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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY

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JOHN DOE, CIVIL ACTION NUMBER:  
Plaintiffs, 3:20-cv-04352  
v. ORAL ARGUMENT  
PRINCETON UNIVERSITY, (REDACTED)  
Defendants.

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COURT HELD VIA VIDEOCONFERENCE  
April 21, 2020  
Commencing at 12:30 p.m.

B E F O R E: THE HONORABLE BRIAN R. MARTINOTTI,  
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

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1 (PROCEEDINGS held via video conference before The  
2 Honorable BRIAN R. MARTINOTTI, United States District Judge,  
3 on April 21, 2020, at 12:30 p.m.)

4 THE COURT: Counsel, are all your colleagues on and  
5 is the plaintiff on?

6 MR. BECKER: Your Honor, it's Christian Becker for  
7 the plaintiff. Kasowitz Benson Torres. I expect for the  
8 plaintiff, John Doe, I expect him to be dialing in. I don't  
9 think he's on the line yet, but he will be.

10 THE COURT: Okay.

11 MR. BECKER: Mr. Fetterman is going to be doing the  
12 argument on behalf of plaintiff.

13 THE COURT: All right. You still got a minute so.  
14 We'll start at 12:30.

15 MR. BECKER: There he is.

16 THE COURT: Good afternoon.

17 MR. DOE: John Doe on.

18 THE COURT: Okay. Before we get started, this matter  
19 is being conducted by telephone in response to the current  
20 state of affairs; particularly, the COVID-19 pandemic and  
21 various governmental responses and court standing orders  
22 entered in response thereto.

23 Just a few ground rules. No speaker phones, please,  
24 and all microphones should be muted, unless you are talking.  
25 So with that, can I have the appearances of counsel that are

1 going to be arguing, please.

2 MR. FETTERMAN: Yes, Your Honor. Daniel Fetterman  
3 and possibly Christian Becker on behalf of John Doe.

4 THE COURT: Okay.

5 MR. KASTENBERG: Stephen Kastenberg from Ballard  
6 Spahr. I will be arguing for Princeton University. Chris  
7 Elliot is with me and may also speak.

8 THE COURT: Okay. So just let us know who's talking  
9 when you do address the Court.

10 That being said, I've reviewed the papers. I  
11 understand the issue. I'll give each side 15 minutes to  
12 highlight whatever you think you need to bring before the  
13 Court. This is the plaintiff's application, so I will hear  
14 you first.

15 MR. FETTERMAN: Thank you, Your Honor. It's Dan  
16 Fetterman on behalf of John Doe. We appreciate the  
17 opportunity to be heard today on behalf of John Doe, who is  
18 quite an extraordinary young man. [REDACTED]  
19 [REDACTED] with an unblemished  
20 disciplinary record to date, you know, current circumstances  
21 excluded, and an outstanding academic record, whose life has  
22 been turned upside down and who is about to face severe  
23 lifetime irreparable harm as a result of Princeton's clearly  
24 gender-biased treatment of plaintiff, and Jane Roe and its  
25 callous arguments, specious arguments concerning the

1 irreparable harm that he will suffer. And while I will  
2 address what we believe is plaintiff's overwhelming likelihood  
3 of success on the merits, with the Court's permission, I would  
4 like to begin where this Court began and ended last hearing.  
5 And that is that there is a reasonable, practical TRO solution  
6 to mitigate some of the irreparable harm that plaintiff will  
7 suffer. And plaintiff reached out to Princeton on Friday  
8 evening, before they filed their papers. Princeton refused to  
9 even consider or engage in dialogue about that resolution --  
10 that solution.

11 Contrary to Princeton's assertions in its papers,  
12 plaintiff can complete his course work -- without interacting  
13 with other students -- by reviewing classes after they occur  
14 that are recorded or by showing up on Zoom as an anonymous  
15 student. And --

16 MR. KASTENBERG: Objection.

17 THE COURT: Let me ask Princeton, there is a note in  
18 the brief that the classes are recorded. Are they recorded  
19 forever or are they deleted at some point after a certain  
20 time, 24 hours, 48 hours? Do we know, Princeton?

21 MR. KASTENBERG: Your Honor, Stephen Kastenberg. So  
22 what I understand -- and my understanding was updated over the  
23 weekend and Monday -- is that Mr. Doe was taking five courses  
24 before his expulsion. Three of those five were consistently  
25 recorded. One of those five was sometimes recorded, sometimes

1 not recorded, and one was not recorded. It was up to the  
2 individual professor how to proceed.

