No. _____

IN THE

Supreme Court of the United States

JOHN MBAWE,

Petitioner,

v.

FERRIS STATE UNIVERSITY, ET AL.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The Americans with Disability Act (ADA), 42 U.S.C. §12101, and Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. §794 require an entity to seek to reasonably accommodate an "other qualified" individual with a disability who desires to participate in the services or programs offered by that entity. In order to determine whether a student is "otherwise qualified", a university must conduct an "individualized assessment" of the disabled student. An "individualized assessment" is an "interactive process" in which the student and university must engage in efforts to craft an accommodation that would permit the student to remain at the university. "In general" an individual must first notify an entity of his or her disability, and indicate a desire to remain, before that entity's obligation to engage in an interactive process is triggered. Most circuits, however, have recognized exceptions to this "general rule", especially when the disability is one that is known to the entity, and particularly where the disability is one that obviously impairs an individual's mental or cognitive abilities. Other circuits, including the Sixth Circuit, have taken the stance that an entity cannot be held liable for failing to meet its obligations under the ADA and Section 504, if the disabled individual did not first propose a specific reasonable accommodation, prior to separation from his or her desired position(s).

The question presented is:

Whether the interactive process is triggered when a University knows or should know of a

student's disability, and of that student's desire to remain at the University despite that disability?

2. Once enrolled, a student, even one with a disability, has a property and liberty interest in continued education. A State cannot deprive a person of a property or liberty interest without sufficient due process protections. A State university must provide a student with notice and a hearing, at a minimum, *prior* to stripping that student of his or her right to remain enrolled in that university. Due process protections must be tailored to the capacities of the individuals subject to dismissal, and more formal protections must be afforded to students facing long term suspension or expulsion from a university.

The question presented is:

Whether a university is permitted to dismiss a student *because of his disability*, without providing that student *prior* due process protections, including notice and a hearing?

PARTIES TO THE PROCEEDINGS

Petitioner John Mbawe was the plaintiff before the district court and appellant before the court of appeals. Respondents, Ferris State University, Renee Vander Myde, Stephen Durst, Jeffrey Bates, and Paul Blake were the defendants in the district court and appellees in the court of appeals.

TABLE OF CONTENTS

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 15

I. THIS COURT SHOULD GRANT REVIEW TO RESOLVE A CONFLICT REGARDING THE TRIGGERING OF AN ENTITY'S OBLIGATION TO ENGAGE IN THE INTERACTIVE PROCESS WITH A DISABLED STUDENT 15

II. THIS COURT SHOULD GRANT REVIEW BECAUSE THIS CASE PRESENTS ISSUES OF NATIONAL IMPORTANCE 25

III. THE SIXTH CIRCUIT'S DECISION IS INCORRECT 27

CONCLUSION 33

INDEX TO APPENDIX

Mbawe v. Ferris State Univ., No. 18-1046, 2018 WL 5793188 (6th Cir. Nov. 5, 2018) 1a

Mbawe v. Ferris State Univ., No. 1:16-CV-1189, 2018 WL 1770618 (W.D. Mich. Jan. 10, 2018) 25a

Order Denying Petition for Rehearing En Banc 73a

TABLE OF AUTHORITIES

Page(s)

Cases

Ah Quin v. Cnty. of Kauai Dept. of Transp.,
733 F.3d 267 (9th Cir. 2013) 1
Arredondo v. Howard Miller Clock Co.,
2009 WL 2871171 (W.D. Mich. Sept. 2, 2009) 16
Arthur v. Am. Showa, Inc.,
625 F. App'x 704 (6th Cir. 2015).....16
Barnes v. Nw. Iowa Health Ctr.,
238 F. Supp. 2d 1053 (N.D. Iowa 2002) 18
Barnett v. U.S. Air, Inc.,
228 F.3d 1105 (9th Cir. 2000).....4, 5, 17, 18
Bd. of Curators of Univ. of Missouri v. Horowitz,
435 U.S. 78 (1978).....9, 33
Beck v. University of Wis. Bd. of Regents,
75 F.3d 1130 (7th Cir.1996).....18, 30
Boddie v. Connecticut,
401 U.S. 371 (1971) 8
Bombard v. Fort Wayne Newspapers, Inc.,
92 F.3d 560 (7th Cir.1996).....18
Brady v. Wal-Mart,
531 F.3d 127 (2nd Cir. 2008) 18
Brown v. Bd. of Educ.,
347 U.S. 483 (1954).....26
Brown v. Chase Brass & Copper Co.,
14 F. App'x 482 (6th Cir. 2001).....16
Brown v. Lucky Stores, Inc.,
246 F.3d 1182 (9th Cir. 2001).....18
Bultemeyer v. Fort Wayne Comm.,
100 F.3d 1281 (7th Cir.1996).....18
Burns v. Coca–Cola Enters., Inc.,
222 F.3d 247 (6th Cir.2000).....32

Cmty. Coll. v. Davis,
442 U.S. 397 (U.S. 1979).....25
Conneen v. MBNA Am. Bank, N.A.,
182 F. Supp. 2d 370 (D. Del. 2002).....18
Constantine v. Rectors and Visitors of George Mason University,
411 F.3d 474 (2005)..... 3
Dark v. Curry County,
451 F.3d 1078 (9th Cir.2006).....18
De Prima v. Columbia-Greene Community Coll.,
89 Misc.2d 620 (1977) 6
Dean v. Univ. at Buffalo Sch. Of Med. & Biomedical Scis.,
804 F.3d 178 (2d. Cir. 2015) 5, 10, 18
Deister v. AAA Auto Club of Michigan,
91 F. Supp. 3d 905 (E.D. Mich. 2015).....16
Dixon v. Alabama State Board of Education,
294 F.2d 150 (5th Cir. 1961).....6, 7
Donahue v. Consol. Rail Corp.,
224 F.3d 226 (3d Cir. 2000) 4, 33
Donohue v. Baker,
976 F.Supp. 136 (N.D. NY 1997) 6
Dunlap v. Liberty Nat. Prod., Inc.,
878 F.3d 794 (9th Cir. 2017).....18
E.E.O.C. v. Sears, Roebuck & Co.,
417 F.3d 789 (7th Cir.2005).....18
Edmunds v. Bd. of Control of E. Michigan Univ.,
2009 WL 5171794 (E.D. Mich. Dec. 23, 2009)..... 5
Equal Opportunity Comm'n v. M.G.H. Family Health Ctr.,
230 F.Supp.3d 796 (W.D. Mich. 2017).....29
Felix v. New York City Transit Auth.,
154 F. Supp. 2d 640 (S.D.N.Y. 2001).....18
Fjellestad v. Pizza Hut of Am., Inc.,
188 F.3d 944 (8th Cir. 1999).....18

Flaim v. Medical College of Ohio,
418 F.3d 629 (6th Cir. 2005).....6, 7, 8
Fuentes v. Shevin,
407 U.S. 67 (1972)..... 8
Gaston v. Bellingrath Gardens & Home, Inc.,
167 F.3d 1361 (11th Cir.1999).....16
Goldberg v. Kelly,
397 U.S. 254 (1970)..... 9
Gorman v. University of Rhode Island,
837 F.2d 7 (1st Cir. 1988) 6, 7, 8
Goss v. Lopez,
419 U.S. 565 (1975).....6, 7, 8
Hale v. Johnson,
245 F. Supp. 3d 979 (E.D. Tenn. 2017) 16
Hall v. University of Minnesota,
530 F. Supp. 104 (D. Minn. 1982)..... 6
Hart v. Ferris State Coll.,
557 F. Supp. 1379 (W.D. Mich. 1983)..... 6
Hedberg v. Indiana Bell Tel. Co.,
47 F.3d 928 (7th Cir. 1995).....18
Hendricks-Robinson v. Excel Corp.,
154 F.3d 685 (7th Cir. 1998).....18
Humphrey v. Mem'l Hosps. Ass'n,
239 F.3d 1128 (9th Cir. 2001).....3, 5, 31
Hurst v. Lilly Co.,
2017 WL 3187218 (E.D. Tenn. July 26, 2017) 16
Jaksa v. Regents of University of Michigan,
597 F.Supp. 1245 (E.D. Mich. 1984).....6, 7
Jakubowski v. Christ Hosp., Inc.,
627 F.3d 195 (6th Cir. 2010).....15, 25
Johnson v. Cleveland City Sch. Dist.,
443 F. App'x 974 (6th Cir. 2011).....16
Keene v. Rodgers,
316 F.Supp. 217 (D.Me.1970) 8
Keith v. Cty of Oakland,

