No. 21-20185
IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

AUSTIN VAN OVERDAM,

Plaintiff – Appellant

v.

TEXAS A&M UNIVERSITY, MICHAEL YOUNG, ALYSSA LEFALL, KYLE MCKRACKEN, DUSTIN GRABSCH, JACLYN UPSHAW-BROWN, DAYNA FORD, KRISTEN HARRELL, and C.J. WOODS,

Defendants – Appellees

On Appeal from the United States District Court for the Southern District of Texas, Houston Division
No. 4:18-cv-02011

BRIEF OF *AMICUS CURIAE*

STOP ABUSIVE AND VIOLENT ENVIRONMENTS

IN SUPPORT OF APPELLANT

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SUPPLEMENTAL STATEMENT OF INTERESTED PERSONS

No. 21-20185, *Van Overdam v. Texas A&M University, et al.*

The undersigned counsel of record certifies the following listed persons and entities, as described in the fourth sentence of Rule 28.2.1, have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal. Per Rule 29.2, counsel for *amicus curiae* SAVE certifies the following persons and entities have an interest in the *amicus* brief, in addition to those persons and entities set forth in Appellant's Certificate of Interested Persons:

SAVE

1. SAVE
2. Center for Prosecutor Integrity
3. SAVE Board of Directors and Employees

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Treatises

STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE

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,[1] published at least five relevant Special Reports,[2] commented on the current Title IX regulations,[3] coordinated a Due Process Statement signed by nearly 300 leading law professors and other interested parties,[4] sponsored an interactive spreadsheet of lawsuits against universities,[5] compiled

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[1] *Victims Deserve Better: Complainants*, SAVE.COM, http://www.saveservices.org/sexual-assault/victims-deserve-better/ (last visited October 4, 2021).

[2] *Special Reports*, SAVE.COM, http://www.saveservices.org/reports/ (last visited October 4, 2021).

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

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

[5] Benjamin North, *Interactive Spreadsheet of Lawsuits Against Universities*, SAVE.COM, http://www.saveservices.org/sexual-assault/complaints-and-lawsuits/lawsuit-analysis/ (last visited October 4, 2021).

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

Through its research and experiences, SAVE identified the disparate treatment and discrimination, particularly against male students, in campus disciplinary processes since 2011. This research shows a dire need for a clear Title IX pleading standard and for greater procedural protections for accused students.

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. 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. All parties consent to the filing of this brief.

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[6] *Faculty Members*, SAVE.COM, http://www.saveservices.org/sexual-assault/faculty-members/ (last visited October 4, 2021).
[7] *Analysis of Judicial Decisions Affirming the 2020 Title IX Regulations,* SAVE.COM, https://www.saveservices.org/title-ix-regulation/analysis-of-judicial-decisions/ (last visited October 4, 2021).
[8] *Title IX Regulation: Title IX Due Process Regulation*, SAVE.COM, http://www.saveservices.org/title-ix-regulation/ (last visited October 4, 2021.

SUMMARY OF ARGUMENT

Campus justice is best served when universities resolve allegations of sexual assault using fair procedures, unencumbered by bias on the basis of sex. Too often, however, gender bias and hostility to due process permeate adjudications of Title IX claims. This record has generated an explosion of litigation by accused students and a corresponding rapid evolution in both Title IX law and constitutional due process jurisprudence. Here, the district court erred when it failed to take note of these significant changes in both areas.

In addressing Title IX claims, public policy strongly favors this Court adopting the *Purdue* standard,[9] which more accurately fulfills Title IX's text and purpose. *Purdue* is now the plurality standard across federal circuit courts and the majority standard across federal district courts. That no circuit has expressly rejected *Purdue* weighs heavily in favor of adopting it here. For these reasons, this Court should utilize *Purdue* to formalize a clear and straightforward Title IX pleading standard.

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[9] *Doe v. Purdue Univ.,* 928 F.3d 652, 667–68 (7th Cir. 2019).

The *Mathews* factors[10] similarly support a finding that cross-examination is required in student disciplinary proceedings anytime credibility of the parties or witnesses is at issue. Without cross-examination, universities prevent students from exposing contradictions, inconsistencies, or ulterior motives in the opposing side's narrative, thereby depriving them of a meaningful opportunity to be heard. For these reasons, this Court should find that cross-examination in the campus disciplinary context is required by due process.

ARGUMENT

I. Public policy favors this Court's adoption of the *Purdue* standard both on its merits and because it ensures uniformity across the circuits.

Title IX provides "[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

[10] *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

university disciplinary processes. *Sheppard v. Visitors of Virginia State U.*, 993 F.3d 230, 235 (4th Cir. 2021).

Since the April 4, 2011 "Dear Colleague Letter,"[11] sex discrimination against accused males has proliferated on college campuses.[12] Where pre-2011 accused student Title IX lawsuits were "few and far between,"[13] since 2011, over 640 have been filed.[14] According to Brooklyn College Professor KC Johnson, to date there have been 214 judicial decisions primarily favorable to accused students, 210 favorable to a university, and 107 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

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

[12] 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).

