SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: THIRD DEPARTMENT

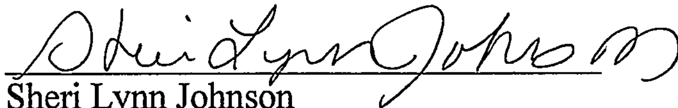
In the Matter of the Application of JOHN DOE, Petitioner-Appellant, For a Judgment Pursuant to Article 78 of the CPLR – against – CORNELL UNIVERSITY, Respondent-Respondent.	Case No. 526013 **Motion for Leave to File Brief of Cornell Law School Professors as *Amici Curiae*** Tompkins County Clerk's Index No. EF 2017-0146

PLEASE TAKE NOTICE that, upon the annexed affirmation dated the 25th day of March, 2018, a motion will be made at a term of this Court to be held in the City of Albany, New York, on the 23rd day of April, 2018, at the Appellate Division Courthouse located at the Justice Building, 5th Floor, Empire State Plaza, Albany, New York 12223, at 10:00 a.m., for an order granting certain Cornell Law School Professors, acting in their individual capacities, leave to file as *amici curiae* in this action the proposed brief, which as attached to the affirmation as Exhibit A, and for such other and further relief as the Court may deem just and proper in the circumstances.

PLEASE TAKE FURTHER NOTICE that, pursuant to CPLR 2214(b), answering papers, if any, shall be served at least seven (7) days before the return

date of this motion. Pursuant to Section 800.2(a) of the Rules of this Court, this motion will be submitted on the papers, and the personal appearance of counsel or the parties is neither required nor permitted.

Dated: March 25th, 2018



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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: THIRD DEPARTMENT

In the Matter of the Application of JOHN DOE, Petitioner-Appellant, For a Judgment Pursuant to Article 78 of the CPLR – against – CORNELL UNIVERSITY, Respondent-Respondent.	Case No. 526013 **Affirmation in Support of Motion for Leave to File Brief of *Amici Curiae* Cornell Law School Professors** Tompkins County Clerk's Index No. EF 2017-0146

I, Sheri Lynn Johnson, an attorney duly admitted to practice law before the courts of the State of New York, hereby affirm the following under penalty of perjury:

1. I am the James and Mark Flanagan Professor of Law at Cornell Law School. I make this affirmation as counsel for certain professors of the Cornell Law School, including myself, who, acting in our individual capacities, move for leave to file a brief in this appeal as *amici curiae*. I submit this affirmation in support of that motion.

2. A copy of the proposed *amici curiae* brief is attached as Exhibit A and is hereby incorporated by reference.

3. Among the issues on appeal, and the sole issue that the proposed *amici curiae* brief addresses, is the right of an accused student in a Title IX sexual misconduct hearing to test his accuser's account of events and credibility by having a disciplinary hearing panel ask his accuser proper questions that he proposes. As explained in the brief, Cornell's Title IX procedures expressly guarantee such a right, which is essential to truth-seeking and a fair adjudication in campus sexual assault proceedings. This right was not honored here.

4. As members of the Cornell community and professors who study, teach, and write about the rule of law, my law school colleagues who join this brief and I have a keen interest in the fairness and accuracy of Cornell University's disciplinary proceedings. Cornell's Title IX program affects our students, our community, and the reputation of the university where we teach.

5. We believe that our expertise, including in the areas of Contracts, Civil Procedure, Constitutional Law, Criminal Law, Criminal Procedure, Evidence, Education Law, Gender Discrimination Law, Torts, and Trial Advocacy, provides us with insight directly applicable to the procedures that Cornell and other colleges and universities use to adjudicate allegations of sexual misconduct. Accordingly, we are confident that the attached brief will be of assistance to this Court.

6. Our perspective and our interests are broader than those of the litigants. Although we believe that John Doe was entitled to have his proper and important

questions about Sally Roe's plans for the night of the incident and her credibility probed by the disciplinary hearing panel and that this did not occur here, we also are concerned more generally with whether Cornell respects this and other procedural protections in its Title IX policy going forward and whether courts properly interpret the policy. Accordingly, although our proposed brief addresses an issue that Doe litigated below and also raises on appeal, we do not duplicate the arguments made by Doe.

7. Our study, scholarship, teaching, and practice enable us to offer this Court with useful insight into these broader concerns. We identify law and arguments that might otherwise escape the Court's consideration and can otherwise be of assistance to this Court. *See* 22 NYCRR §500.23(a)(4).

8. We encourage this Court to continue to serve as an effective check on colleges and universities, which have been vested with authority to inflict life-altering punishment in this controversial area. *See, e.g.*, *Jacobson v. Blaise*, 157 A.D. 3d 1072 (N.Y. App. Div. 2018); *Doe v. Skidmore Coll.*, 152 A.D. 3d 932, 59 N.Y.S.3d 509 (N.Y. App. Div. 2017); *Haug v. State Univ. of New York at Potsdam*, 149 A.D.3d 1200, 51 N.Y.S.3d 663 (N.Y. App. Div. 2017).

9. The interests at stake for both the accuser and the accused require that college Title IX procedures not only be fair on paper, but that they be faithfully and fairly applied. This did not occur here and we have concerns about whether it will

occur in the future. This Court has an important role to play in ensuring that Cornell and other educational institutions comply with their own procedures and honor their commitments to provide important procedural protections, like the one at issue here, to students involved in campus sexual assault proceedings.

