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

MOTION TO STRIKE ANSWER BRIEF ON THE MERITS; [PROPOSED] ORDER

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MOTION TO STRIKE ANSWER BRIEF ON THE MERITS

INTRODUCTION

The University of Southern California and Dr. Ainsley Carry (together, USC) move to strike Matthew Boermeester's answer brief on the merits because it extensively and improperly relies on material that is not found in the administrative record and that was rejected by the courts below. In an administrative mandamus action like this one, a court's analysis is confined to the administrative record. Yet Boermeester's answer brief on the merits contains 30 references to seven separate documents that are not, and never were, part of the administrative record.

None of Boermeester's extra-record material is relevant to the issues on which this Court granted review, including whether the common law requires private universities investigating domestic violence claims to hold live hearings with cross-examination. Moreover, Boermeester never presented this material to USC during the disciplinary proceedings, so USC had no opportunity to analyze it or respond to it. When Boermeester nonetheless attempted to introduce this material first in the trial court and then in the Court of Appeal, both of those courts rejected his efforts and declined to consider material outside the administrative record.

If Boermeester thought the trial court erred in rejecting his extra-record material, it was incumbent on him to raise that claim in the Court of Appeal. He did not. Likewise, if Boermeester thought the Court of Appeal erred in its express

refusal to consider this material, it was incumbent on him to file a petition for rehearing in that court and to raise the issue in an answer to USC's petition for review. He did neither. Instead, Boermeester chose to weave the improper material into his answer brief on the merits in this Court without acknowledging that it was rejected below by both the trial court and the Court of Appeal. This Court should not reward that conduct.

This Court should strike Boermeester's answer brief on the merits in its entirety and order Boermeester to file a revised brief that omits reference to the extra-record material and any arguments or statements that rely on this material, but that is otherwise identical to the brief he has already filed. In the alternative, this Court should refuse to consider the portions of Boermeester's brief that rely on material not included in the administrative record.

STATEMENT OF RELEVANT FACTS

A. Boermeester seeks mandamus review of USC's decision to expel him after he grabs and pushes his ex-girlfriend. The trial court rejects Boermeester's efforts to introduce extra-record material and denies writ relief.

Following an exhaustive investigation, USC concluded that Boermeester violated its domestic violence policy by grabbing his ex-girlfriend, Jane Roe,[1] by the neck and pushing her against a

[1] In his answer brief on the merits, Boermeester uses Roe's real name and observes that she has identified herself in public. (ABOM 14, fn. 5.) But despite Boermeester's contention that Roe "has requested to be referred by her true name" (*ibid.*), Roe is not

wall. (1 AR 54, 221–222.) After affording Boermeester an opportunity to be heard and providing multiple levels of administrative review, USC expelled Boermeester (1 AR 221–222) and Boermeester brought this administrative mandamus action challenging USC's decision (1 CT 6–41). In the trial court, Boermeester attempted on several occasions to inject material into this case that was not part of the administrative record and that had never been offered during USC's investigation:

- First, Boermeester filed an ex parte application for a stay that included new declarations from himself and Roe describing Roe's displeasure with the investigation, USC's alleged bias against Boermeester, and the adverse consequences of Boermeester's expulsion on his academic and athletic prospects. (2 CT 378–416; 3 CT 417–418.)

- A few weeks later, Boermeester attached a new declaration from education consultant Hanna Stotland and another new declaration from Roe to a reply memorandum. (3 CT 583–617.) Stotland's declaration described the challenges faced by students disciplined for sexual misconduct. (3 CT 598–602.) Roe's declaration repeated her defense of Boermeester and her accusations of bias and unfairness against USC. (3 CT 612–615.)

- Boermeester next asked the trial court to take judicial notice of the opinion of another trial judge in a different case involving different students (*Doe v. Carry* (Super. Ct. L.A. County, 2017, No. BS163736)). (5 CT 886–906.) The opinion included statements from USC officials about the students involved in that case that Boermeester claimed demonstrated USC's bias against male students generally. (5 CT 901–902; see 5 CT 876, fn. 4.)

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a party to this case. Thus, consistent with the Court of Appeal, this motion refers to Roe pseudonymously. (See *Boermeester v. Carry* (2020) 49 Cal.App.5th 682, 686, fn. 1 (*Boermeester*).)

