Nos. 18-1870/18-1903

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN DOE,

Plaintiff/Appellee/Cross-Appellant,

v.

UNIVERSITY OF MICHIGAN, BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN, PAMELA HEATLIE, ROBERT SELLERS, MARTIN PHILBERT, ERIK WESSEL, LAURA BLAKE JONES, E. ROYSTER HARPER, SUZANNE MCFADDEN, and PAUL ROBINSON,

Defendants/Appellants/Cross-Appellees.

On Appeal from the United States District Court
for the Eastern District of Michigan
(Dist. Ct. Case No. 18-cv-11776)

FIRST BRIEF OF DEFENDANTS/APPELLANTS/CROSS-APPELLEES UNIVERSITY OF MICHIGAN, *ET AL.*

ORAL ARGUMENT REQUESTED

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Counsel for Defendants/Appellants/Cross-Appellees
University of Michigan, et al.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 18-1870/18-1903 Case Name: John Doe v. University of Michigan, et a

Name of counsel: Joshua W. B. Richards

Pursuant to 6th Cir. R. 26.1, UNIVERSITY OF MICHIGAN
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on November 7, 2018 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Joshua W. B. Richards

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

6th Cir. R. 26.1
DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

(a) **Parties Required to Make Disclosure**. With the exception of the United States government or agencies thereof or a state government or agencies or political subdivisions thereof, all parties and amici curiae to a civil or bankruptcy case, agency review proceeding, or original proceedings, and all corporate defendants in a criminal case shall file a corporate affiliate/financial interest disclosure statement. A negative report is required except in the case of individual criminal defendants.

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UNITED STATES COURT OF APPEALS
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Case Number: 18-1870/18-1903 Case Name: John Doe v. University of Michigan, et a

Name of counsel: Joshua W. B. Richards

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Name of counsel: Joshua W. B. Richards

Pursuant to 6th Cir. R. 26.1, PAMELA HEATLIE
Name of Party
makes the following disclosure:

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Name of counsel: Joshua W. B. Richards

Pursuant to 6th Cir. R. 26.1, ROBERT SELLERS
Name of Party
makes the following disclosure:

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Sixth Circuit
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Name of counsel: Joshua W. B. Richards

Pursuant to 6th Cir. R. 26.1, MARTIN PHILBERT
Name of Party
makes the following disclosure:

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Sixth Circuit
Case Number: 18-1870/18-1903 Case Name: John Doe v. University of Michigan, et a

Name of counsel: Joshua W. B. Richards

Pursuant to 6th Cir. R. 26.1, ERIK WESSEL
Name of Party
makes the following disclosure:

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UNITED STATES COURT OF APPEALS
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Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 18-1870/18-1903 Case Name: John Doe v. University of Michigan, et a

Name of counsel: Joshua W. B. Richards

Pursuant to 6th Cir. R. 26.1, LAURA BLAKE JONES
Name of Party
makes the following disclosure:

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No.

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Case Number: 18-1870/18-1903 Case Name: John Doe v. University of Michigan, et a

Name of counsel: Joshua W. B. Richards

Pursuant to 6th Cir. R. 26.1, E. ROYSTER HARPER
Name of Party
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Name of counsel: Joshua W. B. Richards

Pursuant to 6th Cir. R. 26.1, SUZANNE MCFADDEN
Name of Party
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Name of counsel: Joshua W. B. Richards

Pursuant to 6th Cir. R. 26.1, PAUL ROBINSON
Name of Party
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FEDERAL STATUTES

FEDERAL REGULATIONS

FEDERAL RULES

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Defendants/Appellants/Cross-Appellees the University of Michigan, *et al.* (the "University") request oral argument to address any questions the Court may have after reviewing the briefs and the record and to respond to any arguments raised by Plaintiff/Appellee/Cross-Appellant in his reply brief or in oral argument. The University believes oral argument would assist the Court in rendering its decision on the issues raised in this matter. The Court's rulings on the issues presented in this appeal will have a substantial effect on non-party public colleges and universities within the Sixth Circuit.

INTRODUCTION

This case arises from allegations of sexual assault against Plaintiff/Appellee/Cross-Appellant John Doe by a fellow university student. The University commenced an investigation into those allegations. Before the investigation was complete, Mr. Doe prematurely filed suit in district court. Although he had suffered no cognizable harm, Mr. Doe nevertheless contended that he was entitled to various remedies, including a mandatory injunction requiring a live hearing in which he was guaranteed an opportunity to cross-examine adverse parties and witnesses directly, without questions being posed through a hearing officer or otherwise.

Although University policy in place at the time this lawsuit was filed would not have afforded Mr. Doe a live hearing with direct cross-examination in a sexual misconduct case, in *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018), *rehearing en banc denied* (Oct. 11, 2018), decided after the district court entered its order here, this Court appeared to hold that formal, direct cross-examination is required by the Due Process Clause in college sexual misconduct adjudications.

Following *Baum*, the University has promised to, and will, provide a live hearing with direct cross-examination to students accused of sexual misconduct,[1] including Mr. Doe. The University is in the midst of crafting student conduct procedures for reports of sexual misconduct that are consistent with this Court's decision in *Baum*, but those procedures are not yet complete.[2]

Because the University has committed to provide all of the procedures upon which his due process claims are based, and the procedures used to investigate the allegations against Mr. Doe thus far have been abandoned, Mr. Doe's cross-appeal is either moot (to the extent Mr. Doe challenges policies no longer in use or at risk

[1] On October 25, 2018, the University announced that based on *Baum* it was amending its sexual misconduct policy and procedures to include a live hearing and cross-examination. *See* "Student sexual misconduct policy to include in-person hearing," The University Record (Oct. 25, 2018), https://record.umich.edu/articles/student-sexual-misconduct-policy-include-person-hearing.

[2] The new policy is expected to be available this fall. *See id.*

of being used) or unripe (to the extent Mr. Doe challenges a policy that is not yet complete). As a result, until the new procedures are finalized, made part of the record below, and reviewed by the district court, the record is not sufficiently developed for this Court to decide the issues raised by Mr. Doe on cross-appeal. Instead, a district court should first be given the opportunity to evaluate the University's new procedures in light of this Court's ruling in *Baum*.

The insufficiency of the record on appeal, however, is not the most prominent or the most fundamental defect in Mr. Doe's lawsuit. Instead, the injunction entered below should be vacated, and Mr. Doe's claims dismissed, because the district court had no jurisdiction to hear his claims in the first place for lack of standing and ripeness. The investigation of the allegations made against Mr. Doe has not been completed, no finding has been made as to whether any violation of University policy occurred, and, as a result, no sanction of any kind has been imposed. (*See* First Amended Complaint, RE 28, Page ID # 578, 579, 582, 586.) No sanction may *ever* be imposed. Nevertheless, without so much as a completed investigation – let alone a final decision following an available appeal – Mr. Doe rushed to file a lawsuit against the University.[3]

[3] Mr. Doe has graduated and his degree was conferred in the normal course, unaffected by the student conduct proceeding. The investigation into Mr. Doe's conduct was not an impediment to Mr. Doe gaining admission to graduate school. He was accepted to graduate programs at the University and other institutions. (Order, RE 30, Page ID # 729.) The University had placed a hold on Mr. Doe's

Standing is a fundamental jurisdictional requirement without which a federal district court may not exercise judicial power. Mr. Doe does not have standing because he has not shown, and cannot show, any injury that: (1) is not reliant on speculation or conjecture as to the outcome of the student conduct proceeding; and (2) is fairly traceable to the University's actions, because the University's investigation and adjudication is confidential.[4] Permitting Mr. Doe's suit to proceed would create an unworkable precedent permitting any student to file a lawsuit immediately upon being *accused* of any kind of misconduct – whether cheating, vandalism, underage drinking, or sexual misconduct – *before* the adjudicatory process even finishes. Federal courts are not super-administrators for colleges, and they certainly are not courts of *first resort* to mediate as-yet undecided questions of university discipline. Yet that sort of intervention is precisely what Mr. Doe seeks here with respect to each of his claims.

