No. 07-43

IN THE

Supreme Court of the United States

UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL,
Petitioner,

v.

MELISSA JENNINGS,
Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the *en banc* Fourth Circuit properly ruled that a jury should determine the disputed facts regarding the liability of the University of North Carolina at Chapel Hill (UNC) for damages to student-athlete Melissa Jennings for its deliberate indifference to sexual harassment by its women's soccer coach, given that Jennings presented sufficient evidence for a reasonable jury to conclude that:

a) she notified the university of the coach's sexually hostile actions; and

b) the harm she suffered from the sexual harassment, including severe emotional distress, had a negative impact on her academic performance and ultimately her place on the varsity soccer team, causing her to be denied access to educational opportunities and benefits at UNC.

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INTRODUCTION

Title IX of the Education Amendments of 1972, 21 U.S.C. § 1681 *et seq.*, bars sex discrimination—including sexual harassment—by educational institutions that receive federal funds. *Franklin* v. *Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992). To ensure that recipients will be liable for damages only for their own conduct in sexual harassment cases, this Court issued decisions in 1998 and 1999 that establish stringent standards for liability.

In *Gebser* v. *Lago Vista Ind. Sch. Dist.*, 524 U.S. 274 (1998), a case involving teacher-student sexual harassment, this Court determined that, to be liable for damages for sexual harassment under Title IX, an appropriate school official must have knowledge of the harassment and, in the face of that knowledge, the school must be deliberately indifferent to the harassment. In the context of student-on-student harassment, this Court held in *Davis* v. *Monroe County. Bd. of Educ.*, 526 U.S. 629, 652 (1999), that a private damages action may lie where "the behavior is so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect."

Applying these standards, the Court of Appeals for the Fourth Circuit, sitting *en banc*, ruled 8-2 that Melissa Jennings had "presented sufficient evidence to raise triable questions of fact on all disputed elements of her Title IX [sexual harassment] claim." Pet. App 22a. A soccer player recruited by Head

Coach Anson Dorrance, she was cut from the team during exam period of her sophomore year, reflecting the adverse academic and athletic consequences Jennings suffered because the University of North Carolina at Chapel Hill (UNC) failed to address the sexually hostile environment created by Coach Dorrance. Nothing in this straight forward application of *Gebser* and *Davis* provides a reason for this Court to grant review.

To begin with, there is no dispute in this case that Jennings must demonstrate that the hostile environment created by Coach Dorrance was severe enough to deny her equal access to concrete educational opportunities and benefits. Moreover, she must demonstrate that UNC was on notice regarding the hostile environment, and was deliberately indifferent to addressing it. It is those standards that the Fourth Circuit explicitly applied in finding that Jennings presented enough evidence to allow a reasonable jury to determine whether she carried the burden of meeting them.

Nor is there any dispute among the courts of appeals over the appropriate standard for damages liability in a Title IX sexual harassment case. The Seventh Circuit decision cited by UNC as purportedly in conflict with the Fourth Circuit applies the same well-settled *Gebser* and *Davis* standards. Indeed, the only real disputes in this case are factual.

Although, to be sure, there are some key facts that even UNC cannot dispute: There is no dispute, for example, that Coach Dorrance made inappropriate comments to his students during team practices and events attended by Jennings, a 17-year-

old member of the soccer team. There also is no dispute that Jennings met with UNC's legal counsel, an appropriate school official under *Gebser*, and that no action was taken by UNC after the meeting. Nor is there any dispute that after Jennings was cut from the team and her parents complained vociferously, Coach Dorrance wrote a letter to her father acknowledging that his conduct was "inappropriate" and "unacceptable." Finally, there is no dispute that UNC took no action to determine how it might otherwise remedy the impact that the coach's unacceptable conduct had on Jennings' performance.

However, many other remaining factual disputes remain concerning the scope and effect of the coach's inappropriate conduct, the specific information imparted to UNC regarding that conduct, and the precise nature and cause of the injury suffered by Jennings. These issues reinforce that this case should be allowed to proceed to trial to allow those factual disputes to be resolved by a jury.

UNC attempts to dress up these factual disputes as legal issues. In so doing, it improperly asks this Court to step into the role of trier of fact. But petitions for writs of certiorari are not granted "to review evidence and discuss specific facts." *United States* v. *Johnson*, 268 U.S. 220, 227 (1925). In addition, the factual nature of UNC's claims highlights that any review here is premature. The Fourth Circuit's decision merely denies summary judgment to UNC because of the material facts in dispute. After trial, there may be no legal issues that need resolution, and, if there are such issues, they would be properly defined.

