No. 19-2966

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JOHN DOE,

***Appellant*,**

v.

UNIVERSITY OF THE SCIENCES,

***Appellee*.**

On Appeal from the United States District Court for the Eastern District of Pennsylvania,
No. 19-cv-358, Hon. Juan R. Sánchez

BRIEF OF *AMICI CURIAE* PUBLIC JUSTICE, WOMEN'S LAW PROJECT, ATLANTA WOMEN FOR EQUALITY, HARVARD LAW SCHOOL GENDER VIOLENCE PROGRAM, KNOW YOUR IX, AND NATIONAL WOMEN'S LAW CENTER IN SUPPORT OF APPELLEE'S PETITION URGING RHEARING

ADELE P. KIMMEL (DC ID 412612)
ALEXANDRA BRODSKY (DC ID 1048430)
Public Justice
1620 L St NW, Suite 630
Washington DC 20036
(p) 510-622-8150
akimmel@publicjustice.net
abrodsky@publicjustice.net

JAMES DAVY (PA ID 321631)
2362 E Harold St.
Philadelphia PA 19125
(p) 609-273-5008
jimdavy@gmail.com

Counsel for *Amici Curiae*

Corporate Disclosure Statement

Public Justice is a professional corporation that offers no stock; there are no parent corporations or publicly owned corporations that own 10 percent or more of this entity's stock.

The Women's Law Project is a non-profit corporation that offers no stock; there are no parent corporations or publicly owned corporations that own 10 percent or more of this entity's stock.

Atlanta Women for Equality is a non-profit corporation that offers no stock; there are no parent corporations or publicly owned corporations that own 10 percent or more of this entity's stock.

The Harvard Law School Gender Violence Program is a part of Harvard Law School, a non-profit educational institution that offers no stock; there are no parent corporations or publicly owned corporations that own 10 percent or more of this entity's stock.

Know Your IX is a project of Advocates for Youth, a non-profit corporation that offers no stock; there are no parent corporations or publicly owned corporations that own 10 percent or more of this entity's stock.

The National Women's Law Center is a non-profit corporation that offers no stock; there are no parent corporations or publicly owned corporations that own 10 percent or more of this entity's stock.

/s/ James Davy

James Davy

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

STATEMENTS OF INTEREST OF *AMICI CURIAE*

Amici Curiae are a group of civil rights organizations that work to protect students' access to education when threatened by sexual harassment and other forms of discrimination.

Public Justice

Public Justice is a national legal advocacy organization with programs dedicated to protecting civil, consumer, and worker's rights, as well as environmental sustainability and access to the courts. Our civil rights program includes a robust practice focused on making sure that educational institutions comply with the Constitution and anti-discrimination laws, including Title IX. Public Justice has long worked to secure educational equity and safe campuses for students through lawsuits designed to enforce Title IX. For example, Public Justice often represents students denied equal educational opportunities because of gender-based harassment or sexual violence suffered at school. Public Justice co-authored and joins this brief because survivors' equal access to education depends on fair, non-traumatizing investigatory procedures, protections from retaliation, and schools' ability to correct sexual harassment.

Women's Law Project

The Women's Law Project (WLP) is a Pennsylvania-based nonprofit public interest legal advocacy organization that seeks to advance the legal, social, and

economic status of all people regardless of gender. To that end, WLP engages in impact litigation and policy advocacy, public education, and individual counseling. Founded in 1974, WLP prioritizes program activities and litigation on behalf of people who are marginalized across multiple identities and disadvantaged by multiple systems of oppression. Throughout its history, the WLP has played a leading role in the struggle to eliminate discrimination based on sex, including working to end violence against women and girls and to safeguard the legal rights of students who experience sexual misconduct and violence in our schools and universities. To this end, WLP engages in public policy advocacy to improve the response of educational institutions to sexual violence and counsels and represents students who have been subjected to sexual misconduct on our campuses and in our schools. It is essential that schools respond appropriately to sexual harassment and that courts hold them accountable under the applicable law.