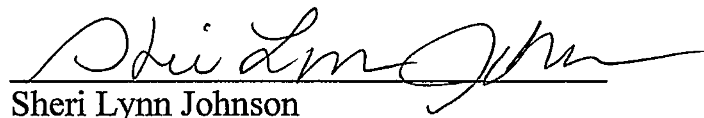
10. My areas of study, scholarship, and teaching include criminal procedure. Because of the stakes for a student accused of sexual assault, including expulsion or suspension and a life-altering transcript notation, there are parallels between these areas of law and campus sexual assault proceedings. Indeed, along with law professors from other institutions, I have publicly expressed concerns about campus sexual misconduct proceedings, including the denial of the right to cross-examine one's accuser, the very right at issue in this appeal. *See Law Professors' Open Letter Regarding Campus Free Speech and Sexual Assault* (available at http://www.saveservices.org/wp-content/uploads/Law-Professor-Open-Letter-May-16-2016.pdf).

11. I have been counsel of record in *amicus* filings in the Supreme Court of the United States and also have joined other *amici* in briefs in that Court. *See, e.g.*, *Shafer v. South Carolina*, 2000 WL 1706753 (U.S.) (U.S. Amicus Brief, 2000); *Texas v. Cobb*, 2000 WL 1519989 (U.S.) (U.S. Amicus Brief, 2000); *Rumsfeld v.*

Forum for Academic and Institutional Rights, 2005 WL 2330345 (U.S.) (U.S. Amicus Brief, 2005).

12. I respectfully request that the motion for leave to file a brief as *amici curiae* be granted in all respects and that proposed *amici* be given leave to file the attached brief in this appeal.

Dated: March 25th, 2018
Ithaca, NY



Sheri Lynn Johnson

Exhibit A

New York Supreme Court

Appellate Division: Third Department

Case No. 526013

In the Matter of the Application of

JOHN DOE,

Petitioner-Appellant,

For a Judgment Pursuant to Article 78 of the CPLR

– against –

CORNELL UNIVERSITY,

Respondent-Respondent.

BRIEF OF *AMICI CURIAE* CORNELL LAW SCHOOL PROFESSORS IN SUPPORT OF PETITIONER-APPELLANT JOHN DOE

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TABLE OF CONTENTS

Page

STATEMENT OF INTEREST 1

FACTUAL AND PROCEDURAL BACKGROUND 3

1. Roe's Statements Prior to the Party 3
2. Roe's Later Statements About the Party 4
3. Cornell's Title IX Procedures Concerning Questioning of the Accuser 6
4. The Disciplinary Hearing and Its Outcome 7

DISCUSSION 9

1. The Procedural Protection That Cornell Denied Doe Is Essential to Truth-Seeking and a Fair Adjudicatory Process 9
2. Cornell Must Follow Its Own Procedures 14
3. By Refusing to Ask Any of Doe's Relevant Proposed Questions in Any Form, Cornell Violated Its Own Procedures 16
4. The Supreme Court's Rationale for Dismissing Doe's Petition Undermines the "All Questions" Requirement in Cornell's Title IX Policy 18
5. Cornell's Varied Defenses of the Decision Are Unpersuasive and Suggest That It Will Not Honor Its Own Procedures in the Future 22

CONCLUSION 25

TABLE OF AUTHORITIES

Cases:

Page

Alcena v. Raine,
692 F. Supp. 261 (S.D.N.Y. 1988) 12

California v. Green,
399 U.S. 149, 158 (1970) 10, 21

Chambers v. Mississippi,
410 U.S. 284 (1973) 10

Curto v. Smith,
248 F. Supp. 2d 132 (N.D.N.Y. 2003) 12

Davis v. Alaska,
415 U.S. 308 (1974) 10

Davis v. Shah,
821 F.3d 231, 251 (2d Cir. 2016) 19

Doe v. Brandeis Univ.,
177 F. Supp. 3d 561 (D. Mass. 2016) 11

Doe v. Miami University,
882 F.3d 579 (6th Cir. 2018) 9

Doe v. Regents of the Univ. of California,
210 Cal. Rptr. 3d 479 (Ct. App. 2016) 13

Doe v. Skidmore Coll.,
152 A.D.3d 932, 59 N.Y.S.3d 509
(N.Y. App. Div. 3d Dept. 2017) 12, 15-16

Doe v. Univ. of Cincinnati,
872 F.3d 393 (6th Cir. 2017) 10-11

Giles v. California,
554 U.S. 353 (2008) 10

Goss v. Lopez,
419 U.S. 565 (1975) 9

Jacobson v. Blaise,
157 A.D.3d 1072 (N.Y. App. Div. 3d Dept. 2018) 12-13

Keyue Yuan v. Tops Market, LLC,
2012 WL 4491106 (N.D.N.Y. 2012) 12

McHale v. Cornell Univ.,
620 F. Supp. 67 (N.D.N.Y. 1985) 12

McNabb v. Mallory,
318 U.S. 332 (1943) 15

Nash v. Auburn Univ.,
812 F.2d 655 (11th Cir. 1987) 13-14

Neal v. Colorado State Univ.-Pueblo,
No. 16-CV-873-RM-CBS,
2017 WL 633045 (D. Colo. Feb. 16, 2017) 11

People v. Smith,
27 N.Y.3d 652, 57 N.E.3d 53, 57,
reargument denied sub nom. People v. McGhee,
28 N.Y.3d 1112, 68 N.E.3d 81 (2016) 10

Plummer v. Univ. of Houston,
860 F.3d 767 (5th Cir. 2017) 11

RadLAX Gateway Hotel, LLC v. Amalgamated Bank,
566 U.S. 639 (2012) 19

Stone v. Cornell Univ.,
126 A.D.2d 816 (N.Y. App. Div. 3d Dept. 1987) 12

Tedeschi v. Wagner Coll.,
49 N.Y.2d 652, 404 N.E.2d 1302 (1980) 14-15

United States v. Torres–Echavarria,
129 F.3d 692 (2d Cir. 1997) 19

Warner v. Elmira Coll.,
59 A.D.3d 909, 873 N.Y.S.2d 381
(N.Y. App. Div. 3d Dept. 2009) 15

