No. _____

In the Supreme Court of the United States

JANE DOE,
Petitioner,

v.

TIMOTHY WHITE, ET AL.,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

When State actors threaten to deprive individuals of liberty or property, the Fourteenth Amendment requires procedural protections that comport with minimum standards of fairness. In *Goss v. Lopez*, 419 U.S. 565, 573-76 (1975), this Court held that high school students had been unconstitutionally deprived of their Fourteenth Amendment liberty and property interests when they were suspended without notice and an opportunity to be heard. The questions presented are:

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

2. Whether, given this Court's decades'-old decision in *Goss*, the law was clearly established at the time of the events giving rise to this case such that Respondents are not protected by qualified immunity.

PARTIES TO THE PROCEEDING

Jane Doe, petitioner on review, was the appellant below and plaintiff in the trial court.

Timothy White, Sarah Clegg, Joyce Suzuki, William Kidder, and Jesse Andrews, respondents on review, were appellees below and defendants in the trial court.

STATEMENT OF RELATED PROCEEDINGS

There are no related proceedings.

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PETITION FOR A WRIT OF CERTIORARI

Jane Doe respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's opinion is unpublished but is available at 859 F. Appx. 76 (9th Cir. 2021). Pet. App. 1-6. The district court's opinion is reported at 440 F. Supp.3d 1074 (N.D. Cal. 2020). Pet. App. 7-38.

JURISDICTION

The Ninth Circuit entered judgment on June 1, 2021. Doe thereafter filed a timely petition for rehearing, which the court denied on July 8, 2021. Pet. App. 40. On July 19, 2021, this Court entered a standing order, the effect of which extends the time to file a petition for writ of certiorari in this case to December 6, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Due Process Clause of the Fourteenth Amendment provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

42 U.S.C. § 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

INTRODUCTION

In 1975, this Court held that high school students were deprived of their Fourteenth Amendment rights to liberty and property when they were suspended without notice and an opportunity to be heard. *Goss v. Lopez*, 419 U.S. 565, 576 (1975). Since *Goss*, this Court has twice assumed, but never expressly decided, that students enrolled in public colleges and universities also possess constitutionally protected liberty or property interests when they face suspension and expulsion proceedings. *Bd. of Curators of the Univ. of Missouri v. Horowitz*, 435 U.S. 78, 84-85 (1978); *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 223 (1985). Each of the federal courts of appeals to consider the issue has held the Due Process Clause applies to such proceedings in the higher-education context, but they are split on what higher-

education students must show, if anything, to establish a liberty or property interest—the threshold question of any procedural due-process analysis.

Among the Circuits, the First, Fifth, and Sixth Circuits have taken the most expansive view, holding that higher-education students confronting suspension or expulsion inherently have a Fourteenth Amendment liberty interest at stake. Students in those Circuits are thus not required to show any special facts because their liberty interests are *automatically* deemed to be at risk. The Seventh, Ninth, and Tenth Circuits, on the other hand, take a considerably narrower view. These courts require students to satisfy a "stigma-plus" test by showing: (1) they suffered a stigma to their reputations; (2) university officials publicly disclosed their purported wrongdoing; and (3) they suffered some change to their legal status. The far more onerous nature of the stigma-plus test means that plaintiffs are typically unable to establish the existence of a protected liberty interest. Indeed, the Ninth Circuit held that Petitioner Jane Doe failed to satisfy this test and that consequently, she did not allege a constitutionally protected liberty interest.

The Circuits are likewise split on the circumstances under which higher-education students may invoke a constitutionally protected property interest when confronting disciplinary proceedings. The First and Sixth Circuits hold that these students have a property interest in their education as a matter

of right (much like both Circuits recognize a liberty interest as a matter of right). Most other Circuits, however (including the Second, Fourth, Seventh, Ninth, and Eleventh), require students to allege that some other non-constitutional source of law, such as a state statute or university policy, confers upon them a property interest in their continued enrollment, as the Ninth Circuit did here.

University students suspended or expelled by their institutions are increasingly filing section 1983 actions in federal court alleging they were denied procedural due process in the investigations brought against them—including in cases where students are charged with sexual misconduct, as Doe here was by Sonoma State University. *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 (2019). Courts and commentators alike have frequently deemed university disciplinary proceedings fundamentally prejudicial to the accused.[1] But before

[1] In 2017, the U.S. Department of Education withdrew prior guidance concerning university investigations of sexual-violence complaints, explaining:

> Legal commentators have criticized the [prior guidance]... for placing "improper pressure upon universities to adopt procedures that do not afford fundamental fairness." [As a result, many schools have established procedures for resolving allegations that] lack the most basic elements of fairness and due process, are overwhelmingly stacked against the accused, and are in no way required by Title IX law or regulation.

there can be any examination of the procedures used, there must first be a finding that the student has a constitutionally protected liberty or property interest. In the First, Fifth, and Sixth Circuits, students inherently have such interests, and those courts therefore reach the merits of the students' procedural due-process claims without any requirement that the students meet a particular test or show a violation of state law. But in the Seventh, Ninth, and Tenth Circuits, the contrary is true and, as a result, the cases of students in those Circuits are often dismissed before any analysis of the procedures deployed against them can be undertaken—no matter how fundamentally unfair those procedures may have been.

This Court should grant review to clarify that higher-education students have a protected liberty and property interest when facing suspensions or expulsions, and to reject the unnecessarily exacting approach endorsed by some Circuits.

Dear Colleague Letter (2017) at 1-2 (quoting Open Letter from Members of the Penn Law School Faculty, Sexual Assault Complaints: Protecting Complainants and the Accused Students at Universities (Feb. 18, 2015) (http://online.wsj.com/public/resources/documents/2015_0218_upenn.pdf); Rethink Harvard's Sexual Harassment Policy, Boston Globe (Oct. 15, 2014) (https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html).

