IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

No. D068901

JOHN DOE,

Plaintiff and Respondent,

v.

REGENTS OF THE UNIVERSITY OF CALIFORNIA,

Defendant and Appellant.

On Appeal from the Superior Court of San Diego County
(Case No. 37-2015-00010549-CU-WM-TL,
Honorable Joel M. Pressman, Judge)

AMICUS CURIAE BRIEF OF FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION IN SUPPORT OF PLAINTIFF AND RESPONDENT

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, APPELLATE DISTRICT, DIVISION	Court of Appeal Case Number: D068901
ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Cynthia P. Garrett (SBN 106218) 3658 Warner Street, San Diego, CA 92106-3245 TELEPHONE NO.: (619) 220-6640 FAX NO. (Optional): E-MAIL ADDRESS (Optional): cgarrett101@gmail.com ATTORNEY FOR (Name): Foundation for Individual Rights in Education	Superior Court Case Number: 37-2015-00010549-CU-WM-TL FOR COURT USE ONLY
APPELLANT/PETITIONER: Regents of the University of California RESPONDENT/REAL PARTY IN INTEREST: John Doe	

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Check one): ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE

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Date: August 1, 2016

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I.
INTRODUCTION

This case concerns whether the University of California, San Diego (UCSD) afforded a student a fair process before finding him responsible for sexual misconduct. But the implications of this court's decision will reach far beyond UCSD and even the state of California. Around the country, lawsuits by students accused of sexual misconduct on campus are slowly working their way through the judiciary. More than 110 such suits have been filed since the Department of Education's Office for Civil Rights (OCR) issued its Title IX "Dear Colleague" letter on April 4, 2011.[1] At least 26 such suits have been filed in 2016 alone.[2] Because this area of the law is so rapidly emerging, every decision is of critical importance to the many students nationwide effectively branded as sex offenders without so much as a hearing. While universities often argue that campus sexual misconduct proceedings are simply educational in nature, the reality is that students found responsible for such conduct face serious and lifelong consequences.

The hearing afforded to Respondent by UCSD suffered from serious, invalidating deficiencies. In correctly ruling that the Respondent in this case was denied a fair hearing, the lower court relied heavily on the fact that the Respondent's right of confrontation was significantly curtailed. Among other things, the court was deeply troubled by the hearing panel's substantial reliance on the report of UCSD's investigator, Elena Dalcourt, because Dalcourt did not testify at the hearing. In relying on Dalcourt's finding of responsibility, the court found that the hearing panel "improperly

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[1] Samantha Harris & Ari Cohn, *Lawsuits Filed by Students Accused of Sexual Misconduct* (July 19, 2016) (unpublished research) (on file with author).

[2] *Id*.

delegate[d]" its own duty to determine responsibility. (Appellant's Appendix at 719–20 (hereafter "AA").) The court also held that UCSD "unfairly limited" the Respondent's ability to confront his accuser. *Id.*

Too many campus hearings nationwide suffer from these same fatal defects. This court's decision about the fairness of UCSD's process will have national significance because of the growing use, on campuses around the country, of a so-called "single investigator" model to resolve cases of sexual misconduct. Under the "single investigator" model, "a trained investigator or investigators interview the complainant and alleged perpetrator, gather any physical evidence, interview available witnesses, and then either render a finding, present a recommendation, or even work out an acceptance-of-responsibility agreement with the offender."[3] Under such a system, one person (or one small group of people) acts as detective, prosecutor, judge, and jury—and an accused student's ability to confront his or her accuser is severely curtailed.

By affirming the ruling of the Superior Court, this Court would establish the importance of a meaningful right to cross-examination in cases such as this one, which turn almost entirely on the credibility of the parties. As universities around the country do away with hearings in sexual misconduct cases in favor of total reliance on investigators such as Dalcourt, such a ruling from this Court could not be more timely and necessary.

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[3] WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT, REPORT: NOT ALONE (Apr. 2014), https://www.notalone.gov/assets/report.pdf.

II.
DUE PROCESS IS OF CRITICAL IMPORTANCE IN CAMPUS SEXUAL MISCONDUCT PROCEEDINGS

A. *A Finding of Responsibility for Sexual Misconduct, Even Within a Campus Court, Carries Life-altering Consequences*

While many supporters of the current structure for campus sexual misconduct adjudication argue that additional protections are unnecessary because the process is merely "academic" or "educational," this argument ignores the reality of the tremendous (and well-deserved, when someone is found responsible after a fair process) stigma of being labeled a sexual offender.[4] As one federal court recently wrote, allegations of campus sexual misconduct are often also "accusations that constitute serious felonies under virtually every state's laws." *Doe v. Brown Univ.*, No. 15-cv-144-S, 2016 U.S. Dist. LEXIS 21027, at *12 (D.R.I. Feb. 22, 2016). As another court put it, such a finding "may permanently scar [a student's] life and career," as he or she would be "marked for life as a sexual predator." *Doe v. Brandeis Univ.*, No. 15-cv-115577-FDS, 2016 U.S. Dist. LEXIS 43499, at *15, *109 (D. Mass. Mar. 31, 2016).

