

21-7208 ORIGINAL
No.

IN THE
SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
FEB 22 2022
OFFICE OF THE CLERK

Theresa Bailey — PETITIONER
(Your Name)

vs.

New York Law School et al. — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

the United States Court of Appeals for the Second Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Theresa Bailey
(Your Name)

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New York, NY 10026
(City, State, Zip Code)

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(Phone Number)

QUESTION(S) PRESENTED

[This Court and circuits have agreed: plaintiff's demonstrated triable issues for a jury on review of similar facts and issues under Title IX, See *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999); *Doe v. Fairfax Cnty. Sch. Bd.*, 1 F.4th 257, 263 (4th Cir. 2021); and *Papelino v. Albany College of Pharmacy of Union University*, 633 F.3d 81 (2d. Cir. 2011).]

1. Whether the underlying case presents one or more Questions of Fact for a jury; and, if no, Whether the case presents one or more cognizable claims that, should the plaintiff's application for pro bono court-appointed counsel have been granted, an attorney presenting such claims could have avoided the pleading and procedural errors charged by the lower courts in deciding the case against the pro so, IFP plaintiff?
2. Whether the court's denial of an indigent Title IX plaintiff's application for pro bono counsel, and subsequent judgment that she could not meet pleading standards, imposes a higher burden on an indigent claimant seeking relief under Title IX in a private action?
3. Whether the record demonstrates misconduct or discrimination sufficient to support the plaintiff's position that the court's judgment cannot stand due to impermissible discrimination and hostility adverse to her rights during the adjudication, and involving the state; and, if no, whether the record demonstrates a departure from proceedings sufficient to impact the judgment, or to require the judgment to be set aside?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Petitioner is Theresa Bailey

Respondents are New York Law School, Anthony Crowell, Deborah Archer, Howard Meyers, Jeffery Becherer, Erika Wood, Oral Hope, Victoria Eastus, David Schoenbrod, Ella Mae Estrada, and Barbara Graves-Poller.

RELATED CASES

- *Bailey v. New York Law School et al.*, No. 100689-16, Supreme Court, County of New York. Case removed Jun. 8, 2016.
- *Bailey v. New York Law School et. al.*, No. 16-cv-04283, U.S. District Court for the Southern District of New York. Judgment entered Sep. 24, 2019.
- *Bailey v. New York Law School et al.*, No. 18-252, U.S. Court of Appeals for the Second Circuit. Judgment entered Mar. 28, 2019.
- *Bailey v. New York Law School et al.*, No. 19-3473, U.S. Court of Appeals for the Second Circuit. Judgment entered Nov. 24, 2021.

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

[] For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was November 24, 2021.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. __A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. __A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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...”

28 U.S.C. § 144

“Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.”

28 U.S.C. § 455(a)

“Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.”

42 U.S.C. § 1983

“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.”

U.S. Const. Amend. VII

“In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.”

U.S. Const. Amend. XIV § 1

“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Initial Incident. In 2014, Bailey and Nesbit were students at New York Law School; Bailey, an evening student, was not personally acquainted with Nesbit. Bailey had seen Nesbit on-campus, and did not find his character to be objectively good, or aligned to the standards for persons in law. Crowell, Archer, Eastus, Hope, Estrada, Meyers, Becherer, Wood, Schoenbrod, and Graves-Poller were employed by New York Law School in varied capacities, and personally interacted with Bailey, as described here and in the record, between October 7, 2014, and Spring 2016, in connection to the underlying suit.

On October 6, 2014, Bailey, a Black-female, was subject to an offensive touching by Nesbit, a white male, outside of the 3rd floor campus restrooms during evening class hours. Bailey's verbal and written statements to the school stated she believed she was targeted based on gender or sex; a second male had entered the hall with Bailey and Nesbit on October 6: Nesbit stopped pursuit of Bailey, leaned against a wall, and lowered his head – concealing his facial appearance, and that he had just touched and pursued Bailey. Nesbit's pants were down (buttocks and thighs exposed), his posture was aggressive, his demeanor was threatening: he clenched and unclenched his fists, he was drooling, he looked "rabid." Bailey was forcefully pinned her to the wall by Nesbit. She freed herself (he did not let her go); after the touching, her first view of Nesbit was his exposed butt and thighs. Nesbit turned to face Bailey, then pursued: Bailey dared not look at his genital area. When that second male entered view, Nesbit became calm, non-threatening, and docile.

B. Notice to School of Incident. That second male was first to report the incident; October 7, Bailey reported the incident to Hope (Dean of Registrar). Hope called Eastus (Title IX Coordinator). At the time of Bailey's complaint, she was unaware that the male student who rescued her had made a complaint on October 6, or that the school had earlier (prior to October 6) received multiple complaints of Nesbit harassing women.

