CASE NO. 16-4693

UNITED STATES COURT OF APPEALS
FOR THE
SIXTH CIRCUIT

John Doe,
Plaintiff-Appellee
v.
University of Cincinnati, et al.
Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

Civil Action No. 1:16-cv-00987
Honorable Michael Barrett, United States District Judge, presiding

ORIGINAL BRIEF OF PLAINTIFF-APPELLEE JOHN DOE

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CORPORATE DISCLOSURE

Not applicable to Plaintiff-Appellee.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Plaintiff respectfully suggests that the Court would benefit from hearing oral argument in this matter. This case raises an issue of significant national concern: whether in college and university disciplinary hearings there is a right to confront adverse witnesses when the information supplied by those witnesses is the reason for the adverse actions and there is a question of credibility to be resolved by the finder of facts, remains good law. Plaintiffs believe oral argument will assist the Court in its analysis of this disputed issue presented on appeal, and will enable counsel to address any questions the Court may have.

JURISDICTIONAL STATEMENT

This case arose, in part, under the United States Constitution and 42 U.S.C. §§ 1983 and 1988. Accordingly, the District Court had jurisdiction in this matter pursuant to 28 U.S.C. §§ 1331 and 1343. The declaratory and injunctive relief sought by the Plaintiff in this matter is authorized by 28 U.S.C. §§ 2201 and 2202, 42 U.S.C. § 1983, and Federal Rules of Civil Procedure 57 and 65.

This is an appeal from decision of a district court of the United States granting an injunction. Accordingly, this Court has jurisdiction pursuant to 28 U.S.C. § 1291(a)(1). The decision granting the injunction was issued on November 30, 2016. (R.20, PageID#226-239.) A Notice of Appeal was filed on December 6, 2016. (R.22, PageID#275.)

STATEMENT OF ISSUES

Whether the District Court abused its discretion in granting a preliminary injunction on November 30, 2016.

Specifically, a review of the factors for the issuance for a preliminary injunction will require this Court to consider the *Flaim-Winnick* rule: in college and university disciplinary hearings there is a right to confront adverse witnesses when the information supplied by those witnesses is the reason for the adverse action and there is a question of credibility to be resolved by the finder of facts.

A review of the factors for the issuance for a preliminary injunction will also require this Court to consider whether the District Court's findings that Doe would suffer irreparable harm in the absence of a preliminary injunction, and that an injunction is in the public interest, were clearly erroneous.

STATEMENT OF THE CASE

This case arises out of the decision of UC to impose disciplinary sanctions against the Plaintiff in violation of the his Constitutional due process rights.

A. The UC Disciplinary Process

This case is one of many amidst a growing national controversy about the responses of colleges and universities to alleged sexual assaults on campuses. After years of criticism for being too lax on campus sexual assault, on April 11, 2011, the U.S. Education Department's Office of Civil Rights ("OCR") sent a "Dear Colleague Letter" to colleges and universities. The Dear Colleague Letter indicated that, in order to comply with Title IX, colleges and universities must have transparent, prompt procedures to investigate and resolve complaints of sexual misconduct. Observers on both the left and the right have noted that this has led colleges to eliminate due process protections for accused students in order to create the appearance of being tough on the problem. Caroline Kitchens, *Overreaching on Campus Rape, National Review,* May 13, 2014 ("Because of the inadequacy of campus courts and lack of procedural safeguards in place to protect students, this has grave consequences for due process");[1] Emily Yoffe*, The College Rape Overreaction*, Slate Dec. 7, 2014 ("Colleges, encouraged by federal officials, are instituting solutions to sexual violence against women that abrogate the

[1] Available at: http://www.nationalreview.com/article/377878/overreaching-campus-rape-caroline-kitchens

civil rights" of accused students)[2] In recent years, and during the period preceding the disciplinary actions against Doe, there was substantial criticism of UC, both in the student body and in the public media, accusing UC of not taking seriously complaints of female students alleging sexual assault by male students. The University of Cincinnati is currently under investigation by OCR for its handling of allegations of sexual misconduct. *See* OCR Docket #15-16-2039.[3]

The UC Student Code of Conduct ("SCOC") governs student behavior and provides for sanctions for violations.[4] The alleged misconduct by Doe occurred on September 6-7, 2015. As a result, his conduct would be covered by the UC Code of Student Conduct that was effective on July 15, 2012 (the policy was, confusingly, filed with the Ohio Legislature on March 11, 2015.) A copy of the SCOC filed with the Ohio Legislative Services Commission is attached to the Complaint. (Complaint Ex. A, R.1, PageID#42-81.)

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[2] Available at: http://www.slate.com/articles/double_x/doublex/2014/12/college_rape_campus_sexual_assault_is_a_serious_problem_but_the_efforts.html

[3] According to the OCR docket on February 9, 2016 OCR sent a letter to UC informing UC of the investigation. Notably, while UC was aware of the allegations against Doe in September 2015, UC did not inform Doe that a formal investigation was underway until shortly (10 days) after receiving the letter from OCR.

[4] The UC Code of Conduct is codified in the Ohio Administrative Code. OAC 3361:40-5-04. According to the Ohio Legislative Service Commission, the UC Code of Student Conduct has been revised a number of times since 2014, with effective dates for new policies in July 2012, September 2015, July 2016 and August 2016.

When a complaint of sexual misconduct is made, a Deputy Title IX Coordinator or designee will begin interviewing witnesses and review relevant evidence. At the conclusion of the investigation, the Deputy Title IX Coordinator prepares an investigatory report which is provided to an Administrative Review Committee ("ARC"). The ARC holds an administrative hearing applying the preponderance of the evidence standard to determine whether the student violated the UC Code of Conduct.

The Distract Court's decision focuses on the SCOC rules governing the ability of students to question adverse witnesses. There is no provision in the SCOC to compel the attendance of witnesses. Cross-examination of witnesses is strictly limited to written questions submitted through the hearing panel chair. The SCOC does not have any rules governing the admissibility of evidence and the use of hearsay evidence, regardless of the presence of any indicia of reliability, is permissible. The SCOC further provides that the ARC may receive notarized statements:

> Witnesses are strongly encouraged to be present for hearings. The hearing chair, in consultation with the ARC, reserves the right to limit the number of witnesses. Witnesses shall be present only when giving testimony. However, if they are unable to attend, notarized statements may be submitted.

(Complaint Ex. A at 29.) Following the ARC hearing, a student facing discipline is permitted to appeal.

B. The Doe I Matter

Doe was suspended from UC for events that allegedly occurred beginning on the evening of September 6-7, 2015. Doe had met Jane Roe on Tinder, a social media

app. They spoke on-line for two or three weeks until they met face to face. They engaged in small talk and flirtation. (Aff. of Doe ¶5, R.2, PageID#102.) The two engaged in sexual intercourse in Doe's apartment. For purposes of this Brief, it is sufficient to state that Doe maintains that the encounter was completely consensual, and Jane Roe maintained that the encounter was not consensual. (Aff. of Doe ¶5-6, R.2, PageID#102.)

Jane Roe, over a month later, reported to UC that she had been sexually assaulted by Doe. On October 30, 2015, Jane Roe was interviewed by the UC Title IX Coordinator. On November 6, 2015 Jane Roe was again interviewed by the same person. On December 18, 2015 Jane Roe reported the alleged assault to the UC Police; the investigation by the UC Police was reported to Cincinnati PD and closed. (Aff. of Doe ¶¶7-8, R.2, PageID#102.)

On February 19, 2016 Doe was informed about the allegations. On February 24, 2016 a Title IX program director conducted a follow-up interview with Jane Roe. Doe was interviewed on March 7, 2016. On March 15, 2016 the Title IX program director conducted a follow-up interview with Jane Roe. The Title IX program director conducted additional interviews of friends of Jane Roe in February and March 2016. (Aff. of Doe ¶¶7-9, R.2, PageID#102.) Summaries of all interviews, along with the police report and email correspondence with Doe and Jane Roe, was assembled into an "Investigative File."

On June 27, 2016, UC conducted an ARC Hearing to determine if Doe had violated the Student Code of Conduct. Jane Roe did not appear at the ARC Hearing. She did not provide a notarized statement. Doe was not told prior to the hearing that Jane Roe would not appear. (Aff. of Doe ¶¶12, R.2, PageID#103.) At the ARC hearing, the "Investigative File" was read to the hearing panel. The investigator and the Title IX coordinators were not present. Instead, the ARC Chair read a summary of the information contained in the Title IX Investigative File. This information included the report made by Jane Doe, the response made by Plaintiff, and the statements of the four people Jane Doe identified as having information about the incident. (Disciplinary Hrg. Tr. at 7-25, R.16, PageID#176-194.) The ARC Chair gave the ARC Committee the opportunity to ask questions regarding the report, but the Committee did not have any questions. (Disciplinary Hrg. Tr. at 28, R.16, PageID#198.) Such questions would have been impossible to ask or answer because the investigators were not present. The ARC Chair then explained:

> [ARC CHAIR:] Okay, so the complainant is not here. At this time I would have given them [sic] time to ask questions of the Title IX report. But again, they [sic] are not here. So we'll move on.
>
> So now, do you, as the respondent, [REDACTED], have any questions of the Title IX report?
>
> [DOE]: Well, since she's not here, I can't really ask anything of the report. Is this the time when I would enter in like a situation where like she said this and this never could have happened? Because that's just –
>
> [ARC CHAIR]: You'll have time here in just a little bit to direct those questions. Just --

[DOE]: Then no, I don't have any questions for the report.

