S263180

IN THE SUPREME COURT OF CALIFORNIA

MATTHEW BOERMEESTER,
Plaintiff and Appellant,

v.

AINSLEY CARRY et al.,
Defendants and Respondents.

AFTER A DECISION BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION EIGHT
CASE NO. B290675

OPENING BRIEF ON THE MERITS

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OPENING BRIEF ON THE MERITS

ISSUES PRESENTED

1. Under what circumstances, if any, does the common law right to fair procedure require a private university to afford a student who is the subject of a disciplinary proceeding with the opportunity to utilize certain procedural processes, such as cross-examination of witnesses at a live hearing?

2. Did the student who was the subject of the disciplinary proceeding in this matter waive or forfeit any right he may have had to cross-examine witnesses at a live hearing?

3. Assuming it was error for the university to fail to provide the accused student with the opportunity to cross-examine witnesses at a live hearing in this matter, was the error harmless?

4. What effect, if any, does Senate Bill No. 493 (2019-2020 Reg. Sess.) have on the resolution of the issues presented by this case?

INTRODUCTION

University of Southern California (USC) student Matthew Boermeester violated USC's domestic violence policy by grabbing his ex-girlfriend, fellow USC student Jane Roe, by the neck and pushing her forcefully against a wall. Eyewitnesses saw the incident, and it was captured on surveillance video. USC gave Boermeester notice of the allegations against him and conducted a thorough investigation. Boermeester had ample opportunity to review and respond to the evidence, including the opportunity to

pose questions for Roe. After USC considered the evidence and provided Boermeester with multiple layers of review, USC expelled him. USC's procedures exceeded the basic fairness required by the common law. Nonetheless, a divided panel of the Court of Appeal disagreed and ordered the trial court to set aside the expulsion, concluding that the administrative hearing did not provide sufficient procedural safeguards.

Most importantly, and of significance far beyond this case, the Court of Appeal erred in concluding that USC violated Boermeester's common law right to fair procedure. This Court has long held that fair administrative hearing procedure provided by private organizations requires only "rudimentary procedural and substantive fairness." (*Ezekial v. Winkley* (1977) 20 Cal.3d 267, 278 (*Ezekial*).) In recent years, however, decisions of the Court of Appeal have moved beyond that principle, importing constitutional due process rules to regulate non-state actors and requiring universities to provide an increasingly burdensome array of litigation-like procedures in student discipline cases arising from allegations of sexual misconduct. The divided decision in this case went further still, requiring cross-examination at a live hearing in the context of a different kind of case: domestic violence.

These decisions are wrong, and contrary to this Court's jurisprudence. Common law fair procedure is a flexible concept that leaves to private organizations, not courts, the primary responsibility for ensuring basic fairness in their internal membership and disciplinary matters, which means notice and

an opportunity to respond. Principles of constitutional due process, which govern only state action, have no bearing in evaluating the fairness of private university disciplinary proceedings.

As part of its expansion of rights to be afforded to students accused of domestic violence, the Court of Appeal majority held that USC was required to provide Boermeester with live cross-examination of witnesses, including Roe. Boermeester, however, never requested a live hearing with cross-examination rights because he knew doing so would not help his case. Indeed, when USC invited him to submit written questions for Roe, Boermeester affirmatively told USC that he did not want Roe to appear for in-person questioning. Thus, even if Boermeester were entitled to additional process—which he was not—he waived this claim.

Moreover, any procedural error was harmless on this record because a live hearing with cross-examination could not have helped Boermeester's case. Boermeester himself admitted that he grabbed and pushed Roe, and intent to harm is not relevant under USC's domestic violence policy. The incident was also captured on surveillance video and seen by other eyewitnesses. A live hearing with cross-examination would have made no difference to USC's disciplinary determination or its consequences because the facts that Boermeester grabbed and pushed Roe were undisputed.

Finally, by passing Senate Bill No. 493 (2019-2020 Reg. Sess.) (SB 493), the Legislature recently recognized the

unacceptable costs of requiring universities to conduct mini-trials in sexual misconduct and domestic violence cases. SB 493 clarified that universities *themselves* must decide whether to provide live hearings with indirect cross-examination in such cases. The Legislature also expressly superseded any case law imposing requirements beyond those established in SB 493, which includes the law as provided in recent appellate decisions that have required universities to conduct adversarial hearings in sexual misconduct cases. Thus, the Legislature expressly rejected the trend of recent appellate decisions, such as the one at issue here, that have expanded the requirements of fair university hearings far beyond their common law basis. This Court should use this case to make clear that the Court of Appeal's decision here is both inconsistent with SB 493 and with the common law of fair procedure independent of SB 493.

For all of these reasons, this Court should reverse the decision of the Court of Appeal.

STATEMENT OF THE CASE

A. Matthew Boermeester grabs Jane Roe's neck and pushes her against a wall.

USC students Matthew Boermeester and Jane Roe[1] dated for about seven months. (1 AR 186.) After breaking up, they lived together in Roe's apartment. (1 AR 185-186.)

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[1] Like the Court of Appeal, we refer to Roe pseudonymously. (See *Boermeester v. Carry* (2020) 49 Cal.App.5th 682, 686, fn. 1 (*Boermeester*).)

In the early hours of January 21, 2017, Boermeester called Roe because he wanted her to pick him up from a party. (1 AR 184.) She obliged. (*Ibid.*) He was the drunkest she had ever seen him. (*Ibid.*)

When they returned home, they went to a nearby alley with Roe's dog. (1 AR 184.) In the alley, Boermeester told Roe to let go of the dog's leash, but Roe refused. (*Ibid.*) Boermeester then grabbed Roe's hair hard and ordered her to " 'drop the fucking leash.' " (*Ibid.*) He grabbed her harder when she again refused, and then she dropped the leash. (*Ibid.*)

Boermeester grabbed Roe by the neck, and she coughed. (1 AR 184.) He then let go and laughed. (*Ibid.*) Boermeester again grabbed Roe by her neck and pushed her forcefully against a concrete wall. (*Ibid.*) When her head hit the wall, he let go and then grabbed and pushed her again. (*Ibid.*) A neighbor entered the alley after hearing disturbing noises; Boermeester told him they were playing around. (*Ibid.*)

B. An eyewitness reports Boermeester's misconduct and USC opens an investigation.

Two fellow students saw the January 21 incident. (1 AR 85, 95.) One of the eyewitnesses reported it to a USC tennis coach, and USC's Title IX Office opened an investigation. (1 AR 1, 95, 126.)

USC's policy against "Student Misconduct—Sexual, Interpersonal and Protected Class Misconduct" then, as now, prohibited domestic violence, which it called intimate partner violence. (2 AR 486-487.) The policy required USC to conduct a

neutral investigation to evaluate whether a preponderance of the evidence overcame the presumption of non-responsibility. (2 AR 487-488.)

USC's Title IX Investigator, Lauren Elan Helsper, began an investigation. (1 AR 1.) She interviewed Roe, and Roe confirmed that Boermeester grabbed her by the neck and pushed her against a wall. (1 AR 184.)

Roe told Helsper that Boermeester had previously given her bruises, and that her father wanted her to get a restraining order against him. (1 AR 183.) Roe explained that when she "doesn't do what [Boermeester] wants she gets bruised." (1 AR 184.) Roe said that Boermeester "wouldn't leave" her apartment, and that when she asked him why he stayed with her, he responded that he could do whatever he wanted and she should shut up. (1 AR 183.) Roe told Helsper that Boermeester said he wouldn't feel bad if he hurt her, because " 'it would have been brought on by her.' " (*Ibid.*) She said his physical conduct towards her had become more frequent and " 'more hurtful' " over the course of their relationship. (1 AR 186.)

USC offered to provide emergency housing to Roe so she could avoid contact with Boermeester, and Roe accepted the offer because she wanted "to feel safe." (1 AR 188.) Roe worried about Boermeester's anticipated reaction to the investigation, and she told Helsper that she was concerned that Boermeester would think she was pressing charges or that she had met with investigators. (1 AR 154-156.)

C. USC notifies Boermeester of the allegations against him and conducts a thorough investigation; Roe recants.

USC served Boermeester with a notice of investigation, an avoidance-of-contact order directing him to stay away from Roe, and a notice of interim suspension. (1 AR 4; 2 AR 470-473.) USC informed Boermeester in writing that a report had been made indicating that he violated the school's policy prohibiting domestic violence by grabbing Roe's neck and pushing her against a wall on January 21. (2 AR 470.)

Helsper then interviewed Boermeester, who admitted that he put his hand on Roe's neck. (1 AR 172-174, 179.) Boermeester also admitted that he "pushed and grabbed" Roe, but he claimed that the pushing and grabbing was a "sexual thing" and playful. (1 AR 60, 173.)

