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

REPLY BRIEF ON THE MERITS

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REPLY BRIEF ON THE MERITS

INTRODUCTION

Domestic violence is a serious problem among university students that cuts across the spectrum of race, gender, and socioeconomic status. USC does not tolerate domestic violence in its community. But domestic violence involving students is difficult to detect, investigate, sanction, and eliminate, in significant part because it is vastly underreported and victims often recant to appease their abusers, as occurred in this case.

The common law fair procedure doctrine requires private universities investigating allegations of sexual misconduct and domestic violence to provide accused students with basic fairness, which means notice and an opportunity to respond. The common law does not require universities to conduct mini-trials featuring cross-examination of witnesses, which would deter the reporting of abuse and divert scarce university resources away from education. The Court of Appeal below erred in holding otherwise. Indeed, through Senate Bill No. 493 (2019–2020 Reg. Sess.) (SB 493), the Legislature recently codified the rule that private universities may decide for themselves whether to provide live hearings with indirect cross-examination in sexual misconduct and domestic violence cases.

The Court of Appeal's divided opinion overturning USC's decision to expel Matthew Boermeester for domestic violence was particularly indefensible on this record for two additional reasons. First, Boermeester waived any right to cross-examination because he did not request it and his lawyer told

USC he did not want Jane Roe[1] to appear for in-person questioning. Second, any procedural error was harmless because Boermeester admitted to putting his hand on Roe's neck and shoving her, which was also captured on surveillance video and corroborated by multiple witnesses. No amount of additional process could have helped his defense.

Boermeester offers no persuasive response to these points in his answer brief on the merits, and he makes little effort to defend the reasoning of the Court of Appeal below. Instead, Boermeester spends most of his brief attempting to relitigate the underlying facts and advancing unfounded accusations of bias that are not properly before this Court.

In short, USC afforded Boermeester a fair procedure as required by law and the Court of Appeal's contrary decision should be reversed.

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[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 representation that Roe "has requested to be referred by her true name" (*ibid.*), Roe is not a party to this case. Thus, consistent with the Court of Appeal, this brief refers to Roe pseudonymously. (See *Boermeester v. Carry* (2020) 49 Cal.App.5th 682, 686, fn. 1 (*Boermeester*).)

LEGAL ARGUMENT

I. USC's investigation of Boermeester satisfied USC's obligation to provide a fair procedure for addressing domestic violence.

A. The common law affords private organizations broad flexibility to develop and implement their own fair procedures and does not require live hearings with cross-examination of witnesses.

Under the common law, private institutions are primarily responsible for developing and implementing fair procedures for themselves. (OBOM 25–26; see *Pinsker v. Pacific Coast Society of Orthodontists* (1974) 12 Cal.3d 541, 555 (*Pinsker II*).) Courts do not intervene routinely in the decisions of private organizations. (*Ibid.*) And courts "should not attempt to fix a rigid procedure that must invariably be observed." (*Pinsker II*, at p. 555; see OBOM 26.)

In its opening brief on the merits, USC traced the development of the common law doctrine of fair procedure and demonstrated that it does not compel private organizations to conduct live, trial-like hearings featuring the cross-examination of witnesses. (OBOM 27–30.) Instead, the common law requires basic fairness, which this Court has defined as notice and a reasonable opportunity to respond. (OBOM 26; *Ezekial v. Winkley* (1977) 20 Cal.3d 267, 278; *Pinsker II*, *supra*, 12 Cal.3d at p. 555.)

Boermeester fails to address USC's argument that this Court imposed no live cross-examination requirement in its seminal fair procedure decisions. (See OBOM 28–30.) He also

fails to address this Court's admonition that private institutions, not courts, are primarily responsible for developing their own fair procedures. (See *ibid.*)

While Boermeester asserts that "common law fair procedure can require private universities to conduct live hearings with cross-examination" (ABOM 50), he offers little authority to support that position. He cites *Cason v. Glass Bottle Blowers Ass'n of U.S. and Canada* (1951) 37 Cal.2d 134, 144 (ABOM 48), but as USC explained in the opening brief, that decision is thinly reasoned and this Court subsequently abandoned any live cross-examination requirement (OBOM 28). Boermeester's reliance on *Gill v. Mercy Hospital* (1988) 199 Cal.App.3d 889, 904, is similarly misplaced. As shown in USC's opening brief (OBOM 35–36), cases like *Gill* erroneously conflate the distinct doctrines of fair procedure and due process, and this Court should correct their error.

