CASE NO. 22-1056

UNITED STATES COURT OF APPEALS
FOR THE
FIRST CIRCUIT

John Doe
Plaintiff-Appellant

v.

Massachusetts Institute of Technology
Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
Case No. 1:21-cv-12060
Honorable Richard Stearns, United States District Judge, presiding

BRIEF *AMICUS CURIAE* OF EDUCATION LAW ATTORNEYS IN SUPPORT OF APPELLANT

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Amicus curiae are attorneys and law firms. *Amicus curiae* are not subsidiaries or affiliates of a publicly owned corporation. To the best of the knowledge of *amicus curiae,* there is no publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome.

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STATEMENT OF THE IDENTITY OF *AMICUS CURIAE*, INTEREST IN THE CASE, AND AUTHORITY TO FILE

Amicus curiae submitting this brief are attorneys who have litigated on Title IX, sexual harassment, and sexual assault matters involving institutions of higher education. The attorneys listed below have represented and advised students and faculty accused of Title IX violations; within that sub-group, several of the attorneys on this list defend students of color, students who are part of the LGTBQ+ community, and students from other marginalized groups. Some of the attorneys listed have also represented and advised Title IX complainants and alleged victims of sexual harassment and sexual assault.

In the view of *amicus curiae*, the decision of the District Court to deny plaintiff leave to proceed anonymously in this case failed to adequately consider the historical and regulatory backdrop. This case is one of many amidst a continuing national controversy about the responses of colleges and universities to alleged sexual assaults on campuses. After years of criticism for being too lax on campus sexual assault, on April 11, 2011, the U.S. Education Department's Office for Civil Rights ("OCR") sent a Dear Colleague Letter (the "DCL") to colleges and universities encouraging schools to become more aggressive in the investigation and adjudication of sexual violence

complaints.[1] The DCL, as well as subsequent guidance and statements provided by OCR, compelled colleges and universities to change their former policies drastically out of fear that the Department of Education would pursue violations of Title IX that could lead to the revocation of all federal funding. In the view of *amicus curiae,* in the years that followed the publication of the DCL, schools often went far beyond the few clear directives contained in it (and in OCR's subsequent guidance) out of fear of attracting negative attention from OCR. The results, as documented in a number of judicial decisions in state and federal courts around the country, were clear violations of individuals' rights under Title IX. This history must be considered in order to properly evaluate the necessity for students in Title IX litigation to proceed anonymously.

Amicus curiae, and, in particular, those attorneys who have represented *both* accused students and alleged victims, are concerned that the decision of the District Court in this case denying a student leave to proceed anonymously will have the effect of denying *both* the accused and victims of sexual harassment access to the private right of action against educational institutions that receive federal funding. Leave to proceed anonymously in Title IX cases is necessary to guarantee that Federal Courts maintain the ability to assure the accuracy and reliability of school disciplinary processes that can result in the deprivation of an education. The District Court in this case failed to

[1] Dear Colleague Letter: Sexual Violence, Russlynn Ali, Office for Civil Rights, U.S. Dep't of Educ. (Apr. 4, 2011) https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf.

appreciate that the ability to proceed anonymously should be seen as supporting alleged victims as much as students accused of misconduct by enabling all parties to be heard, bolstering the search for the truth, and increasing the credibility of outcomes.

Amicus curiae support without reservation Congress' goal in enacting Title IX to eradicate gender discrimination in places of higher learning. *Amicus curiae* share the concerns that animated the 2011 DCL and subsequent guidance from OCR, which acknowledge the prevalence of sexual assault on campus and the unwillingness or inability of many schools to adequately address it. Specifically, and without equivocation, *amicus curiae* share the goal of eliminating sexual assault on campus. Nothing in this Brief should be taken to minimize the importance of the problem or the impact of sexual assault on victims.

Counsel for John Doe has consented to the filing of this Brief. No counsel has appeared for MIT.

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Amicus curiae state:

(i) No party's counsel authored the brief in whole or in part;

(ii) No party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and

(iii) No person – other than the *amicus curiae*, its members, or its counsel – contributed money that was intended to fund preparing or submitting this e brief.

ARGUMENT

The decision of the District Court to deny plaintiff leave to proceed anonymously in this case (i) failed to adequately consider the historical and regulatory backdrop and (ii) will have a deleterious effect on not only on students who seek to challenge disciplinary proceedings, but also on alleged victims. All students – whether accused, alleged victims, or witnesses – should be able to participate in litigation against educational institutions that receive federal funding without fear of embarrassment or harassment.

