No. S263180

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

MATTHEW BOERMEESTER,

Plaintiff and Appellant,

v.

AINSLEY CARRY ET AL.,

Defendants and Respondents.

After a Decision by the Court of Appeal
Second Appellate District, Division Eight, Case No. B290675

APPLICATION FOR PERMISSION TO FILE *AMICI CURIAE* BRIEF AND *AMICI CURIAE* BRIEF OF CALIFORNIA WOMEN'S LAW CENTER, EQUAL RIGHTS ADVOCATES, KYLEE O., MARYAM I., CLAUDIA R., AND 23 ADDITIONAL ORGANIZATIONS IN SUPPORT OF RESPONDENTS

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APPLICATION TO FILE *AMICI CURIAE* BRIEF

Pursuant to rule 8.520(f) of the California Rules of Court, California Women's Law Center ("CWLC"), Equal Rights Advocates ("ERA"), Kylee O., Maryam I., and Claudia R., joined by Alliance for HOPE International, Atlanta Women for Equality, Child Abuse Forensic Institute, Center for Community Solutions, Community Legal Aid SoCal, Domestic Abuse Center, Family Violence Appellate Project, Family Violence Law Center, Feminist Majority Foundation, Law Foundation of Silicon Valley, Legal Aid at Work, Legal Voice, Los Angeles Center for Law and Justice, National Association of Women Lawyers, National Women's Law Center, Public Counsel, Rural Human Services/Harrington House, San Diego Volunteer Lawyer Program, Southwest Women's Law Center, Texas Association Against Sexual Assault, Walnut Avenue

Family & Women's Center, WEAVE, Inc., and Women's Law Project[1] request permission to file the attached *amici curiae* brief.[2]

The organizational *amici* are a group of public interest and gender equality organizations. The educational institutions, including the harmful and unnecessary requirement of live cross-examination implicates the work of these organizations. These organizations directly or indirectly support and assist victims of gender-based violence, including sexual assault and intimate partner violence, in Title IX disciplinary proceedings. The organizational *amici* have an interest in ensuring that the common law right to fair procedure adequately protects the rights of all

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[1] Gibson, Dunn & Crutcher represents CWLC and ERA. The individual survivor *amici*, as well as Alliance for HOPE International, Atlanta Women for Equality, Child Abuse Forensic Institute, Center for Community Solutions, Community Legal Aid SoCal, Domestic Abuse Center, Family Violence Appellate Project, Family Violence Law Center, Feminist Majority Foundation, Law Foundation of Silicon Valley, Legal Aid at Work, Legal Voice, Los Angeles Center for Law and Justice, National Association of Women Lawyers, National Women's Law Center, Public Counsel, Rural Human Services/Harrington House, San Diego Volunteer Lawyer Program, Southwest Women's Law Center, Texas Association Against Sexual Assault, Walnut Avenue Family & Women's Center, WEAVE, Inc., and Women's Law Project have independently chosen to join this brief. Additional information regarding *amici* is included in Appendix A – Signatories.

[2] No party or counsel for party in this case authored the proposed brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the proposed brief. No person or entity other than *amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of the proposed brief.

students, including victims and survivors of gender-based violence, without causing undue harm to survivors. These organizations also have an interest in protecting all students' right to a safe educational environment, free from harassment.

Kylee O., Maryam I., and Claudia R., are individual *amici* who are survivors of gender-based violence that they experienced while attending college. Each survivor *amicus* reported her attack and participated in Title IX disciplinary proceedings that either included or would have included cross-examination at a live hearing. Based on their personal experiences, the survivor *amici* have an interest in safeguarding the educational environments of past, current, and future survivors of gender-based violence, with adequate protection from needless retraumatization.

Accordingly, proposed *amici curiae* respectfully request that the Court accept the enclosed brief for filing and consideration.

DATED: July 1, 2021

Respectfully Submitted,

GIBSON, DUNN & CRUTCHER LLP

By: */s/ Theane Evangelis*
Theane Evangelis

Attorneys for Amici

AMICI CURIAE BRIEF

INTRODUCTION

Over the last five years, the California appellate courts have created a gender-biased legal system for on-campus disciplinary investigations that has forced student victims of sexual assault and intimate partner violence into an unjust and untenable position. These students, who are often dealing with serious trauma from what they experienced, are forced to face barriers that their classmates, who are making a disciplinary complaint for any reason *other* than gender-based violence, are not. At the same time, their perpetrators are afforded more protections than students facing discipline for any other offense, even those with the same serious sanctions at stake.

For example, if a male student physically assaults his girlfriend, he is currently entitled to greater procedures than if he physically assaults a male peer. Specifically, if the violence is directed towards his girlfriend, he is entitled to "a hearing, live testimony, and the full panoply of trial-like procedures" (*Knight v. South Orange Community College Dist.* (2021) 60 Cal.App.5th 854, 870)—including live cross-examination. The law as it stands is a two-track system—***separate and unequal***—requiring an opportunity to cross-examine parties and witnesses *only* in gender-based disciplinary proceedings. And this unequal treatment is built upon the false stereotype that women and girls who report their harassment, assault, abuse, or rape are lying.

This Court should restore its 1974 position: A "fair procedure" in the administrative proceeding does not require formal proceedings akin to that of a criminal trial. (*Pinsker v.*

Pacific Coast Society of Orthodontists (1974) 12 Cal.3d 541, 555.) A school "is not required to convert its classrooms into courtrooms." (*Doe v. Regents of Univ. of Cal.* (2016) 5 Cal.App.5th 1055, 1078, quoting *Murakowski v. Univ. of Del.* (D.Del. 2008) 575 F.Supp.2d 571, 585–586.)

As explained in detail below by survivor *amici* who experienced the trauma of rape, sexual assault, and intimate partner violence, forcing student victims to relive the most horrible moments of their lives in an attempt to undermine their credibility can be as traumatizing as the assault itself. Nor are these three brave *amici* unique. Academic research confirms the profound harm caused by cross-examination in these proceedings.

And there is no need for cross-examination in campus proceedings. The lofty rhetoric about the truth-finding ability of cross-examination found in case law is not supported by research, empirical or otherwise. That is why experts in the field, including a blue ribbon commission assembled by the ABA, have rejected live cross-examination in academic disciplinary proceedings and instead advocated for an investigatory model that focuses on gathering facts without retraumatizing victims. It is also why the Legislature, in passing Senate Bill 493, prohibits criminal trial-style cross-examination in school proceedings and allows for hearings only when a school deems it absolutely necessary to determine whether the misconduct occurred.

None of this is revolutionary—far from it. European countries utilize an investigatory model without cross-examination even in *criminal* cases. So do certain proceedings in

the United States, such as dependency hearings. If these procedures are good enough for criminal defendants in France or to deprive a parent of his or her parental rights in the United States, surely they satisfy the common law right to fair procedure in a private or public school.

The Court should hold that a school disciplinary proceeding can be fair without criminal trial procedures such as cross-examination and make clear that gender bias has no place in California law.

ARGUMENT

A. This Court should emphatically reject California's two-track system—one for gender-based violence cases and another for all other cases—that treats victims of gender-based violence as separate and unequal.

California case law has now created two tracks for school disciplinary proceedings based solely on the type of misconduct. One track—involving sexual assault and (until de-publication of the decision below) intimate partner violence—requires quasi-criminal trial proceedings. The other track—for all other misconduct—does not mandate the strictures of a court trial, let alone cross-examination. Because the majority of gender-based violence (sexual assault, sexual harassment, and intimate partner violence) victims are women, the result is a separate and unequal proceeding that penalizes women and girls and presumes they are lying.

In 1974, this Court set the standard for what constitutes a fair procedure for administrative proceedings and held it does ***not***

require formal proceedings akin to that of a criminal trial. (*Pinsker*, *supra*, 12 Cal.3d at p. 555). Rather, this Court instructed that fair procedure requires notice and "a fair opportunity to defend himself." (*Ibid.*) This Court did not say that fair procedure requires cross-examination, let alone *direct* and *live* cross-examination.