703 F.3d 910 (6th Cir. 2013)..... 3
Kirincich v. Illinois State Police,
196 F. Supp. 3d 845 (N.D. Ill. 2016).....18
Kleiber v. Honda of Am. Mfg., Inc.,
485 F.3d 862 (6th Cir. 2007).....3, 6
Lawrence v. National Westminster Bank New Jersey,
98 F.3d 61 (3d Cir.1996) 4
Lee v. City of Columbus,
636 F.3d 245 (6th Cir.2011).....31
Lockard v. Gen. Motors Corp.,
52 F. App'x 782 (6th Cir. 2002).....16
Loulseged v. Akzo Nobel Inc.,
178 F.3d 731 (5th Cir.1999)..... 4
Maczaczyj v. State of N.Y.,
956 F.Supp. 403 (W.D.N.Y. 1997) 6
Manigan v. Sw. Ohio Reg'l Transit Auth.,
385 F. App'x 472 (6th Cir. 2010).....16
Martinson v. Regents of the Univ. of Michigan,
2011 WL 13124122 (E.D. Mich. Sept. 28, 2011) 6
Martinson v. Regents of University of Michigan,
562 F. App'x 365 (6th Cir. 2014)..... 6
Mathews v. Eldridge,
424 U.S. 319 (1976)..... 9
Mbawe v. Ferris State Univ.,
2018 WL 1770618 (W.D. Mich. Jan. 10, 2018)...1, 16
Mbawe v. Ferris State Univ.,
2018 WL 5793188 (6th Cir. Nov. 5, 2018).....1, 16
McDonnell Douglass Corp. v. Green,
411 U.S. 792 (1973).....28
Melange v. City of Ctr. Line,
482 Fed.Appx. 81 (6th Cir.2012) 16
Miller v. Illinois Dep't of Corr.,
107 F.3d 483 (7th Cir. 1997).....18
Miller v. National Cas. Co.,
61 F.3d 627 (8th Cir.1995)..... 4

Mills v. Bd. of Ed. of D.C.,
348 F. Supp. 866 (D.D.C. 1972) 8
Moloney v. Home Depot U.S.A., Inc.,
2012 WL 1957627 (E.D. Mich. May 31, 2012)..24, 25
Monette v. Electronic Data Systems Corp.,
90 F.3d 1173 (6th Cir. 1996).....15, 32
Morton v. United Parcel Serv., Inc.,
272 F.3d 1249 (9th Cir. 2001).....18
Motsay v. Pennsylvania Am. Water Co.,
2008 WL 376298 (M.D. Pa. Feb. 11, 2008).....18
Mullane v. Central Hanover Trust Co.,
339 U.S. 306 (1950) 7
Nevada Dept. of Human Resources v. Hibbs,
538 U.S. 721 (2003).....26
New Hampshire v. Maine,
532 U.S. 742 (2001) 1
Newsome v. Batavia Local Sch Dist,
842 F.2d 920 (6th Cir. 1988) 8
Nickerson v. Univ. of Alaska Anchorage,
975 P.2d 46 (Alaska 1999) 9
Norris v. Allied-Sysco Food Servs., Inc.,
948 F. Supp. 1418 (N.D. Cal. 1996).....18
Picozzi v. Sandalow,
623 F.Supp. 1571 (E.D. Mich. 1986)..... 6
Rorrer v. City of Stow,
743 F.3d 1025 (6th Cir. 2014) 3
Smith v. Midland Brake, Inc., a Div. of Echlin, Inc.,
180 F.3d 1154 (10th Cir. 1999).....3, 4, 18, 32
Snapp v. United Transp. Union,
547 F. App'x 824 (9th Cir. 2013).....18
Stallings v. Detroit Pub. Sch.,
658 F. App'x 221 (6th Cir. 2016).....16
Stanciel v. Donahoe,
570 F. App'x 578 (6th Cir. 2014).....25
Stanley v. Illinois,

405 U.S. 645 (1972) 8
Swank v. CareSource Mgmt. Grp. Corp.,
657 F. App'x 458 (6th Cir. 2016).....16
Taylor v. Phoenixville Sch. Dist.,
184 F.3d 296 (3d Cir. 1999) 3, 6, 18
Taylor v. Principal Fin. Group, Inc.,
93 F.3d 155 (5th Cir.1996).....16
Toledo v. Sanchez,
454 F.3d 24 (1st Cir. 2006) 2, 6, 7, 26
United States v. City of Denver,
49 F.Supp.2d 1233 (D.Colo.1999) 18
U.S. Airways, Inc. v. Barnett,
535 U.S. 391 .....4, 17
Vinson v. Thomas,
288 F.3d 1145 (9th Cir. 2002)..... 5
Wallin v. Minnesota Dept. of Corrections,
153 F.3d 681 (8th Cir.1998)..... 5
Walsted v. Woodbury Cty., IA,
113 F.Supp. 2d 1318 (N.D. Iowa 2000) 18
Wong v. Regents of Univ. of California,
192 F.3d 807 (9th Cir. 1999)..... 2
Yonemoto v. McDonald,
114 F. Supp. 3d 1067 (D. Haw. 2015)..... 5
Zivkovic v. S. Cal. Edison Co.,
302 F.3d 1080 (9th Cir.2002).....5, 18
Zukle v. Regents of University of California,
166 F.3d 1041 (9th Cir. 1999).....10, 11, 12, 13
Zwick v. Regents of Univ. of Mich.,
2008 WL 1902031 (E.D. Mich. Apr. 28, 2008) 6

Statutes

28 U.S.C. § 1254(1)..... 1
29 U.S.C. §794 1
42 U.S.C. §1211(8)..... 2

42 U.S.C. §1983 14
42 U.S.C. §12101 1
42 U.S.C. §12112(b)(3)(A).....29
42 U.S.C. §12112(b)(5)(A).....28
42 U.S.C. § 12132 2
Section 504.....1, 2, 5

Regulations

28 C.F.R. §35.130(b)(8).....29
28 C.F.R. § 35.104 29
28 C.F.R. § 35.150 33
29 C.F.R. 1630 app. § 1630.2(o)§ 1630.2(o) 31
29 C.F.R. pt. 1630 app. §1630.9 5
29 C.F.R. § 1630.2(h).....29
29 C.F.R. § 1630.2(o)(3).....31

PETITION FOR A WRIT OF CERTIORARI

Petitioner John Mbawe respectfully requests this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is available at *Mbawe v. Ferris State Univ.,* 2018 WL 5793188 (6th Cir. Nov. 5, 2018) and is reproduced at App. 1a. The district court's opinion is available at *Mbawe v. Ferris State Univ.,* 2018 WL 1770618 (W.D. Mich. Jan. 10, 2018), and is reproduced at App. 25a.

STATEMENT OF JURISDICTION

The Sixth Circuit issued its Opinion and Final Judgment on November 5, 2018. App. 1a. The Sixth Circuit denied Petitioner's timely-filed petition for rehearing *en banc* on December 7, 2018. App. 73a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case concerns a University's obligations under the Americans with Disability Act (ADA), 42 U.S.C. §12101, and Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. §794 to engage in an interactive process with a student with a *known* disability, prior to dismissing that student because of his disability. It also concerns a University's obligations under the Fourteenth Amendment to provide proper due process protections to a student with a disability prior to dismissing that student because of his disability.

STATEMENT OF THE CASE

This case involves a university's obligations to a student with a disability under the ADA and Section 504. This case also involves a university's obligations to provide due process protections to a student prior to depriving the student of the ability to remain at the university. Each is discussed here briefly.

1. The ADA "imposes an affirmative obligation on public entities to make their programs accessible to qualified individuals with disabilities, except where compliance would result in a fundamental alteration of services or impose an undue burden." *Toledo v. Sanchez*, 454 F.3d 24, 32 (1st Cir. 2006) (citations omitted). "Public entities, such as schools and university must make 'reasonable modifications to rules, policies, or practices' to ensure that disabled students are able to participate in the educational program[s]." *Id.* at 39. (quoting 42 U.S.C. § 12132). This "affirmative obligation" to "reasonably modify" their programs to accommodate "disabled students of this nation…is not disproportionate to the need to protect against the outright exclusion and irrational disability discrimination that such students experienced in the recent past." *Id.* at 40.

