No. 20-216

In the Supreme Court of the United States

PRIANKA BOSE, PETITIONER

v.

RHODES COLLEGE AND ROBERTO DE LA SALUD BEA, RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT RHODES COLLEGE IN OPPOSITION

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QUESTION PRESENTED

Petitioner's chemistry professor reported her to a disciplinary body of Rhodes College for cheating, and Rhodes College subsequently expelled her for cheating. Petitioner asserts that her chemistry professor accused her of cheating because she rejected his romantic advances.

The question presented is whether petitioner may bring an implied cause of action under Title IX for damages against Rhodes College if the college lacked actual notice of the chemistry professor's alleged retaliatory motive.

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INTRODUCTION

This case is manifestly unsuitable for this Court's review. The petition, in both the question presented and the entire body of the brief, obfuscates two distinct legal questions: (1) whether the cat's paw theory of *respondeat superior* liability recognized under Title VII is a viable theory under a Title IX implied right of action; and (2) whether a school that acts with deliberate indifference

to known retaliation on the basis of sex is liable under Title IX's implied right of action. That distinction is critical. The former question assumes that a school acted *without* any knowledge of discrimination or retaliation whatsoever. By contrast, the second question depends on the school's actual knowledge of retaliation and the school's failure to afford an adequate remedy. In the decision below, the Sixth Circuit addressed only the former question and correctly held that there is no Title IX implied right of action against schools that lack actual notice of someone else's alleged retaliation. As to the second question, the court of appeals declined to address whether schools that *do* have actual notice and are deliberately indifferent to someone else's alleged retaliatory acts can be liable, because the court found that petitioner had forfeited that argument many times over. Because the first holding is correct and does not conflict with the decision of any other circuit, and the second question was neither pressed nor passed on below, the Court should deny certiorari.

STATEMENT

A. Facts

1. Petitioner Prianka Bose was a student at Rhodes College, a small but prominent liberal arts institution in Memphis, Tennessee. Pet. App. 2a. In fall 2015, petitioner took a course, "Organic Chemistry II," taught by faculty member Dr. Roberto de la Salud Bea. *Id.* at 2a-3a. Dr. Bea gave all of his students the option to take tests and quizzes early, and petitioner often took this option. *Id.* at 3a. Dr. Bea let petitioner take some of these early tests or quizzes alone in his office, leaving his computer on and accessible on his desk when he left. *Id.*

In November 2015, petitioner took a quiz in Dr. Bea's office and Dr. Bea left while she did so. Pet. App. 3a-4a. Dr. Bea testified that when he later returned to his office,

the answer key on his computer was open in an enlarged view that he did not typically use. *Id.* Later that month, petitioner again took an exam alone in Dr. Bea's office. *Id.* at 4a. Dr. Bea returned to find his office door closed and locked, despite his usual practice of leaving the door cracked open when he left; after he was able to enter, he found petitioner standing by his desk. *Id.* Petitioner testified that she had accidentally closed the door (causing it automatically to lock), then got up to let Dr. Bea in. *Id.*; C.A. Rec. at 1322-23.[1]

After these incidents, Dr. Bea told a colleague that he suspected a student of cheating. Pet. App. 5a. Dr. Bea's colleague advised him to create a fake answer key with incorrect answers and leave it accessible on his computer to see whether the student used it. *Id.* Dr. Bea testified that he did so before petitioner took the next quiz in his office, and petitioner's answers to the quiz matched his fake answer key precisely. *Id.* Dr. Bea informed college administrators, who then involved the Rhodes College Honor Council, an elected student body that adjudicates accusations of academic dishonesty. *Id.*; C.A. Rec. at 1312-13.

2. A few days after Quiz 5, the Honor Council informed petitioner that she was under investigation for suspected cheating on multiple assignments in Dr. Bea's course. Pet. App. 5a. An Honor Council member interviewed petitioner three times and discussed the allegation that she had copied her answers to Quiz 5 from the fake answer key Dr. Bea had prepared. C.A. Rec. at 1313-14.

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[1] Citations to "C.A. Rec." refer to the pages of the district court record, using the Sixth Circuit's "Page ID" convention. Citations to "C.A. App'x" refer to petitioner's appendix in the Sixth Circuit.

