

IN THE
Supreme Court of the United States

THOMAS CROWTHER, *et al.*,

Petitioners,

v.

BOARD OF REGENTS OF THE UNIVERSITY
SYSTEM OF GEORGIA, *et al.*,

Respondents.

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

REPLY TO BRIEF IN OPPOSITION

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REPLY BRIEF FOR PETITIONERS

This Court should grant certiorari. The Eleventh Circuit admitted splitting with at least eight courts of appeals on the scope of Title IX’s private right of action, which is an issue of “exceptional importance.” Pet.App.157a–163a (Rosenbaum, J., dissenting from denial of rehearing *en banc*). Even Respondent admits that “three circuits . . . have held Title IX creates a right of action” for employees pursuing discrimination claims. BIO 2.

Respondent resorts to several red herrings in a doomed effort to reduce an 8-3 split to 0-3. Respondent wrongly asserts that the Second and Sixth Circuits have not assessed Title IX’s private right of action “in cases where Title VII governs,” BIO 19; but they have done so, and lower courts have applied those rulings in cases involving both Title VII and Title IX claims. And while Respondent asserts the Third Circuit might come out differently from the Eleventh Circuit because of “sovereign immunity concerns,” BIO 19, that is also wrong. Congress “expressly waive[d] state sovereign immunity for violations of . . . ‘title IX’” and provided that Title IX suits against States have the same remedies available as in any other Title IX suit. *Sossamon v. Texas*, 563 U.S. 277, 291 (2011) (quoting 42 U.S.C. § 2000d–7(a)(1)); see § 2000d-7(a)(2).

Nor are there any other obstacles to this Court’s review. The operative decisions on review arise from motions to dismiss and are purely legal. If Petitioners are successful, the lower courts on remand can

address the merits of Petitioners’ resurrected Title IX claims.

The Eleventh Circuit’s decision below is also incorrect. Respondent defends it by characterizing the private right at issue here as judicially conferred. BIO 24–32. But history did not stop after *Cannon v. University of Chicago*, 441 U.S. 677 (1979). Since then, Congress “ratified *Cannon*’s holding”—indeed, Congress’s later amendments to Title IX “cannot be read except as a validation of *Cannon*’s holding.” *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001).

Given the statutory history, the plain text makes answering the question presented a straightforward task. Title IX’s key language—“no person” shall be subjected to sex discrimination at federally-funded institutions—applies to students and employees. As this Court observed decades ago, “Congress easily could have substituted ‘student’ or ‘beneficiary’ for the word ‘person’ if it had wished to restrict the scope of [Title IX].” *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982). Nothing in Title IX or Title VII suggests a contrary reading.

I. The Circuits Are Deeply Split

A. Respondent’s claim that “there is no split at all on the question presented,” BIO 1, is flatly wrong.

1. Respondent argues there is “no real split” because “the few cases that *do* include an actual holding on a Title IX cause of action do not address the question whether Title IX provides a private right of action

in cases *where Title VII governs*.” BIO 18–19 (emphases in original). This is false. Title VII applies to *all* employers, public or private, who are engaged in interstate commerce and employ 15 or more individuals. 42 U.S.C. § 2000e(b). Thus, *Vengalatorre v. Cornell University*, 36 F.4th 87 (2d Cir. 2022), and *Snyder-Hill v. Ohio State University*, 48 F.4th 686 (6th Cir. 2022)—the two cases Respondent seeks to distinguish on this illusory basis—both involved Title IX claims by employees “where Title VII governs.”

If Respondent’s argument is that the circuits have not considered Title IX’s private right of action in light of Title VII, that is also wrong. Multiple circuits have.

Doe v. Mercy Catholic Medical Center, 850 F.3d 545 (3d Cir. 2017), discussed Pet.16–19, expressly considered and rejected the argument that, “[g]iven Title VII’s carefully-drawn framework,” “Title VII [is] the sole avenue of private relief for employees . . . who allege sex discrimination.” *Id.* at 559. The Third Circuit held that, as to the plaintiff-employee, “Title VII’s concurrent applicability does not bar Doe’s private causes of action . . . under Title IX.” *Id.* at 560; see also *id.* at 560–63 (providing thorough analysis of circuit split).

Respondent seeks to distinguish *Mercy* on a separate ground—that it “is plainly inapposite” because “[t]he *Mercy* court made clear that its reasoning would not apply to *government* defendants,” and the Third Circuit purportedly suggested Title IX claims against government employers would “raise ‘problems of sovereign immunity.’” BIO 19 (quoting *Mercy*, 850 F.3d at 561).

