No. 25-

IN THE

Supreme Court of the United States

THOMAS CROWTHER AND MACHELLE JOSEPH,

Petitioners,

v.

BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA AND GEORGIA TECH ATHLETIC ASSOCIATION,

Respondents.

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

JOINT PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Title IX of the Education Amendments of 1972 prohibits federally funded educational institutions from discriminating "on the basis of sex." In *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979), this Court held that Title IX is privately enforceable by "victims of discrimination" through an implied right of action. And in *Jackson* v. *Birmingham Board of Education*, 544 U.S. 167 (2005), this Court held that employees of federally funded educational institutions may invoke Title IX's implied private right of action to bring claims for retaliation.

Following *Jackson*, and until the decision below, "every . . . circuit[] that has considered whether a teacher may sue under Title IX" for sex discrimination in their employment "has found they may." Pet App. 124a (Rosenbaum, J., dissenting from denial of rehearing *en banc*). Splitting with eight courts of appeals, the Eleventh Circuit held in the decision below that Title IX "do[es] not embrace a private right of action for employees." Pet. App. 21a. In so holding, the Eleventh Circuit joined pre-*Jackson* decisions from the Fifth and Seventh Circuits in an 8-3 split.

The question presented is: Whether Title IX provides employees of federally funded educational institutions a private right of action to sue for sex discrimination in employment.

PARTIES TO THE PROCEEDING

Petitioner MaChelle Joseph was plaintiff in the district court and appellant in the Eleventh Circuit. Respondents Board of Regents of the University System of Georgia and Georgia Tech Athletic Association were defendants in the district court and appellees in the Eleventh Circuit.

Petitioner Thomas Crowther was plaintiff in the district court and appellee in the Eleventh Circuit. Respondent Board of Regents of the University System of Georgia was appellant in the Eleventh Circuit.

RELATED PROCEEDINGS

- *Joseph et al.* v. *Bd. of Regents of the Univ. Sys. of Ga. et al.*, Nos. 23-11037, 23-12475, U.S. Court of Appeals for the Eleventh Circuit. Judgment entered November 7, 2024.

- *Crowther* v. *Bd. of Regents of the Univ. Sys. of Ga.*, No. 21-cv-04000, U.S. District Court, Northern District of Georgia. Judgment entered March 15, 2023.

- *Joseph* v. *Bd. of Regents of the Univ. Sys. of Ga. et al.*, No. 20-cv-502, U.S. District Court, Northern District of Georgia. Judgment entered March 3, 2023.

There are no other proceedings in state or federal courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14(b)(1).

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JOINT PETITION FOR WRIT OF CERTIORARI

These appeals concern whether employees of federally funded educational institutions may sue to enforce Title IX's protections against sex discrimination.

Since this Court's decision in *Jackson* v. *Birmingham Board of Education*, 544 U.S. 167 (2005), every court of appeals to have considered the question presented here has answered yes. The Eleventh Circuit held otherwise. It stated that Title IX's private right of action may not be invoked by employees. The court explained that other courts of appeals simply "failed to grapple" with the Constitution's Spending Clause, under which Congress enacted Title IX. Pet. App. 18a. At least eight courts of appeals disagree. The only circuits siding with the Eleventh Circuit are the Fifth and the Seventh Circuits, who held as much in two pre-*Jackson* decisions.

The Eleventh Circuit's ruling is one of "exceptional importance," *id.* 157a–163a (Rosenbaum, J., dissenting from denial of rehearing *en banc*), and has far-reaching implications. It undermines the uniform enforcement of Title IX across the country. It threatens to destabilize enforcement of antidiscrimination provisions under other Spending Clause statutes that, like Title IX, lack explicit private rights of action but have long been interpreted by courts to allow individuals to sue for violations. And it "violates binding Supreme Court precedent," *id*. 157a, most notably *Jackson*, which expressly recognized that employees could seek private redress under Title IX for retaliation claims.

This joint petition presents an excellent vehicle for resolving the circuit split. The Eleventh Circuit's holding on Title IX was outcome-determinative, and there were no alternative bases for affirmance. Certiorari should be granted.

OPINIONS BELOW

Crowther and *Joseph* were consolidated on appeal by the Eleventh Circuit. The Eleventh Circuit's ruling is reported at 121 F.4th 855 and reproduced at Pet. App. 1a.

In *Crowther*, the district court's order is reported at 661 F. Supp. 3d 1342 and reproduced at Pet. App. 33a. In *Joseph*, the district court's order is unpublished and reproduced at Pet. App. 66a.

The Eleventh Circuit's order denying rehearing *en banc* is reported at 133 F.4th 1284 and reproduced at Pet. App. 115a.

JURISDICTION

The Eleventh Circuit filed its decision in the consolidated appeals on November 7, 2024. On April 8, 2025, the Eleventh Circuit filed an order denying rehearing *en banc*.

On May 8, 2025, Justice Thomas extended the time to file a petition for a writ of certiorari in *Joseph* to August 6, 2025. On July 1, 2025, Justice Thomas extended the time to file in *Crowther* to August 6, 2025. This joint petition is timely, and the Court has jurisdiction under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a), provides in relevant part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

The Spending Clause, U.S. Const. art. I, § 8, cl. 1, provides:

> The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.

STATEMENT OF THE CASE

I. Legal Background

A. Enacted in 1972, Title IX prohibits sex-based discrimination in federally funded education programs and activities. Like other federal statutes that contain antidiscrimination provisions, Congress enacted Title IX under its constitutionally prescribed spending powers. U.S. Const. art. I, § 8, cl. 1; see *Cummings* v. *Premier Rehab Keller, P.L.L.C.*, 596 U.S. 212, 218 (2022).[1]

B. Title IX "contains no express private remedy." *Fitzgerald* v. *Barnstable*, 555 U.S. 246, 256 (2009). But this Court has recognized—and repeatedly reaffirmed—an implied private right of action to enforce Title IX. *Cummings*, 596 U.S. at 218.

In *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979) this Court held that a medical school applicant alleging sex discrimination in admissions had a statutory right to sue under Title IX. *Id.* at 689. That conclusion, the Court explained, followed from the fact that when Title IX was enacted in 1972, Title VI "had already been construed as creating a private remedy." *Id.* at 696. Indeed, Congress passed Title IX "with the

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[1] Pursuant to its spending powers, Congress "has enacted four statutes prohibiting recipients of federal financial assistance from discriminating based on certain protected grounds." *Cummings*, 596 U.S. at 217–18. See Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (prohibiting discrimination based on race, national origin, or color); Rehabilitation Act, 29 U.S.C. § 794 (disability discrimination); Affordable Care Act, 42 U.S.C. § 18116 (discrimination by federally funded healthcare entities).

explicit understanding that it would be interpreted as Title VI was," *Fitzgerald*, 555 U.S. at 258, and "patterned" Title IX "after Title VI," *Cannon*, 441 U.S. at 694.

As this Court has recognized, following *Cannon*, Congress "acknowledged" the implied right of action in amendments "to both" Title VI and Title IX. *Cummings*, 596 U.S. at 218. For example, in the Rehabilitation Act Amendments of 1986, Congress abrogated States' sovereign immunity against private suits seeking to enforce Title IX and similar Spending Clause statutes. In so doing, Congress "ratified *Cannon*'s holding." *Alexander* v. *Sandoval*, 532 U.S. 275, 280 (2001).

This Court has also held that Title IX's prohibition on discrimination extends beyond students. In *North Haven Board of Education* v. *Bell*, the Court upheld a regulation prohibiting federally funded education programs from discriminating on the basis of sex with respect to employment, observing that the statutory language "no person" "appears, on its face, to include employees as well as students," and that "Congress easily could have substituted 'student' or 'beneficiary' for the word 'person' if it had wished to" exclude employees from the statute's reach. 456 U.S. 512, 520–21 (1982). This Court thus held "employment discrimination comes within the prohibition of Title IX." *Id.* at 530.

Building on *Bell*, this Court held in *Jackson* v. *Birmingham Board of Education* that Title IX's private right of action may be invoked by employees of federally funded institutions who suffer retaliation for

reporting or opposing sex discrimination. 544 U.S. 167, 171 (2005). In *Jackson*, a public-school teacher claimed that he was retaliated against after he had complained about sex discrimination in the school's athletics program. This Court held that Title IX's private right of action encompasses retaliation claims because "retaliation falls within [Title IX's] prohibition of intentional discrimination on the basis of sex." *Id.* at 171, 174. And the Court reiterated that it had "consistently interpreted Title IX's private cause of action broadly to encompass diverse forms of intentional sex discrimination." *Id.* at 183.

C. In light of these precedents, every court of appeals that has considered the question since *Jackson* has held that an employee of a federally funded university who alleges sex discrimination may invoke Title IX's protections in federal court. In the decision below, the Eleventh Circuit became the first post-*Jackson* circuit to conclude otherwise.

II. Factual and Procedural Background

A. *Joseph*

1. Factual Background

Petitioner MaChelle Joseph is a veteran collegiate basketball coach with an extensive record of achievement. From 2003 until her termination in 2019, she served as the head coach of the women's basketball team at the Georgia Institute of Technology ("Georgia Tech"), one of the flagship institutions in the University System of Georgia. Pet. App. 66a–67a. By the

time of her termination, Joseph was the winningest coach in the program's history, having secured over 300 victories across 16 seasons, which included reaching the "Sweet Sixteen" in the NCAA Division I Women's Basketball Tournament in 2012. Compl. ¶ 3, *Joseph* v. *Bd. of Regents of the Univ. Sys. of Ga.*, No. 1:20-cv-00502 (N.D. Ga. Feb. 3, 2020), ECF No. 1-2.

In time, Joseph grew concerned about what she perceived as persistent disparities in the resources provided to her and her program compared to the men's program. Pet. App. 4a–6a. Joseph raised these concerns through internal channels over several years. *Ibid.* Tensions between Joseph and university officials intensified over these and related concerns. *Id.* 5a–8a.

In early 2019, immediately after Joseph had filed an internal complaint alleging that the University was discriminating against her and her program through its disparate allocation of resources, university administrators began to investigate Joseph's "behavior." *Id.* 6a, 9a. Joseph was placed on administrative leave during the pendency of the investigation. *Id.* 8a.

Although the resulting report noted that some players and staff reported positive experiences with Joseph, others described a culture of high-pressure coaching and, in some instances, expressed concern over verbal treatment. *Id.* 8a–9a; Compl. ¶ 200, *Joseph* v. *Bd. of Regents of the Univ. Sys. of Ga.*, No. 1:20-cv-00502 (N.D. Ga. Feb. 3, 2020), ECF No. 1-2. Joseph was given three business days to respond but was

otherwise not given an opportunity to formally contest the report's conclusions. Pet. App. 107a.

On March 26, 2019, six days after the final report was issued, Georgia Tech terminated Joseph's employment. *Ibid.*

2. District Court Proceedings

Following her termination, Joseph filed a charge of discrimination with the EEOC. Pet. App. 10a. She then filed suit in the United States District Court for the Northern District of Georgia. *Ibid.* Joseph's complaint asserted claims under Title VII, Title IX, and state whistleblower law. *Ibid.*

As relevant here, Joseph alleged Georgia Tech discriminated against her on the basis of sex in violation of Title IX by providing her inferior resources to perform her job as head coach relative to the male coaches of the men's basketball team and by terminating her employment. *Id.* 69a. Joseph contended that Title IX provides a cause of action for individuals alleging sex-based employment discrimination in federally funded educational institutions. *Id.* 75a–76a.

The district court dismissed Joseph's Title IX claims. The court held that Title IX does not allow a private cause of action for employees alleging sex-based employment discrimination. Pet. App. 75a–76a. In the court's view, Title VII provided the exclusive avenue for redress of employment discrimination, and the existence of that remedial scheme precluded a parallel remedy under Title IX. *Ibid.* Joseph timely appealed.

B. *Crowther*

1. Factual Background

Petitioner Thomas Crowther is an Art Professor and working artist who served on the faculty of Augusta University from 2006 until his nonrenewal in 2021. Pet. App. 34a. In his time at Augusta, Crowther received consistently positive student feedback, peer reviews, and annual evaluations, resulting in his promotion to Senior Lecturer in February 2020. *Id.* 34a, 38a.

Around that time, several students reported Professor Crowther for allegedly inappropriate conduct in class, including sexual harassment. *Id.* 35a. Those reports prompted a Title IX investigation. *Id.* 35a–36a. In April 2020, Crowther received a sharply negative performance evaluation—his first in nearly fifteen years—which referenced the Title IX investigation and assigned him the lowest possible rating in all categories. *Id.* 38a. He was then informed that he could either resign or be subjected to termination proceedings. *Id.* 38a–39a. Crowther declined to resign. *Id.* 39a.

Throughout the Title IX investigation, Augusta refused to provide Crowther with the identities of his accusers. *Id.* 38a–40a. Nonetheless, Crowther provided approximately twenty-five witness statements from his students (both current and former) and others, which he contended refuted the complainants' allegations of inappropriate behavior. *Id.* 40a; Compl. ¶¶ 156–162, 180–84, *Crowther* v. *Bd. of Regents of*

Univ. Sys. of Ga., No. 21-cv-04000 (N.D. Ga. Sept. 28, 2021), ECF No. 1. The investigators, however, refused to interview all but one of those witnesses. Pet. App. 40a.

While Augusta initially advised Crowther that he would be provided a "hearing" to resolve the accusations, the Title IX investigation was concluded with no hearing in July 2020. *Id.* 37a, 40a–41a. The investigation concluded that Crowther had violated the University's sexual harassment policy. *Id.* 40a–41a. The University imposed a one-semester suspension, which Crowther appealed. *Ibid.*

While Crowther's appeal was pending, the University reassigned him to remedial duties and told him that his faculty contract would not be renewed for the 2021–2022 academic year. *Id.* 41a–42a & n.4. Thus, Crowther was effectively terminated after the Spring 2021 semester while his appeal was still pending. *Ibid.*

Eventually, Crowther's appeals were denied. *Id.* 42a. Crowther filed a complaint with the EEOC and filed suit in the United States District Court for the Northern District of Georgia. *Id.* 42a–43a; Compl. ¶ 11 n.1, *Crowther* v. *Bd. of Regents of Univ. Sys. of Ga.*, No. 21-cv-04000 (N.D. Ga. Sept. 28, 2021), ECF No. 1. Crowther raised claims of discrimination and retaliation under Title IX as well as a gender discrimination claim under Section 1983. Pet. App. 42a–43a.

2. District Court Proceedings

Crowther alleged that his termination constituted unlawful sex discrimination in violation of Title IX. Pet. App. 3a. Crowther argued that, throughout the investigation into his alleged improper conduct, he was treated differently because of sex. He maintained that comparable allegations against female faculty had not resulted in similar sanctions or job consequences. In his view, the disciplinary measures taken by the university constituted both sex discrimination and retaliation for asserting his rights under Title IX.

The Board moved to dismiss Crowther's Title IX claim, arguing that employment discrimination claims under Title IX are "preempted" by Title VII. Pet. App. 44a.

The district court noted that "there is a circuit split on" whether "Title VII bars employment claims under Title IX." *Id.* 44a–45a. But the court ultimately concluded that "Title VII does not preclude employment discrimination claims under Title IX" because "nothing in Title VII 'in express terms, forbids or limits' Title IX employment discrimination claims." *Id.* 50a (quoting *POM Wonderful LLC* v. *Coca-Cola Co.*, 573 U.S. 102, 111 (2014)).

Therefore, the district court denied the motion to dismiss Crowther's claims against the Board under Title IX. *Id.* 64a. The court certified the order for interlocutory appeal.

III. Eleventh Circuit Proceedings

The appeals in *Joseph* and *Crowther* were consolidated before the Eleventh Circuit. A panel of the Eleventh Circuit affirmed the dismissal of Joseph's Title IX claim and reversed the order denying the dismissal of Crowther's claims. Pet. App. 2a.

The court stated that the "circuits are split" as to whether the existence of a detailed remedial scheme under Title VII precludes any private remedy for employees under Title IX. *See id.* 12a. Nonetheless, focusing on an antecedent and "more fundamental question: whether Title IX provides an implied right of action for sex discrimination in employment," *ibid.*, the court said it did not. Rather, the Circuit held that the "terms" of Title IX "do not embrace a private right of action for employees." *Id.* 21a.

In doing so, the Eleventh Circuit acknowledged that other courts of appeals had decided that question differently, but it viewed those courts as having "failed to grapple" with this Court's Spending Clause precedents. *Id.* 18a. It explained that, "[f]or most Spending Clause legislation, 'the typical remedy for . . . noncompliance with federally imposed conditions is not a private cause of action but rather action by the Federal Government to terminate funds.'" Pet. App. 14a (quoting *Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 280 (2002)). Thus, "because Title IX was enacted under the Spending Clause, it is dubious that recipients of federal funds would understand that they have knowingly and voluntarily accepted potential liability for damages for claims of employment discrimination

under Title IX when those kinds of claims are expressly provided for and regulated by Title VII." *Id.* 22a.

A judge of the Eleventh Circuit *sua sponte* called for rehearing *en banc*, and the full court denied review. *Id.* 116a. Chief Judge Pryor, joined by Judge Luck, concurred in the denial of rehearing *en banc*, explaining that "Title IX does not impliedly create a duplicative right of action for employees" because (referring to Title VII)) "it would be odd . . . to conclude that, over the course of only three months, Congress designed two rights of action for employment discrimination." Pet. App. 120a–21a (Pryor, C.J., respecting denial of rehearing *en banc*).

Judge Rosenbaum, joined by four other judges, dissented from the denial of rehearing *en banc*. First, she emphasized that the panel's position conflicted with the holdings of multiple other circuits, which, since *Jackson*, had uniformly recognized a private right of action under Title IX for employment discrimination. *Id.* 124a (Rosenbaum, J., dissenting from denial of rehearing en banc). Judge Rosenbaum noted that "in the two decades since *Jackson*, every one of our sister circuits that has considered whether a teacher may sue under Title IX has found they may—the opposite conclusion of our Court." *Ibid.*

Next, Judge Rosenbaum observed that the panel decision "defies . . . binding precedent" from this Court. *Id.* 145a. Judge Rosenbaum explained that the panel decision improperly "dismissed *Cannon* as irrelevant" merely because *Cannon* involved a Title IX

challenge by a "prospective student, not an employee." *Id.* 135a–136a. But, as she pointed out, "the Court determined that the statute contained a cause of action for the general category of 'persons' under Section 901(a) of Title IX." *Id.* 136a.

Judge Rosenbaum also observed that the panel opinion "is . . . contrary to *Jackson*." *Id.* 143a. On the panel's view, *Jackson* held that a teacher may sue for retaliation under Title IX only when he had complained about discrimination *against students*. *Id.* 118a (Pryor, C.J., respecting denial of rehearing *en banc*). But, as Judge Rosenbaum noted, the panel's purported distinction "ignores" the logic of *Jackson*, which held that the plaintiff's retaliation claim could proceed because retaliation is a form of intentional sex discrimination. Thus, "the underlying claim recognized in *Jackson* was discrimination against an 'employee.'" *Id.* 144a (Rosenbaum, J., dissenting from denial of rehearing *en banc*).

Finally, Judge Rosenbaum noted that these consolidated appeals were of "exceptional importance." *Id.* 157a–158a. In her view, the panel decision not only "violates binding Supreme Court precedent," but also usurps Congress's "policy judgment." *Ibid.*

REASONS FOR GRANTING THE PETITION

I. The Decision Below Created A Lopsided Post-*Jackson* Split

A. Eight Circuits Interpret Title IX To Permit Private Claims For Sex Discrimination In Employment

1. Since this Court's decision in *Jackson*, five courts of appeals have considered whether Title IX authorizes employees to sue for sex discrimination in employment. All have answered yes. See Pet. App. 155a–57a (Rosenbaum, J., dissenting from denial of rehearing en banc) (discussing *Vengalattore*, *Snyder-Hill*, *Mercy Catholic*, *Campbell*, and *Hiatt*).

Consider first the Second Circuit's decision in *Vengalattore* v. *Cornell University*, 36 F.4th 87 (2d Cir. 2022). There, the plaintiff—a tenure-track faculty member—claimed that his employer, Cornell University, discriminated against him in connection with an investigation conducted by the University into sexual harassment charges made by a female student against him. Although the district court ruled that "Title IX does not authorize a private right of action for discrimination in employment," the Second Circuit reversed. *Id.* at 100. It concluded that "Title IX allows a private right of action for a university's intentional gender-based discrimination against a faculty member." *Id.* at 106. The court explained that "given the Supreme Court's Title IX rulings . . . [it] must honor the breadth of Title IX's language." *Ibid*. The court added that after *Jackson*, it is "now well settled

that . . . a private right of action is implied" for employees under Title IX. *Id.* at 104.

The Sixth Circuit has held that school-contracted referees can invoke Title IX's implied right of action because it has "never limited the availability of Title IX claims to . . . students." *Snyder-Hill* v. *Ohio State University*, 48 F.4th 686, 707–79 (6th Cir. 2022). There, in a suit brought against an Ohio State University physician and athletic-team doctor for abuse of "hundreds" of young men between 1978 and 1999, the court explained that the "plain language" of Title IX—which protects all "persons"—"sweeps broadly." *Id.*

The Third Circuit agrees. In *Doe* v. *Mercy Catholic Medical Center*, 850 F.3d 545 (3d Cir. 2017), the court held that a medical resident's suit alleging sex-based harassment and retaliation was cognizable under Title IX. That result, the court indicated, was compelled by this Court's precedents, since "*Jackson* . . . explicitly recognized an employee's private claim under *Cannon*." *Id.* at 563. Accordingly, "Title VII's concurrent applicability does not bar [plaintiff's] private causes of action . . . under Title IX." *Id.* at 560.

Similarly, in the Ninth Circuit, courts "generally evaluate employment discrimination claims brought under [Title IX and Title VII] identically." *Campbell* v. *Hawaii Dep't of Education*, 892 F.3d 1023 (9th Cir. 2018); *cf. MacIntyre* v. *Carroll Coll.*, 48 F.4th 950, 954 (9th Cir. 2022) (explaining that the Ninth Circuit evaluates employees' retaliation claims under Title IX by applying the "familiar framework . . . under Title

VII"). In *Campbell*, the court considered the merits of the public-school teacher plaintiff's claims regarding intentional sex discrimination under both Title IX and Title VII, without treating the latter as exclusive. 892 F.3d at 1012–13, 1024.

The Tenth Circuit likewise recognizes that employment discrimination claims in educational settings may proceed under Title IX. See *Hiatt* v. *Colorado Seminary*, 858 F.3d 1307, 1316–17 (10th Cir. 2017). There, the plaintiff—a psychiatrist employed by the University of Denver to provide counseling services to its students—asserted claims for gender discrimination and retaliation under both Title VII and Title IX. The court noted that Title IX "includes a prohibition on employment discrimination," *id.* at 1315 (citing *Bell*, 456 U.S. at 535–36), and that *Jackson* further interpreted Title IX "as creating a private right of action" for retaliation, *ibid.* Because Title VII did not negate those rights, the court considered both the Title IX and Title VII claims. *Id.* at 1315–17.

2. Even before *Jackson*, three additional courts of appeals had recognized that private suits by employees alleging sex discrimination were cognizable under Title IX. Those circuits are exceedingly unlikely to reverse themselves on that question after *Jackson*. See *Mercy Catholic*, 850 F.3d at 563 ("*Jackson* . . . explicitly recognized an employee's private claim.").

The First Circuit has long permitted employees to bring Title IX claims for sex discrimination. See, *e.g.*, *Lipsett* v. *Univ. of Puerto Rico*, 864 F.2d 881, 896–97 (1st Cir. 1988). In *Lipsett*, the court held that a

medical resident's claims of discriminatory treatment could "give rise to . . . a cause of action under Title IX against the University." *Id.* at 896. Citing *Cannon*, the court found that Title IX's implied cause of action applied to the plaintiff, who was "both an employee and a student" in a medical program. *Id.* at 897. The court added that Title IX applies broadly to "the context of employment discrimination." *Id.*

So too for the Fourth and Eighth Circuits. In *Preston* v. *Commonwealth of Virginia. ex rel. New River Cmty. Coll.*, 31 F.3d 203, 206 (4th Cir. 1994), the Fourth Circuit explained that Title IX's private right of action "extends to employment discrimination on the basis of gender by educational institutions receiving federal funds[.]" And in *O'Connor* v. *Peru State College*, 781 F.2d 632 (8th Cir. 1986), the Eighth Circuit confirmed that "[c]laims of discriminatory employment conditions are cognizable under Title IX" and "reject[ed]" the argument that the plaintiff there, a former collegiate women's basketball coach, could not "challenge, for example, the assignment of the women's basketball team to the less desirable practice court and the lack of fitting uniforms." *Id.* at 642 n.8.

B. Three Circuits Disagree That Employees May Sue Under Title IX

1. The decision below splits with the foregoing courts. The Eleventh Circuit held that the "terms" of Title IX "do not embrace a private right of action for employees." Pet. App. 21a. In so holding, the Eleventh Circuit acknowledged that it was parting ways with other courts of appeals. Referencing caselaw

concerning the Constitution's Spending Clause, the circuit explained that "our sister circuits that have allowed claims of sex discrimination in employment under Title IX to proceed have failed to grapple with the inquiry required by *Sandoval* (and later *Gonzaga*); they instead have relied primarily on *Bell* (and later *Jackson*) to hold that Title IX prohibits employment discrimination." Pet. App. 18a (citing, *e.g.*, *Vengalattore*, 36 F.4th at 104–06; *Snyder-Hill*, 48 F.4th at 708; *Mercy Catholic*, 850 F.3d at 562; *Campbell*, 892 F.3d at 1023; *Lipsett*, 864 F.2d at 884 n.3, 896; *Preston*, 31 F.3d at 204; and *O'Connor*, 781 F.2d at 642 n.8).

2. If one looks to pre-*Jackson* cases, the decision below finds just two companions. In *Lakoski* v. *James*, the Fifth Circuit held that employees may not invoke Title IX to challenge discriminatory employment decisions in federally funded schools. 66 F.3d 751 (5th Cir. 1995).

Notably, however, *Lakoski* relied on a pre-*Jackson* framework, and accordingly, its reasoning has been rejected by every court of appeals to have considered the question after *Jackson*, aside from the Eleventh Circuit. See, *e.g.*, *Mercy Catholic*, 850 F.3d at 563 (explicitly "question[ing] the continued viability" of *Lakoski* as it was "decided a decade before the Supreme Court handed down *Jackson*, which explicitly recognized an employee's private claim under *Cannon*"); *Vengalattore*, 36 F.4th at 105–06 (declining to follow *Lakoski*). Nonetheless, *Lakoski* is still followed in the Fifth Circuit. See, *e.g.*, *Williams* v. *Texas Southern Univ.*, 2019 WL 13260558, at *1 (S.D. Tex. Mar. 19,

2019) (applying *Lakoski* and granting a motion to dismiss Title IX claims).

Similarly, in *Waid* v. *Merrill Area Public Schools*, 91 F.3d 857 (7th Cir. 1996), although the Seventh Circuit determined that "[a]s an employee of an educational institution that received federal funds, Waid had a statutory right under Title IX" to sue for "intentional discrimination," *id.* at 861, the court nonetheless held the plaintiff's Title IX claim for equitable relief was preempted by Title VII, *id.* at 862. Because money damages under Title VII were not available at the time the conduct in *Waid* took place, *Waid* did not assess whether damages claims under Title IX were also precluded by Title VII. *Id.* Even so, post-*Jackson*, district courts in the Seventh Circuit apply *Waid* to preclude "any Title IX employment discrimination suit," including those seeking damages. See *Ludlow* v. *Nw. Univ.*, 125 F. Supp. 3d 783, 789–90 (N.D. Ill. 2015) (recognizing split, and citing, *e.g.*, *Preston* and *Lipsett*).

Thus, among post-*Jackson* circuit decisions, the Eleventh Circuit is now the "sole outlier" among its sister circuits and "stands alone . . . in holding that Title IX includes no implied private right of action for employees . . . and that the *Cannon*, *Bell*, and *Jackson* trilogy doesn't require [a contrary] conclusion." Pet. App. 128a, 157a (Rosenbaum, J., dissenting from denial of rehearing *en banc*). If one considers pre-*Jackson* cases, the Eleventh Circuit is joined only by the Fifth and Seventh Circuits.

* * *

The courts of appeals are cleanly split on the question presented, and there is no room for further percolation—nearly every circuit has addressed the question presented. Moreover, the split is exceedingly unlikely to resolve itself. The Eleventh Circuit's decision came well after *Jackson*, a judge on the Eleventh Circuit *sua sponte* called for rehearing *en banc*, and the Circuit denied rehearing over the dissent of five judges.

Thus, the circuit split on this important question of federal law will persist in the absence of this Court's intervention.

II. The Decision Below Is Incompatible With This Court's Precedents And Is Wrong

A. The decision below is irreconcilable with this Court's decision in *Jackson*. There, the Court "interpret[ed] Title IX's text to clearly prohibit retaliation [against employees] for complaints about sex discrimination," because such retaliation "constitutes intentional discrimination on the basis of sex." *Jackson*, 544 U.S. at 174, 178 n.2 (cleaned up). The Court explained that this result respected Congress's decision to prohibit broadly all forms of "discrimination," and that "by using such a broad term, Congress gave the statute a broad reach." *Id.* at 175. As this Court has reiterated, *Jackson* concluded, "based on an interpretation of the 'text of Title IX,'" *Gomez-Perez* v. *Potter*, 553 U.S. 474, 484 (2008), that employees are among the undifferentiated class of "person[s]" who can

invoke the statute's private right of action. See *Jackson*, 544 U.S. at 181.

The decision below ignores *Jackson*'s textual analysis. Instead, the Eleventh Circuit purported to distinguish retaliation claims (at issue in *Jackson*) from sex discrimination claims (at issue here). But that distinction "did not prevail" in *Jackson* and, indeed, echoes an argument made in dissent. *Gomez-Perez*, 553 U.S. at 481 ("The *Jackson* dissent strenuously argued that a claim of retaliation is conceptually different from a claim of discrimination . . . but that view did not prevail." (citing *Jackson*, 544 U.S. at 184–85) (internal citations omitted)).

Further, the Eleventh Circuit's holding cannot be squared with this Court's other precedents. The Eleventh Circuit reasoned that it would be "odd" to conclude that "Congress designed two rights of action for employment discrimination." Pet. App. 121a. But this Court has rejected that premise for more than 40 years. Indeed, "this Court repeatedly has recognized that Congress has provided a variety of remedies, *at times overlapping*, to eradicate employment discrimination." *Bell*, 456 U.S. at 535 n.26 (emphasis added); see also *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 47–49 (1974). Contrary to the holding below, and as other circuits have recognized, there is nothing "odd" about parallel enforcement under both Title VII (which prohibits employment discrimination on the basis of various protected characteristics) and Title IX (which reaches only sex discrimination). See *Alexander*, 415 U.S. at 48–49 ("Title VII was designed to

supplement rather than supplant, existing laws and institutions relating to employment discrimination.").

