No. 21-860

IN THE
Supreme Court of the United States

JANE DOE,
Petitioner,
v.

TIMOTHY WHITE, *et al.*,
Respondents.

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

BRIEF *AMICUS CURIAE* OF THE NEW CIVIL LIBERTIES ALLIANCE IN SUPPORT OF PETITIONER

Richard A. Samp
(Counsel of Record)
Jenin Younes
Mark Chenoweth
New Civil Liberties Alliance
1225 19th St. NW, Suite 450
Washington, DC 20036
(202) 869-5210
rsamp@ncla.legal

February 18, 2022

QUESTIONS PRESENTED

1. Whether students at colleges and universities have, as a matter of right, liberty and property interests when facing suspension or expulsion, or whether they must make a particular showing to establish such interests.

2. Whether, given this Court's decades-old decision in *Goss v. Lopez*, 419 U.S. 565 (1975), that high school students facing suspension or expulsion possess liberty and property interests in continued enrollment that are protected under the Fourteenth Amendment's Due Process Clause, the law was "clearly established" that college and university students possess similar due process rights.

TABLE OF CONTENTS

Page

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases:

Page(s)

Statutes and Constitutional Provisions:

Miscellaneous:

Page(s)

INTERESTS OF *AMICUS CURIAE*

The New Civil Liberties Alliance (NCLA) is a non-partisan, nonprofit civil-rights organization devoted to defending constitutional freedoms from violations by the administrative state.[1] The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as jury trial, due process of law, the right to be tried in front of an impartial and independent judge, and the right to live under laws made by the nation's elected lawmakers through constitutionally prescribed channels. Yet these self-same rights are also very contemporary—and in dire need of renewed vindication—precisely because Congress, administrative agencies, and even sometimes the courts have neglected them for so long.

NCLA aims to defend civil liberties—primarily by asserting constitutional constraints on the administrative state. Although Americans still enjoy the shell of their Republic, there has developed within it a very different sort of government—a type, in fact, that the Constitution was designed to prevent. This unconstitutional administrative state within the Constitution's United States is the focus of NCLA's concern.

---

[1] Pursuant to Supreme Court Rule 37.6, NCLA states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than NCLA and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. On February 9, 2022, NCLA notified counsel for the parties of its intent to file. All parties have consented to the filing.

NCLA is particularly disturbed when, as here, an administrative body imposes punitive sanctions on individuals without affording them even the most basic of procedural protections. Petitioner was suspended for 14 months from enrollment in a public university based on charges eventually determined to be groundless. The university suspended her while it conducted an investigation, despite never having concluded that she engaged in sexual misconduct and despite a provision in its Title IX Policy requiring investigations to be completed within 60 working days.

The Ninth Circuit nonetheless dismissed Petitioners' claims, asserting that it is not "clearly established" that public universities are subject to due-process constraints when meting out severe punishment to their students. NCLA urges the Court to grant review for purposes of establishing beyond peradventure that public universities are subject to such constraints. The Court held in *Goss v. Lopez*, 419 U.S. 565 (1975), that students enrolled in public schools are entitled to some degree of due-process protections when threatened with suspension or expulsion, but the Ninth Circuit and several other federal appeals courts have not yet gotten that message.

NCLA is also concerned that many lower federal courts are too frequently evading a decision on important constitutional issues by jumping immediately to the second step of the qualified-immunity deliberative process: whether the constitutional right asserted by the plaintiff was clearly established at the time of the alleged misconduct. Such step-skipping can be justified in a

limited set of circumstances. But the Ninth Circuit's decision to engage in step-skipping was unwarranted here, particularly because the step-one question (whether university students facing suspension or expulsion are entitled to protection under the Due Process Clause) has evaded definitive resolution for so long.

STATEMENT OF THE CASE

In September 2016, Petitioner Jane Doe enrolled in a master's degree program in Depth Psychology at Sonoma State University, which is operated by the State of California. Three classmates (all female) complained about Doe's classroom conduct in April 2017 while they were participating in an exercise dubbed "Authentic Movement." They stated that Doe's movements (which they described as simulated masturbation) amounted to sexual harassment of her movement partner. The classroom instructor, on the other hand, said that Doe had done nothing wrong and that she had performed precisely the sort of "taboo" movements that the instructor had directed students to undertake.

