No. 21-1506

In The Supreme Court of the United States

CHRISTINE M. OWEN,

Petitioner,

v.

LIBERTY UNIVERSITY, NICOLE DiLELLA, MARY DEACON, DENISE DANIEL, ELIAS MOITINHO, and ERIC CAMDEN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

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May 26, 2022

QUESTIONS PRESENTED

Title IX is a federal civil rights law that only applies to colleges and universities who voluntarily choose to seek and accept federal funding in order to attract more students, for which those institutions in turn reap significant financial benefits from those students' tuition and other fees.

When issues of sexual harassment or discrimination arise, students at public institutions are automatically afforded due process and other constitutional rights and protections that students at many private institutions are barred from by conflicting court precedents in the various circuits.

Some circuits in which Title IX policies and procedures are published and disseminated (as required by federal law), regard public student handbooks as contracts that are binding on both those students and their institutions. Some circuits, however, unwittingly interfere with Title IX laws and regulations by deeming private university students' handbooks (the only place such universities publish and disseminate their grievance policies) as not binding on those universities.

This raises discrimination and equal protection violations against an entire class of students in some circuits, as well as between public versus private institutions.

The questions presented are:

1. Whether students at private colleges and universities are entitled to the same contractual, due process and/or constitutional protections that public institution students have as a matter of right, in regards to alleged violations of federal Title IX laws and regulations;

2. Whether private universities are entitled to disparate accountability standards and requirements than public universities, as to the institutions' own handling of Title IX allegations; and

3. Whether voluntary acceptance of federal funding by any institution (public or private) which institution chooses to seek and accept such funding requires that such institution must adhere to the same laws, policies, standards, and regulations regarding Title IX, including being bound by the institution's own published grievance policies and procedures (regardless of where those are published).

PARTIES TO THE PROCEEDING

The parties to this proceeding are identified in the caption of this petition.

DIRECTLY RELATED PROCEEDINGS

The proceedings here are as follows:

- U.S. District Court for the Western District of Virginia; Case No. 6:19-cv-00007; Memorandum Opinion and Order Entered April 13, 2020.
- U.S. Court of Appeals for the Fourth Circuit; Case No. 20-1596; Order Affirming District Court Opinion Entered January 13, 2022.
- U.S. Court of Appeals for the Fourth Circuit; Case No. 20-1596; Order Denying Motion for Rehearing Entered February 28, 2022.

TABLE OF CONTENTS

Page

Table of Authorities vii
Opinion & Orders Below 1
Jurisdiction 1
Statement 1
A. Background & History 2
B. Facts & Procedural History 29
Reasons To Grant The Petition 33
I. Federal Courts Are Divided. 33
II. The Questions Are Especially Important 38
III. This Case Is The Right Vehicle 39
IV. The Decision Below Is Wrong 40
Conclusion. 41
Certificate Of Compliance ..... **Error! Bookmark not defined.**

APPENDIX

Fourth Circuit Opinion (Jan. 13, 2022) 1-2
Fourth Circuit Reh'g Denial (Feb. 28, 2022) 3
W.D. Va. Memorandum Opinion ..... ;...4-66
Department of Education Office of Civil Rights letter opening formal investigation 67-73
Liberty University email communication documenting no records of academic or disciplinary misconduct by Owen pursuant to FERPA request 74
Liberty University handbook excerpts specifying student's "rights to due process" 75-76

TABLE OF AUTHORITIES

Page

LAW

28 U.S.C. §1254(1) 1
20 U.S.C. 1681 et seq. 2
20 U.S.C. 1981(c) 3
20 U.S.C. 1987(2)(a) 3

REGULATIONS

34 CFR § 106.8 2
34 CFR 106.8(c) 28
34 CFR § 106.30 ..... 28, 29
34 CFR § 106.45 ..... 20, 21, 27, 28, 29

CASES

Ashcroft v. Iqbal, 556 U.S. 662 (2009) 32
Bissessur v. Ind. Univ. Bd. of Trs.,
581 F.3d 599 (7th Cir. 2009) 15
DeMarco, 352 N.E.2d 361-62). 16
Doe v. Columbia Univ.
831 F.3d 46 (2nd Cir. 2016) 22, 24
Doe v. Princeton 21-1458 (3d Cir. 2021) 26
Doe v. Purdue University
928 F.3d 652 (7th Cir. 2019) 15, 27
Doe v. Regents of the Univ. of Calif.,
No. 20-55831 (9th Cir. 2022) 18
Doe v. White, 859 F. Appx. 76 (9th Cir. 2021) 14
Doe v. Boston College, 892 F.3d 67 (1st Cir. 2018) 34
Doe v. Boston College, 942 F.3d 527 (1st Cir. 2019 ... 34

Doe v. Univ. of Denver,
1 F.4th 822 (10th Cir. 2021 .....34, 39
Doe v. Univ. of the Sciences,
961 F.3d 203 (3d Cir. 2020) 14, 17, 34, 35
Doe v. Wash. Lee Univ.,
No. 6:l4cv52 (W.D. Va. Aug. 5, 2015) 18
Don Bosco, 730 A.2d at 367..... 26
Foster v. Univ. of Maryland-Eastern Shore,
787 F.3d 243 (4th Cir. 2015)..... 24
Gebser v. Lago Vista Indep. Sch. Dist.,
524 U.S. 274 (1998).....passim
International Bhd. of Teamsters,
431 U.S. 324 (1977)..... 17
Jackson v. Liberty Univ. 34, 36
Jane Doe v. Fairfax County School Board,
1 F.4th 257 (4th Cir. 2021) 37, 39
Jane Does 1-12 v. Liberty Univ.,
2:21-cv-03964 (E.D. NY) 13
Joint Anti-Fascist Refugee Comm. v. McGrath,
341 U.S. 123, 170 (1951)..... 27
Leitner v. Liberty Univ.,
6:19-cv-00029 (W.D. Va. 2020) 12
McDonnell Douglas, 411 U.S. 792 (1973).....23, 24, 25
McLaurin v. Liberty Uni., 6:21-cv-00038 (W.D. Va.) 13
Ross *v. Creighton University*,
957 F.2d 410 (7th Cir. 1992).....15, 16, 34
Schwake v. Ariz. Bd. of Regents,
967 F.3d 940 (9th Cir. 2020)..... 17
Scott Lamb v. Liberty U., 6:210cv-00055 (W.D. Va.) 13
Sheppard v. VSU, 993 F.3d 230 (4th Cir. 2021) 25

Trans World Airlines, Inc. v. Thurston,
469 U.S. 111 (1985) 24
Trans World Airlines, Inc. v. Thurston,
469 U.S. 111, 121 (1985) 24
Withrow v. Larkin, 421 U.S. 35 (1975) 19
Yusuf v. Vassar Coll., 35 F.3d 709 (2d Cir. 1994) 18

GRIEVANCE PROCEDURES & POLICIES

Discrimination, Harassment, and Sexual Misconduct Policy 5
Liberty University Student Handbook (due process) . 6
The Liberty Way 5

Christine Owen respectfully petitions the Court for a writ of certiorari to review the Fourth Circuit's judgment in this case.