B. Moreover, the decision below relies almost exclusively on Spending Clause arguments that this Court has rejected.

The Eleventh Circuit found it "dubious that recipients of federal funds would understand" their "liability for damages" for employment discrimination under Title IX. Pet. App. 22a. But this Court has explained that "[f]unding recipients have been on notice that they could be subjected to private suits for intentional sex discrimination under Title IX since 1979." *Jackson*, 544 U.S. at 182.

Further, although the panel relied on *Sandoval* and *Gonzaga* to justify departing from *Jackson*, neither case supports that approach. Indeed, "the defendants in *Jackson* argued *Sandoval* prohibited recognizing employees' retaliation claims under Title IX," but "the Court rejected that argument." Pet. App. 148a (Rosenbaum, J. dissenting from denial of rehearing *en banc*). Instead, this Court explained that employee retaliation claims were "[i]n step with *Sandoval*" so long as they do "not rely on regulations extending Title IX's protection beyond its statutory limits"—and Petitioners here do not rely on any regulations to justify their sex-discrimination claims. *Jackson*, 544 U.S. at 178.

Gonzaga also supports Petitioners. That decision recognized that "Title IX . . . create[s] individual rights because [that] statute[] [is] phrased 'with an *unmistakable focus* on the benefited class'"—the benefited

class consisting of those falling within the meaning of "person" under Title IX. *Gonzaga*, 536 U.S. at 284 & n.3 (emphasis in original) (quoting *Cannon*, 441 U.S. at 691). Moreover, the Court explained, by contrast to the right-creating language in Title IX, "[w]here a statute does not include this sort of explicit 'right- or duty-creating language,' we rarely impute to Congress an intent to create a private right of action." *Id*.

For similar reasons, the panel's reliance on *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1 (1981), is misguided. While *Pennhurst* shows how to analyze Spending Clause conditions, this Court has made clear that "*Pennhurst* does not preclude private suits for intentional acts that clearly violate Title IX." *Jackson*, 544 U.S. at 182.

C. Finally, the Eleventh Circuit improperly subordinated Congress's considered policy judgments to those of the judiciary, and in doing so, "deprive[d] educational employees of a remedy Congress created for them." Pet. App. 158a (Rosenbaum, J., dissenting from denial of rehearing *en banc*).

This Court has been clear about what Congress's intent was in drafting Title IX. The Court has held that Congress intended for Title VI and Title IX to be privately enforceable, despite the absence of an express right of action. See *Cannon*, 441 U.S. at 695–96; *Franklin* v. *Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 76 (1992). Moreover, "Congress [has] ratified *Cannon*'s holding" through the Rehabilitation Act Amendments of 1986. *Sandoval*, 532 U.S. at 280 (citing 42 U.S.C. § 2000d-7); see also *Franklin,* 503 U.S. at 78 (Scalia,

J., concurring) ("[L]egislation enacted subsequent to *Cannon* . . . must be read . . . 'as a validation of *Cannon*'s holding.'").

Congress yet again confirmed Title IX's broad reach when it passed the Civil Rights Restoration Act of 1987. *See* Pub. L. No. 100-259, § 3(a), 102 Stat. 28 (1988). That statute "broadened the coverage of . . . antidiscrimination provisions" in Title IX and Title VI. *Franklin*, 503 U.S. at 73.

In sum, the drafters of Title IX "explicitly assumed that it would be interpreted and applied" to contain a private remedy invokable by the textually undifferentiated class that the statute protects. *Cannon*, 441 U.S. at 696. Congress then repeatedly legislated against the backdrop of this Court's decisions interpreting Title IX—including *Cannon*, *Bell*, *Franklin*, and *Jackson*—without displacing the private right of action those cases recognized. See *Texas Dep't of Hous. & Cmty. Affs.* v. *Inclusive Communities Project, Inc.*, 576 U.S. 519, 536–37 (2015) (congressional amendments to statute "while still adhering to the operative language . . . is convincing support for the conclusion that Congress accepted and ratified" court decisions that it was "aware of"). The decision below ignored Congress's careful determination in favor of its own "vision for who gets to sue under a piece of critical civil-rights legislation." Pet. App. 158a (Rosenbaum, J., dissenting from denial of rehearing *en banc*).

III. Resolving The Split Is Critically Important

The question presented is a matter of exceptional national importance. This Court's intervention is warranted for at least four reasons.

First, the decision below vitiates the national uniformity of Title IX. Whether an employee can sue for employment discrimination under Title IX—which governs every educational institution receiving federal funds—now depends entirely on where she works.

Indeed, employees working for schools within the same collegiate athletic conference, such as the Southeastern Conference (which contains, *e.g.*, the University of Tennessee (sitting within the Sixth Circuit) and the University of Alabama (Eleventh Circuit)), are now subject to different rules. So too for the Atlantic Coast Conference (which includes, *e.g.*, Syracuse University and the University of Miami), the Big Ten (*e.g.*, Purdue University and Pennsylvania State University) and the Big 12 (*e.g.*, Texas Tech University and University of Colorado at Boulder).

That kind of circuit-dependent access to federal antidiscrimination legislation is anathema to the purpose of the statutes. "[B]ecause Title IX is designed to provide uniform protection against discrimination throughout the nation in all programs that receive federal funds, there should not be a private cause of action available in some circuits, but not others." Br. for United States as Amicus Curiae, *Jackson* v. *Birmingham Bd. of Educ.*, 2004 WL 1062111, at *15 (May

11, 2004); see, *e.g.*, *Bostock* v. *Clayton County*, 590 U.S. 644, 654 (2020) (certiorari granted "to resolve . . . disagreement among the courts of appeals over the scope of [federal antidiscrimination] protections").

Second, the decision below ignores Congress's intent and thus frustrates the goals of Title IX. As this Court has observed, "teachers and coaches" are "often in the best position to . . . identify discrimination." *Jackson*, 544 U.S. at 181. "Indeed, sometimes adult employees are the only effective adversaries of discrimination in schools." *Ibid.* (cleaned up). Denying those employees access to Title IX's protections thus weakens enforcement of the statute, undercuts its objectives, and pushes enforcement of Title IX into other adjudicatory bodies. See generally *Vengalattore*, 36 F.4th at 114 (Cabranes, J., concurring) (observing the "deeply troubling aspects of contemporary university procedures to adjudicate complaints under Title IX," which "signal a retreat from the foundational principle of due process").

Third, the Eleventh Circuit's reasoning unsettles this Court's doctrine on statutes passed under Congress's spending powers, particularly as it relates to implied rights of action. Title IX shares its core structure with Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d; Section 504 of the Rehabilitation Act, 29 U.S.C. § 794; and Section 1557 of the Affordable Care Act, 42 U.S.C. § 18116. See *Cummings*, 596 U.S. at 217. These statutes are all premised on federal funding conditions, and all lack express private rights

of action. But this Court has held that it is "beyond dispute that private individuals may sue to enforce" the antidiscrimination provisions of such statutes. *Barnes* v. *Gorman,* 536 U.S. 181, 185 (2002). The Eleventh Circuit's conclusion to the contrary threatens the potency of the implied rights of action found in other antidiscrimination statutes.

Fourth, the loss of Title IX remedies for private plaintiffs cannot be replaced. As this Court has observed, "Title VII . . . is a vastly different statute from Title IX." *Jackson*, 544 U.S. at 175. So, the "loss of the Title IX remedy carries tangible consequences for litigants." Pet. App. 158a (Rosenbaum, J., dissenting from denial of rehearing en banc).

Title VII erects several procedural roadblocks for plaintiffs that Title IX lacks, such as an exhaustion requirement and a tighter statute of limitations. 42 U.S.C. § 2000e-5(f); see *Fort Bend County* v. *Davis*, 587 U.S. 541, 544–45 (2019) (summarizing Title VII's procedures); Pet. App. 127a (Rosenbaum, J., dissenting from denial of rehearing *en banc*). Title IX also allows for the recovery of uncapped compensatory damages, *Franklin*, 503 U.S. at 76, whereas "Title VII has tight limits on any compensatory damages available," Pet. App. 127a (Rosenbaum, J., dissenting from denial of rehearing *en banc*). The Eleventh Circuit's "usurpation of Congress's policy-making function" thus "leaves open the potential for plaintiffs to be completely deprived of a remedy." *Id.* 162a–163a.

The prospective impact of a loss of Title IX rights for employees at schools is not hypothetical. Between

2011 and 2022, the Department of Education's Office for Civil Rights received over 1,000 Title IX complaints from employees at higher education institutions—*i.e.*, this country's college coaches, teachers, and administrators—alleging sex-based discrimination. U.S. Gov't Accountability Off., GAO-24-105516, Higher Education: Employment Discrimination Referrals Between Education & the Equal Employment Opportunity Commission Could be Improved 43 (2024).

IV. This Case Is An Excellent Vehicle

This joint petition presents an ideal vehicle to resolve this issue. Both appeals arise from motion-to-dismiss rulings, so the facts are taken as alleged. And the question presented here was outcome-determinative below: The Eleventh Circuit stated that "the terms of [Title IX] do not embrace a private right of action for employees," Pet. App. 21a, which, as a threshold matter, required the courts below to dismiss both Petitioners' Title IX sex-discrimination claims. There were no alternative bases for dismissing those claims.

CONCLUSION

For the foregoing reasons, this Court should grant the joint petition for certiorari.

Respectfully submitted,

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August 6, 2025

APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED NOVEMBER 7, 2024

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 23-11037

MACHELLE JOSEPH,

Plaintiff-Appellant,

v.

BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, GEORGIA TECH ATHLETIC ASSOCIATION,

Defendants-Appellees,

GEORGE P. PETERSON, *et al.*,

Defendants.

No. 23-12475

THOMAS CROWTHER,

Plaintiff-Appellee,

v.

BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA,

Defendant-Appellant.

Filed November 7, 2024

Appendix A

OPINION

Appeals from the United States District Court
for the Northern District of Georgia
D.C. Docket Nos. 1:20-cv-00502-VMC,
1:21-cv-04000-VMC

Before WILLIAM PRYOR, Chief Judge, and LUCK and ED CARNES, Circuit Judges.

WILLIAM PRYOR, Chief Judge:

These consolidated appeals require us to decide a common question: whether Title IX of the Education Amendments of 1972 provides an implied right of action for sex discrimination in employment. Thomas Crowther, formerly an art professor at Augusta University, and MaChelle Joseph, formerly the head women's basketball coach at the Georgia Institute of Technology, filed separate complaints of discrimination and retaliation against the University System of Georgia. The Crowther appeal also presents a question about his claim of retaliation under Title IX. And the Joseph appeal requires us to decide whether her remaining claims of discrimination and retaliation under Title VII, Title IX, and the Georgia Whistleblower Act survive summary judgment. As to the common question, we conclude that Title IX does not provide an implied right of action for sex discrimination in employment. We reverse the order denying the dismissal of Crowther's claims and affirm the judgment against Joseph's complaint.

Appendix A

I. BACKGROUND

We review the background of these appeals in two parts. We first describe the background of the Crowther appeal. We then address the background of the Joseph appeal.

A. Thomas Crowther

Thomas Crowther worked as an art professor at Augusta University from 2006 through spring 2021. During the Spring 2020 semester, several students complained that Crowther had sexually harassed them. While the University investigated those complaints, the chair of the Department of Art and Design issued Crowther a negative evaluation of his teaching and tried to negotiate his resignation. After the investigation found that Crowther had violated the University's sexual harassment policy, the University suspended his employment for one semester. Crowther appealed that decision through several channels to no avail. Before Crowther's appeal ended, the interim dean reassigned him to remedial tasks and refused to renew his contract for the 2021-2022 academic year.

Crowther later sued the Board of Regents of the University System of Georgia and several officials for sex discrimination and retaliation under Title IX and other provisions of federal law. He requested both damages and injunctive relief. The Board and officials moved to dismiss Crowther's complaint. The district court dismissed the claims against the officials but denied the motion to

dismiss the claims against the Board under Title IX. The district court also certified the order for interlocutory appeal based on the question whether Title VII precludes claims for sex discrimination in employment brought under Title IX. *See* 28 U.S.C. § 1292(b). And we granted permission to appeal that order.

B. MaChelle Joseph

MaChelle Joseph was the head women's basketball coach at Georgia Tech from 2003 until 2019. Joseph was responsible for coaching the team, recruiting new players, hiring and managing assistant coaches, and marketing the team and their games. The head men's basketball coach performed the same kinds of duties for the men's team. Georgia Tech provided practice and competition facilities, marketing budgets and resources, staffing, travel budgets, and other resources to both teams and coaches.

During Joseph's tenure, the men's basketball program consistently received more money and resources from Georgia Tech than the women's program. The women's locker room was smaller and had old and broken lockers, limited shower, laundry, and multipurpose space, and limited access to the practice facility. The men's facility had been updated with newer and more appliances and spaces and had direct access to the practice facility. The women's coaches' office space was smaller than the men's, requiring assistant coaches to share offices or sit at desks in a hallway. Joseph spent "substantial time" fundraising to improve the locker room and office conditions. Georgia Tech budgeted approximately $22,000 to the women's

basketball team for marketing. That amount was insufficient to hire a full-time marketing professional, so Joseph had to dedicate other resources—including her own time—to market the team. The men's team had more funds and a full-time marketing professional. The Georgia Tech Athletic Association also paid the men's head coach for television and radio sets during the season but did not pay Joseph for or provide parallel opportunities. Georgia Tech also provided less money for assistant coach and staff salaries for the women's team than for the men's team. And Georgia Tech provided less money for the women's team to travel than for the men's team.

Joseph learned about these differences during the 2006-2007 academic year and began to raise concerns about the disparity with Georgia Tech's Title IX coordinator for athletics. Nonetheless, most of the budgeting and resource issues remained unchanged throughout Joseph's career.

Joseph spent large portions of her time raising over $2 million for a locker room upgrade during the 2017-2018 year. Georgia Tech did not immediately proceed with the upgrade because addressing the practice facility access concerns—one of the primary issues with the women's locker room—required also changing the men's locker room. Georgia Tech considered upgrading both locker rooms simultaneously. But the men's team had not raised money for their own renovation, so the women's upgrade waited while the Athletic Department decided what to do.

As Joseph continued to complain about the various disparities to Athletic Department leadership, other

and unrelated issues arose. For example, in 2015 Joseph was reprimanded for appearing intoxicated at a home football game. In 2016, Joseph's administrative assistant filed a complaint against her, which resulted in a written warning and corrective-action plan. Then in early 2018, the National Collegiate Athletic Association informed Georgia Tech that it had received a report that Joseph or her staff paid recruits impermissible benefits. Meanwhile, Joseph and the team had not secured a spot in the National Collegiate Athletic Association tournament since 2014.

On November 21, 2018, Joseph sent a letter to Georgia Tech's president, copying the athletic director and deputy athletic director. That letter alleged that officials of the Athletic Department had retaliated against Joseph because of her repeated complaints about the disparate resources for her team and "differential treatment of her as a female coach." The chief of staff for the president of Georgia Tech testified that the athletic director appeared "worn down" by Joseph's complaints about the women's basketball team around that time.

Also in the fall of 2018, the personnel administrator for the women's basketball team raised concerns about Joseph's treatment of the team's staff. In early 2019, two staff members approached Human Resources with complaints about Joseph's bullying. And in January 2019, an interpersonal conflict arose among Joseph's players. That conflict eventually escalated to a meeting with the team's personnel administrator and then with Georgia Tech's interim general counsel. At the latter meeting, several players reported concerns about Joseph's

treatment of the athletes, expressing what the general counsel called "genuine terror." The general counsel advised the players to have their parents file letters on their behalf to initiate a formal investigation.

A few days later, the deputy athletic director informed the athletic director that he planned to resign because he could not deal with Joseph any longer. The athletic director responded that he had been "working on" a "path forward" regarding Joseph and discouraged the deputy from resigning. On February 7, 2019, the president instructed the athletic director to begin coordinating with human resources about the various staff complaints and resignation threats. The next day, apparently unrelatedly, Joseph filed a formal internal complaint of discrimination and retaliation. She raised the same concerns described above and alleged that the athletic director and others in the Department had retaliated against her.

Three days later, on February 11, the Athletic Department received a letter from the parent of a basketball player. The letter alleged that "Coach Jo and her staff" had isolated the player and created a "toxic" environment that impacted the player's "health and wellness." At some point, the athletic director received another letter from another player's parents. The athletic director and president discussed the contents of the letters, and the athletic director recommended hiring an attorney to investigate the allegations.

Around February 25, 2019, Georgia Tech hired an investigator for the various complaints about Joseph and

the women's basketball program. Joseph first learned of the investigation on February 27 when she was placed on administrative leave, but she received no details about its subject matter. The athletic director communicated regularly with an assigned official from Georgia Tech about the ongoing investigation. That official recommended people for the investigator to interview at Georgia Tech, but the investigator decided who he would contact. On March 11, the investigator delivered a preliminary report in a meeting, although he had not yet interviewed Joseph or the assistant coaches. After that meeting, the president's chief of staff texted the investigation point person, "Good meeting. We will have all we need." The chief of staff later clarified that the text stated that she believed that the Department would have sufficient evidence to take some kind of disciplinary action against Joseph.

On March 12, the investigator interviewed Joseph. On March 15, the investigator delivered an interim report of his findings. After reading that report, the chief of staff texted the general counsel expressing that she "hope[d] the final report ha[d] more details" because the interim report was "not as compelling as [she] had hoped." She again later clarified that she hoped that the final report would provide a "clear-cut case" for firing Joseph.

On March 20, the investigator submitted his final report. The final report revealed that the investigator had interviewed 13 current players, four former players, seven administrative staffers, five current assistant or graduate assistant coaches, three parents of current or former players, three consultants hired to work with the team

during the 2018-2019 season, Coach Joseph, and four other individuals. The report found that the women's basketball players felt "insecure, nervous, anxious, and scared at various points in the season and in their careers," and described the team environment as "toxic," "suffocating," "draining and miserable," and "unhealthy." Eleven of the thirteen current players interviewed "expressed concerns regarding player emotional and/or mental well-being." Players described Joseph "targeting" team members, engaging in "extreme cursing and yelling," and throwing items—possibly even at players. Staff members reported players experiencing "sleep disturbances" and "weight loss during particularly 'bad weeks' with the team." The report stated that Joseph used insulting and demeaning language "on a daily basis." For example, the report stated that Joseph called "a player a 'whore' and accus[ed] her of having sex with everyone on campus," and told "a player that she would be in jail if not for Coach Joseph." Players also reported "feeling manipulated by Coach Joseph," blamed for the team's poor performance, and isolated from their teammates.

The report found that it was "more likely than not that Coach Joseph's actions f[ell] outside acceptable behavior under the [University System of Georgia's] Ethics Policy," that the students were credible, and that "[e]very member of the team reported serious concerns regarding player mistreatment." The report stated that the players "attributed no [coaching] purpose" to the "bullying" and "verbal abuse." Staff corroborated the players' statements, but Joseph denied anything beyond yelling "on occasion" and "cursing in games, practices, and

team meetings." The report deferred to Georgia Tech as to what action should be taken.

After receiving the report, the athletic director shared it with Joseph and allowed her to respond. She produced a 13-page response. It denied most if not all the allegations raised in the report, including a line-by-line denial or defense of each of the specific name-calling allegations.

The athletic director fired Joseph on March 26, 2019. Joseph then filed a charge of discrimination with the Equal Employment Opportunity Commission in which she alleged sex discrimination and retaliation under Title VII. She obtained a right to sue letter, and she sued the Board of Regents, the Georgia Tech Athletic Association, and several individuals. She alleged against the Board and the Athletic Association two claims of sex discrimination under Title IX (counts 1 and 2), two claims of sex discrimination under Title VII (counts 3 and 4), and one count each of retaliation under Title IX, Title VII, and the Georgia Whistleblower Act (counts 9, 10, and 11). Joseph requested damages, declaratory judgments, and an injunction. The defendants removed the suit to the district court.

The defendants moved to dismiss and moved for judgment on the pleadings. The district court dismissed Joseph's claims of employment discrimination under Title IX as precluded by Title VII. It also narrowed Joseph's claims under Title VII based on the applicable limitations period and dismissed those claims insofar as they relied on a theory that Georgia Tech held her to a higher standard

than her male colleagues. The district court also dismissed the claim under the Whistleblower Act as to the Athletic Association. After extensive discovery, the Board and the Athletic Association moved for summary judgment. The district court granted their motion.

III. STANDARD OF REVIEW

We review *de novo* both a dismissal or refusal to dismiss (when interlocutory review is available) for failure to state a claim and a summary judgment. *See Williams v. Bd. of Regents of the Univ. Sys. of Ga.*, 477 F.3d 1282, 1291 (11th Cir. 2007); *Jefferson v. Sewon Am., Inc.*, 891 F.3d 911, 919 (11th Cir. 2018); *S & Davis Int'l, Inc. v. Yemen*, 218 F.3d 1292, 1298 (11th Cir. 2000); *see also Akanthos Cap. Mgmt., LLC v. CompuCredit Holdings Corp.*, 677 F.3d 1286, 1293 (11th Cir. 2012).

IV. DISCUSSION

We divide our discussion into four parts. First, we explain that Title IX does not provide Crowther or Joseph a private right of action for sex discrimination in employment. Second, we explain that Title IX does not provide Crowther a right of action for retaliation where he did not oppose an underlying violation. Third, we explain that Title VII does not provide Joseph a cause of action for the associational discrimination she alleged. Finally, we explain that because Joseph has not rebutted the proffered nondiscriminatory reasons for her termination, her claims of retaliation under Title VII, Title IX, and the Georgia Whistleblower Act fail.

A. Title IX Does Not Provide a Private Right of Action for Sex Discrimination in Employment.

The parties ask us to decide whether the rights and remedies under Title VII preclude claims for employment discrimination under Title IX. Our sister circuits are split on that question. *Compare Lakoski v. James*, 66 F.3d 751, 753 (5th Cir. 1995) (finding preclusion as to individuals seeking money damages under Title IX), *and Waid v. Merrill Area Pub. Schs.*, 91 F.3d 857, 862 (7th Cir. 1996) (same as to claims for equitable relief under Title IX or section 1983), *abrogated in part on other grounds by Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 251, 129 S.Ct. 788, 172 L.Ed.2d 582 (2009), *with Doe v. Mercy Cath. Med. Ctr.*, 850 F.3d 545, 560 (3d Cir. 2017) (finding no preclusion); *see also Vengalattore v. Cornell Univ.*, 36 F.4th 87, 92 (2d Cir. 2022) (holding that Title IX right of action was viable without deciding the preclusion question); *Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881, 896-97 (1st Cir. 1988) (same); *Preston v. Virginia ex rel. New River Cmty. Coll.*, 31 F.3d 203, 206 (4th Cir. 1994) (same); *Hiatt v. Colo. Seminary*, 858 F.3d 1307, 1316-17 (10th Cir. 2017) (same). But Supreme Court precedent requires us to ask a more fundamental question: whether Title IX provides an implied right of action for sex discrimination in employment. We hold that it does not.

Whether express or implied, "private rights of action to enforce federal law must be created by Congress." *Alexander v. Sandoval*, 532 U.S. 275, 286, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001). When Congress fails to provide an express right of action, "[t]he judicial task is to

interpret the statute Congress has passed to determine whether it displays an intent to create not just a private *right* but also a private *remedy*." *Id.* (emphasis added). An intent to create a remedy is necessary "even where a statute is phrased in . . . explicit rights-creating terms." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284, 122 S.Ct. 2268, 153 L.Ed.2d 309 (2002). And even when a statute "was intended to protect" a certain class, "the mere fact that the statute was designed to protect [that class] does not *require* the implication of a private cause of action . . . on their behalf." *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 24, 100 S.Ct. 242, 62 L.Ed.2d 146 (1979) (emphasis added). "The dispositive question [is] whether Congress intended to create any such remedy." *Id.*; *see also Sandoval*, 532 U.S. at 286, 121 S.Ct. 1511 ("Statutory intent . . . is determinative."). Without a clear indication of congressional intent to create a cause of action, "courts may not create one, no matter how desirable [a cause of action] might be as a policy matter, or how compatible with the statute." *Sandoval*, 532 U.S. at 286-87, 121 S.Ct. 1511; *see also Gonzaga Univ.*, 536 U.S. at 280, 122 S.Ct. 2268 ("[U]nless Congress speaks with a clear voice, and manifests an unambiguous intent to confer individual rights, federal funding provisions provide no basis for private enforcement." (alteration adopted) (citation and internal quotation marks omitted)).

Since the landmark decision in *Alexander v. Sandoval*, the Supreme Court has reminded inferior courts to exercise caution in implying rights of action. For example, in *Gonzaga University v. Doe*, the Court "reject[ed] the notion that [its] cases permit anything short

of an unambiguously conferred right to support a cause of action." 536 U.S. at 276, 283, 122 S.Ct. 2268 (considering whether Family Educational Rights and Privacy Act conferred a right that could be vindicated under section 1983). And in *Cummings v. Premier Rehab Keller, PLLC*, the Court circumscribed the remedies for implied rights of action under several statutes prohibiting discriminatory practices. 596 U.S. 212, 142 S. Ct. 1562, 1569-70, 1576, 212 L.Ed.2d 552 (2022) (holding "that emotional distress damages are not recoverable under the Spending Clause antidiscrimination statutes"). Where implied rights of action exist, we must honor them, but we cannot expand their scope without assuring ourselves that Congress unambiguously intended a right of action to cover more people or more situations than courts have yet recognized.

Congress enacted Title IX under the Spending Clause and provided an express remedial scheme for withdrawing federal funding. *See* 20 U.S.C. § 1682. For most Spending Clause legislation, " 'the typical remedy for . . . noncompliance with federally imposed conditions is not a private cause of action . . . but rather action by the Federal Government to terminate funds.' " *Gonzaga Univ.*, 536 U.S. at 280, 122 S.Ct. 2268 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 28, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981)). When deciding whether an implied right of action exists under Spending Clause legislation, "our consideration of whether a remedy qualifies as appropriate relief must be informed by the way Spending Clause statutes operate: by conditioning an offer of federal funding on a promise by the recipient." *Cummings*, 142 S. Ct. at 1570 (citation and internal

quotation marks omitted). Even where Spending Clause legislation is phrased in terms of the "persons" protected, the inclusion of a funding-based remedial scheme cautions against construing the statute to create other remedies. *See Gonzaga Univ.*, 536 U.S. at 284, 289, 122 S.Ct. 2268 (noting that the conclusion that a Spending Clause statute did not confer enforceable rights was "buttressed by the mechanism that Congress chose to provide for enforcing [the statute's] provisions").

"Unlike ordinary legislation, which 'imposes congressional policy' on regulated parties 'involuntarily,' Spending Clause legislation operates based on consent: 'in return for federal funds, the recipients agree to comply with federally imposed conditions.' " *Cummings*, 142 S. Ct. at 1570 (alteration adopted) (quoting *Pennhurst*, 451 U.S. at 16, 17, 101 S.Ct. 1531). But those conditions are binding only if they are clear and the "recipient voluntarily and knowingly accepts the terms of th[e] contract." *Id.* (alteration adopted) (citation and internal quotation marks omitted). The relevant terms of that "contract" include both the duties imposed and the liabilities created because "a prospective recipient would surely wonder not only what rules it must follow, but also what sort of penalties might be on the table." *Id.* So, if an implied right of action would impose unclear conditions or remedies for Spending Clause legislation, we should not recognize that right. *Id.* ("A particular remedy is . . . appropriate relief in a private Spending Clause action only if the funding recipient is *on notice* that, by accepting federal funding, it exposes itself to liability of that nature." (citation and internal quotation marks omitted)). And for a state recipient of federal funds,

the clarity of the penalty is important because Title IX abrogates any recipient's sovereign immunity from claims for damages. *See* 42 U.S.C. § 2000d-7; *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985) (requiring that abrogation to be "unmistakably clear in the language of the statute").

The Supreme Court has held that Title IX provides an implied right of action for students who complain of sex discrimination by schools that receive federal funds. In *Cannon v. University of Chicago*, the Court held that section 901 of Title IX provided an implied right of action for a prospective student because "the language of the statute explicitly conferred a right directly on a class of persons that included the plaintiff in the case" and was "phrased in terms of the persons benefited." 441 U.S. 677, 690 n.13, 692, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979). *Cannon* concluded that the prospective student was clearly a member of an intended beneficiary class and that Congress intended Title IX not only to ferret out discriminatory uses of federal funding but also to protect individual students from discrimination. *Id.* at 680, 693-94, 709-10, 99 S.Ct. 1946 (first interpreting Title IX, then considering the consequences for university admissions decisions).

In *Jackson v. Birmingham Board of Education*, the Supreme Court also held that Title IX provides a private right of action for *retaliation* for an employee's complaint about discrimination against students. 544 U.S. 167, 171, 125 S.Ct. 1497, 161 L.Ed.2d 361 (2005). There, the male coach of a high school girls' basketball team complained

that the school retaliated against him for complaining that the school discriminated against the girls' team. *Id.* at 171-72, 125 S.Ct. 1497. The Court concluded that "the text of Title IX prohibits a funding recipient from retaliating against a person who speaks out against sex discrimination, because such retaliation is intentional 'discrimination' 'on the basis of sex.' " *Id.* at 178, 125 S.Ct. 1497. The Court explained that the statutory goal of protecting students from discrimination "would be difficult, if not impossible, to achieve if persons who complain about sex discrimination did not have effective protection against retaliation" and that "teachers and coaches . . . are often in the best position to vindicate the rights of their *students*." *Id.* at 180-81, 125 S.Ct. 1497 (emphasis added) (citation and internal quotation marks omitted).

Although the Supreme Court has reaffirmed *Cannon* several times, it has never extended the implied private right of action under Title IX to claims of sex discrimination for employees of educational institutions. To be sure, Title IX empowers administrative agencies to promulgate and enforce regulations that require educational institutions to avoid sex discrimination against their employees. *See N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521, 535-36, 102 S.Ct. 1912, 72 L.Ed.2d 299 (1982). The Supreme Court has held that because "[section] 901(a) neither expressly nor impliedly excludes employees from its reach," Title IX "cover[s] and protect[s]" employees through the statute's funding conditions structure. *Id.* at 521, 530, 102 S.Ct. 1912 ("[E]mployment discrimination comes within the prohibition of Title IX."). But that federal funding might

be contingent on an educational institution's treatment of its employees—or that an administrative agency could issue regulations imposing that contingency—has little bearing on whether Congress intended to create a private right of action for employees under Title IX. *Cf. Sandoval*, 532 U.S. at 290, 121 S.Ct. 1511 (refusing to imply a right of action under the administrative enforcement provision of Title VI). To answer that question, we must look to congressional intent in creating "not just a private right but also a private remedy." *Id.* at 286, 121 S.Ct. 1511. *Bell* considered only the administrative remedy evident on the face of Title IX, not any implied private right of action.