Shortly after USC began its investigation, Roe recanted her initial complaint. (1 AR 12-13, 168-169.) Roe was worried that Boermeester might retaliate against her. (1 AR 12.) Roe said she did not want him to be angry at her, and she asked USC to lift the avoidance of contact order. (1 AR 168-169.) She said Boermeester was " 'like my best friend,' " and she feared losing him. (1 AR 168.) She wanted the investigation dropped. (1 AR 158, 168-169.)

Roe also recanted in public. In response to media reports, she tweeted that "[t]he report is false." (1 AR 14.)

Helsper interviewed the eyewitnesses, who corroborated details from Roe's initial account. (1 AR 85, 95.) After first downplaying what he saw (1 AR 131), one eyewitness told

Helsper that he saw Boermeester with his hands around Roe's neck (1 AR 85). This eyewitness saw Boermeester push Roe against the wall, and he heard Roe make gagging sounds. (*Ibid.*) Another eyewitness observed Boermeester pinning Roe against the wall. (1 AR 95.)

Helsper also interviewed Roe's friends, including those with whom Roe spoke shortly after the incident. (1 AR 92-93, 133-135.) Roe's friends said she told them Boermeester threw her against the wall, hurt her, and scared her. (1 AR 93, 133.) Roe's friends confirmed that Roe and Boermeester had a volatile relationship and that they would call each other demeaning names. (1 AR 18-22, 25-30, 151-153, 165-166.) Roe told her friends that he gave her bruises. (1 AR 19, 25.) She also told her friends that she and Boermeester had been in contact even though USC had directed Boermeester to avoid such contact. (1 AR 53-54.)

In addition to conducting interviews, Helsper reviewed surveillance footage of the incident. (1 AR 43-45.) The surveillance footage corroborated Roe's initial account that Boermeester grabbed her and pushed her. (1 AR 43-45; 6 CT 1161-1162.)

D. USC affords Boermeester the opportunity to tell his side of the story and pose questions for Roe, but Boermeester does not request live cross-examination or appear at his hearing.

Under its policy, USC presumed Boermeester was not responsible for the alleged misconduct. (2 AR 487.) That

presumption could be overcome if a preponderance of the evidence showed he committed the misconduct. (2 AR 487-488.)

USC's policy gave Boermeester the right to review the evidence against him. (2 AR 492-493.) He did so with the assistance of counsel. (1 AR 47-48, 89, 291, 301.)

USC's policy also afforded both Boermeester and Roe the opportunity to appear at separate in-person hearings, which would give them the opportunity to respond to the evidence. (2 AR 493.) USC's policy afforded Boermeester the right to submit questions in advance for USC's Title IX Coordinator to ask Roe. (2 AR 492-493.) But Boermeester declined to submit any questions for Roe, nor did he request live cross-examination or any similar procedure. (1 AR 291-295, 296.) Boermeester's lawyer told USC that "I am not interested in having [Roe] come in and being put on the spot yet again." (1 AR 293.)

Boermeester also never sought to pose questions to witnesses other than Roe, either in writing or in person. Boermeester declined to attend his hearing in person, electing instead to submit a written statement. (1 AR 59-66, 291, 293.)

E. USC concludes that Boermeester violated its domestic violence policy and, after affording Boermeester multiple layers of review, expels him.

After considering all of the evidence, Helsper determined that Boermeester violated USC policy by (1) committing domestic violence, and (2) continuing to contact Roe after USC directed him to avoid contact with her. (1 AR 54.) A three-member Misconduct Sanctioning Panel recommended expulsion.

(1 AR 81-82; 2 AR 493.) Boermeester appealed to USC's final decisionmaker, Vice President for Student Affairs Dr. Ainsley Carry, who reviewed the case, including the recommendation of an Appeal Panel. (1 AR 197-208, 215-220; 2 AR 494-496.) Dr. Carry agreed that Boermeester should be expelled. (1 AR 221-222.)

F. Boermeester petitions unsuccessfully for a writ of mandate.

Following his expulsion, Boermeester filed a petition for writ of mandamus in Los Angeles Superior Court. (1 CT 6-208; 2 CT 209-309.) The superior court denied the petition. (2 RT 1514; 6 CT 1129-1151.) Boermeester appealed. (6 CT 1237.)

G. The Court of Appeal reverses in a divided decision. This Court depublishes the opinion and grants review.

In a divided, published opinion, the Court of Appeal majority concluded that USC deprived Boermeester of his common law right to fair procedure and directed the trial court to grant his petition for writ of mandate and set aside his expulsion. (*Boermeester*, *supra*, 49 Cal.App.5th at pp. 708-709.) In doing so, the majority relied on recent intermediate appellate decisions imposing procedural requirements on private institutions like USC and on cases addressing procedures at public universities. (*Id*. at pp. 698-699.)

In a footnote, the majority noted a split of authority regarding the applicability of constitutional due process jurisprudence to private universities. (*Boermeester*, *supra*, 49 Cal.App.5th at p. 698, fn. 7.) The majority stated, without

further explanation, that "[i]n either case, we may rely on cases involving public university disciplinary proceedings." (*Ibid.*)

On the merits, the majority held that USC's procedures were deficient because USC did not provide Boermeester with an in-person hearing featuring cross-examination of key witnesses. (*Boermeester*, *supra*, 49 Cal.App.5th at pp. 705-706.) The majority faulted USC for not (1) giving Boermeester the opportunity to attend Roe's hearing either in person or via videoconference, (2) giving Boermeester the opportunity to cross-examine third-party witnesses, and (3) allowing Boermeester to ask Roe follow-up questions. (*Ibid.*)

The majority concluded that these procedural deficiencies were not harmless because "this case rests on witness credibility." (*Boermeester*, *supra*, 49 Cal.App.5th at p. 708.) The court so held despite the facts that Boermeester declined to seek cross-examination or submit questions for Roe; the abuse occurred in public; and the abuse was corroborated by other witnesses, including the victim in her original detailed statement, and a surveillance video. (*Ibid.*; see *id.* at pp. 686, 694, 700-703, 705-708.)

In dissent, Justice Wiley concluded that "[s]ubstantial evidence shows [Boermeester] committed domestic violence," and "USC's investigation was thorough and fair." (*Boermeester*, *supra*, 49 Cal.App.5th at pp. 709, 713 (dis. opn. of Wiley, J.).)

He concluded that Boermeester waived the cross-examination issue because he made the strategic decision not to submit cross-examination questions for Roe. (*Boermeester*, *supra*,

49 Cal.App.5th at pp. 714-715 (dis. opn. of Wiley, J.).) This was because Roe had already recanted and cross-examination could only harm Boermeester's case. (*Id.* at pp. 714-716 (dis. opn. of Wiley, J.).) Justice Wiley also noted that Boermeester sensibly never sought to cross-examine third-party witnesses because "[t]hese witnesses offered Boermeester nothing but danger" in view of Roe's initial statement and his admission of the central facts. (*Id.* at pp. 716-717 (dis. opn. of Wiley, J.).)

In his dissent, Justice Wiley faulted the majority for relying on precedents addressing university procedures for evaluating allegations of sexual misconduct. (See *Boermeester*, *supra*, 49 Cal.App.5th at pp. 719-721 (dis. opn. of Wiley, J.).) The dissent explained that the sexual misconduct cases "involve cross-examination when a woman and a man tell conflicting stories" and "[t]he accused man want[s] cross-examination to shake the woman's story." (*Id.* at p. 719 (dis. opn. of Wiley, J.).) The dissent observed that here, by contrast, the two conflicting accounts both came from Roe herself (*ibid.*), and noted that it is common for the victim to recant in cases of domestic violence (*id.* at pp. 711-712 (dis. opn. of Wiley, J.)). Finally, Justice Wiley observed that "[t]he cases to date all concern the right of confrontation when it could possibly have done the man some good," but "[n]o precedent deals with a situation where the man wanted to *avoid* confrontation because it offered him only peril." (*Id.* at p. 721 (dis. opn. of Wiley, J.).)

Next, Justice Wiley took issue with the majority's application of constitutional due process principles to a private

institution because "[s]tate law governing private schools can depart from constitutional rules that govern state institutions." (*Boermeester*, *supra*, 49 Cal.App.5th at p. 722 (dis. opn. of Wiley, J.).)

The dissent observed that the new rules created by the majority and other recent intermediate appellate opinions could make victims less likely to report abuse. (*Boermeester*, *supra*, 49 Cal.App.5th at pp. 723-724 (dis. opn. of Wiley, J.).)

After the Court of Appeal summarily denied USC's petition for rehearing or to modify the decision, USC filed a petition for review. This Court granted the petition for review and ordered immediate depublication of the Court of Appeal's opinion.

LEGAL ARGUMENT

I. Common law fair procedure does not require live hearings with cross-examination, and the procedure by which USC investigated Boermeester's domestic violence was fair.

A. Private organizations need flexibility to conduct internal discipline, subject to the rudimentary common law requirements of notice and an opportunity to respond.

