Not yet scheduled for oral argument

No. 22-7012

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Jabari Stafford,

Plaintiff-Appellant,

v.

George Washington University,

Defendant-Appellee.

On Appeal from a Final Judgment of the
United States District Court for the District of Columbia
Case No. 18-cv-02789, Judge Christopher R. Cooper

REPLY BRIEF FOR PLAINTIFF-APPELLANT JABARI STAFFORD

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Introduction and Summary of Argument

GW does not want to discuss what happened to Jabari Stafford on the tennis team. It does want to discuss timeliness, arguing at length that a one-year statute of limitations bars Stafford's race-discrimination claims. But a three-year statute of limitations applies. D.C.'s personal-injury statute is the most appropriate source for a limitations period, and GW's attempts to borrow from the D.C. Human Rights Act neglect the procedural characteristics of that statute. Further, even if this Court concludes otherwise, Stafford's student-on-student harassment claim remains timely. No matter how you slice it, GW cannot avoid engaging with its mistreatment of Stafford.

GW also resorts to a volley of forfeiture arguments to try to foreclose Stafford's claims. But these technical traps come up empty. Stafford has preserved his arguments, and so the merits of his claims belong in front of a jury.

For nearly four years, Stafford's tennis teammates harassed him, barraging him with an unending stream of racial epithets and innuendo. Instead of stepping in to stop the harassment, his coaches joined in. Stafford reported them to GW officials again and again, to no avail. And when no one helped him, Stafford suffered grievously, experiencing chronic anxiety, a loss of academic focus, a lack of motivation, and severe depression.

Given the evidence, it's not surprising that GW continues to tacitly recognize on appeal that this abuse qualifies as "severe, pervasive, and objectively offensive." JA-2-850-51. And it no longer challenges the district court's conclusion that a jury could find that the "unchecked racial harassment" hindered Stafford's education. JA-2-851-52. Instead, GW argues that this unrelenting abuse was not *its* problem. The University admits that Stafford sought help from its officials, objecting only that his requests for help were too vague or that he complained to the wrong people or that their inaction was reasonable.

But GW knew what was going on, and it reacted with deliberate indifference. Stafford's complaints were specific and prolific. He told officials who could have helped him. And across the board, they failed him. This Court should reverse.

Argument

I. Stafford's claims are timely.

A. A three-year statute of limitations applies.

GW begins with forfeiture, arguing that Stafford insufficiently argued below that the statute of limitations is three years. That is a bold choice for a starting point, given that GW originally agreed that a three-year period governs. *See* ECF No. 4-1 at 10-11. It is also wrong on both the facts and the law. Stafford made the argument to the district court. ECF No. 81 at 13-14; JA-2-793-94. In fact, he devoted more real estate to the argument than GW

did in its summary-judgment brief, which included only a single sentence of analysis on the point. *See* ECF No. 78-2 at 19. And even if Stafford had made no argument, it would not matter. This Court's general refusal to consider arguments not made below "does not apply where the district court nevertheless addressed the merits of the issue," *Blackmon-Malloy v. U.S. Capitol Police Bd.*, 575 F.3d 699, 707 (D.C. Cir. 2009), as the district court did here.

Turning to the merits, the district court reached the wrong conclusion. A three-year statute of limitations applies.

1. D.C.'s personal-injury statute is a good analogy to Title VI because the statutes allow recovery for similar harms.

"Distilling the essence" of Title VI claims reveals that they are "best characterized as personal injury actions." *Wilson v. Garcia*, 471 U.S. 261, 265, 280 (1985). Invidious discrimination is a "fundamental injury" to personal rights. *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 661 (1987). Title VI allows individuals to recover monetary damages for those injuries. *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 76 (1992). Thus, Title VI, like D.C.'s personal-injury statute, allows individuals to recover damages for harms they personally sustain.

GW resists this straightforward logic. It argues that personal-injury claims do not take aim at discrimination. Resp. Br. 20. This contention—effectively, that personal-injury statutes are never a good characterization of anti-discrimination laws—is flatly at odds with Supreme Court precedent.

See Goodman, 482 U.S. at 661-62; *Wilson*, 471 U.S. at 273, 276. And while personal-injury claims do have several possible targets, those targets include discrimination. Discrimination, after all, is a tort. *Cummings v. Premier Rehab Keller, P.L.L.C.*, 142 S. Ct. 1562, 1572-73 (2022).

