No. 23-

IN THE

Supreme Court of the United States

MATTHEW BOERMEESTER,

Petitioner,

v.

AINSLEY CARRY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether when an educational institution that is a recipient of Federal funds seeks to impose a lengthy suspension or expulsion on a student for alleged Title IX sexual misconduct and the credibility of witnesses is material to the decisionmaker's finding, confrontation and cross-examination of witnesses at a hearing before neutral decision-makers are necessary elements of a fair process.

PARTIES TO THE PROCEEDING

Matthew Boermeester, petitioner on review, was the petitioner/plaintiff in the state trial court, the appellant in the state court of appeal, and the respondent in the state supreme court.

Ainsley Carry and the University of Southern California, respondents on review, were the respondents/defendants in the state trial court, the respondents in the state court of appeal, and the petitioners/appellants in the state supreme court.

RELATED PROCEEDINGS

- *Boermeester v. Carry, et al.*, BS170473, Superior Court of The State of California for the County of Los Angeles. Judgment entered April 1, 2018.

- *Boermeester v. Carry, et al.*, B290675, California Court of Appeal, Second Appellate District. Judgment entered May 28, 2020.

- *Boermeester v. Carry, et al.*, S263180, California Supreme Court. Judgment entered July 31, 2023.

- *Boermeester v. University of Southern California, et al.*, 2:19-cv-02137, United States District Court, Central District of California, Western District.

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PETITION FOR WRIT OF CERTIORARI

Matthew Boermeester respectfully petitions for a writ of certiorari to review the judgment of the California Supreme Court.

OPINIONS BELOW

The Supreme Court of California's opinion is published at *Boermeester v. Carry*, 15 Cal.5th 72 (2023). App. 1a-37a. The California Court of Appeal, Second Appellate District opinion was ordered unpublished. App. 38a-119a. The Superior Court of The State of California for The County of Los Angeles opinion is unpublished. App. 120a-150a.

JURISDICTION

The California Supreme Court entered judgment on July 31, 2023, in *Boermeester v. Carry*, 15 Cal.5th 72 (2023). This Court has jurisdiction to review the final judgments rendered by the highest court of the State of California pursuant to 28 U.S.C. § 1257.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Due Process Clause of the Fourteenth Amendment provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

Title IX, enacted as part of the Education Amendments of 1972 (20 U.S.C. §§ 1681-1688), states in relevant part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .

STATEMENT OF THE CASE

1. As of January 2017, Matthew Boermeester and Zoe Katz[1] were both undergraduate athlete-scholars attending the University of Southern California ("USC"). App. 39a. Mr. Boermeester, a member of the USC football team, kicked the game-winning field goal for USC at the 2017 Rose Bowl. *Id*. Mr. Boermeester and Ms. Katz had an "on and off" romantic relationship from approximately March 2016 to October 2016. App. 6a-7a.

Just after midnight on January 21, 2017, Mr. Boermeester and Ms. Katz returned to Ms. Katz's home near USC. App. 45a. Mr. Boermeester was recovering from knee surgery. App. 46a n. 5. Mr. Boermeester and Ms. Katz agreed that they had a playful interaction, and Mr. Boermeester admittedly placed one of his hands on Ms. Katz's neck while she was positioned against a wall. App. 45a, 75a.

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1. The below courts referred to Ms. Katz as "Jane Roe," a pseudonym often used in court documents to protect victims of sexual misconduct. However, Ms. Katz spoke publicly in support of Mr. Boermeester and participated in the trial court proceedings by submitting declarations under penalty of perjury in her true name. Ms. Katz insists that she is not a "victim."

DH, Ms. Katz's neighbor, heard Mr. Boermeester and Ms. Katz playing outside and looked out his window. App. 47a-48a. DH saw Mr. Boermeester and Ms. Katz at the wall, and Mr. Boermeester had his hand on Ms. Katz's chest or neck. App. 48a. DH awoke his roommate, TS, and according to TS, DH said, "[Mr. Boermeester] is hitting [Ms. Katz]." *Id*. TS, who did not witness Mr. Boermeester hitting Ms. Katz, reported to his father, the USC men's tennis coach, that Mr. Boermeester was abusing Ms. Katz, and TS's father reported Mr. Boermeester to USC's Title IX Office. App. 39a, 48a.

On January 23, 2017, Ms. Katz attended a mandatory meeting with the USC Title IX Coordinator and Title IX Investigator. App. 40a. USC and Ms. Katz dispute what transpired during this private, unrecorded meeting. According to written summarized notes prepared by USC's Title IX Investigator, Ms. Katz reported that on January 20, 2017, Mr. Boermeester grabbed the back of her hair hard, which "hurt" her; Mr. Boermeester grabbed her "tight" by the neck, causing her to cough; and Mr. Boermeester grabbed her by the neck twice more and pushed her hard against a concrete wall, hurting her head. App. 40a-41a. However, in her own written statements, and in declarations filed in the trial court, Ms. Katz disputed the statements attributed to her by USC's Title IX personnel and asserted that she was manipulated to make false statements about Mr. Boermeester. App. 11a-12a. During the investigation and adjudication, Ms. Katz maintained that Mr. Boermeester never harmed her, and that their interaction on January 21, 2017, was "playful and not violent." App. 75a. Notably, Ms. Katz had no marks, bruising, or other injuries on her body when she attended her investigation interview on January 23, 2017.

Mr. Boermeester was notified that a Title IX investigation was underway into an allegation of "Intimate Partner Violence." App. 42a. Mr. Boermeester was summarily suspended from USC indefinitely without prior notice or a hearing and was told he was not allowed to have any contact whatsoever with Ms. Katz. App. 42a.

During the investigation, USC's Title IX Investigator interviewed and re-interviewed over a dozen witnesses. App. 46a. None of the interviews were audio or video recorded, and almost half of the interviews were conducted only by telephone, with the investigator never actually meeting with or observing the witnesses in person.

Witness MB2, another neighbor, also witnessed part of the January 20, 2017, interaction between Ms. Katz and Mr. Boermeester, but MB2's statements changed dramatically between his first and second interview. App. 46a-47a. Surveillance video was inconclusive, as the interaction between Mr. Boermeester and Ms. Katz in the dark alley behind Ms. Katz's home was barely visible. App. 50a-51a, 76a.

After the investigation, the parties were allowed to separately review the evidence. App. 62a. USC's policy then called for an "Evidence Hearing" where the parties could each meet individually and separately with the Title IX Coordinator and Title IX Investigator to respond orally or by written submission to the evidence. *Id.* The parties were permitted to submit written questions for the Title IX Coordinator to ask the other party during their separate Evidence Hearings. *Id.* USC's procedure did not include a live evidentiary hearing with witnesses and cross-examination held before neutral adjudicators.

Id. Mr. Boermeester declined to submit questions to Ms. Katz, in light of Ms. Katz's representations that her previous statements had been misreported and misrepresented by USC's Title IX personnel. App. 65a.

When USC's investigation concluded, the Title IX Office claimed that Ms. Katz had recanted, in a "textbook case of domestic violence." App. 79a. USC's Title IX Investigator ultimately found Mr. Boermeester responsible for violating USC's misconduct policy by engaging in intimate partner violence and violating the avoidance of contact order. App. 51a. A Misconduct Sanctioning Panel decided the appropriate sanction for Mr. Boermeester was expulsion from USC. *Id.* Mr. Boermeester appealed the findings and determinations, and an anonymous appellate panel recommended a two-year suspension instead of expulsion, finding that Mr. Boermeester' s conduct may have been "reckless" rather than intentional. *Id.* However, USC's vice-president for student affairs, Ainsley Carry, rejected the recommendation and affirmed the decision to expel Mr. Boermeester, reasoning that expulsion was appropriate regardless of whether Mr. Boermeester intended to harm Ms. Katz. *Id.*

2. On August 11, 2017, Mr. Boermeester filed a petition for a writ of administrative mandate pursuant to California Code of Civil Procedure section 1094.5 in the Superior Court of the State of California for the County of Los Angeles, naming USC and Ainsley Carry as Respondents. Mr. Boermeester argued, *inter alia*, that "the process leading to his expulsion violated his right to due process" because he did not receive a formal evidentiary hearing with witnesses and cross-examination; witness testimony was not properly recorded; he was not presumed innocent;

and USC's investigator, who was also the factfinder, was not neutral. App. 121a, 133a-134a.

The trial court denied Mr. Boermeester's writ petition, holding that Mr. Boermeester had sufficient notice and an opportunity to be heard; that USC's investigator was not required to record witness statements verbatim; that USC was not obligated to provide a formal hearing before impartial adjudicators at which the accused could question the accuser and witnesses; and that "[d]ue process does not necessarily require a separation of powers between prosecutorial and adjudicative decision makers." App. 135a-139a.

3. On June 14, 2018, Mr. Boermeester appealed the trial court decision to the Court of Appeal of California, Second Appellate District, Division Eight. Mr. Boermeester argued that he was entitled to a live evidentiary hearing where he could cross-examine witnesses before a neutral adjudicator. App. 52a. A divided Court of Appeal agreed, with the majority concluding in a published decision that "USC's disciplinary procedures at the time were unfair because they denied Boermeester a meaningful opportunity to cross-examine critical witnesses at an in-person hearing." App. 39a. As later summarized by the California Supreme Court,

> [T]he Court of Appeal majority determined that USC's disciplinary procedures were unfair because USC should have afforded Boermeester the opportunity to attend a live hearing at which he or his advisor-attorney would directly cross-examine the alleged victim, Jane Roe, as well as the third party

> witnesses, or indirectly cross-examine them by submitting questions for USC's adjudicators to ask them at the live hearing. (*Boermeester v. Carry*, *supra*, B290675.) The Court of Appeal majority made clear that the witnesses need not be "physically present to allow the accused student to confront them" and could instead appear "by videoconference, or by another method that would facilitate the assessment of credibility." (*Ibid.*) Nevertheless, the Court of Appeal majority believed that accused students must be able to contemporaneously hear and observe the real-time testimony of the accuser and other witnesses at a live hearing to have a "meaningful opportunity to respond to the evidence against [them]" and ask follow-up questions. (*Ibid.*)

App. 3a.

4. On July 6, 2020, Respondents filed their petition for review to the Supreme Court of California, and on September 16, 2020, the petition for review was granted, and the appellate court opinion ordered unpublished. On July 31, 2023, the California Supreme Court reversed the appellate court judgment, holding that Mr. Boermeester did not have the right to a formal hearing with witnesses, cross-examination, and neutral adjudicators prior to being expelled from USC:

> [T]hough private universities are required to comply with the common law doctrine of fair procedure by providing accused students with notice of the charges and a meaningful

> opportunity to be heard, they are not required to provide accused students the opportunity to directly or indirectly cross-examine the accuser and other witnesses at a live hearing with the accused student in attendance, either in person or virtually. Requiring private universities to conduct the sort of hearing the Court of Appeal majority envisioned would be contrary to our long-standing fair procedure admonition that courts should not attempt to fix any rigid procedures that private organizations must "invariably" adopt. (*Pinsker v. Pacific Coast Society of Orthodontists* (1974) 12 Cal.3d 541, 555 [116 Cal. Rptr. 245, 526 P.2d 253] (*Pinsker II*).) Instead, private organizations should "retain the initial and primary responsibility for devising a method" to ensure adequate notice and a meaningful opportunity to be heard. (*Ibid.*)

App. 4a.

The court further declared, "[T]here is no absolute right to a live hearing with cross-examination in administrative proceedings, even where constitutional due process applies." App. 29a.

This petition follows.

REASONS FOR GRANTING THE WRIT

The Supreme Court has not addressed what procedures a postsecondary education institution must use in a disciplinary proceeding to resolve allegations

of prohibited conduct under Title IX in order to satisfy constitutional due process of law requirements (for recipients who are State actors), or requirements of fundamental fairness (for recipients who are not State actors). 85 Fed. Reg. 30026, 30046-30047 (May 19, 2020). The petition for a writ of certiorari should be granted because this case is an optimal vehicle for the Court to address the exceptionally important issue of Title IX sexual misconduct enforcement proceedings on college and university campuses nationwide and whether, when the determination turns on witness credibility, the accused student must be afforded a hearing before a neutral decision-maker and the opportunity to confront and cross-examine witnesses.

A. Background on Title IX

The effect of outside pressures on Title IX regulators is crucial to understanding why this Court's intervention is necessary to clarify the rights of students in campus Title IX proceedings and the obligations of educational institutions that receive Federal funds. The highly politicized Title IX regulatory environment has produced a situation in which campus Title IX grievance procedures, and the rights of students involved in those proceedings, fluctuate with each incoming presidential administration. This Court should clarify that students at postsecondary education institutions receiving Federal funds who are accused of prohibited sexual misconduct under Title IX and thus face the loss of their educations, reputations, and career prospects have a right to due process and fundamental fairness, which includes the right to formal hearings with witnesses, cross-examination, and neutral adjudicators.

From the enactment of Title IX in 1972 until 1997, the Department of Education ("Department") did not assert jurisdiction over student-on-student sexual violence. In March 1997, the Department issued regulations that required schools to have policies and procedures in place to address gender-based sexual violence and harassment. U.S. Department of Education, "Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties," 62 Fed. Reg. 12034 (Washington, D.C.: Office for Civil Rights, March 13, 1997).

In January 2001, the Department issued additional guidance (now rescinded) for schools to address sexual misconduct, provide due process to both parties involved, and alleviate any hostile environment on campus. U.S. Department of Education, "Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties – Title IX (2001)," 66 Fed. Reg. 5512 (Washington, D.C.: Office for Civil Rights, January 19, 2001).

