Case No. 18-5936

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PRIANKA BOSE,

Plaintiff – Appellant

v.

ROBERTO DE LA SALUD BEA AND
RHODES COLLEGE,

Defendants – Appellees

On Appeal from the United States District Court
for the Western District of Tennessee (Case No. 2:16-cv-02308)
The Honorable John T. Fowlkes, Jr.

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 18-5936 Case Name: Bose v. Bea et al.

Name of counsel: Adam W. Hansen

Pursuant to 6th Cir. R. 26.1, Prianka Bose
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on November 30, 2018 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Adam W. Hansen

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Appellant Prianka Bose requests oral argument in this appeal. This case presents two issues of first impression for this Court: The first relates to the applicability of the cat's-paw theory of causation to claims arising under Title IX. The second relates to the scope of the judicial privilege under Tennessee defamation law. The resolution of these legal questions will have an ongoing impact on both Title IX cases and Tennessee defamation law. Accordingly, Bose believes oral argument would benefit the Court in its consideration of these important issues.

STATEMENT OF JURISDICTION

The district court had federal question jurisdiction over appellant's Title IX claim under 28 U.S.C. § 1331 and supplemental jurisdiction over the state law claims under 28 U.S.C. § 1367.

On October 26, 2016, the district court dismissed appellant's defamation claim. Motion to Dismiss Order, R.52, PageID.629-30. On February 27, 2018, the district court granted appellees' motion for summary judgment on the Title IX claim and all other claims except for appellant's claims for breach of contract and intentional interference with business relations. Summary Judgment ("SJ") Order, R.149, PageID.1809. The district court subsequently amended its order to dismiss the claim for intentional interference with business relations as well. Revised SJ Order, R.152, PageID.1925.

Bose filed a stipulation of dismissal with prejudice of her only remaining claim for breach of contract. Stipulation, R.164, PageID.2260-61. On August 7, 2018, the district court entered an order of dismissal and a judgment. Order of Dismissal, R.165, PageID.2264; Judgment, R.166, PageID.2265. On August 14, 2018, the district court entered an amended order purporting to dismiss the action "without

prejudice" and separately entered an amended judgment. Amended Order, R.167, PageID.2266; Amended Judgment, R.168, PageID.2267. The parties filed a joint motion to amend that order to reflect that the dismissal should have been with prejudice. Joint Motion, R.169, PageID.2268. On September 4, 2018, as that motion was pending, Bose filed a notice of appeal. Notice of Appeal, R.170, PageID.2271. Later on September 4, 2018, the district court entered an amended order and judgment dismissing the action in its entirely with prejudice. Amended Order R.171, PageID.2274; Amended Judgment R.172, PageID.2275. On September 5, 2018, Bose filed an amended notice of appeal. Amended Notice of Appeal, R.173, PageID.2276. This Court has jurisdiction under 28 U.S.C. § 1291.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case presents an important and unresolved question regarding the scope of a college's liability under Title IX: whether a college violates Title IX's prohibition on sex discrimination when it expels a student based solely on the false accusations made by a professor who is retaliating against the student for complaining about the professor's unwelcome sexual advances.

Appellant Prianka Bose, a student at appellee Rhodes College, confronted her professor, appellee Dr. Roberto de la Salud Bea, about his unwelcome sexual advances. Less than two weeks later, Bea falsely accused Bose of cheating. He claimed she copied from a fake answer key he created to catch her in the act of cheating. In reality, Bea created the fake answer key after the fact to match Bose's actual quiz answers and make it look as though she had cheated. Based upon Bea's allegation, and with knowledge of Bose's assertion that Bea was framing her in retaliation for complaining about sex discrimination, Rhodes expelled Bose.

Retaliation for complaining about sex discrimination is itself discrimination "on the basis of sex" under Title IX. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173-74 (2005). Bose is a victim of such retaliation. Bose informed Rhodes about Bea's retaliatory motive. Rhodes nevertheless expelled her, based entirely on evidence Bea presented at a disciplinary hearing, and without ever conducting an independent investigation into whether Bea's cheating allegations were retaliatory. The Court should hold that, under these circumstances, a

school on notice of a teacher's discriminatory motive violates Title IX when it carries out that teacher's retaliatory agenda.

The district court wrongly concluded that Bea's retaliatory motive was irrelevant to whether Bose's expulsion was "on the basis of sex." The district court held that because Rhodes is not subject to respondeat superior liability under Title IX, the cat's-paw theory of causation is inapplicable. The district court erred by conflating causation with vicarious liability. Cat's-paw causation does not impose respondeat superior liability here; rather, it holds Rhodes liable for its own discriminatory actions.

This Court should also hold that Bea's defamatory statements against Bose in connection with the Rhodes Honor Council proceedings are not protected by Tennessee's absolute privilege for statements made in the course of judicial and quasi-judicial proceedings. *Jones v. Trice*, 360 S.W.2d 48, 52 (Tenn. 1962). Tennessee has only applied this privilege in the context of government proceedings; it has never extended the privilege to statements made before a private body. A private college's informal, student-run Honor Council proceedings contain no due process protections, do not relate to matters of public concern, and fall well

outside of the scope of Tennessee's historical application of the absolute privilege. This Court should refrain from extending Tennessee's absolute privilege to an entirely new sphere of private proceedings.

For these reasons, this Court should reverse the grant of summary judgment to Rhodes on Bose's Title IX claim and reverse the dismissal of Bose's defamation claim against Bea.

STATEMENT OF THE ISSUES

1. Whether a college violates Title IX's prohibition against discrimination on the basis of sex when the college expels a student based solely on the false accusations made by a professor who is retaliating against the student for complaining about the professor's unwelcome sexual advances.

2. Whether, under Tennessee defamation law, the absolute privilege accorded to statements made in judicial and quasi-judicial proceedings extends to statements made in a hearing conducted by a private college's student-run honor council.

STATEMENT OF THE CASE

I. FACTS.

A. The Parties.

Appellee Rhodes College is a private liberal arts college in Memphis, Tennessee and a federal funding recipient. Appellant Prianka Bose attended Rhodes as a student from the fall semester of 2013 through the end of the fall semester of 2015. SJ Exhibit A, R.116-2, PageID.1016; Statement of Facts ("SOF"), R.116-1, PageID.1004; SOF Response, R.120, PageID.1306. Appellee Dr. Roberto de la Salud Bea taught Bose in his Organic Chemistry classes in the spring and fall semesters of 2015. SJ Exhibit B, R.116-3, PageID.1087; SJ Exhibit C, R.116-4, PageID.1234-35.

A neuroscience and history major, Bose planned to go to medical school after graduation from Rhodes. SJ Exhibit A, R.116-2, PageID.1016-17. Bose was an excellent student and had earned a cumulative GPA of 3.7 by the fall of 2015. *Id.* In her sophomore year, she was accepted into medical school through George Washington University's early selection program. *Id.*, PageID.1017.

In the spring of 2015, Bose took Dr. Bea's Organic Chemistry I course. Bose ultimately performed well in Organic Chemistry I and

signed up for Bea's fall 2015 Organic Chemistry II course. SJ Exhibit C, R.116-4, PageID.1234-35.

B. Bea Questions Bose About Her Romantic Relationship and Asks Her Out to Dinner.

In the summer of 2015, Bose remained in Memphis for an internship. Plaintiff's SJ Exhibits, R.120-1, PageID.1330. In July, while walking alone to her car, she encountered Bea in a parking lot. *Id.*, PageID.1329. Bea called her name and approached her. *Id.* She had to step back to maintain an arm's-length distance; he stopped approaching when she stepped back. *Id.*

The two began to talk. *Id.* At first, the conversation was innocent. He said, "I'm excited about having you in class for the fall semester, it will be really fun." *Id.* He told her he was up for tenure review and was working on his tenure package and doing research. *Id.*, PageID.1330. She told him she was in Memphis for the summer for an internship. *Id.*

After that, the conversation took a personal and unwelcome turn. *Id.* Bea asked Bose how she spent her evenings and her free time in Memphis. *Id.* She told him she played tennis. *Id.* He asked, "do you get to hangout with your boyfriend"? *Id.* At that point, Bose paused because she "felt so uncomfortable." *Id.* Bose had never mentioned her boyfriend

to Bea, yet he was questioning her about her romantic relationship. *Id.* She "didn't understand where the idea of a boyfriend even came from." *Id.* Bose did not answer the question; she simply told Bea she "had to leave." *Id.*, PageID.1331.

As Bose was about to turn and leave, Bea reached out his hand toward her. *Id.* She stepped away again and stopped. *Id.* He said, "wait, so what are you doing"? *Id.* She asked, "what do you mean"? *Id.* "[W]ell," he said, "I meant, you know, would you like to go out to dinner with me just to catch up"? *Id.* According to Bose, "It sounded like he was asking me out on a date and that did not make me comfortable." *Id.* She said "no" and "tried to get out of there as fast as possible." *Id.*

As soon as Bose arrived at her car, she called her mother to tell her about the conversation. *Id.* Bose's mother advised her to try to maintain a strictly professional relationship with Bea. *Id.*, PageID.1332.

C. Bea's Inappropriate Interest in Bose Continues Through the Fall 2015 Semester.

Bea's Organic Chemistry II course began in the fall of 2015. In keeping with her mother's advice, Bose remained enrolled. *See id.*

Students' grades in Bea's Organic Chemistry II course were based on points scored on nine total exams: five quizzes, three midterms, and a

final exam. SJ Exhibit A, R.116-2, PageID.1048. Bea provided all his Organic Chemistry II students the option to take their exams early. *Id.*, PageID.1049. Because Bea scheduled his exams for Fridays, Bose often took her exams early so she could participate in extra-curricular or family events, such as weddings or tennis matches. *Id.*; SJ Exhibit B, R.116-3, PageID.1091-1100.

