UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JOHN DOE Plaintiff; vs. THE UNIVERSITY OF TEXAS AT AUSTIN; DR. GREGORY FENVES, *individually and in his official capacity.* Defendants.	Civil Action No.: 1:17-cv-00732 **COMPLAINT** **JURY TRIAL DEMANDED**

ORIGINAL VERIFIED COMPLAINT

The President of the University of Texas at Austin has recently declared that "someone who is intoxicated cannot give consent to sexual activity because they are incapacitated." This is contrary to the law and common sense. This new unfair policy allows an individual to retroactively withdraw consent for sexual activity, and is inconsistent with UT's prior policy stance that, "Yes Means Yes." The policy shift effectively outlaws a large percentage of the sexual activity that occurs at the University, and subjects students to discipline for activity that is otherwise legal and morally appropriate. If applied indiscriminately, it would result in the suspension of thousands of young men and women who attend the University, and would unjustly interrupt their access to public education. In this case, the policy shift was made to overturn an

independent arbitrator's ruling that the daughter of a wealthy University donor was not incapacitated when she verbally consented to sex.

Plaintiff, John Doe[1], is a student at the University of Texas at Austin. John and Jane Roe, another student, had sex in John's bedroom one night after attending a party together. John asked Jane if she wanted to have sex. *Jane said yes*. Jane decided several days later that she was too intoxicated to make a well-informed decision about whether or not she should have said yes that night.

John was investigated for sexual assault by the University. He was absolved of any wrongdoing at a University hearing. John was then suspended for five semesters by University President Gregory Fenves when the hearing outcome was appealed. President Fenves decided for the first time on appeal that it was against the rules for two college students to have sex while intoxicated. John Doe alleges the following:

PARTIES

1. The Plaintiff, John Doe, is an undergraduate student at the University of Texas at Austin. He is a citizen of Texas and may be served through undersigned counsel. At all relevant times he was an undergraduate student at the University of Texas at Austin.

2. Defendant, the University of Texas at Austin (hereinafter referred to as, UT or the University) is an agency of the state of Texas, and an institution of higher education. UT is located at 110 Inner Campus Drive, Austin, Texas 78705.

[1] John Doe is a pseudonym. John has simultaneously filed a Motion to Proceed Under a Pseudonym with this Complaint.

3. Defendant Gregory Fenves is an adult individual and resident of Texas, who at all relevant times was the President of the University of Texas at Austin. President Fenves' place of business is 110 Inner Campus Drive Stop G3400, Austin, Texas 78712.

JURISDICTION AND VENUE

4. This Court has federal question jurisdiction pursuant to 28 U.S.C. § 1331 because the claims arise out of questions of federal Constitutional law under the 5th and 14th amendment.

5. This Court has supplementary jurisdiction over Plaintiff's state law claims under 28 U.S.C. § 1367(a) because the state law claims are so related to the federal claims that they form a part of the same case or controversy.

6. This court has personal jurisdiction over all the parties in this lawsuit because each party listed in the lawsuit resides in Texas.

7. Venue is proper because the claims arise out of conduct occurring in this district.

FACTUAL BACKGROUND

8. Jane Roe and John Doe had consensual sex on April 16th, 2016. Jane accompanied John to his apartment near the UT campus after her sorority's end of the year formal party. Remembering what he was taught during the University's orientation, John asked for affirmative, verbal consent. John asked Jane if she wanted to have sex. Jane replied "yes."

9. A few days later, Jane decided that she had been too intoxicated to make a good decision about whether or not she wanted to have sex with John that night.

10. Jane went to the University's Title IX Office and accused John of raping her. In doing so, she attempted to retroactively withdraw the consent she had freely given the night she and John were together.

11. During the Title IX Office's investigation, and in the eventual university hearing, certain facts regarding Jane's consent were never in dispute:

a. Jane gave John affirmative verbal consent to have sex.

b. Jane was never unconscious during sex.

c. There was no use of force or violence involved.

12. During the investigation, UT's Title IX office undertook to determine whether or not Jane's affirmative verbal consent was void because she had been "incapacitated" by alcohol.

13. During the investigation the Title IX office determined the following facts:

a. In April of 2016, John and Jane were nearing the end of their sophomore year at UT. Jane invited John to be her date to her sorority's formal. John and Jane met in the afternoon before the formal and attended a pre-formal party together on a boat on Lake Austin.

b. Jane consumed alcohol on the boat. She told the University investigators that she consumed approximately five cups of sangria. After the boat party, she told investigators that she did not consume any more alcohol for the rest of the night.

c. After leaving the boat, John and Jane traveled to Jane's sorority formal. They took a bus from Lake Austin back to Jane's sorority house, then

another bus from the house to the formal. They arrived at the formal approximately two hours after the boat party ended.

d. They spent approximately 1.5 hours at the formal. They left the formal and took another bus back to Jane's sorority house.

e. They spent an hour at the sorority house. They checked in with Jane's sorority, and had something to eat.

f. Then, John asked Jane if she wanted to go back to his apartment. Jane said she did. They walked to John's apartment from the sorority house.

g. John and Jane both believed they were intoxicated on the walk to John's apartment.

h. Once inside John's bedroom, John asked Jane if she wanted to have sex. Jane stated that she did.[2]

i. The two had consensual sex. Jane was conscious and participating throughout having sex. She gave John affirmative verbal consent. There was no force or physical violence involved.

j. After having sex Jane slept the rest of the night in John's bedroom. When she left in the morning she asked John for some clothing to wear and John let her borrow something from his closet.

