No. 24-746

In the
Supreme Court of the United States

JOHN DOE,
Petitioner,
v.
UNIVERSITY OF IOWA, et al.,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A university decision-maker admitted using 'sex' as one of the three factors in evaluating an accused student's credibility, resulting in expulsion. The Eighth Circuit granted summary judgment on Title IX without applying the mixed-motive or burden-shifting frameworks, conflicting with the Tenth and Second Circuits, which used Title VII standards (*Doe v. Univ. of Denver*, 1 F.4th 822, 829 (10th Cir. 2021); *Doe v. Columbia Univ.*, 831 F.3d 46, 56 (2d Cir. 2016)). In granting summary judgment, the panel again focused on undefined "context," as in *Smothers v. Rowley Masonic Assisted Living Cmty.*, 63 F.4th 721, 728 (8th Cir. 2023), conflicting with holdings that "some evidence" of sex as a motivating factor suffices for a prima facie case (*Doe v. Univ. of Denver*, 1 F.4th 822, 836 (10th Cir. 2021); *Doe v. William Marsh Rice Univ.*, 67 F.4th 702, 726 (5th Cir. 2023)), and diverging from the Second Circuit's emphasis on the jury evaluating context (*Sassaman v. Gamache*, 566 F.3d 307 (2d Cir. 2009)).

This case also raises due process requirements in university disciplinary proceedings. The Sixth Circuit in *Doe v. Baum*, 903 F.3d 575, 581 (6th Cir. 2018), and the U.S. Department of Education's 2020 Title IX regulations, relying on *Mathews v. Eldridge*, 424 U.S. 319 (1976), require cross-examination through an advisor. Here, the adjudicator exercised discretion by refusing to ask material questions requested by the petitioner, falsely reported asking all questions, applied disparate standards, and found the petitioner responsible for the conduct of a separate charge without notice. Unclear procedural requirements jeopardize nearly 19 million students' rights. The questions presented are:

1. Whether Title VII's mixed-motive analysis applies to Title IX claims when a decision-maker

explicitly admits to using 'sex' as one of the three factors in determining credibility; or, if direct evidence is inapplicable, whether Title VII's *McDonnell Douglas* framework should apply to Title IX claims, especially where the university does not assert that it would have reached the same decision absent consideration of sex.

2. Whether some evidence of procedural irregularities, combined with external pressure, can establish a prima facie case of sex discrimination.
3. Does the Due Process Clause of the Fourteenth Amendment permit an accused university student to cross-examine adverse witnesses through their advisor, and did the adjudicator's conduct here deprive the petitioner of fundamental fairness guaranteed under procedural due process?

PARTIES TO THE PROCEEDING

Petitioner John Doe was the plaintiff-appellant in the Court below. Respondents University of Iowa; Board of Regents, State of Iowa; Tiffini Stevenson Earl; Monique DiCarlo; Iris Frost; Constance Schriver Cervantes; Lyn Redington; John Keller; Mark Braun; and Angie Reams were the defendants-appellees.

CORPORATE DISCLOSURE STATEMENT

John Doe is not a corporate entity, so a corporate disclosure statement is not required under this Court's Rule 29.6.

STATEMENT OF RELATED PROCEEDINGS

These proceedings are directly related to this case within the meaning of this Court's Rule 14.1(b)(iii):

- *John Doe v. University of Iowa, et al.,* No. 21-3340 (8th Cir.) (judgment entered Sept. 14, 2023; rehearing denied Nov. 13, 2023).
- *John Doe v. University of Iowa, et al.,* No. 3:19-cv-00047 (S.D. Iowa) (judgment entered Aug. 22, 2021).

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case.

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"The day is surely coming—and none too soon—when the Supreme Court will be able to assess the various university procedures that undermine the freedom and fairness of the academy in favor of the politics of grievance." *Vengalattore v. Cornell Univ.*, 36 F.4th 87, 115 (2d Cir. 2022) (Cabranes, J., concurring).[1] That day has arrived. This Court's guidance is needed to resolve the intractable conflicts among lower courts regarding Title VII's applicability to Title IX claims and due process in university disciplinary proceedings—an issue of significant national importance with profound implications for students' rights and reputations.

Title IX aims to eradicate sex discrimination from our nation's campuses. Yet when zealously overcorrected, it undermines its goals and creates new discrimination. Since the 2011 Dear Colleague Letter ("DCL"),[2] universities have overwhelmingly stacked disciplinary processes for sexual misconduct against male students.[3] The DCL reinterpreted Title IX, pressuring schools to aggressively investigate sexual

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[1] *See* Caroline Kitchener, *How Campus Sexual Assault Became So Politicized*, THE ATLANTIC (2017), https://www.theatlantic.com/education/archive/2017/09/how-campus-sexual-assault-became-so-politicized/540846/ (last visited Jun 6, 2024).

[2] U.S. Dep't of Educ., Office for Civil Rights, *Dear Colleague Letter: Sexual Violence* (Apr. 4, 2011), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf (last visited June 6, 2024).

[3] *See* KC Johnson, *The Origins of the 2011 Dear Colleague Letter on Campus Sexual Assault*, THE FEDERALIST SOCIETY (2023), https://fedsoc.org/commentary/fedsoc-blog/the-origins-of-the-2011-dear-colleague-letter-on-campus-sexual-assault (last visited Jun 6, 2024).

misconduct allegations under threat of Office for Civil Rights ("OCR") investigations and funding loss while deprioritizing due process (*Doe v. Purdue Univ.*, 928 F.3d 652, 668 (7th Cir. 2019)). This led to biased proceedings and a flood of lawsuits by accused males, consuming substantial judicial resources. *See* 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. POL'Y 49, 108-09 (2019), available at https://nyujlpp.org/wp-content/uploads/2019/12/Harris-Johnson-Campus-Courts-in-Court-22-nyujlpp-49.pdf (last visited April 11, 2024). Yet courts remain divided on due process for students and standards for evaluating sex-based discrimination claims against universities. Inconsistent national standards create an uneven playing field, resulting in students' fates hinging on the happenstance of geography.

Shifting Title IX regulations, driven by changing administrations, also leaves students' rights uncertain. Petitioner John Doe's ("Doe") case exemplifies the grave cost of the disarray. As an international student pursuing a graduate counseling degree, Doe was expelled from the University of Iowa ("UI") after a procedurally irregular disciplinary process tainted by sex bias and lacking due process safeguards. UI's overcorrection in response to external pressure resulted in Doe's expulsion and loss of his F-1 visa, career, and reputation.

The 2020 Title IX regulations, codified at 34 C.F.R. §106, provided the protections that the petitioner yearned for in his case. But new Department of Education regulations threaten these rights, creating a system that essentially presumes guilt. Such back-and-forth changes erode public confidence in university disciplinary systems, exposing students' futures

to the ever-changing political landscape. They will also increase litigation, similar to the DCL aftermath,[4] diverting funds from education.

Supreme Court intervention is urgently needed to establish a constitutional floor for due process and guide lower courts in evaluating discrimination claims. A decisive ruling can provide uniformity and clarity, ensuring consistent assessment of such cases nationwide.

OPINIONS BELOW

The Eighth Circuit's opinion is reported at 21 F.4th 680 (App.1a-16a). The Southern District of Iowa's unreported summary judgment opinion is available at 2021 WL 4262494 (App.17a-50a).