A. Denying Students Leave To Proceed Anonymously Improperly Shifts The Focus To The Students' Conduct

Title IX prohibits federally funded universities from discriminating against students on the basis of sex. 20 U.S.C. § 1681(a). Sexual harassment, including student-on-student sexual assault, is a form of sex discrimination for Title IX purposes. *Davis v. Monroe Cty. Bd. of Edn.*, 526 U.S. 629 (1999).

This case is one of many amidst a continuing national controversy about the responses of colleges and universities to alleged sexual assaults on campuses following the 2011 DCL. These cases brought by students accused of misconduct, sexual assault, or sexual harassment on college and university campuses, are about whether the college or university complied with its policies and procedures, Title IX, and (if a public institution) constitutional due process guarantees. This is a growing problem and has attracted significant public attention. *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).

Federal courts of appeals have observed that the DCL ushered in a more rigorous approach to campus sexual misconduct allegations. *Doe v. Purdue Univ.*, 928 F.3d 652, 667-68 (7th Cir. 2019); *Doe v. Miami Univ.*, 882 F.3d 579, 593-94 (6th Cir. 2018); *Doe v. Univ. of Sciences*, 961 F.3d 203, 209 (3d Cir. 2020); *Doe v. Regents of the Univ. of Minnesota,* 999 F.3d 571, 578 (8th Cir. 2021). The Sixth Circuit, in *Miami Univ.*, for example, credited claims that "pressure from the government to combat vigorously sexual assault on college campuses and the severe potential punishment – loss of all federal funds – if it failed to comply, led [the school] to discriminate against men in its sexual-assault adjudication process." 882 F.3d at 594. The Sixth Circuit later explained that pressure from the Department of Education "provides a backdrop, that, when combined with other circumstantial evidence of bias in [a student's] specific proceeding" supports a plausible claim of gender discrimination. *Doe v. Baum*, 903 F.3d 575, 586 (6th Cir. 2018).

In *Purdue*, the Seventh Circuit acknowledged that Title IX claims by students facing discipline for sexual misconduct arise "against the backdrop" of the DCL. The court acknowledged that "a school's federal funding was at risk if it could not show that it was vigorously investigating and punishing sexual misconduct." 928 F.3d at 668. The court concluded that the pressure from the Department of Education is relevant because it gives accused students "a story about why [a school] might have been motivated to discriminate against males accused of sexual assault." 928 F.3d at 669.

Similarly, in *Univ. of the Sciences*, the Third Circuit held that "university overreaction to [the DCL] or other public pressure is relevant to alleging a plausible Title IX discrimination claim." 961 F.3d at 210 (citations omitted). Finally, the Eighth Circuit cited *Purdue* and other opinions described in this section with approval, noting that "external pressure from public attention and the threatened loss of federal funding 'provides a backdrop…' to student claims in this area. *Univ. of Minnesota*, 999 F.3d at 578, *quoting Baum*, 903 F.3d at 586.

In almost every case that *amicus curias* has been involved in, students are forced to litigate against this backdrop of heightened pressure and attention from the Federal government, yet have never been accused of any misconduct in any legal proceeding. And, in almost every case that *amicus curias* has been involved in, students challenging disciplinary findings related to sexual misconduct on campus have never been charged with a crime. Requiring students in these cases to litigate under their real names shifts the focus away from the pressure from OCR, the process actually used by the school, and the evidence the school actually relied upon or ignored. The primary cases addressing student misconduct since the DCL, such as *Purdue*, *Univ. of the Sciences,* and *Miami Univ.* are not about the student's underlying "guilt" or "innocence" but, instead, focus on the conduct of the schools in the context of the regulatory actions from OCR.[2]

[2] This Court, in *Haidak v. Univ. of Massachusetts-Amherst*, 933 F.3d 56, 74 (1st Cir. 2019), for example, focused on whether the school's "decision to initiate charges" against a student "was affected by his sex."

