No. S263180

In The Supreme Court of The State Of California

MATTHEW BOERMEESTER,
Plaintiff and Appellant,

v.

AINSLEY CARRY ET AL.,
Defendants and Respondents.

Second Appellate District, Division Eight, Case No. B290675

AMICUS CURIAE BRIEF OF THE ATTORNEY GENERAL IN SUPPORT OF DEFENDANTS AND RESPONDENTS

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STATEMENT OF INTEREST

This case involves the procedures that a private postsecondary school may use to resolve a student's complaint of gender-based violence by a student peer, where a finding against the accused may result in discipline.[1] Given the Attorney General's unique role and experience enforcing the law, the brief discusses grievance procedures that can best satisfy schools' legal obligations while protecting the rights of victims of gender-based violence and the rights of students accused of gender-based violence.[2]

As California's chief law officer, the Attorney General has the independent power and duty to ensure that the State's laws are appropriately enforced. (Cal. Const., art. V, § 13.) The Attorney General possesses "broad powers" to protect the public interest, including "the power to file any civil action or proceeding directly involving the rights and interests of the state, or which" the Attorney General "deems necessary for the enforcement of the laws of the state, the preservation of order, and the protection of

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[1] As used in this brief, "gender-based violence" refers to violence directed at persons because of their gender and includes dating violence, domestic violence, sexual violence, and stalking.

[2] This brief uses "victim" and "survivor" interchangeably to refer to a person who discloses or reports having experienced gender-based violence. A "complainant" is a person, typically a victim, who files a complaint initiating a school's conduct proceeding. This brief uses "accused" to refer to a person accused of gender-based violence generally, and "respondent" to refer to a person accused in a school's conduct proceeding.

public rights and interest." (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 14-15.)

As most relevant here, the Attorney General has the power and duty to enforce students' rights to be free from gender-based violence, on one hand, and students' rights to a fair hearing once accused of such violence, on the other. (See, e.g., Ed. Code, §§ 66270, 66281.5, 66281.8, 67386; 20 U.S.C. § 1681; 34 C.F.R. § 106.8; *Pinsker v. Pacific Coast Society of Orthodontists* (1974) 12 Cal.3d 541, 555 (hereafter *Pinsker II*).) In particular, the Attorney General has the responsibility to enforce Senate Bill 493, which the Legislature recently enacted with the express intent "to clarify the process for adjudicating complaints of sexual or gender-based violence, including dating or domestic violence, at postsecondary educational institutions in the State of California." (Stats. 2020, ch. 303, § 1, subd. (r).) Because this case implicates student rights that the Attorney General enforces, as well as the proper interpretation of Senate Bill 493, the Attorney General has a significant interest in the Court's decision here.

For these reasons, the Attorney General and the State of California are profoundly interested in this Court's balancing between the interests of schools, victims of gender-based violence, and students accused of gender-based violence.[3]

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[3] The Attorney General respectfully submits this brief as amicus curiae pursuant to rule 8.520(f)(8) of the California Rules of Court. The brief is submitted in the Attorney General's

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ARGUMENT

For over a century, and in various contexts involving private entities and institutions, this Court has recognized a common law right to a fair hearing that requires reasonable notice of the allegations and a fair opportunity to be heard. These dual requirements are sufficient to protect a person's right to a fair hearing, and the Court has repeatedly rejected litigants' requests for additional, more specific procedural guarantees. In particular, and as relevant here, the Court has never held that the common law right to a fair hearing requires an opportunity for cross-examination, and the Court has repeatedly explained that in-person hearings may be unnecessary.

Applying these precedents in cases involving complaints of gender-based violence in schools, the lower courts have reached different conclusions regarding the need for cross-examination and in-person hearings to satisfy the common-law right. In this case, involving schools' resolution of claims of gender-based violence, the Court should decline to recognize a common law right to highly adversarial procedures, including a purported unconditional right to confront and directly cross-examine one's accusers. Such adversarial processes are not necessary to ensure fairness to the accused, and they threaten to harm victims of

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(…continued)

independent capacity and not on behalf of any state agency or entity.

gender-based violence, deter reporting, undermine investigations, and lead to inequitable proceedings.

In the context of these school-based proceedings, this Court should also decline to recognize a common law right to other adversarial procedures, including a purported right to a live hearing and to indirectly cross-examine one's accusers. Categorically requiring such adversarial processes would be inconsistent with nationally recognized models for investigating and resolving complaints of gender-based violence. Rather, schools should be permitted to implement investigative models to ensure the prompt and equitable resolution of complaints of, and the comprehensive prevention of, gender-based violence, as well as to satisfy the requirements of California Senate Bill 493.

I. CALIFORNIA'S COMMON LAW FAIR HEARING RIGHT DOES NOT MANDATE SPECIFIC PROCESSES

A. The Court's precedents require only reasonable notice and a fair opportunity to be heard

For over a century, this Court has recognized a common law right to a fair hearing that applies to private entities. (See *Otto v. Tailors' Protective & Benevolent Union of San Francisco* (1888) 75 Cal. 308.) In *Otto*, the Court first determined that a member of an unincorporated association of tailors in good standing with the association had a property interest in membership warranting protection from the courts. (*Id.* at p. 314.) In these circumstances, a private association acts in a "*quasi* judicial character" when expelling one of its members, and its determination is ordinarily conclusive. (*Ibid.*) Courts will

intervene, however, where the association exceeds its powers, does not act in good faith in following its established rules, or violates the law or members' inalienable rights. (*Ibid.*) The proceedings for expelling or sanctioning members must provide for "the essential elements of fairness, good faith, and candor." (*Id.* at p. 316.)

A decade later, the Court expounded on the hallmarks of a "fair" proceeding as comprising notice and an opportunity to be heard. (See *Von Arx v. San Francisco Gruetli Verein* (1896) 113 Cal. 377.) In *Von Arx*, the Court first determined that a private mutual aid society's expulsion of its members involved "ordinary property rights" and was thus subject to judicial review. (*Id.* at p. 379 [citing *Otto*, *supra*, 75. Cal. 308].) In these circumstances, courts review whether the society followed its own, reasonable bylaws and, in the absence of such bylaws, whether the society provided "a reasonable notice of the proceeding" and "a fair opportunity of presenting [the member's] defense in accordance with general principles of law and justice." (*Id.* at pp. 379-380.) As the Court held, because the society had violated its bylaws, failed to provide any notice of the charges, and failed to provide any opportunity to present a defense against those charges, the expulsion was unlawful. (*Id.* at pp. 381-382.)