OPINION & ORDERS BELOW

The Fourth Circuit's January 13, 2022, unpublished opinion is reproduced at App.1-2. The Fourth Circuit's February 28, 2022, denial of rehearing is reproduced at App.3. The district court's April 13, 2020, memorandum opinion is reproduced at App.4-61.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1254(1) based on: (1) the Fourth Circuit's January 13, 2022, opinion (App.1-2); and (2) the Fourth Circuit's February 28, 2022, denial of Owen's timely rehearing petition (App.3).

STATEMENT

This case raises questions of central importance to the hundreds of thousands of private college and university students nationwide. It involves Liberty University specifically: a private university in the 4th Circuit that alone has more than 100,000 students, but the issues involved apply to thousands more private institution students in several circuits.

Title IX is a voluntary law in the sense that higher education institutions can choose not to seek or accept funding, and thus not be bound by that law or its regulations. Both public and private colleges and

universities are eligible to **choose** whether (or not) to accept federal funding in order to draw students to their institutions, for which those institutions in turn reap substantial financial benefits from those students' tuition and other fees. Liberty University, for example, reports that it receives hundreds of millions of dollars in federal funding each year.

Title IX law (20 U.S.C. 1681 et seq.) and regulations require recipient institutions to both "publish" and "disseminate" anti-discrimination and grievance policies as a requirement to receive the federal funds. 34 CFR § 106.8.

The Supreme Court has held "that Title IX is ... enforceable through an implied private right of action." *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 281 (1998).

A. Background & History

Title IX law prohibits discrimination on the basis of sex, 20 U.S.C. 1681(a):

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

Owen alleges that Liberty violated all three of those prohibitions, and then exploited current case law in CA4 to evade responsibility for same.

Title IX allows for an exception for religious institutions, but Liberty has never claimed in any of

the many Title IX lawsuits that application of that law "would not be consistent with the religious tenets of such organization" (20 U.S.C. 1981(c)) and there is no reasonable basis for it to even attempt to raise such argument now. Owen has never read any complaint where any other private institution claimed this exception either, so this exemption is moot.

The terms "program or activity" are defined at 20 U.S.C. 1987(2)(a) as "**all** of the operations of ... a college, university, or other postsecondary institution, or a public system of higher education" which receives federal funding (not simply those activities covered by such funding). By simple definition, this includes litigation involving such university, which is relevant to Owen's case as discussed below, specifically as to Liberty providing legal counsel and paying legal fees for the accused male student (Defendant Camden herein) but not the accused female student.

Owen was a female doctoral student with 30 credits at the doctoral level and excellent academic and unblemished disciplinary records at Liberty University. She was singled out by faculty in her program of study (Counselor Education & Supervision; CES) and targeted for dismissal for purely personal or political reasons (there was no precursor dispute), which was documented in written communications accidentally sent to her by a core faculty member (not Owen's professor), complaining that Owen "was not [going to] go quietly." Owen did not realize at the time that Liberty's personal or political reasons related to

her gender as a female student; this only became readily apparent after Owen was suspended, as detailed below and in the *Complaint* and appellate briefs.

Owen had not done anything that warranted such targeting, however. She had a flawless disciplinary record and a solid GPA; she had never received any negative written or verbal feedback on a single assignment, and in fact had received multitudes of favorable and positive written feedback and grades on all of her coursework. Two of her class papers were published; one in the #1-rated journal worldwide in three research areas (this evidences the caliber of Owen's academic work and emerging expertise in her field of study).

Six months after learning of Liberty's apparent agenda to oust her, however, Owen gave a class presentation in her practicum course on 06/05/2018, which Owen's professor (Defendant DiLella) **recorded** as standard practice for practicum presentations. One of Owen's male classmates (Defendant Camden) challenged why Owen had not used a specific therapeutic protocol and Owen gave an educated and informed response with at least three reasons why it would have been unethical and unprofessional for her to have used that protocol with that client.

One week later, Owen was suspended without notice or opportunity to defend herself. Notably, Owen was in a clinical practicum course with a licensed PhD-

level mental health practitioner as her clinical supervisor.

Liberty's student handbook (called *The Liberty Way*) and its *Discrimination, Harassment, and Sexual Misconduct Policy* (DHSM Policy) detail the university's policies and procedures that Liberty promises to follow and afford students in the event of academic and disciplinary proceedings, as well as Title IX allegations. Among other things, Liberty's published policies include the most basic tenets of a fair and impartial investigation:

- The term "evidence" is used 104 times in the current version of the DHSM Policy;
- The term "fair" or a derivative thereof is used 25 times in the current version of the DHSM Policy;
- Liberty staffs a dedicated department with trained investigators who will ensure "processes that are fair, impartial, and thorough and that provide Parties with sufficient notice, a meaningful opportunity to be heard, and protect the safety of the greater University community while also promoting the accountability of its members...";
- "The University has the burden of gathering sufficient evidence to reach a determination in the matter"; and
- Creation and dissemination of a written investigative report after evaluating all of the evidence and interviewing all of the parties and witnesses.

The Student Handbook in place when Owen was suspended also expressly acknowledged that Liberty's policies were devised (at that time) to ensure the **student's right to due process**" (App.75-76).

Despite Owen's multiple written requests, she was never given the actual allegations against her until AFTER the "remediation committee" had met in secret (contrary to Liberty's published grievance policies)[2] and rendered punishment against her without even hearing her explanations or reviewing the evidence (including the professor's written feedback and grades on that very assignment). Some of the allegations launched against Owen were absolutely fabricated by Liberty faculty and had no basis in fact at all; those can easily be disproven by documentary evidence and testimony (which Owen properly argued).

The videotaped recording of the presentation which would have exonerated Owen and instead implicated her male classmate and professor (Defendants Camden and DiLella) in ethical violations themselves, was concealed or destroyed by the professor. This, too, evidenced bad faith and abuses of power and protocol by Liberty that warranted survival of the motion to dismiss and an evidentiary hearing.