This Court has long recognized a common law doctrine of "fair procedure" applicable to the decisions of private organizations and associations that serve as gatekeepers to certain professions or otherwise affect their members' important economic interests. (E.g., *Otto v. Tailors' Protective & Benevolent Union of San Francisco* (1888) 75 Cal. 308, 314-315; see *Ezekial*, *supra*, 20 Cal.3d at p. 277; *Pinsker v. Pacific Coast Society of*

Orthodontists (1974) 12 Cal.3d 541, 550-551, fns. 7 & 8 (*Pinsker II*).) "The purpose of the common law right to fair procedure is to protect, in certain situations, against arbitrary decisions by private organizations." (*Potvin v. Metropolitan Life Ins. Co.* (2000) 22 Cal.4th 1060, 1066 (*Potvin*).)

Inherent in the common law fair procedure doctrine (which governs the disciplinary procedures used by private universities and many other private associations) is that private institutions "retain the initial and primary responsibility" for developing fair procedures. (*Pinsker II*, *supra*, 12 Cal.3d at p. 555; cf. *El-Attar v. Hollywood Presbyterian Medical Center* (2013) 56 Cal.4th 976, 988-989 (*El-Attar*) [addressing procedural requirements in the context of the statutory scheme detailing procedures for hospital peer reviews].) "In drafting such procedure, and determining, for example, whether an applicant is to be given an opportunity to respond in writing or by personal appearance, *the organization* should consider the nature of the tendered issue and should fashion its procedure to insure a *fair* opportunity for an [individual] to present his position." (*Pinsker II*, at pp. 555-556, first emphasis added; accord, *Ezekial*, *supra*, 20 Cal.3d at p. 279.)

"[C]ourts remain available to afford relief in the event of the abuse of such discretion." (*Pinsker II*, *supra*, 12 Cal.3d at p. 556.) But judicial intervention in the decisions of private organizations is not, and should not be, routine. To the contrary, routine judicial intervention would constitute " 'both an intrusion into the internal affairs of [private associations] and an unwise burden on judicial administration of the courts.' " (*Id.* at p. 557.)

Because private organizations maintain the primary responsibility for managing their internal affairs, the "common law requirement of a fair procedure does not compel formal proceedings with all the embellishments of a court trial." (*Pinsker II*, *supra*, 12 Cal.3d at p. 555.) Such formalities are not required in recognition of "the practical limitations on the ability of private institutions to provide for the full airing of disputed factual issues." (*Ezekial*, *supra*, 20 Cal.3d at p. 278.) Common law fair procedure does not compel "adherence to a single mode of process," and courts "should not attempt to fix a rigid procedure that must invariably be observed." (*Pinsker II*, at p. 555.) Rather, fair procedure requires only "rudimentary procedural and substantive fairness." (*Ezekial*, at p. 278.) This Court has explained that rudimentary procedural fairness requires only that the accused have (1) "adequate notice of the 'charges' against him," and (2) a "reasonable opportunity to respond." (*Pinsker II*, at p. 555.)

Parties seeking to challenge the procedures employed by private organizations may bring a petition for a writ of administrative mandate under Code of Civil Procedure section 1094.5. (*Anton v. San Antonio Community Hosp.* (1977) 19 Cal.3d 802, 814-817 (*Anton*), superseded by statute on another ground as stated in *Fahlen v. Sutter Central Valley Hospitals* (2014) 58 Cal.4th 655, 678, fn. 11.) That provision authorizes courts to evaluate, among other issues, whether the organization provided a "fair trial." (Code Civ. Proc., § 1094.5, subd. (b).) In this context, "fair trial" means a fair administrative

procedure—it does not compel "a formal hearing under the due process clause." (*Pomona College v. Superior Court* (1996) 45 Cal.App.4th 1716, 1730 (*Pomona College*).)

B. Common law fair procedure does not require private organizations to conduct live hearings with cross-examination.

This Court's seminal decisions applying the common law right to fair procedure illustrate that private organizations need only provide notice and an opportunity to respond, and need not conduct live hearings with cross-examination, as the Court of Appeal below erroneously held.

In *Von Arx v. San Francisco Gruetli Verein* (1896) 113 Cal. 377, 379-380, this Court held that a private society could expel a member only if it gave "reasonable notice of the proceeding . . . and a fair opportunity of presenting [a] defense in accordance with general principles of law and justice." This Court did not require the society to conduct a live hearing with cross-examination. (See *ibid.*)

Almost half a century later, in *James v. Marinship Corp.* (1944) 25 Cal.2d 721, 724-725, 740, this Court invalidated a labor union's policy of excluding African Americans from full membership. Drawing on common law principles, this Court rejected the union's argument that it "may, for any arbitrary reason whatsoever, entirely close its membership to otherwise qualified persons and at the same time may, by enforcing a closed shop contract, demand union membership as a condition to the right to work." (*Id.* at p. 730.) This Court did not hold that labor

unions were obligated to provide live hearings with cross-examination in reaching such issues.

This Court took a different approach several years later. In *Cason v. Glass Bottle Blowers Ass'n of U.S. and Canada* (1951) 37 Cal.2d 134, 144-145 (*Cason*), this Court required a national labor union to allow an expelled local union president to cross-examine the witness against him. But *Cason*'s holding regarding cross-examination in the union context is thinly reasoned. *Cason* relied on out-of-state authorities that themselves provided scant justification for requiring cross-examination in labor union proceedings. (See *id.* at p. 144, citing *Harmon v. Matthews* (Sup.Ct. 1941) 27 N.Y.S.2d 656, *Brooks v. Engar* (App.Div. 1940) 19 N.Y.S.2d 114, and *Bartone v. Di Pietro* (Sup.Ct. 1939) 18 N.Y.S.2d 178.) And the two California cases on which *Cason* relied did not discuss cross-examination at all. (See *Cason*, at p. 144, citing *Taboada v. Sociedad Espanola De Beneficencia Mutua* (1923) 191 Cal. 187 and *Ellis v. American Federation of Labor* (1941) 48 Cal.App.2d 440.)

In any event, this Court abandoned any such live cross-examination requirement in its subsequent fair procedure cases. Notably, *Pinsker II* cited *Cason* for the proposition that fair procedure does *not* compel formal proceedings with the embellishments of a court trial. (See *Pinsker II*, *supra*, 12 Cal.3d at p. 555.)

In *Pinsker II*, a professional association rejected a dentist's membership application without providing him an opportunity to respond to the charges against him. (*Pinsker II*, *supra*, 12 Cal.3d

at pp. 544, 555-556.) This Court held that "[u]nder common law principles, a 'fair procedure' requires that before the denial of an application, an applicant be notified of the reason for the proposed rejection and given a fair opportunity to defend himself." (*Id.* at p. 555, boldface omitted.) This Court did *not* hold that the dentist was entitled to cross-examine witnesses at an in-person hearing. (See *id.* at pp. 555-556.) Indeed, this Court did not mandate an in-person hearing at all. (See *ibid.*) Instead, this Court emphasized that the association itself retained the responsibility to determine and implement a fair procedure. (*Ibid.*)

Shortly thereafter, in *Ezekial*, this Court cemented the flexible approach to fair procedure articulated in *Pinsker II*. *Ezekial* concerned "whether a surgical resident in a private teaching hospital must be accorded notice of charges and an opportunity to respond, pursuant to the 'common law right of fair procedure' [citation], prior to dismissal from the residency program." (*Ezekial*, *supra*, 20 Cal.3d at pp. 269-270.) This Court reiterated that "rudimentary" common law fair procedure requires adequate notice of the charges and a reasonable opportunity to respond. (*Id.* at pp. 278-279.) As in *Pinsker II*, this Court did not mandate an in-person hearing, let alone an in-person hearing featuring cross-examination. (*See ibid.*) To the

contrary, this Court emphasized that the organization itself was responsible for developing its own fair procedures. (*Ibid.*)[2]

C. USC provided a fair procedure to Boermeester.

Under the authorities described above, USC provided Boermeester with ample procedural safeguards—indeed, USC provided far more than the simple notice and an opportunity to respond required by *Pinsker II* and *Ezekial*.

USC provided Boermeester with notice of the specific allegations against him (2 AR 470-471), which the Court of Appeal below unanimously and properly determined was sufficient in a part of the opinion that is not on review before this Court. (See *Boermeester*, *supra*, 49 Cal.App.5th at pp. 695-696; *id*. at pp. 714-715 (dis. opn. of Wiley, J.).) USC also provided Boermeester with ample opportunity to respond to the charges against him. USC gave Boermeester multiple opportunities to review the evidence, including Roe's statements. (1 AR 47-48, 291; 2 AR 301.) USC permitted him to tell his side of the story through an interview (1 AR 171-182), written submissions

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[2] Several Court of Appeal decisions reflect this Court's guidance. (See, e.g., *Wilson v. San Luis Obispo County Democratic Central Com.* (2009) 175 Cal.App.4th 489, 502 [fair procedure does not require " 'a full blown adversarial process with the right to counsel and cross-examination' "]; *Dougherty v. Haag* (2008) 165 Cal.App.4th 315, 317-318 (*Dougherty*) [fair procedure requires only notice and an opportunity to respond either in writing or in person]; *Rosenbilt v. Superior Court* (1991) 231 Cal.App.3d 1434, 1445 ["What constitutes a fair procedure is not fixed or judicially prescribed" as long as an organization provides notice and an opportunity to respond].)

