

FIRST CIRCUIT COURT OF APPEAL

STATE OF LOUISIANA

---

DOCKET NO. 2019-00148

---

JENNIFER THIEN AND GINA NGUYEN  
Petitioner/Respondent

VERSUS

BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY AND  
AGRICULTURAL AND MECHANICAL COLLEGE, ET AL.  
Defendants/Applicants

---

ON APPLICATION TO REVIEW THE RULING OF THE  
19<sup>TH</sup> JUDICIAL DISTRICT COURT, PARISH OF EAST BATON ROUGE, STATE OF  
LOUISIANA, NO. 657-157, THE HONORABLE TODD W. HERNANDEZ PRESIDING

---

A CIVIL PROCEEDING

---

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*,  
THE FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION

SUPPORTING PETITIONERS/APPELLEES  
JENNIFER THIEN AND GINA NGUYEN

---

STERNBERG, NACCARI & WHITE, LLC



---

SCOTT L. STERNBERG (BAR #33390)  
935 Gravier Street | Suite 2020  
New Orleans, LA 70112  
Telephone: 504/324-1887  
Facsimile: 504/534-8961  
E-mail: [scott@snw.law](mailto:scott@snw.law)

*Counsel for Amicus Curiae, Foundation for  
Individual Rights in Education*

**NOW INTO COURT**, through undersigned counsel, comes the **Foundation for Individual Rights in Education**, who respectfully moves this Honorable Court for leave to file this brief *Amicus Curiae* as attached hereto.

**INTEREST OF AMICUS CURIAE**

The Foundation for Individual Rights in Education, known as FIRE, is a nonpartisan, nonprofit, tax-exempt educational and civil liberties organization dedicated to promoting and protecting individual rights, including the right to due process, at our nation's institutions of higher education. In its 20-year history, FIRE has defended constitutional liberties on behalf of thousands of students and faculty. In the interest of protecting student and faculty rights at our nation's colleges and universities, FIRE has participated as *amicus curiae* in many significant cases such as the case before this Honorable Court.

The ultimate decision in the appeal of this matter will affect not only the parties, but also the students nationwide for whom FIRE advocates. Since 2011, more than 500 lawsuits have been filed by students alleging that they were denied a fair hearing in on-campus misconduct proceedings. This is a rapidly developing area of the law, and these cases—including the instant case—are working their way through the courts of various states. Each new decision issued has an immediate and nationwide impact on the due process rights of college and university students. For this reason, FIRE urges that this Court grant the applicants writ and review this matter.

**AMICUS' ARGUMENTS CAN ASSIST THIS HONORABLE COURT**

Undersigned counsel has reviewed the briefing and argument in the Court below. Undersigned counsel and *amicus* believe that its brief would provide a perspective that should aid this Honorable Court in deciding this matter.

*Amicus* believes that its substantial interests will be advanced by the argument contained within. The Foundation for Individual Rights in Education believes its focused argument on the national climate regarding this issue would aid the Court as they are issues of paramount constitutional importance to students in Louisiana and the United States. The issues presented in this case are of the highest importance to FIRE, and it is in a unique position to offer an outside and practical perspective on the issues at hand.

Because this case could impact students across the state of Louisiana and have precedential impact throughout the country, *Amicus Curiae* respectfully requests that the Court grant leave to file the attached brief as *Amicus Curiae*.

Respectfully submitted,

STERNBERG, NACCARI & WHITE, LLC



**SCOTT L. STERNBERG (BAR #33390)**

**935 Gravier Street | Suite 2020**

**New Orleans, LA 70112**

**Telephone: 504/324-1887**

**Facsimile: 504/534-8961**

**E-mail: [scott@snw.law](mailto:scott@snw.law)**

***Counsel for Amicus Curiae, Foundation for  
Individual Rights in Education***

**AFFIDAVIT OF SERVICE**

STATE OF LOUISIANA

PARISH OF ORLEANS

**BEFORE ME**, the undersigned authority, personally came and appeared:

**SCOTT L. STERNBERG,**


who did attest that:

1. He is counsel for *Amicus Curiae*, the Foundation for Individual Rights in Education.
2. As attorney for *Amicus Curiae*, he verifies that the allegations contained in this Motion for Leave to File Original Brief of *Amicus Curiae* are true and correct to the best of his knowledge, information and belief; and
3. A copy of this Motion for Leave to File Original Brief of *Amicus Curiae* has been served on the following:

Dennis J. Phayer, Esq. Burglass & Tankersley 5213 Airline Highway Metairie, LA 70001-5602	RANDALL A. SMITH MARY NELL BENNETT SMITH & FAWER, LLC 201 St. Charles Avenue, Suite 3702 New Orleans, Louisiana 70170
Hon. Todd W. Hernandez Judge, Division "A," Sec. 27 19th JDC, Parish of East Baton Rouge 300 N. Boulevard, Suite 8301 Baton Rouge, Louisiana 70801	GREG MURPHY GORDON MCKERNAN, LLC 5656 Hilton Avenue Baton Rouge, Louisiana 70808

  
**SCOTT L. STERNBERG**

Sworn to and subscribed before me  
this 14 day of September, 2020.

, NOTARY PUBLIC

**M. SUZANNE MONTERO  
NOTARY PUBLIC  
BAR NO: 21361**

*[Faint, illegible text]*

**FIRST CIRCUIT COURT OF APPEAL**

**STATE OF LOUISIANA**

---

**DOCKET NO. \_\_\_\_\_**

---

**JENNIFER THIEN AND GINA NGUYEN**  
**Petitioner/Respondent**

**VERSUS**

**BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY AND**  
**AGRICULTURAL AND MECHANICAL COLLEGE, ET AL.**  
**Defendants/Applicants**

---

**ON APPLICATION TO REVIEW THE RULING OF THE**  
**19<sup>TH</sup> JUDICIAL DISTRICT COURT, PARISH OF EAST BATON ROUGE,**  
**STATE OF LOUISIANA, NO. 657-157, THE HONORABLE TODD W.**  
**HERNANDEZ (NOW TRUDY WHITE) PRESIDING**

---

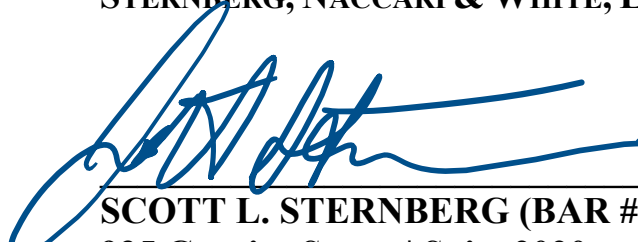
**A CIVIL PROCEEDING**

---

**ORIGINAL BRIEF OF *AMICUS CURIAE*,**  
**THE FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION**

---

**STERNBERG, NACCARI & WHITE, LLC**



---

**SCOTT L. STERNBERG (BAR #33390)**

**935 Gravier Street | Suite 2020**

**New Orleans, LA 70112**

**Telephone: 504/324-1887**

**Facsimile: 504/534-8961**

**E-mail: [scott@snw.law](mailto:scott@snw.law)**

***Counsel for Amicus Curiae, Foundation for***  
***Individual Rights in Education***

**TABLE OF CONTENTS**

**TABLE OF CONTENTS..... 2**

**TABLE OF AUTHORITIES ..... 3**

**INTEREST OF AMICUS CURIAE ..... 4**

**ADOPTION OF STATEMENT OF THE CASE AND FACTS ..... 4**

**LAW & ARGUMENT ..... 5**

**I. Introduction ..... 5**

**II. Universities frequently discipline students using vague or unwritten policies that violate students’ due process rights..... 6**