Mr. Doe's claims are doubly improper because they are also not ripe. Mr. Doe cannot establish, as he must, that the disciplinary sanction he anticipates is

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transcript at the time he filed suit, but the University voluntarily released Mr. Doe's transcript on June 12, 2018. (Order, RE 30, Page ID # 732.) To the extent Mr. Doe relied upon the hold on his transcript as a cognizable harm, that issue is moot, and was so at the time the district court entered its order. (*Id.*)

[4] The University has not identified Mr. Doe publicly as part of this lawsuit or the underlying investigation and his identity and educational records will remain confidential because they are protected from disclosure by the Family Educational Rights and Privacy Act. *See* 20 U.S.C. § 1232g; 34 C.F.R. Part 99 *et seq*.

likely to occur, making his claims "unfit" for judicial decision. Nor can Mr. Doe demonstrate the necessary element of hardship from withholding judicial intervention until the conclusion of the student conduct process.

Because this case should be decided on jurisdictional grounds, the Court need not and should not reach the constitutional issue raised in Mr. Doe's cross-appeal. "Supreme Court precedent makes it clear that courts should avoid unnecessary adjudication of constitutional issues." *Adams v. City of Battle Creek*, 250 F.3d 980, 986 (6th Cir. 2001) (citing *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass on a constitutional question, although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.")). "Where a statutory or nonconstitutional basis exists for reaching a decision, as it does here, it is not necessary to reach the constitutional issue." *Id.* Because of these standing and ripeness defects, the district court was without jurisdiction to award interim equitable relief (or relief of any kind) to Mr. Doe, and this Court should follow *Adams* and reject Mr. Doe's cross-appeal.

Even if the Court were to reach the merits, however, reversal is also appropriate because the district court abused its discretion in finding that Mr. Doe demonstrated actual and imminent harm in support of an injunction. Nothing supports that conclusion, and, to the contrary, the record demonstrates that Mr.

Doe has not experienced and will not experience any legally-cognizable harm unless and until he is sanctioned for violating University policies. The parties, and the Court, can only speculate as to whether this outcome will occur, so no harm can possibly be actual and imminent now.

Finally, and on the merits, to the extent Mr. Doe claims that the University must provide him with a *specific set* of procedures – for instance, those contained in the University's Statement of Student Rights and Responsibilities, which governs claims of non-sexual misconduct – his argument fails because neither he nor the district court is empowered to prescribe the precise means by which the University provides Mr. Doe the process he is due.

For these reasons, the University respectfully requests that the Court: (1) vacate the district court's order granting, in part, Mr. Doe's motion for temporary restraining order and preliminary injunction; and (2) remand this matter to the district court with instructions to dismiss this civil action in its entirety for lack of subject matter jurisdiction; or (3) in the alternative, vacate the district court's order and remand this action to the district court with instructions to hold the civil action in abeyance until the University publishes its new student conduct procedures for claims of sexual misconduct, so that the district court may evaluate Mr. Doe's claims in light of the University's new procedures and consistent with this Court's decision in *Baum*.

STATEMENT OF JURISDICTION

Mr. Doe's first amended complaint erroneously invoked the district court's subject matter jurisdiction over his due process and Title IX claims under 28 U.S.C. § 1331 and § 1343. (First Amended Complaint, RE 28, Page ID # 572.) Mr. Doe also purported to invoke the district court's supplemental jurisdiction over his claims under Michigan's Elliott-Larsen Civil Rights Act pursuant to 28 U.S.C. § 1367. (*Id.*)

The district court did not have subject matter jurisdiction over any of Mr. Doe's claims because Mr. Doe did not and cannot demonstrate Article III standing or that his claims are ripe. The investigation into Mr. Doe's alleged conduct is not complete, no finding as to whether Mr. Doe violated any University policy has been made, no sanction has been imposed, and no appeal of any finding or sanction has been taken. (*See* Defendants' Motion for Judgment on the Pleadings, RE 35, Page ID # 947-948, 953-959; First Amended Complaint, RE 28, Page ID # 582, 586; Answer, RE 31, Page ID # 748; Argument section II., below.)

This Court has jurisdiction to review the district court's July 6, 2018 order entering a mandatory preliminary injunction (Order, RE 30, Page ID # 726-744) pursuant to 28 U.S.C. § 1292(a)(1), which establishes jurisdiction in the Courts of Appeals from "[i]nterlocutory orders of the district courts of the United States . . . granting . . . injunctions . . . ." 28 U.S.C. § 1292(a)(1). This appeal is timely

because it was filed on July 25, 2018, "within 30 days after entry of the . . . order appealed from." *See* Fed. R. App. P. 4(a)(1)(A); (Defendants' Notice of Appeal, RE 32, Page ID # 818-820).

STATEMENT OF THE ISSUES

1. Whether the district court erred by exercising subject matter jurisdiction because Mr. Doe lacks standing to pursue his claims.

2. Whether the district court erred by determining that Mr. Doe's claims are ripe for adjudication.

3. Whether the district court erred by determining that Mr. Doe had demonstrated imminent harm sufficient to justify awarding preliminary injunctive relief.

4. In the alternative, whether the district court erred by ordering the University specifically to use the University's Statement of Student Rights and Responsibilities (as slightly modified) to adjudicate the allegations against Mr. Doe, rather than ordering the University more broadly to adopt a constitutionally-compliant means of adjudicating the claims.

5. In the alternative, whether this Court should remand the case to the district court with instructions to evaluate Mr. Doe's claims under the University's to-be-issued procedures for handling allegations of student sexual misconduct.

STATEMENT OF THE CASE

I. The complaint of sexual assault made against Mr. Doe.

On March 20, 2018, a student complained to the University that Mr. Doe forcibly raped her, anally, vaginally, and orally. (*See* Defendants' Response to Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction, RE 21, Page ID # 310.) The University commenced an investigation under its then-current Policy and Procedures on Student Sexual and Gender-Based Misconduct and Other Forms of Interpersonal Violence (the "Policy"). (*Id.*)

II. The University's Former Policy and Procedures on Student Sexual and Gender-Based Misconduct and Other Forms of Interpersonal Violence.

The Policy in effect at the time of the investigation into Mr. Doe's conduct governed reports of sexual assault alleged to have been perpetrated by one student against another. (*See* Policy, RE 28-2, Page ID # 626, 637, 639-641.) As noted above, the Policy is no longer in use, and the University is in the process of crafting a new set of procedures to adjudicate allegations of sexual misconduct.

The former Policy set forth a process for investigating such claims that included written notice, interviews of parties and witnesses, preparation of party and witness statements, solicitation of feedback from parties and witnesses on their statements, review of relevant evidence, preparation of a preliminary investigation report, solicitation of feedback from parties on the report and requests for additional investigation, follow-up questioning of witnesses and parties,

preparation of a final investigation report and determination, procedures for determining any sanctions, and rights of appeal. (*See generally id.*, Page ID # 626-661.) Under this former process, the parties could "suggest questions to the investigator to be asked of any party or witness." (*Id.*, Page ID # 648.) The investigator "determine[d] which questions may be relevant or appropriate" and posed "any such questions in a form the investigator deems best suited to obtaining relevant information." (*Id.*)

The investigator ultimately would determine, by a preponderance of the evidence, whether the respondent committed a violation of the Policy. (*See id.*, Page ID # 653.) Parties could appeal a final report and findings if, among other reasons, "[a] review of all available and relevant information indicates that the evidence clearly [did] not support the finding(s). . . ." (*Id.*, Page ID # 659.) Appellate review was conducted by a retired federal judge who acted as an external reviewer. (*Id.*, Page ID # 660; Defendants' Response to Plaintiff's Motion, RE 21, Page ID # 317.)