JURISDICTION

The Eighth Circuit's judgment was entered on September 14, 2023 (App.1). A timely petition for rehearing *en banc* was denied on November 13, 2023 (App.51a). Justice Kavanaugh extended the time to file this petition for a writ of certiorari to April 11, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

[4] *See* Colleen Murphy, *'A Wave of Litigation' Likely as Proposed Title IX Changes Roll Back Due Process Rights at Universities, Observers Say*, LAW.COM (2022), https://www.law.com/2022/07/13/proposed-title-ix-changes-would-roll-back-due-process-rights-at-universities-causing-wave-of-litigation/ (last visited Jun. 6, 2024).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides:

> No State shall...deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> U.S. Const. amend. XIV, § 1.

Title IX of the Education Amendments of 1972 provides:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance...
>
> 20 U.S.C. § 1681(a)

Appendix J of this petition (App.237a) reproduces the full text of the relevant constitutional and statutory provisions.

STATEMENT OF THE CASE

I. Factual Background

A. Institutional Pressures

Several external factors influenced UI's mishandling of Doe's proceeding:

1. *Campus Protests*: Students accused UI of responding improperly to sexual

misconduct complaints (App.108a,128a-129a,171a,200a-201a).

2. *Ongoing OCR Investigations*: Following the DCL, the U.S. Department of Education's Office for Civil Rights (OCR) conducted ongoing investigations for potential violations of Title IX against women (App.108a,129a, 166a,202a-203a).

3. *Multiple Lawsuits*: Five Title IX lawsuits against UI filed by women that were reported on the media during Doe's investigation, including one that directly impacted the appellate officer (App.9a,82a-85a,107a-108a,129a-131a,165a-168a,172a,129a, 131a,133a,164a-167a,171a,205a-206a).

These external pressures led UI to overcorrect, biasing proceedings against male students like Doe to avoid further criticism and lawsuits (App.107a-109a,128a-131a-134a,151a,165a-167a, 186a,199a-206a).

B. UI's Biased Response

Amidst this pressure, UI Associate Provost John Keller *admitted* considering sex as a factor in assessing credibility while overseeing Doe's appeal (App.71a-73a). At the time, Keller faced backlash after a female student sued him for leniency towards a male graduate student (App.82a-85a,107a,129a-131a,164a,166a-167a,171a,205a). Doe cited this lawsuit coverage, which alleged "biases that can lead to institutional hostility against *female* accusers and support for perpetrators" (App.130a-131a,166a). Keller's reliance on sex-based stereotypes influenced his

decision, providing direct evidence of sex discrimination under Title IX:

> Q. What role did the *sex* of [Complainant 1] have in your decision to *reject* [Doe's appeal?]
>
> A. Sure. Sure. No, I -- *it has a factor in the decision that I came to the conclusion to*, so, yeah.
>
> Q. So elaborate on that. *You confirm that it was a factor.* Why did you consider for -- [Complainant 1's] *sex* as a basis to reject the [evidence cited in Doe's appeal]?
>
> A. Well...I think every case that I've had to deal with that has to do with a sexual assault has been a male alleged having done something to a female...It's always been male with a female.
>
> Q. Okay. So...again, then, if you can elaborate, then, why did you consider the *sex* of [Complainant 1] in rejecting that, if you can just elaborate?
>
> A. Sure. Because young -- young -- young *female* undergraduate students in my experience of having one, having a *daughter* that age previously and having a lot of young *women* working in my office over the years that are young undergraduate women, you know, my observation of them is that they tend to be more *vulnerable* and *impressionable* than they would be if they were older and more experienced with many things in life including sexual relationships.

(App.71a-72a).

It is undisputed that sex was one of the factors (arguably the *decisive* factor) in Keller's decision. Beyond Keller's bias, the record contained several examples of sex-based pressure motivating UI's response to campus sexual assault. The university implemented female-only services like "Nite Ride," an evening transportation program exclusively for women, which the Iowa Civil Rights Commission later found discriminatory against male students (App.129a,166a,171a-172a 202a-203a).

UI's bias was also evident in its training materials and public statements, which presumed male responsibility for sexual misconduct. UI sponsored events like a "sex-assault summit," which focused solely on "men," "masculinity," and the need for "healthy masculinity" programming while discussing sexual violence. At this event, UI's Rape Victim Advocacy Program ("RVAP"), administrators, and students rallied around women's calls for action aimed at reforming male behavior (App.129a,136a-137a,166a,172a,203a, 207a). RVAP, whose representatives trained UI officials in 2017, promulgated materials defining "rape culture" as "a complex set of beliefs that encourages *male sexual aggression* and supports violence, especially against *women* and *children*" (App.136a,166a, 207a).

Moreover, just two weeks after joining a committee to reform UI's Title IX, UI's Title IX Coordinator pressured the investigator in Doe's case to escalate her initial recommendation of a reprimand (the lowest sanction) to a formal hearing, allowing expulsion (App.23a,105a,109a,132a-134a,186a). This intervention followed a wave of female-initiated lawsuit settlements and protests against UI's handling of female complaints (App.108a,128a-134a,166a-167a,204a-205a).

C. UI's Biased Proceedings

Doe was an undergraduate student of sociology and psychology at UI when he joined his undergraduate research advisor, Dr. Michael Lovaglia's, lab (App.103a,126a). In summer 2016, Doe began his master's program in Mental Health Counseling and Rehabilitation at a different UI college while still completing his undergraduate research project in Dr. Lovaglia's lab (*Id.*). That fall, he met Complainants 1 and 2.

1) The Investigation

Complainant 1

Complainant 1 alleged that she and Doe engaged in kissing in his apartment, stating that she "did not say no," but later felt uncomfortable. She then claimed Doe touched her breast without consent (App.112a-114a). She maintained a friendly relationship with Doe for months afterward, initiating playful texts (*Id.*). Doe denied touching her breast, insisting that their sexual activity remained limited to consensual kissing (*Id.*).

Investigator Stevenson Earl omitted exculpatory evidence from her report, most critically Dr. Lovaglia's statement that Complainant 1 "had initially been okay" with her encounter with Doe, but she "changed [her] mind" about the relationship later (App.112a-114a,184a-186a), and that she told a friend right after the alleged incident that she "didn't take it so seriously at the time," and they "ended up joking about it" (*Id.*). Stevenson Earl omitted this crucial context from her report, which UI relied on to justify proceeding to a hearing (*Id*).

Stevenson Earl failed to explore Complainant 1's motive to lie—anger at Doe for criticizing her

tardiness on a project right before she filed her complaint five months post-incident (*Id.*). Complainant 1 admitted that this criticism upset her and made her worry about how it would affect her relationship with Dr. Lovaglia (*Id.*)

Furthermore, Complainant 1's witness, D.L., did not mention breast touching in his initial interview but suddenly remembered it three months later. Stevenson Earl allowed this change without noting it in her report (*Id*).

Complainant 2

Complainant 2 alleged that Doe pushed alcohol to her "face" and touched her breast non-consensually (App.121a-122a,193a-194a). But she initially stated they left together to get a drink, then changed her account to say Doe went alone to get beer she did not want (*Id.*). Her witness, T.M., corroborated Doe's version that they bought alcohol jointly (App.106a,123a).