Nearly thirty years later, the Court held that the requirements of notice and an opportunity to be heard are indispensable. (See *Taboada v. Sociedad Espanola De Beneficencia Mutua* (1923) 191 Cal. 187.) *Taboada* involved a mutual benefit society's attempt to suspend its own bylaws—

which ordinarily provided for written notice and a hearing—to expel several members without those procedural safeguards. (*Id.* at pp. 189-190.) As the Court explained, regardless of whether the society's bylaws permitted it to suspend the rights of notice and an opportunity to be heard, the common law did not:

> This right to a fair and impartial trial, contemplated and seemingly guaranteed by [the society's bylaws], is not a mere pretense or shadow, but a real substantial, enforceable right. It is a fundamental principle of justice that no man may be condemned or prejudiced in his rights without an opportunity to make his defense. . . . The proceedings of the society, in order to be regular and legal, in effect, must, therefore, provide for notice to the accused and afford him an opportunity to be heard.

(*Id.* at p. 191.) Thus, where it applies, the common law right to a fair hearing always requires "reasonable notice" and "a fair opportunity of presenting [a] defense." (*Id.* at p. 192 [quoting *Von Arx*, *supra*, 133 Cal. at p. 379].)

Since deciding *Taboada*, the Court has reiterated and applied the common law's dual requirements of reasonable notice and fair opportunity to be heard in various contexts involving private organizations. (See *Smith v. Kern County Medical Ass'n* (1942) 19 Cal.2d 263, 269 [medical society must provide "notice and an opportunity to be heard" before expelling member]; *Cason v. Glass Bottle Blowers Ass'n of U.S. and Canada* (1951) 37 Cal.2d 134 [national union must provide "those rudimentary rights which will give . . . a reasonable opportunity to defend against the charges made" before expelling member]; *Pinsker v. Pacific Coast Soc. of Orthodontists* (1969) 1 Cal.3d 160, 166

(hereafter *Pinsker I*) [orthodontist society must provide processes "comporting with the fundamentals of due process" before rejecting applicant]; *Pinsker II*, *supra*, 12 Cal.3d at p. 555 [society must provide applicant "adequate notice of the 'charges' against him and a reasonable opportunity to respond"]; *Anton v. San Antonio Community Hospital* (1977) 19 Cal.3d 802, 829-830 [private hospital must provide "adequate notice of charges and a 'fair opportunity [for the affected party] to present his position'" before denying a doctor reappointment]; *Ezekial v. Winkley* (1977) 20 Cal.3d 267, 278 [same, before dismissing doctor from surgical residency program]; see also *Potvin v. Metropolitan Life Ins. Co.* (2000) 22 Cal.4th 1060, 1070 [explaining that the common law right to fair procedure generally applies to any "private entity affecting the public interest"].)

As these cases emphasize, the notice and hearing requirements are flexible. "The common law requirement of a fair procedure does not compel formal proceedings with all the embellishments of a court trial [citation], nor adherence to a single mode of process." (*Pinsker II*, *supra*, 12 Cal.3d at p. 555.) Rather, the common law requirement "may be satisfied by any one of a variety of procedures which afford a fair opportunity for an applicant to present his position." (*Ibid.*; see also *Cotran v. Rollins Hudig Hall Intern., Inc.* (1998) 17 Cal.4th 93, 109 [quoting Friendly, "Some Kind of Hearing" (1975) 123 U. Pa. L. Rev. 1267, 1269, fn. 10] ["The precise content of the common law 'fair procedure' requirement is far more flexible than that which the Supreme Court has found to be mandated by due process."].)

The Court has repeatedly rejected litigants' efforts to seek additional, specific procedural protections as part of their fair hearing rights. (See *Smith*, *supra*, 19 Cal.2d at p. 269; *Anton*, *supra*, 19 Cal.3d at p. 830.) In *Smith*, a physician challenged his expulsion, after a noticed hearing, from a local medical society. (*Smith*, *supra*, 19 Cal.2d at pp. 266-268.) The Court rejected the physician's arguments asserting a fair hearing right to (1) receive a written copy of the charges and (2) have evidence sustaining the charges be presented at the hearing. (*Id.* at pp. 267-269.) Instead, the Court explained, the physician's rights had been upheld because he "was accorded every opportunity to defend himself." (*Id.* at p. 268.) As the Court held, "[t]he requirements of the law are fulfilled when the accused is afforded notice and an opportunity to be heard." (*Id.* at p. 269.)

Similarly, in *Anton*, the Court rejected a suspended physician's arguments asserting a fair hearing right to (1) be represented by counsel before a hospital judicial review committee, and (2) shift the burdens of production and proof to the hospital. (See *Anton*, *supra*, 19 Cal.3d at pp. 827-831.) As the Court held, first, the hospital bylaws giving the judicial review committee discretion to permit or deny representation by counsel did not offend "the standard of 'minimal due process' which is applicable in proceedings of this kind." (*Id.* at p. 827.) Second, the hospital bylaws placing the burdens of production and persuasion on the person requesting a hearing did not violate the common law, in part because the procedure "provides

adequate notice of charges and a 'fair opportunity [for the affected party] to present his position.'" (*Id.* at p. 830 [quoting *Pinsker II*, *supra*, 12 Cal.3d at p. 555].) As the Court concluded, "[o]ur *Pinsker* decision requires no more than this." (*Ibid.*)

The Court has never required an opportunity for cross-examination in the common-law fair hearing context, though it has had an opportunity to do so. (See *Cason*, *supra*, 37 Cal.2d at p. 144.) In *Cason*, the trial court had determined that the plaintiff, the president of a local glassblowers union who had been expelled from the union, "had been denied the right to know the charges against him, to confront his accusers, *to cross-examine them*[,] and to refute their evidence." (*Id.* at pp. 142-143, italics added.) On appeal, this Court indicated "the authorities recognize" that a fair trial generally includes the right "to confront *and cross-examine* the accusers." (*Id.* at p. 144, italics added.)[4] But the Court did not require cross-examination in

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[4] The Court in *Cason* cited four cases for direct support, but only the out-of-state cases involved cross-examination. (See *Taboada*, *supra*, 191 Cal. at p. 191; *Ellis v. American Federation of Labor* (1941) 48 Cal.App.2d 440, 443; *Harmon v. Matthews* (N.Y. Sup. Ct. 1941) 27 N.Y.S.2d 656, 659; *Brooks v. Engar* (N.Y. App. Div. 1940) 259 A.D. 333, 334.)

The Court also cited an article that found that union bylaws in the early Twentieth Century typically required cross-examination, but that court cases enforcing a fair hearing right did not. (See Note, *The Elements of a Fair Trial in Disciplinary Proceedings by Labor Unions* (1930) 30 Columbia L.Rev. 847, 847-862; *id.* at p. 852 [explaining that "the refined and technical procedural safeguards which have crystallized about civil trials

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these circumstances. Instead, the Court held, the plaintiff's rights were violated because he "was not permitted to confront [his accuser], to hear his evidence or to refute it," and because he "was not given any opportunity to examine" the written evidence against him. (*Id.* at pp. 143-145.) Thus, the Court concluded, the plaintiff was "denied the right to hear the evidence presented against him" and ultimately deprived of "those rudimentary rights which will give him a reasonable opportunity to defend against the charges made." (*Id.* at pp. 144-145.)[5] *Cason* reaffirms the basic proposition that the common law requires "that an individual who will be adversely affected by a decision be afforded some meaningful opportunity to be heard in his defense," but is not guaranteed "the formal proceedings with all the embellishments of a court trial." (*Pinsker II*, *supra*, 12 Cal.3d at p. 555 [discussing *Cason*]; see also *Erickson v. Gospel Foundation of Cal.* (1954) 43 Cal.2d 581, 585 [describing *Cason* as holding that "one may not be expelled . . . without notice and a reasonable opportunity to defend against the charges made"].)

