IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-2966

John Doe,
Plaintiff-Appellant,

v.

University of the Sciences,
Defendant-Appellee.

On Appeal from the United States District Court
For the Eastern District of Pennsylvania Granting Motion to Dismiss,
Case No. 2:19-cv-00358-JS,
The Honorable Juan R. Sánchez, Chief District Judge

BRIEF OF *AMICI CURIAE* LAW PROFESSORS IN SUPPORT OF DEFENDANT-APPELLEE AND SUPPORTING AFFIRMANCE

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici are Nancy Chi Cantalupo (Associate Professor of Law, Barry University School of Law), David A. Super (Professor of Law, Georgetown University Law Center), and 17 additional law professors. The names, titles, and institutional affiliations of all amici and the individual statements of interest of Amici Cantalupo and Super are provided in the appendix to this brief.

Amici have several professional interests in this case. First, as educators, amici have a strong interest in educational environments free of harassment and gender-based violence. In particular, amici believe that in order to promote their central educational mission, universities must prevent, rather than permit, such harassment and violence. When universities permit such harassment and violence, they deny students a full opportunity to learn, earn a degree, and flourish. Second, as law professors, amici have a sustained interest in civil rights law, constitutional law, criminal law, education law, gender-based violence law, and sexual harassment law, including in courts' proper interpretation and application of legal principles that will combat discrimination, prevent violence both inside and outside educational environments, and advance equal educational opportunities.

STATEMENT PURSUANT TO RULE 29(a)(4)(E)

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici curiae* state that: (1) no party's counsel authored this brief in whole or in part; (2) no party or party's counsel contributed money intended to fund preparing or submitting this brief; and (3) no person – other than *amici curiae*, their members or their counsel – contributed money intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

Amici law professors submit this brief in support of Appellee, University of the Sciences, and the decision of the District Court. Appellee's choice to use a non-adversarial, civil rights investigation method to investigate and resolve allegations that John Doe sexually assaulted Jane Roes 1 and 2 was a wise decision. When investigating and conducting disciplinary proceedings due to a complaint of peer sexual harassment and/or gender-based violence, universities such as Appellee have legal obligations to protect the rights of both complainants and respondents, as well as to comprehensively prevent such discriminatory harassment and violence.

Non-adversarial, civil rights investigation methods advance comprehensive prevention of this harassment and violence more effectively than do the live, adversarial hearing-based methods that John Doe is demanding that Appellee use. Comprehensive prevention of sexual harassment and gender-based violence is a public health-based approach that incorporates primary, secondary, and tertiary forms of prevention. Civil rights investigation methods function as much more effective secondary and tertiary prevention than adversarial, live hearings do.

In addition to selecting a better investigation model, Appellee's specific investigation procedures, as implemented in the investigation of the complaints against John Doe, are consistent with recommendations for such investigations

recently published by the American Bar Association's Commission on Domestic and Sexual Violence. Indeed, had Appellee taken the specific investigatory steps that Appellant demands, not only would Appellee's investigation have departed from the best practices articulated by an American Bar Association commission with specialized knowledge and skills regarding combatting sexual harassment and gender-based violence, Appellee would have risked violating its federal legal obligations.

ARGUMENT

I. APPELLEE CHOSE A BETTER WAY TO INVESTIGATE AND RESOLVE THE ALLEGATIONS OF JANE ROES 1 AND 2 THAN THE METHOD THAT JOHN DOE IS DEMANDING THAT APPELLEE USE.

A. In Internal Investigations and Disciplinary Proceedings of Student-to-Student Sexual Harassment and Gender-based Violence, Universities Have Legal Obligations to Protect the Rights of Both Complainants and Respondents and to Comprehensively Prevent Such Harassment and Violence.