Since *Pinsker*, the Court of Appeal has steadfastly followed this precedent for school disciplinary proceedings so long as the conduct does *not* involve gender-based violence. For example:

- In *Doe v. University of Southern California* (2018) 28 Cal.App.5th 26, the Court of Appeal held that a student was provided a fair hearing, and reversed the trial court that had concluded otherwise, where a student was suspended for one year for cheating. (*Id.* at pp. 31, 39–40.) Fair procedure was satisfied by allowing the student to review the investigator's report that explained (1) the charge, (2) the evidence supporting it, and (3) the names of the initiating professors. (*Id.* at pp. 39–40.)
- In *Berman v. Regents of University of California* (2014) 229 Cal.App.4th 1265, the Court of Appeal held that due process was satisfied where a graduate student was suspended for two quarters for striking another student while intoxicated even though the dean imposed a greater sanction than the board recommended without providing the student with an opportunity to be heard regarding the greater sanction. (*Id.* at pp. 1273–1275.)

- In *Scott B. v. Board of Trustees of Orange County High School of the Arts* (2013) 217 Cal.App.4th 117, the Court of Appeal held that a male student who threatened another male student with a knife was not even entitled to a hearing. (*Id.* at pp. 123–124.)
- This year, in *Alpha Nu Association of Theta Xi v. University of Southern California* (2021) 62 Cal.App.5th 383, the Court of Appeal concluded that an investigation into code of conduct violations at fraternity events, including forced underage drinking and hazing, did "not mandate cross-examination." (*Id.* at pp. 421–422.)

But where gender-based misconduct is at issue, the Court of Appeal has taken a vastly different approach, drastically expanding what is required for a "fair" procedure in those cases. In 2016, the Court of Appeal declined to require cross-examination, but required that the accused must be provided the "opportunity to appear directly before the decisionmaking panel." (*Doe v. Univ. of Southern Cal.* (2016) 246 Cal.App.4th 221, 248.) Two years later, in 2018, it required that a *single* adjudicator must physically observe each and every witness whose credibility may be key. (*Doe v. Univ. of Southern Cal.* (2018) 29 Cal.App.5th 1212, 1233.) The Court of Appeal in 2018 also held that "the school's obligation in a case turning on the complaining witness's credibility is to 'provide a means for the [fact finder] to evaluate an alleged victims credibility.'" (*Doe v. Claremont McKenna College* (2018) 25 Cal.App.5th 1055, 1073, quoting *Doe v. Univ. of Cincinnati* (6th Cir. 2017) 872 F.3d 393, 406.)

In 2019, the Court of Appeal went further, first requiring that those same "critical witnesses" be "independent[ly] evaluat[ed]" at a hearing "before assessing credibility," even if there was a prior "investigative report[]." (*Doe v. Westmont College* (2019) 34 Cal.App.5th 622, 637.) That same year, the Court of Appeal then took an even bigger leap and required that a student accused of sexual misconduct be afforded the "right to cross-examine his accuser, directly or indirectly, so the fact finder can assess the accuser's credibility." (*Doe v. Allee* (2019) 30 Cal.App.5th 1036, 1066; see *Westmont*, *supra*, 34 Cal.App.5th at pp. 638–639 [expanding questioning to "witnesses," not just the accused].) Thus, the law currently requires that in gender-based violence matters only, schools must provide "a hearing, live testimony, and the full panoply of trial-like procedures." (*Knight*, *supra*, 60 Cal.App.5th at p. 870 [male student accused of touching and stalking female students].)

These are two separate tracks. And the unmistakable dividing line is gender. Credibility, trustworthiness, and other factors that would theoretically support cross-examination are just as present when a male punches his fraternity brother in an alley as it is when a boyfriend chokes his girlfriend while having sex. And because the overwhelming majority of survivors of gender-based violence are female (Truman & Morgan, *Nonfatal Domestic Violence, 2003–2012* (2014) U.S. Dept. of Justice, at pp. 1, 11 <https://www.bjs.gov/content/pub/pdf/ndv0312.pdf> [as of June 30, 2021]), it is *those* victims whose reporting is treated separately and subject to greater scrutiny and added procedures.

There is no justification for more levels of process for students accused of gender-based violence than those accused of other serious offenses. There is nothing inherent about gender-based violence that warrants more scrutiny on the victim and more protections for the accused. Indeed, studies show that the overall rate of false accusations of sexual assault is between 2% and 7%, and no higher than any other crime. (See *False Reporting Overview* (2012) National Sexual Violence Resource Center, at p. 3, <https://www.nsvrc.org/sites/default/files/Publications_NSVRC_Overview_False-Reporting.pdf> [as of July 1, 2021]; Kelly, *Routes to (In)justice: A Research Review on the Reporting, Investigation and Prosecution of Rape Cases* (2001) at p. 22 <https://www.justiceinspectorates.gov.uk/cjji/wp-content/uploads/sites/2/2014/04/Rapelitrev.pdf> [as of July 1, 2021].)

Rather, California has adopted (perhaps unwittingly) as the law of the state the false stereotype that women and girls who report harassment, assault, abuse, or rape are lying. Nowhere is this clearer than in the underlying decision. In the *first line* of the factual background, the majority introduced Mr. Boermeester by stating that he "kicked the game-winning field goal for USC at the 2017 Rose Bowl." (*Boermeester v. Carry* (2020) 263 Cal.Rptr.3d 261, 265.) This is irrelevant to whether Mr. Boermeester abused Ms. Roe, yet the inclusion of this fact suggests that it was relevant to the justices who signed on to the opinion, and that the law treats women as even less trustworthy when the respondent is a star athlete.

Amici therefore respectfully request that the Court use this case to emphatically reject this dual-track system that penalizes victims of gender-based violence and reinforces untrue stereotypes about their veracity.

B. Cross-examination in school disciplinary proceedings is harmful and counterproductive.

Not only is the two-track system inequitable, these heightened requirements in gender-based violence misconduct proceedings cause pervasive, long-lasting, and debilitating harm. Requiring adversarial criminal trial procedures, such as cross-examination of the survivor and their witnesses in a hearing, will not solve the pervasive problem of gender-based violence on college campuses. To the contrary, cross-examination and similar procedures in non-criminal administrative disciplinary proceedings will exacerbate the problem by making survivors less likely to report and by re-traumatizing those survivors who do come forward, making even fewer survivors want to report.

Cross-examination and similar onerous procedures are therefore *contrary* to the goals of school policies that prohibit such misconduct—policies mandated by Title IX and the California Education Code—to provide a safe environment for the academic community, including preventing, eliminating, and addressing sexual harassment in order to ensure that *all* students have equal access to education regardless of sex. (See 20 U.S.C. § 1681; Educ. Code, §§ 200, 220.) Given that over 26.4% of female undergraduate students experience sexual assault, 43% experience intimate partner violence, and one in three college survivors drop out as a

result of such violence, preventing and addressing gender-based violence in our schools is essential to ensuring women and girls have equal access to educational opportunities. (See Mengo & Black, *Violence Victimization on a College Campus: Impact on GPA and School Dropout* (2015) 18(2) J. of College Student Retention: Research, Theory & Practice 234, 244; *Facts about Dating Abuse and Teen Violence* (2015) National Coalition Against Domestic Violence, at p. 1 <https://assets.speakcdn.com/assets/2497/dating_abuse_and_teen_violence_ncadv.pdf> [as of July 1, 2021] [*Facts About Dating Abuse*]; Cantor et al., *Report on the AAU Campus Climate Survey on Sexual Assault and Misconduct* (2020) Assn. of American Univ., at p. 80 <https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/Revised%20Aggregate%20report%20%20and%20appendices%201-7_(01-16-2020_FINAL).pdf> [as of July 1, 2021].)

And the debilitating impact of cross-examination on victims is not speculation—survivors who work with CWLC and ERA have reported the burden of cross-examination and the adversarial process. This includes three amici, all of whom were subjected to gender-based violence and a hearing with traumatizing cross-examination. This harm should not be allowed to persist, and certainly not under the guise of necessity to get to the truth.

1. Kylee O.: Being cross-examined was as bad as being raped and it traumatized my friends.

My name is Kylee O. and I am joining this amicus brief because being cross-examined about being raped retraumatized me.

On August 25, 2019, during my freshman orientation week and when I was only 17 years old, I was raped by a third-year student while I was drunk. I had gone to multiple parties throughout the night and by the end of the night, I was hanging out with the third-year student in my dorm common room. Eventually, some of my suitemates let us hang out in their room while they showered so that we did not get in trouble for making too much noise. I could barely stand up, walk straight, or keep my eyes open, so I had to be helped into the other room and laid down on a bed. Once my suitemates left to shower, the third-year student started kissing me. While I laid there helpless and motionless, he took my clothes off, sexually assaulted me, and then raped me. A lot of my memory from the incident is hazy or missing but I remember the penetration because it was so painful.