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cannot be imposed upon the deliberations of working men whose time, funds, and interests are taken up with other matters."].)

[5] That the Court in *Cason* quoted multiple authorities that distinguished between a right to confront and a right to cross-examine, and then expressly required only the former, is significant. Indeed, in the recent string of cases discussed below, the lower courts have repeatedly distinguished between the purported rights to confrontation and to cross-examination, coming to different conclusions regarding whether the common law right fair hearing right requires either. (See *post*, Part II(B).)

Even an opportunity to confront is not always required. As the Court explained in *Pinsker II*, in a case involving an orthodontist society's rejection of a person's application for membership for allegedly violating the society's rules, in-person hearings may altogether be unnecessary. (*Pinsker II*, *supra*, 12 Cal.3d at p. 556.) In particular, the Court suggested, private organizations may provide the accused with "an opportunity to respond in writing." (*Ibid.*) Whether the opportunity to respond is written or in person, what matters is that the procedure provides for a "*fair* opportunity for an applicant to present his position." (*Ibid.*; see also *Ezekial*, *supra*, 20 Cal.3d at p. 279 ["[W]hether the procedure is 'fair' in a particular case depends largely on 'the nature of the tendered issue,' which determines, for example, whether a mere written response is adequate."].)

Similarly, when considering the common law fair hearing requirement as it applies to employers, the Court held that an employee could be discharged "for cause" only if the employer's decision was "supported by substantial evidence gathered through an adequate investigation that includes notice of the claimed misconduct and a chance for the employee to respond." (*Cotran*, *supra*, 17 Cal.4th at pp. 107-108.) Expounding on the requirements of an adequate investigation, the Court emphasized that employers need not proceed "as though it were a trial," and instead "can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view." (*Id.* at p. 108 [quoting *Board*

of Education v. Rice (1911) App.Cas. 179, 182].) Thus, the Court suggested, an employee could be discharged based on information gathered and verified through the employer's good faith investigation, rather than an in-person hearing.

In sum, for nearly one hundred fifty years, the Court has recognized a common law right to a fair hearing that invariably requires reasonable notice and a fair opportunity to be heard. These dual requirements are typically sufficient to protect a person's common law right, and the Court has repeatedly rejected litigants' requests for something more. As most relevant to the issues presented here, this Court has never required an opportunity for cross-examination and has repeatedly explained that in-person hearings may be unnecessary.

B. The Court should clarify that the same general rule applies to student disciplinary proceedings involving gender-based violence; no specific processes are required

Although this Court has not yet addressed how the common law right to a fair hearing applies to student disciplinary proceedings conducted by private postsecondary schools, the lower courts have considered the issue in a recent string of cases involving gender-based violence. In this context, the lower courts have correctly recognized "the competing interests of the university, the complaining student, and the accused student." (*Doe v. University of Southern California* (2018) 29 Cal.App.5th 1212, 1231 (hereafter *USC II*).) The school must "provide a safe environment for all of its students" without "divert[ing] both resources and attention from a university's main calling, that is

education." (*Doe v. Westmont College* (2019) 34 Cal.App.5th 622, 634, 640.) The complainant, "who often live[s], work[s], and stud[ies] on a shared college campus" with the accused, must safeguard their own well-being. (*Doe v. Claremont McKenna College* (2018) 25 Cal.App.5th 1055, 1066 (hereafter *CMC*).) And the accused student has an interest in avoiding "unfair or mistaken exclusion from the educational process, with all of its unfortunate consequences." (*Doe v. University of Southern California* (2016) 246 Cal.App.4th 221, 240 (hereafter *USC I*) [quoting *Goss v. Lopez* (1975) 419 U.S. 565, 579].)

Applying the common law and attempting to balance these interests in cases involving gender-based violence, the lower courts have come to differing conclusions regarding the need for cross-examination. One case rejected a purported right to cross-examination. (See *USC I*, *supra*, 246 Cal.App.4th at p. 248.) Others required an opportunity to "indirectly" cross-examine adverse witnesses through a neutral body. (See, e.g., *CMC*, *supra*, 25 Cal.App.5th at p. 1070 [requiring indirect cross-examination of the complainant]; *USC II*, *supra*, 29 Cal.App.5th at. pp. 1233-37 [requiring indirect cross-examination of some adverse witnesses].) The Court of Appeal in this case went furthest, requiring an opportunity for the accused to indirectly cross-examine the complainant and other witnesses, requiring a follow-up opportunity for the accused to indirectly cross-examine the complainant, and favorably citing authority requiring an opportunity for the accused to "directly" cross-examine adverse witnesses. (See *Boermeester v. Carry*

(2020) 263 Cal.Rptr.3d 261, 280-281; see also *Doe v. Baum* (6th Cir. 2018) 903 F.3d 575, 583, fn. 4.)

The lower courts have also come to differing conclusions regarding the necessity of in-person hearings to resolve claims of student gender-based violence. The courts have generally required the parties and certain witnesses to appear—at least remotely—before a finder of fact. For the accused, the appearance ensures an opportunity to be heard. (See *USC I*, *supra*, 246 Cal.App.4th at p. 248.) For the victim and adverse witnesses, the appearance ensures the finder of fact may meaningfully evaluate credibility. (See, e.g., *CMC*, *supra*, 25 Cal.App.5th at p. 1070; *USC II*, *supra*, 29 Cal.App.5th at p. 1233.) But the lower courts have disagreed as to whether a hearing must be held, in some cases requiring appearances only for an investigative interview, and in others requiring a separately-held hearing. (Compare *USC II*, *supra*, 29 Cal.App.5th at p. 1237, with *Doe v. Allee* (2019) 30 Cal.App.5th 1036, 1070.) The courts have also disagreed as to whether the parties are entitled to attend any hearing and observe party or witness testimony. Some cases have required only that a party receive notes of the proceeding, while the Court of Appeal in this case specifically required the accused have an opportunity to attend any hearing. (Compare *Westmont*, *supra*, 34 Cal.App.5th at p. 639, with *Boermeester*, *supra*, 263 Cal.Rptr.3d at p. 280.)

In resolving these splits in authority, the Court should reaffirm its precedents and hold that in school disciplinary proceedings to resolve claims of gender-based violence, the

common law right to a fair hearing requires only reasonable notice and a fair opportunity to be heard, and does not mandate any specific processes to achieve these ends. As discussed next (*post*, Part II), requiring direct cross-examination and confrontational hearings in these circumstances threatens to harm students. And as discussed further below (*post*, Part III), categorically requiring cross-examination and live hearings is unnecessary to achieve fair and accurate outcomes, and these adversarial practices are inconsistent with nationally recognized investigative models that best support schools' compliance with federal and state law.