Under the ADA, a University cannot exclude an individual from participation unless the University can demonstrate that the student was not "otherwise qualified" to meet the essential functions of the program *with or without a reasonable accommodation*.[1] 42 U.S.C. §1211(8). A student is

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[1] Courts apply the same analysis to claims under the ADA and Section 504. *Wong v. Regents of Univ. of California*, 192 F.3d 807, 822 (9th Cir. 1999), as amended (Nov. 19, 1999). Therefore, Petitioner's references to the ADA are intended to

"otherwise qualified" when he "is able to perform all the essential functions of being a student with reasonable accommodations." *Constantine v. Rectors and Visitors of George Mason University*, 411 F.3d 474 (2005).

However, once aware of an individual with a disability, "[t]he ADA mandates an individualized inquiry in determining whether an [individual's] disability or other condition disqualifies him from a particular position." *Keith v. Cty of Oakland*, 703 F.3d 910, 923 (6th Cir. 2013). "The individualized inquiry is 'an interactive process' in which 'both parties have a duty to participate in good faith.'" *Rorrer v. City of Stow*, 743 F.3d 1025, 1040 (6th Cir. 2014) (quoting *Kleiber v. Honda of Am. Mfg., Inc.*, 485 F.3d 862, 871 (6th Cir. 2007)).

The purpose of this "interactive process" "is to determine the appropriate accommodations." *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 316 (3d Cir. 1999). "The obligation to engage in an interactive process is inherent in the statutory obligation to offer a reasonable accommodation to an otherwise qualified disabled employee. The interactive process is typically an essential component of the process by which a reasonable accommodation can be determined." *Smith v. Midland Brake, Inc., a Div. of Echlin, Inc.*, 180 F.3d 1154, 1172 (10th Cir. 1999). The interactive process is a "cooperative problem-solving" process. *Humphrey v. Mem'l Hosps. Ass'n*, 239 F.3d 1128, 1138 (9th Cir. 2001). "The interactive process is at the heart of the ADA's process and essential to accomplishing its goals." *Barnett v. U.S.*

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apply with equal weight to Petitioner's Section 504 claim, and vice versa.

Air, Inc., 228 F.3d 1105, 1113 (9th Cir. 2000), vacated sub nom. *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 122 S. Ct. 1516, 152 L. Ed. 2d 589 (2002).[2]

However, the "interactive process is not an end i[n] itself—it is a means to the end of forging reasonable accommodations." *Loulseged v. Akzo Nobel Inc.*, 178 F.3d 731, 736 (5th Cir.1999). While it is true that "there may be occasions where a reasonable accommodation can be determined without an interactive process, typically the interactive process will be indispensable" as "it is frequently an essential component of the statutory obligation to offer a reasonable accommodation to an otherwise qualified disabled employee." *Smith*, 180 F.3d at 1172 n10.

Under the ADA, discrimination is defined as "not making reasonable accommodations to the *known* physical or mental limitations of an otherwise qualified individual with a disability…" §12112(a) (emphasis added). Therefore, a public entity cannot be held liable for failing to accommodate the physical or mental limitations of an individual, if that entity did not have knowledge that such limitations existed. *Miller v. National Cas. Co.*, 61 F.3d 627, 629 (8th Cir.1995). "*In general*, it is the responsibility of the individual with the disability to inform the employer that an accommodation is needed." *Wallin v. Minnesota Dept. of Corrections*, 153 F.3d 681, 689 (8th Cir.1998) (quotation omitted) (emphasis added).

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[2] *U.S. Airways*, 535 U.S. 391 (Stevens, J., concurring) (noting that the Ninth Circuit's holding with respect to interactive process was "correct[ ]" and "is untouched by the [Supreme] Court's opinion").

"Once an employer becomes aware of the need for accommodation, that employer has a *mandatory obligation* under the ADA to engage in an interactive process with the employee to identify and implement appropriate reasonable accommodations." *Humphrey*, 239 F.3d at 1137 (citation omitted) (emphasis added). Once the interactive process is triggered, "[b]oth sides must communicate directly, exchange essential information and neither side can delay or obstruct the process." *Barnett*, 228 F.3d at 1114–15. The interactive process requires, at minimum, that the employer "consult with the individual with a disability" to "identify potential accommodations", while "consider[ing] the preference of the individual to be accommodated…" 29 C.F.R. pt. 1630 app. §1630.9

The interactive process "requires: (1) *direct communication* between the employer and employee to explore in good faith the possible accommodations; (2) consideration of the employee's request; and (3) offering an accommodation that is reasonable and effective."[3] *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1089 (9th Cir.2002).

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[3]Likewise, "[i]n the education context, the ADA and the Rehabilitation Act require a covered institution to offer reasonable accommodations for a student's known disability…" *Dean v. Univ. at Buffalo Sch. Of Med. & Biomedical Scis.*, 804 F.3d 178, 186-187 (2d.Cir. 2015). With regards to the interactive process, the Sixth Circuit treats a university's obligations in the same manner as that of an employer's. App.18a. Courts have also required the interactive process be applied to public entities under Section 504. *Em Vinson v. Thomas*, 288 F.3d 1145 (9th Cir. 2002); *Yonemoto v. McDonald*, 114 F. Supp. 3d 1067 (D. Haw. 2015), aff'd sub nom. *Yonemoto v. Shulkin*, 725 F. App'x 482 (9th Cir. 2018); *Edmunds v. Bd. of*

"[A]n employer who acts in bad faith in the interactive process will be liable if the jury can reasonably conclude that the employee would have been able to perform the job with accommodations. In making that determination, the jury is entitled to bear in mind that had the employer participated in good faith, there may have been other, unmentioned possible accommodations." *Taylor*, 184 F.3d at 317–18.

2. "'It is undisputed that the threat of suspension or expulsion implicates [a student's] property and liberty interests in public education and reputation, and that such interests are within the purview of the due process clause of the Fourteenth Amendment.'"[4] Once enrolled, a student has both a liberty and property interest in continued education, thereby entitling that student to due process protections.[5]

Control of E. Michigan Univ., 2009 WL 5171794 (E.D. Mich. Dec. 23, 2009)

[4] *Martinson v. Regents of the Univ. of Michigan*, No. 09-13552, 2011 WL 13124122, at *12 (E.D. Mich. Sept. 28, 2011), aff'd sub nom. *Martinson v. Regents of Univ. of Michigan*, 562 F. App'x 365 (6th Cir. 2014) (quoting *Hart v. Ferris State Coll.*, 557 F. Supp. 1379, 1382 (W.D. Mich. 1983)).

[5] *Goss v. Lopez*, 419 U.S. 565, 574 (1975); *Gorman v. University of Rhode Island*, 837 F.2d 7 (1st Cir. 1988); *Toledo*, 454 F.3d 24; *Martinson v. Regents of University of Michigan*, 562 F. App'x 365 (6th Cir. 2014); *Dixon v. Alabama State Board of Education*, 294 F.2d 150, 157 (5th Cir. 1961), cert. denied, 368 U.S. 930 (1961)); *Picozzi v. Sandalow,* 623 F.Supp. 1571, 1576 (E.D. Mich. 1986); *Jaksa v. Regents of University of Michigan*, 597 F.Supp. 1245, 1247 (E.D. Mich. 1984); *Donohue v. Baker*, 976 F.Supp. 136 (N.D. NY 1997); *Flaim v. Medical College of Ohio*, 418 F.3d 629, 638 (6th Cir. 2005); *Maczaczyj v. State of N.Y.*, 956 F.Supp. 403, 408 (W.D.N.Y. 1997); *Zwick v. Regents of*

"The Due Process Clause guarantees some notice and an opportunity to be heard *before* a student can be suspended or expelled from school. These rights are implicated when a student's future attendance at a public institution of higher education is in jeopardy." *Toledo*, 454 F.3d at 32–33; (citing *Gorman*, 837 F.2d 7; *Goss*, 419 U.S. at 574) (emphasis added).

"Notice, of course, is one of the most fundamental aspects of due process when the government seeks to deprive an individual of life, liberty, or property. The more serious the deprivation, the more formal the notice." *Flaim*, 418 F.3d at 638. In the context of expulsion from a University, a student must be given "sufficient notice of the charges against him and a meaningful opportunity to prepare for the hearing." *Dixon*, 294 F.2d at 158; *Jaksa*, 597 F.Supp. at 1250; *Goss*, 419 U.S. at 584 ("Longer suspensions or expulsions...may require more formal procedures.").