At some point, my suitemates came into the room, which I could hardly recall because I couldn't really move or speak. The next thing I recalled was my suitemates freaking out because the bed and I were covered in blood. They told me that the third-year student had sex with me. When I realized I was naked and bloody, I started to cry. When I woke up the next morning, my friends had

to tell me what happened again because I didn't immediately remember. Over the next few months, I stopped being able to function. I fell behind in school, I barely ate and lost 20 pounds, I had to move dorms, and some days I couldn't stand even leaving my room.

After I reported the rape, the third-year student hired an attorney to represent him during the school investigation. After the investigation, there was an incredibly difficult and emotional hearing. My family and friends didn't want me to participate because they were worried it would trigger me. Although having to recount my assault was traumatic enough, I was most worried about the cross-examination. I was asked over one hundred questions by the third-year student's attorney, including many that had nothing to do with the incident—like about an uncomfortable prior interaction with one of his fraternity brothers I had told the third-year student about, and other questions that tried to twist what had happened, like "why did you lead him to the bed?" I had to cope with the trauma of talking about what happened to me while also trying to stay calm enough to respond to questions that tried to trap me into changing my story. The cross-examination made me feel like what I suffered was my fault.

The hearing was also incredibly harmful to my friends who were witnesses and were cross-examined by the third-year student's attorney. My suitemates who were traumatized by that night had to look at him, his family, and his support team all sitting there watching them talk about what happened. One of those friends was so overwhelmed by seeing him that she broke

down in tears and had to pause her testimony because she was about to have a panic attack. It was heartbreaking to realize how much the cross-examination took a toll on my friends. It made me feel even more guilty, like it was my fault they were suffering when being cross-examined.

Ultimately, the hearing officer found the third-year student responsible for aggravated sexual assault by penetration and contact, and sexual intercourse with a minor. I was relieved that he was found responsible, but by the end I was hyperaware of how harmful hearings can be for survivors and secondary survivors like my suitemates. If friends told me they were considering reporting to a Title IX office, I would strongly warn them about the harm caused by the cross-examination, and I wouldn't at all be surprised if they chose not to move forward because of it. I hope this Court will protect victims from such harmful practices in the future.

2. Maryam I.: I was so scared of cross-examination that I reluctantly agreed to an alternative resolution even though I was raped and abused.

My name is Maryam I. and I decided to join this brief because I wanted to make clear that my fear of cross-examination was the most traumatic part of the process. Looking back, I don't think I would report my rape if I had known what the hearing and especially the cross-examination would be like. That choice would have

made me outraged and upset, but at least I wouldn't have been re-traumatized.

In March 2020, I participated in a Title IX hearing at my school after I reported my ex-boyfriend, a fellow student, for dating violence and sexual assault. My ex-boyfriend and I dated during my freshman and sophomore years. He quickly became emotionally abusive and the harm escalated over the course of the relationship. He took his anger out on me verbally, with non-verbal physical threats, and through violent sex that escalated past the point of my consent. He also raped and sexually assaulted me, including while I was unconscious or intoxicated. My ex-boyfriend's actions made me feel constantly afraid, to the point where I felt unable to make my own decisions or disagree with him.

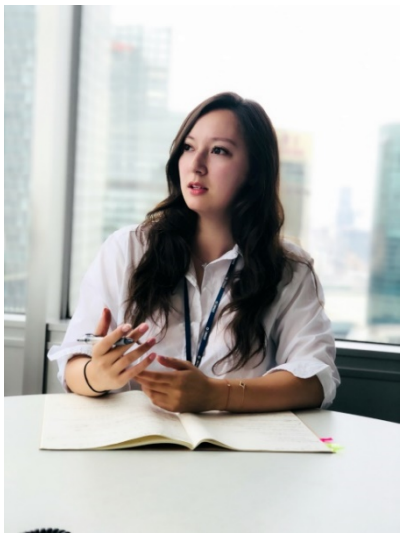
After I was finally able to leave the relationship, I reported the abuse because it felt like the only way I could find resolution or feel safe. He retained a very aggressive attorney in school disciplinary proceedings to represent him. The investigation culminated in a hearing that had a major impact on my mental health and academic performance. My friends all expressed concern for my well-being because they had all heard that cross-examination was the most traumatic part of the process. I was also afraid of cross-examination because I was told that the attorney was known for victim-blaming questions. The night before the hearing, my friends and I sat in my room trying to prepare ourselves for the next day while my advisor did their best to help on a video call. One of my friends was so scared of cross-examination that she almost had a panic attack the night before

her testimony, and she was pale and shaking for the entirety of her testimony.

My case ended in an alternative resolution part-way through the hearing at the request of my ex-boyfriend and before I was cross-examined. I really struggled with the decision to go forward with the alternative resolution or not. I was worried that being questioned by an aggressive attorney would be incredibly detrimental to my mental well-being, I was afraid of not being believed, and I was afraid of my ex-boyfriend watching me during the hearing. And I decided I would rather avoid putting myself and the rest of my witnesses through cross-examination than finishing the hearing as expected because this was the best way for me to get any amount of justice and the hearing would essentially amount to nothing more than re-traumatization.

Being further traumatized was the last thing I needed after the abuse that brought me to report in the first place. Looking back, I'm glad that I chose this alternative resolution because I was saved from the retraumatization. If friends told me they wanted to report, I would stress to them how absolutely grueling, awful, isolating, and traumatic the hearing and cross-examination process is for survivors. I understand now why survivors often choose not to report.

3. Claudia R.: Cross-examination was more traumatic than sexual assault.



I decided to join this brief because I want this Court to know that I would not have reported my assault if I had to do it all over again, knowing what I know now about the hearing and cross-examination. The hearing and cross-examination was the most traumatic experience I have ever had, worse than being sexually assaulted by someone I thought was my friend.

In 2018, I was sexually assaulted by a former friend and classmate during my second year of law school. I was watching a movie and sleeping over at my best friend's house. Another classmate and former friend texted and invited himself over, was intoxicated once he showed up, and then invited himself to spend the night. I got into my air bed and he prepared to sleep on the couch. I fell asleep after scrolling on my phone for a bit. Next thing I know, I woke up to him trying to cuddle me. I was in complete shock, and I tried to push him away as I moved to the edge of the mattress.

I later woke up to him more aggressively touching me. He started to bite me and whisper things that make me nauseous even today. He was also groping me, and pressing his genitalia against me. I couldn't push away because he was so strong. I've never felt that powerless. The entire incident made me feel disgusted, betrayed, confused, scared, and angry.

The Title IX office initiated an investigation shortly after the assault. Taking advantage of the fresh memories, the investigator immediately and thoroughly investigated the incident, talked repeatedly to all of the witnesses, and asked me all of my former friend's follow-up questions. The investigator's report found my former friend responsible for nonconsensual sexual contact, but a hearing with cross-examination was held because of a new court decision.

In the hearing, which took place 21 months after the attack, I sat across a four-foot table from my former friend, his criminal defense attorney, and his girlfriend. When I saw him, I immediately felt sick. When it was time to give my statement, I was so scared. But I told the entire story from beginning to end. I cried the whole time. I talked not just about what happened, but about the guilt and shame. About starting therapy and being diagnosed with PTSD, anxiety disorder, and major depressive disorder. About the fact that I never thought that I would be a "victim" and never imagined that this type of thing would happen to me.

After I gave my statement, I was cross-examined. It was even worse. I was asked victim-blaming questions—why I didn't call for help, why I didn't fight him off, and why I didn't go into my friend's bed. I was also asked about things that had nothing to do with his assault, like whether he was on the couch or in the bed when I was scrolling through my phone. Apparently, I gave a different answer during the hearing about where he was when I looked at my phone, which made me "not credible." The next day,

my former friend's attorney asked even more questions that were repetitive and useless, but nonetheless were permitted. And even though I answered them the same, apparently my word-for-word recitation was not exactly the same. So I was "not credible" and supposedly lying, even though the thorough investigation came to the complete opposite conclusion and the hearing officer could not identify a single reason why I would lie.

Being cross-examined in front of my assailant was incredibly traumatic. I was blamed for the assault and for not taking whatever actions a victim was "supposed" to take. I also had to sit and listen to other former friends who had turned on me during the investigation and who had no knowledge about the event whatsoever testify against me, forcing me to hear unfounded and false accusations about me and my character. It was even harder to ask my remaining friends to testify, knowing that they, too, would have to be cross-examined. I felt like the cross-examination was just a tool my former friend used to intimidate me into settling our case or to stop pursuing it. And although I stuck with the case to the end, cross-examination made me regret it. I ended up more traumatized than after the assault itself.