Despite alleging non-consensual touching, Complainant 2 maintained friendly behavior towards Doe, including having dinner alone with him, texting him repeatedly, and appearing with him in a video a month later (App.104a-106a,123a-125a,193a-194a). She testified she did not recognize the encounter with Doe as misconduct until speaking with UI's Title IX Coordinator, Monique DiCarlo, suggesting improper influence (App.123a,132a). Complainant 2 also said Complainant 1 convinced her that Doe "crossed the line" with her before Complainant 2 decided to file her own complaint (App.105a,121a,122a,157a).

Despite significant investigation issues, Stevenson Earl initially recommended only a reprimand (App.23a,105a,109a,132a-134a,167a,186a,204a-205a). But DiCarlo intervened, recommending a formal hearing that allowed expulsion, just two weeks

after being appointed to a Title IX reform committee amid lawsuits and media scrutiny over UI's handling of female complaints (*Id.*).[5]

2) The Hearing

No eyewitnesses existed to the alleged non-consensual encounters, making credibility paramount. Yet the adjudicator, Iris Frost, excluded exculpatory evidence and applied disparate questioning standards (App.105a-106a,108a,113a,115a-116a,124a-125a,148a-150a). She credited the complainants' uncorroborated allegations while disregarding substantial evidence undermining their claims. Frost refused to ask material questions Doe provided without explanation and rephrased others, rendering them useless (*Id.*). Doe provided a list of questions not asked (*Id.*). On the other hand, Frost cross-examined Doe like a hardened prosecutor, revealing fundamental unfairness (*Id.*).

At the time of summary judgment, Frost was under federal investigation by the OCR for allegations of sex discrimination against male respondents (App.34a,109a,134a-135a,138a-139a,168a,180a).

Complainant 1

Dr. Lovaglia testified that Complainant 1 told him the sexual activity with Doe was consensual:

Frost:	Did [Complainant 1] *tell you* that it was a consensual kiss?
Dr. Lovaglia:	*Yes.*

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[5] *See* Jacob E. Gersen & Jeannie Suk Gersen, *The Sex Bureaucracy*, 104 CALIF. L. REV. 881 (2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_Id=2750143 (last visited Jun. 6, 2024).

Frost: Did she tell you that he touched her breast?
Dr. Lovaglia: I do not remember that.

(App.162a).

Dr. Lovaglia clarified:

> My recollection is -- and I really hope that I did not misunderstand her -- is that my recollection is that she conveyed the idea that *all of that sexual behavior* that occurred in Doe's apartment was *consensual... Id.*

Frost completely excluded Dr. Lovaglia's statements from her report (App.161a-163a). During his appeals, Doe repeatedly asked UI for an explanation but received none. During her deposition, Frost claimed she discounted it because Dr. Lovaglia framed it as a "recollection." (*Id.*). But all testimony is a recollection. Moreover, Dr. Lovaglia's testimony corroborated his earlier statements during the investigation, underscoring its reliability (App.112a-113a).

Frost's cherry-picking of Dr. Lovaglia's testimony shows her bias (*Cf.* her dismissal of Dr. Lovaglia's testimony that Complainant 1 told him the activity was consensual *with* her misrepresentation of R.C.'s doubtful statements) (App.114a,161a-162a,190a).

Complainant 1's friend, R.C., testified that when Complainant 1 first spoke to him right after she reached home from Doe's apartment, she seemed "calm," "tranquil," "not tense," "normal," and "looked fine." (*Id.*). But Frost continued fishing for evidence to support Complainant 1's claims:

> Frost: At any time during this conversation in the stairwell did you find Complainant 1 to be upset? Crying? Shaken? Disturbed?
>
> R.C.: She was much more shaken upon telling me what happened than she was when she walked into the bottom of the dorm. So yeah, I would say she was a *little* confused, a *little* freaked out, *maybe*.

(*Id.*).

Frost reported R.C.'s uncertain statements as definitive, writing that he described Complainant 1 as "confused, freaked, and shaken" (*Id.*). Yet she omitted his initial testimony about Complainant 1's "calm" and "tranquil" demeanor and his "maybe" qualifier when pressed to agree that she was distressed. Frost thus magnified R.C.'s uncertain comments supporting Complainant 1 while ignoring his more conclusive observations favoring Doe. Conversely, she employed the opposite approach with Dr. Lovaglia, emphasizing his use of "recollection" to discredit his statement that Complainant 1 *told him* the incident was consensual (*Id.*). This discrepancy exemplifies Frost's bias.

Frost overlooked Complainant 1's own testimony that Doe's actions did not undermine her education (App.116a-117a,189a-190a), instead *falsely* reporting that Doe "stymied [Complainant 1's] educational performance" (*Id.*). She also disregarded photographs showing Complainant 1 being playful with Doe and chastised Doe for "secretly" taking the photos, despite her posing for them (App.124a).

Complainant 2

Complainant 2 testified that she had "no evidence" beyond her "words." (App.106a,123a,193a-194a). Doe not only had his words, but UI admitted that he provided text messages, emails, pictures, and even a video as evidence supporting his narrative (*Id*). Complainant 2 denied any kissing occurred (App.124a,165a). But Doe claimed consensual kissing occurred. Frost credited Doe's account over Complainant 2's regarding kissing, then used this admission against him to find him responsible for further assault (*Id.*).

Frost ignored the inconsistency between Complainant 2's claim that Doe pressured her to drink beer (App.127a,193a), and her actions three weeks later when she went to dinner with Doe, used her fake ID, and bought multiple beers for herself while alone with him (*Id.*).

Despite no allegation of physical violence, Frost baselessly asked Complainant 2 if she feared Doe would "punch" or "hit" her (App.134a,139a,168a), suggesting sex stereotyping.

In her subsequent adjudication of a case strikingly like Doe's, an accused male student recounted a sexual encounter that the female complainant initiated. The female student, like Complainant 2, was sexually forward in initiating the encounter (App.134a-135a,138a,168a-169a,196a). Frost's response was similar—she characterized the male student's account of the female-initiated encounter as a "young man's fantasy," mirroring her assertion in this case that Doe's description of Complainant 2's exact actions sounded like "fantasy." (*Id.*). Doe argued that this parallel language, *under the same facts*, exemplified Frost's pattern of discrediting male respondents' narratives of

female sexual agency as a mere "young man's fantasy." (*Id.*).

Frost's comments in the subsequent proceeding triggered an OCR investigation into sex discrimination against male respondents (*Id.*).

Frost also *fabricated* evidence, asserting that Complainant 2 "brought friends to Lab to never have to be alone" (App.157a), contradicting messages that show she repeatedly invited Doe to the lab alone at night after the alleged assault (App.125a).

Frost found Doe responsible for all charges, systematically excluding exculpatory evidence, misrepresenting witness statements, applying double standards, and reaching unsupported conclusions in a results-driven process. She also found that Doe held an "educational leadership role," a theory that Doe was not charged with or received notice of, violating basic due process rights (App.106a,118a,146a-147a).

The following table summarizes how the outcome was against the weight of the evidence: C1 = Complainant 1; C2 = Complainant 2; R = Responsible.

Issue & Decision	C1 & C2 Claims	C1 & C2 Evidence	Doe's Claims	Doe's Evidence
C1: Kiss Decision: R	Kiss became unwanted	R.C. (friend): Told of "interesting encounter." E.J. (roommate & best friend): No knowledge	Consensual kiss	Lovaglia: C1 said *all* consensual. S.B. (friend): Doe said consensual. C1 texts & photos playful with Doe afterward.
C1: Breast-touch Decision: R	Non-consensual touch	R.C.: Not told/does not recall. E.J.: No knowledge	Denied touch	Lovaglia: Not told/does not recall. S.B.: No knowledge.
C2: Kiss Decision: R	Denied kissing	T.M. (friend): Told Doe "tried" to kiss	Consensual kiss	S.B.: Doe said consensual. C2 texts inviting Doe to lab afterward while alone.
C2: Breast-touch Decision: R	Non-consensual touch	T.M.: No knowledge	C2 invited; Consensual touch	S.B.: No knowledge. C2 photos & video playful with Doe afterward.