3 THE COURT: Okay.

4 MR. KASTENBERG: I do not know how far back, Your  
5 Honor, those recordings are maintained. I'm sorry.

6 THE COURT: Is there a mechanism? And maybe you  
7 don't know the answer to this now and maybe you can find out  
8 from someone as the hearing progresses. Is there a mechanism  
9 that the classes can be recorded and maintained, pending a  
10 final resolution of this litigation?

11 MR. KASTENBERG: I would believe that is -- that  
12 could be done, and I will confirm and report back to the Court  
13 as soon as possible.

14 THE COURT: Okay. I'll hear back from plaintiff's  
15 counsel.

16 MR. FETTERMAN: Thank you, Your Honor. It's Dan  
17 Fetterman continuing.

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 Overwhelmingly, Your Honor, as we cited, courts have  
22 held that denying and delaying education is irreparable harm.  
23 In *Haney v. West Chester University*, which we cite in our  
24 papers, the Court held that where a student is denied the  
25 benefits of education at his chosen school and his academic

1 and professional reputation will be damaged, there's  
2 irreparable harm.

3           The Southern District of New York recently -- I guess  
4 not that recently -- but held that there's clear irreparable  
5 harm when a student is required to repeat the courses that he  
6 is currently taking after his suspension because it forever  
7 denies him the benefit of the work he has already performed  
8 this semester and would necessarily delay the ultimate goal of  
9 his requirements for a degree. And --

10           THE COURT: If I were to enter an order saying that  
11 Princeton shall maintain all the classes that have been  
12 recorded that the plaintiff has not participated in, and  
13 moving forward all of the classes that the plaintiff would  
14 have taken, had he participated, but he can't view them until  
15 after this litigation is decided on the merits, doesn't that  
16 preserve the status quo, in effect?

17           MR. FETTERMAN: Your Honor, thank you. It's a great  
18 question, and I don't think so. Let me tell you two reasons  
19 why. A. Like so many of us, I'm one of those people, we all  
20 to a greater or lesser extent have bathtub brain, right?  
21 These are very complicated classes and materials, and he's  
22 been, you know, his head is in the game, so to speak, right?  
23 He's up to speed. He can finish this work. But if it's six  
24 months from now or nine months from now, allowing him to see,  
25 you know, six recorded classes and then take exams is not the

1 same thing. It's not. So that's the first concern.

2           The second concern is that what if one of the  
3 professors leaves? I was going to ask that the Court order  
4 him to be provisionally reinstated to watch these classes,  
5 wherever possible, after the fact on a recorded basis or to  
6 show up as an anonymous student, if that's necessary because  
7 they're not going to record. Although, I believe the Court  
8 can easily order Princeton to record, as you just suggested,  
9 all the classes so he can view them after class so that he  
10 doesn't have to -- no one has to know that he's reviewing  
11 them, and then allow him to take his exams now, provisionally,  
12 have them be graded and put into a sealed envelope with the  
13 grades, a pass/fail. Professor has to read them and say pass  
14 or fail because the second concern is who knows if the  
15 professor may decide to move on from Princeton and not show up  
16 or take a sabbatical. And then, you know, how does that get  
17 dealt with?

18           Right now he's capable of just finishing the work and  
19 taking the exams [REDACTED] And then they  
20 can take that completed work and put it all into a sealed  
21 envelope. And then it's just up or down. If we prevail, he  
22 gets his degree. He moves on with his life. Nothing more has  
23 to happen. I'm assuming he passes. And if he doesn't, then,  
24 you know, no harm, no foul. They can throw the sealed  
25 envelopes away.

1 THE COURT: Okay.

2 MR. FETTERMAN: If the Court would like, I can  
3 continue with the argument. I'm happy to address any  
4 additional questions. Your Honor, would you like me to  
5 proceed? Your Honor?

6 MR. BECKER: Dan, this is Christian Becker. I heard  
7 what sounded like a call drop at sort of, you know, like an  
8 electronic beep. That could have indicated somehow the Court  
9 lost connection. I don't hear anything other than you talking  
10 right now.

11 THE COURT: It's Judge Martinotti. I just got kicked  
12 off about three minutes ago. I apologize. Where you were,  
13 counsel, I think you were talking about sealed envelope, no  
14 harm, no foul.

15 MR. FETTERMAN: I hope you heard that. That would be  
16 our request. We think that's the best way to proceed. And  
17 then I was just going to say, unless the Court had more  
18 questions about, you know, our concern about the question that  
19 Your Honor asked, I could proceed with argument.