From the beginning of the semester until November 20, 2015, Bose took six exams—four of which she took early in Bea's office—and excelled on all of them. SJ Exhibit B, R.116-3, PageID.1091-1100. She received a perfect score on the quiz she took in the classroom during the regularly scheduled time. *Id.*, PageID.1094.

Bea's unwelcome and unprofessional conduct continued and intensified during the fall semester of 2015. Throughout the semester, Bea regularly commented on Bose's appearance, calling her "pretty" or "beautiful," and complimenting her clothing. *Id.*, PageID.1127; Plaintiff's SJ Exhibits, R.120-1, PageID.1342. During her exams, Bea sat with her in his office and frequently interrupted and talked to her, sharing personal details about himself. Plaintiff's SJ Exhibits, R.120-1, PageID.1338; Preliminary Injunction Hearing Exhibit ("PI Exhibit") 13,

App.109. Bose would have preferred to take her exams in an empty classroom or lab room, but Bea insisted that she take them in his office. Plaintiff's SJ Exhibits, R.120-1, PageID.1373-76.

Bea even followed Bose as she attended her other courses. Bose was enrolled in a corresponding organic chemistry lab course taught by another professor, Kimberly Brien. SJ Exhibit A, R.116-2, PageID.1078; Plaintiff's SJ Exhibits, R.120-1, PageID.1368. Although Bea did not teach the course, he routinely appeared in the lab room and initiated conversations with Bose. Plaintiff's SJ Exhibits, R.120-1, PageID.1333, 1343, 1368. Although other students were present in the lab, Bea paid almost exclusive attention to Bose. *Id.*; PI Exhibit 13, App.105. Bose took all her laboratory course quizzes in the classroom in Professor Brien's presence and received an A grade in that course. SJ Exhibit A, R.116-2, PageID.1078.

Bea even initiated special meetings with Bose where he asked her about her personal life. In September 2015, Bea tried to pull Bose out of the lab to discuss something with her. PI Exhibit 13, App.106. She told him she was busy, and he asked her to come talk to him after class. *Id.* Once she arrived in his office, he asked her about research opportunities

and said, "I would love for you to be my research assistant." *Id.* To be polite, she told him she would consider it, but she "didn't really want to work in close proximity to him" because she was "still on edge and trying to keep the relationship professional." *Id.* Bea then tried to engage her in personal conversation, asking her about her family, her sorority, and whether she attended parties on campus. *Id.* Bose "just didn't answer" and said she had to leave for a meeting. *Id.*

D. Bea Once Again Invades Bose's Personal Space and Questions Her About Her Boyfriend.

On November 19, 2015, Bose and a friend were sitting in the Rhodes cafeteria—known as "the Rat"—looking at their phones. Plaintiff's SJ Exhibits, R.120-1, PageID.1334-35. Bea snuck up to Bose from behind. *Id.* He leaned over her shoulder, and asked very sternly, "are you texting your boyfriend"? *Id.*, PageID.1335. Bose was startled and "kind of jumped a little" because she had not seen him approach. *Id.*; PI Exhibit 13, App.107. Bea stood very close to her—so close that Bose's friend had to "adjust herself" because Bea was "in her space as well." PI Exhibit 13, App.107; Plaintiff's SJ Exhibits, R.120-1, PageID.1335.

Bose felt "very uncomfortable," did not respond to Bea's question, and "gaped at him in complete shock." PI Exhibit 13, App.107; Plaintiff's

SJ Exhibits, R.120-1, PageID.1335. Bea smiled and walked away, seeming "pretty happy with himself." PI Exhibit 13, App.107; Plaintiff's SJ Exhibits, R.120-1, PageID.1335. Bose's friend who had witnessed the incident encouraged Bose to report it. Plaintiff's SJ Exhibits, R.120-1, PageID.1335.

E. Bose Confronts Bea About His Behavior.

After the incident in the cafeteria, Bose decided to tell Bea in person that he was making her uncomfortable with his unwelcome words and conduct. *Id.*, PageID.1336. She thought speaking to him directly would be the most professional and effective approach. *Id.* So later in the day of the incident in the cafeteria, Bose, accompanied by the same friend who had witnessed the incident, located Bea outside the chemistry building and approached him to discuss the issue. *Id.*

Bea seemed very happy to see Bose until she broached the subject of his inappropriate behavior. *Id.*, PageID.1337. She said, "look, Dr. Bea, I don't know if you mean it this way, but I feel really uncomfortable when you ask me questions about my boyfriend, when you ask me anything about my family, I don't want personal questions, I want to keep our relationship strictly professional." *Id.* Bea's reaction was the complete

opposite of what Bose had expected. *Id.* Instead of apologizing, he got "really mad," looked at the ground, and walked away angrily without saying a word. *Id.*; SJ Exhibit A, R.116-2, PageID.1077; PI Exhibit 13, App.108.

F. Bea Retaliates Against Bose by Refusing to Teach Her.

Bea's Midterm 3 exam was scheduled for the next day, November 20, 2015. SJ Exhibit A, R.116-2, PageID.1051. Bose woke that day with a fever and decided she would take the test early to avoid disturbing the other students with her cough. Plaintiff's SJ Exhibits, R.120-1, PageID.1338. She arrived at Bea's office about thirty minutes before the Organic Chemistry II class commenced. *Id.* Bea printed out her test, tossed it on the desk, and "didn't say anything" to her at all, which was out of character for him. *Id.*, PageID.1338-39.

Bose scored a 74 on her Midterm 3 exam, which was close to the class average. *Id.*, PageID.1406. Bea, however, falsely recorded her grade in his rosters as a 47. *Id.*

Bea's retaliatory conduct continued. Before class the following Monday, on November 23, Bose tried to ask Bea questions about practice problems for the course. *Id.*, PageID.1339. Bea refused to respond to her

or even look at her. *Id.* Instead, he simply shrugged his shoulders. *Id.* Bose had regularly asked for his help on practice problems in the past, and he had never before refused to respond to her questions. *Id.*, PageID.1340.

Feeling uneasy with his changed behavior, Bose went to his office after class to try to address the situation. *Id.* She said, "Dr. Bea, can I talk to you"? *Id.* But he did not even look at her. *Id.* So she sat down and said it again: "Dr. Bea, can I please talk to you, I really need to talk to you." *Id.*, PageID.1340-41. Again, he refused to look at or speak to her. *Id.*, PageID.1341. So Bose simply said her piece: telling Bea that since she had confronted him the day of the cafeteria incident, it seemed as though he did not want to teach her anymore or answer her questions about the material. *Id.* Bea again did not respond, so she left. *Id.*

G. Bea Retaliates Against Bose by Framing Her for Cheating.

A few days later, Bea framed Bose for cheating. On November 26, 2015—Thanksgiving Day—Bea created a document on his computer entitled "Quiz 5 Amswers.docx." *Id.*, PageID.1415, 1425, 1434. Quiz 5, the final quiz in Bea's course, was scheduled for December 4, 2015, but Bose took the quiz on December 2 so she could travel home for a family

event. SJ Exhibit B, R.116-3, PageID.1108. Bose arrived at Bea's office around 7:45 a.m. to take the quiz. Plaintiff's SJ Exhibits, R.120-1, PageID.1422. At 10:29 a.m., approximately two hours after Bose had completed her quiz, Bea modified the "Quiz 5 Amswers.docx" document on his computer. *Id.*, PageID.1414, 1425, 1430, 1435-36.

Bea claims he created the "Quiz 5 Amswers.docx" document as a fake answer key designed to catch Bose cheating on Quiz 5. *Id.*, PageID.1401. Bea testified—without corroborating evidence—that Bose had been viewing answer keys on his computer while taking quizzes and tests in his office. *Id.*; SJ Exhibit A, R.116-2, PageID.1028. In fact, Bose never accessed answer keys on his computer and never cheated in any manner. Plaintiff's SJ Exhibits, R.120-1, PageID.1382. Contrary to Bea's testimony, and consistent with the "Quiz 5 Amswers.docx" document's electronic signature, Bea *modified* the answer key *after* Bose took the quiz to match her actual answers and make it appear as though she had cheated. *Id.*, PageID.1414, 1425, 1430, 1435-36. In other words, Bea's "fake answer key" was itself a fake that Bea forged to retaliate against Bose for confronting him about his inappropriate conduct.

Bea's central allegation—that he created a fake answer key in advance to catch a student in the act of cheating—lacks any basic indicia of truthfulness. For example, if Bea were telling the truth, he could have emailed the answer key to Rhodes' administrators—or even himself—*before* Bose took the quiz, easily proving his allegations. *Id.*, PageID.1402-03. Bea never did so. *Id.* In a similar vein, Bea offered no credible explanation as to why he modified the "Quiz 5 Amswers.docx" document two hours after Bose had completed taking the quiz. *Id.*, PageID.1414, 1425, 1430, 1435-36. His subsequent modification of the answer key strongly suggests that he changed the key to match Bose's actual answers.

Bea had every reason to retaliate against Bose. In the fall of 2015, Bea was being reviewed for tenure. *Id.*, PageID.1405. If Bose had reported his inappropriate conduct, it would have jeopardized his tenure opportunity. *Id.* So Bea decided to preemptively attack Bose by framing her for cheating. *Id.*, PageID.1382.

Bose, by contrast, had no incentive to cheat on Quiz 5. Bose had already scored extremely well—107 out of 100 points—on the first four quizzes in Bea's class:

Quiz #	Date Taken	Grade
Quiz 1	9/18/2015	30/25
Quiz 2	10/9/2015	30/25
Quiz 3	10/23/2015	24/25
Quiz 4	11/13/2015	23/25

SOF Response, R.120, PageID.1310; SOF, R.116-1, PageID.1006-07. Bea's course syllabus provided that the lowest-scoring quiz would be discounted entirely for grading purposes. SJ Exhibit A, R.116-2, PageID.1048. In other words, Bose could have skipped Quiz 5 entirely without consequence; she still would have received a cumulative score of 107 out of 100 points on all her quizzes.