Weber v. State Univ. of N.Y., Coll. at Cortland,
150 A.D.3d 1429, 55 N.Y.S.3d 753
(N.Y. App. Div. 3d Dept. 2017) 13, 20

Winnick v. Manning,
460 F.2d 545 (2d Cir. 1972) 11

Xiaolu Peter Yu v. Vassar Coll.,
97 F. Supp. 3d 448 (S.D.N.Y. 2015) 13

<u>Statutes</u>:

Civil Practice Law & Rules § 7803(3) 15

<u>Other Authorities</u>:

American College of Trial Lawyers, White Paper on Campus Sexual Assault Investigations at http://www.nacua.org/docs/default-source/new-cases-and-developments/New-Cases-April-2017/white-paper-re-sexual-assault-investigations.pdf. 14

5 John H. Wigmore, Evidence §1367 (3d ed. 1940) 10, 21

Law Professors' Open Letter Regarding Campus Free Speech and Sexual Assault at http://www.saveservices.org/wp-content/uploads/Law-Professor-Open-Letter-May-16-2016.pdf. 11-12

Open Letter from Members of the Penn Law School Faculty: Sexual Assault Complaints: Protecting Complainants and the Accused Students at Universities at http://media.philly.com/documents/OpenLetter.pdf. 12

STATEMENT OF INTEREST

The above-named twenty-three faculty members of Cornell Law School offer this brief to the Court as *amici curiae* in our capacities as individuals, not as representatives of the law school or Cornell University. Our specializations include Contracts, Civil Procedure, Constitutional Law, Criminal Law, Criminal Procedure, Evidence, Education Law, Gender Discrimination Law, Torts, and Trial Advocacy. For several reasons, we have an interest in John Doe's appeal from the Supreme Court's dismissal of his petition for relief under Article 78.

Cornell's Title IX procedures apply to all students at Cornell, including those law students whom we teach and mentor, and who serve as our teaching and research assistants; some of us also teach undergraduate students. Accordingly, on behalf of our students, as well as all students attending the University, we have an interest in ensuring that Cornell's procedures are interpreted properly and applied fairly and faithfully. And, as is explained below, we believe that in this case, a Cornell disciplinary hearing panel failed to comply with an important procedural safeguard clearly set out in Cornell's Title IX policy – the right of an accused student to have a disciplinary hearing panel conduct inquiry of his accuser about proper topics that he proposed – and that the Supreme Court erred in its interpretation of this feature of Cornell's policy. This violation of Cornell's procedures may recur without action by this Court, thus harming our students in the future.

Further, it is in our interest that the academic institution to which we have devoted much of our careers be committed to fair process, that it comply with its own procedures, and that its reputation not be undermined by its deviation from fair procedures.[1]

Finally, in our scholarship, teaching, clinical work, and service, we are devoted to the rule of law, to truth-seeking, and to fundamental fairness. These commitments, along with our expertise, cause us concern about the federal government's mandates to universities and colleges in Title IX matters, as well as their implementation in this and other cases. We question whether the required processes promote accurate results and whether they are fair to both complainants and respondents. We offer our accumulated knowledge and experience in the hope that it may be of use to the Court.

For these reasons, we respectfully seek leave of the Court to participate in this appeal as *amici curiae*.

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[1] This is not an isolated case. The University has been the subject of more Title IX-related investigations by the Department of Education's Office of Civil Rights ["OCR"] than any other college or university nationwide, and it has been sued with some frequency as a result of its conduct in Title IX matters. Moreover, one of our colleagues, who serves as an advisor to law students representing respondents in Title IX matters, has expressed reservations about the fairness of those who administer the Cornell Title IX program and their fidelity to Cornell's rules and procedures.

FACTUAL AND PROCEDURAL BACKGROUND

The parties doubtless will provide more detail regarding both the underlying facts and the procedural history of this case, so we summarize here only those facts central to the question of an accused student's right to inquiry into topics that undermine the credibility of his accuser.

On August 23, 2016, Roe filed a formal complaint, alleging that Doe had sexually assaulted her at an off-campus fraternity party on August 19, 2016, by having sex while she was incapacitated. R:657.[2] On August 27, Doe filed a cross-complaint, alleging that Roe had initiated additional sexual activity without his affirmative consent. R:672. On October 14, 2016, Roe filed another complaint, alleging that Doe's sexual assault complaint against her was retaliatory. R:980. A Title IX investigation ensued.

1. Roe's Statements Prior to the Party.

On August 30, 2016, Title IX investigators interviewed Witness #8, a fraternity member who attended the party. He was one of several students who saw Roe in a second-floor room at some point after she had sex with Doe and when Doe was no longer present. Witness #8 volunteered information he learned there from Witness #9, one of Roe's roommates:

> I should add that when [Roe's roommate] first came upstairs to find [Roe], she had said to me that [Roe] had said earlier in the night . . . that

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[2] References to pages in Doe's Record on Appeal are preceded by an "R."

> she was going to try and blackout tonight and that she might even try and sleep with somebody. So . . . she had said that, and then followed that up with saying that [Roe] had broken up with her boyfriend two days previously.

R:298.

Roe's roommate (Witness #9) acknowledged speaking to Roe before the party and then, at the party, telling Witness #8 that Roe was "really upset about this guy [the ex-boyfriend] and she wanted to meet somebody new." R:553. Other witnesses confirmed that Roe was upset about her breakup with her boyfriend and that, at the party and on the way home from the party, she repeatedly talked and cried about him. R:244, 298, 369, 571-72. Roe, however, during the investigation, denied discussing with her roommate an interest in meeting someone at the party. R:497.

