No. 22-1864
IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

John Doe,

Plaintiff – Appellant

v.

University of Southern Indiana,

Defendant – Appellee

On Appeal from the United States District Court for the Southern District of Indiana,
Evansville Division
No. 3:21-cv-144

MOTION OF PROPOSED *AMICUS CURIAE*

STOP ABUSIVE AND VIOLENT ENVIRONMENTS

FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLANT

/s/ Lindsay R. McKasson
Lindsay R. McKasson (VSB 96074)
BINNALL LAW GROUP, PLLC
717 King Street, Suite 200
Alexandria, Virginia 22314
Tel: (703) 888-1943
Fax: (703) 888-1930
lindsay@binnall.com

Attorney for Amicus Curiae SAVE

Stop Abusive and Violent Environments ("SAVE") respectfully moves this Court for leave to file the attached proposed *amicus curiae* brief in support of Appellant, pursuant to Fed. R. App. P. 29. No party or their counsel authored any part of this brief, and no person has funded its preparation aside from SAVE itself. Appellant, through counsel, consented to the filing of SAVE's *amicus curiae* brief. Appellee, through counsel, declined to consent to the filing of the brief.

Established in 2008, proposed *amicus curiae* 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. Through its research and experiences, SAVE has been at the forefront of collecting data and exposing discrimination on college campuses in Title IX matters. Specifically, SAVE has published at least five relevant Special Reports, provided commentary on Title IX regulations, coordinated a Due Process Statement signed by nearly 300 leading law professors and others, sponsored an interactive spreadsheet of lawsuits against universities, and compiled information on the due process violations of faculty members across college campuses nationally. SAVE is a leader in exposing gender discrimination and bias in Title IX

proceedings and brings a niche area of expertise in this proceeding specifically.

SAVE has an interest in the effective enforcement of Title IX and the eradication of sex discrimination in educational institutions. SAVE intends to provide data and arguments reflecting the prevalence of discrimination on college campuses. SAVE hopes that, in light of this data, the Court will properly enforce Title IX through faithful application of this court's *Purdue* standard. *Doe v. Purdue Univ.*, 928 F.3d 652 (7th Cir. 2019). SAVE "has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." *Ryan v. Commodity Futures Trading Commn.*, 125 F.3d 1062, 1064 (7th Cir. 1997). SAVE's brief does not merely repeat the arguments of the Appellant; rather, it "add[s] value to [the Court's] evaluation of the issues presented on appeal… [by] offer[ing] something different, new, and important." *Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, 976 F.3d 761, 763 (7th Cir. 2020). Thus, SAVE's motion should be granted.

CONCLUSION

Respectfully, this Court should grant SAVE leave to file the attached brief as *amicus curiae*.

Dated: June 10, 2022

Respectfully submitted,

/s/ Lindsay R. McKasson

Lindsay R. McKasson, VSB No. 96074
BINNALL LAW GROUP, PLLC
717 King Street, Suite 200
Alexandria, Virginia 22314
Tel: (703) 888-1943
Fax: (703) 888-1930
lindsay@binnall.com

Attorney for Amicus Curiae SAVE

CERTIFICATE OF SERVICE

I certify that on June 10, 2022, 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: June 10, 2022

/s/ Lindsay R. McKasson
Lindsay R. McKasson

Attorney for SAVE

No. 22-1864
IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

John Doe,

Plaintiff – Appellant

v.

University of Southern Indiana,

Defendant – Appellee

On Appeal from the United States District Court for the Southern District of Indiana,
Evansville Division
No. 3:21-cv-144

BRIEF OF *AMICUS CURIAE*

STOP ABUSIVE AND VIOLENT ENVIRONMENTS

IN SUPPORT OF APPELLANT

/s/ Lindsay R. McKasson
Lindsay R. McKasson (VSB 96074)
BINNALL LAW GROUP, PLLC
717 King Street, Suite 200
Alexandria, Virginia 22314
Tel: (703) 888-1943
Fax: (703) 888-1930
lindsay@binnall.com

Attorney for Amicus Curiae SAVE

TABLE OF CONTENTS

TABLE OF CONTENTS I

TABLE OF AUTHORITIES II

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. The district court's failure to faithfully apply *Purdue* improperly precluded Doe's preliminary injunction and sets a dangerous precedent for Title IX claims. 4

II. The district court failed to consider the harsh consequences of being erroneously found responsible of a Title IX violation. 12