Yale University alumnus Patrick Witt wrote about these consequences in a *Boston Globe* editorial protesting Harvard University's

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[4] Association for Student Conduct Administration, ASCA 2014 White Paper: Student Conduct Administration & Title IX: Gold Standard Practices for Resolution of Allegations of Sexual Misconduct on College Campuses (2014), http://www.theasca.org/Files/Publications/ASCA%202014%20White%20Paper.pdf ("While television shows such as Law and Order might be the only frame of reference that parents, students, and others may have, we must teach them that campus proceedings are educational and focus on students' relationships to the institution.")

adoption of a broad sexual harassment policy.[5] According to Witt, a fellow student accused him of sexual misconduct via an "informal complaint" mechanism available at Yale. Because the complaint was made informally, Witt was not entitled to the details of the accusations against him. The university undertook no formal investigation, despite Witt's request that the university do so in order to allow him to clear his name. As a result of the accusation, Witt wrote, he lost his Rhodes scholarship, an offer of employment, as well as the opportunity to play in the NFL:

> The complaint lodged against me caused me and my family immense grief, and as a simple Google search of my name reveals, its malignant effects have not abated. It cost me my reputation and credibility, the opportunity to become a Rhodes scholar, the full-time job offer I had worked so hard to attain, and the opportunity to achieve my childhood dream of playing in the NFL. I have had to address it with every prospective employer whom I've contacted, with every girl that I've dated since, and even with Harvard Law School during my admissions interview. It is a specter whose lingering presence is rooted in its inexplicability.

If Witt committed sexual misconduct, it could be argued that these consequences were appropriate, even insufficient. But the impact of the allegation alone demonstrates the critical importance of ensuring a reliable process within campus conduct proceedings.

Witt is far from alone in having experienced serious consequences from an allegation of sexual misconduct on campus. In 2010, Caleb Warner was suspended from the University of North Dakota (UND) for three years and banned from campus after he was found responsible for sexual misconduct in a campus proceeding. Warner's accuser had also reported the

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[5] Patrick Witt, *A Sexual Harassment Policy That Nearly Ruined My Life*, BOSTON GLOBE (Nov. 13, 2014), https://www.bostonglobe.com/opinion/2014/11/03/sexual-harassment-policy-that-nearly-ruined-life/hY3XrZrOdXjvX2SSvuciPN/story.html.

alleged assault to the Grand Forks Police Department, and after an investigation, the police department charged her with filing a false report with law enforcement and issued a warrant for her arrest. Based on this development, Warner asked UND to rehear the sexual misconduct case against him, but the university declined to do so. Nearly a year and a half later, after extensive media coverage of Warner's situation, the university finally cleared him of the charges.[6] But to this day, Warner has not returned to UND or any other college to finish his degree.[7]

Many of the legal complaints brought by accused students for alleged due process violations further illustrate the impact of a finding of responsibility for sexual misconduct, even "just" from a campus judiciary. After the University of Findlay found students Alphonso Baity and Justin Browning responsible for sexual assault—through a process in which, Baity and Browning allege, the university held no hearing and did not even interview the complainant[8]—the university released their names to the media, stating that they had been expelled for sexual assault.[9] A Google search of either student's name prominently reveals the sexual assault

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[6] Press Release, Foundation for Individual Rights in Education, Victory for Due Process: Student Punished for Alleged Sexual Assault Cleared by University of North Dakota; Accuser Still Wanted for Lying to Police (Oct. 18, 2011), https://www.thefire.org/victory-for-due-process-student-punished-for-alleged-sexual-assault-cleared-by-university-of-north-dakota-accuser-still-wanted-for-lying-to-police-2.

[7] Timothy Bella, *Falsely Accused of Rape?*, AL JAZEERA AMERICA: FLAGSHIP BLOG (Oct. 31, 2013, 11:34 AM), http://america.aljazeera.com/watch/shows/america-tonight/america-tonight-blog/2013/10/31/for-the-falsely-accusedmovingonfromrapistbrandingachallenge.html.