- Finally, Boermeester moved to augment the administrative record to include two more new declarations from Roe in which she repeated that Boermeester did nothing wrong and again accused USC of bias. (5 CT 970–1001; 6 CT 1052–1087.)

The trial court properly declined to add any of this new material to the administrative record because, among other reasons, Boermeester introduced it belatedly and offered no valid justification for withholding it from USC during its investigation. (4 CT 625–627, 643 [sustaining USC's objections to new declarations attached to reply memorandum], 645–650;[2] 6 CT 1130–1131 [order denying Boermeester's motion to augment the record and his request for judicial notice]; 2 RT 915, 1202 [stating reason for denying Boermeester's request for judicial notice].) The trial court denied Boermeester's mandamus petition, and Boermeester appealed that denial. (See 2 RT 1514; 6 CT 1129–1151, 1237.)

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[2] USC did not object in the trial court to the declarations from Boermeester and Roe attached to Boermeester's stay application, but neither the trial court nor the Court of Appeal relied on them. (See 4 CT 645–650; *Boermeester*, *supra*, 49 Cal.App.5th at p. 687, fn. 2.) As USC observed in the Court of Appeal (RB 42–43), Boermeester never sought to augment the administrative record with his own declaration. And Roe's declaration was quoted verbatim in her subsequent declarations that the trial court refused to consider or add to the administrative record. (See, e.g., 2 CT 413–416; 3 CT 612–613; 5 CT 994–995; see also 4 CT 625–627, 643; 6 CT 1130–1131.) Moreover, the fact that a declaration was filed in the superior court does not make it part of the administrative record or citable on appeal.

B. In the Court of Appeal, Boermeester continues to cite the extra-record material, which the Court of Appeal expressly refuses to consider.

Boermeester's reliance on extra-record material did not stop in the trial court. Without acknowledging or challenging the trial court's multiple rejections of his newly manufactured extra-record material, Boermeester simply relied on the material extensively in his appellate briefing. (AOB 9–10, 19–27, 33–34, 44, 48, 54, 60–62; ARB 25.) USC pointed out that such citations to extra-record material were improper. (RB 42–43.) Like the trial court, the Court of Appeal declined to consider this material, stating that its "recitation of facts is derived solely from the evidence in the administrative record, and not the declarations submitted by Boermeester that were not made part of the record." (*Boermeester*, *supra*, 49 Cal.App.5th at p. 687, fn. 2.)

In a two-to-one decision, the Court of Appeal reversed the trial court's decision. (*Boermeester*, *supra*, 49 Cal.App.5th at pp. 708–709.) Boermeester did not seek rehearing of the Court of Appeal's refusal to consider the extra-record material.

C. Boermeester does not raise any alleged error in the lower courts' refusal to consider extra-record material in an answer to the petition for review and continues to cite extensively to extra-record material in his answer brief on the merits without justifying its consideration.

USC filed a petition for review and Boermeester elected not to file an answer to the petition for review. This Court granted review and depublished the Court of Appeal's opinion. In doing so, this Court requested briefing on the following issues:

(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?; and (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?

In its opening brief on the merits, USC addressed each of the four issues the Court asked to be briefed and cited to the relevant evidence in the record relating to each point. (OBOM 24–62.) By contrast, Boermeester's answer brief on the merits focuses on relitigating the underlying facts and cites to six declarations (from Roe, an education consultant, and himself) that are not part of the administrative record and that the courts below properly declined to consider. (ABOM 14–15, 17, 19, 21–27, 30, 36–38, 61.) These declarations focus on Boermeester's contentions that he did nothing wrong, that his expulsion has damaged his academic and athletic prospects, and that USC was supposedly biased against him.

MEMORANDUM OF POINTS AND AUTHORITIES

THIS COURT SHOULD REJECT BOERMEESTER'S RELIANCE IN HIS ANSWER BRIEF ON MATERIAL THAT IS NOT PART OF THE ADMINISTRATIVE RECORD.

A. Administrative mandamus review is limited to the administrative record.

In an administrative mandamus action, appellate review is generally "limited to the face of the administrative record." (*Voices of the Wetlands v. State Water Resources Control Bd.* (2011) 52 Cal.4th 499, 532 (*Voices of the Wetlands*); accord, *Pomona Valley Hospital Medical Center v. Superior Court* (1997) 55 Cal.App.4th 93, 101 (*Pomona Valley*) [" 'The general rule is that a hearing on a writ of administrative mandamus is conducted solely on the record of the proceeding before the administrative agency' "].)