True, as GW stresses, it is theoretically possible that the D.C. Council could enact a law that would provide a better analog for Title VI than the personal-injury statute does. But a state statute that addresses the same subject matter as Title VI is not automatically a better source for the statute of limitations. *Banks v. Chesapeake & Potomac Tel. Co.*, 802 F.2d 1416, 1423-24 (D.C. Cir. 1986). That consideration—the substantive aim of the statute—is far less important than the rest of the inquiry. Opening Br. 33-34; *see Burnett v. Grattan*, 468 U.S. 42, 49-55 (1984); *Banks*, 802 F.2d at 1423-24. Procedural characteristics, like the "nature of the … remedy" and the implicated "federal interest[s]," can disqualify an otherwise substantively on-point state law from serving as an analog for limitations purposes. *Wilson*, 471 U.S. at 276; *Burnett*, 468 U.S. at 49-55. These additional considerations help explain why courts have repeatedly and uncontroversially borrowed personal-injury limitations for anti-discrimination statutes, as our opening brief catalogs (at 48-49). Whether characterized as a default rule or the natural empirical consequence of applying the doctrine, courts have returned to state personal-injury statutes to supply the limitations period over and over absent a state statute that provides a better match not only substantively but procedurally.

GW argues that a better match exists here, in the form of the D.C. Human Rights Act (DCHRA). GW is right that the DCHRA targets misconduct that falls in Title VI's wheelhouse. But as we have explained, *see* Opening Br. 35-49, and will now clarify, the subject matter of the two statutes is where the similarities end.

2. The DCHRA cannot lend its limitations period to Title VI because the statutes' remedial schemes are unalike.

Procedurally, the DCHRA's private cause of action has little in common with Title VI's. The DCHRA's judicial and administrative remedies are "inextricably linked." Opening Br. 35. The law encourages individuals to rely on the administrative process and resort to suit only if that fails them. *Id.* 38-39. And the statute of limitations that governs the DCHRA's private cause of action reflects the policy choice to integrate those two remedies. A person who suffers discrimination can extend her timeline for filing a lawsuit by submitting an administrative complaint first, thereby tolling the limitations period for the duration of the administrative proceedings. D.C. Code Ann. § 2-1403.16(a); *see* Opening Br. 41-42.

Though GW challenges our observation that the DCHRA's one-year limitations period was "designed for an administrative scheme," Opening Br. 40, the interlocking nature of the administrative and judicial remedies makes clear that the judicial limitations period was adopted with the integrated scheme in mind. True, the D.C. Council has expressly applied the one-year limitations period to judicial actions, even though it originally

governed only administrative complaints. *See* Resp. Br. 25 & n.2. But the Council did so at the same time that it specified that filing an administrative complaint tolls the judicial limitations period, *see* Human Rights Amendment Act of 1997, § 2(d), 44 D.C. Reg. 4856, 4857 (Aug. 22, 1997), further confirming that the remedies are meant to dovetail rather than run on parallel tracks.

No similar interrelationship exists between Title VI's administrative and judicial remedies. They play distinct roles. The administrative proceedings exist "to avoid the use of federal resources to support discriminatory practices" and primarily provide for terminating federal funds. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979); *see* 42 U.S.C. § 2000d-1. They are not geared toward remedying particular instances of discrimination against individuals. *See* Opening Br. 38. Private lawsuits fulfill a different goal: protecting individuals and providing them with effective relief from discrimination. *Cannon*, 441 U.S. at 704-06. Indeed, the reality that the administrative process falls short in providing relief to individuals was a primary justification for the Supreme Court's holding that Title VI authorizes private lawsuits in the first place. *Id.* at 704-08, 708 n.42.

GW objects, arguing that students can obtain certain monetary damages in administrative proceedings before the Department of Education's Office for Civil Rights (OCR). Resp. Br. 29. That overstates things considerably. If OCR concludes that a school violated Title VI, it must try to secure voluntary compliance before pursuing relief for a complainant. 42 U.S.C. § 2000d-1.

And OCR "address[es] discrimination faced by individuals … only after conducting systemic investigations." Alyssa Peterson & Olivia Ortiz, *A Better Balance: Providing Survivors of Sexual Violence with "Effective Protection" Against Sex Discrimination Through Title IX Complaints*, 125 Yale L.J. 2132, 2140 (2016); *see* Off. for C.R., U.S. Dep't of Educ., Case Processing Manual 18 (2022), https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf. As a result, individual relief does not arrive until "OCR has reached a resolution agreement with the institution," making the availability of any damages depend on the speed of the institution-wide investigation and "how cooperative the individual's school is." Peterson & Ortiz, 125 Yale L.J. at 2140-41.