"*At the very minimum*, therefore, students facing suspension and the consequent interference with a protected property interest must be given some kind of notice and afforded some kind of hearing. Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." *Goss*, 419 U.S. at 579; *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306 (1950)) (citations and quotations omitted) (emphasis added); *Newsome v. Batavia Local Sch Dist*, 842 F.2d 920, 927 (6th Cir. 1988).

Univ. of Mich., 2008 WL 1902031, at *3 (E.D. Mich. Apr. 28, 2008); *Matter of De Prima v. Columbia-Greene Community Coll.*, 89 Misc.2d 620 (1977); *Hall v. University of Minnesota*, 530 F. Supp. 104, 107 (D. Minn. 1982).

Furthermore, "as a general rule, notice and hearing *should precede* removal of the student from school." *Goss*, 419 U.S. at 582.[6] In addition, and if warranted by the circumstances, a student may also be entitled to the assistance of a lawyer, and/or "the right to call exculpatory witnesses." *Flaim*, 418 F.3d at 636 (citing *Keene v. Rodgers*, 316 F.Supp. 217, 221 (D.Me.1970) ("the student must be permitted the assistance of a lawyer, at least in major disciplinary proceedings")).

In any event, "the procedures [must] be tailored, in light of the decision to be made, to 'the capacities

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[6]*Fuentes v. Shevin*, 407 U.S. 67, 82 (1972) (quoting *Stanley v. Illinois*, 405 U.S. 645, 647 (1972)) ("If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented…[N]o later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. 'This Court has not...embraced the general proposition that a wrong may be done if it can be undone.'…The right to a *prior* hearing has long been recognized by this Court under the Fourteenth and Fifth Amendments…[T]he Court has traditionally insisted that, whatever its form, opportunity for that hearing must be provided *before* the deprivation at issue takes effect.") *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971) (An individual must "be given an opportunity for a hearing *before* he is deprived of any significant property interest…"); *Gorman*, 837 F.2d at 13 ("[F]ederal courts have uniformly held that fair process requires notice and an opportunity to be heard *before* the expulsion or significant suspension of a student from a public school."); *Mills v. Bd. of Ed. of D.C.*, 348 F. Supp. 866 (D.D.C. 1972) ("Due process of law required a hearing *before* children, who had been labeled behavioral problems, mentally retarded, emotionally disturbed or hyperactive, were suspended or expelled from regular schooling in public supported schools or reassigned for specialized instruction.").

and circumstances of those who are to be heard'…to insure that they are given a meaningful opportunity to present their case." *Mathews v. Elridge*, 424 U.S. 319, 349 (1976) (quoting *Goldberg v. Kelly*, 397 U.S. at 268-269).

To the contrary however, a student dismissed for "purely academic reasons" need only be "fully informed" of the University's dissatisfaction, and the University's decision to dismiss the student must be "careful and deliberate." *Bd. of Curators of Univ. of Missouri v. Horowitz*, 435 U.S. 78, 90 (1978). Importantly, when presented with a challenge to the sufficiency of process in an alleged "academic dismissal", courts must not "place an undue emphasis on words rather than functional considerations", as there are times "[w]hen the facts disputed are of a type susceptible of determination by third parties" providing "good reason to provide even more protection" than those afforded in *Goss*.[7]

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[7] As explained by one court,

> we read *Horowitz* as requiring more than mere perfunctory notice rendered with or after the decision to dismiss. Instead, to be meaningful, a student must be given notice prior to the decision to dismiss that the faulty is dissatisfied with this performance, and that continued deficiency will result in dismissal. If the University's interests are truly academic rather than disciplinary in nature, its emphasis should be on correcting behavior through faculty suggestion, coercion, and forewarning, rather than punishing behavior after the fact…[A] university imposing sanctions for improper conduct cannot avoid the marginally greater protections for disciplinary proceedings,

Id. at 104 (Justice Marshall, concurring in part, dissenting in part). In other words, court must not "allow academic decisions to disguise truly discriminatory requirements." *Dean*, 804 F.3d at 191 (citing *Zukle v. Regents of University of California*, 166 F.3d 1041, 1048 (9th Cir. 1999).

3. In 2010, Petitioner John Mbawe was admitted into Ferris State University's ("FSU") pharmacy program, and provided an Educational License. (R.18, PgID#17)[8]. Mbawe completed two years, and was a student in good standing. (LR.1-3, PgID#68).

On August 26, 2013, Mbawe was enrolled in four classes–one of which required usage of his educational license. (R.18, PgID#18). On September 16, 2013, Mbawe informed FSU's student coordinator, Jeffrey Bates, that his brother passed and of the upcoming funeral. (LR.59, PgID#1420). Two days later (September 18, 2013), FSU found notes exhibiting signs of a student suffering from a mental disorder: "*they are killing me for nothing*", and *"I know I will die for what they have on my body*" and referenced traveling for a funeral. (LR.59-25, PgID#1842-43).

Upon receiving the notes, Bates phoned Mbawe and asked whether the notes belonged to him. (LR. 1-1, PgID#257). After confirming, Bates alleges he

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> including an informal hearing, by labeling the dismissal an academic rather than disciplinary.

Nickerson v. Univ. of Alaska Anchorage, 975 P.2d 46, 53 (Alaska 1999)

[8] Citations to "R." will refer to the filings on the Sixth Circuit's docket, while citations to "LR" will refer to the filings on the district court's docket.

requested Mbawe withdraw. (App.5a.) Mbawe did not want to withdraw. (R.18, PgID#19). Bates instructed Mbawe to be evaluated by University professionals. (*Id.*).

Mbawe was evaluated by four medical professionals: physician, limited licensed psychologist, and two nurses. (*Id.*). Each determined Mbawe was suffering from a mental disorder, but was not a threat to others or himself. (LR.59-11, PgID #1648-50).

On September 25, 2013, Director of FSU's health clinic, Renee Vander Myde, learned of an aggravated assault police report from October **2011 (two years earlier)**, where Mbawe was thought to have had a gun, which turned out to be a stapler, and no charges brought. (LR59-16, PgID #1716). Vander Myde had never spoken to or met Mbawe. (LR.1-1, PgID# 39). Vander Myde then called Mbawe, and after speaking to him for 1-5 minutes, "assessed [him]…as someone who posed a significant threat to himself and others." (*Id.*; LR.24, PgID#235; LR59-3, PgID#1469-79). She admittedly did not conduct an individualized assessment of Mbawe before making that determination. (*Id.*).

Vander Myde then faxed a "*Petition/Application for Hospitalization*" to a probate court where she alleged that Mbawe had "engaged in an act or acts or made significant threats", and that Mbawe "[a]ssaulted someone in Big Rapids with what was alleged to be a gun but turned out to be a stapler." (LR.1-4, PgID#70-71; LR.95-3, PgID#3037). FSU's *only* physician–that actually examined and treated Mbawe–testified that she refused "to be part of that kind of *deceitful type of thing*." (LR.59-14, PgID#1703-04).

On October 1, 2013, Mbawe was arrested in class and taken to a mental health facility. (LR.1-5, PgID#73-74). He refused to speak without an attorney. (LR.95-4, PgID#3094). FSU called the hospital claiming that Mbawe "has an aggravated assault charge due to attempting to assault another student with a stapler." (R.26, PgID#18). The hospital determined Mbawe was a "Danger to Self" and "Danger to Others" "Evidenced By" "Assaulting someone with stapler." (LR.57-8, PgID#938-39).

Ten days later, Mbawe and Vander Myde attended a hearing before the probate court. (LR.59-18, PgID#1757). The hospital psychiatrist testified that Mbawe does not need much more hospitalization, and will be discharged "in the next day or two." (*Id*. at #1765,1768). He told the court that hospitalization was warranted because "[t]here's at least one indication" that Mbawe tried to harm another student (the 2011 Stapler Incident). (App. 54a). The probate court determined Mbawe required hospitalization until the hospital determined otherwise.

Three days later, upon discharge (while still enrolled), Mbawe called and left two voicemails with FSU, seeking an accommodation for his return. (LR.59-16, PgID#1717). The Dean (Stephen Durst), Bates, and Vander Myde were notified of Mbawe's impending return and request for accommodation, but refused to respond. (LR.59-16, PgID#1717). Instead, FSU then processed an "involuntary medical withdraw" of Mbawe without speaking to him.