"Augmentation of the administrative record is permitted only within the strict limits set forth in [Code of Civil Procedure] section 1094.5, subdivision (e)." (*Pomona Valley*, *supra*, 55 Cal.App.4th at p. 101.) Under that provision, courts may augment the administrative record to include "relevant evidence that, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before respondent." (Code Civ. Proc., § 1094.5, subd. (e).) This provision "prevents a mandamus petitioner from challenging an agency decision that *is* supported by the administrative record on the basis of evidence, presented to the court, which could have been, but was not, presented to the administrative body." (*Voices of the Wetlands*, *supra*, 52 Cal.4th at p. 532.)

B. A reviewing court should strike citations to extra-record material from any brief.

When a party attempts to rely on material that was not properly before the lower courts, the reviewing court will grant a motion to strike that evidence and all references to or discussion of that material in the party's briefing. (*Mission Imports, Inc. v. Superior Court* (1982) 31 Cal.3d 921, 927, fn. 5 [granting motion to strike]; *C.J.A. Corp. v. Trans-Action Financial Corp.* (2001) 86 Cal.App.4th 664, 673 [granting motion to strike portions of appellate brief that referred to material not presented to the trial court]; see Cal. Rules of Court, rule 8.204(e)(2)(B).)

C. This Court should strike the references to extra-record material in Boermeester's brief.

1. The trial court correctly rejected the extra-record material, and Boermeester has forfeited any right to challenge that decision.

The trial court properly rejected Boermeester's various attempts to introduce extra-record material. First, the trial court properly denied Boermeester's motion to augment the administrative record with new declarations from Roe because Boermeester "fail[ed] to demonstrate that the information in Jane Roe's declarations 'could not have been produced' or was 'improperly excluded' during the administrative proceedings." (6 CT 1131.) Second, the trial court properly denied Boermeester's request for judicial notice of another trial judge's opinion in a different case because that opinion was simply irrelevant. (See 2 RT 915, 1202; see also 5 CT 910.) Finally, the

court correctly declined to consider other extra-record material that Boermeester relied on without even bothering to move to augment the record. (See 4 CT 625–627, 643.)

On appeal, Boermeester did not challenge the trial court's evidentiary rulings and simply once again cited to the extra-record material in his opening brief. (AOB 19–26, 33, 48, 54, 56.) After USC pointed out that this material had been rejected by the trial court and was not part of the administrative record (RB 42–43), the Court of Appeal likewise properly refused to consider it (*Boermeester*, *supra*, 49 Cal.App.5th at p. 687, fn. 2).

Boermeester's failure to challenge the trial court's evidentiary rulings on appeal forfeited that issue. (See *Telish v. State Personnel Bd.* (2015) 234 Cal.App.4th 1479, 1487, fn. 4 ["An appellant's failure to raise an argument in the opening brief waives the issue on appeal"].) After the Court of Appeal declined to consider Boermeester's extra-record material, Boermeester failed to file a rehearing petition or raise it as an additional issue for this Court to consider in an answer to USC's petition for review. This amounts to a second forfeiture of this issue. (See Cal. Rules of Court, rules 8.500(c)(2), 8.504(c), 8.516(b); *In re Marriage of Goddard* (2004) 33 Cal.4th 49, 53, fn. 2 [declining to consider an argument because the party advancing it failed to "petition for rehearing in the Court of Appeal calling attention to any alleged misstatement of fact in its opinion"]; *Flannery v. Prentice* (2001) 26 Cal.4th 572, 590–591 [declining to consider issue not raised in Court of Appeal].)

In his answer brief on the merits, Boermeester relies yet again on the same extra-record material that the trial court and the Court of Appeal declined to consider. His improper reliance on this material is extensive—as shown in the table included in the proposed order accompanying this motion, Boermeester's answer brief on the merits cites material outside the administrative record a total of 30 times. (See ABOM 14–15, 17, 19, 21–27, 30, 36–38, 61.) Boermeester fails to acknowledge in his answer brief that this material was rejected by both lower courts. This Court should not reward that conduct and should strike his brief.