(Disciplinary Hrg. Tr. at 28, R.16, PageID#198.) The ARC Chair explained that if the complainant had been present she would have been able to read into the record what happened and add any additional information. The ARC Chair also explained that Doe would have had the chance to ask questions of the complainant. (Disciplinary Hrg Tr. at 29, R.16, PageID#199.) There was no physical evidence or witness testimony presented to support the allegations that Doe was guilty. The only evidence presented against Doe was the hearsay statements in the Investigative File.

The ARC Chair then told Doe he could summarize what happened and include any additional supporting information. Doe made a statement which acknowledged that he and Jane Roe had different perspectives on what happened. Doe disputed some of the specific facts from Jane Roe's statement. Doe concluded his statement with the following complaint about his inability to question Jane Roe: "And I would have asked her, I don't know if that can be entered in, at what point did she feel I was hostile?" (Disciplinary Hrg Tr. at 32, R.16, PageID#201.) The ARC Committee then asked Plaintiff several questions. The ARC Chair explained that if the complainant had been there, she also would have had an opportunity to ask questions of Doe. The ARC Chair then read an "impact" statement from Jane Roe. The hearing concluded with a statement from Doe. (Disciplinary Hrg Tr. at 36-41, R.16, PageID#206-210.)

Doe was found "responsible," or "guilty," at the hearing. On July 14, 2016, Doe submitted an appeal through the UC appeals process. (Aff. of Doe ¶14, R.2, PageID#103.) On September 23, 2016, Doe received a letter from UC indicating that his appeal had been denied and that Doe would be suspended from UC for one year effective December 10, 2016. (Aff. of Doe ¶¶15-16, R.2, PageID#102-103.) At the hearing on the Motion for a Preliminary Injunction, Doe explained the effect of the suspension:

> A suspension will cause me substantial, immediate, and continuing damages. Suspension from UC will cause me to be denied the benefits of education at my chosen school, damage my academic and professional reputations, and may affect my ability to enroll at other institutions of higher education and to pursue a career.

(Aff. of Doe ¶¶15-16, R.2, PageID#102-103.) There is no guarantee that Doe would be permitted to re-enroll in his program after the suspension. (Nov. 21, 2016 Hrg. at 21, R.28, PageID#403.) Doe explained that the graduate program he is in is small and "very special in the sense that your professors are not just your educators . . . they are also your mentors and your professional contacts . . ." and that a suspension would not only "hinder [him] finishing the program," but would damage his career because "It's not that they are sort of just issuing you a grade. They are -- do they want to introduce you to their friends to work in the professional world and move on from here." (Nov. 21, 2016 Hrg. at 18, R.28, PageID#400.)

C. Procedural History

On October 7, 2016. Doe brought this action for a declaratory judgment, violation of 42 U.S.C. §1983 and violation of Title IX. Doe filed a Motion for a Preliminary Injunction on the same date.

On November 21, 2016, the matter came before the District Court for a hearing on the Motion for a Preliminary Injunction. (Nov. 21, 216 Tr., R.21, PageID#383-420.) The decision granting the injunction was issued on November 30, 2016. (R.20, PageID#226-239.) A Notice of Appeal was filed on December 6, 2016. (R.22, PageID#275.)

SUMMARY OF ARGUMENT

The District Court did not abuse its discretion on granting a Preliminary Injunction.

The District Court correctly found that Doe had a substantial likelihood of success on his claim that his Procedural Due Process rights were violated by the failure of UC to provide him an opportunity to confront Jane Roe. In college and university disciplinary hearings, the Due Process guarantees of the Constitution includes a right to confront adverse witnesses when the information supplied by those witnesses is the reason for the adverse actions and there is a question of credibility to be resolved by the finder of facts.

- In *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970), the Supreme Court said, "in almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." 397 U.S. at 269-270.

- In *Winnick v. Manning*, 460 F.2d 545 (2d Cir. 1972), the Second Circuit said, "if [a school disciplinary] case had resolved itself into a problem of credibility, cross-examination of witnesses might have been essential to a fair hearing." *Id.* at 550.

- In *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629 (6th Cir. 2005), this Court, relying on *Winnick*, said that when there is "a choice between believing an accuser and an accused, . . . cross-examination is not only beneficial, but essential to due process." 418 F.3d at 641.

- In *Doe v. Cummins*, 6th Cir. No. 16-3334, 2016 U.S. App. LEXIS 21790 (Dec. 6, 2016) this Court, relying on *Winnick* and *Flaim*, said, "due process may require a limited ability to cross-examine witnesses in school disciplinary hearings where . . . credibility is at issue." 2016 U.S. App. LEXIS 21790 at *26.

The *Winnick-Flaim* approach is an accurate description of the state of the law and has been followed by courts in this Circuit and elsewhere.

The District Court correctly found that Doe will suffer irreparable harm in the absence of the preliminary injunction. While, in general, a suspension can constitute irreparable harm, in this case additional factors are present. The undisputed evidence in the record is that there is no guarantee that Doe would be permitted to re-enroll in his program after the suspension and the suspension would most likely affect the Doe's ability to engage in the future employment of his choice. Moreover, this Court has observed that if a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated. *Bonnell v. Lorenzo,* 241 F.3d 800, 809 (6th Cir. 2001).

The District Court correctly found that an injunction is in the public interest. In this case, an injunction will not cause any harm to third parties or UC. UC remains able to enforce its rules and regulations in a manner consistent with constitutional and statutory requirements. This is not a case involving academic misconduct where deference to school administrators is heightened. This Court has held that "it is always in the public interest to prevent the violation of a party's constitutional rights." *See G&V Lounge, Inc. v. Mich. Liquor Control Common*, 23 F.3d 1071, 1079 (6th Cir. 1994).

ARGUMENT

A. Standard

This court reviews a challenge to the grant of a preliminary injunction under an abuse of discretion standard and accords great deference to the decision of the district court. *Memphis Planned Parenthood v. Sundquist*, 175 F.3d 456, 460 (6th Cir.1999), *quoting Blue Cross & Blue Shield Mutual of Ohio v. Columbia/HCA Healthcare Corp.*, 110 F.3d 318, 322 (6th Cir. 1997) (citations omitted); *McGlone v. Bell*, 681 F.3d 718, 728 (6th Cir. 2012). This Court recently clarified that the Court will review the District Court's legal rulings *de novo*, and its ultimate conclusion as to whether to grant the preliminary injunction for abuse of discretion. *O'Toole v. O'Connor*, 802 F.3d 783, 788 (6th Cir. 2015). *See also City of Pontiac Retired Emps. Ass'n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014) (*en banc*) ("Whether the movant is likely to succeed on the merits is a question of law we review de novo[,] [but we] review for abuse of discretion . . . the district court's ultimate determination as to whether the four preliminary injunction factors weigh in favor of granting or denying preliminary injunctive relief." (internal citation and quotation marks omitted)); *Wilson v. Gordon*, 822 F.3d 934, 952 (6th Cir. 2016) (observing that this Court may review *de novo* the legal question of whether the movant is likely to succeed on the merits, however, overall determination of whether a preliminary injunction is warranted is reviewed under abuse of discretion standard).

B. Substantial Likelihood Of Success

The District Court correctly concluded that the Plaintiff had a substantial likelihood of success on his claims against the Individual Defendants for violations of the Plaintiff's Procedural Due Process rights.

UC would have this Court hold that because Doe received notice of the charges, an explanation of the evidence against him, and an opportunity to be heard, he is unable to assert a procedural due process claim. UC Br. at 13. As shown below, this is based on an overly narrow reading of the relevant Supreme Court and Circuit Court decisions, which also require a "meaningful" opportunity to be heard. Doe acknowledges he had notice and an opportunity to be heard. But this is only the start of the analysis; that opportunity to be heard had to have been meaningful, or as Justice Powell explained, "fair." *Vitek v. Jones*, 445 U.S. 480, 500, 100 S. Ct. 1254 (1980) (Powell, J., concurring in part) ("The essence of procedural due process is a fair hearing."). *See Doe v. Rector & Visitors of George Mason Univ.,* E.D.Va. No. 1:15-cv-209, 2016 U.S. Dist. LEXIS 24847, at *46-47 (Feb. 25, 2016) ("it may well be that plaintiff deserves to be expelled or otherwise sanctioned for certain behavior, but the Constitution requires that if behavior is to be sanctioned, then the state must ensure the soundness of the decision it reaches as the situation requires.").[5]

[5] UC supports its narrow argument with a block quote from *Doe v. Cummins*, 6th Cir. No. 16-3334, 2016 U.S. App. LEXIS 21790, at *20-21 (Dec. 6, 2016). UC Br. at 14.