None of these Supreme Court precedents—*Cannon*, *Jackson*, or *Bell*—speak to whether Title IX created an implied right of action for sex discrimination in employment. And our sister circuits that have allowed claims of sex discrimination in employment under Title IX to proceed have failed to grapple with the inquiry required by *Sandoval* (and later *Gonzaga*); they instead have relied primarily on *Bell* (and later *Jackson*) to hold that Title IX prohibits employment discrimination. *See, e.g.*, *O'Connor v. Peru State Coll.*, 781 F.2d 632, 642 n.8 (8th Cir. 1986); *Mabry v. State Bd. of Cmty. Colls. & Occup. Educ.*, 813 F.2d 311, 316-17 (10th Cir. 1987); *Lipsett*, 864 F.2d at 884 n.3, 896; *Preston*, 31 F.3d at 204 n.1, 205-06; *Waid*, 91 F.3d at 861; *Mercy Cath. Med. Ctr.*, 850 F.3d at 562; *Vengalattore*, 36 F.4th at 104-06; *see also Campbell v. Haw. Dep't of Educ.*, 892 F.3d 1005, 1023 (9th Cir. 2018); *Snyder-Hill v. Ohio State Univ.*, 48 F.4th 686, 708 (6th Cir. 2022) (non-student, non-employee claims).

It is not enough to say that *Cannon* and *Jackson* recognized an implied right of action under Title IX or that *Bell* recognized that Title IX permits agencies to demand that recipients of federal funding avoid discriminating against employees based on sex. "Because the private right of action under Title IX is judicially implied, we have a measure of latitude to shape a sensible remedial scheme that best comports with the statute." *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 284, 118 S.Ct. 1989, 141 L.Ed.2d 277 (1998). And when we consider whether a particular claim falls within the judicially implied right of action, we "examine the relevant statute to ensure that we do not fashion the scope of an implied right in a manner at odds with the statutory structure and purpose." *Cf. id.* So, to determine the appropriate scope of the implied right of action—and whether that scope includes employment discrimination—we look to the text of Title IX and its statutory context.

The text of Title IX provides that "[n]o person . . . shall, on the basis of sex, be excluded from *participation in*, be denied the *benefits of*, or be subjected to discrimination *under any education program or activity* receiving Federal financial assistance." Education Amendments of 1972, Pub. L. No. 92-318, § 901, 86 Stat. 235, 373 (June 23, 1972) (codified as amended at 20 U.S.C. § 1681) (emphasis added). True, the Supreme Court construed that language not to exclude employees from Title IX's administrative coverage. *See Bell*, 456 U.S. at 521, 530, 102 S.Ct. 1912. But nothing about that language indicates congressional intent to provide a private right of action to employees of educational institutions. In other words, although there

can be little doubt that Title IX's focus on educational institutions and programs represents an intent to provide students new protections from sex discrimination, *see Cannon*, 441 U.S. at 680, 693-94, 709-10, 99 S.Ct. 1946, that connection is less obvious for employees.

Congress passed Title IX in June 1972 as part of a series of amendments to the Civil Rights Act of 1964 and other antidiscrimination statutes. The Equal Employment Opportunity Act of 1972 extended first Title VII's prohibition of employment discrimination to federal employees and educational institutions. Pub. L. No. 92-261, § 701-02, 86 Stat. 103, 103-04 (Mar. 24, 1972). That extension to educational institutions responded to "the widespread and compelling problem of invidious discrimination in educational institutions." *Univ. of Pa. v. Equal Emp. Opp. Comm'n*, 493 U.S. 182, 190, 110 S.Ct. 577, 107 L.Ed.2d 571 (1990). The amendment "expose[d]" employment decisions in educational institutions to the "same enforcement procedures applicable to other employment decisions" under Title VII—the "integrated, multistep enforcement procedure that enables the [Equal Employment Opportunity] Commission to detect and remedy instances of discrimination." *Id.* (citation and internal quotation marks omitted). And Title IX extended next Title VI's protections against discrimination in federally funded programs to cover sex discrimination in educational institutions. Education Amendments of 1972, Pub. L. No. 92-318, § 901, 86 Stat. 235, 373 (June 23, 1972). But Title IX's enforcement mechanism relied on the carrot and stick of federal funding to combat sex discrimination.

Passed only three months apart, the 1972 amendments evince a congressional intent to create a comprehensive antidiscrimination remedial scheme. As amended, Title VII and Title IX work in tandem: "whereas Title VII aims centrally to *compensate* victims of discrimination, Title IX focuses more on protecting individuals from discriminatory practices carried out by recipients of *federal funds*." *Gebser*, 524 U.S. at 287, 118 S.Ct. 1989 (emphasis added) (citation and internal quotation marks omitted); *see also Lakoski*, 66 F.3d at 757.

The two statutes accomplish these goals through different remedies. Title VII creates an administrative process that requires claimants first to file a charge of employment discrimination with the Equal Employment Opportunity Commission and then obtain a right to sue letter from the Commission before filing a complaint in a federal court. 42 U.S.C. §§ 2000e-4-2000e-5. Title IX, in contrast, empowers administrative agencies to condition federal funding on compliance with its anti-sex-discrimination mandate. 20 U.S.C. § 1682. Although it also provides an implied right of action for students—who would otherwise have no statutory remedy to enforce their substantive right under Title IX—the terms of the statute do not embrace a private right of action for employees.

It is unlikely that Congress intended Title VII's express private right of action and Title IX's implied right of action to provide overlapping remedies. Judicially implied rights of action require expressions of congressional intent to create *both* a right *and* a remedy. *Sandoval*, 532 U.S. at 286, 121 S.Ct. 1511. In the light of the complexity of Title

VII's express remedial scheme, it would be anomalous to conclude that the implied right of action under Title IX would allow employees of educational institutions immediate access to judicial remedies unburdened by any administrative procedures. *See Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 180, 114 S.Ct. 1439, 128 L.Ed.2d 119 (1994) ("[I]t would be anomalous to impute to Congress an intention to expand the plaintiff class for a judicially implied cause of action beyond the bounds it delineated for comparable express causes of action." (citation and internal quotation marks omitted)); *cf. Gebser*, 524 U.S. at 289, 118 S.Ct. 1989. That conclusion becomes even weaker when we remember that Congress extended Title VII's remedies to employees of educational institutions only three months before enacting Title IX. And because Title IX was enacted under the Spending Clause, it is dubious that recipients of federal funds would understand that they have knowingly and voluntarily accepted potential liability for damages for claims of employment discrimination under Title IX when those kinds of claims are expressly provided for and regulated by Title VII. *See Gebser*, 524 U.S. at 286-87, 118 S.Ct. 1989 (distinguishing Title IX's "contractual framework" from Title VII's express prohibition and limiting the scope of available remedies under Title IX).

We hold that Title IX does not create an implied right of action for sex discrimination in employment. We reverse the order denying the motion to dismiss Crowther's claim of employment discrimination under Title IX and remand with instructions to dismiss that claim. And we affirm the dismissal of Joseph's claims of employment discrimination under Title IX.

B. Crowther's Retaliation Claim Based on His Participation in an Investigation of His Conduct Does Not State a Title IX Claim.

Although Crowther's case comes before us on interlocutory appeal, 28 U.S.C. § 1292(b), with a certified question concerning whether Title IX employment discrimination claims are precluded by Title VII, interlocutory jurisdiction under section 1292(b) "applies to the *order* certified to the court of appeals, and is not tied to the particular question formulated by the district court." *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205, 116 S.Ct. 619, 133 L.Ed.2d 578 (1996). "[A]ny issue fairly included within the certified order" falls within our discretionary jurisdiction under section 1292(b). *Id.* So, we may also consider whether Crowther's allegation of retaliation for participating in the investigation of his conduct states a claim under Title IX. The Board asks us to hold that it does not. We agree.

Jackson defines the contours of a claim of retaliation under Title IX. The Supreme Court held that "[r]etaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination encompassed by Title IX's private cause of action." 544 U.S. at 173, 125 S.Ct. 1497. The Court linked the act of retaliation to a complaint of sex discrimination against students. *Id.* at 174, 180-81, 125 S.Ct. 1497. Because Title IX's remedial scheme depends in large part on people being willing to report Title IX violations, those reporters are owed protection under the statute. *See id.* at 180-81, 125 S.Ct. 1497.

Jackson does not contemplate protections for an accused discriminator who participates in a Title IX investigation of his own conduct. That situation bears none of the features of the *Jackson* implied right of action: it does not protect students, and it does not encourage reporters to come forward. It is unsurprising then that at least one other circuit has refused to recognize retaliation actions for participation in an investigation where the would-be plaintiff is accused of discrimination. *See Du Bois v. Bd. of Regents of the Univ. of Minn.*, 987 F.3d 1199, 1204-05 (8th Cir. 2021).

Crowther asks us to read *Jackson* too broadly. He contends that his Title IX retaliation claim survives even if his claim of employment discrimination does not because he alleges "retaliation." But Crowther's claim looks nothing like the right of action implied in *Jackson* because he seeks to protect only his participation in the Title IX investigation of complaints *against* him, not his reporting of other violations. Under the same logic regarding implied rights of action that we described above, we decline to extend *Jackson* in this way. *See Cummings*, 142 S. Ct. at 1576-77 (Kavanaugh, J., concurring) ("[W]ith respect to existing implied causes of action, Congress, not this Court, should extend those implied causes of action and expand available remedies."); *Du Bois*, 987 F.3d at 1204-05. We reverse the order denying the motion to dismiss Crowther's retaliation claim under Title IX and remand with instructions to dismiss that claim as well.

C. Title VII Does Not Cover Associational Claims Unrelated to the Employee's Sex.

Next, Joseph's complaint purports to allege two claims of sex discrimination under Title VII: one based on her sex and another based on her association with the women's basketball team. Joseph contends that the Board of Regents and the Athletic Association discriminated against her because she is a woman and because her players are women. But Joseph provides little to no explanation of how her allegations are connected to her sex, beyond a few conclusory statements that she was treated differently for failing to conform to sex-based stereotypes. Instead, for both her claims, she alleges resource disparities between the facilities, budget, and institutional support of the men's team and those of the women's team.

The district court granted summary judgment against Joseph's claims of sex discrimination under Title VII on the ground that she failed to produce evidence that *her* sex was the but-for cause of the resource disparity. On appeal, Joseph makes no argument that her claims of employment discrimination are based on her sex; instead—under a heading *purporting* to argue that her claims were based on her sex—Joseph focuses only on her association with the women's team. She contends that Title VII allows a claim of discrimination based on an employee's association with a protected group, instead of the employee's sex.

Joseph relies on a line of "associational" cases under Title VII to support her argument that Title VII's

prohibition covers discrimination based on an individual's association with a protected group. Under this theory, it does not matter whether Joseph is male or female. What matters is that the disparate treatment alleged was based on an associated person's sex.

Joseph's argument misconstrues the line of precedents that support associational claims. We defined the scope of these claims in *Parr v. Woodmen of the World Life Insurance Co.*, where a company refused to hire a white man because he was married to a black woman. 791 F.2d 888, 889 (11th Cir. 1986). We held that "[w]here a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of *his* race." *Id.* at 892. In other words, claims based on interracial association necessarily implicate the race of both the complainant and the associate. So, any discrimination based on that association is based on the race (or sex or religion or national origin) of both parties. *See Matamoros v. Broward Sheriff's Off.*, 2 F.4th 1329, 1335 (11th Cir. 2021) (discussing *Parr* and its focus on the individual's protected trait in the context of a Florida statute). *Bostock v. Clayton County* confirms this interpretation. *See* 590 U.S. 644, 140 S. Ct. 1731, 1741, 207 L.Ed.2d 218 (2020) ("An *individual* employee's sex is not relevant to the selection, evaluation, or compensation of employees. . . . If the employer fires [a] male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague." (emphasis added) (citation and internal quotation marks omitted)). And Joseph's evidence does not suggest that her

sex mattered in association with the women's team. So, we affirm the summary judgment against Joseph's claims of sex discrimination under Title VII.

D. Joseph's Claims of Retaliation Under Title VII, Title IX, and the Georgia Whistleblower Act Fail.

The parties agree that the common burden shifting framework applies to Joseph's claims of retaliation under Title VII, Title IX, and the Georgia Whistleblower Act. *See Patterson v. Ga. Pac., LLC*, 38 F.4th 1336, 1344 (11th Cir. 2022). And we will assume that this framework applies here. Under the burden-shifting framework, "[t]he plaintiff must first make out a prima facie case of retaliation, showing (1) that she engaged in statutorily protected activity, (2) that she suffered an adverse action, and (3) that the adverse action was causally related to the protected activity." *Id.* at 1344-45 (citation and internal quotation marks omitted). If the plaintiff satisfies her burden on those three elements, then "the burden shifts to the employer to articulate a legitimate, non-discriminatory reason or reasons for the retaliation." *Id.* at 1345. If the employer provides legitimate reasons for taking adverse action against the plaintiff, then "the plaintiff must show that each reason is merely a pretext." *Id.* In sum, "a plaintiff must prove that had she not engaged in the protected conduct, she would not have been fired." *Gogel v. Kia Motors Mfg. of Ga., Inc.*, 967 F.3d 1121, 1135 (11th Cir. 2020) (en banc) (alteration adopted) (citation and internal quotation marks omitted).

Joseph alleges that she engaged in protected activity in her two letters to the Athletic Department. And she contends that Georgia Tech opened the investigation and fired her in sufficient proximity to those letters to raise an inference of causation. *See Patterson*, 38 F.4th at 1352 ("The general rule is that close temporal proximity between the employee's protected conduct and the adverse action is sufficient circumstantial evidence to create a genuine issue of material fact of a causal connection." (alteration adopted) (citation and internal quotation marks omitted)). The Board and Athletic Association responded to Joseph's allegations by producing evidence that Joseph's termination was instead based on the turmoil surrounding the women's basketball team and the findings in the investigation report. Because the pretext question is decisive, we assume that Joseph established a prima-facie case of retaliation.

To establish that an employer's reason for taking an adverse action is pretextual, a plaintiff must prove "that the reason was false." *Gogel*, 967 F.3d at 1136 (citation and internal quotation marks omitted). "At least where the proffered reason is one that might motivate a reasonable employer, an employee must meet that reason head on and rebut it." *Patterson*, 38 F.4th at 1352 (citation and internal quotation marks omitted). "A plaintiff cannot rebut a reason by simply quarreling with the wisdom of that reason or substituting her business judgment for that of the employer." *Id.* (citation and internal quotation marks omitted). "The plaintiff instead must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered

legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence." *Id.* (citation and internal quotation marks omitted). At summary judgment, "it is the plaintiff's burden to provide evidence from which one could reasonably conclude that but for her alleged protected act, her employer would not have fired her." *Gogel*, 967 F.3d at 1136.

Joseph makes three arguments for pretext. None of them persuades us. We address each in turn.

First, Joseph contends that the athletic director had already decided to terminate her before launching the investigation. She argues that the athletic director's comments to his deputy that he had been "working on . . . a path forward," the president's chief of staff's impression that the athletic director intended to use the parents' letters to "negotiate" Joseph's resignation, and the speed with which the athletic director responded to the first parent letter—in contrast to a previous, self-reported allegation against the men's basketball coach—all point to a predetermined outcome of the investigation. But the athletic director clearly had a legitimate reason for initiating the investigation based on the parents' letters, and Joseph's suggestions to the contrary establish only that the letters arrived during administrative discussions about Joseph and the women's basketball team. *See Berry v. Crestwood Healthcare LP*, 84 F.4th 1300, 1309 (11th Cir. 2023) (noting that an "intervening discovery of misconduct [can] undercut[]" an inference of retaliation). Moreover, the general counsel recommended conducting an independent investigation, and the president approved

that recommendation. So, even if Joseph's evidence raised a genuine question about the athletic director's motives, independent decisionmakers agreed that the investigation was necessary.

Second, Joseph attacks the independence of the investigation and report. She contends that the athletic director "manipulated the investigation" by selecting a "biased" official who recommended witnesses that would criticize Joseph. But again none of the evidence she points to supports her conclusion.

At most, the evidence suggests that the Athletic Department supported the investigation and helped the investigator coordinate witnesses and schedules. And Joseph offers no evidence that bias infected either the investigation itself or the decision to fire her. *See Pennington v. City of Huntsville*, 261 F.3d 1262, 1270 (11th Cir. 2001) ("Where a decisionmaker conducts his own evaluation and makes an independent decision, his decision is free of the taint of a biased subordinate employee."). Indeed, the athletic director testified that he did not "oversee the investigation," nor did he speak to the investigator before the investigation began; instead, the general counsel's office handled coordination of the investigation. That coordination is insufficient to raise an inference of manipulation that would undermine the legitimacy of the investigation report.

Finally, Joseph argues that the athletic director did not honestly believe that the report's conclusions warranted her termination. Joseph attacks the athletic

director's conclusion that the report conveyed that "the entire team" had complained about Joseph's conduct or the team environment. And Joseph asserts that the report's failure to provide the specific context for "certain words or actions" that interviewees had complained about raised an inference that the athletic director did not actually conclude that Joseph "engaged in inappropriate coaching practices." But the report provides multiple examples of inappropriate behavior, verbal abuse, and a toxic environment.

The report conveyed that "every [current] member of the team reported serious concerns regarding player mistreatment." That the report did not discuss every possible fact does not undermine its conclusion. *Cf. Berry*, 84 F.4th at 1309. The athletic director certainly could have believed that conclusion warranted Joseph's termination, and he testified that he did believe it. *See Alvarez v. Royal Atl. Devs., Inc.*, 610 F.3d 1253, 1266 (11th Cir. 2010) ("The inquiry into pretext centers on the employer's beliefs."). Joseph points to no evidence suggesting that the athletic director—or any of the other decisionmakers involved—disbelieved the report's findings, and her arguments that the athletic director *should not* have believed the report do little more than "quarrel[] with the wisdom" of his belief. *See Patterson*, 38 F.4th at 1352 (citation and internal quotation marks omitted).

Patterson is instructive. There, the plaintiff offered evidence that created a material factual dispute that her employer's reliance on a deadline was a false reason for firing her and that her employer did not follow its normal

practices in investigating her absences from work. *Id.* at 1353. And, immediately before firing her, the plaintiff's employer told her that her description of her protected activity "made things clear" to him about her loyalty to the company. *Id.* at 1354 (internal quotation marks omitted). Those facts raised reasonable inferences of pretext.

In contrast, Joseph has produced no evidence that the behavior in the report was not actually against Georgia Tech policy or that the investigation and report did not involve many serious complaints. Even her brief discussion of a previous investigation of a self-reported accusation against the men's basketball coach proves nothing about the typical response to the kinds of complaints lodged against Joseph. Her strained inferences of a predetermined outcome, manipulation, and disbelief cannot rebut the Board's legitimate reasons for terminating her. We affirm the summary judgment against Joseph's claims of retaliation.

V. CONCLUSION

We **AFFIRM** the judgment against Joseph's complaint.

We **REVERSE** the denial of the motion to dismiss Crowther's claims and **REMAND** with instructions to dismiss. **SO ORDERED.**

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION, SIGNED MARCH 15, 2023

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA,
ATLANTA DIVISION

Civil Action No. 1:21-cv-04000-VMC

THOMAS CROWTHER,

Plaintiff,

v.

BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, MICHELE REED, SCOTT THORP, BENJAMIN HUTTON, AND BROOKS KEEL,

Defendants.

Signed March 15, 2023

Victoria Marie Calvert, United States District Judge

ORDER

Before the Court is the Motion of the Board of Regents of the University System of Georgia ("BOR") and Defendants Scott Thorp, Benjamin Hutton, and Brooks

Keel, in their official and individual capacities, to Dismiss Plaintiff's Complaint ("BOR MTD," Doc. 32), and the Motion of Michelle Reed to Dismiss ("Reed MTD," Doc. 33). For the reasons that follow, the Court will grant in part and deny in part the BOR MTD and will grant the Reed MTD.

Background[1]

Plaintiff Thomas Crowther taught Art courses at Augusta University ("Augusta" or "University") from 2006 to 2021. (Compl. ¶ 86, Doc. 1). Defendant Board of Regents consists of nineteen members who are responsible for establishing policies and rules that govern the University System. (*Id.* ¶ 13). Defendant Michelle Reed was at all relevant times Augusta's Title IX Coordinator. (*Id.* ¶ 14). Defendant Scott Thorp was at all relevant times the Chair of Augusta's Department of Art and Design. (*Id.* ¶ 15). Defendant Benjamin Hutton was at all relevant times Augusta's Title IX Investigator. (*Id.* ¶ 16). Defendant Brooks Keel was at all relevant times Augusta's President. (*Id.* ¶ 17).

Mr. Crowther's classes included painting of various levels, drawing of various levels, world humanities, marvel of art, and 2D design. (*Id.* ¶ 86). He was promoted in February 2020 to Senior Lecturer. (*Id.* ¶ 88). As well as teaching art courses, Mr. Crowther also exhibits his

1. Because this case is before the Court on a Motion to Dismiss, the following facts are drawn from Plaintiff's Complaint and are accepted as true. *Cooper v. Pate*, 378 U.S. 546, 546, 84 S. Ct. 1733, 12 L. Ed. 2d 1030 (1964).

art regularly. (*Id.* ¶ 89). His work focuses heavily on oil painting landscapes as well as the nude figure. (*Id.*). Due to the nature of his work, his classes often feature nude models, as is typical for such art courses. (*Id.* ¶ 90). On days when there was a model for the class, the model would go into the classroom and change into a robe in a separate room, and then would go into the classroom where the students were ready to draw. (*Id.*). While drawing the model, students were directed to put their cell phones away for the remainder of the class. (*Id.*).

During one particular class, one of Mr. Crowther's students was struggling to draw a model's foot in the model's seated position. (*Id.* ¶ 91). After being asked for help, Mr. Crowther asked the model if he could take a picture from the student's view to assist her drawing. (*Id.* ¶ 92). The model consented to the photo being taken. (*Id.*). Mr. Crowther took the photo, blurred out the model's genitalia and face, showed the model the photo for her consent, and after the model consented, projected the photo onto the screen so that the student could trace the model's foot. (*Id.* ¶ 93). Mr. Crowther did not take any other pictures of the model on that occasion. (*Id.* ¶ 94).[2]

On February 21, 2020, a confidential tip was sent to the Augusta Police that Mr. Crowther had been using his cell phone to photograph nude art models during class, and this information was later forwarded to Ms. Reed and Mr. Thorp. (*Id.* ¶¶ 96-97).

2. Mr. Crowther also alleges that he had only taken a picture of a model on one other occasion at that model's express request. (Compl. ¶ 95).

Appendix B

On March 2, 2020, Ms. Reed sent an email asking to meet with Mr. Crowther "regarding allegations" and stated that she "oversee[s] the Student Sexual Misconduct policy" and would "provide [Plaintiff] with due process." (*Id.* ¶ 96).

Mr. Crowther met with Ms. Reed on March 3, 2020, and she informed him about the allegations concerned touching students in class and taking photos of a nude model, against class policy. (*Id.* ¶ 100). She informed Mr. Crowther that he would receive her intake notes and summary of the interview and would be assigned investigators promptly. (*Id.* ¶ 102).

Mr. Crowther makes several allegations about learning about a "smear campaign" being orchestrated against him by students. (*Id.* ¶¶ 103-08). One student who reached out to him to warn him about the alleged campaign was put on his witness list for the investigation but was never interviewed. (*Id.* ¶ 109).

On March 11, 2020, Mr. Crowther reached out to Ms. Reed after not receiving the intake notes and summary she stated she would send. (*Id.* ¶ 110). Later that day, Ms. Reed emailed him her intake notes in an email that also designated Renee Wray and Debra Arnold as the unofficial investigators of the matter. (*Id.*) That same day, Mr. Crowther was approached by Mr. Thorp to inform Mr. Crowther that he was being placed on administrative leave with pay pending the outcome of the investigation. (*Id.* ¶ 111). He also received an email from the Dean of the College of Arts, Elna Green, confirming

the administrative leave. (*Id.* ¶ 112). Mr. Thorp told Mr. Crowther that he was to immediately leave campus and not return, despite the fact that the University had been informed of the allegations weeks prior and had taken no interim action. (*Id.* ¶ 113).

On March 26, 2020, after Mr. Crowther had sent several forms of correspondence to which he not received responses, he received an email addressed to "Professor Thorp" from Ms. Reed, designating Renee Wray and Debra Arnold as the official investigators. (*Id.* ¶ 116-120). In this email, Ms. Reed included part of the misconduct policy which states "[w]here a case is not resolved through informal resolution, or informal resolution is not available, due to the nature of the charges, the matter will be heard through a hearing officer or a hearing panel." (*Id.* ¶ 121). The email also suggested that he submit a written statement and gather relevant documents and evidence. (*Id.* ¶ 122). Mr. Crowther prepared his statement and evidence and submitted the documents to the investigators on March 30. (*Id.* ¶ 123).

On March 31, 2020, Mr. Crowther received an email from Ms. Reed in which she stated that the two previously assigned investigators were not available due to an undisclosed conflict of interest and that she would be sending another letter designating new official investigators. (*Id.* ¶ 124). On April 6, 2020, Mr. Crowther received another email which designated Mr. Hutton and Justin Jerome as the new official investigators. (*Id.* ¶ 125).

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On April 10, 2020, Ms. Reed emailed Mr. Crowther concerning his witness list, asking him to indicate the relevance of each witness. (*Id.* ¶ 126). Mr. Crowther promptly replied by email, indicating the relevance of his witnesses. (*Id.*). The University refused to disclose the identities of the individuals who made the complaints against Mr. Crowther, presumably to protect the witnesses from retaliation. (*Id.* ¶ 127). A group of students spoke to the investigators about their allegations, which Mr. Crowther maintains were false and lacking in credibility for various reasons. (*Id.* ¶¶ 128-135).

On April 22, 2020, Mr. Thorp contacted Mr. Crowther via email regarding his annual evaluation. (*Id.* ¶ 136). The evaluation not only mentioned the ongoing Title IX investigation, but also gave Mr. Crowther the lowest possible ratings in every category. (*Id.*). Mr. Thorp claimed that the ratings were due to a pattern of "improper behavior" by Mr. Crowther. (*Id.* at 138). Until that evaluation, Mr. Crowther had continuous, positive annual evaluations, as well as peer and student reviews, since his initial employment in 2006. (*Id.*).

Mr. Crowther submitted a rebuttal to the evaluation on May 4, 2020, citing his years of positive evaluations, but Mr. Thorp disregarded the rebuttal and stated that Mr. Crowther would not be needed to teach the summer classes he was scheduled to teach. Mr. Thorp then stated that he needed to have an "urgent" meeting with him. (*Id.* ¶ 139).

On May 8, 2020, Mr. Crowther had his meeting with Mr. Thorp and Dean Greene. In that meeting, Mr. Thorp

stated that he was initiating the process to terminate Mr. Crowther with cause, and that he could resign or else he would be terminated. (*Id.* ¶ 146). Mr. Crowther alleges that Mr. Thorp cited a written "aide to memory" from ten years prior as well as the Departmental Life Model "Policy," neither of which were proper grounds for removal under the Board of Regents Policy. (*Id.* ¶ 147).

On May 13, 2020, Mr. Crowther had his initial investigatory meeting with Investigators Jerome and Hutton. (*Id.* ¶ 149). In the meeting, the investigators continued to refuse to disclose the identities of the complainants (*Id.* ¶ 150). On May 21, 2020, Mr. Crowther submitted an official grievance letter to the Grievance Committee detailing what he presumed was his termination after his termination meeting with Mr. Thorp. (*Id.* ¶ 151). However, the sub-committee's initial report stated that he could not "grieve" the termination because the termination had not yet come to pass. (*Id.*). The sub-committee stated that, in any event, only the President of the University could issue terminations. (*Id.*). On May 27, 2020, after submitting the grievance, Mr. Crowther noticed that close to $1,000 was missing from his paycheck. Mr. Crowther contacted Mr. Thorp, who stated that it was a "mistake." (*Id.* ¶ 152). On June 4, 2020, Mr. Crowther received an email from Assistant Provost, Kathy Browder, informing him that the faculty committee had completed their review of Mr. Crowther's termination process initiated by Mr. Thorp. The faculty committee did not recommend termination, but rather recommended "further inquiry" into the matter. (*Id.* ¶ 153).

Mr. Crowther provided the Investigators with the statements of at least three models, including the very model that he was alleged to have photographed, and the investigators interviewed one of them (though not the model in question) on June 9, 2020. (*Id.* ¶ 157-161). He provided twenty-two more written statements that he contended refuted the complainants' allegations by stating that he did not act inappropriately with his students at any time. (*Id.* ¶ 162). However, the investigators declined to interview all twenty-two of these witnesses and deemed them irrelevant character witnesses. (*Id.*).

On June 19, 2020, Investigator Hutton emailed Mr. Crowther the Initial Title IX Report. (*Id.* ¶ 164). The report listed Professors Pacheco, Onofrio, and Mr. Thorp, University faculty mandatory reporters, as the complainants instead of the students who initially made the complaints. (*Id.*) The complaining students were listed as anonymous witnesses, as the University continued to refuse to disclose their identities. (*Id.*).

Mr. Crowther was given a three-business-day response deadline, which was not extended at his request. (*Id.* ¶ 165). He submitted a response, pointing out his perceptions of the complainants' inaccuracies and shortcomings. (*Id.* ¶ 173). On June 30, 2020, he received the First Final Report, and on July 2, 2020, he received the Second Final Report. (*Id.* ¶¶ 176, 186). Throughout this time, Mr. Crowther pointed to further perceived shortcomings and inaccuracies. (*See generally id.*). On July 9, 2020, Mr. Crowther received a letter from Kim Davies, Interim Dean of the College of Arts, Humanities

and Social Sciences, stating that he was suspended for the Fall 2020 semester due to a violation of the Sexual Harassment Policy. (*Id.* ¶¶ 188, 191). The letter did not give an explanation, but rather just said that based on the report, she agreed with the recommended one-semester suspension. (*Id.* ¶ 191).[3]

Mr. Crowther appealed the finding of responsibility to Augusta's Executive Vice President and Provost, but his appeal was denied. (*Id.* ¶¶ 195-96). He appealed again to Mr. Keel, President of Augusta on July 28, 2020, who again denied the appeal. (*Id.* ¶¶ 197-98). On August 19, 2020, Mr. Crowther submitted the final appeal of the decision to Legal Affairs but did not receive a response to his appeal. (*Id.* ¶ 199).

Although Legal Affairs still had not contacted Mr. Crowther regarding his appeal, Dean Davies emailed him on October 14, 2020, to notify him that his role as Senior Lecturer would not be renewed for the 2021-2022 school year. (*Id.* at 202). As such, Mr. Crowther was effectively terminated after the Spring 2021 semester while his appeal was still pending. (*Id.* at 202). That same day, he

3. Meanwhile, Mr. Crowther had submitted a records request for the student-complainants' names to university legal affairs on June 23, 2020. (*Id.* ¶ 170). On July 11, 2020, after the investigation ended, Mr. Crowther received a response from Legal Affairs concerning his information request, stating that because the investigation was closed, they could not provide the identities of the complainants. (*Id.* ¶ 193). Mr. Crowther accuses Legal Affairs of waiting to respond to him until the close of the investigation so that they would not be obligated to provide him with the names of the complainants. (*Id.* ¶ 194).

received a "Notice of Reassignment of Duties" which he characterizes as "essentially a demotion." (*Id.* ¶ 203-04). The reassignment letter referenced a 2020 memorandum which Mr. Crowther later learned cited five instances of his alleged prior behavior including

> (1) an incident dating back to 2010, which had been dealt with by Plaintiff signing an agreement with the school that was never violated, and had not even been brought up in annual evaluations in the ten years prior; (2) a 2019 Title IX investigation which was dismissed due to the fact that there was no evidence for the baseless claims; (3) the 2020 Title IX investigation; (4) violation of the Departmental Life Model Policy, which, as stated above, was not a policy that was ever adhered to nor were any faculty aware of; and (5) contact with a student witness in the 2020 Title IX investigation, which Plaintiff was completely unaware of as the student witnesses were anonymous.