Regardless, even if some measure of individual relief is theoretically available, that does not bring Title VI's scheme meaningfully closer to the scheme in the DCHRA. Title VI's private cause of action is a self-contained remedy. It requires no administrative exhaustion, *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 255 (2009), and, as *Cannon* explains, is intended to serve as the predominant mechanism for providing effective individual relief, 441 U.S. at 704-06. It is not a thirteenth-hour backstop for administrative proceedings.

3. Adopting the DCHRA's statute of limitations would not serve the interests that Title VI seeks to vindicate.

The way that the DCHRA operates guarantees that applying its statute of limitations to Title VI would impair the interests Title VI protects. GW tries

to undermine the procedural distinctions as "illusory or immaterial," Resp. Br. 28 (capitalization altered), but the procedural differences between the DCHRA and Title VI have important on-the-ground consequences. Under the DCHRA, a plaintiff can add years to the time to prepare for a lawsuit by filing a complaint with the D.C. Commission on Human Rights first. D.C. Council, Comm. on Gov't Operations, Report on Bill 12-0034, at 2-4 (May 29, 1997), https://lims.dccouncil.us/Legislation/B12-0034; *see* Opening Br. 41-42. GW's position would effectively require a federal complainant to file with the Commission first, too—in other words, to seek relief before a D.C. agency to get enough time to sue in federal court. That result runs headlong into *Cannon*'s holding that Title VI authorizes a standalone remedy for private litigants and conflicts with Title VI's lack of an exhaustion requirement. *See Fitzgerald*, 555 U.S. at 255; *Milbert v. Koop*, 830 F.2d 354, 356 (D.C. Cir. 1987).

We do not argue, as GW says, that the existence of a tolling provision always makes a state law an inappropriate borrowing source for a federal limitations period. Our more limited point is that because D.C. set its limitations period based in part on the role played by state administrative proceedings, that limitations period is a poor fit for a federal judicial remedy in which administrative proceedings play no part. *See* Opening Br. 40-42.

In short, while Title VI and the DCHRA address similar substantive concerns, applying the DCHRA's limitations period would interfere with the purposes and mechanics of Title VI. Title VI's private cause of action represents the federal congressional judgment that a standalone judicial

remedy is "necessary" to protect individuals from discriminatory practices. *Cannon*, 441 U.S. at 704-06. The DCHRA reflects the D.C. Council's judgment that one year is an appropriate time limit for a single component of a larger remedial scheme. Excising that lone puzzle piece and using it to constrain Title VI would frustrate Congress's policy choice to authorize a comprehensive judicial remedy for people who suffer discrimination.

B. Even under a one-year statute of limitations, Stafford timely filed his student-on-student harassment claim.

If this Court affirms the district court's conclusion that a one-year statute of limitations applies, it should still reverse in part. Stafford's student-on-student harassment claim remains timely regardless of which limitations period applies. The hostile environment GW created persisted from his first weeks on the tennis team until GW suspended him in January 2018. He filed his lawsuit less than a year later. Under a correct application of the continuing-violation doctrine, these facts render his claim timely.

1. The continuing-violation doctrine requires Stafford to prove only that the hostile environment continued into the limitations period.

GW insists that Stafford's claims are untimely unless acts of deliberate indifference occurred within the limitations period. That error stems from a fundamental misunderstanding of the continuing-violation doctrine.[1]

[1] Stafford has not conceded that no acts of deliberate indifference occurred during the one-year limitations period. Resp. Br. 36. As our opening brief explains (at 52-53), the district court should have considered

The continuing-violation doctrine addresses a difference between a hostile environment and discrimination involving discrete, non-recurring acts. The "standard rule" provides that the statute of limitations begins to run when "the cause of action accrues." *Graham Cnty. Soil & Water Conservation Dist. v. United States*, 545 U.S. 409, 418-19 (2005) (citation omitted). Usually, that equates to "when the injury occurred or was discovered." *CTS Corp. v. Waldburger*, 573 U.S. 1, 7 (2014) (quoting Black's Law Dictionary 1546 (9th ed. 2009)). This general rule applies, as indicated, when a person claims to have suffered only a discrete act of discrimination. The "discrete retaliatory or discriminatory act occurred on the day that it happened," and that date dictates a claim's timeliness. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 110 (2002) (quotation marks omitted).

"Hostile environment claims are different in kind," however. *Morgan*, 536 U.S. at 115. There, the injury stems from "a series of separate acts that collectively constitute one unlawful … practice." *Id.* at 117 (citation omitted). Because of this characteristic of a hostile-environment claim, courts are unable to carve out individual instances of harassment to pinpoint the date on which the harassment became actionable. *Id.* at 117-18. Rather, because all the incidents of harassment are "part of the same claim," the clock does not start ticking on that claim until the hostile environment ends. *Id.* at 118.