        A. Arbitrary and capricious actions deprive college students of due process..... 6

        B. Universities frequently punish students using unwritten, impermissibly vague, or insufficient procedures. .... 8

**CONCLUSION..... 13**

## TABLE OF AUTHORITIES

### Cases

Barnes v. Zaccari, 757 F. Supp. 2d 1313 (N.D. Ga. 2010), <i>aff'd</i> , 669 F.3d 1295 (11th Cir. 2012)	12
<i>De Jesus v. Penberthy</i> , 344 F. Supp. 70, 75 (D. Conn. 1972)	7
<i>Dixon v. Ala. State Bd. of Educ.</i> , 294 F.2d 150, 157 (5th Cir. 1961)	7
<i>Doe v. Baum</i> , 903 F.3d 575 (6th Cir. 2018)	10
<i>Doe v. Brandeis Univ.</i> , 177 F. Supp. 3d 561, 607 (D. Mass. 2016)	10
<i>Doe v. Pa. State Univ.</i> , 276 F. Supp. 3d 300, 309–10 (M.D. Pa. 2017)	8
<i>Doe v. Pa. State Univ.</i> , 336 F. Supp. 3d 441, 449–50 (M.D. Pa. 2018)	7
<i>Doe v. Rector &amp; Visitors of George Mason Univ.</i> , 149 F. Supp. 3d 602, 620 (E.D. Va. 2016)	8
<i>Doe v. Regents of the Univ. of Cal.</i> , 28 Cal. App. 5th 44, 61 (Cal. Ct. App. 2018)	10
<i>Doe v. Univ. of Mich.</i> , No. 2:18-cv-11776-AJT-EAS (E.D. Mich. March 23, 2020)	9
<i>Doe v. Univ. of the Sciences</i> , No. 19-2966 at 14–15, 19 (3d Cir. May 31, 2020)	9
<i>Doe v. University of Cincinnati</i> , 873 F.3d 393 (2017)	10
<i>Furey v. Temple University</i> , 884 F. Supp. 2d 223, 259 (E.D. Pa. 2012)	8
<i>Goss v. Lopez</i> , 419 U.S. 565, 574 (1975); <i>see also</i> <i>Dixon v. Ala. State Bd. of Educ.</i> , 294 F.2d 150, 157 (5th Cir. 1961)	7
<i>Hill v. State Univ. of N.Y. at Buffalo</i> , No. 18-00205, at 2 (N.Y. Sup. Ct. App. Div. July 6, 2018)	11
<i>I.F. v. Administrators</i> , 131 So. 3d 491, 499–500 (La. Ct. App. 2013)	7
<i>Matter of Awad v. Fordham Univ.</i> , 64 Misc. 3d 1234(A), 117 N.Y.S.3d 800 (Sup. Ct. 2019)	8
<i>Paine v. Bd. of Regents</i> , 355 F. Supp. 199 (W.D. Texas 1972), <i>aff'd</i> , 474 F.2d 1397 (5th Cir. 1973)	7
<i>Thien et al. v. Bd. of Supervisors of La. State Univ.</i> , No. C-657157 (La. Dist. Ct. July 6, 2018)	5

### Other Authorities

Julie McMahon, <i>5 Theta Tau brothers in Syracuse frat video file lawsuit against university</i> , SYRACUSE.COM, Apr. 25, 2018, <a href="https://www.syracuse.com/su-news/2018/04/5_theta_tau_brothers_in_syracuse_frat_video_file_lawsuit_against_university_1.html">https://www.syracuse.com/su-news/2018/04/5_theta_tau_brothers_in_syracuse_frat_video_file_lawsuit_against_university_1.html</a>	12
Letter from Ari Cohn, Found. for Individual Rights in Educ., to Kent Syverud, President, Syracuse Univ., May 4, 2018, available at <a href="https://www.thefire.org/fire-letter-to-syracuse-university-may-4-2018">https://www.thefire.org/fire-letter-to-syracuse-university-may-4-2018</a>	12
Letter from Cynthia L. Coulter, Executive Officer of Student Services, Catawba Valley Comm. Coll., to Marcus Bechtol, Oct. 5, 2011, available at <a href="https://www.thefire.org/notice-of-suspension-from-cvcc-to-marc-bechtol">https://www.thefire.org/notice-of-suspension-from-cvcc-to-marc-bechtol</a>	13
Letter from William Creeley, Found. for Individual Rights in Educ., to Erroll B. Davis Jr., Chancellor, Univ. Sys. of Ga., Oct. 23, 2007, available at <a href="https://www.thefire.org/fires-letter-to-chancellor-of-the-university-system-of-georgia-erroll-b-davis-october-23-2007">https://www.thefire.org/fires-letter-to-chancellor-of-the-university-system-of-georgia-erroll-b-davis-october-23-2007</a>	11
Samantha Harris & KC Johnson, <i>Lawsuits by Students Accused of Sexual Misconduct</i> , 4/4/2011 through 3/11/2019, <a href="https://docs.google.com/spreadsheets/d/e/2PACX-1vQNJ5mtRNzFHHValDrCcSBkafZEDuvF5z9qmYneXCi0UD2NUaffHsd5g4zlmnlhP3MINYpURNfVwSZK/pubhtml#">https://docs.google.com/spreadsheets/d/e/2PACX-1vQNJ5mtRNzFHHValDrCcSBkafZEDuvF5z9qmYneXCi0UD2NUaffHsd5g4zlmnlhP3MINYpURNfVwSZK/pubhtml#</a>	9