Bea added more, uncorroborated cheating allegations in his subsequent statement to the Rhodes Honor Council—allegations he had never raised with Bose or anyone else before she confronted him about his inappropriate behavior. SJ Exhibit A, R.116-3, PageID.1026-29. For example, he claimed that he also suspected Bose of cheating on November 13, 2015, when she took Quiz 4 in his office. *Id.*, PageID.1026-27. Bea claimed that when he returned to his office, the answer key document for Quiz 4 was open on his computer. *Id.*, PageID.1027. Bose never touched his computer, however, and Bea was present in his office with Bose for nearly the entire time she took that quiz. SJ Exhibit B, R.116-3,

PageID.1099; Plaintiff's SJ Exhibits, R.120-1, PageID.1382. Bea also later claimed that Bose had been acting suspiciously during Midterm 3 because she had been standing behind his desk when he arrived back at his office. SJ Exhibit A, R.116-2, PageID.1027. However, she only stood to let him into the office, and she was standing near—not behind—his desk simply to provide clearance for the door to open. Plaintiff's SJ Exhibits, R.120-1, PageID.1378-79.

H. Bea Retaliates Against Bose by Commencing Disciplinary Proceedings.

After modifying the Quiz 5 answer key to reflect Bose's actual answers, Bea began to falsely accuse her of cheating. On December 2, 2015—the same day Bose took Quiz 5—Bea sent emails to Rhodes' Associate Deans of Students accusing Bose of cheating. SJ Exhibit C, R.116-4, PageID.1246, 1248. One of the deans brought the matter to the attention of the Honor Council—Rhodes' student-elected, student-run body charged with evaluating and acting upon alleged honor code violations. *Id.*, PageID.1250; PI Exhibit 20, App.133-34. Two days later, Regan Adolph, president of the Honor Council, sent Bose an email indicating Bose was under investigation for having "cheated on multiple

assignments" in Organic Chemistry II. SJ Exhibit B, R.116-3, PageID.1109, 1142.

Over the course of the next nine days, Bose met with Mitchell Trychta, the Honor Council member assigned to investigate her case, and provided a statement. *Id.*, PageID.1109-12. Distraught by the false allegations of cheating and lacking sufficient details about the charges, Bose did not tell Trychta about Bea's inappropriate sexual conduct toward her or her confrontations with Bea. *Id.*, PageID.1113, 1116-17. At that point in time, it did not occur to Bose that Bea had accused her of cheating to retaliate for complaining about his advances and to prevent her from jeopardizing his tenure. *Id.*, PageID.1117; Plaintiff's SJ Exhibits, R.120-1, PageID.1399; PI Exhibit 13, App.113.

I. The Honor Council Hearings.

The Honor Council hearing took place on December 17. SJ Exhibit B, R.116-3, PageID.1119. The hearing was conducted exclusively by a panel of twelve students. Complaint, R.1, PageID.4; SJ Exhibit C, R.116-4, PageID.1233. Adolph, a senior at Rhodes, presided over the hearing with little to no faculty or administrative oversight. Complaint, R.1, PageID.4. Another member of the Honor Council, Zain Virk, worked

as Bea's research assistant but did not recuse himself. *Id.*, PageID.9; SJ Exhibit A, R.116-2, PageID.1081. The Honor Council Constitution gave Adolph complete discretion over the recusal of Honor Council members, as well as the allowance of witnesses and evidence. PI Exhibit 20, App.138. The Honor Council Constitution explicitly forbids representation by counsel during hearings; as a result, Bose was not permitted counsel. *Id.*; Complaint, R.1, PageID.5. At the commencement of the proceedings, Adolph stated, "This is an informal proceeding, not comparable to a criminal trial." PI Exhibit 4, App.18.

At the hearing and in his statement to the Honor Council, Bea offered inconsistent and incredible testimony regarding his allegations against Bose. He claimed, for example, that he had created a fake answer key filled with incorrect answers and that Bose's actual answers aligned perfectly with the made-up answers on the fake key. SJ Exhibit A, R.116-2, PageID.1028. Bea asserted that all but the first of five answers on the fake key were incorrect. *Id.* That statement was misleading. Quiz 5 was not a multiple-choice quiz but rather required students to show their work by proposing and illustrating chemical structures and reactions. *Id.*, PageID.1036-38. Bose's answers would have earned her

either 16 or 17 out of 25 points on the quiz—a fact which Bea did not share with the Honor Council. SOF Response, R.120, PageID.1324; Bea Deposition, R.121-1, PageID.1508. Bea now concedes that Bose's answers were all credible responses to the quiz questions. Plaintiff's SJ Exhibits, R.120-1, PageID.1412.

Bea also misled the Honor Council about the fake answer key document itself. He stated, "I can bring my computer and I can show everybody when it was modified. It was modified two days before [Bose] took that quiz." *Id.*, PageID.1398. That testimony was false. In fact, all parties' forensic experts agree that Bea last modified the answer key approximately two hours after Bose took the quiz. *Id.*, PageID.1414, 1425, 1430, 1435-36.

Bea also misinformed the Honor Council about Bose's prior exam scores. He testified that Bose had scored a 47 on the Midterm 3 exam and said this low score raised his suspicions. *Id.*, PageID.1392; SJ Exhibit A, R.116-2, PageID.1027. At the time of the hearing, Bea knew that Bose had lost the original, graded copies of her Organic Chemistry II exams while traveling through the airport. SJ Exhibit A, R.116-2, PageID.1032; SJ Exhibit C, R.116-4, PageID.1261; Plaintiff's SJ Exhibits, R.120-1,

PageID.1383-84, 1408. After the Honor Council hearing, however, a good Samaritan mailed Bose her lost exams. Plaintiff's SJ Exhibits, R.120-1, PageID.1383-84. The original exams show she actually scored a 74 on Midterm 3, which was near the class average. *Id.*, PageID.1406.

Bea also falsely claimed that Bose had altered his rosters to change her grades on four quizzes or exams. SJ Exhibit A, R.116-2, PageID.1028-29. He claimed that Bose had modified his written roster, which he kept in the top tray of his desk, because the roster did not match the electronic version of the roster he kept on his computer. *Id.*, PageID.1028. However, the original exams prove that neither his written nor electronic rosters were accurate. *Compare id.*, PageID.1045-46, *with* SOF Response, R.120, PageID.1310, *and* SOF, R.116-1, PageID.1006-07. For example, Bose actually scored a 97 on Midterm 2. SOF Response, R.120, PageID.1310; SOF, R.116-1, PageID.1007. The written roster Bea submitted as evidence originally showed she scored a 99, and the electronic roster Bea submitted as evidence showed she scored a 93. SJ Exhibit A, R.116-2, PageID.1045-46. Similarly, Bose scored a 74 on her Midterm 3. SOF Response, R.120, PageID.1310; SOF, R.116-1, PageID.1006-07. The written roster showed she scored a 77, and the

electronic roster showed a score of 47. SJ Exhibit A, R.116-2, PageID.1045-46. These unexplained discrepancies call into question Bea's credibility, the authenticity of the rosters, and all other documentary evidence Bea submitted.

J. Bea Responds Aggressively and Threatens Bose When She Tries to Bring Up Retaliation During the Honor Council Hearing.

Bose had not considered the possibility of a retaliatory motive until the Honor Council hearing. SJ Exhibit C, R.116-4, PageID.1262-63. But sitting in the hearing, watching Bea level detailed false accusations against her, she began to understand that he had a retaliatory motive for accusing her of cheating. *Id.* During the hearing, Bea repeatedly brought up his tenure review and the possibility that his tenure could be in jeopardy. PI Exhibit 4, App.19, 63, 66; Plaintiff's SJ Exhibits, R.120-1, PageID.1397. He said, "Do you think I'm going to put in jeopardy my tenure because of you?" Plaintiff's SJ Exhibits, R.120-1, PageID.1397. At that point, Bose "started putting two and two together," realizing Bea had viewed the possibility that she would report him for his misconduct as a threat to his tenure. PI Exhibit 13, App.113; SJ Exhibit C, R.116-4, PageID.1262-63.

Bea repeatedly interrupted Bose as she questioned him during the hearing, and he behaved aggressively toward her. PI Exhibit 4, App.66-71. When examining Bose at the hearing, Bea asked her if she thought he was "taking a kind of revenge against you." Plaintiff's SJ Exhibits, R.120-1, PageID.1397. She replied, "Possibly." *Id.* Then, he threatened her:

> PROFESSOR BEA: It should be something really, really, really bad you have done to me in order to get a revenge against you. Really, really bad. Anything in particular? A joke, really? For just a joke, I am doing all of this? Tell me.
>
> MS. BOSE: I don't know -- I don't know how you think. I do know that we've spoken a lot about many different things, your tenure, mostly professional. And I mean, this kind of relationship between a teacher and a student should remain professional, but I mean, we were close, so --
>
> PROFESSOR BEA: Careful what you say in close or not close relationship.

Id. In deposition testimony, Bea admitted that he understood Bose was accusing him of retaliation during this exchange; he nevertheless warned her to be "careful what you say." *Id.*, PageID.1404-05.

Bea also reacted aggressively and evasively at the Honor Council hearing when Bose attempted to bring up his inappropriate conduct toward her. For example, Bose asked him, "Do you remember that we ran

into each other once during this past summer?" PI Exhibit 4, App.70-71. He responded defensively: "This summer? Summer, you mean? During summer? Well, maybe. Yes, so? So?" *Id.*, App.71. She then asked whether he remembered encountering her in the parking lot. *Id.* He responded, "No, I don't remember." *Id.* Bea similarly claimed, in response to questions from Bose, that he did not remember the incident in the cafeteria, asking about her boyfriend, or the confrontation later that day. *Id.* In subsequent deposition testimony, however, Bea's memory had improved; he admitted he did, in fact, approach Bose in the cafeteria and ask about her boyfriend. Plaintiff's SJ Exhibits, R.120-1, PageID.1423.