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his testimony about incidents in the team van during his senior year even under its erroneous understanding of the continuing-violation doctrine. But if this Court corrects the district court's misapplication of that doctrine, it need not reach the issue.

GW makes this return to first principles necessary because it conflates Title VI's deliberate-indifference element with its hostile-environment element. *Morgan* and the continuing-violation doctrine involve the contours of the hostile-environment element only. They do not speak to the remaining elements of a discrimination claim. Title VI, for its part, demands an additional showing of deliberate indifference. But the existence of that further requirement does not change when a hostile environment begins and ends; as *Morgan* held, it does not end until the last event in the hostile environment occurs. 536 U.S. at 118. And while GW points out that the Title VII claim at issue in *Morgan* did not require deliberate indifference, Resp. Br. 38, that point only confirms that *Morgan* concerns the hostile-environment element alone.

Aside from the opinion below, GW offers no authority for the proposition that acts of deliberate indifference must occur within the limitations period. Perhaps that's because circuit case law cuts the other way. The Fifth Circuit has applied the continuing-violation doctrine to find a Title VI claim timely simply because the student "allege[d] a pattern of verbal abuse" and "some acts contributing to a hostile environment allegedly took place within the prescription period." *Sewell v. Monroe City Sch. Bd.*, 974 F.3d 577, 583-84 (5th Cir. 2020). The court explained that the doctrine is not a feature of Title VII but more generally "an accrual principle of federal law." *Id.* at 584 n.2. And the Second Circuit similarly concluded that the continuing-violation doctrine could apply to a Title IX hostile-environment claim even though the

only alleged act of deliberate indifference preceded the limitations period. *Papelino v. Albany Coll. of Pharmacy of Union Univ.*, 633 F.3d 81, 90-91 (2d Cir. 2011).

These holdings do not render the statute of limitations a "virtual nullity," Resp. Br. 38-39, any more than *Morgan* did. Even with the continuing-violation doctrine in place, the statute of limitations constrains hostile-environment claims, particularly in the school setting where students rarely remain in a given environment indefinitely. And for the doctrine to apply, the acts of harassment must be sufficiently related to each other to qualify as "part of the same actionable hostile … environment practice." *Vickers v. Powell*, 493 F.3d 186, 198-99 (D.C. Cir. 2007).

Further, though GW posits that a kindergartener might tell her principal about harassment and then suffer in silence through the twelfth grade, such a claim would likely fail even if the statute of limitations allowed it to proceed and even if the whole decade constituted a single hostile environment. A student who remains in school for twelve years might struggle to establish the harassment "deprived [her] of access to the educational benefits or opportunities provided by the school." *Bryant v. Indep. Sch. Dist. No. I-38 of Garvin Cnty.*, 334 F.3d 928, 934 (10th Cir. 2003)

(emphasis omitted). In sum, reversal will honor the principles laid down in *Morgan* without opening the floodgates.[2]

2. A jury could find the hostile environment persisted until January 2018.

As our opening brief explains (at 50-51), Stafford testified that his teammates subjected him to multiple instances of harassment within the year before he filed his lawsuit. He described specific incidents in his senior year, noting that the abuse he'd previously suffered "intensif[ied]" at that time. JA-3-936.

GW argues that Stafford's testimony fails to create a genuine dispute of fact about whether the hostile environment continued into the one-year period, speculating that even if it occurred during his senior year, it could have conveniently stopped on its own weeks before the one-year mark. Resp. Br. 42-43. This contention is baseless. Stafford suffered nonstop, relentless harassment throughout his time at GW. His testimony detailed that the abuse continued unabated into his senior year. JA-3-881; JA-3-908; JA-3-935-41; JA-2-602. And he remained on the tennis team that semester. *See* JA-3-

[2] Accordingly, Stafford needs to show only that a jury could conclude that the hostile environment continued into the limitations period, whether that period began three years or one year before his filing date. The hostile environment persisted from his first weeks on the tennis team in the fall of 2014 until he left the University in January 2018. GW is therefore wrong to argue (at 50) that even if a three-year statute of limitations applies, the Court cannot consider events prior to November 26, 2015. *See Morgan*, 536 U.S. at 120-21.

908; JA-3-924; JA-3-935-38; JA-2-602; JA-3-1020. A reasonable jury could conclude that his teammates harassed him during his final month on the team, just like they had all along.

