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I. INTRODUCTION

One of the crowning achievements of a young adult's life is graduating college. As enrollment in higher educational institutions has become more accessible, the number of enrolled students has increased. In 2020, 40% of young adults were enrolled in college,[1] which amounted to approximately 17,500,000 college students in the United States.[2] Accompanied by these massive student populations, universities are put under pressure to ensure the health and safety of those enrolled young adults. One of the major issues placing pressure on universities is sexual assault.[3]

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1. *College Enrollment Rates*, NAT'L CTR. FOR EDUC. STATS., https://nces.ed.gov/programs/coe/indicator/cpb/college-enrollment-rate [https://perma.cc/2YUX-U8YC] (last visited Nov. 17, 2022).

2. *Fast Facts Enrollment*, NAT'L CTR. FOR EDUC. STATS., https://nces.ed.gov/fastfacts/display.asp?id=98 [https://perma.cc/69A8-HKZU] (last visited Nov. 17, 2022).

3. David Canto et al., *Report on AAU Campus Climate Survey on Sexual Assault and Misconduct*, ASS'N OF AM. UNIVS. (Jan. 17, 2020), https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/Revised%20Aggregate%20report%20%20and%20appendices%201-7_(01-16-2020_FINAL).pdf [https://perma.cc/FQ5Q-46SN]. According to the Association of American Universities, 13% of college students report nonconsensual sexual contact at colleges and universities. *Id.*

Americans, specifically Millennials and Generation Z, seem to be more aware of prevalent social problems. This enhanced social awareness has led universities to crack down on campus sexual assault. Title IX of the Education Amendments of 1972[4] provide universities with the authority and procedural framework to punish those found guilty of campus sexual assault, while also providing them with an unbiased opportunity to be heard.[5] Universities, like their student populations, are prohibited from discriminating based on sex.

The United States Court of Appeals for the Eleventh Circuit, in deciding *Doe v. Samford University*,[6] addressed the question: what is the proper test to apply when a student, accused of sexual assault, claims the university's disciplinary panel used bias based on the student's sex to come to a decision?[7] Moving away from prior applied tests, the court, taking the framework from a plurality of the courts that have decided the question, affirmed the lower court's judgment, and adopted a novel test to determine whether a university's disciplinary action was in violation of Title IX.[8]

II. FACTUAL BACKGROUND

On the evening of Halloween 2020, John Doe, a senior at Samford University, attended a party at an off-campus apartment.[9] Doe brought with him two pitchers of alcohol he concocted. "The drink was, at most, seven percent . . . alcohol."[10]

Jane Roe, another student, arrived at the party sometime later.[11] After consuming some of the alcoholic beverage brought by Doe, Roe began conversing with him. Doe suggested the two go to a friend's nearby apartment where it was quieter. Roe consented and the two departed. Roe did not appear intoxicated, and no one attempted to stop her from leaving with Doe.[12]

At the friend's apartment, Roe asked if Doe wanted to "hook up," which Doe agreed to.[13] Roe expressed her consent multiple times before and during the sexual intercourse. Basing his assumption on Roe's words and

4. 20 U.S.C. § 1681.
5. *Id.*
6. 29 F.4th 675 (11th Cir. 2022).
7. *Id.* at 680–81.
8. *Id.* at 685.
9. *Id.* at 681.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*

actions, Doe believed Roe "understood the who, what, when, where, why, and/or how of the sexual interaction."[14] After the sexual intercourse, Roe, of her own power and volition, dressed herself, left the friend's apartment, descended the staircase, and returned to the party.[15]

When she returned to the party, Roe told one witness that she had been sexually assaulted by Doe.[16] Roe's sister arrived at the party and took Roe back to her apartment. Around this time, Doe also returned to the party. One party-goer asked Doe what he had put in Roe's drink.[17] Doe responded he had put "everything in her drink," but later stated he had meant he made the drink.[18]