The Honor Council subsequently held a hearing to address the cheating accusations. Pet. App. 5a-6a. Petitioner's defense was that Dr. Bea's allegations were just a "huge misunderstanding." C.A. App'x at 23. In support of that argument, petitioner called five witnesses to testify how she might have arrived at her answers without cheating. *Id.* at 23-24, 27, 33-35, 42-43, 47-48; C.A. Rec. at 1317. But several of these witnesses acknowledged inferring a "red flag" or "indicat[ions] of a student being academically dishonest" from the fact that petitioner's answers perfectly matched the fake answer key. C.A. App'x at 44-45, 51.

None of petitioner's witnesses testified that Dr. Bea had acted inappropriately towards her. In her closing argument, petitioner described for the first time an incident in which she claimed Dr. Bea had asked her about her boyfriend, and, when petitioner then asked Dr. Bea not to discuss personal topics with her, Dr. Bea allegedly got angry and walked away. *Id.* at 72. After recounting this allegation, however, petitioner told the Honor Council that she did not "know why [her] quiz matches Dr. Bea's answer key." *Id.* After the hearing ended, petitioner asked to recall one of her witnesses to support her new allegation about her interactions with Dr. Bea, but the Honor Council declined to reopen the proceedings. C.A. Rec. at 1082, 1318.

The Honor Council found that the evidence presented at the hearing was "clear and convincing" that petitioner "had stolen answers . . . from Dr. Bea's computer and used them to cheat." Pet. App. 6a. The Honor Council reasoned that petitioner's answers "matched verbatim to an incorrect answer key" when no one else in the class gave similar answers, and petitioner's own "witnesses testif[ied] to the near impossible odds of her answers." C.A.

Rec. at 1079-80. The Honor Council further rejected petitioner's allegations of Dr. Bea's misconduct: "On at least three occasions, the [Honor Council] investigator asked if [petitioner] could think of any reason why Dr. Bea would create a false answer key after [petitioner] had taken Quiz 5 . . . [but petitioner] responded each time, as well as during the hearing, that she had no idea why he would do that." *Id.* at 1081. Given the severity of the offense, and what the Honor Council deemed petitioner's "egregious lies" during her hearing, the Honor Council voted to expel her. Pet. App. 6a.

Petitioner appealed to the Faculty Appeals Committee. *Id.* Her appeal statement included additional allegations that Dr. Bea had acted inappropriately. C.A. Rec. at 1318-19. Petitioner alleged that Dr. Bea had asked her about personal issues in several of their conversations and invited her to have dinner with him. *Id.* Petitioner further alleged that Dr. Bea gave her more attention in class than other students. *Id.*

After another hearing, the committee upheld the Honor Council's decision. Pet. App. 6a; C.A. Rec. at 1319. The committee concluded that, even assuming arguendo that petitioner's allegations of inappropriate behavior by Dr. Bea were valid, the Honor Council still had adequate evidence showing that petitioner had cheated. C.A. Rec. at 1319-20. The committee remanded for reconsideration of the expulsion penalty, and the Honor Council again voted to expel petitioner. Pet. App. 6a.

After the Honor Council made its decision, petitioner filed a Title IX complaint with Rhodes alleging sexual harassment and retaliation by Dr. Bea. *Id.* After interviewing petitioner, Dr. Bea, and all other witnesses that petitioner requested, the Title IX investigator concluded that petitioner's allegations could not be sustained. *Id.*; C.A.

Rec. at 1320-21.

B. Proceedings Below

1. In May 2016, petitioner filed suit against Rhodes and Dr. Bea in the Western District of Tennessee, alleging, *inter alia*, that Rhodes had violated Title IX and was liable for damages "in excess of $5,000,000." C.A. Rec. at 19. As relevant here, petitioner argued that Rhodes was liable for retaliation under a "cat's paw" theory: petitioner contended that Dr. Bea's alleged retaliatory animus should be imputed to Rhodes. Petitioner thus argued that Rhodes's decision to expel her violated Title IX "*regardless of whether [Rhodes] had actual knowledge* of [Dr. Bea's] retaliatory animus or [petitioner's] protected activity." C.A. Rec. at 1293-1300 (emphasis added).