Bose was questioned by Bea and Honor Council members but had no legal counsel present to elicit favorable testimony from her. PI Exhibit 4, App.18-73. When Bose attempted to bring up Bea's improper conduct and her confrontation with him after the incident in the cafeteria, Adolph, the student presiding over the hearing, repeatedly interrupted her and told her she could only ask questions. *Id.*, App.70-71. During her closing statement, Bose again raised Bea's retaliatory motive, but Adolph would not allow her to recall witnesses to question them about the facts

underlying the retaliation. SJ Exhibit A, 116-2, PageID.1082; SJ Exhibit B, R.116-3, PageID.1178.

K. Relying on Bea's Testimony and Falsified Evidence, Rhodes Expels Bose.

Four days after the hearing, Adolph sent Bose an email informing her that the Honor Council had found her in violation and that she was expelled from Rhodes. SJ Exhibit A, R.116-2, PageID.1052.

Bose appealed the Honor Council's decision to the Faculty Appeals Committee. SJ Exhibit B, R.116-3, PageID.1130. Through counsel, she submitted an appeal statement describing Bea's sexual harassment and retaliation. *Id.*, PageID.1180-1221. She pointed out that Bea's accusations relied entirely on evidence he himself had created and that "[t]he Council had no means of assessing" the answer key's validity "other than Bea's own self-serving assertions." *Id.*, PageID.1197.

The scope of the Faculty Appeals Committee's review was limited. SJ Exhibit A, R.116-2, PageID.1019. The Committee did "not attempt to determine" whether Bose's allegations of retaliation were accurate, instead limiting its review to a determination of whether there was "sufficient evidence to reach the decision that [the] Honor Council did." *Id.*; Transcript, R.40, PageID.394. As the district court explained, the

Committee "by its own admission . . . simply addressed the 'In Violation' determination by the [Honor Council], without determining the validity or effect of [Bose's] allegations regarding Defendant Bea." SJ Order, R.149, PageID.1799.

The Committee ultimately upheld the Honor Council's finding of a violation and remanded for reconsideration of the penalty only, in light of the recovered originals of Bose's tests. SJ Exhibit B, R.116-3, PageID.1133-34. The Committee did not remand for consideration of the cheating allegations or retaliation. *Id.* The Honor Council voted to uphold the expulsion. *Id.*, PageID.1134.

L. Bose's Files a Title IX Complaint, but Rhodes' Investigator Refuses to Look into the Retaliation Allegations.

In February 2016, Bose filed an administrative Title IX complaint alleging sexual harassment and retaliation. SJ Exhibit B, R.116-3, PageID.1135. Rhodes retained an outside lawyer, Whitney Harmon, to investigate the complaint. *Id.*, PageID.1135-36. On February 23, Harmon sent Bose correspondence stating, "My role is exclusively related to the sexual harassment allegations, and not the Honor Council proceeding or the allegations that led to the proceeding." Complaint, R.1, Page ID.7;

Answer, R.53, PageID.638-39. The Honor Council proceeding and the allegations that led to it were, however, the entire basis of Bose's retaliation complaint. In other words, Harmon made it clear from the beginning that she would not be investigating the key facts underlying the retaliation.

Harmon proceeded to conduct interviews of Bose, Bose's witnesses, and Bea. SJ Exhibit B, R.116-3, PageID.1137-38. Harmon's report demonstrates that, true to her February 23 correspondence, her investigation focused on the alleged sexual harassment incidents, such as Bea's advances and inappropriate personal comments, the meeting in the parking lot, and the incident in the cafeteria. Harmon Report, R.161-12, PageID.2223-37. Indeed, Harmon's report opens by stating, "I was asked to conduct an investigation into a complaint of sexual harassment." *Id.*, PageID.2224. The word "retaliation" is conspicuously missing from this statement. *Id.* There is no indication that the scope of Harmon's investigation ever expanded to include the cheating allegations or Honor Council proceedings—the very means of retaliation asserted by Bose. Bose never received a hearing on her complaint. Plaintiff's SJ Exhibits, R.120-1, PageID.1387. Instead, she received a letter from the

Title IX coordinator stating that "the allegations of sexual harassment and retaliation in violation of the College's policy cannot be sustained." SJ Exhibit B, R.116-3, PageID.1231.

II. PROCEDURAL HISTORY.

Bose filed this action asserting a claim against Rhodes for violating Title IX, 20 U.S.C. §§ 1681-1688, a claim against Bea for defamation, and additional claims not subject to this appeal. Complaint, R.1, PageID.1-20. Specifically, Bose alleged that the false cheating allegations were defamatory and that her resulting retaliatory expulsion from Rhodes constituted gender discrimination, in violation of Title IX's prohibition against discrimination "on the basis of sex." Complaint, R.1, PageID.7-8, 17.

Bea and Rhodes filed a motion to dismiss. Motion to Dismiss, R.21, PageID.120-21. Relevant here, Bea argued that his false accusations of cheating and falsification of documentary evidence submitted to the Honor Council were made as part of "quasi-judicial proceedings" and therefore subject to an absolute privilege under Tennessee defamation law. Defendants' Motion to Dismiss Memo, R.21-1, PageID.133-34. The district court agreed and dismissed the defamation claim while allowing

almost all other claims, including Bose's Title IX claim, to proceed. Motion to Dismiss Order, R.52, PageID.619-32.

After discovery, Bea and Rhodes filed a motion for summary judgment. SJ Motion, R.115, PageID.968-69. With respect to Bose's retaliation claim, Rhodes argued that the claim failed because Rhodes itself did not have a retaliatory motive and therefore causation was lacking. Defendants' SJ Memo, R.116, PageID.978-81. The district court agreed, holding that Bea's own retaliatory motive was irrelevant because the cat's-paw theory of causation, which links the discriminatory motive of one actor to the adverse action of another, depends on principles of respondeat superior and constructive notice that do not apply to Title IX. SJ Order, R.149, PageID.1788-90. The court did not say what theory of causation *would* apply to Bose's retaliation claims but, in light of its analysis, presumably concluded that the final decisionmaker must harbor the retaliatory animus.

The district court granted summary judgment to Rhodes on the Title IX claim. *Id.*, PageID.1790. Bose and Rhodes stipulated to the dismissal of her only remaining claim. Stipulation, R.164, PageID.2260-61. This appeal followed.

ARGUMENT

I. UNDER TITLE IX, BEA'S RETALIATORY MOTIVE WAS A CAUSAL FACTOR RENDERING RHODES' EXPULSION OF BOSE DISCRIMINATION "ON THE BASIS OF SEX."

Title IX broadly prohibits sex discrimination in an educational program or activity, including discrimination initiated by teachers and students. Bea's motive is thus relevant to whether Bose's expulsion was "on the basis of sex." Contrary to the district court's holding, the cat's-paw theory fully aligns with Title IX's framework, and, accordingly, applies to Title IX claims. The cat's-paw theory merely recognizes the causal connection between Bea's discriminatory motive and Rhodes' expulsion—it does not impose vicarious liability.

A. Standard of Review.

On review of a grant of summary judgment, the Court views the facts in the light most favorable to Bose. *Hunt v. Sycamore Cmty. Sch. Dist. Bd. of Educ.*, 542 F.3d 529, 532 (6th Cir. 2008). The standard of review is de novo. *Id.* at 534 (citing *Sperle v. Mich. Dep't of Corr.*, 297 F.3d 483, 490 (6th Cir. 2002)).

B. Title IX Broadly Prohibits Discrimination "on the Basis of Sex."

Section 901(a) of Title IX provides that "[n]o 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).

Congress enacted Title IX with two primary objectives: "to avoid the use of federal resources to support discriminatory practices," and "to provide individual citizens effective protection against those practices." *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979). Title IX thus provides a private right of action for victims of illegal sex discrimination. *Id.* at 717.

By using the broad term "discrimination," Congress "gave the statute a broad reach." *Jackson*, 544 U.S. at 175 (citing *North Haven Bd. of Ed. v. Bell,* 456 U.S. 512, 521 (1982)). Discrimination on the basis of sex simply means unfavorable or differential treatment because of one's sex. *Id.* at 174 (citing cases). Thus, although Title IX does not explicitly mention sexual harassment, the Supreme Court has held that sexual harassment by a teacher is intentional discrimination encompassed by

Title IX's private right of action. *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 74-75 (1992). Just as a supervisor discriminates on the basis of sex under Title VII in the employment setting when he sexually harasses a subordinate, under Title IX "the same rule . . . appl[ies] when a teacher sexually harasses . . . a student." *Id.* at 75.

Retaliation is another form of actionable sex discrimination under Title IX. Unlike certain other anti-discrimination statutes, such as Title VII, Title IX does not contain a separate, express prohibition against retaliation. *Compare* 20 U.S.C. §§ 1681-1688 (Title IX), *with* 42 U.S.C. § 2000e–3(a) (Title VII's retaliation provision). Nevertheless, the Supreme Court has held that retaliation against an individual because he or she has complained of sex discrimination is itself intentional discrimination "on the basis of sex" in violation of Title IX. *Jackson*, 544 U.S. at 173-74. "Retaliation is, by definition, an intentional act." *Id.*

Title IX retaliation claims are analyzed using the same standards as Title VII. *Fuhr v. Hazel Park Sch. Dist.*, 710 F.3d 668, 673 n.2 (6th Cir. 2013). To establish a prima facie case of retaliation under Title IX, a plaintiff must show: (1) she engaged in a protected activity under Title IX, (2) defendant's knowledge of the protected activity, (3) adverse school-

related action, and (4) a causal connection between the adverse school-related action and the protected activity. *See Taylor v. Geithner*, 703 F.3d 328, 336 (6th Cir. 2013) (setting forth similar elements for Title VII retaliation claim); *see also Emeldi v. Univ. of Oregon*, 673 F.3d 1218, 1223 (9th Cir. 2012) (setting forth similar elements), *republished as amended at* 698 F.3d 715 (9th Cir. 2012); *Papelino v. Albany Coll. of Pharmacy of Union Univ.*, 633 F.3d 81, 91 (2d Cir. 2011) (same).