(*Id.* ¶ 207).

Mr. Crowther also appealed his nonrenewal. (*Id.* ¶ 209-212). After some back and forth, Legal Affairs eventually denied both of his appeals. (*Id.* ¶ 213-19). This lawsuit followed.[4]

4. At some point, Mr. Crowther filed charges of employment discrimination with the Equal Employment Opportunity Commission (EEOC) and has stated that he intends to amend

Appendix B

Mr. Crowther raises three Counts in his Complaint. Count I is a claim against BOR only for a violation of Title IX of the Education Amendments of 1972 ("Title IX") on an Erroneous Outcome theory. Count II is a claim against BOR only for a violation of Title IX on a retaliation theory. Count III is a claim against all defendants under 42 U.S.C. § 1983 ("Section 1983") for gender discrimination.

Legal Standard

To survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). For the purposes of a motion to dismiss, the court must accept all factual allegations in the complaint as true; however, the court is not bound to accept as true a legal conclusion couched as a factual allegation. *Twombly*, 550 U.S. at 555. "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Iqbal*, 556 U.S. at 679. Although the plaintiff is not required to provide "detailed factual allegations" to survive dismissal, "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* at 678; *Twombly*, 550 U.S. at 555.

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the Complaint to include relevant federal and state claims once he receives a right to sue notice. (Compl. at 4 n.1).

Appendix B

Discussion

The Court begins by discussing the Title IX claims against Defendant BOR and then discusses the Section 1983 claims against all Defendants.

I. Title IX Claims

Mr. Crowther's first two claims are against BOR under Title IX. "The Supreme Court has recognized an implied right of action for money damages in Title IX cases of intentional sexual discrimination. . . ." *Doe v. School Bd. of Broward Cnty., Fla.*, 604 F.3d 1248, 1254 (11th Cir. 2010). The Supreme Court has further held that "retaliation is discrimination 'on the basis of sex' because it is an intentional response to the nature of the complaint: an allegation of sex discrimination" and thus "when a funding recipient retaliates against a person *because* he complains of sex discrimination, this constitutes intentional 'discrimination' 'on the basis of sex' in violation of Title IX." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 174, 125 S. Ct. 1497, 161 L. Ed. 2d 361, (2005) (quoting 20 U.S.C. § 1681(a)) (emphasis in original).

A. Effect of Title VII

BOR first argues that claims under Title IX for employment discrimination are "preempted" by Title VII of the Civil Rights Act of 1964. (Br. Supp. BOR MSJ at 12, Doc. 32). While there is a circuit split on the issue (as discussed below), the Eleventh Circuit has not yet decided the issue. *Heatherly v. Univ. of Ala. Bd. of Trs.*, 778 F. App'x 690, 694 (11th Cir. 2019).

As an initial matter, strictly speaking, "this is not a pre-emption case." *POM Wonderful LLC v. Coca-Cola Co.*, 573 U.S. 102, 111, 134 S. Ct. 2228, 189 L. Ed. 2d 141 (2014). "In pre-emption cases, the question is whether state law is pre-empted by a federal statute, or in some instances, a federal agency action." *Id.* (citing *Wyeth v. Levine*, 555 U.S. 555, 563, 129 S. Ct. 1187, 173 L. Ed. 2d 51 (2009).[5] "This case, however, concerns the alleged preclusion of a cause of action under one federal statute by the provisions of another federal statute." *Id.* The Supreme Court has held that while its "pre-emption precedent does not govern preclusion analysis . . . , its principles are instructive insofar as they are designed to assess the interaction of laws that bear on the same subject." *Id.* at 111-12.

The leading decision supporting the approach that Title VII bars employment claims under Title IX is the Fifth Circuit's decision in *Lakoski v. James*, 66 F.3d 751, 752 (5th Cir. 1995). As the *Lakoski* court noted, Title VII originally "exempted educational institutions from its coverage." *Id.* at 756. However, around the same time that Congress was considering what eventually became Title IX, Congress passed the Equal Employment Opportunity Act of 1972, "which removed Title VII's exemption for educational institutions as well as extend[ed] Title VII's coverage to state and local government employees." *Id.* at 757. As the court noted, original drafts of what would

5. Somewhat adding to the confusion, older Supreme Court cases appear to use the terms indistinguishably. *See e.g.*, *Great American Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 378, 99 S. Ct. 2345, 60 L. Ed. 2d 957 (1979); *Brown v. Gen. Servs. Admin.*, 425 U.S. 820, 835 (1976).

become Title IX originally proposed to remove the education exemption, but that language was dropped from later versions in light of the intervening law change. *Id.* The Fifth Circuit examined the similarity of the laws and concluded "[t]hat Congress intended to create a bypass of Title VII's administrative procedures so soon after its extension to state and local governmental employees is an extraordinary proposition," especially where "Congress enacted Title IX only months after extending Title VII to state and local governmental employees." *Id.* at 756.

The Fifth Circuit also looked to other cases where the Supreme Court held that Title VII's carefully drawn administrative procedures precluded a more general claim targeting the same conduct. *Id.* at 755 (citing *Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 378, 99 S. Ct. 2345, 60 L. Ed. 2d 957 (1979); *Brown v. Gen. Servs. Admin.*, 1976 U.S. LEXIS 101, 425 U.S. 820, 835 (1976)). For example, in *Great American*, "the Court held that Title VII preempts § 1985 actions alleging violations of Title VII rights, [noting that] '[i]f a violation of Title VII could be asserted through § 1985(3), a complainant could avoid most if not all of [Title VII's] detailed and specific provisions of the law [and] . . . could completely bypass the administrative process, which plays such a crucial role in the scheme established by Congress in Title VII.'" *Id.* at 755 (citing 422 U.S. at 375-376). Similarly, it noted that the Supreme Court in *Brown* "held that Title VII provides the exclusive judicial remedy for federal employees' claims of employment discrimination." *Id.* (citing 425 U.S. at 834).

The Third Circuit took the opposite approach in *Doe v. Mercy Catholic Medical Center*, 850 F.3d 545, 560 (3d Cir. 2017), holding that "Title VII's concurrent applicability does not bar [plaintiff's] private causes of action for retaliation and quid pro quo harassment under Title IX." The Third Circuit recognized that cases such as *Brown* precluded federal employment discrimination claims under other statutes, but distinguished those cases and pointed to other cases where the Supreme Court permitted similar federal anti-discrimination claims to proceed in an employment context. *Id.* at 560-60 (citing *Johnson v. Ry. Exp. Agency, Inc.*, 421 U.S. 454, 461, 95 S. Ct. 1716, 44 L. Ed. 2d 295 (1975)). For example, it noted that in *Johnson*, the Court observed that "remedies available under Title VII and under § 1981 [for race discrimination], although related, and although directed to most of the same ends, are separate, distinct, and independent." *Id.* at 560 (citing 421 U.S. at 461). In that case, the Court explained that "Title VII 'manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable' federal statutes." *Id.* (quoting 421 U.S. at 461).

The Third Circuit also pointed to the Supreme Court's decision in *North Haven Board of Education v. Bell*, 456 U.S. 512, 102 S. Ct. 1912, 72 L. Ed. 2d 299 (1982). *Id.* at 561. In that case, the Supreme Court upheld "regulations interpreting Title IX to extend to sex-based employment discrimination," and in doing so, "rejected the argument that Title IX shouldn't extend to private employment because employees have 'remedies other than those available under Title IX,' like Title VII. *Id.* (quoting 456

U.S. at 516, 535 n.26) ("Even if 'alternative remedies are available and their existence is relevant," it rejoined, 'Congress has provided a variety of remedies, at times overlapping, to eradicate employment discrimination.'").

Perhaps most significantly, the Third Circuit pointed to the Supreme Court's decision in *Jackson*, which recognized a Title IX retaliation claim in the employment context and post-dated the Fifth Circuit's decision in *Lakoski. Mercy Cath.*, 850 F.3d at 562 (citing 544 U.S. 167).[6]

Courts in this district have tended to follow the *Lakoski* approach. *Reese v. Emory Univ.*, No. 1:14-CV-2222-SCJ, 2015 U.S. Dist. LEXIS 193183, 2015 WL 13649300, at *5 (N.D. Ga. Jan. 29, 2015); *Cooper v. Bd. of Regents of the Univ. of Ga.*, No. 1:16-cv-01177-TWT-JFK, 2017 U.S. Dist. LEXIS 56753, 2017 WL 1370769, at *1 (N.D. Ga. Feb. 22, 2017), *report and recommendation adopted*, 2017 U.S. Dist. LEXIS 56512, 2017 WL 1354819 (N.D. Ga. Apr. 13, 2017); *Joseph v. Bd. of Regents of Univ. Sys. of Ga.*, No.. 1:20-cv-502-TCB, 2020 U.S. Dist. LEXIS

6. However, courts have distinguished *Jackson* on the grounds that the Title IX retaliation claim recognized in that case would not have been available under Title VII. *Kavianpour v. Bd. of Regents of the Univ. Sys. of Ga.*, No. 1:20-cv-00152-MLB-RGV, 2018 U.S. Dist. LEXIS 244055, 2021 WL 2638999, at *18 n.24 (N.D. Ga. Jan. 28, 2021), *report and recommendation adopted on other grounds*, 2021 U.S. Dist. LEXIS 126686, 2021 WL 2635854 (N.D. Ga. Mar. 29, 2021).

208570, 2020 WL 6494202, at *4 (N.D. Ga. May 8, 2020)[7] ; *Kavianpour v. Bd. of Regents of the Univ. Sys. of Ga.*, No. 1:20-cv-00152-MLB-RGV, 2018 U.S. Dist. LEXIS 244055, 2021 WL 2638999, at *18 n.24 (N.D. Ga. Jan. 28, 2021), *report and recommendation adopted on other grounds*, 2021 U.S. Dist. LEXIS 126686, 2021 WL 2635854 (N.D. Ga. Mar. 29, 2021); *Wainberg v. Piedmont Coll.*, No. 2:19-cv-00251-MHC, slip op. at 50 (N.D. Ga. Mar. 7, 2023), ECF No. 194.

However, some recent academic commentary has favored the Third Circuit's approach. *See*, *e.g.*, Lynn Ridgeway Zehrt, *Title IX and Title VII: Parallel Remedies in Combatting Sex Discrimination in Educational Employment*, 102 Marq. L. Rev. 701 (2019); Kim Turner, *The Rights of School Employee-Coaches Under Title VII and Title IX in Educational Athletic Programs*, 32 ABA J. Lab. & Emp. L. 229 (2017); *but see* Alicia Martinez, *Following the Fifth Circuit: Title VII As the Sole Remedy for Employment Discrimination on the Basis of Sex in Educational Institutions Receiving Federal Funds*, 27 Am. U. J. Gender Soc. Pol'y & L. 73, 76 (2018).

The Court ultimately resolves this split in authority by beginning where it started: the Supreme Court's principles of federal statutory preclusion. *POM Wonderful*, 573 U.S. at 111-12. ("Although the Court's pre-emption precedent does not govern preclusion analysis in this case, its

7. The decision in *Joseph* was issued before reassignment of that case to the undersigned. The Court was later faced with the opposite issue: under what circumstances Title IX violations may support a Title VII claim.

principles are instructive insofar as they are designed to assess the interaction of laws that bear on the same subject."). "[T]his is a statutory interpretation case and the Court relies on traditional rules of statutory interpretation. That does not change because the case involves multiple federal statutes." *Id.* at 122 (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 137-139, 120 S. Ct. 1291, 146 L. Ed. 2d 121 (2000)).

First, nothing in Title VII "in express terms, forbids or limits" Title IX employment discrimination claims. *Id.* at 113. On the contrary, its preemption provision broadly allows for state laws that provide greater protection. 42 U.S.C. § 2000e-7 ("Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter."); *cf. POM Wonderful*, 573 U.S. at 114 ("By taking care to mandate express pre-emption of some state laws, Congress if anything indicated it did not intend the FDCA to preclude requirements arising from other sources.").

Second, Congress has taken no action in the 40 years since the Supreme Court approved the Department of Education's regulation of employment in higher education, despite the EEOC's concurrent jurisdiction. *N. Haven*, 456 U.S. at 520, 534-45 (discussing congressional inaction in response to HEW regulations); *cf. POM Wonderful*, 573 U.S. at 112 (quoting *Wyeth v. Levine*, 555 U.S. 555, 575,

129 S. Ct. 1187, 173 L. Ed. 2d 51 (2009)) ("This is 'powerful evidence that Congress did not intend FDA oversight to be the exclusive means' of ensuring proper food and beverage labeling.").

Finally, looking to the structure of the statutes, the Court finds that they complement each other. *POM Wonderful*, 573 U.S. at 115. (citing *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 144, 122 S. Ct. 593, 151 L. Ed. 2d 508 (2001); *Wyeth*, 555 U.S. at 578-579) ("When two statutes complement each other, it would show disregard for the congressional design to hold that Congress nonetheless intended one federal statute to preclude the operation of the other."). For example, while Congress tasked EEOC with remedying private employment discrimination through conciliation and, where appropriate, individual enforcement actions, the Supreme Court has already recognized that Congress allowed for more proactive enforcement actions targeting employment discrimination against recipients of federal education funding by the Department of Education and its predecessor agency. *Contra N. Haven*, 456 U.S. at 552-53 (Powell, J., dissenting) ("Title VII is a comprehensive antidiscrimination statute with carefully prescribed procedures for conciliation by the EEOC . . . in sharp contrast to Title IX, which contains only one extreme remedy, fund termination. . . . Congress delegated the administration of Title IX to the Department of HEW. In contrast, Title VII and the Equal Pay Act are administered by the Department of Labor and EEOC."). Similarly, it is not unreasonable to assume that Congress would have a special interest in ensuring that recipients

of federal educational funding be compensated for harm suffered from discrimination. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704, 99 S. Ct. 1946, 60 L. Ed. 2d 560 (1979) ("Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices. Both of these purposes were repeatedly identified in the debates on the two statutes."). That this objective overlaps with Congress's objective of curbing workplace discrimination writ large does not imply that one remedy excludes the other. *Cf. Johnson*, 421 U.S. at 465-66 ("But the fundamental answer to petitioner's argument lies in the fact—presumably a happy one for the civil rights claimant—that Congress clearly has retained § 1981 as a remedy against private employment discrimination separate from and independent of the more elaborate and time-consuming procedures of Title VII."). Accordingly, the Court holds that Title VII does not preclude employment discrimination claims under Title IX.

B. Pleading Standards

Next, BOR argues that Mr. Crowther does not plead a prima facie case of sex discrimination. Specifically, BOR argues that Mr. Crowther does not plead the existence of a comparator under the *McDonnell Douglas* framework. (Br. Supp. MTD at 22) (citing *Lewis v. City of Union City, Ga.*, 918 F.3d 1213, 1221 (11th Cir. 2019). In response, Mr. Crowther argues that because his sex discrimination claim is premised on an "erroneous outcome" theory, the *McDonnell Douglas* pleading standards do not apply.

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Courts in this circuit as well as out-of-circuit appeals courts have held that a Title IX sex discrimination claim can be premised on a so-called "erroneous outcome theory." *Doe v. Lynn Univ., Inc.*, 235 F. Supp. 3d 1336, 1339 n.2 (S.D. Fla. 2017) (collecting cases). These courts tend to follow the Second Circuit's framework established in *Yusuf v. Vassar College*, 35 F.3d 709 (2d Cir. 1994). "The Second Circuit held in Yusuf that Title IX 'bars the imposition of university discipline where gender is a motivating factor in the decision to discipline,'" and "identified two general categories of Title IX challenges to university disciplinary proceedings." *Lynn Univ*, 235 F. Supp. 3d at 1339 (quoting *Yusuf*, 35 F.3d at 715).

> Some plaintiffs allege that, guilt or innocence aside, the student's gender affected the penalty imposed, the decision to initiate the proceeding, or both—these are selective enforcement challenges. Other plaintiffs allege that gender bias played a role in the wrongful conviction of an innocent student—these are erroneous outcome challenges.

Id. (citing *Yusuf*, 35 F.3d at 715) (internal citations omitted). For the latter category of cases, "*Yusuf* provides that a plaintiff bringing an erroneous outcome challenge must plead two elements: (1) facts sufficient to cast doubt on the accuracy of the proceeding and (2) a causal connection between the flawed outcome and gender bias." *Id.* (citing *Yusuf*, 35 F.3d at 715). The Eleventh Circuit has not expressly adopted this pleading standard, but in *Doe v. Valencia College*, 903 F.3d 1220, 1236 (11th Cir. 2018), it

"assume[d] for present purposes that a student can show a violation of Title IX by satisfying the 'erroneous outcome' test applied by the Second Circuit in *Yusuf*."

For the purpose of pleading a violation of Title IX, the Court will likewise assume that meeting the *Yusuf* standard is sufficient. That is to say, the Court will assume for present purposes that pleading facts sufficient to cast doubt on the accuracy of the proceeding as well as a causal connection between the outcome and gender bias is sufficient to raise a plausible inference that a Title IX violation occurred. The Court reserves the question of what evidence is necessary to prove a Title IX violation on an erroneous outcome theory for a motion for summary judgment or trial.

The Court finds that Mr. Crowther has stated a claim under *Yusuf*. Mr. Crowther has pled that he provided the investigators with a statement from the model that he was alleged to have photographed leading to the investigation, but the Investigators did not even interview her. (*Id.* ¶ 157-161). Moreover, to the extent that the investigation was later broadened into a more general investigation of his propensity for sexual harassment, he was entitled to put forward some evidence of his character to the contrary. However, "none of the witnesses that Plaintiff had named in his response to the Initial Report were interviewed. Rather, all but [former model] ML were named as irrelevant character witnesses. ML, on the other hand, while not 'irrelevant,' was not interviewed by the Investigator." (*Id.* at 177). Thus, the Court finds that Mr. Crowther has met his pleading burden on the first *Yusuf* prong.

As to the second prong, Mr. Crowther first points to several instances of Defendants promoting narratives aimed at curbing sexual harassment and assault against women, including on social media. However, the Court is not willing to skew this innocuous sentiment that is likely shared by most educators into evidence of bias against men. Mr. Crowther also points to a 2011 Dear Colleague Letter from the Department of Education's Office for Civil Rights and follow-up 2014 Q&A for evidence that there was "pressure on Augusta from the federal government." (Resp. at 12; Compl. ¶¶ 25-46). But if the Court were to adopt this line of logic, it would mean nearly every Title IX investigation in a four-to six-year period would be subject to scrutiny.

Ultimately, the Court must focus on the facts of *this* case, rather than the larger national political debate, to determine whether Mr. Crowther has met his pleading standard. There are a couple of facts present here which "nudge[] [Plaintiff's] claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570. First, the majority of Mr. Crowther's classes were reassigned to female instructors. (*Id.* ¶ 192); *Cf. Cuddeback v. Fla. Bd. of Educ.*, 381 F.3d 1230, 1235 (11th Cir. 2004) (holding, in Title VII context, that replacement by someone outside the protected class can establish a prima facie case of discrimination).

Second, he alleges that after the investigation commenced, he received the lowest possible ratings in his annual evaluation, despite the fact that the investigation had not yet been adjudicated. (Compl. ¶ 136-138).

Moreover, he was pressured to resign prior to the outcome of the investigation. (*Id.* ¶ 146). This lends credence to Mr. Crowther's allegations that he was targeted for reasons other than the outcome of the investigation.

Finally, Mr. Crowther has alleged that Defendants applied university policies in a manner that resulted in harsher penalties for males accused of sexual misconduct as compared to females.[8] The Second Circuit found this allegation, properly contextualized, was sufficient to proceed with a complaint under Title IX. *Yusuf v. Vassar Coll.*, 35 F.3d 709, 716 (2d Cir. 1994) (Finally, he asserts that males accused of sexual harassment at Vassar are "historically and systematically" and "invariably found guilty, regardless of the evidence, or lack thereof."). For all of these reasons, the Court finds that Mr. Crowther has stated a claim for Title IX discrimination on an erroneous outcome theory.

Likewise, the Court finds that Mr. Crowther has stated a claim for retaliation, because, among other reasons, Mr. Crowther alleged he was pressured to resign after having engaged in protected activity by defending himself against the Title IX charges. *Cf. Hargray v. City of Hallandale*, 57 F.3d 1560, 1568 (11th Cir. 1995) (forcing a resignation by "coercion or duress" is adverse employment action).

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8. Mr. Crowther recognizes that he will need to substantiate this allegation with evidence through discovery going forward. (Compl. ¶ 55 n.13).

C. Prospective Relief

Finally, BOR claims Mr. Crowther's claims for injunctive relief are barred by the Eleventh Amendment. Specifically, BOR points to Mr. Crowther's requests that BOR "reverse the outcome and findings of the Title IX investigation; to expunge his disciplinary record; to remove any mention of the investigation from his files; and to 'issue an update/correction to any third parties to whom Plaintiff's disciplinary record may have been disclosed.'" (Br. Supp. BOR MSJ at 14) (citing Compl.).

Injunctive relief is available under the implied cause of action under Title IX recognized by *Cannon*. *Adams by & through Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 811 (11th Cir. 2022) (citing *Cannon*, 441 U.S. at 717). Nevertheless, BOR asserts that it is immune from such relief in this case, pointing to Judge Cohen's decision in *Go v. Board of Regents*, No. 1:18-cv-0233-MHC (N.D. Ga. Nov. 1, 2018). But *Go* was not a Title IX case. BOR is not immune from claims under Title IX because in accepting federal funds under Title IX "[BOR] waived its Eleventh Amendment sovereign immunity." *Pederson v. La. State Univ.*, 213 F.3d 858, 876 (5th Cir. 2000); *see also* 42 U.S.C. § 2000d-7(a)(1) ("A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of . . . title IX of the Education Amendments of 1972."). The Court addresses the remainder of BOR's arguments relating to injunctive relief below in its discussion about Mr. Crowther's Section 1983 claims, but will deny the BOR MTD as to the Title IX claims.

II. Section 1983 Claims

Count III of Mr. Crowther's Complaint raises Section 1983 claims against all Defendants. "To prevail on a claim under § 1983, a plaintiff must demonstrate both (1) that the defendant deprived her of a right secured under the Constitution or federal law and (2) that such a deprivation occurred under color of state law." *Arrington v. Cobb Cty.*, 139 F.3d 865, 872 (11th Cir. 1998) (citing *Willis v. Univ. Health Serv.*, 993 F.2d 837, 840 (11th Cir. 1993)). "One such law is the Equal Protection Clause, U.S. Const. amend. XIV, § 1, which confers a federal constitutional right to be free from sex discrimination." *Hill v. Cundiff*, 797 F.3d 948, 976 (11th Cir. 2015) (citations omitted); see also *Williams v. Bd. of Regents of Univ. Sys. of Ga.*, 477 F.3d 1282, 1302 (11th Cir. 2007) (citation omitted) ("The Equal Protection Clause confers a federal constitutional right to be free from sex discrimination."); *Venice v. Fayette Cty.*, No. 3:09-cv-35-JTC, 2010 U.S. Dist. LEXIS 150525, 2010 WL 11507614, at *2 (N.D. Ga. Sept. 16, 2010) (citation omitted) ("[T]he Equal Protection Clause of the United States Constitution[] prohibits unlawful sex discrimination in public employment."). "In order to establish a violation of the Equal Protection Clause, appellees must prove discriminatory motive or purpose." *Cross v. State of Ala., State Dep't of Mental Health & Mental Retardation*, 49 F.3d 1490, 1507 (11th Cir. 1995) (citing *Whiting v. Jackson State Univ.*, 616 F.2d 116, 122 (5th Cir. 1980)).

The Equal Protection Clause is essentially a direction that all persons similarly situated should be treated alike.

Glenn v. Brumby, 632 F. Supp. 2d 1308, 1312 (N.D. Ga. 2009), *aff'd*, 663 F.3d 1312 (11th Cir. 2011) (citation and quotation omitted); see also *Hossain v. Steadman*, 855 F. Supp. 2d 1307, 1312 (S.D. Ala. Jan. 25, 2012) (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985)) ("The mandate of the Equal Protection Clause essentially 'is that all persons similarly situated should be treated alike.'"). "In order to state an equal protection claim, the plaintiff must prove that he was discriminated against by establishing that other similarly-situated individuals outside of his protected class were treated more favorably." *Amnesty Int'l, USA v. Battle*, 559 F.3d 1170, 1180 (11th Cir. 2009); *see also Jarrett v. Alexander*, 235 F. Supp. 2d 1208, 1212 (M.D. Ala. 2002) (citation omitted) (explaining that to survive a motion to dismiss on an equal protection sex discrimination claim against a defendant in his individual capacity, "the Plaintiff[] still must show that [she was] treated differently from others similarly situated.").

All Defendants seek dismissal of Mr. Crowther's Section 1983 claims.[9] First, they assert that as to claims for monetary relief against BOR and the individual defendants in their official capacity, no remedy is available under Section 1983. *See*, *e.g.*, *Nicholl v. Bd. of Regents of the Univ. Sys. of Ga.*, 706 F. App'x 493, 495 (11th Cir. 2017). Mr. Crowther does not appear to contest this assertion, and the Court agrees as well. As such, the Court will grant the motion to the extent it seeks dismissal of these

9. The Court disagrees with Defendant Reed that the Complaint is a "shotgun pleading."

claims. Next, the individual defendants in their individual capacity seek dismissal of the claims for monetary relief on qualified immunity grounds, which the Court addresses in the following section. Lastly, the BOR and the individual defendants in their official capacity seek dismissal of the claims for injunctive relief pursuant to *Ex Parte Young* and the Eleventh Amendment.

A. Qualified Immunity

"A district court must dismiss a complaint under Fed. R. Civ. P. 12(b)(6) when the complaint's allegations, on their face, show that an affirmative defense bars recovery on the claim." *Nichols v. Maynard*, 204 F. App'x 826, 828 (11th Cir. 2006). "Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery." *Id.* (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985)).

"Qualified immunity offers complete protection for individual public officials performing discretionary functions 'insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Sherrod v. Johnson*, 667 F.3d 1359, 1363 (11th Cir. 2012) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)).

To claim qualified immunity, the defendant must first show he was performing a discretionary function.

Moreno v. Turner, 572 F. App'x 852, 855 (11th Cir. 2014). The parties do not appear to dispute that the individual defendants were performing a discretionary function with respect to the allegations in the complaint.

"Once discretionary authority is established, the burden then shifts to the plaintiff to show that qualified immunity should not apply." *Edwards v. Shanley*, 666 F.3d 1289, 1294 (11th Cir. 2012) (quoting *Lewis v. City of W. Palm Beach*, 561 F.3d 1288, 1291 (11th Cir. 2009)).

The plaintiff demonstrates that qualified immunity does not apply by showing "(1) the defendant violated a constitutional right, and (2) th[e] right was clearly established at the time of the alleged violation." *Moreno*, 572 F. App'x at 855 (quoting *Whittier v. Kobayashi*, 581 F.3d 1304, 1308 (11th Cir. 2009)). The "clearly established" requirement may be met by one of three showings: (1) a materially similar case has already been decided; (2) an accepted general principle should control the novel facts of the case with obvious clarity; or (3) the conduct in question so obviously violated the Constitution that no prior case law is necessary. *Loftus v. Clark-Moore*, 690 F.3d 1200, 1204-05 (11th Cir. 2012).

Defendants assert that there is no law on point that clearly establishes that their actions and application of their Title IX policies and procedures were in violation of Mr. Crowther's right to equal protection. Mr. Crowther largely appears to concede this, focusing his response brief on his claims for injunctive relief. The Court agrees that Mr. Crowther has not met his burden of showing that

the individual defendants were on notice that their actions were allegedly unconstitutional. As such, the Court will grant the BOR MTD and Reed MTD on this ground.

B. Injunctive Relief

Mr. Crowther's Section 1983 count seeks "an injunction enjoining violations of the Fourteenth Amendment in the process of investigating and adjudicating sexual misconduct complaints." (Compl. ¶ 279). Defendants assert that that this relief is barred by the Eleventh Amendment, but the Court finds that these claims must be dismissed for a different reason: Mr. Crowther lacks standing to pursue such claims.

"Because standing is a jurisdictional requirement," the Court "must address [it] sua sponte," even if a party fails to raise it. *Klos v. Paulson*, 309 F. App'x 322, 323 n.1 (11th Cir. 2009). "As an irreducible minimum, Article III requires a plaintiff to meet three standing requirements." *Williams*, 477 F.3d at 1302 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992); *Kelly v. Harris*, 331 F.3d 817, 819-20 (11th Cir. 2003)). "First, the plaintiff must show that she has suffered an injury-in-fact." *Id.* (citing *Lujan*, 504 U.S. at 560). "The plaintiff must show that the alleged injury arises from the invasion of a legally protected interest that is sufficiently concrete and particularized, and not abstract and indefinite. *Id.* (citing *Lujan*, 504 U.S. at 560). "Second, the plaintiff must establish a causal connection between the asserted injury-in-fact and the challenged action of the defendant." *Id.* (citing *Lujan*, 504 U.S. at 560).

"Third, the plaintiff must show that it is likely, rather than speculative, "that a favorable decision will redress her injury." *Id.* (citing *Lujan*, 504 U.S. at 561). "Additionally, '[b]ecause injunctions regulate future conduct, a party has standing to seek injunctive relief only if the party alleges, and ultimately proves, a real and immediate—as opposed to a merely conjectural or hypothetical—threat of future injury.'" *Id.* at 1302-03 (quoting *Wooden v. Bd. of Regents of the Univ. Sys. of Ga.*, 247 F.3d 1262, 1284 (11th Cir. 2001)).

Mr. Crowther no longer works at Augusta and does not seek reinstatement as a remedy. (*See generally Compl.*).[10] Therefore, the threat of future harm to Mr. Crowther by BOR continuing to enforce allegedly unconstitutional policies is too remote to confer standing. *See Williams*, 477 F.3d 1282, 1303 ("Williams no longer attends UGA. Williams alleges that if UGA adopts an equal and more protective sexual harassment policy—presumably the one she asks this court to order—she may pursue undergraduate or graduate studies at UGA. Furthermore, she alleges that in the absence of such a policy, the current students at UGA who are the victims of student-on-student harassment suffer from prohibited inequality. Williams's claim that an equal and more protective sexual harassment policy would prevent future harm is too conjectural to warrant injunctive relief.") Accordingly, the Court will dismiss the Section 1983 claims for injunctive relief as well.

