment on campus amounted to deliberate indifference. *See id.* at 795. It explained:

> In determining whether Merrill was "deliberately indifferent" to sexual harassment of Plaintiff by John Doe, incidents involving John Doe and other students are relevant to the extent that Merrill had "actual knowledge" of them, thereby informing Merrill of John Doe's propensity to commit sexual harassment. In other words, the question is whether Merrill acted deliberately indifferent given the totality of its actual knowledge of John Doe sexually harassing Plaintiff and any other individuals.

Id. at 809.

Even in cases where the majority of the harassing conduct occurred off campus, courts have found schools liable for their failure to intervene. A pair of cases out of the District of Connecticut with strikingly similar facts illustrates this point. In both cases, after plaintiffs were sexually assaulted off-campus they continued to attend school in the same building as the students who had assaulted them. The assaults in both cases were followed by campaigns of mostly off-campus harassment by the assailants' friends. Under the circumstances, the courts both concluded that the off-campus "proxy-harassment" was part and parcel of plaintiffs' claims "concerning the severity and offensiveness of having to go to school in the same building as" their assailants. *Doe ex rel. Doe v. Coventry Bd. of Educ.*, 630 F. Supp. 2d 226, 233-34 (D. Conn. 2009); *Doe ex rel. Doe v. Derby Bd. of Educ*., 451 F. Supp. 2d 438, 445 (D. Conn. 2006).

Both courts explained that a plaintiff can experience trauma merely by virtue of attending school with her assailant sufficient to create a hostile environment on campus, even if the initial assault occurred off-campus. *See Doe v. Coventry*, 630 F. Supp. 2d at 233 ("The mere fact that Mary Doe and Jesse attended school together could be found to constitute pervasive, severe, and objectively offensive harassment so as to deny Mary Doe equal access to school resources and opportunities."); *Doe v. Derby*, 451 F. Supp. 2d at 445 ("[T]here is minimally sufficient evidence from which a reasonable jury could conclude that going to the

same school as [assailant] played a role in Sally Doe's decision to transfer out of Derby High School, thus depriving her of its educational opportunities or benefits."); *see also Doe ex rel. Doe v. Hamden Bd. of Educ.*, No. 3:06-CV-1680(PCD), 2008 WL 2113345, at *5 (D. Conn. May 19, 2008) ("A reasonable jury could conclude that [assailant's] presence at school throughout the school year was harassing to Mary Doe because it exposed her to multiple encounters with him. Further encounters, of any sort, between a rape victim and her attacker could create an environment sufficiently hostile to deprive the victim of access to educational opportunities provided to her at school."); *Kelly v. Yale Univ.*, No. CIV.A. 3:01-CV-1591, 2003 WL 1563424, at *3 (D. Conn. Mar. 26, 2003) (holding that a reasonable jury could conclude that following an off-campus assault, assailant's "presence on campus was harassing because it exposed [plaintiff] to the possibility of an encounter with him"). As a result, the courts held that there was a sufficient nexus between the off-campus conduct and the school environment that the school maintained "control" under *Davis*.

The U.S. Department of Education's Office for Civil Rights, the primary federal agency tasked with enforcing Title IX, shares this understanding. In recent guidance expressing concern over the incidence of sexual violence in our nation's schools, OCR explained that "[s]chools may have an obligation to respond to student-on-student sexual harassment that initially occurred off school grounds,

outside of a school's education program or activity. . . . Because students often experience the continuing effects of off-campus sexual harassment in the educational setting, schools should consider the effects of the off-campus conduct when evaluating whether there is a hostile environment on campus." U.S. Department of Education, Office for Civil Rights, Dear Colleague Letter: Sexual Violence 4 (Apr. 4, 2011), *available at* http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf . In short, the district court's "pay no attention to the man behind the curtain" approach to the off-campus assault is unsupported as a matter of law, as a number of courts following *Davis* have recognized.[3]