1. Legal Framework

a. *Goss*

The starting point for analyzing alleged violations of procedural due process rights in school suspension cases is *Goss v. Lopez*, 419 U.S. 565 (1975). In *Goss*, the Supreme Court concluded that students facing suspensions of ten days or fewer have a property interest in educational benefits and a liberty interest in their reputations that qualify them for protection against arbitrary suspensions under the Due Process Clause. *See Goss*, 419 U.S. at 576 ("Neither the property interest in educational benefits temporarily denied nor the liberty interest in reputation, which is also implicated, is so insubstantial that suspensions may constitutionally be imposed by any procedure the school chooses, no matter how arbitrary."); *see also id.* at 579 ("The student's interest is to avoid unfair or mistaken exclusion from the educational process, with all of its unfortunate consequences.").

The *Goss* Court held that the Due Process Clause does not require that hearings in connection with suspensions of ten days or fewer follow trial-type procedures. 419 U.S. at 583. The *Goss* framework is not explicitly applicable to this case, however. The

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However, the sentences immediately preceding the block quote from *Cummins* underscores that the Court is to review the disciplinary process under the *Mathews* standard. *See infra.*

Goss Court explicitly rejected the suggestion that the *Goss* rules apply to cases where a student faces a more significant penalty:

> We should also make it clear that we have addressed ourselves solely to the short suspension, not exceeding 10 days. Longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures.

419 U.S. at 584. This Court has noted the inapplicability of *Goss* to these situations. *C.Y. v. Lakeview Pub. Schs*, 557 Fed. Appx. 426, 430 (6th Cir. 2014) ("*Goss* did not address the due-process requirements for suspensions longer than ten days.").

b. *Mathews* Standard

Since the Supreme Court has not mandated specific procedures for a suspension or other discipline from a public university, this Court must return to Due Process fundamentals. "The fundamental requisite of due process of law is the opportunity to be heard." *Goldberg*, 397 U.S. at 267, *citing Grannis v. Ordean*, 234 U.S. 385, 394 (1914). The hearing provided must be "at a meaningful time and in a meaningful manner." *Goldberg*, 397 U.S. at 267, *quoting Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187 (1965). "Due process is flexible and calls for such procedural protections as the particular situation demands." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976), *quoting Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

As in all cases involving an alleged deprivation of due process, the question for the Court is determining precisely what process was due.[6] *Morrissey*, 408 U.S. at 481. *See also Flaim v. Med. College of Ohio*, 418 F.3d 629, 634 (6th Cir. 2005) (noting that in school discipline cases "the amount of process due will vary according to the facts of each case and is evaluated largely within the framework laid out by the Supreme Court in *Mathews*"), *citing Gorman, supra* (stating that due process is "not a fixed or rigid concept, but, rather, is a flexible standard which varies depending upon the nature of the interest affected, and the circumstances of the deprivation"); *Newsome v. Batavia Local School Dist.*, 842 F.2d 920, 923-24 (6th Cir.1988) (applying the balancing test of *Mathews* to determine the type of process was required). Under *Mathews*, the level of process the Fourteenth Amendment requires is determined by balancing three factors as part of a "flexible" inquiry: (1) the nature of the private interest affected by the deprivation; (2) the risk of an erroneous deprivation in the current procedures used, and the probable value, if any, of additional or alternative procedures; and (3) the governmental interest involved, including the burden that additional procedures would entail. 424 U.S. at 335.

[6] UC at a number of places cites decisions suggesting that school disciplinary hearings are not criminal trials. UC Br. at 14, 21. This Court in *Flaim* noted that this is a "generalized, though unhelpful observation . . ." 418 F.3d at 635.

c. Doe Has A Protected Property Or Liberty Interest

UC does not contest that the Due Process Clause is implicated by higher education disciplinary decisions. The law on this is well established. *See Richards v. McDavis,* 2013 U.S. Dist. LEXIS 134348, 16-20 (S.D. Ohio Sept. 19, 2013), *citing*, *inter alia, Flaim*, 418 F.3d at 629 ("In this Circuit we have held that the Due Process Clause is implicated by higher education disciplinary decisions."); *Jaksa v. Regents of Univ. of Mich.*, 597 F. Supp. 1245 (E.D. Mich. 1984), aff'd, 787 F.2d 590 (6th Cir.1986) (due process clause implicated in suspension from university for cheating); *See also Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir.1961) (students have a protected interest in "the right to remain at a public institution of higher learning . . .").

2. The Right To Cross-Examination

UC takes a maximal position, asserting that "due process in a school disciplinary hearing does not require the right to cross-examination." UC Br. at 17. UC is not only incorrect, but asks this Court to ignore the contrary language from the Supreme Court, this Court, and the Second Circuit. In essence, UC invites this Court to ask the wrong question.[7] The wrong question is: whether or not there is a generalized right to cross-examination in school disciplinary hearings? The answer: no, and the Plaintiff does

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[7] The old adage that if you ask the wrong question, you get the wrong answer applies. *Compare* Thomas Pynchon, *Gravity's Rainbow* (1973) ("If they can get you asking the wrong questions, they don't have to worry about answers."); U2, *"11 O'Clock Tick Tock"* (1983) ("We thought that we had the answers, It was the questions we had wrong")

not suggest otherwise. The right question is: whether there is a right to confront adverse witnesses when the information supplied by those witnesses is the reason for the adverse actions and there is a question of credibility to be resolved by the finder of facts? The answer to this question is clearly "Yes." This conclusion is supported by: *Goldberg, Winnick*, and *Flaim*.

a. *Goldberg*, *Winnick*, and *Flaim*

In *Goldberg*, the Supreme Court held that the Due Process Clause of the Fourteenth Amendment requires an evidentiary hearing before a recipient of certain government welfare benefits could be deprived of such benefits. Of relevance to the issue in this case, the Court held that while there is no right to a formal trial, due process requires an opportunity for the aggrieved person to confront and cross-examine adverse witnesses. 397 U.S. at 269-270. The Court said, "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses."

The *Goldberg* Court relied, in part, on *Greene v. McElroy*, 360 U.S. 474 (1959) . In *Greene*, the Court emphasized the importance of cross-examination not only in criminal cases, but in administrative hearings where "the reasonableness of the action depends on fact findings" and emphasized that it "has been zealous to protect these rights from

erosion" in both the criminal and administrative contexts[8]. 360 U.S. at 496-97. Such cross-examination is, the Court held, particularly important "where the evidence [against a person] consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy." *Id.*

Consistent with *Goldberg* and *Greene*, this Court in *Flaim* observed that in certain disciplinary cases the due process guarantees of the constitution require some ability of accused students to confront their accusers. In *Flaim*, this Court said, "[s]ome circumstances may require the opportunity to cross-examine witnesses, though this right might exist only in the most serious of cases." 418 F.3d at 636.[9] This Court

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[8] The Supreme Court has repeatedly and without deviation held that the purpose of cross-examination is to promote accuracy. *See, e.g., Crawford v. Washington,* 541 U.S. 36, 61-62 (2004) (reliability achieved "by testing in the crucible of cross-examination"), *citing f.* 3 Blackstone, Commentaries on the Laws of England 373-374 (1768). ("This open examination of witnesses . . . is much more conducive to the clearing up of truth"); M. Hale, *History and Analysis of the Common Law of England* 258 (1713) (adversarial testing "beats and bolts out the Truth much better"); *Pointer v. Texas*, 380 U.S. 400, 404 (1965) ("Probably no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth . . .").

[9] *Flaim* illustrates that there is no need for cross-examination unless credibility of the witnesses is important to the determination of a violation of school rules. In *Flaim* the student was convicted of a felony, which was enough to justify an adverse action by the school. As a result, additional process from confrontation of the accuser would have provided "no benefit to Flaim or any reduced risk of error." 418 F.3d at 639-640. Similarly, in *Winnick* that court found that "cross-examination would have been a fruitless exercise" since the student had admitted to a "crucial fact" establishing his guilt. 460 F.2d at 550.

further said, "if this case had resolved itself into a problem of credibility, cross-examination of witnesses might have been essential to a fair hearing." 418 F.3d at 641 (quotation omitted). The *Flaim* court relied upon and quoted the Second Circuit's decision in *Winnick supra*. In *Winnick*, the Second Circuit held that there was no requirement that a student be able to cross-examine a witness whose testimony is not determinative to the outcome of the case. 460 F.2d at 549. But, significantly, the *Winnick* court said, "if this case had resolved itself into a problem of credibility, cross-examination of witnesses might have been essential to a fair hearing." 420 F.2d at 550.

UC attempts to get around the explicit language in *Flaim* by characterizing these sentences as "*dictum*" UC Br. at 18. Even if the portion of the *Flaim* crucial to the present issue is *dicta*, UC does not explain why it should be ignored. In the words of

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A District Court in this Circuit noted that the *Winnick-Flaim* approach is the accurate statement of the law, but that the right to cross-examine is inapplicable where the accused student has admitted to the essential facts underlying the misconduct. *Doe v. Baum*, E.D.Mich. No. 16-13174, 2017 U.S. Dist. LEXIS 1170, at *28 (Jan. 5, 2017). The court said:

> The Sixth Circuit has noted that "'[t]he right to cross-examine witnesses generally has not been considered an essential requirement of due process in school disciplinary proceedings.'" *Flaim*, . . . *quoting Winnick* . . . However, in some instances, such as when a decision may turn on resolution of conflicting versions and witness credibility must be assessed, "cross-examination of witnesses might [be] essential to a fair hearing." *Id.* But the alleged procedural infirmities in this disciplinary proceedings are immaterial where, as here, [the student] has admitted all of the essential facts that precipitated the adverse decision.

