No. 21-860

In the
Supreme Court of the United States

JANE DOE,

Petitioner,

v.

TIMOTHY WHITE, ET AL.,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. In August 2017, when Petitioner was temporarily prevented from attending graduate degree classes with her 11-person cohort while the university investigated allegations that she simulated masturbation during one class, did existing precedent place beyond debate the constitutional question whether Petitioner had a property interest or a liberty interest in continued enrollment in postsecondary graduate education?

2. Did the district court and the court of appeals abuse their discretion under *Pearson v. Callahan*, 555 U.S. 223 (2009), in declining to reach the constitutional question whether Petitioner was afforded adequate process before she was temporarily prevented from attending classes for her graduate postsecondary program while the university investigated allegations of sexual misconduct when both courts concluded it was not clearly established whether students in graduate programs at public California higher education institutions have a protected property or liberty interest in continued enrollment?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

Respondents temporarily prevented Petitioner from attending classes with her 11-person graduate school cohort at Sonoma State University during an investigation into allegations that she violated university policy regarding sexual harassment and/or misconduct. This interim remedy was only imposed after Petitioner was notified in detail of her alleged violations and interviewed for three hours about her side of the story. After further investigation, school officials determined that Petitioner was not responsible for the alleged violations.

The district court and the Ninth Circuit correctly concluded that Respondents are entitled to qualified immunity because the law was not clearly established in August 2017 whether temporarily preventing a graduate student from attending classes at a public university in California pending a Title IX investigation in which she was ultimately found not responsible implicates a property or liberty interest protected by the Fourteenth Amendment.

Petitioner does not appear to meaningfully dispute the lower courts' conclusion regarding her alleged property interest. Nor could she, given the Ninth Circuit's recognition that "California law remains unsettled" on this point. Pet. App. 4.

Instead, she contends that this Court's decision in *Goss v. Lopez*, 419 U.S. 565 (1975), which held that high school students were entitled to an "informal give-and-take" before being summarily suspended, somehow clearly established that graduate school students in

California have a clearly established liberty interest in continued enrollment. But as made abundantly clear by this Court's decision in *Paul v. Davis*, 424 U.S. 693 (1976), subsequent circuit court decisions applying that case in the educational context, and Petitioner's own concession at oral argument that she was in fact asking the Ninth Circuit to "extend *Goss*,"[1] *Goss* did no such thing.

Faced with the futility of her argument regarding clearly established law, Petitioner focuses primarily on an alleged circuit split over the underlying constitutional issue. In doing so, Petitioner implicitly asks this Court to reach past the lower courts' qualified immunity holdings and decide constitutional issues that were not passed on below.

In any event, the circuits are not meaningfully divided on these issues; any cosmetic differences vanish upon closer inspection. Many of the decisions cited in the Petition simply assumed, without deciding, that a constitutionally cognizable interest was at stake. In each of the cases Petitioner contends recognize an "inherent" liberty interest, there was a stigmatizing change in legal status (such as a formal suspension or expulsion) based on a finding of responsibility for misconduct—unlike the interim remedy here. And none of the cases that she contends recognize an "inherent" property interest in continued enrollment did so in a state that refuses to recognize the contractual relationship between students and universities.

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[1] Record (CA9), Doc. 36 (Oral Arg. Video) at 40:10-41:03.

The unique factual context here (an interim remedy temporarily preventing Petitioner from attending classes pending further investigation that ultimately found her not responsible) and the procedural posture of this case (on appeal from the grant of qualified immunity based on the lack of clearly established law) makes it a particularly bad vehicle for addressing the questions presented in the Petition. Nor, contrary to Petitioner's claims, is this Court's intervention necessary, as higher education students accused of misconduct in California have substantial procedural protections in mine-run Title IX cases. This Court's further review is not warranted.

STATEMENT OF THE CASE

A. Doe began studying for her master's degree in Depth Psychology at Sonoma State University in September 2016. Pet. App. 8. There were 11 students in her cohort, and they all took their classes together. *Id.* 9. In the spring of 2017, Doe and her cohort were enrolled in a class called Methods in Depth Psychology. *Id.* 9. On April 27, the students participated in an "Authentic Movement" exercise. *Id.* 9–10. The exercise involved grouping into pairs—one "mover" and one "witness"—and the mover was to physically move a dream forward. *Id.* 65–68.

1. Three students complained that Doe simulated masturbation during the authentic movement exercise. Pet. App. 10–11. In response, Sonoma State's Title IX Coordinator, Joyce Suzuki, initiated an investigation. *Id.* 11. Doe was informed that she had been accused of breaching Title V of the Sonoma State Code of Conduct, which prohibits "disorderly, lewd, indecent, or obscene

behavior at a University related activity, or directed toward a member of the University community. *Id.* 69.

On May 19, 2017, Ms. Suzuki sent Doe a letter informing her that she was accused of engaging in a display of a sexual activity—masturbation—during the authentic movement exercise without obtaining consent from the exercise "witness." Pet. App. 71. On July 18, 2017, Ms. Suzuki interviewed Plaintiff for three hours in connection with the investigation. *Id.* 72.

2. On August 19, 2017, Ms. Suzuki informed Doe that the school would be imposing an interim remedy preventing Doe from attending classes while the investigation was pending to protect other students. Pet. App. 12 & 73.[2]

The investigation came to involve three different Title IX investigators. Ms. Suzuki separated from employment with the university in September 2017, and the case was assigned to Jesse Andrews. Pet. App. 12. On October 30, 2017, Mr. Andrews went on parental leave and the case was transferred to William Kidder. *Id.* The case was again transferred back to Mr. Andrews when Mr. Kidder took personal leave on May 15, 2018. *Id.*

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[2] The university's interim remedies are "offered prior to the conclusion of an investigation in order to immediately stop any wrongdoing and/or reduce or eliminate any negative impact, when appropriate." Record (CA9), Doc. 12, SER054–55. Unlike suspensions or expulsions based on violations of university policy, interim remedies are not discipline and are not entered on a student's transcript. Compare *id*. SER054–55 (Remedies and Interim Remedies), with at SER050–51 (Discipline).