[3] While some courts have stated that Title IX liability is not implicated by off-campus conduct, they have done so without examining *Davis*'s language. *See Doe v. Round Valley Unified Sch. Dist.*, 873 F. Supp. 2d 1124, 1136 (D. Ariz. 2012); *Doe ex rel. Doe v. Coventry Bd. of Educ.*, 630 F. Supp. 2d 226, 233-34 (D. Conn. 2009); *Dawn L. v. Greater Johnstown Sch. Dist.*, 614 F. Supp. 2d 555, 558 & n.3 (W.D. Pa. 2008); *Clifford v. Regents of Univ. of Cal.*, No. 2:11-CV-02935-JAM, 2012 WL 1565702, at *7 (E.D. Cal. Apr. 30, 2012); *HB v. Monroe Woodbury Cent. Sch. Dist.*, No. 11-CV-5881 CS, 2012 WL 4477552, at *16 (S.D.N.Y. Sept. 27, 2012) (rejecting plaintiffs' claim because "there are no allegations that PG's molestation ever occurred during school hours or on school grounds"). Further, many of the cases are factually distinguishable because they involved off-campus harassment by a former teacher after he was fired, *see Doe-2 v. McLean County Unit Dist. No. 5 Bd. of Dirs.*, 593 F.3d 507, 512-13 (7th Cir. 2010); *Shrum ex rel. Kelly v. Kluck*, 249 F.3d 773, 782 (8th Cir. 2001); *Romero v. City of N.Y.*, 839 F. Supp. 2d 588, 612 (E.D.N.Y. 2012), harassment by a non-student, *see Tyrrell v. Seaford Union Free Sch. Dist.*, 792 F. Supp. 2d 601, 629 & n.10 (E.D.N.Y. 2011); *Mattingly, v. Univ. of Louisville*, No. 3:05CV-393-H, 2006 WL 2178032, at *1 (W.D. Ky. July 28, 2006), harassment targeted at individuals other than the plaintiff, *see Pahssen v. Merrill Cmty. Sch. Dist.*, 668 F.3d 356, 365-66 (6th Cir.

C. *Ostrander v. Duggan* Does Not Require the Result Below.

The district court's erroneous holding regarding Roe's Title IX claim was premised on an incorrect reading of this court's decision in *Ostrander v. Duggan*, 341 F.3d 745 (8th Cir. 2003). The district court read *Ostrander* as precluding liability for the off-campus assault under the deliberate indifference inquiry. But *Ostrander* does not stand for such a premise.

To be sure, there are some similarities between the facts in this case and those in *Ostrander*—both involve off-campus student-on-student sexual assaults[4]—but the questions considered in the cases are distinct. In fact, the court in *Ostrander* did not address whether a school's response to allegations of an off-campus sexual assault can trigger Title IX liability under *Davis*. The plaintiff in *Ostrander* argued that university officials "act[ed] with deliberate indifference regarding complaints of violence made by female students against fraternity members." *Id.* at 750. In other words, plaintiff asserted that her assault could have been prevented had the university not acted with deliberate indifference to similar

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2012), or harassment that occurred during summer break when school was not in session, *see Doe v. Derby Bd. of Educ*., 451 F. Supp. 2d 438, 445 (D. Conn. 2006); *Theno v. Tonganoxie Unified Sch. Dist. No. 464*, 377 F. Supp. 2d 952, 957 n.3 (D. Kan. 2005). None of these courts directly addressed the question presented in this case: whether a school's response to an off-campus sexual assault by one student against another may implicate Title IX.

[4] The cases are also factually distinguishable: This case involves an allegation of post-assault harassment, whereas *Ostrander* did not. Of course, an allegation of post-assault harassment is not a predicate to a school's obligation to respond under Title IX. *See supra* Sections I.A-B.

prior assaults of which it had notice. The court understood the harassment issue to be prophylactic, noting that it "need not resolve the issue whether a public university may be liable under Title IX for failure to *prevent* student-on-student sexual abuse occurring at fraternity or sorority premises located on the university's campus." *Id.* at 750-51 (emphasis added). It was against this backdrop that the court noted that the university "did not own, possess, or control" the property where plaintiff was assaulted. *See id.* at 750.

In contrast, this case turns not on a university's failure to *prevent* an off-campus assault, but the school's deliberately indifferent response to the off-campus assault that Roe herself experienced: As the district court acknowledged, the "Plaintiff contends that SLU acted with deliberate indifference to the October 27, 2006 incident." *Roe v. Saint Louis Univ.*, No. 4:08CV1474 HEA, 2012 WL 6757558 (E.D Mo. Dec. 31, 2012). Because this case turns on SLU's deliberate indifference to Roe's assault by a fellow student, whether SLU in fact maintained disciplinary control over the harasser is a central question, one unanswered by *Ostrander*.