20 THE COURT: Go ahead.

21 MR. FETTERMAN: So, first, Princeton argues that the  
22 28-day delay undermines irreparable harm. I think it's  
23 shocking that during this time of national crisis, Princeton  
24 would elect to make that argument. Courts have been closed.  
25 The lawyers on this team, we're dealing with fallout. They



1 elected to expel him effectively during the Coronavirus. We  
2 are all dealing with Coronavirus and literally displaced from  
3 our offices and homes. And as Princeton knows, plaintiff made  
4 every effort to resolve this amicably. And we filed this  
5 litigation within one week of Princeton denying plaintiff's  
6 request for some version of the relief that we now seek. So  
7 we think that that argument is totally without merit.

8 More importantly, Your Honor, the balance of equities  
9 weighs heavily in favor of plaintiff here. Plaintiff has been  
10 disciplined and expelled for conduct that he denies, that was  
11 adjudicated through a highly biased -- gender-biased process

12 [REDACTED] And as we just discussed, he  
13 can still complete all of the work that he put into the  
14 semester, have it graded and put into a sealed envelope. And  
15 if he prevails, [REDACTED]

16 [REDACTED] Having to repeat a semester [REDACTED]  
17 [REDACTED] is extremely burdensome. [REDACTED]

18 [REDACTED]  
19 [REDACTED] Against this real world harm, Princeton  
20 has essentially argued that the optics of the TRO would be bad  
21 for it.

22 THE COURT: Well, talk to me about your likelihood of  
23 success on the merits. Talk to me about that. Because there  
24 was a complaint, a counterclaim. There was a footnote about  
25 the opportunity to cross-examine, but that had occurred after

1 counsel was appointed or was retained. Talk to me about that.

2 MR. FETTERMAN: That would be great. Thank you, Your  
3 Honor.

4 So in order to -- we believe we have an overwhelming  
5 likelihood of success. We have to show one of two things.  
6 That there were evidentiary or procedural deficiencies that  
7 cast doubt on the outcome that were motivated by gender bias  
8 or that there was selective enforcement motivated by gender  
9 bias. That's under Title 9. And then we can show we have a  
10 likelihood of success on the merits for breach of contract.  
11 And we believe that in each of those categories we have a  
12 likelihood of success on the merits. And I'd like to just  
13 walk the Court through that quickly.

14 So the Rollins case that we cited, an erroneous outcome  
15 can be found where universities report excused inconsistent  
16 statements made by the complainant. Here, Princeton literally  
17 bent over backwards to find Jane very credible.

18 THE COURT: Why do you say that? How do you say  
19 that?

20 MR. FETTERMAN: Well, so, for example, Jane lied, and  
21 the record is clear, about the fact she told the investigator  
22 that she broke up with plaintiff because of his alleged abuse,  
23 when in truth and in fact -- and there are tapes that were in  
24 the record and we transcribed excerpts from them -- he broke  
25 up with her because she had cheated on him. And after he

1 broke up with her -- after he broke up with her, she was upset  
2 and she was harassing him and she was making false claims  
3 about him, and he reported them.

4 THE COURT: [REDACTED]

5 [REDACTED]

6 MR. FETTERMAN: [REDACTED]

7 [REDACTED]

8 THE COURT: Okay. Aren't you getting into  
9 credibility issues and even perhaps a motion to dismiss stage  
10 of the pleadings? Aren't you getting into the merits of the  
11 case and issues that need to be decided after some discovery  
12 is exchanged?

13 MR. FETTERMAN: Well, Your Honor, but there is -- but  
14 they had a record that they ignored. That's exactly the --  
15 that's exactly the procedural deficiency. This is evidence in  
16 the record that they ignored. That they chose to ignore.  
17 They find her, quote, very credible, despite the fact that she  
18 lied about one of the most material facts in the case, that  
19 she had a clear motive to lie. And they didn't provide him  
20 with any meaningful cross-examination. I mean, I can walk  
21 through -- and I will with, you know, with respect to applying  
22 the preponderance standard. But yet you have -- so quickly  
23 turning to the selective enforcement because I think it makes  
24 this point as well. You have a perfect comparator. Jane was  
25 in an intense relationship with plaintiff. There were

1 allegations in both directions of violations of university  
2 policies. He reported her first. We know how they treated  
3 him. They said, yeah, maybe you should go get some counseling  
4 to deal with the breakup. At every turn, Princeton treated  
5 her more favorably. And when they were applying the  
6 preponderance standard -- so the evidence against Jane was  
7 really strong, Your Honor. There's a photo of plaintiff with  
8 a black eye. The mother testified that she saw him with a  
9 black eye during the relevant time period. We have testimony  
10 of a student who saw the defendant with scratches after one of  
11 the incidents in question alleged against her, and he asked  
12 plaintiff what happened and plaintiff said, Jane got really  
13 crazy. And then there was contemporaneous texts from  
14 plaintiff to her roommate in which he said that the  
15 complainant was scratching and hitting him.