[2] Exhibit J at 19, 20, and 22-23 (emphasis added).

14. The University General Catalog, Appendix D, is the University's policy on sexual misconduct.[3]

15. The University defines sexual assault, or more specifically rape as:

> "**Rape:** The penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the Complainant."

16. The Sexual Misconduct Policy defines when consent is not effective:

> "Consent is not effective if it results from: (a) the use of physical force, (b) a threat of physical force, (c) intimidation, (d) coercion, *(e) incapacitation*, or (f) any other factor that would eliminate an individual's ability to exercise his/her own free will to choose whether or not to engage in sexual activity."[4] (emphasis added).

17. The ultimate issue in this case became whether or not Jane was "incapacitated" in John's bedroom. The Sexual Misconduct policy provides the following definition of incapacitation:

> "**Incapacitation:** A state of being that prevents an individual from having the capacity to give consent. For example, incapacitation could result from

[3] Exhibit X at 3.

[4] Exhibit X at 2.

> the use of drugs or alcohol, a person being asleep or unconscious, or because of an intellectual or other disability."[5]

18. The investigators found that there was sufficient evidence to believe Jane was incapacitated, and therefore reason to believe her consent was void.

19. After the investigation, the disciplinary action proceeded to a hearing.[6] The University assigned a disinterested hearing officer to preside over the hearing and make a ruling on whether or not Jane was incapacitated when she consented to sex.[7]

20. A disciplinary hearing at UT is a quasi-trial proceeding. The hearing is presided over by a hearing officer who is typically a professor at the University. The accused student is permitted to give testimony, call witnesses, offer evidence, and cross-examine most witnesses against him. In a Title IX hearing, however, the accused student may not directly cross-examine the complaining witness. The accused student is frequently unable cross-examine the complaining witness entirely, because he cannot compel her attendance at the hearing. The accused student has no ability to subpoena witnesses, and in practice complaining witnesses rarely appear voluntarily at these hearings. The accused student also must advocate on his own behalf. He may have a lawyer present to advise him, but the lawyer may not speak on the record, or to anyone at the hearing other

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[5] Exhibit X at 3.

[6] See generally Exhibit Y at 8-15. (UT's Institutional Rules Chapter 11-600, et seq., for the details of UT's hearing procedure).

[7] The hearing officer was Dr. Conrad Fjetland, a lecturer in the chemistry department.

than the accused student.[8] The hearing officer ultimately makes determinations on the issues of fact and credibility in the case, decides if there has been a policy violation, and if so, imposes a sanction.

21. On the issues of credibility in this case, the hearing officer expressed doubt as to Jane's credibility regarding what she claimed to remember from the night (as did one of Jane's own sorority sisters, whom Jane had specifically asked the investigators to contact).[9] The hearing officer also found inconsistencies in Jane's testimony regarding consent.

22. On the issue of whether or not Jane had been incapacitated when she gave John affirmative verbal consent, the hearing officer used the definition of incapacitation provided by a Title IX investigator who testified at the hearing. The investigator testified as to the University's written definition, and added that slurring words or unsteadiness (of foot) could be signs of incapacitation.

23. Ultimately, the hearing officer determined as to the incapacitation of Jane: "the complainant made rational decisions throughout much of the evening prior to and after the sexual intercourse. These facts do not support her claim that she was incapacitated according to the definition as provided by [the University investigator]."[10]

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[9] Exhibit A (Jane's friend's statement to investigators: "I don't want this [accusation] to ruin someone's life. Her story just did not seem very credible to me. I think she might have been using being drunk as an excuse.")

[10] Exhibit E at 10.

24. After the hearing, Jane appealed the hearing officer's decision to the President of the University.

25. Under University Rules, the President has complete and unfettered authority to reverse or alter the decision of the hearing officer for any reason.[11]

26. John, Jane, and the Title IX office sent written arguments to the President regarding the issues on appeal. The President eventually provided a final written determination on April 12, 2017.

27. The President determined that, "[u]nder University rules, someone who is intoxicated cannot give consent to sexual activity because they are incapacitated."

28. The President also reversed or disregarded the hearing officer's prior findings of fact and determinations of credibility.

29. The President ultimately decided that because Jane was "intoxicated" when she gave affirmative verbal consent to sex, John was responsible for raping her.

30. The President reversed the hearing officer's decision and ordered John be suspended for five semesters – roughly two calendar years.

Cause of Action I-II
Procedural Due Process – No Meaningful Hearing
U.S. Const. am. 5, 14; Tex. Const. art. I § 19.

31. John incorporates by reference each and every preceding paragraph as if fully restated herein.

[11] Exhibit Y at 16. (Chapter 11-800, et seq., for University appeal procedure.)

32. The Texas Constitution's guarantee of procedural "due course of law" is for all practical purposes identical to the Federal Constitution's procedural due process guarantee. The Texas Construction provides an implied private right of action for lawsuits against the state when seeking equitable relief for violations of the due course of law guarantee.

33. 42 U.S.C. 1983 creates a private right of action for lawsuits seeking equitable relief against state agents acting in their official capacity.

34. In a public university disciplinary proceeding involving suspension or expulsion, the United States and Texas constitutions require that the accused student be given notice of the charges against him, and a meaningful opportunity to be heard at a meaningful time.