I cannot in good faith recommend any student report to Title IX because being cross-examined was harrowing, and it did nothing to ascertain the truth. Its sole purpose was to dig for any tiny, irrelevant hole to undermine my credibility, despite the mountain of corroborating evidence, and despite there being no reason for me to lie. While my former friend and assailant has happily moved on with his life, absolved of guilt and unaffected, I

have spiraled into depression, anxiety, and PTSD. I continue to struggle with his assault and the ongoing effects of the hearing, cross-examination, and result.

4. The harm caused by live cross-examination is well established.

The experiences of these three brave amici unfortunately is not unique. The harms caused by cross-examination are well documented, and the prevalence of gender-based violence is far too high.

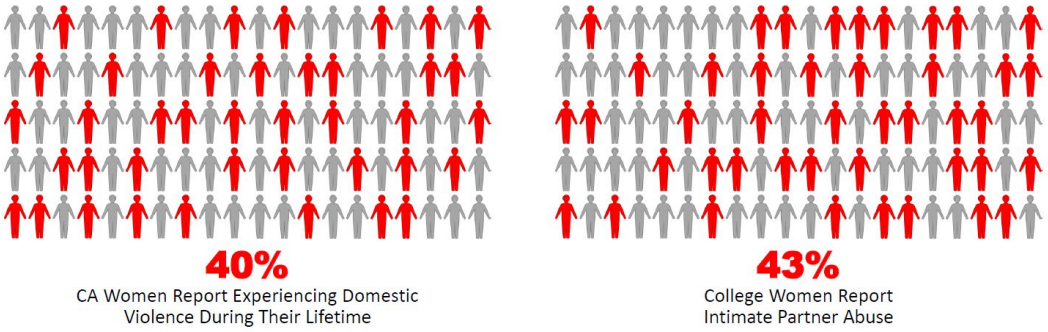
It is widely recognized in academic research that "[h]arm to the victim follows naturally from" invasive cross-examination, "especially in abuse, sexual-assault, and rape cases" because "[u]nlimited and probing cross-examination causes mental and physical distress . . . and can exacerbate the psychological harm a victim suffers after the trial." (Bruton, *Cross-Examination, College Sexual-Assault Adjudications, and the Opportunity for Tuning up the 'Greatest Legal Engine Ever Invented'* (2017) 27 Cornell J. L. & Pub. Pol'y 161, 176–177; see also Fan, *Adversarial Justice's Casualties: Defending Victim-Witness Protections* (2014) 55 B.C. L. Rev. 775, 785.) Testimony, in particular "the confrontation with the perpetrator . . . [and] the presence of spectators are often cited as being especially harmful," leading to "psychological stress." (Orth, *Secondary Victimization of Crime Victims by Criminal Proceedings* (2002) 15 Social Justice Research 313, 315.) And several studies have even found "associations between victims having to testify and the development of post-traumatic stress symptoms." (Fan, *supra*, 55 B.C. L. Rev. at p. 785

[citing studies].) The dissent to the majority opinion below recognized as much:

> We are learning a lot recently about why abuse victims may be reluctant to report abuse and to trigger a process leading to more abuse. Being cross-examined is an unattractive prospect. Skilled cross-examiners take pride in being fearsome. We often say a good cross-examination "destroyed" a witness, that the cross-examination was "scathing." These words are accurate. They are telling. The prospect of being destroyed by a scathing cross-examination can deter reporting. Fine words in opinions somewhere about all the possible procedural adjustments may mean little to a lonely and traumatized woman anguishing over her options.

(*Boermeester*, *supra*, 263 Cal.Rptr.3d at p. 293 (dis. opn. of Wiley, J.).)

The harm of cross-examination on survivors of gender-based violence is also of great importance because so many people, primarily women, are subjected to gender-based violence. Intimate partner violence affects between "21 – 32% [of women] on college campuses," greater than any other populace. (Anasuri, *Intimate Partner Violence on College Campuses: An Appraisal of Emerging Perspectives* (2016) 2016 J. Educ. & Human Development 74, 74.) Forty percent of California women report experiencing intimate partner violence during their lifetime, and 43% of college women report intimate partner abuse.



(Weinbaum et al., *Women Experiencing Intimate Partner Violence, California, 1998–2002* (2006) at pp. 4–5 <https://fhop.ucsf.edu/sites/fhop.ucsf.edu/files/wysiwyg/whs_violence.pdf> [as of July 1, 2021]; *Facts about Dating Abuse*, *supra*, at p. 1.)

Historically "marginalized and underrepresented groups" are also "more likely to experience sexual harassment." (Senate Bill No. 493 (2019-2020 Reg. Sess.), § 1, subd. (e) [SB 493].) This includes students of color, LGBTQI+ students, and students with disabilities. (See *ibid.*; *Youth Risk Behavior Survey* (2017) Center for Disease Control, at pp. 42, 78–80 <https://www.cdc.gov/healthyyouth/data/yrbs/pdf/trendsreport.pdf> [as of July 1, 2021].) Gender-based violence is also notoriously underreported, so these numbers are just the tip of the iceberg. The Department of Justice, for example, has estimated that only 20% of female students who were raped or sexually assaulted reported to the police. (Sinozich & Langton, *Rape and Sexual Assault Victimization Among College-Age Females, 1995–2013* (2014) U.S. Dept. of Justice, at p. 1 <https://bjs.ojp.gov/content/pub/pdf/rsavcaf9513.pdf> [as of July 1, 2021].)

Cross-examination thus puts victims in a Catch-22: (1) report, be heard, be re-traumatized, and *maybe* feel safe on

campus again; or (2) avoid retraumatization, let the assailant evade responsibility, and continue to pose a risk to the victim and other students. Additional procedural hurdles for victims seeking to be safe and maintain their educational access are undoubtedly harmful. And procedures like the right to cross-examination at a hearing will not solve the problem of gender-based violence on campus, they will exacerbate it. These procedures are therefore antithetical to the very purpose of Title IX and similar California laws—to provide students with a safe environment free from harassment and ensure that students (in particular, women) have equal access to education (20 U.S.C. § 1681; Educ. Code, §§ 200, 220)—and should therefore not be required.

C. Cross-examination in school disciplinary proceedings is unnecessary.

Cross-examination in school proceedings is not only harmful, it is unnecessary. Empirical evidence directly contradicts the well-worn maxim that cross-examination is "the greatest legal engine ever invented for the discovery of truth." (Wigmore, Evidence in Trials at Common Law (Tillers ed. 1983) § 1367.) The reality is that "court opinions and commentaries rely on Wigmore's conclusion . . . rather than on empirical evidence." (Lempert, *Built on Lies: Preliminary Reflections on Evidence Law as an Autopoietic System* (1998) 49 Hastings L.J. 343, 345.) Moreover, alternative models for investigating and adjudicating misconduct have been recommended for gender-based misconduct investigations in schools and are used in *criminal* trials in Europe. If a hearing with cross-examination is not necessary for criminal trials in Europe, it

is not necessary for school administrative proceedings in the United States.

1. Cross-examination is not "necessary."

Many courts and practitioners assume that cross-examination is an essential truth-seeking device. (See *Doe v. Baum* (6th Cir. 2018) 903 F.3d 575, 581.) The academic research and reality say otherwise.

First, research shows that cross-examination can result in witnesses recanting *accurate* facts. Several studies reveal that the accuracy of adults and children "decrease[s] significantly following cross-examination-style questioning." (Zajac & Hayne, *Cross-Examination: Impact on Testimony* (2009) Wiley Encyclopedia of Forensic Science, at p. 6 [citing studies].) And cross-examination "pose[s] particular problems for child witnesses" because cross-examination-style questions "have been shown to exert a negative effect on the accuracy of children's reports." (*Id.* at p. 7.) Given that student victims of gender-based violence are typically only slightly above the age of majority, cross-examination's effectiveness is dubious at best in the academic setting.

Other research reveals that cross-examination does little to affect the accuracy of the *innocently* mistaken. (See Simon, *More Problems with Criminal Trials: The Limited Effectiveness of Legal Mechanism* (2012) 75 L. & Contemporary Problems 167, 170.) It often is cross-examination that causes such mistakes; the stress of cross-examination "impairs memory and reduces the accuracy of testimony." (Adler, The Jury: Trial and Error in the American Courtroom (1994) 210.) In sum, "[c]ross-examination's value in

uncovering gaps in memory or perception is duplicative at best and misleading at worst." (Davis, *Symbolism over Substance: The Role of Adversarial Cross-Examination in Campus Sexual Assault Adjudications and the Legality of the Proposed Rulemaking on Title IX* (2020) 27 Mich. J. Gender & L. 213, 231.)

