No. 22-123

In the Supreme Court of the United States

UNIVERSITY OF TOLEDO,

Petitioner,

v.

JAYCEE WAMER,

Respondent.

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

DAVE YOST
Ohio Attorney General

BENJAMIN M. FLOWERS*
**Counsel of Record*
Ohio Solicitor General
MICHAEL J. HENDERSHOT
Chief Deputy Solicitor General
JANA M. BOSCH
Deputy Solicitor General
30 E. Broad St., 17th Floor
Columbus, Ohio 43215
614-466-8980
bflowers@ohioago.gov

Counsel for Petitioner

QUESTION PRESENTED

Can schools be held liable under Title IX for sexual harassment that ceased before they were notified that it happened?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

REPLY

This case presents the question whether schools can be held liable under Title IX for sexual harassment that ceased before they were notified that it happened. That question divides the circuits. Some courts have held that post-notice harassment is an essential element of Title IX harassment claims. *K.T. v. Culver-Stockton Coll.*, 865 F.3d 1054, 1058 (8th Cir. 2017); *Escue v. N. Okla. Coll.*, 450 F.3d 1146, 1153–54, 1156 (10th Cir. 2006); *Reese v. Jefferson Sch. Dist. No. 14J*, 208 F.3d 736, 740 (9th Cir. 2000). Others have held that post-notice harassment *is not* an essential element of a Title IX claim. *Doe v. Fairfax Cnty. Sch. Bd.*, 1 F.4th 257, 273–74 (4th Cir. 2021); *Farmer v. Kan. State Univ.*, 918 F.3d 1094, 1097–98 (10th Cir. 2019); *Williams v. Bd. of Regents of Univ. Sys. of Georgia*, 477 F.3d 1282, 1296 (11th Cir. 2007). And the Sixth Circuit, in the decision below, adopted a hybrid rule. It held that, while plaintiffs alleging harassment by other students must allege post-notice harassment, plaintiffs alleging harassment by school employees need not. *See* Pet.App.2a; *see also Kollaritsch v. Michigan State Univ. Bd. of Trustees,* 944 F.3d 613, 621–22 (6th Cir. 2019); *id.* at 628 (Thapar, J., concurring). Thus, as it stands, the elements of a Title IX claim depend on the circuit in which the plaintiff sues and whether the harasser is a peer or a professor.

The split is implicated by two now-pending cases: this case, along with *Fairfax County School Board v. Doe*, No. 21-968. The Court should grant both cases and hear argument in both. Both ask the same legal question. But they arise in distinct factual circumstances. Whereas *Fairfax* involves alleged harassment by a student, this case involves alleged harassment by a school employee. Hearing both cases will

enable the Court to clarify the elements of a Title IX harassment claim in both peer-peer and teacher-student cases. Were the Court to grant just one of the two cases, it would risk leaving some component of the circuit split unresolved.

Wamer concedes that, if the Court grants the petition in *Fairfax*, "it would be helpful for the Court to review this case in tandem given the potentially important legal differences between peer harassment and teacher-on-student harassment." BIO.22 n.1. But she argues that the Court should grant neither petition. Her arguments for denial all fall short, however. This Court should grant the petition for a writ of certiorari.

I. This case implicates a circuit split.

The question whether Title IX liability requires proof of post-notice harassment divides the circuits. Wamer does not really argue otherwise. She concedes that at least three circuits require no proof of post-notice harassment. BIO.12–14; *Fairfax*, 1 F.4th at 273–74; *Farmer*, 918 F.3d at 1097–98; *Williams*, 477 F.3d at 1296. She also concedes that the Sixth Circuit takes a different tack. BIO.14. On the one hand, high-school plaintiffs (as opposed to college-student plaintiffs) and plaintiffs alleging harassment by teachers (not by peers) need not allege post-notice harassment. *See* Pet.App.2a; *Doe v. Metro. Gov't of Nashville & Davidson Cnty.*, 35 F.4th 459, 468 (6th Cir. 2022). In contrast, *college* students alleging harassment by *peers* must allege and prove post-notice harassment. *Kollaritsch*, 944 F.3d at 622. These Sixth Circuit cases do not reflect an "intra-circuit split." BIO.15. They instead give rise to a context-dependent test: a plaintiff alleging harassment under Title IX must prove

different elements depending on where they go to school (high school or college) and the identity of the person who harassed them (a student or a teacher).