Bailey had several meetings with Eastus and Hope between October 7 – 22: Eastus assured Bailey that the school was not aware of Nesbit's conduct towards women. Eastus said the school was "surprised"; Nesbit was "good"; "well-liked." Hope said: he's [Nesbit] no longer here; he's [Nesbit] not here. These comments were in response to pointed questions about what the school knew and when, Nesbit's whereabouts; and the threat of a repeat event. When asked if the cameras in the ceiling above the restrooms had recorded the incident, Hope responded: are there cameras in the hall? Bailey described responses by Eastus and Hope as misleading, deceptive, and false, upon information later received bearing on the responses.

On October 23, 2014, shortly before evening classes begin, Bailey learned that Nesbit was on campus. That night, after class, Bailey went to the police. School administrators who met with Bailey up to this date had been careful to not identify Stephen Nesbit by name (they referenced 'that student'). Bailey learned her attacker's name at the police station, by reviewing photos of New York Law School students online. The police said they could not do anything to Nesbit: on hearing the facts, police said the evidence would be stale. October 26, Bailey sent an email

complaint to Crowell (Dean) and Archer (Assistant Dean), which also noted the school's failures; the email was clearly personal, but was given to Nesbit by the school without Bailey's consent: it was drafted weeks after the incident, without guidance, but was used as Bailey's formal Complaint on the matter.

Following the email, Archer and Bailey would meet: Archer blamed Bailey for the school's acts, and sharply rebuked her: you went to the person you trusted (i.e., Hope), Archer said; the hostility was so direct that it permanently barred any chance that they might speak again; Bailey ended that meeting early. Crowell, senior in position to Archer and all named defendants, had ignored Bailey's attempts to meet. She would later corner Crowell in a crowded cafeteria in desperation: Crowell then met with Bailey, more than 6 months after Crowell had notice of the incident and the school's failures, that meeting occurred Spring 2015.

C. The School's Investigation. Upon Bailey's notice that Nesbit was reported to the police, Becherer, Wood, and Meyers (the Harassment and Discrimination Review Board) then contacted Bailey to interview her for a school investigation: more than 3 weeks had passed from the school's notice of the incident. April 7, 2015, an email from Bailey to the school would summarize some her contentions with the school's investigation, including a demand made on Bailey to take down a Facebook post, which she deemed necessary for her protection, and posterity: the school's handling became more unreasonable aided by a lack of public awareness. Bailey needed someone to know she needed help: the school's 'aid' was defective and deficient. Under the school's demand, Bailey removed her post.

D. The School's Findings. Ultimately, the school found Nesbit had violated the school's Code of Conduct; Bailey would reject the school's sanctions: among her contentions, sanctions were too light; not designed to cure the harm charged; unreasonable under the weight of the evidence; and, issued only as a formality. A 4-page letter emailed to Crowell, and an April 25, 2015 email to several school professors and administrators informed the school of her decision to transfer law schools, citing the school's decision and treatment in adjudicating her complaint. When Crowell met with Bailey, he was unhelpful: he was mostly silent, but said that he read all of the communications Bailey sent to him and to the school. He said he directed Estrada (Admissions) to help Bailey transfer. Estrada met with Bailey once, but was unhelpful: Bailey would contact Estrada and would not hear back. Notably, Estrada became slightly more responsive but only after the submission date for almost all law school transfer applications had closed: an Admissions counselor would be aware of such dates, and the effect of lateness.

E. Bailey Rejects the School's Sanctions. To transfer, Bailey was required to submit two recommendations from New York Law School; she received one. Bailey was notified her transfer applications would not be read as they were incomplete: they lacked a second recommendation from New York Law School. Bailey had disenrolled from New York Law School, steadfast to complete her degree elsewhere. When the school failed to provide the necessary recommendation, she was forced to re-enroll or risk not ever getting a law degree and having no way to pay back the loans that financed the school's past semesters – an absence of choice

for Bailey, who had become unemployed, and was in a deteriorated state from the school circumstances. She was without healthcare and other benefits tied to her job.

F. Retaliation. Things worsened the semesters following the school's successful obstruction of Bailey's transfer; Bailey was openly mocked in class by Professors Schoenbrod and Graves-Poller (Bailey's emailed letter to Ms. Ginter-Barbara of the Board of Education's Office of Civil Rights described these incidents in detail). Bailey notified Eastus that professors were treating her badly after reporting Nesbit to the school and police, posting about the incident on Facebook, and seeking a transfer due to the school's maltreatment of her.

Schoenbrod, who had participated in the hearings on Nesbit, asked Bailey in the classroom if she had a learning disability – this was before any class assignment had been returned as any basis for such inquiry by Schoenbrod. He would give Bailey a D+, and muse that he had favorably increased the grade when she asked about it, as Eastus suggested she do.