On April 4, 2011, the Department's Office for Civil Rights ("OCR") issued a guidance letter to colleges and universities in the United States in receipt of federal funding which became widely known as the "Dear Colleague Letter" (the "DCL") (now rescinded). Ali, Russlyn, Dear Colleague Letter (April 4, 2011). The DCL advised recipients that sexual violence constitutes sexual harassment within the meaning of Title IX of the Education Amendments of 1972, 20 U.S.C. §1681 et seq. and its regulations, and directed schools to "take immediate action to eliminate the harassment, prevent its recurrence and address its effects." *Id*. at p. 4.

The DCL was a response, in part, to a special investigative report published by National Public Radio and the Center for Public Integrity, which proclaimed a campus rape epidemic and criticized the OCR for its lax response to what the report characterized as a social problem of critical importance. Shapiro, Joseph, *Campus Rape Victims: A Struggle For Justice*, National Public Radio, February 24, 2010. The report described in detail the obstacles faced by sexual assault victims in obtaining redress through college disciplinary proceedings, and how victims who did engage in the college disciplinary process suffered additional trauma as a result. Much of the report focused on underreporting, re-traumatization of victims, rape myth adherence on college campuses, and young men's cultural adherence to the sexual aggressor role.

The DCL further relied on faulty statistics in sounding a "call to action" for campuses nationwide—that "[o]ne of out 5 women will be sexually assaulted during her college years." *Id*. The researchers behind this study subsequently invalidated that statistic as a misrepresentation of the conclusions of the study and warned that it was "inappropriate to use the 1-in-5 number as a baseline . . . when discussing our country's problem with rape and sexual assault." Krebs, Christopher and Christine Lindquist, *Setting the Record Straight on '1 in 5'*, Time Magazine, December 15, 2014. Relying in part on these faulty numbers, the DCL minimized due process protections for accused students by, among other things, eschewing any presumption of innocence, mandating a low preponderance of the evidence standard, limiting cross-examination, and forbidding certain forms of alternative dispute resolution.

On April 29, 2014, OCR issued additional directives to colleges and universities in the form of a guidance document titled, "Questions and Answers on Title IX and Sexual Violence" ("Q&A") (now rescinded), which was aimed at addressing campus sexual misconduct policies, including the procedures colleges and universities "must" employ "to prevent sexual violence and resolve complaints" and the elements that "should be included in a school's procedures for responding to complaints of sexual violence." Lahmon, Catherine E., "Questions and Answers on Title IX and Sexual Violence" (April 29, 2014). The Q&A advised schools to adopt a trauma informed approach, advising, for example, that hearings should be "conducted in a manner that does not inflict additional trauma on the complainant." *Id*. at p. 31. While the Q&A advised that "the rights established under Title IX must be interpreted consistently with any federally guaranteed due process rights . . . a school should ensure that any due process rights do not restrict or unnecessarily delay the protections provided by Title IX to the complainant." *Id*. at p. 13.

In April 2014, the Obama administration's White House Task Force to Protect Students From Sexual Assault, co-chaired by President Joe Biden, issued a report entitled "Not Alone," which included a warning that if the OCR finds that a Title IX violation occurred, the "school risks losing federal funds" and that the Department of Justice ("DOJ") shares authority with OCR for enforcing Title IX and may initiate an investigation or compliance review of schools. White House Task Force to Protect Students From Sexual Assault, "Not Alone" (April 2014), p. 17. Further, the "Not Alone" report cautioned that if a voluntary resolution could not be reached, the DOJ could initiate litigation against the school. *Id*.

In June 2014, then (and now again current) Assistant Secretary of Education Catherine Lhamon testified before the United States Senate that if OCR could not secure voluntary compliance with the DCL from a college or university, it may elect to initiate an administrative action to terminate federal funds or refer the case to the DOJ. According to the Federal Student Aid website, the Department's efforts affected the rights of some 20.6 million undergraduate and graduate students in the United States, as well as the distribution of more than $110 billion in federal education funds each year.[2] The threat to withhold federal funds put tremendous pressure upon both public and private universities, including USC, to aggressively prosecute and discipline students accused of conduct prohibited under Title IX, who are "invariably male." *Knight v. South Orange Community College Dist.,* 60 Cal.App.5th 854, 866 (2021); 34 C.F.R. § 106.8(c). After 2014, litigation to challenge the lack of due process and fairness in campus Title IX proceedings boomed.[3]

In 2017, the OCR rescinded its 2011 DCL and began a rulemaking process culminating in the current Title IX regulations that went into effect on August 14, 2020 ("Regulations"), which specify how recipients of Federal financial assistance covered by Title IX must respond to allegations of sexual harassment. 34 C.F.R. § 106.44. The Regulations require every college and university that receives federal funds to adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging

2. https://studentaid.gov/data-center/student/title-iv

3. The organization Title IX for All reports 880 lawsuits filed to date, including this case. (titleixforall.com).

sexual harassment, which encompasses sexual assault, dating violence, domestic violence, and stalking.

"A recipient [of federal funding] with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent." 34 C.F.R. § 106.44(a). The fundamental principle of such a system is that it be prompt and equitable. *Id.* Among other things, the current Regulations require universities to (1) "provide for a live hearing" at which "the decision-maker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility" (34 C.F.R. § 106.45(b)(6); (2) eliminate use of the "single investigator model," whereby the investigator is the sole individual who investigates and makes findings of responsibility (34 C.F.R. § 106.45(b)(7)(i).); and (3) provide the accused an opportunity to "inspect and review" all the evidence collected during the investigation, "including the evidence upon which the recipient does not intend to rely in reaching a determination." 34 C.F.R. § 106.45(b)(5)(vi). Under the Regulations, cross-examination must be performed at a live hearing "directly, orally, and in real time." 34 C.F.R. § 106.45(b)(6)(i).

In supporting the Regulations, the American Civil Liberties Union (ACLU), commented that a fair process requires "the right to a live hearing and an opportunity for cross-examination in the university setting." ACLU Comment On Department Of Education's Final Title IX Rule On Sexual Harassment (May 6, 2020).

In June 2022, however, the OCR proposed to amend the 2020 regulations to provide that universities may choose whether "to conduct live hearings with cross-examination or have the parties meet separately with the decisionmaker and answer questions submitted by the other party when a credibility assessment is necessary." 87 Fed.Reg. 41390, 41397 (July 12, 2022). OCR determined that "neither Title IX nor due process and fundamental fairness" requires universities "to provide for a live hearing with advisor-conducted cross-examination in all cases." *Id*. at pp. 41505, 41507. The proposed regulations do not specify in which cases a live hearing with cross-examination ought to be provided.

As of the filing of this petition, the proposed regulations are not yet final, but the proposed regulation will eliminate the right of students who are accused of felony-level sexual misconduct, and who face severe and enduring consequences, to procedures that include formal hearings with witnesses, cross-examination, and neutral adjudicators.

B. Under Title IX, students are entitled to due process and fundamental fairness

Title IX applies to both public and private universities. The Department has made clear that "Title IX cannot be interpreted in a manner that denies any person due process of law under the U.S. Constitution. 85 Fed. Reg. 30026, 30047 (May 19, 2020). Additionally,

> [a]lthough it does not enforce the Due Process Clause, '[t]he Department, as an agency of the Federal government, is subject to the U.S.

> Constitution, including the Fifth Amendment, and will not interpret Title IX to compel a recipient, whether public or private, to deprive a person of due process rights.' 85 FR 30051, n.226 (citing 2001 Revised Sexual Harassment Guidance at 22)."

87 Fed. Reg. 41390, 41456 (July 12, 2022).

The Department requires that all recipients of federal funds must "adopt grievance procedures that provide for the fair resolution of complaints of sex discrimination," consistent with both due process and fundamental fairness, "'so that whether a student attends a public or private institution, the student has the benefit of a consistent, transparent grievance process with strong procedural protections regardless of whether the student is a complainant or respondent.'" *Id*. quoting 85 Fed. Reg. 30026, 30047 (May 19, 2020).

C. Due process and fundamental fairness require that when students face the loss of their education in campus Title IX disciplinary proceedings where the determination turns on witness credibility, an educational institution that is a recipient of Federal funds must provide a fair hearing with witnesses, cross-examination, and neutral decision makers

"The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). The determination of what process is due to a student evaluates three factors: (1) the nature of the private interest affected, (2) the danger of error and the

probative benefit of additional or alternate procedures, and (3) the administrative burden of mandating those additional procedures. *Id*. at p. 335.

The private interests affected when postsecondary students are accused of prohibited conduct under Title IX are the students' access to the education they pay for and are enrolled in; the students' ability to enroll at other postsecondary education institutions; their future career prospects; and their reputations. These interests are so significant as to require procedural protections that minimally include formal hearings with witnesses, cross-examination, and neutral adjudicators.

California courts have described the value of higher education as "an interest of almost incalculable value, especially to those students who have already enrolled in the institution and begun the pursuit of their college training." *Goldberg v. Regents of University of California,* 248 Cal.App.2d 867, 876 (1967). The court in *Goldberg* went on to explain that "attendance at publicly financed institutions of higher education should be regarded a benefit somewhat analogous to that of public employment." *Id*. at p. 877.

It is an accepted fact that, "Expulsion denies the student the benefits of education at his chosen school. Expulsion also damages the student's academic and professional reputation, even more so when the charges against him are serious enough to constitute criminal behavior. Expulsion is likely to affect the student's ability to enroll at other institutions of higher education and to pursue a career." *Furey v. Temple Univ.,* 884 F.Supp.2d 223, 245-248 (E.D. Pa. 2012); see also *Doe*

v. Brandeis Univ., 177 F.Supp.3d 561, 602 (D. Mass. 2016) ("stigmatization as a sex offender can be a harsh consequence for an individual who has not been convicted of any crime, and who was not afforded the procedural protections of criminal proceedings.").

The Sixth Circuit similarly found, "Suspension 'clearly implicates' a protected property interest, and allegations of sexual assault may 'impugn [a student's] reputation and integrity, thus implicating a protected liberty interest." *Doe v. Univ. of Cincinnati,* 872 F.3d 393, 399 (6th Cir. 2017). Moreover,

> Being labeled a sex offender by a university has both an immediate and lasting impact on a student's life. *Miami Univ.*, 882 F.3d at 600. The student may be forced to withdraw from his classes and move out of his university housing. *Id.* His personal relationships might suffer. See *id.* And he could face difficulty obtaining educational and employment opportunities down the road, especially if he is expelled. *Id.*

Doe v. Baum, 903 F.3d 575, 582 (6th Cir. 2018).

USC's expulsion decision constitutes an alteration of Mr. Boermeester's legal status as a student. *Doe v. Rector & Visitors of George Mason Univ.*, 149 F. Supp. 3d 602, 613 (E.D.Va. 2016), citing *Sciolino v. City of Newport News,* 480 F.3d 642, 649 (4th Cir. 2007) (termination of employment constitutes a qualifying alteration of status). The California Supreme Court in this case recognized that USC's expulsion decision affects Mr. Boermeester's property interest in his continued university education,

which he paid for, and the University took away by expelling him. *Boermeester v. Carry, supra,* 15 Cal.5th at p. 89. The Court also acknowledged the negative effect the expulsion decision will have on Mr. Boermeester's future employment opportunities:

> Given the seriousness of sexual misconduct or intimate partner violence allegations, a student who is expelled from a university for such conduct may find it especially difficult—if not impossible—to complete a postsecondary education elsewhere, thwarting the student's ability to realize 'the economic and professional benefits flowing' from a college degree.

Id., quoting *Ezekial v. Winkley,* 20 Cal.3d 267, 274 (1977).

Mr. Boermeester was stripped of his full athletic scholarship and separated from the academic, athletic, and medical resources he received as a USC student when Mr. Boermeester was just two classes shy of earning his undergraduate degree. The expulsion decision has precluded Mr. Boermeester from being admitted to another university to finish his undergraduate degree; thus, his ability to realize the economic and professional benefits that naturally flow from a college degree have been thwarted.

As a result of USC's actions, Mr. Boermeester lost the opportunity to play football for USC, a Division I college football team in contention for a National Championship in 2017, making it impossible for him to develop his ranking as a draft-eligible college football player for the

NFL and destroying his chances of recruitment to any professional football team. On top of that, the publicity generated by USC's administrative proceedings, and Mr. Boermeester's public expulsion from USC and removal from the USC football team, all based on allegations that Mr. Boermeester domestically abused Ms. Katz, has shattered Mr. Boermeester's reputation.

The Department acknowledges that an accusation that an individual committed conduct prohibited by Title IX, including sexual assault, is such a "heinous offense," that a grievance process to adjudicate such allegations must "incorporate 'standards of justice' fundamental to notions of 'decency and fairness'." 85 Fed. Reg. 30026, 30050 (May 19, 2020).

The life-altering consequences that befall postsecondary students accused of prohibited conduct under Title IX weighs in favor of guaranteeing students heightened procedural protections that include the right to formal hearings with witnesses, cross-examination, and neutral adjudicators to ensure that students are adjudicated fairly and not unjustly punished. As this Court observed almost 50 years ago,

> [I]t disserves both [the student's] interest and the interest of the State if his suspension is in fact unwarranted. The concern would be mostly academic if the disciplinary process were a totally accurate, unerring process, never mistaken and never unfair. Unfortunately, that is not the case, and no one suggests that it is. Disciplinarians, although proceeding in utmost good faith, frequently act on the reports and advice of others; and the controlling facts and

> the nature of the conduct under challenge are often disputed. The risk of error is not at all trivial, and it should be guarded against if that may be done without prohibitive cost or interference with the educational process.