STATEMENT OF THE CASE

1. Doe began studying for her master's degree in Depth Psychology at Sonoma State University in September 2016. Pet. App. 8. There were 11 students in her cohort and they all took their classes together. *Id.* at 9.

In the spring of 2017, Doe and her cohort were enrolled in a class called Methods in Depth Psychology. *Id.* at 9. The syllabus for the course encouraged students to "experiment[] and maintain[] curiosity in the face of discomfort" and "ride the edge of your comfort zone and push yourself into new terrain." *Id.* at 9-10, 64-65.

On April 27, the students participated in an "Authentic Movement" exercise. *Id.* at 9-10. They paired up during the exercise, and Doe was paired with student NH. *Id.* at 10, 65. One student in each pair was designated the "mover" and the other the "witness." *Id.* at 9. The instructor directed the "movers" to "challenge yourself to move in ways that might be taboo or that you might not normally move." *Id.*

After the class, two students, NH and DB, wrote the instructor to complain about Doe's movements. *Id.* They alleged her movements were harassing because they simulated masturbation. *Id.* at 10-11. A third student, VH, also complained. *Id.* at 10. VH admitted she had not actually seen Doe's movements herself,

but said, "hearing about her actions alone was triggering and anxiety producing." *Id.*

On May 11, 2017, DB filed a written complaint accusing Doe of sexually harassing NH during the movement exercise. *Id.* at 11. VH and NH also filed complaints. *Id.* In the wake of these complaints, the course instructor wrote Doe to say, "rest assured that I hold the perspective that . . . your movement . . . was not egregious nor directed at anyone in a harassing manner. You were simply doing the exercise and your interpretation of it." *Id.*

Sonoma State's Title IX Coordinator, Joyce Suzuki, initiated an investigation of the students' complaints on May 18, 2017. *Id.* at 11. Suzuki wrote Doe on May 19 to notify her that DB and NH had accused her of engaging in a display of masturbation during the movement exercise without the consent of NH, or her classmates. *Id.*

On July 18, two months after the investigation was launched, Suzuki interviewed Doe. *Id.* at 12. She said that Doe would be able to return to class when school resumed in late August. *Id.* On August 19, Suzuki backtracked from her prior representation and informed Doe that she would not, in fact, be permitted to return to class while the investigation was pending. *Id.* at 12. Suzuki characterized what was, in effect, a suspension, as an "interim remedy." *Id.*

Three people were in charge of the investigation at different times. *Id.* at 12. Besides Doe, the

investigators interviewed the complainants and the course instructor. *Id.* at 12-13. During the prolonged investigation, Doe regularly inquired about its status, but without success. *Id.* at 12-13.

Finally, on June 2, 2018, the Deputy Coordinator informed Doe and the complainants that they could review the evidence and submit responses. *Id.* at 13-14. Doe submitted her response on July 30. *Id.* at 14.

On August 22, 2018, the University exonerated Doe of any wrongdoing. *Id.*

Doe ended up suspended from Sonoma State for 14 months, from May 2017 until August 2018. She was thus excluded from the entire second year of her graduate program. She did not receive any hearing before being suspended or during the suspension at which she could confront her accusers and the evidence against her.

2. On August 15, 2019, Doe filed suit in the Northern District of California, naming as Defendants five individuals involved in the University's disciplinary proceedings. *Id.* at 43, 46-48. Doe asserted one cause of action under 42 U.S.C. § 1983 against all the Defendants, alleging she had been deprived of her constitutional right to Due Process under the Fifth and Fourteenth Amendments. *Id.* at 79-82.

Defendants moved to dismiss the complaint. The district court was disturbed by Doe's allegations, commenting that if true, "plaintiff has raised serious

questions about whether she was provided due process during the Title IX investigation and imposition of the 'interim remedy' of preventing plaintiff from attending class for 14 months while the inordinately lengthy investigation took place." *Id.* at 37-38 n.13. Nonetheless, the district court granted Defendants' motion to dismiss. The court agreed with Defendants that they were entitled to qualified immunity because the law was not clearly established that graduate students, like Doe, have a constitutionally protected liberty or property interest in their continued university enrollment. *Id.* at 21-38. At the same time, the district court explained that it would "welcome guidance" concerning how procedural due process applies to university disciplinary proceedings given the increasing number of cases like Doe's:

> Based upon the Court's research, it appears that cases involving procedural due process claims by post-secondary students accused of misconduct arise with some frequency. Thus, these issues will continue to be litigated, and the Court would welcome guidance from the Ninth Circuit about the standards governing such claims.

Id. at 37 n.13.

3. The Ninth Circuit affirmed. *Id.* at 1-6. Like the district court, the Ninth Circuit concluded that Doe had not pleaded the existence of any liberty or

property interests entitling her to the procedural safeguards of the Fourteenth Amendment. *Id.* at 2-6.

First, the court held there was no clearly established protected property interest at stake because California law is ambiguous as to whether there is a contractual relationship between public colleges and universities and their students. *Id.* at 3-5.

Next, the court applied what has come to be known as the "stigma-plus" test to assess whether Doe had adequately alleged a protected liberty interest. *Id.* at 5-6. It held she did not. *Id.* It reasoned that Doe had not satisfied the "stigma" element of the test because she had not pleaded facts indicating Sonoma State had injured her reputation by publicly disclosing the charges in the misconduct investigation. *Id.* at 5. It further reasoned she had not satisfied the "plus" element of the test, rejecting as a basis for this element the 14-month suspension she suffered. *Id.* at 6.

The Ninth Circuit therefore concluded Doe had no protected liberty or property interests at stake and it affirmed the dismissal of her complaint.

This petition follows.

REASONS FOR GRANTING THE WRIT

A. Background on this Court's relevant precedents.

"The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). A plaintiff who alleges that his or her procedural due-process rights have been violated must satisfy a two-step showing. First, the plaintiff must allege the deprivation of a constitutionally protected liberty or property interest. Second, he or she must allege that the procedures used to deprive him or her of that interest did not satisfy the minimum standards of the Due Process Clause. *See Swarthout v. Cooke*, 562 U.S. 216, 219 (2011) (*per curiam*); *Zinermon v. Burch*, 494 U.S. 113, 125 (1990). This case involves the threshold question of what a higher-education student must show to establish the deprivation of a constitutionally protected liberty or property interest.