UNC has presented no reason why this Court should grant certiorari, particularly of this interlocutory decision, and its petition should be denied.

STATEMENT OF THE CASE

Melissa Jennings was only 17 years old when she arrived as a freshman at UNC as a recruited student-athlete on the women's soccer team.[1] Pet. App. 3a. As the Fourth Circuit sets forth in pages and pages of descriptions of highly offensive behavior (Pet. 2a-28a), during practices and other team gatherings the head coach, 45-year-old Anson Dorrance, regularly "bombarded [his] players with crude questions and comments about their sexual activities and made comments about players' bodies that portrayed them as sexual objects." Pet. App. 3a. These sexually hostile comments were difficult to escape, they "permeated team settings," often occurring "during team warm-up time * * * or any time the team was together, whether at home or traveling." Pet. App. 16a. The "questions and comments moved from girl to girl to girl"—some directed at Jennings—and she and her teammates had no choice but to endure them all. Pet. App. 7a.

For example, Jennings heard Dorrance ask one teammate whether there was "a guy [she hadn't] f**ked yet?" and another whether she was planning a "shag fest" with her boyfriend. Pet. App. 15a. He then asked Jennings whether she had "'the same

[1] We present these facts, and any inferences drawn from them, in the light most favorable to Melissa Jennings. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

good weekend' with her boyfriend." Pet. App. 16a. Another time, he asked one player whether she was "going to have sex with the entire lacrosse team." Pet. App. 3a-4a. In addition, he frequently commented on the "nice rack[s]" and "nice legs" of some of the players. *Ibid.*

Jennings also endured Dorrance's musings about his sexual fantasies. She overheard her him talk about "an Asian threesome"—having "group sex with his Asian players." Pet. App. 4a. He told Debbie Keller, one of the team captains, that he would "'die to be a fly on the wall' the first time her roommate, another team member, had sex" because he believed the roommate "was a virgin with repressed sexual desire." Pet. App. 4a,16a. That fantasy made such an impression on the team that they were still talking about it in front of Jennings a year or more after he told it to Keller. Pet. App. 5a n. 1.

The court below also described Jennings' end-of-season performance evaluation that took place in Coach Dorrance's dark hotel room during a tournament. With the two of them alone in the room, "knee-to-knee, bed not made," in the middle of discussing how she needed to improve her grades, he asked Jennings: "Who are you f**king?" Pet App. 6a, 15a.

In addition to all the out-of bounds, offensive sexual remarks, the court discussed the evidence that Coach Dorrance engaged in unwanted and highly inappropriate physical contact with Keller in front of the team. He touched her stomach, and dangled his hand in front of her chest, while putting his arm around her and rubbing her back. Pet. App. 5a.

These advances made Keller's "skin crawl," but, reflecting the obvious power relationship between this successful coach and his young players, she testified that she did not object because she did not want to lose her playing time. Pet. App. 14a-15a.

Jennings testified that experiencing all of the coach's actions, comments and questions—whether they were directed at her individually, the teammate next to her, or the entire team—made her feel "uncomfortable, filthy and humiliated." Pet. App. 7a. The Fourth Circuit noted that her "testimony is supported by a psychiatrist's opinion that Dorrance's destructive practice of verbal sexual abuse caused her to suffer severe emotional distress." Pet. App. 20a.

Jennings further explained that because of the sexually hostile environment created by the coach, her performance as a soccer player and her academic work suffered. *Ibid.* She testified that she received low grades the entire time she was on the team because she "found it hard to focus" in the midst of a hostile environment and was uncomfortable and unhappy. Pet. App. 34a. And her entire soccer experience and ability to improve was negatively affected, as she struggled to "stay out of [Dorrance's] radar" while he was making his sexual remarks. Pet. App. 21a. Jennings was ultimately cut from the team by Coach Dorrance at the end of her sophomore year. Pet. App. 8a.