The district court granted summary judgment to Rhodes on petitioner's retaliation claim. The court deemed her cat's paw theory of liability inapplicable in the Title IX context. Citing this Court's decision in *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998), the court reasoned that Title IX requires that petitioner demonstrate that Rhodes had "actual knowledge of Dr. Bea's alleged retaliatory animus." Pet. App. 34a-35a. The court reasoned that petitioner's cat's paw theory of liability, which petitioner rested on Rhodes's "vicarious liability or constructive notice" of Dr. Bea's alleged retaliatory motive, was insufficient to meet that standard. *Id.*

2. The Sixth Circuit agreed, unanimously holding that Title IX was incompatible with petitioner's cat's paw theory. *Id.* at 9a-10a. Relying on this Court's decision in *Gebser*, the Sixth Circuit reasoned that "'a damages remedy will not lie under Title IX unless an official who at a minimum has the authority to address the alleged dis-

crimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination' and responds with 'deliberate indifference.'" *Id.* at 10a (quoting *Gebser*, 524 U.S. at 290). But under the cat's paw theory of liability that petitioner presented, "the decisionmaker [here, Rhodes] need *not* have notice of the subordinate's discriminatory purpose." *Id.* at 12a (emphasis added). The Sixth Circuit thus held that Title IX does not encompass petitioner's cat's paw theory, which would punish schools that had no actual knowledge of a subordinate's discriminatory animus. *Id.* at 12a-13a.

The Sixth Circuit distinguished *Papelino v. Albany College of Pharmacy of Union University*, 633 F.3d 81 (2d Cir. 2011). *Id.* at 13a-15a. The court acknowledged some language in *Papelino* that might be read to support petitioner's no-knowledge-required cat's paw theory. Specifically, the court noted the Second Circuit's observation that a reasonable jury could find that the college disciplinary panel there was "acting on [a professor's] explicit [retaliatory] encouragement" when the panel expelled a student, even assuming the panel was "unaware that [the student] had engaged in protected activity." *Id.* at 14a. The Sixth Circuit stated that, to the extent the Second Circuit had adopted a notice-free theory of Title IX liability, the Sixth Circuit declined to follow it. *Id.*

But the Sixth Circuit ultimately found *Papelino* distinguishable because the student there had notified the Dean of his protected activity, and "it was the College's own behavior—its deliberate indifference to the professor's known retaliatory act—that subjected the College to Title IX liability." *Id.* at 14a-15a. Here, by contrast, the Sixth Circuit concluded that petitioner had *forfeited* any theory of liability that Rhodes had actual knowledge of

Dr. Bea's alleged retaliation and decided to expel her anyway. *Id.* at 15a-17a.

The Sixth Circuit did "not speculate whether the outcome would have been different had [petitioner] pursued a theory that Rhodes was deliberately indifferent to Bea's known retaliation." *Id.* at 17a. But the court identified many open questions about the viability of that unpursued theory. *Id.* For example, under Sixth Circuit precedent, did petitioner "adequately inform [Rhodes] of the alleged retaliation" and was "Rhodes' response 'clearly unreasonable' in light of what Rhodes knew?" *Id.* (quoting *Williams ex rel Hart v. Paint Valley Local Sch. Dist.*, 400 F.3d 360, 367-68 (6th Cir. 2005)). Is "deliberate indifference to retaliation even actionable under Title IX?" *Id.* The Sixth Circuit concluded that petitioner's "failure to advance a deliberate-indifference-to-retaliation theory below deprive[d] [the Sixth Circuit] of the ability to review these questions." *Id.*

The Sixth Circuit denied rehearing en banc with no request for a vote or dissent. Pet. App. 59a. This petition followed.

REASONS FOR DENYING THE PETITION

The Sixth Circuit correctly held that Title IX plaintiffs cannot hold universities liable for damages based on a professor's alleged misconduct if the university lacks actual notice of that alleged misconduct. This Court has made clear that an implied right of action for damages under Title IX requires that "an official of the school district who at a minimum has authority to institute corrective measures on the [school's] behalf *has actual notice of, and is deliberately indifferent to*, [a] teacher's misconduct." *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 277 (1998) (emphasis added). But the cat's paw theory that

petitioner pursued below sought to hold Rhodes liable for *Dr. Bea's* knowledge of his own alleged misconduct, not *Rhodes's* knowledge of that misconduct. Petitioner identified no one at Rhodes who had "authority to institute corrective measures" and had "actual notice of, and [was] deliberately indifferent to" Dr. Bea's alleged misconduct. *Id.* The Sixth Circuit was thus correct that *Gebser* squarely foreclosed petitioner's theory of liability. And petitioner identifies no split in authority with respect to the Sixth Circuit's actual holding. No court has allowed a Title IX claim to proceed when the school lacked actual notice of a teacher's alleged misconduct.