GW contends that the district court "did not abuse its discretion in refusing to consider" the specific instances of harassment in Stafford's senior year described in our opening brief (at 50-51). Resp. Br. 41. But because the district court erroneously concluded that the continuing-violation doctrine requires an act of deliberate indifference within the limitations period, not just an act of harassment, it did not evaluate the extensive abuse Stafford suffered during that year. Its failure to consider these incidents stemmed from an upstream legal error, and this Court's review is therefore de novo. *Saint Francis Med. Ctr. v. Azar*, 894 F.3d 290, 293 (D.C. Cir. 2018); *see First Pac. Bank v. Gilleran*, 40 F.3d 1023, 1027 (9th Cir. 1994).

Correcting that error requires reversal. And, for the reasons already explained, had the district court correctly applied the continuing-violation doctrine, it would have considered the senior-year harassment and denied summary judgment. No reason exists to think that the court would have bought GW's new assertion that Stafford failed to present that evidence below. In his opposition to summary judgment, Stafford argued that the racism he suffered began in 2014 and "would last until [he] was suspended from GWU" in January 2018. ECF No. 81 at 2-3. In support of his contention that the "hostile educational environment continued," he cited the lines from his deposition where he testified that, in his "senior year," during "the fall

semester," a teammate "passed along" the information that C.R., the team captain, had used a loathsome racial slur to describe Stafford and said that Stafford "should go back to wherever [he] was from." *Id.* at 10 (citing JA-3-936, which refers back to JA-3-881). And Stafford separately described his harassment at the hands of C.R., citing to an exhibit where he recounted how, during his "senior year," C.R. used racial slurs and conspired with other team members to get Stafford kicked off the team. *Id.* at 5 (citing an email Stafford sent, which can be found at JA-2-602). In short, Stafford's summary-judgment papers drew the district court's attention to the relevant portions of the record and "crystallize[d] … the material facts." *Jackson v. Finnegan, Henderson, Farabow, Garrett & Dunner*, 101 F.3d 145, 151 (D.C. Cir. 1996).

GW's invocation of Local Rule 7(h) (at 39-41) is beside the point. True, a party opposing summary judgment must point to evidence that creates a genuine issue of fact. But the opposing party's Local Rule 7(h) submission is a "counterstatement," written in response to the grounds on which the moving party (here, GW) contends that no genuine issue exists. *Jackson*, 101 F.3d at 150-51 (quoting *Gardels v. Cent. Intel. Agency*, 637 F.2d 770, 773 (D.C. Cir. 1980)). GW did not seek summary judgment on the issue whether harassment occurred after November 2017—likely because the record would readily allow a jury to conclude that it did. GW argued only that no instances of *deliberate indifference* occurred in that time frame. ECF No. 78-2 at 19-20. As the opposing party, Stafford had "no obligation to address grounds not

raised in [GW's] motion for summary judgment." *Costello v. Grundon*, 651 F.3d 614, 629 (7th Cir. 2011). In sum, Local Rule 7(h) did not require Stafford to cite evidence about harassment.

II. GW exhibited deliberate indifference to the discrimination Stafford suffered.

A. Stafford's student-on-student harassment claim survives summary judgment.

GW accepts that Stafford was subjected to a racially hostile environment. And it no longer disputes that a jury could conclude that the harassment deprived him of the full benefit of his college education. It does not even contest that two high-ranking GW officials—Associate Provost Helen Saulny and Senior Associate Athletics Director Ed Scott—actually knew about the harassment Stafford suffered and were appropriate persons to respond to it. In light of this flood of concessions, the appalling inadequacy of GW's response to the abuse precludes summary judgment.

We start, though, by refuting GW's protests that the other officials involved, aside from Scott and Saulny, either did not know about the abuse or had no power to intervene. Multiple other officials received extensive notice. They possessed many tools to address the harassment but did not use them. These circumstances render GW's failure to do anything remotely helpful even more egregious than Saulny's and Scott's misconduct alone.

1. GW had actual notice of rampant student-on-student harassment.

When Stafford sought help from GW officials, his complaints left no doubt about the nature of the mistreatment he alleged. He specifically referenced racial discrimination, alleging that his teammates taunted him, called him racist names, and conspired against him because of his race.