Sonoma State's Title IX Coordinator, Defendant Joyce Suzuki, initiated an investigation of the classmates' complaint in May 2017. Pet. App.11. The investigation lasted 14 months, until Doe's eventual exoneration in August 2018. Throughout that period, the university never made any findings adverse to Doe. Nonetheless, university officials suspended Doe's enrollment at the university for the duration of the investigation as an "interim remedy." App.12. Sonoma State's Title IX policy required any sexual

misconduct investigation to be completed within 60 working days of the filing of the misconduct complaint (in this case, August 15, 2017) absent "an official extension of time." *Ibid*. But the investigation of the complaint against Doe (and her suspension) continued for 14 months despite the absence of "official" extensions and despite Doe's repeated inquiries regarding the status of the investigation.

Doe filed suit against several university officials in August 2019, alleging violation of her Fourteenth Amendment rights to procedural due process. The district court stated that Doe "raised serious questions about whether she was provided due process during the Title IX investigation and imposition of the [14-month suspension]." App.37-38 n.13. It nonetheless granted the defendants' motion to dismiss on qualified immunity grounds, holding that Doe "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." App.36.

The Ninth Circuit affirmed in an unpublished decision. App.1 - App.6. It held that "the district court correctly concluded that Doe has not alleged a deprivation of a clearly established property or liberty interest." App.2. The appeals court did not assert that any precedential Ninth Circuit decision had held that university students lack both a property interest and a liberty interest in continued enrollment. But it held that California law was sufficiently "unsettled" to permit a finding that Doe had alleged "deprivation of a clearly established property interest." App.4-5. Doe's liberty-interest allegations were insufficient to

satisfy the "stigma-plus" test that the court determined should be applied to those allegations. App.5. It held that "[d]amage to Doe's academic reputation is 'mere reputational injury,' which does not itself create a liberty interest." *Ibid.* (citation omitted). The appeals court added, "Because we conclude that Doe has not alleged a deprivation of a clearly established property or liberty interest, we need not decide whether the procedures employed by the University comported with due process." App.6.

SUMMARY OF ARGUMENT

The Petition raises issues of exceptional importance. As colleges and universities have begun to address more seriously the problem of student sexual misconduct, the number of students facing suspension and/or expulsion based on misconduct charges has grown rapidly. At the same time, as part of its efforts to enforce Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq*., the U.S. Department of Education has been pressuring schools to *reduce* the procedural protections afforded to the accused in a sexual-misconduct investigation—actions designed to ensure that victims are more willing to participate in those investigations. As a result, school investigators often deny the accused procedural protections that the Due Process Clause would require if the investigation were subject to due-process constraints.

But despite the many claims filed by accused students alleging violations of their due-process rights, and the conflicting resolutions of those claims issued by the federal appeals courts, this Court has never

directly addressed the application of the Due Process Clause to college and university disciplinary proceedings. Review is warranted to address this frequently recurring issue and resolve the deep and irreconcilable conflict among the courts of appeals.

The Petition thoroughly canvasses the breadth of that conflict. NCLA will not repeat those arguments here. Rather, NCLA writes separately to focus on qualified immunity and to explain why the Ninth Circuit's "not clearly established" finding should not deter the Court from addressing the underlying constitutional issue: whether the Due Process Clause entitles students at public colleges and universities to *some* level of procedural protections when they face suspension or expulsion from school.

The Court has mandated a two-step sequence for resolving a government official's qualified immunity defense. First, a court must decide whether the facts alleged make out a violation of a constitutional right. Second, if the plaintiff satisfies the first step, the court must decide whether the right at issue was "clearly established" at the time of the defendant's alleged misconduct. *See Saucier v. Katz*, 533 U.S. 194, 201 (2001). Qualified immunity requires dismissal of the claims unless the official's conduct violated a clearly established constitutional right. *Anderson v. Creighton*, 483 U.S. 635 (1987).

A court is not *required* to address step one of the qualified-immunity analysis before deciding the step-two issue. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). But *Pearson* explained that, for several reasons, it is "often beneficial" for courts to address

step one first. *Ibid*. Doing so "promotes the development of constitutional precedent and is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable." *Ibid*.