1. Nearly 50 years ago, in *Goss v. Lopez*, 419 U.S. 565 (1975), this Court considered what procedural due-process protections high school students were owed before they were suspended. There, nine Columbus, Ohio high school students had been suspended for up to 10 days each without any notice of the charges against them or an opportunity to contest those charges. *Id.* at 568. They brought suit against various administrators employed by the Columbus Public School System, alleging the

deprivation of their constitutional due-process rights. *Id.* at 567.

This Court first considered whether the students had a protected *property* interest in their public education. *Id.* at 572-74. To answer that question, the Court looked to state law, explaining that, "[p]rotected interests in property are normally 'not created by the Constitution. Rather, they are created and their dimensions are defined' by an independent source such as state statutes or rules entitling the citizen to certain benefits." *Id.* at 572-73 (quoting *Regents v. Roth*, 408 U.S. 564, 577 (1972)). The Court reasoned that because Ohio law provided for a free education to all residents between the ages of five and 21, and because the State mandated school attendance, the high school students "plainly had legitimate claims of entitlement to a public education." *Id.* at 573. Having chosen to make education a right, Ohio could not eliminate that right based on alleged student misconduct in the absence of "fundamentally fair procedures to determine whether the misconduct has occurred." *Id.* at 574. Ohio students thus had a property interest protected by the Fourteenth Amendment in their public educations. *Id.*

This Court proceeded to consider whether the students *also* had a protected *liberty* interest in their education. *Id.* at 574-75. The Court held that they did: "'Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him,' the minimal requirements of the

Clause must be satisfied." *Id.* at 574 (quoting *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971)). The suspensions, reasoned the Court, "could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment." *Id.* at 575.

Importantly, *Goss* cited the Fifth Circuit's decision in *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150 (5th Cir. 1961) with approval and characterized it as a "landmark decision." 419 U.S. at 576 n.8. In *Dixon*, students at Alabama State College were expelled, apparently for participating in a civil rights demonstration. 294 F.2d at 151-54. The Fifth Circuit held they had a constitutionally protected interest in their continued enrollment that was violated when they were expelled without notice or a hearing. *Id.* at 154-55. The court treated the applicability of the Due Process Clause as indisputable:

> The precise nature of the private interest involved in this case is the right to remain at a public institution of higher learning in which the plaintiffs were students in good standing. It requires no argument to demonstrate that education is vital, and indeed, basic to civilized society. Without sufficient education the plaintiffs would not be able to earn an adequate livelihood, to enjoy life to the fullest, or to fulfill as completely as

> possible the duties and responsibilities of good citizens.

Id. at 157. The *Goss* Court observed that since *Dixon* "the lower federal courts have uniformly held the Due Process Clause applicable to decisions made by tax-supported educational institutions to remove a student from the institution long enough for the removal to be classified as an expulsion." 419 U.S. at 576 n.8 (collecting cases).

2. A year after *Goss* was decided, this Court decided *Paul v. Davis*, 424 U.S. 693 (1976). *Paul* had nothing to do with the procedural due-process rights of students and instead arose from the distribution of fliers by city and county police departments branding the plaintiff a criminal. *Id.* at 694-95.

The police had distributed a five-page flier to Louisville, Kentucky merchants containing the names and mug shots of purported shoplifters. *Id.* at 695. Respondent Edward Davis was a photographer with the Louisville Courier-Journal and Times. *Id.* at 696. He was among those included on the flier because he had been arrested and arraigned on a charge of shoplifting, but the charge was dismissed shortly after the flier was circulated. *Id.* at 695-96. Davis's supervisor confronted him about the flier and warned him that while he would not be fired over it, he had better not find himself in similar circumstances in the future. *Id.* at 696.

Davis filed a section 1983 action, arguing the dissemination of the flyer had unconstitutionally deprived him of liberty under the Due Process Clause. *Id.* at 698. He argued that publicly branding him an "active shoplifter" impaired his future employment prospects and interfered with his ability to enter local business establishments for fear of arousing suspicion or false accusations of stealing. *Id.* at 697.

This Court held that although Davis had suffered a stigma to his reputation, that fact, by itself, was insufficient to trigger the Due Process Clause. *Id.* at 697-98, 701. Surveying its precedents, the Court concluded there had to be some "alteration of legal status" accompanying the defamation, such as the loss of employment, for the claimant to be entitled to the safeguards of procedural due process. *Id.* at 708-09.

The Court viewed *Paul* as consistent with *Goss*, but in so stating, it referred only to *Goss*'s property analysis, which was predicated on Ohio law, and not to its liberty analysis. *Id.* at 710. The three dissenting justices criticized the majority for what they regarded as the latter's selective reading of *Goss*. *Id.* at 730 n.15.

Twice before this Court has *assumed* that university students possess a constitutionally protected liberty or property interest, but it went on to decide those cases on other grounds. *Horowitz*, 435 U.S. at 84-85 (assuming without deciding plaintiff's dismissal from medical school deprived her of a liberty or property interest, but holding she had "been awarded at least as much due process as the

Fourteenth Amendment requires"); *Ewing*, 474 U.S. at 223 ("We therefore accept the University's invitation to assume the existence of a constitutionally protectible property right in [the student's] continued enrollment, and hold that even if [the student's] assumed property interest gave rise to a substantive right under the Due Process Clause to continued enrollment free from arbitrary state action, the facts of record disclose no such action."); *see also* Fernand N. Dutile, *Students and Due Process in Higher Education: Of Interests and Procedures*, 2 Fla. Coastal L.J. 243, 261 (2001) (commenting that, "This failure of guidance [in *Horowitz* and *Ewing*], on a clearly threshold issue, may well have spawned, or at least lengthened, litigation against universities and others.").[2]

The courts of appeals that have considered the issue uniformly agree the Fourteenth Amendment's procedural due-process guarantees apply to higher-education students confronting suspension or expulsion. But they are divided about what is required to establish procedural due-process claims in this context. As the district court noted, this issue is becoming more acute with each passing day as an increasing number of students subjected to university

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[2] *Horowitz* and *Ewing* involved academic dismissals, rather than disciplinary proceedings based on charges of misconduct. *Horowitz* noted the "significant difference" between the two, but the difference involves the degree of process owed, not the threshold question of whether there is a protected interest at stake. *Id.* at 86-90 & n.3.

discipline seek vindication of their rights in federal court. Pet. App. 37 n.13. This Court's intervention is urgently needed.