## **INTEREST OF AMICUS CURIAE**

The Foundation for Individual Rights in Education, known as FIRE, is a nonpartisan, nonprofit, tax-exempt educational and civil liberties organization dedicated to promoting and protecting individual rights, including the right to due process, at our nation's institutions of higher education. In its 20-year history, FIRE has defended constitutional liberties on behalf of thousands of students and faculty. In the interest of protecting student and faculty rights at our nation's colleges and universities, FIRE has participated as amicus curiae in many significant cases such as the case before this Honorable Court.

The ultimate decision in the appeal of this matter will affect not only the parties, but also the students nationwide for whom FIRE advocates. Since 2011, more than 500 lawsuits have been filed by students alleging that they were denied a fair hearing in on-campus misconduct proceedings. This is a rapidly developing area of the law, and these cases—including the instant case—are working their way through the courts of various states. Each new decision issued has an immediate and nationwide impact on the due process rights of college and university students. For this reason, FIRE urges that this Court grant the applicants' writ and review this matter.

## **ADOPTION OF STATEMENT OF THE CASE AND FACTS**

FIRE adopts the Statement of the Case, Facts, and any other Relevant Arguments advanced in the Original Brief of Jennifer Thien and Gina Nguyen.



## LAW & ARGUMENT

### **I. Introduction**

This case concerns whether a university must be required to follow its own disciplinary procedures. To protect students from arbitrary and capricious decision-making, the answer to that question must be yes, and this Court can ensure that universities around the country recognize that mandate.

LSU-HSC School of Dentistry student Jennifer Thien took two online quizzes for an ill friend. A mutual friend, Gina Nguyen, knew that Jennifer had done so. Both are now Plaintiffs in this action. Allegations of cheating at LSU are ordinarily handled by the Student Affairs Committee (SAC). In a SAC proceeding, students are entitled to numerous due process protections, including the right to a detailed description of the charges, the right to be accompanied to the hearing by an advisor, the right to present documentary evidence and call witnesses, and the right to cross-examine adverse witnesses. Pls' Pet. for Damages, at 5–6.

Rather than present Thien's alleged misconduct and Nguyen's inaction to the SAC as a case of cheating, however, an LSU dean exercised her "discretionary authority" to instead deem this a case of "unprofessionalism." In so doing, the dean routed the charges against Thien and Nguyen through the Academic Performance Advancement Committee (APAC), an obscure organ that the trial court found has "no defined purpose for its creation" and "no written rules or procedure that governs its existence."<sup>1</sup> Instead of a hearing before the SAC, with all of the attendant procedural protections, the two women met individually for interviews with members of the APAC, who then deliberated briefly before deciding to expel them from the dental school.

---

<sup>1</sup> *Thien et al. v. Bd. of Supervisors of La. State Univ.*, No. C-657157 (La. Dist. Ct. July 6, 2018).

The trial court correctly found that the wholly discretionary decision to send the case to the APAC instead of the SAC, as well as the procedures used by the APAC, “clearly violated the plaintiffs’ rights to procedural and substantive due process under the State and Federal Constitutions.” The court ordered Thien and Nguyen “immediately reinstated” “as D2 students,” in LSU’s dental school to repay for and repeat the entire second year.<sup>2</sup> LSU attempted to perform an end-run around the trial court’s decision, seeking a suspensive appeal that would have indefinitely prevented Thien and Nguyen from resuming their studies while the university appealed the trial court’s decision. Put simply, LSU sought by other means to effectuate a punishment that the trial court deemed unconstitutional. Because the district court correctly rejected that effort, LSU now seeks to have the trial court’s decision overturned entirely. To protect Thien and Nguyen, their peers, and students in Louisiana and nationwide, this Court must not allow LSU to succeed.

While the question before this Court involves just two students, its answer will have important implications for the due process rights of students around the country. A wave of litigation regarding the way universities adjudicate student misconduct is reshaping the relationship between higher education and the judiciary, and every ruling in this area of the law is closely watched by universities, their attorneys, advocates, and courts around the country.