[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=0.

[15] KC Johnson, *Post Dear-Colleague Letter Rulings/Settlements*, https://docs.google.com/spreadsheets/d/1CsFhy86oxh26SgTkTq9GV_BBrv5NAA5z9cc178Fjk3o/edit#gid=0 (accessed Sep. 30, 2021).

and private, in student conduct cases . . . University sexual misconduct policies are losing legitimacy in the eyes of the courts."[16]

a. Given the rapid adoption of *Purdue*, this Court should follow suit to avoid creating a formal circuit split.

The explosion in Title IX litigation prompted a major shift in the law. Appellant correctly notes that while courts previously followed the "pre-explosion" standards of "erroneous outcome" and "selective enforcement" under *Yusuf*,[17] this was dramatically changed by the *Purdue* decision. *Purdue* articulated a standard that simply determines whether "the alleged facts, if true, raise a plausible inference that the university discriminated against" the plaintiff on the basis of sex." Appellant's Br., at 13-15; *Purdue*, 928 F.3d at 667-68. Since 2019, the Third, Fourth, Seventh, Eighth, Ninth, and Tenth Circuits have adopted the pleading standard outlined in *Purdue*. *Id.*

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

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

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.[18] 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).[19] *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*).[20] In short, the only two circuits that

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[18] *Yusuf, supra*; *Doe v. Miami Univ.*, 882 F.3d 579, 589 (6th Cir. 2018).
[19] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).
[20] 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).

explicitly adopted *Yusuf* before 2019 both have – at the very least – eroded that precedent.

Thus, since 2019, every circuit asked to adopt the *Purdue* standard has done so. Now followed by six circuits, *Purdue* is the plurality standard among circuit courts and the *majority* standard among district courts.

If this Court were to expressly reject *Purdue*, it would be the first federal circuit to do so, creating a formal circuit split. This Court previously held there must be a "compelling reason to create a circuit split." *U.S. v. Nesmith*, 866 F.3d 677, 680 (5th Cir. 2017). Other circuits have similarly held that circuit splits should be avoided. *See e.g., U.S. v. Thomas*, 939 F.3d 1121, 1130 (10th Cir. 2019) ("the greater the number of circuits that are aligned together, the more an appropriate judicial modesty should make us reluctant to reject that uniform judgment"); *Padilla-Ramirez v. Bible*, 882 F.3d 826 (9th Cir. 2017) (only a "compelling" or "strong" reason can justify a circuit split where enforcement of federal statute is at issue) *cert. denied*, 139 S. Ct. 411 (2018) . Here, no compelling reason exists to avoid adopting *Purdue,* which best fulfills the purpose of Title IX. Moreover, Appellee cannot

show imposing extratextual barriers to victims of discrimination serves the text or purpose of Title IX. *See* Appellant's Br. at 17-19; *Purdue*, 928 F.3d at 667 ("we see no need to superimpose doctrinal tests on the statute"). There is no compelling reason to create a formal circuit split given the clear textual logic of Purdue. Accordingly, this Court should adopt Purdue and avoid creating a formal circuit split.

b. The *Purdue* standard is favored by public policy because it more effectively enforces Title IX's prohibition on sex discrimination.

Purdue is also the standard favored by public policy. 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. U. 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. U. of Denver*, 952 F.3d 1182, 1201-2, n. 18 (10th Cir. 2020), *but see Doe v. U. of Denver,* 1 F.4th 822, 829-36 (10th Cir. 2021) (adopting *Purdue* and reserving the question of whether the university employed "anti-respondent" bias or

"anti-male" bias for the jury, denying summary judgment to the university).

Further, a recent Eighth Circuit case demonstrates how applying *Purdue*'s cleaner approach can illuminate plausible claims of sex discrimination that *Yusuf*'s doctrinal tests obscure. *Doe v. Univ. of Ark.-Fayetteville*, 974 F.3d 858 (8th Cir. 2020). In *Doe v. Univ. of Ark.*, the court held that an illogical finding of responsibility, public pressure on the school to vindicate claims of female accusers, and a procedural irregularity combined to support an inference of sex discrimination. *Id.* at 865-866.[21]

Another 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

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[21] *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.'").

evidence [of Title IX discrimination] is perhaps the merits of the decision itself in his case"). As in *Oberlin*, it appears Appellant's strongest evidence may be the merits of the decision itself.

Here, Texas A&M allegedly made inconsistent and contradictory findings that resulted in labeling Appellant a sex offender. Taking the accusing, female student at her word, Texas A&M found she consented to two sex acts, but not to a sex act directly in between the two consensual sex acts. Appellant's Br. at 5. Texas A&M's blanket acceptance of this testimony, especially considering the accuser changed her story during the hearing, is strong evidence of discrimination. Texas A&M's finding – and the basis therefor – may be Appellant's strongest evidence of a Title IX violation. *Purdue* would permit the court to consider this strong evidence of discrimination, thereby enforcing the text and purpose of Title IX. Because *Purdue* more effectively enforces the statute, this Court should adopt the *Purdue* standard.