2017 U.S. Dist. LEXIS 1170 at *28.

Justice Cardozo "[L]ittle gain is to be derived from drawing nice distinctions between *dicta* and decisions." *Hawks v. Hamill*, 288 U.S. 52, 60 (1933). Regardless, this language is better characterized as "judicial *dictum*," or "considered *dictum*" because it was part of the answer to a question that was directly involved in the case, although not essential to the decision. This Court has explained that considered *dictum* although "not necessarily binding, is entitled to considerable weight." *Metro. Hosp. v. United States HHS*, 712 F.3d 248, 274 (6th Cir. 2013)*, citing inter alia ACLU v. McCreary County, Ky.*, 607 F.3d 439, 448 (6th Cir. 2010) (recognizing that appellate courts consider themselves bound by Supreme Court's considered dicta almost as firmly as by its holdings); *PDV Midwest Refining, LLC v. Armada Oil and Gas Co.*, 305 F.3d 498, 510 (6th Cir. 2002) (discussion, though arguably *dictum*, followed as well-reasoned and persuasive); *Schwab v. Crosby*, 451 F.3d 1308, 1325 (11th Cir. 2006) (collecting cases recognizing that "considered *dictum*" is not to be taken lightly).

The *Winnick-Flaim* formulation, adopted by the District Court, is an accurate description of the law. This description of the circumstances when due process requires the ability of accused students to cross-examine their accusers has been repeated in this and other courts, and has been relied upon by courts of inferior jurisdiction. As a result, it is difficult to say that it must not now be considered as settled law. This is especially true because this Court recently reaffirmed the viability of the *Winnick-Flaim*

formulation in *Cummins*.[10] In *Cummins* this Court considered a claim by two UC students that the UC process for cross-examination, which relies on written questions submitted through the ARC chair, was unconstitutionally restrictive. In resolving this claim, this Court said cited to both *Flaim* and *Winnick* for the proposition that "due process may require a limited ability to cross-examine witnesses in school disciplinary hearings." (2016 U.S. App. LEXIS 21790 at *26 (citations omitted). The *Cummins* Court subsequently found no due process violation because the students in question, unlike Doe in this case, had received an opportunity to cross-examine the complainants.[11] *Id.*

The First Circuit has, consistent with the *Winnick-Flaim* approach, observed that a school had complied with constitutional requirements by providing a student "the opportunity to cross-examine his accusers as to the incidents and events in question."

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[10] If the *Flaim* language is "mere" *dictum*, the *Cummins* decision transforms the language into "repeated *dicta*" which would be entitled to even more deference. *See Mississippi Valley Gas Co. v. Federal Power Commission*,, 294 F.2d 588, 591 (5th Cir., 1961) ("If as dicta the statements are to be treated, they must nevertheless be regarded as considered and repeated dicta, and therefore highly persuasive . . ."). *See also Myers v. Loudoun Cty. Pub. Schs,* 418 F.3d 395, 402 (4th Cir.2005) (relying on "repeated *dicta* from the [Supreme] Court");

[11] One of the students in *Cummins* was not permitted to cross-examine the complainant in a re-hearing. This Court found that this did not constitute a due process violation because (1) he was not facing expulsion, only disciplinary probation, and thus "the requisite level of procedural formalities . . . was not as high"; and (2) the student had been provided "the chance to cross-examine [the complainant] in his initial hearing in the presence of several panel members who then presided over his second hearing." 2016 U.S. App. LEXIS 21790 at *26-28.

Gorman, 837 F.2d at 16. The *Gorman* court further observed that while there is no right to "unlimited" cross-examination, due process requires that some cross-examination to permit an accused to "elicit[] the truth about the facts and events in issue." *Id.*

Numerous federal district courts have cited and followed these decisions. In most of these cases the court first observes that there is no general right to cross-examination.[12] Then, the courts observe that *Winnick* and *Flaim* essentially carve out an exception for situations where the fact-finder has to make a credibility determination. Typical of this approach is the decision in *Bridgeforth v. Popovics*, N.D.N.Y. No. 8:09-CV-0545, 2011 U.S. Dist. LEXIS 56904, at *29 (May 25, 2011). In that case, the court first observed, "The right to cross-examine witnesses has not been considered an essential requirement of due process in school disciplinary proceedings." 2011 U.S. Dist. LEXIS 56904, at *29. The *Bridgeforth* court, citing to *Winnick*, continued: "if a case is essentially one of credibility, the 'cross-examination of witnesses might [be] essential to a fair

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[12] UC, in fact, cites to *Winnick* for the broad, yet incomplete, claim that cross-examination is not "generally" an essential requirement of due process in school disciplinary proceedings. UC Br. at 16. UC also cites a number of pre-*Flaim* decisions that address the general right of cross-examination at all hearings. UC Br. at 15-16, *citing Jaksa v. Regents of the Univ. of Michigan*, 597 F.Supp. 1245 (E.D. Mich 1984), *aff'd* 787 F. 2d 590 (6th Cir. 1986); *Boykins v. Fairfield Bd. of Educ.*, 492 F.2d 697 (5th Cir. 1974); *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir. 1961), *cert. denied* 386 U.S. 390 (1961). None of these cases considered the question presented by this case: whether the Constitution requires some opportunity for cross-examination when there is an issue of credibility and the information supplied by those witnesses is the reason for the adverse actions. Moreover, to the extent they are inconsistent with *Flaim*, they no longer accurately reflect the law.

hearing.'" *Id. quoting Winnick*, 460 F.2d at 550. Other cases follow this approach.[13] In *Doe v. Brandeis Univ.* the court considered a situation where a private school did not permit a student to confront his accuser. *Doe v. Brandeis Univ.*, D.Mass. Civil Action No. 15-11557-FDS, 2016 U.S. Dist. LEXIS 43499 (Mar. 31, 2016). The court said, "the elimination of such a basic protection for the rights of the accused raises profound concerns," and adopted the *Winnick-Flaim* framework explicitly by observing, "The ability to cross-examine is most critical when the issue is the credibility of the accuser." *Id. citing Donohue v. Baker*, 976 F. Supp. 136, 147 (N.D.N.Y. 1997); *Winnick*, 460 F.2d at 550. The *Brandeis* court described a situation that mirrors this case:

> Here, there were essentially no third-party witnesses to any of the events in question, and there does not appear to have been any contemporary corroborating evidence. The entire investigation thus turned on the credibility of the accuser and the accused. Under the circumstances, the lack of an opportunity for cross-examination may have had a very substantial effect on the fairness of the proceeding.

2016 U.S. Dist. LEXIS 43499, at *101. In *Furey v. Temple Univ.*, 884 F.Supp.2d 223, 251-252 (E.D.Pa. 2012), the court cited to both *Winnick* and *Flaim* to support the idea that cross-examination was only unnecessary where the relevant facts were undisputed. The

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[13] *See also Holmes v. Poskanzer,* N.D.N.Y. No. 1:06-CV-0977, 2008 U.S. Dist. LEXIS 13545, at *12 (Feb. 21, 2008) (describing the *Winnick* situation but observing "it is very unusual for due process to require cross-examination of witnesses, [but] it is impossible to rule out").

court held that cross-examination was required in a case of student discipline where the facts were in dispute:

> The purpose of cross-examination is to ensure that issues of credibility and truthfulness are made clear to the decision makers. Given the importance of credibility in this Hearing . . . the Court considers this an important safeguard

884 F.Supp.2d at 251.

Another district court relied on *Flaim* to find that cross-examination was necessary in certain situations involving discipline against a high school student accused of sexually assaulting a fellow student. *Wolski v. Orange Cnty. Sch. Bd.*, M.D.Fla. No. 6:13-cv-1623-Orl-31TBS, 2015 U.S. Dist. LEXIS 4450 (Jan. 14, 2015). The *Wolski* court relied on *Flaim* to hold that the "right to cross-examine a witness in a school discipline context exists in only the most serious of cases and where the disciplinary determination turns on credibility." *Id.* at *4, *citing* Flaim, 418 F.3d at 641 (noting that cross-examination is crucial in cases that turn on credibility). The *Wolski* court denied a motion to dismiss premised on the claim, identical to UC's claim here, that there is no general right to cross examination. The court said,

> This matter presents a serious case, . . . Here the accused and accuser's accounts are what the disciplinary matter turned on. Accordingly, cross-examination may have been required to preserve basic fairness.

2015 U.S. Dist. LEXIS 4450 at *6. Within this Circuit, another court within the Southern District of Ohio relied on *Flaim* for the proposition that "where a disciplinary proceeding depends on 'a choice between believing an accuser and an accused . . . cross-examination is not only beneficial, but essential to due process.'" *Doe v. Ohio State Univ.*, S.D.Ohio No. 2:15-cv-2830, 2016 U.S. Dist. LEXIS 154179, at *27 (Nov. 7, 2016), *citing Flaim*, 418 F.3d at 641 (observing that in *Flaim* "due process was not violated when cross-examination would have been a fruitless exercise, so this language is *dictum*"). After reviewing the state of the law in this Circuit, including taking into account that the applicable language in *Flaim* might be *dictum*, Judge Graham concluded that this was a settled issue:

> The right to some form of cross-examination in university expulsion hearings *is a clearly established due process right* when cross-examination is "essential to due process," as in a case that turns on "a choice between believing an accuser and an accused."