(1 AR 58-66), and an in-person hearing, the last of which he declined (1 AR 291; 2 AR 493). USC also afforded Boermeester the opportunity to submit questions for Roe, which he declined as well. (1 AR 291-295, 296; 2 AR 492-493.) And USC provided Boermeester with multiple layers of review, so that the findings and decision were considered multiple times by independent decisionmakers. (1 AR 1-78, 81-82; 197-208, 215-222; 2 AR 492-496.)

USC thus satisfied its common law duty to provide Boermeester with procedural fairness. The Court of Appeal below erred in concluding otherwise.

D. California's common law fair procedure doctrine is the governing authority for private university disciplinary proceedings—not the federal Constitution's due process clause, as some appellate decisions have erroneously suggested.

1. A private university's student disciplinary investigation is not state action.

In deciding what process was owed Boermeester, the Court of Appeal majority held that it could rely on cases decided under the federal Constitution's due process clause, even though USC is a private university, because other California appellate courts have assumed that constitutional due process requirements are " 'instructive' " on or " 'mirror' " California's common law fair procedure doctrine. (*Boermeester*, *supra*, 49 Cal.App.5th at p. 698, fn. 7.) The dissent observed that this approach is "mystif[ying]," and suggested that this Court should "trace and . . . evaluate this rule's rise in the lower California courts."

(*Id*. at p. 722 (dis. opn. of Wiley, J.).) The dissent was correct on both counts.

The due process clause applies only to state action. (See, e.g., U.S. Const., 14th Amend., § 1; Cal. Const., art. I, § 7, subd. (a); *Rendell-Baker v. Kohn* (1982) 457 U.S. 830, 837 [102 S.Ct. 2764, 73 L.Ed.2d 418] (*Rendell-Baker*) [the Fourteenth Amendment, "which guarantees due process, applies to acts of the states, not to acts of private persons or entities"]; *Homestead Savings v. Darmiento* (1991) 230 Cal.App.3d 424, 431-432 (*Homestead Savings*) ["The threshold question in this case as in any due process case, federal or state, [citation] is whether the challenged conduct involves state action"].)

Thus, for example, in *Rendell-Baker*, the U.S. Supreme Court held that a private school's determination whether to discharge its teachers is not state action under any of several tests.[3] (*Rendell-Baker*, *supra*, 457 U.S. at pp. 837-843.) Recently, the Ninth Circuit, relying on *Rendell-Baker*, held that a private California university was not required to comply with constitutional due process requirements when enforcing Title IX and state antiharassment laws by investigating a sexual harassment complaint against a professor. (*Heineke v. Santa Clara University* (9th Cir. 2020) 965 F.3d 1009, 1014 (*Heineke*).) The court reaffirmed that "[r]eceipt of government funds is insufficient to convert a private university into a state actor."

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[3] *Rendell-Baker* considered claims under 28 U.S.C. § 1983, but explained that these claims turned on the same "state action" requirement as Fourteenth Amendment due process claims. (*Rendell-Baker*, *supra*, 457 U.S. at p. 838.)

(*Id*. at p. 1013.) "Nor is compliance with generally applicable laws sufficient to convert private conduct into state action." (*Ibid*.) Even if failure to comply with these laws subjects the private actor to penalties, there is no state action where the government does not dictate the result in a particular case. (*Id*. at p. 1014.) The court concluded that a private university "does not become a state actor merely by virtue of being required by generally applicable civil rights laws to ameliorate sex (or any other form of) discrimination in educational activities as a condition of receiving state funding." (*Ibid*.; see *Caviness v. Horizon Community Learning Center, Inc.* (9th Cir. 2010) 590 F.3d 806, 808, 814-816 [charter school's publication of allegedly defamatory statements in connection with investigation of sexual harassment complaint against teacher was not state action]; *Sutton v. Providence St. Joseph Medical Center* (9th Cir. 1999) 192 F.3d 826, 835-843 (*Sutton*) [detailing application of numerous state-action tests].)

Here, it is undisputed that USC is a private university. (1 CT 12.) Under *Rendell-Baker* and *Heineke*, the due process clause does not apply to USC's investigation and decision to expel Boermeester.

2. California courts should not treat due process principles applicable to state action as "instructive" or otherwise controlling as to common law fair procedure requirements.

In *Pinsker v. Pacific Coast Soc. of Orthodontists* (1969) 1 Cal.3d 160, 166 (*Pinsker I*), this Court held that an applicant for

membership in a private, professional certification organization "has a judicially enforceable right to have his application considered in a manner comporting with the fundamentals of due process." When that same case returned to this Court a few years later, however, the Court clarified that constitutional due process does not govern or inform common law fair procedure, and that this terminology should be avoided in the future:

> It is important to note that the legal duties imposed on [private] organizations arise from the common law rather than from the Constitution as such; although *Pinsker I* utilized "due process" terminology in describing defendant associations' obligations, the "due process" concept is applicable only in its broadest, nonconstitutional connotation. [Citation.] In an attempt to avoid confusing the common law doctrine involved in the instant case with constitutional principles, we shall refrain from using "due process" language and shall simply refer instead to a requirement of a "fair procedure."

(*Pinsker II*, *supra*, 12 Cal.3d at p. 550, fn. 7.)

Despite this clear instruction, decisions in the Court of Appeal soon began muddying the distinction between constitutional due process and common law fair procedure. In *Applebaum v. Board of Directors* (1980) 104 Cal.App.3d 648, 657 (*Applebaum*), the court stated that the "distinction between fair procedure and due process rights appears to be one of origin and not of the extent of protection afforded an individual; the essence of both rights is fairness. Adequate notice of charges and a reasonable opportunity to respond are basic to both sets of rights." But *Applebaum*'s pronouncement was incorrect. It was

like arguing that the distinction between sushi and lasagna is simply one of origin and not ingredients or flavor, because they both provide sustenance and taste delicious. *Applebaum* provided no reasoned explanation for its analysis, and cited only *Ezekial*, *supra*, 20 Cal.3d 267, in which the words "due process" do not appear, and *People v. Ramirez* (1979) 25 Cal.3d 260, which addressed what process the state owes a criminal defendant before reinstating criminal charges against him. (See *Applebaum*, at p. 657.)

Having decided in novel, unsupported fashion that due process and common law fair procedure are coterminous, the *Applebaum* court then proceeded to apply constitutional due process cases from the U.S. Supreme Court to a claim involving a private hospital's peer review procedures. The crux of the allegations was that the hearing bodies that reviewed charges against the plaintiff were not impartial and included members already prejudiced against him. (See *Applebaum*, *supra*, 104 Cal.App.3d at pp. 657-658, 659-660.) Subsequent appellate courts have parroted and then extended *Applebaum*'s conclusory analysis without questioning its underpinnings, in contravention of this Court's admonition in *Pinsker II*, compounding *Applebaum*'s error for the next 30 years.[4] (See *Palm Medical Group, Inc. v. State Comp. Ins. Fund* (2008) 161 Cal.App.4th 206,

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[4] Two notable exceptions are *Dougherty*, *supra*, 165 Cal.App.4th at page 317, which cited *Pinsker II* and explained that common law fair process "should not be confused with constitutional 'due process,' " and *Pomona College*, *supra*, 45 Cal.App.4th at page 1730.

218; *Kaiser Foundation Hospitals v. Superior Court* (2005) 128 Cal.App.4th 85, 102; *Goodstein v. Cedars-Sinai Medical Center* (1998) 66 Cal.App.4th 1257, 1265 (*Goodstein*); *Lasko v. Valley Presbyterian Hospital* (1986) 180 Cal.App.3d 519, 528.)

One court went so far as to declare that "[e]ssentially there is no real difference between fair procedure and due process rights." (*Gill v. Mercy Hospital* (1988) 199 Cal.App.3d 889, 903 (*Gill).*)

This Court should confirm now what it stated long ago: Common law fair procedure and constitutional due process are not related and should not be confused. (*Pinsker II*, *supra*, 12 Cal.3d at p. 550, fn. 7.) There are important reasons courts should not use constitutional due process principles to govern, instruct, or mirror common law fair procedure.

First, the doctrines exist to serve different purposes. " '[T]he Due Process Clause of the Fourteenth Amendment was intended to prevent government "from abusing [its] power, or employing it as an instrument of oppression." ' " (*Homestead Savings, supra*, 230 Cal.App.3d at p. 431.) " 'Its purpose was to protect the people from the State, not to ensure that the State protected [the people] from each other.' " (*Ibid.*) Common law fair procedure, in contrast, places rudimentary constraints on private organizations when their decisions can deprive individuals of their right to pursue a livelihood or other vital economic interest. (See, e.g., *Potvin*, *supra*, 22 Cal.4th at pp. 1065-1070.) Stating these doctrines differ in origin but not in practical effect, thereby subjecting a substantial amount of

private activity to the due process constraints, would " 'emasculate the [state] action concept.' " (*Sutton*, *supra*, 192 F.3d at p. 839.)

