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

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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,

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*ns 0 Tw 5.89453oB6s 0 Tw 5.894/MCID P>>BDC -02scn /TT0 .

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

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

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 a7i assav(vestigubsta)-9(a Tw 16.882 Td83731 TD (

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

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 constitutional(ttio)a.(t 2zed, an)-9(d)-9tove(d)

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> 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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to determine whether it was more likely than not that

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–

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).

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

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*,

> [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.

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

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 t2 108 Tw (,)Tj 10.56 -0 0 10.5630 0.2 260.5201 Tm ( )Tj 12.96 -0

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: August1, 2016

Respectfully submitted,

/s/Cynthia P. Garrett

Cynthia P. Garrett
Attorney for Amicus Curiae
FOUNDATION FOR INDIVIDUAL
RIGHTS IN EDUCATION

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