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10. The Court does not read the Complaint's request for a "revers[al of] the outcome and findings regarding the anonymous complainants' complaints" as a request for reinstatement, but rather a request that BOR vacate the findings of responsibility made following the investigation.

Appendix B

Conclusion

In summary, the Court allows all of Mr. Crowther's Title IX claims to proceed, but dismisses Mr. Crowther's Section 1983 claims for both monetary and injunctive relief. Mr. Crowther has indicated an intent to amend his Complaint to add a Title VII claim. In light of the circuit split regarding Title VII preclusion of Title IX employment claims, it may be in his interest to do so. Accordingly, Plaintiff is directed to file a status report regarding the progress of the EEOC proceedings, including any expected deadlines for the EEOC to act under 42 U.S.C. § 2000e-5(f)(1), within fourteen days of the date of entry of this Order. Upon receipt of the status report, the Court will enter an order directing further action. Until such time, the Court will stay all proceedings in this case, including the Defendant BOR's answer deadline.

For the reasons the Court gave above, it is

ORDERED that Motion of the Board of Regents of the University System of Georgia ("BOR") and Defendants Scott Thorp, Benjamin Hutton, and Brooks Keel to Dismiss Plaintiff's Complaint (BOR Doc. 32) is **GRANTED IN PART** as to Count III of the Complaint and **DENIED IN PART** in all other respects. It is

FURTHER ORDERED that Motion of Michelle Reed to Dismiss Plaintiff's Complaint (Doc. 33) is **GRANTED**. It is

FURTHER ORDERED that the Clerk is **DIRECTED** to drop Defendants Scott Thorp, Benjamin Hutton, Brooks Keel, and Michelle Reed as parties in this case. It is

FURTHER ORDERED that this case is **STAYED** pending further Order of the Court. Plaintiff is **DIRECTED** to file a status report within fourteen days of the date of entry of this Order.

SO ORDERED this 15th day of March, 2023.

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION, SIGNED MAY 8, 2020

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA,
ATLANTA DIVISION

CIVIL ACTION FILE NO. 1:20-cv-502-TCB

MACHELLE JOSEPH,

Plaintiff,

v.

BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA; GEORGIA TECH ATHLETIC ASSOCIATION; GEORGE P. PETERSON; M. TODD STANSBURY; MARVIS LEWIS; AND SHOSHANNA ENGEL,

Defendants.

Signed May 8, 2020

Timothy C. Batten, Sr., United States District Judge.

ORDER

I. Background

Plaintiff MaChelle Joseph became the head coach for the Georgia Institute of Technology's women's basketball

team in 2003. On March 26, 2019, her employment was terminated. She has sued various entities and individuals affiliated with Georgia Tech, contending that her termination was a result of unlawful discrimination and retaliation. She further contends that her employment was rife with discrimination between herself and her male counterparts.

Joseph alleges that she had an employment contract with Defendants the Board of Regents of the University System of Georgia and the Georgia Tech Athletic Association ("GTAA")[1] providing for her employment as head coach until 2020. Specifically, on October 10, 2014, Georgia Tech offered to renew her employment and provided her an offer letter setting forth the terms and conditions of her employment with Georgia Tech.

On October 20, 2014, Joseph signed a contract with GTAA providing for her employment with Georgia Tech from April 1, 2014 through March 31, 2020. The contract provided that it would be terminated if Joseph's employment as women's basketball head coach was terminated and if GTAA's president determined in his sole discretion that good cause existed for termination. Good cause is defined in the contract as including, but not limited to:

> 1. Conviction of (or entry into pre-trial intervention as a result of) a crime involving moral turpitude or conviction of a felony;

1. GTAA is a nonprofit organization that maintains the intercollegiate program at Georgia Tech.

2. Involvement in conduct that the Athletic Association, in its sole discretion, reasonably considers injurious to the reputation of the Association or the Institute;

3. JOSEPH's failure to substantially perform any of her duties under this Contract;

4. The committing of a major violation of NCAA Legislation by JOSEPH while employed by the Institute or while previously employed at another NCAA member institution, or the committing of a series or pattern of secondary violations of NCAA Legislation while employed by the Institute;

5. The committing of a major violation of NCAA Legislation by a member of JOSEPH's staff while at the Institute of which JOSEPH had prior actual knowledge or should have had prior actual knowledge and did not report in a timely fashion in accordance with all appropriate NCAA, Association and Institute rules, policies and regulations;

6. The committing of a major violation of NCAA Legislation by any representative of the Institute's athletics programs while JOSEPH is at the Institute and of which JOSEP[H] has actual knowledge or should have had actual knowledge, and which JOSEPH did not report in a timely fashion in accordance with all appropriate NCAA, Association and Institute rules, policies and regulations;

7. Serious or repeated misconduct; or

> 8. Any cause adequate to justify the termination of any other non-classified Institute employee.

[1-2] at 86-87.

Joseph alleges that while she was employed at Georgia Tech, she regularly complained that the women's basketball team received inferior treatment to the men's basketball team. She also alleges that the Board of Regents discriminated against her on the basis of her sex and the sex of her players by giving the women's basketball team inferior locker rooms and other facilities, publicity resources, funds for coach and staff salaries, and travel resources in comparison to the men's team. She avers that these differences negatively impacted the terms and conditions of her employment.

Joseph further alleges that her complaints about differential treatment caused the Board of Regents to subject her to unlawful retaliation. Specifically, she alleges what she contends was a baseless written reprimand for excessive alcohol intake from former Georgia Tech Athletic Director Mike Bobinski in 2015. She further alleges that in 2016, Senior Women's Administrator Joeleen Akin pursued a complaint against Joseph too aggressively, leading to a final written warning in November 2016.

Joseph also refers to Georgia Tech's participation in a 2018 NCAA investigation into the women's basketball program and Georgia Tech's 2019 investigation into student-athlete complaints against Joseph. After Georgia Tech received these complaints, it hired a law firm, Littler

Mendelson, P.C., to investigate complaints of player and staff mistreatment by Joseph. After investigating, Littler Mendelson compiled a report in which those interviewed described a toxic, suffocating, unhealthy, and hostile environment, which they attributed to Joseph.

At Georgia Tech's invitation, Joseph responded to the report. Nonetheless, when the investigation was concluded, Georgia Tech's Athletic Director (and GTAA's chief executive officer) Todd Stansbury terminated Joseph's employment.

Joseph has filed this action against Defendants GTAA, the Board of Regents (the "Board"), Stansbury, George "Bud" Peterson (then president of Georgia Tech), Marvin Lewis (Associate Athletic Director of Administration and Finance at Georgia Tech and GTAA's Chief Financial Officer), and Shoshanna Engel (Associate Athletic Director of Compliance and Deputy Title IX Coordinator at Georgia Tech).

Her complaint contains the following claims: (1) discrimination on the basis of sex in violation of Title IX of the Education Amendments a of 1972, 20 U.S.C. §§ 1681, *et seq.* (against the Board and GTAA); (2) discrimination on the basis of sex and association with a protected class (women) in violation of Title IX of the Education Amendments Act of 1972, 20 U.S.C. §§ 1681, *et seq.* (against the Board and GTAA); (3) discrimination on the basis of sex in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (against the Board and GTAA); (4) discrimination on the basis of sex and association with a protected class (women) in violation of Title VII of the

Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (against the Board and GTAA); (5) violation of constitutional and civil rights pursuant to 42 U.S.C. § 1983 and the Equal Protection Clause (against Stansbury in his individual capacity); (6) violation of constitutional and civil rights pursuant to 42 U.S.C. § 1983 and the Equal Protection Clause (against Lewis in his individual capacity); (7) violation of constitutional and civil rights pursuant to 42 U.S.C. § 1983 and the Equal Protection Clause (against Engel in her individual capacity); (8) violation of constitutional and civil rights pursuant to 42 U.S.C. § 1983 and the Equal Protection Clause (against Peterson in his individual capacity); (9) retaliation in violation of Title IX (against the Board and GTAA); (10) retaliation in violation of Title VII (against the Board and GTAA); (11) retaliation in violation of the Georgia Whistleblower Act, O.C.G.A. § 45-1-4 (against the Board and GTAA); (12) retaliatory hostile work environment in violation of Title IX (against the Board and GTAA); (13) retaliatory hostile work environment in violation of Title VII (against the Board and GTAA); (14) breach of contract (against the Board and GTAA); (15) violation of the Georgia Open Records Act, O.C.G.A § 50-18-71 (against the Board); and (16) expenses of litigation under O.C.G.A § 13-6-11 (against all Defendants).

Before the Court are the following motions: (1) the Board's partial motion [3] to dismiss; (2) Engel, Lewis, Peterson, and Stansbury's motion [4] to dismiss; (3) GTAA's motion [6] to dismiss; (4) the Board's motion [29] for partial judgment on the pleadings; and (5) Joseph's motion [32] for leave to file a surreply.

II. Legal Standards

A. Motions to Dismiss

Federal Rule of Civil Procedure 8(a)(2) requires that a complaint provide "a short and plain statement of the claim showing that the pleader is entitled to relief[.]" This pleading standard does not require "detailed factual allegations," but it does demand "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1337 (11th Cir. 2012) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)).

Under Rule 12(b)(6), a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007); *Chandler v. Sec'y of Fla. Dep't of Transp.*, 695 F.3d 1194, 1199 (11th Cir. 2012) (quoting *id.*). The Supreme Court has explained this standard as follows:

> A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully.

Iqbal, 556 U.S. at 678 (citation omitted) (quoting *Twombly*, 550 U.S. at 556); *see also Resnick v. AvMed, Inc.*, 693 F.3d 1317, 1324-25 (11th Cir. 2012).

Thus, a claim will survive a motion to dismiss only if the factual allegations in the complaint are "enough to raise a right to relief above the speculative level. . . ." *Twombly*, 550 U.S. at 555-56 (citations omitted). "[A] formulaic recitation of the elements of a cause of action will not do." *Id.* at 555 (citation omitted). While all well-pleaded facts must be accepted as true and construed in the light most favorable to the plaintiff, *Powell v. Thomas*, 643 F.3d 1300, 1302 (11th Cir. 2011), the Court need not accept as true the plaintiff's legal conclusions, including those couched as factual allegations, *Iqbal*, 556 U.S. at 678.

Thus, evaluation of a motion to dismiss requires two steps: (1) eliminate any allegations in the pleading that are merely legal conclusions, and (2) where there are well-pleaded factual allegations, "assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 679.

B. Judgment on the Pleadings

A party may move for judgment on the pleadings "[a]fter the pleadings are closed—but early enough not to delay trial. . . ." FED. R. CIV. P. 12(c). Judgment on the pleadings is appropriate only "when no issues of material fact exist, and the movant is entitled to judgment as a matter of law." *Ortega v. Christian*, 85 F.3d 1521, 1524 (11th Cir. 1996). When reviewing a motion for judgment

on the pleadings, the Court considers only the substance of the pleadings and any judicially noticed facts, and it accepts the facts in the pleadings as true and views them in the light most favorable to the nonmoving party. *See Hawthorne v. Mac Adjustment, Inc.*, 140 F.3d 1367, 1370 (11th Cir. 1998).

III. Discussion

A. Board of Regents and GTAA's Motion to Dismiss

1. Title IX Claims

a. Joseph Has Pleaded that GTAA Is a Federal Funding Recipient Under Title IX

GTAA contends that it is not subject to liability under Title IX because Joseph has failed to plead facts to show that it is a funding recipient under Title IX. Title IX coverage extends only to entities that receive federal funds. 20 U.S.C. § 1681(a); *Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 468, 119 S. Ct. 924, 142 L. Ed. 2d 929 (1999). At the motion to dismiss stage, a factual showing that a recipient of federal financial assistance has ceded control over one of its programs to a private entity, and provided that private entity funding, is sufficient to show that the private entity is a funding recipient subject to Title IX liability. *Williams v. Bd. of Regents of Univ. Sys. of Ga.*, 477 F.3d 1282, 1294 (11th Cir. 2007).

Joseph alleges that Georgia Tech (which is a recipient of federal funds) "provides monetary contributions to fund GTAA" including "institutional monetary support from [Georgia Tech], monies from seat and ticket sales for [Georgia Tech] sporting events, and student athletic fees." [1-2] ¶ 28. Although GTAA argues that the complaint does not allege the amount or type of support, that the money from the alleged sales and fees derives from federal funds, or the way Georgia Tech controls and disperses funds to GTAA, the Court finds that Joseph has alleged sufficient facts at this stage.

b. Preemption

The parties also disagree about whether Title VII preempts two of Joseph's Title IX claims—counts one and two.[2] Defendants contend that Title VII is the only appropriate vehicle for claims of sex discrimination and retaliation in the employment context. "Title IX prohibits sex discrimination by recipients of federal education funding." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173, 125 S. Ct. 1497, 161 L. Ed. 2d 361 (2005). Title VII prohibits sex discrimination with respect to an employee's compensation, or the terms, conditions, or privileges of employment. 42 U.S.C. § 2000e-2(a).

Although Joseph contends that *Jackson* supports her position that her Title IX claims are not preempted by

2. Defendants initially argued that all four of Joseph's Title IX claims (counts one, two, nine, and twelve) are preempted, but concede in their reply brief that counts nine and twelve are not preempted.

Title VII, that case determined whether Title IX included a private right of action for retaliation where the statute's text did not specifically provide for one.

Although there is a split of authority, courts, including those within this district, have determined that a plaintiff does not have a private right of action to bring employment-based claims under Title IX. *See*, *e.g.*, *Cooper v. Ga. Gwinnett Coll.*, No. 1:16-cv-1177-TWT-JFK, 2016 U.S. Dist. LEXIS 147705, 2016 WL 6246888, at *6 (N.D. Ga. Sept. 16, 2016), *report and recommendation adopted*, 2016 U.S. Dist. LEXIS 147120, 2016 WL 6217124 (N.D. Ga. Oct. 25, 2016) (noting that allowing employment discrimination claims under Title IX "would disrupt a carefully balanced remedial scheme for redressing employment discrimination by employers") (quoting *Lakoski v. James*, 66 F.3d 751, 754 (5th Cir. 1995); *Reese v. Emory Univ.*, No. 1:14-cv-2222-SCJ, 2015 U.S. Dist. LEXIS 193183, 2015 WL 13649300 (N.D. Ga. Jan. 25, 2015).

The Court agrees with the reasoning of these courts that Title VII is intended to provide "the exclusive remedy for individuals alleging employment discrimination on the basis of sex in federally funded educational institutions." *Lakoski*, 66 F.3d at 753. Therefore, the Court will dismiss counts one and two. Counts nine and twelve will proceed against both the Board and GTAA.[3]

3. Defendants briefly mention that they alternatively seek to dismiss the Title IX counts for failure to state a claim. However, Defendants do not explain how counts nine and twelve fail to state a claim, and the Court will not dismiss them on this basis.

2. Title VII Claims

The Board and GTAA also move to dismiss counts three and four as time-barred and for failure to state a claim, and to dismiss count thirteen for failure to state a claim.

a. Joseph's Claims Are Limited to Acts Occurring on or After October 18, 2018, but She Is Not Prohibited from Raising Earlier Factual Occurrences as Background Evidence

Before a plaintiff brings a lawsuit under Title VII, she must exhaust her administrative remedies by filing a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"). 42 U.S.C. § 2000e-5(e)(1). The charge must be filed within 180 days after the alleged unlawful employment practice occurred. *Id.* Joseph filed her first EEOC charge on April 16, 2019, so Defendants contend that she may not seek relief or any adverse actions that occurred or of which she was aware before October 18, 2018.

Joseph includes in her complaint allegations of facts stretching back many years, but concedes that she cannot seek relief under Title VII for any adverse actions that

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Defendants also argue that to the extent Joseph seeks to assert the rights of the players, she does not have standing to do so. However, it appears Joseph may seek to assert an associational claim, which (unlike in Title VII, discussed infra) has been clearly determined to be permissible. See *Jackson*, 544 U.S. at 179.

occurred, or of which she was aware, before October 18, 2018.

She states that she seeks relief for (1) the disparate allocation of funding and resources to Joseph and the women's basketball team, which was an adverse action that continued throughout her employment until her termination; (2) holding her to a higher standard of performance and conduct than her male counterparts, which was a series of adverse actions continuing throughout her employment until her termination; and (3) her March 26, 2019 termination.

However, she contends that the Court should consider the earlier allegations as offering relevant background information to support her claims.

Defendants argue that Joseph's contention about disparate funding throughout her employment is not meritorious because although a continuing violation extends a limitations period, continuing consequences of a one-time violation do not. *Thigpen v. Bibb Cty. Sheriff's Dep't*, 216 F.3d 1314, 1326 (11th Cir. 2000). They contend that budgets for the athletic department are set once per year, so Joseph can complain only of continuing effects.

Joseph, however, does not allege a single budget decision, but instead that GTAA and the Board regularly made discrete discriminatory decisions about funding and resources, materially interfering with the terms and conditions of her employment. Because Joseph's

allegations must, at this stage, be taken as true, the Court cannot credit Defendants' contentions that budget decisions were made once annually. Therefore, Joseph has plausibly alleged that harm from budget discrepancies occurred after October 18, 2018.

The Court agrees that Joseph's recovery is limited to events that occurred on or after October 18, 2018. Clearly, her termination falls within this category. Additionally, the complaint contains allegations of discrimination and retaliation that occurred after this date, for which Joseph may seek to recover. She also has alleged retaliatory events (e.g., the change in her reporting line and housing decision) that occurred after this date.

Although Joseph may not recover for the earlier allegations (which she states she will not attempt to do), she may use them as background evidence. *See*, *e.g.*, *Ledbetter v. Goodyear Tire & Rubber Co.*, 421 F.3d 1169, 1179 (11th Cir. 2005).

b. Merits

To state a claim for sex discrimination under Title VII, a plaintiff must plausibly allege sufficient facts that would tend to show that her employer took an adverse employment action against her on the basis of her sex. *See* 42 U.S.C. § 2000e-2(a)(1); *McCone v. Pitney Bowes, Inc.*, 582 F. App'x 798, 799-800 (11th Cir. 2014).

Appendix C

i. Allegations Made upon Information and Belief

The parties dispute whether the Court should accept as true averments in Joseph's complaint made upon information and belief. As the Eleventh Circuit has held, the Court need not do so when the allegations are conclusory and there are no corresponding facts to support them. *See Mann v. Palmer*, 713 F.3d 1306, 1315 (11th Cir. 2013).[4]

The "information and belief" allegations may, however, be credited to support claims for which Joseph has pleaded sufficient facts. Ultimately, as will be discussed throughout the order, Joseph's allegations pleaded upon information and belief will be credited and considered to support several of her claims. However, for others, the only allegations to support them are those on information and belief. For these claims, the Court will not consider the "information and belief" allegations as true.

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4. Further, in the context of a motion to dismiss, "courts may infer from the factual allegations in the complaint 'obvious alternative explanation[s],' which suggest lawful conduct rather than the unlawful conduct the plaintiff would ask the court to infer." *Am. Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1290 (11th Cir. 2010) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 682, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)). Here, Defendants contend, the obvious alternative explanation drawn from the complaint's allegations is that Joseph was an abusive coach and was justifiably terminated after an external investigation. However, Defendants' argument appears to rely in large part on the substance of the Littler Mendelson Report which, as discussed *infra*, the Court will not consider at this stage.

Appendix C

ii. Associational Claim

To the extent Joseph seeks to assert an associational claim under Title VII unrelated to her own protected status, Defendants argue that such a claim fails because Title VII does not recognize such a claim. Title VII specifically provides that it "shall be an unlawful employment practice for an employer to . . . discriminate against any individual . . . because of *such individual's* race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (emphasis added); *see also Jackson*, 544 U.S. at 179 (contrasting Title VII and Title IX, noting that Title IX does not contain the "such individual's" language and therefore holding that a claim of indirect discrimination is not forbidden under Title IX).

Although it appears that the Eleventh Circuit has not addressed this issue, other courts have held that notwithstanding the language of the statute, a party may assert a claim based on association with or advocacy on behalf of a protected class. *See*, *e.g.*, *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 575 (6th Cir. 2000) ("[T]he fact that Plaintiff has not alleged discrimination because of *his* race is of no moment inasmuch as it was a racial situation in which Plaintiff became involved—Plaintiff's advocacy on behalf of women and minorities in relation to Defendant's alleged discriminatory hiring practices—that resulted in Plaintiff's discharge from employment."). The Court finds this reasoning persuasive and will allow Joseph to proceed on this theory.

iii. Retaliatory Hostile Work Environment

In support of Joseph's claim for retaliatory hostile work environment, she alleges various unwarranted reprimands, disciplinary actions, and investigations on baseless and often discriminatory grounds. Defendants respond that these alleged facts do not constitute an objectively severe or pervasive environment.

To state a claim for a retaliatory hostile work environment, Joseph must allege facts sufficient to show that (1) she engaged in a protected activity; (2) after doing so, she faced unwelcome harassment; (3) the protected activity was a "but for" cause of the harassment; (4) the harassment was sufficiently severe or pervasive to alter the terms of her employment; and (5) her employer is responsible for the environment under either vicarious or direct liability. *See Adams v. Austal, U.S.A., LLC*, 754 F.3d 1240, 1248-49 (11th Cir. 2014). Defendants focus on the fourth element, contending that Joseph has not alleged sufficient facts to support a finding that she experienced harassment that was severe or pervasive.

"The requirement that the harassment be 'severe or pervasive' contains an objective and a subjective component." *Gowski v. Peake*, 682 F.3d 1299, 1312 (11th Cir. 2012) (citing *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1276 (11th Cir. 2002)). "Thus, to be actionable, this behavior must result in both an environment that a reasonable person would find hostile or abusive and an environment that the victim subjectively perceive[s] . . . to be abusive." *Id.*

Focusing on the objective severity of the alleged harassment, courts "consider, among other factors: (1) the frequency of the conduct; (2) the severity of the conduct; (3) whether the conduct is physically threatening or humiliating, or a mere offensive utterance; and (4) whether the conduct unreasonably interferes with the employee's job performance." *Miller*, 277 F.3d at 1276.

Joseph does not allege threats, yelling, humiliation or physical intimidation, foul language, or the various other hallmarks of a hostile work environment. *See*, *e.g.*, *Harris v. Fla. Agency for Health Care Admin.*, 611 F. App'x 949, 953 (11th Cir. 2015). Rather, she alleges "a series of unwarranted reprimands, disciplinary actions, and investigations on baseless and frequently discriminatory grounds"; "constant unwarranted compliance investigations"; being consistently treated "in an adversarial manner" and being mocked for her complaints of discrimination; that the Board and GTAA engaged in "internal discussions about how to 'get rid' of her"; and "unreasonably refusing to engage in discussions about extending her contract on reasonable terms." [16] at 17.

She contends that following her February 3, 2019 complaint to human resources and February 8 complaint of discrimination and retaliation, the harassment became more acute. Specifically, she alleges that she was transferred to report to Joeleen Akin (who Joseph contends had previously "targeted" her) and that GTAA and the Board failed to inform her that she had been cleared of NCAA violations and did not honor their

promise to renew her contract after the end of the NCAA investigation.

Joseph contends that these actions interfered with her ability to do her job, created dissension and anxiety on her team, caused her significant anxiety, cost her substantial time and expenses on legal fees, intimidated her staff and caused them to feel targeted, and created an atmosphere of fear of speaking out lest further targeting occur.

Although Joseph's allegations are weaker than those in most successful retaliatory harassment claims, the Court nonetheless finds that she has stated a claim. Defendants' motion to dismiss this claim will be denied.

iv. Discrimination

In support of her claims for sex discrimination, Joseph relies on allegations regarding (1) disparate allocation of funding and resources; (2) being held to a higher standard of performance and conduct than her male counterparts; and (3) her termination.

Regarding disparate allocation of funding and resources, Joseph contends that she has alleged facts to show that throughout her tenure GTAA and the Board paid similarly situated male employees (particularly the head coaches of the men's basketball team) substantially more than they paid her to perform similar work and provided them with more resources to perform the same tasks in a way that adversely affected the terms and conditions of her employment.

Appendix C

Although Title IX regulations[5] provide that a mere difference in funding is not enough to constitute discrimination, the Court finds that at this stage Joseph has pleaded sufficient facts to state a claim that the alleged underfunding was sufficiently severe as to constitute discrimination. *See*, *e.g.*, [1-2] ¶¶ 50 ("Throughout her employment, GT/GTAA paid Coach Joseph less than the male coaches of the GT MBB Team who had substantially similar duties as Coach Joseph."); 51 ("Throughout Coach Joseph's employment, GT/GTAA provided her and the WBB Team significantly fewer benefits than it provided to the MBB Team ad its coaches, thereby interfering with the terms and conditions of her employment and denying the WBB Team equal athletic opportunity."); 52-66 (elaborating on allegations with respect to locker rooms and other facilities; 67-78 (describing discrepancy between men's and women's basketball teams' budgets for marketing and publicity and impact on Joseph's employment); 79-85 (describing underfunding with respect to staff compensation); 86-92 (describing alleged underfunding with respect to travel).

Regarding being held to a higher standard of performance and conduct than her male counterparts, Joseph points to allegations showing "a long history" of GTAA and the Board "scrutinizing Joseph for conduct which other male Head Coaches engaged in with impunity. . . ." [16] at 13. She alleges that she complained about discriminatory treatment but that GTAA and the Board took no action.

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5. The claim here is, of course, under Title VII.

However, Joseph has not pleaded facts to make plausible her allegations that male coaches engaged in identical conduct without consequence. To the extent she relies on allegations of a "higher standard of performance" based on her sex in support of her Title VII discrimination claim, the claim will be dismissed.

Finally, regarding her termination, Joseph contends that she alleged facts to show that, in terminating her, GTAA and the Board treated her differently than Josh Pastner, the head coach of the Georgia Tech men's basketball team. The Court agrees that Joseph has alleged sufficient facts to support her claim that her termination was based on sex discrimination. *See* [1-2] ¶¶ 143 ("GT/GTAA's treatment of Coach Joseph and her contract contrasted sharply with its treatment of Coach Pastner and his contract a few months later."); 147 ("Even though Coach Joseph had achieved the same level of success as Coach Pastner that same 2016-2017 season and had not engaged in any conduct that violated NCAA rules or regulations, GT/GTAA continued to rebuff her efforts to engage in any conversations about extending her contract."); 197 ("After learning of the NCAA Level I violations levied against Coach Pastner and the GT MBB Team GT/GTAA did not terminate Coach Pastner or, upon information and belief, otherwise discipline Coach Pastner, despite the widespread misconduct in his program.").

Joseph's Title VII discrimination may proceed with respect to her allegations of disparate funding and termination, but will be dismissed with respect to

her allegations of being held to a higher standard of performance.

3. Whistleblower Claim

GTAA also moves to dismiss count eleven (under the Georgia Whistleblower Act). The GWA applies only to public employers, which are defined by the Act as "the executive, judicial, or legislative branch of the state; any other department, board, bureau, commission, authority, or other agency of the state which employs or appoints a public employee or public employees; or any local or regional governmental entity that receives any funds from the State of Georgia or any state agency." O.C.G.A. § 45-1-4(a)(4); *see Lamar v. Clayton Cty. Sch. Dist.*, 605 F. App'x 804, 806 (11th Cir. 2015).

GTAA contends that it does not fall within the definition of a "public employer" that is subject to the Georgia Whistleblower Act. Specifically, it asserts that it did not employ Joseph or pay her salary. The complaint alleges that GTAA is a nonprofit corporation (as opposed to a state institution). Although the complaint alleges that GTAA functioned as an agent of the Board of Regents, it does not allege any facts to support this label.

Although Joseph contends that GTAA employed her because it controlled the time, manner, means, and method of her work, the cases she cites to support her contention do not demonstrate that this sort of control causes a party to be an employer for purposes of the Georgia Whistleblower Act.

The Court finds persuasive the reasoning in *Bradenburg v. MCG Health, Inc.*, No. 2015-RCCV-308 (Ga. Super. Ct. Richmond Cty. Feb. 3, 2020), *appeal filed* (Ga. Ct. App. Mar. 2, 2020). There, the court concluded that an entity managing staff and tasks associated with running the hospital connected to the Medical College of Georgia (operated by the Board of Regents) was not a "state agency" as defined in the GWA although it managed the plaintiff and other employees. Further, because the GWA did not refer to "joint employers" or an "integrated enterprise," the court concluded that a theory of liability based on this failed.

The GWA claim will be dismissed with respect to GTAA.

4. Breach of Contract

GTAA further moves to dismiss count fourteen, which asserts a breach-of-contract claim. The parties do not dispute that Georgia law governs this claim. Joseph's claim is based on the October 10, 2014 offer letter and the October 20 contract.

To state a claim for a breach of contract, Joseph must allege (1) a breach of a contract and (2) resultant damages (3) for the party who has the right to complain about the contract being broken. *Bates v. JPMorgan Chase Bank, N.A.*, 768 F.3d 1126, 1130 (11th Cir. 2014).

Appendix C

a. The Court Will Not Consider the Substance of the Littler Mendelson Report at This Stage

GTAA contends that Joseph has failed to allege that it breached its contract with her. Specifically, it contends that the report from Littler Mendelson constituted good cause to terminate the contract by chronicling allegations of player and staff abuse. This type of behavior, contends GTAA, constituted "conduct that the Athletic Association, in its sole discretion, reasonably considers injurious to the reputation of the Association or the Institute" and/or "serious or repeated misconduct." [1-2] at 86-87.

GTAA moves to dismiss this claim, contending that the Littler Mendelson report demonstrates that it did not breach the contract. It contends that the report may be considered without converting the motion into one for summary judgment because it is central to Joseph's claim and undisputed. *See Horsley v. Feldt*, 304 F.3d 1125, 1134 (11th Cir. 2002).

Although Joseph does refer to the report in her complaint, she does so in a way that challenges its substance. She alleges that it is "a vague report that recited allegations that were either false or completely taken out of context, and which downplayed or otherwise ignored input from Coach Joseph's coaching staff, players, and third party-consultants [sic] who had voiced their support of Coach Joseph." [1-2] ¶ 198.

And as Joseph points out, her complaint only makes brief, passing references to the report. The report is far from central to her complaint. Defendants have made the report central to their defense. To consider the report at this stage, as Defendants urge the Court to do, would be to credit its substance. The Court will not do so.

b. Who Is a Party to the Contract

For a valid contract to exist, the parties must agree to all material terms. O.C.G.A. § 13-3-2. The term of employment is an essential element of an employment contract. *Key v. Naylor, Inc.*, 268 Ga. App. 419, 602 S.E.2d 192, 195 (Ga. Ct. App. 2004). The October 10 offer letter does not contain a set term of employment. Therefore, the Court concludes that it does not constitute a contract.

And the October 20 contract, contends the Board, cannot bind it because it is not a party to the contract. O.C.G.A. § 9-2-20(a). That document states that it "is made by and between [GTAA] and MaChelle Joseph."

The Board of Regents contends that the contract is between only Joseph and GTAA. Although Bobinski, Lewis, and Peterson signed the contract, the Board contends that they did so on behalf of GTAA, not the Board.