After Roe returned to her apartment with her sister, she stated Doe had "raped her, gave her hickeys, and bit her lip and breasts."[19] Photos were taken of Roe's injuries. The following day, Roe filed a police report against Doe. Additionally, Roe filed a Title IX complaint with Samford University, alleging Doe had "raped her on the night of October 31, 2020, when she was incapacitated."[20]

Samford University's Title IX policy provides that the Title IX coordinator must provide written notice of allegations of sexual misconduct violations and schedule an initial meeting with the respondent.[21] According to Doe, Tim Hebson, Samford's Title IX coordinator, "did not provide [Doe] with written notice of the allegations made against him," nor did Hebson conduct an initial meeting with Doe to notify him of the allegations made by Roe.[22]

Instead, Hebson assigned the Title IX investigation to Mallory Kruntorad.[23] This investigation was Kruntorad's first Title IX investigation. Additionally, Kruntorad had "received little to no training about conducting unbiased and impartial Title IX investigations."[24] The investigation started in mid-November, when Kruntorad met with Doe to take his statement. Kruntorad never advised Doe of the specifics surrounding the allegations beyond the claim that he raped Roe.[25]

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14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.* at 681–82.
21. *Id.* at 682.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*

Roe was interviewed several days later.[26] She told Kruntorad she was drugged at the party and could not have given consent to Doe. Roe continued, stating she began to feel "fuzzy" after being given a drink from Doe.[27] During this meeting, Kruntorad stated, "I still think, regardless, you couldn't give consent."[28] Roe was not questioned about possible drinks consumed before the party or if the hickeys had been obtained from any previous sexual interactions. No follow-up interviews occurred.[29]

After the eleven-day investigation, Kruntorad provided both parties with a preliminary investigation report.[30] Doe alleged the report contained multiple witness interviews with "highly prejudicial hearsay."[31] One witness expressed doubt that Roe was drugged, recounting that Roe's sister had stated Roe may have received the hickeys from a previous evening, and Roe had told a third party that she consented to the sex with Doe. Conversely, several witnesses attested to Roe's incapacitation. Kruntorad found Roe more credible than Doe based off the witness interviews.[32]

Per the Title IX policy, Doe and Roe responded to the report.[33] Roe restated her allegations, claiming "she never got physically sick from excess alcohol."[34] Doe submitted evidence of underlying medical conditions to explain his rigid communication style. A revised report found Doe less credible than Roe based on statements Doe made about immaterial facts.[35]

Separately, Doe made objections to Hebson concerning the investigation.[36] Doe questioned the impartiality of the investigation, requested the names of all witnesses, photographs of Roe's alleged injuries, and Roe's medical records. He also asked Hebson to remove statements from witnesses who would not be testifying from the report. Hebson produced nothing Doe requested. Additionally, Hebson stated that decisions about admissible statements would be made at the hearing.[37]

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26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.* at 682–83.
33. *Id.* at 683.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*

A live hearing took place in early 2021.[38] Roe and Roe's sister testified. For the first time, Roe admitted to drinking before the party and that her incapacitation was due to excessive drinking, rather than being drugged by Doe. Roe's sister's testimony included a statement that Roe had passed out and "had no pulse" at the party.[39] The hearing panel refused to hear Doe's evidence about his autism. Ultimately, the hearing panel found Doe responsible for engaging in the prohibited behavior and suspended him for five years.[40]

Doe appealed the decision, arguing "a biased, impartial, . . . and prejudicial investigation process," and "several procedural irregularities."[41] The appeal panel dismissed Doe's appeal. The panel conceded there were procedural irregularities. The irregularities were attributed to inexperience and adjustment to new policy.[42]

Doe sued the university.[43] The complaint alleged that Samford University had violated Title IX because "gender bias was . . . a motivating factor in [the university's] erroneous findings against [Doe]" and because Doe was treated less favorably than a female would have been treated.[44] In support of his theory, Doe alleged that the Clery reports, which document criminal activity on university campuses, showed that there had been seven reported rapes at Samford.[45] Additionally, upon "information and belief," Doe alleged the accused students were all males.[46]

The university moved to dismiss for failure to state a claim.[47] Samford argued the relevant question was "whether the plaintiff has pleaded a plausible set of facts demonstrating that plaintiff's sex was the reason for the university's decision."[48] The district court agreed, granting Samford's motion.[49] Using the erroneous outcome and selective enforcement tests,

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 684.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*; *see* 20 U.S.C. § 1092(a)(1)(F). The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act requires eligible institutions to publish and distribute annual security reports containing campus crime statistics. *Id.*

46. *Doe*, 29 F.4th at 684.