2. Boermeester's belated justification below for citing this material in his opening brief on appeal is without merit.

In his reply brief in the Court of Appeal, Boermeester contended that his reliance on declarations not found in the administrative record was appropriate because appellate courts must consider the entire "record of the trial court proceedings" when conducting administrative mandamus review. (ARB 25–26.) But the case law that Boermeester cited in fact provides (contrary to his position) that courts must review the entire *administrative* record, and does not approve reliance on material outside of the administrative record that has been unsuccessfully introduced during judicial review. (See *Doe v. Regents of University of California* (2016) 5 Cal.App.5th 1055, 1059, 1070–1071 [reciting facts from administrative record and faulting accused student for mischaracterizing evidence in administrative

record]; *Ogundare v. Department of Industrial Relations* (2013) 214 Cal.App.4th 822, 828–829 [an appellate court " 'reviews the administrative record to determine whether the agency's findings were supported by substantial evidence' "]; *California Youth Authority v. State Personnel Bd.* (2002) 104 Cal.App.4th 575, 579 ["in evaluating the substantiality of the evidence in this appeal, we shall consider all relevant evidence in the administrative record, including evidence that fairly detracts from the evidence supporting the agency's decision"]; *Northern Inyo Hosp. v. Fair Emp. Practice Com.* (1974) 38 Cal.App.3d 14, 17–20, 24–26 [evaluating evidence in administrative record].)

In sum, the law is clear that courts conducting administrative mandamus review confine their review to evidence in the administrative record in the absence of an order augmenting the record. (*Voices of the Wetlands*, *supra*, 52 Cal.4th at p. 532.)

3. The extra-record material cited in the answer brief is not relevant to any issue in this case.

The extra-record material that Boermeester cites in his answer brief on the merits has nothing to do with the issues on which this Court has granted review in this case. (See Cal. Rules of Court, rule 8.204(a)(2)(C) [noting requirement to "[p]rovide a summary of the significant facts limited to matters in the record"].) Boermeester relies on this material in an attempt to relitigate the facts and to support his allegations that USC was biased against him, that he did nothing wrong, and that Roe

supports him. (ABOM 14–15, 17, 19, 21–27, 30, 36–38, 61.) But those assertions are irrelevant to determining whether the common law requires private universities investigating domestic violence claims to conduct live hearings with cross-examination.

Boermeester's extra-record material also has nothing to do with whether Boermeester waived his fair procedure claim, whether any procedural error was harmless on this record, or whether Senate Bill No. 493 (2019–2020 Reg. Sess.) affects the resolution of this case. Boermeester's extra-record material merely seeks to bolster Boermeester's reputation and besmirch USC's—it does nothing to aid this Court's resolution of the issues under review. This Court should reject Boermeester's attempt to inject irrelevant material from outside the administrative record into this case.

CONCLUSION

For the foregoing reasons, this Court should strike Boermeester's answer brief on the merits and direct Boermeester to file a new brief limited to the evidence in the administrative record but otherwise identical to the brief he has already filed. In the alternative, this Court should strike the portions of Boermeester's answer brief that rely on extra-record material, as identified in the proposed order accompanying this motion.

April 13, 2021

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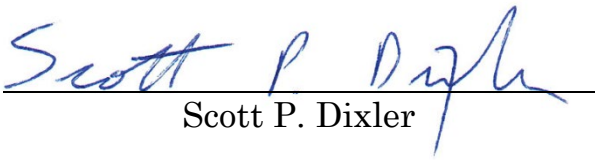
By: 
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S263180

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

[PROPOSED] ORDER

Upon the motion of the University of Southern California and Dr. Ainsley Carry (together, USC), IT IS HEREBY ORDERED THAT:

(1) USC's motion to strike is granted;

(2) Matthew Boermeester's answer brief on the merits is stricken;

(3) Boermeester is directed to file a revised answer brief on the merits that omits any reference to material not included in the administrative record and any arguments or statements that rely on this material, but that is otherwise identical to the brief he has already filed; and

(4) The following references to and discussion of material not included in the administrative record contained in Boermeester's original answer brief on the merits will not be considered by this Court:

Answer Brief Page No.	**Citation to Clerk's Transcript**	**Document Description**
14	2 CT 413	Aug. 16, 2017 Declaration of Jane Roe
14	2 CT 401–402	Aug. 17, 2017 Declaration of Matthew Boermeester
15	2 CT 413	Aug. 16, 2017 Declaration of Jane Roe
17	2 CT 401–403	Aug. 17, 2017 Declaration of Matthew Boermeester
17	2 CT 413–416	Aug. 16, 2017 Declaration of Jane Roe with attachment
17	3 CT 580–581	Sept. 6, 2017 Declaration of Jane Roe
17	3 CT 612–615	Sept. 5, 2017 Declaration of Jane Roe
17	6 CT 1061–1073	Sept. 6, 2017 Declaration of Jane Roe and Feb. 27, 2018 Declaration of Jane Roe
17	3 CT 580 ¶ 15	Sept. 6, 2017 Declaration of Jane Roe
19	6 CT 1070 ¶ 14	Feb. 27, 2018 Declaration of Jane Roe
21	3 CT 579 ¶ 10	Sept. 6, 2017 Declaration of Jane Roe
22	2 [*sic*] CT 579	Sept. 6, 2017 Declaration of Jane Roe
22	3 CT 578 ¶ 3	Sept. 6, 2017 Declaration of Jane Roe
23	3 CT 579 ¶¶ 11–12; 3 CT 580 ¶ 13	Sept. 6, 2017 Declaration of Jane Roe
24	3 CT 581 ¶ 22	Sept. 6, 2017 Declaration of Jane Roe

24	3 CT 580 ¶ 18	Sept. 6, 2017 Declaration of Jane Roe
25	3 CT 581 ¶ 19	Sept. 6, 2017 Declaration of Jane Roe
25	3 CT 580 ¶ 17	Sept. 6, 2017 Declaration of Jane Roe
25	6 CT 1070 ¶ 17	Feb. 27, 2018 Declaration of Jane Roe
25	3 CT 581 ¶ 19	Sept. 6, 2017 Declaration of Jane Roe
26	6 CT 1071–1072 ¶ 29	Feb. 27, 2018 Declaration of Jane Roe
27	6 CT 1072 ¶ 32	Feb. 27, 2018 Declaration of Jane Roe
27	5 CT 1000	Attachment to Aug. 16, 2017 and Sept. 6, 2017 Declarations of Jane Roe
30	2 CT 401 ¶¶ 6–7	Aug. 17, 2017 Declaration of Matthew Boermeester
36	3 CT 601 ¶ 23	Sept. 5, 2017 Declaration of Hannah Stotland
37	1 [*sic*] CT 415–416	Attachment to Aug. 16, 2017 Declaration of Jane Roe
38	5 CT 901–902	Ruling on Petition for Writ of Mandate in *Doe v. Carry*
38	5 CT 893–906	Ruling on Petition for Writ of Mandate in *Doe v. Carry*
61	3 CT 578–581	Sept. 6, 2017 Declaration of Jane Roe
61	6 CT 1068–1073	Feb. 27, 2018 Declaration of Jane Roe

Date: _____

_____
CHIEF JUSTICE

PROOF OF SERVICE

Boermeester v. Carry et al.
Case No. S263180

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 3601 West Olive Avenue, 8th Floor, Burbank, CA 91505-4681.

On April 13, 2021, I served true copies of the following document(s) described as **MOTION TO STRIKE ANSWER BRIEF ON THE MERITS; [PROPOSED] ORDER** on the interested parties in this action as follows:

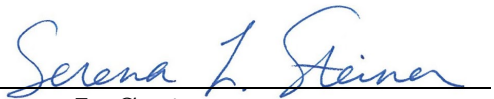
SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

BY E-MAIL OR ELECTRONIC TRANSMISSION: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission via Court's Electronic Filing System (EFS) operated by ImageSoft TrueFiling (TrueFiling) as indicated on the attached service list:

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

Executed on April 13, 2021, at Valley Village, California.



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Boermeester v. Carry et al.
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Clerk of the Court Hon. Amy D. Hogue, Dept. 7 Los Angeles County Superior Court Spring Street Courthouse 312 North Spring Street Los Angeles, CA 90012 (213) 310-7007	Trial Court Judge [Case No. BS170473] ***By U.S. Mail***

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **BOERMEESTER v. CARRY**
Case Number: **S263180**
Lower Court Case Number: **B290675**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **sdixler@horvitzlevy.com**

3. I served by email a copy of the following document(s) indicated below:

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4/13/2021

Date

/s/Scott Dixler

Signature

Dixler, Scott (298800)

Last Name, First Name (PNum)

Horvitz & Levy LLP

Law Firm