B. The courts of appeals are divided on whether higher-education students have, as a matter of right, a liberty interest at stake in suspension and expulsion proceedings, or whether they instead must satisfy the "stigma-plus" test to establish a liberty interest.

The courts of appeals have adopted divergent standards governing when higher-education students have adequately shown the deprivation of a liberty interest protected by the Fourteenth Amendment. Some Circuits follow in the footsteps of *Goss* and hold that university disciplinary proceedings *automatically* implicate a protected liberty interest. Other circuits do not treat this as a foregone conclusion. They instead apply *Paul* and what they describe as *Paul*'s "stigma-plus" test. Under that approach, to invoke a constitutionally protected liberty interest, students must show they suffered *both* a stigma to their reputation as well as some change in their legal status.

1. The First, Fifth, and Sixth Circuits apply the *Goss* standard. *See e.g., Gorman v. Univ. of Rhode Island*, 837 F.2d 7 (1st Cir. 1988); *Plummer v. Univ. of Houston*, 860 F.3d 767 (5th Cir. 2017); *Doe v. Miami Univ.*, 882 F.3d 579 (6th Cir. 2018); *Doe v. Univ. of Cincinnati*, 872 F.3d 393 (6th Cir. 2017). The First

Circuit has stated, for instance, that, "It is . . . not questioned that a student's interest in pursuing an education is included within the Fourteenth Amendment's protection of liberty and property." *Gorman*, 837 F.2d at 12 (citing *Goss*, 419 U.S. at 574-75). Students at public colleges and universities faced with the prospect of suspension or expulsion are therefore "entitled to the protections of due process." 837 F.2d at 12.

The Sixth Circuit takes the same approach. In *Flaim v. Medical College of Ohio*, 418 F.3d 629, 633 (6th Cir. 2005), a case concerning the expulsion of a medical student for a felony drug offense, the court stated, "In this Circuit, we have held that the Due Process Clause is implicated by higher education disciplinary decisions." Likewise, in two more recent cases brought by students disciplined for sexual misconduct, the court stated that "allegations of sexual assault may impugn a student's reputation and integrity, thus implicating a protected liberty interest." *Univ. of Cincinnati*, 872 F.3d at 399 (internal quotation marks and citation omitted); *Miami Univ.*, 882 F.3d at 599.

In *Plummer*, 860 F.3d at 770, 774, the Fifth Circuit relied on *Goss* and *Dixon* to hold that two students expelled for violating the University of Houston's sexual-misconduct policy had a constitutionally protected liberty interest in their higher education. The *Plummer* majority went on to hold that the university's disciplinary procedures were

constitutionally adequate. *Id.* at 774-75. The dissent disagreed that the procedures satisfied the Due Process Clause, but it concurred with the majority's holding that the students had a protected liberty interest at stake: "The panel correctly cites this court's decision in *Dixon* for the proposition that the students have at least liberty interests protected under the due process clause." *Id.* at 781 (J. Jones, dissenting).

Thus, in the First, Fifth, and Sixth Circuits, university students who bring section 1983 actions challenging the procedures used to punish them do not have to show any particular facts to establish they have a protected liberty interest under the Fourteenth Amendment. In these circuits, it is axiomatic that they do.[3]

2. That is not the case in the Seventh, Ninth, and Tenth Circuits. Those courts do not regard liberty within the meaning of the Due Process Clause as invariably at stake in university disciplinary proceedings. Instead, they rely on *Paul* and hold that university students must comply with *Paul*'s stigma-plus test to establish a protected liberty interest. This requires students to allege a stigma to their reputations *and* some "alteration of legal status" as a result of university disciplinary proceedings. *See e.g., Doe v. Purdue Univ.*, 928 F.3d 652 (7th Cir. 2019);

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[3] The Third Circuit has also held the Due Process Clause applicable to university disciplinary proceedings, but it has not specified whether the right at stake is a property right or a liberty right. *See Osei v. Temple Univ.*, 518 F. Appx. 86, 88 (3d Cir. 2013) (quoting *Goss*, 419 U.S. at 581).

Krainski v. Nevada ex rel. Bd. of Regents of Nevada Sys. of Higher Ed., 616 F.3d 963 (9th Cir. 2010), *cert denied*, 562 U.S. 1286 (2011); *Harris v. Blake*, 798 F.2d 419 (10th Cir. 1986). These circuits construe *Paul* as having "circumscribed the reach" of *Goss*. *Krainski*, 616 F.3d at 971.

One of the leading cases in this area is the Seventh Circuit's decision in *Purdue*.[4] There, Purdue suspended John Doe for one year after finding him responsible for sexually assaulting a female student. 928 F.3d at 656. The Navy ROTC then expelled John, dashing his plan to pursue a naval career. *Id.* at 656. John filed a section 1983 action, contending Purdue's disciplinary process did not satisfy the minimum standards of fairness mandated by the Due Process Clause. *Id.* at 659.