That argument is dead on arrival. In the Rehabilitation Act Amendments of 1986, “Congress abrogated the States’ Eleventh Amendment immunity under Title IX.” *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 72 (1992); accord *Sossamon*, 563 U.S. at 291; see 42 U.S.C. § 2000d–7(a)(1)–(2).

Indeed, in invoking the term “sovereign immunity,” *Mercy* was merely describing this Court’s decision in *Brown v. General Services Administration*, 425 U.S. 820 (1976), for the point that “private-sector employees aren’t ‘limited to Title VII’ in their search for relief from workplace discrimination,” *Mercy*, 850 F.3d at 562 (quoting *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454 (1975)). Thus, Respondent is simply wrong, and its purported obstacle is a mere phantom. *E.g.*, *Vermeer v. Univ. of Delaware*, 2022 WL 4103970, at *3–4, *6–7 (D. Del. Sept. 8, 2022) (citing *Mercy* and denying motion to dismiss employee’s Title IX sex discrimination claim against state university).

2. In addition to *Mercy*, other circuits have considered Title VII in recognizing Title IX employee claims. The Second Circuit in *Vengalatorre* noted “Title VII’s discrimination prohibition overlaps [with] Title IX’s prohibition,” 36 F.4th at 103, and “[m]ost of our Sister Circuits that have considered the question of whether an employee has an implied private right of action under Title IX have answered that question in the affirmative and have noted the applicability of Title VII principles in addressing procedural and overlapping substantive issues,” *id.* at 105 (acknowledging split

and citing various cases, *e.g.*, *Mercy*, 850 F.3d at 559–65).

The same is true in the Sixth Circuit. *Snyder-Hill*, analyzed *Mercy*, see 48 F.4th at 708, and built on the Sixth Circuit’s prior decision in *Ivan v. Kent State University*, 92 F.3d 1185 (Table), 1996 WL 422496 (6th Cir. July 26, 1996). The Sixth Circuit’s decision in *Ivan* involved a Title VII claim and expressly stated that it “overrule[d] the conclusion . . . that Title VII preempts an individual’s private remedy under Title IX.” *Id.* at *2 n.10; see *Mesbah v. Univ. of Louisville*, 2023 WL 6050232, at *16 (W.D. Ky. Sept. 15, 2023) (explaining that in *Ivan* “the Sixth Circuit held that Title IX creates a private cause of action for employment discrimination” and “expressly overruled [a case] h[o]ld[ing] that Title VII preempts an individual’s remedy under Title IX”).

Unsurprisingly, courts in the Second and Sixth Circuits have applied *Vengalatorre*’s and *Snyder-Hill*’s/*Ivan*’s core holdings to cases interposing Title VII claims. *E.g.*, *Simons v. Yale Univ.*, 712 F. Supp. 3d 267, 285 & n.13 (D. Conn. 2024); *Mesbah*, 2023 WL 6050232, at *16–17.

B. As to the other circuits in the 8-3 split, the panel below acknowledged splitting with all eight circuits that Petitioner identified—including naming the very cases discussed in the Petition. See Pet.App.18a. Respondent claims that the additional five circuits identified in the Petition “simply assume or state without argument that employees can pursue sex-discrimination or retaliation suits.” BIO 18. Respondent

is both wrong and alone in its view: not only the Eleventh Circuit, but a plethora of other courts read those five circuits to clearly opine on the question presented.

To begin, many courts recognize that in *Preston v. Commonwealth of Virginia. ex rel. New River Cmty. Coll.*, 31 F.3d 203 (4th Cir. 1994), the Fourth Circuit held that “there is a private right of action for employment discrimination under Title IX.” *Summa v. Hofstra Univ.*, 708 F.3d 115, 131 & n.1 (2d Cir. 2013); see also *Mercy*, 850 F.3d at 563 (same); *Vengalattore*, 36 F.4th at 105 (same). Courts within the Fourth Circuit read *Preston* as resolving the question too. *E.g.*, *Bartges v. Univ. of N. Carolina at Charlotte*, 908 F. Supp. 1312, 1332 (W.D.N.C. 1995).

So too for the First Circuit in *Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988). The First Circuit has been understood as “recognizing employees’ private Title IX claims,” *Mercy*, 850 F.3d at 563; *Vengalattore*, 36 F.4th at 105; *Summa*, 708 F.3d at 131 & n.1; *Hauff v. State Univ. of N.Y.*, 425 F. Supp. 3d 116, 130 n.2 (E.D.N.Y. 2019).