III. The University's investigation of the allegations against Mr. Doe.

On March 29, 2018, the investigator from the University's Office of Institutional Equity interviewed the student who made the report against Mr. Doe (the "Claimant"). (*See* First Amended Complaint, RE 28, Page ID # 583.) Mr. Doe was notified in writing about the report made against him and that the

University would be conducting an investigation. (*See* Declaration, Exhibit 2 to Defendants' Response to Plaintiff's Motion, RE 21-1, Page ID # 386.) The investigator requested two meetings with Mr. Doe: a first meeting to explain the allegations, the Policy, the investigation process, as well as to answer any questions, and a second meeting for Mr. Doe to respond to the allegations. (*Id.*, Page ID # 387.) On April 3, 2018, the investigator interviewed Mr. Doe. (*See id.*) Mr. Doe was offered the opportunity to have a second meeting with the investigator on April 5, 2018, but declined. (*See id.*, Page ID # 387-388; Answer, RE 31, Page ID # 774.) Instead, Mr. Doe elected to respond to the allegations at the April 3rd meeting. (*See* Declaration, Exhibit 2 to Defendants' Response to Plaintiff's Motion, RE 21-1, Page ID # 387-388.) On April 11, 2018, Mr. Doe received a summary of his statement and provided feedback that same day. (*See id.*, Page ID # 388.)

Mr. Doe continued to actively participate in the investigation. On May 15, 2018, Mr. Doe sent the investigator an e-mail requesting that a copy of the dormitory's Resident Advisor Duty Log from the night of the incident be considered in the investigation. (*See id.*) The next day, Mr. Doe requested that the investigator include in the investigation report a copy of a statement from a woman he previously engaged in a sexual relationship with and a copy of his Eagle Scout certificate. (*Id.*) Mr. Doe also requested that the investigator interview six

additional witnesses. (*Id.*) Three of those witnesses agreed to be interviewed; a fourth declined, stating that he had no relevant information; and the remaining two witnesses did not respond. (*Id.*) The three witnesses were interviewed, provided with a summary of their respective statements, and then submitted feedback on their statements. (*Id.*)

Unprompted, on May 16, 2018, Mr. Doe submitted significant changes to his April 11, 2018 statement. (Answer, RE 31, Page ID # 774.) On May 24, 2018, Mr. Doe received a first draft investigative report containing the factual information gathered by the investigation to date, but containing no proposed findings. (*Id.*) On May 29, 2018, Mr. Doe provided eighty-eight (88) pages of feedback to the first draft investigative report, which was considered and incorporated into the report. (*Id.*) The investigator also conducted follow-up witness interviews and asked follow-up questions of the Claimant arising from Mr. Doe's feedback. (*Id.*) On June 21, 2018, Mr. Doe received a second draft preliminary report from the investigator. (*Id.*, Page ID # 774-775.) Mr. Doe requested and received an extension to respond to the second draft preliminary report. (*Id.*, Page ID # 775.)

The investigation has not proceeded any further because Mr. Doe preemptively filed a lawsuit and the district court enjoined the process as discussed in section IV, immediately below. There has been no finding or sanction against

Mr. Doe. However, when the proceedings resume under the procedures in the new, yet-to-be-issued policy, there will be a hearing, if warranted by the facts adduced in the investigation, and a finding as to whether Mr. Doe violated University policy. Only if a violation is found to have occurred will sanctions be imposed. And even if a sanction is imposed, Mr. Doe will have the right to an appeal.

IV. The district court proceedings.

While the University was still investigating Mr. Doe's alleged conduct, on June 4, 2018, Mr. Doe preemptively filed this lawsuit asserting, among other things, that the University's process was unfair because it did not provide a live hearing with cross-examination of parties and witnesses. (*See* Complaint, RE 1, Page ID # 1-34.) Mr. Doe's amended, operative complaint, filed June 29, 2018, asserts the following claims: (1) Fourteenth Amendment procedural due process; (2) Title IX disparate treatment; (3) Elliott-Larsen Civil Rights Act disparate treatment; and (4) Elliott-Larsen Civil Rights Act disparate impact. (*See* First Amended Complaint, RE 28, Page ID # 592-603.)

On June 5, 2018, the day after filing his initial complaint, Mr. Doe moved for a temporary restraining order and preliminary injunction seeking to enjoin the University's investigation under the Policy, arguing that he is entitled to a live hearing with cross-examination of parties and witnesses. (*See* Motion for

Temporary Restraining Order and Preliminary Injunction, RE 4, Page ID # 133-162.) The University opposed Mr. Doe's motion on several grounds, including the threshold issues that Mr. Doe's claims do not present a live case or controversy and are not ripe for disposition, as well as on the merits of his due process claim and his failure to establish imminent, irreparable harm. (*See* Defendants' Response to Plaintiff's Motion, RE 21, Page ID # 302-334.)

The district court heard argument on Mr. Doe's motion and, on July 6, 2018, granted the motion in part, ordering the University to halt its investigation under the Policy and provide Mr. Doe "with the opportunity for a live hearing in accordance with the procedures set forth in the [University's] Statement of Student Rights and Responsibilities," which governs non-sexual misconduct at the University, "[a]s soon as practicable." (Order, RE 30, Page ID # 743.) The district court disallowed direct questioning of the Claimant by Mr. Doe, instead ordering that Mr. Doe "may engage only in circumscribed cross-examination, a process through which he may submit questions to the Resolution Officer ('RO'), Resolution Coordinator ('RC'), or Student Resolution Panel to be asked of Claimant." (*Id.*, Page ID # 743-744.)

Despite the University raising the issue in its opposition to the motion and at the hearing on the motion, the district court did not address Mr. Doe's standing. (*See* Defendants' Response to Plaintiff's Motion, RE 21, Page ID # 323;

Transcript, RE 29, Page ID # 702-703.) Necessarily and implicitly finding standing, however, the district court expressly ruled that Mr. Doe's claims are ripe for adjudication. (*See* Order, RE 30, Page ID # 733-734.) The district court further found Mr. Doe likely to succeed on the merits of his procedural due process claim because, according to the district court's interpretation of the law in this Circuit, due process requires a live hearing with modified cross-examination when the credibility of the parties is at stake in a student conduct proceeding. (*See id.*, Page ID # 735-740.) The district court identified the required actual and imminent irreparable harm supporting its mandatory injunction as a purported immediate threat of expulsion and reputational harm. (*See id.*, Page ID # 740-741.)

On July 25, 2018, the University timely filed an interlocutory appeal of the district court's July 6th order and a motion to stay the district court's July 6th order pending appeal. (Defendants' Notice of Appeal, RE 32, Page ID # 818-820; Defendants' Motion to Stay Pending Appeal, RE 33, Page ID # 821-846.) Mr. Doe filed a cross-appeal of the district court's July 6th order on August 7, 2018, challenging the "circumscribed cross-examination . . . in lieu of allowing 'direct' (live) cross-examination of the claimant and other witnesses." (Plaintiff's Notice of Cross-Appeal, RE 36, Page ID # 1067-1068.) On August 22, 2018, the district court granted the University's motion to stay pending appeal and stayed all proceedings, "including the University's investigation into Plaintiff's alleged

misconduct." (Order Granting Defendants' Motion to Stay Pending Appeal, RE 41, Page ID # 1260-1262.)