CONCLUSION 15

CERTIFICATE OF SERVICE 1

CERTIFICATE OF COMPLIANCE 2

TABLE OF AUTHORITIES

Cases

Doe v. Baum,

903 F.3d 575, 582 (6th Cir. 2018) 6, 7, 9

Doe v. Columbia University,

831 F.3d 46, 56-59 (2d Cir. 2016) 4, 6

Doe v. Cummins,

662 Fed. Appx. 437 (6th Cir. 2016)(unpublished) 9

Doe v. Miami Univ.,

882 F.3d 579, 594 (6th Cir. 2018) 6

Doe v. Rector and Visitors of Univ. of Virginia,

3:19-CV-00038, 2019 WL 2718496, at *6 (W.D. Va. June 28, 2019) .. 14

Doe v. Regents of Univ. of California,

23 F.4th 930, 941 (9th Cir. 2022) 10

Doe v. Rensselaer Polytechnic Inst.,

1:20-CV-1185, 2020 WL 6118492, at *6 (N.D.N.Y. Oct. 16, 2020)..... 6

Doe v. Samford U.,

29 F.4th 675, 690 (11th Cir. 2022) 9

Doe v. Trustees of Indiana University,
1:21-cv-00973-JRS-MPB, 2021 WL 2982186 (S.D. Ind. July 15, 2021) 5

Doe v. U. of Scis.,
961 F.3d 203, 211 (3d Cir. 2020) 8

Doe v. Univ. of Connecticut,
3:20-CV-92 (MPS), 2020 WL 406356, at *2 (D. Conn. Jan. 23, 2020) 14

Doe v. Univ. of Denver,
1 F.4th 822, 832-836 (10th Cir. 2021) 5, 8

Doe v. University of Colorado.,
255 F. Supp. 3d 1064, 1077 (D. Colo. 2017) 4

Doe v. University of Denver,
952 F.3d 1182 (10th Cir. 2020) 4

Gebser v. Lago Vista Indep. Sch. Dist.,
524 U.S. 274, 292 (1998) 9

Menaker v. Hofstra University,
935 F.3d 20 (2d Cir. 2019) 4

Miller v. Borden, Inc.,
168 F.3d 308 (7th Cir. 1999) 12

Ritter v. State of Oklahoma,
CIV-16-0438-HE, 2016 WL 2659620, at *3 (W.D. Okla. May 6, 2016)14

Schwake v. Arizona Bd. of Regents,
967 F.3d 940, 948 6

Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.,
858 F.3d 1034, 145-1046 (7th Cir. 2017)..... 12, 13

Woods v. Von Maur, Inc.,
837 F. Supp. 2d 857, 863 (N.D. Ill. 2011)..... 12

Yu v. Vassar College,
97 F. Supp. 3d 448 (S.D.N.Y. 2015)..... 4

Statutes

20 U.S.C. § 1681(a)..... 11

Other Authorities

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 February 10, 2022)..... 3

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

assault/complaints-and-lawsuits/lawsuit-analysis/ (last visited February 10, 2022) 2

Faculty Members, SAVE.ORG, http://www.saveservices.org/sexual-assault/faculty-members/ (last visited February 10, 2022) 3

Jeremy Bauer-Wolf, *Suicide and Title IX*, INSIDE HIGHER ED (May 2, 2017), https://www.insidehighered.com/news/2017/05/02/title-ix-cases-resulted-suicide-suicide-attempt-two-colleges-prompt-fresh-debate.. 13

Jonathan Taylor, *Accused student commits suicide in wake of*..... 13

KC Johnson, *Post Dear-Colleague Letter Rulings/Settlements*, https://docs.google.com/spreadsheets/d/1CsFhy86oxh26SgTkTq9GV_BBrv5NAA5z9cc178Fjk3o/edit#gid=0 (accessed Sep. 30, 2021)..... 5

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..... 5

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/ 2

Robby Soave, *Lawsuit: Male Student Accused of Sexual Harassment*. 13

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) 5

Special Reports, SAVE.ORG, http://www.saveservices.org/reports/ (last visited February 10, 2022) 2

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 2

Title IX Regulation: Title IX Due Process Regulation, SAVE.ORG, http://www.saveservices.org/title-ix-regulation/ (last visited February 10, 2022) 3

U.S. Dep't of Educ., *Dear Colleague Letter*, (Apr. 4, 2011), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html 5

Victims Deserve Better: Complainants, SAVE.ORG, http://www.saveservices.org/sexual-assault/victims-deserve-better/ (last visited February 10, 2022) 2

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Amicus Curiae SAVE makes the following disclosure:

SAVE is a privately held 501(c)(3) corporation. None of its shares are publicly traded. It is a DBA entity of the Center for Prosecutor Integrity, which is similarly not publicly traded.