If LSU is not held to account for deviating from its black-and-white procedures, and the trial court’s correct finding of unconstitutionality is overturned, universities will be effectively empowered to disregard their own policies in punishing their students.

## **II. Universities frequently discipline students using vague or unwritten policies that violate students’ due process rights.**

### **A. Arbitrary and capricious actions deprive college students of due process.**

---

<sup>2</sup> *Id.*; R. 1329-1334, 1346-47.

For over 40 years, it has been the unmistakable holding of the Supreme Court of the United States that students must receive at least rudimentary due process before being expelled from state educational institutions.<sup>3</sup> This standard sets the floor for public universities such as LSU, which are not at liberty to deviate significantly from their own disciplinary procedures, or fail to apply any procedures at all, when punishing students.

A university's failure to apply a clear, cognizable, and readily discernable set of procedures when disciplining students is a textbook example of arbitrary and capricious action—and it is antithetical to long-recognized student due process rights.<sup>4</sup> In *I.F. v. Administrators of the Tulane Educational Fund*, the court found that a student's due process rights were “presumptively violated” when the college failed to state the burden of proof, the procedures for how students could present evidence, or the process by which evidence would be considered by the school.<sup>5</sup> Likewise, in *De Jesus v. Penberthy*, a student's due process rights were violated when a university hearing board's utter lack of cognizable procedures “left the Board without an adequate basis to resolve the key issue in the dispute.”<sup>6</sup>

Even when universities afford some procedures, courts regularly find due process violations in situations where colleges depart from their stated rules. For example, in *Furey v. Temple University*, the university's numerous “failures to comply with the Temple Code” and “the accumulation of mistakes at each step of

---

<sup>3</sup> *Goss v. Lopez*, 419 U.S. 565, 574 (1975); see also *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 157 (5th Cir. 1961) (“[G]overnmental power to expel [students] . . . is not unlimited and cannot be arbitrarily exercised.”).

<sup>4</sup> See *Paine v. Bd. of Regents*, 355 F. Supp. 199 (W.D. Texas 1972), *aff'd*, 474 F.2d 1397 (5th Cir. 1973) (automatic suspension from college for alleged drug offenses violated student due process rights for failing to provide even basic procedures).

<sup>5</sup> *I.F. v. Administrators*, 131 So. 3d 491, 499–500 (La. Ct. App. 2013).

<sup>6</sup> *De Jesus v. Penberthy*, 344 F. Supp. 70, 75 (D. Conn. 1972); see also *Doe v. Pa. State Univ.*, 336 F. Supp. 3d 441, 449–50 (M.D. Pa. 2018) (due process violated when university failed to provide “any guidelines in . . . [the university's] Code of Conduct & Student Conduct Procedures guiding . . . [the university investigator] in his task or cabining his discretion”); *Babcock v. New Orleans Baptist Theological Seminary*, 554 So. 2d 90, 93, 97 (La. Ct. App. 1989) (decision to withhold a student's degree by summarily finding him “unfit” without providing notice or a hearing was “grossly unfair and arbitrary”).

the process” resulted in a disciplinary proceeding devoid of due process.<sup>7</sup> Where there is “significant and unfair deviation from . . . [university] procedures,” courts will find a due process violation.<sup>8</sup>

Similarly, in *Awad v. Fordham University*, the state trial court concluded that Fordham University’s failure to abide by its published policies for recognizing student groups was “arbitrary and capricious.”<sup>9</sup> By rejecting a prospective chapter of Students for Justice in Palestine’s application for recognition because of administrative fears that that group’s message might prove “polarizing,” the university had ignored its own policies and relied on considerations “not enumerated or identified as a relevant factor in any governing or operating rules, regulations, or guidelines.”<sup>10</sup> Accordingly, the trial court annulled the university’s decision.<sup>11</sup>

In February 2020, the U.S. District Court for the Northern District of New York denied Syracuse University’s motion to dismiss a breach of contract claim where the university promised to use the “preponderance of the evidence” standard but evidence suggested that it may not have done so.<sup>12</sup> Louisiana similarly requires private institutions to abide by their own policies and procedures.<sup>13</sup>

B. Universities frequently punish students using unwritten, impermissibly vague, or insufficient procedures.

LSU’s abuse of discretion is, unfortunately, a common occurrence on college and university campuses across the nation. FIRE’s case archives demonstrate that institutions across the country frequently take serious disciplinary action against

---

<sup>7</sup> *Furey v. Temple University*, 884 F. Supp. 2d 223, 259 (E.D. Pa. 2012).