Graves-Poller set criteria for students to do well in her class, and then completely barred Bailey from compliance. Graves-Poller gave students nameplates, which were to be picked up at the start of class and returned at the end, to be recorded as having attended that class. Bailey was one of two students in the front row, and the only student to not be provided a nameplate. Graves-Poller would dump about 25 nameplates on Bailey's desk to be collected by other students, despite there being an empty desk next to Bailey. Bailey emailed Graves-Poller that she hadn't been provided a nameplate; two classes (a week) passed with no

response. Bailey tried to talk to Graves-Poller in person, but was told to send an email. Weeks passed; Bailey had not been marked present; Bailey was unable to comply by Graves-Poller's own acts; and, based on the school's absence policy, Bailey had already failed the course for *excessive absences*, the effect: Bailey would not graduate on time, and would be required to remain at the school for another semester. Graves-Poller also had a participation requirement: you were to volunteer; you would not have to be called on. Bailey raised her hand when no student volunteered. Graves-Poller would then call on other students or scorn and mock Bailey. For example, while discussing *Obergefell*, Graves-Poller had reluctantly called on Bailey, who said: for a moment the holding gave me pause: "for a moment I held my breath." Graves-Poller interrupted: "tell us more about what made you hold your nose." Bailey was forced to correct the professor's statement before continuing to not let stand the professor's insinuation about Bailey's views.

Graves-Poller's hostility forced Bailey to change her class three weeks into the semester. This was Bailey's worst academic semester at the school: she failed a course, and got a D+. Bailey filed suit in the next semester. Bailey's grades in the semester in which she filed suit were the highest of her law school career; four of eight of Bailey's semesters at New York Law School were affected by the unlawful acts of Bailey's peer, and the related fallout involving school administrators.

G. Proceedings Below. On or about April 21, 2016, Bailey, commenced this action in Supreme Court of the State of New York, New York. Bailey, proceeding pro se and In Forma Pauperis, asserted, *inter alia*, under Title IX and state law, the

evidence cited by the school as justification for its actions (i.e., the ‘independent’ “evaluation” that concluded Nesbit was not a threat) was dated *after* the date that the school returned Nesbit to campus. Bailey was seeking “attorneys to take [her] case”, and filed to avoid “Statute of Limitations” issues. Defendants removed the case to the district court, June 8, 2016, omitting Bailey’s jury demand. July 5, 2016, Bailey filed an amended complaint asserting, *inter alia*, sexual harassment, discrimination, and retaliation under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq*; GBL § 349; breach of contract; fraud; intentional infliction of emotional distress; 42 U.S.C. § 1985(3); Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq*; and, *prima facie* tort. Defendants moved to dismiss. March 1, 2017, the district court granted in part and denied in part defendants’ motion. Bailey was permitted to replead her Title IX; Title VI; GBL § 349; fraud; intentional infliction of emotional distress; and 42 U.S.C. § 1985(3) claims.

March 7, 2017, Bailey requested pro bono counsel (the first of two such requests made in the adjudication), and March 9, her application was denied. March 29, Bailey submitted her 2nd amended complaint; and, on June 23, the court would direct Bailey to submit a motion to amend and correct her 2nd amended complaint, to add parties referenced in the complaint but not properly joined: this became the 3rd amended complaint, submitted July 17, 2017, that, *inter alia*, joined all parties identified in the complaint as named defendants, and added new claims. August 14, 2017, defendants submitted a motion to dismiss Bailey’s 2nd amended complaint,

and on December 27, 2017, the district court granted in part and denied in part defendants' motion. The court ruled that the following claims remained: Title IX retaliation; GBL § 349; and New York Human Rights Law Claims. Notably, *inter alia*, the district court dismissed all other claims, and dismissed six defendants: Archer, Eastus, Hope, Meyers, Becherer, and Wood.

Bailey would seek an entry of partial judgment or interlocutory appeal of the court's December Order dismissing parties and claims. During a status conference on January 10, 2018, Bailey did not consent to conducting further proceedings before a Magistrate judge. Magistrate Cott would be assigned to conduct discovery. February 15, 2018, Bailey submitted her second application for pro bono counsel. July 2018, following discovery disputes, the parties appeared before Cott for a status conference. Bailey reluctantly agreed to attend a settlement conference, telling the court she had little faith defendants intended to negotiate in good faith: the defendants had lied to the court that very day, stating they had returned discovery to her, when, in fact, they had not.

July 19, 2018, the parties attend the settlement conference. Cott became irate and verbally abusive towards Bailey: yelling at her to "get a job"; calling her case a "circus"; he ranted about "you people"; and made other despicable remarks on the value of her case. Cott's male aide (who is Black) was laughing and made other sounds of glee (akin to what you might hear at a basketball game); and, the female aide (who is Asian) sat there. Ultimately, at the height of Cott's outburst, Cott himself said: he "has to leave" before he does something he "regrets" – his aides

then urged him to leave, quickly following behind him. Bailey submitted a complaint of misconduct against Cott, and would ask for reconsideration when the complaint was dismissed, citing, *inter alia*, she could not prove what Cott did to her at the conference. December 7, 2018, Bailey would appeal Cott's rulings to Ramos, citing, *inter alia*, Cott's acts during the settlement conference: she attached the complaint of misconduct. Ramos would affirm Cott's Order.

