No. 20-216

In the Supreme Court of the United States

PRIANKA BOSE, PETITIONER

v.

RHODES COLLEGE AND ROBERTO DE LA SALUD BEA

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

REPLY BRIEF FOR THE PETITIONER

ADAM W. HANSEN
ELEANOR E. FRISCH
APOLLO LAW LLC
333 Washington Ave., N., Suite 300
Minneapolis, MN 55401
(612) 927-2969

BRYCE ASHBY
BRICE M. TIMMONS
DONATI LAW, PLLC
1545 Union Avenue
Memphis, TN 38104

ALLON KEDEM
Counsel of Record
ANDREW T. TUTT
JAYCE BORN
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000
allon.kedem@arnoldporter.com

ANYA A. HAVRILIAK
ARNOLD & PORTER KAYE SCHOLER LLP
1144 Fifteenth Street
Suite 3100
Denver, CO 80202
(303) 863-1000

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Prianka Bose faced an all-too-typical scenario. Rejecting the romantic advances of her professor led to false accusations of cheating, which caused her school to expel her. Since the school itself was not biased, the Sixth Circuit held that Bose could not show that her expulsion was "on the basis of sex." But faced with that same scenario, other courts of appeals have upheld Title IX claims under a cat's paw theory of causation. And the Department of Education has promulgated regulations to make clear that school discipline violates the statute if based on sex-biased charges.

Instead of defending the ruling below as consistent with the text, Rhodes College changes the subject. It denies that cat's paw is a theory of causation at all; argues that Bose should have raised a deliberate-indifference claim, but failed to do so; and then faults her for not satisfying the elements of such a claim. Rhodes's criticisms are baseless. The question decided below and presented here merits review.

I. This Case Presents a Question of Causation

Rhodes criticizes (Opp. 12) "petitioner's attempt to frame her cat's paw theory as one of causation." That is like criticizing an attempt to frame Newton's first law as a theory of motion. The question here is one of causation: whether Rhodes College acted "on the basis of sex" when it expelled Bose in reliance on the biased accusations of her professor.

A. Cat's paw is a theory of causation

A cat's paw case "arises when [the decision-making] official has no discriminatory animus but is influenced by previous … action that is the product of a like animus in someone else." *Staub* v. *Proctor Hosp.*, 562 U.S. 411, 417 (2011). The *Staub* plaintiff's supervisor falsified a disciplinary violation due to bias against his military service; the company's VP then "relied on [the] accusation" in firing him. *Id.* at 415. Was the plaintiff fired "on the basis of" his military service, even though the employer acted because of the ostensibly neutral (though fabricated) disciplinary violation?

Staub said yes. Relying on "the traditional tort-law concept of proximate cause," this Court explained that "the exercise of judgment by the decisionmaker does not prevent the earlier agent's action (and hence the earlier agent's discriminatory animus) from being the proximate cause of the harm." *Id.* at 419-20. The firing thus hinged on "discriminatory animus that was intended to cause, and did in fact cause, an adverse employment decision," which satisfied the statute's "requirement that the biased supervisor's action [must] be a causal factor of the ultimate employment action." *Id.* at 420-21.

Rhodes is wrong (Opp. 13) that this theory depends on "common-law agency principles." *Staub* expressly *rejected* the plaintiff's agency argument—namely, that "the discriminatory motive of one of the employer's

agents can be aggregated with the act of another agent to impose liability on [the employer]." 562 U.S. at 418 (parentheticals omitted). The Court deemed it "unnecessary … to decide what the background rule of agency law may be," because the correct rule "[wa]s suggested by the governing text" itself. *Ibid.* Indeed, if the plaintiff's employer could simply have been held liable for the biased actions of its agent as a matter of *respondeat superior*, the entire discussion of proximate causation—the linchpin of the Court's analysis—would have been surplusage.

Rhodes points to the Court's statement in *Staub* that the biased supervisor was "an agent of the employer, [so] when he causes an adverse employment action the employer causes it." Opp. 13. But that statement responded to the separate suggestion from Justice Alito's concurrence that the Court should "adopt a rule immunizing an employer who performs an independent investigation." 562 U.S. at 421; see *id.* at 425 (Alito, J., concurring in the judgment). The majority found no basis for adopting an "independent-investigation defense"; for even where an employer fires the employee after conducting an independent investigation, the Court explained, the firing was still based on bias if it "relies on [false] facts provided by the biased supervisor." *Id.* at 421-22. Thus, under the cat's paw theory, the employer is being held responsible for its *own* decision, not that of its agent, as made clear by the second half of the sentence that Rhodes quotes: "and when discrimination is a motivating factor in his [*i.e.*, the supervisor's] doing so, *it is a 'motivating factor in the employer's action*,' precisely as the text requires." *Ibid.* (emphasis added).