/s/ Lindsay R. McKasson
Lindsay R. McKasson

Attorney for Amicus Curiae SAVE

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 six 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 information on the due process

---

[1] *Victims Deserve Better: Complainants*, SAVE.ORG, http://www.saveservices.org/sexual-assault/victims-deserve-better/ (last visited February 10, 2022).

[2] *Special Reports*, SAVE.ORG, http://www.saveservices.org/reports/ (last visited February 10, 2022).

[3] *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/.

[4] *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.

[5] Benjamin North, *Interactive Spreadsheet of Lawsuits Against Universities*, SAVE.ORG, http://www.saveservices.org/sexual-assault/complaints-and-lawsuits/lawsuit-analysis/ (last visited February 10, 2022).

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]

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.

Appellant consents to the filing of this brief. Appellee does not consent to the filing of this brief.

SUMMARY OF ARGUMENT

Campus justice is best served when universities resolve allegations of sexual assault using fair procedures, unencumbered by bias on the

---

[6] *Faculty Members*, SAVE.ORG, http://www.saveservices.org/sexual-assault/faculty-members/ (last visited February 10, 2022).
[7] *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 February 10, 2022).
[8] *Title IX Regulation: Title IX Due Process Regulation*, SAVE.ORG, http://www.saveservices.org/title-ix-regulation/ (last visited February 10, 2022).

basis of sex. Too often, however, gender bias permeates adjudications of Title IX claims on campus. This record of discrimination has generated an explosion of litigation by accused students and a corresponding rapid evolution in Title IX jurisprudence. Here, the district court erred when it failed to consider these significant changes and consequently denied Doe's motion for a preliminary injunction. It also erred when it failed to meaningfully consider the irreparable harm Doe endures as a consequence of the erroneous finding against him.

ARGUMENT

I. The district court's failure to faithfully apply *Purdue* improperly precluded Doe's preliminary injunction and sets a dangerous precedent for Title IX claims.

Appellant persuasively argues that the district court cited the wrong law and consequently came to the wrong legal conclusion as to the likelihood of success for his Title IX claim. Appellant's Br., at 37-39.[9]

[9] Among other issues, the district court cited *Yu v. Vassar College*, 97 F. Supp. 3d 448 (S.D.N.Y. 2015), which was abrogated by *Doe v. Columbia University*, 831 F.3d 46, 56-59 (2d Cir. 2016) and *Menaker v. Hofstra University*, 935 F.3d 20 (2d Cir. 2019). The district court also cited *Doe v. University of Colorado.*, 255 F. Supp. 3d 1064, 1077 (D. Colo. 2017), *Doe v. University of Denver*, 952 F.3d 1182 (10th Cir. 2020), and *Doe v. Trustees of Indiana University*, 1:21-cv-00973-JRS-MPB, 2021 WL 2982186 (S.D. Ind. July 15, 2021), which were all abrogated by *Doe v. University of Denver*, 1 F.4th at 831 (10th Cir. 2021).

Beyond these clear legal errors, the district court's *reasoning* for future plaintiffs' Title IX claims is particularly concerning due to its far-reaching improper implications – namely, failing to properly analyze *Purdue*, ignoring procedural irregularities as evidence of discrimination, and requiring "gendered statements."

As an initial matter, the district court downplayed the context of Title IX litigation in the last decade. Since the April 4, 2011 "Dear Colleague Letter,"[10] sex discrimination against accused males has proliferated on college campuses.[11] Where pre-2011 accused student Title IX lawsuits were "few and far between,"[12] since 2011, over 655 lawsuits have been filed.[13] According to Brooklyn College Professor KC Johnson, there have been 228 judicial decisions primarily favorable to accused students, 228 favorable to a university, and 111 settled before any court

---

[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] *Id.*
[13] 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 (last visited June 10, 2022).

decision.[14] This record reflects the loss of deference courts used to afford university disciplinary proceedings and sets the proper context for the case at issue.[15]

The development of successful litigation on the part of accused male students is relevant to a motion for preliminary injunction because courts analyzing Title IX claims at the preliminary injunction stage must evaluate the likelihood of success. *See Doe v. Rensselaer Polytechnic Inst.*, 1:20-CV-1185, 2020 WL 6118492, at *6 (N.D.N.Y. Oct. 16, 2020) (looking to Circuit Court authority in other procedural postures when evaluating likelihood of success on a Title IX claim for purposes of a preliminary injunction). Therefore, analyzing other successful cases is helpful, if not necessary, to illustrate a plaintiff's likelihood of success. One such helpful case is this Circuit's *Purdue* decision. *Doe v. Purdue Univ.,* 928 F.3d 652 (7th Cir. 2019).