II. THE COMMON LAW SHOULD NOT REQUIRE SCHOOLS TO IMPLEMENT HIGHLY ADVERSARIAL PROCESSES THAT HARM STUDENTS AND ARE UNNECESSARY TO ACHIEVE FAIR AND ACCURATE OUTCOMES

As noted, the Court of Appeal here went further than the recent string of cases by requiring particularly adversarial mechanisms, ostensibly to protect the rights of the accused. (*Boermeester*, *supra*, 263 Cal.Rptr.3d at pp. 278-282.) Similarly, Plaintiff and Appellant here seeks an opportunity for adversarial cross-examination of witnesses, rejecting as inadequate and "cumbersome" the indirect questioning procedure that the lower courts have sometimes permitted. (See Opening Brief on the Merits 54.) Because these mechanisms—including a purported right to confront and "directly" cross-examine adverse witnesses—threaten to harm students, and are not always necessary to achieve fair and accurate outcomes (see *post*, Part

III), this Court should clarify that they are not categorically required by the common law.

A. Direct cross-examination can harm students

1. Direct cross-examination can traumatize survivors

Cross-examination is, by its "fundamental nature," an "adversarial" procedural mechanism, as the Court of Appeal explained below. (*Boermeester*, *supra*, 263 Cal.Rptr.3d at p. 278.) It is for this reason, as the dissent explained, that "[w]e often say a good cross-examination 'destroyed' a witness." (*Id.* at p. 293 (dis. opn. of Wiley, J.).) Not surprisingly, then, "[i]n administrative cases addressing sexual assault involving students who live, work, and study on a shared college campus, cross-examination is especially fraught with potential drawbacks." (*USC I*, *supra*, 246 Cal.App.4th at p. 245.)[6]

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[6] Although the Attorney General here focuses on the risk that cross-examination will traumatize adult victims of gender-based violence, the arguments apply with even greater force to children. (See, e.g., Righarts, O'Neill & Zajac, *Addressing the Negative Effect of Cross-Examination Questioning on Children's Accuracy: Can We Intervene?* (2013) 37 Law & Hum. Behav. 354 ["Cross-examination directly contravenes almost every principle that has been established for eliciting accurate evidence from children."]; Cal. Dept. of Education, Comment on U.S. Dept. of Education Notice of Proposed Rulemaking on Title IX of the Education Amend. of 1972 (Jan. 30, 2019) p. 3 <https://tinyurl.com/4463tavb> [as of June 30, 2021] ["Being forced to relive trauma can be deeply disturbing for adults; it is even more problematic for young students who do not have the same internal coping mechanisms as adults and may be re-traumatized by such proceedings."].)

The lower courts have appropriately recognized the risk of re-traumatizing victims of gender-based violence when cross-examination is conducted directly by the accused. (See, e.g., *CMC*, *supra*, 25 Cal.App.5th at p. 1067 [explaining that permitting an "alleged perpetrator to question an alleged victim directly may be traumatic or intimidating, thereby possibly escalating or perpetuating a hostile environment"].) Cross-examination of a complainant by a respondent "is not only not required, it is inappropriate." (*Doe v. Occidental College* (2019) 40 Cal.App.5th 208, 223.)

Cross-examination can pose the same risks when conducted directly by the accused's advisor or attorney. When complainants are directly cross-examined, they can be "subjected to hostile attacks on their credibility and public shaming at a time, following a traumatic event, when they may feel most vulnerable," creating a situation "almost guaranteed to aggravate their symptoms of post-traumatic stress." (Dr. Judith Herman, Comment on Dept. of Education Notice of Proposed Rulemaking on Title IX of the Education Amend. of 1972 (Jan. 30, 2019) p. 3 <https://tinyurl.com/3adybedb> [as of June 30, 2021].)[7] For that

[7] In response to the United States Department of Education's recently proposed rulemaking, 83 Fed. Reg. 61,462 (Nov. 29, 2018), the federal record is replete with public comments like these detailing the traumatizing effects of direct cross-examination by a party's advisor. (See, e.g., Cal. State Univ., Comment on U.S. Dept. of Education Notice of Proposed Rulemaking on Title IX of the Education Amend. of 1972 (Jan. 29, 2019) p. 4 <https://tinyurl.com/j7eyfr2c> [as of June 30, 2021] [explaining that "in cases requiring testimony about highly (continued…)

reason, as amended by Senate Bill 493, California law now prohibits a "party or a party's advisor" from directly cross-examining "either party or any witness." (Ed. Code, § 66281.8, subd. (b)(4)(A)(vi)(II).)[8]

2. Direct cross-examination can deter reporting and undermine investigations

Nationwide, "sexual assaults are prevalent on college campuses," and today "many victims are reluctant to report those

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personal and intimate details of a sexual nature . . . . questioning by an advisor-attorney—rather than another student—would hardly be less traumatic for parties and witnesses"]; American Council on Education, Comment on U.S. Dept. of Education Notice of Proposed Rulemaking on Title IX of the Education Amend. of 1972 (Jan. 30, 2019) pp. 9-10 <https://tinyurl.com/7y6p4spj> [as of June 30, 2021] [warning that cross-examination by advisors "will subject students to highly contentious, hostile, emotionally draining" questioning and "will re-traumatize those survivors who are willing to pursue a formal complaint"]; American Psychological Assn., Comment on U.S. Dept. of Education Notice of Proposed Rulemaking on Title IX of the Education Amend. of 1972 (Jan. 30, 2019) p. 4 <https://tinyurl.com/pv5tp3zu> [as of June 30, 2021] [explaining that "live cross-examination has the potential to re-traumatize victims and ultimately cause them to disengage with the systems that should be supporting them"].)

[8] In contrast, indirect questioning by a trained third party is generally recognized as a less traumatic alternative. (See, e.g., U.S. Dept. of Education, Office for Civil Rights, Questions and Answers on Title IX and Sexual Violence (April 29, 2014) p. 31 <https://tinyurl.com/3vpb6yc7> [as of June 30, 2021]; but see also *CMC*, *supra*, 25 Cal.App.5th at p. 1073 [explaining that even indirect questioning "may be traumatic or intimidating" for a complainant].)

assaults to college officials." (*Westmont*, *supra*, 34 Cal.App.5th at p. 639.) Requiring the use of direct cross-examination will only further deter reporting, however. "As a general matter, victims' willingness to report crimes varies inversely with their fear of embarrassment during cross-examination." (Lininger, *Bearing the Cross* (2005) 74 Fordham L.Rev. 1353, 1357.) And in the context of gender-based violence, "[k]nowing that making a complaint will result in a formal, judicial-like hearing in which [complainants] face live cross-examination from the respondent's advisor will undoubtedly dissuade some students from acting, to the detriment of student safety."[9] Witnesses, too, will be deterred, as requiring direct cross-examination will "likely cause witnesses–regardless of whether their testimony might be interpreted as supporting the complainant or the respondent–to refuse to participate in the hearing."[10] Schools should not be required to implement a procedural mechanism that would so clearly undermine their efforts at stopping and addressing gender-based violence.

