No. 19-1842

In the
United States Court of Appeals
for the Eighth Circuit

JOHN DOE,

Plaintiff-Appellant,

v.

THE UNIVERSITY OF ARKANSAS - FAYETTEVILLE; BOARD OF TRUSTEES OF THE UNIVERSITY OF ARKANSAS; TYLER R. FARRAR, individually and in his official capacity; JON COMSTOCK, individually and in his official capacity; ERIC SPECKING, individually and in his official capacity; DINA WOOD, individually and in her official capacity; KRISTIN BARNETT, individually and in her official capacity,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Arkansas – Fayetteville, No. 5:18-cv-05182-PKH.
The Honorable **Paul Kinloch Holmes**, Judge Presiding.

AMICUS CURIAE BRIEF OF FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION IN SUPPORT OF REVERSAL AND APPELLANT

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INTEREST OF AMICUS CURIAE

The Foundation for Individual Rights in Education ("FIRE") is a nonpartisan, nonprofit organization dedicated to promoting and protecting civil liberties at our nation's institutions of higher education. Since 1999, FIRE has worked to protect student due process rights at campuses nationwide, and has filed numerous *amicus* briefs in cases concerning the due process rights of accused students in campus misconduct proceedings. FIRE believes that our perspective will assist the Court in delineating the scope of due process rights in the context of on-campus adjudications.

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amicus* FIRE states that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person other than *amicus curiae*, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

Counsel for all parties have consented to participation by FIRE as *amicus curiae*.

ARGUMENT

I. Introduction

This case concerns whether the University of Arkansas afforded a student a fair process before finding him guilty of sexual misconduct.

Appellant's accuser, Jane Roe, alleged that she was too drunk to consent to sex on the night of their sexual encounter. Under UA's procedures, the initial decision was made by the university's Title IX coordinator, with both parties having the option to appeal that decision and receive a *de novo* hearing before a three-person appeals panel. After UA's Title IX coordinator found for Appellant, Jane Roe appealed, and the appeals panel found Appellant guilty by a 2–1 vote.

The process UA afforded Appellant suffered from serious, invalidating deficiencies. Among other things, his ability to challenge the accusation was significantly curtailed by serious procedural defects: he was not permitted to cross-examine Jane Roe, she was permitted to introduce new evidence at the appeal hearing that Appellant had never seen prior to the hearing, and the investigator did not interview several individuals who Appellant believed had exculpatory information.

The district court issued a sweeping rejection of Appellant's due process claims in an opinion that displayed a shocking disregard for the rights of students accused of one of society's most serious offenses. Not only did the court reject

Appellant's cross-examination claim, it argued that cross-examination itself — even through an advisor — could contribute to the type of "hostile environment" prohibited by Title IX. *Doe v. Univ. of Ark.-Fayetteville*, No. 5:18-cv-05182, 2019 U.S. Dist. LEXIS 57889, *25 (W.D. Ark. Apr. 3, 2019). This erroneous conclusion is a dramatic departure from the growing judicial consensus that some form of cross-examination is essential to due process when universities are adjudicating cases that turn primarily on credibility assessments and often end with life-changing sanctions.

The district court also brushed aside Appellant's argument that the university deprived him of due process by allowing him to be blindsided by new evidence at his appeal hearing. Additionally, the court rejected Appellant's concern over the fact that UA's investigator had not interviewed several witnesses who Appellant believed had exculpatory information.

By reversing the district court's finding that the severe limitations on Appellant's ability to meaningfully defend himself did not violate his due process rights, this Court would reaffirm the importance of robust procedural rights in cases where students face serious charges and life-altering punishments. As universities around the country dispense with critical procedural protections in their conduct processes, such a ruling from this Court could not be more timely and necessary.