2016 U.S. Dist. LEXIS 154179 at *36 (emphasis supplied), *quoting Flaim,* 418 F.3d at 641.[14]

[14] Similar conclusions have been reached in non-school discipline cases. *See e.g. Edgecomb v. Hous. Auth. of Vernon*, 824 F. Supp. 312, 315-16 (D. Conn. 1993) ("the opportunity to confront and cross-examine witnesses is essential when the information supplied by those witnesses is the reason for the" adverse actions").

b. *Newsome* And The Other Cases Cited By UC Are Inapposite

UC has not cited to this Court a single case rejecting the *Winnick-Flaim* approach and holding that cross-examination is not an essential component of due process when the fact-finder has to make a credibility determination.[15]

UC's reliance on *Newsome*, *supra* and *C.Y., supra.*, is particularly misplaced. UC Br. at 16-19. *Newsome* was decided 17 years before *Flaim* and, as a result, to the extent it is inconsistent with *Flaim*, is no longer good law. *Newsome* also presented a number of unique facts not present in this case that tipped the *Mathews* balancing test in that case against cross-examination. In *Newsome*, but unlike in this case, this Court believed that the credibility of the witnesses was "initially assessed by a school administrator -- in this case, the school principal -- who has, or has available to him, a particularized knowledge of the student's trustworthiness." 842 F.2d at 924. In addition, in *Newsome*, but unlike in this case, the school had an interest in "protecting student witnesses from ostracism and reprisal." 842 F.2d at 925. *See Rippy v. Bd. of Sch. Trs.,* S.D.Ind. Cause No.

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[15] UC curiously cites *Dillon v. Pulaski Cty. Special Sch. Dist.*, 468 F.Supp. 54, 58 (E.D.Ark.1978). This case seems to support the District Court's conclusion. The trial court in *Dillon* found that a high school student was denied due process of law by the refusal of a school board to permit the student to compel the teacher who accused the student of misconduct to testify. 468 F.Supp. at 58. On appeal, a judge concurring in the affirmance noted, "the student should have been given an opportunity to conduct a limited examination of the teacher. . ." 594 F.2d 699, 701 (8th Cir.1979) (Benson, J., concurring).

IP 99-1508-C H/G, 2000 U.S. Dist. LEXIS 7427, at *12 (Feb. 4, 2000) (observing that *Newsome* involved a specific fact pattern related to drug usage and "stop[ped] short," however, of establishing general propositions for student hearings).[16] The *C.Y.* case does not appear to discuss the cross-examination issue in detail, most likely because the student had admitted to a violation of school rules and, as a result, the fact-finder was not required to make a credibility determination. 557 F.App'x at 428 (noting that student admitted to sending a threatening tweet and that she threatened another student during conversations with other students).

Moreover, as the District Court observed, *Newsome* and *C.Y.* involved high school students. UC suggests, in a conclusory manner, that "there is no reason" why the analysis of *Newsome* and *C.Y.* "would not apply in a university setting." UC Br. at 20-21. In fact, there are many good reasons. The District Court correctly recognized that the relationship between administrators and students, which was key to the *Newsome*

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[16] *E.K. v. Stamford Bd. of Education*, 557 F.Supp. 2d 272 (D. Conn. 2008), and *Osei v. Univ. of Md. Univ. Coll.*, D.Md. Civil Action No. DKC 15-2502, 2016 U.S. Dist. LEXIS 107376 (Aug. 15, 2016), are inapposite. UC Br. at 19 n.1 and 24. *E.K.* involved a high school disciplinary proceeding. In that case, the court observed that "the record demonstrates . . . consistent corroborating evidence" so that cross-examination "would have provided little probative value to the hearing officer's decision. 557 F.Supp.2d at 277. *Osei* similarly did not involve an issue of credibility requiring cross-examination, as the case involved a student disciplined for submitting false information to the financial aid office. Moreover, the court noted that the student did not attend the hearing, so he did not actually "know whether he would have been given an opportunity to confront his accusers at the hearing." 2016 U.S. Dist. LEXIS 107376, at *22.

decision is different in high school and college, and that, as a result, different standards govern the constitutional rights of high school and college students.

> In a university setting, the administrators do not have the same "particularized knowledge" of a student's trustworthiness that exists in a high school with a smaller student population. Therefore, the value of cross-examination is not "somewhat muted" based on the school administrator's firsthand knowledge of the students involved.

(Nov. 30, 2016 Order at 10, R.20, PageID#235.) The District Court's conclusion is consistent with other courts. These courts have observed that college and university students are entitled to greater due process protections than high school students. One state supreme court observed:

> [A student's] interest in obtaining a higher education with its concomitant economic opportunities, coupled with the obvious monetary expenditure in attaining such education, gives rise to a sufficient property interest to require procedural due process on a removal. From a liberty standard there can be little question that an expulsion from college damages the student's good name, reputation and integrity, even more so than an expulsion from high school. The higher the level of achievement, the greater the loss on removal.

North v. W. Va. Bd. of Regents, 160 W.Va. 248, 253, 233 S.E.2d 411 (1977). This distinction is supported by the broader view that high schools and universities have differing pedagogical goals and *in loco parentis* roles. College students are more mature and reside on campus and thus are subject to university rules at almost all times. For this reason, "a looser standard of constitutional review of high school regulations is appropriate because of the greater flexibility possessed by the state to regulate the conduct of children as opposed to adults." *Alex v. Allen*, 409 F.Supp. 379, 384

(W.D.Pa.1976), *citing Ginsberg v. New York*, 390 U.S. 629 (1968) ("Even where there is an invasion of protected freedoms the power of the state to control the conduct of children reaches beyond the scope of its authority over adults."). *See also Bahr v. Jenkins*, 539 F.Supp. 483, 488 (E.D.Ky.1982) (court: "Nor am I saying anything about maintaining discipline on college campuses. We are talking here about a high school."); *Moore v. Student Affairs Comm.*, 284 F.Supp. 725, 730, fn. 10 (M.D.Ala.1968) (observing that "there are obviously functional differences between the disciplinary requirements of high school and college students").[17]

UC's suggestion that this Court has twice "confirm[ed] in an unqualified manner" the holding of *Newsome* that that cross examination is not necessary in school disciplinary hearings is not well taken. UC Br. at 17-18, *citing Doe by & Through Doe v. Bd. of Educ. of the Elyria City Sch.*, 6th Cir. No. 96-4008, 1998 U.S. App. LEXIS 10783 (May 27, 1998); *Paredes v. Curtis*, 864 F.2d 426 (6th Cir.1988). UC's further reliance on *Ashiegbu v. Williams*, 6th Cir. No. 97-3173, 1997 U.S. App. LEXIS 32345 (Nov. 12,

[17] The difference between high school and college students has been recognized where other, perhaps less significant, constitutional rights are concerned. For example, college students have been found to have a constitutional right to wear their hair as they wish in circumstances where high school students can be regulated. *Lansdale v. Tyler Junior Coll.*, 470 F.2d 659, 663 (5th Cir.1972) ("The place where the line of permissible hair style regulation is drawn is between the high school door and the college gate.")

1997), is similarly misplaced. UC Br. at 26. All three cases were decided prior to *Flaim,* and none involved a situation where there was an issue of credibility to be decided by the finder of fact. The *Elyria* case involved a special education high school student who had a history of behavioral problems. 1998 U.S. App. LEXIS 10783 at *6. *Paredes*, likewise, involved a high school student who possessed counterfeit drugs. Moreover, the student in *Paredes* faced only a ten day suspension, which required less significant due process protections. 864 F.2d at 429. In *Ashiegbu* this Court, reversed a dismissal of a due process claim brought by a university student who had been summarily dismissed following a meeting with a vice president. 1997 U.S. App. LEXIS 32345, at *3-4

UC, perhaps recognizing that the *Winnick-Flaim* approach is an accurate statement of the law, argues nonetheless that affirming this approach would impose an unreasonable administrative burden on schools. UC Br. at 21-23 *citing Osteen v. Henley,* 13 F.3d 221 (7th Cir.1993).[18] UC asks, "If cross-examination were permitted, where would the limitations apply?" UC Br. at 22. The answer to UC's concerns is found within its own code. The SCOC goes further than the *Winnick*-Flaim approach by

[18] The student in *Osteen,* like the student in *Flaim*, had pled guilty to the charge of misconduct. As a result, the hearing concerned only the sanction to be imposed. 13 F.3d at 224. The court never considered whether there is a due process right to cross examination, but instead focused on whether a student had the right to be represented by counsel at the disciplinary hearing. *Id.*

allowing for cross-examination of witnesses *in all cases*, not merely those where there is an issue of credibility to be resolved by the trier of fact. In short, UC is, apparently, able to impose discipline on its students, *and* allow cross-examination, without encountering any of the difficulties UC describes in its brief. *See* UC Br. at 22 (describing 'parade of horribles,' such as requiring the presence of attorneys). *See also* infra (discussion of *Mathews* test).[19]