Wamer nonetheless contends that the decision below implicates no circuit split. BIO.13. She is wrong.

1. In denying a split, Wamer sometimes points to a supposed absence of cases requiring post-notice harassment in the teacher-student context. She says: "No court of appeals has ever required post-notice harassment to establish a deliberate indifference *teacher-on-student* harassment claim." BIO.14. (emphasis added).

This would be irrelevant even if it were true. As the foregoing shows—and as the Sixth Circuit readily acknowledged—the circuits are "divided" regarding whether plaintiffs must *ever* prove post-notice harassment. Pet.App.9a. This case, together with *Fairfax*, provides an opportunity to settle the issue.

Regardless, Wamer's claim is factually incorrect. When a student seeks to hold her school liable for harassment, the Eighth Circuit requires prior notice of harassment—even in teacher-student cases. *See, e.g.*, *Podrebarac v. Minot State Univ.*, 835 F. App'x 163, 164–65 (8th Cir. 2021); *Plamp v. Mitchell Sch. Dist. No. 17-2*, 565 F.3d 450, 456–57 (8th Cir. 2009). The outcome in *Podrebarac* rested exclusively on the fact that the school did not have notice of the alleged harassment until after the student left the school. 835 F. App'x at 164–65. Similarly, the plaintiff in *Plamp* lost her case because she "failed to establish" that anyone in a position of authority at the school "possessed actual knowledge of [the harasser's] discriminatory conduct toward her or anyone else." 565 F.3d at 457. Thus, at least one circuit court of appeals (the Eighth

Circuit) recognizes that schools must have notice of harassment in the teacher-student context before they can be held liable for it.

2. Apparently recognizing this, Wamer attempts to recharacterize the issue her case presents.

Recall what happened below. The "primary issue" in the Sixth Circuit was whether *Kollaritsch*—a Sixth Circuit peer-peer harassment case—applied in cases involving teacher-student harassment. Pet.App.9a. This was the primary issue because *Kollaritsch* "requir[ed] additional post-notice harassment in deliberate-indifference claims." *Id.* Since Wamer alleged no post-notice harassment, her claim failed if *Kollaritsch* controlled. In fact, the District Court dismissed her claim under *Kollaritsch*. The Sixth Circuit reversed, reasoning that teacher-student claims are *not* controlled by *Kollaritsch* and *do not* require proof of post-notice harassment. Pet.App.18a–19a.

Wamer frames the case differently. To understand how, it is worth revisiting the statutory text. Title IX 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.

20 U.S.C. §1681(a) (emphasis added). Wamer argues that she is seeking relief for post-notice *denial of benefits*. BIO.14–17. According to her, the University's alleged "post-notice failure to address teacher-on-student harassment" caused her to "forgo education opportunities in order to avoid additional harassment."

BIO.15. By seeking to hold the school liable for *post-notice* deliberate indifference resulting in the denial of benefits, Wamer claims, she avoids implicating the circuit split regarding whether schools can be held liable for *pre-notice* harassment. Wamer says the Sixth Circuit relied on the post-notice nature of her claims. BIO.10–13. Therefore, she says, the case presents no conflict with the cases from the Eighth Circuit, none of which involved plaintiffs who claimed an "educational deprivation caused by" the school's "own misconduct in failing to timely address" harassment allegations. BIO.10.

This distinction is unavailing.

First, even if Wamer's denial-of-benefits theory had merit, it would only magnify the importance of the question presented. The question of whether and when schools may be subjected to liability is of immense importance to the States and to schools. *See* Br. of *Amici Curiae* Utah, et al., 15–19. So the question of whether plaintiffs can raise Wamer's denial-of-benefits theory—in other words, the question whether schools may be liable for the ripple effects of harassment even if the harassment ended before the schools were put on notice—is immensely important too. Her raising this theory thus presents an additional reason to grant this case.