Petitioner now argues that Rhodes *had* actual notice of Dr. Bea's alleged retaliatory motive in accusing her of cheating, yet deliberately ignored that allegation and decided to expel her anyway. But, as the Sixth Circuit held, petitioner forfeited any actual-notice argument below. The Sixth Circuit thus did not consider petitioner's current theory, nor should this Court. Petitioner's forfeiture prevented the court below from addressing many highly fact-driven issues that would have arisen had petitioner pressed an argument that Title IX allows damages suits against universities for alleged deliberate indifference to a professor's retaliation against a student.

Petitioner's policy arguments falter for similar reasons. Nothing about the Sixth Circuit's decision remotely suggests that universities can blind themselves to discrimination in their programs to avoid Title IX liability.

I. The Sixth Circuit's Decision Was Correct

1. Below, petitioner premised her Title IX case against Rhodes on the allegation that "[Dr.] Bea used Rhodes' Honor Council proceedings as a mechanism to carry out his retaliatory agenda." Pet'r CA6 Op. Br. 37-

38. Under this "cat's paw" theory, petitioner sought to "imput[e] [Dr. Bea's] knowledge and discriminatory intent" to Rhodes, even where Rhodes did "*not* have notice of [Dr. Bea's] discriminatory purpose." Pet. App. 12a. (emphasis added). The Sixth Circuit correctly rejected petitioner's argument that Title IX implicitly authorizes plaintiffs to hold universities liable for millions of dollars in damages even if they lacked actual notice of an employee's alleged intent to retaliate on the basis of sex.

Because the text of Title IX does not provide for a private cause of action, the Sixth Circuit rightly looked to this Court's decision in *Gebser v. Lago Vista Independent School District*, which "define[d] the contours" of petitioner's implied Title IX action. 524 U.S. at 281. Specifically, *Gebser* held that an implied "damages remedy will not lie under Title IX unless an official who at a minimum has the authority to address the alleged discrimination . . . *has actual knowledge of discrimination* in the recipient's programs *and fails to adequately respond*." *Id.* at 290 (emphases added).

Gebser refutes petitioner's "cat's paw" theory of Title IX liability. Pet. App. 8a-13a. Petitioner alleged that Dr. Bea used the Honor Council as a "mechanism to carry out *his* retaliatory agenda." Pet'r CA6 Op. Br. 37-38 (emphasis added). But, since petitioner does not contend Dr. Bea was a school official, that allegation did not establish that Rhodes had "actual knowledge" of discrimination in its programs. At most, under petitioner's cat's paw theory, Rhodes was an "unwitting tool" in Dr. Bea's alleged retaliatory scheme—and that falls short of the actual knowledge and deliberate indifference that *Gebser* requires. Pet. App. 12a.

Gebser also rejected the notion that Title IX plaintiffs can impute a school employee's knowledge to the school.

As the Court explained: "When a teacher's sexual harassment is imputed to a school district or when a school district is deemed to have 'constructively' known of the teacher's harassment, by assumption the district had no actual knowledge of the teacher's conduct." 524 U.S. at 289. *Gebser* thus expressly rejected petitioner's theory. Dr. Bea's knowledge of his alleged retaliation is "not pertinent to the analysis," because Title IX holds Rhodes liable only for its decisions, not "for its employee's independent actions." *Id.* at 290-91.

2. Petitioner's critiques of the Sixth Circuit's decision are meritless. Petitioner faults the Sixth Circuit for focusing its analysis on *Gebser* instead of the language of 20 U.S.C. § 1681(a), which prohibits adverse action by a college "on the basis of sex." Pet. at 13, 17-18. But petitioner's cause of action is *judicially implied*, and *Gebser* defines additional elements of that implied cause of action. Congress enacted Title IX as a condition of universities' receipt of federal funding, so Title IX's express enforcement scheme (in section 1682) relies on administrative action, not an express, private cause of action. And, as *Gebser* explained, Title IX's express administrative enforcement scheme requires that the school receive notice of a Title IX violation and an opportunity for voluntary compliance before facing agency enforcement actions. 524 U.S. at 288-89. Consistent with that express scheme, *Gebser* held that an *implied* Title IX cause of action must show, in addition to Title IX's textual requirement for discrimination "on the basis of sex," that the school had actual knowledge of misconduct and responded inadequately. 524 U.S. at 288-90. The Sixth Circuit thus correctly concluded that petitioner's implied cause of action is governed—and doomed—by *Gebser*'s knowledge requirement.

