No. S263180

IN THE SUPREME COURT 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 TO SUBMIT AMICUS BRIEF AND AMICUS CURIAE BRIEF OF CALIFORNIA INSTITUTE OF TECHNOLOGY, CHAPMAN UNIVERSITY, CLAREMONT MCKENNA COLLEGE, OCCIDENTAL COLLEGE, AND PEPPERDINE UNIVERSITY IN SUPPORT OF DEFENDANTS AND RESPONDENTS AINSLEY CARRY ET AL.

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CERTIFICATE OF INTERESTED PARTIES

Pursuant to California Rule of Court 8.208, Amici Curiae California Institute of Technology, Chapman University, Claremont McKenna College, Occidental College, and Pepperdine University (together, "Amici") certify that they are non-profit organizations that have no shareholders. As such, Amici and their counsel certify that Amici and their counsel know of no other person or entity that has a financial or other interest in the outcome of the proceeding that Amici and their counsel reasonably believe the Justices of this Court should consider in determining whether to disqualify themselves under canon 3E of the Code of Judicial Ethics.

Dated: July 1, 2021

By: */s/ Apalla U. Chopra*
Apalla U. Chopra

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APPLICATION TO SUBMIT AMICUS BRIEF

Amici Curiae California Institute of Technology, Chapman University, Claremont McKenna College, Occidental College, and Pepperdine University (together, "Amici") respectfully seek permission to file the accompanying brief as friends of the Court. Cal. Rules of Court, rule 8.520(f)(1).

Amici Curiae California Institute of Technology, Chapman University, Claremont McKenna College, Occidental College, and Pepperdine University (together, "Amici") represent non-profit private colleges and universities located in California. They include research universities, liberal arts colleges, denominational and non-denominational, graduate and undergraduate institutions. Each Amicus is committed to educating its students according to its respective mission, curriculum, and learning objectives. Consistent with these objectives, Amici have each developed and enforced their own policies governing student conduct and procedures to investigate and adjudicate allegations of misconduct, including academic integrity and disciplinary issues.

Amici are familiar with the parties' briefs and seek to assist the Court "by broadening its perspective" on the context pertinent to the issues presented. *Connerly v. State Pers. Bd.*, 37 Cal. 4th 1169, 1177 (2006) (citation omitted).[1]

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[1] No party or party's counsel authored any part of Amici's brief and, except for Amici's pro bono counsel here, no one made a monetary or other contribution to fund its preparation or submission. Cal. Rules of Court, rule 8.520(f)(4).

AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANTS AND APPELLANTS

I. INTRODUCTION

California courts have long recognized the dangers of judicially imposing "upon the academic community in student discipline the intricate, time consuming, sophisticated procedures, rules and safeguards of criminal law"—such a mandate "would frustrate the teaching process and render the institutional control impotent." *Andersen v. Regents of Univ. of Cal.*, 22 Cal. App. 3d 763, 770 (1972). And while that is true even in the public-university context at issue in *Andersen*, it is all the more true when it comes to private colleges and universities. The only state law that regulates these private institutions' disciplinary procedures is California Code of Civil Procedure § 1094.5's "fair trial," which this Court held in *Pinsker v. Pacific Coast Society of Orthodontists*, 12 Cal. 3d 541, 555 (1974), affords agencies and institutions broad deference to create holistically fair administrative processes that suit the individual institution so long as those procedures provide notice of the allegations and an opportunity to respond.[1] That principle, as applied to private colleges and universities, allows private academic institutions to

[1] As of January 1, 2022, California Education Code § 66281.8 will also regulate postsecondary institutions' sexual harassment disciplinary procedures. Notably, that provision will afford institutions deference with respect to the structure of their procedures, and will prohibit cross-examination directly by a party or a party's advisor unless otherwise required by federal law. *See* S.B. 493, 2019-2020 Reg. Sess. (Cal. 2020).

tailor disciplinary proceedings in a manner that comports with their educational mission, just as *Andersen* recognized is essential. "Although a university must treat students fairly, it is not required to convert its classrooms into courtrooms." *Doe v. Regents of Univ. of Cal.*, 5 Cal. App. 5th 1055, 1078 (2016) (quoting *Murakowski v. Univ. of Del.*, 575 F. Supp. 2d 571, 585-86 (D. Del. 2008)).

This case is before this Court because a spate of appellate court decisions—including the decision below—have unraveled these fundamental principles. It began with decisions holding that private schools must provide students accused of sexual misconduct with specific procedures that essentially convert a subset of private institutions' disciplinary proceedings into quasi-criminal trials. The Court of Appeal's decision in this matter goes further still, extending those same quasi-criminal procedural requirements to hearings involving allegations of domestic violence. These decisions purport to force these trial-like procedures on every college and university regardless of the school's academic mission, its resources, or anything else. And they impose this one-size-fits-all approach on private academic institutions despite the lack of any plausible basis in law—and, in fact, despite the principles just described, which reject the imposition of criminal-like procedures on private educational institutions and which California courts have historically embraced.