II. Due Process Is of Critical Importance in Campus Conduct Proceedings

A. A Finding of Responsibility for Assault, Even by a Campus Tribunal, Carries Life-Altering Consequences

Supporters of the status quo for campus non-academic misconduct adjudications often argue that due process protections in campus procedures need not be nearly as robust as those used in courts of law because the process is merely "academic" or "educational."[1] But as one federal court recently observed, campuses are now routinely adjudicating claims "that constitute serious felonies under virtually every state's laws." *Doe v. Brown Univ.*, 166 F. Supp. 3d 177, 184 (D.R.I. 2016). Insisting that robust procedural safeguards are unnecessary ignores the reality of the heavy (and well-deserved, when someone is found responsible after a fair process) stigma of being found to have committed an act of violence or other potentially criminal conduct. As the U.S. Court of Appeals for the Sixth

[1] *See, e.g.*, Code of Student Conduct, University of Massachusetts, at p.3 ("The resolution of conflict involving students is an educational endeavor."), https://www.umass.edu/dean_students/sites/default/files/documents/2016-2019%20Code%20of%20Student%20Conduct.pdf. *See also* ASS'N FOR STUDENT CONDUCT ADMIN., 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.").

Circuit recently put it: "Being labeled a sex offender by a university has both an immediate and lasting impact on a student's life." *Doe v. Baum*, 903 F.3d 575, 582 (6th Cir. 2018).

Yale University alumnus Patrick Witt wrote about these consequences in a *Boston Globe* editorial protesting Harvard University's adoption of a broad sexual harassment policy.[2] 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. 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, and the opportunity to play in the National Football League. 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 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. Last month, Families Advocating for Campus Equality (FACE) — a nonprofit due process advocacy organization

[2] 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.

founded by parents of students found responsible for sexual misconduct without a fair process — submitted testimony[3] in opposition to a proposed California law, S.B. 493, concerning campus sexual misconduct adjudications.[4] FACE's testimony included numerous examples of the impact of a finding of responsibility for violent misconduct, even "just" by a campus judiciary, underscoring the need for fair and trustworthy proceedings:

- "[M]y son was left suicidal with severe mental illness. Two extensive hospitalizations, three lost semesters at school, $90,000 in out of pocket losses and the complete loss of his hopes, dreams and possibilities."
- "We have spent nearly $320,000 in legal expenses, doctors' bills, and medication. My son's current mental health issues have been diagnosed as a direct result of the trauma imposed upon him by flawed processes, bullying by school and administrators and friends. Four and a half years later, acquaintances still call him a rapist. Today, he suffers from PTSD with debilitating anxiety that prevents him from work and study. No doctor can help. Our son is one of the

[3] Families Advocating for Campus Equality, *Opposition to SB-493; FACE Family Story Excerpts* (May 12, 2019), *available at* https://www.thefire.org/face-sb493-testimony-in-opposition-may-2019.
[4] S.B. 493, 2019–2020 Leg., Reg. Sess. (Cal. 2019).

20% of the population on who antidepressant medications do not work."

- "Our son became depressed, couldn't sleep, couldn't eat, lost 25 pounds in two months, and became suicidal. . . . I found him one day trying to hang himself."

Many of the lawsuits brought by accused students for alleged due process violations further illustrate the lifelong and profound effect of campus sexual misconduct adjudications.

For example, after the University of Findlay found students Alphonso Baity and Justin Browning guilty of sexual assault—through a process in which Baity and Browning allege the university held no hearing and did not even interview the complainant[5]—the university released their names to the media, stating that they had been expelled for sexual assault.[6] A Google search of either student's name prominently displays the sexual assault finding against them, despite the fact that neither student was ever arrested for or charged with any crime. It is not difficult to

[5] Compl. at 23, Browning v. Univ. of Findlay, No. 3:15-02687 (N.D. Ohio Dec. 23, 2015).

[6] Vanessa McCray, *2 student-athletes expelled from University of Findlay after sexual assault investigation*, BLADE (Oct. 6, 2014), http://www.toledoblade.com/local/2014/10/06/2-student-athletes-expelled-from-University-of-Findlay-after-sexual-assault-investigation.html.