The Eighth, Ninth, and Tenth Circuits are similarly situated. District courts within the Eighth Circuit have treated *O’Connor v. Peru State College*, 781 F.2d 632 (8th Cir. 1986), as “binding” in rejecting the argument that “Title IX does not encompass a private right of action for employees.” *Orr v. S. Dakota Bd. of Regents*, 2023 WL 3484207, at *7 (D.S.D. May 16, 2023). So too for the Ninth Circuit in *Campbell v. Hawai’i Department of Education*, 892 F.3d 1005 (9th Cir. 2018)—its “result is that both Title VII and Title

IX may apply where, as here, the employment discrimination claims arise in a school that receives federal funding.” *Oman v. Hawai’i Dep’t of Educ.*, 2024 WL 3090229, at *7 (D. Haw. June 21, 2024) (citing *Campbell*, 892 F.3d at 1023–24). And *Hiatt v. Colo. Seminary*, 858 F.3d 1307 (10th Cir. 2017), is viewed similarly in that circuit. See *Maccagnan v. Cherry Creek Sch. Dist. No. 5*, 2024 WL 6822017, at *25 (D. Colo. Sept. 30, 2024); *Hauff*, 425 F. Supp. 3d at 130 n.2.

Moreover, even if Respondent’s critique of the depth of those circuits’ reasoning were correct, so what? Respondent makes no credible suggestion that those circuits will reverse themselves, and the reasoning of the deep side of the 8-3 split is well-articulated in numerous decisions. *E.g.*, *Mercy*, 850 F.3d at 560–60; *Vengalatorre*, 36 F.4th at 104–09; Pet.App. 18a, 155a–157a.

II. *Joseph* and *Crowther* Are Ideal Vehicles

This joint petition is an ideal vehicle to decide the question presented. Both cases arise from pure legal determinations at the motion-to-dismiss stage. Pet.App.33a, 66a. Indeed, in *Crowther*, the denial of the motion to dismiss was certified for interlocutory appeal, Pet.App.4a, which is a posture common to this Court’s implied-rights jurisprudence. *E.g.*, *Nw. Airlines, Inc. v. Transp. Workers Union of Am., AFL-CIO*, 451 U.S. 77, 79–86 (1981). Respondent’s suggestion that these cases are a poor vehicle to decide the question presented is mistaken.

A. As to Joseph, Respondent contends that Joseph’s loss at summary judgment on her Title VII sex-discrimination claim means she will necessarily lose on a Title IX claim, even if this Court rules in her favor.

That is not correct. Respondent ignores that Joseph lost on only one portion of her Title VII claim: discrimination based on *her* sex. See Pet.App.25a. The Eleventh Circuit refused to consider Joseph’s other Title VII claim—discrimination based on the sex of the athletes she coached—because it held that Title VII does not cover “associational claims,” *i.e.*, the claim that one suffers discrimination based on the sex of those they associate with (here, the women basketball players Joseph coached), see *id.* at 25a–27a.

Critically, courts *do* recognize Title IX associational claims, so Joseph could pursue that theory if she prevails in this Court. *E.g.*, *Pejovic v. State Univ. of New York at Albany*, 2018 WL 3614169, at *2–4 (N.D.N.Y. July 26, 2018) (permitting Title IX claim brought by male coach of women’s tennis team premised “on the basis of the sex of the women student-athletes he coached”); *Morris v. Fordham Univ.*, 2004 WL 906248 (S.D.N.Y. Apr. 28, 2004) (similar).

B. Respondent’s attempt to conjure vehicle issues for Crowther is even weaker. Respondent endeavors to characterize Crowther’s allegations as lacking on the merits, but Respondent ignores that *the district court held that Crowther properly stated a Title IX*

discrimination claim, and the Eleventh Circuit did not disturb that holding. Pet.App.54a, 56a.¹

C. Finally, Respondent asserts that the question presented—the scope of a federal cause of action under a landmark antidiscrimination statute—is not important. BIO 23. Of course it is important, Pet.26–29, which is why this Court has reviewed the scope of Title IX’s cause of action numerous times—and chastised lower courts for “ignor[ing] the import of [its] repeated holdings” regarding Title IX’s broad sweep. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 174 (2005).

III. The Decision Below Is Wrong

Tellingly, Respondent devotes much of its brief to arguing the merits. In advance of full briefing on the merits, a few key points bear emphasis.

A. Respondent relentlessly invokes a strawman: the Eleventh Circuit’s decision must be correct because “[t]his Court long ago exited the private-action-creation business” and “should not stage a comeback.” BIO 24.