Shortly after the case was transferred by Ms. Suzuki, Doe was provided additional information about the progress of the investigation. Pet. App. 13. Mr. Kidder proceeded to interview other students for the investigation. *Id.* On June 2, 2018, Mr. Andrews informed Doe and the complainants that they could review the evidence collected during the investigation and submit responses. *Id.* 13–14. Doe submitted a response on July 30, 2018. *Id.* 76. On August 22, 2018, Doe and the Complainants were informed that Doe "was not responsible for harassing anyone." *Id.*

The Complainants appealed. Pet. App. 76. On October 10, 2018, the CSU Chancellor's Office denied the appeal, stating that "Complainants do not present evidence that * * * Respondent's behavior, especially within the constructs of a graduate level degree, would be considered by a reasonable person, in the shoes of Complainants, as sufficiently severe to limit the ability to participate in university programming." *Id.*

B. Doe filed suit in the Northern District of California, naming as Defendants the Chancellor of the California State University system and four individuals involved in administering the University's Title IX disciplinary procedures. Pet App. 43, 46–48. Doe asserted one cause of action for damages under 42 U.S.C. § 1983 against all Defendants, alleging she had been deprived of her constitutional right to due process under the Fifth and Fourteenth Amendments. Pet. App. 79–82.

1. Defendants moved to dismiss, arguing (among other things) that they were entitled to qualified immunity since Doe had failed to allege that she

(1) was deprived of a clearly established property or liberty interest in her continued enrollment or (2) given less than clearly established process. Pet. App. 21–22; Record (N.D. Cal.), Doc. 25, pp. 14–25; Doc. 27-1, pp. 6–18; Doc. 29, pp. 2–7. Defendants explained that this Court's decision in *Goss v. Lopez*, 419 U.S. 565 (1975), could not provide clearly established law on the constitutional issue in this case because it involved a formal suspension from compulsory primary education, not an interim remedy pending further investigation in the context of higher education. See Record (N.D. Cal.), Doc. 29, pp. 4–5 & n.5. And, in any event, before the interim remedy was imposed, Petitioner was informed of the charges and interviewed for three hours, more than satisfying the "informal give-and-take" required under *Goss*. *Id.*, Doc. 27-1, p. 25.

The district court granted Defendants' motion on the first ground. Pet App. 37. The court extensively surveyed the case law both within and outside the Ninth Circuit, holding that "[a]fter careful review of this case law, the Court concludes that plaintiff has not met her burden to show that at the time of the Title IX investigation, she had a clearly established property or liberty interest in her continued enrollment at Sonoma State." *Id.* 36. As the district court explained:

> There are no binding Supreme Court or Ninth Circuit cases establishing such a right, and a number of district courts within the Ninth Circuit have recognized that there is a "dearth" of case law on the subject, with several recent decisions finding school officials entitled to qualified immunity. Looking outside the Ninth

> Circuit, there is no "robust consensus" holding that students have a protected property or liberty interest in continued enrollment in higher education at a public college or university.

Pet. App. 36–37.

Because of "the unsettled nature of the law in this area," the district court concluded that existing precedent had not "'placed the statutory or constitutional question beyond debate,'" entitling Defendants to qualified immunity. Pet. App. 37 (quoting *White v. Pauly*, 137 S. Ct. 548, 551 (2017)).

2. A unanimous panel of the Ninth Circuit affirmed in an unpublished memorandum disposition. Pet. App. 1–6. Because "the district court correctly concluded that Doe has not alleged the deprivation of a clearly established property or liberty interest," the Ninth Circuit held that "[t]he Defendants are entitled to qualified immunity, and the district court correctly dismissed the case." *Id.* 2, 6.

a. The Ninth Circuit first concluded that the Defendants were entitled to qualified immunity because Doe had "not alleged a deprivation of a clearly established property interest." Pet. App. 3. Recognizing this Court's teachings that plaintiffs must "identify a cognizable property interest based on an 'independent source such as state law'" because "the Due Process Clause does not create freestanding property interests," the Ninth Circuit "examine[d] California law to decide whether Doe had a clearly established property interest in her continued attendance at a state university." *Id.*

3 (quoting *Board of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972)).

As the Ninth Circuit noted, California law on the subject was decidedly "unsettled" because the California Supreme Court "has never held that the relationship between students and universities sounds in contract" and, in fact, had "expressed concern that 'the framing of the student-university relationship in contractual terms * * * incorrectly portrays the manner in which the parties themselves view the relationship." Pet. App. 3–4 (quoting *Paulsen v. Golden Gate Univ.*, 602 P.2d 778, 783 n.7 (Cal. 1979)). Given the "unsettled" nature of California law as reflected in the state supreme court's "ambivalence" and the "uncertainty in the state law" recognized by intermediate state appellate courts, the Ninth Circuit could not "conclude that the precedent is 'clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply.'" Pet. App. 4 (quoting *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018)).

b. The Ninth Circuit also concluded that the Defendants were entitled to qualified immunity because Doe failed to allege the deprivation of a clearly established liberty interest. Pet. App. 5–6. Applying the "stigma-plus" test articulated by this Court in *Paul v. Davis*, 424 U.S. 693, 711 (1976), the panel held that Doe failed to satisfy either the "stigma" or "plus" prongs. *Id.* 5 (citing cases relying on *Paul*). The panel reasoned that Doe had not satisfied the "stigma" element of the test because her complaint "contains no allegations that Defendants publicly disclosed the

charges in the misconduct investigation." *Id.* 5. It further reasoned that Doe had not satisfied the "plus" element of the test because the interim remedy was not a change in legal status. *Id.* 6.

c. Because the Ninth Circuit "conclude[d] that Doe has not alleged a deprivation of a clearly established property or liberty interest," the panel determined that it "need not decide whether the procedures employed by the University comported with due process." Pet. App. 6.

3. Doe petitioned for rehearing and rehearing en banc. See Record (CA9), Doc. 42. In her petition, Doe asked the panel to grant rehearing and certify the following question to the California Supreme Court: whether students have a property interest in continued attendance at a state university? Record (CA9), Doc. 42 at pp. 5, 16. The panel unanimously denied the petition for rehearing, and the Ninth Circuit denied the petition for rehearing en banc with no judge requesting a vote. Pet. App. 40–41.