There was **NO investigation whatsoever**. There were also no findings of fact at all, or written report made by the committee and Owen was never advised which of the allegations she was found to have violated. The committee was made up of the friends, peers, and colleagues of Owen's accusers (CES professors who had

disclosed in writing an internal agenda to oust her six months earlier), within her program of study, via *ultra vires* and subjective judgments; Owen's matter was not presided over by any staff who was trained in investigations, and no one at Liberty outside of the CES department reviewed any of the evidence or actions.

The allegations against Owen rose to what Liberty deemed as "honor code violations," which constitute disciplinary matters (not academic ones; Owen had a 4.0 GPA after 30 credits) and should have afforded Owen very specific safeguards under Liberty's published investigation policies. Owen was not afforded any reasonable inquiry and instead Liberty acted arbitrarily and capriciously.

The incident reports produced after the committee deemed Owen "guilty" were clearly written after-the-fact, for example, and did not align with actual documentary evidence (including grades and written feedback on Owen's class assignments and participation, including specifically that 06/05/2018 videotaped class presentation, and even some of Liberty's admissions in the limited discovery responses it did provide).

The punishment (immediate suspension) doled out also did not in any reasonable way relate to the allegations against Owen, and in fact was exponentially harsher than what many male students had received in the past for causing egregious harm to

others (much more serious issues than what Owen was accused of; even rape).

Notably, Owen submitted a FERPA request seeking any and all records relating to any academic or disciplinary misconduct. Liberty responded in writing that it did not have "**any** disciplinary or academic" records of misconduct involving Owen (App.74). This factor alone is prima facie proof that Owen's case was handled outside of normal university channels and did not follow the university's published disciplinary or Title IX procedures at all.

Owen filed a formal complaint alleging Title IX violations in which she was treated differently on four different occasions than at least three of her male classmates, including specifically that her male classmate (Defendant Camden to this action; who did violate ACA's codes of ethics) was treated differently than Owen (the female student who did not violate any ACA code of ethics) was not referred for discipline at all whereas Owen was suspended without cause or notice or opportunity to defend.

After reviewing Owen's complaint and Liberty's response, then having a staff attorney interrogate Owen for more than two hours, the **Department of Education's Office of Civil Rights (OCR) deemed Owen's allegations to be sufficiently compelling, credible, and plausible enough to open a formal investigation into four of Owen's allegations** (App.67-73).

OCR, as the federal agency tasked with investigating credible allegations of Title IX violations, is especially qualified to evaluate Title IX complaints to deem whether they are plausible enough to warrant further investigation. **This factor regarding OCR's initial evaluation of the exact same allegations Owen raised in this lawsuit is prima facie proof in itself that Owen's allegations of gender discrimination were plausible enough (the same standard of proof required by the OCR) to survive a motion to dismiss and get to an evidentiary hearing.**

Owen was condemned in a secret crusade by the friends, peers, and colleagues of her accusers (fellow professors). There is no other case with such egregious evidence of railroading a student by university officials. This cannot be tolerated in a civil society where citizens are granted reasonable rights under federal laws.

Other students trying to defend their names and reputations (as well as act to protect other students from similar harms) have been bankrupted long before this stage; some have settled and abandoned the opportunity to effect change and accountability through the courts. Owen's academic and professional careers are over due to Liberty's misconduct but she is still fighting for justice to protect ALL students who attend universities that choose to accept federal funding, as Liberty University does to the tune of hundreds of millions of dollars each year.

Recipient universities have two choices: follow the federal laws as written and intended by Congress in order to receive federal funding or choose not to accept federal funding and remain completely autonomous. There is absolutely nothing in the Title IX laws and regulations that remotely interferes with a private university's autonomy or governance that would reasonably justify students at private universities not being treated the same as those at public universities in regard to Title IX policies. Indeed, there should be ONE law that applies to ALL colleges and universities nationwide as to Title IX regulations, since those are federal and voluntary.

As mentioned, Owen filed a formal complaint with the OCR, which opened a formal complaint into her allegations **using the same standard that the district court must use**: plausibility of the allegations. The District Court's opinion, however, is riddled with statements that Owen did not raise a single credible or plausible claim, which is flatly refuted by the OCR's evaluation of Owen's exact same claims. Owen specifically named Defendant Camden as a similarly situated male comparator, for example. Camden and Owen were enrolled in the same course at the same time with the same professor and participated in the same class presentation and discussion on 06/05/2018. Camden (a licensed professional counselor bound by the ACA's code of ethics) violated ACA's codes of ethics in recommending a treatment for Owen's client that was absolutely

unethical to have been considered. Owen gave a legitimate response and rebuttal as to three reasons it would have been unethical for her to have used that treatment with that client.

Camden acted unethically; Owen did not. But Owen was suspended and Camden was not; in fact, Camden was not disciplined or investigated at all.

There are many other instances where the district judge misspoke or asserted "facts" that Owen had vehemently disputed; those were all addressed in the *Complaint* and appellate briefs (*which is moot as to the issues presented here that affect multitudes of students nationwide but Owen felt compelled to broach that*).

The court's dismissal (and CA4's subsequent affirming) of Owen's case cannot be squared with the OCR's initial determination that the exact same claims were plausible enough to warrant investigation.

The bigger issue here is the aspect involving a university's obligation to provide students with fair investigations in the first place, which Liberty flatly did not, and which the current case law in some circuits forestalls because of the precedent that private institutions are not bound to follow their own published disciplinary policies.

Though the Title IX and Breach of Contract claims in Owen's case were pled as separate issues, they are inextricably intertwined. A critical aspect of Owen's Title IX claims necessarily hinged on the fact that she was railroaded through an unjust and unfair process in violation of Liberty's published policies. That is

fundamental to the issue of whether Liberty treats female students differently than male students; those matters cannot truly be isolated or segregated from each other. This is true for other claims, too.

Indeed, the CA4's rulings by the same district judge in several Title IX lawsuits against Liberty (by way of example) denied other claims such as negligence by holding that:

> [T]his Court rejected a student's negligence claim based on similar purported duties of care to, for example, "develop[ ] and implement[ ]" "fair and equitable policies in accordance with the requirements of Title IX," "fully and properly investigat[e] claims of retaliation," and "ensur[e] staff were properly trained to process reports of retaliation." *Leitner v. Liberty Uni.* (W.D. Va. 2020).