Doe v. Brown Univ., 210 F. Supp. 3d 310, 313 (D.R.I. 2016), illustrates the point. In that case, following a consolidated preliminary injunction hearing/bench trial on the merits, the court considered whether the school breached contractual guarantees contained in the student handbook. The court noted that, as in this case, "The problem in this case is that the process was not properly applied." 210 F. Supp. 3d at 331. In evaluating that claim, the court explicitly declined to consider whether the student committed the underlying conduct on relevance grounds. The court in *Brown Univ.* said, "It is important to make it unequivocally clear at the outset that the Court's only role in this case is to determine whether Doe's disciplinary" process was done in accordance with the contract between the parties. The court, in its role as finder of act, further emphasized that "It is not the Court's role to determine the facts of what happened between [plaintiff] and [the alleged victim]." 210 F. Supp. 3d at 313. Similarly, in another breach of contract case brought in this Circuit by a student involving allegations of sexual misconduct, a court considering a motion to dismiss observed that any "decision is based on the entirety of the procedures employed by [the school], given the nature of the charges and the circumstances of the case." *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 608 (D.Mass. 2016). The court specifically observed that the merits of the underlying claim were not relevant: "Finally, and to repeat, the Court is not deciding the merits of the case—in particular, whether [the plaintiff] in fact committed any form of sexual misconduct." *Id.*

The same is true in other circuits. In *Doe v. Rollins College*, M.D.Fla. No. 6:18-cv-1069-RBD-LRH, 2021 U.S. Dist. LEXIS 114806 (Feb. 25, 2021), a district court considered a motion in limine by a student accused of sexual misconduct seeking to preclude the school "from arguing the underlying guilt of Plaintiff because it is not relevant and unduly prejudicial." Id. at *12. The school in that case concurred that "the jury should not be making a new determination on what transpired between Plaintiff and [the alleged victim]…" Id. The *Rollins College* court held that "the jury can consider what was presented to the investigator" but cautioned the school against "trying to turn this breach of contract trial into a sexual misconduct trial."[3] Id. at *14.

B. The Disclosure Of Students' Names Would Forever Associate Them With Allegations Of Sexual Misconduct

The allegations in this type of case concern a matter of utmost intimacy. The testimony at issue in many Title IX cases involves descriptions of sexual activity involving the plaintiffs; many of the cases handled by *amicus curiae* involve graphic details of the alleged incident. Most cases are brought by students whose identity is not already broadly known to the community as a result of media coverage or through some administrative proceeding that predated the lawsuit. The main goal of students in remaining anonymous is to prevent further embarrassment and reputational harm.

[3] The balancing may change as the case proceeds and if a case proceeds to trial. Most cases are resolved prior to a jury trial; the relevant inquiry at this stage primarily involves the impact of written pleadings on the students.

In the experience of *amicus curiae*, public disclosure will subject students to reputational damage and will impair their future educational and career prospects, regardless of the actual outcome of litigation. The identity of John Doe, as well as the alleged victim and all student witnesses, known to MIT and its counsel, but remains unknown publicly. Plaintiff is alleged to have engaged in sexual misconduct, making this case one of a highly sensitive and personal nature for Plaintiff and everyone else involved. But more than this, courts have observed that allegations of sexual assault, in the school disciplinary context, could damage a student's reputation and career prospects. *Doe v. Cummins*, 662 F.App'x 437, 446 (6th Cir.2016) (observing that a finding of responsibility by a school for sexual offenses will "have a substantial lasting impact on [students'] personal lives, educational and employment opportunities, and reputations in the community"); *Doe v. Salisbury Univ.*, 107 F. Supp. 3d 481, 494 (D.Md. 2015) ("The social stigma associated with a sexual assault [school disciplinary finding] is deservedly severe."). The Sixth Circuit Court of Appeals said: "Being labeled a sex offender by a university has both an immediate and lasting impact on a student's life. The student… could face difficulty obtaining educational and employment opportunities down the road." *Baum*, 903 F.3d at 582 (6th Cir. 2018), *citing Miami Univ.*, 882 F.3d at 600. Another court, while granting a motion for leave to proceed anonymously, observed that "the possible injury to plaintiff resulting from public disclosure of his identity rises above the level of mere embarrassment or harm to

reputation." *Doe v. Washington Univ.*, E.D.Mo. No. 4:19 CV 300, 2019 U.S. Dist. LEXIS 234909, *3-4 (Apr. 2, 2019).