For similar reasons, petitioner's reliance (at 16-17) on Department of Education Title IX regulations is inapt, because those regulations do not illuminate the standards governing petitioner's implied cause of action. Those regulations effectuate Title IX's *express* enforcement scheme by Federal agencies. 34 C.F.R. § 106.1. And those regulations also require notice to the university of a potential Title IX violation before an agency takes an enforcement action. *Gebser*, 524 U.S. at 288. *Gebser* accordingly found the regulations supportive of, not inconsistent with, an actual notice requirement for implied Title IX liability. *Id.*

Petitioner (at 18-19) tries to avoid *Gebser* by claiming that she seeks to hold Rhodes liable for affirmative conduct (*i.e.*, its own decision to expel petitioner), not inaction. But that distinction is immaterial under *Gebser*, which requires plaintiffs to show that the school had actual notice of discrimination in its programs regardless of what the school then did or failed to do. *Gebser* confirmed that a school that *did* have notice of harassment and still did nothing could have been liable—underscoring that actual notice is the key ingredient for an implied Title IX claim. *Id.* at 291; *see also Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 641 (1999) (holding "the Board liable for its *own* decision to remain idle in the face of known student-on-student harassment in its schools").

For similar reasons, petitioner's attempt (at 13-14, 18) to frame her cat's paw theory as one of causation is unavailing. Petitioner pinpoints Rhodes's actions as the proximate cause of petitioner's expulsion, but that argument is irrelevant. Even were the school's action the proximate cause, "a recipient of federal funds may be liable in damages under Title IX only for its *own* misconduct," *Davis*, 526 U.S. at 640 (emphasis added), not "for its employees' independent actions," *Gebser*, 524 U.S. at 290-91. As the

Sixth Circuit reasoned, that principle forecloses petitioner's cat's paw theory, which is premised on *Dr. Bea's* alleged retaliatory motive in accusing petitioner of cheating, not on Rhodes's "official decision" to expel petitioner. Pet. App. 12a-13a. Without knowledge of Dr. Bea's alleged retaliatory agenda, Rhodes's decision to expel petitioner for cheating plainly cannot trigger Title IX liability.

Contrary to petitioner's contentions (at 1-2, 14-15), *Staub v. Proctor Hospital*, 562 U.S. 411 (2011), does not change this conclusion. Applying common-law agency principles, *Staub* held that a plaintiff stated a claim for discrimination under the Uniform Services Employment and Reemployment Rights Act against his employer based on discriminatory conduct by the employee's supervisor. *Id.* at 416-23. The supervisor "committed an action based on discriminatory animus that was intended to cause, and did in fact cause, an adverse employment decision." *Id.* at 421. Those facts supported the *employer's* liability because the supervisor acted as "an agent of the employer, [so] when he causes an adverse employment action the employer causes it." *Id.* at 421-23.

Those agency principles have no place in Title IX implied actions. This Court has repeatedly "rejected the use of agency principles to impute liability to [a school] for the misconduct of its teachers" under Title IX. *Davis*, 526 U.S. at 642; *see Gebser*, 524 U.S. at 283 ("Title IX contains no . . . reference to an educational institution's 'agents,' and so does not expressly call for application of agency principles."). In the Title IX context, any alleged misconduct by Dr. Bea is Dr. Bea's alone, *not* Rhodes's.

3. The bulk of petitioner's argument attacks a strawman version of the Sixth Circuit's decision. Petitioner argues that the Sixth Circuit held that Rhodes could not be liable under Title IX despite notice of Dr. Bea's alleged

retaliatory motive. But that argument depends on the assumption that Rhodes had notice—an assumption that pervades the petition. Start with petitioner's purported question presented, which frames the issue before this Court as whether Rhodes is liable under Title IX for expelling petitioner "despite being warned about [her] professor's discriminatory motive" in accusing her of cheating. Pet. I. In more than a dozen places, the petition similarly features statements like, "Bose repeatedly warned Rhodes College that [her professor] was framing her for rejecting his romantic advances, and the school gave effect to his discriminatory agenda anyway." Pet. 11; *see id.* at 1-3, 12, 19-20, 22 n.6, 28-29. And petitioner consistently argues that these warnings gave Rhodes "actual notice" of misconduct. *Id.* at 19-20, 28-29.