When universities such as Appellee receive a report from one or, as here, more than one student that another student sexually assaulted them, federal and state law requires that the university investigate and determine, at a minimum: (1) what happened between the students; (2) whether the accused student violated university policies against student misconduct, including misconduct that constitutes sexual harassment and/or gender-based violence, and (3) if the accused

student did commit such a violation, what sanction the university should impose. In making these determinations, universities must protect certain rights within the investigation and sanctioning procedures for both complainants (students who report sexual harassment or gender-based violence[1] committed against them by another person or persons) and respondents (those named by complainants for committing such harassment and/or violence). In this case, there is no allegation that Appellee violated the rights of the complainants, Jane Roes 1 and 2, so Amici assume without specifically analyzing and determining that Appellee adequately met its legal obligations to protect complainants' rights. With regard to John Doe's rights, Amici agree with the District Court below that Appellee engaged in no violation of John Doe's rights under state and federal law.

In addition to requiring universities to protect the procedural rights of complainants and respondents, two federal statutes require universities and other educational programs that receive federal funds to do more than simply investigate and decide responsibilities and sanctions in response to a complaint. Title IX of the Educational Amendments of 1972 ("Title IX"), 20 U.S.C. §§ 1681-88, and the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics

[1] "Gender-based violence" in this brief refers to one or more of the four Violence Against Women Act crimes included in the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (domestic violence, dating violence, sexual assault and stalking). 20 U.S.C. § 1092(f)

Act ("Clery Act"), 20 U.S.C. § 1092(f), also require funding recipients such as Appellee to *prevent* such harassment and violence. The Clery Act explicitly requires "comprehensive" prevention methods. Title IX implies similar comprehensiveness because Title IX's obligation to prevent such harassment must at least be designed to be effective, and prevention methods that are not comprehensive are unlikely to be effective.

Under the Clery Act, the most explicit reference to universities' obligations to comprehensively prevent gender-based violence can be found in the U.S. Department of Education (ED) Clery Act regulations. First, the Clery Act requires that Institutions of Higher Education provide "programs to prevent dating violence, domestic violence, sexual assault, and stalking" and defines such programs as "comprehensive, integrated and intentional programs, initiatives, strategies, and campaigns intended to end dating violence, domestic violence, sexual assault, and stalking." 34 C.F.R. § 668.46. Amicus Cantalupo served as a Negotiator in the Negotiated Rulemaking that adopted this definition[2] and chaired the subcommittee that drafted this language. The Clery Act's regulations' requirement of "comprehensive…programs" refers to the public health prevention model first articulated by the Centers for Disease Control and Prevention (CDC).

[2] U.S. Department of Education, Negotiated Rulemaking 2013-2014 Violence Against Women Act (VAWA), https://www2.ed.gov/policy/highered/reg/hearulemaking/2012/vawa.html.

Under the CDC's structure, comprehensive prevention incorporates three forms of prevention: primary, secondary and tertiary prevention. Primary prevention seeks to prevent sexual harassment and gender-based violence before they start. Secondary prevention includes methods that respond to such harassment and violence immediately or very soon after they occur. Secondary prevention methods often focus on interventions to address the trauma the harassment/violence causes and the harms that its victims experience, affecting their health, their relationships with others, and their abilities to work and/or go to school. Tertiary prevention addresses the long-term consequences of gender-based violence, not only on the immediate victims but also on secondary victims, on those responsible for committing gender-based violence, and on the community as a whole.[3] The method of investigation the university implemented here is consistent with each of these three phases of required comprehensive programs of sexual violence prevention.