2. Roe's Later Statements About the Party.

Prior to the hearing, Roe made a number of materially inconsistent statements about the events that occurred at the party. Most relevantly (given the accusation that she was too drunk to consent to sex) Roe gave differing accounts of how much she drank at the party. According to a police investigator, Roe reported that "[s]he doesn't think she was drinking that much, she said she drank some . . . But not that much where she would not remember consenting to sexual intercourse," R:1380, "[s]o she thinks that she may have been drugged." R:1391. There was, however, no evidence that Roe was drugged; her toxicology report came back negative for illegal substances. R:1404. And, in contrast to what Roe reported to police, she told

Cornell's Title IX investigators that she drank at least five to six shots of vodka in two mixed drinks during a short period of time, R:136, and that she was unable to recall much of what occurred at the party. R:494. Then at the hearing, Roe testified that she had drunk so much that her blood alcohol content was in the "death range" of a chart showing the effects of blood-alcohol content. R:1506-07.

Relatedly, Roe also gave inconsistent accounts of her mental condition at the party. She told investigators that, at 11:18 p.m., when she sent a joke text message to her mother, "I remember doing that I remember being coherent enough to do that, I don't remember ever being incoherent," R:124, but testified at the hearing that she "genuinely believed I was incapacitated" at 11:20 p.m. when she received a text message from Witness #1. R:704, 1504. Similarly, Roe reported to Title IX investigators: "I don't think I was passed out or something I just, I don't remember," R119, but later testified "I do remember being unconscious at certain points in the room," R:1507.

And finally, Roe's description of her pain and injuries to Title IX investigators were not consistent with the pain and injuries reflected in her medical records. Roe reported that the experience "was extremely painful, more so than anything I have ever felt before," R144, and that she had "never experienced anything that painful." R:145. She stated that the pain persisted twelve days after the party. R:147. She described having "several tears" and "a lot of damage" to her vaginal area. *Id.*

But, according to Roe's medical records, on the day after the party, when hospital personnel asked her to describe her present pain intensity, she reported that it was "0" on a scale of 10. R:736. An expert witness explained that Roe's medical records showed only "minor" and "superficial" injuries, including a single tear that could have been caused by the medical examination itself. R:1074; R:597-98. According to the expert, Roe's injuries "would be expected to heal within a few days" and were consistent with consensual sex. R:1073-74; R:588-89, 599. This expert testimony was uncontradicted.

3. Cornell's Title IX Procedures Concerning Questioning of the Accuser.

Cornell's procedures prohibited Doe from questioning Roe at the disciplinary hearing or having a representative do so.[3] They provide that "[t]hroughout the hearing, the parties with their advisor(s) and support person, if applicable, will be in separate rooms" and "will participate remotely, except when they testify." "The parties may never directly address each other" and "[t]he Hearing Panel conducts all questioning." R:1444.

The procedures do, however, permit parties to submit proposed questions and topics for the hearing panel to ask, including "[q]uestions and topics for . . . the other party." R:1447.

[3] Similarly, a "no contact" order prohibited Doe or a representative from trying to interview or speak with Roe before the hearing. R:686.

In two sequential sentences, Cornell's Title IX procedures describe the hearing panel's general discretion over requested questioning and its obligation to ask questions and inquire about topics proposed by a party:

> The Hearing Chair, in consultation with the Hearing Panel, will determine which of the parties' requested questions will be asked or topics covered.
>
> The Hearing Chair will approve in substance all questions or topics that are relevant and that are not prohibited by these procedures or applicable laws, unduly prejudicial, or cumulative of other evidence.

R:1447.[4]

4. The Disciplinary Hearing and Its Outcome.

As the Supreme Court described it, "Doe exercised his right to submit proposed questions for Roe, and . . . those proposed questions focused on two primary areas: 1) whether Roe had attended the party with the intention of possibly engaging in sexual activity and 2) false statements, inconsistencies and other factors that could bear on Roe's credibility." R:18; *see also* R:1658-60; 1663-64 (Doe's questions for Roe).

On April 17, 2017, when Roe testified at the hearing, the hearing panel did not ask Roe *any* of Doe's proposed questions (either in the form he requested or in any other form) concerning Roe's plans for the party, her recent breakup with her

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[4] The Hearing Chair and Panel are permitted to ask their own questions as well. R:1447.

boyfriend, or her inconsistent statements. Indeed, it asked Roe *no questions at all* on these topics. R:1498-1514.

When Roe completed her hearing testimony, Doe was permitted to submit additional questions and topics for Roe under a provision providing that "[a]t the hearing, the parties . . . have an opportunity to propose reasonable additional questions and topics." R:1447. While doing so, Doe noted that many of his previously submitted questions had not been asked. He reiterated his request for this questioning and also proposed additional inquiry, including questions focused on inconsistencies between Roe's earlier statements and her hearing testimony. R:1681. Cornell's hearing panel refused to ask Roe any additional questions. R:1514.

On May 24, 2017, the hearing panel found Doe "responsible" for sexual assault and "retaliation," and found Roe "not responsible." R: 1471. It ordered Doe suspended from college for two years, during which time any academic credits he earns elsewhere would not be applicable toward a degree at Cornell. Moreover, his academic transcript will permanently reflect that he was found to have committed a disciplinary violation. R: 1489-90.

Doe sought judicial relief under Article 78. R:31. On December 15, 2017, the Supreme Court, found that Cornell had "substantially complied" with its policy and procedures and dismissed the petition. R:25. Doe appealed. R:3.

DISCUSSION

1. The Procedural Protection That Cornell Denied Doe Is Essential to Truth-Seeking and a Fair Adjudicatory Process.

In gauging the adequacy of a process, both the individual's interest in the outcome and the likelihood that additional procedures will increase accuracy must be considered. Thus, it is important that for a college student accused of sexual assault, the stakes are very high. "A finding of responsibility for a sexual offense can have a 'lasting impact' on a student's personal life, in addition to his 'educational and employment opportunities,' especially when the disciplinary action involves a long-term suspension." *Doe v. Miami University*, 882 F.3d 579, 600 (6th Cir. 2018). In addition to being suspended, a student found responsible "may face severe restrictions, similar to being put on a sex offender list, that curtail his ability to gain a higher education degree. . . . Thus, the effect of a finding of responsibility for sexual misconduct on 'a person's good name, reputation, honor, or integrity' is profound." *Id*. (quoting *Goss v. Lopez*, 419 U.S. 565, 574 (1975)) (internal citations omitted).

