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

BRIEF OF STOP ABUSIVE AND VIOLENT ENVIRONMENTS ("SAVE") AS *AMICUS CURIAE* 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 universities;[6] compiled information

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. Timely notice was provided to the parties.

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.

6. Benjamin North, *Interactive Spreadsheet of Lawsuits Against Universities*, SAVE.ORG, http://www.saveservices.org/

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.

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. The circuits are also divided on what an accused student must establish in order to prove a Title IX claim. 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, and unable to rely on a consistent statutory standard as to what they must plead or prove in

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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).

order 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 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

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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).

262 judicial decisions primarily favorable to accused students, 262 favorable to a university, and 156 settled before any court decision.[15] Gary Pavela, a 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 first Trump Administration corrected the error of the Dear Colleague Letter "kangaroo courts,"[17] problems continue to proliferate on campuses across the Nation. Without the benefit of 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.

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15. KC Johnson, *Post Dear-Colleague Letter Rulings/Settlements*, https://docs.google.com/spreadsheets/d/1CsFhy86oxh26SgTkTq9GV_BBrv5NAA5z9cv178Fjk3o/edit#gid=877378063 (last visited May 6, 2023).

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.

The several circuits apply inconsistent constitutional due process standards for public university students accused of misconduct. For instance, the Sixth Circuit holds that the Constitution 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 holds there is not 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 are also inconsistent on Title IX. For example, the Second Circuit requires 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 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. 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 unambiguously holds 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 yet 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 Eighth Circuit assumed, without deciding, that Petitioner had a protected liberty or property interest. *Doe v. Univ. of Iowa*, 80 F.4th 891, 898-899 (8th Cir. 2023). A plurality of other circuits has affirmatively found a liberty interest in a student's occupation of choice post-graduation. *See, e.g., Purdue,* 928 F.3d at 662-663 ("it was this official determination of guilt . . . that allegedly deprived John of occupational liberty"); *Overdam v. Texas A&M Univ.*, 43 F.4th 522, 529 (5th Cir. 2022); *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 holds 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. 928 F.3d at 662-663.

Unfortunately, students in other circuits 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 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

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.

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. Absent intervention from this Court, students in those states will continue to suffer harm without a constitutional remedy.

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*, 174 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 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. *Id.* at 709. 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. citing*

Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 570, 577 (1972). Despite the clear misapplication of *Goss* and *Paul*, as well as 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*, 174 F. Supp. 3d at 660.

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, renders liberty interest 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 is 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*, 933 F.3d at 66. 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. 442 U.S. at 335.

Other circuits have similarly recognized the importance of cross-examination in the campus disciplinary context. Citing *Mathews*, some courts hold 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

20. It is worth noting that Texas had intervened in this case to defend the Title IX Rule requiring 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).

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 disagree 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 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 the adjudicator refused to ask questions posed by Petitioner and otherwise applied inconsistent evidentiary standards to Petitioner and his accuser. *Compare* Pet. for Writ of Cert. at 10, *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. 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 basic fairness on campus, ensures common sense due process protections for public university students across the Nation.

Considering that public universities already provide cross examination (34 C.F.R. §106.45(b)(6)), 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 establish the Purdue standard for Title IX claims.

Granting *certiorari* is necessary to ensure that both the Title IX pleading standard and the Title IX summary judgment standard track the plain text of the Title IX statute. *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.

As a starting point, the Tenth Circuit applies *the Purdue* standard to summary judgment to simply test whether "a reasonable jury—presented with the facts alleged—find that sex was a motivating factor in the University's disciplinary decision." *Doe v. Univ. of Denver*, 1 F.4th 822, 830 (10th Cir. 2021). The Tenth Circuit has correctly formed a basic test across the procedural steps of federal litigation, that hews closely towards the plain text of the Title IX statute and does not superimpose on the law (or plaintiffs) extratextual elements. The Court should take this opportunity to adopt *Purdue* as the standard for the Nation for both pleading and summary judgment, as understood by the Tenth Circuit in *Denver*.

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

a. The history of the Purdue standard supports its adoption by this Court.

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 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]

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

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).

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 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).

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 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"). 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 the totality of the circumstances – including an illogical finding of responsibility, public pressure on the school to vindicate claims of female accusers, and a procedural irregularity – supported an inference of sex discrimination. *Id.* at 865-866.[25]

b. Here, the district court failed to faithfully apply Purdue, warranting reversal.