As a civil rights statute, Title IX prohibits discrimination on the basis of sex or gender. Sexual assault has long been considered a severe form of sexual harassment, which is in turn a form of sex discrimination prohibited by Title IX. U.S. Department of Education, *Revised Sexual Harassment Guidance: Harassment*

[3] Centers for Disease Control and Prevention, *Sexual Violence Prevention: Beginning the Dialogue* 3 (2004), https://www.cdc.gov/violenceprevention/pdf/svprevention-a.pdf.

of Students by School Employees, Other Students, or Third Parties 5-6 (2001). Although neither court decisions nor regulations from the Department of Education's Office for Civil Rights (OCR) enforcing Title IX refer directly to the CDC public health model in the manner of the Clery Act's regulations, both agency and court enforcement of Title IX for more than two decades is consistent with comprehensive prevention. With regard to OCR's enforcement, a guidance document followed since the Clinton administration and confirmed as recently as September 2017 by the current Secretary of Education, the 2001 *Revised Sexual Harassment Guidance*, states that: "Schools are responsible for taking prompt and effective action to stop the harassment and prevent its recurrence. A school also may be responsible for remedying the effects of the harassment on the student who was harassed." *Id.* at 10. Similarly, the standard that courts follow under Title IX has been articulated by the United States Supreme Court in *Davis v. Monroe County Bd. of Ed*. 526 U.S. 629 (1999), as prohibiting schools from acting with "deliberate indifference" to known instances of sexual harassment, defining "deliberate indifference" as actions or failures to act that cause students, at a minimum, "to undergo" harassment or "make them liable or vulnerable" to it. *Id.* at 645.[4]

[4] Note that standards governing universities' obligations to student respondents do not bar or even discourage comprehensive prevention methods. Therefore, the process rights of accused individuals do not conflict with the comprehensive

B. Appellee's Choice of Non-Adversarial, Civil Rights Investigation Methods Advances Comprehensive Prevention of Campus Sexual Harassment and Gender-based Violence More Effectively Than Do Live, Adversarial Hearings.

Appellee utilized a non-adversarial investigation method that has been termed a "civil rights investigation" to determine the accuracy of Jane Roes 1 and 2's reports that John Doe sexually assaulted each of them. Civil rights investigation and fact-finding methods are much more likely to achieve the comprehensive prevention goals of Title IX and the Clery Act than the adversarial "live hearing" method Doe claims the Appellee should have used—and that he would have this court compel Appellee to use—to investigate and resolve the Jane Roes' reports.

Civil rights investigations rely primarily or exclusively on professional investigators to conduct a fact-finding process to determine whether and to what extent an accusation of sexual harassment or gender-based violence is accurate. Investigators gather documentary and physical evidence, as well as conduct separate interviews with and make credibility determination about the parties (i.e. the complainant and respondent) and any witnesses. They then synthesize the

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prevention goals of Title IX and the Clery Act. *See* Nancy Chi Cantalupo, *Civil Rights Investigations & Comprehensive Prevention of Sexual Misconduct* in *Adjudicating Campus Sexual Misconduct: Controversies and Challenges* 95-6 (Claire Renzetti & Diane R. Follingstad, eds., 2019).

evidence gathered and write an investigative report where they make factual findings based on the evidence gathered.

In contrast, the live hearings demanded by Doe rely primarily or exclusively on members of a university's community, who are usually not professionally trained or experienced as investigators and do not do their own investigation but passively hear testimony and consider evidence presented by all parties and witnesses. They then make factual findings based on that testimony and evidence. Such hearings are often described as "adversarial" in nature because the complainant(s) and the respondent(s) inevitably present different and almost always contradictory accounts of what happened between them. In contrast to the parties' roles, the hearing panel is relatively passive, in that panel members do not seek out evidence beyond what the parties air in the hearing itself, and are thus dependent on the extent and quality of the evidentiary presentations, usually presented by the parties or their advocates/representatives.

Various versions of civil rights investigations have long been used in the employment context to address workplace sexual harassment.[5] While adversarial hearing models have historically been used in student disciplinary proceedings, especially at traditional, residential, four-year colleges, in recent years even those

[5] *See* Beth K. Whittenbury, *Investigating the Workplace Harassment Claim* (2013).

schools have increasingly moved towards civil rights investigation models for many of the comprehensive prevention reasons discussed *infra*. Specifically, civil rights investigation methods can act as both tertiary and secondary prevention.