There similarly is no merit to Boermeester's reliance on several recent Court of Appeal decisions holding that private universities investigating claims of sexual misconduct must provide live hearings with cross-examination when witness credibility is central and the accused student faces serious sanctions. (ABOM 44–46.) As USC's opening brief demonstrated (OBOM 39–42), those cases have improperly expanded the common law's requirements and this Court should disapprove

them.[2] Additionally, these decisions should not be applied to university domestic violence cases, which generally do not depend solely on weighing the credibility of witnesses. (OBOM 42–45; see pp. 19–20, *post*.) Recent appellate decisions imposing ever-increasing procedural requirements on private universities investigating certain sexual misconduct claims are irreconcilable with this Court's key decisions applying common law fair procedure. Boermeester neglects to rebut, or even acknowledge, USC's challenge to these decisions.

USC's opening brief showed that USC provided Boermeester with greater procedural protections than the simple notice and an opportunity to respond required by the common law. (See OBOM 30–31.) In addition to providing Boermeester with detailed notice of the allegations against him, USC gave him multiple chances to review the evidence and tell his side of the story. (*Ibid.*) Boermeester was also afforded the opportunity to attend an in-person hearing and to present questions for Roe, but he declined. (*Ibid.*) USC also provided Boermeester with multiple layers of review. (OBOM 31.) No more was required. USC afforded Boermeester a fair process.

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[2] In *Knight v. South Orange Community College District* (2021) 60 Cal.App.5th 854, 858, 872, the Court of Appeal correctly held that a college need not conduct a live hearing with cross-examination of witnesses before reprimanding a student for misconduct. However, the court stated in dicta that live cross-examination would have been required if the college had sought to impose a harsher sanction such as suspension or expulsion. (*Id.* at pp. 858, 866–867, 870; see ABOM 45 [relying on *Knight*'s dicta].) *Knight*'s dicta is irreconcilable with this Court's precedent and this Court should disapprove it.

B. Mandating live cross-examination in the university setting would harm universities and their students.

USC's opening brief explained that mandating live cross-examination in university sexual misconduct and domestic violence cases would deter the reporting of abuse, subject victims to fresh trauma, and divert scarce university resources away from education. (See OBOM 40–42.) In view of these heavy costs, USC reasonably elected not to adopt an adversarial disciplinary system featuring live cross-examination. Under the common law, that decision was USC's to make. (See *Pinsker II*, *supra*, 12 Cal.3d at p. 555; OBOM 25.)

Boermeester offers no response to USC's concern about subjecting victims to the trauma of live cross-examination. Nor does Boermeester address the risk of deterring victims from reporting domestic violence or other forms of abuse. Instead, Boermeester asserts that a college education is valuable and expulsion can have lasting consequences. (See ABOM 46–47.) But these observations do not support requiring private universities to conduct live hearings with cross-examination.[3] While a university must safeguard the interests of an accused student by providing notice and an opportunity to respond, it

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[3] Contrary to Boermeester's assertion that expulsion can tarnish a student's reputation for life (ABOM 46, 59), federal law prohibits universities from disclosing the findings of investigations into alleged misconduct to unauthorized persons without the consent of the student or, when applicable, his parent (see 20 U.S.C. § 1232g(b)(1) & (d); *Gonzaga Univ. v. Doe* (2002) 536 U.S. 273, 278–279 [122 S.Ct. 2268, 153 L.Ed.2d 309].)

must also protect the rest of its community, including its most vulnerable members. A private university has the right " ' "to determine for itself . . . who may be admitted to study." ' " (*University of California Regents v. Bakke* (1978) 438 U.S. 265, 312 [98 S.Ct. 2733, 57 L.Ed.2d 750] (opn. of Powell, J.).) Inherent in this right is the freedom to set standards of conduct for its community members and the responsibility to maintain a safe academic environment for all, including victims of domestic violence and other forms of bullying and abuse.

Boermeester also argues that USC's concerns about mandating live cross-examination are overblown based on his supposition that USC does not hold many sexual misconduct hearings each year. (ABOM 51.) But regardless whether a private university investigates two or twenty cases of misconduct per year, the problems with mandating live cross-examination are the same. University administrators are ill-equipped to preside over mini-trials, and conducting such proceedings threatens serious harm to victims and the academic community as a whole. (See OBOM 40–42, 44.) Conducting even one such mini-trial with live cross-examination could deter many other victims of sexual misconduct and domestic violence from reporting their abuse. (See SB 493, § 1, subd. (d) [recognizing that sexual harassment and violence is pervasive in higher education]; see also *id.*, § 1, subd. (j) [finding that "only 12 percent of college survivors report sexual assault to their schools or the police"].)

C. California's common law fair procedure doctrine—and not the due process clause—governs private university disciplinary proceedings.