Once OCR learned that Owen had filed a lawsuit, it closed its investigation pursuant to its policies and advised Owen that she would be eligible to reopen such investigation if her lawsuit did not end with judicial resolution of the Title IX claim (including, specifically, *dismissal*).

The district court's dismissal of Owen's claim, including that she could not sustain any Title IX allegations and Liberty is not bound by its published policies, allows and enables Liberty to skirt any meaningful investigation into its own misconduct and shields it from any liability for such, which in turn effectively bars Owen's legal right to pursue equitable relief as guaranteed by *Gebser*.

This is especially concerning in light of the three major lawsuits alleging Title IX violations filed against Liberty in the past year, including a class action by 22 Jane Does (12 initially, then joined by 10 more; *Jane Does 1-12 v. Liberty Univ.*, 2:21-cv-03964 (E.D. NY)); an action filed by a former executive vice president of communications who alleged first-hand knowledge that Liberty University mishandled multiple complaints regarding sexual discrimination or harassment (*Scott Lamb v. Liberty Univ.*, 6:210cv-00055 (W.D. Va.); and an action filed by a former Title IX investigator who claims that her judgment was overridden by her superior to at least one student's detriment (*McLaurin v. Liberty Univ.*, 6:21-cv-00038 (W.D. Va.).

These evidence a disturbing pattern of credible allegations of flagrant Title IX violations by Liberty staff and faculty from very distinct plaintiffs' perspectives (including a top administrator) that have been going on for decades—particularly against female students, suggesting a climate and culture of gender discrimination by top administrators—without a single student being able to launch a viable case to hold Liberty accountable in order to protect other students.

Though Owen refers specifically to Liberty throughout this petition, the same concerns can be applied to any of the other private institutions in the circuits who have also enjoyed similar protections from current case law, to their students' detriment. Liberty has more than 100,000 students alone, so it is relevant

for this Honorable Court to consider and evaluate the risk of harm to those students, especially since that is compounded by the number of students at other private institutions.

Until recently, CA3 private universities enjoyed the same loophole protections, too, as do those in 9th Circuit and possibly others[1]. Fortunately, CA3 took action to remedy this and protect private students in its jurisdiction in *Doe v. University of the Sciences*, 961 F.3d 203 (3d Cir. 2020), which held that if a college's policy under Title IX of the Education Amendments of 1972 promises a "fair" process, the college must allow both parties to participate in "some form of cross-examination and a live, adversarial hearing during which he or she can put on a defense and challenge evidence against him or her."

This logic highlights the point made above that Title IX and a university's published policies are inseparably connected.

Nevertheless, circuits are split and this issue inures to the benefit of private institutions and the detriment of students. Even public universities receive disparate treatment in some circuits because they are required to provide students with constitutional and due process rights, but private universities are spared from having to do so.

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[1] *Doe v. Timothy White*, 859 F. Appx. 76 (9th Cir. 2021).

University Policies are Contractual and Binding

Several circuits have issued sound judgments and precedents rationalizing that universities are contractually bound to follow their own written policies and procedures. *Doe v. Purdue University*, 928 F.3d 652 (7th Cir. 2019), held that:

> In the context of higher education, any property interest is a matter of contract between the student and the university. *Bissessur v. Ind. Univ. Bd. of Trs.*, 581 F.3d 599, 601 (7th Cir. 2009) (explaining that the "basic legal relation between a student and a private university or college is contractual in nature" (citation omitted))...[The] student...must establish that the contract entitled him to the specific right that the university allegedly took, "such as the right to a continuing education or the right not to be suspended without good cause." *601.

Liberty's disciplinary policies are designed to ensure that students will not be suspended without good cause. It is inherently unfair for any university to publish university policies and procedures, which students reasonably rely on in choosing to matriculate at such university, only for the university to brazenly feign it has no responsibility to honor its own written promises and commitments when problems arise that could cost the university financially through litigation.

Ross v. Creighton University, 957 F.2d 410 (7th Cir. 1992) provides a cohesive conclusion:

> A contract between a private institution and a student confers duties upon both parties which

> cannot be arbitrarily disregarded and maybe judicially enforced." *DeMarco*, 352 N.E.2d 361-62).

Ross also summarizes this issue through a nationwide lens:

> It is held generally in the United States that the "basic legal relation between a student and a private university or college is contractual in nature. The catalogues, bulletins, circulars, and regulations of the institution made available to the matriculant become a part of the contract." *Zumbrun v. University of Southern California,* 25 Cal.App.3d 1, 101 Cal.Rptr. 499, 504 (1972) (collecting cases from numerous states). Indeed, there seems to be "no dissent" from this proposition...

To be clear, university student handbooks check all of the requirements for a contract: offer, acceptance, and consideration. And as mentioned, the opportunity for private universities to wiggle out of abiding by their own published policies benefits those institutions, not their students. This factor alone warrants this Court barring such abuses of power and authority for universities' self-serving actions.

This is not a difficult prospect for this Court to unify nationwide. Whatever policies are in place at a specific given time, are those that the university must honor:

> "When interpreting a contract, the court's paramount goal is to ascertain and give effect to the intent of the parties as reasonably manifested by the language of their written agreement." *Halpin v. LaSalle Univ.*, 639 A.2d 37, 39 (Pa. Super. Ct. 1994) (citations omitted).

> When "the contract evidences care in its preparation, it will be presumed that [the contract's] words were employed deliberately and with intention. In determining what the parties intended by their contract, the law must look to what they clearly expressed. *Doe v. University of the Sciences* (2020).

Liberty's published policies are extremely specific and detailed. There is no doubt what conduct it committed to engage in and abide by. This is true for other private universities and colleges, too. This Court must hold them all accountable to their own published rules and procedures in place at any given time.

The culture and situation at Liberty University in particular have even more compelling concerns of possible **systemic discrimination** against female students. Owen raised credible allegations of apparent "remediation" of female students out of Owen's specific program of study (*as Owen was*), including nationwide and Liberty's own published gender demographics in that program, alone with supporting photographic evidence showing a dramatic shift in male-to-female ratio in that program. Owen did not merely speculate; she made first—hand observations during her intensive courses and provided photographic evidence to support her claims. Other courts have deemed similar patterns and statistical documentation to be sufficient to raise plausible claims of discrimination. See for example, *International Bhd. of Teamsters*, 431 U.S. 324, 336, 362 (1977), *Schwake v. Ariz. Bd. of Regents*, 967 F.3d 940 (9th Cir. 2020), and *Doe v.*

Regents of the University of California, No. 20-55831, at *23 (9th Cir. 2022).