Direct cross-examination can also lead to inequitable investigations. Adversarial models that include cross-examination "create strong incentives for schools,

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[9] American Assn. of Community Colleges, Comment on U.S. Dept. of Education Notice of Proposed Rulemaking on Title IX of the Education Amend. of 1972 (Jan. 30, 2019) p. 3 <https://tinyurl.com/enyx32s3> [as of June 30, 2021].

[10] American Council on Education, Comment on U.S. Dept. of Education Notice of Proposed Rulemaking on Title IX of the Education Amend. of 1972, *supra*, p. 10.

complainants, and respondents to hire lawyers, because these models most closely model themselves after court proceedings and systems that lawyers are trained to navigate but most non-lawyers are not." (Cantalupo, *Civil Rights Investigations and Comprehensive Prevention of Sexual Misconduct* in Adjudicating Campus Sexual Misconduct and Assault (Renzetti & Follingstad edits., 2020) (hereafter *Civil Rights Investigations*) p. 102.) But many students do not have the resources to hire lawyers, which may be true for complainants or respondents in any given case. (*Id.* at p. 101.) Direct cross-examination thus threatens to taint investigations with the "sharp inequities" that may exist between the parties.[11]

B. Confrontational, in-person hearings can harm students

As noted above, the Court of Appeal here went further than its sister districts in holding that the common law requires an opportunity for the accused to "attend" a live hearing where he could confront, and test the credibility of, the complainant and any witnesses. (*Boermeester*, *supra,* 263 Cal.Rptr.3d at pp. 279-280.) Again, this Court should not require schools to provide such processes, which can be harmful and counterproductive.

Requiring that schools provide the accused with the opportunity to confront the victim (and any witnesses) directly

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[11] Nat. Women's Law Center, Comment on U.S. Dept. of Education Notice of Proposed Rulemaking on Title IX of the Education Amend. of 1972 (Jan. 30, 2019) p. 26 <https://tinyurl.com/shuwb43m> [as of June 30, 2021].

and in-person threatens to deter students from participating and to traumatize those who do. For this reason, the lower courts have repeatedly rejected any categorical right "for the accused to physically confront" their accuser. (See, e.g., *CMC*, *supra*, 25 Cal.App.5th at p. 1073.) Indeed, the lower courts have carefully and thoughtfully identified ways that schools may fairly adjudicate complaints of gender-based violence without requiring a party to physically appear at an adversarial hearing. For any testifying party or witness, testimony may be provided behind a screen, remotely by video conference, or by any other method that would facilitate the assessment of credibility. (*Id.* at pp. 1067-1070.) And for the accused, there are "alternate ways" for them to present and consider adversarial evidence, including the opportunity to review a video recording of the testimony (*USC I*, *supra*, 246 Cal.App.4th at p. 245, fn. 12), or to review a transcript or notes from the hearing (*Westmont*, *supra*, 34 Cal.App.5th at p. 639). This Court should likewise decline to require an opportunity for the accused to personally confront any adverse witnesses.

III. THE COMMON LAW SHOULD PERMIT SCHOOLS TO IMPLEMENT NON-ADVERSARIAL, INVESTIGATIVE PROCESSES THAT COMPLY WITH APPLICABLE FEDERAL AND STATE LAW

Instead of requiring the often harmful and highly adversarial procedural mechanisms discussed above as part of the common law right to fair process, this Court should permit schools to employ nationally recognized investigative models to resolve complaints of gender-based violence. While the

investigative models do not provide for a live hearing or cross-examination, they are well-designed to fairly ascertain the truth, and they can help schools satisfy their obligations under federal and state law to comprehensively prevent gender-based violence. The investigative models are also consistent with Senate Bill 493's purpose and requirements.

A. Investigative models best satisfy federal and state law requiring schools to comprehensively prevent gender-based violence

1. The American Bar Association recommends schools adopt investigative models to address gender-based violence, as many of California's postsecondary schools have done

The American Bar Association Commission on Domestic and Sexual Violence (the Commission) recently released comprehensive recommendations for postsecondary schools to improve their processes for handling complaints of gender-based violence. (See ABA Commission on Domestic & Sexual Violence, *Recommendations for Improving Campus Student Conduct Processes for Gender-Based Violence* (Dec. 2019) (hereafter ABA Recommendations) <https://tinyurl.com/ytbhx3uv> [as of June 30, 2021].) The recommendations address how schools—consistent with their obligation to protect the rights of the accused—should investigate complaints of gender-based violence, handle pre-investigation matters like reporting structures, and handle post-investigation matters like sanctioning. (*Id.* at p. 8.)

The Commission's work in developing its recommendations was extensive. Throughout a three-year drafting and revision process, the Commission conducted research, interviews, and focus groups with an array of stakeholders, including representatives from minority-serving institutions and commuter and community colleges. (ABA Recommendations, *supra*, at p. 9.) Significantly, the Commission received several rounds of feedback from campus representatives, such as Title IX coordinators and campus investigators; victims' rights advocates, such as civil attorneys and gender-based violence experts; and defense advocates, such as criminal defense attorneys and private family law firm litigators. (*Ibid.*; see also *id.* at p. 21 [citing as a model the University of California's respondent services program].) The ABA Recommendations distill national best practices, recognizing what schools can feasibly implement while working towards the comprehensive prevention of gender-based violence.

The Commission recommends that schools employ one of two investigative models to address complaints of gender-based violence—the "Investigative" and "Investigative Hybrid" models. (ABA Recommendations, *supra*, at p. 62, appen. A.) In an "Investigative" model, skilled professional investigators gather evidence and interview parties and witnesses in separate, individual meetings. (*Ibid.*) The investigators then prepare a written report that reviews the evidence, makes factual findings, and determines whether there has been a policy violation. (*Ibid.*) The findings are then passed to another decision-maker for the

determination of sanctions, if any. (*Ibid.*) Alternatively, in an "Investigative Hybrid" model, professional investigators conduct their investigation and make factual findings as in the Investigative model. (*Ibid.*) A deliberative panel then reviews the investigative report, the investigators appear before the panel to answer questions, and the parties may appear before the panel to make statements. (*Ibid.*) The deliberative panel makes final findings of facts and a policy violation determination, which may be forwarded to another decision-maker for the determination of sanctions. (*Ibid.*)

Neither of the investigative models provide a party with the opportunity to ask—directly or indirectly—questions to another party or witness. (See ABA Recommendations, *supra,* at p. 63, appen. A.) In both models, it is the investigator's role to direct the investigation and to interview the parties and witnesses. (*Ibid.*) Although the parties may have multiple opportunities to be interviewed, to ask questions, and to respond to the investigator's evidence and ultimately to the investigator's report, the burden of conducting the investigation remains with the professional investigator. (*Civil Rights Investigations*, *supra*, at p. 94.)[12] The investigator decides what questions, and what form of questions, will best elicit relevant responses and ensure a fair