1. Due process and fair procedure are distinct.

California's common law fair procedure doctrine, not constitutional due process, governs a private university's disciplinary proceedings. (OBOM 31–42; see *Pinsker II*, *supra*, 12 Cal.3d at p. 550, fn. 7 [clarifying that common law fair procedure, rather than constitutional due process, governs private organizations].) The two doctrines are not the same. (See OBOM 33–38.) Due process protects citizens from government action, and its standards are fixed by the federal Constitution as interpreted by the United States Supreme Court. (OBOM 32–33, 36–37.) By contrast, this Court can shape California's common law fair procedure doctrine to meet the evolving needs of this State's private organizations and their members. (OBOM 37.) Requiring private universities to provide basic procedural fairness, rather than resource-intensive mini-trials governed by constitutional due process, appropriately recognizes courts' lack of expertise in managing the operations of private organizations. (OBOM 37–38.) It also reflects the realities that private organizations lack the coercive power over their members that governments have over citizens, and that citizens have the free choice to determine the private organizations with which they associate.

Contrary to Boermeester's assertion (ABOM 48, 52–53), the constitutional line dividing private organizations from public institutions is both logical and doctrinally sound. Private organizations are not state actors, and they have the freedom to develop and implement fair procedures that best serve the needs of their members. Distinguishing private institutions from public institutions reflects hornbook constitutional law, not favoritism toward the private sector.[4]

Boermeester also suggests that due process applies "by analogy" to private institutions (ABOM 44), but he fails to address the key differences between the two doctrines identified by USC. Boermeester thus commits the same error as many of the Court of Appeal decisions discussed in USC's opening brief—he assumes that the requirements of due process and fair procedure are coextensive without pausing to examine the differences between the doctrines. (See OBOM 34–36, 39–42.) This Court should reject that approach and disapprove the decisions that have adopted it.

Finally, Boermeester is wrong that due process should apply because USC's disciplinary proceedings are "quasi-criminal" and USC's employees are "prosecutors." (See ABOM 11–12, 57.) Under USC's policy, investigations are "a neutral fact-finding process" (2 AR 487), and Boermeester's liberty was never in jeopardy (see 2 AR 494 [possible sanctions include

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[4] This Court need not address whether *public* universities must conduct live hearings with cross-examination in domestic violence cases. This case does not present that issue.

expulsion, suspension, or revocation of a degree]). USC's process is meant to protect its academic community, which is inseparable from USC's right to determine its membership. Boermeester concedes that private institutions may decide "who belongs amongst their ranks." (ABOM 12.)

2. Boermeester is wrong in arguing that applying administrative mandamus review to private organizations' decisions supports application of constitutional due process standards to non-state actors.

Contrary to Boermeester's contention (see ABOM 44), the fact that administrative mandamus review under Code of Civil Procedure section 1094.5 applies to both private and public organizations does not support applying constitutional due process standards to private actors. Section 1094.5 is a procedural vehicle for reviewing public and private administrative decisions—it does not impose any particular standards of fair procedure. (See *Alpha Nu Association of Theta Xi v. University of Southern California* (2021) 62 Cal.App.5th 383, 418 [" 'Fair hearing requirements [under section 1094.5] are "flexible" and entail no "rigid procedure" ' "]; *Pinheiro v. Civil Service Com. for County of Fresno* (2016) 245 Cal.App.4th 1458, 1463 ["The 'fair trial' requirement of section 1094.5 is not synonymous with constitutional due process and does not mandate 'a formal hearing under the due process clause.' [Citation.] What is required is simply a 'fair administrative hearing' [citation], which affords the appellant a ' " 'reasonable opportunity to be heard.' " ' "].) For private institutions like USC,

California's common law fair procedure doctrine, not constitutional due process, provides the governing standard. (See *ante*, pp. 15–17.)

Boermeester also appears to argue that courts should hold private institutions to *higher* procedural standards than public agencies because (he contends) doctrines applicable in mandamus actions such as the presumption of impartiality and the presumption of correctness do not apply to private institutions. (See ABOM 52–53.) He is wrong again—these doctrines apply to private institutions as well as public agencies. (See, e.g., *Doe v. Occidental College* (2019) 37 Cal.App.5th 1003, 1018, 1019 & fn. 3 [applying presumption of correctness to private university's administrative decision]; *Michalski v. Scripps Mercy Hospital* (2013) 221 Cal.App.4th 1033, 1042 ["In writ proceedings, the trial court 'presumes that the [administrative tribunal's] decision is supported by substantial evidence, and the petitioner bears the burden of demonstrating the contrary' "].) The applicability of these presumptions to private organizations in administrative mandamus actions simply reflects a bedrock principle of appellate review—it is the appellant's burden to show error below. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.)