1. Civil rights investigation methods function as tertiary prevention.

Civil rights investigations serve as both tertiary and secondary prevention strategies. For instance, as tertiary prevention, civil rights investigations are more conducive to treatment- and restorative justice-based sanctioning of accused individuals who are found responsible for violence or harassment. These methods are also more sustainable for schools in the long-term. This is especially true for schools that have fewer resources, like many minority-serving institutions and community colleges.

With regard to sanctions, because adversarial hearings structurally require the parties to attack each other's evidence and credibility, they polarize the parties or increase pre-existing polarization and hostility. At the sanctioning stage, such a situation is unlikely to support the restorative justice-based sanctioning options that several scholars and campus professionals favor.[6] Parties are also more likely to have a "zero-sum" attitude about sanctions, where they are going to be satisfied only with a sanctioning decision at one end of the spectrum, either expulsion or a

[6] *See, e.g.*, Donna Coker, *Crime Logic, Campus Sexual Assault, and Restorative Justice*, 49 Texas Tech L. Rev. 147 (2017).

borderline non-sanction, rather than potentially more preventative sanctions such as the accused entering a treatment program.

Preventative sanctions may be especially important for student victims or campus professionals who do not support expulsion because of several unintended consequences that could end up further damaging the student victim or other students who could be victimized. Victims and professionals favor preventative sanctions where possible because expelled students can and do go to new schools that may not be notified of such disciplinary actions. This leaves the new school unable to anticipate and take steps to prevent any repeat harassment or violence.[7]

[7] The press has covered several instances of students who were suspended (for terms long enough likely to feel like an expulsion to the student) or expelled due to being found responsible for severe sexual harassment and who then transferred to other schools to continue their college educations. *See, e.g.*, Tyler Kingkade, *Brandon Austin, Twice Accused of Sexual Assault, Is Recruited by a New College*, *HuffPost* (July 28, 2014, 3:44 PM), http://www.huffingtonpost.com/2014/07/28/brandon-austin-northwest-florida_n_5627238.html (discussing a college basketball player who was suspended, along with a teammate, for sexual assault at Providence College, then transferred to the University of Oregon, where he was suspended again with two other teammates for another joint sexual assault, and finally went on to attend and play basketball at a third school, Northwest Florida State College); Todd South, *Jury Finds Sewanee and Student at Fault; Awards Student $26,500*, *Chattanooga Times Free Press* (Sept. 3, 2011), http://www.timesfreepress.com/news/news/story/2011/sep/03/jury-finds-sewanee-and-student-fault-awards-50000-/58021/ (noting that a student expelled from University of the South for sexually assaulting a classmate has "continued his education at another college"); James Taranto, Opinion, *An Education in College Justice*, *Wall St. J.* (Dec. 6, 2013, 6:25 PM), https://www.wsj.com/articles/behind-the-auburn-curtainbehind-the-auburn-curtain-1385756706 (noting that a student expelled from Auburn University after being found responsible for sexual

Moreover, students who are expelled but do not go to another school may stay in the surrounding neighborhood, leaving the school unable to compel non-violent behavior from that (now former) student because it lacks jurisdiction over or ability to control that former student.

Civil rights investigations' greater sustainability also adds to their tertiary prevention strengths. Conducting sexual harassment and/or gender-based violence investigations competently requires extensive training in a wide range of subjects. Civil rights investigations can focus such training on a limited number of specialized employees who develop and hone their expertise in the training areas as they specialize on such investigations. In contrast, adversarial hearings are commonly conducted by existing faculty and staff, who rotate on and off hearing panels, usually annually, on top of doing full-time jobs that require completely different skills and knowledge. Thus, although there is often a perception that using existing employees is cheaper, in actuality the school wastes significant resources to constantly train new people whose temporary service keeps them from developing expertise, getting little to no return on its investment in training. Even for schools that use a hybrid model combining a traditional civil rights investigation with a "deliberative panel" drawn from existing employees, the

harassment had transferred to University of South Carolina Upstate and was expected to graduate in May).

deliberative panel makes a decision after hearing "testimony" only from the investigators, based on their report, although the parties have the choice to make a statement directly to the panel. Because the design of the deliberative panel is to limit the extent of new knowledge and skills needed by panel members, training existing employees to serve on deliberative panels is still more sustainable than doing so for an adversarial hearing.