[8] Compl. at 23, *Browning v. Univ. of Findlay*, No. 3:15-cv-02689 (N.D. Ohio Dec. 23, 2015).

[9] Vanessa McCray, Two Student-Athletes Expelled from University of Findlay After Sexual Assault Investigation, BLADE (Oct. 6, 2014).

finding against them, despite the fact that neither student was ever arrested for or charged with any crime. It is not difficult to imagine the impact that information will have on these students' future academic and career prospects. Indeed, their complaint against the university alleges:

> As a mere example of the damage done by Defendants, Browning has thus far been denied entrance to at least two universities – University of Mount Union in Alliance, Ohio, and Ohio Northern University in Ada, Ohio – as a direct and proximate result of the Defendants' misconduct. Baity, who was being recruited by a prominent Division I basketball program, was denied entrance to school as a direct and proximate result of the Defendants' misconduct.[10]

Lanston Tanyi, a former Appalachian State University football player who sued the university for alleged due process violations in his campus sexual misconduct hearing, alleges that "[a]s he packed his bags to come to [the Carolina Panthers' NFL training camp in] Charlotte, his agent called to say the Panthers discovered 'conduct' concerns in Plaintiff's background. The only conduct issues in his past were these two rape allegation [sic]."[11]

Similarly, in a federal complaint against Butler College in Indiana, a student found responsible for sexual misconduct alleges that in the aftermath, "he applied to seven (7) colleges, and [has] been rejected by all seven—and in each and every case, the reason he was not accepted was the evidence of his expulsion from BUTLER, and the reason therefor."[12]

The stakes are high for students accused of sexual misconduct and tried before campus tribunals. As a judge recently noted in denying

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[10] *Browning* Compl. at 31, *supra*, note 8.

[11] Compl. at 20, *Tanyi v. Appalachian St. Univ*., No. 5:14-cv-00170, 2015 U.S. Dist. LEXIS 95577 (W.D.N.C. July 22, 2015).

[12] Compl. at 5, *Doe v. Butler Univ.*, No. 1:16-cv-01266 (S.D. Ind. May 23, 2016).

Brandeis University's motion to dismiss a lawsuit alleging denial of fundamental fairness in an on-campus sexual misconduct proceeding:

> [A] Brandeis student who is found responsible for sexual misconduct will likely face substantial social and personal repercussions. It is true that the consequences of a university sanction are not as severe as the consequences of a criminal conviction. Nevertheless, they bear some similarities, particularly in terms of reputational injury. Certainly stigmatization as a sex offender can be a harsh consequence for an individual who has not been convicted of any crime, and who was not afforded the procedural protections of criminal proceedings.

Doe v. Brandeis Univ., 2016 U.S. Dist. LEXIS 43499 at *93.

These life-altering consequences are likely to become even more severe due to growing support, among various states and associations, for laws requiring special notations on the transcripts of students found responsible for sexual assault.[13] Virginia and New York already have such laws. In Virginia, for example, universities are required to include a "prominent notation" on the transcript of any student who is found responsible for sexual assault (or who withdraws during the course of a sexual assault investigation) "stating that such student was suspended for, was permanently dismissed for, or withdrew from the institution while under investigation for an offense involving sexual violence under the institution's code, rules, or set of standards."[14] Mandatory transcript notation is not yet a reality in California, but a transcript-notation bill—A.B. 968—did pass the California legislature in 2015 before being vetoed

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[13] Jake New, *Requiring a Red Flag*, INSIDE HIGHER ED (Jul. 10, 2015), https://www.insidehighered.com/news/2015/07/10/states-requiring-colleges-note-sexual-assault-responsibility-student-transcripts.

[14] Va. Code § 23-9.2:15 (2015).

by Governor Jerry Brown.[15] In Maryland, a similar bill was introduced but failed, in part because of opposition from the Maryland Coalition Against Sexual Assault, which noted:

> MCASA believes this would have the unintended consequence of turning transcripts into a form of sex offender registry and, in turn, would necessitate turning college disciplinary proceedings into fully litigated trials. Survivors would not be helped by this practice.[16]

If a *de facto* sex offender registry for college students is to be constructed, it is all the more critical that procedural protections be in place to ensure trustworthy results. But of course, in the states where such a *de facto* registry already exists, colleges are not holding full-dress judicial hearings to determine guilt. Rather, students are being branded for life without any of the protections that would be afforded to them in the criminal justice system.

Any student who has actually committed a sexual assault on campus should, without a doubt, face severe consequences. But those consequences underscore the crucial importance to all parties of a fair and reliable process for determining guilt or innocence.