March 28, 2019, the Second Circuit dismissed Bailey's sought appeal for lack of jurisdiction. September 24, 2019, the district court granted summary judgment on all claims to the defendants; on October 21, 2019, Bailey appealed to the Second Circuit, with an application to proceed In Forma Pauperis. On February 24, 2021, the district court granted Bailey's application to proceed IFP, allowing the appeal to proceed. April 2021, during the COVID-19 pandemic, Bailey appealed, asserting, *inter alia*, impermissible discrimination during the district court's adjudication; violations to Bailey's substantial rights; and, the court's impartiality and temperament.

November 24, 2021, the Second Circuit affirmed the district court, citing, *inter alia*, multiple pleading and drafting errors by Bailey, and the courts' discretionary authority, agreeing substantially with defendants' arguments presented in response to Bailey's appeal and in the lower court, over the multiple objections on record by Bailey in the lower court and stated within her appeal.

REASONS FOR GRANTING THE PETITION

A. Section Summary. In 2014, Bailey, a Black-American female Marine Reserve and full-time Teach for America employee, was physically attacked by a male student while leaving a women's bathroom at an education institution where she was pursuing a degree. New York Law School, a private Title IX funding-recipient, would have advantages over many Title IX funded-schools in interpreting and complying with 20 U.S.C. § 1681(a) ("Title IX"): it's a graduate-level law school. Bailey filed suit in 2016, after seventeen months of seeking non-court remedies¹ with the school: she had filed a complaint with the police and the Board of Education's Office for Civil Rights; she sought to transfer; her efforts substantially affected by her school. Bailey filed this suit *In Forma Pauperis*, because she is indigent, and is pro se: her two applications for pro bono counsel not granted by the court. What Bailey recognized in 2016 is true today: Title IX, New York common law, the Constitution, and precedent of this Court protects her and others from discrimination based on gender or sex at her Title IX funded-school; these same laws allow her to sue for her injuries.

Title IX, in relevant part, states: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . ." 20 U.S.C. § 1681(a). Under the plain text of the

¹ Petitioner presumes familiarity with the facts of her case; in the lower court she asserts, *inter alia*, a claim under 42 U.S.C. § 1983: civil action for deprivation of rights, based on her school's acts to obstruct any state criminal investigation of the initial campus incident.

statute, Bailey is protected from both sexual harassment *and* retaliation based on gender or sex: the record shows that Bailey has demonstrated a violation actionable under Title IX for both. Bailey's position has support from Title IX adjudications within the circuits; however, the Second Circuit would depart from precedent and split from other circuits on the application of Title IX to the facts of Bailey's case. The result, when the Second or other Circuit departs from precedent, is vastly different interpretations of Title IX and varied outcomes for litigants bringing claims under the same law. These variations have a significant and adverse impact on the rights of individuals who attend Title IX funded schools and who bring claims under the statute: Bailey, a Black, indigent, female, pays the same tuition, and is bound by the same Student Code and graduation criteria as her white male peer, but her school environment is burdened and made more difficult: first by her peer's sexual harassment, and then by her school's response; in her civil action, Bailey's injuries and claims would be diminished, and treated differently than a male whose similar case was earlier reviewed by the same court, raising issues under the Fourteenth Amendment's Equal Protection Clause. Determining the right disposition of this case will help determine the right disposition in similar cases.

Sexual and violent assaults on women at school campuses are relevant here: this is the complaint Bailey sent to her law school in 2014. Bailey asserts that her school's response to such facts did not comply with Title IX. She is supported by precedent on similar matters. The Second Circuit's adjudication of Bailey's case conflicts with its earlier decision in *Papelino* (2011), and decisions of sister circuits.

After *Bailey* (2021), the outcome of future Title IX cases in the Second Circuit is unclear. The contrast between *Papelino* and *Bailey*, adds support to Bailey's contention that the court lacked the requisite neutrality,² thereby denying her Equal Protection of law. In *Bailey*, the Second Circuit found a path to deny statutory protection to whole classes of individuals intended to be protected under Title IX using the court's discretion to grant or deny applications for pro bono counsel. The court's judgment that Bailey could not overcome pleading or drafting issues cannot be reconciled with its denial of her application for pro bono counsel: the court imposed a barrier to Title IX protection not contemplated by the statute but read in by the court's adjudication of this claim. In departing from precedent, and applying inconsistent legal standards to cases stating similar facts, the Second Circuit casts doubt on its neutrality and has misinterpreted Title IX, rendering the outcome of future circuit adjudications under the statute unclear. Citing its discretionary power, the court has read into the statute a subjective test, whereby the court can be the sole arbiter of who receives Title IX protection on all claims involving indigent individuals. Bailey filed suit before 'MeToo' – and gender and sex based discrimination claims in schools are not dissipating: determining the proper disposition in this case, involving an unrepresented individual, will also widely benefit Title IX claimants, schools, and courts more generally.