Goss v. Lopez, 419 U.S. 565, 579-580 (1975).

Formal hearings with witnesses, cross-examination, and neutral adjudicators provide the best mechanism to ensure that students are not wrongly adjudicated responsible for felony-level sexual misconduct. Cross-examination has long been recognized as "the greatest legal engine ever invented" for uncovering the truth. *Doe v. Baum*, *supra*, 903 F.3d at p. 581, quoting *Doe v. Univ. of Cincinnati, supra*, 872 F.3d at p. 402, quoting *Maryland v. Craig,* 497 U.S. 836, 846 (1990), quoting *California v. Green,* 399 U.S. 149, 158 (1970); see also *Doe v. Univ. of the Scis.*, 961 F.3d 203, 214 (3d Cir. 2020) (fairness requires "providing the accused with a chance to test witness credibility through some form of cross-examination and a live, adversarial hearing during which he or she can put on a defense and challenge evidence against him or her."), citing *Doe v. Purdue Univ.*, 928 F.3d 652, 663-64 (7th Cir. 2019).

As the Sixth Circuit observed in *Doe v. Baum,* "Even popular culture recognizes the importance of cross-examination. See A Few Good Men (Castle Rock Entertainment 1992) (depicting one of the most memorable examples of cross-examination in American cinema); My Cousin Vinny (Palo Vista Productions et al. 1992) (demonstrating that cross-examination can both undermine and establish the credibility of witnesses)." *Id.* at p. 593, n. 1.

Indeed, some three thousand years ago King Solomon acknowledged that "in a lawsuit the first to speak seems right until someone comes forward and cross-examines." Proverbs 18:17 (NIV).

In 1975, this Court, though hesitant to create a bright line-rule, recommended that when a school disciplinarian is "alerted to the existence of disputes about facts and arguments about cause and effect[,] [h]e may then determine himself to summon the accuser, permit cross-examination, and allow the student to present his own witnesses. In more difficult cases, he may permit counsel." *Goss v. Lopez*, 419 U.S. 565, 583-84 (1975). Likewise, the California Court of Appeal, Second Appellate District found below,

> In short, an in-person hearing coupled with indirect or direct cross-examination would enable the adjudicator to better assess witness credibility in a case where credibility is central to a determination of sexual misconduct. (*University of Cincinnati*, *supra*, 872 F.3d at pp. 401–402; *Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1358 [63 Cal. Rptr. 3d 483, 163 P.3d 160] ["Oral testimony of witnesses given in the presence of the trier of fact is valued for its probative worth on the issue of credibility, because such testimony affords the trier of fact an opportunity to observe the demeanor of witnesses."]; *Doe v. Baum* (6th Cir. 2018) 903 F.3d 575, 586.)

App. 73a-74a.

The appellate court below correctly determined that Mr. Boermeester was "not given a meaningful opportunity to respond to the evidence against him if he is not allowed to attend the very hearing at which the evidence is presented. (Citation omitted.)" App. 72a-73a. Mr. Boermeester was also prevented from presenting a full defense because he could not cross-examine critical witnesses, such as DH, MB2, and TS, "to test their recollection, their ability to observe the incident, and any biases they may have." App. 73a. The process USC afforded Mr. Boermeester and Ms. Katz has led to the absurd result that despite both Mr. Boermeester and Ms. Katz agreeing that no prohibited conduct occurred, Mr. Boermeester's expulsion from USC, and all the attendant negative educational, professional, and reputational consequences, are somehow reasonable and appropriate.

The burden of providing formal hearings with witnesses, cross-examination, and neutral adjudicators is relatively light in comparison to the gravity of the consequences. This is particularly true when considering the infrequency of Title IX complaints requiring adjudication. In 2019, California law required public and private postsecondary institutions to conduct formal hearings with cross-examination before neutral adjudicators to resolve complaints of sexual misconduct in cases where the determination turned on credibility. *Doe v. Allee,* 30 Cal.App.5th 1036, 1067-70 (2019). According to a California Senate Assembly Committee on Appropriations hearing held on August 21, 2019, the California Community Colleges (116 campuses), the University of California (10 campuses), and the California State Universities (23 campuses) each conduct about 100 hearings per year to adjudicate allegations of sexual harassment, indicating

there are between less than one and ten Title IX hearings held per year on California public university and college campuses.[4] During oral argument before the California Supreme Court, counsel for USC conceded that relatively few Title IX cases are adjudicated at USC.

The necessity for procedural protections that pass Constitutional muster outweighs any burden that colleges and universities may bear in providing for formal hearings when the school seeks expulsion or lengthy suspension in charging a student for Title IX sexual misconduct. Indeed, many universities already provide formal hearings with witnesses and cross-examination in disciplinary cases that do not involve prohibited conduct under Title IX. For instance, the University of California procedures provide in non-Title IX disciplinary cases, "a prompt and fair hearing where the University shall bear the burden of proof, and at which the student shall have the opportunity to present documents and witnesses and to confront and cross-examine witnesses presented by the University; no inference shall be drawn from the silence of the accused[.]" University of California – Policy PACAOS-100. But the University of California omits these procedural protections in disciplinary cases for Title IX sexual misconduct.

This case is an ideal vehicle to address the question of procedural protections that postsecondary recipients of Federal funds must include in Title IX sexual misconduct disciplinary proceedings in order to satisfy constitutional due process of law requirements (for recipients who are

4. California Legislative Information, 08/19/19 Assembly Appropriations.

State actors), or requirements of fundamental fairness (for recipients who are not State actors). This Court's review is unquestionably needed and warranted at this time.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX A — OPINION OF THE SUPREME COURT OF CALIFORNIA, DATED JULY 31, 2023

SUPREME COURT OF CALIFORNIA

S263180

MATTHEW BOERMEESTER,

Plaintiff and Appellant,

v.

AINSLEY CARRY *et al.*,

Defendants and Respondents.

Second Appellate District, Division Two
B290675.

Superior Court of Los Angeles County
No. BS170473

July 31, 2023,
Opinion Filed

Justice Groban authored the opinion of the Court, in which Chief Justice Guerrero and Justices Corrigan, Liu, Kruger, Jenkins, and Evans concurred.

Opinion of the Court by Groban, J.

In recent years, courts in California and throughout the nation, as well as the California Legislature and the United States Department of Education's Office

for Civil Rights (OCR), have attempted to determine the precise procedures universities[1] must utilize when investigating and disciplining students accused of sexual misconduct or intimate partner violence. This judicial and legislative activity likely began in response to a "Dear Colleague" letter relating to title IX of the Education Amendments of 1972 (20 U.S.C. § 1681 et seq.) (Title IX) that the OCR issued in 2011, which gave guidance on the specific procedures federally funded universities should implement when investigating sexual harassment allegations. The letter sought to stymie the rising tide of sexual assault on campuses by making it easier for victims to prove their claims in university disciplinary actions. Though the letter was rescinded in 2017, students accused of sexual misconduct or intimate partner violence continue to challenge many of the disciplinary procedures universities have since implemented, asserting that these procedures create an unfair process which may result in universities mistakenly imposing severe sanctions upon accused students, including expulsion.

In this case, respondents University of Southern California and its vice-president of student affairs, Ainsley Carry (collectively, USC) expelled appellant Matthew Boermeester from the private university after conducting a two-month investigation and determining that he violated USC's policy against engaging in intimate partner violence. Boermeester filed a petition for a writ of administrative mandate under Code of Civil

1. In this opinion, we use the term "universities" to refer to all postsecondary educational institutions.

Procedure section 1094.5 (section 1094.5), alleging that he was deprived of the "fair trial" required by that section. A divided Court of Appeal agreed, with the majority concluding that "USC's disciplinary procedures … were unfair because they denied Boermeester a meaningful opportunity to cross-examine critical witnesses at an in-person hearing." (*Boermeester v. Carry* (June 4, 2020, B290675) review granted and opn. ordered nonpub. Sept. 16, 2020, S263180.) More specifically, the Court of Appeal majority determined that USC's disciplinary procedures were unfair because USC should have afforded Boermeester the opportunity to attend a live hearing at which he or his advisor-attorney would directly cross-examine the alleged victim, Jane Roe,[2] as well as the third party witnesses, or indirectly cross-examine them by submitting questions for USC's adjudicators to ask them at the live hearing. (*Boermeester v. Carry, supra*, B290675.) The Court of Appeal majority made clear that the witnesses need not be "physically present to allow the accused student to confront them" and could instead appear "by videoconference, or by another method that would facilitate the assessment of credibility." (*Ibid.*) Nevertheless, the Court of Appeal majority believed that accused students must be able to contemporaneously hear and observe the real-time testimony of the accuser and other witnesses at a live hearing to have a "meaningful opportunity to respond to the evidence against [them]" and ask follow-up questions. (*Ibid.*)

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2. Like the Court of Appeal, we refer to Roe and the other witnesses in a manner that protects their privacy. (Cal. Rules of Court, rule 8.90.)

We hold that, though private universities are required to comply with the common law doctrine of fair procedure by providing accused students with notice of the charges and a meaningful opportunity to be heard, they are not required to provide accused students the opportunity to directly or indirectly cross-examine the accuser and other witnesses at a live hearing with the accused student in attendance, either in person or virtually. Requiring private universities to conduct the sort of hearing the Court of Appeal majority envisioned would be contrary to our long-standing fair procedure admonition that courts should not attempt to fix any rigid procedures that private organizations must "invariably" adopt. (*Pinsker v. Pacific Coast Society of Orthodontists* (1974) 12 Cal.3d 541, 555 [116 Cal. Rptr. 245, 526 P.2d 253] (*Pinsker II*).) Instead, private organizations should "retain the initial and primary responsibility for devising a method" to ensure adequate notice and a meaningful opportunity to be heard. (*Ibid.*) We accordingly reverse the Court of Appeal's judgment.

I. Background

This matter comes to us on appeal from a judgment on a petition for a writ of administrative mandate made pursuant to section 1094.5. Our recitation of the facts is accordingly derived solely from the administrative record. (*Sierra Club v. California Coastal Com.* (2005) 35 Cal.4th 839, 864 [28 Cal. Rptr. 3d 316, 111 P.3d 294]; accord, *Pomona Valley Hospital Medical Center v. Superior Court* (1997) 55 Cal.App.4th 93, 101 [63 Cal. Rptr. 2d 743].)

Appendix A

A. USC's Policies

The USC student conduct code in effect at the time of the incident in question prohibited students from engaging in intimate partner violence, which it defined as "violence committed against a person … with whom [the accused student has] had a previous or current dating, romantic, intimate, or sexual relationship." Violence, in turn, was defined as "causing physical harm to the person." Upon receiving a report of intimate partner violence or other prohibited conduct, USC's Title IX office would conduct an intake interview of the accuser or alleged victim.[3] If USC decided to open a formal investigation, it would notify the accuser and the accused student of the investigation and the alleged policy violations. USC would also assign a Title IX investigator to the matter, who would gather facts and interview witnesses. Upon completion of the investigation, USC would provide the accuser and the accused student "individual and separate" opportunities to review the gathered evidence. After reviewing the evidence, the accuser and the accused student would be given "individual and separate" opportunities to respond to the evidence through an "evidence hearing" held at the Title IX office and conducted by USC's Title IX coordinator. USC would also provide the accuser

3. All universities that receive federal financial assistance must designate at least one employee, referred to as the Title IX coordinator, as being responsible for ensuring compliance with Title IX. (34 C.F.R. § 106.8(a) (2023).) At the time of the incident in question, USC had a Title IX office consisting of a Title IX coordinator, who oversaw the office, and Title IX investigators, who investigated specific allegations of misconduct.

and the accused student the opportunity to submit questions for the Title IX coordinator to ask one another at their separate hearings. If either student shared new information during their separate hearing, USC would provide the other student an opportunity to review and respond to the new evidence.

At the conclusion of the evidence hearings, the Title IX investigator would prepare a summary administrative review (SAR) which, using a preponderance of the evidence standard, would make factual findings and conclusions as to whether the accused student violated one or more of USC's policies. If the SAR found that a policy was violated, the SAR would be forwarded to a misconduct sanctioning panel, composed of one undergraduate student and two staff designated by the provost and senior vice-president for academic affairs, to impose sanctions. Either the accuser or the accused student could file a written appeal. The appeal would be reviewed by an appellate panel composed of three individuals appointed by the vice-president for student affairs. The vice-president of student affairs had the discretion to accept or reject the appellate panel's recommendations and made the final decision. Throughout the process—from investigation to final adjudication—both the accuser and accused student were allowed to receive support and assistance from an advisor of their choice, who could be an attorney.

B. The Incident

Boermeester and Roe were students at USC who had an "'on and off'" romantic relationship from approximately

March 2016 to October 2016. Although they were no longer in a relationship by January 21, 2017—the date the incident occurred—the two often spent time together and Boermeester regularly stayed the night at Roe's apartment.

USC's Title IX office received a report of an incident that took place on January 21, 2017. The office assigned a Title IX investigator to investigate the incident, who interviewed Roe two days later. Roe explained that, on the night of the incident, Boermeester called her and asked her to pick him up from a party. He was the "'drunkest'" she had ever seen him. Roe had her dog with her, and when they arrived at Roe's apartment and exited the car, Boermeester instructed Roe to drop her dog's leash. She did not want to do so, so he grabbed the back of her hair "'hard'" and said "'drop the fucking leash.'" Roe said "'No'" and Boermeester grabbed her harder, causing her to drop the leash because it "'hurt.'" Boermeester then grabbed the front of Roe's throat and neck, causing her to cough. She was able to breathe but stated that the pressure "'hurt.'" Boermeester laughed and let go of her neck, but then grabbed her by the neck again and pushed her "'hard,'" forcing her head against the concrete wall along the alley behind her apartment duplex. Boermeester again let her go, but then grabbed her neck once more and again hit her head against the wall. Roe's head hurt from the impact.

