No. 22-1002

In the
Supreme Court of the United States

AUSTIN VAN OVERDAM,
Petitioner,

v.

TEXAS A&M UNIVERSITY, ET AL.,
Respondents.

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

BRIEF OF *AMICUS CURIAE* STOP ABUSIVE AND VIOLENT ENVIRONMENTS IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

Established in 2008, *amicus curiae* Stop Abusive and Violent Environments ("SAVE") is a 501(c)(3) non-profit, DBA entity of the Center for Prosecutor Integrity and leader in the national movement to assure fairness and due process on college campuses. In recent years, SAVE has identified numerous cases in which complainants were mistreated by campus Title IX procedures;[2] published six Special Reports;[3] commented on the current Title IX Regulations;[4] coordinated a Due Process Statement signed by nearly 300 leading law professors and other interested parties;[5] sponsored an interactive spreadsheet of lawsuits against

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[1] No party or their counsel drafted any part of this brief. Apart from SAVE, no person or entity funded the preparation and submission of this brief. Parties received timely notice of the intent to file this brief.

[2] *Victims Deserve Better: Complainants*, SAVE.ORG, http://www.saveservices.org/sexual-assault/victims-deserve-better/ (last visited May 9, 2023).

[3] *Special Reports*, SAVE.ORG, http://www.saveservices.org/reports/ (last visited May 9, 2023).

[4] *Proposed Title IX Regulations Target Sex Bias on College Campuses*, SAVE.ORG, (Jan. 24, 2019), http://www.saveservices.org/2019/01/proposed-title-ix-regulations-target-sex-bias-on-college-campuses/

[5] *Statement in Support of Due Process in Campus Disciplinary Proceedings*, SAVE.ORG, (November 29, 2018), http://www.saveservices.org/wp-content/uploads/Due-Process-Statement-11.29.2018.pdf.

universities;[6] compiled information on the due process violations of faculty members;[7] published a comprehensive analysis of the current Title IX Regulations and the overwhelming weight of judicial authority supporting the Regulations;[8] and more.[9]

The undersigned firm was retained by SAVE to draft and file this *amicus* brief. The brief was specifically authorized by SAVE's President, Edward Bartlett, who reviewed and approved it to be filed on behalf of SAVE.

The parties consent to the filing of this brief.

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[6] Benjamin North, *Interactive Spreadsheet of Lawsuits Against Universities*, SAVE.ORG, http://www.saveservices.org/sexual-assault/complaints-and-lawsuits/lawsuit-analysis/ (last visited May 9, 2023).

[7] *Faculty Members*, SAVE.ORG, http://www.saveservices.org/sexual-assault/faculty-members/ (last visited May 9, 2023).

[8] *Analysis of Judicial Decisions Affirming the 2020 Title IX Regulations,* SAVE.ORG, https://www.saveservices.org/title-ix-regulation/analysis-of-judicial-decisions/ (last visited May 9, 2023).

[9] *Title IX Regulation: Title IX Due Process Regulation*, SAVE.ORG, http://www.saveservices.org/title-ix-regulation/ (last visited May 9, 2023).

SUMMARY OF ARGUMENT

The several circuits are divided on what process is due to public university students accused of misconduct, or whether they are entitled to any process at all. Consequently, public university students are unable to rely on a consistent constitutional standard as to what steps a public university must take before depriving students of their investment in their education.

The circuits are also divided on what an accused student must plead in order to bring a Title IX claim. Students are therefore unable to rely on a consistent pleading standard to correct discriminatory discipline after the fact.

The Court should clarify what process is due to public university students as well as clarify the Title IX pleading standard. Petitioner's case presents the opportunity to do both.