Finally, subjecting a private university's disciplinary decisions to limited judicial review would not, as Boermeester posits (ABOM 43), somehow favor USC's interests over Boermeester's. Requiring private universities such as USC to provide basic procedural fairness rather than live cross-examination reflects both the appropriate limits on judicial

review of private decisions and the procedural limits inherent in appellate review of any decision.

D. Even if cross-examination is required in certain cases, USC provided a fair procedure in this domestic violence case.

1. Boermeester fails to respond to USC's argument that the rationale for requiring live cross-examination in certain sexual misconduct cases does not apply to domestic violence cases.

Regardless whether the common law requires live cross-examination in certain university sexual misconduct cases where credibility is central (it does not), this Court should not extend that requirement to this domestic violence case. (OBOM 42–45.) USC provided three reasons for distinguishing university sexual misconduct cases from domestic violence cases. First, as in this case, domestic violence cases typically depend on evaluating observable evidence rather than turning primarily on the question of consent. (OBOM 43.) Second, and again as in this case, domestic violence cases are different because victims in these cases commonly recant their initial descriptions of the violence. (OBOM 43–44; *People v. Brown* (2004) 33 Cal.4th 892, 896 (*Brown*).) In these situations, cross-examination of the victim provides little, if any, assistance to the fact finder or the accused student because the victim has already disavowed her prior statements. Indeed, that is precisely why Boermeester declined to pose questions to Roe when given the chance. (OBOM 51.) Finally, requiring cross-examination in university domestic violence cases is likely to have a particularly substantial

chilling effect on victims' willingness to report abuse due to their ongoing interactions with the abuser in the university setting. (OBOM 44.) In view of these differences, mandating live cross-examination in university domestic violence cases is unlikely to improve the accuracy of the factfinding process and threatens to harm universities and their students.

Beyond the blanket assertion that the common law "can require" live cross-examination (ABOM 48), Boermeester says nothing about the differences between domestic violence and sexual misconduct that make live cross-examination particularly unnecessary and harmful in university domestic violence cases. Boermeester's silence amounts to a tacit concession that even if the common law requires private universities to provide live cross-examination in some cases, live cross-examination was not required in this domestic violence case.

2. Boermeester fails to respond to USC's argument that the Court of Appeal erred in imposing three additional procedural requirements.

The majority below erred in faulting USC for not (1) giving Boermeester the opportunity to attend Roe's hearing in person or via videoconference, (2) allowing Boermeester to ask Roe follow-up questions, and (3) allowing Boermeester to cross-examine third-party witnesses. (OBOM 46–49.)

These additional requirements are unjustified and unnecessary. Allowing accused abusers to witness the questioning of their victims in real-time is likely to have an especially pronounced chilling effect on reporting of domestic

violence in the university context without contributing to the accuracy of the factfinding process. (See OBOM 46–47.) Similarly, allowing abusers to pepper victims with follow-up questions would exacerbate survivors' trauma and further chill reporting. (See OBOM 48–49.) Finally, allowing cross-examination of third parties is unlikely to aid a university's factfinding process. Unlike courts, universities lack the power to compel witnesses to appear and testify. (OBOM 42.) Moreover, such a requirement would have made no difference in this case because the credibility of third-party witnesses was not central to USC's decision. (OBOM 47–48; see pp. 23–25, *post*.)

Boermeester's answer brief is silent on these issues. Boermeester makes no effort to defend the Court of Appeal's imposition of additional procedural requirements beyond live cross-examination of the victim. (See ABOM 48–50.) Boermeester also does not attempt to refute USC's argument that imposing these additional requirements represents the type of judicial second-guessing and micromanagement of private organizational decisions that this Court's precedents preclude. At a minimum, therefore, this Court should hold that the common law does not require the additional procedural requirements imposed by the majority below.

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

A student contesting the fairness of a university's disciplinary proceeding forfeits a challenge if he fails to raise it during the university proceeding. (OBOM 49–50.) Here, not only

did Boermeester never ask USC to allow him to cross-examine Roe and other witnesses, his lawyer affirmatively told USC that he did *not* want Roe to appear for live questioning. (OBOM 51, citing 1 AR 293.) Boermeester therefore waived or forfeited any claim that USC should have allowed him to conduct such cross-examination.

USC's opening brief on the merits anticipated and refuted Boermeester's counterarguments. (See OBOM 51–53.)

First, there is no merit to Boermeester's contention that requesting live cross-examination would have been futile because USC's policy did not authorize it. (See ABOM 54–55.) Boermeester eschewed live cross-examination for the sound tactical reason that further questioning of Roe following her recantation could only have hurt his case—not because requesting it would have been futile. (OBOM 51.) Boermeester offers no response to this point. (See ABOM 53–55.)