SUMMARY OF THE ARGUMENT

This case should be decided on threshold jurisdictional standing and ripeness grounds. Simply put, the district court's opinion permits students, employees, and any other number of potential plaintiffs to file a lawsuit as soon as they learn that an investigation into their conduct is underway. Merely being accused of misconduct, without any finding or sanction, cannot satisfy the jurisdictional thresholds of standing and ripeness because the alternative deprives those concepts of any meaning. In the absence of a finding that Mr. Doe violated any University policy and imposing a sanction, Mr. Doe has no claim to be adjudicated. Instead, he presents only abstract, hypothetical questions in asserting each of his claims, all of which necessarily begin with the word "if." This Court should vacate the district court's injunction for the following reasons:

1. Mr. Doe cannot demonstrate standing because he cannot show "an injury in fact that is concrete and particularized" in the absence of a sanction against him. For similar reasons, Mr. Doe also cannot satisfy the fitness and hardship requirements necessary to establish that his claims are ripe. If Mr. Doe is found not to have violated any University policy, and no sanction is imposed, the harm Mr. Doe presumes will never occur. Mr. Doe will suffer no hardship from

withholding judicial consideration until there has been an outcome to the student conduct proceeding. In addition, Mr. Doe cannot demonstrate standing because he cannot show that any harm he purports to have suffered is fairly traceable to the University's actions. Mr. Doe's failure to establish standing and ripeness requires this Court to vacate the injunction entered below and remand the case with instructions to dismiss this civil action for lack of jurisdiction.

2. On the merits, the district court committed clear error with respect to its factual determinations and misapplied the law when it ruled that Mr. Doe would suffer irreparable harm without an injunction because Mr. Doe has demonstrated no immediate harm. The district court's opinion identified two potential imminent harms: that Mr. Doe would suffer a loss of his degree and that he would suffer reputational harm. Notwithstanding that *both* of those harms were, and remain, conditional, their "imminence" is also factually inaccurate: *First*, absent the injunction, the investigation would have simply continued to conclusion, when Mr. Doe may or may not have been found to have violated University policy; no sanction was imminent. *Second*, the outcome of the investigation is confidential, and in this lawsuit, Mr. Doe is proceeding under a pseudonym, so no imminent reputational harm is supported by the record.

3. In the alternative, and to the extent this Court were to determine that Mr. Doe has satisfied the requirements of both standing and ripeness, there is no

dispute that Mr. Doe is entitled to due process as described by this Court's opinions. However, neither Mr. Doe nor the district court may dictate the University's choice in determining how best to provide the process that is due. The district court erred by ordering the University to provide Mr. Doe the specific procedures set forth in the University's Statement of Student Rights and Responsibilities, which governs claims of non-sexual misconduct, and which the University has determined is ill-suited to handling allegations of sexual misconduct. Within the bounds of due process, the district court should have shown deference to the manner in which the University best determined to administer its academic mission and implement its disciplinary process. This Court should vacate the district court's order requiring the University to use the specific procedures contained in the University's Statement of Student Rights and Responsibilities and remand with instructions to permit the University to provide Mr. Doe the process he is due without constraining the University's choice in deciding how best to define that process.

4. Also in the alternative, and in the event this Court were to determine that Mr. Doe has demonstrated both standing and ripeness, this Court should remand the case to the district court with instructions to evaluate Mr. Doe's claims against procedures the University is currently crafting for claims of sexual misconduct reflecting this Court's recent holding in *Doe v. Baum*. Mr. Doe's claims, as

currently stated, are moot to the extent they challenge the University's former Policy. It serves no purpose to adjudicate Mr. Doe's cross-appeal against the backdrop of a stale record and a policy the University no longer uses, especially where, as here, the new policy will provide Mr. Doe with all of the process he has requested: a live hearing with formal, direct cross-examination of adverse parties and witnesses. The proper course is to remand the matter to the district court for further development of the record and adjudication of Mr. Doe's claims in light of that record.

ARGUMENT

I. Standards of review.

This Court reviews questions of standing and ripeness de novo. *See Nat'l Rifle Ass'n of Am. v. Magaw*, 132 F.3d 272, 278 (6th Cir. 1997) (this Court "review[s] issues of justiciability pursuant to Article III *de novo*"); *In re Cassim*, 594 F.3d 432, 437 (6th Cir. 2010) ("Whether a claim is constitutionally ripe for adjudication is a question of law that is reviewed de novo.").

This Court reviews the district court's grant of a preliminary injunction for an abuse of discretion. *See Brake Parts, Inc. v. Lewis*, 443 F. App'x 27, 29 (6th Cir. 2011). The district court's finding of whether a movant has demonstrated irreparable harm "rest[s] largely upon the district court's factual determinations, which [the Court] review[s] for clear error," *id.* at 28, unless it "also involve[s]

questions of law," *Blue Cross & Blue Shield Mut. of Ohio v. Blue Cross & Blue Shield Ass'n*, 110 F.3d 318, 333 (6th Cir. 1997), which are reviewed de novo, *id.* "Either a legal error . . . or a factual error . . . may be sufficient to determine that the district court abused its discretion." *McPherson v. Mich. High Sch. Athletic Ass'n*, 119 F.3d 453, 459 (6th Cir. 1997) (marks omitted).

II. Threshold jurisdictional issues of standing and ripeness require vacating the district court's injunction and remanding with instructions to dismiss all of Mr. Doe's claims for lack of jurisdiction.

A. Mr. Doe cannot establish Article III standing.

Without standing, a district court has no jurisdiction.[5] "The first and fundamental question presented by every case brought to the federal courts is whether it has jurisdiction to hear a case, even where the parties concede or do not raise or address the issue." *Douglas v. E.G. Baldwin & Assocs.*, 150 F.3d 604, 606–07 (6th Cir. 1998), *abrogation on other grounds recognized by Heartwood, Inc. v. Agpaoa*, 628 F.3d 261, 266 (6th Cir. 2010); *see also Am. Telecom Co. v. Republic of Lebanon*, 501 F.3d 534, 537 (6th Cir. 2007) ("Subject matter

[5] "Article III courts have an independent obligation to determine whether subject matter jurisdiction exists." *Airline Prof'ls Ass'n of Int'l Bhd. of Teamsters, Local Union No. 1224 v. Airborne, Inc.*, 332 F.3d 983, 986 (6th Cir. 2003); *see FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230–31 (1990) ("[E]ven if the parties fail to raise the issue before us . . . [t]he federal courts are under an independent obligation to examine their own jurisdiction, and standing is perhaps the most important of [the jurisdictional] doctrines.") (marks omitted), *modified in part on other grounds in City of Littleton, Colo. v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774 (2004).

jurisdiction is always a threshold determination."); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998) (there is no "doctrine of 'hypothetical jurisdiction' that enables a court to resolve contested questions of law when its jurisdiction is in doubt"); *Allstate Ins. Co. v. Renou*, 32 F. Supp. 3d 856, 859 (E.D. Mich. 2014) ("[T]he Court must first address the issue of subject matter jurisdiction as raised by Defendant . . . .").[6] The district court's July 6th order should be vacated, and the case remanded with instructions to dismiss this civil action in its entirety,[7] because Mr. Doe cannot establish standing.

[6] The University raised the issue that Mr. Doe could not satisfy the Constitution's "case or controversy" requirement in its opposition brief and at oral argument on the motion. (*See* Defendants' Response to Plaintiff's Motion, RE 21, Page ID # 323; Transcript, RE 29, Page ID # 702-703.)

[7] This Court may exercise pendent appellate jurisdiction over claims that "could not be raised independently on interlocutory appeal" where the claims are "inextricably intertwined." *Hoard v. Sizemore*, 198 F.3d 205, 221 (6th Cir. 1999) (citing *Swint v. Chambers Cty. Comm'n*, 514 U.S. 35, 51 (1995)). This Court has "held that pendent appellate jurisdiction is proper when the appellate court's finding" on an issue "necessarily and unavoidably" resolves the pendent claims. *Id.* (citing *Brennan v. Twp. of Northville*, 78 F.3d 1152, 1158 (6th Cir. 1996)). Here, the Court should exercise pendent jurisdiction over all claims in the first amended complaint because the absence of Article III standing and ripeness are dispositive not only of the district court's entry of a preliminary injunction and the underlying due process claim upon which that relief was based, but also of Mr. Doe's other claims, which all presuppose a sanction against Mr. Doe at the conclusion of the disciplinary process. Resolution of the threshold issues of standing and ripeness thus "necessarily and unavoidably" resolves all of Mr. Doe's claims. *See id.* at 221–22.