In assessing whether John alleged a protected liberty interest, the Seventh Circuit held he had to show "that the state inflicted reputational damage accompanied by an alteration in legal status that deprived him of a right he previously held." *Id.* at 661 (citing *Paul*, 424 U.S. at 708-09). To adequately allege stigma, John had to plead facts establishing Purdue publicly disclosed his disciplinary history. *Id.* at 661-62. He did so, reasoned the court, based on his allegation that he was required to authorize Purdue to

[4] The *Purdue* decision was authored by Justice Barrett, while sitting on the Seventh Circuit.

disclose to the Navy he had been found guilty of sexual assault. *Id.* at 662.

Next, the court considered whether John had pleaded sufficient allegations of the "plus" element, of the stigma-plus test, asking whether "the stigma was accompanied by a change in legal status." *Id.* at 662. The court concluded he had because the university's finding that he was guilty of sexual assault "changed John's legal status: he went from a full-time student in good standing to one suspended for an academic year." *Id.* This in turn deprived him of occupational liberty because he was precluded from pursuing a career in the Navy. *Id.* at 662-63.

The Ninth Circuit likewise applies the stigma-plus test. In *Krainski*, 616 F.3d at 971, the plaintiff alleged her reputation had been damaged as a result of being found guilty of Student Conduct Code violations. Relying on *Paul*, the court deemed such reputational-injury allegations insufficient to trigger the protections of the Due Process Clause. More recently, in *Schwake v. Arizona Board of Regents*, 821 F. Appx. 768, 770-71 (9th Cir. 2020), the Ninth Circuit applied perhaps the most stringent version of the stigma-plus test, holding that it cannot be satisfied absent a showing that the punishment meted out by the university has the practical effect of entirely

foreclosing a student from pursuing his or her chosen profession.[5]

As in *Krainski* and *Schwake*, the Ninth Circuit applied the stigma-plus test in this case, concluding Doe had not adequately alleged either the "stigma" or "plus" elements. Pet. App. 5-6. The stigma element was not satisfied, according to the court, because Doe did not allege that the sexual-harassment charges leveled against her were publicly disclosed. *Id.* at 5. As to the "plus" element, the court rejected Doe's argument that Sonoma State changed her legal status by suspending her. *Id.* at 5-6.

Finally, the test applied by the Tenth Circuit closely resembles "stigma-plus," although the court has not expressly labeled it as such. In *Harris*, 798 F.2d at 420-22 n.2, the plaintiff was forced to withdraw from his graduate psychology program due to poor grades. He alleged his procedural due-process rights had been infringed when one of his professors placed a letter in his file criticizing his competence and professional ethics, which allegedly caused other professors to give him poor grades. *Id.* at 420-22. The Tenth Circuit held he did not have a liberty interest at play because the damaging letter had not been distributed outside his academic program (in line with the "publication" aspect of the stigma-plus test applied

[5] The Ninth Circuit's unpublished *Schwake* opinion "assumed" the stigma-plus test applied even though the earlier, published decision in *Krainski* held that it did. The *Schwake* panel may have been unaware of the Circuit's precedent, as it did not cite *Krainski*.

by the Seventh and Ninth Circuits), and because he had not been entirely prevented from pursuing his future career plans (in line with the Ninth Circuit's especially exacting application of the stigma-plus test in *Schwake*).[6] *Id.* at 422 n.2.

3. The overarching Circuit split between the First, Fifth, and Sixth Circuits, on the one hand, and the Seventh, Ninth, and Tenth Circuits, on the other hand, means that students confront dramatically different Circuit-dependent burdens to establish the deprivation of a constitutionally protected liberty interest. Students in the First, Fifth, and Sixth Circuits have no burden at all since those Circuits treat students as possessing a protected liberty interest as a matter of right.

Things are not so simple for students in the Seventh, Ninth, and Tenth Circuits. The *Paul* stigma-plus test adopted by those Circuits erects an onerous burden for students. Besides alleging harm to their reputations—which must include facts showing the universities caused the harm by disclosing the students' misconduct—plaintiffs must also allege a change in their legal status.

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[6] The Fourth Circuit has not expressly applied the stigma-plus test but has at least suggested that it yet may. *See Tigrett v. Rector and Visitors of Univ. of Virginia*, 290 F.3d 620, 627-28 (4th Cir. 2002).

The Eighth Circuit's jurisprudence is somewhat muddled. *Compare Woodis v. Westark Comm. College*, 160 F.3d 435, 440 (8th Cir. 1998), *with Does 1-2 v. Regents of the Univ. of Minn.*, 999 F.3d 571, 583 (8th Cir. 2021).

Inevitably, the Circuits' very different approaches are almost always outcome determinative—at least insofar as they control whether the courts proceed to the next step of considering the fairness of the challenged disciplinary procedures. The First, Fifth, and Sixth Circuits invariably reach that analysis but the Seventh, Ninth, and Tenth Circuits typically do not, because plaintiffs only occasionally succeed in clearing the stigma-plus bar. The Ninth Circuit did not consider the challenged procedures in either *Krainski* or this case, and the Tenth Circuit did not do so in *Harris*. Although the Seventh Circuit reached the procedural-fairness question in *Purdue*, district courts in that Circuit since *Purdue* was issued have more often than not found the stigma-plus test *not* satisfied and therefore have not proceeded to analyze the university disciplinary procedures. *See e.g., Doe v. Trustees of Indiana Univ.*, No. 20-cv-00123, 2021 WL 2213257, *4-5 (S.D. Ind. May 4, 2021) (holding stigma-plus test not met); *Doe v. Trustees of Indiana Univ.*, 496 F. Supp.3d 1210, 1216-17 (S.D. Ind. 2020) (same); *but see Doe v. Purdue Univ.*, 464 F. Supp.3d 989, 1001-02 (N.D. Ind. 2020).

C. The courts of appeals are divided on whether higher-education students have, as a matter of right, a property interest in their continued university enrollment or instead whether any such property interest must be supplied by a source of law other than the Constitution.

This Court has held that property interests protected by the Fourteenth Amendment are not typically created by the Constitution, but instead by other sources of law, such as state statutes. *Goss*, 419 U.S. at 572-73; *Paul*, 424 U.S. at 709.