UC further suggests that "Doe's real gripe is that UC did not compel Jane Roe to appear for the disciplinary hearing." UC Br. at 23-24. This is not accurate. Accepting UC's characterization of Doe's claims suggest that UC may avoid its obligation to permit cross-examination by relying solely on hearsay statements from witnesses as evidence of misconduct. Allowing UC to impose discipline based on hearsay, without providing any opportunity for a student to cross-examine the person who provides the adverse information, would allow UC to eviscerate the holding of *Goldberg* that when important governmental decisions are based on determinations of fact, due process usually requires an opportunity to confront and cross-examine adverse witnesses. 397 U.S. 254 at 269. In other words, a natural implication of the *Winnick-Flaim* rule is that the Due Process guarantees of the Constitution prohibit the imposition of discipline based solely on hearsay when there is an issue of credibility and the information

[19] UC could also, with little difficulty, simply adopt the procedures for adjudicative hearings under the Ohio Administrative Procedures Act, R.C. c. 119.01 *et seq*.

supplied by the declarant is the reason for the adverse action. A holding otherwise would allowing school administrators the unlimited discretion to determine in which cases a complainant may be questioned by an accused student. This is certainly inconsistent with fundamental due process guarantees, for it would vest school administration with the final determination of whether or not the sources of charges against the accused student might be favorable to the student if they testified. A school could protect from scrutiny witnesses whose memories may be faulty, or, worse, who in fact may be perjurers or persons with improper motives.[20]

Relatedly, UC notes, correctly, that the Due Process clause does not prohibit the use of hearsay in school disciplinary hearings. UC Br. at 26 n.2. But, a hearing that relies *solely* on hearsay to prove wrongdoing is no hearing at all; it is simply a review of unsworn statements of an accuser with no meaningful opportunity to challenge the truthfulness or accuracy of those assertions.[21] As with UC's argument about cross-

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[20] The presumption of good motives by the UC administration does not respond to this concern. "No man should be subjected to the arbitrary acts, or the possibility of arbitrary acts, of another man even though the other man be a good man." *Goolsby v. Gagnon*, 322 F.Supp. 460, 464 (E.D.Wis. 1971).

[21] Under the *Mathews* test it is a violation of due process for a hearing to rely solely on hearsay evidence and not provide any opportunity for the person facing an adverse action to cross-examine the declarants. Weighing the *Mathews* factors: a student has have a significant private interest in avoiding the imposition of significant discipline; requiring the declarant to be present would reduce the risk of erroneously depriving individuals of protected property interests without placing substantial fiscal or administrative burdens on UC.

examination, UC's blanket statements that a school may rely on hearsay and need not compel the attendance of witnesses is incomplete. Courts have found due process violations when an administrative hearing relies *exclusively* on hearsay to prove wrongdoing without providing any opportunity or mechanism to question the declarant. Courts have, for example, observed that the Due Process Clause is violated when an administrative hearing, as in this case, relies upon hearsay evidence and does not provide any opportunity for the person facing an adverse action to compel the attendance of the declarants so that, if desired, the veracity of the hearsay statements can be attacked.[22] In *Ortiz v. Eichler*, 616 F.Supp. 1066, 1068 (D.Del. 1985), a court observed that due process issues might arise not from the "admission of hearsay per se, but rather the lack of opportunity to confront and cross-examine witnesses." The court noted that an administrative hearing could admit hearsay as long as the party could compel the attendance of the witnesses "because claimants would then have the power to compel confrontation with, and cross-examination of, hearsay declarants." *Id.* (avoiding constitutional issues and deciding on the basis of regulations). In *Basco v. Machin*, 514 F.3d 1177, 1183 (11th Cir. 2008), the Eleventh Circuit suggested that an administrative decision relying solely on hearsay could violate due process guarantees

[22] The SCOC does not contain subpoena power. However, UC certainly does have the ability to compel the presence of UC employees and students at ARC hearings. *Compare* UC Br. at 24 (claiming UC has "no ability to compel the attendance of witnesses at a disciplinary hearing").

when parties could not subpoena the declarants. Finally, in *Edgecomb v. Hous. Auth.*, 824 F.Supp. 312 (D.Conn.1993), the court found that the due process rights of Section 8 tenants in an eviction hearing was violated when the hearing panel relied on a police report but neither the police officers nor witnesses mentioned in the report were available for resident to confront or cross-examine. The court observed, "Denying the tenant the opportunity to confront and cross-examine persons who supplied information upon which the housing authority's action is grounded is improper." 824 F.Supp. at 315-16. *See also Woods v. Willis*, 515 F.App'x 471, 483-484 (6th Cir. 2013) (relying in part in *Basco*; suggesting hearsay evidence "must be at the very least reliable and of proven probative value."); *Treadwell v. Schweiker*, 698 F.2d 137, 144 (2d Cir.1983) (violation of due process occurred when subpoenas were not enforced and party was denied "an opportunity to confront adverse hearsay reports").

Finally, UC attempts to defend the deviation from the SCOC procedures that require statements from witnesses to be notarized. UC Br. at 27. While a deviation from the SCOC may not, by itself, constitute a *per se* a due process violation, a due process violation *can* be premised on the fact that a school disciplinary decision is not based on "substantial evidence." *Slaughter v. Brigham Young University*, 514 F.2d 622, 625 (10th Cir.), *cert. denied*, 423 U.S. 898(1975). *See also Phat Van Le v. Univ. of Med. & Dentistry*, D.N.J. Civil Action No. 08-991, 2009 U.S. Dist. LEXIS 37672 at *38 (May 4, 2009) ("the law on procedural due process does require that the decision of student disciplinary proceedings be supported by 'substantial evidence'"); *Givens v. Poe*, 346 F.

Supp. 202, 209 (W.D.N.C. 1972) ("due process requires a number of procedural safeguards such as . . . the requirement that the decision of the authorities be based upon substantial evidence."); *Center for Participant Education v. Marshall*, 337 F. Supp. 126, 136 (N.D.Fla. 1972) ("in order to satisfy due process requirements, a university disciplinary proceeding should afford the student . . . punishment based only upon substantial evidence adduced at the hearing.").

The SCOC, by specifically requiring notarized statements, appears to anticipate that unsworn statements where the declarant is not subject to cross-examination are inherently unreliable. *Cf. Lee v. Illinois*, 476 U.S. 532, 541 (1986) (unsworn statement deemed unreliable, in part, due to lack of cross-examination). Yet, UC allowed this sort of evidence at Doe's hearing. For example, the ARC Hearing Panel was provided with unsworn statements from the friends of the alleged victim, even though these people had no first-hand knowledge of the events between Doe and Jane Roe. (Disciplinary Hrg. Tr. at 19-25, R.16, PageID#188-194.). As a result, the District Court properly concluded that this significant and unfair departure from the SCOC could amount to a violation of due process. (Nov. 30, 2016 Order at 12, R.20, PageID#237, *citing Furey* 730 F. Supp. 2d at 396–97.)

c. Application of *Mathews* Test

UC position is that accused students need only receive: (i) notice; (ii) an explanation of the evidence; and (iii) an opportunity to present their side of the story.

UC Br. at 26, *citing Ashiegbu, supra.* .[23] However, as this Court made clear in *Cummins*, this is only the start of the analysis. This Court said that "an accused student must *at least* receive" these three things, but that whether additional procedural protections are required must be evaluated under the *Mathews* test. 2016 U.S. App. LEXIS 21790 at *21 (emphasis supplied). *See also Gorman*, 837 F.2d at 14 (the necessity of cross-examination "must be determined by a careful weighing or balancing of the competing interests implicated *in the particular case*"). UC's Brief is notable for the failure to explicitly engage in the *Mathews* analysis on the facts of this case. This is because application of the *Mathews* factors leads clearly to the conclusion that due process includes the right to

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[23] In Section A(2) of its argument, UC relies on a umber of cases that do not address the issue before this Court. UC Br. at 31-33, *citing Marshall v. Ohio Univ.*, S.D.Ohio No. 2:15-cv-775, 2015 U.S. Dist. LEXIS 155291 (Nov. 17, 2015), *Brown v. Univ. of Kan.*, 16 F. Supp. 3d 1275 (D.Kan.2014); *Caiola v. Saddlemire*, D.Conn. No. 3:12-CV-00624, 2013 U.S. Dist. LEXIS 43208 (Mar. 27, 2013); *Jahn v. Farnsworth*, 617 F.App'x 453 (6th Cir.2015).