Based on the plain language of the contract, the Court finds that the Board was not a party. The breach-of-contract claim will be dismissed against the Board. However, the claim will remain pending against GTAA.

Appendix C

B. Individual Defendants' Motion to Dismiss

The individual Defendants move to dismiss the claims against them (counts five, six, seven, and eight) under § 1983.[6] These Defendants acknowledge that Joseph need not plead a prima facie case at this stage, but contend that she fails to provide enough factual matter, taken as true, to suggest intentional discrimination.

"To prevail on a claim under § 1983, a plaintiff must demonstrate both (1) that the defendant deprived her of a right secured under the Constitution or federal law and (2) that such a deprivation occurred under color of state law." *Arrington v. Cobb Cty.*, 139 F.3d 865, 872 (11th Cir. 1998) (citing *Willis v. Univ. Health Servs.*, 993 F.2d 837, 840 (11th Cir. 1993)). "One such law is the Equal Protection Clause, U.S. Const. amend. XIV, § 1, which confers a federal constitutional right to be free from sex discrimination." *Hill v. Cundiff*, 797 F.3d 948, 976 (11th Cir. 2015) (citations omitted); *see also Williams*, 477 F.3d at 1300 (citation omitted) ("The Equal Protection Clause confers a federal constitutional right to be free from sex discrimination."); *Venice v. Fayette Cty.*, No. 3:09-cv-35-JTC, 2010 U.S. Dist. LEXIS 150525, 2010 WL 11507614, at *2 (N.D. Ga. Sept. 16, 2010) (citation omitted) ("[T]he Equal Protection Clause of the United States Constitution[] prohibits unlawful sex discrimination in public employment."). "In order to establish a violation of the Equal Protection Clause, appellees must prove

6. The parties appear to agree that Joseph's recovery for § 1983 allegations is barred for actions that occurred prior to December 23, 2017.

discriminatory motive or purpose." *Cross v. State of Ala., State Dep't of Mental Health & Mental Retardation*, 49 F.3d 1490, 1507 (11th Cir. 1995) (citing *Whiting v. Jackson State Univ.*, 616 F.2d 116, 122 (5th Cir. 1980)).

The Equal Protection Clause is essentially a direction that all persons similarly situated should be treated alike. *Glenn v. Brumby*, 632 F. Supp. 2d 1308, 1312 (N.D. Ga. 2009), *aff'd*, 663 F.3d 1312 (11th Cir. 2011) (citation and quotation omitted); *see also Hossain v. Steadman*, 855 F. Supp. 2d 1307, 1312 (S.D. Ala. Jan. 25, 2012) (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985)) ("The mandate of the Equal Protection Clause essentially 'is that all persons similarly situated should be treated alike.'").

"In order to state an equal protection claim, the plaintiff must prove that he was discriminated against by establishing that other similarly-situated individuals outside of his protected class were treated more favorably." *Amnesty Int'l, USA v. Battle*, 559 F.3d 1170, 1180 (11th Cir. 2009); *see also Jarrett v. Alexander*, 235 F. Supp. 2d 1208, 1212 (M.D. Ala. 2002) (citation omitted) (explaining that to survive a motion to dismiss on an equal protection sex discrimination claim against a defendant in his individual capacity, "the Plaintiff[] still must show that [she was] treated differently from others similarly situated.").

"Employment discrimination claims brought against state actors for violation of the Equal Protection Clause . . . under § 1983[] are subject to the same standards of proof and use the same analytical framework as discrimination

claims brought under Title VII of the Civil Rights Act of 1964[.]" *Hornsby-Culpepper v. Ware*, 906 F.3d 1302, 1312 n.6 (11th Cir. 2018); *see also Venice*, 2010 U.S. Dist. LEXIS 150525, 2010 WL 11507614, at *2 (citing *Rioux v. City of Atlanta*, 520 F.3d 1269, 1275 n.5 (11th Cir. 2008)) ("Where a plaintiff alleges intentional discrimination pursuant to Section 1983 based on circumstantial evidence, courts apply the same *McDonnell Douglas* framework that applies in Title VII cases.").

> A [p]laintiff makes out a prima facie case of discriminatory discharge where she shows that: (1) she is a member of a protected class, (2) she was qualified for the job, (3) she suffered an adverse employment action, and (4) she was replaced by someone outside her protected class or was treated less favorably than a similarly situated individual outside her protected class.

Venice, 2010 U.S. Dist. LEXIS 150525, 2010 WL 11507614, at *2 (citation omitted).

> Although a Title VII complaint need not allege facts sufficient to make out a classic *McDonnell Douglas* prima facie case, it must provide enough factual matter (taken as true) to suggest intentional [sex] discrimination. Further, threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.

Jacobs v. Biando, 592 F. App'x 838, 840 (11th Cir. 2014) (quotation and citation omitted).

To prevail on a § 1983 claim, the plaintiff must allege that the named defendant actually participated in the alleged constitutional violation, or exercised control or direction over the alleged violation. *Gilmere v. City of Atlanta*, 774 F.2d 1495, 1504 (11th Cir. 1985). There must be an affirmative link between the defendant's action and the alleged deprivation of a constitutional right. *Brown v. Smith*, 813 F.2d 1187 (11th Cir. 1987). "[E]ach government official, his or her title notwithstanding, is only liable for his or her own misconduct." *Iqbal*, 556 U.S. at 667 (2009).

Section 1983 creates no substantive rights. *See Baker v. McCollan*, 443 U.S. 137, 144 n.3, 99 S. Ct. 2689, 61 L. Ed. 2d 433 (1979). Rather, it provides a vehicle through which an individual may seek redress when his federally protected rights have been violated by an individual acting under color of state law. *Livadas v. Bradshaw*, 512 U.S. 107, 132, 114 S. Ct. 2068, 129 L. Ed. 2d 93 (1994).

To state a claim for relief under § 1983, the plaintiff must satisfy two elements. First, she must allege that an act or omission deprived her of a right, privilege, or immunity secured by the U.S. Constitution. *Hale v. Tallapoosa Cty.*, 50 F.3d 1579, 1582 (11th Cir. 1995). Second, she must allege that the act or omission was committed by a state actor or a person acting under color of state law. *Id.*

Defendants contend that even if Joseph plausibly stated a claim against them, they are entitled to qualified immunity. "A district court must dismiss a complaint under Fed. R. Civ. P. 12(b)(6) when the complaint's allegations, on

their face, show that an affirmative defense bars recovery on the claim." *Nichols v. Maynard*, 204 F. App'x 826, 828 (11th Cir. 2006). "Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery." *Id.* (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985)).

"Qualified immunity offers complete protection for individual public officials performing discretionary functions 'insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Sherrod v. Johnson*, 667 F.3d 1359, 1363 (11th Cir. 2012) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)).

To claim qualified immunity, the defendant must first show he was performing a discretionary function. *Moreno v. Turner*, 572 F. App'x 852, 855 (11th Cir. 2014). The parties do not dispute that Defendants were performing a discretionary function with respect to the allegations in the complaint.

"Once discretionary authority is established, the burden then shifts to the plaintiff to show that qualified immunity should not apply." *Edwards v. Shanley*, 666 F.3d 1289, 1294 (11th Cir. 2012) (quoting *Lewis v. City of W. Palm Beach*, 561 F.3d 1288, 1291 (11th Cir. 2009)).

The plaintiff demonstrates that qualified immunity does not apply by showing "(1) the defendant violated a constitutional right, and (2) th[e] right was clearly established at the time of the alleged violation." *Moreno*, 572 F. App'x at 855 (quoting *Whittier v. Kobayashi*, 581 F.3d 1304, 1308 (11th Cir. 2009)). The "clearly established" requirement may be met by one of three showings: (1) a materially similar case has already been decided; (2) an accepted general principle should control the novel facts of the case with obvious clarity; or (3) the conduct in question so obviously violated the Constitution that no prior case law is necessary. *Loftus v. Clark-Moore*, 690 F.3d 1200, 1204-05 (11th Cir. 2012).

There are three ways that law can be "clearly established" for purposes of qualified immunity. "First, the words of the pertinent federal statute or federal constitutional provision in some cases will be specific enough to establish clearly the law applicable to particular conduct and circumstances and to overcome qualified immunity, even in the *total absence of case law*." *Vinyard v. Wilson*, 311 F.3d 1340, 1350 (11th Cir. 2002).

Second, "some broad statements of principle in case law are not tied to particularized facts and can clearly establish law applicable in the future to different sets of detailed facts." *Id.* at 1351. These first two examples involve cases of "obvious clarity" and are not implicated in the case at hand.

The third and final way for a right to become clearly established is "by decisions of the U.S. Supreme Court,

Eleventh Circuit Court of Appeals, or the highest court of the state where the case arose." *Jenkins by Hall v. Talladega City Bd. of Educ.*, 115 F.3d 821, 826 n.4 (11th Cir. 1997); *accord Vinyard*, 311 F.3d at 1351-52 (further noting that "most judicial precedents are tied to particularized facts and fall into this category").

"In all but exceptional cases, qualified immunity protects government officials performing discretionary functions from the burdens of civil trials and from liability." *McMillian v. Johnson*, 88 F.3d 1554, 1562 (11th Cir. 1996) (citing *Lassiter v. Ala. A & M Univ.*, 28 F.3d 1146, 1149 (11th Cir. 1994)). In the context of public employment cases, it is "only in the rarest of cases [that] reasonable governmental officials truly know that the termination or discipline of a public employee violated 'clearly established federal rights.'" *Anderson v. Burke Cty.*, 239 F.3d 1216, 1222 (11th Cir. 2001) (quoting *Hansen v. Soldenwagner*, 19 F.3d 573, 576 (11th Cir. 1994)). Because the purpose of qualified immunity is to provide "immunity from suit rather than a mere defense to liability," the Supreme Court has "repeatedly . . . stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Pearson*, 555 U.S. at 231-32.

Whether law is clearly established must be considered "in light of the specific context of the case, not as a broad general proposition." *Leslie v. Hancock Cty. Bd. of Educ.*, 720 F.3d 1338, 1345 (11th Cir. 2013).

Courts are permitted to determine whether a constitutional right is clearly established before reaching

the question of whether the right even exists, because there will be "cases in which it is plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right." *Pearson v. Callahan*, 555 U.S. 223, 235-37, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009).

Although Joseph points to *Cross*, 49 F.3d at 1507, and *Nicholson v. Georgia Department of Human Resources*, 918 F.2d 145 (11th Cir. 1990), those cases are factually distinguishable and serve only as a statement of the general proposition against sex discrimination. Here, the question is not whether sex discrimination is permissible. Instead, the question is whether Defendants' specific actions toward Joseph violated clearly established law.

The Court will analyze the allegations against each individual Defendant to determine whether each is entitled to qualified immunity.

1. Lewis

Joseph's claim against Lewis is based on his allocation of funds to women's basketball when he set the yearly budget for the athletics department. Specifically, she alleges that he violated her constitutional rights by providing fewer benefits to women's basketball than to men's basketball in a way that adversely affected the terms and conditions of her employment and by failing to take responsive action to remedy the situation. She contends that, as the associate athletic director of finance for the Board and GTAA, Lewis had control over funding

and resources, thereby directly participating in the alleged discriminatory funding decisions.

Defendants counter that Joseph has failed to allege that Lewis subjected her to any adverse employment action. A plaintiff alleging disparate treatment must show that she suffered an adverse action. *See Crawford v. Carroll*, 529 F.3d 961, 970-71 (11th Cir. 2008). When the allegations do not involve an ultimate employment decision, she must show that she suffered a "*serious and material* change in the terms, conditions, or privileges of employment." *Id.* (quoting *Davis v. Town of Lake Park*, 245 F.3d 1232, 1239 (11th Cir. 2001)).

Joseph responds that she alleged that Lewis drastically underfunded (not a mere failure to match funding dollar for dollar) women's basketball compared to men's basketball under circumstances giving rise to an inference of sex discrimination, constituting a serious and material change in the terms and conditions of her employment.[7]

Even if the Court were to conclude that Joseph had alleged a violation by Lewis, she has not demonstrated that her alleged right to a budget more in line with that of the men's basketball team was clearly established.

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7. Although Joseph contends in her response brief that Lewis made "hostile responses" to her complaints of discriminatory treatments, [16] at 33, the allegations in her complaint refer to her statements to Lewis and allege merely that Lewis was "visibly frustrated" with her. [1-2] ¶ 116. This is not enough to constitute discrimination.

In fact, Title IX implementing regulations provide that "unequal expenditures for male and female teams" do not by themselves constitute sex discrimination. 34 C.F.R. § 106.41(c). Although Title VII regulations do not contain such a statement, the Title IX regulations certainly cut against a determination that any alleged right that Lewis violated was clearly established.

And the law is clear in the Eleventh Circuit that "[n]ot everything that makes an employee unhappy is an actionable adverse action." *Doe v. DeKalb Cty. Sch. Dist.*, 145 F.3d 1441, 1449 (11th Cir. 1998) (quoting *Smart v. Ball State Univ.*, 89 F.3d 437, 441 (7th Cir. 1996)). "Otherwise . . . 'every trivial personnel action that an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit.'" *Id.* (quoting *Williams v. Bristol-Myers Squibb Co.*, 85 F.2d 270, 274 (7th cir. 1996)).

The law Joseph cites in support of her contention deals with a situation in which an organization was so drastically underfunded that it was unable to function. As much as Joseph decries the negative ramifications of flying economy class and not having leather furniture for her players, she has not pleaded (other than in conclusory terms) that these and other specific alleged underfunding decisions led her to be unable to function. She has pointed the Court to no binding authority, and the Court is aware of none, finding a right to the type of budget decision Joseph seeks.

The Court will therefore dismiss Joseph's claim against Lewis.

2. Engel

Joseph's allegations against Engel are based upon "information and belief" that Engel failed to direct Georgia Tech or GTAA to allocate financial resources equitably to her and the women's basketball team because of Joseph's or her athletes' sex. She does not allege facts to support the conclusion that Engel had or exercised authority over the budgeting process or personally participated in any disparate funding. Joseph does not allege that Engel personally participated in her termination.

Rather, she points to a 2018 compliance investigation, contending that Engel subjected the women's basketball program to a "seemingly baseless" inquiry. She contends that Engel held a position that gave her authority to ensure legal compliance, was aware of Joseph's concerns of disparate treatment, allowed and facilitated the allocation of inferior resources, and targeted Joseph and the women's basketball players with baseless and harassing investigations and inquiries.

She alleges no findings, no resulting disciplinary action, and no loss of pay or benefits that stemmed from the investigation. In this situation, the only allegations that Engel discriminated against Joseph based on sex are those pleaded upon information and belief. Joseph does not plead any facts to make her "information and belief" allegations plausible. Therefore, the Court will

not consider the allegations pleaded upon information and belief against Engel. The remaining allegations do not suffice to state a claim against Engel.[8]

Defendants' motion to dismiss the claim against Engel will be granted.

3. Peterson

Joseph contends that Peterson's liability stems from his failure to act, arguing that he was aware of Joseph's past concerns of discrimination but refused to exercise his authority over Stansbury to prevent or rectify her termination. However, Joseph does not allege any facts to establish that Peterson directed anyone to act unlawfully or that he knew anyone would act unlawfully and failed to stop them. She does not allege that Peterson harbored discriminatory intent toward women in taking any specific actions.

Supervisory liability requires personal participation or a causal connection between the official's actions and the alleged constitutional deprivation. *See Cottone v. Jenne*, 326 F.3d 1352, 1360 (11th Cir. 2003). Joseph has not alleged that Peterson personally participated in her termination. Therefore, the Court will examine whether there was a causal connection. Such a connection exists

8. Even if Joseph had stated a claim against Engel, Engel would be entitled to qualified immunity because the alleged actions did not violate clearly established law.

> when a history of widespread abuse puts the responsible supervisor on notice of the need to correct the alleged deprivation, and he fails to do so. Alternatively, the causal connection may be established when a supervisor's custom or policy . . . result[s] in deliberate indifference to constitutional rights or when facts support an inference that the supervisor directed the subordinates to act unlawfully or knew that the subordinates would act unlawfully and failed to stop them from doing so.

Harper v. Lawrence Cty., 592 F.3d 1227, 1236 (11th Cir. 2010) (quoting *id.* at 1360-61).

Joseph has not alleged a history of widespread abuse or that Peterson had a custom or policy that resulted in deliberate indifference to her rights. Nor has she alleged that Peterson directed her termination. Rather, her allegation is that facts support an inference that Peterson knew his subordinates (specifically, Stansbury) would act unlawfully in terminating her or discriminating against her because of her sex and failed to stop him from doing so.

Joseph's claim against Peterson fails because she has not alleged facts to make plausible that he knew of any *unlawful* act that was to occur against her and failed to stop it. The best she does is to allege that he was aware of the alleged disparate funding, holding to a higher standard, and termination in advance, and that these acts were unlawful. Even these allegations against the president of a large university are weak. However,

assuming they make it across the line from possible to plausible, Joseph fails to allege facts to support a contention that he was aware these acts were occurring based on her sex.

Joseph's strongest allegations are that she sent Peterson two letters informing him of her concerns of sex discrimination, but that he never responded, and that he was aware of the investigation, the Littler Mendelson report, and Joseph's response thereto. However, she does not allege facts to make it plausible that Peterson was aware of a constitutional violation. *See Keating v. City of Miami*, 598 F.3d 753, 765 (11th Cir. 2010) (noting that a failure to stop claim under a theory of supervisory liability "requires that the supervisor (1) have the ability to prevent or discontinue *a known constitutional violation* by exercising his or her authority over the subordinate who commits the constitutional violation, and (2) subsequently fails to exercise that authority to stop it." (citing *Gonzalez v. Reno*, 325 F.3d 1228, 1234 (11th Cir. 2003))) (emphasis added).

As discussed, whether any constitutional violation occurred against Joseph is not clear at this stage. With respect to Peterson's alleged liability, however, it *is* clear that Joseph has not alleged facts to make it plausible that he knew of an ongoing or forthcoming constitutional violation against her.

Further, because Peterson asserts the defense of qualified immunity, the claim against him will be dismissed unless he acted in contravention of clear, binding authority.

As noted above, there is a question as to whether the actions against Joseph constituted sex discrimination or retaliation. It is far from clearly established at this stage. Peterson is therefore entitled to dismissal on this basis as well.

4. Stansbury

Joseph contends that she has alleged a convincing mosaic of evidence to show that Stansbury treater her less favorably than similarly situated males.

Although the parties dispute in their briefs what, exactly, Joseph has alleged against Stansbury, her complaint clarifies the issue.[9] Factually, she alleges,

> Upon information and belief, Defendants Peterson, Stansbury, and Lewis had the authority to allocate financial resource to improve the equality and accessibility of the WBB locker room and other facilities, but chose not to allocate them to Coach Joseph and the WBB Team because of Coach Joseph's sex and/or the sex of the athletes she coached.

9. Defendants contend that, because Stansbury only became the athletic director in late 2016 (at which point Joseph already had a reprimand and final written warning), the only action that conceivably supports a sex discrimination claim against him is Joseph's termination. They argue that the Court should not consider the other allegations as "background evidence" as Joseph suggests. However, as noted above, the Court will consider earlier allegations as background evidence to the extent they are relevant to establish a convincing mosaic of circumstantial evidence.

[1-2] ¶ 65. She makes nearly identical allegations (all upon information and belief) regarding resources for marketing and publicity, women's basketball coaches and staff, and travel (*id.* ¶¶ 77, 84, 91).

She contrasts Stansbury's endorsement of Pastner after news of NCAA violations (*id.* ¶ 146), with his tentativeness about extending her contract in spite of her top-ten recruiting class (*id.* ¶ 149).

She then refers to a May 2, 2018 meeting with Engel, Stansbury, and Rountree regarding a letter from the NCAA requesting an internal review of a new player's recruitment; Joseph contends the claim against her was baseless. *Id.* ¶ 152-53.

Joseph next alleges that she called a formal meeting with Stansbury and Rountree on July 25, 2018, in which she expressed concern that Lewis and Engel ran their departments in ways that benefitted men's basketball to the detriment of the women's basketball program and noted that other women's sports coaches had similar concerns. She contends that Stansbury reacted by "snapping" at her and explained that "if the female coaches could not get on board with the way the Athletic Department was run, maybe they needed to be gone." *Id.* ¶ 164.

Joseph then makes allegations regarding the following month: an August 9 email to Stansbury and Rountree expressing concern about issues such as sex discrimination, *id.* ¶ 166; following up with Stansbury about her contract extension, which Stansbury continued

to delay after the NCAA investigation was finished, *id.* ¶¶ 167-68; a September 6 email to Engel (copying Stansbury, Rountree, and Akin) regarding her concerns of "a double standard and inequity between the men's and women's basketball programs" that resulted in no action to investigate or address her concerns, *id.* ¶¶ 170-71; that on February 7, 2019 (one day after HR business partner Kevin Cruse was to speak with Stansbury about Joseph's concerns), Stansbury "downgraded" Joseph's reporting line, *id.* ¶¶ 179-80; a February 8 formal internal complaint Joseph submitted to Stansbury (and several other individuals); a February 22 letter sent to Peterson (and copying Stansbury and others) stating that Joseph believed Georgia Tech's housing decision (not allowing Joseph's sophomore players to live in off-campus housing) was based on discriminatory and/or retaliatory motives because Stansbury, Rountree, and Akin made their decision two weeks after the February 8 complaint, *id.* ¶¶ 186-87; Stansbury notifying Joseph on February 27 that she was suspended with pay pending an investigation; that Stansbury and Akin "prohibited the WBB coaches and staff from speaking to anyone about the investigation," *id.* ¶ 193; that Stansbury provided Joseph only two business days to respond to the Littler Mendelson report, *id.* ¶ 199; that she provided a detailed response to Stansbury but that on March 26 Stansbury terminated her employment "without ever having even completed an investigation into Coach Joseph's February 8 Complaint alleging discrimination, retaliation and conflict of interest," *id.* ¶ 202.

In count five, she alleges:

> Defendant Stansbury, acting under the color of state law, violated Coach Joseph's constitutional right to be free from sex discrimination in employment by directly participating in Defendants GTAA's and BOR's discriminatory actions to provide Coach Joseph fewer resources for the GT WBB Team (facilities, marketing, assistant coaches, recruitment funds, and travel) in a manner that adversely affected the terms and conditions o her employment, and holding her to a higher standard of performance and conduct than similarly situated male coaches.

[1-2] ¶ 269. She further avers,

> Defendant Stansbury, acting under the color of state law, violated Coach Joseph's constitutional right to be free from sex discrimination in employment, because he, as Athletic Director, was in a position of authority to take responsive action to stop the violations of Coach Joseph's constitutional rights as described above in paragraphs 51-92, 269 (disparate funding), he knew about the violations of Coach Joseph's rights, yet he failed to act, thereby acquiescing in the discriminatory conduct and causing the discrimination against Coach Joseph to persist and worsen. Defendant Stansbury's failure to act in the face of known violations of Coach

> Joseph's constitutional rights amounted to deliberate indifference.

Id. ¶ 270. And further, she alleges that "Defendant Stansbury, acting under color of state law, violated Coach Joseph's constitutional right to be free from sex discrimination in employment because of sex and her failure to conform to sex-stereotypes." *Id.* ¶ 271.

Stansbury presents the closest question of the individual Defendants. Indeed, Joseph's allegations might state a claim against him. Nonetheless, the Court concludes that he is entitled to qualified immunity because his alleged actions did not violate clearly established law. As stated above, the relevant question is not whether sex discrimination is legal. Rather, the relevant question is "when faced with a final report from an outside investigator which stated that Joseph engaged in unacceptable coaching practices and that she had abused her players, would a reasonable . . . Athletic Director know that it is a violation of clearly established law to then terminate her employment?" [4] at 21 (record citations omitted). "A government actor . . . cannot violate a plaintiff's equal protection rights unless the defendant has the intent to discriminate." *Mencer v. Hammonds*, 134 F.3d 1066, 1070 (11th Cir. 1998).

Joseph has pointed to no binding authority that would put Stansbury on notice that the actions he allegedly took violated her constitutional rights.[10] Stansbury is therefore

10. Joseph contends that Pastner is an appropriate comparator with respect to her termination. However, Pastner

entitled to qualified immunity, and the claim against him will be dismissed.

C. Motion for Judgment on the Pleadings

The Board also has filed a motion [29] for judgment on the pleadings as to Joseph's count fifteen under the Georgia Open Records Act.

On March 1 and April 19, 2019, Joseph requested records pursuant to the Georgia Open Records Act, O.C.G.A. §§ 50-18-70 *et seq.* ("ORA"). Her specific request was for notes memorializing the interviews of Georgia Tech women's basketball players and staff by Eric Hoffman from Littler Mendelson, including notes of Georgia Tech's human resource personnel who participated in the interviews. Joseph alleges that Georgia Tech improperly redacted material that was not exempt from disclosure and claims that she is entitled to the substance of the players' statements and the names of the players and parents who participated in the investigation.

The Board argues that because the records Joseph sought were protected, it did not violate the ORA in redacting certain information. Specifically, it contends

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was never accused of abusing student athletes (or found to have done so) or similar aggressive techniques but not investigated or disciplined for such. Joseph has not alleged that any other coach was on a final written warning by the time Stansbury became athletic director and that an outside investigation then found the coach to have engaged in misconduct.

that it redacted the records in accordance with its obligations under the Family and Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232(g), 34 C.F.R. Part 99, as specifically permitted by the ORA in O.C.G.A. § 50-18-72(a)(37).

The ORA allows educational institutions to decline to release documents that are protected by FERPA. *See* O.C.G.A. § 50-18-72(a)(37). Under 20 U.S.C. § 1232g(b) & (d), an educational institution that permits the release of the educational records, or personally identifiable information located within any such records, of any student without written consent of that student may face losing its federal funding. The Board contends that because FERPA defines "education records" broadly, Georgia Tech acted in accordance with the ORA by redacting the names of students and parents and the substance of their complaints.

FERPA defines "education records" to include "those records, files, documents, and other materials which contain information directly related to a student and are maintained by an educational agency or institution." 20 U.S.C.S. § 1232g(a)(4)(A). Further, in defining "personally identifiable information," 34 C.F.R. § 99.3 states:

> The term includes, but is not limited to—
>
> (a) The student's name;
>
> (b) The name of the student's parent or other family members;

(c) The address of the student or student's family;

(d) A personal identifier, such as the student's social security number, student number, or biometric record;

(e) Other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name;

(f) Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or

(g) Information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.

The Board contends that the students' and parents' names are "directly related" to the students, constituting personally identifiable information under subsections (a) and (b). It also contends that Joseph's personal relationship with the relevant students makes it likely that she would be able to identify the students by the contents of their complaints, making the records fall under subsection (g).

Joseph argues that by including the qualifier "directly" before "related," Congress excluded by inference any records containing information relating only indirectly

to a student from the scope of "education records." *See United States v. Koonce*, 991 F.2d 693, 698 (11th Cir. 1993) (explaining the "well-established" doctrine of *inclusio unius est exclusio alterius*).

Joseph further argues that records that relate primarily to the conduct of an employee and only indirectly to the student are not considered education records, but instead as employee records exempt from FERPA. 20 U.S.C. § 1232g(a)(4)(B)(iii). *See*, *e.g.*, *Stanislaus v. Emory Univ.*, No. 1:05-cv-1496-RWS, 2006 U.S. Dist. LEXIS 110376, 2006 WL 8432146, at *10 (N.D. Ga. July 28, 2006). Here, she argues, the records were created for the purpose of investigating her conduct as coach, relate exclusively to assessments of her conduct as an employee, and were allegedly used to justify her termination.

FERPA makes clear that "in the case of persons who are employed by an educational agency or institution but who are not in attendance at such agency or institution, records made and maintained in the normal course of business which relate exclusively to such person in that person's capacity as an employee and are not available for us for any other purpose" are considered employee records, not educational records. 20 U.S.C. § 1232g(a)(4)(B)(iii). Based on this, Joseph contends that "relate exclusively" is intended to apply to the phrase "in that person's capacity as an employee" to address situations in which a school employee may become a student.

The Court is not convinced, at this stage, that the records at issue are educational records protected by

FERPA. Therefore, the Board's motion [29] for judgment on the pleadings will be denied.

IV. Conclusion

For the foregoing reasons, the Board of Regents' partial motion [3] to dismiss and GTAA's motion [6] to dismiss are granted in part and denied in part as discussed above. The individual Defendants' motion [4] to dismiss is granted, and the Clerk is directed to drop the individual Defendants as parties. The Board of Regents' motion [29] for judgment on the pleadings is denied. Joseph's motion [32] for leave to file a surreply is granted, and the Court has considered the substance of the surreply in ruling on the motions.

IT IS SO ORDERED this 8th day of May, 2020.

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED APRIL 8, 2025

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 23-11037

MACHELLE JOSEPH,

Plaintiff-Appellant,

versus

BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, GEORGIA TECH ATHLETIC ASSOCIATION,

Defendants-Appellees,

GEORGE P. PETERSON, *et al.*,

Defendants.

Appendix D

No. 23-12475

THOMAS CROWTHER,

Plaintiff-Appellee,

versus

BOARD OF REGENTS OF THE
UNIVERSITY SYSTEM OF GEORGIA,

Defendant-Appellant.

Filed April 8, 2025

ORDER

Appeals from the United States District Court
for the Northern District of Georgia
D.C. Docket Nos. 1:20-cv-00502-VMC,
1:21-cv-04000-VMC

Before WILLIAM PRYOR, Chief Judge, JORDAN, ROSENBAUM, JILL PRYOR, NEWSOM, BRANCH, GRANT, LUCK, LAGOA, BRASHER, ABUDU, and KIDD, Circuit Judges.

BY THE COURT:

A judge of this Court having requested a poll on whether this appeal should be reheard by the Court sitting en banc, and a majority of the judges in active service on this Court having voted against granting rehearing en

banc, the Court sua sponte ORDERS that this appeal will not be reheard en banc.

WILLIAM PRYOR, Chief Judge, joined by LUCK, Circuit Judge, respecting the denial of rehearing en banc:

I agree with the decision not to rehear this appeal en banc and write to explain that our panel opinion faithfully applied Supreme Court precedent. Congress enacted Title IX under the Spending Clause, and that framing all but dictates our resolution of this appeal. Our dissenting colleague chastises the panel opinion for failing to learn from the reversal of our circuit in *Jackson v. Birmingham Board of Education*, 544 U.S. 167, 125 S. Ct. 1497, 161 L. Ed. 2d 361 (2005). Rosenbaum Dissent at 1. But our dissenting colleague's criticism flunks her own test. Before *Jackson*, the Supreme Court also reversed this circuit in *Alexander v. Sandoval*, 532 U.S. 275, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001). There, the Supreme Court told us—in no uncertain terms—that the days of courts engineering "such remedies as are necessary to make effective the congressional purpose expressed by a statute" are over, and "[h]aving sworn off the habit of venturing beyond Congress's intent, we [should] not accept [the] invitation to have one last drink." *Id.* at 287 (citation and internal quotation marks omitted). After *Sandoval*, in the absence of unambiguous congressional intent, we must decline to imply private rights of action. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 280, 122 S. Ct. 2268, 153 L. Ed. 2d 309 (2002).