In sum, "*Staub* supports using a cat's paw theory of causation" to connect a subordinate's unlawful animus to actions taken by the ultimate decision-maker, who is held to account for its own decision. *Zamora* v. *City of Houston*, 798 F.3d 326, 332 (5th Cir. 2015). All the courts of

appeals agree. See *Macknet* v. *Univ. of Penn.*, 738 F. App'x 52, 57 (3d Cir. 2018) ("cat's paw theory" establishes "causal connection between the charge and [plaintiff's] firing"); see, *e.g.*, *Steele* v. *Mattis*, 899 F.3d 943, 951 (D.C. Cir. 2018) ("cat's paw causation"); *Torgerson* v. *City of Rochester*, 643 F.3d 1031, 1045 (8th Cir. 2011) (en banc); *Stimpson* v. *City of Tuscaloosa*, 186 F.3d 1328, 1332 (11th Cir. 1999).

B. As the parties and courts below understood, this case turns on whether sex bias *caused* Bose's expulsion

This case was litigated on the same understanding. In the district court, Bose argued that "under the 'Cat's paw' theory of liability, Rhodes College is liable for its actions that served as a conduit for … Bea's retaliatory motive in causing [Bose]'s expulsion." Pet. App. 34a. Bose expressly disavowed reliance on "*respondeat superior* or vicarious liability," arguing instead that "Rhodes would not be held liable for the actions of … Bea, but instead held liable for its own actions." *Id.* at 35a-36a. But the court rejected those causation principles as inapplicable to Title IX, instead holding "that [Bose] cannot demonstrate the requisite causal connection" between her expulsion and unlawful sex bias. *Id.* at 34a.

On appeal, Bose again argued that "the cat's-paw theory establishes a causal nexus when an actor with discriminatory animus uses a decisionmaker to carry out an adverse action." Pet. C.A. Br. 37 (capitalization altered). And Rhodes defended the district court's decision as having correctly held that "Bose could not establish the element of causation using the cat's paw theory of liability." Resp. C.A. Br. 22.

The Sixth Circuit recognized that Bose was making an argument about causation, and it ruled against her on that basis. The court began by "spell[ing] out the elements" that "a Title IX plaintiff must show." Pet. App.

8a. Of these, it said, "Bose cannot make out the fourth element—causation." *Id.* at 9a. The court thus rejected Bose's attempt, via causation principles articulated in *Staub*, "[t]o draw the required connection between Bose's opposition to Bea's unwelcome conduct and Rhodes' act of expelling her." *Ibid.*

For that reason, Rhodes is wrong to assert here that the "Sixth Circuit's decision limiting petitioner's implied Title IX action does not affect the statute's express enforcement scheme." Opp. 21. The statutory requirement that an adverse action must have been taken "on the basis of sex" is express, 20 U.S.C. § 1681(a), and thus inherent in *all* violations. The Department of Education has authority only "to effectuate" that prohibition, *id.* § 1682, so the Sixth Circuit's causation ruling applies equally to the Department's investigative and remedial authority. Put another way: If the Sixth Circuit were correct that Rhodes did not violate Title IX because its expulsion of Bose was not "on the basis of sex," then there would be no grounds even for an investigation; the school would go scot-free.

II. *Gebser* Does Not Support the Sixth Circuit's Decision

According to the Sixth Circuit, Bose's Title IX claim was foreclosed by this Court's ruling in *Gebser*. But that decision applies only where a school, due to its deliberate indifference, fails to stop misconduct committed against a student by someone *other than* the school. It has no application where, as here, the school *itself* takes action against the student. For the same reason, Rhodes College cannot evade liability by insisting that Bose should have raised, but failed to raise, a deliberate-indifference claim.

A. *Gebser* only limits claims of deliberate indifference

Rhodes argues (Opp. 12) that any "distinction" between affirmative conduct and inaction in *Gebser* was "immaterial" to the decision there. In fact, the distinction suffuses almost every line of the opinion.

Start with the two theories of liability that *Gebser* rejected—*respondeat superior* and constructive notice. Those are doctrines designed to hold a defendant liable for the conduct of another (in *Gebser*, the teacher who sexually harassed the plaintiff). This Court dismissed the theories precisely because they would have imposed liability on a school that "took no action" of any kind. *Gebser* v. *Lago Vista Ind. Sch. Dist.*, 524 U.S. 274, 283 (1998).