3) The Appeals

On appeal, Doe notified Keller of the sex discrimination permeating his case, including Frost's biased questioning, sex-based stereotypes, and refusal to consider exculpatory evidence (App.71a,118a-119a). Keller, facing a recent backlash for his role in a lawsuit involving a female accuser and a male graduate student, discounted this evidence (*Id.*).

Instead, the appellate officer openly admitted that sex was a factor in his decision:

> Q. -- You had talked about the...*sex* of Complainant 1 in rejecting the Lovaglia-related testimony that he believed that was consensual behavior; correct me if I'm wrong, you had just mentioned the *sex*, correct?
>
> A. Uh-huh. *Yes.*
>
> Q. Yes?
>
> A. *Yep.*
>
> Q. So would you like to add anything else related to that factor that you had not previously done so far?
>
> A. No, I think we're good there too.

(App.72a-73a).

Keller applied archaic stereotypes of "vulnerable and impressionable" young women to justify his reasoning, including referencing his own young daughter (*Id.*). He also endorsed an erroneous definition of consent under which a female student's after-the-fact allegation negates any prior consent to sexual activity (App.71a,136a,170a,197a-198a). This rule would eviscerate due process protections, leaving males exposed to discipline based on the accuser's regret. Keller's

statements exemplify the discriminatory attitudes UI decision-makers brought to bear on Doe's case.

Doe appealed to the Board of Regents, who also affirmed without discussion or addressing Doe's extensive sex discrimination allegations (App.119a,126a, 135a).

II. Statutory Background

A. Title IX

Accused students can bring Title IX claims if sex is "a motivating factor" behind disciplinary actions (*Columbia Univ.*, 831 F.3d at 55; *Doe v. Miami Univ.*, 882 F.3d 579, 592 (6th Cir. 2018)).

The Second Circuit's "erroneous outcome" theory required plaintiffs to cast "articulable doubt" along with sex bias, demonstrated through factors like motive to lie, defense strengths, procedural flaws, statements by officials, and patterns of decision-making that showed the influence of sex (*Yusuf v. Vassar Coll.*, 35 F.3d 709, 715 (2d Cir. 1994)).

But then-Seventh Circuit Judge, Amy Coney Barrett, argued against superimposing doctrinal tests, emphasizing that the focus should be on whether the university discriminated against the student on the basis of sex (*Purdue Univ.*, 928 F.3d at 667). The Eighth Circuit and several other Circuits adopted the Seventh Circuit's standard (*Doe v. Univ. of Ark.-Fayetteville*, 974 F.3d 858, 864 (8th Cir. 2020)).

B. Title VII

In Title VII cases, a plaintiff can show discrimination was a "motivating factor" through (1) direct evidence (mixed-motive theory), or (2) indirect evidence (burden-shifting framework) (42 U.S.C. § 2000(e) et seq.); *Price Waterhouse v. Hopkins,* 490 U.S. 228

(1989); *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973).

The mixed motives standard, established in *Price Waterhouse*, 490 U.S. 228, applies when both legitimate and illegitimate reasons influence a decision. If discrimination was a motivating factor, the burden shifts to the employer to prove that it would have made the same decision regardless (*Id.* at 252).

The burden-shifting framework, from *McDonnell Douglas Corp.*, 411 U.S. 792, involves a three-step process: First, the plaintiff must prove a prima facie case of discrimination. Second, if successful, the burden shifts to the defendant to provide a legitimate, nondiscriminatory reason. Third, if the defendant carries this burden, the plaintiff must prove that the defendant's reasons were a pretext for discrimination (*Id.*at 802-04).

C. Procedural Due Process

Doe's contractual relationship with UI established a property interest in his education (*Corso v. Creighton Univ.*, 731 F.2d 529, 531 (8th Cir. 1984)) (App.144a). He also has a protected liberty interest in his good name, reputation, honor, and integrity. *Goss v. Lopez*, 419 U.S. 565, 572 (1975) (App.145a). Doe, an international student who lost his visa after expulsion, also testified that his advisor, an expert in the field of counseling, told him that his expulsion ended his career in counseling, as he would have trouble with government licensing agencies (App.145a). The stakes in campus disciplinary proceedings are immense—students found responsible face life-altering consequences (*Doe v. Univ. of Cincinnati*, 872 F.3d 393, 400 (6th Cir. 2017)).

In *Goss*, 419 U.S. at 581, this Court held that high school students facing suspension for ten days or less

must receive notice of charges and an opportunity to be heard. But the Court has not addressed the due process requirements for university students, and even so, the landscape has changed significantly since *Goss* with the introduction of the DCL.[6]

This led the Sixth Circuit to hold that when credibility is crucial, due process requires live hearings with cross-examination (*Baum*, 903 F.3d at 578).

III. Procedural History

A. The District Court

1) Motion to Dismiss

Doe filed his verified Third Amended Complaint in the Southern District of Iowa in 2019, asserting claims under Title IX and 42 U.S.C. § 1983 due process (R.Doc.57).

The District Court partially granted the Defendants' motion to dismiss (R.Doc.106), granting qualified immunity on the procedural due process claim (*Id.*at 27-29) but maintaining official capacity claims. It acknowledged Doe's allegation that "Frost falsely and arbitrarily found Doe responsible for an 'educational leadership role,' even though the investigation concluded that he had no such role in the Lab either directly or indirectly" but disregarded its legal significance, stating it did not understand what Doe meant by him being held responsible for the "educational mission" of Complainants (*Id.*at 28). Notably, Defendants conceded in their motion that Doe provided

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[6] *See* Jim Newberry, *After the Dear Colleague Letter: Developing Enhanced Due Process Protections for Title IX Sexual Assault Cases at Public Institutions*, J. COLL. & UNIV. L. (Apr. 21, 2018), SSRN: https://ssrn.com/abstract=3166561 (last visited June 6, 2024).

sufficient facts to sue Frost in her individual capacity (App.53a).

On the Title IX claim, the Court found that Doe plausibly alleged sex bias as a motivating factor (R.Doc.106 at 30-34), citing omitted exculpatory evidence and external pressure on UI (*Id.*at 32).

2) Summary Judgment

Doe argued that three broad categories of evidence showed sex bias: procedural irregularities, statements by UI officials reflecting sex stereotypes, and external pressure from OCR investigations and lawsuits (App.182a-207a,R.Doc.185 at 5-12,13-15,33-35). The Court granted summary judgment to the Defendants on Title IX (App.17-49).

The Court acknowledged that sex played a role in Keller's credibility determination but described this as "incidental to his *primary focus* on age and resulting power differentials" (App.35a), stating that even if *"Keller's observations constitute sex bias, they are insufficient to demonstrate Doe was expelled on the basis of sex*" (App.36a) (emphasis added). The Court failed to apply the mixed-motives framework of direct evidence and instead imposed a "primary focus" requirement, inconsistent with mixed-motive precedents.