Mbawe also called two of his professors, where he again sought an accommodation. (LR. 59-16, PgID#1720-22). Mbawe then met with Bates and Durst and was informed that he had already been dismissed from the University. (LR.59-19,

PgID#1782). Mbawe was only told that he was being withdrawn "for medical reasons" and that the "decision is final". (LR.59-26, PgID #1846).

Mbawe submitted a two-page letter/appeal pleading with the University to accommodate his return. (*Id.*). After receiving the letter, Bates faxed his "friend" at the Health Professional Review Program ("HPRP") the notes that were found a month prior, and then subsequently denied Mbawe's appeal because his license was "compromised" when he was reported to HPRP. (R.18, PgID#39; LR.1-9, PgID#86; LR.68-7, PgID#2259).

Bates then told Mbawe that he was dismissed out of "concern[] for his and the public's safety due to impairment." (LR.68-2, PgID#2199). Five months after dismissal, Mbawe met with FSU to discuss his desire to return. (LR.68-3, PgID#2205-06). FSU promised he would be readmitted so long as he signed an agreement for "voluntary" monitoring with HPRP. Mbawe agreed to this contingency for re-admission, but requested the agreement be edited to name him as a student (rather than a pharmacist), and that he receive a confirmation in writing of the agreement with FSU. (*Id.*; LR.95, PgID#2956-57). FSU agreed to these requests.

That same month (March of 2014), the United States Department of Education Office of Civil Rights ("OCR") began its investigation into FSU's dismissal of Mbawe. (LR.1-1). Instead of providing a new monitoring agreement to Mbawe or the promised letter, FSU reported Mbawe to the Michigan Board of Pharmacy for failure to cooperate with HPRP. (LR.68-7, PgID#2777-78)

On May 2, 2014, Mbawe's educational license was temporarily suspended by the Michigan Board of

Pharmacy for allegedly failing to cooperate with HPRP.[9] (R. 1-13, PgID #102).

4. On July 29, 2016, OCR issued a 31-page report finding FSU in violation of the ADA and Section 504. (R.1-1). Suit was then filed in the Western District of Michigan on September 30, 2016. Mbawe asserted claims against FSU under the ADA and Section 504 for dismissing him without accommodating his known disability. Mbawe also asserted claims against the individual decision-makers pursuant to 42 U.S.C. §1983 for violating his constitutional guarantees of notice and hearing prior to depriving him of his right to continued education.

On January 10, 2018, the District Court granted summary judgment in favor of FSU, and its agent, on all counts. In relevant part, the District Court determined that Mbawe's failure to propose a reasonable accommodation prior to his dismissal excused the University from its obligation to engage in an interactive process under the ADA and Section 504. (App. 59a.). The District Court also determined that FSU's dismissal of Mbawe for failing to "posses the emotional and mental health required" by FSU rendred FSU's dismissal an "academic dismissal" thereby excusing FSU from providing notice and a hearing to Mbawe prior to his dismissal. (App. 52a).

5. A panel of the Sixth Circuit affirmed, holding that Mbawe's failure to propose a reasonable accommodation prior to his dismissal "alone proves fatal to Mbawe's statutory claims", and relieved the University from its obligation to engage in an

[9] At the time, Mbawe had been rendered homeless and did not receive notification of the administrative hearing scheduled to occur before the Michigan Board of Pharmacy.

interactive process with Mbawe. App. 17a. The panel also determined that FSU's dismissal of Mbawe for failing to "possess the emotional and mental health required" by FSU, was an "academic dismissal" excusing the University from its obligation to provide notice or hearing to Mbawe prior to his dismissal. App. 7a, 16a.

On November 19, 2018, Mbawe timely filed his *Petition for Rehearing En Banc*. (R. 35). On December 7, 2018, the Sixth Circuit denied Mbawe's petition. (R. 37-1).

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT REVIEW TO RESOLVE A CONFLICT REGARDING THE TRIGGERING OF AN ENTITY'S OBLIGATION TO ENGAGE IN THE INTERACTIVE PROCESS WITH A DISABLED STUDENT

This Court should grant review to resolve a circuit split regarding an entity's obligation to engage in an interactive process with an individual with a known disability.

In 2010, the Sixth Circuit adopted the following position: "If a disabled employee requires an accommodation, the employee is saddled with the burden of proposing an accommodation and proving that it is reasonable." *Jakubowski v. Christ Hosp., Inc.*, 627 F.3d 195, 202 (6th Cir. 2010) (citing *Monette v. Electronic Data Systems Corp.,* 90 F.3d 1173 (6th Cir. 1996)).[10] This position has resulted in courts

[10] In a concurring decision, Chief Justice Cole explained, "[t]hough I concur in the majority's judgment I write separately

within the Sixth Circuit routinely dismissing claims under the ADA and Section 504 if an individual with a disability fails to propose a precise reasonable accommodation prior to being dismissed or terminated from his or her position, regardless of whether the entity knows of the individual's disability and his or her desire to remain.[11]

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because my view of a disability plaintiff's burden under the Americans with Disabilities Act ("ADA") differs from that of my colleagues." *Jakubowski*, 627 F.3d at 203. As further stated, "we have never squarely held, *as the majority does today*, that the sufficiency of an ADA plaintiff's showing that he is otherwise qualified must be analyzed *exclusively* in light of the scope of the accommodation he requested from his employer prior to his termination from his position, even where more ample evidence that a plaintiff is otherwise qualified or that a defendant acted with discriminatory intent, emerges through discovery." *Jakubowski*, 627 F.3d at 204 (emphasis added).

[11]*Melange v. City of Ctr. Line*, 482 Fed.Appx. 81, 86–87 (6th Cir.2012) ("But if the employee never requests an accommodation, the employer's duty to engage in the interactive process is never triggered."); *Deister v. AAA Auto Club of Michigan*, 91 F. Supp. 3d 905, 928 (E.D. Mich. 2015), aff'd sub nom. *Deister v. Auto Club Ins. Ass'n*, 647 F. App'x 652 (6th Cir. 2016) (same); *Arthur v. Am. Showa, Inc.*, 625 F. App'x 704, 711 (6th Cir. 2015) (same); *Stallings v. Detroit Pub. Sch.*, 658 F. App'x 221, 227 (6th Cir. 2016) ("Plaintiff complains that DPS failed to engage in the interactive process, but in the absence of an accommodation request that was reasonable, defendant's duty to initiate that process was never triggered."); *Swank v. CareSource Mgmt. Grp. Corp.*, 657 F. App'x 458, 467 (6th Cir. 2016) ("[B]ecause Swank did not propose a reasonable accommodation to CareSource that would address her stated limitations, her interactive-process claim fails as a matter of law."); *Manigan v. Sw. Ohio Reg'l Transit Auth.*, 385 F. App'x 472, 478 n 5 (6th Cir. 2010) ("Part of this burden is that a plaintiff show that he requested the specific accommodation; a

The Fifth and Eleventh Circuits have taken similar stances.[12]

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plaintiff may not rely on accommodations that he did not request."); *Hurst v. Lilly Co.*, 2017 WL 3187218, at *7 (E.D. Tenn. July 26, 2017), reconsideration denied, 2017 WL 5180434 (E.D. Tenn. Nov. 8, 2017) ("Because defendant never proposed a reasonable accommodation, defendant's duty to engage in the interactive process was never triggered, and defendant may not be held liable for failing to engage in the interactive process."); *Arredondo v. Howard Miller Clock Co.*, 2009 WL 2871171, at *8 (W.D. Mich. Sept. 2, 2009) ("On a facial reading of the statutory text and the EEOC regulation, the Court's ruling that Mr. Salas was not a "qualified individual" should be dispositive of the interactive process requirement."); *Brown v. Chase Brass & Copper Co.*, 14 F. App'x 482, 487 (6th Cir. 2001) ("Since he failed to propose an accommodation of his disability, he cannot satisfy the second element of his prima facie case (being qualified to perform the essential functions of his job with a reasonable accommodation), so his ADA claim fails."); *Lockard v. Gen. Motors Corp.*, 52 F. App'x 782, 788 (6th Cir. 2002) ("Because we find Lockard failed to request a reasonable accommodation from her employer, the defendant's duty to engage in an interactive search for a reasonable accommodation never arose."); *Hale v. Johnson*, 245 F. Supp. 3d 979, 992 (E.D. Tenn. 2017) ("If a disabled employee does not propose an accommodation, the "failure to accommodate" claim must fail."); *Johnson v. Cleveland City Sch. Dist.*, 443 F. App'x 974, 983 (6th Cir. 2011) ("[A]n employee's claim must be dismissed if the employee fails to identify and request such reasonable accommodations."); *Mbawe v. Ferris State Univ.*, 2018 WL 5793188 (6th Cir. Nov. 5, 2018) ("Mbawe failed to propose any accommodation that would have allowed him to remain qualified to be a pharmacy student, so FSU's duty to engage in the interactive process was never triggered."); *Mbawe v. Ferris State Univ.*, 2018 WL 1770618 (W.D. Mich. Jan. 10, 2018), *aff'd*, 2018 WL 5793188 (6th Cir. Nov. 5, 2018).

