

**FILED UNDER THE ELECTRONIC BRIEFING RULES**

**IN THE SUPREME COURT OF THE STATE OF CONNECTICUT**

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**S.C. 20705**

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**SAIFFULLAH KHAN,**

**Plaintiff-Appellant**

**v.**

**YALE UNIVERSITY, ET AL.**

**Defendants-Appellees**

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***Amicus Curiae* of Legal Momentum, Fierberg National Law Group, Chicago Alliance Against Sexual Exploitation, Connecticut Coalition Against Domestic Violence, Futures Without Violence, Jewish Women International, Know Your IX, National Alliance to End Sexual Violence, National Coalition Against Domestic Violence, National Crime Victim Law Institute, National Women’s Law Center, National Network to End Domestic Violence, Network for Victim Recovery of DC, Sanctuary for Families, and Women’s Law Project in Support of Defendant-Appellee**

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## STATEMENT OF THE INTERESTS OF AMICI CURIAE<sup>1</sup>

Legal Momentum, Fierberg National Law Group, and the 13 above-captioned co-amici are all organizations dedicated to preventing and responding to all forms of gender-based violence and to eliminating sex discrimination in education.

*Amici curiae* have unique expertise on issues central to the questions before the Court in the instant case. Amici are national and state organizations that work to ensure survivors have access to safe pathways for reporting such abuses and seeking safety and accountability. Amici have an interest in the questions before this Court because without immunity for statements made in the course of campus Title IX processes, such reporting avenues will be effectively cut off for many survivors, having serious negative impacts on their ability to remain safe and continue their education.

*Amici* regularly appear as *amicus curiae* in federal and state courts on issues related to sex discrimination in education and sexual and domestic violence. Legal Momentum, and many of its co-amici, have contributed as *amici curiae* in foundational Title IX gender-based violence cases, including *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992); *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998); and *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999).

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<sup>1</sup> No portion of this brief was written by counsel for a party to this appeal. Neither any party to this appeal, nor its counsel, contributed to the cost of the preparation or submission of this brief. No person or entity, other than the amicus and its members, contributed to the cost of the preparation or submission of this brief.

**Legal Momentum, the Women’s Legal Defense and Education Fund** (formerly the NOW Legal Defense and Education Fund) is the nation’s first and long-serving national nonprofit civil rights organization dedicated to advancing women’s rights. For over 50 years, Legal Momentum has worked to achieve gender equality through impact litigation, policy advocacy and education initiatives. Among its core priorities, Legal Momentum works to combat sex discrimination and promote equity in education and to prevent and respond to sexual assault and other forms of gender-based violence. Legal Momentum regularly appears as counsel and *amicus curiae* in federal and state cases involving campus sexual violence. With a rapid rise in retaliatory defamation lawsuits against survivors, Legal Momentum has appeared in state and federal courts as counsel and *amicus curiae*, including *Gottwald v. Siebert*, 2022 NY Slip Op. 01515 (1<sup>st</sup> Dept. 2022) (petition for leave to appeal filed), and published resources regarding the application of defamation laws across the country related to speech about gender-based violence victimization.<sup>2</sup>

**The Fierberg National Law Group (TFNLG)** is a national civil law firm dedicated to securing justice for those who suffer violence in schools and on college campuses, included victims of sexual assault and harassment. Survivors’ ability to fully and safely enjoy the benefits of their education relies on fair and meaningful Title IX proceedings. TFNLG is honored to serve survivors in those proceedings throughout the United States. TFNLG protects students’ and parents’ rights to an education free from violence and ensures schools address and combat sexual violence and the hostile educational

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<sup>2</sup> Legal Momentum, *A Guide to Defamation for Survivors or Harassment*, (April 2022) available at <https://www.legalmomentum.org/library/guide-defamation-survivors-sexual-assault-or-harassment>.

environment it creates and hold perpetrators accountable for the harm they cause survivors.

**Chicago Alliance Against Sexual Exploitation (CAASE)** addresses the culture, institutions, and individuals that perpetrate, profit from, or support sexual exploitation.

**Connecticut Coalition Against Domestic Violence** leads a statewide network focused on anti-domestic violence advocacy, outreach, and education and its 18 member organizations provide direct services to nearly 40,000 survivors of domestic violence in Connecticut each year.

**Futures Without Violence** is a non-profit organization with offices in San Francisco, Washington, D.C., and Boston. Their organizational goal is ending domestic and sexual violence. Futures Without Violence is involved in community-based programs, developing educational materials, and in public policy work.

**Jewish Women International (JWI)** works to empower women and girls by ensuring and protecting their physical safety, building access to long-term economic security and lifting women's leadership. JWI has a long history of work on college campuses, providing prevention programs and speaking with students about barriers to reporting intimate partner violence.

**Know Your IX** is a survivor- and youth-led project of Advocates for Youth that aims to empower students to end sexual and dating violence in their schools. Sexual violence is a barrier to students' access to education, and it is crucial for survivors to be able to report violence to their schools and speak of their experiences in a Title IX grievance process without fear of retaliation through a defamation lawsuit.

**National Alliance to End Sexual Violence** advocates on behalf of the 56 state and territorial sexual assault coalitions and 1500

rape crisis center nationwide serving and supporting survivors of sexual assault.

**National Coalition Against Domestic Violence** leads, mobilizes, and advocates on behalf of victims and survivors of domestic violence nationwide to support efforts that demand a change of conditions that lead to domestic violence.

**National Crime Victim Law Institute** is a nonprofit educational and advocacy organization that promotes victims' rights and victims' voices in justice systems and regularly participates as *amicus curiae* in state, federal, and military cases that present victims' rights of broad importance.

**National Network to End Domestic Violence (NNEDV)** represents the 56 U.S. state and territorial coalitions against domestic violence. NNEDV works to make domestic violence a national priority, change the way society responds to domestic violence, and strengthen domestic violence advocacy at every level. NNEDV was instrumental in the passage and implementation of the Violence Against Women Act. NNEDV has a strong interest in realizing the promise of Title IX and ensuring that student survivors may fully participate in disciplinary processes to hold abusers accountable for sexual abuse and harassment without threat of retaliation.

**The National Women's Law Center** is a nonprofit legal organization dedicated to the advancement and protection of the legal rights of women and girls, and the right of all persons to be free from sex discrimination. Since its founding in 1972, the Center has focused on issues of key importance to women and their families. The Center specifically works to address and prevent sexual harassment, including sexual assault, in K-12 schools and colleges and universities, and to ensure that no individual is denied educational opportunities based on sex. The Center has participated as counsel or *amicus curiae* in a range

of cases before federal and state courts to ensure that all individuals enjoy the full participation against sex discrimination as promised by our laws, including the right to report sexual misconduct without facing retaliatory defamation lawsuits.

**Network for Victim Recovery of DC (NVRDC)** provides legal advocacy to victims of all types of crime in the District of Columbia. As a core member of the District's Sexual Assault Crisis Response Project since 2012, NVRDC advocates are dispatched to meet sexual assault survivors in the hospital and community to facilitate sexual assault forensic exams, provide acute crises services, and connect survivors with in-house legal representation. The District has more than eight colleges and universities, and as a result, NVRDC frequently represents survivors of campus-based sexual abuse in criminal legal proceedings, civil protection orders, and throughout Title IX investigations, hearings, or accommodation processes.

**Sanctuary for Families** is a nonprofit service provider and advocate for victims of domestic violence and related forms of gender-based violence. Sanctuary for Families is committed to supporting student survivors in their pursuit of justice and has serious concerns about the potential chilling effect a negative ruling in this case may have on survivors.

**Women's Law Project** is a nonprofit legal organization working to defend and advance the rights of women, girls, and LGBTQ+ people and regularly serves as counsel to victims of violence and engages in public policy advocacy to improve the response of educational institutions to sexual violence.

This brief aims to aid the Court as it answers two of the questions that the U.S. Court of Appeals for the Second Circuit certified.

*Question 2(c).*<sup>3</sup> This brief aims to aid the Court in its understanding of the clearly-established public policy that supports holding that statements made in the course of school Title IX processes are entitled to absolute immunity, the Connecticut and federal laws that would be undermined by a contrary holding, and the devastating impact on victims of these abuses and their ability to continue to seek an education.

*Question 5.*<sup>4</sup> This brief also argues that regardless of whether the University-Wide Committee on Sexual Misconduct (“UWC”) proceeding is properly recognized as quasi-judicial, Jane Doe should also be afforded absolute immunity for the statements at issue in this case under the doctrine of absolute privilege of consent.

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<sup>3</sup> Question 2(c) asks the Court to address, “How, if at all, does public policy inform the identification of a non-governmental entity as quasi-judicial and, if it does, is this consideration in addition to, or independent of, a law-to-fact requirement and the enumerated *Kelley/Craig* factors?”

<sup>4</sup> Question 5 asks the Court to address, “[If the UWC proceeding is not properly recognized as quasi-judicial] would Connecticut law afford defendant Jane Doe qualified immunity or no immunity at all?”

## ARGUMENT

When Jane Doe was in college, the Plaintiff raped her. She followed Yale’s legally-obligated reporting and disciplinary procedures. Then her rapist invented an ambiguity in Connecticut law and subjected her to years of costly and traumatic retaliatory litigation. This Court can make clear that victims like Jane Doe cannot be liable for engaging in legally-obligated reporting and disciplinary processes aimed at preventing and responding to unlawful discrimination. Otherwise, no victim will be able to safely and confidently report sexual assault in Connecticut colleges.

Whether “and what form of immunity applies in any given case is a matter of policy,” *Rioux v. Barry*, 283 Conn. 338, 346 (2007). For decades, Connecticut courts and legislators, like those across the country, have recognized the strong public policy interest in protecting students from sex discrimination in the form of sexual harassment, including sexual assault (hereinafter sexual misconduct). This public policy cannot be advanced if perpetrators can wield the threat of a lawsuit—with all the attendant financial, psychological, and temporal costs<sup>5</sup>—over victims and witnesses for simply partaking in processes that schools are legally required to offer and students are encouraged to use.<sup>6</sup>

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<sup>5</sup> Alyssa R. Leader, *A “Slapp” in the Face of Free Speech: Protecting Survivors’ Rights to Speak Up in the “Me Too” Era*, 17 *First Amend. L. Rev.* 441, 448–49 (2019) (summarizing studies on costs).

<sup>6</sup> *Razavi v. Sch. of the Art Inst. of Chi.*, 122 N.E.3d 361, 364 (Ill. App. 2018), *dismissed sub nom.*, *Razavi v. Sch. of Art Inst. of Chi.*, 124 N.E.3d 475 (Ill. 2019) (noting that when victims or witnesses to sexual



Part I of this brief answers certified question 2(c). It shows that rather than effectuating public policy, a holding that Jane Doe is not entitled to absolute immunity for her statements to Yale’s University-Wide Committee (UWC) would undermine, if not dismantle, it.

Part II answers certified question 5. It explains that Jane Doe should also be afforded absolute immunity for the statements at issue in this case under the doctrine of absolute privilege of consent, as complaints made pursuant to reporting and disciplinary processes described in school policies cannot form the basis of a defamation suit. *See* Restatement (Second) of Torts § 583 (Am. L. Inst. 1977); *Traylor v. Hammond*, 94 F. Supp. 3d 203, 218 (D. Conn. 2015).

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misconduct engage in a school complaint process, statements made under these “federally mandated procedures” are “cloaked with the same privilege as if [they] were legally required”).

**I. School reporting and disciplinary processes for sexual misconduct are quasi-judicial for the purposes of absolute immunity analysis (Question 2c)**

Courts identify a process as quasi-judicial in large part by evaluating whether “there is a sound public policy reason” for doing so. *Hopkins v. O’Connor*, 282 Conn. 821, 838 (2007). “The policy underlying the privilege is that in certain situations the public interest in having people speak freely outweighs the risk that individuals will occasionally abuse the privilege by making false and malicious statements.” *Preston v. O’Rourke*, 74 Conn. App. 301, 311 (2002).

In the case of sexual misconduct reporting on college campuses,<sup>7</sup> the primary reason for *not* providing absolute immunity—the risk of “false and malicious statements” during the proceeding—is de minimis. False accusations of sexual assault are exceedingly rare<sup>8</sup> and Yale

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<sup>7</sup> Because Jane Doe was raped as a college student, this brief focuses on reporting and disciplinary processes at colleges and universities. Yet the same arguments apply with respect to K-12 students, often with greater force because of the especially grievous nature of sexual misconduct targeting children.

<sup>8</sup> See Nat’l Sexual Violence Resource Ctr., False Reporting Overview 2–3 (2012), [https://www.nsvrc.org/sites/default/files/Publications\\_NSVRC\\_Overview\\_False-Reporting.pdf](https://www.nsvrc.org/sites/default/files/Publications_NSVRC_Overview_False-Reporting.pdf); David Lisak et al., False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases, 16 Violence Against Women 1318, 1330 (2010).

procedures provide for discipline against those who levy them.<sup>9</sup> See *Hartman v. Keri*, 883 N.E.2d 774, 778 (Ind. 2008) (concluding that school discipline for abuse of a disciplinary process substantially deters false reporting); *Razavi*, 122 N.E.3d at 374.

Far outweighing these de minimis risks is the fact that “[s]exual assault and related misconduct have been and remain a serious threat to the safety and security of college and university student victims and to their ability to pursue their education on equal terms with their classmates.”<sup>10</sup> As the Seventh Circuit observed twenty-five years ago, “a nondiscriminatory environment is essential to maximum intellectual growth and is therefore an integral part of the educational benefits that a student receives. A sexually abusive environment inhibits, if not prevents, the harassed student from developing her full intellectual potential and receiving the most from the academic program.” *Mary M. v. N. Lawrence Cmty. Sch. Corp.*, 131 F.3d 1220, 1226 (7th Cir. 1997).

Yet campus sexual misconduct is common—at least one in four women and one in fifteen men will be sexually assaulted in college.<sup>11</sup>

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<sup>9</sup> Mot. for Permission to Litig. Claims against Jane Doe Using a Pseudonym in Place of Her Actual Name 13.

<sup>10</sup> Am. L. Inst., Black Letter of Student Sexual Misconduct 1 (2022), [https://www.ali.org/media/filer\\_public/8e/8a/8e8a0fcc-bac5-45f4-9867-674bfada9316/student-misconduct-td1-black-letter.pdf](https://www.ali.org/media/filer_public/8e/8a/8e8a0fcc-bac5-45f4-9867-674bfada9316/student-misconduct-td1-black-letter.pdf) [hereinafter ALI Principles].

<sup>11</sup> Ass’n of Am. Univs., Report on the AAU Campus Climate Survey on Sexual Assault and Misconduct ix (2019), <https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus->

It is also chronically underreported. Among college student survivors, only one in eight women, one in five transgender and gender-nonconforming students, and one in ten men report the sexual assault to a school program.<sup>12</sup> Given how common and underreported sexual misconduct is, encouraging victims to report is critical as a matter of public policy.<sup>13</sup>

Indeed, Connecticut has a long-established “general public policy against sex-based discrimination”<sup>14</sup> and sexual misconduct on college campuses. This policy is most clearly established through Connecticut General Statutes § 10a-55m, unanimously enacted (in relevant part) in 2012 as An Act Concerning Sexual Violence on College Campuses (hereinafter Campus Violence Act).<sup>15</sup> The statute requires all Connecticut colleges to adopt procedures to ensure that reports of sexual misconduct are addressed. The legislature left an extensive record describing the public policy goals of the statute,<sup>16</sup> including “protect[ing] students” from sexual assault.<sup>17</sup>

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Safety/Revised%20Aggregate%20report%20%20and%20appendices%201-7\_(01-16-2020\_FINAL).pdf.

<sup>12</sup> *Id.* at A7-27, A7-30.

<sup>13</sup> *See* 57 H.R. Proc., Pt. 3, 2014 Sess., 865–69 (Conn.).

<sup>14</sup> *State v. Conn. State Emps. Ass’n*, 287 Conn. 258, 274 n.13 (2008).

<sup>15</sup> 55 H.R. Proc., Pt. 13, 2012 Sess. 4319; 55 S. Proc. Pt. 13, 2012 Sess. 4297, [https://ctatatelibrarydata.org/wp-content/uploads/lh-bills/2012\\_PA78\\_HB5031.pdf](https://ctatatelibrarydata.org/wp-content/uploads/lh-bills/2012_PA78_HB5031.pdf) [hereinafter Campus Violence Act Record].

<sup>16</sup> The legislature expressly engaged in floor debates to establish “legislative intent.” *Id.* at 4299.

<sup>17</sup> *Id.* at 4298.

In Connecticut, “[i]n areas where the legislature has spoken, . . . the primary responsibility for formulating public policy must remain with the legislature” rather than the courts. *State v. Whiteman*, 204 Conn. 98, 103 (1987). The legislature expresses public policy through both statutes<sup>18</sup> and legislative history.<sup>19</sup> Public policy of sister states can also be authoritative.<sup>20</sup>

Denying absolute immunity to participants in these processes would undermine Connecticut’s legislative scheme and the legislature’s primacy in setting public policy.

**A. Because sexual misconduct denies students access to their education, schools must “play an active role in preventing” and responding to such misconduct, including by establishing safe reporting and disciplinary processes and lowering barriers to their use**

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<sup>18</sup> See, e.g., *Sheets v. Teddy’s Frosted Foods, Inc.*, 179 Conn. 471, 480 (1980); *State v. AFSCME, Council 4, Loc. 391*, 309 Conn. 519, 529-30 (2013).

<sup>19</sup> See, e.g., *McCoy v. Comm’r of Pub. Safety*, 300 Conn. 144, 168–171 (2011).

<sup>20</sup> See, e.g., *Cweklinsky v. Mobil Chem. Co.*, 267 Conn. 210, 218–20 (2004).

One in three students subjected to sexual violence drops out of their college.<sup>21</sup> See *Williams v. Bd. of Regents of the Univ. Sys. of Ga.*, 477 F.3d 1282, 1297 (11th Cir. 2007) (Plaintiff’s “decision to [immediately] withdraw from UGA was reasonable and expected” after she was sexually assaulted by fellow students). These harms are long-lasting.<sup>22</sup> Sexual violence “disrupt[s] survivors’ educational performance and attainment, affecting their future earnings”: many survivors experience significant drops in income as compared to peers.<sup>23</sup> These impacts then “exacerbate[] and entrench[] systemic inequalities.”<sup>24</sup> The Campus Violence Act’s legislative history is studded with testimony of how campus sexual assault inhibits educational access.<sup>25</sup>

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<sup>21</sup> Cecilia Mengo & Beverly M. Black, *Violence Victimization on a College Campus: Impact on GPA and School Dropout*, 0(0) J. Coll. Student Retention: Rsch., Theory & Prac. 243 (2015).

<sup>22</sup> See Cari Simon, *On Top of Everything Else, Sexual Assault Hurts the Survivors’ Grades*, Op-Ed, Wash. Post (Aug. 6, 2014), <https://www.washingtonpost.com/posteverything/wp/2014/08/06/after-a-sexual-assault-survivors-gpas-plummet-this-is-a-bigger-problem-than-you-think>.

<sup>23</sup> Rebecca M. Loya, *Rape as an Economic Crime: The Impact of Sexual Violence on Survivors’ Employment and Economic Well-Being*, 30 J. Interpersonal Violence 2793, 2796 (2014).

<sup>24</sup> Alexandra Brodsky, *Sexual Justice* 21 (2021).

<sup>25</sup> See, e.g., Hearings on H.B. 5031 Before the Subcomm. on Higher Educ. and Emp. Advancement of the J. Standing Comm., 2012 Leg. Feb. Sess at 763, 860, 862 [hereinafter Campus Violence Act Hearings].

To help address this tragedy, the Campus Violence Act “asks our schools . . . to play an active role in preventing assaults.”<sup>26</sup> Connecticut,<sup>27</sup> its sister states,<sup>28</sup> and the federal government<sup>29</sup> all recognize that this includes setting up strong reporting and disciplinary processes *and* lowering barriers to their utilization. The importance of establishing such processes and encouraging their use is echoed in the American Law Institute’s new “Principles of the Law, Student Sexual Misconduct: Procedural Frameworks for Colleges and Universities.”<sup>30</sup>

As Connecticut lawmakers have made clear, strong, widely-utilized school processes help prevent sexual misconduct and preserve educational access for victims in at least four ways.

First, they fill gaps left by the criminal justice system.<sup>31</sup> There are many reasons victims may not desire a criminal justice response but may seek a response from school authorities.<sup>32</sup> For example, the Campus Violence Act requires that schools offer a truth-seeking process that helps victims safely and confidentially present testimony,

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<sup>26</sup> Campus Violence Act Record at 4297 (statement by Rep. Roberta Willis, bill sponsor).

<sup>27</sup> *See id.* *See also* Conn. Gen. Stat. Ann. § 10a-55m.

<sup>28</sup> *See, e.g.*, Cal. Educ. Code § 66281.8; N.Y. Educ. Law § 6439–49; S.C. Code Ann. § 59-105-30; Tex. Educ. Code Ann. § 51.281–51.295.

<sup>29</sup> *See, e.g.*, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026, 30190 (2020) [hereinafter 2020 Title IX Regulations].

<sup>30</sup> *See, e.g.*, ALI Principles §§ 3.1, 3.2, & 3.3.

<sup>31</sup> *See, e.g.*, Campus Violence Act Record at 4303.

<sup>32</sup> *See* Leader, *supra* note 2, at 448.

witnesses, and other evidence in ways that the criminal justice system often does not. The availability of school procedures helps address the under-reporting and non-accountability crises.

Second, they create deterrence.<sup>33</sup> The “most potent predictor” of sexual misconduct in academia is the “perception of organizational tolerance” of that misconduct.<sup>34</sup> Sexual misconduct is more often perpetrated in environments where community members see that complaints will not be taken seriously and that there will not be meaningful sanctions for perpetrators.<sup>35</sup>

Third, they prevent repeat perpetration.<sup>36</sup> Repeat perpetrators are responsible for a striking percentage of campus sexual misconduct, including, for example, more than 87% of alcohol-involved campus

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<sup>33</sup> *See, e.g.*, Campus Violence Act Record at 4297.

<sup>34</sup> Nat’l Acads. of Sci., Eng’g, & Med., *Sexual Harassment of Women* (Frazier F. Benya et al. eds., 2018), <https://www.ncbi.nlm.nih.gov/books/NBK507206>.

<sup>35</sup> *Id.*

<sup>36</sup> 57 H.R. Proc., Pt. 3, 2014 Sess. 865–69 (Conn.) (Rep. Haddad, discussing legislation that built on the Campus Violence Act, observing that “90 percent of those sexual assaults that are committed on college campuses are committed by . . . repeat offenders”); Hearings Before the Subcomm. on Higher Educ. and Emp. Advancement of the J. Standing comm., Pt. 1, 2016 Leg. Sess. 368 (Conn.) (Sen. Flexer explaining that reporting and disciplinary processes “identify those repeat offenders early on so that they are caught the first time.”).



rapes.<sup>37</sup> By disciplining perpetrators through these processes, schools protect would-be victims.

Fourth, they help restore victims' educational access, realizing the promise made by Title IX.<sup>38</sup> In addition to the disciplinary processes, initial reporting processes can direct students to supportive resources. *See, e.g.*, ALI Principles §§ 2.4–2.7. For example, accommodations provided in response to a report of sexual misconduct can help protect a victim from continuing harm, such as running into their perpetrator on campus, as “encounters, of any sort, between a rape victim and her attacker could create an environment sufficiently hostile to deprive the victim of access to educational opportunities.” *Doe v. Hamden Bd. of Educ.*, LEXIS 40269, \*17.<sup>39</sup>

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<sup>37</sup> John D. Foubert et al., *Is Campus Rape Primarily a Serial or One-Time Problem? Evidence from a Multicampus Study* (Mar. 18, 2019), <https://journals.sagepub.com/doi/abs/10.1177/1077801219833820?journalCode=vawa#>.

<sup>38</sup> *See* Conn. Gen. Stat. Ann. § 10a-55m(b)(3) (requiring schools to notify reporting victims of available accommodations).

<sup>39</sup> *See* Know Your IX, <https://www.knowyourix.org/wp-content/uploads/2021/03/Know-Your-IX-2021-Report-Final-Copy.pdf> The Cost of Reporting 4-11 (2021), (describing educational costs to victims when accommodations aren't provided). The Second Circuit suggested quasi-judicial immunity may be inappropriate because a perpetrator allegedly does not “wield[] ‘extraordinary power’ within the[ir] . . . community,” *Khan v. Yale Univ.*, 27 F.4th 805, 825 (2022) (quoting *Craig v. Stafford Constr., Inc.*, 271 Conn. 78, 96 (2004)). But in their capacity to violently take over another person's body and create a hostile educational environment for their victims, many perpetrators do wield “extraordinary power” over peers.

Denying victims absolute immunity for engaging in school sexual misconduct processes will frustrate the state’s public policy of lowering barriers to reporting, accommodating victims’ educational needs, and ensuring that disciplinary processes ascertain the truth and ensure accountability.<sup>40</sup>

Without absolute immunity, each victim of sexual assault will be “force[d] . . . to parse out what statements would or would not make her subject to a potential defamation lawsuit as she complies with the procedures of the institution to ensure a proper educational environment.” *Razavi*, 122 N.E.3d at 373–74. Indeed, with every—often legally-mandated<sup>41</sup>—step schools take to encourage students to use their reporting and disciplinary processes, they will need to warn these same students about liability exposure, as mere qualified immunity does not protect against the burdens of litigation. Exacerbating this predicament is the fact that falsely accusing

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<sup>40</sup> Connecticut policy takes so seriously the importance of reporting sexual assault—and the harm created by structures that discourage reporting—that it grants immunity to reporting students who were violating school drug or alcohol policies when they experienced or witnessed an assault, Conn. Gen. Stat. Ann. § 10a-55m(b)(6)(G); treats sexual assault victims’ communications to counselors as privileged, *id.* § 52-146k(b); allows victims to use pseudonyms in court proceedings, *id.* § 54-86e and permits anonymous reporting to university authorities, *id.* § 10a-55m(d).

<sup>41</sup> *See, e.g.*, Conn. Gen. Stat. Ann. § 10a-55m (requiring schools to run “prevention and awareness programming for all students” that provides “information concerning the reporting of incidences of such assaults and violence”).

someone of rape in Connecticut is defamation per se,<sup>42</sup> so the stakes of engaging a school process will be tremendous.

In other words, victims and witnesses who choose to engage school processes will face an ever-present threat of suit. It's hard to imagine a better way to *discourage* victims from reporting sexual misconduct, to *undermine* their statutory right to “present evidence and witnesses on their behalf,”<sup>43</sup> and to *protect* perpetrators of sexual misconduct.

Without victim and witness testimony and evidence, school processes will be “toothless,” *Razavi*, 122 N.E.3d at 373. The victim will be denied their education, and “the sexual assault perpetrator goes free, potentially committing other similar misdeeds. This places the entire campus unnecessarily at a safety risk.” *Id.* at 374.

**B. Without protections from retaliation, including absolute immunity, victims will be dissuaded from using school reporting and disciplinary processes and will lose out on their education while perpetrators dodge accountability**

Sexual assaults “remain vastly under reported, primarily due to victims’ fear of retaliation.”<sup>44</sup> Protections against retaliation are so

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<sup>42</sup> See *Powell v. Jones-Soderman*, LEXIS 64038, \*12.

<sup>43</sup> Conn. Gen. Stat. Ann. § 10a-55m(b)(6)(C)(ii).

<sup>44</sup> *Sagaille v. Carrega*, 194 A.D.3d 92, 94 (N.Y. App. Div. 1st Dept. 2021), *leave to appeal denied*, 174 N.E.3d 710 (N.Y. 2021). See Campus

critical to sexual misconduct prevention efforts that the U.S. Supreme Court has observed that “if retaliation were not prohibited, Title IX’s enforcement scheme would unravel.” *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 180 (2005).

As new avenues of reporting have finally opened to victims, perpetrators have turned to defamation suits as a “form of retaliation against those with the courage to speak out.”<sup>45</sup> Perpetrators often file these suits without any expectation of prevailing on the merits.<sup>46</sup> Their goals instead are to isolate their victims from social and institutional support systems, ruin them financially, threaten their reputations, and generally continue the cycle of abuse.<sup>47</sup> As Jane Doe knows, these risks are not abstract. More than one in five victims are threatened with a defamation suit by their perpetrator or their perpetrator’s attorney.<sup>48</sup> As one abuser told his victim, “If you come after me, I’ll come after you.”<sup>49</sup>

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Violence Act Hearings at 862 (identifying “fear of reprisal” as a “dominant reason” for not reporting sexual assault); Michael Planty, et al., U.S. Dep’t of Just., NCJ 240655, *Female Victims of Sexual Violence, 1994–2010* 3, 7 (2013),

<https://www.bjs.gov/content/pub/pdf/fvsv9410.pdf>.

<sup>45</sup> *Sagaille*, 1194 A.D.3d at 94.

<sup>46</sup> See Leader, *supra* note 2, at 447.

<sup>47</sup> See Madison Pauly, *She Said, He Sued*, Mother Jones (Mar. 2020), <https://www.motherjones.com/crime-justice/2020/02/metoo-me-too-defamation-libel-accuser-sexual-assault>; *Sagaille*, 1194 A.D.3d at 94; Leader, *supra* note 2.

<sup>48</sup> Know Your IX, *supra* note 36, at 21.

<sup>49</sup> Know Your IX, *supra* note 36, at 21.

This concern about retaliatory litigation traces through the case law establishing absolute immunity for quasi-judicial procedures.<sup>50</sup> As the case law anticipates, a failure to grant absolutely immunity for statements made in school disciplinary procedures will create a backdoor to retaliation by perpetrators, undermining the protections against retaliation that schools are legally required to offer, discouraging reporting, and causing the extensive state and federal efforts to prevent sexual misconduct to “unravel.” *Id.*

Barriers to reporting and accommodations “embolden[] sexual assaulters who seek to weaponize the legal system in order to silence their victims.” *Sagaille*, 194 A.D.3d at 94. Denying absolute immunity here would erect such barriers, effectively overruling Connecticut state policy and undermining student safety.

### **C. It is state public policy that the obligation to protect students from sexual misconduct is uniform across public and private colleges**

The Second Circuit suggested that for the purposes of absolute immunity analysis, public school processes may be quasi-judicial while private school ones are less likely to be. *See Khan v. Yale*, 27 F.4th at 829–831. This outcome would directly contravene Connecticut public

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<sup>50</sup> *See, e.g., Craig*, 271 Conn. at 90-92; *Rioux*, 283 Conn. at 339; *Hartman*, 883 N.E.2d at 778. *See also Corbin v. Wash. Fire & Marine Ins. Co.*, 278 F. Supp. 393, 398–99 (D.S.C.), *aff'd*, 398 F.2d 543 (4th Cir. 1968) (concluding that absent protections from “threat of harassment via libel actions, arbitration becomes a farce and the many expressions of judicial and legislative encouragement of arbitration a snare”).

policy. Section 10a-55m expressly requires private *and* public schools to protect students from sexual violence and the legislative history confirms the legislative intent to ensure that “students, at any college in the State of Connecticut, [are] treated in the same manner.”<sup>51</sup> Federal law also soundly rejects the notion that misconduct processes should protect students at one type of educational institution but not the other.<sup>52</sup> But conditioning the type of immunity victims receive on the character of the educational institution they happen to have been accepted into—or received a scholarship to attend—would do just this.

**II. Under the doctrine of absolute privilege of consent, complaints made pursuant to a college’s reporting and disciplinary processes cannot form the basis of a defamation suit, so Jane Doe is absolutely immune for the statements at issue in this case (Question 5)**

The “consent of another to the publication of defamatory matter concerning him is a complete [absolute] defense to his action for defamation.” Restatement (Second) of Torts § 583; *Traylor*, 94 F. Supp. 3d at 218 (Connecticut follows the Restatement so the absolute privilege of consent applies).<sup>53</sup> Because Yale undergraduates consent to the jurisdiction of the UWC—with its attendant complaint, fact-finding, and hearing process—participants in that process enjoy a

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<sup>51</sup> Campus Violence Act Record at 4297–98, 4313 (statements by Rep. Willis).

<sup>52</sup> 2020 Title IX Regulations at 30052.

<sup>53</sup> *See also* Restatement (Second) of Torts § 583 (citing cases); D. Dobbs & P. Hayden, *The Law of Torts* (Sup. 2010) § 542.

complete defense to actions for defamation that arise out of statements given as part of that process.

When students—future victims and perpetrators alike—arrive on campus each year, they receive information about school rules prohibiting sexual misconduct and about school processes for reporting misconduct by fellow students. Schools provide this information pursuant to federal law<sup>54</sup> and, in Connecticut<sup>55</sup> and other states,<sup>56</sup> pursuant to state law. In Connecticut, as elsewhere,<sup>57</sup> undergraduate regulations create a binding contract between student and school, meaning students consent each year to the terms of enrollment.<sup>58</sup>

In the fall of 2015, for example, the plaintiff agreed to the provision of the *Yale Undergraduate Regulations* stating: “Each

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<sup>54</sup> 20 U.S.C. § 1092.

<sup>55</sup> Conn. Gen. Stat. Ann. § 10a-55m(b)(5).

<sup>56</sup> See, e.g., N.Y. Educ. Law § 6447; Cal. Educ. Code § 67385.7; 2021 Me. Laws ch. 733 (titled “An Act Concerning Interpersonal Violence on College Campuses”).

<sup>57</sup> See *Johnson v. Schmitz*, 119 F. Supp. 2d 90, 93 (D. Conn. 2000) (citing cases and recognizing this policy in sister states). See also, e.g., *Cosio v. Med. Coll. of Wis.*, 407 N.W.2d 302, 304 (Wis. App. 1987).

<sup>58</sup> See *Doe v. Quinnipiac Univ.*, 404 F. Supp. 3d 643, 667 (D. Conn. 2019) (“[T]he basic legal relation between a student and a private university or college is contractual in nature’ and ‘there seems to be no dissent from [the] proposition that the catalogues, bulletins, circulars, and regulations of the institution determine the contractual relationship between the student and the educational institution’”) (quoting *Burns v. Quinnipiac Univ.*, 120 Conn. App. 311, 320–21 (2010)).

student in Yale College is required as a condition of enrollment to comply with the *Undergraduate Regulations*.”<sup>59</sup> He further agreed that “[s]tudents may bring complaints regarding sexual misconduct directly to the University-Wide Committee on Sexual Misconduct.”<sup>60</sup> The *Undergraduate Regulations* summarize the disciplinary process and link to the UWC’s procedures.<sup>61</sup>

It is blackletter law that when individuals voluntarily join an institution, they consent to publications contemplated by institution-run disciplinary processes described in handbooks or guidelines.<sup>62</sup> For example, in *Rosenberg v. Am. Bowling Cong.*, 589 F. Supp. 547, 551–52 (M.D. Fla. 1984), the court cited the Second Restatement in holding that a suspended member’s defamation suit was barred because he had “agreed to be bound” by American Bowling Congress rules, which “plainly contemplate[d] the type of publication” issued in connection with a disciplinary process, and it was this publication “upon which plaintiff base[d] his defamation suit.”

Because the Plaintiff here “agree[d] to be bound” by the terms of the sexual misconduct complaint processes established by his school, he “consented to the type of publication” at issue in this suit and his suit is barred. *Rosenberg*, 589 F. Supp. at 551–52. Any other holding

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<sup>59</sup> *Yale College Undergraduate Regulations*, Yale University 2 (2015–2016), <http://catalog.yale.edu/archive/2015-2016/undergraduate-regulations/2015-2016%20Undergraduate%20Regulations.pdf>.

<sup>60</sup> *Id.* at 3.

<sup>61</sup> *Id.* See also *id.* at 66.

<sup>62</sup> See Restatement (Second) of Torts § 583; *id.* at Illustration 3. See also e.g., *Johnson v. Baptist Med. Ctr.*, 97 F.3d 1070, 1071, 1074 (8th Cir. 1996).



would yield the absurdity that the Plaintiff consented to subjecting himself to the federally- and state-mandated complaint process Yale established but is then empowered to drag his fellow student into court just because she used it.<sup>63</sup>

### **III. Conclusion**

Accordingly, the Court should hold that participants in college sexual misconduct processes are absolute immune for statements they give via those processes.

Respectfully submitted,

/s/ Jennifer M. Becker

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<sup>63</sup> See *McGreevy v. Stroup*, 413 F.3d 359, 370 (3d Cir. 2005) (concluding that a school nurse's annual evaluation "[could not] form the basis of a defamation claim" because it was mandated by Pennsylvania law and she thus consented to any defamation contained therein).

## **CERTIFICATION OF SERVICE AND COMPLIANCE**

The undersigned attorney hereby certifies, pursuant to Connecticut Rules of Appellate Procedure § 67-2, that:

(1) the electronically submitted brief has been delivered electronically to the last known e-mail addresses of each counsel of record for whom an email address has been provided; and

(2) the electronically submitted brief and the filed paper brief have been redacted or do not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law; and

(3) a copy of the brief has been sent to each counsel of record and to any trial judge who rendered a decision that is the subject matter of the appeal, in compliance with § 62-7; and

(4) the brief being filed with the appellate clerk are true copies of the brief that was submitted electronically; and

(5) the brief is 3,960 words; and

(6) the brief complies with all provisions of this rule.

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## CERTIFICATION OF MAILING

The undersigned attorney hereby certifies, pursuant to Connecticut Rule of Appellate Procedure § 67-2, that on June 17, 2022, a copy of the brief has been sent via U.S. Mail First Class to each counsel of record, pro se party, and the trial judge and Second Circuit judges who rendered a decision that is the subject matter of the appeal, as follows:

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