Next, the Court analogized private liability to the Department of Education's administrative enforcement scheme, under which a school must be given an opportunity to adopt "prompt corrective measures" to remedy *a subordinate's* misconduct. *Id.* at 289. Tellingly, the Court also pointed to "[c]omparable considerations" for adopting "a deliberate indifference standard for claims under § 1983 alleging that a municipality's actions in *failing to prevent* a deprivation of federal rights was the cause of the violation." *Id.* at 291 (emphasis added).

Finally, *Gebser*'s "deliberate indifference" standard, by its very nature, speaks to the circumstances where a defendant can be punished for its *in*action. *Id.* at 292. What else could "indifference" mean? The point is that Title IX imposes liability only on schools, not teachers or other officials. And so a school will not be held liable for "the independent misconduct of a teacher," unless the school's failure to take corrective measures in the face of "actual notice" is so egregious as to render the school's inaction comparable to a "deliberate" choice. *Id.* at 292-93.

B. Bose seeks to hold Rhodes College liable for its actions, not its indifference

Both sides agree on one thing: Prianka Bose does not assert a deliberate-indifference claim. She seeks now, as she did below, to hold Rhodes College responsible for its own decision to expel her, not for its failure to stop Bea

from harassing or retaliating against her. *Gebser* does not speak to such a claim.

Rhodes nevertheless accuses Bose of failing to preserve and support a claim she does *not* make—something called "deliberate-indifference-to-retaliation." Rhodes raises the specter of forfeiture to persuade the Court that this case is too messy to address the question presented. It is not: The argument Bose makes now is the same one the Sixth Circuit decided. This Court should not reward Rhodes's attempted obfuscation.

1. In district court, Bose raised two arguments under Title IX: (1) Rhodes had been deliberately indifferent to sexual harassment by Bea, and (2) Rhodes expelled her under circumstances where a male student would not have been expelled. Pet. App. 32a. As to the former argument, the court granted summary judgment for Rhodes because, although Bose had given notice of the harassment at her Honor Council hearing, she "d[id] not provide evidence that she suffered any further sexual harassment" after that point. *Id.* at 33a. As to the latter, the court held that Bose could "not demonstrate the requisite causal connection" between her expulsion and unlawful sex bias. *Id.* at 34a.

On appeal, Bose abandoned her argument based on Rhodes's indifference towards Bea's sexual harassment, instead focusing solely on her objection to being expelled. Pet. C.A. Br. 31-54. The Sixth Circuit thus recognized that the district court had rejected "Bose's claim that Rhodes had been deliberately indifferent to Bea's sexual harassment [and] Bose did not appeal that decision." Pet. App. 16a (emphasis omitted).

The Sixth Circuit hypothesized that perhaps Bose *could have* raised a "theory whereby Rhodes would be liable for its own deliberate indifference to Bea's retaliation." *Ibid.* The court questioned whether such a theory, which it labeled a "deliberate-indifference-to-retaliation"

claim, was "even actionable under Title IX." *Id.* at 16a-17a. But since Bose had not pressed the point, the court "d[id] not speculate" how such a theory would have fared. *Id.* at 17a.

Instead, the Sixth Circuit reaffirmed its judgment was based *solely* on Bose's allegations of differential treatment:

> Throughout this litigation, Bose chose to argue that the cat's paw theory applies to Title IX claims. We conclude that it does not. … As a result, we affirm the district court's order granting summary judgment to Rhodes on the Title IX claim.

Id. at 18a.

2. Rhodes repeatedly points to the Sixth Circuit's statement that Bose forfeited any hypothetical deliberate-indifference-to-retaliation claim. Indeed, Rhodes adopts that as its mantra—that Bose has lost any opportunity to argue "that Rhodes knew of Dr. Bea's alleged retaliation and was deliberately indifferent to it." Opp. 14; *e.g.*, Opp. 2, 9, 14-16, 18.

Yet Bose does not seek to hold Rhodes responsible for being *indifferent* to Bea's false accusations of cheating: Had Rhodes simply ignored or shrugged off Bea's allegations, Bose would not have been harmed by the school. She instead faults the school for its own choice to expel her. For similar reasons, all the factual "questions" that Rhodes says are raised by a deliberate-indifference-to-retaliation claim, Opp. 18-20, are wholly beside the point.

The difference between the argument Bose actually raises (being expelled where a male student would not) and the one Rhodes faults her for *not* raising (indifference to retaliation) is aptly illustrated by Rhodes's statement (Opp. 2) that Bose cannot establish the "school's actual knowledge of retaliation and the school's failure to afford an adequate remedy." A remedy for what? The school's

expulsion decision *is* the Title IX violation; it makes no sense to say the school must be given notice of its own decision and a chance to "remedy" it.