[12]*Gaston v. Bellingrath Gardens & Home, Inc.*, 167 F.3d 1361, 1363 (11th Cir.1999) ("[T]he duty to provide a reasonable

Other Circuits refuse to adhere to such a one-size-fits-all approach, and have, instead, adopted exceptions to the "general rule" that an individual with a disability propose an accommodation prior to an entity's obligation to engage in an interactive process is triggered. In particular, the Ninth Circuit's stance is inapposite to the Sixth Circuit. The Ninth Circuits position is, "an employer has a mandatory obligation to engage in the interactive process and that this obligation is triggered *either* by a request for accommodation by a disabled employee *or by the employer's recognition of the need of such an accommodation*." *Barnett,* 228 F.3d at 1112[13] (emphasis added).

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accommodation is not triggered until a specific demand for an accommodation has been made."); *Taylor v. Principal Fin. Group, Inc.*, 93 F.3d 155, 165 (5th Cir.1996) ("[I]t is the employee's initial request for an accommodation which triggers the employer's obligation to participate in the interactive process of determining one."). *Taylor,* at 165, did implicitly acknowledge that "obvious" disabilities may trigger an entity's obligations under the Acts ("Where the disability, resulting limitations, and necessary reasonable accommodations, *are not open, obvious, and apparent* to the employer, as is often the case when mental disabilities are involved, the initial burden rests primarily upon the employee, or his health-care provider, to specifically identify the disability and resulting limitations, and to suggest the reasonable accommodations.") (emphasis added).

[13] Although *Barnett* was later vacated, this Court stated, "[t]he Court of Appeals also correctly held that there was a triable issue of fact precluding the entry of summary judgment with respect to whether petitioner violated the statute by failing to engage in an interactive process…This latter holding is untouched by the Court's opinion today." *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 407 (2002); see also *Barnett*, 535 U.S. 391 (Stevens, J., concurring) (noting that the Ninth Circuit's

The *Barnett* court explained, "[i]n circumstances in which an employee is unable to make such a request, *if the company knows of the existence of the employee's disability*, the employer must assist in initiating the interactive process." *Id.* (emphasis added). The Ninth Circuit has explicitly adopted the position that an employer need only *know* of an employees' disability and desire to remain with the company to trigger its obligation to engage in the interactive process with the disabled individual.[14]

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holding with respect to interactive process was "correct [ ]" and "is untouched by the [Supreme] Court's opinion").

[14] *Dunlap v. Liberty Nat. Prod., Inc.*, 878 F.3d 794, 798 (9th Cir. 2017) ("Due to this ample notice of Dunlap's physical limitations, Liberty was aware of or had reason to be aware of Dunlap's desire for a reasonable accommodation. Such awareness triggered Liberty's duty to engage in the interactive process."); *Zivkovic v. S. California Edison Co.*, 302 F.3d 1080, 1089 (9th Cir. 2002) (citation omitted) ("[O]nce an employee requests an accommodation or an employer recognizes the employee needs an accommodation but the employee cannot request it because of a disability, the employer must engage in an interactive process with the employee to determine the appropriate reasonable accommodation."); *Norris v. Allied-Sysco Food Servs.*, Inc., 948 F. Supp. 1418, 1436 (N.D. Cal. 1996), *aff'd* 191 F.3d 1043 (9th Cir. 1999), cert. denied, 528 U.S. 1182 (2000) ("[I]f an employee's disability and the need to accommodate it are obvious, an employee is not required to expressly request reasonable accommodation."); *Snapp v. United Transp. Union*, 547 F. App'x 824, 826 (9th Cir. 2013) ("[T]here is a genuine dispute over whether BNSF engaged in good faith in a required interactive process, and failure to do so would constitute discrimination under the ADA.") *Brown v. Lucky Stores, Inc.*, 246 F.3d 1182, 1188 (9th Cir. 2001) (citations and quotations omitted) ("The exception to the general rule that an employee must make an initial request applies, however, only when the employer (1) knows that the employee has a

Similar approaches have also been taken by the Second Circuit[15], Third Circuit[16], Seventh Circuit[17],

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disability, (2) knows, or has reason to know, that the employee is experiencing workplace problems because of the disability, and (3) knows, or has reason to know, that the disability prevents the employee from requesting a reasonable accommodation."); *Morton v. United Parcel Serv., Inc.*, 272 F.3d 1249, 1256 (9th Cir. 2001), overruled on other grounds by *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974 (9th Cir. 2007) (explaining that summary judgement is available only where there is no genuine dispute that the employer has engaged in the interactive process in good faith); *Barnett*, 228 F.3d at 1116 ("[S]ummary judgment is available only where there is no genuine dispute that the employer has engaged in the interactive process in good faith."); *Dark v. Curry County*, 451 F.3d 1078, 1088 (9th Cir.2006) (citations and quotations omitted) ("Because the [defendant employer] did not engage in any such [interactive] process, summary judgment is available only if a reasonable finder of fact *must conclude* that there would in any event have been no reasonable accommodation available.") (emphasis added).

[15] *Dean v. Univ. at Buffalo Sch. Of Med. & Biomedical Scis.*, 804 F.3d 178, 18-187 (2d. Cir. 2015) (emphasis added) ("In the education context, the ADA and the Rehabilitation Act *require a covered institution to offer* reasonable accommodations for a student's known disability…"); *Brady v. Wal-Mart*, 531 F.3d 127, 135 (2nd Cir. 2008) ("[A]n employer has a duty reasonably to accommodate an employee's disability if the disability is obvious—which is to say, if the employer knew or reasonably should have known that the employee was disabled."); *Felix v. New York City Transit Auth.*, 154 F. Supp. 2d 640, 657 (S.D.N.Y. 2001), *aff'd*, 324 F.3d 102 (2d Cir. 2003) ("Application of this general rule is not warranted, however, where the disability is obvious or otherwise known to the employer without notice from the employee. The notice requirement is rooted in common sense. Obviously, an employer who acts or fails to act without knowledge of a disability cannot be said to have discriminated based on that disability.")

Eight Circuit[18], and Tenth Circuit[19]. This Circuit Split has enveloped, in part, due to the realization

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[16]*Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 317 (3d Cir. 1999) ("In short, an employer who has received proper notice cannot escape its duty to engage in the interactive process simply because the employee did not come forward with a reasonable accommodation that would prevail in litigation."; "When an employee has evidence that the employer did not act in good faith in the interactive process, however, we will not readily decide on summary judgment that accommodation was not possible and the employer's bad faith could have no effect."); *Motsay v. Pennsylvania Am. Water Co.*, 2008 WL 376298, at *4 (M.D. Pa. Feb. 11, 2008) (citations and quotations omitted) ("All that is required is that the employer knows of both the disability and the employee's desire for accommodations for that disability.")