² "A principled rationale for the difference in treatment of these two instances cannot be based on the government's own assessment of offensiveness." *Masterpiece Cakeshop, Ltd., et al., Petitioners v. Colorado Civil Rights Comm'n, et al.* 584 U. S. __ (2018) at 16.

B. The Second Circuit’s Decision in *Bailey* (2021) Conflicts with *Papelino* (2011). In 2011, the Second Circuit decided *Papelino*: a male college student brought claims against his private Title IX funded-recipient, asserting, *inter alia*, Title IX, *prima facie* tort, and breach of contract; the lower court decided the case against him without a jury. On appeal, the Second Circuit, reversed and remanded, finding, in relevant part: the plaintiff had “demonstrated the existence of genuine issues of material fact [on] sexual harassment, retaliation, breach of contract, and negligent supervision.” *Papelino v. Albany College of Pharmacy of Union University*, 633 F.3d 81 (2d. Cir. 2011) at 85-86³. The court cited circuit precedent to conclude: “to determine whether an environment is hostile or abusive, courts must look at “the totality of the circumstances rather [than] individual events in isolation.” *Id* at 91. (In *Bailey*, the circuit would cite *Papelino* but fail to distinguish the cases or to mention its own key holdings on the issues.) The circuit found the temporal closeness of events adverse to the plaintiff *after* his complaint was a question for a jury. Principally, the circuit concluded that the factual record, which the lower court had construed against the plaintiff, more than proved the plaintiff’s case under Title IX. As in *Papelino* – *Bailey* more than proves triable issues *for a jury* under Title IX. Significantly, Bailey’s school took affirmative steps to preclude her case from a jury: they removed her jury demand, forcing Bailey to assert her Seventh Amendment right on motion to the court. In reviewing this

³ Notably, the Second Circuit’s findings in *Papelino* are based heavily on the *facts*, and these facts are substantially similar to the facts presented by Bailey in her suit after later reviewed by the Second Circuit.

claim, defendants and the Second Circuit would both reach an erroneous⁴ conclusion and ignore or dismiss a violation against Bailey's constitutional rights. In focusing on pleading or drafting errors, the lower courts failed to consider or apply the "totality of the circumstances" standard, which, when applied in *Papelino*, allowed the circuit to remove criteria read in by the court⁵ but not contemplated by Title IX. On Title IX Hostile Education Environment: the Second Circuit (citing *Hayut*) found:

"A Title IX plaintiff must show that he subjectively perceived the environment to be hostile or abusive and that the environment objectively was hostile or abusive, that is, that it was permeated with discriminatory intimidation, ridicule, and insult sufficiently severe or pervasive to alter the conditions of his educational environment."

Papelino at 89 (See *Hayut v. State University of New York*, 352 F.3d 733 (2003) at 745; *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999) at 633.)

The record shows Bailey perceived her environment to be hostile and abusive; and, by failing to apply *Papelino*, which removed judicially imposed criteria, the circuit denied Bailey the protection intended by the statute; a jury decides if the plaintiff's perception is objective. On Quid Pro Quo Harassment: the Second Circuit found: "more than sufficient basis" for a reasonable jury to find the school had "actual knowledge" of harassment: it was reported by the plaintiff to a Dean, a "high-ranking person" with responsibility of "administration of the Student Code"; and, plaintiff's grades had been changed by a person connected to the harassment.

⁴ The courts' treatment of the jury violation supports Bailey's Equal Protection claims

⁵ In *Papelino*, the lower court erroneously decided facts intended for a jury. In so doing, the court articulated an erroneous Title IX standard. The Second Circuit reversed.

Id at 89-90. In *Bailey*, the circuit dismissed these facts; in *Papelino*, it found these facts not only to be relevant but to satisfy the *actual knowledge* requirement⁶ under Title IX. On Retaliation: the Second Circuit disagreed with the lower court, and remanded based on the school's *knowledge* of the plaintiff's complaint of harassment, and the temporal relationship: adverse events followed after. *Id* at 91. On Breach of Contract: the Second Circuit found triable issues, under an "implied contract" – the issue being whether the school breached its duty of "good faith" to the plaintiff. *Id* at 94. The *Bailey* facts with respect to retaliation and breach of contract are identical; yet, the Second Circuit would depart from *Papelino*.⁷ The circuit would contravene its own interpretation of Title IX, shown in *Papelino*, on almost every Title IX requirement examined in *Papelino* to decide *Bailey*'s case⁸.

The circuit's decision in *Bailey* cannot be reconciled with its earlier decision in *Papelino*: the totality of circumstances; continuing violation doctrine; whether the school breached its implied contract of good faith; actual knowledge established by plaintiff's complaint to a Dean, a high-ranking person with authority over the Student Code of Conduct, *inter alia*, were erroneously affirmed in *Bailey* only by

⁶ The circuit's interpretation of Title IX here is relevant, as it materially changes in *Bailey*.