ARGUMENT

Since the April 4, 2011 "Dear Colleague Letter,"[10] sex discrimination against accused male students has proliferated rapidly on college campuses.[11] The Letter departed substantially from this Court's standard for sexual harassment articulated in *Davis*, and redefined "sexual harassment" as merely "unwelcome conduct of a sexual nature."[12] Where pre-2011 accused student Title IX lawsuits were "few and far between,"[13] since 2011, over 700 have been filed.[14] According to Brooklyn College Professor KC Johnson, to date there have been 262 judicial decisions primarily favorable to accused students, 262 favorable to a university, and 156 settled before any court decision.[15] Gary Pavela, a

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[10] U.S. Dep't of Educ., *Dear Colleague Letter*, (Apr. 4, 2011), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html.

[11] Samantha Harris & KC Johnson, *Campus Courts in Court: The Rise in Judicial Involvement in Campus Sexual Misconduct Adjudications*, 22 N.Y.U. J. Legis. & Pub. Policy 49 (2020).

[12] *Compare Dear Colleague Letter*, *supra* n.10, *with Davis Next Friend LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633 (1999) (O'Connor, J.)

[13] *Id.*

[14] KC Johnson, *Sexual Misconduct Accused Student Lawsuits Filed (post 2011-Dear Colleague Letter)*, https://docs.google.com/spreadsheets/d/1ldNBm_ynP3P4Dp3S5Qg2JXFk7OmI_MPwNPmNuPm_Kn0/edit#gid=1598909288 (last visited May 6, 2023).

[15] KC Johnson, *Post Dear-Colleague Letter Rulings/Settlements*, https://docs.google.com/spreadsheets/d/1CsFhy86oxh26SgTkTq9

fellow for the National Association of College and University Attorneys, explained, "[i]n over 20 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 . . . University sexual misconduct policies are losing legitimacy in the eyes of the courts."[16] While the previous Presidential Administration corrected the error of the Dear Colleague Letter "kangaroo courts,"[17] problems continue to proliferate on campuses across the Nation. Given the absence of any guidance from this Court,[18] it is not surprising that several circuit splits have arisen, both as to due process and as to Title IX.

The several circuits have applied inconsistent constitutional due process standards for public university students accused of misconduct. For instance, the Sixth Circuit held that the Constitution

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[16] Jake New, *Out of Balance*, INSIDE HIGHER ED (Apr. 14, 2016), https://www.insidehighered.com/news/2016/04/14/several-students-win-recent-lawsuits-againstcolleges-punished-them-sexual-assault.

[17] David French, *Betsy DeVos Strikes a Blow for the Constitution*, NAT'L REV. (Nov. 16, 2018), https://www.nationalreview.com/2018/11/betsy-devos-strikes-a-blow-for-the-constitution/.

[18] It is also worthy of note that frequently, Title IX offices at colleges and universities are not managed by an attorney; rather, they are managed by the institution's Title IX Coordinator, who is tasked with ensuring a "prompt" and "equitable" resolution to Title IX complaints. 34 C.F.R. §§106.30, 106.44.

protects accused students' due process right to live cross examination where witness credibility is an issue (*Doe v. Baum*, 903 F.3d 575, 581 (6th Cir. 2018)); yet, the Fourth Circuit has not held that there is even an *interest* in a student's education, let alone that the Constitution requires any specific procedure. *Sheppard v. Visitors of Virginia State Univ.*, 993 F.3d 230, 239 (4th Cir. 2021).

The several circuits have also been inconsistent on Title IX. For example, the Second Circuit requires that a plaintiff allege extratextual doctrinal elements to state different causes of action under Title IX (*i.e.*, "erroneous outcome" or "selective enforcement") that bear little resemblance to the statute. *Yusuf v. Vassar Coll.*, 35 F.3d 709, 715 (2d Cir. 1994). Meanwhile, the Seventh Circuit, consistent with the statutory text, simply requires that a student allege discrimination on the basis of sex. *Doe v. Purdue Univ.*, 928 F.3d 652, 667-668 (7th Cir. 2019) (Barrett, J.). The Eleventh Circuit requires a student – depending on where he or she goes to school – to disprove other potential non-discriminatory causes of discipline at the pleading stage, *Doe v. Samford Univ.*, 29 F.4th 675, 689 (11th Cir. 2022) (concluding that a plaintiff failed to state a Title IX claim where "pro-complainant bias" was also a possible cause of the discipline). The Tenth Circuit, however, reserves that factual dispute for trial. *Doe v. Univ. of Denver*, 1 F.4th 822, 836 (10th Cir. 2021) ("it should be up to a jury to determine whether the school's bias was based on a protected trait or merely a non-protected trait that breaks down across gender lines").