The Court recognized Doe's attempt to connect discrimination lawsuits with his case but dismissed it because they were not sexual assault allegations (App.37a). But the Court missed the critical lawsuit against Keller for mishandling a female student's sexual assault claim against a male student, which Doe argued provided compelling evidence that Keller was motivated by sex bias (App.130a-131a).

It also overlooked DiCarlo's suspicious intervention timing in the sanction recommendation, UI's "masculinity" programming, and RVAP's gendered

"rape culture" definition, all of which Doe contended contributed to an environment in which accused male students were presumed responsible (App.36a-37a).

The Court refused to consider the procedural due process claim, deeming it foreclosed by the prior qualified immunity dismissal (App.44a).

B. The Eighth Circuit

The Eighth Circuit affirmed summary judgment (App.1a-16a). The panel failed to apply the mixed-motive framework to Keller's admission of considering sex, emphasizing its purported "context" and saying his focus was actually on age and power dynamics (App.7a-8a).[7] By imposing a "context" requirement, the panel conflicted with this Court's precedent in *Price Waterhouse*, 490 U.S. 228, nullifying the standard of sex as 'a motivating factor' and transforming it into a 'but-for' analysis. Under a mixed-motive analysis, Keller's admission and reliance on stereotypes would establish liability. As mentioned above, the Eighth Circuit similarly used "context" to grant summary judgment in *Smothers v. Rowley Masonic Assisted Living Cmty.*, 63 F.4th 721, 728 (8th Cir. 2023), a Title VII case, showing a recurring issue that is clear cut and will likely continue in both Title IX and Title VII without this Court's intervention.

The Court also relied on the fact that Keller had only reviewed female complainants' appeals and thus had no opportunity to evaluate consent with male accusers (App.8a), even though the "motivating factor" standard requires no such comparative evidence.

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[7] Keller, in fact, testified that "age" and "consent does not mean approval" were the other two factors (App.68a-71a). Still, Doe received no notice for the charge that is associated with 'power dynamics' as mentioned below in the due process section, a charge that was dismissed by the investigator before the hearing.

The Court dismissed evidence of institutional bias, like the lawsuit against Keller, concluding that Doe did not connect the lawsuits to his case (App.8a-9a). In doing so, the panel failed to address Doe's specific contention that the lawsuit against Keller created a particularized risk of bias in Keller's decision (App.82a-85a,107a,129a-131a,164a,166a-167a,171a, 205a).

The panel's use of "context" to explain away Keller's admission of using sex to evaluate Doe's appeal joined other instances of it inappropriately drawing factual inferences in the *university's* favor when evaluating the Title IX claim (App.8a). It dismissed evidence of Frost's sex stereotyping, despite her use of parallel "fantasy" language in a similar case that triggered an OCR investigation (App.134a-135a,138a, 168a-169a,196a) speculating that the word "fantasy" has "more than one connotation" while ignoring Doe's argument about Frost's pattern of decision-making (App.7a).

The panel characterized Dr. Lovaglia's testimony as equivocal and difficult to see as "exculpatory" (App.5a-6a), despite Keller admitting that the testimony was "important information," and had he been aware of it, he could have warranted a remand (App.75a,119a).

Similarly, the panel determined that Frost's straightforward and descriptive explanation that she asked Complainant 2 if she feared Doe would "punch" or "hit" her based on UI's policy factors regarding physical intimidation dispelled any inference of sex stereotyping (App.7a,134a,139a,168a), even though Doe argued he was not charged with such conduct, that UI has a separate charge for such conduct, and the Complainants made no allegations of Doe being violent (*Id.*).

The panel disregarded the suspicious timing of DiCarlo's intervention to increase Doe's sanction (App. 105a,108a-109a,128a-134a,166a-167a,186a,204a-205a). Thus, the Court set an extremely high bar for procedural irregularities for accused students to get past summary judgment (App.9a). This emboldens universities to cut corners and tilt the scales against accused students.

Finally, the panel dismissed UI's "masculinity" programming and the RVAP's gendered definition of "rape culture" as generalized anti-respondent beliefs, even though the RVAP had defined "rape culture" in explicitly gendered terms as beliefs encouraging "male sexual aggression and violence, especially against women and children" (App.136a,166a, 207a).

The Court failed to grapple with Doe's core procedural due process claim—that Frost egregiously found him responsible for an uncharged "educational leadership" offense, which was used in part to argue a crucial power differential (App.106a,118a,146a-147a), yet the Court had no qualms in stating there was indeed such a power differential. UI conceded that Frost could be sued in her personal capacity and that she made this finding despite the initial investigator's dismissal of the charge and its absence in the notice of charges (App.53a). But the panel recasts this procedural violation as factual findings relevant to the charges (App.11a-12a), despite the conduct relating to a different charge.

En Banc Rehearing

Doe argued the panel contradicted precedent by dismissing Keller's admissions, overlooking evidence of external pressure, and contradicting precedent on policy deviations and evidence analysis. Appellant's Pet. for Reh'g En Banc at 8-16. The Eighth Circuit

denied the timely petition for rehearing *en banc* (App.51a).

REASONS FOR GRANTING THE PETITION

I. Divergence in Lower Courts

A. The Courts of Appeals Are Intractably Divided on the Relevance and Application of Title VII Principles to Title IX

This petition seeks this Court's review to resolve a critical Circuit split regarding the applicability of Title VII frameworks to Title IX claims and to clarify the constitutional due process requirements in university disciplinary proceedings. Inconsistent application of legal standards across circuits creates significant legal uncertainty for nearly 19 million students nationwide, demanding uniform standards for fair disciplinary processes.

The Tenth Circuit has expressly held that the *McDonnell Douglas* framework governs Title IX cases based on circumstantial proof (*Univ. of Denver,* 1 F.4th at 836-838). The Sixth and Seventh Circuits looked to Title VII without formally adopting *McDonnell Douglas* (*Doe v. Oberlin Coll.*, 963 F.3d 580, 586-88 (6th Cir. 2020); *Doe v. Purdue Univ.,* 928 F.3d 652, 667-70 (7th Cir. 2019)). In the Fifth Circuit, the *McDonnell Douglas* framework's applicability to Title IX claims is "unsettled." *Sewell v. Monroe City Sch. Bd.*, No. 21-30696, at *4 n.12 (5th Cir. June 29, 2022). But the Eighth Circuit never mentioned *McDonnell Douglas*, disregarding the mixed-motive and pretext analysis (App.5a-10a), thereby erecting near-insurmountable hurdles, even for the most

meritorious Title IX claims. This case presents an ideal vehicle for resolving this circuit split, as it is rare for a case to involve both direct (Keller's admission) and circumstantial evidence of discrimination.[8]

1) The Panel Erred by Not Applying the Mixed Motives Analysis

In Title VII cases, a plaintiff can establish liability by showing that discrimination was a motivating factor, even if other legitimate factors also played a role. *Price Waterhouse*, 490 U.S. at 244-45. Keller's admission that sex was one of the three factors in his decision provides direct evidence of discrimination (App.71a-72a). The panel's lack of application of a framework, allowed it to disregard smoking-gun evidence of sex discrimination, resulting in factual disputes being resolved in UI's favor. Despite Keller admitting that sex was a factor in his decision not to find Doe's appeal credible, the panel found that no reasonable jury could conclude that sex was a motivating factor in the decision (App.7a-8a).