B. *Due Process Is of Great Importance for Victims and the Accused*

Though procedural protections are generally described as inuring to the benefit of the accused, they are in fact vital for victims and the entire campus community. Without the fairness and reliability that the procedural

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[15] Andrew Morse et al., *State Legislative Developments on Campus Sexual Violence: Issues in the Context of Safety* (Dec. 2015), https://www.naspa.org/images/uploads/main/ECS_NASPA_BRIEF_DOWNLOAD3.pdf.

[16] Maryland Coalition Against Sexual Assault, *2015 Legislative Priorities - Final Report* 7, http://www.mcasa.org/_mcasaWeb/wp-content/uploads/2010/09/Legislative-Report-2015-Final.pdf.

protections of due process safeguard, public confidence and trust in the adjudicatory system erode, leaving all students less likely to participate in it, among other ill effects.[17]

When procedurally flawed processes are used to adjudicate campus sexual assault allegations, students found responsible can and will avail themselves of legal remedies to set aside those findings. In cases where those students are in fact responsible, victims of sexual assault are betrayed and re-victimized, and a potential predator is left free to roam campus.

In 2012, the University of Michigan found a student responsible for sexual assault through four separate university processes and removed him from campus for four years. Yet, after procedural defects at each stage of these processes, the accused student filed a lawsuit against the university alleging that he had not been provided with constitutionally mandated due process. As a result of its settlement with the accused student, the university threw out its findings of responsibility. Reacting to the settlement, the alleged victim's attorney expressed dismay that the university agreed to reverse its findings because of its own procedural errors:

> Today, the university has surrendered and turned its back on our client, apparently because of its own technical mistakes.

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[17] *See* Tracey L. Meares, *Everything Old Is New Again: Fundamental Fairness and the Legitimacy of Criminal Justice*, 105 OHIO ST. J. CRIM. L. 105, 108 (2005) ("The public is much more likely to support and participate in the criminal justice process and support those officials who run it when the public believes that the process is run fairly. If the American public does not perceive its criminal justice system to be fair, negative consequences can result. Diminished public support for the criminal justice system, taken to the extreme, can lead to diminished respect for the law and, thereby, less compliance with the law."); Lawrence W. Sherman, *Trust and Confidence in Criminal Justice*, 248 NAT. INST. JUST. J. 23, 30 (2001) ("[D]ata suggest that fairness builds trust in the criminal justice system and that trust builds compliance with the law. Thus, what is more fair is more effective, and to be effective it is necessary to be fair.").

> Blindsided and betrayed, our client is more damaged from having reported the assault to the university than if she had not come forward at all.[18]

Properly conceived, due process protects both the accused's interest in not being wrongly found responsible for an act he or she did not commit, as well as the community's interest in ensuring trustworthy decisions that can be relied upon to protect its wellbeing. The severity of sexual misconduct and the importance of reducing its prevalence on the campuses of our nation's colleges and universities leave no room for faulty procedures, such as the ones used in the instant case, that taint the entire system's reliability and integrity.

III.
DUE PROCESS IN CAMPUS SEXUAL MISCONDUCT ADJUDICATIONS REQUIRES A MEANINGFUL RIGHT OF CONFRONTATION

A. *Schools Are Increasingly Adopting Procedures That Deny Students the Right of Confrontation*.

In ruling that the hearing against the Respondent "was unfair," the Superior Court was particularly concerned with the hearing panel's extensive reliance on UCSD investigator Elena Dalcourt's report. Neither Dalcourt nor any of the 14 witnesses she interviewed were present at the hearing, nor was the Respondent given access to the interview statements of his accuser. (AA at 719–20.) Moreover, the court was deeply troubled by the weight given by the panel to Dalcourt's finding of responsibility:

> The panel stated that Ms. Dalcourt conducted an investigation and concluded that it was more likely than not that petitioner violated the policy. However, it was the *panel's* responsibility

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[18] David Jesse, *U-M drops nonconsensual sex finding to settle suit*, DETROIT FREE PRESS (Sept. 12, 2015, 11:13 AM), http://www.freep.com/story/news/local/michigan/2015/09/12/u-m-drops-nonconsensual-sex-finding-settle-suit/72145304.

> to determine whether it was more likely than not that petitioner violated the policy and not defer to an investigator who was not even present to testify at the hearing. "Due process requires that a hearing… 'be a real one, not a sham or pretense.'"

(AA at 719)(internal citations omitted.) Unfortunately, real hearings are becoming less and less common as universities around the country instead adopt some variation of a "single investigator" model. In many cases, institutions have adopted systems similar to UCSD's, wherein an investigator does the lion's share of the work and recommends a finding of responsible or not responsible. The finding is then finalized after a nominal hearing at which the panel relies primarily upon the investigator's report.