The petition inexplicably omits that the Sixth Circuit found that petitioner had repeatedly forfeited this argument below, so the Sixth Circuit never reached petitioner's question presented. Petitioner never relied on a theory of liability in district court or the Sixth Circuit that Rhodes knew of Dr. Bea's alleged retaliation and was deliberately indifferent to it. Pet. App. 15a-17a. In her district court briefing, petitioner contended that Rhodes was liable to her for damages "*regardless of whether [Rhodes] had actual knowledge* of [Dr. Bea's] retaliatory animus or [petitioner's] protected activity." C.A. Rec. at 1293-1300 (emphasis added). Likewise, on appeal to the Sixth Circuit, petitioner confirmed that her cat's paw theory "refers to a situation in which a biased subordinate, who lacks decisionmaking power, uses the formal decisionmaker *as a dupe* in a deliberate scheme to trigger" an adverse action. CA6 Op. Br. 38 (quotations omitted and emphasis added). Petitioner confirmed again at argument in the Sixth Circuit that she was not pursuing a deliberate-indifference theory based on actual notice. Pet. App. 16a.

The Sixth Circuit thus emphasized that in light of petitioner's forfeitures, it was *not* resolving whether "Rhodes was deliberately indifferent to Bea's known retaliation." Pet. App. 17a. Resolving that question, the Sixth Circuit explained, would have required the court to consider several fact-driven ancillary questions that no party had sufficiently briefed. *Id.* The Sixth Circuit instead answered the only question that petitioner *did* properly present: whether Rhodes could be liable under a cat's paw theory of liability, under which Rhodes "need not have notice of [Dr. Bea's] discriminatory purpose." Pet. App. 12a. The Sixth Circuit was unambiguously correct that *Gebser* precludes that cat's paw theory.

II. This Case Does Not Implicate Any Circuit Split

1. Petitioner argues (at 22) that the decision below conflicts with the Second Circuit's decision in *Papelino v. Albany College of Pharmacy*, 633 F.3d 81 (2d Cir. 2011). In *Papelino*, a student reported his professor's sexual advances to a Dean at his university; his professor retaliated by accusing the student of cheating, ultimately prompting a school disciplinary body to expel him. *Id.* at 85-88. The Second Circuit allowed the student's Title IX claim to proceed. *Id.* at 94.

Petitioner (at 22) cites isolated language in *Papelino* regarding the disciplinary panel's lack of knowledge of the student's harassment complaints. In particular, the Second Circuit observed—without explanation—that a reasonable jury could find that the disciplinary panel had "act[ed] on [the professor's] explicit encouragement" even if it was "unaware that [the student] had engaged in protected activity." *Id.* at 92-93. The Sixth Circuit noted that, to the extent this language had embraced a theory under which the university could be liable without actual notice

of the professor's misconduct, it declined to follow it. Pet. App. 14a.

But, as the Sixth Circuit explained, *Papelino* could also be read to be based on the *university's* knowledge of such misconduct in light of the student's complaints to the Dean. *Id.* at 14a-15a. Because the Dean was "high-ranking member of the College's administration," the Second Circuit concluded that, under *Gebser*, his knowledge meant that the school had actual notice of the professor's actions. 633 F.3d at 89. By contrast, petitioner here forfeited any argument relying on Rhodes's knowledge of and deliberate indifference to Dr. Bea's alleged retaliation. Pet. App. 15a-16a. Thus, the Sixth Circuit ultimately found *Papelino* distinguishable. Petitioner's argument that the Second Circuit's decision *could be read* to conflict with the decision below falls far short of presenting a square conflict to justify this Court's intervention.

Petitioner also cites (at 23), *Doe v. Columbia University*, 831 F.3d 46 (2d Cir. 2016). But that decision too involved actual knowledge by the university. In *Doe*, a university disciplinary panel suspended a male student for sexual assault; he brought a Title IX claim alleging that the school's Title IX Coordinator harbored anti-male bias that influenced the disciplinary panel's decision. *Id.* at 51-53. The Title IX Coordinator, as the alleged bad actor, clearly had actual notice of her own discriminatory intent. And the plaintiff had sufficiently alleged that the Title IX Coordinator's intent was the school's intent, the Second Circuit reasoned, because the Title IX Coordinator exercised "supervisory authority." *Id.* at 58-59; *see also id.* at 58 n.12 (noting that *Gebser* would bar the student's claim if discovery revealed the Coordinator did not have such authority). That fact pattern starkly contrasts with Dr. Bea's non-supervisory role at Rhodes. Nothing in *Doe*

suggests that a school could be liable under Title IX absent actual knowledge by a school official of discrimination in its programs.