Atlanta Women for Equality

Atlanta Women for Equality is a 501(c)(3) nonprofit legal aid organization dedicated to empowering women students to assert their right to equal treatment using the law and to shaping our education system according to true standards of gender equity. AWE accomplishes this mission by providing free legal advocacy for women and girls facing gender discrimination—in particular campus sexual

violence—and by protecting and expanding educational opportunities through policy advocacy.

Harvard Law School Gender Violence Program

The Gender Violence Program is committed to protecting the rights of victims and survivors of gender-based violence through legal policy interventions, as well as preventive work to stop such violence. This case has significant implications for victim's rights coming forward to seek protection from their schools under Title IX's guarantee of equal access to educational opportunities.

Know Your IX

Know Your IX is a survivor- and youth-led project of Advocates for Youth that works to end gender violence and discrimination in schools. Know Your IX accomplishes its mission by educating college and high school students in the U.S. about their legal rights to a safe educations free from sexual harassment and violence; training, organizing, and supporting student survivors activists in challenging their educational institutions to address violence and discrimination; and advocating for policy change at the campus, state, and federal levels to ensure meaningful systematic action to end gender violence. Know Your IX knows that survivors' equal access to education depends on a fair process that includes protections from retaliation. This case has significant and lasting implications for

victims' right to report violence to their schools and seek protections that guarantee their equal access to education.

National Women's Law Center

The National Women's Law Center (NWLC) is a non-profit legal advocacy organization dedicated to the advancement and protection of the legal rights and opportunities of women and girls since its founding in 1972. Because equal access to education in an environment free of sexual harassment is essential to full equality, NWLC seeks to ensure that no individual is denied educational opportunities based on sex and that all individuals enjoy the full protection against sex discrimination promised by law.

Amici Curiae submit this brief Pursuant to Fed. Rule App. Proc. 29(a) and L.A.R. 29.0, and do not repeat arguments made by the parties. Neither party's counsel authored this brief, or any part of it. Neither party's counsel contributed money to fund any part of the preparation or filing of this brief. For that matter, no person at all contributed money to fund the preparation or submission of this brief. Public Justice, the Women's Law Project, Atlanta Women for Equality, the Harvard Law School Gender Violence Program, Know Your IX, and the National Women's Law Center file this brief with the consent of the parties.

INTRODUCTION

As civil rights organizations, *amici* work to protect students' access to education. One threat to that access is unfair discipline. Another is sexual harassment, which, when left unchecked by schools, devastates individual survivors and further entrenches widespread inequalities.[1] *Amici* write to urge the Court to grant rehearing or rehearing en banc to clarify what process ensures "fundamental fairness" and reconsider its holding on John Doe's Title IX claim. *Amici* ask that the panel at least clarify that private colleges and universities in Pennsylvania may use "indirect" cross-examination methods; the specified procedural requirements are not specific to sexual assault allegations; and Witness 1 and Roe 1 are not proper comparators for Doe.

ARGUMENT

I. Alternative Models of Cross-Examination Provide Fundamental Fairness Without Retraumatizing Victims.

Fair disciplinary procedures are crucial to protect educational access. However, *amici* fear that schools may read the panel's opinion (correctly or not) to forbid a method of cross-examination common in student disciplinary hearings: "inquisitorial" or "indirect" cross-examination, where students submit questions to a neutral board or administrator who then poses those to witnesses, including the

[1] Sexual assault is a form of sexual harassment. *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 633 (1999).