The district court, like the courts that maintain the *Yusuf* framework, fell into the same pitfalls here by not faithfully applying *Purdue*; instead of taking the totality of the circumstances together, it isolated discrete pieces of evidence, dismissing even direct evidence of discrimination through this "silo" approach to the evidence. In this case, Petitioner elicited rare direct evidence of discrimination in discovery. The university appeal officer, Keller, admitted in his deposition ***that the sex of the students was "a factor in the decision [he] came to," to affirm Petitioner's expulsion***. Pet. for Writ of Cert., at 6. Remarkably, and contrary to the witness's own statement, the district court did not appear to consider these comments to be evidence

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.'").

that university decisionmakers improperly considered sex as a factor in the discipline. *Doe,* No. 3:19-CV-00047-RGE-HCA, 2021 WL 12137718, at *9 ("to the extent Keller's observations constitute sex bias, they are insufficient to demonstrate Doe was expelled on the basis of his sex"). Indeed, it seems a "reasonable inference" (if one is necessary as this is direct evidence without a need for an inference) to infer that when Keller said he took sex into consideration, he meant it. *K.C.*, 983 F.3d at 368.[26]

To highlight another example of the *Purdue* standard being helpful for Petitioner, the district court isolated and then similarly dismissed the gendered statements made by the adjudicator in Petitioner's case. Pet. for Writ of Cert., at 13. Petitioner presented evidence that the adjudicator used demeaning and hostile gendered language to characterize a male student's[27] version of events, describing them as a "young man's fantasy." *Id.* Again, it seems a "reasonable inference" – to put it mildly – from this gendered testimony that the adjudicator harbored sex bias that may have infected Petitioner case.

Instead of so ruling, the district court joined in the adjudicator's derogatory comments, agreeing that "Frost's use of the term 'fantasy' appears straightforward and descriptive of the dramatic difference between Doe's and Complainant #2's version of events." *Doe,* No.

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26. This error can only be explained by the district court's construing the facts in the movant's favor in violation of the summary judgment standard.

27. This characterization occurred in a subsequent case at the university with the same adjudicator. The adjudicator, however, used similar language in Doe's case, calling Doe's accounting of events a "fantasy."

3:19-CV-00047-RGE-HCA, 2021 WL 12137718, at *8. Far from viewing the facts in the light most favorable to Doe, the district court conducted a credibility determination that Petitioners account was less believable than his accuser's, which was not his role. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("Credibility determinations… are jury functions, not those of a judge, [when] [s]he is ruling on a motion for summary judgment").

The district court here was able to reach its conclusion through its avoidance of considering all of the evidence together, as it was supposed to do. *Doe*, No. 3:19-CV-00047-RGE-HCA, 2021 WL 12137718, at *9 (S.D. Iowa Sept. 20, 2021). Indeed, instead of taking the facts together, or "considering… the totality of the [evidence],"[28] the district court took a "silo" approach, looking at each piece of evidence piecemeal to test whether it alone could make the case for Petitioner. *Id.* Thus, the district court erroneously divided Doe's Title IX claim into four distinct parts and tested whether each part alone could survive summary judgment, which offends the textual purpose of the *Purdue* test. *See, e.g., Doe*, No. 3:19-CV-00047-RGE-HCA, 2021 WL 12137718, at *9 ("a reasonable jury could not find Keller's narrow statement… as sufficient evidence that sex bias motivated the University to expel Doe").

Of course, the question was never whether Doe could provide a single piece of evidence that would be "sufficient evidence" to show sex bias; rather, it was whether the "totality" of the evidence was sufficient to allow a reasonable juror to find that sex bias motivated the decision to expel Doe. *Compare Doe*, at *9; *with Regents of the Univ. of Minnesota*, 999 F.3d at 579. Consequently,

28. *Regents of the Univ. of Minnesota*, 999 F.3d at 579.

the district court plainly erred in undertaking a "silo" approach to the evidence. This Court should reverse that error, providing guidance to courts regarding the pleading and summary judgment standards in Title IX cases.

The failure to apply the *Purdue* totality of the circumstances test offends the plain text of the statute which states simply that "No person in the United States shall, on the basis of sex, be … subjected to discrimination" and does not require courts to painstakingly splice each piece of evidence in a case to test whether it alone makes the case. 20 U.S.C. §1681. 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 "[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 summary judgment standard – consistent with the

Purdue pleading standard – is based on the totality of circumstances and that courts may not analyze each piece of evidence by itself.

A holding that embraces the totality of the circumstances test would also effectively resolve the *Yusuf/Purdue* circuit split because the *Yusuf* standard, as described above, is hostile to the totality of the circumstances text. 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* for purposes of summary judgment, 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 put an end to district courts evading the plain text of the Title IX statute and 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* totality of the circumstances test standard for both pleading and summary judgment.

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

Establishing the *Purdue* test as the test for Title IX claims will also eliminate a different emergent problem: 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.*

Accordingly, 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 grant *certiorari*.

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Respectfully submitted,

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