Indeed, courts within CA4, including the very district judge who presided over Owen's case:

> Recognized that a plaintiff might sufficiently allege gender bias by pointing to (the existence of (statements by members of the disciplinary tribunal, statements by pertinent university of trials, or patterns of decision-making that also tend to show the influence of gender, or statements reflecting bias by members of the tribunal." *Doe v. Wash. Lee Univ.*, No. 6:l4cv52, 2015 U.S. Dist. LEXIS 102426, at *26 (W.D. Va. Aug. 5, 2015) (citing *Yusuf v. Vassar Coll.*, 35 F.3d 709, 715 (2d Cir. 1994).

This pattern alone, and the unprecedented fact that Liberty paid for and provided legal counsel for Owen's similarly situated male classmate, whom Owen named as a defendant in her lawsuit, but did not likewise pay for or provide Owen (as the female student) with comparable legal counsel, both give prima facie evidence that Liberty (a recipient of federal funding) has a pattern of treating male students differently than female students. Certainly, one that warrants an evidentiary hearing at a minimum. No other university has ever paid legal fees for an accused student. Camden was allowed to continue his studies and he graduated and received his doctorate degree; Owen was suspended and dismissed.

Continuing one's education and receiving legal counsel paid by the university are certainly "aid[s],"

"benefit[s]," and "services" that Owen did not receive as the accused female CES student but Defendant Camden did as the similarly situated, accused male CES student. https://www.hhs.gov/civil-rights/for-individuals/sex-discrimination/title-ix-education-amendments/index.html

To be clear, Owen's case was dismissed because of 4th Circuit *district court* precedents deeming that Liberty's student handbook was not binding on Liberty and thus it was not required to provide Owen with an investigation (much less a fair and impartial one by persons trained to conduct such), nor was Liberty obligated to use any standard of proof or even basic fairness. **The 4th Circuit Court of Appeals itself has never ruled on the issue of whether private universities are bound to abide by their published policies, regardless of where those are published**.

Notwithstanding, private universities must not act arbitrarily or capriciously, as Liberty undeniably did. Owen adequately pled this. And yet the 4th District Court of Appeals was silent on that, too, and Owen has been barred from gaining any meaningful inquiry or investigation or evidentiary hearing on Liberty's own misconduct.

In *Withrow v. Larkin*, 421 U.S. at 47, the Court stated: "In pursuit of [an unbiased decision-maker], various situations have been identified in which experience teaches that the probability of actual bias

on the part of the judge or decisionmaker is too high to be constitutionally tolerable."

Private university students have no less right to pursue their educations than public university students do ... particularly when receiving federal funds to do so.

To be clear, the policies Owen argues she was entitled to as applicable to Title IX investigations include basic elements of fairness in an investigation, as required by 34 CFR § 106.45, including but not limited to the student's right to be informed of the allegations against her (or him), the student's right to rebut the allegations and present evidence to refute such, and the student's right to and the university's obligation to provide a fair and impartial investigation using reasonable evidentiary standards (preponderance of evidence, per Liberty's published policies). Liberty's policies also promise that students are to be treated with "fairness" (14 times) and in fact specify that the policies are expressly devised "to protect the student's right to due process" (App.75-76).

Owen raised additional challenges to current CA4 precedents by distinguishing her personal situation as different, since it involved Liberty's contractual obligations to its CACREP accreditor, as well as American Counseling Association codes of ethics that regulated the CES faculty and professors as licensed and professional "counselor educator" members of ACA. Those alone warranted a fresh look at this issue

by the 4th Circuit under that novel argument (never made in any other case because of the unique facts involved in Owen's case), and, at a minimum, Owen was entitled to an evidentiary hearing on whether she (and other similarly situated private university student) was entitled to third-party beneficiary protections under those distinctions. But Owen still seeks to have the overall Title IX disparity and discrimination against all private university students in that circuit reviewed.

Owen adequately pled specific allegations that inferred that she was discriminated against on the basis of sex (as the OCR's investigation itself supports). Other circuits have found that allegations similar to those claimed by Owen supported an inference of sex discrimination sufficient to survive a motion to dismiss:

- The investigator/committee declined to seek out potential witnesses in the plaintiff's favor;
- The investigator/committee "failed to act in accordance with University procedures designed to protect accused students";
- The investigator/committee "reached conclusions that were incorrect and contrary to the weight of the evidence"; and
- "Where the evidence substantially favors one party's version of a disputed matter, but an evaluator forms a conclusion in favor of the other side (without an apparent reason based in the evidence), it is plausible to infer ... that the

evaluator has been influenced by bias." *Doe v. Columbia University*, 831 F.3d 46 (2nd Cir. 2016).

When the legislature enacted Title IX, it did not contemplate that private university students would be treated differently than public university students or that courts would apply the law in a lopsided and imbalanced manner. And to be clear, there is no reasonable justification for doing so.

Gebser v. Lago Vista, *supra*, held that Congress enacted Title IX under its spending power:

> Condition[ing an offer of] federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds... **Title IX's contractual nature** has implications for our construction of the scope of available remedies.

The remedy decided was that aggrieved students have the right to pursue private causes of actions for violations.

Both public and private universities are thus contractually bound to the federal government and obligated to follow the regulations governing Title IX, including adopting, publishing, disseminating (and necessarily following) their respective instutitonal policies and procedures as to allegations of sexual harassment and discrimination.

As such, private universities take on a quasi-public/government role in accepting federal funding on behalf of their students (a decidedly self-serving prospect that such universities profit from financially)

and it is wholly fair and reasonable that all students be afforded the same constitutional and due process rights under Title IX laws and regulations.

Private universities are certainly free to create their own policies in accordance with their values, and student handbooks can surely be fluid instruments that are updated as appropriate and necessary ... but such universities MUST be bound to adhere to the policies in place at any specific given time, under contract with the federal government.

Whereas a private university's general policies and procedures may not be binding on such university since handbooks are "fluid" and may change (though it makes sense that such policies should be enforced based on the policies that were in place at any give time), **this cannot be reasonably extrapolated and applied to matters which the institutions themselves are contractually bound to the federal government under *Gebser*.**

Burden-shift to University

Like *Doe v. University of Denver*, when a Title IX plaintiff relies on indirect proof of discrimination, many courts apply the three-part burden-shifting framework announced in *McDonnell Douglas*, 411 U.S. 792 (1973); see also *Hiatt v. Colorado Seminary*, 858 F.3d 1307, -12-1315 n.8 (10th Cir. 2017) ("The *McDonnell Douglas* framework applies" to Title IX sex discrimination claims.").