Second, even Wamer acknowledges that *Kollaritsch* requires college students in the Sixth Circuit to prove post-notice harassment—not just post-notice deliberate indifference generally—in peer-peer cases. BIO.19–20. In *those* cases, college students unable to allege post-notice harassment cannot sue for "educational deprivation caused by" the school's failure to timely investigate peer-peer harassment. BIO.10; *see*

also Kollaritsch, 944 F.3d at 622. The decision below adopted the opposite rule for teacher-student cases. The Sixth Circuit's *reasons* for treating teacher-student and peer-peer cases differently have no bearing on the presence or absence of a split. Regardless of whether one characterizes the Sixth Circuit's opinion as rejecting a post-notice harassment requirement or recognizing a denial-of-benefits theory unique to the teacher-student context, it applies different rules in the teacher-student and peer-peer contexts. Because no other circuit takes a similar approach, the case implicates a circuit split.

Third, this Court's cases recognize a cause of action when a school subjects a student to discrimination by deliberately ignoring harassment. It does not recognize a hybrid claim that blends harassment and denial of benefits under the umbrella of harassment. It is important to remember that this Court, not Congress, created Title IX's private cause of action. It is "a relic of the heady days in which this Court assumed common-law powers to create causes of action—decreeing them to be 'implied' by the mere existence of a statutory or constitutional prohibition." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring). Congress has since ratified the existence of a cause of action. *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 72 (1992); *id.* at 76–78 (Scalia, J., concurring in the judgment). Still, the cause of action amounts to federal common law. Title IX's text *limits* the cause of action's scope. But it does not necessarily *define* its scope. This Court's precedents do that. *Accord* Supp. Br. for Petr. at 7, *Fairfax Cnty. Sch. Bd. v. Doe*, No. 21-968 (Oct. 12, 2022).

Read together, those precedents create liability only in cases involving post-notice harassment. One

case holds that, if "a funding recipient does not engage in harassment directly, it may not be liable for damages *unless* its deliberate indifference 'subjects' its students to harassment." *Davis Next Friend LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 644 (1999) (emphasis added). Another holds that deliberate indifference to harassment requires "actual notice" of the harassment in question. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 291 (1998). Thus, when a student experiences damages from harassment, she can sue her school under Title IX only if the harassment resulted from the school's failure to address earlier harassment about which it had actual notice. Put differently, students must prove post-notice harassment. *See Doe v. Fairfax Cnty. Sch. Bd.*, 10 F.4th 406, 415 (4th Cir. 2021) (Wilkinson, J., dissenting from the denial of rehearing *en banc*).

Finally, any denial-of-benefits theory would fail as a matter of law here. The University will assume for argument's sake that Title IX plaintiffs may seek redress for harassment under either a subjected-to-discrimination theory or a denial-of-benefits theory. Further, the University will assume away any waiver issues; while Wamer focused her case below on the University's alleged deliberate indifference to harassment, her complaint does allege—in a single, fleeting passage—that the University's inadequate investigation caused her to be denied certain benefits. *See* Compl. ¶62, R.1, PageID#9. (The District Court's docket is available electronically on PACER.)

Even with these assumptions, Wamer's case presents no sound denial-of-benefits claim. Title IX's cause of action does not permit claims resting on vicarious liability or negligence. *See Davis*, 526 U.S. at 642; *Gebser*, 524 U.S. at 288. Instead, plaintiffs must

prove that *the school* took some action that Title IX forbids. *See Gebser*, 524 U.S. at 288. That standard is obviously satisfied if the school actively causes the Title IX violation, such as by denying admission on the basis of sex. *See Cannon v. Univ. of Chicago*, 441 U.S. 677, 680 (1979). Further, at least in the harassment context, schools can be liable for violations that they cause by deliberately failing to act. That is, schools may be liable for sexual harassment that results from their own deliberate indifference. *Gebser*, 524 U.S. at 290–91; *accord* Pet.7–8. But deliberate indifference requires inaction in the face of *actual* notice of a known risk; constructive notice does not suffice. *Gebser*, 524 U.S. at 289–91. Applied to the denial-of-benefits context, this means that schools could be liable—at most—for denials of benefits that result from their own affirmative acts or their own deliberate indifference.

