

**Case No. S263180**

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*In the*  
**Supreme Court**  
*of the*  
**State of California**

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MATTHEW BOERMEESTER,,  
*Plaintiff and Appellant,*

v.

AINSLEY CARRY et al.,  
*Defendants and Respondents.*

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AFTER A PUBLISHED DECISION OF THE COURT OF APPEAL,  
SECOND APPELLATE DISTRICT, DIVISION EIGHT, CASE NO. B290675  
LOS ANGELES SUPERIOR COURT, THE HONORABLE AMY D. HOGUE,  
CASE NO. BS170473

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**OPPOSITION TO OPPOSITION TO MOTION TO  
STRIKE ANSWER BRIEF ON THE MERITS**

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## OPPOSITION TO MOTION TO STRIKE ANSWER BRIEF ON THE MERITS

The University of Southern California and Dr. Ainsley Carry (collectively, “USC”) move to strike Matthew Boermeester’s answer brief on the merits because it references the following pages from the Clerk’s Transcript of the trial court proceedings:

1. Aug. 17, 2017 Declaration of Matthew Boermeester (2 CT 401-403)
2. Aug. 16, 2017 Declaration of Zoe Katz (2 CT 413-416)
3. Sept. 5, 2017 Declaration of Zoe Katz (3 CT 612-615)
4. Sept. 6, 2017 Declaration of Zoe Katz (3 CT 578-581; 5 CT 1000; 6 CT 1061–1073)
5. Feb. 27, 2018 Declaration of Zoe Katz (6 CT 1068-1073)
6. Sept. 5, 2017 Declaration of Hannah Stotland (3 CT 601)
7. Ruling on Petition for Writ of Mandate in *Doe v. Carry* (5 CT 893-906)

Mr. Boermeester’s answer brief cites to the Administrative Record, the Clerk’s Transcript, and the Reporter’s Transcript, the complete record of the documents in the superior court file and the documents considered by the Court of Appeal. To Mr. Boermeester’s knowledge, there is no prohibition against including citations to documents that are properly included in the Clerk’s Transcript. In fact, the Court may decide that a party has waived a point urged on appeal when it is not supported by accurate citations to the record. (*City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 287; Cal. Rules of Court, Rule 8.204(a)(1)(C).) To that end, Mr. Boermeester has made an effort

to provide complete citations to the record so that the court can reach a reasoned and informed decision.

The documents in the Clerk's Transcript were properly filed in the trial court and designated as part of the record on appeal by USC and Mr. Boermeester. (6 CT 1240-1252.) USC raised no objection to Mr. Boermeester's designation of the documents as part of the record and does not now object to the documents in the record.

The documents are relevant to the issues this Court ordered briefed and argued, specifically, the circumstances in which the common law right to fair procedure requires a private university to afford a student who is facing severe disciplinary penalties with a live hearing and cross-examination, and whether Mr. Boermeester inadvertently waived the right to cross-examine Ms. Katz. In this case, Ms. Katz has maintained that she did not say the words attributed to her by USC's Title IX investigator in the investigator's non-verbatim notes of their private meeting; the factfinders were not impartial; and Mr. Boermeester and Ms. Katz were never given an opportunity to respond to USC's opinion that Ms. Katz "recanted" before USC issued its final administrative findings and decisions. Under the circumstances, fairness required a live hearing before a neutral adjudicator and cross-examination.

The Court may consider documents in the Clerk's Transcript, so there is no basis to strike references to the Clerk's Transcript from Mr. Boermeester's answer brief on the merits. However, if the Court orders the references to the Clerk's

Transcript stricken, Mr. Boermeester requests leave to revise his answer brief to include citations to the Administrative Record in lieu of the stricken references to the Clerk's Transcript to avoid waiver of any arguments.

### **STATEMENT OF RELEVANT FACTS**

#### **A. USC misidentifies Ms. Katz as a “victim”.**

A pattern has arisen in this case of USC suppressing, or moving to suppress, statements made by Ms. Katz so that USC can continue to label her a “victim” of domestic violence. The bulk of the references USC seeks to strike are references to sworn declarations provided by Ms. Katz in her endeavor to set the record straight. USC's urging that Ms. Katz's testimony in the Clerk's Transcript ought to be ignored and stricken is fueled by the presumption of correctness, the presumption of impartiality, and the limitations on independent judgment review afforded to governmental agency administrative decisions, which USC relies upon to its advantage, when in fact USC is a private litigant, not impartial, and has been directly adverse to Mr. Boermeester and Ms. Katz from the outset.