The court below also discussed the meeting that took place during the fall of 1996, Jennings' first soccer season at UNC, with Susan Ehringhaus, Senior University Counsel and Assistant to the Chancellor. Jennings testified that at that meeting

she described Coach Dorrance's sexual questions and comments to the team, and the feelings of discomfort and humiliation that they caused her. Pet. App. 22a. Ehringhaus took no action after the meeting and merely told Jennings that Dorrance "was a 'great guy' and that she should work out her problems directly with him." *Ibid.*

UNC did not respond to Jennings' complaint about the hostile environment at all until May 1998, after she had been cut from the team and her parents complained. On June 9, 1998, the Athletic Director sent Jennings' father a letter stating that Coach Dorrance "now realizes that his involvement in [team] discussions is inappropriate, and he will immediately discontinue * * * these unacceptable conversations." Pet. App. 91a. The next day, the Athletic Director issued a letter of reprimand to Coach Dorrance, notifying him that "it is inappropriate for you to have conversations with members of your team (individually or in any size group) regarding their sexual activities." *Ibid.*

On August 25, 1998, Jennings and Keller sued UNC and several of its employees individually and in their capacity as UNC employees.[2] Pet. App. 9a. Afterwards, Jennings was so severely threatened and harassed that "UNC officials warned her that they could not guarantee her safety on campus." *Ibid.* She was forced to spend her senior year at another school, though awarded a degree from UNC. *Ibid.*

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[2] In its *en banc* decision, the Fourth Circuit affirmed the district court's grant of summary judgment as to all of the individual defendants except for Coach Dorrance and Susan Ehringhaus. Pet. App. 23a. UNC was the only defendant to seek this Court's review. Pet. ii.

Several years later, on March 19, 2004, Coach Dorrance sent a letter of apology to Keller, acknowledging that his participation in "discussions of th[e] team members' sexual activities or relationships with men" was "altogether inappropriate and unacceptable." J.A. 777. Keller then settled her claims with all defendants and filed a stipulation of dismissal with prejudice on March 24, 2004. Pet. App. 92a. The district court granted defendants' motion for summary judgment on October 27, 2004. Pet. App. 155a.

On appeal, the Fourth Circuit, in a split decision, upheld the district court. Pet. App. 76a. In an opinion written by District Judge Dever, sitting by designation, the court concluded that there was no hostile environment because the Coach's conduct had not "crossed the line" between vulgar, mildly offensive language and sexual harassment. Pet. App. 111a. Judge Michaels dissented, emphasizing that because he believed that "Jennings had proffered facts showing that the soccer team environment was persistently degrading and humiliating to her and to other young women, she is entitled to a trial." Pet. App. 129a-130a.

The Fourth Circuit granted Jennings' petition for rehearing *en banc*, vacating the panel decision. Pet. App. 2a. On April 19, 2007, in an 8-2 decision,[3] the court reversed the district court's grant of summary judgment. *Ibid.* Closely following this Court's decisions in *Gebser* and *Davis*, the court held

[3] Judge Niemeyer, joined by Judge Williams, dissented from the majority decision.

that the facts put forth by Jennings "are sufficient to establish that Jennings gave Ehringhaus, and by extension UNC, actual notice of the hostile environment created by Dorrance. This notice and the University's failure to take any action to remedy the situation would allow a rational jury to find deliberate indifference to ongoing discrimination." Pet. App. 22a. The court further found that a reasonable jury could determine that the crude questioning, comments, touching, and other manifestations of sexual harassment toward the young women on his soccer team, including 17-year-old Jennings, were "sufficiently degrading to create a hostile or abusive environment." Pet. App. 13a-14a.

The court also determined that Jennings had put forth evidence that she had been denied equal access to educational benefits by demonstrating that her academic and athletic performance was negatively affected by the harassment. It pointed to the fact that Jennings "testified that the hostile atmosphere created by Dorrance made her feel humiliated, anxious, and uncomfortable; these effects, in turn, had a negative impact on her participation and performance in soccer and on her academic performance." Pet. App. 20a.

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS OR WITH THIS COURT'S PRECEDENTS.

In support of certiorari, UNC argues that the Fourth Circuit's decision conflicts with a decision of the Seventh Circuit and with this Court's Title IX

jurisprudence. Pet. App. 19a-20a. There simply is no conflict among the courts of appeals,[4] and the decision below is fully in accord with this Court's decisions in *Gebser* and *Davis*. Review is therefore unwarranted. SUP. CT. R. 10.