Roe also provided the Title IX investigator with a detailed account of prior instances of physical violence perpetrated by Boermeester. She described Boermeester

as being "'mean'" and "'always putting [her] down,'" and she read a list of demeaning things he had said to her within a 24-hour period, which she had catalogued on her phone. Roe requested an avoidance of contact order prohibiting Boermeester from contacting her and requested temporary emergency housing.

There were two eyewitnesses to the incident. A student, D.H., reported to the Title IX investigator that sometime after midnight on January 21, 2017, he heard a male yelling loudly in the alley next to the apartment duplex D.H. shared with Roe. D.H. looked out the window and saw Boermeester pinning Roe against a wall with his hand around her neck. He also saw Roe's dog running up and down the street, which D.H. perceived as a problem because Roe never allowed her dog to run freely. He awakened his roommate, T.S., who did not see the incident but accompanied D.H. outside. D.H. and T.S. escorted Roe back to their apartment. D.H. reported that Roe seemed "'pretty scared'" but she refused to sleep at their apartment because she did not want to make Boermeester "'more mad.'" Roe told the investigator that she refused to spend the night at D.H.'s and T.S.'s apartment because Boermeester "'wouldn't understand,'" and so she returned to her own apartment to avoid "'mak[ing] it worse.'" Later the same day, D.H. reported the incident to the men's tennis coach, who in turn reported it to the Title IX office.

A second eyewitness, M.B.2, was interviewed twice. Initially, he told the Title IX investigator that he saw Roe arguing with a male he did not recognize but did not see any physical contact between the two. Later, however, he

called the Title IX investigator to report that he "'saw everything'" and wished to speak with the investigator again. During the second interview, M.B.2 explained that he "'tried to downplay' the incident" in his initial interview both because he believed Roe was scared of Boermeester and because Roe had asked M.B.2 to "'keep it on the down low.'" M.B.2 reported during his second interview that he, like D.H., heard screaming in the alley near his residence on the night in question. He looked out the window and saw Boermeester standing in front of Roe with both hands around her neck. Boermeester pushed Roe into the alley wall and Roe made "'gagging'" sounds. Based on his observations, M.B.2 stated that Boermeester "'is violent'" and "'domestically was abusing [Roe].'" M.B.2 grabbed a trash bag, went outside, and asked Roe and Boermeester how things were going, which "'broke it up.'"

In his own interview with the Title IX investigator, Boermeester admitted that he had instructed Roe to release her dog, and then put his hand around her neck while she was against the alleyway wall. But he insisted that the act amounted to playful "'horsing around'" or sexual foreplay—not intimate partner violence.

USC's Title IX office obtained surveillance video of the incident. As the Court of Appeal majority observed, the video is "grainy and there is no audio"; Boermeester and Roe "are small figures in the frame of the video" since the camera "is positioned approximately two buildings away from [them]"; and "the interaction between Boermeester and Roe when they are near the wall [is] barely visible." (*Boermeester v. Carry, supra*, B290675.) Nevertheless,

the following events can be seen, as described by both the superior court and the Court of Appeal majority: "'At 12:16:16 a.m., the video shows [Boermeester] shoving Roe from the area adjacent to the house into the alleyway. At 12:16:50, [Boermeester] appears to be holding Roe's neck or upper body area. At 12:17:12, [Boermeester] grabs Roe by the neck and pushes her toward the wall of the alley. At 12:17:13 and 12:17:14, Roe's head and body arch backwards. Between 12:17:16 and 12:17:26, [Boermeester] and Roe are against the wall and barely visible from the camera. At 12:17:26, [Boermeester] backs away from the wall and re-enters the camera's view. At 12:17:28, Roe re-enters the camera's view. Roe and [Boermeester] proceed to push each other. At 12:17:38, [Boermeester] moves toward Roe and appears to be pushing her against the wall. At 12:17:40, a dog can be seen running across the alley. At 12:17:57, a third party enters the camera's view and walks in the direction of [Boermeester] and Roe. At that moment, [Boermeester] and Roe walk away from the wall and back towards the house. At 12:18:19, the third party walks over to the dumpster, places a trash bag inside, and walks back toward the house.'" (*Ibid.*)

Over the course of USC's investigation, the Title IX investigator interviewed both parties (as noted) and 16 additional witnesses (including D.H., T.S., and M.B.2), and also gathered documentary evidence including the video and text messages. Roe did not want to participate in the investigation and discouraged other witnesses from testifying against Boermeester. Two days after her initial interview, she told the Title IX investigator she was "'freaked out'" that Boermeester would learn of

the investigation and she feared retaliation from USC's football team (Boermeester was a member of the team). The next day, she reiterated that she was "freaked out" and stressed that Boermeester "can't know I made a statement" and "can't know I met with you guys." After Boermeester was given notice of the investigation, Roe stated that she no longer "'fully believe[d]'" the statements she made during her initial interview and asked if she could withdraw her statement and the avoidance of contact order, explaining she did not want Boermeester to be "'mad'" at her and she did not "'trust'" that it would be clearly conveyed to Boermeester that the investigation was initiated by the Title IX office. Roe also expressed concern that Boermeester would be punished too harshly. After the investigation was reported in the media, Roe published a tweet on Twitter stating that "I am the one involved in the investigation with Matt Boermeester. The report is false."

At the conclusion of the investigation, Boermeester and Roe separately reviewed the evidence with their advisor-attorneys at the Title IX office. The parties declined to attend their separate hearings or to submit questions for USC's Title IX coordinator to ask one another during their hearings. Instead, they opted to submit separate written statements responding to the evidence. In her written statement, Roe recanted her initial statement and claimed the Title IX office manipulated her into saying exaggerated or untrue things about Boermeester and their relationship. Specifically, Roe explained that she believed her initial discussion with the Title IX office was a "counseling session where [she] was free to vent about

[her] relationship or blow off steam," but she later felt that the office was "trying to get [her] to say bad things about [Boermeester] so that they could use those things against him." She further claimed that, had she understood the true nature of the meeting, she "would not have said many of the things [she] said and [she] would have made a greater effort to be accurate." Finally, she emphasized that Boermeester never "hit, choked, kicked, pushed or otherwise physically abused" her. (Boldface omitted.)

The Title IX investigator issued an SAR concluding that Boermeester violated USC's student conduct code by (1) engaging in intimate partner violence and (2) violating the interim avoidance of contact order. The SAR was forwarded to a misconduct sanctioning panel, which recommended expulsion. Boermeester appealed to an appellate panel, which agreed that Boermeester physically harmed Roe—and thus engaged in intimate partner violence—but was "less certain as to whether [Boermeester] *intentionally* physically harmed [Roe]." The appellate panel acknowledged that intent "is not a required element" for proving intimate partner violence as defined by USC's policy, but nevertheless felt that intent was relevant for sanctioning purposes and accordingly recommended reducing the sanction to a two-year suspension and completion of a 52-week intimate partner violence program. The vice-president of student affairs, respondent Carry, rejected the appellate panel's recommendation to reduce the sanction of expulsion. She explained that, whether Boermeester intended to cause Roe physical harm or did so recklessly, expulsion was appropriate given the nature of the harm inflicted.

Boermeester filed a section 1094.5 petition for writ of administrative mandate, which the superior court denied. A divided Court of Appeal reversed, with the majority concluding that USC's disciplinary procedures were unfair because Boermeester was unable to directly or indirectly question Roe and the third party witnesses in real time at a live hearing. (*Boermeester v. Carry, supra*, B290675.) The Court of Appeal majority declined to reach Boermeester's other claims regarding fairness, including his assertion that USC's disciplinary procedures were unfair because USC's Title IX investigator held the dual roles of investigator and adjudicator. (*Ibid.*) We granted review to determine whether the Court of Appeal majority was correct in concluding that USC should have held a live hearing featuring real-time direct or indirect cross-examination of all parties and witnesses (whether conducted in-person or virtually) with an opportunity for Boermeester to ask the witnesses follow-up questions. [4]

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4. The Court of Appeal was split as to whether Boermeester forfeited his right to challenge USC's failure to provide him with a live hearing featuring direct or indirect cross-examination of Roe and the other witnesses. Justice Wiley emphasized in his dissent that Boermeester did not submit cross-examination questions for USC's adjudicators to ask Roe and "*never requested live cross-examination*" of Roe or the other witnesses. (*Boermeester v. Carry, supra*, B290675 (dis. opn. of Wiley, J.).) The Court of Appeal majority declined to find forfeiture, deciding that it would have been futile for Boermeester to request cross-examination at a live hearing since neither USC's policies nor the law at the time allowed for it. (*Boermeester v. Carry, supra*, B290675.)

Neither party asks that we resolve this matter on forfeiture grounds. USC instead urges us to resolve the issue on the merits, noting the need for "clear guidance on what the common law

II. Discussion

A. Writ of Administrative Review

A writ of administrative review brought pursuant to section 1094.5 allows for judicial review of quasi-judicial decisions that are made "as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer." (§ 1094.5, subd. (a).) Judicial review is limited to "whether the respondent has proceeded without, or in excess of, jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion." (§ 1094.5, subd. (b).) "'A challenge to the procedural fairness of the administrative hearing is reviewed de novo on appeal because the ultimate determination of procedural fairness amounts to a question of law.'" (*Doe v. University of Southern California* (2016) 246 Cal.App.4th 221, 239 [200 Cal. Rptr. 3d 851] (*University I*); accord, *Natarajan v. Dignity Health* (2021) 11 Cal.5th 1095, 1111 [282 Cal. Rptr. 3d 1, 492 P.3d 294].)

Section 1094.5 review applies not only to the decisions of governmental agencies but also to the decisions of

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actually requires." We find that the issues raised are important and recurring, and accordingly exercise our discretion to reach the merits without deciding whether Boermeester forfeited his claims. (See *Teacher v. California Western School of Law* (2022) 77 Cal. App.5th 111, 129 [292 Cal. Rptr. 3d 343]; *JMS Air Conditioning & Appliance Service, Inc. v. Santa Monica Community College Dist.* (2018) 30 Cal.App.5th 945, 962, fn. 6 [242 Cal. Rptr. 3d 197].)

private organizations, so long as the private organization was legally required to hold a hearing, take evidence, and make factual determinations in coming to its decision. (*Anton v. San Antonio Community Hospital* (1977) 19 Cal.3d 802, 815–817 [140 Cal. Rptr. 442, 567 P.2d 1162].) We have never previously applied section 1094.5 to a private university's disciplinary decisions. We nevertheless find that section 1094.5 writ review is appropriate because, for the reasons more fully explained below, the common law doctrine of fair procedure applies in this context. Among other things, this doctrine, when applicable, requires a private organization to comply with its own procedural rules governing the expulsion of individuals from the organization, and it permits courts to evaluate the basic fairness of those procedural rules when the organization seeks to exclude or expel an individual from its membership. (*Cason v. Glass Bottle Blowers Assn.* (1951) 37 Cal.2d 134, 143 [231 P.2d 6] (*Cason*); accord, *Otto v. Tailors' P. & B. Union* (1888) 75 Cal. 308, 314–315 [17 P. 217].) Here, USC's policies were subject to the common law doctrine of fair procedure, and those policies specified that the university would offer the accused student a hearing, take evidence, and make factual determinations in a final adjudicatory decision issued by the vice president of student affairs. Thus, the section 1094.5 "elements of hearing, evidence, and discretion in the determination of facts are clearly required by law" and section 1094.5 writ review applies. (*Anton*, at p. 815; see also *Bray v. International Molders & Allied Workers Union* (1984) 155 Cal.App.3d 608, 616 [202 Cal. Rptr. 269] [courts "pay 'proper respect'" to a private organization's "'quasi-judicial procedure, precluding an aggrieved party from circumventing'" section 1094.5 review].)

The parties do not dispute that section 1094.5 applies. The parties' dispute instead centers on the meaning of a "fair trial" under section 1094.5, subdivision (b). Boermeester asserts that section 1094.5's fair trial component can only be satisfied by adhering to principles established by the common law doctrine of fair procedure which, in certain limited contexts, requires a private organization to give an individual adequate notice of the charges and a reasonable opportunity to respond before expelling the individual from the organization's membership. (*Pinsker II, supra*, 12 Cal.3d at p. 555.) Boermeester additionally urges us to rely on constitutional due process principles, though he does not go so far as to suggest that due process applies to private universities like USC. USC, on the other hand, claims that "[s]ection 1094.5 is a procedural vehicle for reviewing public and private administrative decisions" and "does not impose any particular standards of fair procedure." Even so, USC does not dispute that some minimum standard of procedural fairness is required in this context. Moreover, USC relies on cases decided under the common law doctrine of fair procedure in asserting that its disciplinary process was fair.

Neither we nor any other court has held that the fair trial component of section 1094.5 is synonymous with either the common law doctrine of fair procedure or with due process principles, and we decline to do so here. Nevertheless, and as explained more fully below, our fair procedure cases are instructive because the membership-related decisions made by the private organizations in those cases are similar in significant respects to private universities' student disciplinary decisions.