35. In university sexual assault disciplinary hearings, the accused student is typically entitled to:

a. Some kind of hearing.[12]

b. The opportunity to call witnesses.[13]

c. The opportunity to be advised by a lawyer at the hearing.[14]

d. The opportunity to cross-examine adverse witnesses.[15]

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[12] *Plummer v. Houston*, ___ S.W.3d ___, No. 15-20350, *7 (5th Cir. June 26, 2017) (citing *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 158 (5th Cir. 1961)).

[13] *Flaim v. Medical Col. Of Ohio*, 418 F.3d. 629, 636 (6th Cir. 2005)

[14] *Id*; *Gomes v. Univ. of Maine System*, 365 F.Supp.2d. 6, 16 (D.Me. 2005).

[15] *Winnick v. Manning*, 460 F.2d 545, 549 (2d. Cir. 1972)*; Flaim* at 636.

e. The opportunity to cross-examine the complaining witness, at least through the hearing officer.[16]

f. The opportunity to have questions of fact determined by a fair and unbiased fact finder.[17]

36. Whether or not a university's disciplinary procedures comply with the requirements of due process depends on balancing the risk of an erroneous punishment, the cost to the University of implementing procedures to reduce that risk, and the cost of an erroneous punishment to the accused student, on a case by case basis.[18]

37. UT's disciplinary process did not meet the requirements of due process in this case. At UT, an accused student is not allowed to compel testimony through compulsory attendance of witnesses at the hearing. The accused student, who is typically a teenager, or an adult in his early twenties, is expected to act as his own lawyer at the hearing. He may have an advisor with him at the hearing, but the advisor is not allowed to speak to anyone except the accused student. The advisor cannot advocate on behalf of the student. The complaining witness is not required to appear at the hearing, and cross-examination of the complaining witness is subject to the discretion of the hearing officer. In addition, and most importantly in this particular case, all of the procedural safeguards that were in

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[16] *Winnick* at 549.

[17] *Sill v. Penn. State Univ.*, 462 F.2d 463, 469 (3d. Cir. 1972)*; Duke v. N. Tex. St. Univ.*, 469 F. 2d. 829, 833 (5th Cir. 1973).

[18] *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

place at the hearing were overridden through the President's arbitrary exercise of his sweeping and unfettered authority on appeal.

38. The President's authority in the appeal of a hearing determination is despotic in scope. The unfettered discretion granted to the President to make appellate determinations in disciplinary cases disregards one of the most basic concepts enacted by the judicial system to ensure fairness in appeals.

39. An appellate court will traditionally give almost total deference to findings of fact and credibility that are made by a trial judge. This is done because a trial judge is in a better position to make such findings. A trial judge can evaluate the demeanor of witnesses, can listen to live testimony, and can directly question witnesses.

40. The University's appeal process, as a result of the President's entirely unfettered discretion, unnecessarily injects the risk that the President will make an incorrect fact or credibility determination due to his ineffective ability to make those judgments relative to the hearing officer. It allows the President, whose job is political, to reverse decisions made within the confines of something at least akin to due process, for publicity reasons or in the interest of political correctness. Namely, the President may (and did in this case) reverse a hearing outcome when the hearing outcome, although correct, did not advance the University's goal of being on the forefront of the national movement against on-campus sexual assault. In addition, it allowed President Fenves, in this case, to overturn an independent arbitrators ruling that had gone against the daughter of a wealthy University donor.

41. In finding against the Plaintiff and in favor of the daughter of a donor, President Fenves unilaterally changed the definition of who could consent to sexual activity in a way which ignored UT's own prior policy that 'Yes Means Yes." It also ignored the definition used in Sexual Assault Survey that President Fenves championed just days before issuing his ruling in Plaintiff's case. That study defined incapacitation as "when [a person is] too drunk or high to know what they are doing, or to control their behavior or to provide consent." A much higher and more reasonable standard than the one President Fenves suddenly announced.

42. The risk of error that the President's unfettered discretion represents is a violation of the Plaintiff's right to procedural due process because there is no cost to implementing a procedure to eliminate that risk. There is no cost to impose rules or to specify a standard of review that the President, or preferably a neutral arbitrator, is required to follow when considering Title IX appeals.

43. The risk of error that is represented by the President's scope of authority came to fruition in this case. President Fenves, as opposed to the hearing officer, strained the meaning of John's statements at the hearing to find them inconsistent. President Fenves ignored critical inconsistencies in Jane's testimony. President Fenves misunderstood the timeline of events and overemphasized the relevance of third-party witness testimony in purely he-said, she-said case.

44. President Fenves made these alternate findings as to the weight of the evidence and the credibility of witness testimony based entirely on the reading of a cold record.

45. Due process requires that the President be prevented from making these errors and instead be required to defer to the findings of fact and determinations of credibility that were made by the hearing officer.

46. In failing to give deference to the findings and fact and credibility determinations made by the hearing officer, the President and the University have caused actual damages to John. His future career opportunities and personal reputation are imminently threatened with harm that has no remedy at law.

Cause of Action III-IV
Procedural Due Process – President Fenves' Political and Personal Bias
U.S. Const. am. 5, 14; Tex. Const. art. 1 § 19

47. In this case, John was entitled to a meaningful opportunity to be heard at both the hearing and the appellate stage of the disciplinary process.[19]

48. The precise requirements of procedural due process in the context of university disciplinary action require case by case analysis. However, a neutral adjudicator is essential.[20]

49. The University did not provide a meaningful opportunity for John to be heard in the appeal. President Fenves is not a neutral adjudicator.