Cornell's Title IX process is elaborate. But at least as interpreted by the panel, it lacked a procedural safeguard that is essential to accuracy. No process can be reliable or fair if a person accused of wrongdoing is unable to effectively challenge the accusations against him by testing his accuser's credibility. It is a truism in American criminal and civil justice systems that the best tool for achieving these

ends is cross-examination, "the 'greatest legal engine ever invented for the discovery of truth.'" *California v. Green*, 399 U.S. 149, 158 (1970) (quoting 5 John H. Wigmore, Evidence §1367, at 29 (3d ed. 1940)). As New York's highest court recently wrote:

> The United States Supreme Court has stated that "[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested" (*Davis v. Alaska*, 415 U.S. 308, 316 [1974]) and that the right of cross-examination is "implicit in the constitutional right of confrontation, and helps assure the accuracy of the truth-determining process" (*Chambers v. Mississippi*, 410 U.S. 284, 295 [1973] [internal quotation marks and citation omitted]).

People v. Smith, 27 N.Y.3d 652, 659, 57 N.E.3d 53, 57, *reargument denied sub nom. People v. McGhee*, 28 N.Y.3d 1112, 68 N.E.3d 81 (2016). Indeed, both the Sixth Amendment Confrontation Clause and the rule against hearsay embody the notion that fair and reliable fact-finding is best accomplished with live testimony from witnesses who are subject to cross-examination. *See, e.g.*, *Giles v. California*, 554 U.S. 353, 380–81 (2008) (explaining that "the Sixth Amendment's Confrontation Clause bars admission against a criminal defendant of an un-cross-examined 'testimonial' statement that an unavailable witness previously made out of court").

Thus, given the stakes in campus Title IX proceedings, it is not surprising that judges, law professors, and others familiar with Title IX have opined that students facing accusations of sexual misconduct should be afforded an opportunity to cross-examine their accusers and other witnesses against them. *See, e.g.*, *Doe v. Univ. of*

Cincinnati, 872 F.3d 393, 403 (6th Cir. 2017) ("Cross-examination . . . can reduce the likelihood of a mistaken exclusion and help defendants better identify those who pose a risk of harm to their fellow students.") (internal quotation marks omitted); *Plummer v. Univ. of Houston*, 860 F.3d 767, 781 (5th Cir. 2017) (Jones, J., dissenting) ("Given the nature of charges against these students, limiting cross-examination to written questions seems dubious."); *Winnick v. Manning*, 460 F.2d 545, 549–50 (2d Cir. 1972) ("if this case had resolved itself into a problem of credibility, cross-examination of witnesses might have been essential to a fair hearing"); *Neal v. Colorado State Univ.-Pueblo*, No. 16-CV-873-RM-CBS, 2017 WL 633045, at *25 (D. Colo. Feb. 16, 2017) ("Plaintiff's allegations plausibly support that the disciplinary proceeding did "resolve [ ] into a problem of credibility, [such that] cross-examination of witnesses might have been essential to a fair hearing"); *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 604–05 (D. Mass. 2016) ("the elimination of such a basic protection for the rights of the accused raises profound concerns.") (footnotes omitted); *Law Professors' Open Letter Regarding Campus Free Speech and Sexual Assault* at 5-6 ("These disciplinary policies must afford due process protections that are appropriate to the particular circumstances, considering . . . the severity of potential sanctions. These due process protections

include . . . affording [accused students] the right to cross-examination . . . .")[5]; *Open Letter from Members of the Penn Law School Faculty: Sexual Assault Complaints: Protecting Complainants and the Accused Students at Universities* at 3 ("What is required is fundamental fairness, including . . . the right to cross-examine witnesses against the accused student . . . .").[6]

It is true that New York State's "Enough is Enough Law does not require a college to permit cross-examination of a complainant or a witness" and it is also true that "[t]he right to cross-examine witnesses is limited in administrative proceedings." *Doe v. Skidmore Coll.*, 152 A.D.3d 932, 934, 59 N.Y.S.3d 509, 513 (N.Y. App. Div. 3d Dept. 2017).[7] However, "where a material factual conflict exists between the statements of a reporting person and an accused student, a mechanism should be made available for the accused student to present questions for the reporting person to address." *Jacobson v. Blaise*, 157 A.D.3d 1072, 1078 (N.Y.

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[5] Available at http://www.saveservices.org/wp-content/uploads/Law-Professor-Open-Letter-May-16-2016.pdf.

[6] Available at http://media.philly.com/documents/OpenLetter.pdf.

[7] We also recognize that Cornell is not a state actor and thus not legally obligated to comply with constitutional due process requirements. *See Curto v. Smith*, 248 F. Supp. 2d 132, 139-40 (N.D.N.Y. 2003); *Alcena v. Raine*, 692 F. Supp. 261, 267 (S.D.N.Y. 1988); *McHale v. Cornell Univ.*, 620 F. Supp. 67, 70 (N.D.N.Y. 1985); *Stone v. Cornell Univ.*, 126 A.D.2d 816, 818 (N.Y. App. Div. 3d Dept. 1987); *cf. Keyue Yuan v. Tops Market, LLC*, 2012 WL 4491106, at *3 (N.D.N.Y. 2012) (holding that Cornell police officers are state actors because they are deputized as specialty sheriffs by a New York state statute). Even private universities and colleges must, however, comply with their own procedures. *Doe v. Skidmore*, 152 A.D.3d at 935, 59 N.Y.S.3d at 513.