16           So they -- they find none of that sufficient for  
17 probable cause. Your Honor, I was a federal prosecutor. I  
18 would have gotten an indictment returned on that evidence  
19 every day of the week by application of the preponderance  
20 standard.

21           Conversely, you have a witness who lied, and that's the  
22 complainant. A witness who lied about the most fundamental  
23 facts possible. That is, who broke up with whom, you know,  
24 she alleged because of abuse. A witness who had a motive to  
25 lie. She was revengeful and vindictive, and that's

1 demonstrated in texts, in emails, and in his report to the  
2 university. A witness with drug and alcohol abuse problems,  
3 including browning and blacking out during some of the events  
4 in question. A witness who lied about where and how the  
5 photos were taken. A witness who concealed or omitted to tell  
6 the investigators that she was engaging in consensual choking  
7 sex, the very kind of abuse that she was alleging until after  
8 our client raised it in his interview. And then they cite to  
9 that -- her concealing that material fact as evidence that  
10 she's credible. A witness who posted social media saying she  
11 -- after he's expelled, [REDACTED]

12 [REDACTED]  
13 And a witness who sent texts saying that there were bad people  
14 in [REDACTED] and plaintiff was not one of them.

15 They find her very credible, and in every -- in every  
16 single specification where they find him guilty or they find  
17 her not guilty, they cite the very credible witness Jane and  
18 the very not credible witness Doe.

19 THE COURT: In what ways do I look at those  
20 determinations at this point?

21 MR. FETTERMAN: You look at it through the factual  
22 record that they didn't consider these things. You know what  
23 else is really significant, Your Honor? I think it's really,  
24 really significant because Your Honor knows this because you  
25 sit as a district court judge. They put in the record that

1 they were making no credibility determinations based on the  
2 demeanor of the witnesses, Jane and plaintiff. And they also  
3 said they found every other witness to be generally credible.

4 So I believe, Your Honor, that the lens that you look  
5 at with respect to procedural deficiencies -- and I'll  
6 continue with the selective enforcement -- but the lens that  
7 you look at is the evidence in the record and how they looked  
8 at it because it's consistent with everything else they've  
9 done. It was biased.

10 THE COURT: How about the no-contact orders regarding  
11 the selective enforcement?

12 MR. FETTERMAN: Absolutely, Your Honor. That's a  
13 great example. Jane commits an intentional in-person  
14 violation of the no-contact order. Plaintiff reports it.  
15 Says it made him uncomfortable. They say no problem.  
16 Plaintiff accidentally butt dials Jane once and doesn't even  
17 speak with her and accidentally likes a social media. He's, you  
18 know, sort of scrolling through. I would submit, Your Honor,  
19 thousands if not hundreds of thousands of Americans do that  
20 accidentally and incidentally every day. I've done it more  
21 times than I'd like to admit. I don't mean to like something  
22 and I accidentally did it. They investigate him and they give  
23 him a dean's warning.

24 So you have that. You have the fact that he reports  
25 harassment, and they say, yeah, no problem. We're not going

1 to do anything. She reports her allegations and she doesn't  
2 want to take any action. And the university actually solicits  
3 her to help them and to bring charges.

4           You have the way they handled the no contact. And the  
5 most significant, in my view, is the incredible one-sided  
6 application biased -- gender-biased application of the  
7 preponderance standard. There was overwhelmingly evidence  
8 that she committed acts of violence against him, with credible  
9 witnesses. They've been found credible, and they say, yeah,  
10 but not enough there. We're not even going to sanction her in  
11 any way, shape, or form. We fully exonerate her, and yet --  
12 and I'll walk through all of her difficulties as a witness --  
13 we find her to be very credible. This case wouldn't even be  
14 brought. The case against [REDACTED] with a complaining witness  
15 like this likely would never get brought in, you know, by a  
16 district attorney or someone who's looking at who is the  
17 complaining witness here.