⁷ Reviewing *Papelino de novo*, the appeals court would also overrule the lower court on excluding plaintiff's claims, finding: "under the continuing violation doctrine, a plaintiff may bring claims for discriminatory acts that would have been barred by the statute of limitations as long as "an act contributing to that hostile environment [took] place within the statutory time period." *Papelino* at 91.

⁸ The court construing *Bailey*'s lack of legal drafting experience against her, after denying her application for pro-bono counsel to overcome the issue that, in the court's view, barred her from relief and protection in a private action under Title IX does not explain the difference in treatment between cases: the circuit reaches its legal conclusion in *Papelino* by examining facts substantially similar to those presented in *Bailey*.

breaking with circuit precedent and casting the court as the rightful decider of facts. Determining the proper disposition in this case, will widely benefit claimants whose cases were decided inconsistent with circuit precedent.

C. The Second Circuit Conflicts with the Fourth Circuit on Title IX.

In *Papelino*, the Second Circuit, would correctly determine that the plaintiff was subjected to discrimination. The circuit departed from precedent to decide *Bailey*; there are at least two standards for Title IX adjudications in the Second Circuit: *Bailey* and *Papelino*. The Fourth Circuit's decision in *Doe v. Fairfax Cnty. Sch. Bd.*, 1 F.4th 257, 277 (4th Cir. 2021), is distinct⁹ from the Second's Title IX adjudication.

In *Doe*, a female high school student, asserted Title IX claims against her school board after Doe was sexually assaulted by a male peer. Doe deemed the school's acts in response to that complaint as deliberately indifferent. A jury concluded Doe's school board lacked *actual knowledge*; the district court denied Doe a new trial, but the Fourth Circuit reversed and remanded, finding: "no evidence in the record supports the jury's finding that the School Board lacked *actual notice* or *knowledge* (Title IX standards) of the alleged sexual harassment." *Doe* at 277.

Doe and Bailey are female, asserting claims under Title IX against their schools after an unwanted, physical touching by a male peer; both incidents were reported to the school, stating clearly the harassment was uninvited; both suffered repercussions in their academic environments, including a decline in grades, and enduring staff demeanor not appropriate under the circumstances, after the

⁹ In *Doe*, the Fourth's decision relies heavily on the law; the Second relies heavily on facts.

harassment. Likewise, the perpetrators in both cases are similar: male peers; known to the school to have lied during the school's investigation; described as academically high-performing, and not seen as a threat by the school even after claims were brought to the school's attention by female students of inappropriate, unwanted touching in the school environment. The application of Title IX to the facts of these two cases couldn't be further dissimilar: the Fourth Circuit made clear such facts demonstrate a *prima facie* case under Title IX: Doe was subjected to *discrimination* identified by Title IX; the school had *notice* of liability under the statute; the school had *notice* and *knowledge* of an event satisfying Title IX discrimination; and, the school's liability arises from the school's *own* acts and omissions *after* notice. The Fourth Circuit found meritless the school board's arguments on limitless liability, and disagreed with the Dissent that argued that such acts would have to occur again – after *notice* – for liability to attach; the Fourth's majority correctly found that the statute does not permit one-free rape or discriminatory act before liability can attach¹⁰.

In *Doe*, the Fourth Circuit, citing *Davis*, found: deliberate indifference could be shown by: accusatory questions, angry and menacing demeanor and tone, and attempts to dissuade from legal action ("Under Title IX, a school acts with deliberate indifference where its "response to the [alleged] harassment or [the] lack [of any such response] is clearly unreasonable in light of the known

¹⁰ In *Bailey*, the district court accepted variations of these arguments from the defendants: interpreting Title IX's intent to protect *all* to mean that some students could be discriminated against before a school could be held liable. This view is inconsistent with the plain text of the statute, and has been expressly rejected by the Fourth Circuit.

circumstances."). *Doe* at 271-273. On the issue of when the duty to investigate arises, the Fourth Circuit, citing *Davis* found: "Under Title IX, a school's actual notice of the alleged sexual harassment is what triggers its duty to investigate." *Doe* at 268. Relying heavily on *Davis*, and the plain language of the statute, the Fourth Circuit would conclude that the intent and purpose of the statute is to protect persons, like *Doe*, from being subjected to the discrimination she described; and, a jury must determine the facts – not the court. To afford *Doe* the protection intended by Title IX, demonstrated from the plain statutory text, and this Court's precedent, the Fourth Circuit reversed and remanded. The Second Circuit, however, decided *Bailey* after the Fourth Circuit's decision in *Doe*, and thus, with opportunity to weigh the arguments and analysis of the Fourth Circuit, dismissed or ignored the Fourth's Circuit's interpretation of Title IX and its application of *Davis*, including on *deliberate indifference* and when a *duty to investigate* arises under Title IX, despite the similarities in claims and issues asserted. Determining the proper disposition here would lead to more uniform application of Title IX across circuits.