---

[14] KC Johnson, *Post Dear-Colleague Letter Rulings/Settlements*, https://docs.google.com/spreadsheets/d/1CsFhy86oxh26SgTkTq9GV_BBrv5NAA5z9cv178Fjk3o/edit#gid=0 (last visited June 10, 2022).

[15] Federal courts have held consistently that federal or social pressure provides a "backdrop that, when combined with other circumstantial evidence of bias in Doe's specific proceeding, gives rise to a plausible [Title IX] claim." *Doe v. Baum*, 903 F.3d at 586; *see, e.g., Purdue*, 928 F.3d at 668-69, *Doe v. Columbia Univ.*, 831 F.3d 46, 58-59 (2d Cir. 2016), *Doe v. Miami Univ.*, 882 F.3d 579, 594 (6th Cir. 2018), *Schwake v. Arizona Bd. of Regents*, 967 F.3d 940, 948 (OCR pressure may be relevant to a Title IX claim).

In *Purdue*, this Court analyzed the plaintiff's claim of sex discrimination by looking to all of the alleged facts together in his complaint.[16] *Purdue Univ.,* 928 F.3d at 667-668. These facts included but were not limited to (1) the Dear Colleague Letter[17] which served as a backdrop[18] for the plaintiff's particularized facts; (2) the procedural irregularities in the plaintiff's case; and (3) gender-based statements made by University personnel. *Id.* at 668-670. *Purdue* concluded that, "*taken together*, John's allegations raise a plausible inference" of sex discrimination. *Purdue*, 928 F.3d at 670 (emphasis added). Notably, *Purdue* did not hold that explicitly gendered statements are necessary to state a Title IX claim. *Compare Purdue,* 928 F.3d at 670, *with* Appellant's App., at 18 (citing the district court's statement that "[n]o evidence of statements or conduct demonstrating gender bias or discrimination have been presented").

---

[16] As an initial matter, it appears that the district court pigeon-holed Doe into an "erroneous outcome" claim, where he never pleaded his claim as such and does not maintain such a claim now. *Compare* Appellant's App., at 11., *with* Appellant's Br., at 32.

[17] *Supra,* n. 10

[18] *Univ. of Ark.*, 974 F.3d at 865 (describing "a dubious decision in his particular case taken against the backdrop of substantial pressure on the University"); *see also Doe v. Baum*, 903 F.3d 575, 586 (6th Cir. 2018) (pre-*Purdue,* describing federal and media pressure as "backdrop" facts that support a Title IX claim).

Purdue's totality of the circumstances ("taken together") test is essential for Title IX claims because sophisticated defendants may manifest bias on the basis of sex (or any other protected class) in subtle ways. Indeed, there may be multiple potential explanations for the allegedly discriminatory actions because defendants rarely directly state that they are engaged in unlawful discrimination. *See, e.g., Doe v. Univ. of Denver,* 1 F.4th 822, 832-836 (10th Cir. 2021) (denying summary judgment to university where procedural irregularities could be explained by anti-male bias or anti-respondent bias); *Doe v. U. of Scis.*, 961 F.3d 203, 211 (3d Cir. 2020) (finding that plaintiff stated a Title IX claim where "one plausible explanation" for the discipline was sex bias); *Doe v. Baum*, 903 F.3d 575, 586 (6th Cir. 2018) (same).

Often, bias is manifested in procedural flaws or university decisions that run "against the substantial weight of the evidence." *Univ. of Ark.*, 974 F.3d at 864; *see also Oberlin,* 963 F.3d at 587-88 ("Doe's strongest evidence [of sex bias] is perhaps the merits of the decision itself in his case" even where the decision makes no gendered statements). Therefore, at the preliminary injunction phase, it is necessary to analyze the

likelihood of success on the merits through the totality of the circumstances lens required by *Purdue*.