No one disputes that employees of federally funded educational institutions have a private right of action for

sex discrimination in employment. Title VII provides an express right of action and an administrative remedial scheme for those employees. 42 U.S.C. § 2000e-5. No one disputes too that the Supreme Court has recognized an implied right of action for *students* who have suffered sex discrimination in violation of Title IX, *see Cannon v. Univ. of Chi.*, 441 U.S. 677, 690 n.13, 694, 709, 99 S. Ct. 1946, 60 L. Ed. 2d 560 (1979); *accord Sandoval*, 532 U.S. at 279-80, and Congress has since ratified that reading, *see* 42 U.S.C. § 2000d-7. And, in *Jackson*, the Supreme Court interpreted Title IX to create a related implied right of action for retaliation when employees complain about sex discrimination against *students*. 544 U.S. at 171-74. But Title IX *does not* provide a duplicative implied private right of action for sex discrimination *against employees*.

In *Sandoval*, the Court cautioned that "[t]he judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy." 532 U.S. at 286. Without the requisite intent, "a cause of action does not exist and courts may not create one." *Id.* at 286-87. In the Spending Clause context, "[t]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." *Id.* at 290. "Sometimes," the Court concluded, "th[at] suggestion is so strong that it precludes a finding of congressional intent to create a private right of action, even though other aspects of the statute (such as language making the would-be plaintiff 'a member of the class for whose benefit the statute was enacted') suggest the contrary." *Id.* (citations omitted). Where Congress's chosen remedy belies intent to create a secondary, implied right of action,

"federal tribunals" have no license to "[r]ais[e] up causes of action." *See id.* at 287 (citation and internal quotation marks omitted).

Since *Sandoval*, the Court has reiterated its warning. *Gonzaga University v. Doe*, for example, "reject[ed] the notion that [its] cases permit anything short of an unambiguously conferred right to support a cause of action." 536 U.S. at 283. "[U]nless Congress speaks with a clear voice, and manifests an unambiguous intent to confer individual rights, federal funding provisions provide no basis for private enforcement." *Id.* at 280 (citation and internal quotation marks omitted). So, without an "unambiguous" congressional mandate, we have no basis for implying rights of action.

For Spending Clause legislation, "'the typical remedy for . . . noncompliance with federally imposed conditions is not a private cause of action . . . but rather action by the Federal Government to terminate funds.'" *Id.* (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 28, 101 S. Ct. 1531, 67 L. Ed. 2d 694 (1981)). "Unlike ordinary legislation, which 'imposes congressional policy' on regulated parties 'involuntarily,' Spending Clause legislation operates based on consent: 'in return for federal funds, the recipients agree to comply with federally imposed conditions.'" *Cummings v. Premier Rehab Keller, P.L.L.C.*, 596 U.S. 212, 142 S. Ct. 1562, 1570, 212 L. Ed. 2d 552 (2022) (alteration adopted) (quoting *Pennhurst*, 451 U.S. at 16, 17). Spending Clause legislation works like a contract: in exchange for federal dollars, prospective recipients accept certain duties and

consequences for noncompliance—namely, the revocation of those funds. *See id.* So even where Spending Clause legislation is phrased in terms of the "persons" protected, the inclusion of a funding-based remedial scheme cautions against construing the statute to create other, *implied* remedies. *See Gonzaga Univ.*, 536 U.S. at 284, 289-90 (noting that the conclusion that a Spending Clause statute did not confer enforceable rights was "buttressed by the mechanism that Congress chose to provide for enforcing [the statute's] provisions").

Title VII and Title IX work together to attack the problem of sex discrimination in schools through *different* mechanisms. As the panel opinion explained, Congress passed Title IX in June 1972 as part of a series of amendments to the Civil Rights Act of 1964 and other antidiscrimination statutes. The Equal Employment Opportunity Act of 1972 first eliminated the educational-institution exception in Title VII's prohibition of employment discrimination, creating an express right of action for school employees. Pub. L. No. 92-261, § 2-3, 86 Stat. 103, 103-04 (Mar. 24, 1972). Just three months later, Congress enacted Title IX to create a separate Spending Clause remedy for sex discrimination in educational institutions. *See* Education Amendments of 1972, Pub. L. No. 92-318, § 901, 86 Stat. 235, 373 (June 23, 1972).

Title IX does not impliedly create a duplicative right of action for employees. It creates an alternative remedy by conditioning federal funding on compliance with its prohibition of sex discrimination in schools. But the dissent would have us believe that Congress—without

ever saying as much—fashioned not just an "overlapping" or alternative remedy for employment discrimination in schools, but one nearly identical to Title VII. Rosenbaum Dissent at 11, 19-20 (citing *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 535 n.26, 102 S. Ct. 1912, 72 L. Ed. 2d 299 (1982)).

It would be odd for our Court to conclude that, over the course of only three months, Congress designed two rights of action for employment discrimination, the first of which expressly requires employees of educational institutions to exhaust administrative procedures with short deadlines while the other allows those same employees to bypass those requirements and proceed directly to federal court. That conclusion would be odder still when you consider that we would have to assume that Congress supposedly created the second right without ever saying so. *Cf. Lakoski v. James*, 66 F.3d 751, 753 (5th Cir. 1995) (finding that Title VII precludes Title IX as to individuals seeking money damages). And, importantly, asking whether duplicative remedies exist for employees of educational institutions is different from asking whether students have *any* private right of action. *See Cannon*, 441 U.S. at 693-94, 709 (holding that a prospective student has a private right of action for sex discrimination in admissions). Students have no federal remedy for sex discrimination besides Title IX. That statutory context matters.

In short, the 1972 amendments created a comprehensive scheme to combat sex discrimination in schools. Title VII operates at the individual level. *See* 42 U.S.C. § 2000e-5(f)(1).

Title IX largely operates at the program level. *See* 20 U.S.C. §§ 1681-1682. Title VII creates express private remedies. *See* 42 U.S.C. § 2000e-5(g). Title IX creates express funding remedies. *See* 20 U.S.C. § 1682. *Cannon v. University of Chicago* held that Congress also clearly implied a private right of action under Title IX for students who would other-wise have no remedy for sex discrimination. 441 U.S. at 709. And *Jackson* held that a teacher could sue under Title IX for retaliation because he complained about sex discrimination against students, a remedy too that would otherwise be unavailable under Title VII. 544 U.S. at 173-74. These rights and remedies cover each "person" Congress intended to protect from sex discrimination in schools through a multi-faceted, multi-*remedy* system.

Our dissenting colleague suggests that our panel opinion undermines the "overlapping" remedies for sex discrimination that Congress designed. Rosenbaum Dissent at 11, 19-20. But that conclusion follows only if we accept her reading of Supreme Court precedents. Our Court has rejected that reading for all the reasons explained in the unanimous panel opinion.

ROSENBAUM, Circuit Judge, joined by JILL PRYOR, ABUDU, and KIDD, Circuit Judges, and by JORDAN, Circuit Judge, as to Parts I and III, dissenting from the denial of rehearing en banc:

Twenty-three years ago, in *Jackson v. Birmingham Board of Education*, we held that a public-school teacher could not sue his employer under Title IX of the Education Amendments of 1972 for gender-based discrimination he faced. *See* 309 F.3d 1333 (11th Cir. 2002), *rev'd & remanded*, 544 U.S. 167, 125 S. Ct. 1497, 161 L. Ed. 2d 361 (2005). The Supreme Court reversed. And it emphasized that it had "consistently interpreted Title IX's private cause of action broadly to encompass diverse forms of intentional sex discrimination." *Jackson*, 544 U.S. at 183.

Yet today we repeat our mistake from twenty-three years ago. We decline to correct our panel's recent holding that no public-school teacher can sue under Title IX for gender-based discrimination she faced. *See Joseph v. Bd. of Regents of the Univ. Sys. of Ga.*, 121 F.4th 855 (11th Cir. 2024). Our decision shows that when it comes to Title IX, we need some more education.

We are an inferior federal court. And Article III of the Constitution binds us to adhere to all the decisions of the "one supreme Court"—even if we don't always agree with them. *See* U.S. CONST. art. III; *Ramos v. Louisiana*, 590 U.S. 83, 124 n.5, 140 S. Ct. 1390, 206 L. Ed. 2d 583 (2020) (Kavanaugh, J., concurring) (reiterating respect for the Supreme Court's precedents "is absolute, as it must be in a hierarchical system with 'one supreme Court'").

As the Court has explained, and we have acknowledged, "[u]nless we wish anarchy to prevail within the federal judicial system, a precedent of [the Supreme] Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be." *Litman v. Mass. Mut. Life Ins.*, 825 F.2d 1506, 1509 (11th Cir. 1987) (en banc) (quoting *Hutto v. Davis*, 454 U.S. 370, 375, 102 S. Ct. 703, 70 L. Ed. 2d 556 (1982)).

But today we shirk our obligation. It's telling that in the two decades since *Jackson*, every one of our sister circuits that has considered whether a teacher may sue under Title IX has found they may—the opposite conclusion of our Court. *See Doe v. Mercy Cath. Med. Ctr.*, 850 F.3d 545, 560 (3d Cir. 2017); *Vengalattore v. Cornell Univ.*, 36 F.4th 87, 106 (2d Cir. 2022); *Hiatt v. Colo. Seminary*, 858 F.3d 1307, 1316-17 (10th Cir. 2017); *Campbell v. Haw. Dep't of Educ.*, 892 F.3d 1005, 1023 (9th Cir. 2018); *see also Snyder-Hill v. Ohio State Univ.*, 48 F.4th 686, 707-08 (6th Cir. 2022) (recognizing an employee may sue under Title IX when evaluating the suit of a non-student, non-employee plaintiff).

Chief Judge William Pryor's Statement Respecting Denial tries to excuse the *Joseph* panel opinion's failure to comply with controlling Supreme Court precedent by invoking a different case where the Supreme Court reversed us: *Alexander v. Sandoval*, 532 U.S. 275, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001). But *Jackson*, decided four years after *Sandoval*, explains why *Sandoval* does not permit limiting the class of plaintiffs Congress gave access to Title IX's cause of action. And two earlier cases

that led to *Jackson*—*Cannon v. University of Chicago*, 441 U.S. 677, 99 S. Ct. 1946, 60 L. Ed. 2d 560 (1979), and *North Haven Board of Education v. Bell*, 456 U.S. 512, 102 S. Ct. 1912, 72 L. Ed. 2d 299 (1982)—also preclude the William Pryor Opinion's reading of *Sandoval* and its progeny to remove employees' implied private cause of action under Title IX.

As the body of this dissental explains in detail, *Cannon* and *Jackson* reason that anyone who falls into the category of "person[s]" covered under Title IX necessarily enjoys an implied private cause of action under the statute. And *Bell* and *Jackson* show that educational employees are "person[s]" under Title IX. Those three cases give us the answer key here: employees can sue under Title IX.

To be sure, as the William Pryor Opinion notes, Title IX includes an enforcement mechanism that allows the cutting off of federal funds for educational entities that discriminate. But the funding-restriction mechanism kicks in regardless of whether the entity discriminates (or retaliates) against students or employees. And even the William Pryor Opinion concedes that students enjoy an implied private cause of action under Title IX *despite the federal-funds remedy*. Students have this implied private cause of action, the Court has explained, because they are "person[s]" within the meaning of Title IX—just as the Court has found that employees are. And no text or structural aspects of Title IX distinguish between the applicability of the "person[s]" language to students versus employees.

With no apparent answer to this problem, the *Joseph* panel opinion and the William Pryor Opinion pivot and note that Title VII and Title IX provide some overlap in remedies. But contrary to the panel opinion's description, the Court has explained that the legislative history of Title IX shows that Congress intended the law's full force to apply against employment discrimination. *See Bell*, 456 U.S. at 527-28. Not only that, but in 1986, four years after *Bell* recognized Title IX prohibits employment discrimination, Congress passed legislation that "'ratified *Cannon*'s holding' that 'private individuals may sue to enforce'" Title IX and that placed the existence of such a private right of action "beyond dispute." *Cummings v. Premier Rehab Keller, P.L.L.C.*, 596 U.S. 212, 218, 142 S. Ct. 1562, 212 L. Ed. 2d 552 (2022) (first quoting *Sandoval*, 532 U.S. at 280; and then quoting *Barnes v. Gorman*, 536 U.S. 181, 185, 122 S. Ct. 2097, 153 L. Ed. 2d 230 (2002)).

And on top of that, the Court "repeatedly has recognized that Congress has provided a variety of remedies, at times overlapping, to eradicate employment discrimination." *See Bell*, 456 U.S. at 535 n.26. So an overlap in remedies does not provide a basis for ignoring Congress's policy determination and depriving employees of access to Title IX suits.

In short, the Supreme Court has schooled us that educational employees enjoy an implied private cause of action under Title IX. We have just failed to learn the lesson. And the William Pryor Opinion doesn't earn us any extra credit.

The panel's holding also comes with real-world consequences. Our decision makes ending sex discrimination in our schools harder. Although some teachers may secure relief under Title VII, that statute has procedural differences from Title IX—including a significantly shorter statute of limitations—that make filing claims more burdensome. This matters for teachers especially, who are overworked and underpaid already, particularly during the schoolyear. Title IX's filing deadlines are much more accommodating and consistent with teachers' workloads than are Title VII's.

Title IX also allows for the recovery of *uncapped* compensatory damages. *See Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 76, 112 S. Ct. 1028, 117 L. Ed. 2d 208 (1992) (holding a damages remedy is available under Title IX). By contrast, Title VII has tight limits on any compensatory damages available. *See* 42 U.S.C. § 1981a(b)(3). So by forcing teachers to litigate under Title VII, we deprive them of relief that Congress created for them.

Worse still, the panel did not limit its holding that a teacher cannot sue for discrimination under Title IX to claims cognizable under Title VII. That is, the panel didn't rely on a theory that Title IX precludes only overlapping claims. But "Title VII . . . is a vastly different statute from Title IX. . . ." *Jackson*, 544 U.S. at 175. So to the extent that in the future, we find substantive daylight between the two independent statutes, some teachers who face discrimination might find themselves completely remediless.

I discuss my concerns in more detail in the following sections. Part I shows how the *Joseph* panel's decision violates Supreme Court precedent. Part II reflects on the legislative developments after the Supreme Court issued its binding precedent, which confirm Congress's intent that Title IX provides an implied private cause of action for educational employees. Part III reviews the decisions of all five of our sister Circuits that, since *Jackson*, have considered whether Title IX offers a private right of action for educational employees. It shows that they unanimously have concluded it does—leaving us as the sole outlier. And Part IV explains why this case presents a question of "exceptional importance" that warrants en banc review. For all these reasons, I respectfully dissent from today's denial of rehearing en banc.

I. The panel's decision contradicts a long line of Supreme Court precedent.

Section 901(a) of Title IX unambiguously prohibits sex-based discrimination against any "person" in "any education program or activity" that receives federal monies. It provides,

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . .

Education Amendments of 1972, Pub. L. No. 92-318, § 901, 86 Stat. 235, 373 (1972) (codified as amended at 20 U.S.C.

§ 1681). Congress enacted the statute under the Spending Clause, which gives Congress the authority to provide federal funds with conditions. *See Joseph*, 121 F.4th at 865.

Title IX has two enforcement mechanisms: the federal government may terminate funds if discrimination occurs, or victims may sue in court under Title IX's Supreme Court-recognized implied cause of action (or both). *See Cannon*, 441 U.S. at 704-08 (discussing how the two enforcement mechanisms work together to accomplish Title IX's goals).

But the panel opinion holds that Title IX "does not create an implied right of action for sex discrimination in employment." *Joseph*, 121 F.4th at 869. That is, the panel opinion says employees can't bring suit under Title IX for discrimination they face. According to the panel, "[n]one of the[] Supreme Court precedents—*Cannon, Jackson*, or *Bell*—speak to" that issue. *Id.* at 867. After dispatching the governing precedent, the panel opinion relies largely on broader Spending Clause and implied-right-of-action cases like *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 101 S. Ct. 1531, 67 L. Ed. 2d 694 (1981), *Alexander v. Sandoval*, 532 U.S. 275, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001), *Gonzaga University v. Doe*, 536 U.S. 273, 122 S. Ct. 2268, 153 L. Ed. 2d 309 (2002), and *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 118 S. Ct. 1989, 141 L. Ed. 2d 277 (1998), to conclude that Title IX contains no implied cause of action for employees. *See generally Joseph*, 121 F.4th at 864-69.

The panel opinion is wrong. And none of the authorities it relies on support its holding. In fact, Supreme

Court precedent belies the panel's assertion that Title IX contains no implied cause of action against sex-based discrimination in education employment.

This section walks through each of the cases I mention above, beginning with a discussion of how *Joseph* departs from *Cannon, Bell*, and *Jackson*. It then explains why *Pennhurst, Sandoval, Gonzaga*, and *Gebser* cannot justify the panel's methods. Ultimately, this section shows that the *Joseph* panel opinion clashes with the Supreme Court's decisions.

A. The panel disregards *Cannon*, *Bell*, and *Jackson*.

I begin with *Cannon*. There, the Supreme Court determined that Title IX contains an implied cause of action for private victims of discrimination that Title IX prohibits. *Cannon*, 441 U.S. at 709.

In concluding Title IX has an implied cause of action, the Court considered four factors. *Id.* at 688-709. First, it observed that "Title IX explicitly confers a benefit on persons discriminated against on the basis of sex," and the petitioner there—a medical-school applicant—was "clearly a member of that class for whose special benefit the statute was enacted." *Id.* at 694.

Second, the Court found that "the history of Title IX rather plainly indicates that Congress intended to create [an implied cause of action]." *Id.* It highlighted that "Title IX was patterned after Title VI of the Civil Rights Act

of 1964" and "[i]n 1972 when Title IX was enacted, the critical language in Title VI had already been construed as creating a private remedy." *Id.* at 694, 696 (footnote omitted). And the Court concluded that the legislative history showed Congress was aware of that fact. *Id.* at 699-701.

Third, the Court explained that "[t]he award of individual relief to a private litigant who has prosecuted her own suit is not only sensible but is also fully consistent with—and in some cases even necessary to—the orderly enforcement of [Title IX]." *Id.* at 705-06. Indeed, the Court explained, Title IX has two main purposes: "to avoid the use of federal resources to support discriminatory practices" and "to provide individual citizens effective protection against those practices." *Id.* at 704. But "the termination of federal financial support for institutions. . . . is . . . severe and often may not accomplish the second purpose if merely an isolated violation has occurred." *Id.* at 704-05 (footnote omitted). And "it makes little sense to impose on an individual . . . the burden of demonstrating that an institution's practices are so pervasively discriminatory that a complete cut-off of federal funding is appropriate." *Id.* at 705.

And fourth, the Court rejected the notion that "implying a federal remedy [under Title IX] is inappropriate because the subject matter involves an area basically of concern to the States." *Id.* at 708. Rather, the Court noted, "a prohibition against invidious discrimination of any sort, including that on the basis of sex[,]" is within the federal government's wheelhouse. *See id.*

Appendix D

Three years after it issued *Cannon*, in *Bell*, as relevant here, the Court held that "Title IX proscribes *employment discrimination* in federally funded education programs." *Bell*, 456 U.S. at 535-36 (emphasis added). *Bell* involved two public-school boards that faced complaints by school employees. One employee—a tenured teacher—complained that the school board had violated Title IX by refusing to rehire her after her one-year maternity leave. *Id.* at 517. The other—a school guidance counselor—complained that the board had discriminated against her because of her gender with respect to job assignments, working conditions, and the failure to re-new her contract. *Id.* at 518. When the then-existing Department of Health, Education, and Welfare investigated the boards for failure to comply with regulations against employment discrimination that the Department issued under Title IX, the boards challenged the Department's authority to issue those regulations. *See id.* at 514-19. But before determining whether the regulations exceeded the Department's authority, the Supreme Court first had to consider whether Title IX's reference to "persons" included educational employees in the first place. The Court concluded it did. The Court arrived at this decision for several reasons.

First, "of course," the Court began with the text of Title IX. *See id.* at 520. As the Court explained, Title IX's "broad directive that 'no *person*' may be discriminated against on the basis of gender appears, on its face, to include employees as well as students." *Id.* (emphasis added). Indeed, the Court continued, "Under that provision, employees, *like other 'persons,'* may not be

'excluded from participation in,' 'denied the benefits of,' or 'subjected to discrimination under' education programs receiving federal financial support." *Id.* (emphasis added). And "[e]mployees who directly participate in federal programs or who directly benefit from federal grants, loans, or contracts clearly fall within the first two protective categories described in § 901(a)" of Title IX. *Id.* Not only that, but "a female employee who works in a federally funded education program is 'subjected to discrimination under' that program if she is paid a lower salary for like work, given less opportunity for promotion, or forced to work under more adverse conditions than are her male colleagues." *Id.* at 521.

Based on this reasoning, the Court determined that it "should interpret [Title IX] as covering and protecting [employees] unless other considerations counsel to the contrary. After all," the Court said, "Congress easily could have substituted 'student' or 'beneficiary' for the word 'person' [in Title IX's text] if it had wished to restrict the scope of [Title IX]." *Id.* (footnote omitted).

That queued up the Court's second consideration: whether anything else in the text suggested that Congress did not intend for Title IX to cover employees. *See id.* at 521-22. The Court rejected any such suggestion. *See id.*

Third, the Court reviewed Title IX's legislative history "for evidence as to whether Congress meant somehow to limit the expansive language of [Title IX]." *Id.* at 522 (footnote omitted). It found none. *See id.* at 523-35. To the contrary, the Court pointed to legislative

history that showed Congress intended for Title IX to cover educational employees. *See id.*

Fourth, when the school boards argued that "the victims of employment discrimination have remedies other than those available under Title IX," the Court chided, "These policy considerations were for Congress to weigh, and we are not free to ignore the language and history of Title IX even were we to disagree with the legislative choice." *Id.* at 535 n.26. Not only that, the Court continued, but "even if alternative remedies are available and their existence is relevant," the Supreme Court "repeatedly has recognized that Congress has provided a variety of remedies, at times overlapping, to eradicate employment discrimination." *Id.*

So to sum up these two binding cases, *Cannon* held that Title IX created an implied cause of action for private litigants who were "persons" to whom Title IX applies. And *Bell* held that educational employees are "persons" to whom Title IX applies. Based on *Cannon* and *Bell* alone, then, the panel opinion, which concludes employees enjoy no implied cause of action under Title IX, is clearly wrong.

Add *Jackson* to *Cannon* and *Bell*, and the panel opinion's error becomes even more confounding. In *Jackson*, a high-school basketball coach complained that the girls' team he coached was not receiving equal resources. *Jackson*, 544 U.S. at 171-72. In response, his supervisors began to give him negative work evaluations and eventually removed him from his coaching position. *Id.* at 172. Jackson sued the school board, alleging that

the board violated Title IX by retaliating against him for protesting the discrimination against the girls' basketball team. *Id.* The district court dismissed the coach's case after concluding that Title IX doesn't provide a private right of action for retaliation, and we affirmed. *Id.*

The Supreme Court reversed. *Id.* at 171. It explained that "[r]etaliation against a person because that person has complained of sex discrimination is *another form of intentional sex discrimination encompassed by Title IX's private cause of action*." *Id.* at 173 (emphasis added). And then the Court reversed our Court's judgment against the coach—a school employee—and remanded to allow his sex-based retaliation claim to proceed. *See id.* at 184. So even independently of *Cannon* and *Bell*, *Jackson* stands for the proposition that Title IX provides an implied cause of action for an educational employee discriminated against on the basis of sex.

But together, this trilogy of cases—*Cannon*, *Bell*, and *Jackson*—necessarily demands the conclusion that the panel opinion here is wrong.

Of course, the panel opinion attempts to distinguish and limit *Cannon*, *Bell*, and *Jackson*. But the panel opinion's efforts fail because they are contrary to the Supreme Court's statements and reasoning in and since these cases.

The panel opinion dismissed *Cannon* as irrelevant because it said that *Cannon*'s finding of an implied cause of action under Title IX applies to students only,

not employees. *Joseph*, 121 F.4th at 866. And to be sure, *Cannon* involved a Title IX challenge by a prospective student, not an employee. *See Cannon*, 441 U.S. at 680.

But the panel's sidelining of *Cannon* requires us to ignore *Cannon*'s reasoning for *why* Title IX contains an implied cause of action for students. *Cannon* recognized an implied cause of action under Title IX for the student there because it considered (1) the text of Title IX; (2) the legislative history of Title IX; (3) the consistency of an implied cause of action with the rest of Title IX; and (4) the appropriateness of implying a federal cause of action. And based on those things, the Court determined that the statute contained a cause of action for the general category of "persons" under Section 901(a) of Title IX. After all, the text states, "No *person* in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . ." (emphasis added). Only because the student was a "person" under Section 901(a), she was "a member of *that* class for whose special benefit the statute was enacted." *Cannon*, 441 U.S. at 694 (emphasis added).

As the Court explained, "There would be far less reason to *infer a private remedy in favor of individual persons* if Congress, instead of drafting Title IX with an *unmistakable focus on the benefited class* [referring to the term "persons" in § 901(a)], had written it simply as a ban on discriminatory conduct by recipients of federal funds or as a prohibition against the disbursement of public funds to educational institutions engaged in discriminatory

practices." *Id.* at 690-93 (emphases added) (footnote omitted); *see also id.* at 690 n.13 (collecting cases where the Supreme Court has found an implied cause of action when the operable statute referred to individuals, such as "person[s]"). Indeed, the Court observed, "because the right to be free of discrimination is a personal one, a statute conferring such a right will almost have to be phrased in terms of the persons benefited" and thus imply a cause of action for them. *Id.* at 690 n.13 (cleaned up). So necessarily, *Cannon* recognized that *anyone* who qualifies as a "person" within the meaning of Section 901(a) is a part of the "class for whose especial benefit the statute was enacted" and thus enjoys an implied cause of action under Title IX. *Id.* at 688 n.9 (cleaned up).

Granted, standing alone, *Cannon* doesn't tell us whether an employee falls within the category of "person" under Title IX.

But *Bell* does. It says, "Because § 901(a) neither expressly nor impliedly excludes employees from its reach, *we should interpret the provision as covering and protecting these 'persons'* unless other considerations counsel to the contrary." *Bell*, 456 U.S. at 521 (emphasis added). The opinion then determines that no "other considerations counsel to the contrary." *See id.* at 521-40.

Yet the *Joseph* panel opinion brushes off *Bell*. *Joseph*, 121 F.4th at 867. In doing so, it inaccurately characterizes what the Supreme Court did there. The panel opinion asserts that "[t]he Supreme Court . . . held that because '[section] 901(a) neither expressly nor impliedly excludes

employees from its reach,' Title IX 'cover[s] and protect[s]' employees through the statute's funding conditions structure." *Id.* (quoting *Bell*, 456 U.S. at 521). That's simply wrong. The Supreme Court limited its holding in *Bell* in no such way. We know this for at least six reasons.

First, the Supreme Court's full quotation tells us so. As I've noted, the actual quotation says, "Because § 901(a) neither expressly nor impliedly excludes employees from its reach, *we should interpret the provision as covering and protecting these 'persons'* unless other considerations counsel to the contrary." *Bell*, 456 U.S. at 521 (emphasis added). Nowhere does this quotation or the context in which it appears purport to limit Title IX's inclusion of employees as "person[s]" to Title IX's funding remedies. Rather, as we know from *Cannon*, § 901(a) provides an implied cause of action for any-one who qualifies as a "person" under that section. In fact, as I've noted, *Cannon* expressly tells us that Congress did not limit the remedies of those who qualify as "person[s]" under Section 901(a) to simply "a prohibition against the disbursement of public funds to educational institutions engaged in discriminatory practices." *Cannon*, 441 U.S. at 690-93 (footnote omitted).

Second, nothing at pages 521 or 530 of *Bell*, which *Joseph* pincites as purported authority for its attempt to limit *Bell*'s holding, *see Joseph*, 121 F.4th at 867, in fact supports *Joseph*'s novel interpretation of that case. And there's simply no other statement or reasoning in *Bell* that justifies the panel's limitation. Look as much as you want; it's not there.

Third, the panel's effort to limit *Bell*'s holding to protect employees through only the withholding of federal funding is illogical. As I've noted, *Bell* holds that Title IX covers employees because they are "persons" under Section 901(a)'s text. *See Bell*, 456 U.S. at 522 ("Title IX's broad protection of 'person[s]' does extend to employees of educational institutions."); *see also id.* at 520 ("Under [Section 901(a)], employees, like other 'persons,' may not be 'excluded from participation in,' 'denied the benefits of,' or 'subjected to discrimination under' education programs receiving federal financial support."). And *Cannon* tells us Congress enacted Title IX for the benefit of those who fall within the category of "persons" under Section 901(a)'s text, so those "person[s]" enjoy an implied private cause of action.

The *Joseph* panel tries to avoid this inconvenient fact by noting that *Bell* involved challenges to the Department's application of regulations it used to determine whether to withhold federal funding and then stating that "nothing about [Section 901(a)'s] language indicates congressional intent to provide a private right of action to employees of educational institutions." *See Joseph*, 121 F.4th at 867-68. But the Supreme Court found that the very same text of Section 901(a) that required it to conclude students have an implied private cause of action under Title IX—"No *person* . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance" (emphasis added)—also "cover[s] and protect[s]" employees. *Bell*, 456 U.S. at 521. And the panel does not explain how the very

same text that "cover[s] and protect[s]" both students and employees somehow limits its coverage of a "person" under Title IX (and thus the availability of an implied cause of action) for employees but not for students.

Fourth, as the Supreme Court painstakingly reviews over twelve pages in *Bell*, Title IX's legislative history shows that Congress intended to provide the statute's protections equally to students and employees. *See id.* at 523-35. For instance, the Court relies on the statements of Senator Bayh, the sponsor of the language that Congress ultimately enacted, as "an authoritative guide to the statute's construction." *Id.* at 526-27. And Senator Bayh explained, in speaking about "the scope of the sections that in large part became §§ 901(a) and (b)," "we are dealing with three basically different types of discrimination here. We are dealing with discrimination in admission to an institution, discrimination of available services or studies within an institution once students are admitted, and *discrimination in employment within an institution, as a member of a faculty or whatever. In the area of employment, we permit no exceptions*." *Id.* at 526 (emphasis in original) (internal quotation marks & citation omitted). In other words, the same rules and remedies apply to discrimination in employment in education as apply to discrimination against students in education.

The Court also pointed to an early draft of Title IX to show that Congress intended the law's full force to apply against employment discrimination. *See id.* at 527-28. As the Court explained, Congress based Title IX on Title VI, borrowing near identical language from that

statute. *See id.* at 514. But it departed from Title VI in at least one important way: Title VI reaches employment discrimination only when the primary purpose of the federal funds is to support employment, but that is not the case with Title IX. *See id.* at 527-28; 42 U.S.C. § 2000d-3. In fact, the House version of Title IX originally included a parallel limitation, but that limitation was eliminated at conference. *Bell*, 457 U.S. at 527-28. And Senator Bayh highlighted this change: "Title VI . . . specifically excludes *employment* from coverage (except where the primary objective of the federal aid is to provide employment). *There is no similar exemption for employment* in" Title IX. *Id.* at 531 (quoting 118 Cong. Rec. 24684, n.1 (1972) (first emphasis in original; second emphasis added)).