Appendix A

The principles of common law fair procedure are similar to those of constitutional due process in that they are flexible and context specific. Under either concept, the precise procedures necessary to provide a complainant with a meaningful opportunity to be heard "depend[] largely on 'the nature of the tendered issue.'" (*Ezekial v. Winkley* (1977) 20 Cal.3d 267, 279 [142 Cal. Rptr. 418, 572 P.2d 32] (*Ezekial*); accord, *Saleeby v. State Bar* (1985) 39 Cal.3d 547, 565 [216 Cal. Rptr. 367, 702 P.2d 525].) This is not to say that fair procedure and due process are identical. Due process is a constitutional right designed to protect citizens from abuses of state power, and it does not apply here since no state action is involved. Fair procedure, on the other hand, is a more flexible judicially created concept applicable to private organizations in limited situations. (See *Pinsker II, supra*, 12 Cal.3d at p. 550, fn. 7 [distinguishing due process and fair procedure]; *Cotran v. Rollins Hudig Hall Internat., Inc.* (1998) 17 Cal.4th 93, 108 [69 Cal. Rptr. 2d 900, 948 P.2d 412], quoting Friendly, "*Some Kind of Hearing*" (1975) 123 U. Pa. L.Rev. 1267, 1269–1270, fn. 10 ["'The precise content of the common law "fair procedure" requirement is far more flexible than that which the Supreme Court has found to be mandated by due process'"].) Because this matter involves a private university, no constitutional rights are at stake and a greater degree of flexibility is warranted. (See *Pinsker II*, at p. 555.)

With these considerations in mind, we next provide a background on the common law doctrine of fair procedure and discuss how it governs our inquiry.

B. The Common Law Doctrine of Fair Procedure

The common law doctrine of fair procedure originally developed to prevent the arbitrary expulsion of individuals from memberships in certain private organizations—such as mutual aid societies, fraternities, or unions—where the expulsion "adversely affected [property] rights in specified funds held for the association's members." (*Potvin v. Metropolitan Life Ins. Co.* (2000) 22 Cal.4th 1060, 1066 [95 Cal. Rptr. 2d 496, 997 P.2d 1153] (*Potvin*).) The doctrine was subsequently expanded to prevent the arbitrary expulsion or exclusion of individuals from private organizations that "possess substantial power either to thwart an individual's pursuit of a lawful trade or profession, or to control the terms and conditions under which it is practiced." (*Ezekial, supra*, 20 Cal.3d at p. 272.) For the doctrine to apply, individuals need not show that they would be fully unable to practice their chosen profession absent membership in the organization; they can instead show that "exclusion from membership … deprives [them of] substantial … educational, financial, and professional advantages." (*Pinsker v. Pacific Coast Soc. of Orthodontists* (1969) 1 Cal.3d 160, 164–165 [81 Cal. Rptr. 623, 460 P.2d 495], italics omitted (*Pinsker I*).)

In *Pinsker I*, for example, we held that an orthodontics association was subject to the doctrine of fair procedure, explaining that while membership in the association was "not economically necessary in the strict sense of the word," it was a "practical necessity for a dentist who wishes not only to make a good living as an orthodontist but also to realize maximum potential achievement and

recognition in such specialty." (*Pinsker I, supra*, 1 Cal.3d at p. 166.) Similarly, in *Potvin*, we held that an insurer's removal of a physician from its preferred provider list was subject to the doctrine of fair procedure because "the insurer possesses power so substantial that the removal significantly impairs the ability of an ordinary, competent physician to practice medicine or a medical specialty in a particular geographic area, thereby affecting an important, substantial economic interest." (*Potvin, supra*, 22 Cal.4th at p. 1071.) We also elaborated on our rationale for requiring certain private organizations to apply fair procedure in their membership decisions by observing that these organizations "affect[] the public interest" and "'are viewed by the courts as quasi-public in nature'" which "'lead courts to impose'" on them certain obligations to the public and the individuals with whom they deal. (*Id.* at p. 1070.) This rationale applied to the insurer in *Potvin* since "'[t]he public has a substantial interest in the relationship between [insurers] and their preferred provider physicians.'" (*Ibid.*)

Most notably, in *Ezekial*, we applied the fair procedure doctrine to prevent an individual's arbitrary expulsion from a residency program at Kaiser, a private teaching hospital. (*Ezekial, supra*, 20 Cal.3d 267.) We found that the plaintiff was entitled to fair procedure because, by accepting him into its residency program and later seeking to expel him from that program, "Kaiser has assumed the power to permit or prevent [the plaintiff's] practice of a surgical specialty and to thwart the enjoyment of the economic and professional benefits flowing therefrom." (*Id.* at p. 274.) We additionally reasoned that "[d]ismissal from

Kaiser will, as a practical matter and because of Kaiser's close relationship with other teaching hospitals, prevent plaintiff's acceptance in any other surgical residency program. Successful completion of an approved surgical residency is a prerequisite to attainment of the status of a 'board certified general surgeon,' without which plaintiff cannot practice a surgical specialty in any accredited California hospital." (*Id.* at pp. 270–271.) Because "the right to practice a lawful trade or profession is sufficiently 'fundamental' to require substantial protection against arbitrary administrative interference," the doctrine of fair procedure applied. (*Id.* at p. 272.)

Unlike in the above cases, this matter does not involve a private entity with "a virtual monopoly" sufficient to impede an individual's pursuit of a particular trade or profession. (*Pinsker I, supra*, 1 Cal.3d at p. 166; accord, *Potvin, supra*, 22 Cal.4th at p. 1072 [fair procedure applied because "only a handful of health care entities have a virtual monopoly on managed care" and "removing individual physicians from preferred provider networks controlled by these entities could significantly impair those physicians' practice of medicine"].) Nevertheless, a private university provides an important, quasi-public service—a postsecondary education—affecting the public interest. "'[E]ducation is vital and, indeed, basic to civilized society. … [I]t is an interest of almost incalculable value, especially to those students who have already enrolled in the institution and begun the pursuit of their college training.'" (*Goldberg v. Regents of the University of California* (1967) 248 Cal.App.2d 867, 876 [57 Cal. Rptr. 463] (*Goldberg*); accord, *Doe v. University*

of Cincinnati (6th Cir. 2017) 872 F.3d 393, 399 [expulsion from a university "'clearly implicates' a protected property interest" and may also involve a protected liberty interest].) Much like in *Ezekial*, this case involves "an important benefit or privilege," which was already conferred on Boermeester and which USC took away from him by expelling him. (*Ezekial, supra*, 20 Cal.3d at p. 273.) Given the seriousness of sexual misconduct or intimate partner violence allegations, a student who is expelled from a university for such conduct may find it especially difficult—if not impossible—to complete a postsecondary education elsewhere, thwarting the student's ability to realize "the economic and professional benefits flowing" from a college degree. (*Id.* at p. 274.)[5] For these reasons, we find that a student's interest in completing a postsecondary education at a private university is analogous to an individual's interest in continuing membership in a private organization that impacts the individual's ability

5. USC counters that expulsion will not "tarnish a student's reputation for life" because "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." The statute to which USC cites, the Family Educational Rights and Privacy Act of 1974 (20 U.S.C. § 1232g), prohibits the federal funding of educational institutions that have a policy or practice of releasing education records to unauthorized persons. (20 U.S.C. § 1232g(b)(1).) It contains an exception, however, that allows the release of a student's records to other schools at which the student is seeking admission. (20 U.S.C. § 1232g(b)(1)(B).) It therefore does not alter our observation that a student who is expelled from a university for committing sexual misconduct or intimate partner violence may find it difficult to complete his or her education elsewhere.

to practice his or her chosen profession. Our common law doctrine of fair procedure therefore applies in determining whether USC's disciplinary procedures were fair.

Where it applies, the common law doctrine of fair procedure requires private organizations to provide adequate notice of the charges and a meaningful opportunity to be heard. (*Pinsker II, supra*, 12 Cal.3d at pp. 555–556; *Ezekial, supra*, 20 Cal.3d at p. 278.) We have never held, however, that any specific or baseline procedures must be followed to satisfy these requirements. Boermeester points to *Cason, supra*, 37 Cal.2d 134, where we observed in dicta that a "fair trial" "includes the right … to confront and cross-examine the accusers" (*id.* at pp. 143, 144), but we did not hold in *Cason* that the plaintiff was denied a fair procedure on that ground. Instead, we held that the plaintiff was denied a fair procedure because he was not permitted to hear or review the accuser's testimony or to refute that testimony, nor was he allowed to examine the written evidence submitted against him. (*Id.* at pp. 144–145.) **(9)** Moreover, we have since noted that "[t]he common law requirement of a fair procedure does not compel formal proceedings with all the embellishments of a court trial [citation], nor adherence to a single mode of process. It may be satisfied by any one of a variety of procedures which afford a fair opportunity for an applicant to present his position." (*Pinsker II*, at p. 555.) In fact, we have observed that a formal hearing is not required in all circumstances; at times, it may be sufficient for a private organization to allow only a written response to the charges. (*Ezekial*, at p. 279.) We have further emphasized that, given "the practical limitations on the

ability of private institutions to provide for the full airing of disputed factual issues" (*id.* at p. 278), courts "should not attempt to fix a rigid procedure that must invariably be observed. Instead, the associations themselves should retain the initial and primary responsibility for devising a method which provides an applicant adequate notice of the 'charges' against him [or her] and a reasonable opportunity to respond" (*Pinsker II*, at p. 555).

In short, though the fair procedure doctrine requires adequate notice of the charges and a reasonable opportunity to respond, applying the doctrine to this context requires us to give private universities primary responsibility for crafting the precise procedures meant to afford a student with notice and an opportunity to respond. (*Pinsker II, supra*, 12 Cal.3d at p. 555.) Private universities generally know best how to manage their own operations, and requiring a fixed set of procedures they must utilize in every situation when determining student discipline would constitute an improper "'intrusion into the[ir] internal affairs.'" (*Id.* at p. 557; accord, *Ezekial, supra*, 20 Cal.3d at pp. 278–279.)

C. Recent Legislation

The Legislature recently enacted legislation setting forth the precise procedures it felt were necessary to ensure fairness to both the accused student and the accuser and to combat sexual violence on university campuses. Senate Bill No. 493 (2019–2020 Reg. Sess.) (Senate Bill 493), which became effective on January 1, 2021 (Stats. 2020, ch. 303), applies to public or private

universities that receive state financial assistance and are not exempt from the statute. (Ed. Code, § 66281.8, subd. (a)(1); *id.*, § 66271.) It specifies the procedures universities must implement on and after its effective date to address incidents of sexual violence. (See generally *id.*, § 66281.8.) Senate Bill 493 does not apply here since the incident itself and USC's subsequent investigation of the incident occurred prior to Senate Bill 493's effective date. We nevertheless find it noteworthy that the statute does not require universities to conduct live hearings featuring cross-examination of the accuser and other witnesses. (Cf. *Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, 91 [133 Cal. Rptr. 2d 234] [the Administrative Procedure Act (Gov. Code, § 11340 et seq.) was inapplicable but was nonetheless "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"].)

Senate Bill 493 is intended "to account for the significant individual civil consequences faced by respondents alleged to have committed sexual violence as well as the significant harm to individual complainants and to education equity more generally if sexual violence goes unaddressed." (Stats. 2020, ch. 303, § 1, subd. (n).) As relevant here, it gives universities the discretion to decide whether "a hearing is necessary to determine whether any sexual violence more likely than not occurred." (Ed. Code, § 66281.8, subd. (b)(4)(A)(8), added by Stats. 2020, ch. 303, § 3.) It also instructs universities to consider, "[i]n making this decision, … 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.*) Thus, universities are left to determine for themselves whether to conduct a hearing, how to format it, and what rules govern it.

Senate Bill 493 expressly provides that universities need not comply with any of its provisions that conflict with federal law. (Ed. Code, § 66281.8, subd. (f).) Federal law in this area is still evolving. After the OCR rescinded its 2011 "Dear Colleague" letter in 2017, it began a rulemaking process culminating in Title IX regulations that went into effect on August 14, 2020, three years after Boermeester's expulsion from USC. Though the 2020 Title IX regulations are inapplicable here, it is worth observing that the Title IX regulations may be trending towards providing private universities with more flexibility in determining whether to conduct a live hearing. To explain, the 2020 Title IX regulations require universities receiving federal funds to "provide for a live hearing" that allows "each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility," which "must be conducted directly, orally, and in real time." (34 C.F.R. § 106.45(b)(6)(i) (2023).) In June 2022, however, the OCR proposed amendments to the 2020 regulations, which are not yet final. The proposed amendments provide that universities may opt "to conduct live hearings with cross-examination or have the parties meet separately with the decisionmaker and answer questions submitted by the other party when a credibility assessment is necessary." (87 Fed.Reg. 41390, 41397 (July 12, 2022).)

After reexamining its position and evaluating relevant case law, the OCR determined that "neither Title IX nor due process and fundamental fairness" (87 Fed.Reg., *supra*, at p. 41505) requires universities "to provide for a live hearing with advisor-conducted cross-examination in all cases" (*id.* at p. 41507). The OCR further justified the proposed amendments by stating that growing evidence calls into question "whether adversarial cross-examination is the most effective tool for truth-seeking in the context of sex-based harassment complaints involving students at postsecondary institutions" and shows that "information-gathering approaches such as questions asked in individual meetings instead of during a live hearing (sometimes described as inquisitorial procedures) are more likely to produce the truth than adversarial methods like cross-examination." (*Ibid.*)

As stated above, we find it significant that Senate Bill 493 (as well as the OCR's most recent proposed amendments to the Title IX regulations) give universities wide latitude in determining the precise nature of their disciplinary proceedings. But we also observe that the state of the law in this area is in flux and is, therefore, subject to continued change and development. We further emphasize that, because neither Senate Bill 493 nor the current or proposed Title IX regulations apply to this matter, they are not dispositive. [6]

6. Going forward, all universities that receive state financial assistance and are not exempt from Senate Bill 493 will need to comply with Senate Bill 493 in any context in which the statute applies. To the extent that our holding conflicts with any of the provisions of Senate Bill 493, Senate Bill 493's provisions control.