"Any number of federal constitutional and statutory provisions reflect the proposition that, in this country, we determine guilt or innocence individually—rather than collectively, based on one's identification with some demographic group." *Oberlin Coll.*, 963 F.3d at 580. UI did not argue that the same result would have occurred absent consideration of sex. In fact, none of Keller's three factors for determining credibility was based on Doe being guilty under UI

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[8] The Eleventh Circuit intensified this Circuit split, requiring accused students pleading Title IX claims to show—at the 12(b)(6) stage—that sex bias is "more likely" than "inexperience, ineptitude, and sex-neutral pro-complainant bias" for the university's actions (*Doe v. Samford Univ.*, 29 F.4th 675, 692 (11th Cir. 2022)).

policies (App.68a-71a).[9] Still, the panel attempted to place Keller's remarks "in context," focusing on his references to the complainants' youth while overlooking his explicit mention of sex multiple times (App.8a), even though both Doe, a young man in his mid-20s, and the Complainants were adults (App.68a,177a). Even if age was a legitimate factor (which it was not), the mere presence of a potentially legitimate consideration does not negate the fact that sex was also an express factor in Keller's analysis.

The panel also erred in finding no discrimination because Keller only considered female complainants' appeals and thus had no male comparators (App.8a). This argument is immaterial because Doe need not identify a comparator to establish a prima facie discrimination case under the motivating factor analysis. *See, e.g., Menaker v. Hofstra Univ.,* 935 F.3d 20, 37 (2d Cir. 2019); *Lewis v. City of Union City,* 934 F.3d 1169, 1185 (11th Cir. 2019).

Keller's reliance on sex and archaic stereotypes about the impressionability of young "women" provided direct evidence from which a jury could infer that sex was a motivating factor in his decision,

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[9] One distinguishing factor in the viability of a Title IX claim is whether the accused student presents a plausible argument that the disciplinary action was erroneous. Courts consistently—and rightfully—grant summary judgment in cases where guilt is admitted or evident (*Rowles v. Curators of the Univ. of Mo.*, 983 F.3d 345, 359 (8th Cir. 2020); *Oirya v. Brigham Young Univ.*, 854 Fed. Appx. 968, 970 (10th Cir. 2021)). Here, however, the petitioner challenged the accuracy of the decision itself and provided evidence to show articulable doubt in its accuracy (see *supra*, Factual Background section), including showing the Complainants' motives, that the adjudicator repeatedly falsified evidence (see *supra* at p. 13-14), and that all decisions went against him (*cf. Doe v. Regents of Univ. of Cal.*, 23 F.4th 930, 937 (9th Cir. 2022)).

regardless of any comparative evidence. *See Doe v. William Marsh Rice Univ.,* 67 F.4th 702, 713 (5th Cir. 2023) (reversing summary judgment by finding an issue of material fact on sex-based stereotype when the plaintiff alleged the university was "[r]efusing to acknowledge that [the accuser] had accountability for her own actions, her own choices[,] and her own conduct [was] 'remarkably outdated'"); *Brenden v. Independent Sch. District,* 742, 477 F.2d 1292, 1296 (8th Cir. 1973) ("[D]iscrimination on the basis of sex can no longer be justified by reliance on 'outdated images' of women as peculiarly delicate and impressionable creatures in need of protection from the rough and tumble of unvarnished humanity.").

The decision below was published, and the resolution was outcome dispositive. Had the panel applied Title VII standards, it would not have dismissed Doe's arguments based on its Title VII precedent: *See Griffith v. City of Des Moines,* 387 F.3d 733, 735 (8th Cir. 2004) ("[E]vidence of additional motives, and the question whether the presence of mixed motives defeats all or some part of plaintiff's claim, are trial issues, not summary judgment issues."). Keller's explicit admission that sex was a factor in his decision-making process provides a rare opportunity for the Court to clarify how direct evidence and mixed-motive analysis apply in Title IX cases at the summary judgment stage.

2) The Panel Erred by not Evaluating Indirect Evidence Under the *McDonnell-Douglas* Framework

Even if Doe cannot establish direct evidence, he can still prove liability through circumstantial evidence under the framework established in *McDonnell Douglas Corp.,* 411 U.S. at 792. The Second and Tenth Circuits have applied this framework to Title IX

(*Columbia Univ.*, 831 F.3d at 56; *Univ. of Denver*, 1 F.4th, at 830). The Tenth Circuit specifically applied the framework to Title IX claims for circumstantial evidence (*Id.*at 833-34). The framework is a critical tool for assisting plaintiffs in reaching trial and presenting their evidence to a jury.

Although not expressly invoking *McDonnell Douglas*, other circuits have relied on Title VII precedent when assessing Title IX claims, reflecting an emerging consensus that the Title VII frameworks provide the relevant touchstone for analyzing whether sex was a motivating factor in the decision. *See, e.g., Oberlin Coll.*, 963 F.3d, at 586-88; *Doe v. Univ. of Scis.*, 961 F.3d 203, 209 (3d Cir. 2020); *Doe v. Miami Univ.*, 882 F.3d 579, 593 (6th Cir. 2018); *Schwake v. Ariz. Bd. of Regents*, 967 F.3d 940, 947-48 (9th Cir. 2020).

Circumstantial evidence includes procedural irregularities, stereotypes, and external pressures. The panel's failure to apply Title VII frameworks resulted in the misapplication of summary judgment standard and a failure to view the evidence in the light most favorable to Doe. Keller's testimony provides the clearest example of pretext.

Besides sex, Keller cited age and "consent does not mean approval" to affirm the decision (App.68a-72a,119a). He testified that someone could manifest consent to sexual behavior yet still violate university policy (App.71a,197a-198a). These rationales lack support from UI policies or evidence. Keller even admitted that age was not permissible under UI's policy (*Id.*), and Stevenson Earl found no indication that Doe held any supervisory or evaluative authority that would give rise to a power imbalance (App.118a,126a). The notion that "consent does not mean approval" appears nowhere in UI's sexual misconduct policies; it reflects Keller's personal beliefs outside the scope of

the charges. A rational jury may not agree that Keller's insertion of personal beliefs was appropriate or even relevant, but it was improper of the panel to replace its role.

Keller also endorsed an erroneous definition of consent, suggesting a female student's after-the-fact assault allegation negates any prior consent to sexual activity, eviscerating due process for accused males (App.71a,136a,170a,197a).

Moreover, Keller's testimony revealed that he harbored doubts about Frost's findings. He admitted that Dr. Lovaglia's testimony was "important information" and that, had he known of its exclusion, he would have considered remanding the decision (App.75a,119a). These statements, coupled with Keller's explicit reliance on sex stereotypes and the female student's lawsuit against him then, strongly suggest that his proffered rationales were pretextual.