Students deserve clarity and consistency. The current state of the law provides neither. Students' rights vary wildly across federal circuits as a consequence of the several circuit splits that have arisen since accused students first began bringing claims in force. This change began when the Department of Education's "Dear Colleague Letter" in 2011 informed schools that their "federal funding was at risk if [they] could not show that [they were] vigorously investigating and punishing sexual misconduct." *Purdue*, 928 F.3d at 668. Since that time, the circuit courts have demonstrated significant disagreement on what the law requires.

Petitioner's case involves all of the above circuit splits. This Court should resolve those disagreements and establish a clear, uniform standard for students across the Nation. *See* Supreme Court Rule 10(a) (a compelling reason for granting *certiorari* exists where "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter").

I. This Court should grant *certiorari* because Petitioner's case presents the opportunity to set a consistent due process standard for students at public universities.

While this Court has unambiguously held that students at public secondary schools possess liberty interests in their education when charged with misconduct (*Goss v. Lopez*, 419 U.S. 565, 574-575 (1975)), the Court has not addressed whether students

at public *universities* possess any interests in their education. *See, e.g., Regents of Univ. of Michigan v. Ewing,* 474 U.S. 214, 223 (1985) (assuming without deciding that a public university student possessed a property interest in his education). Derivative of that question, of course, is whether any process is due to students at all before the state deprives them of their interests. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *see also Goss*, 419 U.S. at 575 ("It is apparent that the claimed right of the State to determine unilaterally and without process whether … misconduct has occurred immediately collides with the requirements of the Constitution"). In the absence of clear guidance from this Court on these questions, circuits are split and the law "is in flux" for students at public universities. *Walsh v. Hodge*, 975 F.3d 475, 487 n.54 (5th Cir. 2020) (collecting cases).

In Petitioner's case, the Fifth Circuit correctly held that Petitioner alleged a cognizable liberty interest "in seeking to restore his reputation and clear his student disciplinary record," *Overdam v. Texas A&M Univ.*, 43 F.4th 522, 529 (5th Cir. 2022). In doing so, it followed a plurality of other circuits to consider the question. *See, e.g., Purdue,* 928 F.3d at 662-663 ("it was this official determination of guilt … that allegedly deprived John of occupational liberty"); *Gorman v. Univ. of Rhode Island*, 837 F.2d 7, 12 (1st Cir. 1988) ("a student's interest in pursuing an education is included within the fourteenth amendment's protection of liberty and property"), *citing Goss*, 419 U.S. at 574-575; *Doe v. Univ. of Cincinnati,* 872 F.3d 393, 399 (6th Cir. 2017) (suspension from public university implicates a liberty

interest); *see also Doe v. Univ. of Arkansas - Fayetteville,* 974 F.3d 858 (8th Cir. 2020) (assuming accused student possessed a liberty interest).

Students in these circuits are fortunate to have circuits that faithfully apply the logic of *Goss*, which held that formal determinations of serious misconduct clearly "interfere with later opportunities for higher education and employment." 419 U.S. at 575. These rulings recognize the obvious reality: getting suspended or expelled from a public university for violations of a serious misconduct policy causes both disastrous reputational harm and an actual change in the student's status because the student is no longer a student in good standing or a student at all.[19] As then-Judge Barrett held in *Purdue*, such determinations deprive students of their liberty interests. *Purdue*, 928 F.3d at 662-663.