At Brown University, for example, the policy refers to a "hearing panel," but in reality, the accuser and accused student's role in the "hearing" is limited to providing the panel with a written and an oral statement. Although the hearing panel has the opportunity to meet with the investigator and ask questions related to his or her investigative report, the parties are given no such opportunity.[19]

Last year, Pennsylvania State University also adopted an investigative system for claims of sexual assault on campus, noting that "[t]he approach is the one supported by the White House Task Force to Protect Students from Sexual Assault."[20] Similar to UCSD's policy, Penn State's policy provides that a final determination is made by a Title IX

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[19] Brown University, Title IX and Gender Equity Complaint Process: Complaints Against Students, https://www.brown.edu/about/administration/title-ix/complaints/complaints-against-students.

[20] PENN STATE NEWS, *University implements new model for investigating sexual assault cases* (Apr. 29, 2015), http://news.psu.edu/story/355163/2015/04/29/administration/university-implements-new-model-investigating-sexual-assault.

Decision Panel that relies heavily on the findings and recommendations of Penn State's investigator. Although the Panel meets with the investigator, the accuser and accused are not given the opportunity to ask questions of the investigator.[21]

Recently, courts have begun to express concern about these systems. In *Prasad v. Cornell University*, a student found responsible for sexual misconduct challenged the fairness of a process that, much like UCSD's, turned almost entirely on an investigator's report and recommendations.[22] In denying Cornell's motion to dismiss, the judge noted that Prasad had "little meaningful opportunity to challenge the investigators' conclusions or their rendition of what witnesses purportedly stated," and held:[23]

> Plaintiff presents facts plausibly suggesting that the fact finders' determinations turned on the investigators' report of the evidence. When accepting Plaintiff's allegations that the investigators intentionally misconstrued and misrepresented critical exculpatory evidence, as the Court must do on this motion, Plaintiff presents facts casting an articulable doubt on the accuracy of the outcome of his disciplinary proceeding.

Similarly, in *Doe v. Brandeis University*, the district court judge denying Brandeis' motion to dismiss expressed significant concern about Brandeis' use of a single investigator system:[24]

> The dangers of combining in a single individual the power to investigate, prosecute, and convict, with little effective power of review, are obvious. No matter how well-intentioned, such a person may have preconceptions and biases, may make mistakes, and may reach premature conclusions.

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[21] Pennsylvania State University, *Code of Conduct & Student Conduct Procedures*, http://studentaffairs.psu.edu/conduct/Procedures.shtml.

[22] Decision & Order, No. 15-cv-00322-TJM-DEP, at 32 (N.D.N.Y. Feb. 24, 2016).

[23] *Id.*

[24] *Doe v. Brandeis Univ.*, 2016 U.S. Dist. LEXIS 43499, at *106–107.

And in a decision that was publicly available before the case was recently sealed, a federal judge in the Northern District of Georgia expressed deep concerns with the Georgia Institute of Technology's single-investigator system in his opinion denying the university's motion to dismiss a student's claim that he was denied due process in a campus sexual misconduct case.[25]

Despite these concerns, however, single-investigator systems continue to proliferate, and students are facing lifelong consequences without ever being given an opportunity to meaningfully defend themselves. This court has an opportunity to address these failings in the instant case.

B. *Although Due Process Requirements Are More Flexible in the Campus Judicial Setting, a Meaningful Right of Confrontation Is Necessary in the Context of Sexual Misconduct Cases*

i. Due Process Standards Fluctuate According to the Circumstances and Stakes of the Case

Courts have recognized that due process standards fluctuate according to the circumstances and stakes of the particular case. *See Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands."); *Gorman v. Univ. of R.I.*, 837 F. Supp. 2d 7, 12 (1st Cir. 1988) ("Due process, which may be said to mean fair procedure, is not a fixed or rigid concept, but, rather, is a flexible standard which varies depending upon the nature of the interest affected, and the circumstances of the deprivation."). Because of the life-altering consequences of campus sexual assault adjudications discussed above, care must be taken to ensure that

[25] *Doe v. Bd. of Regents of the Univ. Sys. of Ga.*, No. 1:15-cv-04079 (N.D. Ga. Apr. 29, 2016).

decisions offer sufficient due process protections so as to be fair and reliable.