Those considerations are particularly apt here. Given the frequency with which procedural due-process claims of this sort have arisen in the past decade, there is a pressing need to establish a constitutional precedent regarding the applicability of the Due Process Clause to school disciplinary proceedings. And the issue almost always arises in the context of cases in which a qualified immunity defense is available—meaning that the underlying constitutional issue will never be definitively resolved if courts repeatedly declare that the claim has not been "clearly established" and dismiss it on that basis.

NCLA urges the Court to grant the Petition in order to review the underlying constitutional issue, without regard to the Court's views as to whether the rights asserted by Doe were "clearly established" in 2017-18. Doing so will permit the Court to resolve the long-standing conflict among the federal appeals courts regarding the scope of procedural due-process rights in the college and university setting.

Moreover, a decision in Doe's favor on that issue is very likely outcome-determinative. Doe has a strong argument that her rights to due-process protection were "clearly established" by the Court's 1975 *Goss* decision. *Goss* held that students at public high schools and middle schools possessed property and liberty interests in continued enrollment that entitled

them to due-process protections in connection with disciplinary proceedings that led to ten-day suspensions from school. Nothing in *Goss* suggests that the same protections should not also apply in the college and university context. While several federal appeals courts in other circuits have declined to apply *Goss* to students facing suspension/expulsion from a college or university, the Ninth Circuit had not addressed the issue before this case. Accordingly, a reasonable university administrator in California in 2017-18 would have realized, based on *Goss*, that a student charged with sexual misconduct possessed constitutional rights to at least some procedural protections before being suspended from her educational program for 14 months. In any event, final resolution of the underlying constitutional issue is sufficiently important that review of this case is warranted even if the Court questions whether the rights asserted were "clearly established."

REASONS FOR GRANTING THE PETITION

I. THE DUE-PROCESS RIGHTS OF COLLEGE AND UNIVERSITY STUDENTS WILL REMAIN UNRESOLVED INDEFINITELY UNLESS THE COURT GRANTS REVIEW

The Ninth Circuit did not directly address the underlying constitutional question at issue in this case: whether students at public colleges and universities possess either property or liberty interests in continued enrollment and thus qualify for protection under the Due Process Clause before being suspended or expelled from school. Instead of reaching that question, the appeals court held merely that Doe's claimed property

and liberty interests were not recognized under "clearly established" law—and thus that Respondents were entitled to dismissal of Doe's claims under the qualified-immunity doctrine.[2]

But unless the Court grants review, the underlying constitutional issue may *never* be resolved within many of the federal circuits. In the absence of review by this Court, the Ninth Circuit and other federal circuits can dispose of students' procedural due-process claims by deeming them "not clearly established" and thereby avoid addressing those claims directly. Review is warranted to provide both students and university administrators with sorely needed guidance regarding what procedural protections must be afforded students facing possible suspension or expulsion.

A. *Pearson* Does Not Endorse Step-Skipping Where, as Here, Constitutional Rights Require Elaboration

Before its 2009 decision in *Pearson*, the Court *mandated* that the requisites of a qualified immunity

---

[2] The Petition does not challenge the qualified-immunity doctrine's applicability to this case. But in a proper case, NCLA's urges the Court to reconsider whether the doctrine is properly applied to university officials alleged to have violated constitutional rights. The doctrine is frequently applied to protect police officers required to make split-second decisions in defense of public safety. But as Justice Thomas has pointed out, university officials are under no similar time constraints when they consider whether to extend basic due-process rights to students facing misconduct charges. *Hoggard v. Rhodes*, 141 S. Ct. 2421 (2021) (Thomas, J., respecting the denial of certiorari).

defense "be considered in proper sequence." *Saucier*, 533 U.S. at 200. That is, courts were directed to first consider whether the facts alleged made out a violation of a constitutional right. Only after determining that the plaintiff had stated a claim for a constitutional violation were courts authorized to proceed to step two: a determination of whether the claimed constitutional right was "clearly established" at the time of the alleged violation. *Id.* at 201. The Court concluded that this mandated sequence ensured the Constitution's "elaboration from case to case" and prevented constitutional stagnation. *Ibid.*

Pearson eliminated *Saucier*'s mandatory sequencing, reasoning that efficient use of resources in a qualified immunity case may on occasion warrant skipping over step one and proceeding directly to the step-two "clearly established" issue. 555 U.S. at 236-37 (noting that the *Saucier* procedure "sometimes results in a substantial expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case"). The Court took pains to emphasize, however, that it endorsed *Saucier*'s analysis regarding the importance of determining whether the act complained of violated a constitutional right:

> [T]he *Saucier* Court was *certainly correct* in noting that the two-step procedure promotes the development of constitutional precedent and is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable.