Students in other circuits, unfortunately, do not have such assurances that their interests will be protected. Public university students in the Fourth Circuit, for example, are routinely subject to dismissals from district courts which reject the notion that students have due process interests in their public university education. *See e.g., Doe v. Virginia*

[19] In fact, the "status change" in the education context may be even more severe than in the employment context. In the employment context, a terminated employee may seek other employment in his chosen career, despite how very difficult that may be after having to disclose the termination. In the education context, a suspended or expelled college student is effectively barred, categorically, from his chosen occupation because he may not be able to attain the required degree to even be able to apply to jobs in his chosen field.

Polytechnic Inst. & State Univ., 400 F. Supp. 3d 479, 499 (W.D. Va. 2019) ("*Virginia Tech I* "); *Doe v. Virginia Polytechnic Inst. & State Univ.*, 617 F. Supp. 3d 412, 424-428 (W.D. Va. 2022) ("*Virginia Tech II* "); *Doe v. Univ. of Virginia*, No. 3:22-CV-00064, 2023 WL 2873379, at *6-7 (W.D. Va. Apr. 10, 2023); *Doe v. Alger*, 175 F. Supp. 3d 646, 656-661 (W.D. Va. 2016) (allowing plaintiff to "prove" a property interest in discovery but rejecting a student's liberty interest because Virginia does not protect state university enrollment as a matter of state law); *but see Doe v. Rector & Visitors of George Mason Univ.*, 132 F. Supp. 3d 712, 724 (E.D. Va. 2015) ("In sum, expulsion from a public university on charges of misconduct implicates a protected liberty interest under the Fourteenth Amendment"). Because "neither the Supreme Court nor the Fourth Circuit has explicitly recognized a property interest in a student's continued enrollment in a public college or university or a liberty interest in his good name," *Alger*, 175 F. Supp. 3d at 656, district courts in the Fourth Circuit have almost uniformly decided against the recognition of a either a liberty or a property interest in the public university context. As the Fifth Circuit held in this case, contrary to the prevailing view in the Fourth Circuit, Petitioner's liberty interest was implicated. *Overdam*, 43 F.4th at 529.

This trend in the Fourth Circuit began with the *Alger* decision. *Id.* In *Alger*, the district court erroneously held that "*Paul* instructs that there must be a *statutory* right that was altered or extinguished" to state a liberty interest. *Alger*, 175 F. Supp. 3d at 660 (emphasis added), *citing Paul v. Davis,* 424 U.S. 693,

708-711(1976). But *Paul* instructs no such thing. *Paul* instructs that a plaintiff must show "(i) the infliction by state officials of a 'stigma' to plaintiff's reputation and (ii) the deprivation of a legal right or status." *Rector and Visitors of George Mason University*, 132 F. Supp. 3d at 722, *citing Paul*, 424 U.S. at 710–11. Importantly, in Section II of this Court's opinion in *Paul*, the Court distinguished liberty and property interests. While property interests stem from "independent source such as state law rules or understandings," liberty interests may arise where the government, for example, defames an individual (the stigma) while refusing to rehire him (the plus). *Id.* at 709, *citing Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 570, 577 (1972). Despite the clear misapplication of *Goss* and *Paul*, and despite the weight of circuit authority to the contrary, district courts continuously fail to recognize public university students' liberty interests because no statute specifically grants the right to a college education in Virginia. *See e.g.*, *University of Virginia*, 2023 WL 2873379, at *7; *Alger*, 175 F. Supp. 3d at 660.

Even setting aside the *de facto* circuit split between the Fourth Circuit and other circuits, the district courts' holdings that a "statutory" right need be implicated to state a liberty interest also presents another problem warranting review in that these repeated holdings "would render liberty interest claims irrelevant, completely swallowed up by property interest claims." *Rector and Visitors of George Mason University*, 132 F. Supp. 3d at 722. It is axiomatic that a plaintiff can typically show a property interest by pointing to a right protected by

state statute. *See, e.g., Goss*, 419 U.S. at 574. To require a plaintiff to state a deprivation of a statutory right (*i.e.*, a property interest) in order to state a liberty interest, would render liberty interests claims irrelevant. The Constitution protects both "liberty" and "property." It would not list both terms if one was fully encompassed by the other. Thus, the district courts' conclusion cannot be correct.