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[12] *Civil Rights Investigations* was written by a principal author of the ABA Recommendations and provides additional detail, explanation, and rationale for the Commission's recommendations. (See *Civil Rights Investigations*, *supra*, at p. 91.)

and accurate outcome. And in an Investigative Hybrid process, although a party may choose to make a statement to a deliberative panel, the panel's goal is not to solicit "new or additional evidence beyond the evidence in the investigators' report, but to give the parties an opportunity to speak directly to the [school] decisionmakers, without any kind of filter." (*Id.* at p. 95.) If a party's statements help identify additional, unanswered questions, the panel refers those questions to the investigator to answer or to investigate further. (*Ibid.*)

Nor do the investigative models provide either party with a confrontational, in-person hearing. The Investigative model involves no hearing whatsoever. (ABA Recommendations, *supra*, at p. 62, appen. A.) And the Investigative Hybrid proceeding is a "hearing" only in the sense that each party has an opportunity to make a statement and to be heard by the deliberative panel. (*Ibid.*) To be sure, the opportunity to be heard by a deliberative panel may be important to both parties, including as a safeguard against any biases held by a sole investigator. (*Civil Rights Investigations*, *supra*, at pp. 105-106.) But the primary purpose of the hearing is not for the panel to test the credibility of the parties or witnesses—as noted, the deliberative panel does not receive new evidence or testimony or cross-examine parties or witnesses, nor does the panel hear directly from any non-party witness. (*Id.* at pp. 94, 109.)[13]

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[13] As this discussion makes clear, the University of Southern California in this case implemented an investigative procedure, borrowing elements from both of the ABA's

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The Commission not only recommends the investigative models, it affirmatively recommends against the adversarial models currently in use by some schools—the "Hearing" and "Hearing Hybrid" models. (ABA Recommendations, *supra*, at pp. 62-63, appen. A.; *id.* at p. 16) In a "Hearing" model, both parties present evidence and witnesses in support of their factual account over a single day or several days, generally while both parties are present, to a neutral panel of university community members. (*Id.* at p. 62, appen. A.) The panelists do not conduct their own investigation, but make factual findings and determine whether there has been a policy violation after hearing testimony from all parties and witnesses. (*Ibid.*) And in a "Hearing Hybrid" model, investigators prepare a report, which is shared with a hearing panel and is considered along with additional testimony from the parties and witnesses. (*Ibid.*) In this model too, the panel makes factual findings and a policy-violation determination, and the hearing panel may recommend or issue sanctions. (*Ibid.*)

According to the Commission, schools prefer the investigative models as a more efficient use of resources than the

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recommended models. The school relied on a skilled external investigator who interviewed the parties and witnesses, gathered and reviewed evidence, and prepared a lengthy investigative report (as in the Investigative model) and then held evidentiary hearings for the parties to make statements and respond to the investigative report (as in the Investigative Hybrid model). (See *Boermeester*, *supra*, 263 Cal.Rptr.3d at pp. 265-270, 275.)

adversarial models. (ABA Recommendations, *supra*, at p. 63, appen. A.) Given the high level of expertise needed to appropriately investigate complaints of gender-based violence, hiring a professional investigator is an effective investment, especially where it obviates the need for complex, lengthy, and costly adversarial proceedings. (*Ibid.*) Most schools, especially commuter and community colleges and minority-serving institutions, face significant resource restrictions. (*Ibid.*) Accordingly, the investigative models represent the "clear consensus" among the over-225 higher education professionals that were consulted in preparing the ABA Recommendations. (*Ibid.*; see also Lave, *A Critical Look at How Top Colleges and Universities Are Adjudicating Sexual Assault* (2017) 71 U. Miami L.Rev. 377, 393–397 [in a 2015 survey, finding that only 14 out of 36 top-ranked universities and colleges (39 percent) guarantee the accused a right to an adversarial hearing, and also that 11 out of 36 (31 percent) do not permit the accused to even indirectly cross-examine their accuser].)

To the extent they can under current law, California's public postsecondary schools have embraced the investigative models. The University of California's policies require—for complaints of gender-based violence not covered by the recently-amended Title IX regulations—an investigative process.[14] Under

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[14] See Univ. of Cal., Policy on Sexual Violence and Sexual Harassment (Aug. 14, 2020) <https://tinyurl.com/8s368k4x> [as of June 30, 2021]; Univ. of Cal., PACAOS-Appendix-E: Sexual Violence and Sexual Harassment Student Investigation and

(continued…)

the policies, an investigator must conduct an impartial investigation, prepare a written report that includes factual findings and preliminary determinations, and provide an opportunity to the parties to review and respond to the report. (See Appendix E, *supra*, at pp. 6-9.) And unless the investigator's preliminary policy-violation determinations are contested, the determinations become final. (*Id.* at pp. 9-11.) The California State University policies similarly require an investigative process.[15]

2. Investigative models effectively promote the comprehensive prevention of gender-based violence in schools required under federal and state law

Federal and state law require schools to take appropriate steps to comprehensively prevent gender-based violence, including by implementing short- and long-term responses to gender-based violence when it occurs and also by taking steps to prevent gender-based violence from occurring in the first place. As discussed below, the investigative models effectively promote the comprehensive prevention of gender-based violence because

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Adjudication Framework for Non-DOE-Covered Conduct (Aug. 14, 2020) (hereafter Appendix E) <https://tinyurl.com/z8rb2du6> [as of June 30, 2021].

[15] See Cal. State Univ., Student Conduct Procedures, Addendum A: State Mandated Hearing Addendum (Aug. 14, 2020) < https://tinyurl.com/59aymkd4> [as of June 30, 2021].

of how the processes affect complainants, respondents, and schools.

a. Federal and state law require schools to comprehensively prevent gender-based violence

The Centers for Disease Control and Prevention (CDC) first articulated a comprehensive prevention approach to gender-based violence nearly twenty years ago. (Centers for Disease Control and Prevention, Sexual Violence Prevention: Beginning the Dialogue (2004) (hereafter CDC Report) <https://tinyurl.com/4fty9aew> [as of June 30, 2021].) As the administrator for the federal Rape Prevention and Education grant program, the CDC was repeatedly asked by grantees to define "prevention." (*Id.* at p. 1.) The CDC responded by calling for a comprehensive approach that focuses on the health of the entire community, including perpetrators, victims, and bystanders, and works to eliminate gender-based violence and the conditions that enable its occurrence. (*Ibid.*) The CDC Report recognized three categories of prevention: (1) primary prevention includes "approaches that take place before sexual violence has occurred to prevent initial perpetration or victimization"; (2) secondary prevention includes "immediate responses after sexual violence has occurred to deal with the short-term consequences of violence"; and (3) tertiary prevention includes "long-term responses after sexual violence has occurred

to deal with the lasting consequences of violence and sex offender treatment interventions." (*Id.* at pp. 3-4.)[16]

Federal law has adopted the CDC's comprehensive prevention framework for postsecondary schools. For example, the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act), as amended by the Violence Against Women Reauthorization Act of 2013, requires postsecondary schools to describe the school's programs and procedures for preventing and responding to gender-based violence. (20 U.S.C. § 1092(f)(8)(A).) Schools must provide "[c]omprehensive, intentional, and integrated programming, initiatives, strategies, and campaigns intended to end" gender-based violence, including "both primary prevention and awareness programs directed at incoming students and new employees and ongoing prevention and awareness campaigns directed at students and employees." (34 C.F.R. § 668.46(a).)