Ms. Katz never made a misconduct report against Mr. Boermeester. (1 AR 189.) On January 23, 2017, she was told that she had to attend a private meeting with the USC Title IX Office, although she “didn't understand the purpose of the meeting or why [she] was there.” (1 AR 67.) Because the meeting was not audio or video recorded, and there are no verbatim notes or transcripts of what transpired, what Ms. Katz said during the meeting is the subject of considerable dispute. During the Title IX proceedings at USC, Ms. Katz's took every

available opportunity to correct USC's record of her statements. (See 1 AR 168-169 [January 30, 2017 interview with Ms. Katz]; 1 AR 158-159 [Ms. Katz's text messages with investigator Helsper]; 1 AR 56 [Ms. Katz's public tweet]; 1 AR 67 [Ms. Katz's response to evidence], 1 AR 192-196 [Ms. Katz's appeal], 1 AR 212-214 [Ms. Katz's response to Mr. Boermeester's appeal].)

In conflict with the evidence, USC made a finding that Ms. Katz requested to withdraw her initial statement in "fear of retaliation" from Mr. Boermeester. (1 AR 3.) USC gave Ms. Katz and Mr. Boermeester no opportunity to respond to USC's theory that Ms. Katz "recanted" her initial statement before deciding that Ms. Katz had, in fact, recanted. Ms. Katz has gone to great lengths to convince USC and the court that she did not recant nor request to withdraw her statement out of fear of retaliation from Mr. Boermeester, and she has never been afraid of Mr. Boermeester because he has never acted violently toward her. (See e.g., AR 192-196.)

USC's Appeal Panel continued USC's pattern of muzzling Ms. Katz by disregarding her own words that she was not a victim and had never recanted. (1 AR 220.) Over the objections of Ms. Katz and Mr. Boermeester, Mr. Boermeester was expelled from USC. (1 AR 221.)

**B. USC takes issue with Mr. Boermeester's references in his answer brief to documents filed in the trial court.**

Mr. Boermeester appealed USC's findings and decision to expel him by writ of mandate. (1 CT 6.) He also requested a stay



of the administrative action pending the court's review of his petition on the merits. (2 CT 278.)

In support of Mr. Boermeester's *ex parte* application for a stay, Mr. Boermeester filed a declaration regarding the irreparable harm that would result in the absence of a stay. (2 CT 401-403 ["Aug. 17, 2017 Declaration of Matthew Boermeester"].) Ms. Katz also provided a sworn declaration, consistent with statements she made to USC's Title IX Office, affirming under oath that she had never been abused, assaulted, or mistreated by Mr. Boermeester. (2 CT 413-416 ["Aug. 16, 2017 Declaration of Jane Roe"].)

USC opposed Mr. Boermeester's request for a stay but did not object to the declarations filed by Mr. Boermeester and Ms. Katz in support of Mr. Boermeester's *ex parte* application. (3 CT 434.) The Court considered these declarations and ordered supplemental briefing on the issue of whether a stay was against the public interest. (2 RT 1-33.)

In reply to USC's supplemental brief, Mr. Boermeester filed the Declaration of Hannah Stotland, an independent education and admissions consultant, who attested, based on her own education, background, and professional experience, to the significant impact of an expulsion from USC for a Title IX violation on Mr. Boermeester's education and future. (3 CT 598-602 ["Sept. 5, 2017 Declaration of Hannah Stotland"].) Mr. Boermeester also filed two Declarations of Zoe Katz (3 CT 3 CT 577-581 [September 6, 2017 Declaration of Zoe Katz"] and 612-617 ["Sept. 5, 2017 Declaration of Jane Roe"]), in which Ms. Katz

responded to USC’s misrepresentations about her in its supplemental brief. (See 3 CT 551-568.) Duplicates of the September 6, 2017 Declaration of Zoe Katz appear in the Clerk’s Transcript at 5 CT 979-983, 5 CT 993-997, and 6 CT 1061-1065.

USC raised general objections to the declarations of Zoe Katz and Hannah Stotland, and specific objections to the Declaration of Hannah Stotland.<sup>1</sup> (4 CT 625-643.)

During the hearing on Mr. Boermeester’s application for stay, USC referenced the Declaration of Hannah Stotland twice. (2 RT 310:4-9, 312:3-7.) The court generally sustained USC’s objections to the declarations because the only issue of concern was whether granting a stay was against the public interest. The court did not want to “get into the merits of his likelihood to succeed on the merits and the actual substantive issues that will be reserved for trial.” (2 RT 302:17-19; 4 CT 627.)