App. Div. 3d Dept. 2018). In *Jacobson*, this Court described with approval the processes that were both promised *and actually provided* at Skidmore College, where "during the investigatory stage, an accused student was permitted to submit written questions *to be answered by the reporting person if* deemed relevant and appropriate by the investigator," and at SUNY Cortland where "the accused student submitted questions through the hearing officer who reworked them 'into a more neutral form.'" *Id*. at 1077-78 (emphasis added).[8]

Other state and federal courts similarly have recognized that without a right to cross-examine one's accuser in a campus sexual assault proceeding, the presentation of the accused student's questions to the accuser is important and necessary. *Doe v. Regents of the Univ. of California*, 210 Cal. Rptr. 3d 479, 504 (Ct. App. 2016) ("a fair procedure requires a process by which the respondent may question, if even indirectly, the complainant"); *Xiaolu Peter Yu v. Vassar Coll.*, 97 F. Supp. 3d 448, 465 (S.D.N.Y. 2015) (characterizing questioning through a hearing panel chair as "procedurally adequate"); *Nash v. Auburn Univ*., 812 F.2d 655, 664 (11th Cir. 1987) (sufficient to permit accused students to "pose questions of the accusing witnesses by directing their questions to the presiding board chancellor,

[8] At SUNY Cortland, "the Hearing Officer changed the style of certain questions that petitioner submitted from traditional, leading cross-examination type statements into a more neutral form" but this "did not substantially change the information sought by petitioner in his submitted questions." *Weber v. State Univ. of N.Y., Coll. at Cortland*, 150 A.D.3d 1429, 1432, 55 N.Y.S.3d 753, 758 (N.Y. App. Div. 3d Dept. 2017).

who would then direct appellants' questions to the witnesses"); *see also* American College of Trial Lawyers, *White Paper on Campus Sexual Assault Investigations* at 2 ("The parties to a sexual misconduct investigation should be permitted to conduct some form of cross-examination of witnesses, in a manner deemed appropriate by the institution, in order to test the veracity of witnesses and documents.").[9]

Accordingly, our point is not that Cornell should have given Doe the right to full cross-examination that he would be entitled in a criminal proceeding. Rather, we stress that the alternative to traditional cross-examination that Cornell's procedures promised to Doe was crucial, and that the procedures he was promised should be interpreted in light of both the importance of those procedures to the accurate determination of the facts and also the public discussion and debate that was occurring when those procedures were adopted. In essence, by its Policy 6.4, Cornell promised to ask questions of the accuser in exchange for denying the accused the right to cross-examine, but Cornell broke its promise here.

2. Cornell Must Follow Its Own Procedures.

In *Tedeschi v. Wagner Coll.*, 49 N.Y.2d 652, 662, 404 N.E.2d 1302 (1980), the Court of Appeals described the importance of a college's compliance with its own procedures:

[9] Available at http://www.nacua.org/docs/default-source/new-cases-and-developments/New-Cases-April-2017/white-paper-re-sexual-assault-investigations.pdf.

> As Mr. Justice Felix Frankfurter wrote almost 40 years ago in *McNabb v United States* (318 US 332, 347), "The history of liberty has largely been the history of observance of procedural safeguards." If that be true in the dealings of the State with citizens enmeshed with its criminal justice system it is no less true in the dealings of a college with the members of its student body. To suggest . . . that the college can avoid its own rules whenever its administrative officials in their wisdom see fit to offer what they consider as a suitable substitute is to reduce the guidelines to a meaningless mouthing of words. We do not countenance that in other relationships nor should we between student and college.

This imperative of institutional fidelity to established procedure is embodied in Article 78 of New York Civil Practice Law and Rules. It mandates that a court vacate and annul "a determination [that] was made in violation of lawful procedure" and thus is "arbitrary and capricious." CPLR § 7803(3). Accordingly, "[w]hen reviewing a private university's disciplinary determinations concerning its students . . . the court must determine 'whether the university substantially adhered to its own published rules and guidelines for disciplinary proceedings so as to ascertain whether its actions were arbitrary or capricious.'" *Warner v. Elmira Coll.*, 59 A.D.3d 909, 873 N.Y.S.2d 381, 382 (N.Y. App. Div. 3d Dept. 2009). Although perfect compliance is not necessary, a failure to substantially comply requires annulment. *Doe v. Skidmore*, 152 A.D.3d at 935, 59 N.Y.S.3d at 514.

Applying these principles, this Court, in *Doe v. Skidmore*, *supra*, found a lack of substantial compliance in a Title IX sexual assault proceeding and annulled a private college's expulsion of an accused student. Skidmore College violated a

provision in its Title IX policy requiring that it notify an accused student of the factual allegations against him, a violation that was "aggravated" when the college also failed to give prompt notice of a new factual allegation (itself not a violation of policy), and where there were irregularities related to two witness interviews. 152 A.D.3d at 935-40, 59 N.Y.S.3d at 514-16.

3. By Refusing to Ask Any of Doe's Relevant Proposed Questions in Any Form, Cornell Violated Its Own Procedures.

Roe's sexual assault complaint was predicated on her claim that she was incapacitated by alcohol and therefore incapable of consent. Some of the requested testimony, such as that bearing on the amount of alcohol Roe had consumed, was directly relevant to the merits.

Even more obviously, because Doe contended lack of affirmative consent, both Roe's credibility and Doe's were central to determining his guilt. Credibility is affected by a number of factors, depending upon the circumstances; thus, corroboration (or lack thereof) by physical evidence, the inherent likelihood of the reported events, the opportunity to observe what a witness claims to have observed, and similarity to the account of another witness are each factors that can be of great importance or no importance in a particular case. But the classic factors – ones that virtually always are important – are the truthfulness and reliability/accuracy of a witness. The questions Doe proposed were aimed at those two critical factors and,

as such, were both appropriate inquiry and necessary to resolution of whether Roe was assaulted.