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.[7]

The stakes are high for students accused of violent misconduct and tried before campus tribunals. As a federal judge noted in denying 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., 177 F. Supp. 3d 561, 602 (D. Mass. 2016).

The life-altering consequences illustrated by the foregoing examples are likely to become even more severe due to growing support, among various states and associations, for special notations on the transcripts of students suspended or

[7] Compl. at 31, ¶ 144, Browning v. Univ. of Findlay, No. 3:15-02687 (N.D. Ohio Dec. 23, 2015).

expelled for serious misconduct.[8] While *amicus* FIRE takes no position on the wisdom of disciplinary notations on transcripts, the increasing use of such notations underscores how important it is that meaningful procedural protections be in place to ensure trustworthy results.

Virginia, New York, and Texas already have such laws. In Virginia, 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.[9] In New York, "[f]or crimes of violence, including but not limited to sexual violence . . . institutions shall make a notation on the transcript of students found responsible after a conduct process that they were 'suspended after a finding of responsibility for a code of conduct violation' or 'expelled after a finding of responsibility for a code of conduct violation.'"[10]

Texas just enacted a law requiring transcript notations "[i]f a student is ineligible to reenroll in a postsecondary educational institution for a reason other than an academic or financial reason."[11] And the Massachusetts state legislature is currently considering a bill that would require universities to place a "prominent

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[8] Jake New, *Requiring a Red Flag*, INSIDE HIGHER ED (July 10, 2015), https://www.insidehighered.com/news/2015/07/10/states-requiring-colleges-note-sexual-assault-responsibility-student-transcripts.
[9] Va. Code § 23.1-900 (2016).
[10] N.Y. STATE EDUC. LAW §6444.6 (2018).
[11] Tex. Educ. Code § 51.9364(b) (2019).

and temporary" notation on a student's transcript "[u]pon commencement of any disciplinary proceedings conducted by the institution against a student alleged to have committed a crime of violence." If the student is found responsible, the notation would become permanent.[12]

Meanwhile, in June 2017, the American Association of Collegiate Registrars and Admissions Officers (AACRAO), whose membership includes representatives from more than 2,500 colleges and universities,[13] issued guidance stating its belief that institutions "have a responsibility to notify other institutions of potential threats to their communities from students they have suspended/expelled for serious misconduct," and recommending a notation either on a student's academic transcript or by some other means, such as a disciplinary transcript.[14] This is a reversal of the organization's previous recommendation that recording disciplinary actions on a student's transcript was not "a recommended best practice."[15]

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[12] S. 747, 191st Gen. Court of the Commonwealth of Mass. (Mass. 2019).
[13] Hillary Pettegrew, *New Guidance on Student Discipline Transcript Notations for Higher Education*, EDURISK (June 2017), https://www.edurisksolutions.org/blogs/?Id=3334.
[14] American Ass'n of Collegiate Registrars and Admissions Officers, TRANSCRIPT DISCIPLINARY NOTATIONS: GUIDANCE TO AACRAO MEMBERS (June 2017), *available at* https://www.aacrao.org/docs/default-source/signature-initiative-docs/disciplinary-notations/notations-guidance.pdf.
[15] American Ass'n of Collegiate Registrars and Admissions Officers, *Disciplinary Notations*, https://web.archive.org/web/20180424142449/http://www.aacrao.org/resources/trending-topics/disciplinary-notations.

Any student who has committed violent misconduct 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 as Well as the Accused

Though procedural protections are generally described as inuring to the benefit of the accused, they are vital for victims and the entire campus community, too. Without the fairness and reliability that the procedural protections of due process safeguard, public confidence and trust in the adjudicatory system erode, leaving all students less likely to participate in it or respect its outcomes, among other ill effects.[16]

[16] *See* Tracey L. Meares, *Everything Old Is New Again: Fundamental Fairness and the Legitimacy of Criminal Justice*, 3 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.").

When procedurally flawed processes are used to adjudicate allegations of serious misconduct, 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 are betrayed and re-victimized, and a criminal is left free to roam campus.