Likewise, Title IX of the Education Amendments of 1972 (Title IX)—which prohibits discrimination on the basis of sex in any federally funded education program or activity, 20 U.S.C. § 1681(a)—has for decades been construed to require schools to prevent, address, and end gender-based violence. (See, e.g., U.S. Dept. of Education, Off. for Civil Rights, Revised Sexual

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[16] See also Dills et al., Sexual Violence on Campus: Strategies for Prevention (2016) Nat. Center for Injury Prevention & Control, Centers for Disease Control & Prevention <https://tinyurl.com/knbsu2c9> [as of June 30, 2021] [applying the comprehensive prevention framework to postsecondary schools].

Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties (2001) p. 6 [rescinded] <https://tinyurl.com/r3xf8feu> [as of June 30, 2021].)[17]

California law has similarly embraced a comprehensive prevention framework. For years, postsecondary schools in California have been required to "implement comprehensive prevention and outreach programs addressing sexual violence, domestic violence, dating violence, and stalking." (See Stats. 2014, ch. 748, § 1, subd. (d) [adding Ed. Code, § 67386].) Each "comprehensive prevention program" must include "a range of prevention strategies," including "empowerment programming for victim prevention, awareness raising campaigns, primary prevention, bystander intervention, and risk reduction." (Ed. Code, § 67386, subd. (d).)

More recently, the Legislature enacted Senate Bill 493, which adopts a comprehensive prevention approach to "clarify the process for adjudicating complaints of sexual or gender-based violence." (Stats. 2020, ch. 303, § 1, subd. (r).) To stop harassment when it occurs, schools must adopt grievance

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[17] California has challenged the legality of the United States Department of Education's recent changes to the Title IX regulations that attempt to curtail these comprehensive prevention requirements. (See *Commonwealth of Pennsylvania, et al. v. Cardona, et al.* (D.D.C. 1:20-cv-01468).) The case is currently held in abeyance while the Secretary of Education reviews the rule and considers administrative actions pursuant to President Biden's March 8, 2021 Executive Order. (See Exec. Order No. 14021, 86 Fed.Reg. 13803 (March 8, 2021).)

procedures that provide for the "prompt and equitable" resolution of gender-based violence complaints and include "trauma-informed and impartial" investigations. (Ed. Code, § 66281.8, subd. (a)(4).) And to comprehensively prevent harassment, schools must "immediately take reasonable steps to end the harassment, address the hostile environment, if one has been created, prevent its recurrence, and address its effects." (Ed. Code, § 66281.8, subd. (b)(3)(C)(i).)[18]

b. Investigative models promote the comprehensive prevention of gender-based violence

The investigative models effectively promote the comprehensive prevention of gender-based violence because of how the processes affect complainants, respondents, and schools.

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[18] The Legislature has adopted a number of additional state laws requiring schools to engage in comprehensive prevention of gender-based violence. (See, e.g., Ed. Code, § 66281.5 [requiring postsecondary schools to have a written and disseminated policy on sexual harassment, including information about the complaint process]; Ed. Code, §§ 33544, 33546 [calling for the state framework for teaching health to provide "comprehensive information" addressing "sexual harassment and violence" (for grades 9-12) and "the development of healthy relationships" (for grades 1-8)]; Evid. Code, § 1035.8 [recognizing an evidentiary privilege for confidential communications between college students and campus-based sexual assault counselors].)

The Legislature is currently considering other legislation regarding sexual assault procedures and protocols for postsecondary schools, though the current draft would not affect procedures required by Senate Bill 493, discussed further below. (See Assem. Bill No. 1467 (2021-2022 Reg. Sess.) as amended April 28, 2021.)

For complainants, the investigative models ensure the prompt reporting of incidents of gender-based violence, thereby preventing such incidents from recurring. Each time a complainant must retell their story can be re-traumatizing. (See Karjane, Fisher & Cullen, *Sexual Assault on Campus: What Colleges and Universities Are Doing About It*, U.S. Dept. of Justice, Nat. Inst. of Justice (Dec. 2005) <https://tinyurl.com/2zf52wtz> [as of June 30, 2021].) A best practice is thus to "eliminate the need for the victim to retell the experience multiple times." (*Ibid.*)[19] Investigative models avoid some of the additional and more daunting retellings that adversarial models require, such as a retelling to a school "prosecutor" or a hearing panel. (*Civil Rights Investigations*, *supra*, at p. 103.) Although a complainant may make a statement to a deliberative panel, it is the complainant's choice to do so. Trauma-informed practices like these support secondary prevention, by ensuring that victims are more likely to report gender-based violence when it occurs, as well as tertiary prevention, by tending to the longer-term needs of the complainant. (ABA Recommendations, *supra*, at p. 63, appen. A.; *Civil Rights Investigations*, *supra*, at pp. 97-110.)

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[19] Similarly, to ensure that investigations into child abuse and neglect do not re-traumatize child victims, the Legislature last year called for counties to implement forensic interviews whereby a multidisciplinary team conducts a single interview of the victim. (Stats. 2020, ch. 353, § 1 [adding Pen. Code, § 11166.4].)

For respondents found responsible for committing gender-based violence, the investigative models more effectively facilitate post-proceeding treatment. (ABA Recommendations, *supra*, at p. 63, appen. A.) Adversarial models encourage the parties "to attack each other's credibility and evidence, polarizing the parties or increasing preexisting polarization and their hostile feelings toward one another." (*Civil Rights Investigations*, *supra*, at p. 98.) In these circumstances, the parties are unlikely to be open to non-punitive treatments or to agree on a sanction, the latter of which is necessary for schools to implement restorative justice principles, as the Commission suggests. (*Ibid.*; ABA Recommendations, *supra*, at p. 64, appen. B.) In contrast, investigative models do less to polarize the parties and enable schools to provide rehabilitative sanctions, thereby preventing the respondent from committing violence again at a different school (if they enroll elsewhere) or at the same school (if they stay).[20] (*Civil Rights Investigations*, *supra*, at p. 98.) The investigative models thus promote all three types of prevention. (ABA Recommendations, *supra*, at pp. 62-63, appen. A.)

Finally, for schools, the investigative models are more sustainable to implement. "Conducting gender-based violence investigations competently and well requires a lot of training."