Here, instead of construing the facts together, the district court analyzed each example of gender bias by itself. Appellant App., at 15-16. It first asserted – and cited to an unpublished case for support[19] – that courts "have rejected erroneous outcome claims based upon allegations of general anti-male bias resulting from public and government pressure." *Id.; but see, e.g., Baum,* 903 F.3d at 586 (holding that federal and public pressure can provide a "backdrop" that can give rise to a Title IX when combined with other evidence). As the *Baum* court illustrates, federal and public pressure is not to be analyzed by itself to test whether the pressure, on its own, is sufficient to give rise to a Title IX claim (it is not); rather, it is to be construed together with the other facts.

Similarly, the district court erred with respect to the procedural irregularities in Doe's case, analyzing each fact discretely instead of together. Doe provided evidence of severe and consistent procedural irregularities in the form of consistent refusal to follow federal Title IX

[19] *Doe v. Cummins*, 662 Fed. Appx. 437 (6th Cir. 2016) (unpublished).

Regulations.[20] *See* Appellant's Bf., at 33-35. Yet, the district court wrote that Doe "failed to demonstrate that the cause of *any* of these irregularities originated from an individual's animosity towards his male sex." Appellant's App., at 18 (emphasis added). The use of the word "any" reveals that the district court analyzed each individual irregularity to test whether it had a connection to Doe's male sex. *But see, e.g., Doe v. Regents of Univ. of California*, 23 F.4th 930, 941 (9th Cir. 2022) ("at some point an accumulation of procedural irregularities all disfavoring a male respondent begins to look like a biased proceeding despite the [university's] protests otherwise").

The district court's analysis of each individual fact,[21] rather than construing the facts together, obscures the legitimate discrimination that

---

[20] Of course, violations of the Regulations themselves do not constitute actionable discrimination under Title IX for private enforcement purposes. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292 (1998) ("We have never held, however, that the implied private right of action under Title IX allows recovery in damages for violation of those sorts of administrative requirements"). Consistent refusal to follow the law or policies in order to reach a predetermined outcome, however, can be evidence of unlawful bias. *See*, *Doe v. Samford U.*, 29 F.4th 675, 690 (11th Cir. 2022) ("when the erroneous decision ceases to be consistent with good-faith mistake, the explanation of improper bias becomes sufficiently likely to cross the line between possibility and plausibility").

[21] Of course, Doe also provided evidence of the institution's bias against males accused of sexual assault. Appellant's Bf., at 5.

likely occurred against Doe. This Circuit, by contrast, requires a district court to consider the facts "taken together." *Purdue*, 928 F.3d at 670.

A holding that requires courts to analyze each fact discretely to test for gender bias will permit discrimination so long as a defendant does not take obviously discriminatory actions. Such a rule limits Title IX claims only to those plaintiffs who could marshal direct evidence of discrimination.[22] *But see Purdue*, 928 F.3d at 669 (considering "circumstantial evidence" of discrimination). Accordingly, this Court's holding should reflect that faithful application of the *Purdue* standard is required when analyzing the likelihood of success at the preliminary injunction stage.

Furthermore, a holding that adopts the district court's improper reasoning, explicitly or implicitly requiring a plaintiff to provide "gendered statements" in order to state a Title IX claim (as opposed to flexible consideration of all of the facts), frustrates the purpose of Title

---

[22] "Direct evidence of discrimination is evidence which, if believed by the trier of fact, 'will prove the particular fact in question without reliance or inference or presumption.'" *Woods v. Von Maur, Inc.*, 837 F. Supp. 2d 857, 863 (N.D. Ill. 2011) (citing *Miller v. Borden, Inc.*, 168 F.3d 308 (7th Cir. 1999)). Direct evidence is typically limited to "an admission by the decision maker that she acted upon the discriminatory animus." *Id.*

IX[23] by superimposing an extratextual element on the statute. *Purdue*, 928 F.3d at 667. In other words, requiring "gendered statements" is not and should not be the standard for analyzing a likelihood of success because it runs afoul both the precedent set by *Purdue* as well as the purpose of Title IX – preventing sex discrimination. To hold otherwise sets a dangerous precedent for all Title IX plaintiffs, trying to prove sex discrimination based on the totality of circumstances not whether University personnel happened to make obviously discriminatory statements.

The Court should not adopt such a rule; instead, it should faithfully apply *Purdue* and find that Doe has demonstrated a likelihood of success on the merits.

II. The district court failed to consider the harsh consequences of being erroneously found responsible of a Title IX violation.

Doe demonstrated irreparable harm by pleading his suspension and the consequences thereof. This Court previously held, in a different Title

[23] 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).