Along with Saulny and Scott, GW does not dispute that Coach Gregory Munoz or Coach Torrie Browning knew Stafford was being harassed. Still, it insists that Coach David Macpherson, Assistant Athletics Director Nicole Early, and Director of Multicultural Services Michael Tapscott did not. But given the record, a jury could conclude otherwise.[3]

Consider what Stafford told Macpherson. Stafford explained that as his teammates' attacks "intensif[ied]," he told Coach Macpherson "directly" that his teammates were "plotting" against him by "trying to record" him, and that he thought "racism was at play." JA-3-932.[4] And he told Macpherson that his teammates were "taunting" him and "racially discriminating against" him. JA-3-934. Indeed, in his deposition, he

[3] GW argues that Saulny's and Scott's actions do not give rise to liability because they responded reasonably. For the reasons that contention is wrong, see below (at 22-24). As for Munoz and Browning, GW argues they were not "appropriate persons" to hear Stafford's reports. We show why that contention cannot be right below (at 20-22).

[4] GW asserts that Stafford forfeited reliance on this conversation by failing to mention it in his opening brief. Resp. Br. 47 n.17. But we cited to the conversation in the list of occasions when Stafford reported harassment to Macpherson. Opening Br. 24.

summarized his conversation with Macpherson by explaining that he described "everything [that was] going on." *Id.* Stafford put Macpherson on notice and then some.

Stafford spoke to Early with even more frequency and in even more detail. He "raised concerns of … racial mistreatment and hostility," reported the "racial rhetoric," and told her about the "racial name calling." JA-3-896-97. He told her he was "experiencing racial mistreatment on the tennis team" during his sophomore year. JA-3-912. He told her about his teammates' racist "plots." JA-3-971. In sum, he repeatedly and expressly conveyed to Early the substance of his allegations.

The evidence about the role that Tapscott played confirms that he and Early both knew. Tom Stafford, Stafford's father, testified that he had a "long conversation" with Tapscott, one of the school's "so-called diversity people," to discuss "what was going on with" his son. JA-3-991. Stafford's father testified that Tapscott responded by telling him what happened to Tapscott's son "as a result of being a kid of color on the rowing team and all the bullshit that he had to deal with being a person of color on the rowing team." *Id.* Tapscott also spoke to Stafford about "derogatory comments" made by his teammates. JA-3-1222. After that conversation, Tapscott called Early and told her about "their concerns about [Stafford's] treatment on the team" and indicated that he "felt it was important that she look into it." *Id.* Viewing that evidence in the light most favorable to Stafford, a jury could conclude that Stafford and his father raised allegations of racial harassment with Tapscott,

who, in turn, relayed them to Early. Together with what Stafford told Early directly, she too had actual notice.

GW objects that Stafford spoke in vague terms and failed to describe specific instances of harassment. But the cases GW cites do not cloud the clarity of Stafford's complaints. Two of the cases turned on the plaintiffs' failures to introduce evidence of deliberate indifference, not on whether the school districts had notice. *Stiles v. Grainger County*, 819 F.3d 834, 843 n.5 (6th Cir. 2016); *Gordon v. Traverse City Area Pub. Schs.*, 686 F. App'x 315, 325 (6th Cir. 2017). In the third case, the student failed to allege that she reported the incidents in question. *Gabrielle M. v. Park Forest-Chi. Heights Sch. Dist. 163*, 315 F.3d 817, 822-23 (7th Cir. 2003). Stafford, by contrast, introduced evidence that he repeatedly and specifically reported his harassment.

GW is not wrong that courts have held that a "vague communication" might not establish actual notice. Resp. Br. 49 (quoting *I.L. v. Houston Indep. Sch. Dist.*, 776 F. App'x 839, 844 (5th Cir. 2019)). But GW *is* wrong to contend that this proposition is relevant here. True, when reports do not "alert" a school to the "possibility" of a violation, the school lacks actual notice. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 291 (1998). For example, a report that a student "wasn't feeling comfortable at school" fell short. *I.L.*, 776 F. App'x at 844. But Stafford went far beyond alluding to amorphous

discomfort. As indicated, he expressly informed his coaches and administrators that his teammates were targeting him because he is Black.[5]

2. Stafford reported his teammates' abuse to appropriate persons.

Stafford described his harassment to "appropriate person[s]" who had the "authority to take corrective action to end the discrimination." *Gebser*, 524 U.S. at 290. Whether an official is empowered to respond varies with the circumstances. *Doe v. Edgewood Indep. Sch. Dist.*, 964 F.3d 351, 359-61, 360 n.30 (5th Cir. 2020). For example, when one student harasses another in the classroom, an administrator might be an appropriate person if she can take "measures such as transferring the harassing student to a different class, suspending him, curtailing his privileges, or providing additional supervision." *Murrell v. Sch. Dist. No. 1*, 186 F.3d 1238, 1247 (10th Cir. 1999).

GW does not contest that Saulny, Scott, and Early each were authorized to abate the harassment Stafford suffered, emphasizing instead that his coaches were powerless.