C. Under Title IX, the Source of the Discriminatory Animus Can Be an Agent or Even a Third Party.

Title IX's prohibition against discrimination is broad enough to cover discrimination by an educational institution's agents and even third parties. For example, sexual harassment by teachers constitutes discrimination "on the basis of sex." *Franklin*, 503 U.S. at 75. For the same reason, sexual harassment by fellow students also constitutes discrimination "on the basis of sex." *Davis Next Friend LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 646-47 (1999). This rule is not limited to the sexual harassment context. Courts have found that other forms of intentional sex discrimination carried out by teachers or other school agents violate Title IX. These include a professor giving a student a failing grade in retaliation for complaining of pregnancy

discrimination, *see Varlesi v. Wayne State Univ.*, 643 F. App'x 507, 512, 518 (6th Cir. 2016); a coach's policy that prohibited male athletes from growing out their hair, *see Hayden ex rel. A.H. v. Greensburg Cmty. Sch. Corp.*, 743 F.3d 569, 583 (7th Cir. 2014); a professor's decision to resign as a student's dissertation chair after the student complained of sex discrimination, *see Emeldi*, 698 F.3d at 726-29; and, in a case remarkably similar to this one, a professor's false allegations of cheating against a student who had complained of sexual harassment, *see Papelino*, 633 F.3d at 91.

Independent discriminatory acts of non-decisionmaking agents or third parties, however, will not lead to monetary damages under Title IX unless the funding recipient had notice and failed to remedy them. *See generally Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998). The Supreme Court held in *Gebser* that Congress did not contemplate damages against a funding recipient where the recipient was unaware of discrimination in its programs. *Id.* at 285. The Court concluded it would "frustrate the purposes" of Title IX "to permit a damages recovery against a school district for a teacher's sexual harassment of a student based on principles of *respondeat superior* or constructive notice, *i.e.,* without

actual notice to a school district official." *Id.* Accordingly, the Court held that "damages may not be recovered . . . unless 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." *Id.* at 277. Thus, in cases "that do not involve official policy of the recipient entity," an agent's *independent* acts will result in institutional liability only if the funding recipient has actual notice of the discrimination and "fails adequately to respond." *Id.* at 290.

The Supreme Court adopted this standard to avoid the "risk that the recipient would be liable in damages not for its own official decision but instead for its employees' independent actions." *Id.* at 290-91. "Comparable considerations led to [its] adoption of a deliberate indifference standard for claims under § 1983 . . . ." *Id.* at 291; *see also Davis*, 526 U.S. at 642-43. Under Title IX, deliberate indifference is established through "an official decision by the recipient not to remedy the violation." *Gebser*, 524 U.S. at 290.

Gebser did not change the rule that a funding recipient can be liable under Title IX for the discriminatory conduct of its agents or third parties. *See supra* at 34-35. *Gebser* merely set forth the standard

governing monetary liability of a funding recipient where the complained-of conduct consists of independent actions of the funding recipient's agents or third parties. *Gebser*, 524 U.S. at 290-91; *Davis*, 526 U.S. at 641-43 (extending *Gebser* to claims of student-on-student harassment). *Gebser* did not analyze causation—the "on the basis of sex" requirement; rather, its holding rested on Title IX's "statutory structure and purpose" and the Spending Clause's notice requirement. 524 U.S. at 284, 287; *Davis*, 526 U.S. at 640. Accordingly, this Court has limited the application of the deliberate indifference standard to cases of sexual harassment. *Doe v. Miami Univ.*, 882 F.3d 579, 591 (6th Cir. 2018).

D. The Cat's-Paw Theory Establishes a Causal Nexus When an Actor with Discriminatory Animus Uses a Decisionmaker to Carry Out an Adverse Action.

Under the "cat's-paw" theory of causation, an individual without decisionmaking authority harbors a discriminatory agenda and utilizes an official decisionmaker to carry it out. This case provides a prime example. Here, Bea used Rhodes' Honor Council proceedings as a mechanism to carry out his retaliatory agenda. Under such circumstances, the discriminatory motive and the adverse action stem

initially from different people. Courts have developed the "cat's-paw" theory of causation to address those situations.

"[T]he term 'cat's-paw' refers to 'one used by another to accomplish his purposes.' In the employment discrimination context, 'cat's paw' refers to a situation in which a biased subordinate, who lacks decisionmaking power, uses the formal decisionmaker as a dupe in a deliberate scheme to trigger a discriminatory employment action." *Marshall v. The Rawlings Co. LLC*, 854 F.3d 368, 377 (6th Cir. 2017) (citing *EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles*, 450 F.3d 476, 484 (10th Cir. 2006)). In such a situation, the decisionmaker acts "as the conduit of the [employee's] prejudice—his cat's paw." *Christian v. Wal-Mart Stores, Inc.*, 252 F.3d 862, 878 (6th Cir. 2001) (quoting *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990)), *opinion supplemented on denial of reh'g*, 266 F.3d 407 (6th Cir. 2001). The cat's-paw theory recognizes a causal link between the decisionmaker's adverse action and the animus of an employee who influenced, but was not in charge of, the ultimate decision to take adverse action. *Marshall*, 854 F.3d at 377.

In *Staub v. Proctor Hospital*, 562 U.S. 411 (2011), the Supreme Court applied the cat's-paw doctrine to a claim under the Uniformed Services Employment and Reemployment Rights Act (USERRA). Staub's supervisors, motivated by hostility toward his military obligations, fabricated allegations of company rule violations. *Id.* at 414. Staub's employer then fired him based on the false allegations. *Id.* at 415. The Supreme Court considered whether the discriminatory motive of Staub's supervisors could be linked to "the act of another agent"—the individual who fired him—to find the requisite causal connection for a discrimination claim. *Id.* at 418.

The Supreme Court first attempted to look to general principles of agency law but determined that those principles did not provide a clear answer. *Id.* So the Court turned to USERRA's statutory text, which required that discrimination be "a motivating factor" in the adverse action. *Id.* The Court noted that "[w]hen a decision to fire is made with no lawful animus on the part of the firing agent, but partly on the basis of a report prompted by discrimination" then discrimination would be a "causal factor" but not necessarily a "motivating factor" in the employer's decision. *Id.* at 419. Thus, the "central difficulty" in *Staub* was construing

the phrase "motivating factor in the employer's action." *Id.* at 417. Ultimately, the Court relied on principles of causation to hold that an agent's discriminatory animus is a "motivating factor" for an adverse action "so long as the agent intends, for discriminatory reasons, that the adverse action occur." *Id.* at 419. The words "vicarious liability" and "respondeat superior" appear nowhere in the *Staub* decision, and the Court did not rest its cat's-paw analysis on vicarious liability principles.

E. Cat's-Paw Causation Does Not Depend Upon Principles of Respondeat Superior.

The cat's-paw theory does not, as the district court believed, require the application respondeat superior principles. Instead, cat's-paw theory is a doctrine of causation; it simply draws a causal link between the discriminatory animus of one individual and the adverse action of another. *See, e.g.*, *Chattman v. Toho Tenax Am., Inc.*, 686 F.3d 339, 352 (6th Cir. 2012) (describing *Staub*'s cat's-paw analysis as a "causation analysis" and noting that "[c]at's paw liability attaches when the biased intermediate employee's actions are 'a causal factor of the ultimate employment action'" (quoting *Staub*, 562 U.S. at 420)); *Zamora v. City Of Houston*, 798 F.3d 326, 331 (5th Cir. 2015) (describing cat's paw as a "theory of causation").

Courts have applied the cat's-paw theory to establish causation for claims to which respondeat superior is inapplicable. For example, civil rights claims arising under § 1983 utilize a deliberate indifference standard rather than respondeat superior. *See Gebser*, 524 U.S. at 291; *Monell v. Dep't of Soc. Servs. of New York*, 436 U.S. 658, 691 (1978) (rejecting respondeat superior for § 1983 claims). Nevertheless, numerous courts, including this Court, apply or assume the application of the cat's-paw theory to claims under § 1983. *See, e.g.*, *DeNoma v. Hamilton Cnty. Court of Common Pleas*, 626 F. App'x 101, 105-08 (6th Cir. 2015) (applying cat's-paw theory to claim under § 1983); *Campion, Barrow & Assocs., Inc. v. City of Springfield,* 559 F.3d 765, 771 (7th Cir. 2009) (assuming, in a § 1983 action, that the cat's-paw theory would be available to establish municipal liability); *Arendale v. City of Memphis,* 519 F.3d 587, 604 n. 13 (6th Cir. 2008) (in § 1983 retaliation case, stating that employer may be held liable "[w]hen an adverse hiring decision is made by a supervisor who lacks impermissible bias, but that supervisor was influenced by another individual who was motivated by such bias").

The district court's holding that the cat's-paw theory only establishes causation in cases of respondeat superior cannot be squared with these cases or with the Supreme Court's analysis in *Staub*.

F. The Cat's-Paw Theory of Causation Applies to Title IX Claims.

The cat's-paw theory comfortably aligns with the text and purpose of Title IX. Indeed, Title IX's broad prohibition against discrimination—including by agents and third parties—requires application of cat's-paw theory to analyze causation.