The petitioner has explained in detail the doctrinal reasons for rejecting the approach taken by the court below. Amici write

separately in petitioner's support to explain why *Andersen* had it right nearly a half century ago. Requiring courts to turn private educational institutions' classrooms into courtrooms is fundamentally incompatible with those institutions' academic mission, and should not be imposed by judicial mandate in lieu of a clear legislative mandate that is indisputably absent here.

There is, in short, no basis for the Court of Appeal's determination that students who complain of sexual misconduct and domestic abuse in a school program must subject themselves to the most adversarial and aggressive litigation procedures in order for their schools to address their complaints. This Court should reverse and restore to private educational institutions the deference to frame their own disciplinary policies that § 1094.5 allows and that sound policy requires.[2]

II. ARGUMENT

Courts have long recognized that schools' handling of

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[2] In contrast to § 1094.5, recently-enacted federal regulations expressly require live hearings with cross-examination in certain disciplinary matters concerning allegations of sex-based misconduct. *See* 34 C.F.R. § 106.45. Significantly, however, these regulations provoked consternation among educational institutions for all the reasons just discussed, and explained in more detail below. *See, e.g.*, Letter from Ted Mitchell, President of the American Council on Education, to Suzanne B. Goldberg, Acting Assistant Secretary for the Office for Civil Rights, U.S. Dep't of Educ., *Written Comment: Title IX Public Hearing (2020 Amendments to the Title IX Regulations)* (June 10, 2021) attached hereto as Exhibit A. In an effort to better "guarantee[] an educational environment free from discrimination on the basis of sex[,]" the Biden Administration has ordered a reassessment of the new Title IX regulations—including the live hearing with cross-examination requirement. Exec. Order No. 14021, 86 Fed. Reg. 13803–13804 (Mar. 8, 2021).

disciplinary matters is part of the educational process and that the schools themselves are best-situated to determine how to administer discipline consistent with their educational goals. *See, e.g.*, *Paulsen v. Golden Gate Univ.*, 25 Cal. 3d 803, 808 (1979) ("There is a widely accepted rule of judicial nonintervention into the academic affairs of schools."); *Karimi v. Golden Gate School of Law*, 361 F. Supp. 3d 956, 974 (N.D. Cal. 2019) ("Courts are deferential to university disciplinary processes"); *Lucey v. Nev. ex rel. Bd. of Regents of Nev. Sys. of Higher Educ.*, 2009 WL 971667, at *6 (D. Nev. Apr. 9, 2009) ("tak[ing] a deferential review of a university's disciplinary procedures, as other courts have done[,]" regarding student accused of assault and violation of substance abuse policy), *aff'd*, 380 F. App'x 608 (9th Cir. 2010); *Holert v. Univ. of Chi.*, 751 F. Supp. 1294, 1301 (N.D. Ill. 1990) (commenting that courts adopt a deferential standard for university discipline decisions because of reluctance to interfere with the regulation of student conduct in a private university). That realization derives in part from the well-established "'freedom of a university to make its own judgments as to education includ[ing] the selection of its student body,'" *Lachtman v. Regents of Univ. of Cal.*, 158 Cal. App. 4th 187, 192 (2007)) (quoting *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003))—a freedom that necessarily extends beyond admissions and also includes disciplinary matters, such as expulsion decisions and the grounds on which these decisions are made. But as explained above, it also includes the more basic point, reflected in *Andersen*, that imposing upon colleges and universities "the intricate, time

consuming, sophisticated procedures, rules and safeguards of criminal law would frustrate the teaching process and render the institutional control impotent." 22 Cal. App. 3d at 770 (quotation omitted).

The decision below and others like it—which require that colleges and universities effectively conduct a mini-trial consisting of parties or their advisors cross-examining witnesses at a live hearing in order to enforce disciplinary policies—simply cannot be reconciled with the traditional understanding that the manner in which private academic institutions enforce disciplinary policies is an integral part of the educational mission they carry out. The most important problem is that these decisions impose a uniform policy of trial-like procedures that contradict and even stymie institutions' educational mission. But that is not the only problem. This procedural imposition, moreover, cannot emulate or improve upon courtroom outcomes, both because trial-like procedures simply do not translate to the context of college and university disciplinary proceedings, and because colleges and universities have neither the trained personnel, the resources, nor the courts' subpoena power to carry those procedures out.

A. This Court Should Reject The Court of Appeal's One-Size-Fits-All Rule As Incompatible With Academic Freedom And Private Educational Institutions' Educational Mission.