47. *Id.*

48. *Id.*

49. *Id.* at 685.

the court concluded Doe had not supported a reasonable inference that anti-male bias had caused the decision. Doe timely appealed.[50]

On appeal, the Eleventh Circuit affirmed the lower court's decision to grant Samford's motion to dismiss.[51] In doing so, the Eleventh Circuit created a novel framework to be used when determining alleged Title IX violations by university disciplinary action.[52]

III. LEGAL BACKGROUND

A. Plausibility of Alleged Facts

To establish a claim for relief, a complaint must make a "short and plain statement . . . showing the pleader is entitled to relief."[53] The short and plain statement must assert factual allegations that provide the grounds of entitlement to relief.[54] Factual allegations must go beyond merely restating elements of a cause of action, and instead must express a right to relief going above pure speculation.[55] Even if recovery is unlikely, a well-pleaded complaint showing recovery is at least plausible may proceed.[56] Moreover, the lack of a well-pleaded complaint creates the risk of a motion to dismiss for failure to state a claim.[57]

Two of the most-cited cases from the Supreme Court of the United States, *Bell Atlantic Corp. v. Twombly*[58] and *Ashcroft v. Iqbal*,[59] established the standard that factual allegations must meet to constitute a well-pleaded complaint.[60] *Twombly* held that factual allegations must "state a claim to relief that is plausible on its face."[61] The Court heightened the pleading standard to require plaintiffs to cross the line from conceivable to plausible.[62] Additionally, while courts generally must accept a plaintiff's allegations as true, mere conclusory statements do not

50. *Id.*

51. *Id.* at 693.

52. *Id.* at 687.

53. FED. R. CIV. P. 8(a)(2).

54. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007); *see* Papasan v. Allain, 478 U.S. 265, 286 (1986) (holding courts are not required to accept legal conclusions given as factual allegations).

55. *Twombly*, 550 U.S. at 555.

56. Scheuer v. Rhodes, 416 U.S. 236 (1974).

57. *See* FED. R. CIV. P. 12(b)(6).

58. 550 U.S. at 555.

59. 556 U.S. 662 (2009).

60. *See Twombly*, 550 U.S. at 544; *Iqbal*, 556 U.S. at 662.

61. *Twombly*, 550 U.S. at 570.

62. *Id.*

carry this presumption.[63] In doing so, the Court analyzed Federal Rule of Civil Procedure 8(a)(2), determining that the need for plausible allegations reflected the language used in Rule 8(a)(2).[64] While specific facts are not required, a "plain statement . . . showing that the pleader is entitled to relief" only gives the defendant notice of the grounds which support the claim and ensures a reasonable expectation that discovery will bring evidence of illegality.[65] Further, parties and courts should avoid expenditure of time and money for implausible complaints.[66]

In *Ashcroft v. Iqbal*, the Supreme Court applied its ruling in *Twombly* to a discrimination suit, holding the respondent's complaint failed to plead sufficient facts to state a claim for discrimination.[67] In considering a motion to dismiss, the Supreme Court kept with the principles set in *Twombly*[68] and held courts could begin by identifying conclusory pleadings not entitled to an assumption of the truth.[69] The Supreme Court began its analysis by identifying such conclusory allegations that were not entitled to an assumption of the truth and discarding them. As to the factual allegations, the Supreme Court found them to be unpersuasive as well. Even if the facts gave rise to possible plausibility, the facts were held to be unsupported, as the complaint lacked facts that plausibly supported that the policy was based upon discriminatory factors.[70]

B. History of Title IX

Commonly referred to as Title IX, 20 U.S.C. § 1681 prohibits discrimination on the basis of sex in educational settings.[71] The section provides: "No 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 educational program or activity receiving Federal financial assistance."[72] As an attempt to address the growing issue of sexual harassment occurring in public high schools and

63. *Id.* at 555.