II. SLU EXERCISED DISCIPLINARY CONTROL OVER THE HARASSER AND THEREFORE CAN BE LIABLE UNDER TITLE IX.

A. SLU's Student Code of Conduct and Sexual Assault Policy Apply to Off-Campus Behavior.

The facts of this case amply demonstrate that SLU can be liable under Title IX for the off-campus assault of one of its students by another. As examined in detail above, whether a school is answerable for its response to an off-campus assault is not an inquiry that begins and ends with whose name is on the lease of the site of the assault; when the facts beyond geography are examined, SLU's disciplinary authority, and resultant responsibility, is clear.

SLU holds itself out as having disciplinary authority over sexual assault by its students, regardless of where such conduct occurs. SLU's Sexual Assault Policy provides that "[a]ny form of sexual assault is a serious violation of [community] standards and will not be tolerated." *See* Saint Louis Univ., 2012-2013 University Policies and Procedures, § 1.17: Sexual Assault Policy, *available at* http://www.slu.edu/office-of-student-conduct/2012-2013-student-handbook/2012-2013-university-policies-and-procedures#Sexual%20Assault%20Policy [hereinafter "SLU Sexual Assault Policy"]. The Policy "applies to *all behavior* in which the Accused Party is a student." *Id.* (emphasis added). The Code of Student Conduct defines sexual assault as "sexual contact or conduct with another without that person's clear,

knowing, and voluntary consent." Saint Louis Univ., 2012-2013 Code of Student Conduct, § 2.4.22: Sexual Assault, *available at* http://www.slu.edu/office-of-student-conduct/2012-2013-student-handbook/2012-2013-code-of-student-conduct [hereinafter "SLU Code of Conduct"]. SLU makes clear that "[w]hen an individual is incapacitated because of alcohol or other drugs," that individual "cannot consent to sexual activity." SLU Sexual Assault Policy. Possible outcomes for Level 2 sexual assault ("vaginal, oral or anal penetration") include long-term probation, suspension, or expulsion. SLU Code of Conduct; SLU Sexual Assault Policy. SLU "encourages the reporting of all incidents of sexual assault."[5] SLU Sexual Assault Policy. Both the Sexual Assault Policy and Code of Conduct can be found in the Student Handbook, which applies to all undergraduate, graduate, and professional students attending SLU. *See* Saint Louis Univ., 2012-2013 University Policies and Procedures, *available at* http://www.slu.edu/office-of-student-conduct/2012-2013-student-handbook/2012-2013-university-policies-and-procedures.

The Code of Student Conduct specifically addresses off-campus conduct: SLU "reserves the right to initiate action and seek appropriate sanctions for

[5] For ease of reference, this brief cites to the publicly-available website version of SLU's current policies; however, these policies do not differ in any material way from those in place during the 2006-2007 school year, which are included in the district court record. *See* Statement of Material Facts, Exhibits in Support of Title IX Separate Statement, PAF Exhibit No. 122, *Roe v. Saint Louis Univ.*, No. 4:08CV1474, Docket No. 237 (Dec. 14, 2012) (filed under seal).

conduct," including "conduct that occurs away from the Campus." SLU Code of Conduct, § 2.2: Policy Overview and Applicability. Specifically, the Code applies to "conduct that occurs on-Campus, at University sponsored events *and to off-campus conduct and activity that may adversely affect the University community or the pursuit of the University's objectives.*" *Id.* (emphasis added). "Each Student shall be responsible," the Code continues, "for his/her conduct from the time of application for admission through the actual awarding of a degree." *Id.*

Quite simply, SLU prohibits its students from committing sexual assault. Not just in empty lecture halls, or dorm rooms, or at an on-campus basketball game. Regardless of where it takes place, SLU has rightly told its students that sexual assaults will not be tolerated. *See Mattingly v. Univ. of Louisville*, No. 3:05CV-393-H, 2006 WL 2178032, at *4 (W.D. Ky. July 28, 2006) (stating in a case involving an assault against a student during her study abroad program, that a code of conduct that covered student-on-student assaults would be relevant to a university's disciplinary control and damages liability under *Davis*). SLU not only agrees that it has disciplinary control over off-campus sexual assaults, but it has communicated that point to the university community.