A. The Fourth Circuit's Ruling Is Consistent With Rulings From Other Circuits.

UNC contends that the Fourth Circuit's ruling has contributed to an "apparent" conflict among the lower courts. Pet. 20. There is no apparent conflict—much less a real one. The only case that UNC claims is in conflict with the Fourth Circuit is *Gabrielle M.* v. *Park Forest-Chicago Heights, Ill. Sch. Dist. 163*, 315 F.3d 817 (7th Cir. 2003). But in *Gabrielle M.*, the Seventh Circuit applied the same legal standards as the Fourth Circuit. It reached a different outcome because the facts it addressed were entirely different.

Both the Fourth Circuit and the Seventh Circuit applied the stringent *Gebser* and *Davis* standards for establishing a sexual harassment claim under Title IX. In the instant case, the Fourth Circuit properly held that the facts offered by Jennings were sufficient to allow a jury to decide whether the team environment was so hostile that it severely affected her emotional state, and had a negative impact on

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[4] UNC also claims that a Second Circuit decision, *Hayut* v. *State Univ. of N.Y.*, 352 F.3d 733 (2d Cir. 2003), is in conflict with the Seventh Circuit. *Hayut* involves the sexual harassment of a college student by a professor, and is very similar to this case. Like the Fourth Circuit, as discussed below, the Second Circuit properly applied this Court's precedents to the facts before it, and its decision does not raise any conflict.

her academic and athletic performance.[5] Pet. App. 20-21a. Put differently, it held that a reasonable jury could find that the sexually hostile environment had deprived Jennings of access to educational opportunities and benefits at UNC, including her ability to stay on the soccer team, and to perform as well as she otherwise might academically.

To be sure, the Seventh and Fourth Circuits reach different outcomes, but the key difference between the decision below and the *Gabrielle M.* case is the very different facts to which the Seventh Circuit applied the legal standards. In stark contrast to the facts here, *Gabrielle M.* involved student-on-student harassment by a five year-old kindergartner, not a 45-year-old coach harassing teenage and young adult students. Further, in *Gabrielle M.*, the school district immediately attempted to address the harassment—again in contrast to the uncontraverted evidence presented by Jennings that UNC did

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[5] This case does not raise the question of whether the rigorous *Davis* deprivation of access to educational opportunities or benefits standard used by the Fourth Circuit applies to teacher-student harassment cases. Compare *Sauls* v. *Pierce County Sch. Dist.*, 399 F.3d F.3d 1279, 1284 (11th Cir. 2005) ("Because this case involves teacher-on-student harassment, Appellants need not establish [that the] misconduct was 'so severe, pervasive, and objectively offensive' that it denied [the victim] equal access to educational programs or opportunities.") with Pet. App. 19a n.2. Accordingly, this Court need not reach that issue here. *Texas* v. *Mead*, 465 U.S. 1041, 1042 (1984) (Stevens, J., respecting the denial of the writ) (The "Court's decision to deny the petition for a writ of certiorari [when the issue discussed by the dissent was neither presented to the court below nor raised in the petition for certiorari] is demonstrably consistent with the principles which inform [the] exercise of certiorari jurisdiction.").

nothing following her meeting with Ehringhaus. Indeed, the rest of Jennings' freshman soccer season and her full sophomore season went by (culminating with her being cut from the team), before the university took any steps to end the Coach's undisputedly improper behavior. Pet. App. 8a. Even then, UNC responded only by sending a letter acknowledging that Dorrance's sexual comments were inappropriate and unacceptable. *Ibid.* It took no steps to remedy the injury caused by Dorrance's behavior, and in fact counseled her to leave the university rather than offer her protection after she filed this case. Pet. App. 9a.

In its effort to create a conflict with *Gabrielle M.*, UNC's petition ignores that Jennings has put forth specific evidence that the sexually hostile environment resulted in concrete harm. Pet. 19-20. From the very start of her freshman year at UNC, she suffered severe emotional distress, was unable to concentrate on her school work, received poor grades, avoided her soccer coach during practice, and was ultimately dismissed from the team. Pet. App. 20-21a. In contrast, in *Gabrielle M.*, the court found it difficult to determine the concrete effect on a five-year-old's access to education resulting from what it believed to be imprecisely defined harassment from another five-year-old. 315 F.3d at 822-23. It is these factual differences, not legal differences, that explain the results in the two cases. Accordingly, there is no legal issue that needs to be settled by this Court. See *Johnson*, 268 U.S. at 227 ("We do not grant certiorari to review evidence and discuss specific facts.").