18           So the plaintiff in final and selective treatment, Your  
19 Honor, the plaintiff, a male, receives the harshest possible  
20 sanction and Roe is exonerated. And, you know, I would --  
21 Your Honor cut me off at the end of my argument, but I just  
22 wanted to make one point about the fact that they point to the  
23 optics to the message that's going to be sent because we have  
24 to show that plaintiff's selective application of -- is their  
25 selective treatment and the other procedural deficiencies were

1 the result of gender bias. And I would argue that on this  
2 strong record it's basically res ipse loquitur. But the fact  
3 that what they point to is the message that's going to be sent  
4 to their community, those are statements that I think can be  
5 held against the university and show their motivation for how  
6 they're acting here.

7 But beyond that, and as we put in our papers -- and I  
8 don't need to go through it -- there's, you know, overwhelming  
9 evidence that they were faulted for their handling of these  
10 kinds of Title 9 cases and including May of 2019, Princeton  
11 students protest Title 9 process demanding firing of the  
12 administrator. That's Reagan Crotty. In a review of Chief  
13 Officer Michelle Mitner, they were -- Crotty was responsible  
14 for coaching and urging Jane to formalize her charges. Ms.  
15 Mitner was responsible for barring plaintiff from campus.  
16 There's also that, Your Honor.

17 And then if I might quickly address the breach of  
18 contract. I mean --

19 THE COURT: Please.

20 MR. FETTERMAN: The breach of contract claim is  
21 likely stronger than our very strong Title 9 claim. You know,  
22 they halfheartedly suggest that the policies and like can't be  
23 recognized as a contract. There's tremendous case law on  
24 this. We've cited to it in our papers, and I won't go through  
25 it, but courts have rejected or reached an obligation of



1 contractual principles to university and student conflicts.  
2 There have been a number of cases where -- and, in fact, I  
3 think Your Honor has sustained a case where there was a breach  
4 of contract.

5           And let me just say one last point, actually, if I  
6 might, to jump back on the gender motivation. Your Honor can  
7 take judicial notice -- it's in our papers -- of the slew of  
8 litigations that are coming out against Princeton. Your Honor  
9 has three of those before you, and you sustained the breach of  
10 contract claim in one of those cases.

11           THE COURT: A different stage of litigation, counsel.

12           MR. FETTERMAN: Different stage. I understand. But  
13 it shows a pattern here that I think Your Honor can -- can  
14 take notice of.

15           But going back to the breach of contract, it's clear  
16 that they breached the contract in their application of the  
17 preponderance of the evidence standard, in our view, Judge.  
18 It's clear that they provided plaintiff with a highly  
19 conflicted advisor, and it was on the advisor to raise his  
20 hand and say he had a conflict. He served, you know, as a  
21 student conduct disciplinary official. He's actually part of  
22 the gender-biased response by the university because he's the  
23 person who doesn't encourage plaintiff to report Jane's  
24 harassment, and he's the person who conducts the investigation  
25 on the no contact, and he's the person who ultimately delivers

1 the dean's warning to the plaintiff. He should not have been  
2 plaintiff's advisor under any forum. As a lawyer, he would  
3 have been, you know, he would have been sanctioned by the Bar  
4 and he --

5 THE COURT: How did he come to be plaintiff's  
6 advisor?

7 MR. FETTERMAN: He came to be plaintiff's advisor  
8 because plaintiff knew him and plaintiff asked him to be. But  
9 I don't think -- that doesn't take the burden off of him just  
10 like when a potential client comes to a lawyer and says, can  
11 you be my lawyer? And the lawyer knows he has a conflict, he  
12 has a duty to tell the potential client, can't represent you  
13 because I have an actual or potential conflict.

14 The denial of the request for an extension is  
15 laughable. If Your Honor would just look at the two emails.  
16 I sent one and my partner sent one, and we laid out the good  
17 cause. And if you look at what the standards are for cause,  
18 including the complexity of the matter and the length of, you  
19 know, of the record and the like, there was definitely good  
20 cause. We cited to their policy and we asked them for the  
21 extension and they say we gave them no reason.

22 And then finally they provided him with the harshest of  
23 penalties without giving any sort of analysis about the, you  
24 know, the factors that went into that.

25 So, Your Honor, that, in essence, is the sum and

1 substance. We believe on -- that there were procedural  
2 irregularities. We clearly have a likelihood of success on  
3 the merits on the fact that he was -- there was selective  
4 enforcement here. For numerous different reasons, we have a  
5 likelihood of success on the merits. And we have a likelihood  
6 of success on the merits for the breach of contract and the  
7 overwhelming harm to plaintiff, with almost no prejudice to  
8 Princeton, we submit, should allow the Court to just enter  
9 this really very benign request that we're making to the  
10 university.