Common sense tells us that cannot be right. If anyone could have reined in misconduct on the tennis team, and done so promptly, it was the head coach. Munoz, Browning, and Macpherson could have reprimanded the

[5] GW tries to undercut that it was on notice by contending that no appropriate person knew that, in addition to tolerating Stafford's abuse at the hands of his teammates, Munoz personally harassed Stafford. Resp. Br. 52. Because that (incorrect) contention bears on Stafford's teacher-on-student harassment claim, not his student-on-student harassment claim, we address it below (at 25-26).

racist team members, docked their playing time, or suspended them. Instead, they allowed the team to make Stafford's life miserable, reserved their discipline for him instead of his tormentors, and permitted the principal perpetrator, C.R., to serve as team captain.

GW insists that coaches can never be appropriate persons. But that invented bright-line rule ignores the fact-specific nature of the inquiry. It also makes no sense. As Early herself explained, coaches have the power to set "rules and policies" for the team. JA-4-1303-05. Munoz, Browning, and Macpherson had a day-to-day direct line to the players. No other individual had more authority to shape team culture and discipline the players (as evidenced by their repeated discipline of Stafford). That GW can cite decisions finding coaches powerless to address discrimination by non-athletes, off the court and outside the locker room, says nothing about Stafford's coaches' ability to respond to the harassment he endured here at the hands of his own teammates. *Kesterson v. Kent State Univ.*, 967 F.3d 519, 529 (6th Cir. 2020); *Ross v. Corp. of Mercer Univ.*, 506 F. Supp. 2d 1325, 1352 n.43 (M.D. Ga. 2007). In fact, in other cases where the harasser was a student athlete, courts have found that coaches *can* qualify as appropriate persons for reporting student-on-student harassment. *E.g., S.E.S. v. Galena Unified Sch. Dist. No. 499*, 446 F. Supp. 3d 743, 790-94 (D. Kan. 2020); *S.M. v. Sealy Indep. Sch. Dist.*, 2021 WL 1599388, at *5 (S.D. Tex. Apr. 23, 2021).

GW also latches on to the district court's incorrect holding that Munoz did not qualify as an appropriate person because he himself harassed

Stafford. As our opening brief explains (at 25-26), that argument mistakes Stafford's student-on-student harassment claim for his teacher-on-student harassment claim. Munoz could have stopped Stafford's teammates from racially harassing him. His decision to join in instead of intervening does not let GW off the hook.

3. GW officials exhibited deliberate indifference to the tennis team's harassment of Stafford.

The collective non-response of GW officials amounted to deliberate indifference to the discrimination Stafford endured. GW offers no argument that its response as a whole did anything but let Stafford down. GW maintains instead that particular individual officials acted reasonably. But this divide-and-conquer approach mistakes the inquiry. Under Title VI, a university is liable "for its own official decision," not "employees' independent actions." *Gebser*, 524 U.S. at 290-91. The focus is the federal "funding … recipient's response." *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 648-49 (1999).

GW's response, if one can call it that, fell miles short of what the law requires. GW took only two steps that it views as corrective. First, in a one-on-one meeting during Stafford's sophomore year, over a year after he first reported the harassment, Early told Stafford he could "wait the year out" to see if bringing on a new coach in the fall cleared up the problem. JA-3-923. Second, Saulny and Scott met with Stafford and referred him to an online grievance form. JA-3-931. The administrators' feeble reactions, which came

far too late, were not "reasonably calculated to end" Stafford's harassment. *Zeno v. Pine Plains Cent. Sch. Dist.*, 702 F.3d 655, 669 (2d Cir. 2012). Their responses were not reasonably calculated to end anything except their meetings with Stafford.

GW insists that referring Stafford to its online grievance form absolved it of liability, stressing that other courts have held "that a school has not acted clearly unreasonably when it informs a student how to make a complaint." Resp. Br. 45. But that grievance form is no trump card. Consider the closest of the cases GW cites (which is still far afield). In *Abramova v. Albert Einstein College of Medicine*, 278 F. App'x 30 (2d Cir. 2008), the court considered a Title IX claim from a student alleging that a professor sexually harassed her. *Id.* at 31. She reported what happened to a "friend and community leader not affiliated with the College." *Abramova v. Albert Einstein Coll. of Med.*, 2006 WL 8445809, at *3 (S.D.N.Y. July 6, 2006). Her friend reported the allegation to a university official. Within a month, the university sent her a letter detailing the procedures she could use to report what happened. *Abramova*, 278 F. App'x at 31. There, "[i]n light of the manner in which Abramova made her charges known," the university's response met the moment. *Id.* And it did so within 30 days. *Id.*

Abramova thus reveals nothing about the adequacy of GW's response. A response must be considered "in light of the known circumstances," *Davis*, 526 U.S. at 648, including the extent of the notice received and the solutions at the school's disposal. Stafford's repeated complaints, made directly to

powerful GW officials, deserved far more attention with far more speed than they received.