"The Constitution does not extend the 'judicial Power' to any legal question, wherever and however presented, but only to those legal questions presented in 'Cases' and 'Controversies.' U.S. Const. art. III, § 2." *Warshak v. United States*, 532 F.3d 521, 525 (6th Cir. 2008). As a result, a "claim is not 'amenable to . . . the judicial process'. . . when it is filed too early (making it unripe) . . . or when the claimant lacks a sufficiently concrete and redressable interest in the dispute (depriving the plaintiff of standing)." *Id.* (quoting *Steel Co.*, 523 U.S. at 102) (citation omitted).

To satisfy the "case-or-controversy" requirement, a plaintiff must establish, among other things, "an injury in fact that is concrete and particularized" and that such injury is "fairly traceable to the defendant's action." *Airline Prof'ls Ass'n*, 332 F.3d at 987 (marks and citation omitted); *see also Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (describing these requirements as the "irreducible constitutional minimum of standing"). To establish injury in fact, Mr. Doe must demonstrate that he has "sustained or is in immediate danger of sustaining some direct injury." *Airline Prof'ls Ass'n*, 332 F.3d at 987 (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 448 (1923)). "The injury . . . must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'" *Id.* (quoting *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974)). "[W]ithout evidence that the [plaintiff's] predicted result is 'actual or imminent,' such an injury can only be 'conjectural or

hypothetical.'" *Id.* (quoting *Mich. Gas Co. v. FERC*, 115 F.3d 1266, 1270-71 (6th Cir. 1997)).

(1) Mr. Doe cannot establish a concrete injury because there has been no sanction and thus no harm with respect to the investigation into his conduct.

No sanction has been imposed against Mr. Doe. (*See* First Amended Complaint, RE 28, Page ID # 582, 586.) Absent the imposition of a sanction, the questions raised by this civil action are purely advisory. "Without evidence that the [plaintiff's] predicted result is 'actual or imminent,' such an injury can only be 'conjectural or hypothetical.'" *Airline Prof'ls Ass'n*, 332 F.3d at 987 (quoting *Mich. Gas Co.*, 115 F.3d at 1270-71); *see also Morrison v. Bd. of Educ. of Boyd Cty.*, 521 F.3d 602, 610 (6th Cir. 2008) (student lacked standing to challenge constitutionality of school policy because his expectation of discipline for violating such policy did not suffice as injury-in-fact required for standing).

Other Circuit Courts around the country are in accord. The Third Circuit has aptly explained the issue this way: "an injury does not meet the imminence requirement if one cannot describe how the [plaintiff] will be injured without beginning the explanation with the word 'if.'" *Williams v. Governor of Pa.*, 552 F. App'x 158, 162 (3d Cir. 2014) (marks omitted); *see also Rodriguez v. E. Air Lines, Inc.*, 816 F.2d 24, 28 (1st Cir. 1987) (employee lacked standing to litigate a hypothetical question of benefits upon discharge when she had not been discharged

by employer); *Oriental Health Spa v. City of Fort Wayne*, 864 F.2d 486, 489 (7th Cir. 1988) (massage parlor lacked standing to bring suit challenging licensing ordinance because parlor's future threat of denial of license did not rise to level of injury for standing purposes); *Essence, Inc. v. City of Fed. Heights*, 285 F.3d 1272, 1281-82 (10th Cir. 2002) (corporation with business license failed to establish standing to challenge municipal code governing licensing because possibility that city would suspend or revoke license was insufficient to constitute "real and immediate" threat of injury); *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 914 (D.C. Cir. 2015) (no standing where consumers and advocacy organization challenged regulation because purported harm was speculative and, "[w]ere all purely speculative increased risks deemed injurious[,] . . . requirement of actual or imminent injury would be rendered moot, because all hypothesized, nonimminent injuries could be dressed up as increased risk of future injury"); *Nw. Airlines, Inc. v. F.A.A.*, 795 F.2d 195, 201 (D.C. Cir. 1986) ("The injury requirement will not be satisfied simply because a chain of events can be hypothesized in which the action challenged eventually leads to actual injury . . . . Where there is no current injury, and a party relies wholly on the threat of future injury, the fact that the party (and the court) can imagine circumstances in which [the party] *could* be affected . . . is not enough.") (marks omitted and emphasis in original).

Because Mr. Doe has experienced no harm, and may very well never experience any such harm, he has no standing to pursue his claims at this time. Any other conclusion would permit a student to file a lawsuit as soon as he or she is accused of misconduct, effectively grinding universities' internal student conduct proceedings to a halt, raising the costs of everyday investigations, and inviting a rash of federal lawsuits. Indeed, under any alternative formulation, nothing would prevent a student accused of cheating on an exam, drinking under age, vandalizing property in a dormitory, or stealing food from a dining hall from immediately going to court to enjoin the investigation of alleged wrongdoing without waiting to see if he or she will be found responsible for a violation, let alone disciplined.

Of course, standing must be established in every case, and these concerns are not limited to the educational context. What would prevent a public employee from rushing into court as soon as he or she learns that human resources is investigating an allegation brought against him or her? Federal courts are not empowered to hear such claims, and for good reason. The standing and ripeness doctrines prevent courts from having to resolve hypothetical claims based on events, circumstances, and injuries that may never occur. *See Warshak*, 532 F.3d at 533 (even if early judicial intervention would be preferable "[a]s a matter of efficiency . . . efficiency is not the only end of the Constitution").

(2) Mr. Doe also cannot establish standing because no purported injury to him is fairly traceable to the University's actions.

Article III standing requires litigants to demonstrate that the complained-of harm is "fairly traceable to the defendant's action." *Airline Prof'ls Ass'n*, 332 F.3d at 987 (marks and citation omitted). In conclusory fashion, Mr. Doe alleges that he "has ***and will*** suffer . . . loss of personal and professional reputation." (First Amended Complaint, RE 28, Page ID # 594, 597-600, 602-603) (emphasis added). Mr. Doe provides no facts to support this conclusory allegation, and presented none in support of his motion for preliminary injunction. Moreover, he is proceeding under a pseudonym in this action "[t]o protect his privacy and safeguard his reputation and personal and professional standing in the community." (Motion to Proceed Under Pseudonym, RE 2, Page ID # 98.)

And even if the record supported the district court's finding of an imminent loss of reputation (it does not), any present injury cannot be fairly traced to *the University's* actions. The district court asserted in its July 6th order that "sexual assault allegations" may injure Mr. Doe's reputation. (Order, RE 30, Page ID # 734, 741.) So perhaps they may, but those allegations were made by the Claimant, not by the University, which is obligated to act as an impartial arbiter pursuant to federal law.

To that end, the University has simply commenced a confidential investigation into Mr. Doe's conduct, as it is required to do.[8] (*See* First Amended Complaint, RE 28, Page ID # 578.) The University has not identified Mr. Doe publicly, and his identity and educational records will remain confidential because they are protected by the Family Educational Rights and Privacy Act. *See* 20 U.S.C. § 1232g; 34 C.F.R. Part 99 *et seq*. Consequently, no supposed injury to Mr. Doe's reputation is "fairly traceable" to the University's actions. As a result, Mr. Doe does not have standing and the district court improperly exercised subject matter jurisdiction.

B. Mr. Doe's claims are not ripe for adjudication.

"A court lacks jurisdiction over the subject matter if the claim is not yet ripe for judicial review." *Norton v. Ashcroft*, 298 F.3d 547, 554 (6th Cir. 2002). The July 6th order also should be vacated, and the case remanded with instructions to dismiss all claims for lack of jurisdiction, because Mr. Doe cannot show either element of ripeness: (a) that his claims are fit for judicial decision; or (b) that withholding judicial consideration at this time would constitute a hardship to establish that his claims are ripe.

[8] *See* 34 C.F.R. § 668.46(k)(2); Office for Civil Rights, *Revised Sexual Harassment Guidance* (66 Fed. Reg. 5512, Jan. 19, 2001), *available at* https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf.