Second, Boermeester did not simply decline to request live questioning—his lawyer affirmatively rejected it. (OBOM 52, citing 1 AR 293.) Boermeester's express waiver could not have been clearer, yet Boermeester fails to mention it in his answer brief. (See ABOM 53–55.)

Third, Boermeester argues that USC's refusal to commit to provide him with Roe's "unfiltered" answers to any written questions somehow excused his waiver of live cross-examination. (ABOM 54.) But Boermeester's argument rests on a mischaracterization of the record. (OBOM 52–53.) When Boermeester's counsel told USC that he did not want USC to

"filter" Roe's answers to written questions, USC responded that it would not do so. (1 AR 293–294.) Nonetheless, Boermeester declined to submit any written questions for Roe (see 1 AR 296), and his lawyer told USC that he did not want Roe to appear for live questioning (1 AR 293).

Finally, although Boermeester asserts in conclusory fashion that "USC's cited authorities are not directly on point" (ABOM 55), he does not dispute their key principle that a student accused of misconduct must raise any procedural objections at the university level in order to preserve them for appeal (see OBOM 49–50). Because that critical principle is undisputed, any factual differences between USC's authorities and this case are immaterial.

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

Boermeester does not dispute that courts may not overturn universities' disciplinary decisions due to inconsequential errors. (OBOM 54–55; ABOM 56–61.) Instead, he contends that cross-examination would have changed the result here because witness credibility was central to USC's decision. (ABOM 56–58.) The record shows otherwise, particularly in light of the surveillance footage and Boermeester's admission of the key facts:

- Boermeester's quibble that he merely admitted to " 'putting [his] hand on' " Roe's neck rather than "grabbing" her neck (ABOM 56) is semantic—the key point is that Boermeester admitted to putting his

hand on Roe's neck and pushing her, which violated USC's domestic violence policy (OBOM 55; 1 AR 60, 172–174, 179).

- Boermeester says the surveillance footage is "inconclusive" (ABOM 56), but both the trial court and the Court of Appeal agreed that it showed Boermeester grabbing Roe by the neck and pushing her (*Boermeester*, *supra*, 49 Cal.App.5th at p. 693; 6 CT 1135–1136).
- Boermeester's assertion that he was acting playfully is beside the point because intent is irrelevant under USC's policy. (OBOM 56; 1 AR 222; 2 AR 486–487.)
- Although Boermeester argues otherwise (ABOM 58), USC's conclusion that Boermeester violated his avoidance of contact order did not depend solely on witness credibility (see OBOM 56). For example, USC noted that Boermeester knew information about the investigation he could not have known unless Roe told him. (See 1 AR 53–54.)
- The fact that both Roe and an eyewitness changed their stories as the investigation progressed (see ABOM 56–58, 60–61) is immaterial because Roe's initial statement that Boermeester grabbed and pushed her was corroborated by surveillance footage (1 AR 43–45; 6 CT 1161–1162) and confirmed by Boermeester himself (1 AR 60, 172–174, 179).

In sum, Boermeester fails to show that a live hearing with cross-examination would have changed the outcome of USC's investigation. For this reason, too, this Court should reverse the decision below.

IV. Senate Bill No. 493 confirms 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 SB 493, the Legislature confirmed that private universities investigating sexual misconduct or domestic violence complaints possess broad discretion to establish fair procedures that best serve the needs of their communities. (SB 493, § 3, subd. (b)(4)(A)(viii); see *id.*, § 1, subd. (r) [SB 493 applies to "complaints of sexual or gender-based violence, including dating or domestic violence, at postsecondary educational institutions in the State of California"].) So long as they take a trauma-informed rather than an adversarial approach (see *id.*, § 3, subd. (b)(4)(A)(i)), private universities may decide for themselves whether to conduct hearings and whether to permit indirect cross-examination (*id.*, § 3, subd. (b)(4)(A)(viii)). The Legislature thus codified the common law in a manner consistent with this Court's interpretation, and concluded that private universities must provide basic fair procedure, but they need not conduct live hearings with cross-examination. (See OBOM 60.)

Section 3, subdivision (g)(2) of SB 493 abrogates any case law that conflicts with SB 493. Through this provision, the Legislature has rejected the Court of Appeal decisions requiring private universities to conduct live hearings with cross-examination in certain sexual misconduct cases. (OBOM 61.) This provision overrides the authority on which the Court of Appeal majority below relied to overturn USC's disciplinary determination in this case. (*Ibid.*) Subdivision (g)(2) also refutes Boermeester's assertion (ABOM 63) that the common law requires live hearings with cross-examination even though SB 493 does not.