Based on this precept, several Circuits hold that university students do not have any property interest in their education unless such an interest is conferred by the law of the state in which the university is located and/or the university's particular policies. Other Circuits hold that higher-education students possess an inherent property interest in their continued enrollment.

1. The First and Sixth Circuits fall within this latter category. *See Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56 (1st Cir. 2019); *Miami Univ.*, 882 F.3d at 599; *Univ. of Cincinnati*, 872 F.3d at 399. They hold that university students necessarily possess a property interest in their education and they do not undertake any separate inquiry to ascertain whether such a property right is embodied in state law or the university's policies.

In *Haidak*, for example, the court invoked *Goss* for the proposition that students have a "'legitimate entitlement to a public education as a property interest'" protected by the Due Process Clause:

> It has long been clear that, though states have broad authority to establish and enforce codes of conduct in their educational institutions, they must "recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause."

Haidak, 933 F.3d at 65 (quoting *Goss*, 419 U.S. at 574); *see also Miami Univ.*, 882 F.3d at 599 (stating that "[s]uspension clearly implicates a protected property interest . . . .") (internal quotation marks and citation omitted); *Univ. of Cincinnati*, 872 F.3d at 399 (same).

2. Most other Circuits, however, do not recognize an inherent property interest in public higher education but instead hold that a property interest must be conferred by state law or university policies.

In *Sheppard v. Visitors of Virginia State University*, 993 F.3d 230, 239 (4th Cir. 2021), the Fourth Circuit held the plaintiff had to show that Virginia "created [a] property interest in continued

enrollment at a public education institution," which he failed to do. Similarly, in *Branum v. Clark*, 927 F.2d 698, 705 (2d Cir. 1991), the Second Circuit concluded that because New York recognizes an implied contract between its public colleges and universities and their students, the plaintiff had a property interest in continuing his education that was entitled to constitutional protection.

The Seventh Circuit also rejects "a stand-alone property interest in an education at a state university." *Charleston v. Bd. of Trustees of Univ. of Ill. at Chicago*, 741 F.3d 769, 772 (2013). While that court allows express or implied contracts between students and universities to form the basis of a protected property interest, the plaintiff must be specific in identifying the exact promises the university made to him or her, and the return promises he or she made to the university. *Id.* at 773; *see also Purdue*, 928 F.3d at 660 ("And to demonstrate that he possesses the requisite property interest, a university student must . . . establish that the contract entitled him to the specific right that the university allegedly took, such as the right to a continuing education or the right not to be suspended without good cause.") (internal quotation marks and citation omitted). Finally, the Ninth and Eleventh Circuits also decline to recognize a property interest in the absence of a state- or contract-based authority. *See Schwake*, 820 F. Appx. at 770 (holding the plaintiff failed to identify any Arizona law conferring a property right in his continued education); *Barnes v.*

Zaccari, 669 F.3d 1295, 1304-05 (11th Cir. 2012) (holding that the university's student Code of Conduct and the Board of Regents' Policy Manual bestowed a property interest that could not be taken away without complying with the Due Process Clause). In this case, the Ninth Circuit held that California law is equivocal as to whether university students have a property interest in their education. Pet. App. 3-4. It therefore would not recognize one.[7]

3. Like the split in authority concerning a liberty interest, this property-interest split carries significant consequences for higher-education plaintiffs. The First and Sixth Circuits' recognition of an inherent, stand-alone property interest in students' continued enrollment means those courts will invariably reach the question as to whether a university's disciplinary procedures were fundamentally fair in compliance with the Fourteenth Amendment. *See Haidak*, 933 F.3d at 66-73; *Miami Univ.*, 882 F.3d at 599-604; *Univ. of Cincinnati*, 872 F.3d at 399-407. Not so in the other Circuits, in which plaintiffs must point to specific state laws and/or university policies to establish a constitutionally

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[7] The Tenth Circuit is at odds with itself. In *Harris v. Blake*, 798 F.2d 419, 422 (10th Cir. 1986), *cert denied*, 479 U.S. 1033 (1987), the court concluded that the plaintiff had a property interest under Colorado law entitling him to procedural due process. In *Gossett v. Oklahoma ex rel. Board of Regents for Langston University*, 245 F.3d 1172, 1181 (10th Cir. 2001), the court relied on *Harris* to support its conclusion that the plaintiff had a property interest in his continued enrollment in nursing school, even though the university was in Oklahoma, not Colorado.

protected property interest. These courts have deemed this requirement satisfied only about half the time. *See Branum*, 927 F.2d at 705; *Harris*, 798 F.2d at 422; *Barnes*, 669 F.3d at 1304-05; *but see Sheppard*, 993 F.3d at 239 (holding that no independent source of law conferred a property interest on university students); *Purdue*, 928 F.3d at 660 (same); *Charleston*, 741 F.3d at 772 (same); *Schwake*, 820 Fed. App'x at 770 (same).

This Court's intervention is necessary to clarify, once and for all, whether students inherently have a protected property interest in their continued enrollment in public colleges or universities, or whether no such interest exists absent a state statute, university policy, or some other source of law providing for it.

D. The law was clearly established by *Goss* that a higher-education student facing disciplinary proceedings has a protected liberty interest.

The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). This Court has articulated a two-part test for resolving qualified-immunity claims.

> First, a court must decide whether the facts that a plaintiff has alleged . . . or

> shown . . . make out a violation of a constitutional right. Second, if the plaintiff has satisfied this first step, the court must decide whether the right at issue was "clearly established" at the time of defendant's alleged misconduct.