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[19] *Furey v. Temple Univ*, 884 F.Supp.2d 223, 261 (E.D.Pa 2012); *Doe v. Rector & Visitors of George Mason Univ.*, 179 F.Supp.3d 583, 589 (E.D.Va. 2016)

[20] *Sill v. Penn. State Univ.*, 462 F.2d. 463, 469 (3rd Cir. 1972); *Gorman v. Univ. of Rhode Island*, 837 F.2d. 7, 15 (1st Cir. 1988); *Nash v. Auburn Univ.*, 812 F.2d. 655, 665 (11th Cir. 1987); *Winnick v. Manning*, 460 F.2d. 545, 548 (2nd Cir. 1972).

50. As President of the University, President Fenves has biases and conflicts of interest that were the overriding force in his ultimate decision to reverse the hearing officer's findings.

51. In this case, the father of the complaining witness is a wealthy donor to the University. He donated significant sums to the University just last year (2016), within approximately one month of the allegations by his daughter. His biography is listed in several University publications, and while the Title IX investigation was ongoing, he was appointed as an advisor to the University.[21]

52. As the primary fund raiser for the University, President Fenves has a conflict of interest in deciding Title IX appeals generally, but especially when a donor's child is involved because of his potential bias towards donors and his role as a fundraiser. The potential for abuse in this circumstance is significant, and the appearance of impropriety is striking.

53. Having the President of the University decide this Title IX appeal with no guidelines for reversal, is as if the President of the United States were to overturn a criminal conviction for a significant campaign donor. At the University of Texas, there is no separation of powers. The prosecuting office investigates the case, tries the case, and if the result doesn't turn out the way they want with a neutral arbitrator, they can overturn the case on appeal.

[21] The specifics of complaining witness's father's contributions to the University have been omitted in order to protect the identity of the complaining witness in this case.

54. President Fenves' discretion is so sweeping that he is permitted to unilaterally interpret the rules of the University, as he did in this case, in a way that was inconsistent with prior University announcements ("Yes Means Yes"), and their own survey on sexual violence. It's not fair that President Fenves can change the rules in order to overturn a ruling he didn't find furthered the political/monetary goals of the University.

55. President Fenves cannot adjudicate a Title IX claim without bias because his role as the President of the University creates a direct and unavoidable conflict of interest.

56. One of the President's responsibilities is to represent and protect the University's political interests in the state and national media. He is responsible for the University's ability to attract potential students, donations from alumni, and grants to fund research and operations.

57. Rape on university campuses is an issue which is frequently covered in the national media. Particular media attention is paid when a Title IX complainant sues a university alleging the university did not adequately investigate a complaint of rape, or adequately punish the accused student.

58. As President of the University, President Fenves must conduct himself with the political implications of his actions in mind.[22]

[22] Ralph K.M. Haurwitz, *Gregory Fenves declined $1 million salary for top UT job, emails show*, AUSTIN AMERICAN-STATESMAN, http://www.mystatesman.com/news/state--regional/gregory-fenves-declined-million-salary-for-top-job-emails-show/ (last visited 7/6/2017) (President Fenves rejecting a one million dollar a year salary because it "may not play well politically.")

59. In order to protect the University from the reputational damage done by a lawsuit filed by a Title IX complainant, it is in the interest of the President to ensure that if the University is sued over their Title IX disciplinary process, the Plaintiff in the lawsuit is the accused student, not the alleged victim.

60. President Fenves was appointed to his office in 2015 by the UT Board of Regents, including Chancellor William McRaven. Chancellor McRaven has stated publically that he views projecting an appearance as the leader in fighting sexual assault on campus is attractive to donors.[23]

61. President Fenves acted to protect the University's reputation in this case by reversing the decision of the hearing officer, without regard for the facts or University rules, because he believed the complaining witness was likely to file a lawsuit if the University did not decide her way.

62. President Fenves is also biased to side with the complaining witness in a Title IX case because it protects the University's interest in continued receipt of federal funding. Maintaining a "tough-on-sexual-assault" appearance protects the University from "huge potential" federal funding penalties that can be enacted by federal officials.[24]

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[23] Lauren McGaughy, *How the man who led the bin Laden raid is now leading the way on addressing campus sexual assault*, DALLAS NEWS, https://www.dallasnews.com/news/higher-education/2017/04/22/man-killed-bin-laden-leading-way-addressing-campus-sexual-assault (last visited 7/6/2017) (Chancellor McRaven commenting on the release of UT's Sexual Assault Survey that: "[w]ithin a week, no kidding, the donors were stopping by and saying, 'Hey, we're glad you're getting ahead of this.'").

[24] Exhibit S (KC Johnson and Stuart Taylor, *The dangers of gutting due process in campus sexual assault cases*, THE WASHINGTON POST, January 30th, 2017).

63. President Fenves also cannot adjudicate a Title IX appeal without bias because he has a personal interest in appearing tough on students accused of sexual assault on campus.

64. The careers of university presidents, and other high-level university officials have been destroyed because of their failure to adequately investigate Title IX allegations, and because of their failure to adequately punish those thought to be guilty of wrongdoing.[25]

65. University officials have not been fired for being too tough on accused students, however. President Fenves' personal career is at stake if he takes the side of an accused student and gets it wrong. It is directly beneficial to him to err on the side of suspending an accused student, regardless of the facts or the rules, because his career is not at stake if he wrongfully punishes an accused student.[26]

66. One only has to look a hundred miles north of UT to Baylor University to see what happens when it appears that a university is not taking an accuser's allegations seriously. However, President Fenves' ruling that University students can't have sex if they are intoxicated is simply the flipside of the extremism that motivates a regent at another school to think that a young lady is a tart for drinking when it was legal for her to do so.