Absent this Court's intervention, public universities in the Fourth Circuit are generally free as a constitutional matter to "take a student's tuition and housing money and then expel him on the second day of classes for no reason whatsoever, and the student would not have any 'enforceable' right to recourse." *Doe v. Alger*, 228 F. Supp. 3d 713, 729 n.12 (W.D. Va. 2016). This kind of unchecked and unaccountable government power is repugnant to the Constitution. Whatever the Court ultimately were to decide as to the specifics of what process is due, a holding that at least *some* process is due at all would be a long overdue recognition of students' basic right to some process before they are disciplined for misconduct at government universities.

II. Due process requires cross examination in the public university context.

It is imperative that public university tribunals minimize the chances for erroneous findings of sexual misconduct. Indeed, "students have paramount interests in completing their education, as well as avoiding unfair or mistaken exclusion from the educational environment, and the accompanying stigma." *Haidak v. Univ. of Mass.-Amherst*, 933 F.3d

56, 66 (1st Cir. 2019). Cross examination is essential to protecting against erroneous findings because it is the only procedure that allows each side to challenge the other, exposing contradictions, manufactured memories, or ulterior motives, and thereby uncovering the truth. Further, the penalties for being found responsible at the end of a Title IX disciplinary process approach those of a criminal proceeding. As recognized by the Sixth Circuit:

> Being labeled a **sex offender** by a university has both an **immediate and lasting impact on a student's life**. He may be forced to withdraw from his classes and move out of his university housing. His personal relationships might suffer. And he could face difficulty obtaining educational and employment opportunities down the road, especially if he is expelled.

Doe v. Baum, 903 F.3d at 582 (emphasis added). Accordingly, cross-examination should be required to protect students' rights.

While one could conceive of countervailing governmental interests in *not* providing cross examination, *Walsh*, 975 F.3d at 484, any such interests are negated by the fact that universities have provided cross examination as part of the normal course of business since the 2020 Title IX Regulations went into effect on August 14, 2020. *See also Pennsylvania v. DeVos*, 480 F.Supp.3d 47, 68 (D.D.C., 2020) (finding that plaintiff states had not demonstrated "irreparable harm" for purposes of

enjoining the Title IX Rule when they had already successfully brought themselves into compliance).[20] Therefore, the balance of the *Mathews* factor's weighs heavily in Petitioner's favor. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

Other circuits have similarly recognized the importance of cross-examination in the campus disciplinary context. Citing *Mathews*, courts have held that some form of cross examination is required by due process. *See generally, Baum,* 903 F.3d 582-583 (holding that when credibility is at issue, student is entitled to attorney-led adversarial cross-examination); *Haidak*, 933 F.3d at 70 (holding "some form" of cross-examination is required, if only through a hearing panel, provided the hearing panel "conduct[s] reasonably adequate questioning"); *Doe v. Regents of Univ. of California,* 28 Cal. App. 5th 44 (2018) (holding selective questioning by a hearing panel can violate student's due process rights); *see also Doe v. Univ. of Sciences*, 961 F.3d 203 (3d Cir. 2020) ("basic fairness" requires cross-examination).