Pearson, 555 U.S. at 232 (quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001)).[8]

The clearly established analysis focuses on "settled law;" as a result, the right at issue may be clearly established by "controlling authority" or "a robust consensus of cases of persuasive authority." *District of Columbia v. Wesby*, __ U.S. __, 138 S. Ct. 577, 589-90 (2018) (internal quotation marks and citations omitted). This Court has required that a right be "sufficiently clear that every 'reasonable official would [have understood] that what [the

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[8] Sometimes courts bypass the constitutional question and decide cases at the second step, holding that even if a constitutional right was violated, it was not "clearly established." While this Court permits that approach, it has also cautioned that declining to decide the constitutional question has serious drawbacks: It leaves important constitutional questions undecided, thereby failing to advance the development of the law, and it enables officials to persist in potentially unlawful behavior because they know they will not be held liable. *Camreta v. Greene*, 563 U.S. 692, 705-06 (2011). In *Camreta*, the Court explained that avoiding the constitutional question "sometimes does not fit the qualified immunity situation because it threatens to leave standards of official conduct permanently in limbo." *Id.* at 706. Indeed, "[q]ualified immunity thus may frustrate 'the development of constitutional precedent' and the promotion of law-abiding behavior." *Id.* (quoting *Pearson*, 555 U.S. at 237).

official] is doing violates that right.'" *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). "We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft*, 563 U.S. at 741.

Goss squarely held that students have Fourteenth Amendment liberty and property interests at stake when confronting suspension and expulsion proceedings. Although *Goss* concerned high school students, not higher-education students, its reliance on the "landmark decision" of *Dixon*—which *did* concern a university student—would have put reasonable university administrators on notice that they could not suspend a student for 14 months without giving him or her a hearing to challenge the evidence against them. This Court has never backtracked on *Goss*'s holding that students have constitutionally protected interests implicated by suspension and expulsion proceedings and, as described above, *Goss* has long been relied on by the lower courts for exactly that holding. There is thus a robust consensus on this issue and Respondents are not entitled to qualified immunity.

E. The Ninth Circuit's decision is wrong.

The Ninth Circuit erred in concluding that Doe had neither a protected liberty interest, nor a protected property interest, at stake in her 14-month suspension.

1. To begin with, the court's reliance on the stigma-plus test for assessing whether Doe adequately alleged a liberty interest was wrong. Although this Court assumed, without deciding, the existence of some type of protected interest in both *Horowitz* and *Ewing*, in neither case did it suggest the stigma-plus test might apply. Indeed, neither case even cited *Paul*.

Moreover, *Paul*'s stigma-plus test did not arise out of a university disciplinary case, but out of an entirely different set of facts. The plaintiff in *Paul* was publicly branded a shoplifter by police department flyers, but he did not suffer any loss of employment or any other tangible detriments.

This gets to the next problem with the Ninth Circuit's use of the stigma-plus test: It is fundamentally unsuitable in the context of claims arising out of university disciplinary proceedings. Suspensions and expulsions by definition have far-reaching consequences for the trajectory of students' lives and the choices and experiences available to them. As *Goss* explained, suspensions can "seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment." 419 U.S. at 575. In the same vein, the Department of Education recently recognized that "the way in which a school, college, or university responds to allegations of sexual harassment in an education program or activity has serious consequences for the equal educational access" of the accused (and the accuser).

Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026, 30030 (May 19, 2020). There are "life-altering consequences that may follow a determination regarding responsibility for such conduct." *Id.* at 30049.[9] Students who suffer a suspension or expulsion may see their education ended abruptly and their career plans derailed. Even if they ultimately complete their degree programs, the suspension or expulsion may follow them far into the future, as notations on official transcripts, as gaps in their university careers that need to be explained, and in the loss of valuable professional connections and training opportunities.

The stigma-plus test is perhaps most frequently applied in the public-employment context, where plaintiffs allege they have been terminated or otherwise denied public employment.[10] Subjecting plaintiffs in that setting to a higher standard of pleading and proof is fundamentally different from subjecting suspended or expelled university students to it. The former can presumably find other jobs, but university students may not be able to enroll in other degree programs and may be prevented from pursuing

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[9] These statements were made in the context of the new Title IX regulations, but extend beyond Title IX and sexual harassment.

[10] "Stigma-plus claims often arise in the public-employment context where, for example, an employer is alleged to have made defamatory statements in connection with firing the plaintiff." *Schultz v. Incorporated Village of Bellport*, No. 08-CV-0930-JFB-ETB, 2010 WL 3924751, at *9 (E.D.N.Y., Sept. 30, 2010), *aff'd*, 479 F. Appx. 358 (2d Cir. 2012).

their chosen career paths. Because of the formative role colleges and universities play in students' lives—setting the stage for their educational, professional, financial, and personal opportunities far into the future—students naturally have a liberty interest in university disciplinary proceedings worthy of constitutional protection. Those Circuits that recognize an inherent liberty interest have adopted the correct rule. The stigma-plus test has no place in this particular context and should be rejected.

2. Even if the stigma-plus test governs, however, the Ninth Circuit misapplied it and opened a rift with the Seventh Circuit by holding that Doe's 14-month suspension did not constitute a change to her legal status (the "plus" element of the stigma-plus test). *See Purdue,* 928 F.3d at 662 (holding that year-long suspension constituted a change in legal status sufficient to satisfy the "plus" element). Going from a student in good standing to one who is expelled or suspended necessarily amounts to a change in legal status, and a potentially grievous one at that. During Doe's suspension—which spanned the entire second year of her master's program—she was prevented from continuing her studies, prevented from transferring to another graduate program, and prevented from pursuing her career plans. Naturally, the prolonged investigation—one in which she was falsely accused of sexually harassing lewd behavior—was damaging not least because it froze her in place, unable to move forward or move on.

In addition, the Ninth Circuit and the other stigma-plus Circuits are wrong to demand a showing—as a predicate to establishing the "stigma" element of the test—that the university has publicly disclosed the plaintiff's misconduct. Disclosure by a party other than the plaintiff may make sense in the employment context—where the stigma-plus test is mainly applied—because without disclosure of the reasons for a discharge decision, an employee may not suffer any harm to his or her reputation and his or her future employment prospects may not be jeopardized.[11] In the university disciplinary context, however, suspensions and expulsions inflict reputational harm regardless of whether the university publicly discloses the misconduct leading to them. The mere fact of a suspension or expulsion may prove fatal to a student's career or educational plans in a way that the mere fact of losing a job does not.