Ironically, the Supreme Court's factual findings themselves demonstrate that Cornell failed to substantially comply with its own procedural requirement that, at the disciplinary hearing, the panel ask Roe in substance "all" proper questions that Doe proposed. First, the Supreme Court found that "Doe exercised his right to submit proposed questions for Roe" and that his questions "focused on two primary areas: 1) whether Roe had attended the party with the intention of possibly engaging in sexual activity and 2) false statements, inconsistencies and other factors that could bear on Roe's credibility." R:18. Second, after reviewing the transcript of the disciplinary hearing, the Supreme Court found that "Doe is correct that Roe was not asked questions about her plans for the party, or other questions Doe posed relative to Roe's credibility." R:19. Third, the Supreme Court determined that Doe's requested-but-not-asked-questions "would have been *quite necessary* in a cross examination context." *Id*. (emphasis added). Fourth, the Supreme Court concluded that "Doe was deprived of . . . having the questions asked directly to Roe by the Hearing Panel." *Id*. This, of course, is precisely what Cornell's procedures promise – a right to have one's accuser be personally confronted at the disciplinary hearing with proper inquiry in some form. Here, however, the hearing panel asked none of

the above-described questions that Doe requested in any form. When the policy requires "all" and the panel asked "none" there cannot be "substantial compliance."

4. The Supreme Court's Rationale for Dismissing Doe's Petition Undermines the "All Questions" Requirement in Cornell's Title IX Policy.

When Doe challenged Cornell's determination against him under Article 78, claiming that Cornell had not followed its procedures, the Supreme Court rejected the claim. Its reasoning does not withstand scrutiny and, if followed, threatens to impair truth-seeking in future Cornell Title IX hearings.

First, the Supreme Court reasoned that "[t]he Procedures give broad discretion to the Hearing Panel on the questions which will be asked." R:19. True, the first of the two above-quoted sequential sentences in the policy states that "[t]he Hearing Chair, in consultation with the Hearing Panel, will determine which of the parties' requested questions will be asked or topics covered." R1447. But, as set out immediately thereafter, the procedures obligate "[t]he Hearing Chair [to] approve in substance all questions or topics" that are not objectionable. *Id*. The Supreme Court here erred when it read the first of these mandates – the general discretion that the procedures vest in the hearing chair and panel – to eliminate the second, the more specific "all questions" requirement. Under a well-established canon of interpretation, both of these rules must matter. "The general/specific canon is perhaps most frequently applied to statutes in which a general permission or

prohibition is contradicted by a specific prohibition or permission. To eliminate the contradiction, the specific provision is construed as an exception to the general one." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012); *Davis v. Shah*, 821 F.3d 231, 251 (2d Cir. 2016) (explaining that "a 'specific provision takes precedence over a more general' one") (quoting *United States v. Torres–Echavarria*, 129 F.3d 692, 700 n.3 (2d Cir. 1997)).

Thus, the only sensible interpretation of Cornell's policy is that the first sentence states a general rule vesting discretion over questioning, one empowering the chair and panel to (fairly) reframe requested questions and to determine whether a proposed topic of inquiry is proper, i.e., relevant and not prohibited by the procedures or applicable laws, not unduly prejudicial, nor cumulative of other evidence. The second sentence imposes a requirement as to all requested questions and topics that *are* proper. These must be approved (asked) in substance. Reading the two provisions together, the hearing chair and panel can reword proposed questions, refuse to pose improper questions, and refrain from exploring improper topics, but they are not free to simply reject proposed questions and topics. Instead, there must be *some* inquiry in *some* form about *all* requested topics that are relevant

and proper.[10] This Court essentially assumed as much in *Weber*, *supra*, 150 A.D.3d at 1432, 55 N.Y.S.3d at 758.

Second, the Supreme Court asserted that "the topics raised by Doe were addressed elsewhere in the investigative record, including in prior testimony of the parties and other witnesses, and were available to the Hearing Panel." R:19. This is both irrelevant and inaccurate.

It is irrelevant because the policy expressly requires approval of "all" questions and topics for purposes of *inquiry at the disciplinary hearing.* R:1447. That parties and witnesses may have made unsworn hearsay statements touching on the same topics to an investigator does not matter under the policy, which requires questioning at the hearing itself. (Indeed, the mention of certain topics in investigative interviews – such as Witness #8's account of what Roe's roommate reported to him about Roe's plans for the party – rather than justifying refusal to inquire into those topics at the hearing, instead demonstrates that Doe's proposed

[10] Doe's questions were not improper. The Cornell Policy does have a provision analogous to limitations on cross examination found in "rape shield" statutes, but neither that provision nor the policy behind rape shield statutes apply here. The Cornell provision explicitly limits cross examination on the topic of the parties' prior history: "Generally, during both the investigation and any hearing to determine responsibility, both parties may exclude evidence of their own prior sexual history with anyone other than the other party." R:1441. That provision, however, does not foreclose Doe's proposed questions about Roe's "plan to maybe sleep with somebody at the party," because his question did not relate to prior sexual history at all. Cornell has never argued that this provision barred Doe's questions.

questions were "quite necessary in a cross examination context" and should have been asked during the hearing.) Cornell has chosen to adjudicate sexual misconduct claims at a disciplinary hearing and promises to ask proposed questions there.[11] As discussed above, it has done so for a very good reason: cross-examination, even a modified, rough equivalent of cross-examination, is "the 'greatest legal engine ever invented for the discovery of truth.'" *California v. Green*, 399 U.S. 149, 158 (1970) (quoting 5 John H. Wigmore, Evidence §1367, at 29 (3d ed. 1940)). And having made that wise choice, its hearing panels cannot choose to ignore requested questions in favor of untested hearsay statements buried in the investigative record.