Second, cross-examination is rarely effective at detecting deceit. As one academic put it—"not all inconsistencies arise from deceit." (Bruton, *supra*, 27 Cornell J. L. & Pub. Pol'y at p. 161.) Even if there is deceit, "[l]ies in response to humiliating or degrading questions about topics such as sex acts"—questioning all too common in gender-based misconduct investigations—"are not necessarily indicative of a willingness to lie about other matters." (Davis, *supra*, 27 Mich. J. Gender & L. at p. 232.) And, in any event, unveiling a "willful falsehood" through cross-examination is rare. (Morgan, *Hearsay Dangers and the Application of the Hearsay Concept* (1948) 62 Harv. L. Rev. 177, 186.) In fact, "in some situations cross-examination can actually cause [finders of fact] to find dishonest witnesses more honest." (Heller, *The Cognitive Psychology of Circumstantial Evidence* (2006) 105 Mich. L. Rev. 241, 249.)

Third, cross-examination is not used as a truth-seeking device. Cross-examination is often used to attack credibility, not honesty. (E.g., *United States v. Wade* (1967) 388 U.S. 218, 256–258 (dis. opn. of White, J.) ["If [counsel] can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course"].) Academics recognize the same: "[S]ome questions do not advance a truth-seeking function at all, but instead serve only to embarrass or abuse."

(Bruton, *supra*, 27 Cornell J. L. & Pub. Pol'y at p. 175.) Wigmore also recognized this: "A lawyer can do anything with cross-examination . . . He may make the truth appear like falsehood." (Wigmore, *supra*, at p. 32.) This is all too common for *amici* as well. One ERA client was just recently asked "why weren't you able to fight him off if you are such a strong athlete?"

This focus on credibility, not the truth, is worse in school proceedings because "aggressive, adversarial questioning is more likely to distort reality than enable truth-telling." (Goldberg, *Keep Cross-Examination Out of College Sexual-Assault Cases* (Jan. 10, 2019) Chronicle of Higher Education <https://www.chronicle.com/article/keep-cross-examination-out-of-college-sexual-assault-cases/> [as of July 1, 2021].) The evidentiary rules that provide some limits in courts do not exist in school proceedings. Therefore, accused students can use cross-examination to continue their abuse of the victim and their witnesses by asking needlessly repetitive, combative, and victim-blaming questions. This renders the potential for harm in cross-examination *more* likely in school disciplinary proceedings than even in criminal proceedings where evidentiary rules prohibit such questions.

The nature of many gender-based misconduct cases themselves demonstrates that cross-examination is unnecessary. In these proceedings, cross-examination supposedly is required to evaluate "credibility." (See *Westmont College*, *supra*, 34 Cal.App.5th at p. 637.) But in many instances, credibility is not at issue. If a survivor was intoxicated and cannot remember

anything, there is no need to cross-examine the survivor. In Kylee O.'s case, for example, there were multiple witnesses who saw Kylee O. and her assailant before the rape, observed their relative levels of intoxication, and saw the blood after the rape. There were multiple witnesses who saw Kylee O. drunk and who had to carry her. A hearing was not needed to assess witness credibility—especially Kylee O., who was severely intoxicated and had little memory of the rape and assault itself. In many other investigations, there is substantial corroborating evidence—such as text messages from the assailant, rape kits, and video evidence—that further renders "credibility" determinations unnecessary.

In fact, this case itself demonstrates why a mandatory hearing with the right to cross-examination is unnecessary—it is well established that Mr. Boermeester grabbed Roe's neck and shoved her. Mr. Boermeester admits that he grabbed Roe's neck. Video surveillance (as the lower courts recognize) showed that Mr. Boermeester "shov[ed] Roe" and "grab[bed] Roe by the neck and push[ed] her toward the wall of the alley." (*Boermeester*, *supra*, 263 Cal.Rptr.3d at p. 271 [quoting with approval the trial court's description of the video].) And given that an eyewitness, not Jane Roe, reported the attack and Roe recanted, there was nothing to be gained by a cross-examination. Presumably, Mr. Boermeester recognized this, as he never actually requested live cross-examination or submitted questions for the investigator to ask, despite the opportunity to do so. (1 AR 291–296.)

2. An investigatory model, which lacks cross-examination, balances the rights of interested parties.

Built into the conclusion that cross-examination is required in school proceedings is the (erroneous) belief that the only adequate model of adjudication is the United States' adversarial model. But "[a]n adversary method . . . is merely one way of finding facts and implementing norms." (Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure* (1974) 26 Stan. L. Rev. 1009, 1017.) Another method—the investigatory model whereby the tribunal "undertakes significant responsibility for gathering evidence" and developing the pre-trial record (Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search of an Alternative to the Adversarial* (2005) 90 Cornell L. Rev. 1181, 1188)—has been recommended for use in school proceedings and is utilized in many United States proceedings and in other countries.[3]

Unlike the adversarial system that is the backbone of the United States' criminal justice system, the investigatory model emphasizes the tribunal's role in initiating the action, gathering evidence, and conducting the proceedings. (*Id.* at pp. 1187–1188.) In the investigatory model, an administrative or judicial official conducts pre-trial interviews and investigates the underlying merits of the case, which is then compiled into a dossier. (Goldstein, *supra*, at pp. 1018–1019.) Thus, the emphasis is on the

[3] Courts, practitioners, and academics often use "investigatory" and "inquisitorial" interchangeably. For consistency, *amici* refer to the model as investigatory.

role of the judge or investigator to "amass[] evidence and [to] assur[e] that the merits of guilt and penalty are correctly assessed." (*Id.* at p. 1019.) As a result, the investigatory model "places little emphasis on . . . cross-examination by counsel"; rather, "the trial is mainly a public recapitulation of written materials included in a dossier [or report] complied earlier by an investigating" official. (*Id.* at pp. 1018–1019.)

While this Court need not decide whether schools *should* use an investigatory model and how that model would be used in disciplinary proceedings, the use of such a model in other proceedings demonstrates that there are benefits to alternative or modified methods of adjudication. This, in turn, demonstrates that "fair procedure" does not mandate that school conduct disciplinary proceedings with criminal trial-like procedures, such as cross-examination.

a. The investigatory model is recommended for gender-based misconduct proceedings.

An investigatory model is recommended for school disciplinary proceedings into gender-based misconduct. The ABA Commission on Domestic & Sexual Violence examined in detail the different models for adjudicating gender-based misconduct at schools and, in 2019, issued comprehensive recommendations endorsing an investigatory model over importing criminal trial-like proceedings into classrooms. (Am. Bar Assn., Recommendations for Improving Campus Student Conduct Processes for Gender-Based Violence (2019) at p. 1 <https://www.americanbar.org/content/dam/aba/publications/domestic-

violence/campus.pdf> [as of July 1, 2021] (ABA Recommendations).) The ABA Recommendations—the culmination of three years of research and interviews with gender-based violence experts, professors, administrators, family law litigators, criminal defense attorneys, and prosecutors—sought to develop recommendations for "improv[ing] campus student conduct processes" that "provid[e] flexible support for both survivors and the accused," in order to "create a safe learning environment for everyone" (not simply the accused) and ensure that "harmful conduct like gender-based violence is not the common experience." (*Id.* at pp. 2, 9, 11, itals. added.)

The result was a recommendation for an "Investigative Model." (*Id.* at p. 8.) Under this model, professionally trained investigators hired by the school would work in pairs to investigate the evidence, including conducting witness and party examinations. (*Id.* at pp. 30–32, 62.) Then the investigators make credibility determinations and "memorialize and summarize" the evidence into a written report. (*Id.* at p. 33.) After providing the parties with an opportunity to comment, the report is presented to the school, who makes a final determination. (*Id.* at pp. 33, 55–56.) There is no cross-examination.

As an alternative, the ABA Recommendations suggest a "Investigation + Deliberative Panel Model" ("IDP Hybrid Model"). (*Id.* at p. 8.) Like the Investigative Model, an investigator prepares a written report based on witness interviews and the evidence. (*Id.* at p. 54.) Following the completion of the investigator's report, a panel of administrators "question[s] the investigators and hear[s]

the statements of any parties who wish to speak to the Panel, before issuing a decision on the complaint." (*Id.* at pp. 6, 54.) The panel makes the final factual findings, determines whether there has been a student code violation, and recommends or issues sanctions. (*Id.* at p. 6.)