Moreover, enforcing a publication requirement would insulate college and university administrators from liability so long as they do not disclose the charges against accused students. Students could find themselves suspended or expelled based on sham procedures, yet be entirely foreclosed from challenging the deprivation of their liberty interests in a court of law. Universities would be privileged to commit the greater sin of suspending or expelling students through fundamentally unfair processes, so long as

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[11] The origin of the public-disclosure requirement is this Court's decision in *Bishop v. Wood*, 426 U.S. 341, 348 (1976), an employment case, not a case concerning education.

they do not commit the lesser sin of revealing the students' misconduct to third parties. Such a rule has nothing to recommend it. [12]

3. The Ninth Circuit also erred in holding state law must conclusively provide for a property right in higher education to trigger the Due Process Clause. In *Perry v. Sinderman*, 408 U.S. 593, 601-02 (1972), this Court held that it is not just state laws or contracts that may provide a basis for a protected property interest—mutual understandings may do so as well. Sinderman taught in the Texas state college system under one-year contracts that were renewed annually between 1959 and 1969. *Id.* at 594. When he became involved in some public disputes with the Board of Regents, his contract was not renewed. *Id.* at 595. This Court held that Sinderman, "who has held his position for a number of years, might be able to show from the circumstances of this service—and from other relevant facts—that he has a legitimate claim of entitlement to job tenure" under an implied contract or de facto tenure program. *Id.* at 602.

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[12] In *Horowitz*, 435 U.S. at 85, the University of Missouri asked this Court to hold that it had not violated the student's liberty interest because it did not publicly reveal the reasons for her dismissal. Indeed, this was one of the questions on which this Court granted certiorari. The Court, however, declined to delve into this issue and instead held that even if the student had a protected liberty interest, she received all the process she was due. *Id.* at 84-85. Thus, in *Horowitz*, the applicability of the stigma-plus test to university disciplinary proceedings was squarely presented, but this Court did not adopt it.

The same kind of reasoning applies here. The relationship between students and their universities creates a mutual understanding that bestows on students a property interest in their continued enrollment. They agree to pay tuition, complete a certain number of credits, maintain a minimum grade-point average, and comply with specified rules of conduct, and in exchange, their universities agree to award them their degrees. *See* Tamara Rice Lave, *Ready, Fire, Aim: How Universities Are Failing the Constitution in Sexual Assault Cases*, 48 Ariz. St. L.J. 637, 666 (2016); Curtis L. Berger & Vivian Berger, *Academic Discipline: A Guide to Fair Process for the University Student*, 99 Colum. L. Rev. 289, 292 (1999) ("The contract, formed when an accepted student registers, arises from the mutual understanding that the student who satisfactorily completes a program's academic requirements will receive the appropriate degree."). The recognition by the First and Sixth Circuits of an inherent property interest in university enrollment comports with this reasoning (and that of *Sinderman*) and should be endorsed by this Court.

F. The questions presented are important, arise repeatedly, and are squarely raised in this case.

The division among the lower courts on what plaintiffs must allege to establish a protected liberty or property interest and thereby obtain the procedural protections of the Due Process Clause has become increasingly problematic. More and more students are

challenging the fundamental fairness of university disciplinary proceedings through section 1983 cases in federal court. As one district court recently observed, there has been a "wave" of litigation about this issue as colleges and universities "devote more attention to sexual assault accusations." *Doe v. Univ. of Colorado*, 255 F. Supp.3d 1064, 1067 (D.Colo. 2017). Cases involving suspensions or expulsions for sexual misconduct, like this case, are among the most common. As the district court in Doe's case made clear, guidance is needed. Pet. App. 37 n.13.

Unless this Court clarifies the law, the lower courts will continue to take significantly different approaches which, in turn, will yield different outcomes for litigants on similar facts. For instance, had Doe's case been before the First, Fifth, or Sixth Circuits, those courts would not have questioned that she had a protected liberty or property interest at stake and they would have gone on to consider the issue that neither the district court nor the Ninth Circuit reached here—whether Sonoma State's conduct met the constitutional minimum when it suspended her for 14 months without any hearing. Although the amount and kind of process Doe was entitled to is not at issue here, at least one court (the First Circuit) would have held that her prolonged suspension did not meet the fundamental fairness mandated by the Due Process Clause.[13]

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[13] In *Haidak*, 933 F.3d at 72, the First Circuit held that a five-month suspension without a hearing violated the Due Process

But of course, before they can consider the constitutional adequacy of the disciplinary procedures at issue, courts must first confirm that a constitutional right to liberty or property is implicated. Setting the bar too high on that question—as the Circuits employing the stigma-plus test do—disregards the reality of the profoundly influential role colleges and universities play in shaping students' life trajectories, and it risks leaving students vulnerable to deeply unfair university disciplinary procedures.

Finally, this case is an excellent vehicle for answering the questions presented. The issues were fully presented below. The case was dismissed at the pleading stage so there are no factual disputes or procedural wrinkles that would prevent a decision here from having broad applicability. And this case presents one of the most common fact patterns occurring in this area—a student accused of sexual misconduct who alleges the denial of due process.

This Court should grant certiorari to ensure uniform interpretation of the Due Process Clause on an important issue that that has divided the lower

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Clause even though the plaintiff had an opportunity to, and did, respond orally and in writing to the suspension. The court concluded that "[w]hen a state university faces no real exigency and certainly when it seeks to continue a suspension for a lengthy period, due process requires 'something more than an informal interview with an administrative authority of the college.'" *Id.* (quoting *Gorman*, 837 F.2d at 14). Here, Doe had nothing but an informal meeting with former Title IX Coordinator Suzuki. She was never afforded any hearing.

courts and that promises to recur with increasing frequency.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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