On February 27, 2018, Mr. Boermeester moved to augment the administrative record to include the September 6, 2017 Declaration of Zoe Katz and an updated February 27, 2018 Declaration of Zoe Katz. (6 CT 1052-1058; 6 CT 1068-1073 [“Feb. 27, 2018 Declaration of Zoe Katz”].) In denying Mr. Boermeester’s motion to augment the administrative record, the court noted that “much of the information in [Zoe Katz’s] two declarations was included in her internal appeal of USC’s decision.” (6 CT 1131.)

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<sup>1</sup> Mr. Boermeester also filed two additional declarations, which are not referenced in Mr. Boermeester’s Answer Brief.

USC also takes issue with Mr. Boermeester’s reference in a footnote in his answer brief to a trial court decision in another case against USC, *Doe v. Carry* (Super. Ct. L.A. County, 2017, No. BS163736), where the trial court held that statements made by the Title IX Coordinator, Gretchen Dahlinger Means, describing the accused male student and his advisor as “motherfuckers” while describing the female complainant as “cute” “intelligent” and “a catch” to “amply demonstrate an unacceptable probability of actual bias” against the accused student. (5 CT 893-906 [“Ruling on Petition for Writ of Mandate in *Doe v. Carry*”].) The trial court denied Mr. Boermeester’s request for judicial notice of the decision. (6 CT 1130.)

**C. The Court of Appeal did not decline to consider material in the Clerk’s Transcript.**

The Court of Appeal did not decline or refuse to consider any material in the Clerk’s Transcript. The Court of Appeal simply based its “recitation of facts” in its decision on “the evidence in the administrative record, and not the declarations submitted by Boermeester that were not made part of the [administrative] record.” (*Boermeester v. Carry* (2020) 49 Cal.App.5th 682, 687, fn. 2.) The dissenting justice, the Honorable Justice John Shepard Wiley, Jr., specifically referenced the complete “record exceeding 2,000 pages” in this case. (*Id.* at p. 714.) The complete record consists of the administrative record, the Clerk’s Transcript, and the Reporter’s Transcript and is the only record in the case that exceeds 2,000 pages. The events that transpired in the trial court are part of

the record, just as the events that transpired during the administrative proceedings are part of the record.

**THE COURT SHOULD CONSIDER  
ALL INFORMATION IN THE RECORD**

“The reviewing court will presume that the record in an appeal includes all matters material to deciding the issues raised.” (Cal. Rules of Court, Rule 8.163.) USC and Mr. Boermeester designated the record on appeal. (6 CT 1240-1247.) USC did not object to Mr. Boermeester’s designation of documents in the record or move to correct the record. (Cal. Rules of Court, Rule 8.155(c).) Mr. Boermeester has found no authority prohibiting references in the parties’ briefs to documents that are properly part of the Clerk’s Transcript and the record on appeal. (*Voices of the Wetlands v. State Water Resources Control Bd.* (2011) 52 Cal.4th 499, 529-532 (finding that under Code Civ. Proc., § 1094.5, subd. (e), a board was not precluded from accepting and considering new evidence on remand); *Pomona Valley Hospital Medical Center v. Superior Court* (1997) 55 Cal.App.4th 93 (finding that the trial court abused discretion by permitting deposition of a doctor and augmentation of the administrative record in the absence of a proper preliminary foundation showing that any or all of the reviewing panel members were biased); *Mission Imports, Inc. v. Superior Court* (1982) 31 Cal.3d 921, 927, fn. 5 (granting motion to strike items that were not brought to the attention of the lower court); *C.J.A. Corp. v. Trans-Action Financial Corp.* (2001) 86 Cal.App.4th 664, 673 (granting motion to strike materials filed with appellants’ “Application for Consideration of Additional

Evidence,” which was denied after appellant’s opening brief was filed, because the citations found no support in the record on appeal.)

The Court is not reviewing whether USC’s findings were supported by substantial evidence; therefore, Mr. Boermeester and USC prepared no argument on that issue. Authority cited by USC for the proposition that the appellate court reviews the administrative record to determine whether the agency’s findings were supported by substantial evidence are not on point. (Motion to Strike pp. 15-16, citing *Ogundare v. Department of Industrial Relations* (2013) 214 Cal.App.4th 822, 828–829; *California Youth Authority v. State Personnel Bd.* (2002) 104 Cal.App.4th 575, 579; *Northern Inyo Hosp. v. Fair Emp. Practice Com.* (1974) 38 Cal.App.3d 14, 17–20, 24–26.)