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[25] Marc Tracy, *Baylor demotes President Ken Starr over sexual assault investigation*, NEW YORK TIMES, https://www.nytimes.com/2016/05/27/sports/ncaafootball/baylor-art-briles-kenneth-starr-college-football.html (last visited 7/6/2017).

[26] *See Doe v. Columbia Univ.*, 831 F.3d. 46, 57 (2nd Cir. 2016) ("[I]t is entirely plausible that the University's decision-makers and its investigator were motivated to favor the accusing female over the accused male, so as to protect themselves and the University from accusations that they had failed to protect female students from sexual assault.")

67. This sort of thinking is un-American. It is political gamesmanship done to advance the reputation of a powerful bureaucrat and a wealthy university at the expense of truth about their own students. Public humiliation and punishment without a fair trial, done by insiders within the power structure, is a vestige of Middle Ages. As civilization advanced, one of the most powerful agencies of historically needed change proved to be the rise of universities. This University should look inward and honor the historic mission of fairness and legal protections and away from the institutional abuse of power undertook here to protect its own image.

68. President Fenves is also an advocate for greater university crackdown on campus sexual assault.[27] Permitting the President to have final and unfettered authority over the outcome of a sexual misconduct investigation also allows advocacy to leak into what should be neutral decision-making.

69. President Fenves' written determination evidences his bias. The President's interpretation of the facts and application of the University rules are diametrically opposed to the neutral hearing officer's findings.

70. The hearing officer found inconsistencies in Jane's testimony; the President found the inconsistencies immaterial.

[27] Exhibit Q (Photograph of the President's participation in anti-sexual assault advocacy campaign, taken in March of 2017 when the appeal in this case was pending.)

71. The hearing officer found John's testimony to be consistent and credible; the President found his testimony to contain inconsistencies about the amount of alcohol Jane consumed.

72. The hearing officer followed the standard of incapacitation provided by the Title IX investigators and the University's Sexual Misconduct Policy; the President made up his own standard.

73. The hearing officer considered a third-party witness's testimony about Jane's behavior during the night in the context of the proper timeline of events; the President misunderstood the timeline to wrongly imply Jane appeared more intoxicated at a later point in the night.

74. These omissions and misrepresentations in his written determination evidence bias on the part of the President. John did not have a meaningful opportunity to be heard at the appellate stage of the disciplinary process because President Fenves had no interest in listening to him.[28]

75. President Fenves has a history of stretching the University rules or the facts to find accused students responsible for sexual assault. There is no indication that President Fenves has ever reversed a hearing officer's decision in favor of an accused student.[29]

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[28] Compare Exhibit P (President's determination), Exhibit J (Excerpts from hearing record), and Exhibit E (Hearing officer determination letter).

[29] See Exhibit T (Redacted appeal decision from 2015 where President Fenves expelled a student for sexual assault despite the fact that the complaining witness awoke the accused student by grabbing his genitals and initiating intercourse with him. The complaining witness later realized she woke up the wrong person, and the person she woke up was expelled for raping her.)

76. In this case, the President ignored and misinterpreted evidence in a way that was consistent with his overriding interest in protecting the University's reputation and his own career. He acted to advance the political reputation of himself and the university at the expense of truth about one of his own students. He has forwent logic and fairness in a misguided attempt to ensure that UT does not suffer the same public relations disaster that occurred at nearby Baylor University.

77. The President's bias in his adjudication of Title IX appeals is intolerable to due process because there is no cost to eliminating that bias in these appellate decisions. There are innumerable more fair and less costly university employees that could be used to decide Title IX hearing appeals.

78. As a result of the deprivation of a meaningful opportunity to be heard in the University appeal, John has sustained actual damages. His career opportunities and reputation is imminently threatened with harm that has no remedy at law.

Cause of Action V-VI
Substantive Due Process – Vagueness
U.S. Const. am. 5, 14.; Tex. Const. art. 1 § 19.

79. John incorporates by reference each and every preceding paragraph as if fully restated herein.

80. The vagueness doctrine arises out of the due process guarantees of the Texas and U.S. Constitutions. It applies to University rules and regulations, however university

rules and regulations do not need to be drawn with the same specificity as criminal laws.[30]

81. A rule may be impermissibly vague if it either does not give a reasonable person notice of the conduct proscribed, or if it does not provide specific guidelines for enforcement.

82. The University's Sexual Misconduct Policy is unconstitutionally vague as it relates to sexual assault by way of incapacitation. It is unconstitutionally vague because it provides an entirely meaningless definition of the term incapacitation.

83. It is impossible to tell what incapacitation means from the University's definition: "a state of being that prevents an individual from having the capacity to give consent." This definition is circular. The root of the word being defined has been used in the definition.

84. The definition provides no determinate guidelines for enforcement. At the hearing, the University investigator was asked to define incapacitation without using the word 'capacity' in the definition. His answer:

> "A: Sure. So incapacitation would be lacking the ability to give consent based on all the aforementioned ways that one could be incapacitated or lack the ability."[31]

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[30] *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 674, 686 (1986).

[31] Exhibit J at 64.

85. If a University investigator cannot give a coherent definition of the term incapacitation, then the term cannot provide any determinate guidelines for the way he or she enforces the policy. It likewise cannot provide any guidance to a student reading the rule.