Rhodes' argument, and the district court's holding below, depend on the erroneous conclusion that *Staub*'s cat's-paw analysis of a USERRA claim was inextricably linked to respondeat superior principles. That argument is misplaced. *See supra* at 39-40. Although *Staub* did discuss agency principles, it did so for reasons entirely inapplicable here. USERRA, similar to many other statutes including Title VII, only prohibits discrimination "by an *employer*" where the impermissible motive is a "motivating factor in the *employer's* action." 562 U.S. at 416 (quoting 38 U.S.C. § 4311(a), (c)) (emphasis added); *see also* 42 U.S.C. § 2000e-2(a), (m) (making it unlawful under Title VII for "an employer" to discriminate when membership in the protected class was "a

motivating factor"). Thus, under USERRA and other similar statutes, the discrimination and motivating factor must stem from the "employer," requiring an analysis of agency principles to address the source of the "motivating factor" and attribute it to the employer. *Staub* discussed agency principles as a matter of statutory construction—not because cat's-paw causation necessarily corresponds to respondeat superior liability. *See* 562 U.S. at 417 ("The central difficulty in this case is construing the phrase 'motivating factor in the employer's action.'").

Title IX is broader than USERRA in several important respects: Title IX's plain language prohibits any discrimination on the basis of sex, by anybody, as long as the student is "subjected to" the discrimination "under any education program or activity." 20 U.S.C. § 1681(a). Under Title IX, the discriminatory motive need not stem from the funding recipient's final decision-makers but can also stem from other agents or even third parties. *See, e.g.*, *Davis*, 526 U.S. at 644-47; *Franklin*, 503 U.S. at 75; *Emeldi*, 698 F.3d at 726-29; *Papelino*, 633 F.3d at 92-93. Given these differences, there is no reason to reject the cat's-paw theory of causation because it looks to the motives of the funding recipient's agents. And under Title IX, the student's membership in a protected class

need only be a causal factor and not a "motivating factor." *See* 20 U.S.C. § 1681(a) (prohibiting discrimination "on the basis of sex" without reference to motivating factors). *Staub* explicitly recognized that, in a cat's-paw scenario, the answer to the question whether an agent's discriminatory motive was a "causal factor" in the employer's adverse action, as opposed to a "motivating factor," would be an even clearer "yes." 562 U.S. at 419. This analysis did not hinge on respondeat superior principles.

Rhodes' argument that Rhodes itself—or the Rhodes agents who ultimately decided to expel Bose—must have personally harbored a retaliatory animus makes no sense in light of Title IX's text and purpose. Under Title IX, Bea's *own* retaliatory acts against Bose would constitute discrimination "on the basis of sex." For example, if Bea had retaliated by giving Bose an F in his class instead of implementing Honor Council proceedings, the conduct would satisfy Title IX's causation requirement. *See Varlesi*, 643 F. App'x at 518 (upholding finding of causation on Title IX retaliation claim where faculty member gave student a poor grade after student complained of pregnancy discrimination); *cf. Emeldi*, 698 F.3d at 726-29 (professor's resignation as student's dissertation chair

after student complained of unequal treatment of women satisfied causation requirement for Title IX retaliation claim).

Rhodes has not explained why the outcome should be any different simply because Bea utilized Rhodes' Honor Council proceedings to carry out his scheme of retaliation. It should not be. As the Supreme Court explained in *Staub*, "[a]nimus and responsibility for the adverse action can both be attributed to the earlier agent . . . if the adverse action is the intended consequence of that agent's discriminatory conduct." 562 U.S. at 419. Accordingly, cat's-paw theory does not merely "impute" Bea's motivations to Rhodes. If anything, it imputes part of the responsibility for the adverse action to Bea because Bea intended to set it in motion. *See id.* By the same token, because the agent—here, Bea—invokes the machinery of the principal, the principal's acts themselves are both caused by and motivated by the agent's acts. "Retaliation is, by definition, an intentional act." *Jackson*, 544 U.S. at 173-74. Cat's-paw liability simply recognizes the reality that a principal who accepts the recommendation of a discriminating agent *itself discriminates*.

Rhodes' argument primarily relies on *Gebser*'s rejection of respondeat superior principles under Title IX. But application of cat's-

paw causation does not violate the principles underlying *Gebser*. Bose is seeking to hold Rhodes liable for its own actions, not for the independent acts of its agents. Here, the adverse action was an overt act by the funding recipient, which had actual notice of the discriminatory source of information underlying its decision. In a case such as this, unlike in *Gebser*, the school would be held liable not for "its employees' independent actions" but "for its own official decision." 524 U.S. at 291. Since Bose put Rhodes on notice of Bea's retaliatory motive, Rhodes had an obligation to ensure its own official actions did not discriminate against her "on the basis of sex." Bose defended herself before the Honor Council, appealed the Honor Council's decision to an appeals committee, and also filed a Title IX complaint—at all stages explaining that Bea's cheating allegations stemmed from a retaliatory motive. *See supra* at 25-27; Defendants' SJ Reply Memo, R.123, PageID.1557 (admitting that Rhodes was aware of Bea's alleged retaliatory motive). Rhodes nevertheless made the official decision to expel Bose without performing any sort of independent investigation to cut off the chain of causation and ensure Bea's retaliatory motive was not the cause of Bose's expulsion. Notably, if Rhodes had performed a truly independent investigation and

reached the conclusion, on its own, that it should take adverse action, the cat's-paw doctrine would no longer apply. "A supervisor who conducts an in-depth and truly independent investigation is not being manipulated by biased lower-level supervisors, but rather making a decision based on an independent evaluation of the situation." *Marshall*, 854 F.3d at 380. Rhodes did not do so. The "intent to discriminate is thus attributable to the school." *Hayden*, 743 F.3d at 583 (athletic coach's discriminatory rule was attributable to school district when it was protested through the school's chain of command and "remained in place unmodified").

Cat's-paw theory thus aligns with the principle underlying *Gebser*'s rejection of respondeat superior—that a funding recipient should only be liable for damages for its own acts and policies. *See Davis*, 526 U.S. at 640-41. Cat's paw prevents a situation just like this one—where a biased individual might effectuate official adverse action "by selectively reporting or even fabricating information in communications with the formal decisionmaker." *Marshall*, 854 F.3d at 378 (quoting *BCI Coca-Cola*, 450 F.3d at 486). In such circumstances, the cat's-paw theory achieves two goals. *Id.* "First, the cat's-paw theory addresses situations in which decisionmakers unthinkingly adopt the recommendations of

their biased lower-level supervisors; second, it 'forecloses a strategic option for [decisionmakers] who might seek to evade liability . . . through willful blindness as to the source of reports and recommendations.'" *Id.* (quoting *BCI Coca-Cola*, 450 F.3d at 486). A funding recipient who has notice of bias and unthinkingly adopts the biased recommendation, or who seeks to evade liability "through willful blindness," would be liable for its own acts, not the acts of its agents. *See Gebser*, 524 U.S. at 290 (a funding recipient is deliberately indifferent if it has actual notice of the discrimination and "fails to adequately respond"). Thus, application of cat's-paw causation does not offend the principles outlined in *Gebser*.

The abstract nature of the doctrines involved in this case perhaps obscures "[a] sometimes-forgotten guide . . . : common sense." *See EEOC v. Ford Motor Co.*, 782 F.3d 753, 762 (6th Cir. 2015) (en banc). Lawyers and non-lawyers alike would readily agree that a *college itself* does not discriminate on the basis of sex when its decisionmakers are unaware that a teacher is sexually harassing a student. (That conclusion would change, of course, if the law explicitly made the college responsible for the actions of the teacher, or if the college knew about the misconduct and failed to stop it.) But those same lawyers and non-lawyers would

surely agree that a college discriminates "on the basis of sex" when it expels a student based solely on the false allegations of cheating made by a professor who is retaliating against the student for complaining about his unwelcome sexual conduct. In such a case, the college acts directly; and absent the discriminatory motive, the student would still be enrolled. This is the very essence of discrimination. The student has, in a literal sense, been "excluded from participation in, . . . denied the benefits of, [and] . . . subjected to discrimination" on the basis of sex. 20 U.S.C. § 1681(a).

Cat's-paw theory applies to Title IX claims as it aligns with Title IX's statutory language, its prohibition against discrimination from a broad variety of sources, and the principles set forth in *Gebser*.

G. A Reasonable Jury Could Find Rhodes Liable Under a Cat's-Paw Theory, and the Second Circuit Applied the Theory in a Remarkably Similar Title IX Case.

Applying the cat's-paw theory, a reasonable jury could find a clear causal connection between Bose's complaint about Bea's unwelcome sexual advances and her expulsion from Rhodes.

First, the close temporal proximity between Bose's confrontation with Bea, his cold-shouldering of her over the course of the following

week, and his allegations of cheating, support a finding of causation. *See supra* at 12-15, 18. "Temporal proximity can establish a causal connection between the protected activity and the unlawful [adverse] action in the retaliation context." *Asmo v. Keane, Inc.*, 471 F.3d 588, 593 (6th Cir. 2006); *see also Papelino*, 633 F.3d at 91 (citing *Kaytor v. Elec. Boat Corp.*, 609 F.3d 537, 552 (2d Cir. 2010)).

Second, Bea's inconsistent and incredible testimony further support a finding of causation. A jury could infer, for example, that Bea modified the Quiz 5 answer key two hours after Bose took the quiz to mimic her answers. Plaintiff's SJ Exhibits, R.120-1, PageID.1414, 1425, 1430, 1435-36. The same is true with respect to (1) Bea's failure to share his alleged fake answer key with Rhodes' administrators, (2) his motivation to retaliate to protect his tenure opportunity, (3) his false and inconsistent testimony before the Rhodes Honor Council, and (4) his claimed lack of memory about any of his unwelcome sexual behavior. *See supra* at 16, 20-23, 25.