Id. at 236 (emphasis added).

Although holding that the two-step *Saucier* procedure is not always the best formula, it said that the protocol is "often ... advantageous[.]" *Id*. at 242. The *Pearson* Court stood by the principle that the first step "is necessary to support the Constitution's elaboration from case to case." *Id*. at 232. It favorably quoted *Saucier*'s observation that without the first step, "[t]he law might be deprived of this explanation were a court simply to skip ahead." *Ibid*. Thus, while no longer requiring a rigid sequential analysis in every qualified-immunity decision, *Pearson* reaffirmed that *Saucier*'s sequencing "is often appropriate" and "often beneficial." *Id*. at 236.

Pearson strongly suggests that step-skipping is inappropriate in this case. Nearly 50 years ago, this Court decided *Goss*, which held that students in public high schools and middle schools are entitled to due-process protections when facing suspensions or expulsions and implied that the same constitutional principles applied to students at public colleges and universities. Yet the law has stagnated in the Ninth Circuit ever since. Although college and university students have asserted on many occasions that *Goss* applies to them, the Ninth Circuit has never decided that issue directly. Instead, its usual response (as here) is to duck the constitutional issue by holding that the asserted constitutional right is not "clearly established."

The Court recently recognized that repeated step-skipping can end up as an endless loop that

"threatens to leave standards of official conduct permanently in limbo." *Camreta v. Greene*, 563 U.S. 692, 706 (2011). As Justice Kagan's opinion for the Court explained:

> Consider a plausible but unsettled constitutional claim asserted against a government official in a suit for money damages. The court does not resolve the claim because the official has immunity. He thus persists in the challenged practice; he knows that he can avoid liability in any future damages action, because the law has still not been clearly established. Another plaintiff brings suit, and another court both awards immunity and bypasses the claim. And again, and again, and again. Courts fail to clarify uncertain questions, fail to address novel claims, fail to give guidance to officials about how to comply with legal requirements. ... Qualified immunity thus may frustrate "the development of constitutional precedent" and the promotion of law-abiding behavior.

Ibid. (quoting *Pearson*, 555 U.S. at 237).

There is no serious question that the appeals courts are in irrevocable conflict over whether *Goss* applies in the college and university setting. This Court should not persist in step-skipping on this issue by permitting concerns about whether *Goss*'s application was "clearly established" to prevent it from granting review and resolving the conflict over the

underlying constitutional issue. As explained *infra*, the evidence suggests that *Goss*'s application to colleges and universities was indeed "clearly established." But any doubts the Court may harbor on that score should not deter it from granting review on both of the Questions Presented—thereby ending a half-century of constitutional stagnation.

Moreover, college-student due-process cases are unique because, unlike in other types of 42 U.S.C. § 1983 cases, there is little likelihood here that the underlying constitutional issue can be resolved in a case arising outside the qualified-immunity context. As *Pearson* explained, "Most of the constitutional issues that are presented in § 1983 damages actions and *Bivens* cases also arise in cases in which that defense is not available, such as criminal cases and § 1983 cases against a municipality." 555 U.S. at 822. But college-student due-process cases almost always involve schools operated by a state government, not a municipality. Suits against a State are barred by the Eleventh Amendment, while suits against college administrators are always subject to a qualified immunity defense. Insisting on orderly resolution of *both* qualified-immunity steps "is especially valuable with respect to questions that [as here] do not frequently arise in cases in which a qualified immunity defense in unavailable." *Id.* at 236.

B. Doe's Right to Due-Process Protection Was "Clearly Established" at the Time of Respondents' Alleged Misconduct

Review is also warranted because the Ninth Circuit misinterpreted existing case law; not only was

Doe entitled to due-process protection but her right was "clearly established."

The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." At issue here is whether Respondents, by suspending Doe for 14 months from the graduate program in which she was enrolled, deprived her of either a "liberty" interest or a "property" interest. If so, then Doe was entitled to the process due under the Due Process Clause.