[17] *Hedberg v. Indiana Bell Tel. Co.*, 47 F.3d 928, 934 (7th Cir. 1995) ("[I]t may be that some symptoms are so obviously manifestations of an underlying disability that it would be reasonable to infer that an employer actually knew of the disability."); *Hendricks-Robinson v. Excel Corp.*, 154 F.3d 685, 693 (7th Cir. 1998) (Once informed of a disability, the employer's obligation to engage in an interactive process is triggered.); *Beck v. University of Wis. Bd. of Regents*, 75 F.3d 1130, 1134 (7th Cir.1996); *Bombard v. Fort Wayne Newspapers, Inc.*, 92 F.3d 560, 563 (7th Cir.1996); *E.E.O.C. v. Sears, Roebuck & Co.*, 417 F.3d 789, 805 (7th Cir.2005) ("True, assumptions are not what the ADA requires. Rather, it obligates an employer to engage in the interactive process precisely for the purpose of allowing both parties to act upon information instead of assumptions."); *Kirincich v. Illinois State Police*, 196 F. Supp. 3d 845, 852 (N.D. Ill. 2016)

[18] *Fjellestad v. Pizza Hut of Am., Inc.*, 188 F.3d 944, 952 (8th Cir. 1999) ("Although an employer will not be held liable under the ADA for failing to engage in an interactive process if no reasonable accommodation was possible, we find that for purposes of summary judgment, the failure of an employer to engage in an interactive process to determine whether

that some disabilities (such as mental or psychiatric disabilities) may interfere with an individual's awareness of his or her disability, or the perceived limitations that disability may have on his or her abilities.[20]

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reasonable accommodations are possible is prima facie evidence that the employer may be acting in bad faith. Under these circumstances, we feel a factual question exists as to whether the employer has attempted to provide reasonable accommodation as required by the ADA."); *Walsted v. Woodbury Cty., IA*, 113 F. Supp. 2d 1318, 1336 (N.D. Iowa 2000) (Where the mental disability "was obvious", the County "was required to initiate an interactive process with Walsted to determine the appropriate reasonable accommodation."); *Barnes v. Nw. Iowa Health Ctr.*, 238 F. Supp. 2d 1053, 1088 (N.D. Iowa 2002) (quotations omitted) ("[B]oth common sense and basic fairness command that, when an employer knows of an impairment, concludes that the impairment precludes an employee from performing the essential functions of the job, and, in fact, considers accommodation, an employer cannot escape liability merely because the employee, having been told no accommodation was possible, fails to request accommodation, as is generally required to initiate the ADA's interactive process.")

[19]*Smith v. Midland Brake, Inc., a Div. of Echlin, Inc.,* 180 F.3d 1154, 1174 (10th Cir. 1999) ("We note…summary judgment would be premature if there is a genuine dispute regarding whether Midland Brake participated in good faith in attempting to secure a reassignment position for Smith as part of its duty to offer a reasonable accommodation to Smith."); *United States v. City of Denver*, 49 F.Supp.2d 1233, 1241-42 (D.Colo.1999) (stating that if an employee requests accommodation *or an employer knows of a disability of a qualified individual*, the employer has the obligation to participate in the interactive process of determining an accommodation)

[20]*Taylor*, 184 F.3d at 318 ("When the disability involved is one that is heavily stigmatized in our society—as is true when the

This Circuit Split has been acknowledged by courts within the Sixth Circuit. For example, in *Moloney v. Home Depot U.S.A., Inc.*, 2012 WL 1957627, at *14 (E.D. Mich. May 31, 2012), the Eastern District of Michigan referred to cases from the Second and Seventh circuit to hold,

> [T]he application of the general rule that a plaintiff must request an accommodation in order to establish a

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employee is voluntarily or involuntarily committed to a mental institution—courts should be especially wary on summary judgment of underestimating how well an employee might perform with accommodations or how much the employer's bad faith may have hindered the process of finding accommodations."); *Conneen v. MBNA Am. Bank, N.A.*, 182 F. Supp. 2d 370 (D. Del. 2002), *aff'd*, 334 F.3d 318 (3d Cir. 2003) ("Employer's duty under ADA to initiate interactive process to identify potential accommodations that will permit disabled employee to continue working may be more stringent when employee suffers psychiatric disability."); *Barnes v. Nw. Iowa Health Ctr.,* 238 F. Supp. 2d 1053, 1086 (N.D. Iowa 2002) ("[W]here a plaintiff suffers from a mental disability, the communication process becomes more difficult, and it is incumbent on the employer to meet the employee half-way."); *Bultemeyer v. Fort Wayne Comm. Schs.*, 100 F.3d 1281, 1285–86 (7th Cir.1996) (employee with a mental illness may not need to explicitly request an accommodation; "if it appears that the employee may need an accommodation but doesn't know how to ask for it, the employer should do what it can to help."); *Miller v. Illinois Dep't of Corr.*, 107 F.3d 483, 486 (7th Cir. 1997) ("If, moreover, the nature of the disability is such as to impair the employee's ability to communicate his or her needs, as will sometimes be the case with mental disabilities, the employer, provided of course that he is on notice that the employee has a disability, has to make a reasonable effort to understand what those needs are even if they are not clearly communicated to him.")

> prima facie case is not warranted where: 1) the disability at issue is a mental disability that is obvious or otherwise known to the employer without notice from the employee; 2) the employer has reason to believe that the employee is experiencing work problems because of that disability; and 3) and the nature of the disability impairs the employee's ability to request an accommodation. Where such evidence exists, the fourth element of a typical prima facie failure-to-accommodate claim (the plaintiff requesting an accommodation) is not necessary.

Two years later, in referring to this three part test in *Moloney,* the Sixth Circuit acknowledged the *Moloney* court's reliance on "out-of-circuit case law", rejected its rationale, and clarified that such a holding is not a law of the Sixth Circuit. *Stanciel v. Donahoe*, 570 F. App'x 578, 584 (6th Cir. 2014).

In other words, while the Second, Third, Seventh, Eight, Ninth, and Tenth Circuits have identified exceptions to the "general rule" that an individual first propose a reasonable accommodation to trigger the interactive process, the Fifth, Sixth, and Eleventh have instead applied the "general rule" in a manner that would categorically bar any individual from prevailing on an ADA or Section 504 case if that individual did not first propose "a trial-ready accommodation". *Jakubowski*, 627 F.3d at 203 (Justice Cole, concurring)

The Court should grant certiorari to resolve this fundamental dispute over this discrepancy.

II. THIS COURT SHOULD GRANT REVIEW BECAUSE THIS CASE PRESENTS ISSUES OF NATIONAL IMPORTANCE

The Court should also grant certiorari because this case presents several issues of national importance.

First, as previously acknowledged by this Court, the proper application of Section 504 is of national importance given the substantial amount of institutions covered by the statute. *Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 404 (U.S. 1979). Furthermore, this Court has also "recognized the vital importance of all levels of public education in preparing students for work and citizenship as well as the unique harm that occurs when some students are denied that opportunity." *Toledo,* 454 F.3d at 36 (citing *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)).

The importance of protecting an individual's ability to obtain education is especially imperative in the context of students with disabilities. In fact, as recent as 1983, a report before Congress revealed "that tens of thousands of disabled children continued to be excluded from public schools or placed in inappropriate programs." *Toledo*, 454 F.3d at 38 (citing U.S. Civil Rights Commission, Accommodating the Spectrum of Individual Abilities 28–29 (1983)).

Indeed, the ADA was enacted in large part due to *schools* routinely excluding students with disabilities from their programs. "[T]he thirty years preceding the enactment of the ADA evidence a widespread pattern of states unconstitutionally excluding disabled children from public education and irrationally discriminating against disabled students within schools. Faced with this record of persistent unconstitutional state action, coupled with the

inability of earlier federal legislation to solve this 'difficult and intractable problem,' Congress was justified in enacting prophylactic § 5 legislation in response." *Toledo,* 454 F.3d at 38-39 (quoting *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 735 (2003)).

Accordingly, it is not only an issue of national importance to ensure that University interactively engage with a student with a *known* disability, prior to dismissing that student, but it is also of substantial importance to ensure that universities are prohibited from utilizing "truly discriminatory requirements" (such as requiring a student to possess the requisite "emotional and mental health", as required by FSU) to characterize a dismissal as an "academic dismissal" and exclude those students from their programs without even the most basic due process protections: notice and a hearing.

According to the US Department of Education National Center for Education Statistics, there are more than 300,000 schools in the United States. Within those schools (as of 2015), there are approximately $6.7 million students between the ages of 3-21 who are receiving special education. That does not account for those individuals that have been able to successfully meet the demands of their programs without seeking placement in special education programs.

Given the significant importance this Court and Congress has continued to place on preserving an individual with a disability's ability to attend school, it is of equal importance to ensure that those with disabilities are afforded equal to (if not more) due process protections than those afforded to students without disabilities.

Particularly, universities should not be permitted to expel a student *because of his disability* (or because of the effects of that disability), without first ensuring the student receives sufficient due process protections. Otherwise, those with disabilities will continue to be expelled under the guise of an "academic dismissal", while those without disabilities (but who may have engaged in serious disciplinary conduct) would be afforded superior guarantees of due process protections.

This Court's review is essential to address these issues of national importance.

II. THE SIXTH CIRCUIT'S DECISION IS INCORRECT

The Court should also grant certiorari because the Sixth Circuit's decision is incorrect.