"[R]ipeness and standing . . . 'unquestionably . . . overlap.'" *Warshak*, 532 F.3d at 525 (quoting *Airline Prof'ls Ass'n*, 332 F.3d at 988). "Like standing, ripeness 'is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction.'" *Id.* (quoting *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003)). As this Court observed *en banc*, "[a]nswering difficult legal questions before they arise and before the courts know how they will arise is not the way we typically handle constitutional litigation." *Id.* at 526.

> The ripeness doctrine serves to "avoid[ ] ... premature adjudication" of legal questions and to prevent courts from "entangling themselves in abstract" debates that may turn out differently in different settings. In ascertaining whether a claim is ripe for judicial resolution, we ask two basic questions: (1) is the claim "fit[ ] ... for judicial decision" in the sense that it arises in a concrete factual context and concerns a ***dispute that is likely to come to pass***? and (2) what is "the hardship to the parties of withholding court consideration"?

Id. at 525 (marks and citations omitted) (emphasis added). "To be ripe for review, claims must satisfy both the fitness and the hardship components of the inquiry." *Airline Prof'ls Ass'n*, 332 F.3d at 988.[9]

[9] Some panels of this Court have articulated the ripeness inquiry as a three-part test, asking separately "whether the factual record is sufficiently developed to produce a fair adjudication of the merits of the parties' respective claims." *See, e.g.*, *Berry v. Schmitt*, 688 F.3d 290, 298 (6th Cir. 2012) (marks omitted). This appears to be a distinction without a difference, as the fitness inquiry in the two-part test subsumes the issue of whether the factual record is sufficiently developed

(1) Mr. Doe's claims are not fit for judicial decision because the alleged harms assume a hypothetical finding and sanction against Mr. Doe in the student conduct proceeding, which may never happen.

The facts pleaded by Mr. Doe do not establish that the harm he alleges is "likely to come to pass," *Warshak*, 532 F.3d at 525, so his claims are unripe. *See also id.* at 526 (plaintiff's claim that further *ex parte* searches of his e-mail account by the government would violate the Fourth Amendment was not fit for judicial review because the harm to plaintiff – another *ex parte* search of his e-mail account – "depends on contingent future events that may not occur") (marks omitted). "Ripeness doctrine exists to ensure that courts decide only existing, substantial controversies, not hypothetical questions or possibilities." *Norton*, 298 F.3d at 554 (citations and marks omitted).

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for judicial decision. Here, the district court erred in determining that the factual record was sufficiently developed. Without an outcome to the investigation into Mr. Doe's conduct, and a fully-developed record on which to base an outcome, Mr. Doe's claims are not ripe. *Cf. United Steelworkers of Am., Local 2116 v. Cyclops Corp.*, 860 F.2d 189, 195 (6th Cir. 1988) (even where "an allegedly injurious event is certain to occur, the Court may delay resolution of constitutional questions until a time closer to the actual occurrence of the disputed event, when a better factual record might be available") (marks omitted); *Syron v. ReliaStar Life Ins. Co.*, 506 F. App'x 500, 504 (6th Cir. 2012) (factual record was not sufficiently developed when insurer "had not indicated whether it would approve or deny [a] claim," but was sufficiently developed once insurer "filed an action to declare the . . . insurance policy void"). In addition, the record on appeal is stale, and Mr. Doe's cross-appeal challenging the Policy is moot, in light of the University's abandonment of the Policy and commitment to develop a new policy consistent with *Baum*. *See* Section V., below.

Here, it is undisputed that the investigation is not complete. (*See* First Amended Complaint, RE 28, Page ID # 578, 579, 582, 586.) No finding has been made. (*See id.*, Page ID # 578, 579, 582, 586.) With no finding issued, no sanction has been imposed against Mr. Doe. (*See id.*, Page ID # 579, 582, 586.) If there were to be a finding and there were to be a sanction, Mr. Doe would still have an opportunity to appeal. Like the *ex parte* e-mail searches anticipated in *Warshak*, the harm Mr. Doe anticipates at the conclusion of the foregoing chain of events may never occur. He may well never be found to have violated any University policy and never have a sanction levied against him. In short, Mr. Doe's claims may never ripen, but at a minimum, none of his claims are fit for judicial decision now.

(2) Mr. Doe's claims also are not ripe because there is no hardship to withholding judicial consideration pending the conclusion of the student conduct proceeding in light of the University's commitment to provide direct cross-examination as part of its new policy.

Although Mr. Doe cannot satisfy the fitness requirement of the ripeness inquiry, and therefore the Court need not reach the hardship component, *see Airline Prof'ls Ass'n*, 332 F.3d at 988, Mr. Doe also cannot show hardship from withholding judicial consideration of his claims. "The prototypical case of hardship comes from the claimant who faces a choice between immediately complying with a burdensome law or risk[ing] serious criminal and civil

penalties." *Warshak*, 532 F.3d at 531 (marks omitted). Here, there is no such risk to Mr. Doe because the investigation itself does not and cannot constitute a harm to Mr. Doe.

The district court disapproved of the University "ask[ing] the Court to sit back and wait for the investigator to issue findings against Plaintiff before intervening in this action," where the district court "is well-equipped to determine whether the [University's] Policy adequately protects Plaintiff's due process rights." (Order, RE 30, Page ID # 734.) But the district court erred in this articulation. "A central tenet of the case-or-controversy requirement after all is that a general interest in a judicial ruling on the merits does not by itself confer jurisdiction on the federal courts. Otherwise, a claimant's interest in a judicial ruling itself would justify reaching the question, prematurely or not." *Warshak*, 532 F.3d at 532. Critically, and on all fours with the district court's error, "an otherwise-unripe claim" may not "be entertained on the ground that it will facilitate a judicial ruling on the merits." *Id.* As this Court has explained, "[t]he ripeness doctrine, like all limitations on the 'judicial Power,' prevents us from 'do[ing] today what can be done tomorrow' and, in the process, prevents us from announcing interpretations of the Constitution that some citizens and commentators may wish to hear today." *Id.* at 533.

Cases arising from similar circumstances, both within this Circuit and elsewhere, are instructive. In *Doe v. The Ohio State University*, 136 F. Supp. 3d 854 (S.D. Ohio 2016), much as here, the plaintiff was a student accused of misconduct. As here, he sought an injunction against an investigation of his conduct based on his claim that the proceedings would violate his due process rights. *Id.* at 862-63. The court denied injunctive relief noting that where the investigation was at an early stage, with no adverse finding against the plaintiff, the claim was not ripe for disposition. *Id.* at 864-65; *see also B.P.C. v. Temple Univ.*, No. 13-7595, 2014 WL 4632462, at *5 (E.D. Pa. Sept. 16, 2014) (same); *Peloe v. Univ. of Cincinnati*, No. 1:14-CV-404, 2015 WL 728309, at *8 (S.D. Ohio Feb. 19, 2015) (ruling that plaintiff's "procedural due process claim is not ripe" when plaintiff had "not yet suffered a constitutional injury" because the "disciplinary proceedings [we]re not complete and no disciplinary penalty ha[d] been imposed upon [plaintiff]"); *Morreim v. Univ. of Tenn.*, No. 12–2891, 2013 WL 5673619, at *12 (W.D. Tenn. Oct. 17, 2013) (dismissing for lack of ripeness plaintiff's claim that the university was seeking to strip her of tenure in violation of the due process clause when the university had initiated proceedings which could lead to a loss of tenure but no decision had been made).