64. *Twombly*, 550 U.S. at 557; *see* FED. R. CIV. P. 8(a)(2).

65. *Twombly*, 550 U.S. at 555.

66. *Id.* at 558.

67. *Iqbal*, 556 U.S. at 687.

68. *Id.* at 678–84; *see Twombly*, 550 U.S. at 555–56 (reasoning two principles underlined the Court's decision: (1) courts are not required to accept as truth legal conclusions and (2) only complaints that bring plausible claims for relief will survive a motion to dismiss).

69. *Iqbal*, 556 U.S. at 679.

70. *Id.* at 682–83.

71. 20 U.S.C. § 1681.

72. 20 U.S.C. § 1681(a).

institutions of higher learning, the United States Department of Education's Office for Civil Rights looked to employ Title IX to deter sexual misconduct. Likewise, Title IX provides guidance for any procedure that educational institutions implement.[73]

Many universities create their own Title IX policy and procedures, generally making minor deviations from the Office for Civil Rights' guidelines or instruction.[74] As Title IX has developed, the Office of Civil Rights has further interpreted sections to fit its preferred usage. One significant instructional document issued by the Office of Civil Rights came in 2011, in the form of the "Dear Colleague Letter."[75] The letter, sent to all federally funded institutions, called the statistics on student-on-student sexual violence "deeply troubling and a call to action for the nation," and set required procedural instructions dealing with Title IX claims.[76] In addition, the letter mandated universities to "minimize the burden on the complainant," and focus on victim advocacy.[77] Following the Dear Colleague Letter, most higher educational institutions revised their Title IX policy.[78] Critics of the letter argued that educational disciplinary hearings, due to public and state sponsored pressure, resulted in unfair treatment, overly long punishments, and a heightened rate of wrongful convictions.[79]

Moreover, these criticisms spawned a wave of litigation brought by accused students punished as a result of Title IX investigations.[80] Following the increased number of Title IX suits, the Department of Education rescinded the Dear Colleague Letter in 2017.[81] In doing so, the Department of Education stated that the letter, while well-intentioned,

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73. Amy R. LaMendola, Annotation, *School's or School Official's Liability for Unfair Disciplinary Action Against Student Accused of Sexual Harassment or Assault*, 34 A.L.R. 7th Art. 1.

74. *See e.g., Mercer University–Sexual Misconduct Policy*, MERCER UNIV., https://titleix.mercer.edu/www/mu-titleix/upload/Final-Policy-12-17-2021.pdf (last visited Nov. 17, 2022).

75. LaMendola, *supra* note 73.

76. Office for Civil Rights, *Dear Colleague Letter*, U.S. DEP'T OF EDUC. (Apr. 4, 2011), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf [https://perma.cc/GG56-ZR95].

77. *Id.*

78. LaMendola, *supra* note 73.

79. *Id.*

80. *See* Doe v. Coll. of Wooster, 243 F. Supp. 3d 875 (N.D. Ohio 2017) (stating this case was one of a multitude of cases filed in the wake of the Dear Colleague Letter).

81. *See* Office for Civil Rights, *Dear Colleague Letter*, U.S. DEP'T OF EDUC. (Sept. 22, 2017), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf [https://perma.cc/GAH3-S6BM].