REASONS FOR DENYING THE WRIT

I. Petitioner overstates the degree, and practical significance, of any cosmetic difference among the circuits' approaches.

Petitioner contends that the circuits are split on the circumstances under which university disciplinary proceedings implicate constitutionally protected liberty or property interests. Not so.

The purported division concerning liberty interests is based on cases in which courts have assumed the

existence of such interests, either because they were not called upon to decide the issue or because the issue was not outcome determinative. And closer inspection of the factual circumstances of each case reveals that the tests applied by the circuits are functionally the same and consistent with this Court's decision in *Paul*, 424 U.S. 693.

Petitioner's effort to manufacture a split regarding property interests fares no better. The purported divisions concerning property interests are merely the product of differences in state law, consistent with this Court's directive that property interests must flow from an "independent source such as state statutes or rules." *Goss*, 419 U.S. at 572.

A. Petitioner first argues that the courts of appeals are divided over whether university disciplinary proceedings inherently implicate a protected liberty interest or require satisfaction of the "stigma-plus" test articulated by this Court in *Paul*. Pet. 17. Specifically, Petitioner alleges that the First, Fifth, and Sixth Circuits fall into the former category, while the Seventh, Ninth, and Tenth Circuits fall into the latter. Pet. 17–19. But this argument mistakes generalized pronouncements and constitutional avoidance for constitutional clarity and overlooks the implicit presence of *Paul*'s stigma-plus test in the former circuits.

1. In the First, Fifth, and Sixth Circuit decisions cited by Petitioner (Pet. 17–19), courts simply assumed a liberty interest—either because they could easily reject the plaintiff's claim without breaking new ground (e.g., by finding that the plaintiff received

adequate process) or because it was clear that the discipline in question implicated a property interest.

In *Gorman v. University of R. I.*, 837 F.2d 7, 12 (1st Cir. 1988), it was "not questioned that a student's interest in pursuing an education is included within the fourteenth amendment's protection of liberty and property." *Id.* at 12. The university instead argued that the plaintiff had received adequate process. *Id.* The First Circuit agreed, holding that the university's disciplinary process "comported with requirements of due process." *Id.* at 16. Because the case could be resolved on this basis, the court had no occasion to probe the contours of the alleged property and liberty interests at stake. As the district court observed here, "the *Gorman* * * * decision[] do[es] not specify whether the protected interest is a liberty interest or arises from a property right (and if the interest stems from property, * * * the source of that property right)." Pet. App. 33.

Similarly, in *Flaim v. Medical Coll. of Ohio*, 418 F.3d 629 (6th Cir. 2005), the Sixth Circuit made a general pronouncement that "the Due Process Clause is implicated by higher education disciplinary decisions" without identifying the protected interest at stake, only to find that the challenged university procedures were "fundamentally fair" and afforded due process. *Id.* at 633, 637. The court based its holding on a Michigan district court decision, which likewise proceeded to evaluate the process due without expressly holding "[w]hether plaintiff's interest is a 'liberty' interest, 'property' interest, or both." *Jaksa v. Regents of Univ. of Mich.*, 597 F. Supp. 1245, 1248

(E.D. Mich. 1984). Just as in *Gorman*, the *Flaim* court did not specify whether the protected interest was a liberty or property interest or, if the latter, the source of the interest. *Flaim*, 418 F.3d at 633; Pet. App. 33.

Likewise, in *Doe v. University of Cincinnati*, 872 F.3d 393 (6th Cir. 2017), and again in *Doe v. Miami Univ.*, 882 F.3d 579 (6th Cir. 2018), the Sixth Circuit reached the process issue, but only after explaining that "[s]uspension '*clearly implicates*' *a protected property interest*, and allegations of sexual assault *may* 'impugn [a student's] reputation and integrity, thus implicating a protected liberty interest.'" *Miami Univ.*, 882 F.3d at 599 (quoting *University of Cincinnati*, 872 F.3d at 399) (emphasis added)); see also *J. Endres v. Northeast Ohio Med. Univ.*, 938 F.3d 281, 297 (6th Cir. 2019) ("Endres alleges both a property and liberty interest in his continued enrollment at NEOMED, and our case law supports—at the very least—his alleged property interest") (citing *University of Cincinnati*, 872 F.3d at 399)).

Finally, in *Plummer v. University of Hous.*, 860 F.3d 767 (5th Cir. 2017), the district court had "assume[d], without deciding, * * * that Plaintiffs had protected property and liberty interests," 2015 WL 12734039, at *11, and the university did not contend otherwise in its briefing on appeal. See Appellee's Br., 2015 WL 6775972, at *12–13, 31–32. The Fifth Circuit affirmed on the grounds that the student-plaintiffs had received adequate process. *Plummer*, 860 F.3d at 777. In doing so, the court noted that the students had "a liberty interest in their higher education" under Texas case law but did not have a property interest. *Id.* at 773 &

n.6 (citing *University of Tex. Med. Sch. at Hous. v. Than*, 901 S.W.2d 926, 929–30 & n.1 (Tex. 1995)).[3]

In each of the foregoing cases, interrogating the source of the right at issue was unnecessary to resolve the case—either because it was clear that *some* liberty or property interest was at stake or because the plaintiff had received adequate process. The fact that courts only occasionally have reason to scrutinize a plaintiff's purported liberty interest does not mean that the courts of appeals have adopted different standards.

As this Court has recognized, courts may skip the step of identifying a protected liberty interest precisely because the outcome may be resolved on another, more "appropriate basis" so as not to "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 222 (1985) (quotation marks omitted); see also *Board of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 84–85 (1978) ("Assuming the existence of a liberty or property interest, respondent has been awarded at least as much due process as the Fourteenth Amendment requires").

2. Contrary to Petitioner's arguments (Pet. 19–21), the standards applied by the Seventh, Ninth, and

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[3] Petitioner points to the dissenting opinion's characterization of the majority opinion (Pet. 19), but as this Court has recognized, "comments in a dissenting opinion about legal principles and precedents are just that: comments in a dissenting opinion." *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1511 (2020) (quotation marks and alterations omitted).

Tenth Circuits regarding liberty interests are consistent with the foregoing cases.