Importantly, adversarial hearings exacerbate wealth disparities between student parties as well as between schools. Many students' families do not have the resources to hire lawyers, and inequality can exist not only between complainants and respondents but also between respondents and between complainants. Such concerns have long been discussed, including during the Negotiated Rulemaking amending the Clery Act regulations,[8] and there is wide acknowledgement that adversarial hearings create strong incentives for schools, complainants, and respondents to hire lawyers, perhaps regardless of whether they can afford them, because adversarial hearings imitate court proceedings that lawyers are trained to navigate but most non-lawyers are not. The pressure on schools to hire lawyers to run adversarial hearings so that the school is not placed in the difficult position of acting in the role of a judge and managing attorneys who

[8] *See* Monica Vendituoli, *Colleges Face New Requirements in Proposed Rules on Campus Sexual Assault, Chron. Higher Educ.* (June 20, 2014), https://www.chronicle.com/article/Colleges-Face-New-Requirements/147275.

have more legal training than the educational professionals ultimately making the decision is most acute for those schools that cannot afford in-house lawyers, including minority-serving and commuter/community colleges. Because non-lawyers have been shown to be effective investigators where these models are used in other settings, such as many workplaces, civil rights investigations can alleviate, not exacerbate economic disparities between students.

Several other examples of how civil rights investigations serve as tertiary prevention are too lengthy to explain here, but they include practical benefits such as easier and therefore speedier evidence gathering.[9]

2. Civil Rights Investigation methods function as secondary prevention.

To be effective as a secondary prevention strategy, investigations must be trauma-informed, because secondary prevention aims to minimize the harm to victims by intervening as quickly as possible after the harassment/violence and addressing the victim's needs. Trauma-informed investigations recognize, first, that some student victims initiate an investigation for trauma-related reasons, and second, how investigations can *re*-traumatize student victims.

Adversarial hearings are more likely to re-traumatize a complainant in several ways. For example, although law enforcement officials who specialize in sex offense investigation and prosecution repeatedly confirm that trauma-informed

[9] For additional such examples, *see* Cantalupo, *supra* note 4.

investigations will minimize the number of times a gender-based violence victim must recount the violence,[10] adversarial hearings require a complainant to recount—and in recounting, to relive—much of the trauma of the original victimization as many as six times. In contrast, civil rights investigations likely will avoid two to three of such retellings. In addition, the re-traumatizing effects of repeated re-tellings are exacerbated by the adversarial hearing requirement of divulging deeply private information to a larger number of people, including potentially people with whom the complainant has an ongoing relationship that will be inevitably affected by the disclosure of this private information. An example of such adversarial hearing re-traumatization was painfully described by a student survivor who, in an adversarial hearing, had to "sit[] in a room full of Harvard professors as they look[ed] at a magnified photo of [her] backside covered in bruises and broken blood vessels."[11] These dynamics are likely to be even more

[10] For instance, Dr. Kim Lonsway and Sgt. (Retired) Joanne Archambault, who collectively have about five decades of experience with such criminal investigations, advise law enforcement to minimize the numbers of times victims have to recount their victimizations to law enforcement including through methods such as not passing a survivor between officers for trivial and avoidable reasons like a shift change. Kim Lonsway & Joanne Archambault, *Incomplete, Inconsistent, and Untrue Statements Made by Victims: Understanding the Causes and Overcoming the Challenges* 10-11 (2008), https://www.evawintl.org/Library/DocumentLibraryHandler.ashx?id=630.