Even without Keller's circumstantial evidence (and direct evidence), Doe can still prevail under *McDonnell Douglas* based on the ample circumstantial evidence from other facts. Doe presented evidence of a one-sided, irregular investigation and adjudication that excluded key exculpatory evidence, and the record is replete with circumstantial evidence supporting an inference that sex was a motivating factor in the decision, including:

- The one-sided investigation by Stevenson Earl, which omitted crucial exculpatory evidence such as Dr. Lovaglia's testimony that Complainant 1 told him the encounter with Doe was consensual and discounting of Complainant 1's ulterior motive for filing a complaint (112a-114a,121a-123a);

- Adjudicator Frost's biased decision-making favoring female complainants while disregarding testimony from neutral witnesses like Dr. Lovaglia. Frost cherry-picked Dr. Lovaglia's testimony, omitting his statements that Complainant 1 said the activity was consensual (App.105a-106a,108a,113a,115a-116a,124a 125a,148 a-150a);
- Frost's reliance on sex-based stereotypes, such as characterizing Doe's account of Complainant 2 initiating sexual activity as a "fantasy" while baselessly asking Complainant 2 if she feared Doe would "punch" or "hit" her, despite no allegations of physical violence, exemplifying blatant male stereotyping her (App.134a,139a, 168a);
- The striking parallels between Frost's "fantasy" remarks in Doe's case (App.134a-135a,138a,168a-169a,196a), and her assertion in a subsequent proceeding with identical facts that the male respondent's description of the female complainant initiating a sexual encounter sounded like a "young man's fantasy" (*Id.*), manifesting a pattern of discrediting male accounts of female sexual agency. Frost's conduct in the subsequent case triggered a federal OCR investigation into anti-male bias (*Id.*);
- The clear irregularity of Frost finding Doe responsible for non-consensual kissing of Complainant 2 (and thus sexual assault)

when Complainant 2 herself denied any kissing occurred, crediting only the portions of Doe's testimony that allowed her to find additional violations while disregarding his same testimony about it being consensual (App.124a,165a);

- UI's failure to follow its policies, with Frost holding Doe responsible for an "educational leadership role" theory that was never charged and had been rejected by investigator Stevenson Earl (App.106a, 118a,146a-147a);
- Title IX Coordinator DiCarlo intervening to override Stevenson Earl's initial recommendation of a reprimand (UI's lowest sanction) and pushing for a formal hearing, resulting in Doe's expulsion. This action occurred just two weeks after DiCarlo was tasked with reforming UI's policies following media coverage of a wave of female-initiated Title IX lawsuits (App. 105a,108a-109a,128a-134a,166a-167a, 186a,204a-205a).

This cumulative evidence, viewed holistically under the *McDonnell Douglas* framework, strongly suggests that sex discrimination infected Doe's disciplinary process. As the Sixth Circuit recognized in *Oberlin College*, a "pattern[] of decision-making" and irregularities disfavoring male respondents can establish the requisite connection between outcome and sex. 963 F.3d at 586-88.

Importantly, where procedural irregularities taint fact-finding, Doe need not show a strong causal link between UI's sex bias and the flawed outcome, as even

"minimal evidence of pressure on the university related to sex" can suffice. *Menaker,* 935 F.3d 20 at 34. Yet the panel nullified this holistic inquiry by dissecting evidence into disconnected fragments that were each treated as insufficient to raise an inference of bias (App.6a-10a). This approach disregards the reality that sex discrimination often operates subtly, manifesting through the uneven application of procedures, inconsistent evaluation of evidence, and reliance on sex-based stereotypes and assumptions. Such an approach will enable universities to stack the deck against accused students, secure in the knowledge that accused students can rarely connect the dots between individual irregularities to paint a picture of bias.

The *McDonnell Douglas* framework exists precisely to expose such bias by allowing plaintiffs to show discrimination circumstantially through a holistic assessment of the evidence. This case presents an ideal vehicle for the Supreme Court to answer the clear legal question of whether Title VII standards should apply to Title IX, especially given the rarity of a case having both direct and indirect evidence.

B. The Quantum of Proof Needed for a Prima Facie Discrimination Claim is an Entrenched Circuit Split

In contrast to the Eighth Circuit's demanding approach to the evidentiary burden for Title IX claims, the Fifth and Tenth Circuits require only "some evidence" of sex as a motivating factor to raise a triable issue (*Univ. of Denver,* 1 F.4th at 836; *William Marsh Rice Univ.,* 33 F.4th at 711). Other circuits also disagree with the panel's contextual reading of sex-bias statements (*Purdue Univ.,* 928 F.3d 652, 669; *Doe v. Regents of Univ. of Cal.,* 23 F.4th 930, 937 (9th Cir.

2022)) and its findings on campus-related pressure (*Columbia Univ.*, 831 F.3d at 57; *Baum*, 903 F.3d at 586). This Court's intervention is necessary to establish uniform standards in this area.

Several circuits consider procedural irregularities, such as extra-procedural intervention, suppression of exculpatory evidence, and improper appellate standards, to contribute to a record of sex discrimination when viewed holistically. The Seventh Circuit even held that troubling procedural irregularities could merit a preliminary injunction in *Doe v. Univ. of S. Ind.*, 43 F.4th 784 (7th Cir. 2022). In *Regents of the Univ. of Cal.*, 23 F.4th at 941, the Ninth Circuit stated, "[A]t some point an accumulation of procedural irregularities all disfavoring a male respondent begins to look like a biased proceeding." Like the Second Circuit in *Menaker*, 935 F.3d 20 at 34, the Ninth Circuit also emphasized that minimal evidence is required to raise a genuine issue of fact about motive in summary judgment. *Chuang v. Univ. of Cal. Davis, Bd. of Trs.*, 225 F.3d 1115, 1124 (9th Cir. 2000).

The panel's approach to drawing factual inferences in the university's favor is unique among the Circuits and departs far from the accepted and usual course of proceedings (App.6a-10a). The Second Circuit assumed that the accused student's "insistence that the sexual encounters were consensual was sufficient to raise a disputed issue of material fact on the question of misconduct." *Doe v. Colgate Univ. Bd. of Trs.*, 760 Fed. Appx. 22, 30 (2d Cir. 2019) (granting summary judgment on other grounds). For the Fifth Circuit, it was enough that the accused student "continuously and strenuously questioned" why the Title IX coordinator did not seek additional information that might have corroborated his position in a he-said/she-said case. *William Marsh Rice Univ.*, 67 F.4th at 709. The

Tenth Circuit found it sufficient that the university's investigative report, "when viewed in the light most favorable to John, can be construed as ignoring, downplaying, and misrepresenting inconsistencies in Jane's account of the alleged assault." *Univ. of Denver,* 1 F.4th at 832. After the Seventh Circuit remanded *Purdue Univ.*, the District Court denied Purdue's motion for summary judgment, even though "a reasonable juror could infer that John sexually assaulted Jane" since other evidence suggested that the university's finding might have been contrary to the evidence. *Doe v. Purdue Univ.,* 2:17-CV-33-JPK, at *15 (N.D. Ind. Aug. 11, 2022).

The panel's departure from other Circuits on the quantum of proof creates a roadmap for schools to evade accountability. This inconsistency means that universities in circuits like the Second, Fifth, Sixth, Seventh, and Tenths face greater scrutiny and are more likely to have their feet held to the fire if they engage in biased investigations or railroad accused students, while universities in the Eighth Circuit will escape liability.

II. The Constitutional Floor for Due Process in Campus Disciplinary Proceedings is a Nationally Important Yet Unsettled Issue

The Due Process Clause under 42 U.S.C. § 1983 is implicated in university disciplinary proceedings. Doe was denied a meaningful hearing, as Frost refused to ask his material questions and applied disparate questioning standards. This Court should clarify the unsettled constitutional floor for due process in university disciplinary proceedings, a matter of significant public interest.