For one, the Tenth Circuit did not even reach the issue whether the plaintiff had been deprived of a liberty interest because it concluded that the plaintiff had a property interest under Colorado law and had received adequate process. See *Harris v. Blake*, 798 F.2d 419, 422 n.2 (10th Cir. 1986) ("Given our ultimate conclusion that Harris received procedural and substantive due process, we need not consider whether a graduate student is deprived of liberty when forced to withdraw for reasons which are not made public").

The Seventh and Ninth Circuits, for their part, do expressly apply *Paul*'s stigma-plus test. But this alone does not demonstrate disagreement among the circuits; it is merely a study in the basic idea that more searching analysis may be warranted under different circumstances considering the facts of the case and principles of judicial restraint. Indeed, the Seventh and Ninth Circuits may have felt that directly confronting the threshold question of the disputed liberty interest was the "most appropriate basis" for resolving the plaintiffs' procedural due process claims based on "the precise facts disclosed by the record," *Ewing*, 474 U.S. at 222.

For example, in *Doe v. Purdue Univ.*, 928 F.3d 652 (7th Cir. 2019), the Seventh Circuit focused on the plaintiff's alleged liberty interest only after concluding that he "fail[ed] to establish a property interest" under Indiana state law. *Id.* at 661. Likewise, given the absence of any citation to Nevada law giving rise to a property interest in plaintiff's briefing, the Ninth

Circuit did not have occasion to meaningfully address the alleged property interest at stake in *Krainski v. Nevada ex rel. Bd. of Regents of Nev. Sys. of Higher Ed.*, 616 F.3d 963, 971 (9th Cir. 2010); see also Appellant's Opening Br., 2009 WL 4921468; Appellant's Reply Br., 2009 WL 4921470.

More fundamentally, the stigma-plus test adopted by this Court in *Paul* and expressly applied in the Seventh and Ninth Circuits is implicit in the First, Fifth, and Sixth Circuit decisions that Petitioner contends recognize "a protected liberty interest as a matter of right." Pet. 23. In each of the decisions Petitioner identifies from the First, Fifth, and Sixth Circuits, the student-plaintiff (unlike Petitioner here) was subject to a stigmatizing change in legal status through formal suspension or expulsion after being found responsible for violating school policies.

In *Gorman*, 837 F.2d 7, the plaintiff was "found guilty" of violating the school's policy on verbal abuse, harassment, and threats and received "sanctions consisting of a permanent ban from office in any recognized student organization, a mandatory examination by the University's consulting psychiatrist, and if recommended, commencement of a course of treatment." *Id.* at 10. After the student-plaintiff prevailed in the district court, "all sanctions were vacated, and the University was ordered to purge Gorman's records of all references to the proceedings and charges." *Id.* at 11–12. Although the First Circuit reversed after concluding that the student was given adequate process, it recognized the significance of the

"stigma" that accompanies a suspension based on a finding of misconduct. *Id.* at 14.

In *Flaim*, 418 F.3d 629, the plaintiff had been expelled from medical school after pleading guilty to a felony drug offense that violated school policy. The Sixth Circuit concluded that the plaintiff had been given adequate process before his expulsion but recognized that the plaintiff's interest in seeking to "*correct his official record*" was "significant" and "extend[ed] beyond his immediate standing at Medical College of Ohio and *could interfere with later opportunities for higher education and employment*." *Id.* at 633, 638 (quotation marks omitted) (emphasis added); see also *id.* at 638 (noting "the seriousness and lifelong impact that expulsion can have on a young person").

Likewise, in *Univ. of Cincinnati*, 872 F.3d 393, the "University found John Doe 'responsible' for sexually assaulting" Jane Roe and suspended him. *Id.* at 396. The Sixth Circuit refused to vacate the district court's preliminary injunction against the suspension because "[w]ere we to vacate the injunction, Doe *would be suspended* for a year and *suffer reputational harm* both on and off campus *based on a finding rendered after an unfair hearing*." *Id.* at 407 (emphasis added). And in *Miami Univ.*, 882 F.3d 579, the plaintiff had been found responsible for violating the school's sexual assault policies and sanctioned with suspension and disciplinary probation upon re-enrollment. *Id.* at 587–88. The Sixth Circuit reversed the dismissal of the procedural due process claim in part because the "*effect of a finding of responsibility for sexual misconduct* on

a person's good name, reputation, honor, or integrity is profound" and could lead to a "potential *lifetime of stigma and preclusion from further educational and employment opportunities*." *Id.* at 600 & 602 n.8 (quotation marks omitted) (emphasis added).

In *Plummer*, 860 F.3d 767, the plaintiffs were expelled for violating the school's sexual misconduct policy and banned from the university. *Id.* at 770. Relying on Texas caselaw recognizing a liberty interest for a medical school student who had been dismissed for academic dishonesty where "[t]he stigma is likely to follow the student and preclude him from completing his education at other institutions," *Univ. of Tex. Med. Sch. at Hous. v. Than*, 901 S.W.2d 926, 930 (Tex. 1995), the Fifth Circuit explained that such "*sanctions imposed by the University could have a 'substantial lasting impact* on appellants' personal lives, educational and employment opportunities, and reputations in the community.'" *Plummer*, 860 F.3d at 773 (quotation marks omitted) (emphasis added).[4]

Viewed through the proper factual context, these decisions (which involved formal findings of guilt and corresponding stigmatizing sanctions of suspension or expulsion that are meaningfully distinct from the interim remedy imposed in this case) are faithful to this Court's decision in *Paul* and consistent with the circuits that expressly apply *Paul*.

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[4] Indeed, the Fifth Circuit has expressly applied *Paul v. Davis* in the higher education context. See *Wheeler v. Miller*, 168 F.3d 241, 249 (5th Cir. 1999).

B. Petitioner next argues that the First and Sixth Circuits hold that higher-education students possess "an inherent property interest" in their continued enrollment regardless of state law, whereas "[m]ost other Circuits" require that such an interest be conferred by state law or university policy. Pet. 25–29.