Goss held that the Appellees, students enrolled at public high schools and middle schools, possessed both property and liberty interests in continued enrollment, 419 U.S. at 576, and that Appellants violated their due-process rights by suspending them for ten days without "some kind of hearing." *Id.* at 579. The Court's property-interest and liberty-interest findings were sufficiently broad that they have come to be understood to apply to *all* public elementary and secondary education, not simply to the Appellees' school district.

Moreover, *Goss*'s liberty-interest finding is sufficiently broad that it logically applies to *all* public education, including college- and graduate-level programs. The Court explained its finding as follows:

> The Due Process Clause also forbids arbitrary deprivations of liberty. "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him," the minimal requirements of the Clause must

> be satisfied. ... School authorities here suspended appellees from school for periods up to ten days based on charges of misconduct. If sustained and recorded, those charges 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 574-75 (quoting *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971)).

Those justifications are equally applicable to colleges and universities. Doe's "good name, reputation, honor, or integrity" were clearly at stake when Respondents suspended her from her graduate program for 14 *months*—not a mere ten days—based on sexual misconduct charges, and she plausibly alleges that the suspension "seriously damage[d] [her] standing with [her] fellow pupils and [her] teachers" and "interfere[d] with later opportunities for higher education and employment." At a minimum, the suspension delayed her post-graduation entry into the workforce.

For a constitutional right to be "clearly established," its contours "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Hope v. Pelzer*, 536 US. 730, 739 (2002). But that standard does not require that a factually identical case has recognized the constitutional right. *Id.* at 741 (stating that "officials can still be on notice that their conduct violates established law even in novel factual circumstances").

Officials have received the requisite "fair warning" if a "general constitutional rule already identified in the decisional law ... appl[ies] with obvious clarity to the specific conduct in question, even though the very action in question has [not] previously been held unlawful." *Ibid*. (quoting *United States v. Lanier*, 520 U.S. 259, 270-71 (1997)). The contours of the liberty interest recognized in *Goss* were identified with sufficient clarity that any reasonable university administrator should recognize that a student facing suspension from a public college or university enjoys those same liberty interests.

The Ninth Circuit held that in order to establish a protected liberty interest, Doe needed to satisfy its "stigma-plus" test, which requires a showing of something more than reputational injury. App.5. But even assuming that the stigma-plus test applies here, Doe easily satisfies it. She suffered far more than reputational injuries; she was also suspended from her educational program for 14 months.

If an university administrator works within one of the circuits that has adopted a more limited understanding of *Goss*, she could plausibly argue that she reasonably relied on one of those circuit precedents in concluding that *Goss* is inapplicable to colleges and universities. But no precedential Ninth Circuit case law adopts a limiting construction of *Goss*. *Kainski v. Nevada ex rel. Board of Regents*, 616 F.3d 963 (9th Cir. 2020), one of the decisions cited by the court below, is inapposite. Although it involved university disciplinary proceedings, suspension of the accused student was never at issue. *Id.* at 971 (stating that the appellant "does not allege that the UNLV Employees

suspended or expelled her for her conduct, or that she was otherwise deprived of an education conferred by the state"). One nonprecedential Ninth Circuit decision suggests that *Goss* applies to colleges and universities, *Lucey v. Nevada ex rel. Board of Regents*, 380 Fed. Appx. 608 (9th Cir. May 21, 2010), while a nonprecedential Ninth Circuit decision issued after the events of this case appeared to reach the opposite conclusion. *Schwake v. Arizona Board of Regents*, 821 Fed. Appx. 768 (9th Cir. July 29, 2020).[3] In sum, Respondents cannot plausibly contend that they reasonably relied on Ninth Circuit case law to disregard *Goss*'s fair warning that Doe was entitled to due-process protections, including at least some kind of hearing, before being suspended for 14 months.

Indeed, *Goss*'s recognition that due process requires the government to provide a hearing before imposing the severe sanction of a school suspension can hardly be said to have broken new ground. This Court declared more than a century ago that "[t]he fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). The Court later held that "at a minimum" the Due Process Clause "require[s] that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313 (1950). The impropriety of suspending students indefinitely

[3] Ninth Circuit Rule 36-3(a) states unequivocally that "[u]npublished dispositions and orders of this Court are not precedent."

before they are fully investigated has been well recognized at least since Lewis Carroll mocked the practice in *Alice's Adventures in Wonderland* (1865), when the Queen of Hearts declared, "Sentence first—verdict afterwards."