The codes of student conduct and disciplinary procedures Amici developed prior to the judicially-mandated live hearing with direct cross-examination requirement reflect their

individual educational missions and promote the well-being of their students, faculty, and staff. Drawing on their expertise in maintaining a supportive educational community that balances the protection of victims of misconduct with the right of accused students to be heard, Amici adopted disciplinary procedures that previously applied in sexual misconduct cases and varied in certain mechanics while overall providing notice, evidence gathering, and a full opportunity to be heard. For example:

- Investigation and determination of responsibility by an investigator with an opportunity for the parties to participate throughout investigation, continually submit additional evidence, and appeal adverse findings and disciplinary action.[3]
- Investigation by a one or two-person team with oversight review by an administrator, and with an opportunity for parties to submit questions for the investigator to pose to witnesses before final determination of responsibility.[4]
- Preparation of an investigative report submitted to the associate dean, who would then decide whether a

[3] Chapman University, *Harassment, Discrimination, and Sexual Harassment Policy*, revised as of September 2017, available at https://www.chapman.edu/faculty-staff/human-resources/_files/harassment-and-discrimination-policy.pdf.

[4] Occidental College, *Occidental College Sexual Misconduct Policy*, last amended May 20, 2016, available at https://web.archive.org/web/20171204215550/https://www.oxy.edu/sexual-respect-title-ix/policies-procedures.

probable violation exists and whether a one-person or three-person panel should be convened to conduct a hearing on the probable violation in which the parties appear separately and are not cross-examined by one another or their advisors.[5]

- Investigation with an opportunity for parties to review preliminary investigation report and submit request for additional investigatory steps before investigator prepares a final report with final determination of responsibility.[6]
- Choice of non-investigation resolutions involving respondent admitting conduct and receiving discipline or parties' mediating education, outreach, and safety measures between them; or formal investigation including, among other things, the opportunity to suggest questions for the investigators to ask the other party.[7]

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[5] Pepperdine University, *Sexual Misconduct Policy*, last updated on July 28, 2017, available at https://gsep.pepperdine.edu/degrees-programs/content/2017-2018.sexual.misconduct.policy.pdf.

[6] Claremont McKenna College, *Civil Rights Handbook*, approved July 1, 2016, available at https://catalog.claremontmckenna.edu/content.php?.

[7] California Institute of Technology, *Sexual and Gender-Based Discrimination and Harassment and Sexual Misconduct Policy*, last updated August 2018, available at http://www.catalog.caltech.edu/documents/2718/caltech_catalog-1718.pdf.

Some Amici found elements of a hearing approach well-suited to their needs and expertise, though no Amici utilized a process involving direct cross-examination of witnesses by the parties or their advisors. Many more California institutions, including several Amici, used an "Investigative Model" instead, finding such a model consistent with their educational mission and fair treatment of students:

- The Investigative Model benefits both complainants and respondents equitably. It can be less traumatizing for survivors of sexual assault and domestic violence who are less likely to report if doing so requires subjecting themselves to cross-examination at a live hearing. This is especially so where a respondent's advisor conducts the cross-examination despite having no training in trauma-informed practices. The chilling effect resulting from forcing all schools to provide a live hearing with cross-examination advantages respondents and compromises campus safety. Moreover, the current hearing model advantages parties who can afford attorneys, unfairly injecting personal wealth as a variable affecting the outcome and compromising the equal access to their educational programs which schools are required to provide their students.
- The Investigative Model allows schools to focus precious resources on educational programs and activities. With annual tuition at both public and private institutions costing tens of thousands of dollars, this is an important

consideration for students and schools alike. Copious courtroom-style procedures require vast resources in terms of money, including to hire outside hearing officers, and numerous hours of students' and administrators' time.

- The Investigative Model allows students to focus on their academic goals and administrators to spend their time teaching and assisting them. It takes a far shorter amount of time to enact and conclude. By contrast, the additional procedural intricacies and concomitant preparation time a hearing model presents for students and administrators can add months to the timeline, interfering with students' studies and prolonging their stress.
- The Investigative Model is non-adversarial, allowing schools to encourage healthier interactions between student parties and witnesses, who may continue to attend school together. The complainant and respondent are not pitted against one another in a setting resembling litigation but instead meet individually with a third-party investigator on a truth-seeking mission in a setting that is generally more comfortable for both parties.

Private colleges and universities, in short, historically utilized procedures that advanced their respective educational missions—a consideration that California law has recognized as central to private institutions' academic freedom. The decision below and

similar decisions ignored that reality.

The Court of Appeal's one-size-fits-all approach has, without any basis, wiped out these considered approaches in favor of one that promotes procedural form over students' education and equity, derived as it is from courtrooms, not classrooms. In doing so, it fails to account for the benefits schools provide their students—indeed, the very reasons the students are present—and thus does not and cannot provide the fairness that is the goal of criminal-style procedures. That is reason enough to reverse the decision below.

B. The Court of Appeal's Approach Does Not Yield Fairer Results.

The Court of Appeal's approach is also entirely misguided even on its own terms because it wrongly assumes that procedures that result in fairness in court translate to the college and university setting. Schools are not courts; they have no subpoena power to compel witnesses to attend a hearing. Student witnesses may be unwilling to testify before, and even against, their classmates or to take time away from classes or work to participate in arduous procedures. As a result, evidence that an investigator would be able to gather and test may end up excluded altogether under a live hearing process for administrative reasons that have nothing to do with the reliability of the evidence itself. Alternatively, schools may end up delaying misconduct proceedings for prolonged periods so that witnesses whom an investigator has already interviewed, evaluated, and collected physical evidence from can appear at a

hearing on a date that works for the many participants in the hearing process. The approach of the court below, in other words, undermines the very fairness and accuracy it purports to provide.