In December 2017, the Santa Barbara County Superior Court ordered the University of California, Santa Barbara (UCSB) to reinstate and reconsider the appeal of a student who had been found responsible for stalking his ex-girlfriend. *Doe v. Regents of the Univ. of Cal.*, No. 17-cv-03053 (Cal. Super. Ct. Dec. 22, 2017). UCSB rendered its initial decision without granting the student a hearing or an opportunity to confront his accuser, relying instead on a single investigator who interviewed the parties and a number of witnesses separately before finding the student responsible. On appeal, the student was given a hearing at which he and other witnesses testified and evidence was presented. However, in upholding the investigator's decision, the appeals board considered "only the evidence in the Title IX investigator report," and did *not* consider the evidence presented at the appeal hearing, as required by UCSB policy. *Id.* at 8.

Finding this problematic, the court ordered UCSB to reconsider the student's appeal. UCSB's second decision, however, was "identical in every respect" to the original appeal decision, so the court held UCSB in contempt and ordered it to

vacate the finding of responsibility entirely and to re-admit the student. This was an unjust result for the alleged victim, since the alleged perpetrator was allowed to remain on campus not because the substantive case against the respondent fell short, but because of UCSB's repeated failure to offer the accused student a fair process. *Doe v. Regents of the Univ. of Cal.*, No. 17-cv-03053 (Cal. Super. Ct. Aug. 10, 2018).

In 2015, a female student proceeding under the pseudonym Jane Doe filed a federal lawsuit against the University of Kentucky. Jane first reported a rape to the university and to police as a freshman in the fall of 2014. According to Jane, she was violently raped by a fellow student, a football player who held his hand over her mouth and forcibly removed her clothing. The university held a hearing, but the accused student could not attend because of a criminal court date arising from the same conduct. The university found him responsible *in absentia*.[17]

A university appeals board concluded that the accused student's due process rights had been violated because he was not able to attend the hearing. A second hearing was scheduled. This time, Jane did not attend, on advice from staff at the university's counseling center. The accused student was found responsible for a second time. And for a second time, the appeals board overturned the decision on

[17] Compl., *Doe v. Univ. of Ky.*, No. 5:15-cv-00296 (E.D. Ky. Oct. 1, 2015).

due process grounds—this time because Jane's absence had denied the accused student the right to confront his accuser.[18]

The university scheduled a third hearing. Jane reported that the notice of the third hearing "caused [her] mental health to deteriorate" and that she had withdrawn from classes. At his third hearing, the accused student was found responsible again, but the appeals board again overturned the decision on due process grounds.[19]

In denying the university's motion to dismiss Jane Doe's complaint, the U.S. District Court for the Eastern District of Kentucky wrote:

> [T]he University bungled the disciplinary hearings so badly, so inexcusably, that it necessitated three appeals and reversals in an attempt to remedy the due process deficiencies. The disciplinary hearings were plagued with clear errors, such as conducting a hearing without [the accused] Student B's presence, and refusing to allow Student B to whisper to an advisor during the proceeding (as only two examples of several obvious errors), that resulted in multiple appeals spanning months, [and] profoundly affected Plaintiff's ability to obtain an education at the University of Kentucky (the Court suspects this lengthy process profoundly affected Student B as well).[20]

Properly conceived, due process protects all interests at stake: the accused's interest in not being found responsible for an act he or she did not commit, the complainant's interest in a reliable adjudication that holds the correct person

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[18] *Id.* at ¶¶ 24–28.
[19] *Id.* at ¶¶ 32–37.
[20] *Doe v. Univ. of Ky.*, No. 5:15-cv-00296, 2016 U.S. Dist. LEXIS 117606, *8 (E.D. Ky. Aug. 31, 2016).

responsible and is not subject to reversal on procedural grounds, and the community's interest in trustworthy decisions that can be relied upon to protect its wellbeing. The allegations of serious, often violent misconduct adjudicated within the judicial systems 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. 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 Must Account for the Circumstances and Stakes of the Case