other party. *See* Slip. Op. at 19 (requiring "adversarial" questioning by "the accused student or his or her representative"). Almost all courts to address the issue have approved this model. *See, e.g.*, *Doe v. Colgate Univ*., 760 F. App'x 22, 33 (2d Cir. 2019); *Haidak v. Univ. of Massachusetts-Amherst*, 933 F.3d 56, 68-71 (1st Cir. 2019); *Nash v. Auburn Univ*., 812 F.2d 655, 664 (11th Cir. 1987); *Doe v. Allee*, 30 Cal. App. 5th 1036, 1066 (Ct. App. 2019). Indirect cross-examination allows parties to probe each other's stories without inviting "acrimony or worse," a significant risk when untrained students without a right to counsel question each other directly. *Haidak*, 933 F.3d at 68.[2]

Mediated cross-examination is especially important when, as here, the alleged conduct is deeply sensitive. "Recognizing the risk that an accusing witness may suffer trauma if personally confronted by an alleged assailant at a hearing," courts have recognized "that mechanisms can readily be fashioned to provid[e] accused students with the opportunity to hear the evidence being presented against them without subjecting alleged victims to direct cross-examination by the accused." *Doe v. Westmont Coll*., 34 Cal. App. 5th 622, 635 (Ct. App. 2019) (internal quotation marks omitted). In *amici*'s experience, these models encourage reporting from

[2] *Doe v. Baum* does not permit this model, but fails to explain its departure from previous Sixth Circuit precedent that did. 903 F.3d 575, 589 (6th Cir. 2018) (Gilman, J, concurring).

victims who, understandably, might be deterred by the prospect of adversarial questioning.

Moreover, direct cross-examination simply is not required by Pennsylvania law. Neither the Pennsylvania legislature nor its courts have required direct cross-examination in public or private school discipline. *See* 22 Pa. Code § 505.3. The cases the panel cites hold, at most, that students denied an opportunity for cross-examination in contravention of their schools' policies have a contract claim. *See* Slip Op. at 16-17. Federal courts may not answer novel questions of state law. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938); *see also Doe v. Trustees of Bos. Coll.*, 942 F.3d 527, 535-36 (1st Cir. 2019) (explaining why it applied existing state law when presented with the same question). To read adversarial cross-examination requirements into Pennsylvania contract law would be an impermissible overreach.

For the above reasons, *amici* urge the panel to clarify that its opinion does not foreclose indirect cross-examination.

II. Sexual Assault Allegations Should Not Be Subject to Uniquely Onerous Disciplinary Procedures.

On its face, the panel's opinion cabins its cross-examination requirement to students accused of sexual assault. *E.g.*, Slip Op. 20-21 ("[B]asic fairness in the context of sexual-assault investigations requires that students accused of sexual assault receive these procedural protections."). But the question of what procedures are sufficiently fair is not answered allegation-by-allegation. In *Goss v. Lopez*, for

example, the Supreme Court explained what due process requires for short student suspensions, not for the specific disciplinary offenses with which the student-plaintiffs were charged. 419 U.S. 565, 584 (1975). Courts use the same civil procedures in all civil suits, including those concerning sexual harassment and sexual battery claims. Fed. R. Civ. Pro. 2 ("There is one form of action—the civil action."); Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. Pa. L. Rev. 2067, 2080-81 (1989) (explaining history and purpose of trans-substantive procedural rules).

The best formulation of the question before the Court, then, is what is required for a student facing suspension or expulsion for peer-on-peer misconduct, a set of proceedings in which the stakes and various interests will be similar to those here. *Cf. Mathews v. Eldridge*, 424 U.S. 319, 340-48 (1976) (explaining that for federal due process, court should consider stakes, public and private interests, and value of additional safeguards). Other disciplinary offenses under this umbrella may include, for example, simple assault or race- or disability-based harassment. Much of this misconduct, like sexual assault, may also be criminal. Yet schools deal with these offenses not as crimes but as student code violations and threats to classmates' safety, educations, and, in some instances, civil rights.