"The shifting burdens of proof set forth in *McDonnell Douglas* are designed to assure that the

plaintiff has his day in court despite the unavailability of direct evidence." *Trans World Airlines, Inc. v. Thurston,* 469 U.S. 111, 121 (1985). See also *Doe v. Columbia University*, 831 F.3d 46, 55–56 (2d Cir. 2016).[2]

OCR's determination that Owen's allegations were plausible enough to warrant it opening a formal investigation satisfies the first-prong. Therefore, Owen met her initial burden pursuant to *McDonnel Douglas.*

Liberty never even denied Owen's claims; it merely filed a motion to dismiss on technical grounds under the 4th circuit prcedent that has protected Liberty from many other Title IX claims.

Therefore, the burden remained on Liberty to prove that its suspension of Owen were for reasons unrelated to her gender ... which it failed to do. Owen was entitled to proceed on her claims.

The Fourth Circuit itself affirmed *McDonnell Douglas*'s but-for causation wisdoms in *Foster v. University of Maryland-Eastern Shore,* 787 F.3d 243 (4th Cir. 2015), and then extended the but-for

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[2] Cohesive findings that "at the 12(b)(6) stage... allegation of facts supporting a minimal plausible inference of discriminatory intent suffices...because this entitles the plaintiff to the temporary presumption of McDonnell Douglas until the defendant furnishes its asserted reasons for its action against the plaintiff." See also specifically FN8 therein, as to vacating 12(b)(6) dismissals alleging discrimination because plaintiffs were held "to overly stringent pleading standards" and "[a]t the pleading stage, district courts would do well to remember this exceedingly low burden that discrimination plaintiffs face . . . .").

causation application to Title IX claims in *Sheppard v. Virginia State University*, 993 F.3d 230 (4th Cir. 2021) ... but then refused to apply the burden-shifting aspect of *McDonnell Douglas* to Owen's situation.

It is proper that both public and private university students' claims be evaluated in the blame-shifting protocol in *McDonnel Douglas*.

Owen and multitudes of other private university students have improperly been denied their days in court.

Breach of Contract

As discussed above, the 4th Circuit's current precedents regarding private university handbooks as not binding on such institutions have all been issued by district courts. The 4th Circuit Court of Appeals itself has failed to set a formal precedent on this issue.

The case law is misplaced, however.

As mentioned above, however, this cannot be reasonably extrapolated and applied to matters which the institutions themselves are contractually bound to the federal government under *Gebser*.

Owen and other similarly situated private university students in the 4th Circuit (and others) were barred from pursuing their Title IX claims because of an erroneous application and interpretation of flawed case law.

This did not just bar their breach of contract claims; it fully barred their Title IX claims.[3] Again, this fact

[3] The sole exception is *Jackson v. Liberty University*, No. 6:17-cv-00041, 2017 WL 3326972, at *6 (W.D. Va. Aug. 3, 2017) in

demonstrates how interconnected Title IX and Breach of Contract claims are.

> *Doe v. Princeton* 21-1458 (3d Cir. 2021),[4] noted that: When adjudicating a dismissal for misconduct, courts should consider whether the school "follow[ed] its own established procedures for expulsion," a standard much like that for academic dismissals from universities. *Don Bosco*, 730 A.2d at 367. The school "must follow a procedure that is fundamentally fair," *Don Bosco*, 730 A.2d at 367. *Don Bosco* also ... explained that "[a] student at a private university, if expelled during the semester ... loses academic credit for the entire semester" ... while "[a]n expelled student in a private high school ... may transfer immediately to the local public high school" and "will not lose credit for the semester." *Id.* **Given those added harms, "the procedural rights of a private university student will be more aggressively protected by the courts** when compared to the procedural rights of an expelled student at a private high school." *Id.* at 376.

Basic Fairness

In the absence of a defined contract that binds the university, common sense and law dictate that

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which Liberty likewise chose to file a motion to dismiss the claims and did not file an answer refuting those claims but opted not to seek dismissal of the Title IX claims ... then it settled the Title IX claims out of court in order to evade a disfavorable court ruling against it.

[4] https://www2.ca3.uscourts.gov/opinarch/211458p.pdf

universities must absolutely afford students with basic fairness in disciplinary processes and investigations. *Purdue* detailed this when considering the fact that students were entitled to, at a minimum, oral or written notice of the charges against a student and an opportunity to defend him/herself. *Purdue* then recognized that the university "did not disclose its evidence" to the accused student, "[a]nd withholding the evidence on which it relied in adjudicating his guilt was itself sufficient to render the process fundamentally unfair. *See id.* at 580 ("[F]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights...." (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170 (1951).

It is especially critical to note that the elements of basic fairness cited by Purdue above, including disclosing the charges to the student and giving him/her an opportunity to defend, etc., also relate to the very university-derived and -published disciplinary policies and procedures that are at issue here.

This again reinforces the entire premise that whether a university followed its published policies (or not) is <u>necessarily relevant to a student's Title IX claims</u> and **ALL** recipient universities (public or private) are most certainly required to abide by the fair grievance procedures detailed in 34 CFR § 106.45.

Title IX is a voluntary program. Only those colleges and universities who CHOOSE to receive federal aid

(their choice; not an obligation) are bound by its law and regulations, which require that such recipient institutions "publish" and disseminate" their grievance policies and procedures relating to alleged violations of Title IX.

For example, Section 106.8(c), regarding adoption of grievance procedures, specifically requires that:

> A recipient must **adopt** and **publish** grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by this part and **a grievance process that complies with § 106.45 for formal complaints** as defined in § 106.30.

Some private universities have skirted this federal requirement by publishing their Title IX grievance procedures and policies **ONLY** in their student handbooks, which technically satisfies the "publish" and "dissemination" requirements.

The issue, however, is that current case law in the 4th Circuit holds that student handbooks of private universities in that circuit are not binding on those universities. This has resulted in many students at private universities in that circuit suffering real and immeasurable harm, while their universities have repeatedly gotten off scot-free because of the case law that their handbooks are not binding.

This, in turn, has created a situation where private university students have absolutely zero protections against abuses of power and authority by their

universities, resulting in stark discrimination between the rights and protections that public students have versus private students, **which is wholly contrary to the legislative intent and purpose of Title IX law and its regulations**. This is inherently unfair, unreasonable, and unjust.