This point is bolstered by the fact, noted above, that the court-like procedures mandated by the Court of Appeal inject inequities into the school discipline setting based on parties' varying financial circumstances. The cross-examination mandate, for example, advantages students who can afford to hire trial attorneys, which feeds inequities between complainants and respondents in individual cases. There is no basis in the law for imposing this procedure on private academic institutions, and the Court should decline to do so.

C. Private Colleges And Universities Are Ill-Equipped To Function As Courts As A Practical Matter.

Finally, it is important to note that college staff and administrators possess neither the training, the time, nor the resources to function effectively as courts. Under the current legal regime reflected in the Court of Appeal's decision, school administrators must, for example, spend numerous hours learning the record of evidence, which often number in the hundreds of pages, and become experts at making immediate "rulings" and "objections" when cross-examination goes too far into areas that are irrelevant and/or harassing. Schools must also decide whether to effectively import the California Rules of Evidence or develop their own rough-justice approximation. These are just some of the reasons that a "formalized hearing process would divert both resources and attention from a

[college's] main calling, that is education. Although a university must treat students fairly, it is not required to convert its classrooms into courtrooms." *Regents*, 5 Cal. App. 5th at 1078 (quoting *Murakowski*, 575 F. Supp. 2d at 585-86). Yet that is precisely what the Court of Appeal's rule requires.

The practical consequences of this problem were anticipated in *Andersen* and *Regents*, and reality has borne them out. It is not just that trial-like procedures are antithetical to many private academic institutions' educational missions; the requisite classrooms-into-courtrooms transition has in fact diverted significant resources from educating students to adjudicating disciplinary complaints. In Amici's experience, for example:

- Institutions are often forced to spend significantly more money on hearing officers than investigators, even though investigators often become far more familiar with the facts of a particular case and gain a more holistic understanding of the record, evidence, parties, witnesses, and credibility issues than hearing officers, who only interact with the parties and witnesses for the hearing (but charge a great deal of money to prepare sufficiently for that hearing).
- Live hearings with direct cross-examination create a significant burden that requires countless hours to coordinate schedules of the parties, advisors, hearing officer, Title IX office personnel, and witnesses, as well as attendant preparation time.

- The court-mandated procedures significantly increase the average time to resolve and conclude misconduct cases, especially for smaller schools that, for example, have limited rooms with the expensive but necessary technology to conduct hearings. Pandemic-related budget cuts or freezes have only exacerbated these issues.

All these consequences would be regrettable but necessary if a legal mandate required them. But as the petitioner's brief demonstrates at length, there is no such legal requirement. To the contrary, § 1094.5's "fair trial" requirement has long been understood by this Court to require notice and an opportunity to be heard, with broad deference to the subject institution to determine how best to satisfy the requisite legal standard. *See Pinsker*, 12 Cal. 3d at 545, 558. And the foregoing discussion demonstrates the Legislature's wisdom in allowing all the different types of institutions covered by § 1094.5 the freedom to comply with the "fair trial" requirement consistent with those institution's resources, competences, and—especially important for private colleges and universities—individual institutional mission. This Court should reject the Court of Appeal's legally baseless mandate in favor of the deference the Legislature granted and this Court long ago recognized.

III. CONCLUSION

Properly framed, the question here is who should choose, within the confines of the "fair trial" requirements of California law, which procedures private colleges and universities should

use to enforce standards of conduct in their educational programs. The Court of Appeal concluded that courts should decide, and once it came to that conclusion, it chose the procedures courts know—hearings, cross-examination, evidentiary rules, and the like.

But schools are not courts of law—they pursue different goals, impose different forms of accountability and punishment, and have different resources and capabilities. This Court has long understood that the sort of "judicial mandate" the Court of Appeals imposed—the requirement that classrooms are run like courtrooms—undermines academic freedom, and that academic institutions, not courts, are best suited to decide for themselves, consistent with their individual educational missions, the procedures that ensure that accused students potentially subject to serious sanctions are provided the requisite notice and opportunity to be heard. Amici respectfully urge this Court to reaffirm that understanding, and restore their discretion to implement procedures that afford respondents notice and an opportunity to respond to allegations against them in a manner that each institution determines is best-suited for their individual programs and all of their constituents. The decision below should be reversed.

Dated: July 1, 2021

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ANTON METLITSKY
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By: */s/ Apalla U. Chopra*
Apalla U. Chopra

Attorneys for Amici

CERTIFICATE OF COMPLIANCE

In accordance with California Rules of Court 8.204(c)(1) and 8.486(a)(6), counsel for amici hereby certifies that the number of words contained in this amicus brief, including footnotes but excluding the Table of Contents, Table of Authorities, and this Certificate, is 3,368 words as calculated using the word count feature of the computer program used to prepare the brief.