With respect to non-academic student disciplinary proceedings, courts have been particularly sensitive to those cases in which students stand accused of behavior that would amount to a crime. *See Gomes v. Univ. of Maine Sys.*, 365 F. Supp. 2d 6, 16 (D. Me. 2005) ("A university is not a court of law and it is neither practical nor desirable it be one. Yet a public university student who is facing serious charges of misconduct that expose him to substantial sanctions should receive a fundamentally fair hearing. In weighing this tension, the law seeks the middle ground."). In *Smyth v. Lubbers*, 398 F. Supp. 777 (W.D. Mich. 1975), a case involving students accused of marijuana possession—certainly a crime less severe than sexual assault—the court noted:

> This case is among the most serious ever likely to arise in a college context. In the interest of order and discipline, the College is claiming the power to shatter career goals, and to make advancement in our highly competitive society much more difficult for an individual than it already is.

Id. at 797. Accordingly, the court stated that "[i]t is in light of the high stakes involved that the Court must determine" whether the due process afforded the accused students met constitutional standards. *Id*.

Cases of sexual misconduct, as explained above, involve the highest stakes possible in the college disciplinary context. Students found responsible suffer tangible and extensive repercussions that extend far beyond campus. It is these stakes, and the unique nature of campus sexual assault hearings, that this court must consider in determining the level of procedural fairness owed to accused students.

Campus adjudications of sexual misconduct require more trial-like procedural protections for the accused than might other types of cases not only because of the stakes involved but also because these cases typically

arise "in an environment in which there are seldom, if any, witnesses to an activity which requires exposing each party's most private body parts." *Mock v. Univ. of Tenn. at Chattanooga*, No. 14-1687-II, at 12 (Tenn. Ch. Ct. Aug. 10, 2015). As a result, the crux of these adjudications is often the credibility of parties and witnesses. Because cases decided on credibility assessments are fraught with the risk of error, more formal procedural protections are appropriate to safeguard against erroneous outcomes. *See Ingraham v. Wright*, 430 U.S. 651, 676–78 (1977) (finding that, with respect to corporal punishment in schools, there is a "typically insignificant" risk of error because paddlings are "usually inflicted in response to conduct directly observed by teachers in their presence" and therefore "advance procedural safeguards" were not required).

ii. Cross-examination Is Critical in the Context of Campus Sexual Misconduct Adjudications

In cases where a decision rests primarily on credibility determinations, cross-examination—"the greatest legal engine ever invented for the discovery of truth"—is of utmost importance. *Lilly v. Virginia*, 527 U.S. 116, 124 (1999) (internal quotation marks and citations omitted).

While cross-examination is not a procedural protection required in *all* student disciplinary cases, *Newsome v. Batavia Local Sch. Dist.*, 842 F.2d 920, 925 (6th Cir. 1988), courts have cautioned that it may properly be required in disciplinary cases resting primarily upon credibility issues, especially where the stakes are high.[26] Indeed, as the United States Court of

[26] *See Winnick v. Manning*, 460 F.2d 545, 550 (2d Cir. 1972) ("[I]f this case had resolved itself into a problem of credibility, cross-examination of witnesses might have been essential to a fair hearing."); *Furey v. Temple Univ.*, 730 F. Supp. 2d 380, 397–98 (E.D. Pa. 2010) ("In this case, where the credibility of Officer Wolfe was critical and the plaintiff was claiming perjury by Officer Wolfe, counsel with the right to cross

Appeals for the Sixth Circuit has noted, where a case rests on the "choice between believing an accuser and an accused . . . cross-examination is not only beneficial, *but essential to due process*." *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 641 (6th Cir. 2005) (emphasis added).

In *Donohue v. Baker*, 976 F. Supp. 136 (N.D.N.Y. 1997), a case resembling the case now before this Court, a student faced disciplinary charges for sexual misconduct and "threaten[ing] or endanger[ing] the health or safety of any person" based on allegations that he had sexually assaulted a fellow student. *Id*. at 140. At the hearing, the Vice President for Student Affairs prohibited the accused student from cross-examining the complainant, citing the sensitive nature of the proceedings and the desire to prevent additional trauma to the complainant. Noting that the accused student's due process rights could not be infringed based on the sensitivity of the proceeding, the court found:

> [I]f a case is essentially one of credibility, the cross-examination of witnesses might be essential to a fair hearing. In the instant case, the disciplinary hearing became a test of the credibility of plaintiff's testimony versus the testimony of defendant Scott. . . . [T]he plaintiff here faced expulsion and procedures necessarily had to take on a higher level of formality to ensure fairness. At the very least, in light of the disputed nature of the facts and the importance of witness credibility in this case, due process required that the panel permit the plaintiff to hear all evidence against him and to direct questions to his accuser through the panel.