Courts have recognized that due process standards depend upon 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."). Because of the life-altering consequences of campus adjudications of violent misconduct discussed above, care must be taken to ensure that 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, e.g., Gomes v. Univ. of Me. 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, "It 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 violent misconduct, as explained above, involve the highest stakes possible in the college disciplinary context. Students who are victims of violence suffer trauma that should be fairly and thoroughly investigated, and students found to have committed such assaults will be subjected to tangible and extensive

repercussions extending far beyond campus. It is these stakes that this Court must consider in determining the degree of procedural protection in campus Title IX proceedings.

ii. As Courts Are Increasingly Recognizing, the Circumstances and Stakes of Sexual Misconduct Cases Make Cross-Examination Essential

In recent years, the nature and scope of campus judicial proceedings has changed dramatically. Universities now routinely adjudicate claims of serious, violent misconduct, leaving many students permanently labeled as violent offenders without having had a meaningful opportunity to confront their accusers. Many schools either disregard hearings altogether, relying solely on investigative reports, or (as UA did here) provide hearings but with numerous restrictions on testing the credibility of the parties. These models undermine the truth-seeking purpose of these investigations. The parties are the witnesses who have the most information and the most incentive to thoroughly question each other about the facts and raise credibility issues.

This has led to a flood of litigation: Since 2011, more than 480 students accused of sexual misconduct have sued their universities alleging that they were

denied fundamental fairness in university judicial proceedings.[21] As of this writing, more than 50 lawsuits have been filed in 2019 alone.[22]

As these cases proceed, courts are revisiting the question of cross-examination and increasingly are holding that, at least where a case turns primarily on the credibility of the parties, cross-examination — which the U.S. Supreme Court has called "the greatest legal engine ever invented for the discovery of truth," *Lilly v. Virginia*, 527 U.S. 116, 124 (1999) — is an essential element of a fair proceeding.

In *Doe v. Baum*, 903 F.3d 575, 578 (6th Cir. 2018), the U.S. Court of Appeals for the Sixth Circuit held that "if a public university has to choose between competing narratives to resolve a case, the university must give the accused student or his agent an opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral fact-finder." *See also Doe v. Rhodes Coll.*, No. 2:19-cv-02336, at 8 (W.D. Tenn. June 14, 2019) ("When a disciplinary decision relies on any testimonial evidence in a case where credibility is in dispute and material to the outcome, due process requires an assessment of credibility through cross-examination."); *Norris v. Univ. of Colo.*, 362 F. Supp. 3d 1001, 1020

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[21] Samantha Harris & KC Johnson, Lawsuits by Students Accused of Sexual Misconduct, 4/4/2011– Present, https://docs.google.com/spreadsheets/d/e/2PACX-1vQNJ5mtRNzFHhValDrCcSBkafZEDuvF5z9qmYneXCi0UD2NUaffHsd5g4zlmnIhP3MINYpURNfVwSZK/pubhtml#

[22] *Id.*

(D. Colo. 2019) ("[W]ith the credibility of the parties in the investigation at issue, the lack of a full hearing with cross-examination provides evidence supporting a claim for violation of his due process rights."); *Oliver v. Univ. of Tex. Sw. Med. Sch.*, No. 3:18-cv-1549-B, 2019 U.S. Dist. LEXIS 21289, *40 (N.D. Tex. Feb. 11, 2019) ("[T]he Court finds that by not disclosing the incriminating evidence to Oliver before the hearing, combined with the lack of live testimony by [the complainant] or opportunity to cross-examination her, there was a substantial risk of erroneously depriving Oliver's interests through the procedures used"); *Lee v. Univ. of N.M.*, No. 1:17-cv-01230, at 2 (D.N.M. Sept. 20, 2018) ("Lee's allegations plausibly support a finding that his sexual misconduct investigation resolved into a problem of credibility such that a formal or evidentiary hearing, to include the cross-examination of witnesses and presentation of evidence in his defense, is essential to basic fairness."); *Doe v. Bd. of Trs. of the Univ. of Ill.*, No. 17-cv-2180 (C.D. Ill. Dec. 18, 2017) ("[W]hen the outcome of a disciplinary decision is dependent on credibility-based determinations, the accused's right to some form of cross examination is enhanced."); *Doe v. Allee,* 30 Cal. App. 5th 1036, 1066 (Cal. Ct. App. 2019) ("[W]here credibility is central to a university's determination, a student accused of sexual misconduct has a right to cross-examine his accuser, directly or indirectly, so the fact finder can assess the accuser's credibility.").