By: */s/Apalla U. Chopra*
Apalla U. Chopra

EXHIBIT A

June 10, 2021

Suzanne B. Goldberg
Acting Assistant Secretary for Civil Rights
Office for Civil Rights
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202-1100

Re: Written Comment: Title IX Public Hearing (2020 amendments to the Title IX regulations)

Dear Acting Assistant Secretary Goldberg:

On behalf of the higher education associations listed below, I write to provide comments for improving enforcement of Title IX of the Education Amendments of 1972 ("Title IX"), with specific focus on the 2020 amendments to the Title IX regulations, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30,026 ("the Regulations"). We commend the Office for Civil Rights ("OCR") for its attentiveness to Title IX, and its prompt reconsideration of this recent regulatory action.

America's colleges and universities share Title IX's commitment that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[1] Higher education is constantly striving to ensure that campuses are safe, supportive, and responsive for all students, so that students can benefit from the widest possible array of educational opportunities.

Higher education institutions understand that they have a clear, unambiguous responsibility under Title IX to promptly and effectively respond to allegations of sexual harassment, including sexual assault. They are committed to developing and maintaining processes that address sexual misconduct in all its forms, support survivors, are fair to all parties, and are viewed as meeting these goals across a broad range of campus stakeholders. Doing so requires policies and procedures that are appropriate for the particular institution, and have a sensible level of simplicity and consistency, thereby providing flexibility for campuses to handle these often difficult cases fairly, reasonably and compassionately. Without these fundamental elements, campus communities

[1] 20 U.S.C. § 1681(a).

cannot develop and maintain familiarity with these processes and, most significantly, have confidence in them.

It is our hope that the work of the Department of Education ("the Department") to improve the Regulations will cause these fundamental elements to be emphasized and affirmed. It is also our hope that in the rulemaking process and in the enforcement of the regulations thereafter, the Department will consider higher education institutions to be collaborative and indispensable partners in this important work regarding our academic communities, and not treat us as impediments or opponents.

The Regulations are the most complex and challenging rules ever issued by the Department. Their micromanagement of campus disciplinary processes has discouraged survivors from participating in them, heightened confusion and concern, and imposed on every college and university in America an extremely problematic, "one-size-fits-all," court-like framework. This is antithetical to the unique campus educational environments that can vary from small public rural community colleges to larger private urban research universities; and it transforms institutional disciplinary processes into complex and expensive prosecutorial proceedings that actually inhibit colleges' and universities' ability to address the reasonable concerns of a complainant and respondent, ultimately undermining the goals of Title IX. Colleges and universities are not civil or criminal courts, nor should they be. The notion that they should establish a parallel judicial structure to accomplish what the judicial system is already responsible for makes no sense.

The Department now has an opportunity to make a significant, long-term contribution to helping America's higher education institutions continue their efforts to eradicate sexual harassment in their programs and activities. Reconsidering the Regulations and their flawed underpinnings can enable each college and university to sensibly refine its own campus processes, in order to stand the test of time and advance the aspirations of Title IX. We offer the following observations to guide the Department's initial consideration of likely revisions to the Regulations.[2]

[2] In response to OCR's 2018 notice of proposed rulemaking ("NPRM"), *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 83 Fed. Reg. 61,462 (Nov. 29, 2018), a twenty-eight page letter was submitted by sixty-one higher education associations, including many of the same associations listed at the end of this letter. If and when OCR issues another NPRM addressing aspects of the Regulations, it can expect a similarly detailed assessment and recommendations.

We begin by noting that **the Regulations are antithetical to the fundamental educational nature and objectives of campus student disciplinary processes**. Campuses can best respond to allegations of sexual assault by using processes that are part of, or at least align with, their institutional student codes of conduct. These codes do not, as a first priority, seek to punish. Rather, they assure that the complainant and the respondent are entitled to a fair and impartial process; that there is prompt and equitable resolution; that the remedies prevent the recurrence of sexual assault; and that they appropriately address the impact on the individuals involved and the larger college community.

Again, **colleges and universities are not courts, nor should they be. They do not convict people of crimes, impose criminal sanctions, or award damages.** They do not—and ought not—have court system infrastructures such as trained judges, prosecutors and litigators, private investigators, crime labs, rules of evidence and procedures, subpoena power, etc. Yet, **the Regulations force campuses to turn their disciplinary proceedings into legal tribunals with highly prescriptive, court-like processes**. These processes are run by campus administrators, often aided by faculty and students. By imposing highly technical legal standards and complex processes onto these institutional disciplinary proceedings, the Regulations inhibit, rather than enhance, campuses from addressing allegations of sexual assault in a reasonably prompt and effective manner. For example, requiring non-lawyer campus administrators to make immediate "rulings" about the permissibility of every question during a live hearing, or whether they comport with rape-shield law, imposes expectations and burdens not even required of seasoned trial judges. Further, in a purported attempt to "simplify" the complex proceedings required by the Regulations, they require recipients to exclude virtually all statements, text messages, etc., made or sent by an individual who does not answer every relevant cross-examination question at a hearing, even if such information (for example, a texted admission of responsibility) would be highly probative of whether institutional policy was or was not violated. Moreover, the Regulations' definition of "relevance" is so broad that institutions have very little leeway to exclude duplicative, marginal, or unduly prejudicial information. These legalistic and counterintuitive requirements have made it more difficult for campuses to prevent and address sexual assault, protect survivors, and treat both parties fairly and equitably.