B. Courts Have Upheld Higher Educational Institutions' Discipline of Students for Certain Off-Campus Behavior.

This court and courts around the country have upheld student discipline for a wide range of off-campus conduct, relying on the university's institutional

prerogative to control the educational environment. For example, one court expressly rejected the argument that a university lacked jurisdiction to discipline students for an off-campus sexual assault because "[t]he [u]niversity's legitimate interest in punishing the student perpetrator of a sexual assault or protecting the student victim does not end at the territorial limits of its campus." *Gomes v. Univ. of Me. Sys.*, 304 F. Supp. 2d 117, 126 (D. Me. 2004).

In *Woodis v. Westark Community College*, 160 F.3d 435 (8th Cir. 1998), this court held that a nursing student who pled nolo contendere to a misdemeanor controlled substance charge was in violation of a college rule requiring her to "obey all federal, state and local laws," and was therefore properly expelled, recognizing "the school's need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process."[6] *Id.* at 438 (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 686 (1986)); *see also Ray v. Wilmington Coll.*, 666 N.E.2d 39, 41 (Ohio Ct. App. 1995) ("An educational institution's authority to discipline its students does not necessarily stop at the physical boundaries of the institution's premises. The institution has the prerogative to decide that certain types of off-campus conduct are detrimental to the institution and to discipline a student who engages in that conduct."); *Kusnir v. Leach*, 439 A.2d 223, 226 (Pa. Commw. Ct. 1982) ("Obviously, a college has a

[6] Of course, since SLU is a private educational institution, the procedural due process protections in *Woodis* do not apply in this case.

vital interest in the character of its students, and may regard off-campus behavior as a reflection of a student's character and his fitness to be a member of the student body.").

One court, faced with a battery of constitutional claims after a public university suspended a student for rioting on public, not university, property after a crushing defeat in the "Final Four" of the NCAA men's basketball tournament, rejected plaintiff's challenges based on the off-campus nature of his conduct. *See Hill v. Bd. of Trustees of Mich. State Univ.*, 182 F. Supp. 2d 621 (W.D. Mich. 2001). The court dismissed the plaintiff's argument—unsupported by any cases—that a university violates the Constitution by suspending a student for off-campus acts:

> [I]f a student sold drugs across the street from campus, or committed arson one block from campus, such acts could certainly be taken into account in determining whether to retain a person on campus. These acts raise legitimate concern, even fear, as to the safety of the property and persons on campus—i.e., if he does it off-campus, he is as likely to do it on campus. Likewise, encouraging fires, rocking vehicles, and kicking telephone booths, even though occurring off-campus, shows a disregard for the property and safety of others that raises a legitimate concern as to the safety of the property and persons on-campus.

Id. at 637 n.2. In addition, other courts have upheld discipline based on fraudulent publications in an unaffiliated academic journal, *Slaughter v. Brigham Young Univ.*, 514 F.2d 622 (10th Cir. 1975), driving offenses, *Cornette v. Aldridge*, 408 S.W.2d 935 (Tex. Civ. App. 1966), and drug possession, *Krasnow v.*

Va. Polytechnic Inst. and State Univ., 414 F. Supp. 55 (W.D. Va. 1976), *aff'd* 551 F.2d (4th Cir. 1977); *Hart v. Ferris State Coll.*, 557 F. Supp. 1379 (W.D. Mich. 1983) (plaintiff not entitled to preliminary injunction); *Sohmer v. Kinnard*, 535 F. Supp. 50 (D. Md. 1982) (same). In short, SLU's prohibition on sexual assault both on and off campus falls well within the legal bounds of the school's disciplinary authority.

III. THE PREMISE THAT EDUCATIONAL INSTITUTIONS MUST BE ABLE TO CONTROL CERTAIN TYPES OF OFF-CAMPUS BEHAVIOR BY THEIR STUDENTS IS SUPPORTED BY THE ROLE OF UNIVERSITIES IN SOCIETY AND THE NATURE OF STUDENT-UNIVERSITY RELATIONSHIPS.

A. Colleges and Universities Transmit Values and Create Citizens, Along With Educating Their Students.

SLU's policies and procedures, like student codes of conduct around the country, aim not only to facilitate education, but also to transmit values and mold students into citizens. The Supreme Court has "repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as" holding "a fundamental role in maintaining the fabric of society." *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003). Educational institutions are "the primary vehicle for transmitting the values on which society rests." *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (internal quotation marks omitted) (discussing public schools). Indeed, "[u]niversities have long accepted the role of shaping tomorrow's leaders. Inherent in that role is the obligation to discipline students for

violations of rules promulgated by university administrators." J. Wes Kiplinger, *Defining Off-Campus Misconduct that "Impacts the Mission": A New Approach*, 4 U. St. Thomas L. J. 87, 88 (2006). SLU's prohibition on sexual assault is in line with our societal values, which condemns sexual contact without consent.