As this Court has repeatedly articulated, however, "property interests are creatures of state law," *Horowitz*, 435 U.S. at 82, and must flow from an "independent source such as state statutes or rules," *Goss*, 419 U.S. at 572; see also *Roth*, 408 U.S. at 577; *Perry v. Sindermann*, 408 U.S. 593, 601–02 & n.7 (1972). Petitioner's supposed split rests on the faulty premise that the First and Sixth Circuits are at odds with this longstanding principle and permit procedural due process claims to proceed in the absence of state-law created property interests.

Each of the cases Petitioner identifies as recognizing "an inherent property interest in [] continued enrollment" (Pet. 25) involved an institution in a state where the relationship between students and universities is undisputedly governed by contract. The universities in those cases thus had no basis to contend (and the courts no reason to consider) otherwise. Viewed through that lens, those decisions are entirely consistent with decisions in other circuits that expressly look to state law to determine whether a property interest is at stake before evaluating the process required under the Constitution.

For example, the First Circuit's decision in *Haidak v. University of Massachusetts-Amherst*, 933 F.3d 56 (1st Cir. 2019), involved a claim against a

Massachusetts university by a student who was suspended and then expelled for assaulting a fellow student. *Id.* at 60. Although the court did not expressly mention state law before evaluating the process due, this was immaterial given how Massachusetts law views the relationship between students and higher education institutions. As the Massachusetts Supreme Judicial Council recently reiterated, "[c]laims that a university did not exercise proper care or follow its established procedures in student disciplinary proceedings have been treated as claims for breach of contract, based on the university's student handbook or other documents, such as the student code of conduct at issue here." *Helfman v. Northeastern Univ.*, 149 N.E.3d 758, 776 (Mass. 2020).[5]

Likewise, the two cases that Petitioner points to from the Sixth Circuit—*Doe v. Miami Univ.* and *Doe v. Univ. of Cincinnati*—involved institutions in the state of Ohio, which "treats the relationship between a university and its students as 'contractual in nature.'" *Al-Dabagh v. Case W. Reserve Univ.*, 777 F.3d 355, 359 (6th Cir. 2015) (quoting *Behrend v. State*, 379 N.E.2d 617, 620 (Ohio Ct. App. 1977)); see also *Bleicher v. Univ. of Cincinnati Coll. of Med.*, 604 N.E.2d 783, 787 (Ohio Ct. App. 1992) ("It is axiomatic that when a

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[5] By similar token, to the extent that the First Circuit's decision in *Gorman*, 837 F.2d 7, can be read as resting on the deprivation of a property interest (see *supra* at 11), that case is consistent with *Haidak* because Rhode Island, like Massachusetts, recognizes the contractual dimensions of the relationship between students and universities. See *Havlik v. Johnson & Wales Univ.*, 490 F. Supp. 2d 250, 260 (D.R.I. 2007); *Gorman v. St. Raphael Acad.*, 853 A.2d 28, 34 (R.I. 2004).

student enrolls in a college or university, pays his or her tuition and fees, and attends such a school, the resulting relationship may reasonably be construed as being contractual in nature" (quotation marks omitted)). The fact that these two cases did not expressly mention the underlying source of the property interest does not change the fact that Ohio law recognizes a contractual relationship between students and universities that gives rise to certain procedural due process rights under the Fourteenth Amendment.[6]

Indeed, the Sixth Circuit has long recognized that courts must look to state law to determine whether a student has been deprived of a property interest in continued enrollment. See *Ku v. State of Tenn.*, 322 F.3d 431, 435 (6th Cir. 2003) ("we will assume without deciding that Raymond Ku has a constitutionally protectible property interest in continuing his medical studies under Tennessee law"); *Bell v. Ohio State Univ.*, 351 F.3d 240, 248–49 (6th Cir. 2003) ("Because property interests are creatures of state law, [the plaintiff is] required to show * * * that her seat at the Medical School was a 'property' interest recognized by [ ] state law" (quoting and altering *Horowitz*, 435 U.S. at 82)).

Once the decisions that Petitioner relies on are placed in their proper legal context against the backdrop of state law principles, her claim of a

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[6] Petitioner does not mention *Flaim* in her argument regarding a property interest, but that case, too, involved an institution in Ohio. See *Flaim*, 418 F.3d 629.

purported split regarding the recognition of property interests vanishes.[7]

II. This case is a poor vehicle for resolving the questions presented because it turned on the lack of clearly established law.

This case is an exceedingly poor vehicle for resolving the questions presented. For starters, the lower courts never even addressed the first question. Nor would resolving the first question have any bearing on the outcome here since Respondents would still be entitled to qualified immunity. What is more, this case is ill-suited for providing meaningful guidance on the questions presented because of the relatively unusual circumstances: the imposition of an interim remedy pending investigation without a finding of responsibility resulting in discipline.

A. Petitioner's first question presented asks this Court to abandon its long-standing function as a court of review and instead write on a blank slate with respect to issues that the lower courts never reached. See Pet. App. 6; *id.* 37.

In *Pearson*, 555 U.S. 223, this Court held that a court need not decide whether an official's conduct was constitutional before deciding whether the official is entitled to qualified immunity. *Id.* at 236. Consistent with that principle, the lower courts did not address whether Respondents' conduct was constitutional. Pet.

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[7] Even if, as Petitioner contends, the "Tenth Circuit is at odds with itself" (Pet. 28 n.7), any such inconsistency should be resolved by the Tenth Circuit, not this Court.

App. 6; *id.* 37. After noting its discretion to avoid the constitutional question, *id.* 22, the district court dismissed the case "on qualified immunity grounds." *Id.* 37. Similarly, having concluded that "Doe has not alleged a deprivation of a clearly established property or liberty interest," the Ninth Circuit held that it "need not decide whether the procedures employed by the University comported with due process." *Id.* 6.

As the members of the Ninth Circuit panel in this case observed at oral argument, the briefing in the case was predominantly focused on the issue of clearly established law, not the underlying constitutional questions.[8] It is therefore unsurprising that the panel opted to resolve the case on qualified immunity grounds in an unpublished memorandum disposition. See *Pearson*, 555 U.S. at 239 (recognizing that reaching the constitutional question "may create a risk of bad decisionmaking" where "the briefing of constitutional questions is woefully inadequate").

The first question presented nevertheless asks this Court to reach out and address the constitutional issues that the lower courts in this case declined to reach. See Pet. i. This Court, however, is "a court of

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[8] See Record (CA9), Doc. 36 (Video of Oral Arg.), at 35:49–36:05 (Judge Gould noting that the "briefs at least as I understand it, seem to like focus almost exclusively, maybe as they should, on the issue of clearly established law and so some other issues were not reached"); *id.* at 38:21–38:45 (Judge Friedland noting that "I wonder whether we are even capable of resolving this question because it's really—the threshold question is a California law question and it seems best resolved by the California courts not us because we can't really resolve California law ourselves anyway").

review, not of first view," meaning it does "not normally strain to address issues that are less than fully briefed and that the district and appellate courts have had no opportunity to consider." *Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media*, 140 S. Ct. 1009, 1018 n.* (2020) (citation omitted).

B. The foregoing principle of judicial restraint is "particularly appropriate" where "addressing the issue is entirely unnecessary" to the Court's "resolution of the case." *Comcast*, 140 S. Ct. at 1018 n.*. Here, because the lower courts correctly concluded that Respondents are entitled to qualified immunity, reaching the constitutional questions identified in the Petition would "have no effect on the outcome of the case." *Pearson*, 555 U.S. at 237.

As discussed *infra* at 29–36, the lower courts correctly concluded that Respondents are entitled to qualified immunity based on the lack of a clearly established property or liberty interest in continued higher education enrollment. Even under *Goss*, there need only be "an informal give-and-take between student and disciplinarian" in which the student is given "the opportunity to characterize his conduct and put it in what he deems the proper context." *Goss*, 419 U.S. at 584. That is exactly what happened in this case. Petitioner was provided a letter explaining the detailed allegations against her (i.e., notice) and was interviewed for three hours prior to the imposition of the interim remedy (i.e., opportunity to be heard). Pet. App. 71–72. The pre-deprivation notice of allegations and lengthy interview was an adequate "initial check against mistaken decisions," *Cleveland Bd. of Educ. v.*

Loudermill, 470 U.S. 532, 545 (1985), under the circumstances, especially given the further investigation that occurred before making the more impactful final decision that could have led to suspension and/or expulsion.

This Court has long recognized that it should not "anticipate a question of constitutional law in advance of the necessity of deciding it." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 (2008). There is no reason to deviate from that principle here.

C. This case presents a poor vessel for giving meaningful guidance on the underlying constitutional issues because of the numerous case-specific issues fundamental to resolving the questions posed by Petitioner—questions that were, for the reasons above, never addressed at length by the lower courts or extensively addressed in the briefing by the parties. See *Pearson*, 555 U.S. at 239 ("when qualified immunity is asserted at the pleading stage, the answer to whether there was a violation may depend on a kaleidoscope of facts not yet fully developed" (quotation marks omitted)).

To give an example, Petitioner characterizes the University's interim remedy as a "suspension." See*, e.g.*, Pet. 32, 34. That is incorrect. Temporarily preventing Petitioner from attending classes was not a disciplinary sanction, but rather an interim measure undertaken "to stop further alleged harm until an investigation [was] concluded or a resolution [was] reached." Record (CA9), Doc. 12, at SER054–55; see also SER050–51 (discussing suspensions and

expulsions). This is a distinction with a constitutional difference. Surely, an interim remedy pending an investigation—even if it requires a temporary halt to in-person class attendance pending the investigation—is a smaller degree of "deprivation" than a full expulsion or long-term suspension of multiple years, along with the accompanying discipline etched on a student's record.

Furthermore, the protracted timeline for the investigation is unique to this case. Three separate university officials were tasked with leading the investigation at various times because one separated from employment with the university, another went on parental leave, and another went on personal leave. Pet. App. 11–13, 74. Moreover, during the investigation, a fire almost destroyed Sonoma State University, stopping just one-quarter of a mile from the campus. Record (CA9), Doc. 11, p. 68 n.19. The university cancelled classes for over a week and opened an emergency operations center. *Id.*

The relatively distinct fact pattern here—the imposition of an interim remedy pending investigation followed by a finding of non-responsibility—does not warrant this Court's review, particularly in light of the lower courts' qualified immunity holdings and the fact that Petitioner received more than the informal give-and-take described in *Goss*.

III. Petitioner overstates the need for answering the questions presented in the specific factual context of this case.

Petitioner insists that the issue of fairness in university disciplinary proceedings has become "increasingly problematic" and warrants this Court's immediate intervention. Pet. 37–38. But this ignores that the Ninth Circuit has recently provided guidance to students complaining about biased disciplinary proceedings; that federal administrative agencies have amplified procedural protections for students accused of sexual misconduct; and that California courts afford significant procedural protections to students challenging university disciplinary decisions.

A. Petitioner argues that this Court's guidance is needed, pointing to a Colorado district court's observation of the "wave" of Title IX litigation in the wake of the Dear Colleague Letter "brought by male university students who have been suspended or expelled after they had been found, after allegedly faulty investigations, to have violated school policies regarding sexual assault." *Doe v. Univ. of Colo., Boulder ex rel. Bd. of Regents of Univ. of Colo.*, 255 F. Supp. 3d 1064, 1067–68 (D. Colo. 2017); Pet. 37–38.

The Ninth Circuit, however, has recently provided "guidance on what allegations suffice to state a Title IX claim" in the context identified by the Colorado district court. See *Schwake v. Az. Bd. of Regents*, 967 F.3d 940, 943 (9th Cir. 2020); see also *Doe v. Regents of Univ. of Cal.*, --- F.4th ----, 2022 WL 98135, *5 (9th Cir. 2022) (implementing the *Schwake* standard).

Moreover, the Department of Education has recently revised its Title IX regulations to afford significantly greater procedural protections to alleged perpetrators of sexual harassment. See *Non-discrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30026 (May 19, 2020).

B. Despite relying on Title IX cases and authorities to support her claim of a "wave" of litigation requiring this Court's imminent review, Petitioner might argue that the foregoing guidance is less helpful in the context of a procedural due process claim under 42 U.S.C. § 1983. But Title IX cases regularly require the resolution of procedural due process claims, and plaintiffs in the Ninth Circuit may establish a property interest where state law gives rise to a legitimate claim of entitlement to continued enrollment. See, *e.g.*, *Doe v. Univ. of Or.*, No. 6:17-cv-01103-AA, 2018 WL 1474531, at *11 (D. Or. Mar. 26, 2018) ("Oregon courts acknowledge that payment of tuition forms a contract for educational services between the student and the school").