In his hearing at UA, Appellant's ability to ask questions of his accuser was heavily circumscribed by the fact that he was only permitted to submit written questions to the hearing panel to be asked "at the hearing panel's discretion." *Doe v. Univ. of Ark.-Fayetteville*, No. 5:18-cv-05182, 2019 U.S. Dist. LEXIS 57889, *28 (W.D. Ark. Apr. 3, 2019). According to Appellant, the panel exercised this discretion to paraphrase questions, to leave out "important points from the questions," and to refrain from asking "pertinent follow-up questions." (Compl., ECF No. 1, at ¶ 180). And even this severely limited form of cross-examination apparently exists at the whim of the university: There is no mention of it in the university's Sexual Assault and Sexual Harassment Policy, which states only that "[t]he parties will not be allowed to personally question or cross-examine each other or the Title IX Coordinator during the hearing, but will be allowed to question witnesses and will be allowed to hear the testimony of the other party via closed circuit television or other means."[23]

While real-time cross-examination through a hearing panel might theoretically satisfy the requirements of due process, the university's ability to reject proposed questions must be subject to reasonable limitations if cross-examination is to be meaningful. In *Doe v. Pennsylvania State University*, for

[23] Fayetteville Policies and Procedures 418.1, Sexual Assault and Sexual Harassment, https://vcfa.uark.edu/policies/fayetteville/oeoc/4181.php.

example, the district court noted the "precarious balance hearing panel members must strike in their review of submitted questions." 276 F. Supp. 3d 300, 310 (M.D. Pa. 2017). Finding that "inconsistent application of a university's procedures governing a disciplinary hearing may offend due process," the court ruled that "Penn State's failure to ask the questions submitted by Doe may contribute to a violation of Doe's right to due process as a 'significant and unfair deviation' from its procedures." *Id.* at 309.

Here, with no guidelines as to when the hearing panel may alter or reject questions — and apparently with no written requirement that the hearing panel even allow the parties to submit questions in the first place — the requirements of due process have not been satisfied.

IV. Multiple Other Procedural Defects Contributed to a Denial of Due Process in Appellant's Case

Although the lack of meaningful cross-examination alone is sufficient to establish that Appellant was denied due process, a denial of due process can also occur through a series of lesser, but cumulative, procedural errors. In *Doe v. Alger*, for example, a Virginia district court reviewed a number of alleged procedural defects (including, as in the instant case, the introduction of new evidence for the first time at an appeal hearing) in a campus sexual misconduct proceeding, and held that "[t]aking all of these deficiencies together, the court concludes that no

reasonable jury could find Doe was given fundamentally fair process." *Doe v. Alger*, 228 F. Supp. 3d 713, 732 (W.D. Va. 2016).

A. Appellant Was Blindsided by New Evidence at His Appeal Hearing

The university deprived Appellant of a fair process by allowing Jane Roe to introduce new evidence at the appeal hearing without first providing Appellant with notice or the opportunity to see the evidence to be used against him. Inexplicably, the lower court found that not only did this procedure not raise fairness concerns, but that it actually "only increases the possibility of a correct determination . . . ." *Doe v. Univ. of Ark.-Fayetteville*, No. 5:18-cv-05182, 2019 U.S. Dist. LEXIS 57889, *23 (W.D. Ark. Apr. 3, 2019).