To impose uniquely onerous procedures on sexual assault allegations would contravene basic legal principles of trans-substantive procedures. Unique procedures, if required, would also perpetuate unfounded stereotypes that such claims are singularly suspect. Before modern reforms, when legislatures and courts singled out reports of sexual assault for special burdens, they did so based on stereotypes about women, who are the majority of rape victims. Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U. L. Rev. 945, 953-87 (2004) (discussing three now-defunct procedural and evidentiary rules unique to sexual assault). For example, many states imposed special "prompt complaint" requirements for rape reports. *See State v. Hill*, 578 A.2d 370, 374-77 (N.J. 1990) (explaining history of prompt complaint requirement and underlying stereotypes). These were rooted in "beliefs about the psychology of women," *id*. at 376, including a conviction that rape allegations are inherently suspect because "young girls and women's . . . psychic complexes are multifarious, distorted partly by inherent defects," 3A Wigmore, *Evidence,* § 924a, at 736 (Chadbourn rev. ed. 1970), *quoted in Hill*, 578 A.2d at 376.

For good reason, modern courts and legislators have rejected this kind of exceptionalist treatment of sexual assault allegations. Anderson, *supra*, at 964-77. *Amici* urge the panel to make clear that their holding does not single out sexual

assault allegations for unique procedures, either. A trans-substantive rule will guarantee that students accused of a range of harms receive procedural protections. It will also ensure that victims of sexual assault are not subject to unique obstacles when they try to protect their access to education. A contrary rule would send a dangerous message to students who see their classmates accused of rape guaranteed greater rights than classmates accused of simple assault or race-based harassment, among other offenses: Sexual assault allegations—primarily made by women—are either singularly suspect or unworthy of concern.

III. The Panel's Conclusion That Doe Pleaded Anti-Male Bias Is Contrary to Settled Law and Discourages Schools from Addressing Sexual Harassment.

The panel held that Doe stated a claim for sex discrimination based on the University's allegedly different treatment of female classmates, which occurred against the backdrop of the U.S. Department of Education's 2011 "Dear Colleague Letter." Slip Op. 12. Neither the comparison nor the government guidance establishes anti-male bias, even in combination.

A. Witness 1, Roe 1, and Roe 2 Are Inappropriate Comparators.

The panel wrongly inferred sex discrimination based on the University's decision not to punish Doe's two alleged victims and a witness, all women. Doe alleges Witness 1 and Roe 1, one of his alleged victims, violated a University confidentiality rule; he says Roe 2, the other alleged victim, may have violated the

University's Sexual Misconduct Policy by having sex with him when he had been drinking. Slip Op. 10-12. "An unlawful inference of discrimination can be shown by identifying a similarly situated individual, outside of the protected class, who engaged in the same conduct and was treated more favorably." *Mandel v. M & Q Packaging Corp*., 706 F.3d 157, 170 (3d Cir. 2013).

Roe 1 and Witness 1 are inappropriate comparators because they allegedly committed an infraction wholly different from sexual assault: breaking a school confidentiality rule. "[W]hile 'similarly situated' does not mean identically situated, purported comparators must have committed offenses of 'comparable seriousness.'" *Opsatnik v. Norfolk S. Corp*., 335 F. App'x 220, 223 (3d Cir. 2009) (quoting *Wright v. Murray Guard, Inc*., 455 F.3d 702, 710 (6th Cir. 2006)). Sexually assaulting classmates and violating a confidentiality policy are plainly not "offenses of comparable seriousness." Even if the panel retains its original holding, it should modify its opinion to clarify that Roe 1 and Witness 1 are not adequate comparators.