<sup>8</sup> *Doe v. Pa. State Univ.*, 276 F. Supp. 3d 300, 309–10 (M.D. Pa. 2017); *see also Doe v. Rector & Visitors of George Mason Univ.*, 149 F. Supp. 3d 602, 620 (E.D. Va. 2016) (due process violated because “[i]t is clear from the record that the process afforded to plaintiff included certain deviations from GMU’s own established policies and procedures”).

<sup>9</sup> *Matter of Awad v. Fordham Univ.*, 64 Misc. 3d 1234(A), 117 N.Y.S.3d 800 (Sup. Ct. 2019).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Doe v. Syracuse University*, No. 5:19-cv-00190 (N.D.N.Y. Feb. 21, 2020).

<sup>13</sup> *See I.F.*, 131 So. 3d at 500 (“Tulane must adhere to the standards it provides.”).

students in ways that leave those students with little meaningful opportunity to defend themselves.

In recent years, for example, many colleges and universities have dramatically lowered the procedural protections available to students accused of sexual misconduct on campus. Students are often found guilty of sexual misconduct without a hearing, without meaningful notice of the charges against them, and without the opportunity to present evidence and call or cross-examine witnesses. As a result, since 2011, there have been more than 500 state and federal lawsuits brought against universities by students who allege they were denied fundamental fairness in campus sexual misconduct adjudications.<sup>14</sup> Many of the courts to hear these cases have been appalled by the total lack of any meaningful process offered to students who, like the students in the instant case, are facing serious, life-altering consequences.

In May 2020, for example, the U.S. Court of Appeals for the Third Circuit found that a private institution’s promise of a “fair” and “equitable . . . resolution process” obligated it to provide procedures “conducted in accordance with due process”—which is “at least a real, live, and adversarial hearing and the opportunity for the accused student or his or her representative to cross-examine witnesses—including his or her accusers.”<sup>15</sup>

In March 2020, the U.S. District Court for the Eastern District of Michigan, Southern Division held University of Michigan administrators personally liable for violating a student’s due process rights when the university denied him a hearing with the opportunity to cross-examine his accuser, and the case hinged on the credibility of those testifying.<sup>16</sup> The student’s right to cross-examination conducted

---

<sup>14</sup> Samantha Harris & KC Johnson, *Lawsuits by Students Accused of Sexual Misconduct*, 4/4/2011 through 3/11/2019, <https://docs.google.com/spreadsheets/d/e/2PACX-1vQNJ5mtRNzFHhValDrCcSBkafZEDuvF5z9qmYneXCi0UD2NUaffHsd5g4zlmnlhP3MINYpURNfVwSZK/pubhtml#>.

<sup>15</sup> *Doe v. Univ. of the Sciences*, No. 19-2966 at 14–15, 19 (3d Cir. May 31, 2020) (internal citations omitted).

<sup>16</sup> *Doe v. Univ. of Mich.*, No. 2:18-cv-11776-AJT-EAS (E.D. Mich. March 23, 2020).

by someone “aligned with” him had been established by *Doe v. Baum*,<sup>17</sup> but a more general right to cross-examination was established earlier in *Doe v. University of Cincinnati*.<sup>18</sup> Accordingly, the administrators were not entitled to qualified immunity. Repeated court rulings against an institution, therefore, are sometimes necessary before the institution provides students with the due process they are already entitled to.

