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

REPLY BRIEF FOR PETITIONER

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The courts of appeals are sharply divided over what university students must plead to establish constitutionally protected liberty or property interests in their continued enrollment. Students in Texas, for example, have an unquestioned liberty interest, whereas students in California do not and must satisfy the exacting "stigma-plus" test just to get past the courthouse steps. Respondents' contention that there is at most a "cosmetic" split among the circuits is simply wrong. And indeed, it is precisely the opposite of what Respondents told the Ninth Circuit, when they represented that the courts of appeals are "all over the map" on this issue. Record (CA9) Doc. 11 at 1.

Respondents' insistence that this case is a "poor vehicle" for adjudicating the questions presented fares no better than their attempts to harmonize splintered circuit rulings. The constitutional issues were fully briefed below and the Ninth Circuit addressed them. In addition, this case does not turn on any unique facts or circumstances that could skew this Court's analysis. Doe was suspended for 14 months without a hearing, and missed the entire second year of her master's program. The fact that this occurred while Sonoma State investigated the sexual-harassment allegations against her, rather than after a final determination of guilt, is a distinction without a difference. The requirements of notice and an opportunity to be heard exist any time a student is faced with a lengthy suspension.

The decades-old decision by this Court in *Goss v. Lopez*, 419 U.S. 565 (1975), and the "landmark"

decision in *Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961) (on which *Goss* relied) show that Doe had a clearly established liberty interest in her continued enrollment. Many circuits accept that no reasonable university administrator could have concluded that a student could be suspended for her entire second year of graduate study without a meaningful hearing. Yet the Ninth Circuit held otherwise.

Respondents do not dispute that the lower courts are increasingly being asked to adjudicate whether public universities have provided constitutionally adequate due process before suspending or expelling their students. The time has come for this Court to clarify that university students have liberty and property interests—as a matter of right—in their educations, and are not required to show any special facts to establish those interests.

I. The decisions of the courts of appeals reflect a substantial conflict—not merely a "cosmetic" one.

1. *Liberty interest.* Respondents contend that the First, Fifth, and Sixth Circuits do not recognize a liberty interest as a matter of right, but have sidestepped that question and decided the cases before them on other grounds. That is not correct. These courts have not "assumed without deciding" the existence of a constitutionally protected interest, as this Court did in *Board of Curators of the University of Missouri v. Horowitz*, 435 U.S. 78, 84-85 (1978), and *Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 223 (1985). Instead, these circuits have

unambiguously announced that university students have a liberty interest as a matter of right; unlike their sister circuits, these courts have not subjected plaintiffs to any special requirements. *See, e.g., Gorman v. Univ. of Rhode Island*, 837 F.2d 7 (1st Cir. 1988); *Plummer v. Univ. of Houston*, 860 F.3d 767 (5th Cir. 2017); *Flaim v. Medical College of Ohio*, 418 F.3d 629 (6th Cir. 2005).

The Sixth Circuit, for example, has held in three cases that the plaintiffs adequately alleged that challenged disciplinary procedures fell below the constitutional minimum. *See Doe v. Miami Univ.*, 882 F.3d 579 (6th Cir. 2018); *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018); *Doe v. Univ. of Cincinnati*, 872 F.3d 393 (6th Cir. 2017). Permitting the plaintiffs to litigate the merits of their due-process claims would have been pointless if a constitutionally protected interest was not at stake—if the answer to the threshold liberty or property question is "no," the disciplinary procedures are not required to comply with the Due Process Clause. The Sixth Circuit has thus not avoided the threshold constitutional question, but has decided it in plaintiffs' favor by concluding that a protected interest is *inherently* at stake in university disciplinary proceedings. *Baum*, 903 F.3d at 582 ("Time and again, this circuit has reiterated that students have a substantial interest at stake when it comes to school disciplinary hearings for sexual misconduct."). Students in the Sixth Circuit thus do not need to allege any particular facts to establish a threshold liberty interest.

