No. A161546

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION THREE

JANE ROE, *Appellant,*

v.

JOHN DOE, *Petitioner and Appellee,*

REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Respondent and Appellee.

Appeal From Alameda County Superior Court
The Honorable James Reilly, Case No. RG18888616

APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND PROPOSED *AMICI CURIAE* BRIEF IN SUPPORT OF APPELLANT JANE ROE

CALIFORNIA WOMEN'S LAW CENTER
Chelsea Mutual (SBN 299656)
360 N Pacific Coast Hwy, Ste 2070
El Segundo, California 90245
Telephone: (323) 951-9276
Email: chelsea.mutual@cwlc.org

Counsel for Amici Curiae
California Women's Law Center, Know Your IX – a Project of Advocates for Youth, et al.

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

There are no interested entities or persons that must be listed in this certificate under California Rule of Court 8.208.

Dated: October 14, 2021

/s/ *Chelsea Mutual*

Chelsea Mutual
CALIFORNIA WOMEN'S LAW CENTER
360 N Pacific Coast Hwy
Suite 2070
El Segundo, CA 90245

TABLE OF CONTENTS

TABLE OF AUTHORITIES

APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF

Pursuant to California Rule of Court 8.200(c), the California Women's Law Center ("CWLC") and Know Your IX respectfully submit this application and proposed *amici curiae* brief in support of Appellant Jane Roe. CWLC and Know Your IX are joined in this request by Family Violence Appellate Project, the Maryland Coalition Against Sexual Assault, National Women's Law Center, and the Women's Law Project (collectively, "*Amici*"). The proposed brief is submitted concurrently with this application.

I. CERTIFICATION OF NON-PARTICIPATION

Pursuant to California Rule of Court 8.200(c)(3), *Amici* certify that: no counsel for a party in this matter authored the proposed brief in whole or in part; no party or party's counsel contributed money that was intended to fund the preparation or submission of the brief; and no person or entity contributed money that was intended to fund the preparation or submission of the brief.

II. INTERESTS OF *AMICI CURIAE* APPLICANTS

Amicus curiae CWLC is a statewide, nonprofit law and policy center whose mission is to break down barriers and advance the potential of women and girls through transformative litigation, policy advocacy, and education. For more than 30 years, CWLC has placed a particular emphasis on eradicating all forms of discrimination and violence against women. CWLC has submitted several amicus briefs before this Court and before the

California Supreme Court on legal issues affecting survivors of campus sexual assault. CWLC has also co-sponsored bills fighting for the rights of those victimized by gender-based violence, developed extensive educational resources on sexual violence, and conducted legal trainings for other attorneys and members of the public on these issues.

Amicus curiae Know Your IX is a national survivor- and youth-led campaign of the non-profit organization Advocates for Youth. Know Your IX works to end sexual and dating violence in education through educating students about their civil rights and organizing for institutions to address violence and discrimination. Since 2013, Know Your IX has engaged in policy advocacy and participated as *amicus curiae* or plaintiffs in a range of cases to build a world in which all students can pursue their civil right to an education free from violence and harassment.

III. INTERESTS OF OTHER *AMICI CURIAE*

Family Violence Appellate Project ("FVAP") is a California and Washington state non-profit legal organization whose mission is to ensure the safety and well-being of survivors of domestic violence and other forms of intimate partner, family, and gender-based abuse by helping them obtain effective appellate representation. FVAP provides legal assistance to survivors of abuse at the appellate level through direct representation, collaborating with pro bono attorneys, advocating for survivors on important legal issues, and offering training and legal support for legal services providers and domestic violence, sexual assault, and human trafficking counselors. FVAP's work

contributes to a growing body of case law that provides the safeguards necessary for survivors of abuse and their children to obtain relief from abuse through the courts.

The Maryland Coalition Against Sexual Assault ("MCASA") is the statewide collective voice advocating for accessible, compassionate care for survivors of sexual assault and abuse, and accountability for all offenders. Established in 1982 as a private, not-for-profit 501(c)(3) organization, MCASA works closely with local, state, and national organizations to address issues of sexual violence in Maryland. It is a membership organization that includes the state's seventeen rape crisis centers, a college consortium, health care personnel, attorneys, law enforcement, other allied professionals, concerned individuals, survivors of sexual violence and their loved ones. MCASA includes the Sexual Assault Legal Institute (SALI), which provides legal services for sexual assault and abuse survivors. MCASA and SALI provide support to survivors on college campuses through on campus office hours, training, and direct representation.

National Women's Law Center ("NWLC") is a nonprofit legal organization dedicated to advancing and protecting the legal rights of women and girls and all people to be free from sex discrimination, including sexual harassment and assault. Since 1972, NWLC has engaged in policy advocacy and participated as counsel or amicus curiae in a range of cases to secure equal opportunity in education, workplace justice, income security, child care, and reproductive rights and health, with particular

attention to women and girls who face multiple and intersecting forms of discrimination. The NWLC Fund also houses and administers the TIME'S UP Legal Defense Fund. NWLC has participated as counsel or amicus curiae in a range of cases to secure the equal treatment of women and girls under the law.

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

IV. PURPOSE OF THE *AMICI CURIAE* BRIEF

Amici seek to file the proposed brief to explain that the trial court erred in concluding that Appellant Jane Roe is not a real party in interest with due process rights to notice in the underlying writ proceedings in this case. *Amici* are nonprofit organizations dedicated to advancing and protecting the rights of sexual assault survivors in California. The expertise and

experience of *Amici* will assist in resolving the important legal issues in this case.

The proposed brief first argues that Roe and other campus sexual assault survivors have concrete, legal interests in the outcome of their sexual misconduct proceedings. These interests include well-established statutory and regulatory interests as well as reputational, emotional, and psychological interests. The outcomes of these proceedings can severely impact survivors' reputations, educational access and success, and financial prospects.