Third, Bose's own testimony supports a finding of causation. She testified that she did not cheat on her exams and lacked any motive to do so on Quiz 5. *See supra* at 15-17. And it is extremely unlikely that Bea's

fake answer key exactly matched her answers out of sheer coincidence. Thus, if the jury believes Bose, then the jury could reasonably conclude that Bea forged the fake answer key in order to frame Bose for cheating and undermine her ability to pursue further reports of his unwanted advances. Ultimately, this case turns on Bea and Bose's credibility, and "questions of credibility are peculiarly for the jury." *Dickinson v. Scruggs*, 242 F. 900, 902 (6th Cir. 1917) (citation omitted). A reasonable jury could believe Bose over Bea. If the jury did believe Bose, then it would necessarily also find that Bea's cheating allegations were merely a pretext for retaliation.

The Second Circuit reached the same conclusion when it applied cat's-paw causation theory in a case remarkably similar to this one. In *Papelino*, a female professor made unwelcome sexual advances on Papelino, a student in her Medicinal Chemistry course. 633 F.3d at 85. Papelino reported the professor's behavior to the College's Associate Dean for Student Affairs, but the Dean did not pass along the report to other school officials because he "didn't want to let it out." *Id.* at 86. Around that time, Papelino noticed a change in the professor's behavior: "she started to act cold and unfriendly toward him." *Id.*

Shortly thereafter, the professor told the Faculty Advisor to the Student Honor Code Committee that Papelino had cheated in her Medicinal Chemistry course. *Id.* A hearing was held, and the professor presented statistical charts she claimed showed Papelino had cheated. *Id.* at 86-87. The Student Honor Code panel found Papelino had violated the Honor Code. *Id.* at 87. As a result, Papelino received a failing grade and was expelled. *Id.* Papelino sued the college for sexual harassment and retaliation under Title IX. *Id.* at 88. The district court, like the district court in this case, concluded that the *professor's* "motive in raising charges of cheating against [Papelino] is . . . irrelevant to the ultimate determination of guilt made by the student panel assembled to hear" the case. *Papelino v. Albany Coll. of Pharmacy of Union Univ.*, 2009 WL 2957789, at *15 (N.D.N.Y. Sept. 11, 2009).

On appeal, the Second Circuit explicitly considered whether the Honor Code panel's lack of knowledge of the professor's retaliatory motive defeated causation. The court explained that, despite the lack of evidence that the school or panel itself harbored a retaliatory intent, "the record contains substantial evidence of causation" and that a "reasonable jury could find that [the professor] initiated the Honor Code proceedings

for retaliatory reasons rather than a good faith belief that Papelino had actually cheated." 633 F.3d at 93. The court applied the cat's-paw theory, noting that "while lack of knowledge on the part of particular agents who carried out the adverse action is evidence of lack of causal connection, a plaintiff may counter with evidence that the decision-maker was acting on orders or encouragement of a superior who did have the requisite knowledge." *Id.* at 92. The court went on to hold that "even if the Panel members were themselves unaware that Papelino had engaged in protected activity," a reasonable jury could conclude "they were acting on [the professor's] explicit encouragement." *Id.* at 92-93.

This case runs in parallel to *Papelino* in all material respects. Here, as in *Papelino*, a reasonable jury could find Bea initiated the Honor Code proceedings for retaliatory reasons and that the Honor Council acted on his explicit encouragement. Indeed, application of cat's-paw liability is even clearer here than in *Papelino*, because here Rhodes' Honor Council, Faculty Appeals Committee, and Title IX coordinator all had actual notice of Bea's alleged retaliatory motive. *See supra* at 25-27; Defendants' SJ Reply Memo, R.123, PageID.1557. Rhodes could have commenced an independent investigation into whether Bea's cheating allegations were

retaliatory in nature, but it never did so. Instead, it expelled Bose based entirely on evidence provided by Bea. Indeed, Rhodes' Title IX coordinator explicitly stated that she would not investigate Bea's cheating allegations—the very means of the retaliation. *See supra* at 28. In light of these facts, Rhodes certainly did not break the cat's-paw chain of causation through an exercise of independent judgment.

Given the facts here and the clear parallel with the facts of *Papelino*, this Court should follow the Second Circuit's lead and hold that a reasonable jury could find the requisite causal connection between the retaliatory conduct and Bose's ultimate expulsion from Rhodes.

II. AN ABSOLUTE PRIVILEGE DOES NOT EXTEND TO STATEMENTS MADE IN A PRIVATE COLLEGE'S STUDENT-RUN HONOR COUNCIL PROCEEDINGS.

Bea's defamatory statements are not absolutely privileged under Tennessee law, and the district court erred in concluding otherwise. Tennessee's appellate courts have never extended the absolute privilege accorded to judicial and quasi-judicial proceedings to statements before private bodies. Given the policy considerations underlying the privilege, as well as a preference for restraint in expanding state-law principles

beyond their historical application, this Court should hold that the absolute privilege does not apply to Bea's statements.

A. Standard of Review.

The Court reviews de novo a district court's decision to grant a motion to dismiss. *Stein v. Regions Morgan Keegan Select High Income Fund, Inc.*, 821 F.3d 780, 785 (6th Cir. 2016) (citing *Cataldo v. U.S. Steel Corp.*, 676 F.3d 542, 547 (6th Cir. 2012)). The Court accepts all factual allegations as true and construes the complaint in the light most favorable to the plaintiff. *Id.* (citing *Laborers' Local 265 Pension Fund v. iShares Trust*, 769 F.3d 399, 403 (6th Cir. 2014)).

B. The Absolute Privilege Accorded to Statements Made in Judicial Proceedings Is Designed to Promote the Public Interest and the Effective Functioning of Government.

Tennessee law recognizes both absolute and qualified privileges as defenses to defamation claims. *Jones v. State*, 426 S.W.3d 50, 53 (Tenn. 2013) (citing *Simpson Strong-Tie Co., Inc. v. Stewart, Estes & Donnell*, 232 S.W.3d 18, 22 (Tenn. 2007)). "Absolute privileges shield a defendant from liability for defamatory statements even when made with ill will, malice or some other improper purpose." *Id.* (citation omitted). "Qualified privileges, on the other hand, shield defendants from liability for most

defamatory statements, but can be overcome by a plaintiff's showing that the statements were made with actual malice or ill will." *Id.* (citation omitted).

When determining whether to adopt an absolute privilege with regard to a class of communications, Tennessee courts balance the right of an individual to protect his own reputation against the public interest. *Id.* at 56. Tennessee courts recognize that the "right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty." *Id.* at 53 (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring)).

Tennessee courts recognize an absolute judicial and quasi-judicial privilege. *Lambdin Funeral Serv., Inc. v. Griffith*, 559 S.W.2d 791, 792 (Tenn. 1978). Tennessee courts recognize that "proceedings connected with the judicature of the country are so important to the public good" that nothing said or written pertinent to those proceedings can constitute libel or slander. *Jones v. Trice*, 360 S.W.2d at 52 (quoting *Lea v. White*, 36 Tenn. 111, 114 (1856)). The judicial privilege reflects "a policy decision

by the courts that access to the judicial process . . . is so vital and necessary to the integrity of our judicial system that it must be made paramount to the right of an individual to a legal remedy" for reputational damage. *Id.* at 51; *see also Lambdin*, 559 S.W.2d at 792 (explaining "the public's interest in and need for a judicial process free from the fear of a suit for damages for defamation"). The "rationale" for the rule is "permitting free, frank and robust discussion relative to public issues." *Boody v. Garrison*, 636 S.W.2d 715, 717 (Tenn. Ct. App. 1981).

C. Tennessee Has Never Extended the Privilege to Private Hearings Conducted by Private Bodies.

Neither the Tennessee Supreme Court nor the Tennessee Court of Appeals has ever extended the absolute judicial or quasi-judicial privilege to private proceedings conducted by private bodies. The absolute privilege represents "an expression of a policy designed to aid in the effective functioning of government." *Jones v. State*, 426 S.W.3d at 54 (quoting *Barr v. Matteo*, 360 U.S. 564, 572-73 (1959)). Thus, "[t]he class of absolutely privileged communications is narrow and is practically limited to legislative and judicial proceedings and other acts of state." *Jones v. Trice*, 360 S.W.2d at 51 (citation omitted).

Accordingly, Tennessee appellate courts have applied the absolute privilege only to statements related to proceedings before government bodies. Most often, the privilege applies to proceedings conducted by an actual court of law. *E.g.*, *id.* at 50, 53; *Dyer v. Dyer*, 156 S.W.2d 445, 447 (Tenn. 1941) ("lunacy proceedings" conducted "by the Judge of the County Court"). The privilege applies also to communications preliminary to proposed or pending litigation or criminal prosecution. *Hayslip v. Wellford*, 263 S.W.2d 136, 137 (Tenn. 1953) (reports of the Shelby County Grand Jury); *Issa v. Benson*, 420 S.W.3d 23, 29 (Tenn. Ct. App. 2013) (statement of intent to sue); *Myers v. Pickering Firm, Inc.*, 959 S.W.2d 152, 159, 161 (Tenn. Ct. App. 1997) (reports made by a potential witness in contemplation of litigation); *Sullivan v. Young*, 678 S.W.2d 906, 911 (Tenn. Ct. App. 1984) (statements made in connection with a warrant).

Tennessee courts have extended the privilege to "quasi-judicial" proceedings but have limited that application to official proceedings before legislative bodies, subordinate legislative bodies, or public officers. *See, e.g.*, *Lambdin*, 559 S.W.2d at 792 (proceedings before the Tennessee Board of Funeral Directors and Embalmers, a public body); *Logan's Super Markets, Inc. v. McCalla*, 343 S.W.2d 892, 894 (Tenn. 1961) (public

hearing before a legislative committee); *Indep. Life Ins. Co. v. Rodgers*, 55 S.W.2d 767, 768-70 (Tenn. 1933) (proceedings before the insurance commissioner, a public officer statutorily granted judicial-like authority); *Buckner v. Carlton*, 623 S.W.2d 102, 108 (Tenn. Ct. App. 1981) (proceedings before the Rutherford County Board of Education). A related absolute privilege protects communications by government officials made pursuant to their official duties. *Cornett v. Fetzer*, 604 S.W.2d 62, 63 (Tenn. Ct. App. 1980) (remarks by city councilman); *Jones v. State*, 426 S.W.3d at 58 (statements by cabinet-level executive officials).