86. During the hearing, the same investigator was handed a photograph of Jane which was taken at the sorority formal.[32] The investigator was asked if Jane appeared incapacitated at the formal. Kia Hill, the Assistant Director of Student Conduct, objected to the question and said, "[The university investigator] isn't an expert in determining if she's incapacitated or not."[33]

87. If the person investigating claims of incapacity is not qualified to determine when someone is or is not incapacitated, who is? If the Assistant Director of Student Conduct believes it requires an expert to determine whether or not someone is incapacitated, how can any student be expected to tell?

88. The rule plainly provides no standard for the University to determine when a person is or is not incapacitated. The rule can be enforced with complete and arbitrary discretion because its terms are so vague.

89. UT is certainly capable of providing a definition that is not meaningless. UT released a survey of the prevalence of sexual assault on its campuses earlier this

[32] Exhibit B (Redacted photos from the boat party and formal. Jane in two piece dress, posing for photos throughout the night. One photo was obtained from Jane's Instagram account during the pendency of the University investigation and appeal.)

[33] Exhibit J at 55.

year. UT was able to provide a more meaningful definition of incapacitation in that survey. The definition used was: "taking advantage of [a person] when [the person was] too drunk or out of it to stop what was happening."[34] The survey also referenced the definition contained in the Texas Penal Code which defines incapacitation as, "unconscious or physically unable to resist."[35]

90. UT's "Blueprint for Campus Police: Responding to Sexual Assault" defines "incapacitated rape" as "when the victim voluntarily uses drugs or alcohol and then experiences unwanted sexual acts when they are too drunk or high to know what they are doing, or to control their behavior to provide consent."[36]

91. The Association of Title IX Administrators Model Policy also provides a more meaningful definition: "incapacitation is a state where someone cannot make rational, reasonable decisions because they lack the capacity to give knowing consent. (e.g. to understand the "who, what, where, when, why, or how of their sexual interaction)."[37]

92. The U.S. Department of Justice funded a study where incapacitated rape was defined similarly: "The victim is passed out or awake but too drunk or high to know what she is doing or control her behavior."[38]

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[34] Exhibit F at 6.

[35] Exhibit D (TEX. PEN. CODE § 22.011).

[36] Exhibit G at 6.

[37] Exhibit H at 9.

[38] Exhibit I at 10.

93. Other schools have been capable of providing a meaningful definition of incapacitation, and have provided substantial guidance for distinguishing between incapacitation and intoxication.

94. Dartmouth College describes signs of *intoxication* to include "slurred speech," "weaving or stumbling while walking," and "exaggerated emotions." These were exactly the kind of signs that President Fenves relied on to find *incapacitation* of the complaining witness in this case. According to Dartmouth's policy however, incapacitation requires more, such as: an "inability to speak coherently," "confusion on basic facts (day of the week, birthdate)," "inability to walk unassisted," and "passing out."[39]

95. MIT also provides significant instructions for evaluating incapacitation: "…incapacitation is a state beyond drunkenness or intoxication. A person is not incapacitated merely because they have been drinking or using drugs." "A person who is incapacitated may not be able to understand some or all of the following questions: 'Do you know where you are?', 'Do you know how you got here?', 'Do you know what is happening?', 'Do you know whom you are with?'"[40]

96. Whitman College provides examples of when someone might be incapacitated: "… if someone is passing in and out of consciousness, and there is a high probability they could pass out again. Or, [incapacitation] might be if someone

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[39] Exhibit C at 1-2.

[40] Exhibit C at 3.

is vomiting so violently and so often that they are simply in such bad shape that they cannot be said to have capacity."[41]

97. The University of Texas, by contrast, has provided two sentences to define incapacitation and in those two sentences they use the root of the word they are trying to define. The University's Sexual Misconduct Policy as it relates to incapacitation is therefore unconstitutionally vague under the requirements of substantive due process.

98. As a result of attempting to enforce this policy, the President and the University have caused actual damages to John. His career opportunities and reputation is imminently threatened with harm that has no remedy at law.

Cause of Action VII-VIII
Substantive Due Process – Unconscionable Disciplinary Action
U.S. Const. am. 5, 14; Tex. Const. art. 1 § 19

99. John incorporates by reference each and every preceding paragraph as if fully restated herein.

100. The established norm for sexual consent between university students is described by the University's Voices Against Violence program. VAV is a University-funded campus advocacy group that educates students about sex and consent.

[41] Exhibit C at 4.

101. The VAV website explains that: "[c]onsent is a 'Yes' when it's OK to say 'No.'" It explains that to obtain consent a conversation is required, and the conversation requires "consciousness and clarity."[42]

102. The group produced a campaign of posters that were hung around the UT campus, and displayed on the VAV website called "UT Gets Consent." The posters prominently state the same thing: "Yes Means Yes." Particular posters in the campaign describe circumstances where a person cannot consent: "Asleep means no," "Unconscious means no," and "Wasted means no."[43]

103. These explanations of consent are consistent with the established norm: someone can become so intoxicated that they lose the ability to consent, however intoxication alone does not make it impossible for a person to consent.

104. This characterization of intoxication and incapacity is also consistent with the established norm at universities across the country.[44]

105. The law also recognizes intoxication as a level of impairment that may not rise to the level of incapacitation. Using intoxication as the standard instead of incapacitation ignores this distinction and allows lack of consent to be artificially and illegally inferred where actual consent was given.[45]

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[42] Exhibit L.

[43] Exhibit M.

[44] See e.g. Exhibit C (Intoxication vs incapacitation at other Universities).

[45] See Exhibit W (for a general discussion of the meaning of "capacity" as an inability to perceive reality in other legal contexts.).