D. There is Disharmony across Circuits Adjudicating Title IX Cases.

The Second Circuit's decision here, in *Bailey*, favors Title IX funded-recipients, and leans against granting statutory protection to claimants on facts found by the Fourth Circuit to state a *prima facie* Title IX case. In *Doe* (4th Cir. 2021), the Fourth Circuit, on appeal, saved the plaintiff from being denied protection under the statute, relying heavily on Supreme Court precedent in existence during the trial court's adjudication. Fourth Circuit Title IX claimants can only hope the circuit

applies precedent in the future, whereas Second Circuit claimants will hope *Bailey* is not repeated¹¹.

The *Doe* court found that the First, Fourth, and Eleventh Circuits have construed Title IX to be more protective of a claimant's rights: Title IX liability can attach and the school can be held liable on a single incident or act of harassment under the statute¹². On the other hand, the Sixth, Eighth, Ninth, and Tenth Circuits lean in favor of Title IX funded-schools; specifically, they have required post-notice harassment for a school to be liable: that is 1. a discriminatory act against a student; 2. notice provided to the school; and, 3. a second act of discrimination, before a claimant can benefit from Title IX protection in court¹³. The Second Circuit, which decided *Bailey* after *Doe*, is aligned with the Sixth, Eighth, Ninth and Tenth circuits that interpret Title IX to be less protective of Title IX claimants. As the Fourth Circuit correctly found: this less protective interpretation adopted by some circuits is at odds with the plain text of the statute and Congress' clear intent. As a matter of public policy and concern – particularly for women, as showed in *Bailey* and *Doe*, who often report sexual harassment as unwanted touching by a harasser who is physically larger, and not comparable in size, and a school that finds the reported harasser to be non-threatening and decent, despite a

¹¹ Whether a case has precedential effect is irrelevant to the court's ability to repeat its decision or decide future cases consistent with an erroneous decision.

¹² See *Fitzgerald v. Barnstable Sch. Comm.*, 504 F.3d 165, 172–73 (1st Cir. 2007); *Williams v. Bd. of Regents of the Univ. Sys. of Ga.*, 477 F.3d 1282, 1288 & n.3, 1295–97 (11th Cir. 2007).

¹³ See *Kollaritsch*, 944 F.3d at 620–23 & n.3; *K.T. v. Culver-Stockton Coll.*, 865 F.3d 1054, 1058 (8th Cir. 2017); *Escue v. N. Okla. Coll.*, 450 F.3d 1146, 1155–56 (10th Cir. 2006); *Reese v. Jefferson Sch. Dist.* No. 14J, 208 F.3d 736, 740 (9th Cir. 2000)

clear adverse effect on the female student's performance and environment after the harassment – students need to know in advance if attending schools in certain circuits decreases their statutory protection for gender or sex based discrimination claims under Title IX. Bailey shows clearly: reduced Title IX protection is not a risk she knowingly undertook, and is still suffering the adverse effects.

E. The Second Circuit's Decision Conflicts with Precedent of this Court on Title IX; and Government Neutrality. In, *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), this Court held:

"On this complaint, we cannot say "beyond doubt that [petitioner] can prove no set of facts in support of [her] claim which would entitle [her] to relief." *Conley v. Gibson*, 355 U. S. 41, 45-46 (1957). See also *Scheuer v. Rhodes*, 416 U. S. 232, 236 (1974) ("The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims"). Accordingly, the judgment of the United States Court of Appeals for the Eleventh Circuit is reversed, and the case is remanded..." *Davis* at 654

In *Davis*, this Court granted cert on the issue of whether a Title IX school can be held liable for student-to-student harassment. The facts and claims in *Davis* are similar to those in *Bailey* and *Doe*. In *Davis*, this Court's decision to reverse and remand (citing precedent) preserved the individual rights of the plaintiff to proceed with her case, consistent with the statute and the laws that govern individual rights and court adjudications. The Second Circuit's decision in *Bailey* is inconsistent with *Davis*, which found relevant: (citing OCR Title IX Guidelines) the "age of harasser, victim, and number of individuals involved" (*Id* at 651); intentional acts by the school (*Id* at 641), and expressly stated: the school was being held to account for its own acts – *not those of the harasser* (*Id* at 641-642). By ignoring *Davis*, *Papelino*,

OCR Title IX Guidelines, and failing to review the facts and circumstances of Bailey's case with the requisite neutrality, the Second Circuit denied Bailey protections stated plainly in Title IX, and rendered judgment inconsistent with precedent on Title IX.