11 THE COURT: I understand your argument.

12 MR. FETTERMAN: Thank you, Your Honor.

13 THE COURT: Thank you. Counsel.

14 MR. KASTENBERG: Thank you, Your Honor. Stephen  
15 Kastenberg.

16 I will try to adhere to the 15 minutes, but I hope the  
17 Court will allow me a little over, given that we've been going  
18 about a half hour so far.

19 THE COURT: Sure.

20 MR. KASTENBERG: Your Honor, I want to start by  
21 talking about the merits and talking about the irreparable  
22 harm and balance of the harms issue. But, you know, as Your  
23 Honor would be well aware, you don't reach these issues of  
24 irreparable harm without ample harm. Lastly, the likelihood  
25 of success on the merits here.

1 I also want to start by just underscoring that what  
2 we're talking about here is Doe was found responsible for very  
3 serious sexual misconduct. Multiple acts of violence against  
4 Roe, who was his dating partner, including choking her on  
5 three occasions. And particularly, on the last occasion,  
6 choking her so hard that the -- before she was not able to  
7 breathe and thought it was a possibility she would die. And  
8 in that same incident, he then yanked her off of her bed,  
9 punches her in the face repeatedly. She gets a nose bleed.  
10 And this is reported not only by -- by Jane Roe's testimony  
11 and interviews with the investigatory panel, but by other  
12 corroborative evidence. I mean, there are pictures. There is  
13 video. The pictures show a bloody nose, a cut and bloody lip,  
14 bruised and scratched neck. It shows Doe. He has three  
15 pictures or videos, including him speaking, him speaking in  
16 his foreign language in which he is fluent. And, you know, he  
17 admits at first in the interview that it is him. Later he  
18 turns around and denies that it's him in a couple of the  
19 videos. But initially he's in all of them. You know, he --  
20 he denies that these are -- these time-stamped pictures and  
21 videos must be manufactured. Princeton -- the panel has an  
22 expert look at that and concludes, based on the expert  
23 analysis, that it is not true. And, you know, admits that  
24 there was no one else who was present at this time. There are  
25 corroborative emails and texts between Jane Roe and her

1 friends, but also with Doe in which Jane was arguing by text  
2 and Doe -- Jane Roe says something -- says, I never made your  
3 nose bleed, to which Doe responds, I F'd up. I know it's not  
4 okay.

5 So besides her testimony, which is found to be very  
6 credible, besides the corroborative pictures and videos, there  
7 are emails and texts. There's emails and texts with Doe.  
8 There's admissions by Doe. There are other incredible  
9 statements by Doe, you know, including a statement  
10 contradicted by his own friends who were witnesses. He  
11 denies, for example, that the relationship was contemptuous at  
12 all, which was -- as it was described not only by Jane Roe but  
13 by multiple of the witnesses, including friends of Doe.

14 THE COURT: Where is this argument taking us? To the  
15 fact that based on this record, based on the standards that  
16 this Court need to employ, there was not a reasonable  
17 probability of success on the merits? Or at least at this  
18 point, I can't draw that conclusion.

19 MR. KASTENBERG: You cannot draw that conclusion that  
20 there is a reasonable possibility of success on the merits.  
21 Your Honor, we don't get into that in the -- in the brief  
22 because, in fact, you don't really have to reach that. I  
23 mean, you don't reach the analysis of the merits. But, you  
24 know, there's so much said about how it was an unfounded  
25 conclusion. You don't reach that analysis because there's

1 also no evidence of gender bias as the motive. I mean, it is  
2 clearer, right or left, under numerous cases that general, you  
3 know, pressures that are -- a university has alleged with  
4 respect to Title 9 process. They're inadequate. And there's  
5 no specific allegations of bias here. I mean, the only two  
6 persons involved or mentioned anywhere in the briefing are  
7 Crotty and Mitner, and they're not alleging anything that  
8 presents bias. What they alleged was that they were the  
9 subject of protests a year ago, unrelated to this incident and  
10 investigation, which they were not being sufficiently  
11 understanding or receptive -- not to men -- but to victims.  
12 Victims, of course, is not the protective category that we're  
13 talking about here.

14           So we don't even get to that, Your Honor. And, you  
15 know, if you look at the outcomes analysis, if you look at the  
16 selective enforcement analysis, the episodes that the  
17 plaintiff talks about are nothing more than argument. The  
18 issue Your Honor asked about with the no-contact rule, for  
19 example. So on the very day that the rule was put into place,  
20 Jane Roe did contact John Doe. John Doe asked that she not be  
21 adjudicated. She was not adjudicated further. Doe was told,  
22 however, that future violations would lead to an adjudication  
23 and potential penalty. Nonetheless, when John Doe committed  
24 an infraction of the no-contact rule, he also was not -- he  
25 was not punished. He was not warned. There was no -- there

1 was no consequences. It was only when there was a second  
2 incident, which John Doe did self-report, that there was, you  
3 know, a sanction only in the form of a dean's warning. There  
4 is simply nothing to that.