The ABA Commission found that these models best achieved the comprehensive goals of establishing "competent and fair investigations" that "ensur[e] the safety of all students" and "prevent acts of violence and abuse from occurring" (*id.* at p. 2), by:

> ● Requiring any party or witness who has experienced trauma to undergo fewer potentially re-traumatizing events such as repeated recounting of the traumatic events; contact between complainant and respondent during proceedings; and direct divulgences of deeply private information to the larger number of people inherent in a traditional hearing process, potentially including people with whom the complainant has an ongoing relationship that will be inevitably affected by such disclosures.
>
> ● Promoting greater sustainability as long-term responses to violence by being more affordable long-term for [schools].
>
> ● Facilitating post-proceeding psycho-social treatment [of] and education [for] accused students who are found responsible for committing gender-based violence by avoiding the adversarial structure of a traditional hearing.

(*Id.* at p. 63.)

An investigatory model also ensures a fair process that balances the accused's interest in "avoid[ing] an unfair or mistaken exclusion from the educational process," the school's

desire "to provide a safe environment for all of its students," and the victim's interest in "safeguard[ing] his or her own well-being" while "on a shared college campus with the accused." (*Westmont College*, *supra*, 34 Cal.App.5th at p. 634, quoting *Claremont McKenna College*, *supra*, 25 Cal.App.5th at p. 1066.)

b. An investigatory model is used in some United States proceedings.

While the United States still largely relies upon the adversarial model, versions of the investigatory model are utilized. Because the investigatory model is "fair enough for critical administrative decisions" and in certain court proceedings, it certainly is fair enough for school disciplinary proceedings. (*Haidak v. Univ. of Massachusetts-Amherst* (1st Cir. 2019) 933 F.3d 56, 68.)

Parental rights and juvenile dependency hearings, for example, blend the investigatory and adversarial models, particularly for examination of children. Dependency hearings are statutorily structured to be "conducted in an informal nonadversary atmosphere." (Welf. & Inst. Code, § 350, subd. (a)(1).) To that end, and much like the IDP Hybrid Model, a trained investigator interviews the children and other witnesses, gathers the evidence, and compiles that evidence into a comprehensive report with a finding as to whether removal from the home is necessary. A court reviews that report and can ask clarifying questions from the investigator or parties.

While parents in dependency hearings generally are entitled to cross-examine witnesses (see *In re Amy M.* (1991) 232

Cal.App.3d 849, 864), "[t]he testimony of a minor may be taken in chambers and outside the presence of the minor's parent or parents." (Welf. & Inst. Code, § 350, subd. (b).) California courts have held that "this procedure does not violate due process." (*In re Amy M.*, *supra*, 232 Cal.App.3d at p. 866.)

Section 240 of the Evidence Code also excuses children from testifying as "unavailable" upon a showing "that physical or mental trauma resulting from an alleged crime has caused harm to a witness of sufficient severity" such that the witness "is physically unable to testify or is unable to testify without suffering substantial trauma." (*In re Daniela G.* (2018) 23 Cal.App.5th 1083, 1091, quoting Evid. Code, § 240, subd. (a)(3).) Moreover, California juvenile courts have "discretion to refuse to require a child to testify even when section 240's requirements are not met if the material effect of the child's testimony on the relevant issues is outweighed by the psychological injury the child risks by testifying." (*Ibid.*; see also *In re Jennifer J.* (1992) 8 Cal.App.4th 1080, 1089 ["the juvenile court judge in a proper case may refuse to require the attendance and testimony of the child"].) Much like juvenile dependency hearings, gender-based violence disciplinary proceedings involve victims who are children (or just barely above the age of majority) who have been subjected to horrendous and traumatizing violence. And both types of proceedings also involve high stakes for the accused—loss of parental rights and school sanctions. Yet these types of proceedings are treated differently, for no reason. A 17-year-old survivor of intimate partner violence should not be subjected to an adversarial process in a school

disciplinary proceeding when a 17-year-old survivor of domestic violence by a parent is protected from that same process.

c. Other legal systems use an investigatory model.

European countries also approve of the investigatory model without cross-examination in *criminal* cases. (See Goldstein & Marcus, *The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy, and Germany* (1977) 87 Yale L.J. 240, 265–266.) If the investigatory model, without the right to cross-examination, provides adequate protections to criminal defendants in other countries, there is no reason that *administrative* school proceedings in the United States require cross-examination to bear the imprimatur of fairness.

For example, France utilizes an investigatory model that lacks a "process of cross-examination," with the "trial judge ask[ing] the questions, lead[ing] and steer[ing] the hearing, and determin[ing] the value of the evidence submitted." (Coscas-Williams & Alberstein, *A Patchwork of Doors: Accelerated Proceedings in Continental Criminal Justice Systems* (2019) 22 New Crim. L. Rev. 585, 597.) "The court's function is not simply to pass judgment on the evidence presented by the parties, but to conduct its own [i]nquiries into the case in order to satisfy itself of the guilt or innocence of the accused." (Hodgson, French Criminal Justice: A Comparative Account of the Investigation and Prosecution of Crime in France (Shan et al. eds. 2005) 67.) Thus, in the "all important [pre-trial] judicial investigation," the investigating judge reviews the evidence, interviews witnesses

(with no cross-examination), and creates a dossier for use in the coming trial. (*Id.* at pp. 117, 219–220, 222.) The trial itself, overseen by a separate trial judge, serves "almost as a formality confirming the earlier findings," with the trial judge, at most, "questioning witnesses and the accused, and calling for additional information where necessary." (*Id.* at pp. 67, 117, 222.)[4] If such an investigatory model is fair in French criminal trials, there is no reason that "fair procedure" requires that a school disciplinary proceeding must including a hearing with cross-examination.

D. Senate Bill 493 recognizes cross-examination is unnecessary and harmful.

Through passage of SB 493, the California Legislature (as approved by Governor Newsom) recognized the devastating impact that certain trial-like procedures can have on vulnerable students who are victims of gender-based violence in universities.[5] SB 493

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[4] Germany has adopted a modified approach wherein conducting a criminal trial largely "lies in the hands of the judge." (Robbers, An Introduction to German Law (6th ed. 2016) at p. 140.) A presiding judge gathers and evaluates evidence before trial, including witness examinations, and then leads the questioning of witnesses during the trial. (Strafprozessordnung [StPO] [Code of Criminal Procedure], § 239 <http://www.gesetze-im-internet.de/englisch_stpo/index.html> [as of July 1, 2021].) The presiding judge may permit the prosecutor or defense counsel to ask questions, but the presiding judge may reject this right upon abuse of this right or if the questions are "inappropriate or irrelevant." (*Id.* §§ 240–241.)

[5] Amicus ERA was one of the primary stakeholders who worked with State Senator Hannah-Beth Jackson to draft, develop, and ratify SB 493. (*ERA Decries Trump Administration's New Title*

(Cont'd on next page)

received broad support, including from both the California State University system and the University of California system, which together represent 31 campuses and over 700,000 students. (See *Enrollment*, The California State University <https://www2.calstate.edu/csu-system/about-the-csu/facts-about-the-csu/enrollment> [as of June 30, 2021]; *UC's California Student Enrollment Climbs for Fourth Straight Year* (Jan. 21, 2020) University of California <https://www.universityofcalifornia.edu/press-room/uc-s-california-student-enrollment-climbs-fourth-straight-year> [as of July 1, 2021].) SB 493's stated goal was to establish procedures for universities that fulfill the obligations of schools to protect students "from sex discrimination, including sexual harassment," and provide students with "safe[] and equal access to education," while also providing for "equitable investigations." (SB 493, § 1, subds. (k)–(l).)