B. The Student-University Relationship Is Contractual, in Which Students Agree to Abide by a Given Code of Conduct.

It is axiomatic that, because the student-university relationship is a contractual one, schools may constrain the behavior of their students. "The campus is, in fact, a world apart from the public square in numerous respects" and students "must abide by certain norms of conduct when they enter an academic community." *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, ___U.S.___, 130 S. Ct. 2971, 2997 (June 28, 2010) (Stevens, J., concurring); *Corso v. Creighton Univ.*, 731 F.2d 529, 531 (8th Cir. 1984) ("The relationship between a university and a student is contractual in nature."). A university's student handbook provides the "primary source of the terms governing the parties' contractual relationship." *Id.* Students at SLU commit themselves to follow the rules established by the SLU Code of Conduct and its Policies and Procedures, which include a prohibition on sexual assault.

C. Due to the Unique Student-University Relationship, It Is Routine for Student Codes of Conduct to Extend to Off-Campus Behavior.

It is common practice for student codes of conduct, like that at SLU, to bind students during their entire time at the university, not just for those parts of their days when they are physically present on campus. *See generally* Edgar Dyer, *Off-Campus Behavior of Students in Higher Education and the Jurisdiction of Institutional Codes of Conduct*, 208 Ed. L. Rep. 1 (2006). In 1997, three quarters of the 520 college administrators surveyed reported that their codes of conduct applied to off-campus conduct. *See* Ben Gose, *Some Colleges Extend Their Codes of Conduct to Off-Campus Behavior*, Chron. Higher Educ., Oct. 9, 1998. A model student conduct code drafted by consultants on educational practices provides for the code to apply on university premises, at university sponsored activities, "and to off-campus conduct that adversely affects the . . . [university] community and/or the pursuit of its objectives." Edward N. Stoner & John Wesley Lowery, *Navigating Past "The Spirit of Insubordination": A Twenty-First Century Model Student Conduct Code with a Model Hearing Script*, 31 J. Coll. & Univ. L. 1, 24 (2004). This same language appears in the SLU policy.

Examining the policies of the Atlantic 10 Conference schools—those against whom SLU competes in athletics—illustrates the prevalence of higher education institutions exercising jurisdiction over their students' off-campus conduct. All of the Atlantic 10 Conference schools assert that enrollment in their schools means

honoring the school's code of conduct. Naturally, the Codes govern the conduct of students on school property and at events sponsored or supervised by the school. However, none of the Codes limit themselves to behavior on campus alone—they also provide for jurisdiction over off-campus student conduct. All but one school[7] assert jurisdiction over off-campus conduct that conflicts with the university's mission and/or objectives, or has the potential to harm the university community.[8]

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[7] The University of Massachusetts Amherst explicitly limits its jurisdiction to violations of federal, state, and local laws. *See* Univ. of Massachusetts, Amherst, Code of Student Conduct 2012-2013, at 2, *available at* http://www.umass.edu/dean_students/downloads/CodeofStudentConduct.pdf. Of course, these laws may extend to off-campus conduct.

[8] *See* Butler Univ., Student Handbook 2012-2013, at 111, *available at* http://www.butler.edu/media/2876468/studenthandbook12-13_print.pdf; Duquesne Univ., Code of Student Rights, Responsibilities, and Conduct 2012-2013, at 13, *available at* http://www.duq.edu/Documents/student-conduct/_pdf/337687%20Student%20Code%20Book%20REV10-12_WEB.pdf; Fordham Univ., Student Handbook, *available at* http://www.fordham.edu/student_affairs/deans_of_students_an/student_handbooks/rose_hill_student_ha/university_regulatio/offcampus_conduct_po_70920.asp; The George Washington Univ., Code of Student Conduct 1, *available at* http://studentconduct.gwu.edu/code-student-conduct; LaSalle Univ., Student Guide to Resources, Rights, and Responsibilities, *available at* http://www.lasalle.edu/students/dean/divpub/manuals/sgrrr/index.php?accordion_num=2&vn2_accordion_num=2&content=comm&anchorID=rule; Saint Bonaventure Univ., Student Code of Conduct 2012-2013, at 20, *available at* http://www.sbu.edu/uploadedFiles/Admissions/Undergraduate/Visit_Us/Code%20of%20Conduct.pdf; Saint Joseph's Univ., Campus Guide Policies and Regulations 2012-2013, at 22, *available at* http://www.sju.edu/int/academics/pls/pdf/transfer/SJU%20ADULT%20STUDENT%20HANDBOOK%202012-2013.pdf; SLU Code of Conduct, § 2.3; Temple Univ., Board of Trustees Policies and Procedures Manual, Student Code of Conduct 5, *available at* http://policies.temple.edu/PDF/205.pdf; Univ. of Dayton, Student Handbook 2012-2013, at 19, *available at*