Nor, contrary to Petitioner's claims, is this Court's guidance necessary to avoid "different outcomes for litigants on similar facts." Pet. 38. Unlike here, in the First, Fifth, and Sixth Circuit cases concerning liberty interests, the plaintiffs were subjected to stigmatizing findings of responsibility for misconduct accompanied with an alteration of legal status in the form of a formal suspension or expulsion. See *supra* at 15–17. With respect to Petitioner's claimed property interest, different outcomes are an unavoidable part of looking

to state law in determining the contours of property interests protected by the Due Process Clause. Indeed, this explains why the plaintiff in *Haidak* (who did not receive notice and an opportunity to respond like Petitioner here) was entitled to procedural due process before being deprived of what Massachusetts courts would recognize as a property interest. See 933 F.3d at 60, 62–63; *Northeastern Univ.*, 149 N.E.3d at 776. Petitioner's quibble in this regard is with the California courts' refusal to create a property interest, not this Court.

C. Even in the absence of a constitutionally cognizable interest, higher education students in California who have been suspended or expelled are entitled to certain procedural protections under section 1094.5 of the California Code of Civil Procedure.

Under that statute, state courts are charged with evaluating whether the administrative body "proceeded without, or in excess of, jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion." Cal. Code Civ. Proc. § 1094.5(b). "The statute's requirement of a 'fair trial' means that there must have been 'a fair administrative hearing.'" *Doe v. Univ. of S. Cal.*, 200 Cal. Rptr. 3d 851, 866 (Cal. Ct. App. 2016) (quotation marks omitted). "Where student discipline is at issue, the university must comply with its own policies and procedures." *Id.*

Although the inquiry under section 1094.5 is not constitutional in dimension, it nevertheless closely resembles the due process analysis. "Generally, a fair procedure requires notice reasonably calculated to apprise interested parties of the pendency of the action

and an opportunity to present their objections." *Doe*, 200 Cal. Rptr. 3d at 867 (quotation marks and alterations omitted). Indeed, California courts often look to federal precedents, including *Goss*, in evaluating the fairness of the procedure involved before a student is suspended or expelled. See *id.* ("The hearing need not be formal, but 'in being given an opportunity to explain his version of the facts at this discussion, the student [must] first be told what he is accused of doing and what the basis of the accusation is'" (quoting *Goss*, 419 U.S. at 582)).

IV. The Ninth Circuit's decision is correct.

In *Pearson*, 555 U.S. 223, this Court explained that "[t]he judges of the district court and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Id.* at 236.

Here, both the district court and the Ninth Circuit exercised that discretion to decide the case on the clearly established prong, concluding that Respondents are entitled to qualified immunity because Petitioner did "not allege[] the deprivation of a clearly established property or liberty interest." Pet. App. 2. Petitioner disagrees for four reasons. None are compelling.

A. First, after straining to establish a lack of judicial consensus on these matters, *supra* at 9–20, Petitioner nevertheless asserts that the "law was clearly established by *Goss* that a higher-education

student facing disciplinary proceedings has a protected liberty interest." Pet. 29.[9] Not so.

As this Court has recognized, the inquiry whether a right was clearly established "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Saucier v. Katz*, 533 U.S. 194, 201 (2001), *receded from on other grounds in Pearson*, 555 U.S. 223. This Court has never decided that higher-education students have, as a matter of right, a protected liberty interest in continued enrollment in higher education. In *Goss*, this Court explained that a suspension depriving secondary school students of "legitimate claims of entitlement to a public education" under Ohio law could implicate a liberty interest if the suspension were "sustained and recorded" because it "could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment." 419 U.S. at 573–75 & n.7.

Petitioner nonetheless contends that *Goss*'s favorable citation in a footnote to *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150 (5th Cir. 1961)—which involved the expulsion of college students who had

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[9] Petitioner does not appear to contend that *Goss* gave rise to a clearly established property interest in continued enrollment for graduate students at public universities in California. See Pet. 29–31. Nor could she, as "California law remains unsettled" on this point (Pet. App. 4) and *Goss* itself explained that "[p]rotected interests in property * * * are created and their dimensions are defined by an independent source such as state statutes or rules entitling the citizen to certain benefits." *Goss*, 419 U.S. at 572–73 (quotation marks omitted).

attended a sit-in at a segregated lunch grill in Alabama—would have put reasonable university administrators on notice that the interim remedy imposed in this case pending further investigation implicated a liberty interest. Pet. 31.[10]

But that was not the case when this Court decided *Goss* and it was certainly not the case after this Court clarified in *Paul* that a liberty interest is not implicated without state action that "significantly alter[s] [the plaintiff's] status as a matter of state law * * * which, combined with the injury resulting from the defamation, justifie[s] the invocation of procedural safeguards." 424 U.S. at 708–09. As this Court explained in *Paul*, this requirement of stigma plus alteration of legal status was "quite consistent" with *Goss* because the suspension in that case "could seriously damage the student's reputation" and "the act of the school officials suspending the student there involved resulted in a denial or deprivation of" a right conferred upon all children to attend school under Ohio law. *Id.* at 710.

As Petitioner concedes, the Ninth Circuit has read *Paul* to "circumscribe[] the reach" of *Goss* on this issue

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[10] It bears mentioning that this argument was barely pressed or passed on in the district court and was not passed on at all by the Ninth Circuit. See Record (N.D. Cal.), Doc. 28 at p. 13:23–24 (citing *Dixon* just once in a parenthetical string-cite); Pet. App. 36 (same); *id.* 5–7 (no mention of *Dixon*); *id.* 24–25 n.6 (noting it was unclear whether Petitioner was even asserting a freestanding liberty interest claim). At oral argument, counsel for Petitioner even conceded that "counsel suggested that we are asking you to extend *Goss* and in a sense he's right." Record (CA9), Doc. 36 (Oral Arg. Video) at 40:10–41:03.