D. Fair Procedure Does Not Require Live Hearings with Cross-examination

We must decide whether fair procedure requires private universities to provide accused students the opportunity to directly or indirectly cross-examine the accuser and other witnesses at a live hearing with the accused student in attendance, either in person or virtually. Applying our fair procedure precedent discussed above, we hold that it does not. Requiring live hearings featuring real-time cross-examination of witnesses in the accused student's presence would be contrary to our prior conclusion that "fair procedure does not compel formal proceedings with all the embellishments of a court trial." (*Pinsker II, supra*, 12 Cal.3d at p. 555.) It would also be contrary to our admonition that courts must refrain from fixing rigid trial-like procedures "that must invariably be observed." (*Ibid.*)

As we have recognized, an accused student has a significant interest in completing a postsecondary education. For this reason, private universities must comply with the fair procedure doctrine by affording accused students reasonable notice of the charges and a

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(Ed. Code, § 66281.8, subd. (g)(2) ["Any case law that conflicts with the provisions of the act … shall be superseded as of this statute's effective date"]; see also *Woods v. Young* (1991) 53 Cal.3d 315, 324 [279 Cal. Rptr. 613, 807 P.2d 455] ["[A] later, more specific statute controls over an earlier, general statute"].) The parties agree that Senate Bill 493 does not apply retroactively to this matter, and we accordingly do not opine on what the outcome of Boermeester's petition would have been had the statute applied to his claims.

meaningful opportunity to respond before disciplining them. When crafting the precise procedures necessary to provide a meaningful opportunity to respond, however, a private university must balance competing interests, including the accused student's interests in a fair procedure and completing a postsecondary education, the accuser's interest in not being retraumatized by the disciplinary process, and the private university's interests in maintaining a safe campus and encouraging victims to report instances of sexual misconduct or intimate partner violence without having to divert too many resources from its main purpose of education. (See *Ezekial, supra*, 20 Cal.3d at pp. 277–278 [weighing the plaintiff's economic interest in completing the residency program against the private hospital's interest in protecting itself from the mistakes of incompetent physicians]; accord, *Doe v. Westmont College* (2019) 34 Cal.App.5th 622, 634 [246 Cal. Rptr. 3d 369] (*Westmont*) [observing that "[a] fair hearing strives to balance three competing interests" among the accused student, the accuser, and the university].) It is therefore appropriate to give private universities broad discretion in formulating their disciplinary processes to ensure that they not only provide the accused student a meaningful opportunity to be heard, but also embolden victims to report incidents of sexual misconduct or intimate partner violence, encourage witnesses to participate in the disciplinary process, and allow the private university to conserve its resources so that it can remain focused on its primary mission of providing a postsecondary education.

The Court of Appeal majority reasoned that the accused student must be able to engage in adversarial

back-and-forth questioning with the accuser and other witnesses at a live hearing in order to assess witness credibility and to "fully present his [or her] defense." (*Boermeester v. Carry, supra*, B290675.) While live adversarial questioning may be considered essential in the context of a criminal trial (*People v. Louis* (1986) 42 Cal.3d 969, 982–983 [232 Cal. Rptr. 110, 728 P.2d 180]), there is no absolute right to a live hearing with cross-examination in administrative proceedings, even where constitutional due process applies. As courts have explained in other administrative contexts, "'[d]ifferences in the origin and function of administrative agencies "preclude wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of courts." … The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances.'" (*Murden v. County of Sacramento* (1984) 160 Cal.App.3d 302, 311 [206 Cal. Rptr. 699].) The fair procedure doctrine similarly recognizes "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.) Private universities are ill equipped to function as courts because they lack subpoena power to force key witnesses to attend a hearing and be subject to cross-examination. They must instead rely on the voluntary participation of witnesses, which may prove more likely when the disciplinary process allows witnesses to testify outside of the context of a live hearing and outside the accused student's presence. As the Attorney General, appearing here as amicus curiae, observes, requiring live hearings featuring real-time adversarial questioning

"threatens to deter students from participating and to traumatize those who do." Furthermore, such hearings would require private universities to make on-the-fly rulings on objections to proposed questions and other issues raised during the hearing, which university staff may not be adequately trained to do. This would "divert both resources and attention from a university's main calling, that is education." (*Doe v. Regents of University of California* (2016) 5 Cal.App.5th 1055, 1078 [210 Cal. Rptr. 3d 479] (*Regents I*); accord, *Goss v. Lopez* (1975) 419 U.S. 565, 583 [42 L. Ed. 2d 725, 95 S. Ct. 729] ["To impose … even truncated trial-type procedures might well overwhelm administrative facilities in many places and, by diverting resources, cost more than it would save in educational effectiveness"].) Simply put, the "'procedures for dismissing college students [are] not analogous to criminal proceedings and could not be so without at the same time being both impractical and detrimental to the educational atmosphere and functions of a university.'" (*Andersen v. Regents of University of California* (1972) 22 Cal.App.3d 763, 770 [99 Cal. Rptr. 531], quoting *Goldberg, supra*, 248 Cal.App.2d at p. 881.)

In this case, USC provided Boermeester notice of the allegations; the opportunity to provide his version of events in his interview with the Title IX investigator; the opportunity to independently review the testimonial and documentary evidence with his attorney-advisor; the opportunity to submit his own evidence and the names of potential witnesses to the Title IX investigator; the opportunity to respond to the testimonial and documentary evidence through an in-person evidence hearing held at the

Title IX office and conducted by the Title IX coordinator (which he declined to attend in favor of submitting a written response to the evidence); the opportunity to submit questions for the Title IX coordinator to ask Roe at her own evidence hearing (which he also declined to do); and the opportunity to appeal the misconduct sanctioning panel's decision to the appellate panel. USC was not required to have gone further by conducting a live hearing with Boermeester in attendance and with Boermeester directly or indirectly cross-examining the witnesses and asking follow-up questions, either in person or virtually.

Boermeester relies on recent appellate court decisions to support his view that fair procedure requires live hearings at which accused students are permitted to cross-examine witnesses (in person or virtually), but most of these cases do not help him. In *University I*, the first California appellate case to analyze what procedures might be required in this context, the court correctly observed that fair procedure requires only "'notice reasonably calculated to apprise interested parties of the pendency of the action … and an opportunity to present their objections'" (*University I, supra*, 246 Cal.App.4th at p. 240) and concluded from this that "a full trial-like proceeding with the right of cross-examination is not necessary" (*id.* at p. 248). It is true that, subsequent to the *University I* decision, some courts have held that private universities must allow the accused student to indirectly cross-examine the accuser or third party witnesses where the adjudication "turns on witness credibility," but most of these decisions have not specified that the indirect cross-examination should occur within the context of a

live hearing. (*Westmont, supra*, 34 Cal.App.5th at p. 638; accord, *Doe v. Claremont McKenna College* (2018) 25 Cal. App.5th 1055, 1070 [236 Cal. Rptr. 3d 655] (*Claremont McKenna*); *Doe v. University of Southern California* (2018) 29 Cal.App.5th 1212, 1237 [241 Cal. Rptr. 3d 146] (*University II*); see also *Regents I, supra*, 5 Cal.App.5th at p. 1084.) In *University II*, for example, the court directed the private university to give the accused student "an opportunity to submit a list of questions" for the university's adjudicators to ask the accuser if it proceeded with a new disciplinary proceeding upon remand (*University II*, at p. 1238), but it did not direct the university to conduct a hearing—even after acknowledging that the university's policies did not allow for a hearing (see *id.* at pp. 1235, 1238). Moreover, courts have been careful to observe that there exist several "'alternate ways of providing accused students with the opportunity to hear the evidence being presented against them'" and to rebut such evidence, other than "permit[ting] [the accused student's] presence during the [witnesses'] testimony." (*Westmont*, at p. 638; accord, *University I*, at p. 245, fn. 12.)

Indeed, aside from the split opinion of the Court of Appeal below, *Doe v. Allee* (2019) 30 Cal.App.5th 1036 [242 Cal. Rptr. 3d 109] is the only decision to hold that a private university must allow an accused student to indirectly cross-examine witnesses "at a hearing at which the witnesses appear[] in person or by other means [e.g., videoconferencing]," even where the private university's policies do not provide a hearing. (*Id.* at p. 1071.) The *Allee* court acknowledged that fair procedure "requirements are 'flexible' and entail no 'rigid procedure'" (*id.* at p.

1062), yet it failed to explain how its holding comports with these principles. We accordingly disapprove of *Doe v. Allee, supra*, 30 Cal.App.5th 1036 to the extent it is inconsistent with our opinion.

At oral argument, Boermeester's counsel asserted that providing direct or indirect cross-examination of the accuser or other witnesses outside of a live hearing attended by the accused student is inadequate because the private university may "filter" or misrepresent witnesses' answers to the accused student's questions. Of course, if universities choose to question the accuser or other witnesses outside of the accused student's presence, they will need to conceive of a method by which to meaningfully convey the responses to the accused student, such as by providing the accused student with transcripts, video or audio recordings, or reasonably detailed summaries of the testimony. (See *Westmont, supra*, 34 Cal.App.5th at p. 638.) We leave these specific procedures up to the university to determine. But we see no reason to address the theoretical risk that private universities may filter answers by, in response, categorically requiring them to conduct a live hearing with the accused student in attendance and at which the accused student is allowed to directly or indirectly cross-examine witnesses.

We note that this is not a case in which the accused student was given *no* hearing at all. As described above, the parties agree that USC's policies provided separate and individual evidence hearings for both Boermeester and Roe, and that USC complied with its policies by offering the parties the opportunity to attend their

separate evidence hearings. Although Boermeester could not have cross-examined Roe or the third party witnesses in real time at his hearing, he could have responded to the evidence and presented his defense before USC's adjudicators had he chosen to attend his hearing. We do not opine on whether and under what circumstances a private university might properly choose to refrain from providing an accused student with a hearing that gives the accused student the opportunity to respond to the evidence before the university's adjudicators, since such a hearing was offered to the accused student in this case.

We also do not opine on whether and under what circumstances a private university might be *required* to allow the accused student to indirectly cross-examine the accuser by submitting questions for the university's adjudicators to ask the accuser outside of the context of a live hearing or the accused student's presence, since USC afforded Boermeester the opportunity to submit questions for the Title IX coordinator to ask Roe at her separate evidence hearing. Similarly, we do not opine on whether USC's procedure was unfair because Boermeester was not allowed to submit questions for USC's adjudicators to ask the third party witnesses during the Title IX investigator's interviews with those witnesses, since Boermeester does not raise this claim.

Were we to assume, however, that a private university must provide an accused student the opportunity to indirectly cross-examine the accuser or third party witnesses outside of the context of a live hearing when the credibility of the accuser or third party witnesses

is central to the adjudication, as some lower courts have held (see *Claremont McKenna, supra*, 25 Cal.App.5th at p. 1070; *University II, supra*, 29 Cal.App.5th at p. 1237; *Westmont, supra*, 34 Cal.App.5th at pp. 638–639; see also *Regents I, supra*, 5 Cal.App.5th at p. 1084), we would find USC's failure to provide Boermeester the opportunity to submit questions for the third party witnesses in this case to be harmless. In this case, the accounts of the third party witnesses merely corroborated Roe's initial accusation that Boermeester harmed her during the incident in question. Shortly after the incident occurred, Roe told the Title IX investigator that Boermeester had physically harmed her. Specifically, Roe said that it "hurt" when Boermeester grabbed the back of her hair "hard" and told her to drop her dog's leash; that it "hurt" when Boermeester grabbed the front of her throat and neck, causing her to cough; and that her "head hurt" after Boermeester grabbed her by the neck again and pushed her head "hard," causing her head to hit the alleyway wall. The video of the incident—though grainy and soundless—is consistent with Roe's initial account. (*Boermeester v. Carry, supra*, B290675.) Boermeester himself admitted that he had his hands on Roe's neck and had her against the alleyway wall. In sum, even without considering the third party eyewitness testimony, USC could have concluded that Boermeester "caus[ed] physical harm" to Roe and, thus, violated its policy against intimate partner violence.

Boermeester maintained that the act was playful or sexual in nature and amounted to mere "roughhousing." USC determined, however, that Boermeester's intent was irrelevant. Carry—who made the final decision per USC's

policy—found that since "[i]ntent to cause physical harm is not a required element" of USC's policy against intimate partner violence, Boermeester's alleged lack of intent to cause Roe physical harm was not a mitigating factor. She therefore concluded that, "[w]hether [Boermeester] intended to cause [Roe] harm or did so recklessly, expulsion [was] appropriate given the nature of the harm inflicted." Because intent was irrelevant under USC's policy against intimate partner violence, USC could have based its decision to expel Boermeester exclusively on Roe's initial statement, the video consistent with that statement, and Boermeester's own admissions—all of which tended to show that Boermeester caused Roe physical harm.