Second, the fair procedure doctrine can be developed under the relatively flexible and constantly evolving common law, over which this Court is the ultimate arbiter, whereas due process is fixed by the relatively unchanging strictures of the U.S. Constitution, the final arbiter of which is the U.S. Supreme Court. (Compare *Potvin*, *supra*, 22 Cal.4th at pp. 1070-1071 with *Department of Homeland Security v. Thuraissigiam* (2020) 591 U.S. __ [140 S.Ct. 1959, 1963-1964, 207 L.Ed.2d 427].) This Court can tailor the common law to meet the specific needs of private organizations and their members in California.

Third, common law fair procedure and constitutional due process properly allocate institutional competence differently. While courts of law are experts in applying due process, the same cannot necessarily be said of their competence or expertise to manage private affairs. (See *Goodstein*, *supra*, 66 Cal.App.4th at p. 1266 [" ' " '[j]udges are untrained and courts ill-equipped for hospital administration' " ' and therefore should not second-guess policies made rationally and in good faith unless the policy is clearly unlawful"]; see also *Pinsker II*, *supra,* 12 Cal.3d at p. 555 [explaining that courts should allow private associations "the initial and primary responsibility" for developing their internal procedures].)

Indeed, it is largely for this last reason that the high court of Massachusetts has also declared unequivocally that in sexual

misconduct investigations, a "university is not required to adhere to the standards of due process guaranteed to criminal defendants or to abide by rules of evidence adopted by courts." (*Schaer v. Brandeis University* (Mass. 2000) 735 N.E.2d 373, 381.) "[C]ourts are chary about interfering with academic and disciplinary decisions made by private colleges and universities." (*Ibid*.) This Court should follow the lead of Massachusetts and the First Circuit, and declare that "federal due process law does not dictate to states the procedures which its private colleges must follow in administering student discipline." (*Doe v. Trustees of Boston College* (1st Cir. 2019) 942 F.3d 527, 529.)[5]

[5] *Natarajan v. Dignity Health*, review granted February 26, 2020, S259364, which is currently pending in this Court, presents the question whether a physician with privileges at a private hospital has the right to disqualify a hearing officer in proceedings for revocation of those privileges based on an appearance of bias, or whether the physician must show actual bias. The applicability of constitutional due process standards to the conduct of private organizations is potentially relevant to answering that question, as the doctor in that case erroneously argues that common law fair procedure and due process are coterminous. (See Opening Brief on the Merits, *Natarajan* (May 11, 2020, S259364) 2020 WL 2526764, at pp. *46-*52.) The hospital argues that due process and common law fair procedure are not the same. (Answer Brief on the Merits, *Natarajan* (Aug. 10, 2020, S259364) 2020 WL 4808340, at pp. *45-*50.)

3. This Court should disapprove the Court of Appeal decisions applying due process principles to hold that common law fair procedure requires burdensome procedures in student sexual misconduct cases.

In recent years, several Court of Appeal decisions have departed from this Court's precedents by relying on constitutional due process principles to impose ever-increasing common law procedural burdens on private universities investigating allegations of sexual misconduct (not domestic violence). (See *Doe v. Occidental College* (2019) 40 Cal.App.5th 208, 221, fn. 5 (*Occidental College II*); *Doe v. Westmont College* (2019) 34 Cal.App.5th 622, 634 (*Westmont College*); *Doe v. Allee* (2019) 30 Cal.App.5th 1036, 1061 (*Allee*); *Doe v. Claremont McKenna College* (2018) 25 Cal.App.5th 1055, 1067, fn. 8 (*Claremont McKenna*).)

This trend began in *Doe v. University of Southern California* (2016) 246 Cal.App.4th 221, 240, 248 (*USC I*), where the Court of Appeal correctly declined to require live cross-examination in university disciplinary hearings. But *USC I* departed from *Pinsker II* and *Ezekial* by holding that common law fair procedure *also* requires the "opportunity to appear directly before the decisionmaking panel." (*USC I*, at p. 248.)

In the years since *USC I*, a series of intermediate appellate decisions have rapidly expanded fair procedure requirements even further. Far from simply requiring notice and an opportunity to respond, these courts have mandated live hearings with testimony from key witnesses. (See *Westmont College*,

supra, 34 Cal.App.5th at p. 637.) Some have required direct or indirect cross-examination of witnesses whose credibility is critical to the university's decision. (See *Occidental College II*, *supra*, 40 Cal.App.5th at p. 224; *Westmont College*, at pp. 638-639; *Allee*, *supra*, 30 Cal.App.5th at p. 1066; *Claremont McKenna*, *supra*, 25 Cal.App.5th at pp. 1057-1058.) These cases have required universities to adopt an adversarial framework, mandating "adversarial questioning at an in-person hearing at which a neutral fact finder can observe and assess the witness' credibility." (*Allee*, at p. 1068.)

Disregarding this Court's admonition that common law fair procedure does *not* require the embellishments of a court trial (*Pinsker II*, *supra*, 12 Cal.3d at p. 555), these decisions have imposed administrative procedures that are increasingly difficult to distinguish from courtroom proceedings (cf. *Haidak v. University of Massachusetts-Amherst* (1st Cir. 2019) 933 F.3d 56, 69-70 [even constitutional due process does not require direct cross-examination in a disciplinary hearing; if it did, "the mandated mimicry of a jury-waived trial would be near complete"]). They have saddled universities with rigid and costly requirements that detract from their central mission—to educate. (See *Newsome v. Batavia Local School Dist.* (6th Cir. 1988) 842 F.2d 920, 926 ["To saddle [administrators] with the burden of overseeing the process of cross-examination (and the innumerable objections that are raised to the form and content of cross-examination) is to require of them that which they are ill-equipped to perform"].)

Mandating live cross-examination in student disciplinary hearings has serious practical consequences. As the dissent below explained, in the university context, the prospect of being subject to "a scathing cross-examination can deter reporting." (*Boermeester*, *supra*, 49 Cal.App.5th at p. 723 (dis. opn. of Wiley, J.).) These concerns are particularly substantial in the university context—"In administrative cases addressing sexual assault involving students who live, work, and study on a shared college campus, cross-examination is especially fraught with potential drawbacks." (*USC I*, *supra*, 246 Cal.App.4th at p. 245.)[6]

The burdensome and inflexible requirements that the lower courts have imposed on private universities also represent inappropriate judicial micromanagement of universities' disciplinary procedures. Under the case law that has proliferated in recent years in the Court of Appeal, private universities are not permitted to "retain the initial and primary responsibility" (*Pinsker II*, *supra*, 12 Cal.3d at p. 555) for developing and implementing fair procedures. Instead, educational institutions are forced to incur the time and expense of live hearings involving multiple witnesses, even in cases where such

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[6] Recognizing these concerns, the American Bar Association's Commission on Domestic and Sexual Violence recently recommended that universities adopt a trauma-informed approach that does not involve adversarial procedures. (American Bar Association Commission on Domestic & Sexual Violence, Recommendations for Improving Campus Student Conduct Processes for Gender-Based Violence (2019) pp. 5, 63 <https://www.americanbar.org/content/dam/aba/publications/domestic-violence/campus.pdf> [as of Dec. 14, 2020] (hereafter ABA Commission on Domestic & Sexual Violence).)

procedures do not meaningfully improve the quality and fairness of the factfinding. Indeed, requiring live hearings with cross-examination in the university setting could impede accurate factfinding because universities—unlike courts—lack the power to compel witnesses to appear and testify. Without the ability to compel witness participation, universities may be able to amass less evidence in a hearing than they would through an investigation like the one USC conducted in this case.

Accordingly, this Court should disapprove the intermediate appellate decisions that have required private universities to conduct live hearings with cross-examination in sexual misconduct cases.

E. Even if the common law requires live hearings with cross-examination in certain sexual misconduct cases, USC nonetheless provided a fair procedure in this domestic violence case.

1. The rationale for requiring live cross-examination in certain sexual misconduct cases does not apply to domestic violence cases.

To support its rejection of USC's procedure for adjudicating claims of domestic violence, the majority below relied almost entirely on cases arising from allegations of sexual misconduct. (*Boermeester*, *supra*, 49 Cal.App.5th at pp. 698-699, 703-706.) In doing so, the majority unmoored those cases from their legal and factual context. Regardless of the merits of requiring live cross-examination in certain university *sexual misconduct* cases where credibility is central to the university's decision, this Court should refuse to extend that requirement to this domestic

violence case, which lacks the factfinding challenges that generally accompany sexual misconduct cases.