Further, the Supreme Court's assertion that these cross-examination topics were "addressed elsewhere in the investigative record" is not accurate. Much of the inquiry that Doe requested at the hearing was *not* conducted during the investigation and thus *not* contained in the investigative record. Most clearly, Roe was never confronted with material inconsistencies between what she told investigators and what she said in hearing testimony. These inconsistencies bore directly on the credibility of Roe's claim that she was "incapacitated" during sex. But, because this inconsistent testimony occurred at the disciplinary hearing, these material discrepancies were not (and could not have been) explored during the investigation.

[11] Cornell's policy also states that "[t]he hearing is intended to provide the parties with a fair opportunity to present relevant information to the Hearing Panel and enable the Hearing Panel to make informed decisions regarding responsibility and sanctions/remedies." R:1444.

Nor was Roe ever questioned during the investigation about the variance between her reported pain and injuries and what the medical records or her shifting accounts of how much she drank and the effect it had on her ability to recall events.

Application of the Supreme Court's reasoning would enable Cornell hearing panels to disregard students' properly proposed inquiry in future Title IX disciplinary hearings, either by relying on their general discretion over requested questions and topics or by considering the pre-hearing investigative record as a sufficient substitute for inquiry at the hearing. This would leave students in Cornell Title IX matters with no right to test the credibility of their accusers at a hearing and would render the "all questions" requirement in the policy a dead letter. Permitting students to only *request* questioning or *propose* topics for inquiry is meaningless unless there is a corresponding obligation on the part of the hearing panel to conduct the requested inquiry in some form during the hearing as to proper topics. Accordingly, this Court should expressly reject the Supreme Court's reasoning and make clear that Cornell hearing panels must make proper inquiry when requested to do so.

5. Cornell's Varied Defenses of the Decision Are Unpersuasive and Suggest That It Will Not Honor Its Own Procedures in the Future.

Cornell's hearing panel responded to Doe's written request reiterating that his proposed questions be asked, R:1681, by asserting that it *had* asked all of his proper questions in substance. The panel contended that it "revised the form of

argumentative questions[,] combined cumulative questions," and rejected improper questions. R:1489. As described above, however, when the Supreme Court reviewed the hearing transcript, it reached a very different conclusion, namely that questions that "would have been quite necessary in a cross examination context" went unasked. R119. Notably, neither Cornell's Appeal Panel nor its counsel in the Supreme Court endorsed the hearing panel's response.

Instead, the Appeal Panel and Cornell's counsel offered other defenses for the hearing panel's refusal to ask the questions Doe posed. Both contended that Roe's plan "to seek an opportunity for sexual activity . . . has no bearing on her ability to consent or to engage in sexual activity" at the party; and that the record did not show that Doe's proposed inquiry was necessary for the hearing panel to judge Roe's credibility. R:1632; Cornell Memorandum of Law dated September 1, 2017 at 38-39. The claim that evidence of Roe's plan for the party was irrelevant is simply wrong. Of course, the *weight* to be given to that evidence would be up to the factfinder, but there can be no doubt that Roe's pre-party intent to have sex *increased the likelihood* that her consistent conduct later that night was volitional; "relevance" requires nothing more. Further, this evidence bore on the credibility of Roe's claim to have been "confused" when, in response to Doe's expressed reluctance to have sex because he had no condom, she told him that she was on birth control, had only one previous sex partner, and had no sexually transmitted infections. R:119, 1503.

Roe's statements to Doe were more consistent with the execution of a pre-determined plan to have sex than with confusion or incapacitation.

Cornell's further contention, that there was sufficient evidence in the record for the hearing panel to judge Roe's credibility without posing Doe's requested questions, is either fundamentally misguided or factually wrong. A decisionmaker could always declare that nothing could change his or her mind; closemindedness might make that statement an accurate prediction, but such closemindedness is antithetical to an adversary system of justice. Alternatively, if Cornell means that the positive evidence supporting Roe' credibility was so overwhelming that no answer that Roe could give to the questions Doe proposed could in fact undermine her credibility, then it has ignored the questions raised by the evidence uncovered during the investigation. It also ignores that the procedures Cornell adopted expressly provide for a right to have proposed questions asked, without any qualification relating to the state of the record. Relatedly, to deny a student rights during the hearing based on an assessment of the prior investigative record defeats the purpose of having a hearing at which a panel can assess live witness testimony and make an independent decision.

In the Supreme Court, Cornell more broadly argued that "[t]he determination of what questions witnesses will be asked is left to the sound discretion of the Hearing Chair and Hearing Panel." Cornell Memorandum of Law at 38. But, as

noted above, this ignores that the procedures also require that "all" of a party's proposed questions be asked in substance if proper.

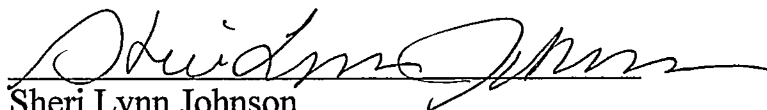
The common thread that runs through what the Supreme Court characterized as Cornell's "varied arguments," R:18, is Cornell's refusal to acknowledge that its own Title IX procedures, the imperative of truth-seeking, and fundamental fairness all require that a disciplinary hearing panel must ask relevant questions posed by the accused. The failure to acknowledge that such questioning is not optional both caused great harm to Doe and also poses a great threat of wrongful conviction to students who will face such proceedings in the future.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court reverse the Supreme Court's order dismissing Petitioner-Appellant Doe's Article 78 petition and vacate and expunge Cornell's determination against him.

Dated: March 25, 2018
Ithaca, New York

Respectfully submitted,



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