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[20] See also Sherman & Strang, "Restorative Justice: The Evidence," The Smith Institute (2007) pp. 68–71 <https://tinyurl.com/3sb5xfw3> [as of June 30, 2021] [in a meta-study, finding evidence that restorative justice practices may substantially reduce recidivism following violent crime].

(ABA Recommendations, *supra*, at p. 63, appen. A.) And in the long run, it is "more efficient and effective for schools to focus such in-depth training on a limited number of specialized employees" rather than on rotating members of an adversarial Hearing panel. (*Civil Rights Investigations*, *supra*, at p. 99.) Professional investigators "can act as repositories for skills, institutional knowledge, and experience that can not only sustain, but also improve the [school's] expertise in preventing gender-based violence." (*Id.* at p. 100.) Thus, the investigative models offer a sustainable and long-term response to gender-based violence and can serve as an important tertiary prevention strategy. (ABA Recommendations, *supra*, at pp. 5, 63, appen. A; *Civil Rights Investigations*, *supra*, at pp. 99-102.)

B. Investigative models promote Senate Bill 493's purpose and comply with its requirements

The investigative models discussed above effectively equip schools to comply with Senate Bill 493's requirements regarding comprehensive prevention and grievance procedures, and thus promote its purpose.

Initially, as noted above, Senate Bill 493 requires schools to adopt comprehensive prevention strategies in their handling of complaints of gender-based violence—schools must conduct "trauma-informed and impartial" investigations, adopt grievance procedures that provide for the "prompt and equitable" resolution of complaints, and, if the school determines that harassment has occurred, "immediately take reasonable steps to end the harassment, address the hostile environment, if one has been

created, prevent its recurrence, and address its effects." (Ed. Code, § 66281.8, subd. (b)(3)(C)(i) & (4)(A).) For all of the reasons discussed above (*ante*, Part III(A)(2)), the investigative models can help ensure schools comply with Senate Bill 493's comprehensive prevention requirements.

Further, the investigative models are consistent with each of Senate Bill 493's provisions regarding schools' grievance procedures. First, Senate Bill 493 requires schools provide a grievance process that "is not an adversarial process between the complainant, the respondent, and the witnesses."[21] (Ed. Code, § 66281.8, subd. (b)(4)(A)(i).) Investigative processes, which are non-adversarial by design, plainly meet that requirement. (See *Civil Rights Investigations*, *supra*, at pp. 94-97.)

Second, Senate Bill 493 addresses when, if ever, a hearing must be held. A school "shall decide whether or not a hearing is

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[21] Senate Bill 493 was expressly "intended to clarify the process for adjudicating complaints of sexual or gender-based violence, including dating or domestic violence." (Stats. 2020, ch. 303, § 1, subd. (r).) Although the law's procedures apparently apply to complaints of "sexual harassment" but not dating or domestic violence (see Ed. Code, §§ 66262, 66281.8, 212.5), to the extent relevant, the Court should construe Senate Bill 493 consistent with the Legislature's express intent. (See *Carter v. California Dept. of Veterans Affairs* (2006) 38 Cal.4th 914, 925 [explaining that, "[i]n considering the purpose of legislation, statements of the intent of the enacting body contained in a preamble, while not conclusive, are entitled to consideration" and "properly may be utilized as an aid in construing a statute."].)

necessary to determine whether any sexual violence more likely than not occurred." (Ed. Code, § 66281.8, subd. (b)(4)(A)(viii).) And in evaluating the need for a hearing, schools may consider the robustness of the initial investigation, including the extent of each parties' participation in the investigation. (*Ibid*.) As discussed above, the investigative models are designed to obviate the need for an adversarial hearing by charging a skilled, professional investigator to conduct a thorough investigation and prepare an investigative report that the parties then review and respond to. Thus, by providing a robust investigation, a hearing is generally not "necessary" or required.

Third, even where a hearing is "necessary," Senate Bill 493 carefully circumscribes the scope of the hearing. For example, a party is generally barred from introducing evidence at the hearing that was not introduced during the investigation. (Ed. Code, § 66281.8, subd. (b)(4)(A)(iv) & (viii)(IV).) As discussed above, among the Commission's three models that contemplate a hearing, only the Investigative Hybrid model limits a hearing panel to the same universe of evidence considered by an investigator.

Fourth, Senate Bill 493 does not provide for a statutory right to personally confront an adversarial party or witness at any hearing. To the contrary: "Either party or any witness may request to answer [] questions *by video from a remote location*." (Ed. Code, § 66281.8, subd. (b)(4)(A)(viii)(II), italics added.) The adversarial models necessarily bring the parties together in a confrontational hearing, and special provisions must be crafted in

each case to temper the harm that can come from the parties' in-person confrontation. (*Civil Rights Investigations*, *supra*, at p. 105.) In contrast, the investigative models generally separate the complainant and the respondent throughout the process, and, therefore, no special efforts are needed to separate the parties to comply with Senate Bill 493.

Finally, Senate Bill 493 carefully circumscribes how a party or witness may be questioned at any hearing. A party or a party's advisor or counsel is explicitly prohibited from directly cross-examining another party or witness. (Ed. Code, § 66281.8, subd. (b)(4)(A)(viii)(I).) Although a party may submit written questions to be asked indirectly, the other party may object to any question, and the hearing officer may reject any question deemed to be "repetitive, irrelevant, or harassing." (Ed. Code, § 66281.8, subd. (b)(4)(A)(viii)(III).) And though a party may submit questions prior to the hearing, schools need not provide a party with an opportunity to submit follow-up questions at the hearing or following it. (*Ibid.*) Thus, while Senate Bill 493 provides for an opportunity for cross-examination, it is highly controlled; it is based on prior evidence, posed indirectly by a neutral individual, and permitted without an opportunity for follow-up by a party. Such a circumscribed procedural right is more consistent with the investigative models, which do not depend on a party's cross-examination to assess witness credibility, than the adversarial models, which do.

For these reasons, postsecondary schools can use investigative models to satisfy their obligations under Senate

Bill 493, in turn promoting the "paramount importance" of protecting students' rights to be free from discrimination. (Stats. 2020, ch. 303, § 1, subds. (b) & (n).)

CONCLUSION

For the reasons explained the above, this Court should reaffirm its prior precedents that the common law right to a fair hearing requires private organizations to provide only reasonable notice and a meaningful opportunity to be heard. That right should not require private postsecondary schools to provide for cross-examination and a live hearing in disciplinary cases involving gender-based violence. The judgment of the Court of Appeal should be reversed.

Respectfully submitted,

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July 1, 2021

CERTIFICATE OF COMPLIANCE

I certify that the attached **AMICUS CURIAE BRIEF OF THE ATTORNEY GENERAL IN SUPPORT OF DEFENDANTS AND RESPONDENTS** uses a 13 point Century Schoolbook font and contains 7650 words.

ROB BONTA
Attorney General of California

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July 1, 2021

STATE OF CALIFORNIA
Supreme Court of California

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