B. Facts & Procedural History

Owen gave a class presentation, which was videotaped on 06/05/2018. Following Owen's presentation (and still during the videotaped session) one of Owen's male classmates, Defendant Camden herein, challenged Owen as to why she had not used a specific treatment protocol with her client.

Owen responded with three specific reasons why it would have been unethical for Owen to have used that specific protocol with that client. Camden's suggestion of that treatment for that client was unethical according to ACA's code of ethics, for the three reasons Owen gave.

Liberty, however, suspended Owen without notice or explanation. Liberty later claimed that Owen had acted unethically during her presentation.

Camden, and not Owen, had violated codes of ethics and acted unprofessionally, however, and the videotape recording would easily prove this.

Liberty did not investigate or suspend Camden, even though Owen raised allegations that he had acted unprofessionally and unethically during that same class presentation.

Following her suspension, Owen requested in writing what the specific allegations against her were; Liberty responded in writing for Owen to wait until she received the "incident reports" and then respond to those in writing.

On 06/29/2018, Liberty's "remediation committee" met in secret and rendered punishment against Owen (multiple violations of Liberty's published policies). It attached four incident reports to that same email communication for the first time.

As such, Owen never had any opportunity to defend herself against any of the allegations before Liberty suspended her or determined her "guilt."

Owen's version of events was never even sought or obtained by anyone at Liberty, and there was no investigation at all.

The final arbiter (Defendant Moitinho) was the recipient of the email six months earlier where another core faculty member (Defendant Deacon) had complained that Owen "was not [going to] go quietly" (clearly cannot claim unbiased).

There is significant documentary evidence refuting and disproving the allegations against Owen, including specifically the videotaped recording of Owen's 06/05/2018 presentation (which Liberty has unlawfully destroyed or concealed) and the professor's grades and written feedback on that specific presentation, which completely disprove the allegations against Owen.

In October of 2018, Owen filed a formal investigation with OCR detailing the facts and

situation. Liberty replied to Owen's allegations in November of 2018. In December of 2018, a staff attorney for OCR interrogated Owen for more than two hours before deeming her allegations to be compelling, credible, and plausible.

OCR opened a formal investigation in January of 2019 into four separate instances in which Owen alleged that Liberty had treated her differently than at least three of her male classmates. At that time, the investigation was published on OCR's website (it has inexplicably since been removed).

In February of 2019, Owen filed this lawsuit.

In or about April of 2019, the OCR learned of the lawsuit and closed its investigation, pending the outcome of this case. OCR advised that Owen would be eligible to reopen the investigation if the litigation did not resolve the Title IX claim.

Liberty filed a motion to dismiss Owen's lawsuit on technical grounds that case precedent does not bind private universities to follow their Title IX policies, but did not answer or thus deny any of the allegations in Owen's complaint.

Liberty evaded most discovery requests, but it did provide some responses to Owen's requests for admissions that specifically affirm Owen's explanations about the three reasons that treatment would have been unethical for Owen to have used with that client, which affirms Owen's claims about her ethical conduct and Camden's unethical conduct.

In April of 2020, the District Judge dismissed Owen's complaint in full. The Judge misrepresented material facts (as Owen argued in her initial brief when she appealed to CA4) and completely disregarded case law about erroneous outcomes and selective enforcement, despite Owen having adequately argued both claims**, including the very same claims of disparate treatment of Owen as a female student than her male classmates that OCR deemed credible enough to open a formal investigation into**.

Again, the OCR's determination that Owen's allegations were "plausible enough" to warrant an investigation clearly shows that the District Court erred in dismissing Owen's complaint on grounds that Liberty was not required to follow its own Title IX policies and procedures. Owen was entitled to a proper investigation, and it was grave error for the 4th Circuit to have not addressed this fact. This satisfies *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), too.

The District Court's dismissal of Owen's lawsuit effectively resolved the Title IX claim, rendering Owen ineligible to ask the OCR to reopen its investigation.

This effectively thwarts Owen's right to seek redress for violations of Title IX, which is contrary to the legislative purpose and intent of Title IX, and it places all private university students in CA4 (and others) at risk of ongoing abuses of power and authority by those private institutions' administrators who take

advantage of this unfortunate loophole created by judicial failures to redress such abuses.

Owen timely appealed to the 4th Circuit court of appeals in May of 2021.

During the 20-months that the case pended before CA4, Owen filed two supplements with new information that was divulged in new Title IX court cases that were filed against Liberty during that period.

In January of 2022, the court of appeals issued a one-page blanket order affirming the district court's opinion, without addressing any of Owen's legitimate legal challenges. Owen cannot fathom why it took 20 months [5] for the court of appeals to issue such a bare opinion.

Owen timely sought rehearing. The Fourth Circuit denied the motion on February 28, 2022. App.3.

This certiorari petition follows.

REASONS TO GRANT THE PETITION

I. Federal courts are divided.

The federal courts of appeals are intractably split on the rights and protections that private university students are entitled to when allegations are made about Title IX violations.

All public institutions nationwide are required to grant their students constitutional and due process

[5] Owen is unclear why the CA4 Order indicates that the appeal was "Submitted: December 8, 2021" when in fact it was submitted in May of 2020, more than 20 months earlier.

rights; the universities' own promised policies and procedures as published in their student handbooks are regarded as contractual and binding on public institutions. Some circuits deem private universities' handbooks as binding on those universities, too.[6] Others are silent, or deem contractual issues as state matters (but Title IX violations must be pursued in federal courts).

Some circuits, however, do not regard private university handbooks as binding on those institutions, including the disciplinary policies and grievance procedures that such universities promise to afford their students (especially as to Title IX investigations).[7]

The end result is that some circuits effectively (albeit surely unwittingly) negate the legislative and regulatory purpose and intent of Title IX in requiring recipient universities to "adopt," "publish" and "disseminate" policies and procedures for investigations into purported Title IX violations.

This enables some private universities to exploit the current precedent in their circuit (specifically 4th), which in turn enables such institutions to actively and openly discriminate against their students without any recourse at all under color of legal "authority."

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[6] *Doe v. Trustees of Boston College*, 892 F.3d 67 (1st Cir. 2018); *Doe v. Trustees of Boston College*, 942 F.3d 527 (1st Cir. 2019); *Doe v. University of the Sciences*, 961 F.3d 203 (3d Cir. 2020); *Ross v. Creighton University*, 957 F.2d 410 (7th Cir. 1992); *Doe v. University of Denver*, 1 F.4th 822 (10th Cir. 2021).