The brief also explains why the Respondent-Appellee Regents of the University of California is wrong when it argues that: (1) adopting Appellant's position will have a "chilling effect" on Title IX reporting (the opposite is true); (2) it is traumatizing for survivors to participate in litigation regarding their assault (a paternalistic argument that flies in the face of Respondent's own guidance on ensuring that survivors maintain their agency); (3) providing survivors with notice will create a "slippery slope" (it will not); and (4) Respondent adequately represents Roe's and other survivors' interests in such writ proceedings (an absurd argument given that Respondent is advocating *against* survivors' interests in this very appeal).

Last, the brief argues that Petitioner-Appellee John Doe's arguments are merely outcome driven—he merely disagreed with the substantive outcome of his disciplinary proceeding, and this lawsuit is the result. *Amici* respectfully submit that the Court should reject his efforts to establish precedent of using writ

proceedings to wrongly exclude survivors from proceedings California schools.

PROPOSED *AMICI CURIAE* BRIEF

I. INTRODUCTION

The question at issue is this: where a young student who has been sexually assaulted has the courage to resist the weighty stigma of rape culture and report to her school, endures a lengthy investigation into one of the most traumatic events of her life, prevails in proving her assault, and—against all odds—manages to graduate, does she suddenly become irrelevant to the continued (even if collateral) adjudication of her own assault?

Petitioner-Appellee John Doe ("Doe") argues as much. This is unsurprising given that excluding Jane Roe ("Roe") from the writ proceeding he initiated removes the most powerful check on his credibility. Respondent-Appellee Regents of the University of California (the "UC")—purportedly acting to protect Roe's feelings (at the expense of her legal rights) by substituting its own judgment for hers—seems to agree. But the law is in accord with common sense: the answer is no.

Roe has articulable and well-supported legal interests in proceedings pertaining to the adjudication of her sexual assault. Doe cannot erase Roe from these proceedings by weaponizing the state writ process as a valve through which to escape the finding of responsibility made against him. Yet this is exactly what he seeks to do. The Court should not permit Doe to silence Roe yet again. *Amici*, writing on behalf of survivors and advocates nationwide and across California, implore the Court to rule—in accordance with the law—that Roe is a real party in interest in the underlying writ proceeding.

II. ARGUMENT

A. Roe Is a Real Party in Interest with a Due Process Right to Notice of the Writ Proceedings at Issue.

Jane Roe is a real party in interest ("RPI") with a due process right to notice of the writ proceedings regarding the Title IX investigation of the night Doe sexually assaulted her. Survivors of campus sexual misconduct have concrete legal interests in the outcome of their report of sexual assault. While Roe's interests were perhaps clearest when she was enrolled in school, she still maintains significant reputational, statutory, and regulatory interests in the outcome of her sexual misconduct case even now that she has graduated.

Other survivors like Roe have comparable legal interests where the respondent has been found responsible but seeks to vacate that finding through California's state writ proceeding. Survivors have the right to advocate for those legal interests as RPIs in writ proceedings.

Moreover, the UC is not an appropriate proxy for survivors' interests and therefore cannot represent those interests in lieu of a survivor's inclusion as RPI. Schools' interests and those of survivors are not congruent. In fact, schools' (and the UC's) interest in avoiding liability creates perverse incentives that render schools particularly ill-suited to represent survivors' interests. As such, survivors must be afforded their legal right to advocate for themselves as RPIs in this type of writ proceeding.

1. Survivors have real, concrete legal interests in the outcome of their own sexual misconduct proceeding.

Student-survivor complainants, like Roe, have obvious interests in the outcomes of their own sexual misconduct proceedings. Whether a student survivor's assailant is found responsible and sanctioned can have lifelong consequences for student survivors, deeply impacting their ability to equitably participate in their education. It defies both logic and the law to dispute that Roe is an RPI in judicial proceedings that challenge—and can overturn—the results of the very disciplinary process she initiated. Future Roes, too, have cognizable legal interests in the outcome of their sexual assault reports. The implications of the Court's determination here are therefore widespread, affecting not only *this* Jane Roe's rights but also those of hundreds of thousands more like her—all of whom have concrete legal interests in notice of writ proceedings like this one.

a. Roe has legal interests at stake in this writ proceeding.

Roe rightly contends that sharing a campus with her assailant after the UC found him responsible for sexual misconduct violates her right to an educational environment free of sex discrimination. This argument is distinct from Doe's mischaracterization that Roe argues she has an "absolute right to have [Doe] removed from campus." (Respondent John Doe's Responding Br. ("Doe Br.") p. 25.) Roe only advocates her right to learn in a safe environment, which the UC determined necessitated Doe's removal from campus.

Doe argues that because Roe has since graduated, her legal interests in sharing a campus with her perpetrator are null. First, this argument distorts the truth, as Roe *was enrolled* when Doe filed his writ petition where he sought to return to campus prior to the completion of his three-year suspension. Sharing a campus with one's perpetrator has well-documented negative effects on a survivor's educational access. (See Loya, *Economic Consequences of Sexual Violence for Survivors: Implications for Social Policy and Social Change* (2012) p. 96 (unpublished Ph.D. dissertation, Brandeis University) (on file with Know Your IX).) One student survivor, for example, explained how she was eventually forced to drop out of school altogether:

> I was in class with the perpetrator of my rape. I was unable to attend this class without flashbacks and had to take it as an independent study. My grades dropped significantly as I became afraid to leave my dorm room as he was still on campus. The dean of the school of liberal arts was one of my professors and she suggested I withdraw from one of her courses, ironically a women's and gender studies course. . . . When I started having severe panic attacks because of his presence on campus, they forced me to drop all my classes. I tried to re-enroll for the next semester but couldn't do it and left for good over spring break.

(See Know Your IX, *The Cost of Reporting: Perpetrator Retaliation, Institutional Betrayal, and Student Survivor Pushout* (2021) p. 5.)[1] Roe thus undoubtedly was a real party in interest—denied her right to notice—at the time Doe filed the writ.

---

[1] <https://www.knowyourix.org/wp-content/uploads/2021/03/Know-Your-IX-2021-Report-Final-Copy.pdf> ("*The Cost of Reporting*").