That misses the mark—the story of Title IX does not end with *Cannon*, as Respondent suggests. BIO 24–28. Rather, following *Cannon*, Congress “acknowledged” the implied right of action in amendments “to both” Title VI and Title IX. *Cummings v. Premier Rehab Keller, P.L.L.C.*, 596 U.S. 212, 218 (2022). In the

¹ Respondent’s attempt to litigate the merits of Crowther’s factual allegations is better saved for remand. See BIO 22–23.

Rehabilitation Act Amendments of 1986, Congress abrogated States’ sovereign immunity against private suits seeking to enforce Title IX and similar Spending Clause statutes. See 42 U.S.C. § 2000d-7. Moreover, Congress expanded the number of actions that could be brought under Title IX, and 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).

Thus, Congress “ratified *Cannon’s* holding”—indeed, the statute “cannot be read except as a validation of *Cannon’s* holding,” *Alexander*, 532 U.S. at 280 (quotation marks omitted), and placed the existence of such a private right of action “beyond dispute,” *Cummings*, 596 U.S. at 218.

Given this pellucid statutory history, the question is whether the private right of action encompasses employee suits for sex discrimination. The text makes plain that it does. It provides that “[n]o person” shall be discriminated against on the basis of their sex. 20 U.S.C. § 1681. “No person” means what it says: no person—student or employee.

That conclusion is inescapable under this Court’s decisions. In *Bell*—decided four years before the Rehabilitation Act Amendments of 1986—this Court held that “Title IX proscribes employment discrimination in federally funded education programs.” *Bell*, 456 U.S. at 535–36. In so concluding, *Bell* reasoned that “[b]ecause [Title IX] 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.” *Id.* at 521. As this Court explained in *Bell*, Title IX’s legislative history shows that Congress intended to provide the statute’s protections equally to students and employees, including because, after Title IX’s passage, Congress refused to pass legislation to remove employment discrimination from Title IX’s coverage. See *id.* at 523–35. Thus, as *Bell* observed, “Congress easily could have substituted ‘student’ or ‘beneficiary’ for the word ‘person’ if it had wished to restrict the scope of [Title IX].” *Id.* at 521.

B. Title VII does not alter the conclusion. Although Respondent assesses Title VII through the lens of “preemption,” BIO 28–31, the question is whether the existence of Title VII requires interpreting the plain text of Title IX to preclude the availability of private redress for employment discrimination in federally-funded institutions. It does not.

First, Respondent’s argument is at war with at least two decisions of this Court. At bottom, the argument was rejected in *Bell*. Dissenting there, Justice Powell described the putative inefficiencies, redundancies, and contradictions of parallel enforcement in private-sector employment under Titles VII and IX. *Bell*, 456 U.S. at 540–55 (Powell, J., dissenting). But given Congress’s use of the expansive term “person” in Title IX, the Court rejected the argument. See *id.* at 514–40 & n.26.

Respondent’s position is also irreconcilable with *Jackson*. Pet.21–22. Although Respondent seeks to

distinguish *Jackson* on the basis that the plaintiff alleged retaliation for complaining about sex discrimination suffered by students, that distinction is irrelevant. As the Court explained, the plaintiff-coach complained about lesser benefits for a high-school girls basketball team because those things “made it difficult for Jackson to do his job as the team’s coach.” *Jackson*, 544 U.S. at 171. Thus, he was “discriminated against . . . in the terms and conditions of *his* employment.” Pet.App.144a (Rosenbaum, J., dissenting from denial of rehearing *en banc*) (emphasis in original).

Second, the cases cited by Respondent concerning Title VII’s purported “preclusive effect” on other statutes are inapposite. BIO 31. In *Brown*, the Court held that Title VII is the exclusive enforcement remedy for specific classes of federal employees. 425 U.S. at 833. But the Court has never applied *Brown* outside of this context and has declined to extend it. See *Davis v. Passman*, 442 U.S. 228 (1979). Notably, as the dissent observed in *Brown*, Congress expressly considered and rejected a provision that would have made Title VII an exclusive remedy. *Brown*, 425 U.S. at 838 n.6 (Stevens, J., dissenting).

And in *Great Am. Fed. Sav. & Loan Ass’n v. Novotny*, 442 U.S. 366 (1979), the Court held a private employee could not assert Title VII claims under 42 U.S.C. § 1985 only because Section 1985 “provides no substantive rights itself; it merely provides a remedy for violation of the rights it designates.” *Id.* at 372.

The more instructive decision from Title VII caselaw is *Alexander v. Gardner-Denver Co.*, 415 U.S.

36 (1974), which confirmed “Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes.” *Id.* at 48. That case goes conspicuously unmentioned by Respondent.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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