While courts have disagreed on the form of cross-examination required by due process in this context, Petitioner's "circumstances entitle[] him to relatively formal procedures." *Purdue*, 928 F.3d at 663. His case does not involve the power dynamics

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[20] It is worth noting that Texas had intervened in this case to defend the Title IX Rule requiring, among other things, cross-examination. Here, however, Texas has opposed that very requirement in their brief at the Appellate level. *Overdam v. Texas A&M University*, No. No. 21-20185, ECF No. 45, at *52-53 (Dec. 29. 2021).

associated with student allegations against a professor and his request for cross-examination by his lawyer mitigated concerns of the hearing degenerating into a "shouting match." *Walsh v. Hodge*, 975 F.3d at 485. Further, in contrast to *Haidak,* where the First Circuit concluded that the university hearing panel effectively substituted for the student's representative, Petitioner alleged here that questioning occurred a Panel that provided unequal assistance to the accusing student, even going so far as to restrict her own testimony in her favor. *Compare* Pet. for Writ of Cert. at 5, *with Haidak,* 933 F.3d at 70-71. Petitioner's case more closely resembles *Doe v. Baum*, a case in which the university chose between two narratives with little to no physical evidence, and where the university disciplinary panel did not ask questions of the accuser that meaningfully addressed the credibility concerns raised by the accused student. *Baum*, 903 F.3d at 580. Accordingly, Petitioner should be entitled to the same protections that *Baum* requires.

In short, a holding for Petitioner, recognizing that cross examination is necessary to ensure fairness on campus, would ensure basic fairness for public university students across the Nation. Considering that public universities already provide cross examination, the balance of interests weighs heavily in Petitioner's favor. This Court should grant *certiorari* and ensure fairness to students at public universities.

III. This Court should grant *certiorari* to resolve the circuit split relating to the *Yusuf* or *Purdue* Title IX pleading standard.

Granting *certiorari* is necessary to ensure that the Title IX pleading standard tracks the text of the statute by resolving the split between courts that apply the *Yusuf* or *Purdue* Title IX pleading standards. *Yusuf*, 35 F.3d at 715; *Purdue*, 928 F.3d at 667-668 (Barrett, J.). While *Yusuf* requires a plaintiff to plead either "erroneous outcome" or "selective enforcement" claims[21]; *Purdue* articulated a standard that simply determines whether the complaint, on the totality of circumstances, "raise a plausible inference that the university discriminated against John on the basis of sex." 928 F.3d at 668.

Since 2019, the Third, Fourth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits have adopted the pleading standard outlined in *Purdue*. *Doe v. Samford Univ.*, 29 F.4th 675, 686 (11th Cir. 2022) (collecting cases). The Second and Sixth Circuits have not yet adopted *Purdue* but have signaled a departure from the earlier *Yusuf* standards. Previously, these Circuits both embraced the earlier *Yusuf* standards before the *Purdue* decision.[22] Nonetheless, following *Purdue*, the Sixth Circuit favorably cited *Purdue* for the proposition that, in an "erroneous outcome" claim, the "perplexing" basis of a university decision can, in and

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[21] *Yusuf v. Vassar Coll.*, 35 F.3d 709, 715 (2d Cir. 1994).

[22] *Yusuf, supra*; *Doe v. Miami Univ.*, 882 F.3d 579, 589 (6th Cir. 2018).

of itself, support an inference of gender bias. *Doe v. Oberlin College*, 963 F.3d 580, 587-88 (6th Cir. 2020). The Second Circuit moved beyond *Yusuf* in favor of the burden shifting *McDonnell-Douglas* test (used for Title VII cases).[23] *Doe v. Columbia U.*, 831 F.3d 46, 53-59 (2d Cir. 2016) (undertaking no *Yusuf* analysis and instead holding the plaintiff had made out *prima facie* case under *McDonnell-Douglas*).[24]

In short, the only two circuits that explicitly adopted *Yusuf* before 2019 have both – at the very least – eroded that precedent. Thus, since 2019, every circuit asked to adopt the *Purdue* standard has done so. Now followed by at least seven circuits, *Purdue* is the majority standard among circuit courts and the *majority* standard among district courts.