Domestic violence cases typically depend on the truth of independently verifiable facts—i.e., did Boermeester grab Roe by the neck and push her against a wall or violate his avoidance-of-contact order—rather than on the question of consent that often is at the heart of sexual misconduct cases, in which determinations often depend solely on the parties' credibility. (See Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount* (2017) 166 U.Pa. L.Rev. 1, 1 ["Credibility is central to the legal treatment of sexual violence, as epitomized by the iconic 'he said/she said' contest"]; see also *Allee*, *supra*, 30 Cal.App.5th at pp. 1064-1065 [describing sexual misconduct case: "In light of the directly conflicting claims, and an absence of corroborative evidence to either support or refute the allegations, the review panel was forced to choose whom to believe"].) Domestic violence cases are also different because of "the tendency of victims . . . later to recant or minimize their description of that violence." (*People v. Brown* (2004) 33 Cal.4th 892, 896 (*Brown*).) Indeed, "victims' false recantations or failure to appear at trial . . . are the norm in domestic violence cases." (Beloof & Shapiro, *Let the Truth Be Told: Proposed Hearsay Exceptions to Admit Domestic Violence Victims' Out of Court Statements as Substantive Evidence* (2002) 11 Colum. J. Gender & L. 1, 1.) Recanting is common in domestic violence cases because "victims frequently feel a sense of loyalty to their

abusers." (*Brown*, at p. 899.) Indeed, consistent with this pattern, Roe recanted in this case.

Where, as here, the victim recants, there is little reason to mandate cross-examination of the victim in the university setting. That is because, as the dissent below correctly observed, "when a domestic violence victim has publicly recanted, the accused already has all he wants" and therefore "[f]urther questioning offers him only hazard." (*Boermeester*, *supra*, 49 Cal.App.5th at p. 720 (dis. opn. Wiley, J.).)

Finally, requiring live cross-examination in university domestic violence cases is likely to have a particularly acute chilling effect on victims' willingness to report abuse. Although the risk of retaliation is often present for victims of sexual misconduct, domestic violence survivors are especially vulnerable because of their ongoing relationship with the abuser. (See Percival, *The Price of Silence: The Prosecution of Domestic Violence Cases in Light of* Crawford v. Washington (2005) 79 So.Cal. L.Rev. 213, 242 [discussing how truthful testimony against an abuser may place a victim in an "unreasonable amount of danger . . . even if the case is successful"].) Requiring victims of domestic violence to testify before their abuser, as the majority below did here, puts victims in the untenable position of choosing between either lying or telling the truth and risking further violence. (See *ibid.*)

The majority's reasons for applying sexual misconduct precedents to this domestic violence case do not withstand scrutiny. The majority asserted that credibility issues can arise

in both sexual misconduct and domestic violence cases, and victims of sexual misconduct sometimes recant. (*Boermeester*, *supra*, 49 Cal.App.5th at p. 707.) But, as the facts of this very case illustrate, domestic violence cases often do not turn *solely* on "he said/she said" issues of credibility. The tendency of domestic violence victims to recant is well documented and casts a very different light on the issue of who is to be believed—and what additional evidence is presented. (See *Brown*, *supra*, 33 Cal.4th at p. 899.)

The majority also treated allegations of domestic violence in the same way as charges of sexual misconduct because USC grouped the two forms of misconduct together in its misconduct policy. (*Boermeester*, *supra*, 49 Cal.App.5th at p. 708.)[7] But the common law requirements of fair procedure should not depend on the details of a single university's policy, which is subject to change in any event.

Thus, even if this Court were to find that the common law right to fair procedure requires live hearings with cross-examination in certain sexual misconduct cases, this Court should nevertheless reject that requirement in domestic violence cases such as this one, in which no sexual misconduct is asserted and a "he said/she said" credibility determination is unnecessary.

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[7] The Court of Appeal's reasoning proves too much, because USC's policy also covered such unrelated misconduct as racial discrimination and harassment, which present wholly different factual and legal issues from those present here. (See 2 AR 483-484, 487.)

2. Alternatively, even if the common law requires a live hearing with cross-examination in some domestic violence cases, the Court of Appeal erred in imposing three additional procedural requirements.

Even assuming the common law requires private universities to provide live hearings with cross-examination in some domestic violence cases, the majority below went even further and faulted USC for (1) not giving Boermeester the opportunity to attend Roe's hearing in person or via videoconference, (2) not giving Boermeester the opportunity to cross-examine third-party witnesses, and (3) not allowing Boermeester to ask follow-up questions of Roe. (*Boermeester*, *supra*, 49 Cal.App.5th at pp. 705-706.) These requirements represent the type of judicial second-guessing of private administration that this Court's seminal precedents forbid. At a minimum, this Court should clarify that they are not required.

Boermeester's presence at Roe's hearing. Prior to the decision below, some Court of Appeal decisions had required that *adjudicators* physically observe complaining witnesses and evaluate their demeanor in cases where credibility is central. (*Doe v. University of Southern California* (2018) 29 Cal.App.5th 1212, 1233 (*USC II*); *Claremont McKenna*, *supra*, 25 Cal.App.5th at p. 1070.) The rationale for this requirement is to enable adjudicators to assess the credibility of complaining witnesses. (*Ibid.*) But the majority here went further in requiring the physical or virtual presence of the *accused student* at the victim's hearing. (See *Boermeester*, *supra*, 49 Cal.App.5th at pp. 705-706.)

That holding threatens real harm to universities and their students. As discussed above (*ante*, p. 44), subjecting victims to cross-examination of any kind threatens to chill reporting in domestic violence cases, which are already severely underreported. That chilling effect is likely to be even more pronounced where the victim knows that her abuser can witness the examination in real-time. (See ABA Commission on Domestic & Sexual Violence, *supra*, at p. 63 [emphasizing importance of minimizing "contact between complainant and respondent during proceedings"].) If both are students, the possibility of ongoing contact on campus with the opposite party or his or her friends and acquaintances already may be a daunting prospect.

Opportunity to question third party witnesses. The majority below also held that USC's procedure was deficient because it did not afford Boermeester an opportunity to question third-party witnesses who corroborated Roe's account. (*Boermeester*, *supra*, 49 Cal.App.5th at p. 706.) Here, too, the Court of Appeal erred. Fair procedure in university disciplinary hearings does not mandate in-person cross-examination of *any* witness, let alone witnesses other than the victim. (See *USC I*, *supra*, 246 Cal.App.4th at pp. 239, 248.)

Alternatively, even if the common law requires universities to allow questioning of third-party witnesses whose credibility is central to the university's decision, it was not required *here* because the credibility of third-party witnesses was not *central*. Boermeester's interaction with Roe was captured on a surveillance video. (1 AR 43-45; 6 CT 1161-1162.) The video

corroborated the eyewitness' account of the incident. (1 AR 32, 95.) Thus, USC did not need to rely solely on witness credibility to reach its findings as it would in a "he said/she said" case. Instead, USC could compare the witnesses' statements to the video in assessing whether the statements were accurate. Moreover, Boermeester himself admitted the key physical facts that he grabbed and pushed Roe. (1 AR 60, 172-173, 179.)

Opportunity to pose follow-up questions at a live hearing. Finally, the majority below held that USC's procedure was deficient because USC did not permit Boermeester to pose follow-up questions to Roe at a live hearing. (*Boermeester*, *supra*, 49 Cal.App.5th at p. 706.) This holding, too, was erroneous because the common law did not entitle Boermeester to question Roe in the first place, let alone at an in-person hearing. (See *ante*, pp. 24-30.)

At a minimum, the common law does not obligate private universities to allow follow-up questioning in addition to an initial opportunity to pose written questions. Other courts have correctly imposed no such requirement. (See *USC II*, *supra*, 29 Cal.App.5th at p. 1238 [requiring only that the university "afford John an opportunity to submit a list of questions to ask Jane" prior to the hearing].) Classrooms are not courtrooms, and a rule entitling students not only to cross-examination, but also to potentially multiple rounds of recross-examination at a live hearing, erodes the distinction between university disciplinary proceedings and trials. Moreover, a university could reasonably conclude that allowing follow-up questions would exacerbate the

trauma of domestic violence survivors by exposing them to persistent questioning by their abusers. Universities should retain the flexibility to decide for themselves whether live follow-up questioning is necessary for a fair disciplinary proceeding.

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In sum, this Court should hold that common law fair procedure affords universities discretion to fashion student disciplinary procedures that meet the needs of their communities and further their missions as private organizations, so long as those procedures provide accused students with notice of the allegations against them and an opportunity to respond. In the alternative, and at a minimum, this Court should hold that the common law does not require universities to provide live cross-examination in domestic violence cases, particularly where the case does not turn on witness credibility because corroborative evidence supports or refutes the allegations.

II. Boermeester waived any common law right to cross-examine witnesses at a live hearing.

A. An accused student must challenge a university's procedures at the university level in order to preserve a fair procedure challenge for appeal.