Although USC discussed subdivision (g)(2) in its opening brief (OBOM 61), Boermeester fails to mention it even once in his answer brief (see ABOM 61–64). This Court should respect the Legislature's disavowal of prior case law and confirm that those cases are wrong.

B. 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 undermines the reasoning of the majority below by providing that any case law imposing procedural requirements on universities investigating claims of sexual or gender-based violence, including domestic violence, has no retroactive effect. (See OBOM 61–62.) The majority below faulted USC for failing to comply with fair procedure decisions that had not been issued when USC expelled Boermeester. (*Ibid.*, citing *Boermeester*, *supra*, 49 Cal.App.5th at

pp. 698–699, 703–706.) Through subdivision (g)(1), the Legislature rejected the Court of Appeal's approach.

Without analyzing subdivision (g)(1)'s language or endeavoring to explain its scope, Boermeester contends that this provision is merely "a mechanism to reduce costly litigation against universities besieged by a recession and pandemic-related budget cuts." (ABOM 64.) He says nothing about what the provision means or how it might achieve that goal.

Despite the plain language of subdivision (g)(1), Boermeester claims that this provision cannot restrict the retroactive application of fair procedure case law because "[j]udicial decisions are, by nature, retroactive due to stare decisis." (ABOM 64.) This is so, he contends, because the common law rules articulated in recent decisions such as *Doe v. Westmont College* (2019) 34 Cal.App.5th 622, 634 and *Doe v. Allee* (2019) 30 Cal.App.5th 1036, 1061 "have always existed." (ABOM 64.)

Boermeester is wrong. The common law evolves with legal and social standards. (See *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 821–823 [discussing common law's evolution from contributory negligence to comparative negligence]; *Rodriguez v. Bethlehem Steel Corp.* (1974) 12 Cal.3d 382, 394 [courts must "remain alert to their obligation and opportunity to change the common law when reason and equity demand it"]; see also *Newman v. Emerson Radio Corp.* (1989) 48 Cal.3d 973, 979 [the notion that courts discover common law principles rather than develop them "has long been criticized as unrealistic and out of

touch with practical judicial realities"].) While most judicial decisions apply retroactively, some do not, even in the absence a statutory nonretroactivity provision like subdivision (g)(1). (See *Vazquez v. Jan-Pro Franchising International, Inc.* (2021) 10 Cal.5th 944, 952–953 [considerations of fairness and public policy can result in a decision being given only prospective application]; *Claxton v. Waters* (2004) 34 Cal.4th 367, 378–379 [applying holding only prospectively because it changed a settled rule on which parties relied].) Moreover, "[t]he Legislature, as well as the court, . . . is competent to define the retroactive scope of an overruling decision." (*Los Angeles County v. Superior Court of Los Angeles County* (1965) 62 Cal.2d 839, 845.) Boermeester cites no authority supporting his contention that common law decisions *must* apply retroactively even when, as here, the Legislature directs otherwise. (ABOM 63–64.)

C. Boermeester's reliance on Title IX is misplaced.

Throughout his brief, Boermeester cites Title IX, federal case law interpreting it, and federal regulations promulgated thereunder. (See ABOM 13, 40–42.) He says that SB 493 has no effect here because it conflicts with federal Title IX regulations requiring universities to permit live cross-examination in certain circumstances. (ABOM 61–63.) But none of those federal authorities are relevant to the key issue presented here, which concerns California law.

In any event, Boermeester's reliance on Title IX is misplaced. Unlike SB 493 (*id.*, § 3, subd. (b)(3)(B)), the federal regulations do not apply to most instances of *off-campus*

misconduct, such as occurred here (34 C.F.R. § 106.44(a) (2020)). Further, the Biden Administration has ordered a reassessment of these regulations, so they may be short-lived. (Exec. Order No. 14021, 86 Fed. Reg. 13803–13804 (Mar. 8, 2021).)

SB 493 is instructive in this case because it codifies the proper understanding of common law fair procedure, not because it governs USC's investigation of Boermeester's domestic violence. (See OBOM 60.) Regardless of any conflict with federal regulations, SB 493 did not apply to the disciplinary proceedings in this case because USC investigated and expelled Boermeester years before the Legislature enacted SB 493. (OBOM 57.) Nonetheless, given the Legislature's recent codification of fair procedure in university sexual misconduct and domestic violence cases, it would be anomalous for this Court to hold that the common law requires private universities to adopt more extensive procedures than the Legislature has required. (OBOM 60.) That is true regardless of the current federal regulatory landscape.

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The Court of Appeal's decision below is both erroneous under the common law of fair procedure and inconsistent with SB 493. (See OBOM 62.) Boermeester offers no persuasive response.