[7] Jackson, *supra*.

Adopting a policy necessarily requires the university to FOLLOW such policy; the legislature certainly did not intend to require such mandates, only to allow some universities to not follow their own published policies.

This is unfair to public universities (who must abide by their policies in every circuit of this nation), as well as to private institution students, whose rights are effectively **negated** by current precedent in at least CA4.

The Fourth Circuit's decision herein evades a critical issue that adversely affects more than 100,000 students just at Liberty University alone, plus the students at every other private college and university in those circuit that protect universities over students.

The Third Circuit had a similar quandary, but it resolved this matter by requiring private universities to adhere to doctrines of "fairness" when their policies proclaim to offer their students such, as Liberty's handbook mentions at least 14 times (*Doe v. University of the Sciences*, 961 F.3d 203 (3d Cir. 2020).

Other circuits deem that private universities are contractually bound by their handbooks as detailed above or must afford them basic fairness including notice and opportunity to defend (essentially constitutional due process rights), but the Fourth Circuit does not even mandate that private universities within its circuit treat students fairly.

It is inherently unfair and unreasonable that some private universities have been able to skirt multiple

Title IX allegations under current precedents holding that student handbooks (the ONLY place such institutions publish and disseminate their Title IX policies) do not constitute "contracts" and are thus not binding on those universities.[8]

This disparity has enabled some universities, including Liberty, to engage in decades of Title IX violations that have harmed multitudes of students.

Title IX is a federal law and it is imperative that there be one standard nationwide regarding institutional accountability for all students, both public and private, in terms of institutional accountability involving claims of sexual harassment or discrimination under Title IX.

Current precedent in some circuits forestalls private university students' opportunities to pursue their private right action under *Gebser*, by deeming private universities' handbooks as not binding upon such institutions, which in itself discriminates against that population of students.

Students in those circuits are unable to get past the motion to dismiss stage due to the current precedents and many do not have the resources or determination to appeal their cases to higher courts for a review of the disparity against such students.

Worse, universities settle cases in order to maintain their status quo safeguards and prevent any students

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[8] See, for example, *Jackson*, *supra*, cited by the District Court as its basis for dismissing Owen's complaint.

from gaining a new case law precedent that would challenge the current university-favored protections.

Liberty University, for example, just settled this week with 20 of the 22 Jane Does in the class action lawsuit filed against it last year. One of the two hold-outs is barred from pursuing litigation due to statute of limitations, so she has no real opportunity to effect change through litigation but she detailed that Liberty's administrators' disregard for female victims (during settlement negotiations) is as bad today as it was 20 years ago when she was horrifically gang raped.[9] (*The other Jane Doe's status is unknown.*)

Owen's case stands in a unique position to garner this Honorable Court's attention about the critical issue of holding universities accountable. When given an opportunity to address this issue in the 4th Circuit, and despite Owen's case having spent more than 20 months under appellate review, the 4th Circuit flatly refused to even mention this crisis even though it was timely raised in the pleadings.

This appears to be a pattern for the 4th Circuit, wherein one of the judges recently wrote in a dissenting opinion in *Jane Doe v. Fairfax County School Board*, 1 F.4th 257 (4th Cir. 2021): "We now leave the Supreme Court as the only possible venue for review of this important legal issue that will implicate educational institutions across the country."

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[9] https://julieroys.com/exclusive-victim-mays-accuses-liberty-retraumatizing-insulting-jane-does/

Absent this Court's intervention, the circuit split will fester, leaving students at private universities in some parts of the country with different rights than all public university students (actually with NO rights), which effectively creates a discrimination status against private university students in the 4th Circuit, as well as public institutions nationwide who are held to a different standard than some private institutions. This issue has percolated long enough. Unless the Court grants review, the underlying constitutional issue may never be resolved within many of the federal circuits.

II. The questions are especially important.

Viewed apart or together, the questions raised by Owen are especially important in light of the three major lawsuits filed against Liberty in the past month, evidencing class action by multiple students who were harmed by Liberty's failures to protect them and abide by its own published policies, and both a former executive vice president's and former Title IX investigator's allegations of widespread abuses of power and authority in Title IX matter which places all 100,000+ of Liberty's students at grave risk of imminent harm.

Using Liberty as an example is again representative of a systemic problem in some circuits, since there are many other students at the other affected private universities who are equally deserving of the very safeguards and protections that the

legislature intended when it drafted the Title IX laws and regulations, although Liberty's sheer size and student population alone warrant a serious look by this court.

III. This case is the right vehicle.

This case is the right vehicle for the Court to settle the questions presented.

The 4th Circuit chose not to delve into the critical issues raised in this case (as well as in *Doe v. Fairfax*, which it likewise punted to the Supreme Court as the "the only possible venue," at great inconvenience, expense, and injustice to the plaintiff), and thus has left potentially hundreds of thousands of private university students in its own circuit at risk of being harmed by abuses of institutional power and authority during Title IX investigations.

This is especially true in light of the systemic pattern of abuses evidencing **deliberate indifference** alleged against Liberty's top administrators over decades, involving grave harm to affected students and evidencing an apparent systemic culture that favors male students over female students.

Title IX case law has evolved over the past few years and many other circuits have stepped up to set reasonable safeguards to protect students in their circuits ... but some private university students are still treated differently than public university students, without legitimate cause or reason.

Again, Title IX is not a matter that reasonably impinges on any private university's autonomy or

governance, and universities are free to choose not to seek or accept federal funding.

But when a university chooses to do so and agrees to abide by published laws and regulations governing such, then those universities MUST be held to one standard nationwide in terms of following their own published policies, matters of "fairness," and even basic due process of involved students' rights.

Indeed, such universities are contractually bound with the federal government to do so, as *Gebser* mentioned.

IV. The decision below is wrong.

The Fourth Circuit's failure to address this grave issue of disparate treatment of private university students versus public university students in regards to Title IX laws and institutional obligations during investigations either conflicts with the legislative intent of the Title IX law or this Court's relevant precedents, or fails to represent the better rule of law in light of all relevant considerations.

The Fourth Circuit erred in refusing to set a clear precedent as to what conduct private universities must adhere to in regards to Title IX, whether it ruled in favor of Owen's argument or not (though it is hard to fathom any reasonable dispute against her position), but this is a matter that warrants one unified mandate for all public and private universities nationwide, as to what institutions are obligated to provide their students during Title IX challenges and investigations.

CONCLUSION

The Court should grant Owen's petition.

Respectfully submitted,

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