The Regulations mandate that every campus must provide a "live hearing" with direct cross-examination by the party's advisor of choice or an advisor supplied by the institution. A "live hearing" with direct cross-examination is not necessary in order to provide a thorough and fair process for determining the facts of a matter and a means for the parties to test the credibility of the other party and other witnesses.[3] This

[3] The Regulations relied heavily on the rationale of *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018), a decision by two members of a three-judge panel that actually recognizes that permitting a

requirement is deeply problematic in many respects. It creates a chilling effect on the willingness of survivors and, of equal importance, witnesses to participate in a campus proceeding and raises serious concerns about the potential for unnecessary re-traumatization of survivors.[4] It raises serious equity concerns, as it can tip the scales in favor of a party who is able and motivated to pay for a high-priced litigator, while the other may not be willing or motivated to do so. It may also perpetuate within campus systems the same systemic racism concerns that exist with respect to the criminal justice system.

The Regulations' legalistic pre-and post-hearing mandates, such as those pertaining to the requirements for notice of the filing of a formal complaint, and the mechanisms for appealing from determinations, are not subject to the sorts of limitations and rulings provided by judicial codes and judges in courts of law. This only contributes to confusion, acrimony, and further litigation. The Regulations' requirement that institutions must formally "dismiss" a complaint that does not fit within the Regulations' narrowed definition of sexual harassment and allow appeals of such determinations is particularly onerous, unnecessary and confusing for parties. The requirement that a respondent receive immediate notification when a formal complaint is received is also problematic. This can cause significant difficulties when the complaint involves a crime being investigated by law enforcement, which is not yet ready for the respondent to know a complaint has been filed because it may hamper their investigative efforts. We agree that appeals, if an option at all, should be offered equally to both survivors and accused students, but campuses should be permitted to determine if and how appeals will be provided.

The Regulations inappropriately extend these court-like and prescriptive processes to sexual harassment allegations involving employees. While institutions clearly have responsibilities to address sexual harassment involving employees, applying the

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respondent to personally cross-examine the complainant may not be required, due to concerns about resulting emotional trauma, and applies only to public institutions in the Sixth Circuit. Given the substantial contrary authority from other federal courts, the use of this decision to create a nationwide mandate is deeply troubling. See, e.g., *Haidak v. Univ. of Mass. at Amherst*, 933 F.3d 56 (1st Cir. 2019) (rejecting rationale of two-judge opinion in *Doe v. Baum*, and finding that even at a public institution to which Constitutional due process principles apply, live cross-examination by parties or advisors was not required, and that an "inquisitorial" system in which a neutral campus official asks questions satisfies Constitutional due process requirements); *Doe v. Belmont Univ.*, 334 F. Supp. 3d 877, 893 (M.D. Tenn. 2018) (finding that cross-examination was not required at private universities and noting that opportunity for parties to review and respond to an investigative report, written statements, and other evidence provided adequate means for respondent to challenge veracity of complainant's claims).

[4] Two schools reported that lawyers' delay had caused their complainants such frustration with the process that they transferred to another university, feeling as though they did not receive a prompt, nor timely, response from the university.

Regulations in the employee-respondent context is both unwise and unworkable. It requires an unnecessary, costly, complex, time-consuming, and wholesale overlay of Title IX processes developed with students as the primary focus, and a redesign of campus human resources functions. We fail to see the logic for extending Title IX procedures to these cases, when sexual harassment involving employees has been successfully addressed under Title VII for years.

Significantly, the Regulations make it more difficult for colleges and universities to address sexual misconduct by their employees and, in some instances, employees now are less likely to face corrective action for sexual misconduct than for other forms of employee malfeasance. For example, an investigation may reveal sufficient evidence of sexual misconduct to take disciplinary action, but a survivor or relevant witness may decline to participate in a hearing, meaning that a finding of a policy violation is much less likely and, absent that finding, the employer may not be able to act on the matter. (If the misconduct at issue were any other form of misconduct, a hearing would not be required and the employer would be able to take corrective action consistent with its employment policies and procedures.)