V. The extraneous issues raised by Boermeester are not properly before this Court and are meritless.

Boermeester makes multiple arguments seeking to taint the result of his disciplinary proceeding. He argues, for example,

that USC was biased against him, that USC treated Roe unfairly, and that substantial evidence did not support USC's decision to expel him. The Court of Appeal rejected some of Boermeester's arguments and did not address others. (See, e.g., *Boermeester*, *supra*, 49 Cal.App.5th at p. 694 & fn. 6.)

Boermeester's extraneous arguments are not properly before this Court for several reasons: (1) Boermeester did not dispute the contrary facts set forth in the Court of Appeal's opinion in a petition for rehearing in the Court of Appeal; (2) Boermeester did not challenge the adverse aspects of the Court of Appeal's opinion in an answer to USC's petition for review, which did not raise them; and (3) this Court did not identify them as among the issues to be reviewed. (See Cal. Rules of Court, rules 8.500(c)(2), 8.504(b)(1), 8.504(c), 8.516(b); PFR 9; see also *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"].)

Moreover, as explained in USC's motion to strike Boermeester's answer brief (Mot. to Strike 11, 15–17), Boermeester supports these arguments with material outside the administrative record, which provides yet another reason to reject them (see *Voices of the Wetlands v. State Water Resources Control Bd.* (2011) 52 Cal.4th 499, 532 [in an administrative mandamus action, appellate review is generally "limited to the face of the administrative record"]).

In any event, even if this Court were to consider them, Boermeester's extraneous arguments have no merit.

1. Boermeester contends that USC's decisionmakers were biased against him. (ABOM 22, 30–31, 38–39, 58–59.) The trial court found otherwise. (6 CT 1142–1147.) The Court of Appeal likewise rejected Boermeester's claim that USC was biased, concluding that "he has presented no legal or factual basis to support this argument other than to say its decisions were not in his favor." (*Boermeester*, *supra*, 49 Cal.App.5th at p. 694, fn. 6.) The dissent below similarly concluded that "USC's investigation was thorough and fair." (*Id.* at p. 713 (dis. opn. of Wiley, J.).)

The courts below were correct—bias is never implied (*Breakzone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205, 1237), and Boermeester fails to show that USC was biased against him. USC's decisions to investigate and ultimately expel Boermeester were based on the severity of his misconduct as shown by the copious evidence that USC gathered. USC's decision to pursue its investigation after Roe recanted and asked for the investigation to stop reflects USC's recognition that domestic violence victims often recant their accusations of abuse in order to avoid retaliation. (See 6 CT 1146; see also *Brown*, *supra*, 33 Cal.4th at p. 896 [recognizing the tendency of domestic violence victims to recant].) Moreover, as the trial court correctly found, "the University's conduct—providing temporary emergency housing and informing [Boermeester] that the investigation had been initiated by the Title IX Office rather than by Roe—provides evidence the University was motivated by a

desire to protect Roe rather than any bias against [Boermeester]." (6 CT 1144.) USC was not biased against Boermeester.[5]

2. Boermeester complains that, at the outset of USC's investigation, he was "summarily suspended indefinitely without prior notice or a fair hearing." (ABOM 29.) The Court of Appeal below unanimously disagreed. (*Boermeester*, *supra*, 49 Cal.App.5th at pp. 695–698; see *id.* at pp. 714–715 (dis. opn. of Wiley, J.).) Properly so. When USC placed Boermeester on an interim suspension, it notified him that it was investigating a report that he committed domestic violence by grabbing Roe by the neck and pushing her against a wall on January 21, 2017. (1 AR 4; 2 AR 470–473.) Contrary to Boermeester's unsupported contention (ABOM 29), USC was not required to conduct a hearing before placing him on interim suspension pending its investigation (see 2 AR 489–490 [USC policy authorizing interim suspension]; see also *Goss v. Lopez* (1975) 419 U.S. 565, 582 [95 S.Ct. 729, 42 L.E.2d 725] [even constitutional due process authorizes immediate suspension of a student when the student

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[5] Boermeester claims that statements in the opinion of a trial judge in a different case involving different students illustrate USC's bias against male students generally. (ABOM 37–38, fn. 19.) As explained in USC's motion to strike (Mot. to Strike 8–11, 13–15), Boermeester's reliance on this material is improper because the trial court declined his request for judicial notice of the material (6 CT 1130–1131; 2 RT 915, 1202) and Boermeester did not challenge that ruling on appeal or before this Court. In any event, these statements from a different case are irrelevant here.

"poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process"]).