106. The use of intoxication as a method to achieve the standard of proof for lack of consent ignores the analogous laws of alcohol consumption and intoxication. Established law is that intoxication is not a defense to voluntary conduct. That is how DWI and felony homicides are proved if the driver is "intoxicated". The same logic applies to consent: voluntary intoxication does not negate the voluntary act of consent.

107. University of Texas investigators also did not believe that an intoxicated person is automatically incapacitated under the rules:

> "Q: There's a difference between drunk and being incapacitated, isn't there?
>
> A: Yes. One is intoxication and one is incapacity."[46]

108. The President's appeal determination changed the standard of consent from the established norm. The President then applied this new standard to John's case ex post facto. Inconsistent with all of the above norms, President Fenves wrote in his appellate decision: "An intoxicated person cannot consent to sex due to incapacitation."[47]

109. This is unconscionable because the President of the University cannot make up the rules as he goes.

110. Beyond being a gross deviation from the standard of intoxication and consent in the law and at other universities, the President's assertion that an

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[46] Exhibit J at 63.

[47] Exhibit P at 10.

intoxicated person cannot consent to sex is also a gross deviation from a reasonable or viable policy.

111. Intoxication is not a term of art. It is frequently defined however, as having a blood alcohol concentration of 0.08 grams per deciliter or more or when a person has lost the "normal use" of their mental and physical faculties.[48]

112. Even when the term intoxication has a concrete definition, it is difficult to determine when a person actually is intoxicated. Police officers who have received special training to identify signs of intoxication often observe loss of balance and slurred speech in people who are at or below the legal limit, for example.[49]

113. Research indicates that the range of behaviors that persons exhibit at differing blood alcohol levels is so wide that a person with a blood alcohol level of 0.09 to 0.25 may or may not exhibit slurred speech, impaired balance, or sensory motor incoordination.[50]

114. The range of behaviors is so wide that forensic chemists frequently testify in Driving While Intoxicated trials that alcohol effects individuals in ways that vary

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[48] TEX. PEN. CODE § 49.01(2)(A)-(B).

[49] See Exhibit K (Set of Probable Cause Affidavits from individuals with low blood alcohol contents in Driving While Intoxicated investigations).

[50] Exhibit N (Kurt M. Dubowski, Signs and Symptoms of Acute Alcohol Intoxication, Garriott's Medicolegal Aspects of Alcohol 6th Ed., p. 28)

so greatly, you cannot predict with any certainty how a person will behave at a given blood alcohol level.[51]

115. It is unconscionable to hold an undergraduate college student responsible for rape under this standard. It requires training and practice to reliably identify intoxication even in the context of intoxication having a statutory definition.

116. The President's interpretation of the University's sexual misconduct policy, that an "intoxicated person cannot consent to sex," is therefore impossible to follow. The misconduct policy does not provide a definition of intoxication, and even if it did, students have no training, ability, or experience to identify whether or not a person is or is not intoxicated by observing their behavior alone.

117. Actual incapacitation, marked by a loss of consciousness or the loss of the ability to perceive and appreciate reality, is the normal standard for when consent to sex is not effective because it can reliably be followed and enforced, and because it reflects the moral norm, as well as the law.

118. The University and the President in this case made up a rule that could never consistently be enforced or followed. The President then applied that rule ex post facto to John. This conduct is a violation of John's right to substantive due process under the Texas and Federal Constitutions.

[51] Exhibit O (Testimony of blood alcohol expert in State of Texas v. J.S.F (Criminal records were expunged and Defendant's name has been redacted.)).

Cause of Action IX
Title IX: Erroneous outcome.
20 U.S.C. § 1681, et seq.

119. John incorporates by reference each and every preceding paragraph as if fully restated herein.

120. Title IX applies to an entire school or institution if any part of that school receives federal funding. The University of Texas receives federal funding and is covered by Title IX.

121. Title IX "broadly prohibits a funding recipient from subjecting any person to 'discrimination' 'on the basis of sex.'" A university violates Title IX when it reaches an erroneous outcome in the matter of a disciplinary proceeding, and the reason for that erroneous outcome is gender bias.

122. As a result of the foregoing, UT reached an erroneous outcome in the disciplinary action in this case. It reached an erroneous outcome because the process, and the people carrying out the process, are predisposed to favor a female accuser over a male who has been accused.

123. The President's written appeal evidences this gender bias. He disregarded the facts of the case and made up a new standard for sexual assault in order to achieve the female student's desired result: John's suspension.

124. The University's investigation also evidences gender bias. The investigators proceeded with a charge of sexual assault against John despite it being undisputed that Jane gave affirmative verbal consent.

125. The investigators also failed to follow up with one of Jane's friends, whose statements were contrary to a sexual assault finding.[52]

126. This conduct is consistent with gender bias, and it is consistent with UT's Blueprint for Campus Police on "responding to sexual assault." The "Blueprint" has been criticized for overtly seeking to undermine "notions of impartiality," and for causing "systematically bias investigations in favor of the complainant." [53]

127. The "Blueprint" was produced by UT's Institute on Domestic Violence and Sexual Assault. It instructs investigators on how to investigate claims of sexual assault in such a way as to advocate for the complaining witness. This includes instructing investigators to "reduce the number of reports prepared," "avoid repeating a detailed account of prior interview statements," and to "anticipate likely defense strategies and include information to counter them."

128. The University, President Fenves, and the Title IX office are motivated to portray the University in local and national media as being tough on males who are accused of sexual assault on-campus.