Roe 2, the other alleged victim, is also an inappropriate comparator. Doe and Roe 2 would need to be "similarly situated" as potential rule-violators for Doe to state a claim for sex discrimination based on the University's decision to investigate and discipline one but not the other for sexual assault. *See, e.g.*, *Mandel*, 706 F.3d at 170. In *Haidak v. University of Massachusetts-Amherst*, the First Circuit rejected a sex discrimination claim where a student accused of sexual assault briefly suggested

he might be the true victim, but did not file a formal complaint. 933 F.3d at 74. *Haidak* explained that a student who "affirmatively contacted the university to report her charges and to seek relief" is not similarly situated to one whose "accusations came second in time and arose only defensively," especially where the second student does not file a complaint—even though the school could have initiated an investigation without one. *Id*. Here, Doe's claim of sex discrimination is even weaker because he *never* accused Roe 2 of sexual assault. *See* App. 99-106. To the contrary, he told the University their sexual encounter had been consensual. Slip Op. 11 n.4; *see also* App. 251-54. As a result, Roe 2 cannot be an appropriate comparator: She, unlike Doe, was never even accused of the offense for which he was expelled. Doe, therefore, has not plausibly alleged sex discrimination.

The panel's opinion, as it stands, creates a dangerous regime with sweeping ramifications within and outside of schools. First, because the panel accepts as comparators two classmates accused of very different misconduct, a student disciplined for any offense—not just sexual assault—will always have a ready comparator: any student of a different gender (or other protected identity) who was accused of *any* disciplinary infraction but not punished. A school, then, will find itself in discovery, at least, every time it disciplines a student, even where that action is necessary to protect other students' civil rights and safety. Employers could find themselves in the same situation if courts apply the panel's rule to workplaces as

well. *See Doe by & through Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 534 (3d Cir. 2018) (noting analogy between Title IX and Title VII).

Treating Roe 2 as a comparator comes with additional risks. *Amici* regularly see students accused of sexual harassment file retaliatory cross-complaints against their alleged victims. The panel's opinion ensures that any time (1) a respondent files a cross-complaint, (2) a school disciplines one student but not the other, and (2) the two students are of different sexes (or other protected identities), the sanctioned student will be able to survive a motion to dismiss on an anti-discrimination claim. That will be true even if the school reached a reasonable conclusion after a fair process. The panel's rule, then, will encourage more students accused of sexual harassment to file bad faith cross-complaints to discourage their schools from taking action against them, even when merited.

The panel's pleading standard for respondents like Doe contrasts sharply with the burden for victims of sexual harassment, who must plead deliberate indifference to state a Title IX claim. *Davis*, 526 U.S. at 633. This inequality sets up a dangerous incentive for schools to avoid finding students responsible for sexual harassment. A sanctioned student's lawsuit will usually be much harder to defeat on a motion to dismiss than a suit brought by a disbelieved victim, especially where the former filed a cross-complaint. Regardless of the evidence, schools may go through the motions of an investigation—often enough to ensure an alleged victim cannot successfully

plead deliberate indifference—and then find no student responsible for sexual harassment, regardless of the evidence.

Such a result would be devastating for survivors' access to education, which suffers when schools allow sexual harassment to persist unchecked and students must share classes and campuses with their assailants. Sexual violence depresses college victims' class participation and academic performance. Cecilia Mengo & Beverly M. Black, *Violence Victimization on a College Campus: Impact on GPA and School Dropout*, J. College Student Retention: Research, Theory & Practice 3-4, 9, 11 (2015).[3] A disproportionate number of survivors drop courses, avoid particular buildings or parts of campus, or leave school altogether. *Id*. at 3-4, 10 (34.1% of sexual assault victims dropped out). Title IX seeks to prevent and ameliorate such civil rights injuries. But the panel's opinion, as it stands, discourages schools from doing exactly that.

B. The Dear Colleague Letter Does Not Support a Claim of Sex Discrimination.

The Dear Colleague Letter does not support Doe's sex discrimination claim. As an initial matter, neither Doe nor the panel distinguish between alleged discrimination against students accused of sexual harassment and alleged

[3] The article is available at https://www.researchgate.net/profile/Cecilia_Mengo/publication/277343957_Violence_Victimization_on_a_College_Campus_Impact_on_GPA_and_School_Dropout/links/572234a108ae586b21d3d791.pdf.

discrimination against men. These forms of bias are distinct, as not all students accused of sexual harassment are men. *E.g.*, *Doe v. Univ. of Denver*, 952 F.3d 1182, 1196-97 (10th Cir. 2020) (collecting cases). (Courts have not recognized a cause of action for disparate impact under Title IX. *See Haidak*, 933 F.3d at 75.) Doe must plead that his alleged mistreatment was on the basis of his sex, rather than his status as a student accused of sexual assault.