The problem presented by the decision of the district court in this case goes beyond an allegation of sexual misconduct involving a single student. *Amicus curiae* urge this Court to consider that the public generally has an interest in protecting those who challenge college and university decisions – particularly those decision that violate federal statutory and constitutional guarantees – so that they are not deterred from vindicating their rights. If students are not permitted to proceed anonymously, they would be deterred from bringing lawsuits because even if the students are successful and obtain injunctive relief clearing their names, the damage to their reputations would be irreparable if the student's identity is disclosed by a simple Google or PACER search. *Doe v. Univ. of St. Thomas*, D.Minn. No. 16-cv-1127, 2016 U.S. Dist. LEXIS 193775, at *5 (May 25, 2016). *See also Doe v. Alger*, 317 F.R.D. 37, 42 (W.D.Va. 2016) ("If [student] were not allowed to proceed anonymously, part of the relief he seeks—expungement of his student record—would fall short of making him whole: the cat would have already been let out of the bag.").[4]

[4] *Compare Doe v. Drake Univ.,* S.D.Iowa No. 4:16-cv-00623, 2017 U.S. Dist. LEXIS 224438, at *12 (June 13, 2017) ("detailed exposure and the fact that plaintiff's identity has not been kept confidential… undermines allowing Plaintiff to proceed under a pseudonym").

Recent decisions on this issue have recognized that, in the Internet age, the mere accusation of sexual assault can subject the accused to lasting reputational damage and harassment. One court in this Circuit, in granting a student leave to proceed anonymously, said, "Such a concern is only exacerbated in the Internet age, which can provide additional channels for harassment and will connect plaintiff's name to [the school's] findings and sanction forever, whether or not he is successful in this litigation." *Doe v. Trustees of Dartmouth College*, D. N.H. No. 18-cv-040, 2018 U.S. Dist. LEXIS 74066 (May 2, 2018), *citing Doe v. Cabrera,* 307 F.R.D. 1, 7 (D.D.C. 2014) ("Having the plaintiff's name in the public domain, especially in the Internet age, could subject the plaintiff to future unnecessary interrogation, criticism, or psychological trauma, as a result of bringing this case.").

C. Congress, In Enacting FERPA, Sought To Protect The Privacy Of All Student Records

Education records are protected from disclosure by the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g; 34 CFR Part 99. Congress has, in enacting FERPA, indicated that school disciplinary records should be maintained as confidential. FERPA "recognizes an important privacy interest for students." *Brown v. Univ. of Kansas*, D.Kan. No. 10-2606, 2012 U.S. Dist. LEXIS 24565, at *4-5 (Feb. 27, 2012). As one court observed, "the privacy concerns" of students has been "vigorously and intentionally protected by Congress." *Stanislaus v. Emory Univ.*, N.D.Ga. No. 1:05-CV-1496-RWS, 2006 U.S. Dist. LEXIS 110376, at *23 (July 28, 2006). *See also Krebs v.*

Rutgers, 797 F.Supp. 1246, 1259 (D.N.J. 1992) (noting that "the important privacy interests protected by… FERPA reflect the fact that any violation of those protected rights presents serious, 'irreparable' injury"); *Jackson v. Willoughby Eastlake Sch. Dis*t., N.D.Ohio No. 1:16CV3100, 2018 U.S. Dist. LEXIS 49508, at *9 (Mar. 23, 2018) (noting "FERPA's underlying privacy concerns").

In one case addressing this issue, a district court specifically relied upon FERPA in concluding that Plaintiff's privacy interests substantially outweigh the presumption of open judicial proceedings. *Roe v. Adams-Gaston*, S.D.Ohio No. 2:17-cv-945, 2017 U.S. Dist. LEXIS 181930, at *2 (Nov. 2, 2017). The court interpreted information protected by FERPA as "information of the utmost intimacy." *Id.* Consistent with Congress' intent to prevent the public disclosure of student educational records, the identity of students seeking to challenge school disciplinary findings should be protected in order to avoid deterring students from suing educational institutions to vindicate their rights because they fear that they will be forced to forfeit their FERPA rights and bring suit under their true identity. One court noted:

> It makes little sense to lift the veil of pseudonymity that—for good reason—would otherwise cover these proceedings simply because the university erred and left the accused with no redress other than a resort to federal litigation. In fact, to do so may well discourage aggrieved students from seeking recourse when they fall victim to defective university disciplinary procedures or may discourage victims from reporting sexual misconduct in the first instance.

Doe v. Rector & Visitors of George Mason Univ., 179 F. Supp. 3d 583, 593 (E.D.Va. 2016).