Tennessee appellate courts have never applied the absolute privilege to private proceedings by private bodies. Indeed, even with respect to government functions, Tennessee courts have been hesitant to extend the judicial privilege outside the context of official government hearings. For example, the Tennessee Court of Appeals refused to extend the absolute privilege to witnesses who present at city council meetings. *Boody*, 636 S.W.2d at 717. The court recognized that the privilege extends to witnesses in both judicial and legislative proceedings, but explained that the "persuasive force of this analogy . . . is diluted to a degree when

we remember as to both a person may be punished for refusing to testify or prosecuted for testifying falsely." *Id.* Thus, the court held that the privilege should not extend to the more informal proceedings of a city council meeting. *Id.* Tennessee courts have also declined to extend the absolute privilege to statements made to the state inspector general alleging misconduct, *see Moore v. Bailey*, 628 S.W.2d 431, 436 (Tenn. Ct. App. 1981), or to statements in a petition to the mayor's board, *McKee v. Hughes*, 181 S.W. 930, 931-32 (Tenn. 1916).

Tennessee courts' application of the absolute privilege for judicial and quasi-judicial proceedings reflects the public-private distinction recognized by many courts in other jurisdictions. For example, in *Overall v. Univ. of Pa.*, 412 F.3d 492 (3d Cir. 2005), the Third Circuit considered whether the absolute privilege should apply to statements made during the University of Pennsylvania's internal grievance proceedings. In an opinion by now-Justice Alito, the Third Circuit recognized the public-private distinction under Pennsylvania law and refused to extend the privilege to statements made in a private university's hearing. *Id.* at 498. Justice Alito went on to note that "[e]very case" on the privilege "cited in the leading torts treatise involves a government entity of some sort," *id.*

at 497 (citing Page Keeton et al., *Prosser & Keeton on Torts* § 114, at 818-19 (5th ed. 1984)), and that every example in the pertinent section of the Restatement also "involves a government actor," *id.* (citing Restatement (Second) of Torts § 585). "Sound reasons exist for this public-private distinction. Government hearings typically involve basic procedural safeguards that may be lacking in private proceedings." *Id.* at 498.

The Eastern District of Michigan came to a similar conclusion in *Heike v. Guevara*, No. 09-10427-BC, 2009 WL 3757051 (E.D. Mich. Nov. 6, 2009), *aff'd*, 519 F. App'x 911 (6th Cir. 2013). The court explained that the absolute privilege typically applies to matters of public concern, whereas the qualified privilege generally relates to private interests. *Id.* at *7, 9. As a result, Michigan courts are extremely hesitant to extend the judicial privilege "beyond traditional judicial, military, and legislative proceedings." *Id.* at *9. The Eastern District of Michigan thus refused to extend the privilege even to a public university's appeal hearing. *Id.*

Tennessee courts have been equally hesitant to extend the privilege to proceedings before private bodies, and in fact have never done so. The Court should not do so here.

D. The Absolute Privilege Does Not Apply to Rhodes' Private, Student-Run Honor Council Proceedings.

This Court should decline Bea's invitation to greatly expand the judicial privilege by applying it to a private proceeding, before a private college's student-run Honor Council, relating solely to private concerns. Such an extension of the privilege would amount to a great leap beyond current law.

Since the Tennessee Supreme Court has not decided the issue, this Court "must predict how it would resolve the issue from 'all relevant data.'" *Kingsley Assocs., Inc. v. Moll PlastiCrafters, Inc.*, 65 F.3d 498, 507 (6th Cir. 1995) (quoting *Bailey v. V & O Press Co., Inc.*, 770 F.2d 601, 604 (6th Cir. 1985)). The Court's "respect for the role of the state courts as the principal expositors of state law counsels restraint by the federal court in announcing new state-law principles, or applying such principles to novel situations." *Grubb v. W.A. Foote Mem'l Hosp., Inc.*, 741 F.2d 1486, 1500 (6th Cir. 1984), *vacated on other grounds*, 759 F.2d 546 (6th Cir. 1985).

The absolute privilege should not extend to Rhodes' Honor Council proceedings. Rhodes is a private college. Rhodes' Honor Council is a student-run, student-elected, private body. PI Exhibit 20, App.133-34. Rhodes' Honor Council hearings are conducted by a panel of twelve undergraduate students who have yet to earn their bachelor's degrees. Complaint, R.1, PageID.4; SJ Exhibit C, R.116-4, PageID.1233. The Honor Council president—also a student—presides over the hearings with little to no faculty or administrative oversight. Complaint, R.1, PageID.4. The president has complete discretion over whether to allow witnesses or evidence and whether Honor Council members should recuse themselves. PI Exhibit 20, App.138. In Bose's case, the president decided that Bea's own research assistant did not need to recuse himself. Complaint, PageID.9; SJ Exhibit A, R.116-2, PageID.1081.

Honor Council hearings, though governed by the Honor Council Constitution, are "informal proceeding[s], not comparable to a criminal trial." *See supra* at 20. Accused students are not allowed to have legal counsel present. PI Exhibit 20, App.138. Unlike proceedings at a public university, Rhodes' Honor Council proceedings are not bound by the principles of due process. *See Doe v. Baum*, 903 F.3d 575, 581 (6th Cir.

2018) (describing due process requirements for hearings at public universities). Furthermore, Rhodes' Honor Council proceedings relate to matters of private rather than public concern: whether a particular student cheated or violated the private college's rules. PI Exhibit 20, App.133-34.

Tennessee law does not recognize an absolute privilege for statements made before private bodies at private institutions. The rationales underlying the absolute privilege for judicial and quasi-judicial proceedings—the public interest and the effective functioning of government—simply do not apply to Rhodes' Honor Council proceedings. *See Jones v. State*, 426 S.W.3d at 54, 56; *Jones v. Trice*, 360 S.W.2d at 52. Nor are statements made during such proceedings subject to penalties of perjury. *See Boody*, 636 S.W.2d at 717.

The district court held that an absolute privilege should attach to the proceedings because Rhodes' Honor Council utilizes "pre-defined standards" and because Tennessee applies the privilege liberally. *See* Motion to Dismiss Order, R.52, PageID.629-30. But Tennessee only applies the absolute privilege liberally to statements made in connection with a certain class of proceedings—judicial ones. Outside of the context

of judicial proceedings, Tennessee courts have not applied the privilege liberally. *See, e.g.*, *Boody*, 636 S.W.2d at 717 (declining to extend the privilege to city council meetings). And outside the context of government proceedings, Tennessee courts have not applied the privilege *at all*. *See Jones v. Trice*, 360 S.W.2d at 51 (describing the privilege as "limited to legislative and judicial proceedings and other acts of state" (citation omitted)).

If, as the district court suggested, the absolute privilege could apply to any proceedings with "pre-defined" standards, including proceedings related to private concerns before a private body, then any private organization could shield statements from defamation suits simply by creating a hearing system and a set of pre-defined standards. The district court's rationale would establish an enormous slippery slope, effectively granting any savvy actor with access to a private hearing system a license to commit libel and slander. A manager would be free to defame his subordinate. A company executive could defame his competitor. A member of a private club could defame members of a disfavored group. And because the quasi-judicial privilege is *absolute*, there would be no limitation on the character of the defamatory statements. A speaker

could knowingly and falsely accuse someone of murder, fraud, or child molestation—without facing any risk of liability.

The principles animating the judicial and quasi-judicial privilege do not apply to protecting defamatory statements made before Rhodes' Honor Council. Accordingly, this Court should decline to extend the privilege beyond its traditional moorings. *See Grubb*, 741 F.2d at 1500 (counseling "restraint by the federal court" in applying state-law principles to "novel situations"); *Overall*, 412 F.3d at 498; *Heike*, 2009 WL 3757051, at *9.

CONCLUSION

The district court's judgment should be reversed, and the case remanded for further proceedings and trial on Bose's Title IX and defamation claims.

Date: November 30, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because the brief contains 12,931 words, as determined by the word-count function of Microsoft Word 2016, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and this Court's Rule 32(b)(1).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Century Schoolbook font.

Date: November 30, 2018

s/Adam W. Hansen
Adam W. Hansen

ADDENDUM

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Dkt. No.	Description of Document	PageID
1	Complaint	1-20
21	Motion to Dismiss	120-21
21-1	Defendants' Motion to Dismiss Memo	122-36
40	Transcript	216-399
52	Motion to Dismiss Order	619-32
53	Answer	633-44
115	Summary Judgment ("SJ") Motion	968-69
116	Defendants' SJ Memo	970-1003
116-1	Statement of Facts ("SOF")	1004-14
116-2	SJ Exhibit A	1015-82

116-3	SJ Exhibit B	1083-1231
116-4	SJ Exhibit C	1232-83
120	SOF Response	1306-27
120-1	Plaintiff's SJ Exhibits	1328-1473
121-1	Bea Deposition	1494-1511
123	Defendants' SJ Reply Memo	1555-59
149	SJ Order	1778-1809
152	Revised SJ Order	1925-26
161-12	Harmon Report	2222-37
164	Stipulation	2260-63
165	Order of Dismissal	2264
166	Judgment	2265
167	Amended Order	2266

CERTIFICATE OF SERVICE

I hereby certify that, on this 30th day of November, 2018, I caused the foregoing brief and addendum to be filed electronically with the Court, where they are available for viewing and downloading from the Court's ECF system, and that such electronic filing automatically generates a Notice of Electronic Filing constituting service. I certify that all parties required to be served have been served.

s/Adam W. Hansen
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