First, while SB 493 is not dispositive to this case because it is not retroactive, it supports amici's position: mandating cross-examination, and specifically cross-examination by a party or party advisory, is improper. SB 493, while a compromise as part of the legislative process, demonstrates the careful balance between affording schools the discretion they need to adjudicate

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IX Regulations, Urges SB 493 in CA (May 8, 2020) Equal Rights Advocates <https://www.equalrights.org/news/sb-493-title-ix-regulations/> [as of July 1, 2021]; *SB 493 (Jackson) Fact Sheet* (Apr. 1, 2019) California Commission on the Status of Women and Girls <https://women.ca.gov/wp-content/uploads/sites/96/2020/08/SB-493-Fact-Sheet_4.4.19.pdf> [as of July 1, 2021].)

these cases while ensuring equitable practices and protections for students. Schools can *choose* "whether or not" to hold a hearing, considering whether, given the facts, a hearing "is *necessary* to determine whether any sexual violence more likely than not occurred." (*Id.*, § 3, subd. (b)(4)(A)(viii), italics added.) In fact, the process is expressly "not an adversarial" one, adopting instead an investigatory approach similar to that recommended by the ABA. (*Id.*, § 3, subd. (b)(4)(A)(i).)

In making this decision, schools can consider whether the parties had the opportunity during the investigation to propose follow-up, cross-like questions to the other party via the investigator, much like the investigatory process recommended by the ABA. (*Id.*, § 3, subd. (b)(4)(A)(viii).) And even if there *is* a hearing, direct cross-examination—meaning that conducted by a party or party advisor—is expressly prohibited. (*Id.*, § 3, subd. (b)(4)(A)(viii)(I); see *id.*, § 3, subd. (b)(4)(viii)(III).) Even if indirect cross-examination is used, the law expressly prohibits questions that are "repetitive, irrelevant, or harassing." (*Id.*, § 3, subd. (b)(A)(4)(vii).) The adjudicator likewise cannot consider topics such as the survivor's sexual history. (*Id.*, § 3, subd. (b)(4)(A)(vi)(I)–(III).) In other words, hearings (only if necessary) under SB 493 are less harmful because they prohibit direct cross-examination and impose evidentiary protections not currently in place.

Second, as Appellants noted, SB 493 was expressly intended to cover all gender-based violence, including sexual assault and domestic violence. (See AOB at 59, fn. 8.) SB 493 plainly provides

that it serves to establish a process for adjudicating investigations into "sexual or gender-based violence, *including dating or domestic violence*." (SB 493, § 1, subd. (r), italics added.)

CONCLUSION

The Court should undo the gender bias that has infected California law. There is nothing "fair" about imposing greater burdens on victims of gender-based violence than victims of other misconduct. And cross-examination is both harmful and unnecessary in the school setting. The Court should make clear that while a school may choose to allow cross-examination, it is not necessary in any school proceedings.

DATED: July 1, 2021

Respectfully Submitted,

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Theane Evangelis

Attorneys for Amici

CERTIFICATE OF WORD COUNT

I certify that the text of this brief consists of 8,465 words as counted by the program used to generate this brief.

DATED: July 1, 2021

/s/ Theane Evangelis
Theane Evangelis

APPENDIX A - SIGNATORIES

CWLC is a nonprofit organization whose mission is to break down barriers and advance the potential of women and girls through transformative litigation, policy advocacy, and education. CWLC works across several areas of gender justice, including gender discrimination, economic security, women's health, and violence against women. One of our core priorities is to eliminate intimate partner violence in homes and on school campuses. CWLC closely monitors legislation and federal guidelines regarding colleges' responses to gender-based violence on campus. CWLC's website provides up-to-date information regarding state and federal legislation and contains educational resources concerning intimate partner violence. CWLC has submitted many amicus briefs related to Title IX and domestic violence in state and federal appellate courts. As a result, CWLC is well-versed in the federal laws and guidelines governing the investigation and resolution of intimate partner violence claims on college campuses.

ERA is a national nonprofit civil rights organization dedicated to protecting and expanding educational access and opportunities for women and girls and people of marginalized gender identities. For the past 45 years, ERA has advocated for gender equity in education across the country through a unique combination of strategies including litigation, policy reform, direct services, and community engagement. We provide free legal information, advice, and assistance to individuals facing discrimination at school and at work through our Advice & Counseling Program. ERA represents victims of sexual

harassment and assault in cases brought pursuant to Title IX at all stages, from campus disciplinary proceedings through and including the United States Supreme Court. ERA recently launched an initiative to End Sexual Violence in Education ("ESVE") in order to narrow a rapidly expanding justice gap for survivors of sexual violence in schools. Through this initiative, ERA created the nation's first pro bono network of attorneys dedicated to representing student victims of gender-based violence in higher education. We also collaborate with students, schools, and worker and community organizations to provide Know-Your-Rights workshops on issues related to gender discrimination and Title IX. We publish reports, fact sheets, and other materials about sexual harassment and gender-based violence in education. Students are ERA's clients and our partners in this work; their experiences, input, and needs drive ERA's commitment of resources, our search for solutions, and our fight for justice.

Kylee O. is a University of California, Irvine student who was sexually assaulted and raped during her freshman year of college. She reported the attack and subsequently went through the Title IX process at her school, including a hearing and cross-examination.

Maryam I. is a graduate of Scripps College who was sexually assaulted, was raped, and was subjected to intimate partner violence by her ex-boyfriend while a student. She participated in a Title IX hearing at Claremont McKenna College, and her case ended in alternative resolution partway through the hearing just

before she was subjected to cross-examination by her assailant's attorney.

Claudia R. is a lawyer and graduate of University of California, Hastings law school. During her second year of law school, she was sexually assaulted by a classmate. After reporting the assault, she participated in a Title IX disciplinary proceeding, which included two separate days of cross-examination.

Alliance for HOPE International ("Alliance") is a non-profit organization launched in 2003. The Alliance has five core programs: National Family Justice Center Alliance, Training Institute on Strangulation Prevention, Camp HOPE America, Justice Legal Network and VOICES Survivor Network. The Justice Legal Network is an innovative public interest law firm made up of approximately 15 solo attorneys who have pledged to work with the Alliance in providing civil legal services to domestic violence/sexual assault victims and their children, including protection orders, family law, immigration, personal injury, landlord issues, criminal law and victim rights.

Atlanta Women for Equality ("AWE") is a 501(c)(3) non-profit legal aid organization dedicated to empowering women to assert their legal right to equal treatment in the educational environment and to shaping our education system according to true standards of gender equity. AWE accomplishes this mission by providing free legal advocacy for women and girls facing gender discrimination in the educational environment—in particular campus sexual violence—and by protecting and expanding their educational opportunities through policy advocacy.

Center for Community Solutions is a non-profit organization that provides legal support for survivors of sexual assault and intimate partner violence, including students.

Child Abuse Forensic Institute assists victims of crime involving sexual assault. Its consultants represent every aspect of a forensic case and assist in developing policy in response to abuse, litigation preparation, expert testimony, court presentation, and advocacy. Clients range in age from infancy to adulthood.

The mission of Community Legal Aid SoCal is to provide civil legal services to low-income individuals and to promote equal access to the justice system through advocacy, legal counseling, innovative self-help services, in-depth legal representation, economic development and community education.

The Domestic Abuse Center is a San Fernando Valley-based nonprofit, non-shelter, domestic violence program whose mission is to support survivors of domestic violence and their children to live violence-free lives. It provides advocacy, court preparation, support, and accompaniment to clients in all court systems. The Domestic Abuse Center also works to train and inform in the police, criminal court personnel (both prosecution and defense), and institutions in Los Angeles in the field of domestic violence.

Family Violence Appellate Project ("FVAP") is the only statewide nonprofit in California dedicated to helping low- and moderate-income survivors of domestic violence challenge dangerous trial court orders that put them and their families at risk, for free. Since its founding in 2012, FVAP has represented appellants and respondents in almost 50 appeals and writs, and

has filed amicus curiae briefs in almost 20 cases that raised significant issues of statewide concern for domestic abuse survivors.

Founded in 1978, Family Violence Law Center ("FVLC") helps diverse communities in Alameda County heal from domestic violence and sexual assault, advocating for justice and healthy relationships. FVLC provides survivor-centered legal and crisis intervention services, offers prevention education for youth and other community members, and engages in policy work to create systemic change. FVLC represents survivors in Title IX proceedings.

Feminist Majority Foundation is a national nonprofit organization dedicated to eliminating sex discrimination and to the promotion of women's and girls' equality and empowerment in the U.S. and globally. The Foundation's programs focus on advancing the legal, social, economic, educational, and political equality of women and girls, countering the backlash to women's advancement, and recruiting and training young feminists to encourage future leadership for the feminist movement. To carry out these aims, the Foundation engages in research and public policy development, public education programs, litigation, grassroots organizing efforts, and leadership training programs. The Foundation's Education Equality Program plays a leading role in compiling research and developing a national Title IX Action Network with Title IX gender equity Coordinators and others who support equality in education to fight the many threats to Title IX and maximize its beneficial impact on society.