The *Marshall*, *Brown* and *Jahn* cases did not include claims that the student was denied the ability to cross-examine witnesses; in all three cases the students admitted to the improper conduct. *Marshall*, 2015 U.S. Dist. LEXIS 155291 at *16 (" no doubt is cast about the determination that [the student] violated" school policies); *Brown*, 16 F. Supp. 3d at 1290 (student "failed to controvert the charges against him") *Jahn*, 617 F.App'x at 455 (student admitted to theft of school property). In *Caiola,* the plaintiff had "the opportunity to question witnesses and the Complainant." 2013 U.S. Dist. LEXIS 43208 at *8.

confront adverse witnesses when the information supplied by those witnesses is the reason for the adverse actions and there is a question of credibility to be resolved by the finder of facts.

i. The Nature Of The Private Interest Affected By The Deprivation

In terms of the first *Mathews* factor, the potential interest of the student is significant. The Plaintiff's interest in avoiding unfair or mistaken exclusion from the benefits of the educational system has been recognized as significant. This interest includes the loss of education, potential damage to Doe's reputation, and potential interference with later opportunities for education and employment. *Goss*, 419 U.S. at 579. In *Cummins,* this court reviewed the first factor to be weighed under *Mathews* in the context of two students disciplined by UC. The court observed:

> [The students were] accused of serious sexual offenses. A finding of responsibility will thus have a substantial lasting impact on [the students'] personal lives, educational and employment opportunities, and reputations in the community. *Accordingly, [the students'] private interests are compelling.*

Cummins, 2016 U.S. App. LEXIS 21790 at *21-22 (emphasis supplied). The same analysis applies here

ii. The Probable Value Of Cross-Examination

In terms of the second *Mathews* factor, the risk of erroneous deprivation when no cross-examination is permitted is high. In this case, Doe would have used cross-examination to question Jane Roe about inconsistencies in her statements and

accommodations she received from UC as a direct result of her claim to be a victim of sexual assault, both of which would have undermined her credibility.

UC fails to acknowledge what this Court observed in *Newsome*: "the value of cross-examination to the discovery of truth cannot be overemphasized." 842 F.2d at 924 *citing Davis v. Alaska*, 415 U.S. 308, 316 (1974) ("Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested."). To deny the value of cross examination is to deny hundreds of years of tradition recognizing the fundamental role of cross-examination in the truth finding process, and the Framers of the Fifth and Fourteenth Amendments would likely be astounded to learn that a valuable benefit could be taken from a citizen in a Star Chamber-type proceeding relying on hearsay without cross-examination.[24]

This Court has long observed that "cross-examination is 'the great and permanent contribution of the Anglo-American system of law . . .'" *Brown v. United States*, 234 F.2d 140, 144 (6th Cir.1956), *quoting* Wigmore on Evidence, Vol. 5, 3rd Ed., §1367. Cross-examination is particularly valuable where, as here, the ultimate

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[24] The Star Chamber relied upon written testimony without cross-examination. Judge Nelson wrote about this particular aspect of the Star Chamber process and observed, "the Court of Star Chamber was abolished in 1641, and its name has been a term of opprobrium throughout the English-speaking world from that time to this." *United States v. Gomez-Lemos*, 939 F.2d 326, 334 (6th Cir.1991) (Nelson, J., concurring).

determination of credibility turns on the motives and intentions of those who make accusations of wrongdoing. It is only by subjecting the complainant to cross-examination that an accused student, and eventually the hearing panel or factfinder, "can assess the credibility of those who disclaim any improper motivations." *Hart v. Lew*, 973 F.Supp.2d 561, 574 (D.Md. 2013), *citing* 5 Wigmore on Evidence §1367 (referring to cross-examination as the "greatest legal engine ever invented for the discovery of truth").

The logic of this conclusion is particularly compelling when viewed in the factual context of this case. In these proceedings, the ARC was presented with summaries of unsworn hearsay statement of the complainant, contained in a report compiled by the UC Title IX Investigator. The hearsay statements to the Title IX Investigators were not under oath. The report also contained summaries of statements that the complainant allegedly made to her friends; none of these hearsay within hearsay statements were, likewise, under oath. The Complainant, her friends, and the Title IX Investigators were not, of course, available for cross-examination by the Plaintiff. Instead, a summary of all of the statements obtained by the Title IX Investigator was read to the ARC Hearing Panel. However prejudiced, mistaken, untruthful, or defective the complainant or the witnesses might prove to be if they could be cross-examined, the Title IX investigator's belief in the reliability of the statements went essentially unchallenged.

The potential for abuse in the minimal "Notice and opportunity to be heard" approach urged by UC is obvious when the entire basis of the alleged violations

presented to and obviously relied upon by the ARC Hearing Panel are based on nothing more than hearsay reports.[25] Such a process can not be considered "meaningful," as the Due Process Clause requires that UC employ some procedure to assure the reliability of these statements. "It is significant that most of the provisions of the Bill of Rights are procedural, for it is procedure that marks much of the difference between rule by law and rule by fiat." *Wisconsin v. Constantineau*, 400 U.S. 433, (1971). Instead, the process employed by UC in this case, creates a risk of an erroneous deprivation because it provides hardly any protection at all against unsubstantiated assertions of wrongdoing. Accused students, when confronted with hearsay evidence supported by no physical evidence, can only deny such assertions and attempt to prove that they are more credible than a person who appears only on paper. Accused students, without any ability to question their accusers, can prove no specific contradictions and no ulterior motives; the accused student cannot discover anything that the Title IX investigator did not ask or did not choose to include in the summary of the statement provided by the Complainant. *See Doe v. Ohio State Univ.*, 2016 U.S. Dist. LEXIS 154179

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[25] It is plainly insufficient for UC to merely provide Doe with an opportunity to "point[] out to the panel a number of instances where he specifically disagreed with Jane Roe's version of events." UC Br. at 26. The many possible deficiencies, suppressions, sources of error and untrustworthiness, which lie underneath the bare untested assertion of a witness, may be best brought to light and exposed by the test of cross-examination, the greatest legal engine ever invented for the discovery of truth. *Compare Bailey v. Richardson*, 182 F.2d 46, 68-69 (D.C. Cir. 1950) (due process violated when party is not given an opportunity to test, explain, or refute evidence presented).

at *35-36 (observing that in university disciplinary proceedings, an accused student "is left to rely on the beneficence of the university administrators" to learn about "critical evidence that would impeach his accuser's credibility").

iii. The Burden Of Cross-Examination On UC Is Minimal

In terms of the third *Mathews* factor, the UC administrative proceedings would not become too burdensome if an opportunity to cross-examine adverse witnesses in certain cases were required because the UC SCOC *already* specifically anticipates cross-examination of all witnesses. In this case, the ARC Chair even went through the charade of noting the times when this questioning would have taken place. For example:

> [ARC Chair:] So at this time the complainant would have the opportunity to ask questions of the respondent. But again, she is not present. So we will move on.

(Disciplinary Hrg. Tr. at 35-36, R. 16, PageID#204-205.) And:

> [ARC Chair:] the respondent would have time to ask questions of the complainant. The complainant is not here, so we'll move to the next step.

(Disciplinary Hrg. Tr. at 30, R. 16, PageID#199.) There is nothing in the record suggesting that the UC process is not operating efficiently and effectively when cross-examination is permitted. Every terrible thing that UC claims would occur if there were cross-examination empirically has been avoided. *See e.g.* UC Br. at 22. Accordingly, there can be no credible argument that this Court explicitly affirming the *Winnick-Flaim* Rule requiring cross-examination when there is an issue of credibility and the information supplied by the party is the reason for the adverse action would add a

substantial additional burden to the UC disciplinary system as it is currently constituted.[26]

C. John Doe Will Suffer Irreparable Harm In The Absence Of An Injunction

The District Court observed that the suspension imposed by UC would damage Doe's "academic and professional reputation, and due to the somewhat unique nature of his graduate program, the one-year suspension could affect his ability to pursue a career." (Nov. 30 Order at 12, R.20, PageID#237.) This is a finding of fact by the District Court that is entitled to deference unless clearly erroneous. *Williamson v. Recovery Ltd. P'ship*, 731 F.3d 608, 627 (6th Cir.2013); *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 520 (6th Cir.2011).

1. Doe Made A Showing of Irreparable Harm

The record clearly supports the finding that Doe will suffer irreparable harm in the absence of the preliminary injunction. UC's argument that such harm is speculative is not supported by the record. UC Br. at 35. In his Affidavit, Doe stated:

> I do not believe that I, even if I could obtain admission [to another school], I would be able to obtain a comparable educational experience at another school. Moreover, because I have teaching and practical

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[26] At best, UC may have an interest protecting an alleged victim from traumatic or intimidating questioning. However, as the *Brandeis* court recently observed, "While protection of victims of sexual assault from unnecessary harassment is a laudable goal, the elimination of such a basic protection for the rights of the accused [cross-examination] raises profound concerns." 2016 U.S. Dist. LEXIS 43499, at *101

> responsibilities as part of my program, a suspension will effectively end my academic career.