Under the Regulations, colleges and universities now have to follow stringent procedures even for at-will employees, meaning that at-will employees are also now much less likely to be subject to corrective action for engaging in sexual misconduct than for other types of misconduct. Many institutions must also re-negotiate union contracts so that the process for addressing sexual misconduct complaints against union members is consistent with the Regulations. In some instances unions are refusing to renegotiate. In others, the unions have insisted that after the entire process outlined in the Regulations concludes, including the appeal process, the employer must then begin the disciplinary process outlined in the collective bargaining agreement, including arbitration.

Title VII requires that an employer, including institutions of higher education, take action when the employer "knew or should have known" about sexual harassment. But, the Regulations can make it difficult for higher education employers to fulfill this obligation in cases where it learns of sexual harassment but cannot handle it under Title VII-compliant procedures because, again, a survivor or witness declines to submit to cross-examination at a live hearing, resulting in a Regulations-driven outcome that does not support the institution's ability to take disciplinary action. Simply put, the Regulations have significantly and negatively impacted higher education's ability to address sexual misconduct allegations against its employees.

The Regulations fail to recognize the myriad other federal, state and local laws, judicial precedent, institutional commitments and values regarding the handling of sexual harassment with which campuses must also comply. This, of course, includes

state legislation that may dictate specifically how institutions must respond to and address sexual harassment complaints. As a result, the Regulations exacerbate a confusing maze of overlapping and inconsistent obligations for campuses. We implore OCR to be cognizant of the need to provide flexibility to ensure campuses can navigate the multitude of different legal requirements and institutional culture and values. Federal policy initiatives, especially under Title IX, have an important impact on campuses. But, Title IX is not the only source of law, guidance, and philosophy driving the efforts by higher education institutions. OCR and its regulations and policies implementing and enforcing Title IX need to give institutions enough flexibility to also attend to other legal and other obligations—no matter their source— when resolving sexual harassment allegations.

The Regulations also provide insufficient flexibility to allow campuses to choose between using a "preponderance of evidence" or "clear and convincing" evidentiary standard. By limiting an institution's ability to choose which of these evidentiary standards to apply in different types of campus disciplinary proceedings pertaining to sexual harassment, the Regulations unnecessarily and inappropriately neutralize a broad range of significant campus inputs, including those offered by students, faculty shared governance, and employees' collective bargaining.

We appreciate that the Regulations allow campuses to use informal resolution processes when both parties are fully informed of this option and voluntarily consent. Students often prefer these options to more formal campus disciplinary proceedings, and it is important to respect their wishes to the greatest extent possible. These informal resolution processes are even more crucial now, since many students are unwilling to go through the prescriptive, and potentially traumatizing, courtroom-like process dictated by the Regulations. While the Regulations' provisions regarding informal resolution are helpful, they still manage to restrict colleges' and universities' sensible use of these alternatives. For example, the Regulations prohibit an institution from offering an informal resolution process until after a formal complaint is filed. Yet, the timing or filing a formal complaint has nothing to do with whether informal resolution is best under the circumstances.

Everyone benefits from clarity regarding the scope of Title IX jurisdiction. **However, the Regulations require colleges and universities to adopt a new Title IX-specific definition of "sexual harassment" that is inconsistent with Title VII's definition, and also with definitions contained in campus sexual misconduct policies.[5] The Regulations also**

[5] This definition in the Regulations was drafted to capture conduct that is so "severe" *and* "pervasive" *and* "objectively offensive" that it effectively denies a person equal access to the recipient's education program or activity. Notably, this construction runs counter to the OCR's prior guidance regarding discriminatory harassment, and also is inconsistent with the "severe" *or* "pervasive" offensive

raise questions about precisely what conduct will be considered to have occurred within a "program or activity." Determining whether a particular case meets these definitional and jurisdictional requirements, particularly at the initial stages of a case prior to an investigation, can be challenging. It also raises serious compliance questions, given the strict and formal processes that the Regulations require to be followed should the alleged conduct be determined to fall within Title IX's scope. Any revised regulations should clearly define what conduct is included within the scope of Title IX, while being equally clear that the Regulations do not prevent or hamper institutions from choosing to address sexual misconduct that falls outside the scope of Title IX.

The Regulations have driven up the costs and burden of compliance at a time when colleges and universities are struggling with revenue losses and increased costs due to the pandemic. The prior Administration grossly underestimated the cost of this massive Title IX regulatory package. Redesigning campus policies and procedures for the 2020-21 academic year to align with the Regulations was costly, to be sure, but the ongoing compliance costs are at least as burdensome. For example, outside, contracted adjudicators can easily cost $300-500 an hour, with campuses often needing to prepay these hearing officers for a possible appeal, in order to ensure their availability. The length of the hearing can vary depending on the complexity of the case, and it is not unheard of to have numerous witnesses testifying. Given the trial-like complexity of the processes mandated by the Regulations, campuses also must continually spend significant time and money training new staff, and refreshing existing staff, on these new procedures, as well as hiring outside counsel to advise them on compliance with these requirements. Because the Regulations require campuses to provide advisors for any party who does not have one, institutions must properly train a standby cadre of advisors, which is both time consuming and can be costly. For some institutions, this means hiring outside attorneys, because there is no internal capacity or because the campus culture requires it. The net effect of the Regulations is to redirect resources toward compliance and away from helping prevent sexual harassment, including sexual assault, and providing additional resources to support survivors. Just as importantly, there is a human cost associated with the reduction of persons willing to access and continue to participate in a legalistic, litigation-oriented process.