No other courts of appeals have allowed plaintiffs to pursue implied Title IX actions against schools that lack actual notice of alleged discrimination or retaliation, either. Petitioner (at 23-24) misreads *Gossett v. Oklahoma ex rel. Board of Regents for Langston University*, 245 F.3d 1172 (10th Cir. 2001), as allowing a Title IX claim to proceed "without requiring [a student] to prove that the school itself, or any school officials other than his instructors, were also biased." In *Gossett*, a student was forced to withdraw from his nursing school due to a poor grade. He then alleged a "facility-wide policy" of gender discrimination: that "the Nursing school routinely discriminated on the basis of gender in applying its *school-wide policy* of allowing failing students . . . time to improve their performance," producing alleged "*school-wide* gender discrimination." *Id.* at 1177-79 (emphasis added). Petitioner is thus flat wrong that *Gossett* rested on the independent actions of a particular teacher.

Petitioner (at 24) also points to *Emeldi v. University of Oregon*, 698 F.3d 715 (9th Cir. 2012), to no avail. In *Emeldi*, "all Department faculty" became aware of a Ph.D. candidate's complaints regarding the lack of female faculty, such that it was "common knowledge" that "she was dissatisfied with the Department's level of support for women." *Id.* at 722. The student's male Ph.D. advisor allegedly resigned in retaliation for the student's complaints. *Id.* at 722-23. After pursuing the "[u]niversity's internal grievance procedure," the student brought a Title IX retaliation claim against the university, which the Ninth Circuit allowed to proceed. *Id.* at 723, 725-30. Contrary to petitioner's suggestion, the student in *Emeldi*

had unquestionably and repeatedly notified the university of her concerns of discrimination and retaliation. *Emeldi* thus offers no support whatsoever for the notion that universities like Rhodes would be liable under Title IX in other circuits *without* such notice.

Finally, *Theidon v. Harvard University*, 948 F.3d 477 (1st Cir. 2020) does not help petitioner, either. There, a professor filed a Title IX retaliation claim against a university that denied her tenure, claiming that the tenure committee's decision rested on another professor's retaliatory, disparaging statements to the committee. *Id.* at 493, 505-08. The First Circuit rejected her claim, concluding that the plaintiff lacked evidence that the tenure committee was aware of any protected activity, and that the professor's "cat's paw" theory of liability failed for a lack of evidence, too. *Id.* at 505-08. Petitioner (at 25) portrays *Theidon* as implicitly accepting her cat's paw theory. But the fact that the First Circuit concluded that the professor's cat's paw theory of liability lacked evidence, instead of rejecting the theory as legally improper, hardly counts as an endorsement. Certainly, the decision below does not conflict with that non-analysis.

III. This Case Does Not Warrant This Court's Review

1. This case is obviously an unsuitable vehicle to address petitioner's question presented: whether Title IX implicitly imposes liability on schools that know of, and are deliberately indifferent to, an employee's sex-based retaliation. This Court ordinarily does not consider arguments "neither raised nor considered below." *E.g.*, *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 n.3 (1999).

Though petitioner never acknowledges this forfeiture, she insists (at 28-29) that it is undisputed that Rhodes

eventually became aware of her belief that Dr. Bea had retaliated against her. But that point does not show that an appropriate entity at Rhodes received *adequate* notice of Dr. Bea's alleged retaliation, nor does it show that Rhodes was deliberately indifferent to that allegation. Pet. App. 17a.

Indeed, the Sixth Circuit emphasized that these and other questions remained open and unresolved in this case. *Id.* For instance, it is not apparent that petitioner ever notified an "appropriate person" at Rhodes with authority to address Dr. Bea's alleged retaliation. *Id.* (quoting *Gebser*, 524 U.S. at 290). Even if petitioner did so, it is unclear that petitioner's notice to any such entity at Rhodes was "adequate[]." *Id.* Taking petitioner's version of the facts as true, she never notified the Honor Council of any inappropriate conduct by Dr. Bea during her three pre-hearing interviews (C.A. Rec. at 1313-14), and presented no witnesses at the Honor Council hearing to substantiate that allegation. Petitioner instead first mentioned Dr. Bea's alleged inappropriate conduct during her closing argument, but even then told the Honor Council that she did not know why her answers matched Dr. Bea's fake answer key. C.A. App'x at 72. And petitioner notified other entities at Rhodes—like the Faculty Appeals Committee or the Title IX Coordinator—only after the Honor Council had voted to expel her. That sequence of events raises questions about the adequacy of petitioner's notice to Rhodes that the Sixth Circuit left unanswered in light of her forfeiture.