The decisions of the First and Fifth Circuits likewise do not reflect mere "constitutional avoidance" (or "generalized pronouncements"). BIO 10. The First Circuit has unequivocally declared that it is "not questioned that a student's interest in pursuing an education is included within the [F]ourteenth [A]mendment's protection of liberty and property." *Gorman*, 837 F.2d at 12. The First Circuit's extensive reliance on *Goss* and *Dixon*—two cases that expressly recognize a liberty interest in education (*Goss* in the high-school context and *Dixon* in the university context)—buttress its holding that a liberty interest is necessarily at stake in university disciplinary proceedings. The Fifth Circuit also relied on *Dixon*, as well as the Sixth Circuit's decision in *Doe v. Cummins*, 662 F. Appx. 437, 446 (6th Cir. 2016), to reaffirm that students have a liberty interest in their university education.[1] *Plummer*, 860 F.3d at 773. *Gorman* and *Plummer* could have "assumed without deciding" that the threshold liberty or property question was satisfied, but that is plainly not what they did. They instead addressed the threshold issue, concluding the plaintiffs had a liberty interest as a matter of right.

Respondents claim that the decisions of the First, Fifth, and Sixth Circuits are consistent with the stigma-plus test employed by the Seventh, Ninth, and Tenth Circuits. This too is incorrect. The decisions of

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[1] As Respondents note, *Plummer* also cited a Texas Supreme Court case holding that university students have a liberty interest under the Texas Constitution. Significantly, that case relied on *Goss* and *Dixon*. *Univ. of Texas Medical Sch. v. Than*, 901 S.W.2d 926, 929-30 (Tex. 1995).

the former circuits do not cite *Paul v. Davis*, 424 U.S. 693 (1976), or the stigma-plus test, nor do they undertake any analysis of the elements of that test.

Despite these omissions, Respondents argue that as long as what's at issue is a university's final determination of guilt (as was true in the First, Fifth, and Sixth Circuit decisions), the stigma-plus test is automatically satisfied because a guilty finding constitutes an "alteration of legal status," *Paul*, 424 U.S. at 708-09, whereas what Respondents label the "interim" suspension here does not. But drawing a due-process line between lengthy suspensions imposed without a hearing during an investigation and lengthy suspensions imposed without a hearing after guilty findings is unsupportable. The impact on the student is the same.

2. *Property interest.* The courts of appeals are also divided about whether university students have a property interest as a matter of right in their continued enrollment, or whether state or contract law must bestow a property right. Respondents contend that the First and Sixth Circuits' decisions were predicated on a state property interest, reasoning that the universities at issue were all located in states that recognize a property interest in higher education. But there is no discussion of state law in those cases. Instead, they hold that students have, as a matter of right—not state-specific law—a property interest in their continued enrollment. *See Haidak v. Univ. of Mass.*, 933 F.3d 56, 65 (1st Cir. 2019); *Miami Univ.*, 882 F.3d at 599 ("Suspension clearly implicates a protected property interest . . . .").

II. The law was clearly established by *Goss*.

In arguing there was no clearly established law at the time of Doe's suspension, Respondents blur *Goss*'s discussion of the liberty and property interests. BIO 30. They argue that the existence of a liberty interest turned on state law, but *Goss* looked to state law only to determine whether the students had a property interest. 419 U.S. at 573-74. *Goss* additionally held the students had an inherent liberty interest without regard to state law. *Id*. at 574-75.

Respondents also assert that *Paul* later clarified that the liberty interest described in *Goss* was not inherent. BIO 30-31. But *Paul* did not affect *Goss*'s holding that students facing suspensions and expulsions have protected liberty interests, because *Paul*'s stigma-plus test did not arise out of a university disciplinary case. Based on the longstanding decisions in *Goss* and *Dixon*, a reasonable university administrator would have known that she could not suspend Doe for 14 months without providing Doe any opportunity to confront the evidence and witnesses against her.[2]

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[2] Respondents note that the Ninth Circuit did not address whether the law was clearly established by *Goss* and *Dixon*, BIO 31 n.10, but do not dispute that Doe argued that point extensively. *See* Record (CA9), Doc. 5 at 14-15, 33-43 & n.22; Doc. 20 at 2, 5 & n.4, 14. And while Doe's counsel referred at oral argument to "extend[ing] *Goss* . . . in a sense," that was in the context of the property interest, before he addressed the liberty interest described by *Goss* and *Dixon*. Counsel argued that "you don't need to reach the issue of California state law" because plaintiff "has plausibly alleged a constitutionally protected liberty interest . . . ." Doc. 36 (Oral Argument Video) at 40:08-41:22.