Id. at 147. Similarly, the court in *Doe v. Brandeis University* noted:

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examine the witnesses would have been helpful. It also may have removed doubts about the fairness of the hearing described above. If an institution decides not to allow counsel or cross examination to avoid an adversarial hearing and the additional administrative burden and cost, it must make sure that the hearing it does provide is fair and impartial. This obligation takes on more force when expulsion is the penalty.") (internal citations omitted).

> [T]here were essentially no third-party witnesses to any of the events in question, and there does not appear to have been any contemporary corroborating evidence. The entire investigation thus turned on the credibility of the accuser and the accused. Under the circumstances, the lack of an opportunity for cross-examination may have had a very substantial effect on the fairness of the proceeding.

2016 U.S. Dist. LEXIS 43499, at *101.

In his hearing at UCSD, Respondent Doe was afforded only a very limited opportunity to confront and cross-examine both his accuser and witnesses against him. As noted by the Superior Court, the university deprived Doe of the rights of confrontation and cross-examination vital to establishing a defense by introducing and relying upon its investigator's report without making the investigator, or any of the witnesses (aside from the complainant) whose testimony the report was based upon, available for questioning by the panel or Doe. (AA at 719–20.)[27] As more institutions adopt this investigatory model, as discussed *supra* at pp. 18–21, students accused of serious misconduct regularly find themselves without access to the most reliable and necessary mechanism to challenge those assertions or the reliability of the individuals making them. *See Davis v. Alaska*, 415 U.S. 308, 316 (1974) ("Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested.").

Doe was also required to submit any questions in writing, to be reviewed by the panel chair, who would then ask some form of whichever questions he felt appropriate. (AA at 718.) While the university claims that

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[27] The *Brandeis* court similarly criticized the denial of the right to confrontation inherent in the single investigator model: "[T]he Special Examiner nonetheless interviewed, and relied to some degree, on the testimony of witnesses other than [the accuser]. [The accused student] was not provided an opportunity to cross-examine any of those witnesses, or indeed be advised of the substance of their testimony." 2016 U.S. Dist. LEXIS 43499, at *102–03.

this arrangement preserved Doe's ability to adequately confront the complainant (Appellant's Opening Brief at 29–31), the Superior Court properly expressed concern regarding the heavy-handed and uneven filtering of questions directed to the complainant. (AA at 718.) In particular, the court noted that the hearing panel chair "allowed restricted answers and prevented any follow-up that may have been necessary for petitioner to make his defense." (*Id.* at 719.) Indeed, in discarding a large number of questions, the panel effectively prevented Doe from engaging in lines of inquiry that might have led to the exposure of inconsistent testimony, or immediate follow-up questions that may have been pertinent.

UCSD claims that allowing Doe himself to cross-examine the complainant would result in her re-victimization, which the university has a strong interest in preventing. (Opening Brief at 29.) But the protection of an alleged victim from re-victimization and the protection of an accused student's due process rights need not be in tension. By permitting each student to utilize the active assistance of counsel, an accused student's right to engage in meaningful and effective cross-examination can be preserved without subjecting a victim to direct questioning by his or her assailant. Had UCSD afforded these students that right, cross-examination would be undertaken by counsel rather than the student accused of perpetrating the assault, and the complainant would be protected by his or her own counsel's ability to request that the hearing panel set reasonable limits on the topics and manner of the cross-examination.

Allowing students—both complainants and the accused—to benefit from the active representation of counsel during sexual assault hearings is entirely consistent with federal laws and regulations, and it would

drastically increase the reliability and fairness of such adjudications.[28] Universities should not be simultaneously allowed to prohibit students from active representation by counsel and, as a result of the consequences of this decision, reduce other important procedural protections necessary to preserving the integrity of the campus adjudication.

iii. The U.S. Department of Education's Mandate to Use the Lowest Standard of Proof Increases the Importance of Additional Procedural Safeguards

In *Smyth*, the court noted that the importance of examining the procedural protections afforded—in that case, the standard of proof applied—was "all the more crucial to fundamental fairness where, as in the college context, there are few constitutional or practical limitations on the nature of the evidence which may be admitted against the accused." 398 F. Supp. at 797. The converse is equally true: Where a low standard of proof is used in resolving serious allegations against a student, the importance of other procedural protections rises dramatically. Unfortunately, in recent years the procedural safeguards provided to students facing allegations of