"led to the deprivation of rights for many students."[82] While the Department of Education moved to follow proper legal procedures,[83] accused students continued to cite the Dear Colleague Letter in Title IX suits.[84]

C. Evaluating the Legitimacy of Alleged Title IX Violations

Currently, the United States Circuit Courts of Appeals are split regarding which test will be used when evaluating a university's alleged Title IX violation.[85] As the Supreme Court has yet to adopt a test, the Circuits have adopted their own.[86] In *Yusuf v. Vassar College*,[87] the United States Court of Appeals for the Second Circuit heard a case concerning an accused male student who claimed his university, Vassar College, had discriminated against him on the basis of his sex in violation of Title IX.[88] The court noted that plaintiffs claiming unfavorable treatment on grounds of sex bias can be expected to fall into two categories.[89] First, the plaintiff claims they were innocent and wrongfully found to have committed the offense. That is the so-called "erroneous outcome test." Second, the plaintiff claims selective enforcement, meaning "regardless of the student's guilt or innocence, the severity of the penalty and/or the decision to initiate the proceeding was affected by the student's [sex]."[90] This is the "selective enforcement test."

The court began by analyzing the erroneous outcome test.[91] The court said plaintiffs who claim an erroneous outcome must allege sufficient facts to cast doubt on the accuracy of the disciplinary hearing's outcome.[92] Likewise, allegations may prevail if the plaintiff alleges procedural flaws affecting the outcome of their original hearing.[93] If no such doubt exists, the claim must fail.[94] Along with doubt of the hearing's accuracy, the court emphasized the need for a causal connection between the flawed

82. *Id.*

83. LaMendola, *supra* note 73.

84. *See Doe*, 29 F.4th at 691–92 (noting plaintiff's argument that the Dear Colleague Letter continued to influence universities years after the letter's recission).

85. *Id.* at 686–87.

86. *See* Yusuf v. Vassar Coll., 35 F.3d 709 (1994); Doe v. Purdue Univ., 928 F.3d 652 (7th Cir. 2019).

87. 35 F.3d 709 (1994).

88. *Id.* at 713.

89. *Id.* at 715.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

outcome and sex bias.[95] Allegations of circumstances of sex bias must have been a motivating factor in coming to the erroneous outcome.[96] The court held that the plaintiff had alleged enough facts to sufficiently claim the outcome was erroneous.[97]

Next, the court briefly analyzed the selective enforcement test.[98] The court held that the university had consistently given accused male students similar punishments when being found in violation of Title IX.[99] The hearing panel showed no inconsistency of procedure or severity of penalty.[100]

The United States Court of Appeals for the Eleventh Circuit has used *Yusuf*'s erroneous outcome test as recently as 2018. Following stalking allegations made against a student, the court in *Doe v. Valencia College*[101] applied the erroneous outcome test to an alleged Title IX violation committed by the university's disciplinary board.[102] In *Valencia College*, the court assumed "that a student [could] show a violation of Title IX by satisfying the 'erroneous outcome' test applied by the Second Circuit in *Yusuf*."[103] While the court held that the university's conduct did not violate the *Yusuf* test, *Valencia College* presents the Eleventh Circuit's indecisiveness regarding how to analyze a disciplinary hearing's alleged violations of Title IX.[104]

Opposing the *Yusuf* test, the United States Court of Appeals for the Seventh Circuit created and adopted a novel test in 2019. In *Doe v. Purdue University*,[105] the court decided a case in which a male student, Doe, was accused of sexual assaulting a female student, Roe.[106] The students dated for multiple months during the 2015 fall semester. After Roe's attempted suicide, the two stopped having sexual intercourse but continued to date until the spring of 2016. The relationship ended a few months later.[107]

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95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.* at 716.
99. *Id.*
100. *Id.*
101. 903 F.3d 1220 (11th Cir. 2018).
102. *Id.*
103. *Id.* at 1236.
104. *Id.* (holding the plaintiff showed no genuine issue about the correctness of the university's chosen outcome).
105. 928 F.3d 652 (2019).
106. *Id.* at 656–57.
107. *Id.* at 656.