III. This case is an excellent vehicle to resolve the circuit split.

Respondents contend this is an "unusual" case involving a "relatively distinct fact pattern." BIO 21, 25. Not so. While there inevitably are factual variations in any due-process case, none of the facts Respondents point to here would hinder this Court from answering the questions presented.

To begin with, Respondents' efforts to minimize what happened to Doe are unavailing. They claim that the 14 months during which she was prohibited from attending classes—comprising the entire second year of her two-year master's program—did not constitute a "suspension," but merely an "interim measure." BIO 24. Sonoma State cannot evade the requirements of the Due Process Clause by using artful terminology to characterize Doe's prolonged exclusion from "all the benefits of being enrolled at a university." *Haidak*, 933 F.3d at 56; *Univ. of Cincinnati*, 872 F.3d at 396 ("The Due Process Clause guarantees fundamental fairness to state university students facing long-term exclusion from the educational process."). Doe's 14-month suspension was as long, and even longer, than the suspensions imposed in several cases following guilty findings. *See, e.g., Miami Univ.*, 882 F.3d at 584 (four-month suspension); *Univ. of Cincinnati*, 872 F.3d at 396 (one-year suspension); *Doe v. Purdue Univ.*, 928 F.3d 652, 656 (7th Cir. 2019) (academic-year suspension). Indeed, the district court regarded the length of Doe's suspension as "unsettling" and "appalling" and Ninth Circuit Judge Friedland was equally aghast. Pet. App. 37-38 n.13; Record (CA9),

Doc. 6 at ER 57; Doc. 36 (Oral Argument Video) at 24:40-25:00.[3] Contrary to Respondents' suggestion, the Due Process Clause does not permit universities to impose lengthy suspensions during the pendency of their investigations without affording students any meaningful due process simply by calling those suspensions "interim." *See Haidak*, 933 F.3d at 72 (holding that a five-month suspension pending expulsion without a hearing violated the Due Process Clause).

Next, there is no merit to Respondents' argument that this Court's review is unwarranted because Doe received all the process she was due. BIO 23-24. Before her 14-month suspension, Doe had a right to a meaningful hearing. Instead, she was granted a single interview.[4] Quoting *Goss*, Respondents claim that an "'informal give-and-take'" is sufficient, BIO 23, but *Goss* made that comment in the context of suspensions of ten days or less. 419 U.S. at 581. *Goss* explained that "as a general rule notice and hearing should precede removal of the student from school," *id*. at 582, and it

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[3] Respondents make excuses for their "inordinately lengthy investigation" (in the words of the district court). Pet. App. 38 n.13. They note that the investigation was passed among three Title IX investigators. The reasons for the delay are irrelevant. The fact remains that Doe was excluded from the entire second year of her graduate program.

[4] The interview was in July 2017, but Doe was not given the evidence to review until June 2018. Moreover, the investigator told Doe at the interview that she could return to class when school resumed the following month. A short time later, the investigator backtracked and told Doe she was prohibited from returning to class. Pet. App. 12-14.

specifically stated that "[l]onger suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures." *Id*. at 584. The investigative interview conducted by Sonoma State before Doe's suspension may be many things, but it was decidedly not a hearing.[5]

Respondents also argue that granting the petition would require this Court to "write on a blank slate" by ruling on questions the lower courts did not. BIO 21. That is not accurate; the lower courts extensively addressed the constitutional questions. The Ninth Circuit discussed when liberty and property interests arise and expressly concluded Doe had not adequately pleaded a protected liberty interest because she had not satisfied the "stigma-plus" test, Pet. App. 5-6, in conflict with the circuits that hold students have an inherent liberty interest. The Ninth Circuit also stated that a property interest must be conferred by state law, Pet. App. 3, in conflict with the circuits that hold students have an inherent property interest. Similarly, the district court "extensively surveyed the case law both within and outside the Ninth Circuit," as Respondents concede. BIO 6. And Doe thoroughly briefed her argument that she has both a protected liberty and property interest in her continued enrollment. Record (CA9), Doc. 5 at 14-15, 23-27; Doc. 20 at 3-4, 15-16.