B. The Fourth Circuit Applied This Court's Title IX Precedents Properly.

UNC further asserts that the decision below conflicts with this Court's decisions in *Gebser* and *Davis*. Pet. 20-29. These claims are also meritless.

1. The Decision Below Is Consistent With *Gebser*.

The Fourth Circuit studiously followed *Gebser*'s requirements for damages liability in a Title IX sexual harassment case. Under this standard, educational institutions are subject to liability for teacher-student sexual harassment when an appropriate school official has actual knowledge of the harassment and responds to it with deliberate indifference. *Gebser*, 524 U.S. at 277.

In an effort to drum up an issue for this Court, UNC argues that Jennings' description of Coach Dorrance's conduct during team practices and events, and the discomfort and humiliation that she felt, did not give sufficient notice of sexual harassment to Ehringhaus because: a) the comments Jennings complained of "involved Dorrance's interaction with other players;" b) Jennings did not schedule the meeting with the announced purpose of providing notice; and c) the comments could not have constituted sexual harassment because of the "informal" nature of interactions in athletics. Pet. 20-26. All of these arguments are factual and should be decided by a jury. None raise the kind of legal issues that warrant this Court's review.

First, UNC protests (Pet. 24) that Jennings did not complain of the Coach's comments to her—only to others made in her presence. But this argument ignores that Jennings was subject to a sexually hostile environment created by those very comments and other behaviors. Because Coach Dorrance's regular comments "permeated team settings," (Pet. App. 16a) moving from "girl-to-girl-to-girl," (Pet. App. 7a) a jury could reasonably determine that Jennings' "vivid details of Dorrance's sexual comments about his players" and report "that the situation was causing her intense feelings of discomfort and humiliation" provided Ehringhaus with sufficient notice. Pet. App. 22a. Moreover, UNC's argument is contrary to the whole concept of sexual harassment caused by a hostile environment. A hostile *environment* is just that—it is created by the conduct that surrounds the student and that the student must endure—not just the conduct directed specifically at the student. It is precisely because the coach's offensive comments were addressed to so many players that they permeated the environment and harmed Jennings.

This is particularly true here, given that, as the court below noted, "Dorrance was not just any college coach. He was and still is the most successful women's soccer coach in U.S. college history, and he has coached the national team." Pet. App. 14a. And "[a]s the coach, Dorrance controlled everything: team membership, position playing time, and scholarship eligibility." *Ibid.* While UNC emphasizes that other players did not complain, a jury could consider that some players were afraid to complain and risk losing a spot on the "premier women's soccer team in the

country" (Pet. 2).[6] Cf. *Faragher* v. *City of Boca Raton*, 524 U.S. 775, 805 (1998) (a supervisor has "power to alter the environment").

Second, UNC suggests (Pet. 22-26) that to provide adequate notice Jennings was required to formally announce to Ehringhaus that she had come to complain about sexual harassment. Certainly such a formal announcement by a college-age student should hardly be needed to alert a knowledgeable attorney—"an official responsible for fielding sexual harassment complaints" (Pet. App. 22a)—that one of its employees was harassing students.[7]

Third, UNC's argument (Pet. 23-26) that it was not on notice of a hostile environment because sexually offensive comments are permitted in school

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[6] Debbie Keller, the team captain and star soccer player who settled with UNC in 2004, testified that Dorrance's sexual "'comments about his affection' for her, together with the inappropriate touching, 'made her skin crawl' and made her 'fe[e]l dirty.'" Pet. App. 14a. But even she "didn't want to tick him off to a point * * * where he would take it out on [her] by not playing [her]." Pet. App. 14-15a.

[7] UNC stresses that Jennings "understood that the conversation was in confidence" (Pet. 23), but this argument further corroborates testimony that she and Keller were afraid of provoking Coach Dorrance. Pet. App. 15a ("[H]ow do you say anything [to stop him?] * * * You are stuck between a rock and a hard place."). And, of course, Ehringhaus was perfectly free to investigate the coach's behavior without divulging how she had learned of the problem. Moreover, even UNC could not contest that it was on notice of the hostile environment following the complaints by Jennings' parents immediately after she was cut from the team. Yet UNC only submitted a "mild letter of reprimand to Dorrance" and a letter of apology to Jennings's father (Pet. App. 8a-9a), taking no steps to identify and address the academic and athletic harm suffered by Jennings.