A federal judge in Massachusetts ruled in *Doe v. Brandeis University* that Brandeis had denied a student basic fairness in a sexual misconduct adjudication process that was decided, without a hearing, by a single investigator. The judge wrote that the student “was required to defend himself in what was essentially an inquisitorial proceeding that plausibly failed to provide him with a fair and reasonable opportunity to be informed of the charges and to present an adequate defense.”<sup>19</sup> In doing so, the judge held, Brandeis had “substantially impaired, if not eliminated, an accused student’s right to a fair and impartial process.”<sup>20</sup>

Similarly, in holding that the University of California, Santa Barbara had violated the due process rights of a student accused of sexual misconduct, a California appellate court found it “ironic that an institution of higher learning, where American history and government are taught, should stray so far from the principles that underlie our democracy.”<sup>21</sup>

And as the instant case illustrates, the lack of fairness and transparency in campus judiciaries is hardly limited to the issue of sexual misconduct. Last summer, for example, a New York state appellate court ruled that the State University of New York at Buffalo violated a student’s due process rights when it disciplined him for

---

<sup>17</sup> *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018)

<sup>18</sup> *Doe v. University of Cincinnati*, 873 F.3d 393 (2017)

<sup>19</sup> *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 607 (D. Mass. 2016).

<sup>20</sup> *Id.* at 573.

<sup>21</sup> *Doe v. Regents of the Univ. of Cal.*, 28 Cal. App. 5th 44, 61 (Cal. Ct. App. 2018).

harassment and weapons possession without “any evidence, much less substantial evidence” of his guilt. In finding for the student, the court stated:

[W]e are compelled to express our dismay at respondent’s cavalier attitude toward petitioner’s due process rights in this case, and we remind respondent—and all other colleges and universities, particularly state-affiliated institutions—of their unwavering obligation to conduct student disciplinary proceedings in a manner that comports with fundamental notions of due process for the accused, that renders determinations consistent with the facts, and that respects the presumption of innocence to which all students are entitled.<sup>22</sup>

Another egregious example of universities’ disregard for students’ due process rights is Valdosta State University’s (VSU’s) treatment of former student Hayden Barnes. Barnes, concerned about the environment, vigorously protested VSU’s plans to construct two new parking garages on campus. He created a collage of images related to his protest and posted it on Facebook. Interspersed with the images were lines of text opposing the construction, one of which referred to it as the “Zaccari Memorial Parking Garage”—a reference to the fact that the university’s then-president, Ronald Zaccari, had expressed his hope that the garages’ construction would be an important part of his legacy as VSU president.<sup>23</sup>

Several weeks after posting the collage, Barnes returned to his dorm to find that a notice of administrative withdrawal had been slipped under his door, identifying him as a “clear and present danger” to the campus and giving him 48 hours to vacate his dormitory. This administrative withdrawal was a drastic departure from any of VSU’s disciplinary policies and procedures.<sup>24</sup> Barnes filed a federal lawsuit alleging free speech and due process violations, and a court ultimately found Zaccari personally liable for violating Barnes’ due process rights,

---

<sup>22</sup> *Hill v. State Univ. of N.Y. at Buffalo*, No. 18-00205, at 2 (N.Y. Sup. Ct. App. Div. July 6, 2018).

<sup>23</sup> Letter from William Creeley, Found. for Individual Rights in Educ., to Erroll B. Davis Jr., Chancellor, Univ. Sys. of Ga., Oct. 23, 2007, available at <https://www.thefire.org/fires-letter-to-chancellor-of-the-university-system-of-georgia-erroll-b-davis-october-23-2007>.

<sup>24</sup> *Id.*

holding that he disregarded clearly established law regarding the right of students facing disciplinary action to receive notice of charges and a hearing.<sup>25</sup>

Last year, Syracuse University took indefensibly arbitrary and unfair action against members of a fraternity after someone, without permission, sent videos of a private, satirical roast hosted by the fraternity to the student newspaper. One of the skits from the roast mocked a fraternity member for his conservative political beliefs through a skit about a fictitious racist and anti-Semitic fraternity; another depicted a fraternity member as “brain dead” and “retarded” due to being “chronically whipped by his controlling girlfriend.” Stripped of their satirical context, the videos provoked backlash and calls for the university to impose discipline.

Within 24 hours of the first video becoming public, Syracuse suspended the fraternity, and just days later, it fired an adjunct professor who questioned the university’s handling of the situation, cryptically stating that he was no longer qualified to teach Syracuse students because of the “misalignment between [his] values and those of the college.” The fraternity was permanently banned with no opportunity to appeal. Moreover, 18 individual students involved in the videos were charged with a litany of conduct code violations and barred from attending classes or university functions until the judicial process was completed.<sup>26</sup> The students were tried as a group and suspended for up to two years. Several of the students are currently suing the university.<sup>27</sup>

Catawba Valley Community College (CVCC) suspended a student, without a hearing, for comments he made on CVCC’s Facebook page criticizing a deal the

---

<sup>25</sup> *Barnes v. Zaccari*, 757 F. Supp. 2d 1313 (N.D. Ga. 2010), *aff’d*, 669 F.3d 1295 (11th Cir. 2012).