129. In furtherance of this goal, the survey that UT conducted included a definition of sexual assault so unfairly expansive that it suggested that sex is not consensual if consent was obtained by "telling lies, threatening to end the relationship, threatening to spread

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[52] Exhibit E at 5.

[53] Exhibit V (Stop Abusive and Violent Environments, VICTIM-CENTERED INVESTIGATIONS: NEW LIABILITY RISK FOR COLLEGES AND UNIVERSITIES, October 2016.)

rumors about you, making promises you knew were untrue, or continually verbally pressuring you after you said you didn't want to." (E.g. "I promise I'll love you forever.").

130. The University, President Fenves, and the Title IX office are also motivated to protect the reputation of the University by preventing the University from being the target of a Title IX lawsuit from a female who has accused a male student of sexual assault.

131. The University, President Fenves, and the Title IX office are also motivated to protect the University from federal financial penalties for failing to comply with the Department of Education's mandate to suspend or expel students for sexual assault.

132. The foregoing constitutes intentional gender discrimination under Title IX and the Defendants have caused actual damages to John as a result of their conduct.

Cause of Action X
Title IX: Selective enforcement.
20 U.S.C. § 1681, et seq.

133. John incorporates by reference each and every preceding paragraph as if fully restated herein.

134. A University is liable for gender discrimination under Title IX if its decision to initiate disciplinary proceedings is affected by the student's gender.

135. The evidence obtained during the investigation in this case and at the hearing, indicated that two intoxicated college students had sex in John's bedroom

on the night in question. John was intoxicated when he consented to have sex with Jane and vice versa.

136. The male student was charged and punished for rape and the female student was not. The reason for this inequity is gender bias.

137. If the standard for when a student is unable to consent to sex is truly as low as mere intoxication, then the evidence in this case supports the proposition that John was intoxicated and therefore unable consent to sex due to incapacitation.

138. If both students were intoxicated, and therefore incapacitated, then both students were in violation of University rules. Under that logic they both should have been suspended if the school were not discriminating against males. If intoxication actually invalidates consent, then in this case the school is only enforcing their rules against the male student.

139. This is intentional gender discrimination under Title IX and it has resulted in disciplinary proceedings being initiated against John and not Jane because of John's gender. The Defendants have caused actual damages to John as a result of their conduct.

Cause of Action XI
Declaratory Judgment

140. John incorporates by reference each and every preceding paragraph as if fully restated herein.

141. John requests, as a result of ongoing and irreversible damages that the university's conduct is causing to his future career opportunities and earning

potential, a declaration that: (1) the University's disciplinary process does not comply with the requirements of due process, (2) orders the President's decision on appeal suspending John be reversed because of the President's inherent bias, and inability to make findings of fact and credibility on appeal, and (3) orders John's bar to registration at UT lifted, and any finding of responsibility for sexual assault on his record removed.

142. John requests a declaratory judgment pursuant to 28 U.S.C. § 2201 because there is justiciable controversy between John and the Defendants and a declaratory judgment is necessary to prevent future conflict between the parties on the issues herein stated.

REQUEST FOR A JURY TRIAL

143. In accordance with Fed. R. Civ. P. 38, John requests a trial by jury on all issues so triable.

PRAYER FOR RELIEF

144. The University's decision to suspend John for five semesters will cause imminent and irreparable harm to his career and educational opportunities and goals. A suspension would harm his reputation and cause emotional harm. No legal remedy exists for these injuries.

WHEREFORE, the Plaintiff, John Doe, requests the Court:

a. On the causes of action under 42 U.S.C 1983 for violations of substantive and procedural due process, retrain and enjoin the Defendants from enforcing a suspension against him, restrain and

enjoin the Defendants from continuing to adjudicate Title IX appeals through the Office of the President, and award John such other relief at law or in equity to which he may be entitled.

b. On the causes of action under Article 1 § 19 of the Texas Constitution, for violations of substantive and procedural due process, retrain and enjoin the Defendants from enforcing a suspension against him, restrain and enjoin the Defendants from continuing to adjudicate Title IX appeals through the Office of the President, and award John such other relief at law or in equity to which he may be entitled.

c. On the causes of action under Title IX of the Education Amendments of 1972, award John damages in an amount to be determined at trial including, past and future economic losses, loss of educational opportunities, loss of career opportunities, emotion distress and psychological damages, plus prejudgment interest and attorney's fees, expenses, costs, and disbursements, and any other relief at law or in equity to which he may be entitled.

d. On the cause of action for declaratory judgment, a declaration stating: the University's disciplinary process does not comply with the requirements of due process; the President's decision on appeal suspending John should be reversed because of the President's inherent bias, and inability to make findings of fact and credibility on

appeal; John's enrollment at UT should be restored; and any finding of responsibility for sexual assault should be removed from his record.

e. John asks that he be granted all other relief as the Court deems just, equitable, and proper.

Dated: August 7, 2017

Respectfully Submitted,

/s/ Brian Roark

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ATTORNEY FOR JOHN DOE

VERIFICATION

STATE OF TEXAS §

COUNTY OF TRAVIS §

BEFORE ME, the undersigned authority, on this day personally appeared John Doe who, being by me duly sworn, and deposed and said that he has read the allegations in the foregoing Original Complaint, and each and every fact and matter therein stated is within his personal knowledge and is true and correct.

SIGNED this 3 day of August, 2017.

John Doe

John Doe

SUBSCRIBED AND SWORN to before me, this the 3 day of August, 2017.

Notary Public

KARINA BARRAZA BRANHAM NOTARY PUBLIC STATE OF TEXAS EXPIRES 09-28-2018