[28] Such an approach is permitted by the Violence Against Women Reauthorization Act of 2013 and its accompanying regulations. The legislation requires university policies to afford "the same opportunities to have others present during an institutional disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding by an advisor of their choice[.]" Campus Sexual Violence Elimination Act, Pub. L. No. 113-4, 127 Stat. 91 (2013). The regulations promulgated by the United States Department of Education further prohibit universities from preventing students from choosing an attorney as an advisor and do not require universities to prohibit active participation of such advisors in proceedings provided that the advisor for each party has the same ability to participate. Institutional security policies and crime statistics, 34 C.F.R. § 668.46(k)(2)(iii)–(iv) (2014).

serious non-academic misconduct on campus have been greatly diminished across the board.[29]

UCSD uses the judiciary's lowest standard of proof—the preponderance of the evidence—in resolving allegations of sexual assault, as mandated by a 2011 "Dear Colleague" letter from the United States Department of Education's Office for Civil Rights (OCR) to institutions of higher education receiving federal funding.[30] OCR and its supporters proffer that the preponderance standard is used to resolve civil cases and is therefore appropriate for the resolution of these administrative hearings. But while the preponderance standard is used to decide most civil cases in federal court, litigants are afforded a broad range of procedural safeguards in order to ensure that a decision rendered based on 50.01% of the evidence is both fair and reliable. Such safeguards include experienced and impartial judges, the right to be represented by counsel, discovery, rules of evidence, sworn testimony and depositions, and the ability to cross-examine witnesses.

Imposing all of the rigors of our criminal justice and civil legal systems on campus tribunals might be, as many courts have noted,

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[29] *See* Joseph Cohn, *Campus Is a Poor Court for Students Facing Sexual-Misconduct Charges*, CHRON. HIGHER EDUC. (Oct. 1, 2012) http://chronicle.com/article/Campus-Is-a-Poor-Court-for/134770 ("Without any of the safeguards designed to increase the reliability and fairness of civil trials, the risk of erroneous findings of guilt increases substantially, especially when a fact finder is asked to decide only if it is merely 50.01 percent more likely that a sexual assault occurred. The absence of the [procedural] protections listed above makes the preponderance standard inappropriate and renders the comparison of campus sexual-misconduct hearings to civil suits in federal court inexact.").

[30] Letter from Russlynn Ali, Assistant Sec'y for Civil Rights, United States Dep't of Educ. (Apr. 4, 2011), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html.

impractical and cumbersome. Indeed, for this reason, sexual assault allegations—among the most serious claims our society recognizes—are better resolved by the judiciary, which has the expertise and authority to ensure fair and reliable outcomes. But to the extent that campus administrators must undertake the resolution of these types of allegations, great care must be taken to ensure a proper balance between the rights of the accused and the administrative or logistical interests of the university.

IV.
CONCLUSION

This is a rapidly emerging area of law. Since OCR issued its April 4, 2011 "Dear Colleague" letter, kicking off a still-ongoing period of aggressive federal intervention into the inner workings of university judicial systems, more than 110 male students have filed lawsuits alleging deprivations of due process in campus sexual misconduct proceedings. Many of these lawsuits are still pending, with new suits being filed frequently. As a result, each decision issued in one of these cases is of critical importance and has a direct impact on the rights of students around the country.

More guidance from the courts is desperately needed. Nowhere is this truer than on the question of an accused student's right to meaningfully confront his accuser and the witnesses against him. To help ensure fair, reliable hearings and just outcomes for all students, including those involved in the instant case, FIRE urges this court to uphold the decision of the Superior Court.

DATED: August 1, 2016

Respectfully submitted,

/s/Cynthia P. Garrett

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Attorney for Amicus Curiae
FOUNDATION FOR INDIVIDUAL
RIGHTS IN EDUCATION

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the forgoing *Amicus Curiae* Brief of Foundation for Individual Rights in Education in Support of Plaintiff and Respondent is proportionately spaced, has a typeface of 13 points or more, and contains 6,041 words.

DATED: August 1, 2016

/s/Cynthia P. Garrett

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Attorney for Amicus Curiae
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DECLARATION OF SERVICE

I, Christopher W. Garrett, declare as follows:

I am a resident of the State of California, residing or employed in San Diego, California. I am over the age of 18 years and am not a party to the above-entitled action. My address is 3658 Warner Street, San Diego, CA 92106-3245.

On August 1, 2016, a true copy of Application to File *Amicus Curiae* Brief of Foundation for Individual Rights in Education in Support of Plaintiff and Respondent and *Amicus Curiae* Brief of Foundation for Individual Rights in Education in Support of Plaintiff and Respondent were electronically filed with the Court through truefiling.com. Notice and courtesy copies of this filing will be sent to the parties in the above-entitled action via U.S. Mail and electronic mail.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 1st day of August, 2016, at San Diego, California.

/s/Christopher W. Garrett

CHRISTOPHER W. GARRETT