For these reasons, this Court should adopt the *Purdue* standard, following the lead of every other circuit to consider the question since 2019.

II. Public policy favors cross-examination in quasi-criminal university disciplinary proceedings in public schools.

Cross-examination is an ancient and traditional legal principle, dating back to the Old Testament.[22] In the campus disciplinary context, it is imperative that public university tribunals minimize the chances for wrong findings due to the extremely high stakes (*i.e.* being found responsible of sexual misconduct). Cross-examination is essential to this goal because it allows each side to challenge the other, exposing contradictions, faulty memories, or ulterior motives, and thereby uncovering the truth. Cross-examination is "beyond any doubt the greatest legal engine ever invented for the discovery of truth." *E.g.*, *Doe v. Brandeis U.*, 177 F. Supp. 3d 561, 605 (D. Mass. 2016) (Brandeis, J.), *citing* 3 Wigmore, Evidence § 1367, p. 27 (2d ed. 1923).

Public policy favors cross-examination in this context because the balance of interests favors strong procedural protections. *Mathews*, 442 U.S. at 335. College students bear extreme risks; but must face these high stakes without the benefit of being attorneys trained in defense

[22] 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/.

litigation strategy, trial advocacy, negotiation, or examination of witnesses. 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**. [They] 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 575, 582 (6th Cir. 2018) (emphasis added). Acknowledging these life-altering effects, Appellant correctly argues universities have no interest outweighing this risk of deprivation under the factors set forth by the Supreme Court in *Mathews.* Appellant's Br. at 40-43 (citing *Mathews*, 424 U.S. at 335).

Authorities in both the Executive and Judicial branches have similarly recognized the importance of safe-guarding due process protections for accused students. In passing the 2020 Regulations, the Executive Branch requires cross-examination in campus Title IX disciplinary proceedings. *See* 34 C.F.R. §106.45(b)(6)(i). Courts also have recognized the importance of cross-examination in the campus

disciplinary context. Citing *Mathews*, courts have held cross-examination is required by the Constitution. *See generally, Doe v. Baum,* 903 F.3d 575 (6th Cir. 2018) (holding that when credibility is at issue, student is entitled to true cross-examination); *Haidak v. U. of Massachusetts-Amherst*, 933 F.3d 56, 70 (1st Cir. 2019) (holding "some form" of cross-examination is required, if only through a hearing panel, provided the hearing panel "conduct[s] reasonably adequate questioning"); *Doe v. Regents of Univ. of California,* 28 Cal. App. 5th 44 (2018) (holding selective questioning by a hearing panel can violate student's due process rights); *see also Doe v. U. of Scis.*, 961 F.3d 203 (3d Cir. 2020) ("basic fairness" requires cross-examination).

While courts have disagreed on the form of cross-examination required by due process in this context, Appellant's "circumstances entitle[] him to relatively formal procedures." *Purdue*, 928 F.3d at 663. Appellant's case does not involve the power dynamics associated with student allegations against a professor. Appellant's request for cross-examination by his lawyer mitigated concerns of the hearing degenerating into a "shouting match." *Walsh v. Hodge*, 975 F.3d 475, 485 (5th Cir. 2020). Further, in contrast to *Haidak,* where the First Circuit

concluded that the university hearing panel effectively substituted for the student's representative, Appellant alleged here that questioning occurred "by a Texas A&M employee who was aligned with the complaining student." *Compare* Appellant's Br. at 43, *with Haidak,* 933 F.3d at 70-71. Appellant's case more closely resembles *Doe v. Baum*, a case in which the university chose between two narratives with little to no physical evidence, and where the university disciplinary panel did not ask questions of the accuser that meaningfully addressed the credibility concerns raised by the accused student. *Baum*, 903 F.3d at 580.

Appellant's case demonstrates cross-examination by an advisor is essential to a fair campus disciplinary proceeding. Without it, universities cannot be trusted to adequately test the credibility of the parties or witnesses, thus stripping the accused of his constitutional due process rights. Public policy therefore supports this Court holding due process requires cross-examination.

CONCLUSION

For the above reasons, this Court should adopt the *Purdue* pleading standard for Title IX claims and hold cross-examination is required by procedural due process.

Dated: October 4, 2021

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CERTIFICATE OF SERVICE

I certify that on October 4, 2021, a copy of the foregoing was filed with the Clerk of the Court using the Court's CM/ECF system, which will send a copy to all counsel of record.

Dated: October 4, 2021

/s/ Lindsay McKasson
Lindsay McKasson

Attorney for SAVE

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2,855 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and at 15 pages is one-half the maximum length authorized for a party's principal brief.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because: this brief has been prepared in a proportionally spaced typeface using Word 2019 in 14 point Century font, except footnotes which are in 12 point Century font.