The *Joseph* panel opinion ignores *Bell*'s analysis of Title IX's legislative history and substitutes its own half-page abridged version. *See Joseph*, 121 F.4th at 868. That alternative version concludes that "Title IX's enforcement mechanism relied on the carrot and stick of federal funding to combat sex discrimination[,]" even though the panel opinion acknowledges that Title IX "also provides an implied right of action for students." *Id.* The panel opinion tries to explain the inconsistency in its approach by simply noting that educational employees have a private cause of action for employment discrimination under Title VII and speculating, "It is unlikely that Congress intended Title VII's express private right of action and Title IX's implied right of action to provide overlapping remedies [for educational employees]." *Id.* at 869.

But *Bell* expressly rejects this kind of thinking for two independent reasons. *See Bell*, 456 U.S. at 535 n.26.

First, *Bell* explains that "policy considerations [that "the victims of employment discrimination have remedies other than those available under Title IX"] were for Congress to weigh, and we are not free to ignore the language and history of Title IX even were we to disagree with the legislative choice." *Id.* And second, *Bell* notes, "even if alternative remedies are available and their existence is relevant, *but cf. Cannon v. University of Chicago*, 441 U.S., at 711 . . . [("The fact that other provisions of a complex statutory scheme create express remedies has not been accepted as a sufficient reason for refusing to imply an otherwise appropriate remedy under a separate section.")], this Court repeatedly has recognized that Congress has provided a variety of remedies, at times overlapping, to eradicate employment discrimination." *Id.*

In fact, in dissent, Justice Powell tried to advance the same rationale that the *Joseph* panel puts forth. He stressed that "Title VII is a comprehensive antidiscrimination statute with carefully prescribed procedures for conciliation by the EEOC [Equal Employment Opportunity Commission], federal-court remedies available within certain time limits, and certain specified forms of relief. . . . in sharp contrast to Title IX." *Id.* at 552 (Powell, J., dissenting). But the *Bell* majority rejected his view.

Not only that, but *Jackson* too supports the conclusion that a plaintiff can bring overlapping claims between Title VII and Title IX. Title VII prohibits retaliation against anyone who complains of "an unlawful employment practice" under that statute. 42 U.S.C § 2000e-3(a). Yet

Jackson determined that an employee who was retaliated against for speaking out against discrimination (that would violate Title VII) in his own job can file a claim directly under Title IX. *See Jackson*, 544 U.S. at 179 ("The complainant is himself a victim of discriminatory retaliation, regardless of whether he was the subject of the original complaint.").[1] So *Jackson* recognized the existence of overlapping claims between Titles VII and IX. After all, the underlying reason the *Jackson* plaintiff could bring his claim was that he was an employee who had experienced discrimination. *See id.* at 173-77. For that reason, the *Joseph* panel opinion's preclusion argument is also contrary to *Jackson*.

Fifth, we also know from *Jackson* that *Bell*'s holding didn't limit Title IX's coverage of employees to the remedy of withholding federal funds. *Jackson* wouldn't have found that the coach there enjoyed an implied private cause of action for the retaliation he faced after complaining about sex discrimination if employees enjoyed no implied private cause of action under Title IX.

To be sure, the *Joseph* panel opinion asserts that the *Jackson* coach enjoyed an implied private cause of action only because the sex discrimination he complained of involved students. *Joseph*, 121 F.4th at 866. But that ignores what the Supreme Court said about the facts and the law in *Jackson* (not to mention the line-drawing problems

1. To the extent that the *Joseph* panel opinion dismissed appellant Crowther's retaliation claim based on a contrary reading of *Jackson*, it too should have been revisited. *See Joseph*, 121 F.4th at 870.

it creates). As the Court explained, the plaintiff coach complained about the girls' team's inadequate funding, equipment, and facilities *because these things "made it difficult for Jackson to do his job as the team's coach."* *Jackson*, 544 U.S. at 171 (emphasis added). In other words, the sex-based discrimination discriminated against the coach in the terms and conditions of *his* employment. So the Supreme Court said that the suit could move forward because Title IX bars "intentional 'discrimination' 'on the basis of sex,'" and "[retaliation] is a form of 'discrimination' because the *complainant* is being subject to differential treatment." *Id.* at 174 (emphasis added). Put another way, the underlying claim recognized in *Jackson* was discrimination against an "employee." And the retaliation claim could move forward only because it fell into that category. *See id.* at 178 ("[R]etaliation falls within the statute's prohibition of intentional discrimination on the basis of sex").

The Court reached this conclusion even though the *Jackson* dissent stressed that "extending the implied cause of action under Title IX to claims of retaliation expands the class of people the statute protects beyond the specified beneficiaries [of people who had been discriminated against on the basis of sex]." *Id.* at 192 (Thomas, J., dissenting). Indeed, the Court confirmed that "*Title IX's beneficiaries* plainly include *all* those who are subjected to 'discrimination' 'on the basis of sex.'" *Id.* at 179 n.3 (emphases added). In other words, the Court confirmed that, as "person[s]" within the meaning of Section 901(a), employees enjoy an implied private cause of action under Title IX.

But on top of that, in *Gomez-Perez v. Potter*, writing for the Court, Justice Alito said that "*Jackson* did not hold that Title IX prohibits retaliation because the Court concluded as a policy matter that such claims are important. Instead, the holding in *Jackson* was based on an interpretation of the 'text of Title IX.'" 553 U.S. 473, 484, 128 S. Ct. 1931, 170 L. Ed. 2d 887 (2008) (quoting *Jackson*, 544 U.S. at 173, 178). At bottom, the Court recognized, the position that "a claim of retaliation is conceptually different from a claim of discrimination. . . . did not prevail" in *Jackson*. *Id.* at 481. Jackson could bring his retaliation claim only because it *was* a permissible employment-discrimination action.[2] But the *Joseph* panel nowhere addressed *Gomez-Perez*'s understanding of *Jackson*.

In short, controlling Supreme Court precedent is clear: employees enjoy an implied private cause of action under Title IX. The *Joseph* panel opinion, which reaches the opposite conclusion, defies that binding precedent.

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2. In fact, no Justice in *Jackson* questioned that employees could bring suits for employment discrimination. Even the dissent was not concerned that an employee was bringing a claim under Title IX; it objected that "Jackson's claim for retaliation is not a claim that his sex played a role in his adverse treatment." *Jackson*, 544 U.S. at 187 (Thomas, J., dissenting). The dissent raised no objections to an employee suing directly under Title IX, under *Cannon*, for discrimination they personally faced. *See id.* (citing *Bell* as an example of a case where "a claimant . . . sought to recover for discrimination because of her own sex").

B. Other Supreme Court precedent does not support the panel's conclusions.

Perhaps the panel opinion could justify disregarding the Supreme Court's marching orders if the Court gave us contradictory directives. But none of the principal authorities the panel opinion relies on—*Pennhurst, Sandoval, Gonzaga*, and *Gebser*—can support its holding. *See Joseph*, 121 F.4th at 864-69. I explain why for each.

I start with *Pennhurst*. *Pennhurst* provides the framework for considering when conditions on legislation enacted under the Spending Clause (like Title IX) are permissible. *See* 451 U.S. at 15-27. That case establishes that funding "conditions are binding only if they are clear and 'the recipient voluntarily and knowingly accepts the terms. . . .'" *Joseph*, 121 F.4th at 866 (quoting *Cummings*, 596 U.S. at 219). So, the panel opinion reasons, "we should not recognize" an "implied right of action [that] would impose unclear conditions or remedies. . . ." *Id.* And in the panel opinion's view, allowing employees to sue under Title IX would do just that.

But once again, *Jackson* (not to mention *Cannon* and *Bell*) precludes the panel's reasoning. It explains that "[f]unding recipients have been on notice that they could be subjected to private suits for intentional sex discrimination under Title IX since 1979, when [the Court] decided *Cannon*." *Jackson*, 544 U.S. at 182. So, *Jackson* continues, "*Pennhurst* does not preclude private suits for intentional acts that clearly violate Title IX." *Id.* And it's been clear since at least 1982, when the Court issued *Bell*,

that employment discrimination (an intentional act by its nature) violates Title IX. *Bell*, 456 U.S. at 520.

The panel opinion also invokes *Sandoval* and *Gonzaga*—each of which the Supreme Court decided a few years *before* it issued *Jackson*. *Sandoval* holds that *Title VI* does not have a private cause of action "to enforce *regulations* promulgated" under that statute. *Sandoval*, 532 U.S. at 293 (emphasis added). In reaching that conclusion, as *Joseph* recognizes, *Sandoval* holds that "statutory intent" to create a private cause of action is necessary to find a private cause of action. *Id.* at 286. "Without it, a cause of action does not exist and courts may not create one. . . ." *Id.* at 286-87.

And *Gonzaga* holds that provisions of the Family Educational Rights and Privacy Act of 1974 are not enforceable in a 42 U.S.C. § 1983 action because they "create no personal rights. . . ."[3] *Gonzaga*, 536 U.S. at 276. To reach that conclusion, the Court had to "first determine whether Congress *intended to create a federal right*." *Id.* at 283 (emphasis in original). As *Joseph* tells it, *Gonzaga* "rejects the notion that [the Court's] cases permit anything short of an unambiguously conferred right to support a cause of action." *Joseph*, 121 F.4th at 865 (quoting *Gonzaga*, 536 U.S. at 283).

Based on these two pre-*Jackson* decisions, the *Joseph* panel concludes that "[w]here implied rights of action exist,

3. Section 1983 allows for suits against state and local officials who violate federal rights. *See* 42 U.S.C. § 1983.

we must honor them, but we cannot expand their scope without assuring ourselves that Congress unambiguously intended a right of action to cover more people or more situations than courts have yet recognized." *Id.* at 865. Then, once again relying on its erroneous conclusion that *Cannon, Bell*, and *Jackson* don't recognize a right of action for employment discrimination under Title IX, the panel opinion states that Title IX lacks such an implied private cause of action. *Id.* at 867-69.

We already know that the panel opinion's (mis)reading of *Cannon, Bell*, and *Jackson*, in violation of what they hold, is wrong. But on top of that, the panel opinion's ruling also gets *Sandoval* and *Gonzaga* wrong. As it turns out, they also fully support the conclusion that *Cannon* recognizes a broad scope of entitled plaintiffs under Title IX.

Sandoval explains that it's "beyond dispute that private individuals may sue to enforce" the statutory right conferred by Title VI (and by extension Title IX, which has identical language). *Sandoval*, 532 U.S. at 280. And it recognizes that the 1986 congressional amendments to Title IX "cannot be read except as a validation of *Cannon*'s holding." *Id.* So what was once an implied cause of action effectively became an express one.

In fact, like the *Joseph* panel opinion, the defendants in *Jackson* argued *Sandoval* prohibited recognizing employees' retaliation claims under Title IX. But the Court rejected that argument. *Jackson*, 544 U.S. at 178. It explained that employee retaliation claims were

"[i]n step with *Sandoval*" so long as they do "not rely on regulations extending Title IX's protection beyond its statutory limits. . . ." *Id.* So employees can bring suits for retaliation because "the statute *itself* contains the necessary prohibition." *Id.* (emphasis in original).

Here, the plaintiff does not rely on regulations as in *Sandoval*. Rather, the plaintiff invokes the statutory text. And under *Bell*, an employee is a "person" under Title IX. So Title IX's implied private right of action extends to employment discrimination in education.

Gonzaga offers even less support for *Joseph* than does *Sandoval*. It recognizes that "Title IX of the Education Amendments of 1972 create[s] individual rights because [that] statute[] [is] phrased 'with an *unmistakable focus* on the benefited class,'"—the benefited class consisting of those falling within the meaning of "*person*" under Title IX. *Gonzaga*, 536 U.S. at 284 & n.3 (emphasis in original) (quoting *Cannon*, 441 U.S. at 691). Indeed, the Court explains, unlike with the right-creating language in Title IX, "[w]here a statute *does not* include this sort of explicit 'right- or duty-creating language,' we rarely impute to Congress an intent to create a private right of action." *Id.* (emphases added) (citations omitted). So the panel opinion cannot justify its conclusion by relying on *Gonzaga*.

The final major authority the *Joseph* panel opinion mistakenly relies on is *Gebser*, which the Court decided seven years before *Jackson*. *See Joseph*, 121 F.4th at 869. *Gebser* holds that a school district may be held liable in

damages under Title IX for a teacher's sexual harassment of a student only if "an official of the school district who at a minimum has authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to, the teacher's misconduct." *Gebser*, 524 U.S. at 277.

In reaching that conclusion, the Court explains that "[b]ecause the private right of action under Title IX is judicially implied, we have a measure of latitude to shape a sensible remedial scheme that best comports with the statute." *Id.* at 284. Then the Court notes that Title IX's express enforcement mechanism—the withdrawal of federal funding—"operates on an assumption of actual notice to officials of the funding recipient." *Id.* at 288. In fact, the Court continues, "an agency may not initiate enforcement proceedings until it 'has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means.'" *Id.* (citation omitted). Given that Title IX's express enforcement mechanism requires actual notice and the rough equivalent of deliberate indifference, the Court reasons, Title IX's implied remedy must likewise require these same things. *See id.* at 289-90.

The *Joseph* panel opinion points to language from *Gebser* that says, "To guide the analysis, we generally examine the relevant statute to ensure that we do not fashion the scope of an implied right in a manner at odds with the statutory structure and purpose." *See Joseph*, 121 F.4th at 867 (quoting *Gebser*, 524 U.S. at 284). Based

on this language, the *Joseph* panel then independently evaluated the "text of Title IX and its statutory structure," disregarding *Cannon, Bell*, and *Jackson*, to conclude Title IX's cause of action doesn't include employment-discrimination claims. *Id.* at 867-69. But *Gebser* holds only that the *scope* of the implied private remedy for "person[s]" under Title IX must comport with the structure and purpose of Title IX. *See Gebser*, 524 U.S. at 284. *Gebser* doesn't in any way purport to give courts license to reevaluate whether an implied right of action for "person[s]" under Title IX exists in the first place. After all, *Cannon, Bell*, and *Jackson* already hold that it does.

And the Court has never restricted access to Title IX's cause of action to any subclass of these "person[s]" subject to intentional sex discrimination. In fact, in upholding employee-retaliation actions in *Jackson*, the Court explained that its "cases since *Cannon*, such as *Gebser* . . . , have consistently interpreted Title IX's private cause of action broadly to encompass diverse forms of intentional sex discrimination." *Jackson*, 544 U.S. at 183. Put simply, we don't have authority to eliminate employment-discrimination actions "because the statute *itself* contains the necessary prohibition." *Cf. id.* at 178.

So none of the panel opinion's cited authorities support its conclusions. And the panel's holding defies *Cannon, Bell*, and *Jackson*.

II. Legislative developments since *Cannon* and *Bell* further confirm that Congress intended a private cause of action for "person[s]" under Title IX.

Not only does Supreme Court precedent require the conclusion that Title IX contains an implied private right of action for educational employees who experience intentional discrimination, but in the years following *Cannon* and *Bell*, Congress has effectively blessed the Court's conclusions in those cases.

As I've discussed, in 1979, in *Cannon*, the Supreme Court determined that Title IX contains a private implied cause of action for "person[s]" within the meaning of that statute. Three years later, in 1982, the Court issued *Bell*, concluding that employees are "person[s]" under Title IX. Congress has since amended Title IX in ways that have led the Supreme Court "to conclude that Congress did not intend to limit the remedies available in a suit brought under Title IX" to relief other than damages. *Franklin*, 503 U.S. at 72.

Through the Rehabilitation Act Amendments of 1986, 100 Stat. 1845, 42 U.S.C. § 2000d-7, "Congress . . . ratified *Cannon*'s holding." *Sandoval*, 532 U.S. at 280. It "expressly abrogated States' sovereign immunity against suits brought in federal court to enforce" Title IX. *Id.*; *see* 42 U.S.C. § 2000d-7. Faced with *Cannon*, Congress *expanded* the number of actions that could be brought under Title IX. And Congress also provided that "remedies (including remedies both at law and in equity) are available . . . to the same extent as such remedies

are available . . . in the suit against any public or private entity other than a State." 42 U.S.C. § 2000d-7(a)(2). So Congress expressly acknowledged that public and private entities could already be sued under Title IX. This statute "cannot be read except as a validation of *Cannon*'s holding." *Sandoval*, 532 U.S. at 280 (quoting *Franklin*, 503 U.S. at 72).

Congress's 1986 amendments of Title IX came four years after the Court's opinion in *Bell* and seven after its decision in *Cannon*. So when Congress chose to expressly acknowledge and expand the cause of action under Title IX, it knew the Court interpreted the statute to prohibit employment discrimination. Indeed, at least one of our sister circuits had already taken it as a given that employees could sue under Title IX. *See O'Connor v. Peru State Coll.*, 781 F.2d 632, 642 n.8 (8th Cir. 1986) ("Claims of discriminatory employment conditions are cognizable under Title IX." (citing *Bell*, 456 U.S. 512)); *see also Thompson v. Bd. of Educ. of Romeo Cmty. Schs.*, 709 F.2d 1200, 1202, 1206 (6th Cir. 1983) (adjudicating the class-action certification and standing of pregnant teachers suing their schools under Title IX). In other words, even if we ignore, on their own terms, the Supreme Court's conclusions in *Cannon* and *Bell* that the 1972 Congress intended an implied private right of action for "person[s]" under Title IX and employees are such "person[s]," in 1986, when Congress amended the statute, it intended such a right of action.

In fact, when Congress passed the 1986 amendments, it "correct[ed] what it considered to be an unacceptable

decision" of the Supreme Court. *Franklin*, 503 U.S. at 73 (citing *Grove City Coll. v. Bell*, 465 U.S. 555, 104 S. Ct. 1211, 79 L. Ed. 2d 516 (1984)). Yet tellingly, though it did so, Congress neither abrogated the Court's holding in *North Haven Board of Education v. Bell* nor limited the cause of action in *Cannon* to students, as the panel opinion did.

This is especially noteworthy because in the years following Title IX's passage, Congress also refused to pass legislation to remove employment discrimination from Title IX's coverage. *See Bell*, 456 U.S. at 534-35 (noting that Congress took no action on two bills that would have amended Title IX to exclude coverage for employees, one of which Senator Bayh opposed in part on the ground that it "would exempt those areas of traditional discrimination against women that are the reason for the congressional enactment of title IX," including "employment and employment benefits." (citing S. 2146, § 2(1), 94th Cong. 1st Sess. (1975); 121 Cong. Rec. 23845-47 (1975); S.2657, 94th Cong. 2d Sess. (1976); 122 Cong. Rec. 28136, 28144, 28147 (1976))); *see also*, *e.g.*, *Franklin*, 503 U.S. at 73 (noting that the Civil Rights Restoration Act of 1987, Pub. L. 100-259, 102 Stat. 28 (1987), did not "in any way alter[] the existing rights of action and the corresponding remedies permissible under Title IX," but rather "broadened the coverage" of Title IX).

In sum, both in the process leading to Title IX's enactment and in the years following the Supreme Court's decisions in *Cannon* and *Bell*, Congress has shown its intent for Title IX to provide employees with an implied private right of action.

III. Every other Circuit that, since *Jackson*, has considered whether Title IX provides an implied private cause of action for employees has concluded it does.

Since the Supreme Court issued *Jackson* in 2002, holding that the employee there enjoyed an implied private cause of action under Title IX, every other Circuit that has considered the question—five in all—have (unsurprisingly) likewise held that employees have an implied private cause of action under Title IX. Not only that, but most of our sister Circuits have expressly found that Supreme Court precedent requires that conclusion.

I begin with *Doe v. Mercy Catholic Medical Center*, 850 F.3d 545 (3d Cir. 2017). There, the Third Circuit held that "Title VII's concurrent applicability does not bar [the employee plaintiff's] private causes of action for retaliation and *quid pro quo* harassment under Title IX." *Id.* at 560. In reaching this conclusion, the court noted that the Fifth and Seventh Circuits had, before *Jackson* issued, concluded that Title VII precludes employees' access to Title IX's private right of action for employees. *Id.* at 563 (discussing *Lakoski v. James*, 66 F.3d 751 (5th Cir. 1995), and *Waid v Merrill Area Pub. Sch.*, 91 F.3d 857 (7th Cir. 1996)). But the court rejected those courts' conclusions, observing that the cases "were decided a decade before the Supreme Court handed down *Jackson*, which explicitly recognized an employee's private claim under *Cannon*." *Id.*

Similarly, the Second Circuit determined in *Vengalattore v. Cornell University*, 36 F.4th 87 (2d Cir. 2022), that an implied cause of action for employees exists under Title IX. It reviewed *Cannon, Bell, Franklin*, and *Jackson* and also rejected *Lakoski*, the pre-*Jackson* opinion that found no implied cause of action for employees. *Id.* at 104-06. The Second Circuit said that, "having the benefit of all of the Supreme Court decisions discussed" and "given the Supreme Court's Title IX rulings in *Cannon* and [*Bell*], we must honor the breadth of Title IX's language. We thus hold that Title IX allows a private right of action for a university's intentional gender-based discrimination against a faculty member. . . ." *Id.* at 105-06.

Hiatt v. Colorado Seminary, 858 F.3d 1307 (10th Cir. 2017), is no different. There, the Tenth Circuit considered an educational employee's suit against her former employer under, among other laws, Title IX. *See id.* at 1314. The court first cited *Bell* for the proposition that Title IX "includes a prohibition on employment discrimination in federally funded educational programs." *Id.* at 1315. Then the court noted that *Jackson* "interpret[ed] Title IX as creating a private right of action for [a claim of retaliation against a person for complaining of sex discrimination]." *Id.* Without further ado, the court considered whether the employee there had established a prima facie case of discrimination.

As for the Sixth Circuit, it had to determine whether contract employees and visiting students enjoy an implied private right of action under Title IX in *Snyder-Hill v. Ohio State University*, 48 F.4th 686, 707-09 (6th Cir. 2022). In

concluding they do, the court explained, "[W]e have never limited the availability of Title IX claims to employees or students." *Id.* at 707. The court quoted *Bell* and noted that Congress "did not limit" Title IX by "substitut[ing] 'student' or 'beneficiary' for the word 'person,'" so "Title IX's plain language sweeps more broadly." *Id.* (quoting *Bell*, 456 U.S. at 521).

Finally, in *Campbell v. Hawaii Department of Education*, 892 F.3d 1005 (9th Cir. 2018), the Ninth Circuit apparently viewed the notion that Title IX provides for an implied private right of action for employees as so well settled that it simply noted that it "generally evaluate[s] employment discrimination claims brought under [Title IX and Title VII] identically. . . ." *Id.* at 1023. Then the court addressed the merits of the plaintiff employee's Title IX claims for intentional sex discrimination. *See id.* at 1024.

Since the Supreme Court issued *Jackson*, the *Joseph* panel opinion stands alone both in holding that Title IX includes no implied private right of action for employees and that the *Cannon*, *Bell*, and *Jackson* trilogy doesn't require that conclusion.

IV. This case is one of "exceptional importance" warranting en banc review.

The panel decision also raises a question of "exceptional importance." FED. R. APP. P. 35(a)(2). First, as I've explained, it violates binding Supreme Court precedent. Second, the panel decision usurps congressional policy-making authority. And third, this case concerns the

scope of a cause of action at the heart of Congress's intentions for Title IX, the principal tool for eliminating sex discrimination in our schools. While *Cannon* originally implied a cause of action under Title IX, Congress placed "beyond dispute" the proposition that Title IX is privately enforceable. *See Sandoval*, 532 U.S. at 280. And *Joseph* has undermined Congress's vision for who gets to sue under a piece of critical civil-rights legislation. In doing so, *Joseph* deprives educational employees of a remedy Congress created for them.

As I've noted, the Supreme Court has found that the text and legislative history of Title IX require the conclusion that Congress intended for the law to cover educational employees. Congress's decision to provide employees with a private cause of action under Title IX was a policy judgment for Congress's determination, not ours. Our job is to simply recognize Congress's intent to allow employees to sue directly under Title IX.

It's especially important that the panel's error be corrected because Title IX has significant differences from Title VII, and the loss of the Title IX remedy carries tangible consequences for litigants. Title VII comes with several procedural roadblocks that make claims harder to file than under Title IX. *See Fort Bend Cnty. v. Davis*, 587 U.S. 541, 544-45, 139 S. Ct. 1843, 204 L. Ed. 2d 116 (2019) (summarizing Title VII's procedures). Title IX also allows for the recovery of damages that Title VII does not provide for. And we may find substantive differences between Title IX and Title VII's coverage in the future because they are two *independent* statutes.

I begin with the procedural differences. For starters, Title VII requires that employees file a claim with the EEOC *within 180 days*. *See* 42 U.S.C. § 2000e-5(e)(1). Title IX claims don't expire that quickly. Because Title IX contains no express statute of limitations, we have held, consistent with our sister circuits, that the statute of limitations for state personal-injury actions applies to Title IX cases. *M.H.D. v. Westminster Schs.*, 172 F.3d 797, 803 (11th Cir. 1999) (citing *Lillard v. Shelby Cnty. Bd. of Educ.*, 76 F.3d 716, 729 (6th Cir. 1996)).

In Georgia and Alabama, the relevant limitations period is *two years*. Ga. Code Ann. § 9-3-33; Ala. Code § 6-2-38(*l*). In Florida, it may be as long as *four years*. Fla. Stat. § 95.11(3)(e) & (o) (providing the statute of limitations for actions "founded on a statutory liability" and "[a]ny action not specifically provided for" by Florida's statutory law.) By forcing litigants to proceed under Title VII, we severely shrink the time they have in which to file their claims.

Title IX's longer filing deadlines are especially important because the class of plaintiffs for this cause of action is teachers. Inundated with assignments to grade, lesson plans, and student emergencies—tasks that teachers can't complete during only school hours—these educators don't have spare time to quickly file EEOC complaints. Plus, we want schoolteachers' focus to be on their students. And teachers themselves may want to wait until term breaks to avoid the disruption to their classrooms that might come from a high-profile complaint.

Given the stigma that might result from filing a complaint, teachers may also need time to develop the courage to come forward. Indeed, the scrutiny of close-knit campus communities can amplify teachers' fears in a way that other work environments generally don't.

The burden on teachers' time is also greater because Title VII forces them to jump through hoops that Title IX doesn't require. For example, Title VII mandates plaintiffs first file a complaint with the EEOC and obtain a right-to-sue letter before filing in federal court. *See* 42 U.S.C. § 2000e-5(f). Before providing the letter, the EEOC conducts an independent investigation of the charges and attempts to reach a conciliation agreement. *Id.* If state or local law is on point, the law directs litigants to file with a state or local agency first. *Id.* § 2000e-5(c). Within 90 days of receiving a right-to-sue letter, Title VII plaintiffs must bring their claims. *Id.* § 2000e-5(f)(1). Litigants under Title IX's cause of action do not have to meet these requirements. And hard-working teachers should not be forced to, either.

On top of the procedural obstacles of Title VII, some teachers can recover more in damages under Title IX. So we refuse them relief that Congress intended by restricting them to Title VII. Title IX allows for the recovery of *uncapped* compensatory damages. *See Franklin*, 503 U.S. at 76. By contrast, Title VII has tight limits on any compensatory damages available. The statute caps damages by an employer's size for future

pecuniary losses, inconvenience, and other nonpecuniary losses. 42 U.S.C. § 1981a(b)(3).[4]

This could be especially limiting for academics who, because of prohibited discrimination, for instance, have been denied grants critical for research that create lucrative or otherwise important opportunities. Several federal courts have recently recognized that plaintiffs proceeding under Title IX and similar Spending Clause statutes may recover damages on a "loss of opportunity" theory. *See Doe v. Fairfax Cnty. Sch. Bd.*, No. 1:18-cv-614, 2023 U.S. Dist. LEXIS 13886, 2023 WL 424265, at *5 (E.D. Va. Jan. 25, 2023) (finding that under Title IX, "compensatory damages that are not based upon specific monetary harm but stem directly from lost opportunities suffered as a result of discrimination can nonetheless serve as a basis for damages"); *A.T. v. Oley Valley Sch. Dist.*, No. 17-4983, 2023 U.S. Dist. LEXIS 16619, 2023 WL 1453143, at *4 (E.D. Pa. Feb. 1, 2023) (Title IX "[p]laintiffs' claims for lost income, lost opportunity, fringe benefits, attorney fees, costs and any other non-emotional distress compensatory damages shall remain"); *see also Chaitram v. Penn Medicine-Princeton Med. Ctr.*, No. 21-17583, 2022 U.S. Dist. LEXIS 203676, 2022 WL 16821692, at *2 (D.N.J. Nov. 8, 2022) (allowing recovery of damages under Section

4. It's true that Title VII allows punitive and emotional damages likely not recoverable under Title IX. See *Barnes*, 536 U.S. at 189; *Cummings*, 596 U.S. at 230. But whether the overall recoverable damages are larger under Title VII or Title IX will vary case by case, so teachers should have access to both their statutory remedies, given that Congress created mechanisms for them to do so.

1557 of the Affordable Care Act and Section 504 of the Rehabilitation Act for loss of opportunity); *Montgomery v. D.C.*, No. CV 18-1928, 2022 U.S. Dist. LEXIS 92281, 2022 WL 1618741, at *25 (D.D.C. May 23, 2022) (allowing recovery of damages for loss of opportunity under Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act). Advancing that theory, these professors could likely recover more under Title IX than under Title VII.

And there's also a meaningful difference in the amount of lost wages that a plaintiff can recover under these statutes. Under Title VII, "[b]ack pay liability shall not accrue from a date more than two years prior to the filing of a charge with the [Equal Employment Opportunity Commission]." 42 U.S.C. § 2000e-5(g)(1). No such cap exists for Title IX. So a long-tenured professor could not recover the same withheld wages that he might be able to get under Title IX.

Finally, it's important to remember that "Title VII . . . is a vastly different statute from Title IX. . . ." *Jackson*, 544 U.S. at 175. So although we typically evaluate Title IX in line with Title VII, we may in the future find substantive daylight between the two independent statutes. Yet the panel opinion does not limit its holding to only claims that can be litigated under Title VII. *See Joseph*, 121 F.4th at 869. And that leaves open the potential for plaintiffs to be completely deprived of a remedy.

Our usurpation of Congress's policy-making function and these tangible consequences for educational employees

make this case one of "exceptional importance." And we should have corrected the panel's mistake as an en banc court.

V. Conclusion

With Title IX, Congress sought to eradicate employment discrimination in our schools. The Supreme Court has recognized this fact. But the panel's decision knee caps a critical tool to address this corrosive force, contradicting both the Supreme Court's precedents and the intent of Congress. As a result, I respectfully dissent from today's decision to deny rehearing en banc.