[11] The Obama White House, *Vice President Biden Speaks on Preventing Campus Sexual Assault*, YOUTUBE (April 30, 2014), https://www.youtube.com/watch?v=m6-Fz_VO_Ss.

traumatic if the school is small and the survivor is more likely to be forced to interact with campus community members who were on the hearing panel and thus privy to the invasive disclosures that the process requires.

Like with tertiary prevention, civil rights investigations can act as secondary prevention in several additional ways, including by striking the optimal balance between investigating promptly, providing the appropriate amount of process to the parties, and ensuring certainty of the investigation outcome.[12] Finally, civil rights investigations mix secondary and tertiary prevention by, for instance, increasing the accuracy of the fact-finding process through trauma-informed interviewing that uses modern research on topics such as the neurobiology of sexual trauma to improve the accuracy of fact-finders' credibility determinations.[13]

II. APPELLEE'S INVESTIGATION OF THE COMPLAINTS AGAINST JOHN DOE ALIGNS WITH RECOMMENDATIONS FOR CONDUCTING SUCH INVESTIGATIONS RECENTLY PUBLISHED BY THE AMERICAN BAR ASSOCIATION'S COMMISSION ON DOMESTIC AND SEXUAL VIOLENCE.

Appellee's design and implementation of its civil rights investigation system are consistent with practices recommended by the American Bar Association Commission on Domestic and Sexual Violence ("ABA CDSV"). These

[12] For additional discussion, see *see* Cantalupo, *supra* note 4.

[13] Rebecca Campbell, *The Neurobiology of Sexual Assault: Implications for Law Enforcement, Prosecution, and Victim Advocacy, National Institute of Justice* (Dec. 1, 2012), https://nij.ojp.gov/media/video/24056.

recommendations were recently published after a three-year drafting and vetting process, with an "overarching goal … to transform the way [institutions of higher education] think about not just student conduct processes and sanctions, but primary, secondary, and tertiary prevention of gender-based violence." The recommendations further make clear that universities need "a comprehensive infrastructure that aims to address the immediate and long-term consequences of violence and abuse *and* to prevent acts of violence and abuse from occurring."[14]

Early drafts of these recommendations underwent an extensive peer review process over three days of in-person discussion in Washington, D.C., as well as written feedback from reviewers. Peer reviewers included higher education professionals from Minority-Serving Institutions of Higher Education, community colleges, private and public institutions, commuter and residential campuses, as well as professionals serving a variety of roles related to sexual harassment and gender-based violence, including: "Title IX Coordinators & Directors of Student Conduct; campus investigators (in house and contracted); civil attorneys; gender based violence experts and technical assistance providers; law professors; criminal defense attorneys; TCU [Tribal College and University] experts; private family law firm litigators; Clery and Title IX compliance experts; university general counsels;

[14] American Bar Association Commission on Domestic & Sexual Violence, *Recommendations for Improving Campus Student Conduct Processes for Gender-Based Violence* 2 (2019).

prosecutors; and Deans of Students" from throughout the country.[15] Between the peer review process and initial information gathering and discussions with likely stakeholders, over 225 higher education professionals were consulted during the process of crafting the recommendations.[16]

Based on this extensive review process and the commitment to comprehensive prevention articulated, the ABA CDSV recommendations select two particular investigation approaches as models. Both favored models use non-adversarial, civil rights investigation methods rather than the live, adversarial hearings. The ABA provided thirteen recommendations for detailed steps universities can take to build a comprehensive prevention system in which the investigation process is one part. The ABA also provides twenty-five individual recommendations on the conduct of the investigation itself and eight on a variety of post-investigation matters.[17]

When compared to the ABA CDSV Recommendations, Appellee's investigation—as described in Appellant's Statement of the Case and/or Appellee's Counterstatement of Facts—aligns with best practices in the following ways:

[15] *Id.* at 9.
[16] *Id.* at 63.
[17] *Id.* at iv.