II. UNIVERSITY TRIBUNALS THROUGHOUT THE COUNTRY ARE DENYING STUDENTS BASIC PROCEDURAL RIGHTS IN DISCIPLINARY PROCEEDINGS

Doe's predicament is hardly unique. Colleges and universities throughout the country have been conducting disciplinary proceedings (particularly proceedings involving alleged sexual misconduct) in which students receive few if any of the procedural protections available in courts of law. Many of those students have filed lawsuits alleging that the truncated proceedings violate their procedural rights under the Due Process Clause. *See, e.g.*, Tamara Rice Lave, *Ready, Fire, Aim: How Universities Are Failing the Constitution in Sexual Assault Cases*, 48 Ariz. St. L.J. 637 (2016). Review is also warranted in light of the large number of litigants whose claims depend on resolution of the questions presented here.

The decisions of so many colleges to limit the procedural rights of students accused of sexual misconduct were largely a response to pressure from the U.S. Department of Education ("ED"), which has concluded that granting extensive procedural rights to the accused interferes with the Title IX rights of the victims of sexual misconduct. Review is particularly warranted to determine whether ED's efforts to limit procedural rights come into conflict with the due-

process rights of those accused of misconduct.

ED's pressure campaign began more than a decade ago. Responding to a perceived failure of universities and colleges to adequately respond to large numbers of campus sexual assaults, in 2011 ED's Office for Civil Rights ("OCR"), sent a "Dear Colleague" letter to Title IX officers at institutions of higher education throughout the United States. *See* Letter from Russlyn Ali, Assistant Secretary for Civil Rights (April 4, 2011) ["Dear Colleague Letter"], *available at* https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf (last visited Feb. 15, 2022).[4] The Letter asserted that sexual violence constitutes a form of discrimination for Title IX purposes, a position first asserted by Guidance documents issued during the Clinton Administration.

The Dear Colleague Letter asserted that many colleges and universities had failed to abide by their

---

[4] ED's enforcement level has varied as Administrations have changed. The Trump Administration rescinded the Dear Colleague Letter in 2017. The Biden Administration has announced that it intends to propose new Guidance by April 2022 that will likely emulate Obama-era policies, including the Dear Colleague Letter. *See* Emily Tulloch, *et al.*, *Biden Administration to Propose New Title IX Rules by April 2022*, TITLE IX INSIGHTS (Dec. 14, 2021), *available at* https://www.titleixinsights.com/2021/12/biden-administration-to-propose-new-title-ix-rules-by-April-2022/#more-2519 (last visited Feb. 15, 2022); GianCarlo Canaparo, *The "Prisoner's Dilemma" in Biden's Title IX Policies*, THE HERITAGE FOUNDATION (Oct. 26, 2021), *available at* https://www.heritage.org/crime-and-justice/commentary/the-prisoners-dilemma-bidens-title-ix-policies (last visited Feb. 16, 2022).

Title IX obligations, as evidenced by the pervasiveness of sexual assault on campus. *Id.* at 16. According to OCR, to be in compliance with Title IX and retain federal funding, institutions of higher education should minimize due process protections for those accused of sexual misconduct throughout any investigation and hearing process. *Id.* OCR recommended, *inter alia*, that during any hearing conducted pursuant to a campus assault allegation, the burden of proof be reduced to preponderance of the evidence, cross-examination be prohibited, and the accused be denied access to the complainant's statement, unless she is permitted to review his as well. *Id.*

OCR emphasized that implementation of its recommendations should be given top priority and warned schools that their federal funding was at risk if they failed to demonstrate that they were vigorously investigating and punishing sexual misconduct. *See Doe v. Purdue University*, 928 F.3d 652, 668 (7th Cir. 2019). *See also* Examining Sexual Assault on Campus, Focusing on Working to Ensure Student Safety, Hearing Before the S. Comm. on Health, Educ., Labor, and Pensions, 113th Cong. 7 (2014) (statement of Catherine Lhamon, Assistant Secretary for Civil Rights, U.S. Dep't of Educ.) ("[S]ome schools still are failing their students by responding inadequately to sexual assaults on campus. For those schools, my office and this Administration have made it clear that the time for delay is over.").