Even setting aside the absence of an adverse finding or sanction against Mr. Doe, the University is also no longer using the procedures in the Policy to

adjudicate the allegations of sexual misconduct against Mr. Doe. This further underscores the absence of any hardship from withholding judicial consideration of Mr. Doe's claims, all of which are based upon the stale procedures set forth in the Policy and therefore are moot. *Cf. Nat'l Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 404 F. Supp. 2d 1015, 1019 (M.D. Tenn. 2005) ("[T]he Sixth Circuit has repeatedly found to be moot claims negated by subsequent, permanent rule and policy adoptions by the government."); *Bench Billboard Co. v. City of Cincinnati*, 675 F.3d 974, 981 (6th Cir. 2012) (explaining that "self-correction provides a secure foundation for a dismissal based on mootness so long as it appears genuine") (marks omitted); *Chaudhuri v. Tennessee*, 130 F.3d 232, 235 (6th Cir. 1997) (noting district court denied preliminary injunction because the university president changed the policy at issue and issued a statement confirming it); *Ky. Right to Life, Inc. v. Terry*, 108 F.3d 637, 644 (6th Cir. 1997) ("[T]he Supreme Court has routinely declared moot those claims effectively nullified by . . . amendment.").

In short, Mr. Doe cannot satisfy either the fitness or hardship components of the ripeness inquiry. For these reasons, as well as Mr. Doe's failure to establish Article III standing, the Court should vacate the injunction and remand with instructions to dismiss this action for lack of jurisdiction.

III. The district court's entry of a preliminary injunction should be vacated because the district court erred in ruling that Mr. Doe had demonstrated actual and imminent harm.

The district court correctly stated that a "Plaintiff must show that the harm is actual and imminent" to satisfy the irreparable harm requirement for preliminary injunctive relief (Order, RE 30, Page ID # 740), but misapplied the law and erred with respect to the facts by finding that Mr. Doe had demonstrated imminent harm. Mr. Doe's failure to establish irreparable harm requires that this Court vacate the injunction entered below because "[i]n order to be entitled to [injunctive] relief" he bears "the burden of establishing a clear case of irreparable injury," but failed to do so here. *See Garlock, Inc. v. United Seal, Inc.*, 404 F.2d 256, 257 (6th Cir. 1968); *see also Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (holding that "[a] plaintiff seeking a preliminary injunction must establish" all four of the injunction factors).

Relying on *Doe v. University of Cincinnati*, the district court presumed irreparable injury because "plaintiff's constitutional right to due process is 'threatened or impaired.'" (Order, RE 30, Page ID # 740) (citing *Cincinnati*, 872 F.3d 393, 407 (6th Cir. 2017)). However, this presumption of irreparable harm is rebuttable. *See Cincinnati*, 872 F.3d at 407. In *Cincinnati*, this Court concluded that the presumption had not been rebutted because "[w]ere we to vacate the injunction, Doe would be suspended for a year and suffer reputational harm both

on and off campus ***based on a finding*** rendered after an unfair hearing." *Id.* (emphasis added). That is manifestly not the case here, and this case is a long way from reaching the factual and procedural scenario presented in *Cincinnati*, in which a sanction *had been imposed*. *See id.* Here, the district court found that "[p]laintiff faces an immediate threat of expulsion" and "has already suffered and will continue to suffer" reputational harm (Order, RE 30, Page ID # 740-741), but both of those conclusions are clearly erroneous.[10] *See Brake Parts*, 443 F. App'x at 29 n.2 ("A finding is 'clearly erroneous' when . . . the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.") (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

Simply put, absent the injunction, Mr. Doe would suffer no immediate harm whatsoever. Nothing in the record approaches a suggestion that Mr. Doe would be immediately expelled or, now that he has graduated, have his degree revoked, if the injunction were dissolved. Instead, an investigation, erroneously paused mid-stream by the district court's order, would resume. The district court also reasoned that Mr. Doe *had* suffered reputational harm and would continue to do so, but that

[10] The district court's erroneous conclusion regarding irreparable harm necessarily informed the court's analysis and tipped the scales in Mr. Doe's favor when the district court considered harm to others and performed the required balancing of harms as part of its injunction analysis, compounding the error. (*See* Order, RE 30, Page ID # 741-742.)

conclusion is not supported by the record either. The investigation is confidential, and Mr. Doe is proceeding under a pseudonym "[t]o protect his privacy and safeguard his reputation and personal and professional standing in the community." (Motion to Proceed Under Pseudonym, RE 2, Page ID # 98.) In reality, the investigation would continue, a hearing would be held if warranted by the facts adduced in the investigation, a finding would be made, and appeals could be taken from the finding or sanction, if applicable. Any injury to Mr. Doe is speculative, and at a minimum, not actual or imminent, because a finding of injury must presuppose that Mr. Doe ultimately will be found responsible for the alleged conduct and sanctioned.

IV. In the alternative, this Court should vacate the district court's injunction because, although the University must provide Mr. Doe procedural due process, it is entitled to determine the specific procedures through which it provides the process that is due.

In the event this Court determines that the district court did not err in failing to address Mr. Doe's standing and in concluding that Mr. Doe's claims are ripe, the Court nevertheless should vacate the injunction requiring the University to use a specific set of student conduct procedures rather than allowing the University to provide due process in the manner it deems most appropriate. Although a district court is empowered to define the fundamental requirements of due process, and to order the University to comply with those requirements, the district court exceeded principles of sound judicial practice, and its authority, by requiring the University

to use *a particular set* of procedures, rather than simply ordering the University to design constitutionally-compliant ones. (*See* Order, RE 30, Page ID # 743-744.) Specifically, the district court erred in ordering the University to provide Mr. Doe with the procedures set forth in the University's Statement of Student Rights and Responsibilities, which governs student complaints of non-sexual misconduct. (*See id.*)

Educational institutions are entitled to deference in determining how they structure their procedures, so long as those procedures comport with minimum procedural due process. *See New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985) (recognizing that "schools require[] a certain degree of flexibility in school disciplinary procedures") (citing *Ingraham v. Wright*, 430 U.S. 651, 680-82 (1977)); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969) ("[T]he Court has repeatedly emphasized the need for affirming the comprehensive authority of . . . school officials . . . to prescribe and control conduct . . . ."). Indeed, this Court has emphasized that federal court review of university disciplinary actions is "circumscribed," and "limited to determining whether the procedures used . . . were constitutional." *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 638 (6th Cir. 2005).

While Mr. Doe is entitled to due process, respectfully, neither Mr. Doe nor a federal court is empowered to write a state university's student misconduct policy.

See, e.g., *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006) ("[M]indful that our constitutional mandate and institutional competence are limited, we restrain ourselves from rewrit[ing] state law to conform it to constitutional requirements . . . .") (marks omitted); *United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 362 (6th Cir. 1998) ("We will not, however, rewrite the [state agency's] guidelines to cure their substantial infirmities.").

The Supreme Court's precedents establish that state actors retain flexibility in crafting constitutionally-compliant procedures. In *Bell v. Burson*, the Supreme Court reviewed a Georgia statute governing the suspension of uninsured motorists' driver's licenses and vehicle registrations when such motorists are involved in an accident. *See Bell v. Burson*, 402 U.S. 535, 535-36 (1971). The Court ruled that the administrative hearing conducted prior to a suspension violated due process because it excluded consideration of the motorist's fault, which was an important factor in the state's decision to deprive a motorist of his or her license. *Id.* at 536, 541-42. The Court then held that "before the State may deprive petitioner of his driver's license and vehicle registration it must provide a forum for the determination of the question whether there is a reasonable possibility of a judgment being rendered against him as a result of the accident." *Id.* at 542. However, the Court "deem[ed] it inappropriate . . . to do more than lay down this

requirement," because "[t]he alternative methods of compliance are several," and "[t]he area of choice is wide." *Id.* at 542-43. Instead, the Court held "only that the failure of the present Georgia scheme to afford the petitioner a prior hearing on liability of the nature we have defined denied him procedural due process in violation of the Fourteenth Amendment." *Id.* at 543.

Similarly, in *Freedman v. State of Maryland*, the Supreme Court held that the procedural scheme of a Maryland motion picture censorship statute failed "to provide adequate safeguards against undue inhibition of protected expression." *Freedman v. State of Md.*, 380 U.S. 51, 60 (1965). Although the Supreme Court discussed in dicta ways the state might remedy the statute's constitutional infirmities, the Court refused to dictate a remedy, stating instead that "[h]ow or whether Maryland is to incorporate the required procedural safeguards in the statutory scheme is, of course, for the State to decide." *See id.* at 60-61.