GW's remaining cases only underscore the deficiency of its grievance-form referral. In *Shank v. Carleton College*, 993 F.3d 567 (8th Cir. 2021), the school not only informed the student that grievance procedures existed, it also initiated its own investigation (in which the student submitted a statement) and punished her attacker. *Id.* at 574-75. And in *DT v. Somers Central School District*, 348 F. App'x 697 (2d Cir. 2009), the assistant principal likewise did more than inform the student that he could file a complaint. There, too, the assistant principal investigated. *Id.* at 701. And she "kept an informal eye on [the student] for the rest of the school year," during which she saw him interact with the alleged harasser "without further problem." *Id.* (internal quotation marks omitted). These multi-pronged, timely responses dwarf the collective shrug GW gave to Stafford's allegations.

As for Early's role, GW says that at least "it did not amount to an intentional choice to sit by and do nothing." Resp. Br. 49. That is a strange way to describe what happened, given that, in fact, Early told Stafford to sit by and do nothing. *See* JA-3-915.

GW tries to justify Early's inaction by pointing to Stafford's statement that he felt "satisfied" with her March 2016 suggestion that the harassment might abate that fall when a new head coach arrived. Resp. Br. 49-50. But even if Stafford felt hopeful in the moment that things might change, that does not suggest he found GW's response adequate on the whole. Ultimately Early

was just one of many GW officials who, he explained, "would tell [him] things would get better," even though "they never ended up getting better." JA-3-972-73. And, besides, the deliberate-indifference inquiry focuses on the policymaker's state of mind, not the student's. *See Bd. of Cnty. Comm'rs of Bryan Cnty. v. Brown*, 520 U.S. 397, 411 (1997); *City of Canton v. Harris*, 489 U.S. 378, 390 & n.10 (1989); *see also Gebser*, 524 U.S. at 291 (noting that *Brown* and *Harris* adopted the same deliberate-indifference standard). Regardless of how Stafford *later* said he felt, from Early's perspective at the time, it was clearly unreasonable for her to punt.

B. Stafford's teacher-on-student harassment claim survives summary judgment.

Stafford's teammates were not his only harassers. His coaches also subjected him to heinous mistreatment. Munoz in particular singled out Stafford and his two teammates based on national origin and race. Stafford told Early as much, JA-3-919, and she emailed Munoz to express concern about accusations that he was "punishing Jabari for the same offenses others are allowed to get away with," JA-2-698. Further, Munoz copied her on an email in which he directed Stafford and his two non-white American teammates to read the email three times more than their white, foreign counterparts. JA-4-1278-79; ECF No. 79-13.

GW does not even try to contest the severity, offensiveness, or pervasiveness of Munoz's misbehavior. And it does not argue that Early took appropriate steps to address the harassment (which makes sense, because

she took no steps at all). Instead, it asks this Court to apply an upside-down summary-judgment standard and accept that she lacked actual notice because she professes not to have read the derogatory email. Even if a jury were to credit her testimony on that score, though, the harassment appeared not only in the body of the email but in the subject line. A jury could thus still conclude that she saw Munoz's directive that Stafford read it "3x." And the email was not her only source of notice. Stafford himself told Early that Munoz treated him differently because of his race. JA-3-919.

As for the other evidence that Early knew that Munoz was punishing Stafford more severely than the white, foreign players, GW simply does not engage, arguing instead that Stafford forfeited reliance on the evidence. He did not. In opposing summary judgment, Stafford quoted from and cited the email demonstrating Early's awareness that Munoz was accused of targeting him. ECF No. 81 at 6. And he cited the pages of his deposition containing his testimony that he told Early that Munoz treated him differently because of his race. *Id.* at 8 (citing Stafford's deposition at 209-12, which can be found at JA-3-919).

Conclusion

If this Court concludes that the applicable statute of limitations is three years, then the district court's judgment should be reversed and remanded for trial on both of Stafford's Title VI claims. If this Court concludes that the applicable statute of limitations is one year, then the district court's

judgment should be reversed in part and remanded for trial on Stafford's student-on-student harassment claim.

Respectfully submitted,

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I certify that, on August 23, 2022, this brief was filed using the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served electronically via that system. Eight paper copies of this brief will also be filed with the Clerk of this Court.

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