It is true that Roe later recanted her testimony and agreed with Boermeester that the incident was playful in nature. But even if Roe's recantation put her initial testimony in doubt, USC provided Boermeester the opportunity to indirectly cross-examine Roe and explore any inconsistencies in her story. Boermeester thus had the opportunity to submit questions to be asked of the most important witness—the person he allegedly hurt. Moreover, USC, as the finder of fact, was entitled to determine that Roe's first statement was more credible than her later recantation. Finally, we must acknowledge, as we did in *People v. Brown* (2004) 33 Cal.4th 892, 899 [16 Cal. Rptr. 3d 447, 94 P.3d 574], that it is not uncommon for victims of intimate partner violence to recant. Roe's post-incident communications with USC's Title IX office and her friends indicate that she feared retaliation and felt a sense of loyalty towards Boermeester, either of which may have motivated her later recantation.

In conclusion, USC was not required to provide Boermeester the opportunity to directly or indirectly cross-examine Roe and other witnesses at a live hearing with Boermeester in attendance, whether in person or virtually.

III. Disposition

We reverse the judgment of the Court of Appeal and remand for it to determine in the first instance the remaining claims Boermeester raised on appeal that the Court of Appeal expressly declined to reach.

GROBAN, J.

We Concur:

Guerrero, C. J.,
Corrigan, J.
Liu, J.
Kruger, J.
Jenkins, J.
Evans, J.

APPENDIX B — OPINION OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION EIGHT, FILED MAY 28, 2020

THE COURT OF APPEAL OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION EIGHT

B290675

(Los Angeles County
Super. Ct. No. BS170473)

MATTHEW BOERMEESTER,

Plaintiff and Appellant,

v.

AINSLEY CARRY *et al.*,

Defendants and Respondents.

May 28, 2020,
Opinion Filed

Matthew Boermeester was expelled from the University of Southern California (USC) for committing intimate partner violence against Jane Roe.[1] The superior

1. Although Jane Roe has identified herself to the public in the events at issue, we will continue to use a pseudonym or initials to refer to Roe and other witnesses in this opinion. (Cal. Rules of Court, rule 8.90.)

court denied his petition for writ of administrative mandate to set aside the expulsion. He appeals, contending, among other things, that the process leading to his expulsion violated his right to a fair hearing. We conclude USC's disciplinary procedures at the time were unfair because they denied Boermeester a meaningful opportunity to cross-examine critical witnesses at an in-person hearing. We thus reverse and remand with directions to the superior court to grant the petition for writ of administrative mandate.

FACTUAL AND PROCEDURAL BACKGROUND[2]

Boermeester was a member of the USC football team, who kicked the game-winning field goal for USC at the 2017 Rose Bowl. Roe was also a student-athlete who played tennis for USC. Boermeester and Roe dated from March 2016 to approximately October 2016. On January 21, 2017, two USC students observed Boermeester put his hand on Roe's neck and push her against a wall. They reported this incident to the USC men's tennis coach, which resulted in the initiation of an investigation. Boermeester did not deny he put his hand on Roe's neck and that she had her back against a wall while he did so. He contends, however, he did not intend to harm her and they were merely "horsing around."

2. Our 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.

Appendix B

Initial Interview with Jane Roe

Roe agreed to meet with USC's title IX office[3] on January 23, two days after the incident. Roe's advisor was present.

Roe reported she spent the day with Boermeester on Friday, January 20, 2017. He called to ask her to pick him up from a party at approximately 12:30 or 1:00 a.m. on January 21, 2017. She did, and they returned to her home after getting food. Boermeester was the drunkest she had ever seen. He yelled in the alley behind her house, trying to be funny.

Roe had her dog, Ziggy, with her. Boermeester wanted her to drop Ziggy's leash to allow him to run in the alley. He grabbed the back of Roe's hair hard and said "drop the fucking leash." Roe refused. Boermeester responded by increasing his hold on Roe's hair, causing her to drop the leash because it "hurt."

Boermeester then grabbed Roe "tight" by the neck, causing her to cough. He laughed and let go. He grabbed her by the neck twice more and pushed her hard against

3. The University's policy and procedures on student sexual, interpersonal, and protected class misconduct (sexual misconduct policy) prohibits conduct such as intimate partner violence. It is intended to comply with statutes prohibiting discrimination in education, including title IX of the Education Amendments of 1972 (20 U.S.C. § 1681 et seq.) (Title IX). As a result, the office which implements the sexual misconduct policy is known as the Title IX office.

a concrete wall that ran along the alley behind her duplex. Roe's head hurt after she hit the wall.

Three USC students, DH, TS, and MB2, exited their apartments. Roe believed they were woken up by the loud yelling. When they asked after Roe, Boermeester told them that he and Roe were just "playing around." DH and TS, who lived on the other side of Roe in the duplex, took her into their apartment. Boermeester was asleep when she got back to her room.

The next day, Roe told Boermeester that he scared DH and TS because "it looked really bad when you pushed me and it looked really bad with your hand around my neck." He replied, "it was a joke, we were messing around, tell them to calm down" and added, "tell them you're into that," implying that it was foreplay. When Roe asked him, "what if you hurt me bad? Would you feel bad? If you were playing around and it hurt?" Boermeester told her, "no" because it would have been "brought on by" her.

The Title IX coordinator explained Roe had the option to request an avoidance of contact order (AOC) prohibiting Boermeester from contacting her. Roe indicated she wanted the AOC as well as temporary emergency housing because Boermeester had a key to her house. The investigator noted Roe was crying throughout the meeting.

Roe acknowledged she was in a "bad situation" but was conflicted about what to do because she still cared for Boermeester. Roe indicated she did not want to participate

in an investigation and did not want Boermeester to be charged with anything other than the January 21, 2017 incident. She was informed the Title IX office was obligated to investigate and could proceed without her consent. Boermeester was charged with the January 21, 2017 incident of intimate partner violence[4] for which there were eyewitnesses.

Boermeester Is Notified of the Investigation

On January 26, 2017, USC notified Boermeester of an investigation into the events of January 21 and that he may have violated USC's sexual misconduct policy by committing intimate partner violence. He was placed on interim suspension and received an AOC letter.

That day, Roe exchanged a series of text messages with the investigator stating, I am "pretty freaked out about today. I know I've said this a lot but I really can't emphasis [*sic*] enough that you guys please please make it clear that I did not bring this forward that I want nothing to do with it and I'm not pressing any charges." She further stated, "He can't know I made a statement.

4. USC's sexual misconduct policy defines intimate partner violence as violence committed against a person with whom the accused student has a previous or current dating, romantic, intimate, or sexual relationship. "Violence means causing physical harm to the person or to their possessions. Intimate partner violence may also include nonphysical conduct that would cause a reasonable person to be fearful for their safety; examples include economic abuse and behavior that intimidates, frightens, or isolates. It may also include sexual assault, sexual misconduct, or stalking. Intimate partner violence can be a single act or a pattern of conduct."

Can you not tell him I made a statement[?] Like he can't know I met with you guys." The investigator assured her Boermeester would be advised the investigation was initiated by the Title IX office and he would not be made aware of her statement until the time of the evidence review.

Jane Roe Recants

Roe and her advisor met with the investigator on January 30, 2017. Roe indicated she had reservations about the investigation because she felt as though her voice was not heard and that it was more about "burning him" than her well-being. Roe explained she thought she was in a supportive environment when she initially met with the Title IX office and so she freely shared her story. Although she understood the Title IX office was "trying to do the right thing," it has made things for her more "difficult." Roe felt bullied by the process and no longer "fully believe[d]" many of the statements she initially made to the Title IX office.

Roe also requested the AOC be lifted because she had changed her mind. She requested the AOC during her first meeting because she did not "trust" that it would be clearly conveyed to Boermeester that the investigation was initiated by the Title IX office, not her. She did not want Boermeester to be "mad" at her. She remarked "at the end of the day, he is like my best friend so it is like you are taking that away too." She explained, "you think this is to protect me. Feels like I lost control on everything and I feel like you are controlling who I can talk to." Roe stated

that she did not feel she was in danger. She was upset they could not speak. She believed that the investigation was too harsh and that instead, Boermeester should be mandated to go to counseling and be placed on probation.

The next day, Roe texted the investigator, "Will I know tomorrow if I can get rid of my statement because I really don't want it used and I don't even think it is fair because I still disagree with somethings I said so to use it wouldn't be accurate and I just have been stressing about if it's being used or not so will [the coordinator] have an answer for me tomorrow?"

Meanwhile, media attention surrounding the suspension had begun. Roe's roommate reported Roe was worried about the impact the publicity would have on Boermeester's future career and NFL prospects. On February 8, Roe tweeted in response to media reports about Boermeester: "I am the one involved in the investigation with Matt Boermeester. The report is false. @Deadspin @latimes @ReignofTroy."

Boermeester's Statement

On January 30, 2017, Boermeester was interviewed by the investigator with a USC administrative assistant present. Boermeester's mother attended as his advisor. Boermeester generally confirmed the events of January 21 as Roe had described them; however, he denied intending to hurt her.

He reported he and Roe ate at the Cheesecake Factory at approximately 4:00 p.m. Later that night, he

text messaged Roe to pick him up from a party because he was unable to drive. He had three glasses of wine at the restaurant and four to five beers at the party. When they arrived at Roe's home after picking up food, they began playfully throwing french fries at one another.

Boermeester wanted to watch Roe's dog run around so he asked her to let the dog go. They were standing by a wall when he instructed her to release the dog. He acknowledged he put his hand around her neck while she stood against the wall, but denied they were arguing or that he was angry. He also denied choking her or slamming her head against the wall. He believed Roe felt safe with him. He asserted he did not have a tight grip on her.

Boermeester reported he and Roe spent the next three nights together and were sexually intimate. They saw each other every day until she left for a tennis match on January 26, 2017. Boermeester recalled he and Roe laughed about TS and DH assuming it was "real violence."

Boermeester believed the eyewitnesses misinterpreted what they saw. Although he understood how it looked to them, he thought it was ridiculous they wanted her to spend the night over at their home rather than sleep with him.

He explained he and Roe sometimes put their hands on each other's necks during sex. When asked what impact this has had on him, he stated, "I know to never do anything that resembles domestic violence in public again. To be aware of my surroundings." The investigator asked, "just in public?" He responded, "Well no, just to never give

the impression of domestic violence." Boermeester stated, "I feel like a monster even though I didn't do anything. I can't go to class, rehab, etc. I'm kinda sleeping, it's on my mind all of the time."[5]

On February 14, 2017, the Title IX office notified Boermeester he would also be investigated for violating the AOC. He provided a written response by e-mail denying contact with Roe in any format. He asserted he had moved home to San Diego and had remained there aside from meeting with his lawyer.

Additional Witness Statements

USC's Title IX investigator interviewed over a dozen people, including Roe, Boermeester, the eyewitnesses, Roe's roommates and friends, and Boermeester's ex-girlfriend. The investigator made it a general practice to reread the statement to the person after the interview to confirm accuracy.

MB2 is Roe's neighbor. He initially reported he did not see any physical contact between Roe and Boermeester. He explained he heard an argument between a man and a woman about a dog. When he walked outside to take out his trash and see what was happening, "it kinda settled a little bit." Roe approached him a few days later to ensure he did not get the wrong impression.

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5. Boermeester had knee surgery in early January 2017 and was scheduled to receive rehabilitation and physical therapy from USC staff. The Title IX office noted his treatment at USC facilities was not prohibited by the interim suspension.

One month later, MB2 called the investigator to admit he had not been truthful in his initial statement because he was trying to "protect" Roe's wishes to "keep it on the down low" and "downplay" the incident. He explained Boermeester's attorney attempted to speak with him at his home in March 2017. He told the attorney what he initially told the Title IX investigator. However, he decided, "the lawyer coming to speak to me, finding my apartment, I don't want to keep this any longer, perpetuating this lie."

During a second interview, MB2 reported he heard laughing and screaming sounds coming from the alley by his home, which initially seemed playful. The noise then changed to what sounded like a male trying to "assert his dominance" over a female. MB2 looked into the alley and saw Boermeester standing in front of Roe with both hands around her neck. He then pushed her into the alley wall and she began to make "gagging" noises. MB2 added, "once he put his arms around her the first time she wasn't saying anything." MB2 believed, "this guy is violent. He domestically was abusing her." He stated, "truth is I really wanted to beat the shit out of this guy." Because of what he saw, MB2 grabbed a trash bag and went outside. He asked them how things were going, which "broke it up." Afterwards, Boermeester and Roe walked back to her apartment.

DH is a member of the USC men's tennis team and Roe's neighbor. He was reluctant to participate in the investigation but described what he saw on the night of January 21, 2017. He reported he heard screaming. He heard a male voice yelling loudly and a female voice talking

but could not make out what they were saying. He looked outside and saw Roe and Boermeester standing by the wall. He noticed Roe's dog running in the alley, which made him realize something was wrong because Roe did not allow her dog to run freely. He saw Roe pinned against the wall by Boermeester, who had his hand around her chest/neck. DH did not see or hear Roe hit the wall.

TS is also a member of the USC men's tennis team and is DH's roommate. He reported DH woke him up, urgently stating, "we gotta go downstairs, [Boermeester] is hitting [Roe]." When they got downstairs, DH asked to speak to Roe. Boermeester walked back to Roe's house. DH tried to convince her to spend the night at their apartment. DH observed Roe was "playing casual at first" and tried to "downplay it." When DH confronted her about Boermeester's arm around her throat, she rationalized it by saying, "he's just drunk." About 15 to 20 minutes later, Roe returned home, crying. She then texted that Boermeester was asleep and stated, "I am safe. Thanks for looking out for me." TS and DH reported the incident the next day to the men's tennis coach.