Doe was accused of sexual assault and a Title IX investigation was initiated.[108] Roe neither appeared before the hearing panel nor submitted a written statement, while Doe presented text message evidence and was prepared to present multiple witnesses. The panel did not allow any witness to be presented. Doe was found guilty of sexual assault. On appeal, Purdue's Dean of Students claimed to have found Doe not a credible witness and Roe a credible witness, even though the dean had never spoken with Roe.[109]

Doe sued Purdue and the dean for violation of Title IX.[110] In analyzing Doe's allegation, the court had to determine what framework to use. The court began by considering the *Yusuf* test. Noting the *Yusuf* tests merely described ways a plaintiff could show sex as being a motivating factor in a university's disciplinary decision, the court adopted its own novel analysis. Mirroring the statutory prohibition, the *Purdue* court asked the question more directly: "do the alleged facts, if true, raise a plausible inference that the university discriminated against [Doe] 'on the basis of sex.'"[111] After considering Doe's allegations, the court held it was plausible that Purdue had discriminated against Doe on the basis of sex.[112] Since *Purdue*, a plurality of jurisdictions have adopted some form of this framework for analyzing disciplinary hearings for alleged Title IX violations.[113]

IV. COURT'S RATIONALE

The question in *Doe v. Samford University* is whether the alleged facts, if true, permit a reasonable inference that Samford discriminated against Doe based on his sex.[114] To answer this question, the United States Court of Appeals for the Eleventh Circuit adopted, with one slight modification, the Seventh Circuit's novel framework for establishing a violation of Title IX by university disciplinary bodies. The court then applied each alleged fact to the new test.[115]

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108. *Id.* at 657.

109. *Id.* at 658–59.

110. *Id.* at 658.

111. *Id.* at 667–68.

112. *Id.* at 669 (emphasizing the importance of an April Facebook post by the university event titled "Alcohol isn't the cause of campus assault. Men are.").

113. *Doe*, 29 F.4th at 687. *See* Doe v. Univ. of Scis., 961 F.3d 203 (3d Cir. 2020); Sheppard v. Visitors of Va. State Univ., 993 F.3d 230 (4th Cir. 2021); Doe. v. Univ. of Denver, 1 F.4th 822 (10th Cir. 2021).

114. *Doe*, 29 F.4th at 687.

115. *Id.* at 687–93.

A. Court's Discussion on Failure to State a Claim

The court's opinion, authored by Judge William Pryor, is a straightforward rule application, as the relevant legal authority is cited to determine the proper framework and apply the framework to the facts.[116] The discussion begins with the court revisiting long-standing case law governing failure to state a claim.[117] Citing *Ashcroft v. Iqbal* and *Bell Atlantic Corp. v. Twombly*, the court stated a presumption of truth applies when viewing factual allegations but may disregard conclusions masquerading as factual allegations.[118]

Further, a claim is said to have facial plausibility when the plaintiff brings forth factual content that permits the court "to draw the reasonable inference that the defendant is liable for the misconduct alleged."[119] Factual allegations that are simply consistent with the defendant's alleged liability fail to meet the plausibility bar. Consequently, the court stated that, when determining whether allegations are possible or plausible, courts may infer "obvious alternative explanations" suggesting lawful conduct rather than unlawful conduct preferred by the plaintiff.[120]

B. The Court's Adoption of Proper Framework

Before applying the principles stated above, the court addressed "a threshold question: the appropriate framework for establishing a violation of Title IX."[121] First, the court looked to Title IX.[122] Under Title IX, "[no] person . . . 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."[123] The court noted that a framework for analyzing alleged Title IX violations by university disciplinary

116. *Id.* at 680.

117. *Id.* at 685.

118. *Id.* at 685–86. *See* Ashcroft v. Iqbal, 556 U.S. 622, 678 (2009) (holding a complaint "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face" to survive a motion to dismiss).

119. *Id.* at 685 (quoting *Iqbal*, 556 U.S. at 678).

120. *Id.* at 685–86. *See Twombly*, 550 U.S. at 554 (holding allegations not plausible because facts alleged were "consistent with [liability], but just as much in line with a wide swath of" lawful conduct).

121. *Doe*, 29 F.4th at 686.