Schools will not suffer any harm or prejudice if Plaintiff is allowed to remain anonymous. *See, e.g., Doe v. Colgate Univ.*, N.D.N.Y. No. 5:15-cv-1069, 2016 U.S. Dist. LEXIS 48787, at **3 (Apr. 12, 2016) (noting an absence of harm to the defendant in support of granting leave to proceed anonymously). Other than the need to make redactions and take measures not to disclose the identity of students, schools will not be hampered or inconvenienced merely by a plaintiff's anonymity because the identity of Plaintiff is not relevant or essential to the claims in this case. Worse: unscrupulous school administrators may be encouraged to violate student rights with the expectation that students will not pursue litigation for fear of forfeiting their FERPA rights. One court noted that the potential embarrassment *to a school* is not prejudice:

> [A]lthough the University… might prefer not to have to defend its internal discipline policies regarding claims of sexual assault in the public forum, it would have to do so regardless of Mr. Doe's anonymity. Indeed, even absent the lawsuit itself, universities everywhere are part of an ongoing public conversation regarding these issues on campus.

Univ. of St. Thomas, 2016 U.S. Dist. LEXIS 193775, at *4-12. But other individuals might suffer prejudice. Schools, in the experience of *amicus curiae*, wish for the identity of other students implicated in the litigation, including alleged victims, to remain private. *Amicus curiae* agree. *See Doe v. Univ. of S. Alabama*, S.D.Ala. No. 17-0394, 2017 U.S. Dist. LEXIS 145587, at *8 (Sep. 8, 2017) (granting motion to proceed anonymously so that all students involved would remain anonymous). In the current heated political environment, the disclosure of *any* student names in connection with such emotional and high-profile issues could subject all of the students involved – the accused, the

alleged victim, and witnesses – to retaliation or harassment. *See George Mason*, 179 F. Supp. 3d at 592-593 ("the mere accusation [of sexual misconduct], if disclosed, can invite harassment and ridicule"). A simpler, more direct application of "sauce for the goose is sauce for the gander" doctrine is hard to imagine. In the absence of leave to proceed anonymously, a student bringing this type of lawsuit would inevitably be required to include the name of the alleged victim and student witnesses. This is not a desirable outcome; the decision to permit a plaintiff to proceed anonymously in this type of case protects everyone involved, most especially the alleged victim.[5]

Courts, including courts in this Circuit, have recognized that the interest of the alleged victim in remaining anonymous is an important consideration. In *Dartmouth Coll.*, *supra*, the court said, "Even more salient to the court is [the alleged victim's] interest in anonymity." The court granted the plaintiff leave to proceed anonymously, in part, because it found "reasonable" the alleged victim's "fears relating to public

[5] Occasionally, in the experience of *amicus curiae*, a school will oppose a motion for a student to proceed anonymously. A belief that *only* students seeking to challenge the decisions of educational institutions should be compelled to relinquish anonymity gives away the game: those schools seek a tactical advantage in making a plaintiff litigate under his real name by imposing a risk of additional harm. Students challenging decisions of schools in court will not gain any tactical advantage by having *all* student names kept from the public record. The *Univ. of St. Thomas* court noted a similar inconsistency and observed that this undermined any claim of prejudice by a school. The court said, it is "difficult to reconcile" a school's "repeated and genuine expressions of concern for the privacy of its students… with its decision not to follow the course taken by other (though by no means all) universities and acquiesce to pseudonymous proceeding." 2016 U.S. Dist. LEXIS 193775, at *10 (citations omitted).

identification." *Id.* Similarly, in *Colgate Univ.*, 2016 U.S. Dist. LEXIS 48787, at *6-7, a court found that "protecting the anonymity of sexual assault victims and those accused of committing sexual assault can be an important safeguard to ensure that the due process rights of all parties are protected."

Amicus curiae acknowledge a substantial public interest in access to civil judicial proceedings and that the public has a related interest in the true identity of the parties. This interest must, however, be balanced against a strong public interest, described *supra*, in protecting the privacy of plaintiffs in sensitive cases so that these plaintiffs are not discouraged from asserting their claims. The public interest would be disserved by disclosing the identity of students because (i) students may be deterred from pursuing meritorious claims against schools; and (ii) much of the injury litigated against would be incurred as a result of disclosure of the plaintiff's identity. *See Colgate Univ.*, 2016 U.S. Dist. LEXIS 48787, at *9-10 ("The Court is also mindful of the potential chilling effect that forcing Plaintiff to reveal his identity would have on future plaintiffs facing similar situations.")

CONCLUSION

The District Court abused its discretion in denying plaintiff leave to proceed anonymously.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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CERTIFICATE OF SERVICE

I hereby certify that on April 12, 2022, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

Paper copies have been served by U.S. Mail upon Defendant-Appellee,
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