To be sure, Bose *did* warn Rhodes about Bea's false accusations, well before the school expelled her, as Rhodes has admitted. C.A. Rec. 1557. That makes the school's decision to expel her all the more egregious. But nothing about the decision below turns on it.

3. Labels like "sexual harassment," "deliberate indifference," and "retaliation" can offer helpful ways to think about why some conduct amounts to a legal violation and other conduct does not. But these judge-made concepts should not obscure the real inquiry: whether the plaintiff has alleged—or at summary judgment, has proffered evidence supporting—behavior that, if proved, would mean the defendant has done something that the statutory text forbids.

Expelling a female student under circumstances where a male student would not have been expelled is precisely what Congress has said, in plain language, that federal-funding recipients may *not* do.

III. Other Circuits and the Federal Government Accept Cat's Paw Causation under Title IX

Rhodes attempts to sidestep the circuit split on cat's paw causation under Title IX by asserting (Opp. 17) that the determinative factor in every case was "actual notice of alleged discrimination or retaliation." To the contrary, *none* of the cited decisions turn on that factor.

Acknowledging the conflict with *Papelino* v. *Albany College of Pharmacy*, 633 F.3d 81 (2d Cir. 2011), Rhodes suggests (Opp. 17) that *Papelino* "could also be read to be based on the *university's* knowledge" of the misconduct by the professor there. Yet the allusion to knowledge by a "high-ranking member of the College's administration" referred to the plaintiff's deliberate-indifference claim,

not his complaint about being expelled. 633 F.3d at 89. As to the latter, the Second Circuit expressly held that the plaintiff could prevail "even if the Panel members" who disciplined him "were themselves unaware" of the professor's bias. *Id.* at 92-93.

Rhodes distinguishes *Doe* v. *Columbia University*, 831 F.3d 46 (2d Cir. 2016), because the "Title IX Coordinator, as the alleged bad actor, clearly had actual notice of her own discriminatory intent" and "exercised 'supervisory authority,'" in contrast with Bea's "non-supervisory role." Opp. 16. Actually, *Doe* refers to the coordinator's "supervisory authority or institutional influence *in recommending and thus influencing the adverse action by a non-biased decision-maker*." 831 F.3d at 59 (emphasis added). Bea had exactly the same authority to "recommend[] and thus influenc[e]" the Honor Council in disciplining Bose.

The "school-wide policy" at issue in *Gossett* v. *Oklahoma rex rel. Board of Regents*, 245 F.3d 1172 (10th Cir. 2001), was a "school-wide policy of allowing failing students to receive incomplete grades and extra time," *id.* at 1178, not the basis for the plaintiff's discrimination complaint. And the reference to "school-wide gender discrimination" was a description of "opinion testimony" from a witness who claimed no personal knowledge of the plaintiff's expulsion by his biased instructors. *Id.* at 1179. The Tenth Circuit certainly did not suggest that the school *itself* knew of the instructors' bias.

The "causal link" in *Emeldi* v. *University of Oregon*, 698 F.3d 715, 726 (9th Cir. 2012), between the biased dissertation chair and the plaintiff's exclusion from her Ph.D. program, had nothing to do with use of the school's grievance procedure. And the school policy that led to her exclusion—no dissertation advisor means no Ph.D.—was undoubtedly neutral, though weaponized by the biased advisor to punish her.

Finally, Rhodes simply ignores the Department of Education's regulations, 34 C.F.R. § 106.71(a), expressly forbidding what happened to Bose. In fact, the Department has *rejected* any supposed "actual knowledge" requirement outside the deliberate-indifference context. 85 Fed. Reg. 30,026, 30,537 (May 19, 2020).

IV. This Case Warrants the Court's Review

Apart from reasserting forfeiture of the nonexistent deliberate-indifference-to-retaliation claim (Opp. 18-20), Rhodes makes only a perfunctory attempt to argue that the question presented is unimportant. *Amici* persuasively explain (at 3) why the decision below "will have wide-ranging and deeply damaging effects." And Rhodes's self-congratulation (Opp. 22) regarding its "voluntary and enthusiastic compliance with Title IX" is particularly ironic, given what it did to Bose.

At base, this case is about whether a school can expel a student in reliance on fabricated evidence by a biased professor, and yet deny that the dismissal was "on the basis of sex." If the Sixth Circuit is correct, then Title IX would have second-class status among anti-discrimination protections.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ADAM W. HANSEN
ELEANOR E. FRISCH
APOLLO LAW LLC
333 Washington Ave., N., Suite 300
Minneapolis, MN 55401
(612) 927-2969

BRYCE ASHBY
BRICE M. TIMMONS
DONATI LAW, PLLC
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ANYA A. HAVRILIAK
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1144 Fifteenth Street
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