IX context, that a plaintiff demonstrated irreparable harm when he risked suffering the use of a bathroom that did not comport with his gender identity. *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 145-1046 (7th Cir. 2017). *Whitaker* reasoned that the plaintiff demonstrated irreparable harm because the action of the school district "directly caus[ed] significant psychological distress and place[d] [Ash] at risk for experiencing life-long diminished well-being and life-functioning". *Id.* Accordingly, "significant psychological distress" and "diminished well-being and life functioning" can demonstrate irreparable harm in the Title IX context.

Just as in *Whitaker*, an erroneously disciplined Title IX plaintiff, such as Doe, is at risk of "significant psychological distress" and "diminished well-being and life functioning." *Id.* This is well documented in the media.[24] Indeed, Doe risks being wrongly associated with

---

[24] *See, e.g.,* Robby Soave, *Lawsuit: Male Student Accused of Sexual Harassment for Rejecting Gay Advances Commits Suicide After Title IX Verdict*, REASON (Apr. 12, 2017), https://reason.com/2017/04/12/lawsuit-male-student-accused-of-sexual-h/; Jonathan Taylor, *Accused student commits suicide in wake of Occidental's Title IX investigation*, TITLE IX FOR ALL (Mar. 10, 2019), https://titleixforall.com/accused-student-commits-suicide-in-wake-of-title-ix-investigation/ (student overdosed after being found responsible of a Title IX violation); Jeremy Bauer-Wolf, *Suicide and Title IX*, INSIDE HIGHER ED (May 2, 2017), https://www.insidehighered.com/news/2017/05/02/title-ix-cases-resulted-suicide-suicide-attempt-two-colleges-prompt-fresh-debate.

allegations of sexual assault for the remainder of his life as he will be forced to disclose the findings to future employers and educational institutions.

These harms are directly related to the imposition of the suspension in Doe's case. If the suspension is put into effect, Doe will forever be required to disclose on future educational and employment applications that he was disciplined, even if the suspension is later revoked or held unlawful by a court.[25] Courts have repeatedly held that this constitutes irreparable harm. *See, e.g., Doe v. Univ. of Connecticut,* 3:20-CV-92 (MPS), 2020 WL 406356, at *2 (D. Conn. Jan. 23, 2020) ("if he is [suspended], he would need to explain a gap on his résumé in future applications to schools or jobs… therefore…, the Plaintiff has demonstrated irreparable harm"); *Doe v. Rector and Visitors of Univ. of Virginia*, 3:19-CV-00038, 2019 WL 2718496, at *6 (W.D. Va. June 28,

[25] *See, e.g.,* 7Sage Admissions Consulting, *Character and Fitness Addenda: What Are They & What Should I Disclose,* 7SAGE.COM, https://7sage.com/admissions/lesson/character-fitness-addenda/ (last visited June 10, 2022) (citing the University of Michigan's law school application, which asks whether an applicant has "*ever been subject to disciplinary action* for academic or other reasons in any of the colleges, universities, graduate, or professional schools you have attended" and containing no provision that would allow an applicant to omit discipline that was subsequently overturned or expunged).

2019) (finding irreparable harm where the University Hearing Panel's finding would "drastically curtail future educational and employment opportunities."); *Ritter v. State of Oklahoma,* CIV-16-0438-HE, 2016 WL 2659620, at *3 (W.D. Okla. May 6, 2016) (irreparable harm includes loss of educational and professional opportunities).

The district court curiously dismissed these harms as "speculati[on] about hypothetical future injuries." Appellant's App., at 19. Far from "speculation" or "hypothetical," Doe is at risk for very real psychological, emotional, and financial injury if the University is not enjoined from enforcing his suspension. He has shown a likelihood of irreparable harm and the district court should be reversed.

CONCLUSION

For the above reasons, this Court should reserve the district court's denial of a preliminary injunction.

Dated: June 10, 2022

Respectfully submitted,

/s/ Lindsay McKasson
Lindsay McKasson (VSB96074)
BINNALL LAW GROUP, PLLC
717 King Street, Suite 200

Alexandria, Virginia 22314
Tel: (703) 888-1943
Fax: (703) 888-1930
lindsay@binnall.com

Attorney for Amicus Curiae SAVE

CERTIFICATE OF SERVICE

I certify that on June 10, 2022, 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: June 10, 2022

/s/ Lindsay McKasson
Lindsay McKasson

Attorney for Amicus Curiae 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 2,889 words, excluding the parts of the brief exempted by the Federal Rules, 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.