1) John Doe received written notice of the investigation (ABA CDSV Recommendation #14)[18]
2) The investigator reviewed text messages from the students (ABA CDSV Recommendation #18)[19]
3) John Doe was allowed to bring his attorney to meetings with the investigators (ABA CDSV Recommendation #19)[20]
4) The investigator conducted two interviews with Jane Roe 1, Jane Roe 2 and John Doe (ABA CDSV Recommendation #20)[21]
5) The students involved were given an opportunity to review and provide written feedback on the investigator's preliminary findings (ABA CDSV Recommendation #37)[22]
6) A separate panel of university faculty and staff (*i.e.*, members of Appellee's campus community) decided what the appropriate sanction should be (ABA CDSV Recommendation #43)[23]

In addition, at no point does either Appellant's or Appellee's discussion of the Appellee's investigation indicate that any aspect of Appellee's process ran directly

[18] *Id.* at 33.
[19] *Id.* at 37.
[20] *Id.*.
[21] *Id.* at 37-9.
[22] *Id.* at 54.
[23] *Id.* at 59.

counter to the ABA CDSV recommendations in a manner that was biased against Appellant.

For instance, nothing in the ABA CDSV recommendations lends legitimacy to Appellant's objection to Appellee hiring a single investigator to investigate two complaints that were linked both by how the complainants came forward and by the fact that both complainants accused Doe of sexual assault. Indeed, a Title IX Resource Guide issued by OCR in 2015 makes clear that part of a school's responsibilities under Title IX is to "monitor incidents to help identify students or employees who have multiple complaints filed against them … and address any patterns or systemic problems that arise..." It is noteworthy that although the current Secretary of Education has rescinded some guidance on Title IX compliance issued by her predecessors, this guidance remains in place. U.S. Department of Education, *Title IX Resource Guide* 16 (2015). This guidance from the federal agency assigned to enforce Title IX demonstrates that, had Appellee taken deliberate steps to separate its investigation of Jane Roe 1's Title IX complaint from that of Jane Roe 2 -- complaints that were linked in multiple ways -- Appellee would have been at risk of violating its Title IX obligations.

Similarly, Appellant objects to Appellee not disciplining the Jane Roes for sharing with each other information about their experiences with John Doe. Appellant points to Appellee's policy that "If it is determined that anyone involved

in a report or complaint either as a complainant, respondent or witness, colluded or shared information with another, sanctions *may* be imposed by [Appellee]" (emphasis changed from Appellant's quote of the same policy language). Aside from the clear reservation in this language of discretion to enforce this policy or not as Appellee sees fit, had Appellee chosen to discipline the complainants for sharing information with each other, Appellee would once again have been in danger of violating complainants' rights, this time under both Title IX and the Clery Act. Under Title IX, had Appellee disciplined either or both Jane Roes, it risked being viewed as having retaliated against a complainant for asserting her and another's Title IX rights by bringing forward relevant evidence tending to establish a pattern of harassment creating a hostile environment that Appellee was obliged to address.[24] In addition, under the Clery Act, ED has made it clear that universities may not compel victims' silence about a university investigation of a sexual assault.[25]

[24] *See* Nancy Chi Cantalupo, *"Decriminalizing" Campus Institutional Responses to Peer Sexual Violence*, 38 *J.C. & U.L.* 483, 496 (2012), discussing cases in footnote 51 in which courts recognized retaliation claims brought by students who reported sexual harassment and were subsequently disciplined by the institution.

[25] *See* Nancy Chi Cantalupo, *Campus Violence: Understanding the Extraordinary through the Ordinary*, 35 *J.C. & U.L.* 613, 639-41 (2009), for a discussion of universities found in violation of the Clery Act for requiring student complainants to sign non-disclosure agreements in order to be told the university's conclusion regarding its investigation of the complainant's complaint.

Thus, the ABA CDSV recommendations support Appellee's choice to investigate the Jane Roe complainants' claims using civil rights investigation methods, as well as the quality of Appellee's particular process. In contrast, both of Appellant's claims alleging that Appellee's investigation was inadequate run contrary not only to the ABA CDSV recommendations but also to ED enforcement of both Title IX and the Clery Act.