(Pet. 20), holding that the law is not clearly established as to put a reasonable official on notice that a college student's reputational injuries relating to charges of misconduct implicated a liberty interest in the absence of allegations that school officials "suspended or expelled her for her conduct, or that she was otherwise deprived of an entitlement to education conferred by the state or secured by some other independent source or understanding." *Krainski*, 616 F.3d at 971.

Accordingly, *Goss* could not possibly have placed the constitutional issue beyond doubt, and the district court and Ninth Circuit correctly concluded that Respondents were entitled to qualified immunity.

B. Petitioner next argues that the Ninth Circuit's reliance on this Court's stigma-plus test was wrong as a matter of law and public policy. Pet. 32–34.

As explained above, *Paul* quite clearly explained how the stigma-plus test was consistent with *Goss*, which involved a stigmatizing alteration of legal status under Ohio law. See *Paul*, 424 U.S. at 710. What is more, in describing the liberty interest implicated by the suspension, *Goss* itself cited this Court's decisions in *Wisconsin v. Constantineau*, 400 U.S. 433 (1971) and *Roth*, 408 U.S. 564—both of which emphasized the importance of a stigmatizing change in legal status. See *Constantineau*, 400 U.S. at 436–37 (liberty interest where publicly forbidden from purchasing alcoholic beverages within city limits); *Roth*, 408 U.S. at 573 (requiring "a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities").

Nor, contrary to Petitioner's assertions, do policy considerations warrant departing from the stigma-plus test here. Petitioner argues that suspensions and expulsions—neither of which are at issue here—are far more damaging than other contexts in which the stigma-plus test is applied, such as the termination of public employees. Pet. 32–34. In her view, terminated public employees "can presumably find other jobs" while "students may not be able to enroll in other degree programs and may be prevented from pursuing their chosen career paths." *Id.* 33–34.

Such speculation is unfounded. In developing the stigma-plus test, this Court recognized that, following a public disclosure of stigmatizing information, an employee will *not* be "as free as before to seek another" job. *Roth*, 408 U.S. at 575. Terminated public employees may even suffer more career damage than a disciplined student, not least because the adverse action may take place mid-career, rather than at its nascent stages when there is still ample time for correction. There is no basis in law or fact for courts to treat students who are temporarily prevented from attending classes pending an investigation any more favorably under the Due Process Clause.

C. Petitioner argues that the Ninth Circuit misapplied the "plus" element of the stigma-plus test, which requires a showing that state action changed a plaintiff's "legal status." *Paul*, 424 U.S. at 708; Pet. 34–35. Citing *Purdue Univ.*, 928 F.3d 652, Petitioner also cautions that to hold that the "plus" element is not satisfied here is to open a "rift with the Seventh Circuit." Pet. 34. Not so.

As an initial matter, it bears mentioning that the Seventh Circuit also held that the individual defendants were entitled to qualified immunity because "the relevant legal rule was not 'clearly established,' and a reasonable university officer would not have known at the time of [the plaintiff's] proceeding that her actions violated the Fourteenth Amendment." *Purdue Univ.*, 928 F.3d at 665–66.

Petitioner's argument also rests on the faulty premise that the interim remedy imposed here is the same as a suspension after a formal finding of responsibility. Pet. 34. The *Purdue* court found that the defendant university altered the plaintiff's legal status because the university "formally determined" that he was guilty of the alleged misconduct. *Purdue Univ.*, 928 F.3d at 662. The court expressly disavowed that "loss of reputation" is "itself a loss of liberty," even when it causes "serious impairment of one's future employment." *Id.* at 662 (quotation marks omitted). Rather, as the court explained, the school's formal "determination changed John's status: he went from a full-time student in good standing to one suspended for an academic year." *Id.* at 662. "[I]t was *this official determination of guilt, not the preceding charges or any accompanying rumors*, that allegedly deprived John of occupational liberty." *Id.* at 662–63 (emphasis added).

Here, unlike the plaintiff in *Purdue*, Doe was neither suspended nor found responsible for violating any university policies. The Ninth Circuit's decision is therefore entirely consistent with *Purdue*. *See* Pet. App. 5–6.

In any event, the question whether Petitioner has alleged a sufficient "plus" element is immaterial to the resolution of this case, as the Ninth Circuit also found that Petitioner failed to satisfy the "stigma" element given the lack of any public disclosure of the allegations of misconduct. Pet. App. 5. Petitioner does not dispute that the Ninth Circuit's reasoning is consistent with this Court's holdings in *Paul*, 424 U.S. at 708–10, and *Bishop v. Wood*, 426 U.S. 341, 348 (1976). Instead, Petitioner again falls back on policy arguments, dismissing the "stigma" element as unfair in this context. Pet. 35–36. For the reasons explained above, however, these arguments do not warrant carving out an exemption from the stigma-plus rule here.

D. Finally, after lamenting that decisions in the employment context have shaped procedural due process doctrine, Petitioner raises a novel legal argument *based on an employment case*. Pet. 36 (citing *Perry*, 408 U.S. at 601–02). The touchstone of this argument is that state law or contracts need not provide for a property interest to trigger the Due Process Clause because "mutual understanding" between students and their universities may also "bestow[] on students a property interest in their continued enrollment." *Id.* 37.

This argument runs headlong into the language of *Perry* itself, which explained that property interests "'are defined by existing rules or understandings that stem from an independent source such as state law'" before cautioning that "[i]f it is the law of Texas that a teacher in the respondent's position has no contractual or other claim to job tenure, the respondent's claim

would be defeated." *Perry*, 408 U.S. at 602 n.7 (quoting *Roth*, 408 U.S. at 577); see also *Goss*, 419 U.S. at 572–73 (citing *Roth* for the proposition that property rights protected by the Due Process Clause flow from "an independent source such as state statutes or rules"). Petitioner's novel theory thus seems to simply return to the contract-based property interest theory rejected by the lower court for its lack of support in state law. Pet. App. 5–6.

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As the Ninth Circuit correctly found, Petitioner cannot establish a liberty interest "clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply." Pet. App. 4 (quoting *Wesby*, 138 S. Ct. at 590). Nor has she put the existence of a property interest "beyond debate." Pet. App. 3 (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)). This Court's review of these fact-bound determinations is simply not warranted.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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