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[5] The Ninth Circuit did not reach the question of whether Doe received the hearing due process requires (she did not), and that question is not before this Court. The Court is thus not called upon to describe precisely what a meaningful hearing includes.

There is thus nothing unique or unusual about this case that warrants denying the petition. Indeed, addressing the constitutional questions—which have divided the circuits for decades—is "beneficial to clarify the legal standards governing public officials." *Camreta v. Greene*, 563 U.S. 692, 707 (2011). Otherwise, the constitutional issues will continue to vex the federal courts. *Id.* at 706.

Respondents invoke inapposite statutes and regulations as reasons for denying review. They argue that recent changes to Title IX regulations have provided greater protections to students accused of sexual harassment. BIO 27. That may be, but regulations can, and do, change with successive administrations. In fact, the current administration intends to issue a notice of proposed rulemaking by April 2022.[6] Without this Court's direction as to whether due-process protections apply, the regulations will continue to fluctuate with each administration.

Respondents next say this Court's intervention is unnecessary because the Ninth Circuit has clarified the pleading standard for a Title IX claim. BIO 26. That has no bearing here, however, because Doe pleaded only a constitutional due-process claim, not a Title IX claim.

Finally, they point to California Code of Civil Procedure § 1094.5, but that statute is irrelevant

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[6] *See* https://www.ed.gov/news/press-releases/statement-us-department-education-assistant-secretary-office-civil-rights-catherine-lhamon-title-ix-update-fall-2021-unified-agenda-and-regulatory-plan (Dec. 10, 2021).

because it is "not constitutional in dimension." BIO 28. In addition, it governs review of final decisions by administrative bodies, but Doe does not challenge the final decision that found her innocent.

IV. The Ninth Circuit's decision is wrong.

The Ninth Circuit's embrace of the stigma-plus test in the context of university disciplinary proceedings should be rejected. That test emerged from the distinct factual context of *Paul* and, although this Court had the opportunity to apply it to university disciplinary proceedings in *Horowitz*, it did not do so. Respondents have no answer for why *Paul*'s stigma-plus test should be extended to university disciplinary proceedings, especially when such proceedings threaten not just students' reputations, but their future prospects of every sort. In *Purdue*, for example, John Doe's military career was ruined. 928 F.3d at 656. A protracted inability to continue with one's studies in pursuit of a degree is not just a temporary setback—it has life-long ramifications.

Even if the stigma-plus test applies, the Ninth Circuit's application of it is at odds with the Seventh Circuit's application in *Purdue*. Both Jane Doe here and John Doe in *Purdue* were subjected to year-long suspensions. While the Seventh Circuit regarded John's suspension as a change in legal status sufficient to satisfy the "plus" element of the stigma-plus test, the Ninth Circuit regarded Jane's identical suspension as insufficient to meet this element. Respondents claim that this contradiction is explained by the fact that John was suspended after being found guilty, while Jane's suspension occurred before a final decision had

been reached. In support, Respondents rely on *Purdue*'s statement that "[i]t was this official determination of guilt" that "allegedly deprived John of occupational liberty." BIO 34 (quoting 928 F.3d at 662-63). But *Purdue* does not require a final determination to satisfy the stigma-plus test. The decision simply states that in John's particular case, it was the "official determination of guilt," not "the charges" against him or "any accompanying rumors" that satisfied the test. *Id.*

Here, Jane Doe is not complaining that the charges against her or any rumors implicated a protected liberty or property interest, but rather her 14-month suspension did. Just as in *Purdue*, Sonoma State's "determination changed [Jane Doe's] status; [s]he went from a full-time student in good standing to one suspended for an academic year." *Id.* at 662.

CONCLUSION

Absent this Court's intervention, the circuit split will fester, leaving students at public universities in different parts of the country with different rights. This issue has percolated long enough. The Court should grant the petition.

Respectfully submitted,

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