(Aff. of Doe ¶4, R.2, PageID#101.) The Affidavit further provides, "Suspension from UC will cause me to be denied the benefits of education at my chosen school, damage my academic and professional reputations . . ." (Aff. of Doe ¶17, R.2, PageID#104.) In a case involving a different UC student, a District Court in the Southern District of Ohio found irreparable harm where the student "was unable to attend classes and would be unable to graduate as planned." *Doe v. Univ. of Cincinnati*, S.D.Ohio No. 1:15-cv-600, 2015 U.S. Dist. LEXIS 132864, at *7 (Sep. 30, 2015) (denying TRO, but finding irreparable harm where a different University of Cincinnati student was suspended). A number of other courts have found that suspension, by itself, can constitute irreparable harm. *Boman v. Bluestem Unified Sch. Dist. No. 205,* 2000 U.S. Dist. LEXIS 5389 (D. Kan. Jan. 28, 2000) (noting that suspension of student constitutes irreparable harm); . *Tully v. Orr*, 608 F. Supp. 1222 (E.D.N.Y. 1985) (Air Force academy cadet who was expelled right before final exams and graduation suffered irreparable harm); *Bhandari v. Trs. of Columbia Univ. in N.Y.,* S.D.N.Y. 00 Civ. 1735, 2000 U.S. Dist. LEXIS 3720 at *15-16 (Mar. 24, 2000) (suspension or expulsion from an academic institution may constitute irreparable harm); *Gardenhire v. Chalmers*, 326 F.Supp. 1200, 1202 (D.Kan.1971) (student "has and will be irreparably harmed by a continuation of his suspension without legal foundation"); *Stricklin v. Regents of Univ. of Wis.*, 297 F.Supp. 416, 422 (W.D.Wis.1969)

("an extended enforced absence from the university results in irreparable harm to a student").

UC cites a number of decisions holding otherwise. UC Br at 34 (collecting cases). In one respect, this contrary authority illustrates the fact-specific nature of the irreparable harm inquiry and supports the deference due to the District Court on this issue. However, two additional factors are present in this case that are absent in the cases cited by UC. First, the undisputed evidence in the record is that there is no guarantee that Doe would be permitted to re-enroll in his program after the suspension. (Nov. 21, 2016 Hrg. at 21, R.28, PageID#403.) The inability to re-enroll can constitute irreparable harm. *Compare Pierre v. Univ. of Dayton*, 143 F. Supp. 3d 703 (S.D. Ohio 2015) (finding no irreparable harm from suspension because after the suspension ends the student would be able to reenroll). Second, the record is undisputed that Doe would, in addition to losing education opportunities, lose professional connections by virtue of his suspension. He provided specific testimony that a suspension would prevent him from continuing to foster any networking connections he has through his unique program of study and that he would be unable to complete a "thesis" that would aid in his future employment. (Nov. 21, 2016 Hrg. at 19-20, R.28, PageID#401-402.) This type of harm from a suspension has been found to be irreparable. *See Maczaczyj v. State of N.Y.*, 956 F.Supp. 403, 408 (W.D.N.Y. 1997) (finding irreparable harm where suspension "would most likely affect the plaintiff's ability to engage in the future employment of his choice"); *Bonnette v. District of Columbia Court of Appeals*, 796 F.Supp.2d

164, 186 (D.D.C. 2011)("The lost opportunity to engage in one's preferred occupation goes beyond monetary deprivation").

2. Irreparable Harm Is Shown By A Violation Of Constitutional Rights

Doe established potential constitutional violations. "When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." *Bery v. City of New York*, 97 F.3d 689, 693 (2d Cir. 1996), *cert. denied*, 520 U.S. 1251 (1997). This Court has also observed that the denial of an injunction can "cause irreparable harm if the claim is based upon a violation of the plaintiff's constitutional rights." *McNeilly v. Land*, 684 F.3d 611, 620-21 (6th Cir. 2012) ("Once a probability of success on the merits was shown, irreparable harm followed . . . ."). *See also Preston v. Thompson*, 589 F.2d 300, 303 n.3 (7th Cir. 1978) ("[t]he existence of a continuing constitutional violation constitutes proof of an irreparable harm, and its remedy certainly would serve the public interest."); *Campbell v. Miller*, 373 F.3d 834, 840 (7th Cir. 2004) (Williams, J., dissenting) ("[w]hen an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable harm is necessary").[27] This Court has further observed that if a constitutional right is

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[27] In particular, procedural due process violations in this case are, alone, sufficient to establish irreparable harm. *See Gordon v. Holder*, 826 F. Supp. 2d 279, 296 (D.D.C. 2011) (violation of plaintiff's procedural due process rights creates irreparable harm); *Goings v. Court Services and Offender Supervision Agency*, 786 F. Supp. 2d 48, 78-79 (D.D.C. 2011) (same).

being threatened or impaired, a finding of irreparable injury is mandated. *Bonnell*, 241 F.3d at 809. *See, also, Hillside Productions, Inc. v. Duchane*, 249 F.Supp.2d 880, 900 (E.D. Mich 2003) (where a plaintiff's procedural due process rights were likely violated, a finding of irreparable harm should follow as a matter of law).

Related to the finding of a constitutional violation, UC has elsewhere taken the position that money damages in this case are precluded by the doctrine of qualified immunity. (UC Motion to Dismiss at 22, R.30, PageID#447.) This is inconsistent with the argument in the UC Brief that "adequate compensatory . . . relief will be available at a later date." UC Br. at 34 (citation omitted). Of course, even if UC is correct qualified immunity would prevent an award of damages, but does not prevent Doe from pursuing declaratory and injunctive relief. *Top Flight Entm't, Ltd. v. Schuette*, 729 F.3d 623, 635 (6th Cir. 2013); *Flagner v. Wilkinson*, 241 F.3d 475, 483 (6th Cir. 2001). *See also Hydrick v. Hunter*, 669 F.3d 937, 939-40 (9th Cir. 2012) (explaining that qualified immunity "is only an immunity from a suit for money damages, and does not provide immunity from a suit seeking declaratory or injunctive relief").

D. An Injunction Is In The Public Interest[28]

In constitutional cases, an inquiry into the public interest is difficult to separate from the likelihood of success on the merits because "the public interest is promoted

[28] UC is apparently not challenging the finding of the District Court that a preliminary injunction will not harm third parties. (Nov. 30, 2016 Order at 13, R.20, PageID#238.)

by the robust enforcement of constitutional rights." *Am. Freedom Def. Initiative v. Suburban Mobility for Reg. Transp.*, 698 F.3d 885, 896 (6th Cir. 2012). In this case, an injunction will not cause any harm to third parties or UC. UC remains able to enforce its rules and regulations in a manner consistent with constitutional and statutory requirements and its obligation under Ohio law to employ procedures that are "consistent with both the customs of a free society and the nature and function of an institution of higher learning." OAC 3361:40-5-03.

While UC is correct in observing that school administrators are entitled to deference, that deference does not extend to the ability to violate the requirements of the Constitution. And, in particular, that deference if most commonly provided when discipline is for an academic, as opposed to the disciplinary reason presented in this case. *Bd. of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, 86, (1978) ("far less stringent procedural requirements [are necessary] in the case of an academic dismissal") Such deference is appropriate because to "determine whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decision making." *Horowitz*, 435 U.S. at 90. Contrastingly, courts gives less deference to a university's disciplinary decision. This Court, in particular, has not hesitated to require that schools comply with the constitution's due process requirements in disciplinary matters. *See e.g. Flaim*, *supra*, *Cummins, supra.*

UC is simply incorrect that the injunction interferes with its ability to maintain its disciplinary systems. The UC disciplinary system is essentially unchanged by the Preliminary Injunction issued by the District Court; the only change is that UC is prohibited from imposing discipline on students without providing an opportunity to confront adverse witnesses when the information supplied by those witnesses is the reason for the adverse actions and there is a question of credibility to be resolved by the finder of facts. UC's claim is belied by two undisputed factors. First, the record contains no evidence that this has happened in any other situations or that this decision has affected any other proposed disciplinary action by UC. Second, the record contains substantial evidence that UC did not, in this case, comply with the SCOC by requiring that any absent witnesses submit notarized statements. *See infra.* UC can hardly complain about a disruption of its disciplinary system when it does not even follow its own rules.

The District Court was ultimately correct in finding that the failure to grant an injunction would harm the public because it would permit UC to violate the constitutional rights of all current and future students on an ongoing basis while this case is resolved, which necessarily would cause substantial, irreparable harm to those students. *See G&V Lounge*, 23 F.3d at 1079 (noting "it is always in the public interest to prevent the violation of a party's constitutional rights"); *Doe v. Lee*, U.S.D.C., D. Conn. No. NO. 3:99CV314, 2001 U.S. Dist. LEXIS 7282 (May 18, 2001) ("there is a

distinct public interest in having this Court discharge its duty to protect and enforce [constitutional] rights").

CONCLUSION

The Order Granting a Preliminary Injunction should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 6, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Fed. R. App.P. 32(a)(7), that this brief complies with the type-volume limitation. The word-processing system used to prepare the brief, Microsoft Word, indicates that this brief contains 12,955 words, excluding the parts of the brief exempted by Fed. R. App.P. 32(a)(7)(B)(iii).

I further certify this document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface, Garamond 14 pt, using Microsoft Word.

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

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3	MOTION LEAVE TO PROCEED ANONYMOUSLY AS JOHN DOE	October 7, 2016	106-108
11	RESPONSE IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION AND ATTACHMENTS (AFFIDAVIT OF PHILLIPS, AFFIDAVIT OF MITCHELL)	October 28, 2016	123-149
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24	AMENDED COMPLAINT	December 12, 2016	279-376
30	MOTION TO DISMISS AMENDED COMPLAINT	December 23, 2016	422-56