In short, SLU's code—and its extension to certain types of off-campus conduct—is in line with the vast majority of its peer institutions.

As institutions that are tasked with fashioning not just educated young people but leaders, colleges and universities have broad discretion to set rules that constrain the behavior of their students, and to discipline those who violate them. Because SLU's prohibition on sexual assault extends off campus, like that of so many of its peer institutions, it maintained disciplinary control over the harassment at issue in this case, and therefore may be held liable under Title IX for its failure to respond.

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http://www.udayton.edu/studev/_resources/files/civility/student_handbook_2012_2013.pdf; Univ. of Massachusetts, Amherst, Code of Student Conduct 2012-2013, at 2, *available at* http://www.umass.edu/dean_students/downloads/CodeofStudentConduct.pdf; Univ. of North Carolina at Charlotte, The Code of Student Responsibility, *available at* http://legal.uncc.edu/policies/up-406; Univ. of Rhode Island, University Student Handbook, *available at* http://www.uri.edu/judicial/Student%20Handbook/htmlStart.html; Univ. of Richmond, Standards of Student Conduct, *available at* http://studentdevelopment.richmond.edu/student-handbook/; Virginia Commonwealth Univ., VCU Insider: Student Handbook and Resource Guide 2012-2013, at 135, *available at* http://www.students.vcu.edu/insider.html; Xavier Univ., Student Handbook 2011-2012, at 16, *available at* http://www.xavier.edu/student-integrity/documents/studenthandbook.pdf.

CONCLUSION

For the foregoing reasons, this court should reverse the district court's order.

Date: May 14, 2013

Respectfully submitted,

/s/ *Fatima Goss Graves* .
Fatima Goss Graves
Counsel of Record
NATIONAL WOMEN'S LAW CENTER
11 Dupont Circle, N.W.
Suite 800
Washington, D.C. 20036
(202) 588-5180

Neena K. Chaudhry
Devi M. Rao
NATIONAL WOMEN'S LAW CENTER
11 Dupont Circle, N.W.
Suite 800
Washington, D.C. 20036
(202) 588-5180

Counsel for Amicus Curiae
National Women's Law Center

CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 32(a)(7)

I hereby certify the following:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,427 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in Times New Roman 14-point font.

/s/ *Fatima Goss Graves* .
Fatima Goss Graves
NATIONAL WOMEN'S LAW CENTER
11 Dupont Circle, N.W.
Suite 800
Washington, D.C. 20036
(202) 588-5180

Counsel for Amicus Curiae
National Women's Law Center

May 14, 2013

CERTIFICATE OF SERVICE

I certify that this *amicus* brief was served on the following counsel of record on the 14th day of May, 2013 via the Court's electronic filing system:

David J. Fraser
LAW OFFICE OF DAVID J. FRASER
99 Frontier St.
Trabuco Canyon, CA 92679

Debbie S. Champion
RYNEARSON & SUESS
Suite 1550
500 N. Broadway
Saint Louis, MO 63102-0000

Victor H. Essen, II
RYNEARSON & SUESS
Suite 1550
500 N. Broadway
Saint Louis, MO 63102-0000

Sarah Elizabeth Mullen
LEWIS & RICE
Suite 2500
600 Washington Avenue
Saint Louis, MO 63101

Neal Frederick Perryman
LEWIS & RICE
Suite 2500
600 Washington Avenue
Saint Louis, MO 63101

David Zachary Hoffman
SANDBERG & PHOENIX
15th Floor
600 Washington Avenue
Saint Louis, MO 63101-1313

Mary Anne Mellow
SANDBERG & PHOENIX
15th Floor
600 Washington Avenue
Saint Louis, MO 63101-1313

/s/ *Fatima Goss Graves*
Fatima Goss Graves