He cannot do so for the reasons explained above. Additionally, Doe has not pleaded any facts—and none exist—indicating the Department of Education pushed schools to discipline *men* specifically. "The [Dear Colleague Letter] is gender-neutral on its face." *Univ. of Denver*, 952 F.3d at 1192–93. Doe can only suggest the Department pressured schools to punish students accused of sexual assault, not that it pressured schools to punish *men*. *See* App. 95-96. Because Doe has not "explained how the Dear Colleague Letter reflects or espouses gender bias," he cannot successfully argue "that the Letter somehow infected the proceedings at issue here with gender bias." *Doe v. Trustees of Bos. Coll.*, 892 F.3d 67, 92 (1st Cir. 2018). The Letter, then, does not bolster his sex discrimination claim, and does not provide a reason for the Court to hold Doe's case-specific allegations to a lower pleading standard, as it appears to have done here. Slip Op. 10.

CONCLUSION

For the reasons explained, *amici* ask the Court to grant rehearing by the panel or *en banc*. At a minimum, the panel should revise its opinion to clarify that (1) private colleges and universities may use "indirect" or "inquisitorial" cross-examination, (2) these new procedural protections are required for students who face suspension or expulsion for peer-on-peer misconduct, and (3) Roe 1 and Witness 1 are not appropriate comparators.

Respectfully submitted,

/s/ James Davy

James Davy (PA ID 321631)
2362 E Harold St.
Philadelphia PA 19125
(p) 609-273-5008
jimdavy@gmail.com
PA ID 321631

Adele P. Kimmel (DC ID 412612)
Alexandra Brodsky (DC ID 1048430)
Public Justice
1620 L St NW, Suite 630
Washington, DC 20036
(p) 202-797-8600
akimmel@publicjustice.net
abrodsky@publicjustice.net

Counsel for *Amici Curiae* Public Justice, Women's Law Project, Atlanta Women for Equality, Harvard Law School Gender Violence Program, Know Your IX, and National Women's Law Center

CERTIFICATION OF BAR MEMBERSHIP

I, Jim Davy, certify pursuant to Local Rule 46.1 that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit Court of Appeal.

Dated: June 26, 2020

/s/ James Davy

James Davy, Esq.

CERTIFICATE OF COMPLIANCE

I, Jim Davy, hereby certify as follows:

(1) the Brief for Amicus Curiae complies with the typeface requirements of Fed. R. App. P. 32(a)(5) because the brief has been prepared in proportionally spaced typeface using Microsoft Word 14 point Times New Roman font;

(2) the Brief for Amicus Curiae complies with the type volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2599 words, excluding those parts of the brief excluded by Fed. R. App. P. 32(f), as calculated using the word count function on Microsoft Word software;

(3) the text of the electronic and hard copies of the Brief for Amicus Curiae is identical; and

(4) the electronic copy of the Brief for Amicus Curiae was scanned for electronic viruses on June 26, 2020, before transmission to this Court, and no viruses were detected.

Dated: June 26, 2020

/s/ James Davy

James Davy, Esq.

CERTIFICATE OF SERVICE

I, Jim Davy, certify that on June 26, 2020, I caused a copy of this Brief for Amicus Curiae to be filed with the Clerk of Court and served on all counsel of record using the *CM/ECF* system.

I also certify that within the time limits specified, I will have caused seven (7) hard copies of the instant brief to be hand-delivered to the Clerk of the Third Circuit Court of Appeals, in accordance with the Rules.

Dated: June 26, 2020

/s/ James Davy

James Davy, Esq.