The Law Foundation of Silicon Valley advances the rights of underrepresented individuals and families in our diverse community through legal services, strategic advocacy, and educational outreach. The Law Foundation, Santa Clara County's largest legal services provider, has served people with mental health disabilities, children, individuals in housing crises, and a variety of other residents in its 40 years of existence. The Law Foundation serves as an umbrella organization for five programs serving distinct client populations: Fair Housing Law Project; Health Legal Services; Legal Advocates for Children and Youth; Mental Health Advocacy Project; and the Public Interest Law Firm.

Legal Aid At Work (LAAW) is a non-profit public interest law firm whose mission is to protect, preserve, and advance the employment and education rights of individuals from traditionally under-represented communities. LAAW has represented plaintiffs in cases of special import to communities of color, women, recent immigrants, individuals with disabilities, the LGBTQ community, and the working poor. LAAW has litigated a number of cases under Title IX of the Education Amendments of 1972, including *Ollier v. Sweetwater*, 768 F.3d 843, 854 (9th Cir. 2014). LAAW's interest in preserving the protections afforded to students by this country's antidiscrimination laws is longstanding.

Legal Voice, founded in 1978 as the Northwest Women's Law Center, is a non-profit public interest organization that works to advance gender equity through litigation, legislation, and legal rights education. Since its founding, Legal Voice has worked to

protect and advance women's reproductive rights and to establish and improve legal protections for survivors of intimate partner violence. Toward that end, Legal Voice has pursued legislation and has participated as counsel and as amicus curiae in cases throughout the Northwest and the country that seek to protect reproductive rights as well as survivors of intimate partner violence.

The mission of Los Angeles Center for Law and Justice ("LACLJ") is to secure justice for survivors of domestic violence and sexual assault and empower them to create their own futures. Located in East Los Angeles, LACLJ is a nonprofit law firm providing free legal services, including representation and other extensive services, to survivors throughout Los Angeles County. LACLJ represents survivors in family and immigration court, files humanitarian and other forms of immigration relief, advocates for survivors in the criminal justice system, and takes appeals when appropriate. Through our integrated service model, LACLJ also provides supportive services such as education, safety planning, accompaniment, and linkages to other service providers as part of the legal team. In the past five years, LACLJ has filed 13 appeals, four of which have resulted in published decisions.

The mission of National Association of Women Lawyers ("NAWL") is to provide leadership, a collective voice, and essential resources to advance women in the legal profession and advocate for the equality of women under the law. Since 1899, NAWL has been empowering women in the legal profession, cultivating a diverse membership dedicated to equality, mutual support, and

collective success. As part of its mission, NAWL promotes the equality of women under the law and safety from gender-based violence.

National Women's Law Center ("NWLC") is a nonprofit legal advocacy organization dedicated to the advancement and protection of the legal rights and opportunities of women and girls and the rights of all to be free from sex discrimination. Because equal access to education in an environment free of sexual harassment and other forms of gender-based violence is essential to full equality, NWLC seeks to ensure that no individual is denied educational opportunities based on sex.

Public Counsel is the largest pro bono law firm in the nation specializing in delivering pro bono legal services to low-income communities. Public Counsel's 73 attorneys and 70 support staff—along with over 5,000 volunteer lawyers, law students, and legal professionals—assist thousands of individuals, families, and community organizations every year. Public Counsel both provides full legal representation in-house and places cases with pro bono counsel. Public Counsel advocates for justice, equity and opportunity across program areas including immigration, housing, education, consumer and employment rights. Our Women & Girls Rights project represents students in Title IX complaints in partnership with ERA's ESVE program and pro bono network, and conducts Know-Your-Rights workshops on issues related to discrimination and Title IX. The Women & Girls Rights project and Public Counsel's impact litigation team also engage in impact litigation and policy advocacy on behalf of low-wage women

workers and students experiencing discrimination and harassment at school and work. Public Counsel is a recipient of Victims of Crime Act (VOCA) Victim Assistance Formula Grant Program funds and provides free legal services to survivors of sexual harassment, domestic violence, stalking and sexual assault.

Rural Human Services/Harrington House is a 30-bed emergency domestic violence shelter for domestic violence victims, their children, and their pets. Rural Human Services is located in rural Northern California. Rural Human Services is a nonprofit organization providing for the health, safety, and economic well-being of its communities since 1981.

San Diego Volunteer Lawyer Program, Inc. ("SDVLP") was established in 1983 as a private, not for profit, charitable law firm which provides pro bono legal assistance to indigent residents of San Diego County. One of SDVLP's priority areas of service is legal assistance to victims of domestic violence.

The Southwest Women's Law Center ("SWLC") works to raise New Mexico's women and girls out of poverty, to secure equality and economic justice, to address all manner of violence directed at women and girls, and to ensure that New Mexico's women and girls have access to reliable information about, and unfettered access to, safe and legal reproductive healthcare. The SWLC is committed to the ideals represented by Title IX and the protections within Title IX and supports aggressive and fair enforcement of Title IX and the life changing opportunities and protections that come with it for women and girls. The Southwest

Women's Law Center is committed to the elimination of all forms of violence against women and girls, including dating violence.

Texas Association Against Sexual Assault ("TAASA") is a nonprofit organization committed to ending sexual violence in Texas. Its membership includes approximately 80 rape crisis centers, and victim-serving agencies on campuses throughout the state of Texas. Focused on education, prevention, and advocacy on behalf of sexual assault victims, TAASA strives to reduce sexual violence of all types, including harassment and intimate partner violence. Since 1982, TAASA has worked to bring hope, healing, and justice to victims of sexual assault. As part of that mission, TAASA strongly supports policies that ensure victims of sexual assault have access to the resources necessary for their mental, emotional, and physical well-being. TAASA's interest in this case is in support of trauma-informed processes and responses to sexual violence occurring on college campuses.

Walnut Avenue Family & Women's Center understands how traumatic multiple interviews can be for a survivor of violence. Especially if the personnel conducting the interview is not an expert in trauma-informed care with violence survivors. Walnut Avenue advocates for a system that is fair and encourages survivors coming forward—not traumatizing and punishing the survivor/victim.

The mission of WEAVE, Inc., Sacramento, is to build a community that does not tolerate domestic violence and sexual assault and provides survivors with the support they need to be safe and thrive. A core component of WEAVE's services is access

to legal assistance and support in obtaining legal interventions to ensure the short and long term safety of domestic violence victims and their children.

The Women's Law Project (WLP) is a nonprofit public interest legal organization working to defend and advance the rights of women, girls, and LGBTQ+ people. We leverage impact litigation, policy advocacy, public education, and direct assistance and representation to dismantle discriminatory laws, policies, and practices and eradicate institutional biases and unfair treatment based on sex or gender. Elimination of violence against women and safeguarding the legal rights of individuals who are subjected to sexual harassment is a high priority for WLP. The WLP represents and counsels students who have been subjected to sexual misconduct in educational programs, engages in policy advocacy to improve the response of educational institutions to sexual violence, and participates in amicus curiae briefs challenging bias against victims of domestic and sexual violence in educational programs.

PROOF OF SERVICE

I, Andrew M. Kasabian, declare as follows:

I am employed in the County of Los Angeles, State of California, I am over the age of eighteen years, and I am not a party to this action. My business address is 333 South Grand Avenue, Los Angeles, CA 90071. On July 1, 2021, I served the following document:

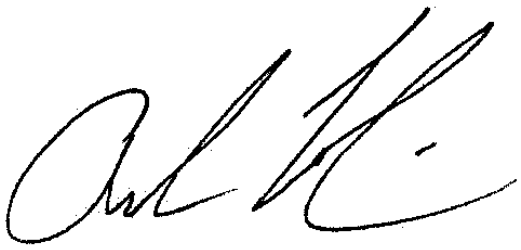
APPLICATION FOR PERMISSION TO FILE *AMICI CURIAE* BRIEF AND *AMICI CURIAE* BRIEF OF CALIFORNIA WOMEN'S LAW CENTER, EQUAL RIGHTS ADVOCATES, KYLEE O., MARYAM I., CLAUDIA R., AND 23 ADDITIONAL ORGANIZATIONS IN SUPPORT OF RESPONDENTS

on the parties in the attached service list, by the following means of service:

☑ **BY ELECTRONIC SERVICE**: I caused a copy of the attached document to be electronically served through TrueFiling.

☑ **(STATE)** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 1, 2021



Andrew M. Kasabian

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