The court's holding here defies common sense. Blindsiding a party with new evidence for the first time on appeal makes it unlikely that they will be able to adequately defend themselves. It is for this reason that courts have held that the notice requirement of due process in a campus proceeding is met only "if the student 'had sufficient notice of the charges against him and a meaningful opportunity to prepare for the hearing.'" *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 638 (6th Cir. 2005).

In *Doe v. Alger*, a Virginia district court granted summary judgment to a student who alleged that he had been deprived of due process in sexual misconduct

proceedings at James Madison University. Like Appellant, the plaintiff in *Alger* had been found not responsible initially, and then later found responsible when his accuser appealed the initial decision. And as in Appellant's case, his accuser submitted new evidence to the appeals board that the plaintiff did not have the opportunity to review and respond to. Noting that if the plaintiff had known about his accuser's new evidence, "he might have tried to submit additional materials of his own in response," the court found this to be a "procedural deficiency" that contributed to the lack of a "fundamentally fair process." *Doe v. Alger*, 228 F. Supp. 3d 713, 732 (W.D. Va. 2016).

B. The University Refused to Interview Witnesses with Potentially Exculpatory Information

Appellant also alleges that the university refused to interview two witnesses — Jane Roe's mother and her ex-boyfriend — who "communicated with Roe contemporaneous to the alleged incident and were believed to hold exculpatory information." (Pl.'s Response to Def.'s Mot. to Dismiss, ECF No. 22, at 9). The district court interpreted this as an argument that due process requires universities to go to the ends of the earth to track down witnesses, however obscure, who may have exculpatory information:

> Due process surely does not require that the UA track down all potential witnesses that a party believes has information in a given case. To require a university to do so would place an incredibly difficult burden on the

> university to complete its investigations in an efficient manner as required by Title IX.

Doe v. Univ. of Ark.-Fayetteville, No. 5:18-cv-05182, 2019 U.S. Dist. LEXIS 57889, *29 (W.D. Ark. Apr. 3, 2019).

But Appellant was not arguing that UA must "track down" anyone who might conceivably possess exculpatory information, or anything even close to it. Appellant was asking UA to interview two specific individuals who had close contact with his accuser around the time of the alleged assault. Given the life-altering consequences of a finding that he committed sexual misconduct, it hardly seems unreasonable that before finding someone responsible, a university should interview two readily identifiable individuals whom the accused believes might be able to exonerate him.

As a final point, it is critical to note that although Appellant was ultimately given a relatively "minor" sanction by the appeals board, he was facing expulsion throughout the proceedings, and thus was entitled to the degree of due process owed to someone facing potential expulsion for serious non-academic misconduct. Moreover, since the district court did not cite the level of punishment as part of its rationale for concluding that such a low level of process was due, the court's decision is equally applicable to cases in which students have, in fact, received the most severe sanctions available.

CONCLUSION

Since 2011, almost 500 accused students have filed lawsuits alleging they were denied a fair process in campus sexual misconduct proceedings. Many of these lawsuits are still pending, with new suits being filed frequently; FIRE is aware of 26 new suits filed in just the past three months alone.[24]

More guidance from the courts regarding the necessity of fundamentally fair procedures in campus adjudications 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 reverse the district court's decision to dismiss Appellant's due process claims.

[24] Harris & Johnson, Lawsuits by Students Accused of Sexual Misconduct, 4/4/2011– Present, *supra* note 21.

Dated: June 25, 2019

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(a)(5). This brief contains 5,512 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in fourteen (14) point Times New Roman font.

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CIRCUIT RULE 28A(H) CERTIFICATION

The undersigned hereby certifies that I have filed electronically, pursuant to Circuit Rule 28A(h), a version of the brief in non-scanned PDF format. I hereby certify that the file has been scanned for viruses and that it is virus-free.

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The undersigned hereby certifies that on June 25, 2019, an electronic copy of the Amicus Curiae Brief of Foundation for Individual Rights in Education in Support of Reversal and Appellant was filed with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. The undersigned also certifies that the following participants in this case are registered CM/ECF users and that service of the Brief will be accomplished by the CM/ECF system:

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