Under the *Yusuf* framework, students who allegedly suffered sex-based discrimination by their universities sometimes failed to meet doctrinal elements not found in the Title IX statute. For example, in *Doe v. Univ. of Denver*, the Tenth Circuit discussed a campus adjudication that "look[ed]… like a railroading" but nevertheless granted the

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[23] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

[24] The First and Eleventh Circuits have applied *Yusuf*'s doctrinal categories, but only in cases where both parties accepted *Yusuf* for pleading purposes. *See, e.g., Doe v. Trustees of Boston College*, 892 F.3d 67 (1st Cir. 2018); *Doe v. Valencia College*, 903 F.3d 1220 (11th Cir. 2018). The D.C. Circuit has never heard an appeal filed by an accused student in a Title IX case, but the most recent opinion at the district court level adopted the *Purdue* standard. *Doe v. American Univ.*, 2020 U.S. Dist. LEXIS 171086, *22 (D.D.C. September 18, 2020).

university's summary judgment because the plaintiff's clear evidence of anti-respondent bias did not satisfy *Yusuf*'s second prong. *Doe v. Univ. of Denver*, 952 F.3d 1182, 1201-2, n. 18 (10th Cir. 2020), *but see Doe v. Univ. of Denver,* 1 F.4th 822, 829-36 (10th Cir. 2021) (adopting *Purdue* and reserving the question of whether the university employed "anti-respondent" bias or "anti-male" bias for the jury, denying summary judgment to the university). Further, a recent Eighth Circuit case demonstrates how applying *Purdue*'s cleaner approach can illuminate plausible claims of sex discrimination that *Yusuf*'s doctrinal tests obscure. *Doe v. Univ. of Ark.-Fayetteville*, 974 F.3d 858 (8th Cir. 2020). In *Doe v. Univ. of Ark.*, the court held that an illogical finding of responsibility, public pressure on the school to vindicate claims of female accusers, and a procedural irregularity combined to support an inference of sex discrimination. *Id.* at 865-866.[25]

A feature of the *Purdue* standard is that it allows courts to consider all the facts of the case, including the discriminatory finding of responsibility, which in some cases is the strongest evidence of

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[25] *See also Doe v. Regents of the Univ. of Minn.*, 999 F.3d 571, 579 (8th Cir. 2021) (reversing district court that had applied *Yusuf* standard, noting that "[t]he district court concluded that a university's bias in favor of the victims of sexual assault does not establish a reasonable inference of bias against male students . . . While the circumstances here also give rise to a plausible inference of bias in favor of sexual assault victims rather than against males, '[s]ex discrimination need not be the only plausible explanation or even the most plausible explanation for a Title IX claim to proceed.'").

discrimination. *See Oberlin,* 963 F.3d at 587-88 ("Doe's strongest evidence [of Title IX discrimination] is perhaps the merits of the decision itself in his case"). For example, here, Texas A&M allegedly made inconsistent and contradictory findings that resulted in labeling Petitioner a sex offender. Taking the accusing, female student at her word, Texas A&M found she consented to two sex acts, but not to a sex act directly in between the two consensual sex acts. Texas A&M's blanket acceptance of this testimony, especially considering the accuser changed her story during the hearing, is strong evidence of discrimination. Texas A&M's finding – and the basis therefor – may be Petitioner's strongest evidence of a Title IX violation. *Purdue* would permit the court to consider this strong evidence of discrimination, thereby enforcing the text and purpose of Title IX.

The courts that still apply the *Yusuf* standard – like the district court in this case – offend the plain text of the Title IX statute by limiting discovery to either "erroneous outcome" or "selective enforcement" claims, where the statute makes no such distinction. As this Court held in *Bostock*, the text of Title IX "should be the end of the analysis." *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1743 (2020) (holding that Title VII's plain terms "should be the end of the analysis"); see also "The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration." *Id.* at 1749. And "[w]e begin where all such inquiries must begin: with the language of the statute itself." *Republic of Sudan v. Harrison*, 139 S. Ct. 1048, 1056 (2019) (Alito, J.).