This Court must make an independent determination of questions having a legal character. (*Bekiaris v. Bd. of Educ.* (1972) 6 Cal.3d 575, 587.) Mr. Boermeester has made an effort to provide complete and thorough citations to the record so that the Court can reach well-reasoned and informed decisions on the legal issues presented in this case. Mr. Boermeester is also loath to waive any points on appeal due to insufficient citation to the record considering that one of the four issues in this case involves the potential inadvertent waiver of his constitutional right to cross-examination. (*City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 287; Cal. Rules of Court, Rule 8.204(a)(1)(C).) Mr. Boermeester did not intend to improperly introduce any material in his brief and is simply drawing the Court’s attention

to facts in the record that may inform the Court's deliberation on the legal questions.

Regarding references to the four declarations of Zoe Katz filed in the trial court, much of the information in Ms. Katz's declarations was presented to USC's administrative bodies. (See 6 CT 1131 ("much of the information in [Zoe Katz's] two declarations was included in her internal appeal of USC's decision.")) The record should reflect that Ms. Katz took great pains both during the administrative proceeding at USC and in the trial court to correct USC's record of her intake interview. The record should also reflect that USC consistently objects to any reviewing body considering statements by Ms. Katz that do not align with USC's non-verbatim notes of her intake interview. In his dissent, the Honorable Justice Wiley surmised that Mr. Boermeester strategically sought to avoid cross-examining Ms. Katz because doing so would give her an opportunity to modify or to contradict her "recantation". (*Boermeester, supra*, 49 Cal.App.5th at p. 715.) But it is USC, not Mr. Boermeester, that has consistently marginalized and sought to suppress statements made by Ms. Katz when Ms. Katz did not cooperate with USC's Title IX Office to prosecute Mr. Boermeester, and when Ms. Katz revealed USC's Title IX Office as aggressive, agenda-driven, unfair, and biased. The very reasons for a live hearing with cross-examination in this case are to get to the truth, and to prevent misuse of the Title IX process by USC's Title IX personnel, a problem that has been all too common at USC. (See *Doe v. Allee* (2019) 36 Cal.App.5th 1036, 1070; *Doe v. University*

*of Southern California* (2018) 29 Cal.App.5th 1212, 1232-1240.) USC opposes the opportunity for students to present their cases at a live hearing with cross-examination, while Mr. Boermeester and Ms. Katz have consistently embraced it.

Regarding the single reference to the Sept. 5, 2017 Declaration of Hannah Stotland (ABOM p. 36 [3 CT 601 ¶ 23]) and the three references to the Aug. 17, 2017 Declaration of Matthew Boermeester (ABOM pp. 14, 17, 30 [2 CT 401–403]), the court may find this information useful when determining whether the severity of the sanction in this case warranted providing Mr. Boermeester a live hearing with cross-examination, a consideration not undertaken by USC during USC’s administrative proceeding.

Finally, regarding the footnote reference to the Ruling on Petition for Writ of Mandate in *Doe v. Carry* (Super. Ct. L.A. County, 2017, No. BS163736) (ABOM p. 38, n. 19), the Court may take judicial notice of “Records of (1) any court of this state or (2) any court of record of the United States or of any state of the United States.” (Evid Code, § 452(d).) The Title IX Coordinator in *Doe v. Carry* who referred to a respondent and his advisor as “motherfuckers” is the same Title IX Coordinator who oversaw the investigation in Mr. Boermeester’s case. The Court may find this information relevant when determining whether a live hearing with cross-examination would have resolved issues raised by both Mr. Boermeester and Ms. Katz regarding the lack of impartiality in USC’s proceedings.

The Court is well-equipped to discern the relevance of documents in the record. If the Court finds that the references to the record on appeal in Mr. Boermeester's brief do not comply with Cal. Rules of Court, Rule 8.204, the Court may disregard the noncompliance. (Cal. Rules of Court, Rule 8.204(e)(2)(C).) However, if it would be helpful to the Court to remove references to the Clerk's Transcript that appear in Mr. Boermeester's answer brief, Mr. Boermeester will do so.

### **CONCLUSION**

Based upon the foregoing, Mr. Boermeester respectfully requests that this Court deny USC's motion to strike Mr. Boermeester's answer brief on the merits, or alternatively, permit Mr. Boermeester to revise his answer brief to include citations to the administrative record in lieu of the stricken references to the Clerk's Transcript and re-file the brief.

DATED: April 28, 2021

Respectfully submitted,  
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