The Dear Colleague Letter had the effect on university policy intended by ED. The Letter "ushered in a more rigorous approach to campus sexual misconduct allegations." *Purdue University*, 928 F.3d

at 668. OCR began aggressively investigating large numbers of institutions for alleged Title IX violations. Many universities relaxed protections for the accused out of fear that their federal funding could be rescinded. *See* Samantha Harris and K.C. Johnson, *Campus Courts in Court: The Rise in Judicial Involvement in Campus Sexual Misconduct Adjudications*, 22 Legislation and Public Policy 49, 51, 58, 64 (2019) ("With federal funds at stake, the same financial pressures that lead some universities to sweep accusations of sexual assault under the rug can lead others to abandon basic fairness for those accused of the offense[.]").

A survey conducted in 2016 found that *all fifty* state flagship universities had, by then, implemented a preponderance-of-the-evidence standard, a change many concluded was prompted by the Dear Colleague Letter. *See* Lave, *Ready, Fire, Aim* at 656. *See also* Harris, *Campus Courts* at 58 (by 2016, all 100 of the nation's top institutions of higher education had adopted the preponderance-of-the-evidence standard). Likewise, in 2017, about 60 percent of colleges and universities denied students in sexual misconduct proceedings a meaningful right to cross-examine their accusers, a decrease in procedural protections widely viewed as directly attributable to OCR's threatened Title IX enforcement activity. Harris, *Campus Courts* at 60.

Not surprisingly, the elimination of procedural protections afforded to students accused of sexual misconduct has been accompanied by a significant increase in the number of state and federal lawsuits filed against universities by students claiming that

they were subjected to unfair sexual-misconduct proceedings. The volume of that due-process litigation rose dramatically, beginning around 2013. Harris, *Campus Courts* at 66. Many of those claims were successful; of the 298 substantive decisions resulting from these challenges, colleges and universities have been on the losing side in 151 and have prevailed in 134 (the remaining decisions are neutral, mixed, or sealed). *Id.*

Knowledgeable observers have characterized universities' success rate in litigation as unusually low and have viewed it as an indication that universities have gone too far in reducing procedural protections afforded to students accused of sexual misconduct. A longtime educational consultant and fellow for the National Association of College and University Attorneys remarked: "In over 10 years of reviewing higher education law cases, I've never seen such a string of legal setbacks for universities, both public and private, in student conduct cases. Something is going seriously wrong." Jake New, *Out of Balance*, INSIDE HIGHER ED (Apr. 14, 2016), *available at* https://www.insidehighered.com/news/2016/04/14/several-students-win-recent-lawsuits-against-colleges-punished-them-sexual-assault (last visited Feb. 15, 2022). A firm that regularly consults with colleges on sexual-assault issues concluded that universities are "losing case after case in federal court on what should be very basic due process protections. Never before have colleges been losing more cases than they are winning[.]" *See* Harris, *Campus Courts* at 65.

Retired federal judge (and former Harvard Law School Professor) Nancy Gertner observed that "the

new standard of proof, coupled with the media pressure, effectively create[d] a presumption in favor of the woman complainant. If you find against her, you will see yourself on 60 Minutes or in an OCR investigation where your funding is at risk. If you find for her, no one is likely to complain." Nancy Gertner, *Sex, Lies, and Justice*, AM. PROSPECT (Jan. 12, 2015), *available at* https://prospect.org/justice/sex-lies-justice/ (last visited Feb. 15, 2022) (detailing paucity of due process protections in Harvard's investigation and hearing procedures).

Colleges are being hit from both sides. They face funding cut-offs from ED unless they reduce procedural protections afforded to students accused of sexual misconduct, but they face lawsuits from those accused students who assert that reductions in procedural protections violate their rights under the Due Process Clause. Both colleges and the numerous students whose procedural rights have been reduced would be well served if the Court grants review and ultimately provides guidance regarding whether the due-process principles set out in *Goss* apply to the college/university setting as well.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

Richard A. Samp
(Counsel of Record)
Jenin Younes
Mark Chenoweth
NEW CIVIL LIBERTIES ALLIANCE
1225 19th St. NW, Suite 450
Washington, DC 20036
(202) 869-5210
rich.samp@ncla.legal

Dated: February 18, 2022