122. *Id.*

123. 20 U.S.C. § 1681(a).

proceedings had not been established by the Supreme Court or the Eleventh Circuit.[124]

Next, the court considered three tests—two advanced by Doe and one advanced by the university—for establishing liability for university disciplinary proceedings.[125] Relying on *Yusuf v. Vassar College*, Doe argued for the "erroneous outcome" and the "selective enforcement" tests.[126] By contrast, the university proffered the test first developed by the Seventh Circuit in the *Purdue* case.[127] Noting a plurality of other circuits had adopted this test, the court determined the Seventh Circuit test conformed more closely to the text of Title IX and binding case law. The court further held the test mirrored Title IX's prohibition of unpropitious action based on the party's sex.[128]

Having held the Seventh Circuit test adhered more closely to Title IX's language than the *Yusuf* tests, the majority reasoned the *Yusuf* tests "[did] not capture the full range of conduct that could lead to liability under Title IX."[129] Rather, the *Yusuf* tests merely described two ways in which a plaintiff might show that "sex was a motivating factor in a university's decision."[130]

Finally, the majority chose a modified version of the Seventh Circuit test as the proper framework.[131] The majority emphasized that the Seventh Circuit test asked whether the facts "raise[d] a plausible inference" of a Title IX violation.[132] Conceding that the ultimate inquiry of a complaint is facial plausibility, the majority emphasized that facts alleged must allow courts to draw a "reasonable inference" that a defendant is liable.[133] Thus, the majority determined the question would

124. *Doe*, 29 F.4th at 684.

125. *Id.* at 686.

126. *Id. See* Doe v. Valencia Coll., 903 F.3d 1220, 1236 (2018). Under the erroneous outcome test, "a student must show both that he was 'innocent and wrongfully found to have committed an offense'" and a causal connection existed between the erroneous outcome and sex bias. *Id.* at 1236. Under the selective enforcement test, students must prove the severity of punishment and decision were based on the student's sex, regardless of guilt or innocence. *Id.*

127. *Id.* at 686; Doe v. Purdue, 928 F.3d 652, 667–68 (7th Cir. 2019) (holding the test is, "do the alleged facts, if true, raise a plausible inference that the university discriminated against [the plaintiff] 'on the basis of sex'?").

128. *Doe*, 29 F.4th at 686.

129. *Id.* at 687.

130. *Id.* (quoting *Purdue*, 928 F.3d at 667).

131. *Doe*, 29 F.4th at 687.

132. *Id.* at 687 (quoting *Purdue*, 928 F.3d at 667–68).

133. *Id.* (citing *Iqbal*, 556 U.S. at 678).

be, "whether the alleged facts, if true, permit a reasonable inference that the university discriminated against Doe on the basis of sex."[134]

C. Court Application of Modified Seventh Circuit Test

The majority applied the newly adopted test to the allegations made by Doe: (1) the existence of "gross procedural deviations" allow a reasonable inference of sexual discrimination; (2) alleged public pressure and public statements may reasonably infer sexual discrimination; and (3) Clery statistics show an alleged anti-male bias.[135]

1. Court's Discussion of Alleged Procedural Irregularities

The majority concluded Doe's allegations of sex bias based on "gross procedural deviations" failed for two reasons.[136] First, the majority found some of the alleged deviations to be either conclusory or incomplete. Second, the majority found the remaining allegations did not permit a reasonable inference of sex discrimination.[137]

While Doe could show multiple irregularities regarding the investigation and hearing, the court held that the bar—a reasonable inference of discrimination based on sex—was not met.[138] Doe's first allegation, that the investigative report contained prejudicial hearsay, was mere "labels" that were unsupported by the facts.[139] Further, the court explained that the allegations were "not entitled to the assumption of truth" because of their unsupported nature.[140]

Doe's remaining allegations of procedural irregularities did not lead the court to conclude that bias based on sex was present, as more obvious explanations could explain the deviation.[141] The court emphasized that "a deviation from a Title IX policy is not, in and of itself, a violation of Title IX."[142] In its analysis of Doe's allegations, the court held ineptitude, inexperience, and pro-complainant bias were obvious alternative explanations that the university acted lawfully rather than unlawfully. Chief Judge Pryor wrote that the university's failure to redact certain