Second, even now, after Roe's graduation, she retains indisputable legal rights to notice of the writ proceeding. Title IX of the Education Amendments of 1972,[2] federal Title IX guidance, the Clery Act,[3] and the California Education Code afford Roe the right to a prompt, equitable, and impartial investigation and resolution of her discrimination complaint;[4] the opportunity to be provided notice of the finding, the outcome, and *changes to the outcome*;[5] the right to be present at *all* "proceedings" related to a resolution of an institutional disciplinary complaint;[6] and the right to be informed, in writing, of "any subsequent changes to the results and when results will become final." (U. of Cal., Policy on Sexual Violence and Sexual Harassment (Jan. 1, 2016) p. 10.)[7] Doe's writ petition jeopardizes these rights by delaying a prompt resolution of Roe's complaint, depriving her of her right to notice of changes to the outcome, and blocking her from participating in the proceedings to which she is a proper party.

---

[2] 20 U.S.C. § 1681, *et seq*.
[3] 34 C.F.R. § 668.46.
[4] 20 U.S.C. § 1092(f)(8)(B)(iv)(I)(aa); 34 C.F.R. § 668.46(k)(2)(i); Off. for Civil Rights, Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, Title IX (January 19, 2001) pp. iii, 13, 21 ("2001 OCR Guidance") [rescinded in 2020 but still in place when Doe filed his writ petition].
[5] 20 U.S.C. § 1092(f)(8)(B)(iv)(III) (emphasis added); 34 C.F.R. §§ 668.46(k)(2)(v), 668.46(k)(3)(iv), 668.46(k)(3)(i)(B); 2001 OCR Guidance p. 20.
[6] 34 C.F.R. § 668.46(k)(3)(iii) (emphasis added); 20 U.S.C. § 1092(f)(8)(B)(iv)(II); 34 C.F.R. § 668.46(k)(2)(iii).
[7] <https://www.graddiv.ucsb.edu/sites/default/files/2020-11/policy-2c-gradudate-amp-tas-9-7-16.pdf>.

In addition to these well-established statutory and regulatory interests Roe harbors in the writ proceedings, she has strong reputational, emotional, and psychological interests in them. Survivors, like respondents, also have reputational interests related to sexual misconduct cases. Just as Doe would be harmed by being wrongly labeled a sexual assailant, Roe would be harmed by being wrongly labeled as someone who lied about sexual assault. As Roe notes, the trial court acknowledged in its 2019 Order that Doe's "private interests extend beyond the tangible consequences of a failed grade, suspension, or expulsion, and also includes the intangible 'stigma' of having been found [responsible]." (See Appellant's Opening Br. ("AOB") p. 45; 2AA:874–75 [citations]). Yet the court itself implicitly challenged *Roe's* reputation in finding that "credibility was a significant issue" in her campus proceedings. (2AA:865–66 [citations].) Indeed, it vacated the UC's finding of responsibility in part based on this conclusion. The implication is that Roe may have lied about being sexually assaulted by Doe. The court arrived at these conclusions even though there was no consideration of Roe's testimony on the record and Roe was not given the opportunity to defend her credibility.

Correcting the record regarding her own case is critical to Roe's reputational interests. For example, the trial court appeared to fault Roe for the delay in filing her Title IX sexual assault complaint with the school. (See AOB p. 49.) The court likely came to this conclusion because Roe had not been given the opportunity to participate in the litigation and thus the court was

not aware that Roe did not initially pursue a Title IX claim because she had a pending criminal case against Doe and was not informed that both options were available to her. (*Id.*) Further, the Order—premised upon Doe's (mis)representations to the court—calls Roe's integrity into question by implying she withheld police records related to the criminal investigation. (AOB p. 48.) But Roe never even received those police records—a fact she could have told the court had she not been excluded from the proceedings. (AOB p. 49.)

Roe's exclusion from the proceedings also had negative psychological effects on her. The court overturned the UC's finding of Doe's responsibility without notice to or input from Roe, leaving her to choose between accepting that reversal or engaging in the rehearing. It may not have come down to those two painful options had she been included in the litigation prior to that point. And even if it had, Roe would have had the opportunity to provide her own account of the facts and to hear the court's reasoning with respect to that account. Instead, she was left feeling dismissed and silenced—again. (AOB p. 30.)

Finally, Roe has a continued interest in engaging with her *alma mater* without the threat of sexual violence after graduation. The Department of Education's interpretation of Title IX runs directly contrary to Doe's suggestion that Roe has no relationship to her school upon graduation. Under Title IX, alumni—including survivors of sexual violence—have the right to be free from sex discrimination while participating in their educational institutions' "alumni programs or activities." (U.S.

Dept. of Education, Questions and Answers on the Title IX Regulations on Sexual Harassment (July 20, 2021) p. 15.)[8] As such, Roe's relationship to the school did not end when she received her diploma, and Doe cannot discount her interests in the writ proceeding on those grounds.

b. Future Roes also have concrete interests in the outcomes of campus disciplinary cases, which impact their reputations, educations, and finances.

Beyond *this* Jane Roe, future Roes have interests in the outcome of their sexual assault reports, as those outcomes can severely impact the survivors' reputations, educations, and financial prospects.

Survivors of sexual violence face heightened stigma due to societal disbelief of survivors. As it is women who most commonly report being victims of campus sexual assault and harassment (see Nat. Sexual Violence Resource Center, Statistics About Sexual Violence (2015) Sexual Violence in the U.S.),[9] most sexual assault survivors face compounding reputational harms stemming from combining stereotypes of women with stereotypes of survivors. The phenomenon of society's baseline disbelief of women has been dubbed the "credibility discount" by scholars. (Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount* (2017) 166 U. Penn. L.Rev. 1, 3). Both social groups face extensive discrediting, no matter the strength of their

[8] <https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf>.
[9] <http://perma.cc/D6YD-8HD5>.

story, creating a likelihood of facing undue scrutiny for reporting even the most provable allegations. In essence, the disbelief of women based on their gender fuses with "narratives about the motives behind allegations of sexual violence to tarnish the reputations of those who come forward about their experiences." (Carson & Nesbitt, *Balancing the Scales: Student Survivors' Interests and the Mathews Analysis* (2020) 43 Harv. J.L. & Gender 319, 350 ("*Balancing the Scales*").) Studies have found that college men embrace these layered stereotypes: a frightening percentage of those surveyed believe women use allegations of sexual violence to "get back at men," and think that "a lot of women lead men on and then cry rape." (Edwards et al., *Rape Myths: History, Individual and Institutional-Level Presence, and Implications for Change* (2011) 65 Sex Roles 761, 767.) Despite the fact that false reports of rape are comparable to false reports of other crimes in terms of volume, survivors are often immediately branded as liars and face unmatched backlash from their community for allegedly "false" reporting. (See, e.g., *Unbelievable* (Netflix, Sept. 13, 2019).)

This case underscores that failing to provide survivors with notice of writ proceedings allows attacks on their credibility to go unchecked. Where a survivor like Roe is not present to testify as to the facts of the case, a respondent like Doe has a nearly unrestricted opportunity to unilaterally establish the "factual" record. And overturning a campus disciplinary determination without even getting the survivor's account on the record allows the disciplined student to label the survivor as non-credible—

with potentially devastating effects on their career and social success.

Take, for example, the case of Kamilah Willingham: Willingham and her friend were sexually assaulted by their classmate while she was a student at Harvard Law School. (Willingham, *To the Harvard Law 19: Do Better*, MEDIUM (Mar. 24, 2016).)[10] Though the original school hearing panel found her assailant responsible, a group of Harvard law professors overturned that decision without Willingham's knowledge or participation in the process. Those same professors then attempted to publicly discredit Willingham. They argued she was untrustworthy because "there [were not] even any charges that he used force." (*Id.*) The idea that force is required to demonstrate sexual assault is a rape myth—an incorrect belief that often shifts blame to the survivor. Asserting that a sexual assault could not have occurred because no force was involved shows a fundamental misunderstanding of sexual assault and how the law defines it. In California, for example, a rape is the non-consensual act of sexual intercourse, including when someone is incapable of giving their consent to the activity. (See Cal. Pen. Code § 261.) Use (or accusation) of "force" is not required. (See *id.*) As Willingham explained: "Unconsciousness and incapacitation are widely recognized as circumstances indicating the absence of consent to engage in sexual activity. Such circumstances tend to render the use of 'force' moot." (*To*

[10] https://medium.com/@kamily/to-the-harvard-law-19-do-better-1353794288f2

the Harvard Law 19: Do Better.) "In most cases of so-called acquaintance rape, perpetrators do not rely on force so much as exploit their position of trust." (*Id.*) Not only is the professors' statement implying force is required to show sexual assault wrong, but it also trivializes the assault and/or suggests that the assault did not actually happen. (See Boux, *"If You Wouldn't Have Been There That Night, None of This Would Have Happened to You": Rape Myth Usage in the American Judiciary* (2019) 40 Women's Rts. L. Rep. 237, 244–245.) Years later, as Willingham pursues her career, these statements discrediting her—which went unrebutted by Willingham on the record, as she was not invited to participate—remain emblazoned across the internet. (See, e.g., Gersen, *Shutting Down Conversations About Rape at Harvard Law*, THE NEW YORKER (Dec. 11, 2015).)

Future Roes who are still enrolled when their assailant initiates a writ proceeding have significant academic concerns that must be acknowledged. Students who are sexually assaulted during college often see drops in their grade point averages following their assault. (Jordan et al., *An Exploration of Sexual Victimization and Academic Performance Among College Women* (2014) 15 Trauma, Violence, and Abuse 191, 195–96.) Survivors go to great lengths to avoid their perpetrators: skipping shared classes, avoiding libraries or dining halls, and withdrawing from campus life. Those who do not receive the support they need from their schools, such as removing their perpetrator from their shared classes or from campus, may delay or barely participate in their education. (See *The Cost of Reporting*, *supra*, at p. 4.) This

results in what advocates have dubbed "constructive expulsion," where institutional apathy leaves survivors little chance at educational success. (MacLellan, *We're Just Starting to Grasp How Campus Rape Steals Women's Careers Before They Start*, Quartz at Work (July 28, 2018).)[11] Approximately one-third of survivors are pushed out of school by some combination of these factors in the wake of violence. (See Mengo & Black, *Violence Victimization on a College Campus: Impact on GPA and School Dropout* (2015) 18 J. of College Student Retention 234, 243.)

When schools fail to adequately respond to reports of sexual violence and to protect students, they can also exacerbate survivors' trauma symptoms, interfering even more substantially with their educations. (See *The Cost of Reporting*, *supra*, at pp. 12–13.). Survivors frequently explain how their post-traumatic stress disorder ("PTSD") diagnoses are linked not only to the violence they suffered at the hands of their perpetrator, but also to their schools' deficient responses to that violence, which is commonly referred to as institutional trauma or betrayal. (*Id.*) For example, one high school survivor explained that most of her PTSD treatment has focused on sorting through the shame her school inflicted upon her when she reported. (*Id.*) Another survivor reported that her trauma nightmares involve not only re-living the assault, but also re-living the horrific ways her school's Title IX office treated her throughout the reporting process. (*Id.*) Another survivor, who was forced to report against

[11] https://perma.cc/Y79F-3ZYS

her wishes upon seeking medical care in the wake of her rape, explained:

> The insensitive response from my school added a whole other trauma on top of the actual sexual assault. I was diagnosed with PTSD, but a large portion of my continued PTSD treatment has to do with the shame inflicted upon me by my high school. It's hard to deal with people of authority, like school administrators, telling you that your truth isn't enough, or that what happened wasn't 'bad enough' for my perpetrator to face any disciplinary action. . . . I firmly believe that the way my case was handled as well as the social pressures within my department made my trauma into deeper, more lasting damage.

(*The Cost of Reporting*, *supra*, at p. 13.).

The interpersonal betrayal of sexual violence and the institutional betrayal of a school's inadequate response thus operate in a vicious cycle, mutually compounding the negative effects on the survivor. (Smith & Freyd, *Institutional Betrayal* (2014) 69 Am. Psychol. 575 ("*Institutional Betrayal*").) Overturning the outcome of a survivor's case without their knowledge or opportunity for input only exacerbates these effects.

Survivors who are forced to share a campus with their abuser often pay the price—literally. Survivors whose academic performance declines in the wake of violence report that their falling grades jeopardize financial aid and scholarships, often pushing them to take time off, transfer schools, or even drop out. (Bolger, *Gender-Based Violence Costs: Schools' Financial Obligations Under Title IX* (2016) 125 Yale L.J. 2106, 2108.) One student survivor in the University of California system lost about forty-four thousand dollars in costs related to avoiding her abuser

and recovering from the academic toll his abuse took on her. (Hatch, *First They Told Their Stories. Now They Want Their Money*, Huffpost (May 12, 2019).) Others report that their student debt, which increased while they took time off to avoid their abuser, stopped them from ever returning to school again. (See *The Cost of Reporting*, *supra*, at p. 27.) Survivors may be pushed out of shared classrooms and extracurriculars (*id.* p. 5), which can have severe economic impacts, including loss of scholarships. One student explained: "Because of my school's failure to take my complaint and my safety seriously, I lost scholarships and access to extracurriculars that would have helped me get a job after graduating. My grades suffered, my attendance dropped, my anxiety and depression spiraled out of control, and I didn't even feel safe in my own home." (See Koffer, *Students Push Biden to Undo Trump-Era Campus Sexual Assault Rules*, Rewire (Oct. 5, 2021).)[12] Excluding survivors from writ proceedings related to their assaults only increases the likelihood that they will suffer this same fate.

Student survivors' need for—and right to—an education free from violence and harassment does not end upon graduation. Some survivors may, like many of their peers, matriculate into graduate programs. The outcome of their sexual misconduct case, however, may impact their ability to equitably access further educational opportunities. And if the outcome of a survivor's Title IX process is overturned without their knowledge

[12]<https://rewirenewsgroup.com/article/2021/10/05/students-push-biden-to-undo-trump-era-campus-sexual-assault-rules>

or opportunity to participate, it renders it more likely that they will be forced out of educational opportunities they would have otherwise been afforded. If a survivor seeks higher education following graduation, a finding of responsibility against their perpetrator could provide them the necessary support and resources to ensure their right to a campus free from violence, such as no-contact orders, accommodations, and the restructuring of class schedules to ensure the survivor never shares a class with their abuser. Without this finding, survivors may have future educational opportunities curbed. For example, one survivor was forced to decline an offer of admission to her top choice law school because her abuser matriculated there, and the school refused to intervene. (Leader & Nesbitt, *As Campus Sexual Assault Survivors, We Call on DeVos to Do Better*, Vice (Sept. 11, 2018).)[13] Revoking outcomes of survivors' sexual misconduct proceedings, like Roe's, has concrete impacts on survivors' future educational and career success.

2. Schools are not an appropriate proxy for survivors' interests in writ proceedings.

Schools (and thus, the UC) cannot adequately represent the full interests of student survivors in writ proceedings like the one at issue here. Student survivors and schools may share common interests in pursuing efficiency, campus safety, and fairness when it comes to the adjudication of a campus sexual misconduct disciplinary proceeding, but survivors also have their own

[13] <https://www.vice.com/en/article/8x79kx/betsy-devos-title-ix-sexual-assault-on-campus>.

significant interests when seeking to hold their perpetrators accountable. Those interests often conflict with a school's interest—both financial and otherwise—in avoiding liability. Given these significant conflicts, schools are not an appropriate proxy for survivors' participation in writ proceedings.

Schools' interests do not map directly onto those of survivors. In the adjudication of a campus sexual misconduct disciplinary proceeding, schools have vested interests in pursuing efficiency, safety, and perceptions of fairness for all involved. Because disciplinary adjudications require personnel power and time, and because students—whether as complainant or respondent—dread the purgatory of awaiting a disciplinary decision, efficiency is key. But an over-prioritization of efficiency can lead to overlooking evidence, neglecting key witnesses, producing a cursory investigative report, or conducting an unfair hearing. This leads to a scenario in which schools tout efficiency at the expense of the student parties, often finding against the survivor due to a lack of evidence that may have been curable with greater resource input. (See *The Cost of Reporting*, *supra*, at p. 13.)

The UC's and survivors' interests may be similarly incongruent when it comes to perceptions of fairness. Schools exist to attract and retain students, which requires maintaining both a practice and an image of fairness with respect to survivors and respondents alike. Survivors and respondents, however, may have competing understandings of fairness. The UC and its schools must balance these competing perceptions rather than

advocate for one over the other. As such, the UC's interpretation of what creates a perception of fairness likely differs from that of survivors, rendering it an ineffective proxy for survivors' interests—both in school proceedings as well as collateral proceedings such as the writ proceeding at issue here.

Most critically, the UC has a financial interest in avoiding liability altogether. Because most schools are first and foremost businesses, they act to protect their wallets. This is never clearer than when a survivor challenges their school's actions with respect to a sexual misconduct disciplinary proceeding, at which point schools unfailingly defend vigorously against those challenges no matter the merits. (See, e.g., *Doe v. Fairfax Cty. Sch. Bd.* (4th Cir. 2021) 1 F.4th 257.) The posture of litigation makes it most convenient and financially sound for schools to stand by their disciplinary actions—or inactions—no matter how egregiously wrong or violative of survivors' civil rights they might have been, or else risk what might be a substantial payout. Because schools are likely to prioritize their own bottom line over students' civil rights, financial solvency serves as a perverse incentive for schools to position themselves in opposition to civil rights. (*Balancing the Scales*, *supra*, at p. 371. See also, e.g., Broady, *Gwinnett Schools Lose Bid to Dismiss Suit Over Sex Assault Case*, The Atlanta Journal-Constitution (Aug. 27, 2019).) To substitute schools' curated voices for those of survivors essentially removes survivors from the calculus.

In an attempt to reduce its exposure to liability, the UC proffers a slippery slope argument regarding Roe's argument that

survivors are real parties in interest in writ cases like this one. The UC warns the Court to be "[c]autious of an [o]verly [c]apacious [v]iew of [r]equired [n]otice" (Respondent's Br. p. 27), insisting that "if Roe's arguments were to prevail, students found responsible for sexual assault would need to name as respondents in writ petitions not only the University but also any witness whose 'psychological, emotional, and reputational interests' may be impacted by the proceeding, or risk the resulting judgment being voided by their absence." (*Id.* at pp. 10–11.)

But the UC "cautions" the Court against adopting an argument Roe did not make. Rather than claiming that "any witness" who has been psychologically impacted by a sexual misconduct disciplinary proceeding has due process rights in an ensuing writ proceeding, Roe merely states what courts have repeatedly recognized: that "*participants*" in the underlying proceedings have a stake in writ proceedings like this one. (See AOB pp. 43–44 (citing *Doe v. Allee* (2019) 30 Cal.App.5th 1036, 1059).) Roe's narrowly tailored request that the Court recognize and affirm that right here leaves no risk of the hyperbolic outcome of which the UC warns. Where respondents pursue a writ to alter the underlying disciplinary proceeding, solely the other party (or, more rarely, parties) to that proceeding has due process rights to notice. In other words, Roe does not ask the Court to open any flood gates; she merely asks for a seat at the table in the case she initiated in the wake of her traumatic assault.

B. Depriving Student Survivors of Notice of Writ Proceedings Is Likely to Chill Reporting.

Even more egregious is the UC's assertion that honoring survivors' due process rights to notification of writ proceedings would chill reporting. The UC contends that providing survivors notice of writ proceedings would have an "immeasurable" "chilling effect on complainants' willingness to report their sexual assaults" and "undermine the University's efforts to address sexual assault and sexual harassment on its campuses." (Respondent's Br. p. 11.) Quite the opposite is true: in addition to being *legally entitled* to notice in these situations, survivors *want* and *deserve* such notice.

The UC's contention that it opposes the form of notice at issue because it wants to *protect* survivors is a paternalistic smokescreen for its own legal (and financial) self-interest. It is well established that survivors of sexual assault nearly always experience feelings of a loss of agency in the wake of violence, and empowerment-based advocacy is the best way to combat those feelings. (See, e.g., Dundas, Maehle, & Stige, *Finding One's Footing when Everyone Has an Opinion. Negotiating an Acceptable Identity After Sexual Assault* (July 2021) 12 Frontiers in Psychol. 1, 9.)[14] The UC is well aware of this. The University of California, Berkeley, for instance, wrote in its 2020 annual sexual assault and harassment report that campus resources for

---

14 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8281139/pdf/fpsyg-12-649530.pdf> .

survivors are "empowerment- and choice-oriented services." (U. of Cal. Berkeley, 2020 Annual Report on Sexual Violence and Sexual Harassment: Prevention, Incidence, and Response (2020).)[15] It goes on:

> "[The University] centers[s] survivors as agents and experts in their own lives, honoring the decisions they make for themselves. This means respecting survivors who report as well as survivors who choose not to . . . Another way we strive to center survivors is by supporting them and listening to their needs."

(*Id.* at 15.)

How can the UC respect the agency of Roe and other survivors as it simultaneously purports to speak on their behalf? The UC does not strive to honor Roe's desire to participate in a writ proceeding related to her sexual assault. To the contrary, it seeks to remove her (and other survivors') ability to make such a decision altogether.

In any event, the UC is wrong. Receiving information about one's rights and legal proceedings that directly implicate those rights does not chill reporting. In fact, survivors have made clear that being excluded from, ignored during, and neglected throughout the handling of their reports of sexual violence is what chills reporting. (See *The Cost of Reporting*, *supra*, at p. 9. See also *Institutional Betrayal*, *supra* [describing the

---

[15]<https://svsh.berkeley.edu/sites/default/files/2020_svsh_annual_report_interactive_final.pdf>.

retraumatization survivors face when their schools respond ineffectively to reports of sexual violence].)[16]

The UC goes on to argue that "[e]ven if" the required notice were limited to the survivors who were party to the underlying sexual misconduct disciplinary proceeding (which it is), "the ordeal of participating in a lawsuit brought by the perpetrator may be traumatic." (Respondent's Br. p. 28.) As an initial matter, the trauma of belatedly discovering that your perpetrator and school administration have continued to hash out the details of your sexual assault report and the validity of any disciplinary action without your knowledge or input is almost certainly far greater. Regardless, the possibility of unearthing additional trauma is not reason to deprive survivors of their constitutional rights. Nor is it appropriate, as explained above, for the UC to remove Roe's and other survivors' agency by making such a determination on their behalf.

The UC's given reasons for arguing against writ notification underscores its inability to adequately represent survivors' interest in writ proceedings such as the one at issue here. The UC wields unsubstantiated warnings of retraumatization and chilling reporting—using what is, at best, a misguided concern for survivors—to advocate *against* survivors'

---

[16] As one student survivor recounted: "[T]he Title IX coordinators constantly fed me misinformation, 'accidentally forgot' to include evidence, never responded to me, refused to move the hearing date to accommodate one of my witnesses because they had already ordered the catering, and . . . put up every roadblock they could find to try to get me to drop my case." (*Id.*) She ultimately left neuroscience, her field of study, altogether.

interests. If any doubt remains in the eyes of the UC or the Court, *Amici*—advocacy organizations that are comprised of, are led by, and advocate for student survivors of sexual violence—state with unmistakable clarity: survivors want to know when the proceedings into which they have injected so much time, energy, resources, and courage when seeking to hold their perpetrators accountable are at risk of being gutted.

C. Doe Seeks to Exclude Roe from a Process That Directly Implicates Her Rights in an Attempt to Escape Culpability.

Doe's efforts to exclude Roe from California's writ process is an attempt to replicate a strategy of so-called "men's rights activists" ("MRAs") in using collateral legal attacks that exclude survivors' interests to weaken Title IX and other laws intended to protect the right to be free from sex discrimination. This strategy has pushed California toward lopsided processes that prioritize students disciplined for sexual misconduct over the survivors who report them.

Recent due process litigation challenging school sexual misconduct disciplinary procedures has improperly excluded survivors and thus yielded lopsided procedures that unfairly favor student respondents. Some student respondents, having been found responsible for sexual misconduct in school, have taken to the courts to sue their school for due process violations. The last few years have seen a tsunami of this type of litigation. As of 2019, respondents had filed more than 500 lawsuits of this kind. (Yoffe (Nov. 12, 2019) *Joe Biden's Record on Campus Due Process Has Been Abysmal. Is It a Preview of His Presidency?*

Reason.)[17] Some of these lawsuits stem from genuine claims of process violations, but many are instead outcome-oriented: student respondents—the vast majority of whom are young men—contest the process afforded them simply because they disagree with the substantive outcome of the disciplinary proceeding. MRAs, like the group Save Our Sons, inform parents that "at college there is a powerful yet small cabal of gender feminists that believe college males are predators and rapists" and who "[l]earn to [a]ccuse" men of sexual assault "[f]or [g]irl [p]ower." (See, e.g., True, *You Raised Your Son Right, But Don't Think He's Safe From Accusers Who Learn To Accuse For Girl Power* (Oct. 27, 2019) Help Save Our Sons. ["If you want to end false accusations you need to stand up for due process rights for all students."])[18] These groups tout "due process" arguments as the best way to stave off discipline for sexual misconduct. (*Id.*) Once those due process claims get to court, they are assessed under the due process framework proffered by the U.S. Supreme Court in *Mathews v. Eldridge* in 1976. (*Mathews v. Eldridge* (1976) 424 U.S. 319, 335, 347.) *Mathews* established a balancing test for assessing due process claims, but courts' application of that test to three-party cases like Doe's due process challenge has pushed survivors off the scales entirely. This has led to rulings that enable imbalanced disciplinary processes that unfairly burden survivors.

---

[17] <https://perma.cc/W4F8-ZXKU>.
[18] <https://perma.cc/ EX88-UWDU>.

In *Mathews v. Eldridge*, respondent Eldridge was a recipient of social security disability benefits whose eligibility for such benefits had been called into question. When the government cut off Eldridge's benefits based on its determination that he no longer had a qualifying medical condition, Eldridge sued, claiming he was denied his due process right to notice and an opportunity to be heard. (*Id*. at 323–24.) The Court, in considering Eldridge's claims, established a balancing test to determine the process due a party facing a deprivation or discipline by the State in any given scenario. Under the *Mathews* balancing test, the court assessing whether due process has been violated must balance: (1) the private interest at stake; (2) the risk of an erroneous deprivation with the present procedures, discounted by the probable value of additional procedural safeguards; and (3) the public interest, including (but not limited to) the fiscal and administrative burdens additional procedures would entail. (*Id*. at 335, 347.)

Mathews forms part of the same line of cases as the seminal school discipline case, *Goss v. Lopez*, decided one year prior. (*Goss v. Lopez* (1975) 429 U.S. 572.) In *Goss*, the Supreme Court established that in the case of an up-to-ten-day suspension from school, due process affords students facing discipline the fundamental minimum requirements of notice and a hearing (though not necessarily live or oral) prior[19] to sanctioning. *Goss*

---

[19] There is an exception for exigent circumstances. (See *Goss*, 429 U.S. at 582–83 [affirming lower court's determination that controlling case law permits the "immediate removal of a student

involved an incident in which students were suspended for disruptive behavior. (*Goss*, 429 U.S. at 569.) As in *Mathews*, there was no alleged victim of the respondents' conduct. In *Mathews*, the government sought to deprive Eldridge of his disability benefits, and in *Goss*, the school sought to deprive the students of their right to come to school during their suspensions. These are two-party scenarios: charging institution vs. party facing discipline.

This two-party scenario upon which case law regarding due process is based does not account for the unique three-party structure of campus sexual misconduct disciplinary cases. (*Balancing the Scales*, *supra*, at p. 339.) In sexual misconduct cases, the school also considers discipline against the respondent—the student alleged to have committed sexual misconduct. But in these cases, the complainant-survivor, too, is involved.[20] The complainant-survivor participates in the hearing and operates under the same rules and procedures imposed upon the respondent by the school. "Despite this fact, courts have continued to graft the two-party origin *Mathews* framework, unchanged, directly onto three-party campus sexual misconduct proceedings." (*Balancing the Scales*, *supra*, at p. 339.) In other words, the due process cases collaterally challenging the proceedings examining survivors' sexual misconduct allegations allow only two parties into the courtroom: the school and the

---

whose conduct disrupts the academic atmosphere of the school, endangers fellow students, teachers or school officials, or damages property," so long as a "rudimentary hearing… follow[s]."].)

[20] Though they are not required to be, they most often are.

student-respondent. The result is not only the analytical exclusion of student survivors—who have significant interests at stake—but also their structural exclusion. They have no opportunity to explain to the court how any decision made on the matter will directly implicate their interests. It is no wonder these cases—where survivors' voices are excluded from processes that implicate and directly impact them—have become the chosen vehicle of MRAs for gutting sexual misconduct disciplinary proceedings.

Doe urges the Court to replicate that analytical and structural exclusion here, using the writ proceeding—which has been wrongly applied to exclude survivors from proceedings nationwide—to tilt the scales against survivors in California schools. Doe seeks to achieve this goal by (1) using his brief to re-litigate the finding of responsibility against him instead of focusing on the RPI question at hand, and (2) dedicating much of his brief to unsupported statements that paint allegations of sexual violence as a male witch hunt built on false reporting. (See, e.g., Doe's Br. p. 11 ["Falsely accused are often convicted in court and in the court of public opinion."].)

The narrative Doe proffers is steeped in rape myths and false equivalencies. He attempts to use this as a red herring to distract the Court from the question at issue, on which Doe is clearly wrong on the law.[21]

Doe first cites misleading and unsubstantiated numbers surrounding "false" reporting. (*Id*. at pp. 10–12.) He primarily

---

[21] See Section II.A, *supra*, demonstrating that Roe is an RPI.

relies on a blog post from MRA organization SAVE to assert that "studies have shown that 20-50% of criminal sexual assault allegations are unfounded." (*Id.* at pp. 10–11.). The five "studies" from which SAVE arbitrarily draws its conclusion that one in three sexual assault allegations are unfounded—and on which Doe relies here to argue that false reports of sexual assault are rampant—include: (1) a quote stating that "[p]robably 40 or 50% of allegations of sexual assault are baseless," made by a man named Brett Sokolow who cites no study, data, or other evidence in support of his offhand comment; (2) a report regarding the use of DNA evidence to establish innocence after trial involving cases where forensic DNA testing of sperm took place (the majority of which placed the identity of the perpetrator at issue); and (3) a Department of Defense ("DOD") analysis stating that in 2018, the "percentage of cases deemed to be 'unfounded' *or* with 'insufficient evidence of any offense to prosecute'" [emphasis added] was 28%. (See *id.* at p. 11 note 1.). When viewing only the "unfounded" DOD sexual assault reports, however, and not improperly lumping them in with cases where the government declined to prosecute, the percentage is *less than 3%.* Doe's numbers thus hardly constitute conclusive data on which the Court (or anyone) should rely. Studies have repeatedly shown that false reports of sexual assault—as opposed to claims that the government declines to prosecute—are rare. [22] (See, e.g., *id.*

[22] See Lisak, Gardinier, Nicksa, & Cote, *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases* (2010) 16 Violence Against Women 1318, 1318–34 ["To classify a case as a

[placing prevalence of false allegations between 2% and 10%]; Spohn, White, & Tellis, *Unfounding Sexual Assault: Examining the Decision to Unfound and Identifying False Reports* (2014) 48 L. & Soc. Rev. 161 ["A 2014 study of sexual assault cases reported to the Los Angeles Police Department used quantitative and qualitative methods to review reports and analyze detective interviews. The study found that 4.5% of cases were false reports."[23]]; see also Appellant's Reply Br. p. 20 note 5.)

Doe also insultingly compares the UC's denial of his opportunity to continue to study at his chosen institution of higher education—after a thorough investigation and finding of responsibility for sexual misconduct—to criminal cases where later-exonerated men spent decades living in the inhumane conditions of prison. (See Doe's Br. pp. 12–13.) Doe's strategy does nothing to advance his stated position that Roe is not an RPI (which is wrong). Instead, it merely reveals his desire to eschew accountability by excluding Roe—and survivors like her—from writ proceedings. The law does not permit this, and neither should this Court.

III. CONCLUSION

Doe attempted to silence Roe years ago when he sexually assaulted her. He tried to silence her again when she bravely sought help from her school in the wake of that assault. Realizing he cannot escape accountability when Roe is given a voice and permitted to speak the truth, Doe now seeks to silence

---

false allegation, a thorough investigation must yield evidence that a crime did not occur."].

[23] <https://onlinelibrary.wiley.com/doi/full/10.1111/lasr.12060>.

her yet again by removing her from the process entirely, asking this Court to define an RPI so narrowly as to do away with the concept. The UC—likely fearing the financial consequences of further litigation—has buckled to that strategy. *Amici* have years of experience both *being* and working with student survivors who have faced similar attempts at erasure by their perpetrators and their schools alike. *Amici* request that the Court reject Respondents' attempt at erasure here and affirm Roe's status as an RPI in a case that could not exist without her.

Dated: October 14, 2021

Respectfully submitted,

/s/ *Chelsea Mutual*
Chelsea Mutual

Counsel for *Amici Curiae*
CALIFORNIA WOMEN'S
LAW CENTER and
KNOW YOUR IX

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204(c) of the California Rules of Court, I certify that this *amici curiae* brief contains 8,215 words of text using 13-point Century Schoolbook font, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

Dated: October 14, 2021

/s/ *Chelsea Mutual*
Chelsea Mutual

PROOF OF SERVICE

I, Chelsea Mutual, declare as follows:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to this action. My business address is: 360 N Pacific Coast Hwy, Suite 2070, El Segundo, CA 92045.

On October 14, 2021, I served the following listed document(s) described as:

APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND PROPOSED *AMICI CURIAE* BRIEF IN SUPPORT OF APPELLANT JANE ROE

on the interested party/parties below addressed as follows:

SEE ATTACHED SERVICE LIST

/ / (BY MAIL) I placed the envelope for collection and mailing on the date shown above, at this office, in El Segundo, California, following our ordinary business practices. I am readily familiar with this office's practice of collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. Postal Service in a sealed envelope with postage fully prepaid.

/X/ (BY ELECTRONIC TRANSMISSION) I served the document(s) on the persons listed in the Service List by submitting an electronic version of the document(s) to True Filing through the user interface at www.truefiling.com.

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

Executed on October 14, 2021, at El Segundo, California.

/s/ Chelsea Mutual
Chelsea Mutual

SERVICE LIST

Brenda Star Adams, Esq.
Maha Hammam Ibrahim, Esq.
EQUAL RIGHTS ADVOCATES
1170 Market Street, Suite 700
San Francisco, CA 94102
badams@equalrights.org
mibrahim@equalrights.org
Attorneys for Appellant, Jane Roe

Kathryn Ann Eidmann, Esq.
Amanda Savage, Esq.
PUBLIC COUNSEL LAW CENTER
610 South Ardmore Avenue
Los Angeles, CA 90005
keidmann@publiccounsel.org
asavage@publiccounsel.org
Attorneys for Appellant Jane Roe

Robyn Carrico Crowther, Esq.
Melanie Ayerh, Esq.
STEPTOE & JOHNSON LLP
633 West Fifth Street
Los Angeles, CA 90071
rcrowther@steptoe.com
mayerh@steptoe.com
Attorneys for Appellant Jane Roe

Mark M. Hathaway
Jenna Eyrich Parker
HATHAWAY PARKER
445 S. Figueroa Street, 31st Floor
Los Angeles, CA 90071
Tel: (213) 529-9000
Fax: (213) 529-0783
mark@hathawayparker.com
jenna@hathawayparker.com
Attorneys for Petitioner-Appellee John Doe

Hailyn J. Chen, Esq.
Cassidy Hunter Hayes, Esq.
MUNGER TOLLES & OLSON LLP
350 South Grand Avenue, 50th Floor
Los Angeles, CA 90071
hailyn.chen@mto.com
Hunter.Hayes@mto.com
Attorneys for Respondent-Appellee Regents of the University of California

Supreme Court of California
350 McAllister Street
San Francisco, CA 94102