Further, even if petitioner provided adequate notice, it is far from clear that Rhodes was deliberately indifferent to that notice. Rhodes appointed counsel to investigate petitioner's claims and found them without merit.

C.A. Rec. at 1320-21. While petitioner deems this investigation inadequate, she acknowledges that the outside counsel interviewed all witnesses that petitioner asked her to interview. *Id.* Whether those facts could amount to deliberate indifference even when viewed in the light most favorable to petitioner is yet another difficult question the Sixth Circuit left open. Pet. App. 17a.

Finally, even if the record could support a conclusion that Rhodes was deliberately indifferent to Dr. Bea's known retaliation, is that allegation even actionable under Title IX? The Sixth Circuit explicitly did not attempt to answer that question below. *Id.*

Delving into these issues now would thus require this Court to address in the first instance difficult questions that the district court and Sixth Circuit bypassed in light of petitioner's litigation strategy below.

2. Petitioner's policy concerns with the Sixth Circuit's decision are baseless, because they attack an unrecognizable version of that decision where the court somehow held that a "school can launder even the most blatant discrimination through the expedient of an additional layer of decision-making—even if it uncritically rubber-stamps a decision it knows was based on a prohibited consideration." Pet. 2. The Sixth Circuit condoned no such conduct. The court merely reached the commonsense conclusion that schools that lack actual notice of alleged misconduct are not liable for non-supervisory employees' alleged misconduct. That decision plainly does not "offer[] a roadmap for federal-funding recipients to insulate themselves from Title IX liability" by abusing multi-layer disciplinary processes to mask retaliation or discrimination in their programs. Pet. 27-28; Amicus Br. 8-11. Because the Sixth Circuit explicitly did not address petitioner's forfeited ar-

gument that Rhodes had actual notice of and was deliberately indifferent to Dr. Bea's alleged misconduct, the decision offers no basis for a university to ignore complaints of sexual harassment or retaliation by its students.

Nor does the Sixth Circuit's decision authorize a university to deliberately avoid knowledge of discrimination or retaliation within its programs, as petitioner suggests. Pet. 27-28. Petitioner did not allege below that Rhodes deliberately avoided knowledge of discrimination, so the Sixth Circuit understandably did not consider those circumstances. Thus, petitioner's mud-slinging that Rhodes has condoned "weaponiz[ing]" charges of misconduct to conceal sexual harassment in its programs is utterly baseless. *Id.* at 26-27.

Likewise, petitioner's concern that the Sixth Circuit's holding will serve as a "limit on the investigative and remedial authority of the U.S. Department of Education" makes no sense. *Id.* at 25-26. As discussed above, the Sixth Circuit's decision limiting petitioner's *implied* Title IX action does not affect the statute's *express* enforcement scheme, wherein the Department of Education can withhold federal funds from universities that fail to comply with the statute's nondiscrimination conditions. *Supra*, pp. 11-12.

What the Sixth Circuit's decision does do is to vindicate the policies underlying Title IX. The notion that plaintiffs cannot subject universities to millions of dollars in damages without actual notice of misconduct within their programs is eminently sound. As *Gebser* explained, "it would frustrate the purposes of Title IX to permit a damages recovery against a school district for a teacher's sexual harassment of a student . . . without actual notice to a school district official." 524 U.S. at 285 (quotations omitted). To do so risks "diverting education funding

from beneficial uses where a recipient was unaware of discrimination in its programs and is willing to institute prompt corrective measures." *Id.* at 289.

Rhodes does not take lightly the problem of sexual harassment in American universities. That is why Rhodes maintains and enforces an extensive Title IX policy to combat sexual harassment and discrimination (available at https://sites.rhodes.edu/titlenine). Consistent with that policy, Rhodes facilitates the reporting of sexual harassment or discrimination by other students or professors, provides medical and counseling assistance to victims of such misconduct, and appoints outside counsel to thoroughly and independently investigate reported instances of misconduct. That voluntary and enthusiastic compliance with Title IX is precisely what Congress envisioned in enacting the statute. Petitioner's attempt to hold Rhodes liable for millions of dollars in damages despite Rhodes's vigorous efforts to keep its educational programs free of discrimination and harassment would only undermine Title IX's objectives.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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NOVEMBER 25, 2020