5 The issue of fair treatment or alleged gender-biased  
6 treatment of any processes here, there's no evidence that the  
7 plaintiff knew that -- Dean Crotty or anyone at Princeton  
8 sought to induce the plaintiff -- excuse me, sought to induce  
9 Jane Roe to go file a claim. There's no evidence. There's no  
10 facts alleged. There's no evidence presented on that.

11 Frankly, even if it were revealed that he had come to  
12 the administration and says, I've been physically attacked and  
13 punched, it would be a perfectly appropriate response to in  
14 fact charge the claimant needs to come forward. But there's  
15 no evidence that that, in fact, happened here other than what  
16 counsel's argued.

17 THE COURT: Counsel, I understand this argument.  
18 Talk to me about Haney, the finding of irreparable harm. I  
19 know we're going past where we are in this part of the  
20 argument, but I think I've heard enough on this. I understand  
21 that Haney, ultimately the court did not grant the injunction.  
22 But that being said, the finding of irreparable harm because  
23 of a strikingly similar type situation.

24 MR. KASTENBERG: Well, Your Honor, I absolutely  
25 acknowledge, Your Honor, that there is case law on both sides

1 of the irreparable harm. There are strikingly similar factual  
2 circumstances in cases that we cite, in the Yale case, where  
3 the court finds that there is no irreparable harm. There are  
4 other cases where the Court finds that an expulsion and  
5 interruption of education can be irreparable harm.

6 I think that the -- the better analysis here, Your  
7 Honor, is that it is not irreparable harm to start with for a  
8 couple reasons. One is that Doe acknowledges [REDACTED]  
9 [REDACTED] In response to our arguments on this  
10 point, in the reply brief, Doe acknowledges that even if he's  
11 granted the full measure of relief that he's seeking, it would  
12 only reduce the irreparable harm. So they're asking the Court  
13 to enter an injunction that will not even have the effect of  
14 avoiding so-called irreparable harm. And what we are talking  
15 about, and the emphasis has been on, [REDACTED]

16 [REDACTED] Today counsel mentioned that  
17 there might be classes involved in attending Princeton. But  
18 besides the fact that this student is [REDACTED]

19 [REDACTED] And I'll go to the point that  
20 there is monetary relief if the plaintiff ultimately prevails  
21 that could be involved and it is not irreparable harm.

22 And the fact is, Your Honor, that the idea that an  
23 interruption in education will permanently harm someone,  
24 people do take off from school for all kinds of reasons. It  
25 is not something that in our society is an immediate red flag



1 or scarlet letter, and particularly so during the current  
2 COVID-19 emergency situation where people are subject to all  
3 kinds of exigent circumstances, the idea of a small delay in  
4 completing the education, when, in fact, [REDACTED]

5 [REDACTED] Even if the Court granted the injunction, [REDACTED]  
6 [REDACTED]  
7 [REDACTED]

8 And then, Your Honor, the issue even is if there is  
9 some irreparable harm, small as it may be -- and I say small  
10 because, again, even if you viewed it as irreparable harm,  
11 [REDACTED] With the balance of equities,  
12 hence let's skip the Princeton thing. This is a person who  
13 underwent a thorough investigation, was found responsible for  
14 very, very serious physical violence. And I understand  
15 there's not a physical camping at the moment. But Your Honor,  
16 the idea that the defendant can go free during the  
17 postconviction, you know, phase because his counsel viewed it  
18 as a prosecutor of the case, that doesn't happen. We're not  
19 in a criminal defense here. I understand Princeton is a  
20 private university. We defend these cases about the deference  
21 to -- in the academic setting all the time for a reason.  
22 Princeton is acting not just for an individual, but Princeton  
23 is acting on behalf of a community that it is charged with  
24 looking out for and the well-being of. And that includes a  
25 person who at this point has been adjudged to be a victim of

1 violence in a relationship. And it includes the rest of the  
2 community. And to readmit -- to readmit and reinstate because  
3 that appears to be potential -- for something to ask for in a  
4 hearing. He's says, why not reinstate it? It's about  
5 community. It is a real harm, and to dismiss the idea of  
6 reinstating a person in this circumstance does not only, in  
7 fact, send a very strong signal to the victim, it sends a  
8 strong signal to the community that even after a thorough  
9 investigation and determination and expulsion, a person can  
10 put off an extension. They can participate in the community,  
11 even in some limited fashion, as Your Honor contemplates, is a  
12 very, very bad message, in the university's view, Your Honor,  
13 as far as to -- you understand my point.