These principles defeat Wamer's claim. She does not argue that the University affirmatively denied her any benefits. Instead, she alleges that she removed *herself* from classes in response to the school's alleged failure to investigate the harassment. But she never alleged that the University acted with deliberate indifference upon receiving notice that she removed herself to avoid future harassment. Stated otherwise, Wamer is seeking to hold the school liable for *pre-notice* denial of benefits—for the denial of benefits she experienced *before* the school received actual notice of her being denied benefits. Thus, even if Wamer's denial-of-benefits claim is legally valid and preserved, it fails because it seeks to impose Title IX liability without showing actual knowledge of—or deliberate indifference to—the Title IX violation on which it is based.

*

In sum, there is no doubt that the circuits are confused and conflicted regarding the scope of Title IX liability. The only debate concerns *how* confused and conflicted the circuits are and how precisely this case implicates that confusion and conflict. The Court should grant review and bring clarity to this corner of the law.

II. The Sixth Circuit erred.

Wamer further argues that the Sixth Circuit correctly decided her case. Even if that were true, it would provide no impediment to granting review. *See, e.g.*, *Patel v. Garland*, 142 S. Ct. 1614, 1621 (2022) (affirming after granting certiorari to resolve circuit split). But it is not true.

As an initial matter, Wamer's defense of the Sixth Circuit's opinion rests on her denial-of-benefits theory. That theory fails for the reasons laid out above.

In any event, because Title IX is Spending Clause legislation, any ambiguity in the scope of Title IX's private cause of action must be resolved in favor of a narrow reading. As the University explained in its petition, conditions attached to Spending Clause legislation are valid only if they are unambiguous. Pet.5; *see Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). Title IX does not *clearly* make schools liable for damages stemming from harassment that ended before they received notice it was occurring. Therefore, it cannot be read to impose liability in these circumstances at all.

Wamer disagrees. She points to "[d]ecades of caselaw authoriz[ing] damages for intentional sex discrimination under Title IX." BIO.25. That caselaw,

she says, provided all the notice the Spending Clause requires. Not so. Congress can subject a recipient of federal funds to a particular form of liability only if it makes clear that, by taking the money, the recipient "exposes itself to liability *of that nature*." *Cummings v. Premier Rehab Keller, PLLC*, 142 S. Ct. 1562, 1570 (2022) (internal quotation marks omitted) (emphasis added). While the cases put recipients on notice of liability generally, none clearly establishes liability for harm relating to discrimination that ended before the school was put on notice.

Regardless, the clear-notice requirement binds *Congress*—it is a limit on the legislature's spending power. Courts cannot cure an unconstitutional lack of clarity with clarifying interpretations. Instead, "statutory ambiguity defeats altogether a claim by the Federal Government that Congress has unambiguously conditioned the States' receipt of federal monies in the manner asserted." *Va. Dep't of Educ. v. Riley*, 106 F.3d 559, 560–61, 567 (4th Cir. 1997) (*en banc*) (plurality) (adopting Judge Luttig's panel-stage dissent and appending it to the *en banc* court's opinion); *see also Tex. Educ. Agency v. United States Dep't of Educ.*, 992 F.3d 350, 361–62 (5th Cir. 2021). For that reason, Spending Clause conditions do not apply at all to circumstances in which they do not apply clearly. *See, e.g. Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006). Thus, the decades of Title IX caselaw should not affect the question whether Congress spoke with sufficient clarity.

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse.

Respectfully submitted,

DAVE YOST
Ohio Attorney General

BENJAMIN M. FLOWERS*
Solicitor General
**Counsel of Record*
MICHAEL J. HENDERSHOT
Chief Deputy Solicitor General
JANA M. BOSCH
Deputy Solicitor General
30 East Broad St., 17th Floor
Columbus, Ohio 43215
614-466-8980
bflowers@ohioago.gov

Counsel for Petitioner

OCTOBER 2022