athletics must also be rejected. Whatever different social mores may govern professional football players and office workers (see *Oncale* v. *Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 81 (1998)), surely UNC is not claiming that its student-athletes must endure a sexually hostile environment to participate in varsity sports. Cf. *Robinson* v. *Jacksonville Shipyards*, 760 F. Supp. 1486, 1526-27 (M.D. Fla. 1991) ("social context" arguments cannot be used to require women to endure abuse in order to work in a historically male environment). Indeed, UNC itself admitted that the comments made by Dorrance were highly inappropriate. Pet. App. 8a. Moreover, *Oncale* emphasizes that whether there is actionable sexual harassment depends on the entire "constellation of surrounding circumstances, expectations and relationships." *Oncale*, 523 U.S. at 81-82. As the Fourth Circuit properly recognized, these factual questions belong, in the first instance, with the jury. See, *e.g.*, Pet. App. 18a.

In sum, the Fourth Circuit was correct in holding that a jury should examine all of the facts to determine whether UNC had sufficient notice that Coach Dorrance's conduct created a hostile environment. UNC does not present any conflict with *Gebser* that requires correction by this Court.

2. The Decision Below is Consistent with *Davis*.

UNC also erroneously contends that review is warranted because the Fourth Circuit's decision conflicts with the standard established for Title IX damages liability for student-on-student harassment in *Davis*. Pet. 26-28. *Davis* requires that such

harassment must be severe and pervasive enough that it "so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities." 526 U.S. at 651.

UNC's repeated claims that Jennings did not suffer the injury required under *Davis* rest on disputed facts, not legal issues. Its assertions that "nothing happened to her while she was a member of the women's soccer team" (Pet. 27) and "[a]ll that happened to Jennings after her conversation with Ehringhaus is that she continued to fully participate without incident in all the activities of the women's soccer program" (*ibid.*) only exemplify its attempt to ignore Jennings' evidence that disputes its contentions. As a jury could more than reasonably find, the degrading and abusive environment that Jennings endured caused her to suffer severe emotional distress during the entire period that she was on the team.[8] Her grades were hurt, her soccer performance was impaired, and ultimately she even lost her chance to continue to be a member of the team. It is difficult to imagine more concrete injury that a student could suffer while on the team.

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[8] UNC's claim (Pet. 28) that under *Davis* a psychological injury, even when reflected in a decline in grades, is insufficient to show that a student was deprived of her educational opportunities is simply wrong. *Davis* stated only that a drop in grades can demonstrate concrete injury but that alone does not *itself* create liability—the severity of the misconduct and the school's knowledge of that misconduct must still be established. 526 U.S. at 652. In any event, Jennings' allegations that her academic and athletic performance suffered, including losing her spot on the soccer team, are the very concrete injuries that could lead a jury to determine that she had been denied access to significant UNC educational programs and benefits.

In yet another attempt to create a legal dispute, UNC claims that there was no academic harm suffered because Jennings' grades did not fall, and in fact improved somewhat. Pet. 16. The fact that Jennings' grades rose slightly during her sophomore year (her academic performance was consistently "barely above passing" Pet. App. 20a.) could reasonably show that she was managing slightly better to endure the hostile environment—not that she suffered no harm. See *ibid.* And, in contrast to *Davis*, 526 U.S. at 634, because the harassment began as soon as she arrived on campus, there is no "pre-harassment" period with which to compare what her grades could have been absent the harassment.

In fact, Jennings' claims present even more severe adverse educational effects than those suffered in *Davis*. Jennings' evidence, which a jury should assess, supports a finding not only of an adverse effect on her grades, as was the case in *Davis*, but also of being cut from an athletic team because of her negatively affected performance, denying her access to a key UNC athletic opportunity.

Moreover, in contrast to *Davis* there was a significant age and power difference between Jennings, a 17-year-old student-athlete, and 45-year-old Coach Dorrance. Indeed, as Justice Kennedy made clear in his dissenting opinion in *Davis*, "[a] teacher's sexual overtures toward a student are always inappropriate." 526 U.S. at 675. And as the Court held in *Gebser*, when a student is subjected to "sexual harassment and abuse by a teacher," that "teacher's conduct is reprehensible and undermines

the basic purposes of the educational system." *Gebser*, 524 U.S. at 292.