CONCLUSION

For all of the foregoing reasons, as well as those set forth in Brief for Appellees, *amici curiae* respectfully request the Court to affirm the decision below.

Respectfully submitted,

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Date: December 13, 2019

APPENDIX
INDIVIDUAL STATEMENTS OF INTEREST AND LIST OF *AMICI CURIAE*

NANCY CHI CANTALUPO

The first co-lead signatory of this amicus brief is Professor Nancy Chi Cantalupo. Professor Cantalupo is a leading scholar on Title IX, the Clery Act, and sexual harassment/gender-based violence in education. An Associate Professor of Law at Barry University Dwayne O. Andreas School of Law, she has written 20 articles and book chapters on these subjects, including in the YALE LAW JOURNAL FORUM, HARVARD JOURNAL OF LAW AND GENDER, WAKE FOREST LAW REVIEW, MARYLAND LAW REVIEW and the peer-reviewed social science journal TRAUMA, VIOLENCE & ABUSE and co-authored studies in the CALIFORNIA LAW REVIEW ONLINE, U.C. DAVIS LAW REVIEW, and UTAH LAW REVIEW.

Professor Cantalupo's writing draws from her 25 years as a researcher, campus administrator, student activist, victims' advocate, attorney, and policymaker combatting sexual harassment and gender-based violence. As a part of her extensive *pro bono* work on these topics, she has served as the lead drafter or sole author of numerous practice-related writings, including: the American Bar Association Commission on Domestic & Sexual Violence's recently published *Recommendations for Improving Campus Student Conduct Processes for Gender-Based Violence*; nearly a dozen comments with various federal lawmakers; a white paper on "Title IX & the Preponderance of the Evidence," signed by over 100 law professors from across the country; and op-eds she was invited to write for the NEW YORK TIMES, TIME, USA TODAY, and WASHINGTON POST. In addition, she has consulted with President Obama's White House Task Force to Protect Students from Sexual Assault, spoken on a U.S. Senate roundtable, testified before the Maryland and Virginia state legislatures, and served as a Negotiator on the Negotiated Rulemaking Committee that amended regulations for the Clery Act.

DAVID A. SUPER

The second co-lead signatory of this amicus brief is David A. Super, Professor of Law at Georgetown University. Professor Super teaches courses in administrative law, statutory interpretation, and civil rights. He has written extensively on

procedural due process in his casebook and in several scholarly articles published in leading law journals. He also has written on Title IX in the popular media, including *The Hill*.

Other signatories to this amicus brief are Professors Nadia Ahmad, Kelly Behre, Jennifer A. Brobst, Erin Buzuvis, David S. Cohen, Margaret Drew, Marie A. Failinger, Miranda B. Johnson, Judith E. Koons, Mary A. Lynch, Lisa Mazzie, Cathren Page, Stacey Ellen Platt, Nicole Buonocore Porter, JoAnne Sweeny, Merle H. Weiner, and Dwayne Kwaysee Wright.

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COMBINED CERTIFICATIONS OF COUNSEL

The undersigned counsel hereby certifies as follows:

1. The undersigned counsel is a member of the bar of the United States Court of Appeals for the Third Circuit. L.A.R. 28.3(d).

2. This Brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) & 32(a)(7)(B) because this Brief contains 6451 words, as counted by Microsoft Office Professional Plus 2013, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

3. This Brief complies with the typeface requirement of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally space typeface using Microsoft Office Professional Plus 2013 in 14-point Times New Roman font.

4. A copy of this Brief was served on all counsel of record through the Court's Electronic Case Filing System.

5. The text of the electronic version of the Brief transmitted to the Court on this date is identical to the text of the paper copies to be delivered to the Clerk. L.A.R. 31.1(c).

6. A virus check was performed on the PDF version of this Brief using Norton Internet Security 2018 with daily updates prior to transmitting it to the Clerk electronically and no virus was found.

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