A. The Supreme Court and Other Circuits Have Recognized That Cross-Examination Is the Greatest Legal Engine Ever Invented for the Discovery of Truth

In *Mathews v. Eldridge,* this Court articulated the interest-balancing framework governing the scope of due process owed before a deprivation of protected rights. 424 U.S. 319 at 334-35. Doe presented evidence of numerous unasked material questions (App.187a-189a), and UI admitted that such questions were unasked. The panel held that UI providing Doe a hearing where the adjudicator vetted his questions in advance sufficed for due process (App.13a-15a). But this hollow ritual in a 'he said/she said' case does not resemble true cross-examination, which the Sixth Circuit in *Baum* held is "not only beneficial, but essential to due process." 903 F.3d at 581. The *Baum* Court relied on this Court's recognition that cross-examination is the "greatest legal engine ever invented for the discovery of truth." (*Id.*) and held that an advisor must conduct the examination. In 2020, the U.S. Dept. of Education agreed, mandating in new Title IX regulations, that schools conduct live hearings with cross-examination by the parties' advisors. *See* 34 C.F.R. § 106.45(b)(6)(i). The panel's holding directly conflicts with and guts the central protection that *Baum* and the 2020 Title IX regulations consider essential.

B. The Decision Departs from *Baum* and the 2020 Title IX Regulations, Allowing Questioning Practices That Prejudice Accused Students

Frost's refusal to ask material questions and the application of double standards violate due process

(App.148a-150a). Instead of allowing Doe, through his advisor, to ask probing questions that could expose inconsistencies or improper motives, UI required him to submit inquiries to Frost in advance. Frost refused to ask the Complainants multiple questions on key post-incident interaction topics (*Id.*). She also rephrased Doe's remaining questions, blunting their impact, but aggressively cross-examined Doe and tried to coerce him into confessing guilt (*Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56, 70 (1st Cir. 2019); *Columbia Univ.*, 831 at 49)).[10] While Doe weathered Frost's leading questions without admitting guilt, he could not confront his accusers or challenge the validity of uncorroborated allegations directly contradicted by documentary evidence. Allowing an advisor to conduct cross-examination as required by *Baum* and the 2020 Title IX regulations would immediately eliminate such disparate questioning standards, providing both the accuser and the accused with an equal playing field.

C. This Case Is an Ideal Vehicle to Clarify the Constitutional Floor for Student Due Process.

UI's admission of unasked questions (R.Doc.185-2 at 5-7; R.Doc.187-1 at 13) makes this case a perfect tool for determining a university student's right to cross-examination when credibility is paramount. The facts presented here are symbolic of how this legal issue generally arises. A student's rights must not

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[10] *See* Casey McGowan, *The Threat of Expulsion as Unacceptable Coercion: Title IX, Due Process, and Coerced Confessions*, 66 EMORY L.J. 1175 (2017), https://scholarlycommons.law.emory.edu/elj/vol66/iss5/3 (last visited June 10, 2024).

fluctuate based on the circuit their university sits on. But that is exactly the paradigm the current morass in lower court case law has created. Only the Supreme Court can untangle these knots, harmonize federal law, and ensure that the Due Process Clause applies uniformly nationwide. Allowing these splits and uncertainties to persist will impede federal regulations and lead to more students facing life-altering consequences.

D. Granting Qualified Immunity to Frost Despite a Conceded Due Process Violation Undermines the Purpose of § 1983 Liability

Doe presented sufficient evidence to sue Frost, but the lower courts improperly dismissed the claim. Doe alleged—*and UI conceded*—that adjudicator Frost (and charging officer Cervantes) found him responsible under a theory that he occupied a "leadership role," which was never charged in the formal complaint against him and was, in fact, rejected by Stevenson Earl (App.53a, R.Doc.57 at 30; R.Doc.187-1 at 18) (emphasis added). Advancing a new factual basis for discipline at the eleventh hour, without affording the accused notice or opportunity to respond, is a textbook due process violation. *See, e.g., Navato v. Sletten,* 560 F.2d 340, 345-46 (8th Cir. 1977); *Univ. of Cincinnati* at 399-400. The law clearly established Doe's entitlement to the specific notice of charges.

Beyond the improper dismissal itself, the panel's substantive basis for rejecting Doe's claim—that he was not actually "charged" with an educational leadership role—ignores the gravamen of his argument and the resulting prejudice (App.11a-12a). While Frost did not cite the "Consensual Relationships Involving Students" policy ("CRISP") (which prohibits

sexual relationships where a "power differential" exists between instructor and student), she unmistakably relied on Doe's alleged leadership position and "power differential" to find sexual misconduct—even though UI never charged Doe with abusing such authority (App.172a-178a). Critically, Frost used language mirroring CRISP, stating that Doe's conduct affected the complainants' "educational mission." (*Id.*). *Compare with* CRISP: "The integrity of the University's *educational mission* is promoted by professionalism that derives from mutual trust and respect in *instructor-student relationships*." (*Id.*).

According to UI policies, an impermissible power differential occurs when an "instructor" is "*instructing*, *evaluating*, or *supervising*, directly or indirectly, a student's academic work" (*Id.*). But Doe was not an instructor, and UI's investigator found no evidence that Doe directly or indirectly *instructed*, *evaluated*, or *supervised* the complainants (*Id.*). As a result, UI did not "charge" Doe for violating CRISP.

This unalleged predicate infected the entire proceeding, as both Frost and Keller explicitly invoked the "power differential" theory to justify their decisions. Title IX regulations recognize that an impermissible power imbalance may vitiate consent. 34 C.F.R. § 106.30(a)(3). By predicating liability on an unnoticed "power differential" theory, Frost applied a quasi-criminal standard without affording the requisite procedural protections.

Nowhere did the panel cite that Doe was an instructor or had power over the complainant's grades directly or indirectly (which is what a power differential is defined as under Title IX regulations and UI policy), yet it continued arguing this power differential. Doe's briefs cogently explained how UI exploited a leadership role that its investigator rejected to

support the critical "power differential" finding (App.118a,126a,173a-178a). Under UI policies, even a *professor* can be in a relationship with a *student*, and it still would not count as a power differential if the professor had no power over the student's grades (*Id.*). The panel's failure to address the heart of Doe's claim, the defendants' dispositive concession, or the resulting prejudice from the lack of notice contradicts basic principles of judicial review and due process. The panel's hands-off approach leaves students vulnerable to arbitrary expulsions based on unalleged conduct. By affirming the dismissal of a concededly well-pleaded claim, the decision departs from existing legal standards and foments confusion over pleading and due process standards for constitutional violations. This Court needs only to focus on UI's clear admission that Doe has alleged sufficient facts to keep his individual claims against Frost.

This Court's review is urgently needed to clarify personal-capacity claim standards and to reaffirm the judiciary's vital role in vindicating constitutional rights. The Court should grant certiorari, reverse the Eighth Circuit's departure from precedent, and hold that where the defendants *concede* a well-pleaded constitutional violation, dismissal on qualified immunity grounds is improper. Any other rule would convert the doctrine into an impenetrable shield and eviscerate the right to a fair process before deprivation of a protected liberty interest (*Mathews*, 424 U.S. 319 at 333). Due process demands more.

These examples illustrate how the Eighth Circuit's outlier positions led to a disastrous outcome for Doe: The Court did not apply the proper frameworks, imposed an insurmountable evidentiary burden, and failed to enforce basic due process protections. The cumulative effect was to bless a procedurally deficient

and discriminatory disciplinary process that destroyed Doe's educational prospects. The Supreme Court's guidance is essential to ensuring that campus disciplinary systems operate fairly and consistently across the country, that wrongfully accused students have a path to justice, and that universities face appropriate incentives to respect due process.

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX