FILED, Clerk of the Supreme Court, 06 Oct 2025, **090230**

SUPREME COURT OF NEW JERSEY
Docket No. 090230

IN THE MATTER OF RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY, Petitioner-Petitioner, and AFSCME LOCAL 888, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, Respondent-Respondent.	On Petition for Certification from the December 13, 2024, Judgment of the Superior Court of New Jersey, Appellate Division Docket No. A-0277-23 Sat Below: Hon. Lisa Perez Friscia, J.A.D. Hon. Stanley L. Bergman, Jr. J.A.D. Civil Action Date Submitted: October 6, 2025

BRIEF IN REPLY TO AMICI CURIAE AMERICAN FEDERATION OF TEACHERS, COMMUNICATIONS WORKERS OF AMERICA, COUNCIL OF NEW JERSEY STATE COLLEGE LOCALS, LOCAL 5094, HEALTH PROFESSIONALS AND ALLIED EMPLOYEES, PART-TIME LECTURER FACULTY CHAPTER, RUTGERS COUNCIL OF AAUP CHAPTERS, AND UNION OF RUTGERS ADMINISTRATORS

SILLS CUMMIS & GROSS P.C.
The Legal Center, One Riverfront Plaza
Newark, New Jersey 07102
973-643-7000
pverniero@sillscummis.com
mcarucci@sillscummis.com
Counsel for Petitioner

Of Counsel and On the Brief:
Peter G. Verniero, Esq. (#017471984)
Michael S. Carucci, Esq. (#025192008)
On the Brief:
Paul Salvatoriello, Esq. (#032782001)

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

REGULATIONS AND FEDERAL REGISTER

OTHER SOURCES

PRELIMINARY STATEMENT

Amici curiae American Federation of Teachers and its allied organizations (collectively, AFT) seek to avoid the preemptive effect that federal Title IX rules have over this dispute. To do so, AFT proffers the same artificial dichotomy embraced by the Appellate Division—that a school's grievance process mandated by Title IX is "pre-disciplinary," while the grievance procedure contained in the union collective negotiations agreement (CNA) is "post-disciplinary." That distinction breaks with the plain language of the Title IX regulations and the drafter's underlying intent.

The Title IX regulations require institutions such as Rutgers to establish a comprehensive adjudicatory process when responding to sexual harassment complaints. The federally mandated process encompasses notice, an investigation, a live hearing, cross-examination, findings of responsibility, imposition of sanctions and appellate review. The CNA arbitration requested by the employee's union in this case would do more than review the employee's level of discipline. It would re-open and re-litigate the same questions of fact and responsibility already resolved under the Title IX process. And it would do so not before an appeals panel but at an arbitration hearing at which the victim would have no procedural rights, in contrast to the rights she had under the Title

IX process—all to determine, once again, whether there was "just cause" to terminate her harasser.

Rather than being "pre- or post-disciplinary," the Title IX proceeding and the requested CNA arbitration cover the ***same ground***. Thus, the CNA arbitration process would bring about a duplicative, collateral re-litigation of the same issues with the added specter that an arbitrator could nullify a finding of responsibility under the Title IX grievance process and order reinstatement of an employee found to have sexually harassed his female coworker in a bathroom and elsewhere in the workplace.

That result is not merely theoretical. It is a real possibility. That is so because, under the Appellate Division's judgment, a federally mandated Title IX grievance determination is now subject to second-guessing under a collateral CNA proceeding that affords ***no*** rights to victims and strips away the carefully calibrated equal protections guaranteed to both victim and accused under the Title IX regulations. Federal law does not permit that conflicting collateral process. The U.S. Department of Education (the Department) has been explicit that when the terms of a union contract or state law are inconsistent with the Title IX regulations, the federal regulations prevail. The New Jersey Employer-Employee Relations Act similarly seeks to avoid such inconsistencies.

Further, AFT asserts that Rutgers' reading of the operative Title IX regulations is "wrong." In so doing, AFT itself fails to recognize that it spends much of its brief relying on the wrong Title IX regulations. Indeed, many of AFT's arguments rest on the mistaken premise that the Department's 2024 Title IX regulations are in effect. They are not. The governing law is the 2020 Title IX regulations. By building so much of its analysis on an incorrect foundation, AFT's arguments miss the mark with respect to the questions before this Court.

Accordingly, Rutgers respectfully requests that the Court reject AFT's arguments and reverse the Appellate Division's judgment.

ARGUMENT

I. THE 2024 VERSION OF THE TITLE IX RULES ARE OF NO HELP TO AFT BECAUSE THEY WERE NOT IN EFFECT AT THE RELEVANT TIME AND HAVE SINCE BEEN INVALIDATED.

AFT asserts in its brief that the 2024 Title IX regulations "are currently in effect" (AFT Brief at 8 n.1), and that Rutgers is relying on "unconstitutional and thus invalid" regulations. (AFT Brief at 18 n.5). AFT relies on the 2024 regulations, devoting its argument at Point II to them. (See, e.g., AFT Brief at 5, 15-20). But AFT is mistaken—the 2024 rules were neither in effect at the relevant time nor are they currently in effect. Rutgers is correctly relying on the 2020 Title IX regulations.

This matter arose when a female Rutgers employee filed a Formal Complaint with the University on February 22, 2022, after she had been sexually harassed by a male co-worker. As of that date, the Title IX rules in effect were those adopted in 2020. See Final 2020 Title IX Rules, 85 Fed. Reg. 30579, 30028 (May 19, 2020) ("these final regulations are effective August 14, 2020").

More than two years after the formal complaint and PERC's decision below, the Department on April 29, 2024, attempted to amend the Title IX rules. 2024 Title IX Rules, 89 Fed. Reg. 33474 (Apr. 29, 2024). Before the amended rules could take effect on August 1, 2024, they were enjoined by the federal courts, which amounted to a prohibition against their enforcement. See, e.g., Tennessee v. Cardona, 737 F. Supp. 3d 510, 572 (E.D. Ky. 2024), and Louisiana v. Dept. of Education, 737 F. Supp. 3d 377, 410 (W.D. La. 2024). Ultimately, the 2024 rules in their entirety were invalidated by a federal court on January 9, 2025, in the case captioned Tennessee v. Cardona, 762 F. Supp. 3d 615 (E.D. Ky. 2025). That decision was not appealed. See Tennessee v. McMahon, No. 24-5588, 2025 WL 848197, at *8 (6th Cir. 2025).[1] As a result, the 2020 regulations have since been reinstated as the controlling law. See bit.ly/4nXKGCx (the Department acknowledging that the "2020 Title IX Rule

[1] That unreported decision is found at AFT Appendix at Aa39.

is now back in effect and is the basis for [Office of Civil Rights] enforcement of Title IX.").

Thus, AFT's assertion that the 2024 regulations "are currently in effect" is incorrect. AFT's discussion of the 2024 regulations should not be relied upon when analyzing the 2020 regulations. The 2020 regulations, and the Department's commentary related to those regulations, remain applicable. Such text and commentary represent the relevant law and regulatory history under which this appeal should be evaluated. Relying on the 2024 regulations in the current dispute would cause unnecessary confusion.

II. THE TITLE IX PROCESS IS COMPREHENSIVE, NOT MERELY "PRE-DISCIPLINARY," AND THE UNION ARBITRATION WOULD RE-LITIGATE AND CONFLICT WITH IT.

To avoid the inescapable conflict between the Title IX process and a CNA arbitration, AFT constricts the scope of Title IX. The crux of AFT's brief rests on the false premise that the "Title IX regulations only established a ***pre-disciplinary process***." (AFT Brief at 10) (emphasis added). That incorrect "pre-disciplinary vs. post-disciplinary" (or "pre-termination vs. post-termination") dichotomy is at the heart of all the briefs aligned against Rutgers' Petition as well as the opinions of PERC and the Appellate Division below.

The dichotomy is false for two fundamental reasons: (1) the Title IX regulations, as well as the Department's lengthy commentary, demonstrate that

the regulations govern the ***entirety*** of a school's response to a sexual harassment complaint up to and including any appeals; and (2) the union's CNA grievance process would include a ***complete re-litigation*** of a sexual harassment complaint, beginning with findings of fact. The oft-repeated argument that the Title IX grievance process is "pre-disciplinary," while the CNA arbitration is "post-disciplinary," is a fiction. In reality, both processes cover the same ground and, therefore, the state CNA grievance process must give way to the federal Title IX regulations under the Supremacy Clause. U.S. Const. art. VI, cl. 2; see also Hager v. M&K Const., 246 N.J. 1, 27 (2021) (doctrine of federal preemption "unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail").

A. Title IX Regulations Govern The Entirety Of A Response To A Sexual Harassment Complaint And Expressly State That Conflicting Union Contract Terms Are Preempted.

Contrary to AFT's select quotations from select passages of the Title IX regulations and commentary, the Title IX regulations are comprehensive. The intention to insist that institutions respond thoroughly to sexual harassment complaints is apparent from the Department's opening comments to its Title IX regulations, which state:

> These regulations are intended to effectuate Title IX's prohibition against sex discrimination by requiring recipients to address sexual harassment as a form of sex discrimination in education programs or activities. The

> final regulations obligate recipients to respond promptly and supportively to persons alleged to be victimized by sexual harassment, resolve allegations of sexual harassment promptly and accurately ***under a predictable, fair grievance process that provides due process protections to alleged victims and alleged perpetrators of sexual harassment***, ***and effectively implement remedies for victims***.
>
> [85 Fed. Reg. at 30026 (emphasis added).]

The preamble to the Title IX regulations also makes the Department's intention clear with respect to preemption in this setting, stating: "We wish to clarify that ***in the event of an actual conflict between a union contract or practice and the final regulations, then the final regulations would have preemptive effect***." 85 Fed. Reg. at 30298 (emphasis added). Likewise, the Title IX regulations expressly indicate the Department's intent to preempt conflicting state laws. 34 C.F.R. § 106.6(h) ("To the extent of a conflict between State or local law and title IX as implemented by . . . § 106.45, the obligation to comply with . . . 106.45 is not obviated or alleviated by any State or local law.").

The Title IX regulations define the elements of the mandated, holistic Title IX grievance process. 34 C.F.R. § 106.45(b). The regulations define the underlying principles for the process, including presumptions, standards of evidence, notice, representation, and unbiased investigators and decision-makers, as follows:

- written notice of allegations to the parties after receipt of a formal complaint, 34 C.F.R. § 106.45(b)(2);

- the right of each party to an attorney or non-attorney advisor of their own choosing for all grievance proceedings, or, if the party does not choose one, an advisor provided by the school for the purpose of conducting cross-examination at the live hearing, 34 C.F.R. § 106.45(b)(2)(i)(B), 34 C.F.R. § 106.45(b)(5)(iv), and 34 C.F.R. § 106.45(b)(6)(i);

- "a presumption that the respondent is not responsible for the alleged conduct" and "an objective evaluation of all relevant evidence," 34 C.F.R. § 106.45(b)(1)(ii) and (iv);

- a defined standard of evidence, 34 C.F.R. § 106.45(b)(1)(ii);

- investigation of formal complaints by an unbiased investigator, with the right of each party to respond to the evidence prior to the conclusion of the investigation, 34 C.F.R. § 106.45(b)(5);

- an investigation report "that fairly summarizes relevant evidence" and is provided to the parties, 34 C.F.R. § 106.45(b)(5)(vii);

- "a live hearing" before a "decision-maker(s)," with the presentation of evidence including the examination and cross-examination of witnesses by each party's advisor, 34 C.F.R. § 106.45(b)(6);

- "a written determination regarding responsibility," "disciplinary sanctions," and "remedies," 34 C.F.R. § 106.45(b)(7);

- a right to appeal on certain enumerated grounds and procedures, and a written determination of the appeal, 34 C.F.R. § 106.45(b)(8);

- the opportunity to appeal on "additional bases," provided the opportunity is allowed "equally to both parties, 34 C.F.R. § 106.45(b)(8)(ii);"[2] and
- having decision-makers—both at the initial live hearing stage and on appeal—who are unbiased and who comply with Title IX standards, including training. 34 C.F.R. § 106.45(b)(1)(iii).

Moreover, the Department repeatedly stresses, in the preamble to the Title IX regulations, that they pertain to the "investigation and ***adjudication***" of harassment complaints, not just the "investigation" of complaints. See, e.g., 85 Fed. Reg. at 30045. In that vein, the written determination at the conclusion of the investigation and hearing must incorporate not only a finding of responsibility, but "disciplinary sanctions," and "remedies." 34 C.F.R. § 106.45(b)(7). Then, the parties may appeal the written determination. 34 C.F.R. § 106.45(b)(8). That is, in fact, a post-disciplinary right of appeal included in the Title IX regulations.

In that regard, AFT's argument that "nothing in Section (b)(8) expressly spoke to an appeal of a disciplinary sanction," is contradicted by how the Title IX process is designed to work. (AFT Brief at 9-10). Critically, as if to dispel

[2] AFT also misstates the law in saying that the "2020 regulation governing appeals . . . do[es] not contain equal participation or equal opportunity requirements[.]" (AFT Brief at 11). To the contrary, 34 C.F.R. § 106.45(b)(8) provides, as noted, that additional bases for appeal must be allowed "equally to both parties," and "[a]s to all appeals, the recipient must . . . implement appeal procedures equally for both parties." 34 C.F.R. § 106.45(b)(8)(ii) and (iii)(A).

the doubts voiced by Respondent and amici, the Department stated in its commentary that "the final regulations leave to a recipient's discretion whether severity or proportionality of ***sanctions*** is an appropriate basis for appeal, but ***any such appeal offered by a recipient must be offered equally to both parties***." 85 Fed. Reg. at 30396 (emphases added). That commentary settles any question about whether the required provision of equal rights extends to appeals—it does. And the regulatory history demonstrates that the Title IX grievance process covers disciplinary sanctions and an appeal of those sanctions.

The text of the regulations is in accord. The rules permit an appeal of a disciplinary sanction so long as the appeal is offered equally to both parties. 34 C.F.R. § 106.45(b)(8)(ii). And any "provisions, rules, or practices" adopted beyond the specific mandated grievance procedures must be set forth in the implementing policy and "must apply equally to both parties." 34 C.F.R. § 106.45(b). The Title IX regulations also require that, under a Title IX grievance process, "[t]he determination regarding responsibility becomes final" upon the expiration of the time to appeal or, if there is an appeal, upon "the written determination of the result of the appeal." 34 C.F.R. § 106.45(b)(7)(iii).

Overall, the Department demonstrates that it views the mandated Title IX grievance process as sufficient to address concerns regarding "fairness, proportionality and prevention of discrimination ***in disciplinary sanctions*** that

recipients impose at the conclusion of the § 106.45 grievance process." 85 Fed. Reg. at 30104 (emphasis added). That is why the Department's commentary is replete with references to the due process protections incorporated into the regulatory procedures for "the benefit of both complainants and respondents, as well as recipients." 85 Fed. Reg. at 30051; see also id. at 30127 (the Department "believes that the final regulations benefit respondents by ensuring that recipients do not impose disciplinary sanctions against a respondent without following a process that complies with § 106.45 and that the prescribed grievance process gives strong due process protections to both parties"); id. at 30265 (Title IX grievance process rights ensure "equal opportunities ***to meaningfully participate in putting forth their views about . . . their desired case outcome***, an essential requirement for due process" (emphasis added)).

The foregoing sets forth clear and extensive evidence that the Title IX regulations are meant to provide a comprehensive, due-process protective response to a sexual harassment complaint, including post-discipline appeal rights. Attempting to counter that evidence, AFT emphasizes the Department's commentary that allows for "additional rights" under a CNA "as long as the recipient fulfills its obligations under Title IX." (AFT Brief at 14) (citing 85 Fed. Reg. at 30442). The operative phrase in the quote, however, is "***as long as the recipient fulfills its obligations under Title IX***." As discussed in more detail

below, the CNA grievance procedure, particularly the commencement of a collateral arbitration, would force Rutgers to neglect its "obligations under Title IX" because that arbitration would not comport with the mandatory requirements of the Title IX regulations.

On page 10 of its brief, AFT states, "Title IX regulations only established a pre-disciplinary process." If taken literally, not only is that cramped theory of Title IX incorrect, but its ramifications are disconcerting. If the Title IX process is "pre-disciplinary" only, then the federal regulations would never compel the school (as it in effect does now) to impose a remedy for found violations, which could include disciplining the perpetrator. That, in turn, would leave the victim with nothing more than the written determination of responsibility—a piece of paper. Under AFT's theory, the only way for the victim to see her harasser disciplined would be if the harasser's union agrees to a process as reflected in a CNA that contemplates such discipline, but even then, the process would afford procedural rights only to the accused. It is hard to imagine that the federal drafters of Title IX would design such a one-sided, hollow process.

Put another way, this case presents two possible constructions of federal law. The first is the federal rules set forth an integrated set of procedures that include a determination of liability; the imposition of a remedy, which could include employee discipline; and an appellate process—all applied equally to

both the accuser and accused. That is what Rutgers has been arguing since it filed its Petition. The second is that the federal rules only specify pre-disciplinary procedures and any additional procedures (including the imposition of discipline or appeals) need not apply equally and do not preempt state law. That construction—which seems to be AFT's construction—is antithetical to the framework, text and purposes of Title IX for the reasons stated in this and other briefs filed by Rutgers.

In sum, the comprehensive grievance process contemplated by the Title IX regulations—including a post-discipline appeals process—belies AFT's claim that the regulations merely outline a "pre-discipline" process. Rather, the Title IX regulations pertain to "investigation and ***adjudication***" of harassment complaints and provide "a predictable, fair grievance process that provides due process protections to alleged victims and alleged perpetrators of sexual harassment." 85 Fed. Reg. at 30026.

B. The CNA Process Is More Than A "Post-Discipline" Process; It Is A Collateral Proceeding That Denies Rights To Victims And Risks Usurping And Nullifying The Title IX Process.

AFT, as with others opposed to Rutgers' Petition, want this Court to believe that the CNA grievance procedure is merely a "post-discipline" process, which simply would allow for "a grievance challenging the discipline or discharge of a union member following a determination of responsibility."

(AFT Brief at 10). While AFT (and others) make such a process sound simple enough, the opposite is true. Rutgers need not repeat its response to the Attorney General's amicus brief on this subject. See Rutgers' Brief in Reply to the Attorney General, dated September 2, 2025, at 14-18. Instead, Rutgers will emphasize the relevant practical realities of a CNA arbitration to determine "just cause."

First, there is nothing in the CNA, in State law, or in general collective negotiations practice that requires an arbitrator to accept as true the Title IX decision-maker's factual findings or determination of responsibility in a sexual harassment case. As a threshold matter, an arbitrator in a so-called "post-discipline" arbitration is not required to agree that sexual harassment or sexual assault occurred. As such, an arbitrator under the CNA process—a process in which the sexual harassment victim has ***no*** substantive rights—can make a determination about responsibility that is the opposite of what the Title IX grievance investigator and decision-maker decided.

Second, and relatedly, the so-called "post-discipline" arbitration cannot focus solely on the question of whether "just cause" for termination existed without an investigation into the underlying facts that may support, or not support, "just cause." Thus, the arbitration will, by necessity, involve evidence and testimony about the facts of the sexual harassment allegation. In other

words, the CNA "post-discipline" arbitration would re-litigate what was extensively investigated and adjudicated in the Title IX grievance process—a process which already included a live hearing and an appeal. (Notably, forcing a victim to re-live an incident of sexual harassment or sexual assault a second time in a CNA arbitration, after completion of the comprehensive Title IX grievance process, can only add to the victim's trauma, especially when this CNA process offers her no substantive or procedural rights.)

Third, a CNA arbitration presents the possibility that an arbitrator will come to the opposite conclusion, that there was no "just cause" for termination and order the accused employee back to work. The Attorney General in his amicus brief admits this possibility. While the Attorney General speculates that the possibility of inconsistent results may be "highly unlikely" (AG Brief at 38), the fact remains that an arbitrator can order an employee found to commit sexual harassment under the Title IX grievance process back to work alongside his victim. That result would impair the school's obligation under Title IX to remedy the sexual harassment. Undoubtedly, the possibility of such reinstatement is the point of the union filing a grievance, and it proves the fatal flaw in AFT's (and others') "pre-discipline vs. post-discipline" dichotomy.

AFT further attempts to distinguish the CNA arbitration from the Title IX grievance process by suggesting that the decision-makers in a Title IX grievance

are not neutral or independent because they are "unilaterally" selected by the employer. (AFT Brief at 11 n.2). That suggestion fails to appreciate the safeguards in the Title IX regulations designed to ensure fairness, objectivity and neutrality towards both the complainant and respondent. The Title IX grievance process appropriately does not put the entire sexual harassment process in the hands of one person. Rather, the Title IX process calls for an "investigator" to investigate a formal complaint and a separate "decision-maker" to conduct a live hearing and determine responsibility and sanctions. 34 C.F.R. § 106.45(b)(5)-(7).

In this case, Rutgers went beyond the requirements of the Title IX process by utilizing an initial investigator and not one, but two, separate decision-makers. Rutgers' initial investigation was conducted by its Office of Employment Equity. Rutgers then, as is its practice, retained an outside attorney to serve as the first decision-maker who oversees the live hearing and makes a determination as to responsibility. Finally, Rutgers' second decision-maker determined whether there was just cause to terminate the employee.

Consistent with the foregoing, the Title IX regulations governing appeals ensure "that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator." 34 C.F.R. §

106.45(b)(8)(iii)(B). And perhaps most importantly, the Title IX regulations require that any investigator or decision-maker (i) have no conflict of interest or bias and (ii) receive training on "how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias." 34 C.F.R. § 106.45(b)(1)(iii). All those federal safeguards go beyond that which the union CNA provides, which is the selection of only one arbitrator by both the employer and the union.

Therefore, the argument that the selection by the employer and the union of a single arbitrator somehow leads to a more "independent, neutral decision-maker" is without merit. The regulatory safeguards in place to ensure fairness in a Title IX grievance process undermine AFT's attempt to cast doubt on the neutrality or independence of the multiple decision-makers in the Title IX process. Although AFT characterizes the Title IX process as embodying a unitary "judge, jury and executioner" of a sexual harassment complaint (AFT Brief at 22), in reality, the Title IX process requires the participation of multiple decision-makers trained on "how to serve impartially." By contrast, the single arbitrator contemplated by the CNA grievance process truly would act as "judge, jury and executioner" on whether the accused engaged in wrongful conduct and if so, what penalties should be imposed.

In sum, the comprehensive nature and due process protections of the Title IX grievance process—and the practical realities of a CNA arbitration—demonstrate that the "pre-discipline vs. post-discipline" argument is a fallacy. AFT says the two processes are "in peaceful coexistence" (AFT Brief at 29), but they are not. The Title IX and CNA grievance processes cover the same ground—i.e., whether there was just cause to terminate the accused's employment—but have widely different components, thus allowing for an actual conflict between the two processes. The union's attempt to get a "second bite at the apple" after a Title IX adjudication by advocating for re-litigation of the same issues in a CNA arbitration is nothing more than an attempt to nullify the Title IX determination and usurp the Title IX regulations themselves. Under federal preemption law, the CNA process must yield.

III. THE CNA ARBITRATION WOULD CONFLICT WITH THE TITLE IX REGULATION MANDATES, FURTHER PROVING THAT PREEMPTION IS REQUIRED.

As noted, any "provisions, rules, or practices" adopted beyond the specific mandated grievance procedures in the Title IX regulations "must apply equally to both parties." 34 C.F.R. § 106.45(b). Further, if there is an "actual conflict between a union contract or practice and the final regulations, then the final regulations would have preemptive effect." 85 Fed. Reg. at 30298.

Here, because the CNA grievance process does not apply equally to both parties (to both respondent and complainant), an actual conflict exists and the Title IX regulations "have preemptive effect." The arbitration contemplated by the CNA lacks so many procedural protections required by the Title IX regulations that it must be preempted by the regulations.

Specifically, in an arbitration under the CNA, the sexual harassment victim would be shorn of the procedural rights that are central to the framework and purpose of the Title IX regulations. The victim is not a party to a CNA arbitration brought on behalf of the accused harasser to contest the just cause of his discipline and, therefore, she has no rights under that process. For example, unlike the grievant (the accused harasser) in a CNA arbitration brought by the union on his behalf, the sexual harassment victim would have no right to:

- Notice of the proceedings;
- Participate in the selection of the arbitrator (as provided to the grievant's union in the CNA arbitration process);
- Gather, provide, and respond to evidence prior to or during the arbitration; or
- Participate in the arbitration, including presenting evidence and examining and cross-examining witnesses.

In each of those respects, the CNA arbitration process fails to "apply equally" to both the sexual harassment victim and the accused. Further, the

CNA arbitration conflicts with procedural requirements for an appeal from a Title IX grievance process determination, including:

- Having appeal decision-makers who comply with Title IX standards, including training. 34 C.F.R. § 106.45(b)(1)(iii).
- Giving the victim the right to have an advisor of their own choosing advocating on their behalf. 34 C.F.R. § 106.45(b)(5)(iv).
- "Giv[ing] both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome." 34 C.F.R. § 106.45(b)(8)(iii)(D).
- "Provid[ing] the written decision simultaneously to both parties." 34 C.F.R. § 106.45(b)(8)(iii)(E) and (F).

The CNA arbitration process also would deprive the sexual harassment victim of other rights that the Title IX regulations require for the adjudication and resolution of sexual harassment issues. It does not require application of the previously defined standard of evidence. 34 C.F.R. § 106.45(b)(7)(i). And it does not require consideration of the purposes and goals of Title IX, including "whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant." 34 C.F.R. § 106.45(b)(7)(ii)(E). All those procedural points are integral to the purpose and intent of the Title IX regulations.

The Appellate Division's opinion, championed in AFT's brief, relies on the happenstance that both the complainant and the respondent in this case were both union members. To argue that the complainant and the respondent would

stand "on equal footing" under the CNA process, AFT quotes the Appellate Division, that "the complainant was permitted to file a CNA grievance if she disagreed with the Title IX decision affecting a condition of her employment." (AFT Brief at 29). That argument assumes that it is procedurally and contractually possible for one union member to grieve the discipline (or lack thereof) imposed on another member. None of the briefs submitted to this Court has substantiated that assumption by citing any actual examples of such dueling grievances occurring in this setting. Indeed, there is at least one decision finding that the discipline to be imposed against certain supervisory employees cannot be arbitrated. See Twp. of Neptune and AFSCME Council 63, Local 2792, P.E.R.C. No. 2022-42, 48 N.J.P.E.R. ¶ 97, 2022 WL 1604471 (April 28, 2022) (Pa181) ("Accordingly, to the extent that Local 2792's grievances seek an arbitral remedy that would order the Township to impose discipline on certain employees, arbitration must be restrained.").

Any such assertion of dueling grievances would be impractical. That would mean that the union could simultaneously file: (1) one grievance in which the accused challenges the level of discipline imposed as too severe, in which the accused would be the grievant and the victim has no rights to participate and (2) a separate grievance in which the victim challenges the level of discipline imposed as not severe enough, in which the victim would be the grievant and

the accused would have no right to participate. If both grievances proceeded in parallel through the respective grievance procedures, and through to binding arbitration, one arbitrator could hold the discipline should be downgraded and the other could hold an upgrade in discipline is warranted, to the extent there is any basis to seek such a remedy through a contractual grieving process. That is obviously unworkable.

Moreover, the rule of law adopted by the Appellate Division would allow the employee found to have harassed (or as in this case, assaulted) a nonunion member (e.g., a student) to grieve his termination with the possibility of obtaining a reversal of that Title IX remedy. But, under that circumstance, the nonunion victim would have no access to a CNA agreement through which to seek her own grievance challenging that reversal. Either scenario—(1) a union member victim who somehow is able to seek her own grievance or (2) a nonunion victim who is without a CNA and thus unable to avail herself of the same process as the accused—would offend Title IX requirements. In the first scenario, the victim's union grievance still would lack the procedural protections required under the Title IX regulations and, under the second scenario, there is no opportunity for the victim even to activate her own grievance.

Even if the victim could somehow subsequently grieve the discipline (or lack thereof) imposed on the accused, the CNA arbitration still would lack all the elements mandated by the Title IX regulations discussed above—whether the arbitration was labeled an appeal or union grievance. In short, any hypothetical ability of the victim in this case to submit her own grievance under the CNA does nothing to bring a CNA arbitration on behalf of the accused into the scope of, and in compliance with, the Title IX requirements mandated in 34 C.F.R. § 106.45.

In sum, the CNA arbitration urged by AFT denies the most basic principle of the Title IX regulations—the guarantee of due process and "equal" treatment of a sexual harassment victim and the accused.[3] The CNA arbitration would not extend due process protections to the victim in this case. She would not be included as a party and, thus, would be deprived of the right to present evidence, examine and cross-examine witnesses, or otherwise participate in the CNA arbitration. Instead, the CNA arbitration would subject her to a procedure

[3] AFT appears to downplay the notion that "equal" treatment of the victim and accused is a touchstone feature of the Title IX regulations by arguing that the Department's comments "confirm that a negotiated disciplinary appeals process need not be available to both parties." (AFT Brief at 19). Yet, that argument is at odds with the Title IX regulation mandating that "all appeals . . . must . . . implement appeal procedures equally for both parties." 34 C.F.R. § 106.45(b)(8)(iii), (iii)(A). It is possible that AFT again is erroneously relying on the 2024 regulations that are not in effect.

designed only to address the accused's rights, rather than one mandated by the Department to require a careful balancing of the victim's and accused's rights. Therefore, permitting the CNA grievance process to proceed would alter and conflict with the procedural framework and balancing of rights established by the Title IX regulations, which is precisely what preemption is meant to prevent.

IV. AFT'S RELIANCE ON THIS COURT'S TURNPIKE DECISION IS MISPLACED; THAT DECISION IS DISTINGUISHABLE AND ACTUALLY SUPPORTS RUTGERS' POSITION.

AFT also argues that the Title IX regulations can exist "in peaceful coexistence" with the CNA arbitration because of how it construes this Court's decision in New Jersey Turnpike Authority v. New Jersey Turnpike Supervisors' Association, 143 N.J. 185 (1996). AFT's reading of Turnpike Authority, however, overlooks fundamental differences between that case and this one.

First, as a threshold matter, Turnpike Authority did not involve a question of federal preemption or the Title IX regulations. Rather, Turnpike Authority involved the interplay between two State statutes—New Jersey's Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -50, and the New Jersey Employer-Employee Relations Act (the EERA), N.J.S.A. 34:13A-1 to -64—under State preemption law. Thus, as discussed in greater detail in Rutgers' response to the Attorney General's amicus brief, Turnpike Authority has only limited

application because it neither addresses federal preemption nor the regulations at issue here.

Second, the analysis in Turnpike Authority is more of a description on how the LAD and the EERA can be harmonized than a rigorous analysis of state preemption law. In that regard, the Court in Turnpike Authority noted that so long as the employer's policy against sexual harassment reflects the standards of the LAD, and the CNA arbitration addresses those substantive standards, then the LAD and principles of the EERA can be harmonized. Id. at 199-200. Here, as already demonstrated, the procedural components of the CNA process are so procedurally different than the Title IX process, the two cannot be harmonized. Thus, under the Supremacy Clause, the CNA process must yield.

Third, the facts in Turnpike Authority differ from the facts of this case. And, as important, the Title IX regulations at issue here, unlike the LAD, provide an "alternative statutory remedy against alleged unjust discipline," which replaces the CNA procedures for disciplinary review. Specifically, in Turnpike Authority, a female employee registered a complaint with her employer, the Turnpike Authority, alleging that her immediate supervisor had sexually harassed her. Id. at 189. In accordance with its Sexual Harassment Policy, the Authority conducted an investigation and convened a hearing. Id. at 190. At the hearing, the supervisor was neither permitted to cross-examine

witnesses nor call any character witnesses. Ibid. After the supervisor was found to have committed sexual harassment, the Authority called for a three-day suspension and informed the supervisor that he could appeal the discipline to the Commissioners of the Authority. Ibid. After the supervisor lost his appeal before the Commissioners, his union filed a grievance which the Authority denied, believing that the grievance was preempted under state law by the LAD. Id. at 190-91.

Once the case came before this Court, the Court reviewed the EERA requirements. The Court first observed that N.J.S.A. 34:13A-5.3 provides that disciplinary procedures shall be subject to collective negotiations, including binding arbitration. Id. at 194. The Court further recognized, however, that if an employee has "an ***alternative statutory remedy against alleged unjust discipline***," then binding arbitration under a CNA grievance procedure "***may not be invoked***." Id. at 195 (emphases added). The Court reached that conclusion based on the language of N.J.S.A. 34:13A-5.3, which states that disciplinary review procedures "agreed to by the parties may not replace or be inconsistent with any alternate statutory appeal procedure." Ibid. The Court then reasoned that because "the toll supervisor has no appeal rights under LAD or any other statute" (ibid.), the exemption from binding arbitration under the CNA did not apply.

This case is materially different from Turnpike Authority, the holding of which, respectfully, should be confined narrowly to the facts and law presented in that case. Unlike the LAD, the Title IX regulations at issue here provide what was lacking in Turnpike Authority, namely, an "alternative statutory remedy against alleged unjust discipline." As discussed at length earlier, the mandatory Title IX grievance process confers the right to appeal the adjudication of a sexual harassment complaint under 34 C.F.R. § 106.45(b)(8). That right covers not only an enumerated set of bases for appeal, but also allows "additional bases" for appeal at the discretion of the institution. 34 C.F.R. § 106.45(b)(8)(ii). Notably, those appellate rights emerge after (not before) discipline is imposed, meaning the scope of such an appeal encompasses the discipline itself, not just the finding of responsibility. Moreover, unlike the supervisor in Turnpike Authority, the accused in the present case was afforded the right to bring witnesses on his behalf and cross-examine fact witnesses at his hearing, consistent with 34 C.F.R. § 106.45(b)(6).

For those reasons, the discussion in Turnpike Authority of an "alternative statutory remedy against alleged unjust discipline," which replaces an inconsistent CNA arbitration procedure, is an implicit recognition of the preemption principle at work in this case. The language of the EERA itself acknowledges that a discipline-related CNA arbitration must yield, i.e., it "may

not replace or be inconsistent with" any appellate procedure in law, which is the appellate process codified in the Title IX regulations in this case.

Rather than undermine Rutgers' argument, Turnpike Authority supports Rutgers' overall position that preemption must apply in this case. Under the EERA, when an "alternative statutory remedy against alleged unjust discipline" exists—the Title IX appeal process regulations in this case—then binding arbitration under a CNA "may not be invoked." Therefore, from that perspective, a Title IX appeal is the method by which an accused may challenge a disciplinary sanction, preempting the CNA arbitration process when a sexual harassment complaint is at issue.

V. RUTGERS' TITLE IX POLICY DOES NOT INCORPORATE THE CNA ARBITRATION AS A SUPPLEMENTAL APPEAL PROCESS OR OTHERWISE.

AFT also argues that Rutgers' Title IX Policy incorporates the CNA grievance procedure because the Policy provides that sanctions may include termination "consistent with the terms of all University Policies and the terms of any CNA (collective negotiations agreement) that may be applicable." (AFT Brief at 13). AFT's argument is without merit for two reasons.

First, as discussed in detail above, the CNA grievance procedure does not comport with the mandated requirements of the Title IX grievance process. Therefore, even if Rutgers intended to incorporate the CNA grievance procedure

with the resulting conflicts—which it did not—it could not do so and remain compliant with the Title IX regulatory mandates. In that regard, the phrase "that may be applicable" in the quoted passage confirms that an inconsistent CNA process would not "apply" to Rutgers' Title IX Policy.

Second, related language in the Policy also confirms that the Policy addresses consistency with the substance, not the process, of possible disciplinary actions under other policies or agreements. The Policy, at § VIII.L.1, provides:

> The Decision-maker(s) will impose sanctions. . . . The Decision-maker(s) will consider recommended sanctions and may consult the appropriate Title IX Coordinator to obtain ***information about sanctions imposed in similar cases***. However, the Decision-maker(s) will determine the appropriate sanctions to impose. In all cases involving employee Respondents, ***the decision concerning discipline shall be consistent with*** the terms of all University Policies and the terms of any collective negotiations agreements that may be applicable.

[(Pa82).]

Thus, the decision-maker is to determine disciplinary sanctions consistent with sanctions imposed in similar cases, under other policies and under any collective negotiations agreements—for example, termination for "just cause." Following the Policy, therefore, the written determination in this case described its "just cause to terminate" conclusion as being "consistent with" the discipline

available under Rutgers' policies and the CNA. (Pa126). Nothing in the Title IX Policy nor the written determination incorporates grievance procedures in any other policies or agreements, nor could it do so in accordance with the Title IX regulations.

VI. AFT'S SUGGESTED "EASY FIX" FAILS TO APPRECIATE THAT THE CNA ARBITRATION STILL WOULD NOT COMPORT WITH ALL THE REQUIREMENTS OF THE TITLE IX REGULATIONS.

If preemption applies, AFT nonetheless offers what it calls an "easy fix" to keep the CNA arbitration alive in the Title IX context. AFT suggests that this Court could "simply rule" that in all Title IX claims, the CNA grievance procedures "must be read as applicable to both the complainant and the respondent." (AFT Brief at 19). Such a ruling would be ill-suited and would still likely fail to avoid the conflicts between the two processes.

For starters, AFT's suggestion would allow the accused a complete do-over in a state CNA process, after the completion of a fully adjudicated federal process, and force the victim to re-live the trauma of her injuries. As demonstrated in Rutgers' numerous briefs, the Title IX process is intended to displace any competing or inconsistent state process. Abiding by that preemptive effect in this case would not only be efficient and avoid needless duplication of resources, but it would save the victim from the real possibility

of having to work alongside an employee who previously had been found to be her harasser.

Moreover, AFT's "easy fix" is essentially an invitation for this Court to do what it or any other court would typically decline to do. Namely, "a court should not rewrite a contract or grant a better deal than that for which the parties expressly bargained." Quinn v. Quinn, 225 N.J. 34, 45 (2016). This Court should not re-write a state arbitration process in an attempt to navigate all the permutations and interplay between complex Title IX regulations and a multi-step grievance procedure pursuant to a collective negotiations agreement.

Instead, the Court need only decide the case before it. In doing so, the true "easy fix" is already provided in the law—federal (not state) preemption law. Here, the comprehensive Title IX grievance process, which covers an investigation, adjudication and appeal of sexual harassment complaints and determinations, preempts the inconsistent grievance process under the specific language of the CNA at issue in this case. The Appellate Division incorrectly applied state rather than federal preemption law, which contributed to its incorrect holding. This Court's intervention is necessary to correct those errors.

CONCLUSION

For all the reasons discussed above, Petitioner respectfully requests that this Court reject AFT's arguments and reverse the judgment of the Appellate Division.

Respectfully submitted,

SILLS CUMMIS & GROSS P.C.

Dated: October 6, 2025

By: */s/ Peter G. Verniero*
Peter G. Verniero
Michael S. Carucci

Counsel for Petitioner Rutgers, the State University of New Jersey