<sup>26</sup> Letter from Ari Cohn, Found. for Individual Rights in Educ., to Kent Syverud, President, Syracuse Univ., May 4, 2018, available at <https://www.thefire.org/fire-letter-to-syracuse-university-may-4-2018>.

<sup>27</sup> Julie McMahon, *5 Theta Tau brothers in Syracuse frat video file lawsuit against university*, SYRACUSE.COM, Apr. 25, 2018, [https://www.syracuse.com/su-news/2018/04/5\\_theta\\_tau\\_brothers\\_in\\_syracuse\\_frat\\_video\\_file\\_lawsuit\\_against\\_university\\_1.html](https://www.syracuse.com/su-news/2018/04/5_theta_tau_brothers_in_syracuse_frat_video_file_lawsuit_against_university_1.html).



college had entered into with a credit card company. The day after he posted his comments, he was pulled out of class by a CVCC administrator and told he could not return. Accused of violating a vague policy that prohibited conduct “contrary to the best interest of the CVCC community,” he was suspended without a hearing and banned from campus for two semesters.<sup>28</sup>

These cases, shown above, and even more uncited, demonstrate the need for a clear, unmistakable ruling from this Honorable Court. Educational Institutions, including LSU, must firmly be held to their obligation to honor and respect the due process rights of their students. To permit otherwise will allow unchecked administrative power that flaunts our decidedly American notions of fairness and justice. Nowhere is this more important than on the campus of a public university, and therefore the judgment of the Honorable Trial Court should be affirmed.

### **CONCLUSION**

For the reasons stated above, *Amicus* Foundation for Individual Rights in Education urges this Court to affirm the ruling of the Trial Court.

**STERNBERG, NACCARI & WHITE, LLC**



**SCOTT L. STERNBERG (BAR #33390)**

935 Gravier Street | Suite 2020

New Orleans, LA 70112

Telephone: 504/324-1887

Facsimile: 504/534-8961

E-mail: [scott@snw.law](mailto:scott@snw.law)

***Counsel for Amicus Curiae, Foundation for  
Individual Rights in Education***

---

<sup>28</sup> Letter from Cynthia L. Coulter, Executive Officer of Student Services, Catawba Valley Comm. Coll., to Marcus Bechtol, Oct. 5, 2011, *available at* <https://www.thefire.org/notice-of-suspension-from-cvcc-to-marc-bechtol>.

**AFFIDAVIT OF SERVICE**

**STATE OF LOUISIANA**

**PARISH OF ORLEANS**

**BEFORE ME**, the undersigned authority, personally came and appeared:

**SCOTT L. STERNBERG,**

who did attest that:

1. He is counsel for *Amicus Curiae*, the Foundation for Individual Rights in Education.
2. As attorney for *Amicus Curiae*, he verifies that the allegations contained in this Original Brief of *Amicus Curiae* are true and correct to the best of his knowledge, information and belief; and
3. A copy of this Original Brief of *Amicus Curiae* has been served on the following:

Dennis J. Phayer, Esq. Burglass & Tankersley 5213 Airline Highway Metairie, LA 70001-5602	RANDALL A. SMITH MARY NELL BENNETT SMITH & FAWER, LLC 201 St. Charles Avenue, Suite 3702 New Orleans, Louisiana 70170
Hon. Todd W. Hernandez Judge, Division "A," Sec. 27 19th JDC, Parish of East Baton Rouge 300 N. Boulevard, Suite 8301 Baton Rouge, Louisiana 70801	GREG MURPHY GORDON MCKERNAN, LLC 5656 Hilton Avenue Baton Rouge, Louisiana 70808

  
\_\_\_\_\_  
**SCOTT L. STERNBERG**

Sworn to and subscribed before me  
this 14 day of September, 2020.

  
\_\_\_\_\_  
**NOTARY PUBLIC**

**M. SUZANNE MONTERO  
NOTARY PUBLIC  
BAR NO: 21361**

M. SUZANNE MONTERO  
NOTARY PUBLIC  
BAR NO: 21361