When considering revising the Regulations, **we urge OCR to keep the "long game" in mind, and look for solutions that are broadly supported by stakeholders**. It is harmful to have constant churn and pendulum swings. This invites further Title IX regulatory and enforcement changes with every new administration. We encourage a framework that is less prescriptive and provides flexibility for campuses to ensure that survivors are not

conduct standard applied by courts in Title VII cases. [add citations]

denied their ability to participate in their education programs, while ensuring fair processes for all. The Clery Act offers a possible model–it outlines some fundamental principles that all campus policies must provide, but leaves flexibility to institutions to determine the specifics of how they meet those principles in ways that are most appropriate for their campus and institutional mission.[6]

We appreciate the opportunity to provide these comments at this time, and look forward to providing additional perspective during a formal notice and comment regulatory process that ensures the Department considers comments from a variety of stakeholders. We also look forward to working with the Department to ensure a collaborative relationship with institutions that can truly encourage and enable them to seek and receive technical assistance from OCR. Colleges and universities remain committed to advancing Title IX's objectives, and optimally addressing sexual harassment and sexual assault on their campuses, not only because they take their legal obligations seriously, but also because it is the right thing to do.

Sincerely,

Ted Mitchell
President

On behalf of:

American Association of Collegiate Registrars and Admissions Officers
American Association of Colleges for Teacher Education
American Association of Community Colleges
American Association of State Colleges and Universities
American College Personnel Association
American Council on Education
American Dental Education Association
American Indian Higher Education Consortium
APPA, "Leadership in Educational Facilities"
Association of American Colleges and Universities

[6] 20 U.S.C. §1092(f)(8).

Association of American Universities
Association of Catholic Colleges and Universities
Association of Community College Trustees
Association of Governing Boards of Universities and Colleges
Association of Independent California Colleges and Universities
Association of Independent Colleges & Universities in Massachusetts
Association of Independent Colleges and Universities in Pennsylvania
Association of Independent Colleges and Universities of Rhode Island
Association of Jesuit Colleges and Universities
Association of Public and Land-grant Universities
College and University Professional Association for Human Resources
Connecticut Conference of Independent Colleges
Council for Advancement and Support of Education
Council for Christian Colleges & Universities
Council of Graduate Schools
Council of Independent Colleges
Council on Social Work Education
Higher Education Consultants Association
Hispanic Association of Colleges and Universities
Independent Colleges of Washington
Maryland Independent College and University Association
NASPA - Student Affairs Administrators in Higher Education
National Association for Equal Opportunity in Higher Education
National Association of College and University Business Officers
National Association of Colleges and Employers
National Association of Diversity Officers in Higher Education
National Association of Independent Colleges and Universities
National Collegiate Athletic Association
New England Commission of Higher Education
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Phi Beta Kappa Society
Southern Association of Colleges and Schools Commission on Colleges
Tennessee Independent Colleges and Universities
TMCF
WASC Senior College and University Commission

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APPLICATION TO SUBMIT AMICUS BRIEF AND AMICUS CURIAE BRIEF OF CALIFORNIA INSTITUTE OF TECHNOLOGY, CHAPMAN UNIVERSITY, CLAREMONT MCKENNA COLLEGE, OCCIDENTAL COLLEGE, AND PEPPERDINE UNIVERSITY IN SUPPORT OF DEFENDANTS AND RESPONDENTS AINSLEY CARRY ET AL.

by putting a true and correct copy thereof in a sealed envelope, with postage fully prepaid, and placing the envelope for collection and mailing today with the United States Postal Service in accordance with the firm's ordinary business practices, addressed as follows:

SERVICE LIST ATTACHED

I declare under penalty of perjury under the laws of State of California that the above is true and correct. Executed on July 1, 2021, at Los Angeles, California.

/s/ Stephen Kemp
Stephen Kemp

SERVICE LIST
Matthew Boermeester v. Ainsley Carry et al.
Supreme Court Case No. S263180

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Cynthia P. Garrett Families Advocating for Campus Equality 14914 Gibralter Road Anacortes, WA 98221	Attorneys for Amicus Curiae Families Advocating for Campus Equality (*Via TrueFiling*)

STATE OF CALIFORNIA
Supreme Court of California

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STATE OF CALIFORNIA
Supreme Court of California

Case Name: **BOERMEESTER v. CARRY**
Case Number: **S263180**
Lower Court Case Number: **B290675**

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

7/1/2021

Date

/s/Court Services

Signature

Chopra, Apalla (163207)

Last Name, First Name (PNum)

O'Melveny & Myers LLP

Law Firm