134. *Id.*
135. *Id.* at 687–92.
136. *Id.* at 687.
137. *Id.*
138. *Id.* at 688.
139. *Id.* at 687–88.
140. *Id.* at 92; *see Iqbal*, 556 U.S. at 678–79.
141. *Doe*, 29 F.4th at 688.
142. *Id.*; *see* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 292 (1998).

information, as required by the Title IX policy, was "'more likely explained by . . . lawful' mistake than unlawful bias."[143]

Similarly, the court reasoned that deficiencies in the investigation were due to the inexperience of Kruntorad.[144] The court explained, that due to Kruntorad's lack of training and experience, the deficiencies could be blamed on ineptitude, "a sex-neutral explanation that does not violate Title IX."[145] Moreover, if any bias existed, it was thought to be a pro-complainant, anti-respondent bias. Employing the modified Seventh Circuit test, the court held that discrimination against respondents, without knowing the respondents' sex, did not create a reasonable inference of sex bias.[146]

Finally, the court compared Samford's hearing panel to district courts.[147] By doing so, the court explained that one of Doe's allegations—that the hearing panel made no mention of Roe's inconsistencies—was like allowances given to factfinders in district courts to "make unstated but implicit credibility determinations."[148] As such, the court concluded a hearing panel cannot be held to a higher standard than a district court.[149]

2. Court's Discussion of Alleged Public Pressure and Public Statements

Next, the court looked to Doe's second allegation: that the university "yielded to 'public pressures to . . . appear tough on sexual assault' by discriminating on the basis of sex."[150] The court reviewed the aforementioned Dear Colleague Letter, which was issued by the United States Department of Education in 2011. Again, Doe's argument failed, as the court noted the letter was formally rescinded and replaced in 2017.[151]

143. *Doe*, 29 F.4th at 689.

144. *Id.*

145. *Id.*

146. *Id.* at 690.

147. *Id.* at 691.

148. *Id.*

149. *Id.*; *see* Bd. of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78, 88 (1978) ("A school is an academic institution, not a courtroom or administrative hearing room.").

150. *Doe*, 29 F.4th at 691.

151. *Id.* at 691–92.

3. Court's Discussion of Clery Statistics

Lastly, Doe cited the university's Clery reports.[152] The Clery reports documented that the university had dealt with seven reported rapes and nine reported fondling incidents. Doe alleged, "[u]pon information and belief," that all accused students were male.[153] Examining the reports, the court held Doe's allegations of sex discrimination were mere conclusionary allegations, as the reports did not state the sex of the person reporting or being accused.[154]

V. IMPLICATIONS

The Eleventh Circuit's adoption of a novel Title IX analysis—created partially from a federal circuit split—ultimately brings the Eleventh Circuit's analysis of a disciplinary hearing's alleged Title IX violation in line with the plurality of other appellate courts that have faced the issue. Previous such cases consistently applied one or more of the *Yusuf* tests, even if the Eleventh Circuit never fully adopted the test.[155] Formally adopting the modified Seventh Circuit framework sets the stage for which all future alleged Title IX disciplinary violations will be considered.

Title IX cases will no longer be restricted by *Yusuf*'s erroneous outcome or selective enforcement framework. The newly adopted test encompasses all ways in which a university could employ sex bias in a Title IX hearing. If an accused student can show sex discrimination was plausible, there will be no requirement of additionally showing the outcome or punishment was caused by sex discrimination.

As noted in the Eleventh Circuit's opinion in *Samford*, university disciplinary boards are not held to the same standard as district courts.[156] In many cases, however, these boards have comparable authority. A disciplinary board's finding that a student committed sexual assault can damage the future of that student as harshly as a civil suit. Private university students are particularly vulnerable and without recourse in similar situations, due to the inaccessibility of due process claims.[157]

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152. *Id.* at 692.

153. *Id.*

154. *Id.*

155. *Doe* 903 F.3d at 1236.

156. *Samford Univ*, 29 F.4th at 691.

157. Rendell-Baker v. Kohn, 457 U.S. 830 (1982) (holding the Fourteenth Amendment applies to acts of the states, not acts of private entities).