3. Boermeester is wrong to argue that USC violated its own policy by continuing to investigate his domestic violence after Roe asked USC to drop the inquiry. (See ABOM 25, fn. 15, 38.) USC's policy permitted an investigation to proceed over a reporting party's objection if circumstances warranted, including when "there is a danger to the greater community." (2 AR 482, 491–492.) USC reasonably proceeded with its investigation because eyewitnesses, including Roe herself, reported that Boermeester's conduct was violent. (E.g., 1 AR 85, 95, 184–187.) Moreover, contrary to Boermeester's contention (see ABOM 31, fn. 16), USC's policy did not prohibit telephonic interviews as part of its investigation (see 1 AR 492).

4. Boermeester asserts that USC treated *Roe* unfairly, citing USC's decision to investigate his misconduct after Roe recanted. (See ABOM 24–29.) But Roe is not a party to this case. As the Court of Appeal below properly held, "Boermeester lacks standing to assert Roe's rights in this matter." (*Boermeester*, *supra*, 49 Cal.App.5th at p. 694, fn. 6; see *Angelucci v. Century Supper Club* (2007) 41 Cal.4th 160, 175 [to have standing, a plaintiff must allege a violation of his own rights].) In any event, USC permissibly continued to investigate Boermeester's domestic violence even after Roe asked for the investigation to be dropped. (2 AR 482, 491–492.)

5. There is no merit to Boermeester's contention that USC's decision impermissibly rested on "uncorroborated

hearsay." (ABOM 59–61.) Boermeester did not raise this argument in the Court of Appeal, which is reason enough to reject it. (See *Flannery v. Prentice* (2001) 26 Cal.4th 572, 590–591 [declining to consider issue not raised in Court of Appeal]; Cal. Rules of Court, rule 8.500(c)(1).) In any event, formal evidentiary rules that apply in court are not required in administrative proceedings like USC's. (See *Doe v. Regents of University of California* (2018) 28 Cal.App.5th 44, 56 [formal rules of evidence do not apply in university student disciplinary proceedings]; *Floresta, Inc. v. City Council of City of San Leandro* (1961) 190 Cal.App.2d 599, 608 ["rules of admissibility of evidence do not bind administrative agencies"].) Indeed, Boermeester conceded in connection with his administrative appeal that "this is not a court of law and that the rules of evidence do not apply." (1 AR 202, fn. 6.)

Moreover, the evidence against Boermeester was hardly uncorroborated. Multiple witnesses, including Roe herself, described Boermeester's misconduct (see 1 AR 85, 95, 183–185), which was confirmed by surveillance footage (1 AR 43–45; 6 CT 1161–1162) and Boermeester's own admission (1 AR 60, 172–174, 179).

6. Finally, Boermeester is wrong that the evidence supporting USC's decision to expel him "is not substantial and cannot support a finding that Mr. Boermeester was responsible for Intimate Partner Violence." (ABOM 61.) To the contrary, the evidence of Boermeester's misconduct is conclusive. Intent is irrelevant under USC's policy (1 AR 222; 2 AR 486–487), so

Boermeester's admission that he put his hand on Roe's neck and pushed her shows a violation of the policy notwithstanding his defense that he was just joking and "horsing around" (ABOM 16, 57). Eyewitnesses observed Boermeester's actions (1 AR 85, 95), which were also captured on surveillance footage (1 AR 43–45; 6 CT 1161–1162). Moreover, although Roe later recanted, she initially provided USC with a detailed account of Boermeester's misconduct that was consistent with those of other witnesses. (See 1 AR 183–189.) As the trial court properly determined (6 CT 1148–1150), USC had sufficient evidence to conclude that Boermeester violated its domestic violence policy.

CONCLUSION

For the foregoing reasons, and the reasons in USC's opening brief on the merits, this Court should reverse the decision of the Court of Appeal.

June 1, 2021

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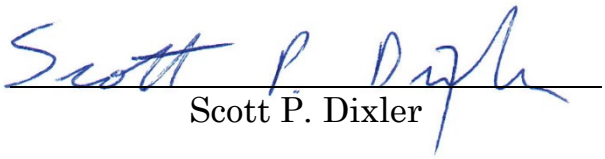
By: 
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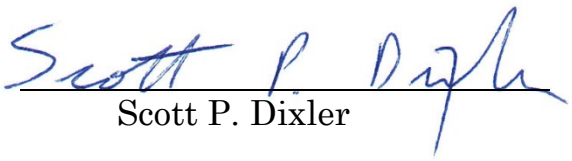

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Case No. S263180

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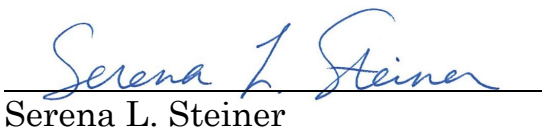

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Case No. S263180

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Supreme Court of California

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