Thus, contrary to UNC's statements, the decision below is not the "realization of Justice Kennedy's fears." Pet. 9. The fears he expressed in his dissenting opinion in *Davis* were about cases of student-on-student harassment, not the teacher-student harassment at issue here. *E.g.*, *Davis*, 526 U.S. at 678 ("[A]lmost every child, at some point, has trouble in school because he or she is being teased by his or her peers * * * The majority's test for actionable harassment will, as a result, sweep in almost all of the more innocuous conduct it acknowledges as a ubiquitous part of school life."); 526 U.S. at 672 (emphasis added) (schools may be exposed to "potentially crushing financial liability for *student conduct* that is not prohibited in clear terms by Title IX").[9]

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[9] UNC also argues that schools have not received adequate notice that they could be held liable for the type of harassment alleged by Jennings under *Arlington Cent. Sch. Dist. Bd. of Educ.* v. *Murphy*, __ U.S. __, 126 S. Ct. 2455, 2459 (2006) and *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981). Pet. 18. But recipients of federal funds have long been on notice that sexual harassment may trigger a claim for damages where, as alleged here, the educational institution failed to respond to teacher-student harassment. See *Gebser*, *supra*; *Franklin*, *supra.* Moreover, in 1997, the Office for Civil Rights of the Department of Education ("OCR"), which administers the Title IX, issued a Sexual Harassment Guidance that sets forth a recipient's obligations. Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12034 (March 13, 1997). That Guidance, which was revised in 2001 after this Court issued its decisions in *Gebser* and *Davis*, notifies all recipients that if they know, or should know, that a hostile environment

At bottom, UNC is unhappy because the Fourth Circuit concluded that Jennings presented sufficient facts to go forward with her case under this Court's stringent requirements. This unhappiness does not support a grant of certiorari. SUP. CT. R. 10.

II. THE COURT'S REVIEW OF THIS CASE WOULD BE PREMATURE

Even if UNC had presented legal issues that were in dispute, this case provides a poor vehicle for resolving any such issues because of its interlocutory posture. There is no final ruling on the merits—the court below found only that UNC was not entitled to summary judgment because of the material facts in dispute. See *Kyles* v. *Whitley*, 514 U.S. 419, 456 (1995) (Scalia, J., dissenting); *Johnson*, 268 U.S. at 227.

In remanding the case for trial, the Fourth Circuit determined that Jennings had created genuine issues of fact as to whether: 1) Coach Dorrance's "degrading and humiliating conduct was sufficiently severe or pervasive to create a sexually hostile environment" (Pet. App. 18a); 2) that

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exists, they are "responsible for taking immediate effective action to eliminate the hostile environment and prevent its recurrence." They further have the obligation "to remedy the effects on the victim that could reasonably have been prevented had the school responded promptly and effectively." Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 66 Fed. Reg. 5512 (Jan. 19, 2001). Cf. *Davis*, 526 U.S. at 647 (noting that school board associations had warned its members in 1993 that they could be liable for peer sexual harassment). Accordingly, its conditions and obligations as a recipient of federal funds were clear. *Arlington Cent. Sch. Dist. Bd. of Educ.*, 126 S. Ct. at 2459.

environment caused Jennings to become so nervous, anxious, and uncomfortable that it had a negative impact on her academic and athletic performance (Pet. App. 20a); and 3) UNC had adequate notice of the hostile environment (Pet. App. 22a). It is also clear that UNC plans to raise its version of the facts in dispute before the district court. *E.g.* Pet. 5 (noting that "Ehringhaus denie[s] that Jennings ever mentioned sexual harassment on the women's soccer team"); see also Pet. 12, 16-17.

At this time, it is highly speculative as to whether review by this Court will ever be warranted, let alone sought, by UNC. The jury may agree with UNC's version of the facts and the district court may find for UNC. Any appeal by Jennings under such circumstances is highly unpredictable at this point. Similarly, if judgment were entered for Jennings, and if UNC decides to appeal and is then unsuccessful, the nature of any petition for certiorari that UNC might choose to file would likely be very different from the one currently before this Court. It would be shaped by the actual findings of fact and any lower court legal conclusions based on those facts.

In sum, as UNC's fact-dependent arguments demonstrate, this case is the very sort of case that should be decided by a jury, and that decision should not be delayed. In light of the many material disputes of fact, the interlocutory position of this case "itself alone furnishe[s] sufficient ground for the denial" of the petition. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see also *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., respecting the denial of the petition).

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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