The district court's neutrality presented an issue for Bailey early on: the court's own acts in response to complaints of clear instances of violations of her rights during proceedings (in one incident her jury demand was removed by her school); and, the court's own acts, would deny Bailey a neutral consideration of her case. The court's inconsistent treatment (including, *inter alia*, denying Bailey's request for pro bono counsel while concluding she lacked an ability to comply with legal drafting requirements) in adjudicating Title IX cases would read-in judicially-imposed conditions that would affect indigent litigants seeking protection under the statute: plainly, Blacks, women, and the indigent in the Second Circuit would have their gender or sex based discrimination claims reviewed under a higher standard: can a non-attorney plaintiff seeking Title IX relief and protection fashion her complaint of discrimination in the form that an attorney would? ¹⁴

Further, Bailey demonstrates that she suffered discrimination *by the government* in her Complaint of Misconduct against James L. Cott, and in her appeal of a judgment which was not just plainly wrong but decided with impermissible discrimination by the court. The Second Circuit's judgment on

¹⁴ The district court implied Bailey may later submit her pro bono counsel request again (Bailey did) but the harm arises in imposing a barrier which treats claimants differently based on an ability to pay fees. When the *facts* of Bailey have been found repeatedly to state a *prima facie* claim under Title IX, the court denying a jury and counsel is not reconcilable.

Bailey's government discrimination claims is likewise wrong: precedent of this Court protects her right to a full, fair, impartial, and neutral consideration of all facts and circumstances relevant to her case; and such consideration must be free of all government discrimination: See *Masterpiece Cakeshop, Ltd., et al., Petitioners v. Colorado Civil Rights Comm'n, et al.* 584 U. S. __ (2018); also: *Palmore v. Sodoti*, 466 U.S. 429 (1984). (Both Court's reversed finding impermissible discrimination by the state). The state's hostility to Bailey's claims against her law school and its handling of her complaints involving the court cast doubt on the court's impartiality (See 28 U.S.C. §§ 144 Bias or prejudice of judge; 455 Disqualification of justice, judge, or magistrate judge), and thus the lower courts have not provided the requisite opportunity for this case to be heard, and have violated her Equal Protection rights. Whether a right is *absolute*, as argued by defendants on appeal, does not allow the state to permit or ignore an infringement to Bailey's right to a jury, and *later* conclude: the plaintiff may not reach the jury stage, as the lower courts did. Such facts tend to show the adjudication lacked impartiality early on, and the record shows the effect of that bias. Whatever shortcomings a pro se, IFP litigant may have in legal drafting, neither the plain text or intent of Title IX, nor the Constitution, contemplate judicially-imposed barriers to receiving protection from discrimination based on gender or sex under the statute.

F. The Indigent, Blacks, and Gender and Sex Discrimination

Claimants' Rights are Implicated. The questions presented to the Court in this petition concern distinct classes of U.S. persons particularly vulnerable to the

discrimination targeted by Title IX. The first, considers the impact and effect of the court's discretion on poor litigants: on facts and issues similar to those raised in this suit, this Court and circuits have generally agreed: under Title IX, the plaintiffs demonstrated triable issues of fact for a jury (*Davis, Doe, and Papelino*). In *Bailey*, the Second Circuit affirmed, dismissing facts widely held to state triable issues for a jury, and to satisfy the legal requirements of Title IX. The second, concerns the intent and meaning of Title IX, and considers if the adjudication correctly expresses and gives effect to the statute. The plain language and intent of Title IX expressly considers that *students* – like *Bailey* – would articulate facts to persons in positions of trust and authority who discern that discrimination has occurred; the statute does not contemplate a student's ability to plead facts consistent in style or manner of *legal pleadings* to benefit from Title IX protection: Title IX claimants sound like *Bailey*, not an attorney. When a court mandates that a pro se, IFP plaintiff, suffering the effects of gender or sex based discrimination, communicate her injuries at the legal standard while obstructing her ability to comply, is such demand reasonable, and is it consistent with the statute's intent? If this petition is granted, the Court's decision will determine the correct disposition of this case and others asking for a proper determination and interpretation of Title IX. The third, seeks a determination and proper disposition on the prohibition on government discrimination and misconduct under the facts presented: is the lower courts adjudication of this case constitutionally sound?

These questions target distinct causes, arising under the facts of this case, that preclude claimants from intended statutory protection; and, in so doing, has raised broader concern of the constitutional protection of distinct classes of U.S persons in U.S. courts. When, as here, a Title IX plaintiff contends with misconduct from week-one in court proceedings against her law school, and she objects, the continuation, furtherance, and persistence of these acts, and the court's acts or omissions in response to her multiple objections can, as here, become barriers to statutory protection and relief not contemplated by Title IX. The Constitution's guarantee of Equal Protection requires that adjudications be free of all conduct that casts doubt on the courts' neutrality, impartiality, and fairness. Petitioner asks this Court to review the judgment of the Second Circuit Court of Appeals and of the District Court. If the Court grants this petition, the Court will determine the proper disposition of this case and others involving similar questions arising under Title IX.

For the reasons aforementioned:

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Theresa

Date: February 22, 2022