To preserve arguments for appeal, litigants must ordinarily raise the arguments below. (*Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 184, fn. 1.) Under the related doctrine of issue exhaustion, a court reviewing a petition for administrative mandate cannot consider an issue unless it was raised at the administrative level. (See *Sierra Club v. San*

Joaquin Local Agency Formation Com. (1999) 21 Cal.4th 489, 510; see also *Niles Freeman Equipment v. Joseph* (2008) 161 Cal.App.4th 765, 787-788 [failure to raise a due process challenge to administrative procedures at the administrative level forfeits that claim].)

This rule applies to common law fair procedure cases—litigants waive or forfeit their right to demand certain procedural protections if they choose not to request or utilize them at the administrative level. (See *Anton*, *supra*, 19 Cal.3d at pp. 826-827 [plaintiff did not preserve unfair procedure claims because he did not raise them at the administrative level]; see also *Gill*, *supra*, 199 Cal.App.3d at p. 909 [rejecting challenge to purported denial of cross-examination where appellant declined the opportunity to question witnesses]; *Samann v. Trustees of Cal. State University & Colleges* (1983) 150 Cal.App.3d 646, 659 [in an administrative proceeding, "[a] person may elect to forego strict legal procedures to which he might be entitled and where he does so he cannot be permitted to speculate upon a favorable result in his chosen proceeding and then refuse to be bound by an adverse decision"].)

Courts have consistently applied this rule in challenges to university disciplinary procedures. (See *Occidental College II*, *supra*, 40 Cal.App.5th at pp. 224-225 [accused student forfeited claim by not raising it at the university level or in the trial court]; *Doe v. Occidental College* (2019) 37 Cal.App.5th 1003, 1017-1018 (*Occidental College I*) [same]; *Doe v. University of Southern California* (2018) 28 Cal.App.5th 26, 37, 41-42 [same].)

B. Boermeester told USC he did not want to question Roe at a live hearing, and he did not ask to question other witnesses.

Here, Boermeester neither requested nor desired live cross-examination. When USC asked Boermeester's lawyer to submit questions for Roe, the lawyer responded "I am not interested in having [Roe] come in and being put on the spot yet again." (1 AR 293.) Boermeester also never asked to cross-examine witnesses other than Roe. And Boermeester did not even attend his own in-person hearing. (See 1 AR 59-66, 293.) Accordingly, he waived or forfeited any argument that he was entitled to an in-person examination of Roe and the other witnesses.

Boermeester's failure to request live cross-examination was not due to a technical oversight or an accidental forfeiture. Rather, Boermeester, with the advice of counsel, strategically eschewed live cross-examination. As the dissent below correctly observed (*Boermeester*, *supra*, 49 Cal.App.5th at p. 715 (dis. opn. Wiley, J.)), further questioning of Roe could only harm Boermeester's defense because Roe had already recanted to Boermeester's benefit. Moreover, Boermeester himself admitted the physical facts that he grabbed Roe by the neck and pushed her (1 AR 60, 172-173), and the other witnesses who saw and characterized his acts as more than mere horseplay were unlikely to help his case. Boermeester sensibly declined to question these witnesses.

The majority below speculated that asking for a live hearing with cross-examination would have been futile because USC's policy did not provide for it. (*Boermeester*, *supra*, 49

Cal.App.5th at pp. 700-701.) But, as the dissent correctly observed, "[n]othing barred Boermeester from asking for further questions for any witness." (*Id.* at p. 718 (dis. opn. Wiley, J.).) And Boermeester's lawyer did not simply remain silent—he told USC that Boermeester did *not* want Roe to appear for questioning at a live hearing. (1 AR 293.) Thus, the record contradicts the Court of Appeal's speculation that asking for live cross-examination would have been futile.

The majority below also excused Boermeester's waiver on the ground that his disciplinary proceedings in 2017 occurred before the issuance of the Court of Appeal's *Doe v. Allee* decision in 2019, which (incorrectly) recognized a common law right to a live hearing featuring cross-examination of third-party witnesses. (*Boermeester*, *supra*, 49 Cal.App.5th at p. 701, citing *Allee*, *supra*, 30 Cal.App.5th 1036.) That was error. Boermeester eschewed cross-examination because it would not help his defense, not because the case law had not yet established a common law right to cross-examination.

Finally, Boermeester argued below that he did not waive the right to cross-examine Roe at a live hearing because he purportedly objected to the manner in which USC would have handled the questioning. (ARB 51-52.) The record shows otherwise. Boermeester's lawyer initially told USC that Boermeester intended to submit *written* questions for Roe, and he asked for guidance on how to do so. (1 AR 294-295.) USC's Title IX investigator Helsper responded that "[y]ou send me the questions and we will ask them of [Roe]." (1 AR 294.)

Boermeester's lawyer then wrote that he did not want USC to "filter" Roe's answers. (1 AR 293-294.) USC responded that it would not do so and that it would provide Boermeester with any new factual information in Roe's answers before Helsper issued her report. (*Ibid.*) Nonetheless, Boermeester declined to submit written questions for Roe. (See 1 AR 296.) And Boermeester's lawyer told USC that he did *not* want Roe to appear in person. (1 AR 293.) This email exchange about "filtering" did not preserve Boermeester's arguments about cross-examination.

In sum, Boermeester waived any common law right to cross-examine witnesses at a live hearing because he disavowed any interest in pursuing cross-examination. Holding otherwise, as the majority below did, would encourage gamesmanship by rewarding students accused of misconduct for withholding procedural objections from universities and then raising them for the first time in subsequent litigation. For this reason, too, this Court should reverse the decision below. However, as explained in Section I, it is nonetheless important to provide lower courts and all private associations subject to the common law fair procedure doctrine clear guidance on what the common law actually requires.

III. Any error in failing to provide Boermeester with an opportunity to cross-examine witnesses at a live hearing was harmless.

A. Courts may not overturn private universities' disciplinary decisions due to inconsequential errors.

"California courts adhere to the doctrine of prejudicial error, pursuant to which an administrative decision will not be overturned for error when the error made no difference in the outcome of the case (i.e., the error was 'harmless'). It is petitioner's burden to establish that error in the lower tribunal was prejudicial." (Asimow et al., Cal. Practice Guide: Administrative Law (The Rutter Group 2020) ¶ 13:520; see Cal. Const. art. VI, § 13; Code Civ. Proc., § 1094.5, subd. (b) [courts may examine whether "there was any prejudicial abuse of discretion"]; see also *El-Attar*, *supra*, 56 Cal.4th at pp. 990-991; *Citizens for Open Government v. City of Lodi* (2012) 205 Cal.App.4th 296, 307-308; *Saad v. City of Berkeley* (1994) 24 Cal.App.4th 1206, 1215.)

This rule applies in fair procedure cases, including university discipline cases. (See *Anton*, *supra*, 19 Cal.3d at p. 826 [rejecting fair procedure challenge for failure to show prejudice]; *Occidental College II*, *supra*, 40 Cal.App.5th at pp. 225-226 [rejecting fair procedure challenge where there was "no reasonable likelihood the result would have been any different"]; *Occidental College I*, *supra*, 37 Cal.App.5th at pp. 1016-1017 [same]; *Guilbert v. Regents of University of California* (1979) 93 Cal.App.3d 233, 241-242 [" 'There is a generally accepted

principle that the appellant must show prejudicial error affecting his interests in order to prevail on appeal . . . and it follows that the appellate court need not and will not review errors which could not have been prejudicial to him' "].)

B. Any error here was harmless because USC's disciplinary decision did not depend primarily on assessing witness credibility, much less in the absence of supporting evidence.

Even assuming USC should have afforded Boermeester the opportunity to cross-examine witnesses at a live hearing, and even assuming Boermeester has not waived this opportunity, USC's failure to do so was harmless. Assessing witness credibility ultimately was not necessary or central to USC's determinations that Boermeester committed domestic violence against Roe and violated USC's order to avoid contact with her.

USC's policy defined domestic violence to include causing physical harm to someone with whom the accused student had a previous or current dating or romantic relationship. (2 AR 486.) Boermeester admitted that he grabbed Roe's neck and pushed her against a wall, which video surveillance footage confirmed. (1 AR 60, 172-173, 179; 6 CT 1161-1162.) Two third-party witnesses independently offered corroborating testimony, which was also consistent with the surveillance footage, and Roe's friends corroborated the story based on what she told them shortly afterwards. (1 AR 32, 85, 92-93, 95, 133-135.) On this record, and in light of the elements of USC's domestic violence policy, there is no reasonable possibility that Boermeester would have

obtained a more favorable result if he cross-examined Roe or other witnesses at a live hearing.

The majority below nonetheless concluded that USC's alleged procedural deficiencies were prejudicial because USC faced conflicting accounts of the incident. (*Boermeester*, *supra*, 49 Cal.App.5th at p. 708.) The majority observed that (1) the surveillance video merely corroborated Roe's *initial* statement, (2) Boermeester claimed that his conduct was playful, and (3) an eyewitness initially downplayed the severity of what he saw and then changed his story. (*Ibid.*)

But the majority's conclusion that "this case rests on witness credibility" (*Boermeester*, *supra*, 49 Cal.App.5th at p. 708) was mistaken. Again, Boermeester admittedly grabbed Roe's neck and pushed her, and the surveillance video confirmed that he did so. (1 AR 43-45, 172-174, 179; 6 CT 1161-1162.) And Boermeester's intent was irrelevant under USC's policy. (1 AR 222; 2 AR 486-487.) Boermeester thus violated USC's policy against domestic violence regardless of whether he thought he was acting playfully, so USC had no need to assess the credibility of Boermeester's explanation.