Here, the University has made a reasoned judgment that the Statement of Student Rights and Responsibilities is not well-suited for the sensitivities unique to claims of sexual misconduct. Within the bounds of due process, and following *Ayotte*, the district court should have shown deference to the manner in which the University elects to administer its academic mission and implement its disciplinary process. "Schools . . . have an unquestionably powerful interest in maintaining the safety of their campuses and preserving their ability to pursue their educational

mission." *Seal v. Morgan*, 229 F.3d 567, 574 (6th Cir. 2000). These interests are directly and particularly implicated in the efforts of universities to ensure students are protected from sexual misconduct, efforts mandated by federal law and the requirements of Title IX.[11] This Court should vacate the district court's order requiring the University to use the specific procedures in the Statement of Student Rights and Responsibilities and remand with instructions to permit the University to provide Mr. Doe the process he is due without dictating the University's choice in deciding how best to provide that process.

V. In the alternative, this Court should remand this action to the district court with instructions to evaluate Mr. Doe's claims under the University's to-be-issued procedures for handling allegations of student sexual misconduct in accord with *Baum*.

In the event this Court determines that the district court did not err in failing to address Mr. Doe's standing and in concluding that Mr. Doe's claims are ripe, the Court should remand this case with instructions to evaluate Mr. Doe's claims under the University's new policy. As noted above, the University no longer uses the Policy challenged in the district court. *See* note 1, *supra*. Instead, the University is developing a new policy that will be consistent with *Baum*. *See id*. Mr. Doe's

[11] Title IX requires educational institutions to take action to eliminate sexual harassment and sexual assault, prevent its recurrence, and address its effects. (*See* Office for Civil Rights ("OCR"), "Q&A on Campus Sexual Misconduct" (Sept. 2017), Exhibit 4 to Defendants' Response to Plaintiff's Motion, RE 21-1, Page ID # 455-461.) As relevant here, OCR requires colleges and universities to investigate and adjudicate complaints of sexual assault.

cross-appeal is moot to the extent it challenges the University's former Policy, which is no longer in use or at risk of being used. *See Ford v. Wilder*, 469 F.3d 500, 504 (6th Cir. 2006) ("[A] case is moot when the issues presented are no longer 'live' . . . .") (marks omitted); *see also id.* ("[A] federal court has no authority to render a decision upon moot questions or to declare rules of law that cannot affect the matter at issue.") (marks omitted); *cf. Nat'l Wildlife Fed'n*, 404 F. Supp. 2d at 1019 ("[T]he Sixth Circuit has repeatedly found to be moot claims negated by subsequent, permanent rule and policy adoptions by the government."); *Bench Billboard Co.*, 675 F.3d at 981 (explaining that "self-correction provides a secure foundation for a dismissal based on mootness so long as it appears genuine") (marks omitted); *Chaudhuri*, 130 F.3d at 235 (noting district court denied preliminary injunction because the university president changed the policy at issue and issued a statement confirming it); *Ky. Right to Life, Inc.*, 108 F.3d at 644 ("[T]he Supreme Court has routinely declared moot those claims effectively nullified by . . . amendment.").

Moreover, where the record below is stale and incapable of meaningful review because of a change in material facts, the most efficient course is to remand the case to the district court with instructions to develop the record in light of that change. *Neumann v. Neumann*, 684 F. App'x 471, 483 (6th Cir. 2017) (remand appropriate where "material facts underlying the district court's judgment have

changed during the appeal"); *City of Pontiac Retired Emps. Ass'n v. Schimmel*, 751 F.3d 427, 432-33 (6th Cir. 2014) (*en banc*) (per curiam) (where "factual considerations . . . have changed considerably during the pendency of [the] appeal," remand for examination of more developed record is "[t]he prudent course of action"); *Concerned Citizens of Vicksburg v. Sills*, 567 F.2d 646, 649-50 (5th Cir. 1978) (where "changes in fact or law occur[] during the pendency of a case on appeal," appellate court should remand for consideration of the changed circumstances) (quoting *Hawkes v. I.R.S.*, 467 F.2d 787, 793 (6th Cir. 1972)). Here, that means evaluating the University's new policy for compliance with this Court's precedential opinions in a manner that may obviate the need for appellate review. Indeed, to the extent that Mr. Doe is able to demonstrate standing and ripeness, he can challenge (or accept as sufficient) the University's new procedures, and this matter can proceed to the underlying administrative process that this lawsuit has delayed.

In sum, circumstances have changed and the record below is no longer applicable to the claims being asserted below or on appeal. The proper course is to remand the matter to the district court for further development of the record and adjudication of any ripe claims in the first instance. Such a remand is appropriate only if this Court first determines that the district court did not err in failing to address Mr. Doe's standing and in concluding that Mr. Doe's claims are ripe.

Federal courts have an independent duty to satisfy themselves that they have jurisdiction over an action, especially when their jurisdiction is called into doubt. *See Douglas*, 150 F.3d at 606–07 ("The first and fundamental question presented by every case brought to the federal courts is whether it has jurisdiction to hear a case, even where the parties concede or do not raise or address the issue."); *Airline Prof'ls Ass'n*, 332 F.3d at 986 ("Article III courts have an independent obligation to determine whether subject matter jurisdiction exists."); *FW/PBS, Inc.*, 493 U.S. at 230–31 (same); *Am. Telecom Co.*, 501 F.3d at 537 ("Subject matter jurisdiction is always a threshold determination."); *Steel Co.*, 523 U.S. at 101 (there is no "doctrine of 'hypothetical jurisdiction' that enables a court to resolve contested questions of law when its jurisdiction is in doubt"); *Allstate Ins. Co.*, 32 F. Supp. 3d at 859 ("[T]he Court must first address the issue of subject matter jurisdiction as raised by Defendant . . . .").

CONCLUSION

The University respectfully requests that the Court: (1) vacate the district court's order granting, in part, Mr. Doe's motion for temporary restraining order and preliminary injunction; and (2) remand this matter to the district court with instructions to dismiss this civil action in its entirety for lack of subject matter jurisdiction; or (3) in the alternative, vacate the district court's order and remand this action to the district court with instructions to hold the civil action in abeyance

until the University publishes its new student conduct procedures for claims of sexual misconduct, so that the district court may evaluate Mr. Doe's claims in light of the University's new procedures and consistent with this Court's decision in *Baum*.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using 14-point Times New Roman font in Microsoft Word.

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure and the Court's Order dated October 23, 2018 because this brief contains 10,678 words, excluding the parts of the brief exempted by Rule 32(f) of the Federal Rules of Appellate Procedure and Rule 32(b)(1) of this Court's Circuit Rules.

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Dated: November 7, 2018

CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2018, I electronically filed the foregoing brief with the Clerk of the Court using the CM/ECF system, which will serve all registered parties.

Respectfully submitted,

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DESIGNATION OF RELEVANT ORIGINATING DISTRICT COURT DOCUMENTS

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RE 2	06/04/2018	*Ex Parte* Motion to Proceed Under Pseudonym	95-108
RE 4	06/05/2018	Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction	133-162
RE 21	06/15/2018	Defendants' Response to Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction	302-336
RE 21-1	06/15/2018	Declaration of Suzanne Q. McFadden, Exhibit 2 to Defendants' Response to Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction	385-395
RE 21-1	06/15/2018	Office for Civil Rights, "Q&A on Campus Sexual Misconduct" (Sept. 2017), Exhibit 4 to Defendants' Response to Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction	454-461
RE 28	06/29/2018	First Amended Complaint and Demand for Jury Trial	570-604
RE 28-2	06/29/2018	Exhibit B to First Amended Complaint, The University of Michigan Policy and Procedures on Student Sexual and Gender-Based Misconduct and Other Forms of Interpersonal Violence	621-664

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