The Sixth Circuit determined that this case did not involve direct evidence of discrimination; therefore it applied the *McDonnell Douglass Corp. v. Green,* 411 U.S. 792, 802-804 (1973) burden-shifting framework. (App. 14a). However, under the ADA, direct evidence exists when a University does "not mak[e] reasonable accommodations" to a student with a known disability. 42 U.S.C. §12112(b)(5)(A).

Here, FSU admitted that Mbawe was dismissed "for medical reasons…" (R.23, PgID#223). FSU repeatedly argued that Mbawe's mental disability rendered him "out of compliance" with the "mental or emotional health" required by the University. (LR. 30, PgID #314). During arguments before the Sixth Circuit, FSU's counsel reiterated this:

> Counsel: "[Mbawe's] license was impaired because he was committed. And in addition to that, he did not meet the Technical Standards of being able to

> participate in the program because of his mental illness."
>
> Justice Stranch: "So there's two things, it's not just that he lost his license, it's that there is a separate technical standard that he has to attain. And was that the standard that the individuals in the pharmacy department had determined prior to his involuntary commitment was violated?"
>
> Counsel: Yes your Honor. That's absolutely correct.

In other words, without conducting an individualized assessment or engaging in the interactive process, FSU determined that Mbawe did not "possess the emotional or mental health required" to remain in the program. This is direct evidence that Mbawe was dismissed because of his disability.

A disability is defined as "[a]ny mental…disorder, such as an…emotional or mental illness." 29 C.F.R. § 1630.2(h); 28 C.F.R. § 35.104. FSU admits that Mbawe was excluded from the University because "his mental illness" prevented him from possessing the "emotional or mental health required" by FSU. This is direct evidence.

Discrimination is also defined as "criteria, or methods of administration...that have the effect of discrimination on the basis of disability." 42 U.S.C. §12112(b)(3)(A). The ADA prohibits the utilization of eligibility criteria that: "screen out or tend to screen

out...any class of individuals with disabilities..." 28 C.F.R. §35.130(b)(8).

By dismissing Mbawe for not possessing the "emotional or mental health required", FSU utilized standards and criteria to exclude him from participation at the University, which violates the explicit language of the statute. Not conducting an individualized assessment prior to excluding an individual because of his disability is direct evidence of discrimination.[21]

Further, Mbawe was admittedly dismissed for safety concerns. (LR. 68-2, PgID #2199). As also admitted, prior to his commitment, "Vander Myde was convinced that Plaintiff was a significant risk of harming himself or others." (R. 23, PgID #29). As admitted in arguments, prior to Mbawe's commitment the school determined that Mbawe was not "otherwise qualified" because he did not possess the "emotional or mental health required". However, as also admitted, prior to making this decision there was no individualized assessment. (LR. 59-3, PgID #1469-70). This is direct evidence of discrimination, as the ADA "mandates an individualized inquiry" to determine whether an individual's disability disqualifies him for a position, or deems him a "significant risk", and FSU admittedly did not do so.

The Sixth Circuit also determined FSU was not required to participate in an interactive process with Mbawe, because Mbawe "never proposed any

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[21]*Equal Opportunity Comm'n v. M.G.H. Family Health Ctr.*, 230 F.Supp.3d 796, 812 (W.D. Mich. 2017) (An employer is statutorily estopped from arguing that an employee was not otherwise qualified if that employer did not first conduct an individualized inquiry).

accommodation" and "*it is doubtful* that such an accommodation existed…" (R.100, PgID#3310-11) (emphasis added).

However, upon discharge, Mbawe made four calls to FSU seeking an accommodation for his return. FSU ignored those phone calls. FSU then dismissed Mbawe without speaking to him. *See Beck*, 75 F.3d at 1135 ("A party that obstructs or delays the interactive process is not acting in good faith. A party that fails to communicate, by way of initiation or response, may also be acting in bad faith."). FSU then met with Mbawe where they merely told him that he was dismissed for "medical reasons", but would not provide him with any more information. (R. 26, PgID #20-22).

The Panel determined that Mbawe's failure to address concerns to which he was unaware, excluded him from the protections of the ADA and Section 504. This is contrary to the regulations of the ADA which state, "[t]o determine the appropriate reasonable accommodation *it may be necessary* for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation." 29 C.F.R. § 1630.2(o)(3) (emphasis added).[22]

Mbawe even identified various accommodations that could have been contemplated had FSU engaged in the interactive process. (R.18, PgID#76; LR.68, PgID#2192). FSU's own handbook identifies accommodations that would have allowed him to

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[22]"Enforcement Guidance, while non-binding, 'constitute[s] a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'" *Lee v. City of Columbus*, 636 F.3d 245, 256 (6th Cir.2011).

remain enrolled. (LR.59-6, PgID#1505-14). One possible accommodation would have been a "behavioral contract" requiring he continue treatment and monitoring of his condition. (*Id.*). FSU admitted that Mbawe would have been "otherwise qualified" if he had agreed to continue medication. (LR.59-8, PgID#1563). Mbawe testified he would have complied with such terms to stay enrolled. (LR. 59-12, PgID#1653)

Another possible accommodation would have been an "interim suspension", which (according to FSU's own handbook) is provided to students suffering a "mental health crisis or emotional distress." (L R.59-6, PgID #1514); *Humphrey*, 239 F.3d at 1135–36 ("A leave of absence for medical treatment may be a reasonable accommodation under the ADA. *See* 29 C.F.R. 1630 app. § 1630.2(o).).

Another possible accommodation would have been to allow Mbawe to transfer to another program within one of the University's 180-programs. Courts have held that an entity is required to consider reassignment if a disabled individual cannot meet the essential functions of the desired position.[23] This was even considered by Bates in December of 2013 – two months after Mbawe was dismissed. (LR.68-2, PgID#22023). This option was provided to another pharmacy student who "fell out of compliance" with the "Technical Standards" when he was caught cheating (particularly, the "Ethical Values" portion). (LR.59-8, PgID#1555-56). This student was provided

[23]*Smith*, 180 F.3d at 1174; *Burns v. Coca–Cola Enters., Inc.*, 222 F.3d 247, 257 (6th Cir.2000); *Monette v. Electronic Data Systems Corp.*, 90 F.3d 1173, 1187 (6th Cir.1996).

due process, and permitted to transfer to another program.

FSU could have also permitted Mbawe to enter into a monitoring agreement with HPRP while remaining enrolled. This option was provided to another student in the pharmacy program, where he remained enrolled and graduated while being monitored by HPRP. (*Id.* at #1565-66). Also, given the fact that Mbawe's license was only utilized in one of his four classes, FSU could have suspended the completion of that class while Mbawe sought to address the University's alleged concerns regarding his license. (L R.59-23, PgID#1828 – an "in-progress" allows the student to complete the class the following semester). Where a student demonstrates the existence of possible accommodations, the University cannot evade liability without proving that such accommodations would cause an "undue burden". 28 C.F.R. § 35.150.[24]

The Sixth Circuit's decision unduly increases the burden on a student to propose an accommodation that addresses all the University's concerns, even without the University informing the student of the particular concerns it has.

The Sixth Circuit also improperly relied on *Horowitz*, 435 U.S. 78 to hold that Mbawe was afforded sufficient due process protections before

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[24]"[W]here a universe of potential accommodations has been identified, if the employer refuses in bad faith to engage in the interactive process, we will not readily decide on summary judgment that accommodation was not possible and the employer's bad faith could have no effect." *Donahue v. Consol. Rail Corp.*, 224 F.3d 226, 235 (3d Cir. 2000) (citations and quotations omitted).

being deprived of his liberty and property interest in continued education. In so ruling, the court held that Mbawe's dismissal was an "academic dismissal" because Mbawe "fell out of compliance" with the "Technical Standards" of FSU when he exhibited signs of lacking the requisite "mental or emotional health…" App. 27a. The Sixth Circuit then adopted FSU's characterization of the dismissal as an "academic dismissal", even though Mbawe presented evidence that he was a student in good standing at the time of his dismissal, and each of his professors testified that accommodations could have been made to allow him to successfully pass his courses at the time of his dismissal. (R. 18, PgID#36-38).

As cautioned by Justice Marshall in his concurring in part, dissenting in part opinion in *Horowitz,* courts must not "place an undue emphasis on words rather than functional considerations." The Court erred in applying *Horowitz*'s "academic dismissal" analysis to the facts of this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted, or in the alternative, this Court should reverse and remand this case for further proceedings.

Respectfully submitted,

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