14 THE COURT: I understand the point, and I'm going to  
15 give plaintiff five minutes. And the reason is I have another  
16 conference on a criminal matter that I'm starting, and my  
17 concern is that they're going to dial in when we're in the  
18 middle of our conference because we only have one number.

19 MR. KASTENBERG: Your Honor, can I bring up one very  
20 brief point? Your Honor, if counsel for the plaintiff  
21 mentions the plaintiff's name, there may be other things that  
22 have been said in this call that are confidential. I would  
23 ask Your Honor's permission that we keep this transcript  
24 initially confidential so the parties can review it and  
25 propose any redactions.

1 THE COURT: So ordered.

2 MR. FETTERMAN: I would like just very quickly, Your  
3 Honor -- I realize we have very little time. But on these  
4 issues that he went through about the evidence, I mean, this  
5 proves exactly our point. That the whole point about what  
6 occurred in that room relies heavily on Jane Roe who is a  
7 highly suspect witness for many, many reasons. But the  
8 choking occurred during a period when they were engaged in  
9 consensual sexual acts of choking sex, admitted by both sides.  
10 University officials showed up at the door, trained university  
11 officials, and they saw nothing wrong with Jane Roe and her  
12 face. She says she ran to the bathroom and took pictures, but  
13 the pictures show they weren't taken in the bathroom. It goes  
14 on and on. He said there were texts that admit that I never  
15 made your nose bleed. That is not what those texts say.

16 I'm telling you, Your Honor, that when you look at the  
17 preponderance standard on the record before the Court, it is  
18 -- it would not pass scrutiny. I just must say that on the  
19 messaging, he said, you know, the message that a defendant  
20 should go free from a conviction, this is exactly the point  
21 and why this case is so important. We are talking about Title  
22 9 due process rights. The plaintiff here is not a convicted  
23 defendant. They applied and misapplied a preponderance  
24 standard. We all know that when a target of an investigation  
25 is indicted by a Grand Jury by the preponderance standard,

1 there's a presumption of innocence. And for all those  
2 reasons, we had a confidential proceeding with a confidential  
3 outcome. People should not know what the nature of the  
4 allegations were and they shouldn't know what the university  
5 found. And the university despite, I would add, Your Honor,  
6 two or three weeks of saying, we're not even going to consent  
7 to using anonymous names has now all of a sudden wanted to  
8 keep everything or as much as possible under seal. What  
9 they're worried about is the quote-unquote message and signal.  
10 This boy will have his life ruined. They will have charged  
11 him with, you know, having been found guilty, as counsel put  
12 it, of what they're describing as multiple acts of violence,  
13 choking so hard she couldn't breathe. Your Honor is going to  
14 see these pictures. This is a very delicate subject. But the  
15 pictures don't look like what counsel just described. And  
16 there's lots of other evidence here. It wasn't applied. The  
17 standards were not applied fairly.

18 I don't need to, you know, reargue everything. I just  
19 wanted to go back finally to the real material harm. He  
20 believes the work that he's done today, that will all be lost.  
21 It will be a gap in his education. He may not ever be able to  
22 make that up. And there are real meaningful costs involved if  
23 he has to redo his semester.

24 So we're asking, in effect, for him to anonymously be  
25 provisionally -- it's really the status quo ante because we do

1 have, we believe, a strong likelihood of success on the merits  
2 both with breach of contract claims, and I invite Your Honor  
3 to look carefully at that as well as on the Title 9 claims.  
4 And we have made the link, as I described in my prior  
5 argument.

6 THE COURT: Counsel, I understand your arguments. I  
7 also understand the emergent nature of this application. This  
8 decision will be out no later than noon tomorrow. Anything  
9 further?

10 MR. FETTERMAN: Not from plaintiff, Your Honor. We  
11 appreciate it.

12 THE COURT: Be safe. Be well.

13 MR. FETTERMAN: Thank you, Your Honor.

14 MR. KASTENBERG: Thank you, Your Honor.

15 (Proceedings concluded at 1:15 p.m.)

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FEDERAL OFFICIAL COURT REPORTER'S CERTIFICATE.

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I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

I

/s/ Megan McKay-Soule, RMR, CRR      May 14, 2020

Court Reporter

Date

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