Boermeester also violated USC policy by contacting Roe despite USC's instruction not to do so. (AR 53-54.) Cross-examining witnesses at a live hearing would not have changed USC's decision in this respect, either, as it did not depend solely on assessing witness credibility.

The majority below thus mandated live cross-examination of Roe and third-party witnesses in a case where it could be of no

real help to the accused student because credibility was not central to USC's determination. On this record, conclusions about what happened between victim and abuser could be resolved without further testing of their credibility, or the credibility of other witnesses, through live cross-examination. Even if USC should have afforded Boermeester the opportunity to cross-examine witnesses at a live hearing, its failure to do so was harmless.

IV. Senate Bill No. 493 confirms, in the context of complaints of sexual misconduct or domestic violence, that private universities have the authority and flexibility to develop fair procedures for themselves.

A. Under SB 493, universities adjudicating sexual misconduct and domestic violence complaints have discretion to determine whether hearings are necessary, and whether to allow cross-examination in such hearings.

In September 2020, Governor Newsom signed Senate Bill No. 493 (2019-2020 Reg. Sess.) into law. Through SB 493, the Legislature clarified "the process for adjudicating complaints of sexual or gender-based violence, including dating or domestic violence, at postsecondary educational institutions in the State of California." (*Id.*, § 1, subd. (r).) Although SB 493's requirements did not apply at the time USC investigated Boermeester's misconduct in 2017 (and likewise do not apply to the myriad of other private organizations governed by common law fair procedure), the new law confirms that private universities have

broad flexibility to establish fair procedures that best serve the needs of their communities. (*Id.*, § 3, subd. (b)(4)(A)(viii).)

In SB 493, the Legislature recognized the devastating consequences of sexual harassment and violence on university students. (SB 493, *supra*, at § 1, subd. (c).) The Legislature found that sexual misconduct threatens students' physical safety, impedes their ability to learn, and reinforces social inequality. (*Ibid.*) Citing studies published by the American Association of University Women and the Association of American Universities, the Legislature recognized that sexual harassment and violence is "pervasive in higher education," with approximately 62 percent of women and 61 percent of men experiencing it. (*Id.*, § 1, subd. (d).) The Legislature also recognized the disparate impact that sexual harassment has on marginalized groups such as LGBTQ students and disabled students. (*Id.*, § 1, subd. (e).)

Relying on research from the National Women's Law Center, the Legislature found that survivors vastly underreport instances of sexual harassment and assault in the university context—"only 12 percent of college survivors report sexual assault to their schools or the police." (SB 493, *supra*, at § 1, subd. (j).) The Legislature also acknowledged that 34 percent of sexual harassment and violence survivors drop out of college. (*Id.*, § 1, subd. (*l*).)

To remedy these problems, the Legislature has required private universities accepting state financial assistance to adopt certain procedures for adjudicating sexual harassment and domestic violence complaints as a condition for continuing to

receive state financial assistance. (*Id.*, § 1, subds. (p) & (r); *id.*, § 3, subd. (b).) Universities must adopt these policies no later than January 1, 2022. (*Id.*, § 3, subd. (e).)[8]

The cornerstone of SB 493's procedural requirements is notice and an opportunity to respond. (See SB 493, *supra*, at § 3, subd. (b)(4)(A)(ii), (viii), (xiii), (xiv), & (xvi).) The Legislature has instructed universities to take a trauma-informed approach. (See *id.*, § 3, subd. (b)(2), (4)(A)(iv), (6)(A) & (7).) To this end, the Legislature has forbidden universities from employing adversarial procedures. (*Id.*, § 3, subd. (b)(4)(A)(i).)

The Legislature has left it up to individual universities whether to conduct hearings—"the institution shall decide whether or not a hearing is necessary to determine whether any sexual violence more likely than not occurred." (SB 493, *supra*, at § 3, subd. (b)(4)(A)(viii).) "In making this decision, an institution may consider whether the parties elected to participate in the investigation and whether each party had the opportunity to suggest questions to be asked of the other party or witnesses, or both, during the investigation." (*Ibid.*)

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[8] The definitions of "sexual harassment" and "sexual violence" in SB 493 seem to exclude domestic violence. (See *id.*, § 2, subds. (a) & (b).) Nonetheless, the Legislature expressly provided that SB 493 is intended to govern "the process for adjudicating complaints of sexual or gender-based violence, *including dating or domestic violence*, at postsecondary educational institutions in the State of California." (*Id.*, § 1, subd. (r), emphasis added.) In light of this language, there is no reason to assume that the Legislature intended a different set of procedural requirements to govern university domestic violence cases.

Under SB 493, a university that chooses to conduct hearings on allegations of sexual misconduct may also decide for itself whether to permit cross-examination of witnesses, with the caveat that "[a]ny cross-examination of either party or any witness shall not be conducted directly by a party or a party's advisor." (SB 493, *supra*, at § 3, subd. (b)(4)(A)(viii)(I).)

Consistent with the rudimentary common law procedural fairness required by *Pinsker II* and *Ezekial*, the Legislature has now codified the proper understanding of common law fair procedure—at least for private universities investigating sexual misconduct—by simply requiring universities to provide accused students with notice and an opportunity to respond. (See *Nightlife Partners v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, 91 ["the provisions of the [Administrative Procedure Act (Gov. Code, § 11340 et seq.)] are helpful as indicating what the Legislature believes are the elements of a fair and carefully thought out system of procedure for use in administrative hearings"].) Going forward, private universities retain the flexibility to select and implement fair procedures for themselves, including the decisions whether to hold a hearing and whether to permit indirect cross-examination. In light of the Legislature's codification of fair procedure in sexual misconduct and domestic violence cases, it would be anomalous for this Court to hold that the common law requires more.

B. SB 493 expressly supersedes the fair procedure cases on which the majority below relied.

Section 3, subdivision (g)(2) of SB 493 provides that any "case law that conflicts with the provisions of the act that adds this section shall be superseded as of this statute's effective date." The effect of this provision is clear—to the extent some Court of Appeal decisions have mandated private universities to adopt procedures such as live hearings with cross-examination, the Legislature has abrogated that case law. (See *McMillin Albany LLC v. Superior Court* (2018) 4 Cal.5th 241, 249 [to show an intent to abrogate the common law, "it is enough that 'the language or evident purpose of the statute manifest a legislative intent to repeal' a common law rule"].)

C. SB 493 provides that case law imposing new procedural requirements on private universities does not apply retroactively.

Section 3, subdivision (g)(1) of SB 493 provides that "[a]ny case law interpreting procedural requirements or process that is due to student complainants or respondents when adjudicating complaints of sexual or gender-based violence, including dating or domestic violence, at postsecondary educational institutions in the State of California shall have no retroactive effect."

Through this provision, the Legislature has disapproved the reasoning adopted by the majority below. Even though USC expelled Boermeester in 2017, the Court of Appeal faulted USC for failing to comply with fair procedure decisions issued in 2019, such as *Allee* and *Westmont College*. (*Boermeester*, *supra*, 49 Cal.App.5th at pp. 698-699, 703-706.) The Court of Appeal thus

applied those decisions retroactively to reverse USC's disciplinary proceedings, even though USC designed its policies to comply with the law as it existed at the time. The Court of Appeal's approach is irreconcilable with SB 493, and this Court should reject it. Even if the common law were expanded to required live cross-examination in university domestic violence cases—which it should not be—such a requirement should not be applied retroactively to prior disciplinary decisions.

***

This Court should confirm that the Court of Appeal's decision is both erroneous under the common law of fair procedure and prospectively incorrect under SB 493. (See *El-Attar*, *supra*, 56 Cal.4th at pp. 986-988 [discussing common law precedents in connection with applying statutory scheme detailing hospital peer review procedures]; *Economy v. Sutter East Bay Hospitals* (2019) 31 Cal.App.5th 1147, 1159 [after codification of hospital peer review procedures, "a physician retains a common law right to fair procedure where the hospital's act significantly impairs the physician's practice of medicine"].) Such a clear statement from the Court is essential to providing guidance to all private associations subject to the inconsistent appellate decisions applying the common law of fair procedure.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Court of Appeal.

December 14, 2020

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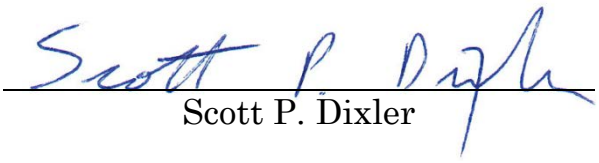
By: 
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Dated: December 14, 2020

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Case No. S263180

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