Title IX provides simply that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. §1681(a). "The text of Title IX prohibits all discrimination on the basis of sex," including in university disciplinary processes. *Sheppard v. Visitors of Virginia State U.*, 993 F.3d 230, 235 (4th Cir. 2021); *Purdue*, 928 F.3d at 668. Accordingly, this Court should hold that the Title IX pleading standard merely requires that Petitioner raise a plausible inference, based on the totality of circumstances, that the university discriminated against him on the basis of sex.

To the extent dissenting circuits wish to apply the *Yusuf* standards instead of *Purdue*, there must be a "compelling reason to create a circuit split." *U.S. v. Nesmith*, 866 F.3d 677, 680 (5th Cir. 2017); *U.S. v. Thomas*, 939 F.3d 1121, 1130 (10th Cir. 2019) ("the greater the number of circuits that are aligned together, the more an appropriate judicial modesty should make us reluctant to reject that uniform judgment"); *Padilla-Ramirez v. Bible*, 882 F.3d 826 (9th Cir. 2017) (only a "compelling" or "strong" reason can justify a circuit split where enforcement of federal statute is at issue) *cert. denied*, 139 S. Ct. 411 (2018). Here, no compelling reason exists to avoid adopting *Purdue,* which best fulfills the purpose of Title IX. Moreover, the University cannot show that imposing extratextual barriers to victims of discrimination serves the text or purpose of Title IX. *Purdue*, 928 F.3d at 667 ("we see no need to superimpose doctrinal tests

on the statute"). This Court should not permit this circuit split to continue depriving students of their rights on the basis of geographic location. It should grant *certiorari* to formally establish the only test that tracks the language of the statute: the *Purdue* standard.

IV. Granting *certiorari* is necessary to correct courts that require a Title IX plaintiff to disprove other potential causes at the pleading stage.

Courts consistently dismiss Title IX claims because the plaintiff did not, at the pleading stage, disprove other potential causes of the university's actions. *See e.g., Samford*, 29 F.4th at 689 (affirming dismissal of a student's Title IX claim because there were "alternative explanations" for the university's actions); *Pappas v. James Madison Univ.*, No. 5:22-CV-00028, 2023 WL 2768425, at *12 (W.D. Va. Mar. 31, 2023) (dismissing Title IX claim where discrimination on the basis of being an "accused" was also possible). It is apodictic, of course, that this Court holds all complaints to a plausibility standard. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007). That is, a complaint will survive dismissal under Fed. R. Civ. P. 12(b)(6) if it states "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009). As articulated in the previous section, a plain application of this standard to Title IX claims is that a Title IX claim will survive dismissal if its well-pleaded facts "raise a plausible inference that the university discriminated against John on the basis of sex." *Purdue*, 928 F.3d at 668. In other words, the

plausibility standard tests whether it is plausible that sex was a motivating factor for the university's actions. *Id.*

As a matter of simple logic, it does not require a plaintiff to disprove other potential causes of the university's discipline at the pleading stage. *Bostock*, 140 S. Ct. at 1739 ("So long as the plaintiff 's sex was one but-for cause of that decision, that is enough to trigger the law"). As Judge Jordan explained in his concurrence-in-part in *Samford*, dismissal of a Title IX claim at the pleading stage on the basis of "alternative explanations" is "difficult to justify at the pleading stage, where proof of the claim is not required." *Samford*, 29 F.4th at 695. Rather, as this Court put it in the Title VII context, "so long as the plaintiff 's sex was one but-for cause of that decision, that is enough to trigger the law." *Bostock*, 140 S. Ct. at 1739.

This Court's intervention is required to enforce the plausibility standard for Title IX claims. Of course, at the pleading stage, there can be multiple "plausible" reasons for the defendant's actions. A plaintiff is not required, pre-discovery, to discount every other possible cause for the defendant's actions. Given the circuits' continuing disagreement on the issue, *certiorari* is both warranted and necessary.

CONCLUSION

Students subject to the same law deserve the same rights. This Court should resolve the circuit splits and make that happen. This Court should grant *certiorari*.

Respectfully submitted,

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