Roe's roommates and friends uniformly reported that Roe and Boermeester's relationship was volatile, but they did not personally witness any physical violence between them. Most of them did not believe Roe was in any physical danger. Instead, they often heard Roe and Boermeester demean one another by calling each other names. As the investigation progressed, Roe indicated to her friends she did not want them to participate in the investigation.

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Roe stated in a text message to TS, "Look what I want to say is I'm helping Matt. I know you won't agree with it but he's already gotten a shit ton of punishment for something I didn't want to happen in the first place. I wanted non[e] of this to take place at all. He's already suspended for probably two months and will be kicked off the team and has a restraining order from me. I literally wanted non[e] of it so what I'm asking as a friend is don't say much. Please don't fuck him over more. I'm not in danger at all I trust him I trust that he won't ever hurt me again. I just hate that any of this is going on. So I'm begging you."

Roe confided in a few friends that Boermeester had given her bruises. A text message from Roe to GO also indicated Roe may have been in contact with Boermeester while the AOC was in place.

Boermeester's ex-girlfriend, AB, dated him for almost three years. She reported she and Boermeester would wrestle and joke around. It sometimes started as tickling but would end in him placing her in a "chokehold." She would tell him to stop and he did. She estimated he had his hands around her neck five to 10 times. When Boermeester placed his hands around her neck, "it crossed the line from being joking and then it would be too much." On two occasions, he shoved her during an argument.

AB's mother thought their roughhousing was "always [going] too far." She "freaked out" when she saw Boermeester with his hands around AB's neck and screamed, "get your arms off [my] daughter right now!"

Boermeester apologized, but AB did not think he realized he was "definitely too rough." Nevertheless, AB did not believe her parents were concerned about her safety when she was dating Boermeester.

Surveillance Video

The investigator retrieved surveillance video of the incident from a camera located in the alley approximately two buildings away from Roe's duplex. The recording does not contain audio and is grainy. It is undisputed the video depicts Boermeester and Roe interacting in the alley after midnight on January 21, 2017. The video supports the trial court's description of the events as follows:

"At 12:16:16 a.m., the video shows Petitioner shoving Roe from the area adjacent to the house into the alleyway. At 12:16:50, Petitioner appears to be holding Roe's neck or upper body area. At 12:17:12, Petitioner grabs Roe by the neck and pushes her toward the wall of the alley. At 12:17:13 and 12:17:14, Roe's head and body arch backwards. Between 12:17:16 and 12:17:26, Petitioner and Roe are against the wall and barely visible from the camera. At 12:17:26, Petitioner backs away from the wall and re-enters the camera's view. At 12:17:28, Roe re-enters the camera's view. Roe and Petitioner proceed to push each other. At 12:17:38, Petitioner moves toward Roe and appears to be pushing her against the wall. At 12:17:40, a dog can be seen running across the alley. At 12:17:57, a third party enters the camera's view and walks in the direction of Petitioner and Roe. At that moment, Petitioner and Roe walk away from the wall and back towards the house. At 12:18:19, the

third party walks over to the dumpster, places a trash bag inside, and walks back toward the house."

USC's Findings and Disciplinary Action

Based on the evidence obtained, the investigator found Boermeester violated USC's misconduct policy by engaging in intimate partner violence and violating the AOC. The investigator submitted her findings to the Misconduct Sanctioning Panel, which is comprised of two staff or faculty members and an undergraduate student. The panel decided upon a sanction of expulsion.

Boermeester appealed the findings of fact and determination of violation to the vice-president for student affairs. An appellate panel found the evidence supported the findings, but recommended a two-year suspension because Boermeester's conduct could have been "reckless" rather than intentional. The vice-president for student affairs rejected the appellate panel's recommendation and affirmed the decision to expel Boermeester, reasoning the sanction was appropriate under the sexual misconduct policy regardless of whether Boermeester intended to harm Roe or not.

Proceedings in the Superior Court

Boermeester filed a petition for writ of mandate in the superior court under Code of Civil Procedure section 1094.5. The court denied the petition for writ of mandate. Boermeester appealed.

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DISCUSSION

Boermeester contends he was denied notice of the allegations against him and that interim measures were improperly imposed. We find these contentions meritless.[6] Boermeester also contends he was entitled to a live evidentiary hearing where he can cross-examine witnesses. We find Boermeester's fair hearing argument supported by caselaw and thus reverse and remand.

Because we conclude Boermeester was deprived of a fair hearing for lack of a meaningful opportunity to cross-examine critical witnesses at an in-person hearing, we decline to address whether USC's policy was also unfair because the Title IX investigator held the dual roles of investigator and adjudicator. We also need not address Boermeester's other claims of error, including whether substantial evidence supported USC's findings.

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6. To the extent Boermeester argues USC's Title IX office was biased against him, an argument that appears throughout his appellate briefs, he has presented no legal or factual basis to support this argument other than to say its decisions were not in his favor. Boermeester has failed to meet his burden to demonstrate prejudicial error in this regard. (*In re Marriage of McLaughlin* (2000) 82 Cal. App.4th 327, 337 [98 Cal. Rptr. 2d 136].) Boermeester also complains Roe was not provided proper notice she was a suspected victim and intended reporting party in the proceedings. Boermeester lacks standing to assert Roe's rights in this matter. (*Angelucci v. Century Supper Club* (2007) 41 Cal.4th 160, 175 [59 Cal. Rptr. 3d 142, 158 P.3d 718]; see Code Civ. Proc., § 367.)

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I. Standards of Review

In an appeal from a judgment on a petition for writ of mandate, the scope of our review is the same as that of the Superior Court, that is, we review the agency's decision rather than the Superior Court's decision. (*Doe v. University of Southern California* (2016) 246 Cal.App.4th 221, 239 [200 Cal. Rptr. 3d 851] (*USC I*).) We determine "whether the respondent has proceeded without, or in excess of, jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion." (Code Civ. Proc., § 1094.5, subd. (b).) "Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." (*Ibid.*)

"The statute's requirement of a '"fair trial"' means that there must have been 'a fair administrative hearing.'" (*Gonzalez v. Santa Clara County Dept. of Social Services* (2014) 223 Cal.App.4th 72, 96 [167 Cal. Rptr. 3d 148].) "A challenge to the procedural fairness of the administrative hearing is reviewed de novo on appeal because the ultimate determination of procedural fairness amounts to a question of law." (*Nasha v. City of Los Angeles* (2004) 125 Cal.App.4th 470, 482 [22 Cal. Rptr. 3d 772].) However, we review for substantial evidence USC's substantive decisions and factual findings. (*USC I, supra*, 246 Cal. App.4th at p. 239; Code Civ. Proc., § 1094.5, subd. (c).)

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II. Boermeester Received Sufficient Notice

Boermeester complains he was not provided full notice that the Title IX investigation would "extend to his entire relationship history with [Roe], nor his relationship history with a previous girlfriend who did not attend USC." Thus, he claims he was unaware the investigator was "collecting evidence to support her opinion about an alleged 'pattern' of intimate partner violence, nor that he needed to produce evidence to combat [the investigator's] preconceived notions about domestic violence." We disagree.

"Generally, a fair procedure requires 'notice reasonably calculated to apprise interested parties of the pendency of the action … and an opportunity to present their objections.' [Citations.] With respect to student discipline, '[t]he student's interest is to avoid unfair or mistaken exclusion from the educational process, with all of its unfortunate consequences. … Disciplinarians, although proceeding in utmost good faith, frequently act on the reports and advice of others; and the controlling facts and the nature of the conduct under challenge are often disputed. The risk of error is not at all trivial, and it should be guarded against if that may be done without prohibitive cost or interference with the educational process.' [Citation.] [¶] 'At the very minimum, therefore, students facing suspension … must be given *some* kind of notice and afforded *some* kind of hearing.' [Citation.] The hearing need not be formal, but 'in being given an opportunity to explain his version of the facts at this discussion, the student [must] first be told what he is accused of doing and what the basis of the accusation

is.' [Citation.]" (*USC I, supra*, 246 Cal.App.4th at p. 240, quoting *Goss v. Lopez* (1975) 419 U.S. 565, 579–580 [42 L. Ed. 2d 725, 95 S. Ct. 729] (*Goss*).)

Here, USC's misconduct policy provides that an accused student be given "[w]ritten notice of the alleged policy violation including the specific acts, the date/period of time, and [the] location [where the act allegedly occurred]." Boermeester acknowledges USC complied with this policy. Indeed, USC informed him on January 26, 2017, that it was investigating a report he committed intimate partner violence, "specifically, grabbing Jane Roe by the neck, and pushing her head into a cinder block wall multiple times on/or about January 21, 2017." He was later notified of a second policy violation, "specifically, contacting and communicating with [Roe] via text, phone call, social media, and in-person since the issuance of the Avoidance of Contact Order issued by Dr. Lynette Merriman and served on you January 26, 2017."

Boermeester reviewed the evidence compiled by the investigator and responded to both allegations by written statement. In his response, he complained about the interview with his ex-girlfriend and contended her statement was "completely irrelevant to the evidence relating to what happened on January 21, 2017." Boermeester also viewed text messages from Roe to GO in which she indicated she had been in contact with him after issuance of the AOC. After reviewing the evidence related to the AOC violation, Boermeester responded by denying he had contact with Roe.

Boermeester's written statements belie his contention that he did not get notice of the extent of the investigation into his actions. Boermeester was not only provided notice of the factual basis of the allegations against him, he was also provided with a meaningful opportunity to respond to them. We find that is sufficient notice of the violations with which he was charged. (*USC I, supra*, 246 Cal.App.4th at pp. 240–241.)

III. The Interim Suspension Was Not Unfair

Boermeester next argues his interim suspension was "patently unfair" because it was imposed without a hearing and he was not provided with the evidence supporting it. In his reply brief, Boermeester asserts the evidence was insufficient to support the interim suspension. We are not persuaded.

Goss, supra, 419 U.S. 565, cited by Boermeester, supports our conclusion. *Goss* recognized the need for interim measures, allowing for the immediate removal of a student without notice or hearing if the student "poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process …" (*Id.* at p. 582.) It held an accused student must be given "*some* kind of notice and afforded *some* kind of hearing" when faced with disciplinary proceedings. *Goss* did not hold a student was entitled to two different notices and two different hearings if interim measures were also imposed. (*Id.* at pp. 579–580.)

USC's policy comports with *Goss*. It states that interim protective measures, including interim suspension, may

be imposed when there is information the accused student poses a substantial threat to the safety or well-being of anyone in the university community. In deciding whether to impose interim protective measures, the policy sets forth specific factors for consideration, including whether the reported behavior involved the use of a weapon or force, the risk of additional violence or significant disruption of university life or function, whether there have been other reports of prohibited conduct by the respondent, and the university's obligation to provide a safe and nondiscriminatory environment. It further states, "[a] student or organization subject to interim protective measures is [to be] given prompt written notice of the charges and the interim measure. An opportunity for review of the measure is provided within 15 calendar days of the notice by the *Vice President for Student Affairs* or designee."

Consistent with its policy, USC provided Boermeester with notice of the charges against him and a review of the interim suspension. Boermeester was notified of the charges against him, the interim suspension, and the AOC, by letter dated January 26. The letter advised him to schedule a meeting with the Title IX investigator, at which time he would be able to "review the basis for the investigation," review his procedural rights, ask questions, provide a statement, and submit relevant information or the identity of potential witnesses. Thereafter, on January 30, Boermeester met with the investigator. The record shows USC reviewed the basis for the investigation with him at the meeting. On the same day, Boermeester requested the interim suspension be discontinued or

modified because two witnesses "misinterpreted" the incident and because it placed an undue burden on him. The request was denied by USC's vice-president of student affairs on January 31. In sum, Boermeester was informed of the evidentiary basis for the interim suspension and was provided with a hearing. His contentions to the contrary are thus meritless.

It appears Boermeester is actually asserting USC should have provided him with a preliminary hearing prior to the full evidentiary hearing. However, Boermeester presents no authority for this proposition. Nor does he present any authority for the proposition USC was required to share its ongoing investigation with him.

In his reply brief, Boermeester asserts there was insufficient evidence he posed a threat to Roe or any other student to support the interim suspension. As an initial matter, we may disregard arguments raised for the first time in a reply brief. (*WorldMark, The Club v. Wyndham Resort Development Corp.* (2010) 187 Cal.App.4th 1017, 1030, fn. 7 [114 Cal. Rptr. 3d 546].) In any case, sufficient evidence supported the interim suspension. Roe stated Boermeester pulled her hair, pushed her against a wall, and put his hand on her neck. DH's statements supported Roe's version of the events. Further, Boermeester admitted he had his hand on her neck and she was against a wall. While there was also evidence Boermeester did not pose a threat to Roe, we decline to reweigh the evidence.

IV. Fair Procedure Requires Boermeester Be Given the Opportunity To Cross-examine Critical Witnesses at an In-person Hearing

We find meritorious Boermeester's contention that he should have had the right to cross-examine the witnesses against him at an in-person hearing. In reaching this conclusion, we reject a number of forfeiture-related arguments advanced by USC and the dissent. We also find the errors identified are not harmless. We thus reverse and remand.

A. Relevant Legal Authorities

California has long recognized a common law right to "fair procedure" when certain private organizations have rendered a decision harmful to an individual. (*Doe v. Allee* (2019) 30 Cal.App.5th 1036, 1061 [242 Cal. Rptr. 3d 109] (*Allee*); *Doe v. University of Southern California* (2018) 29 Cal.App.5th 1212, 1232, fn. 25 [241 Cal. Rptr. 3d 146]; *Doe v. Regents of University of California* (2018) 28 Cal.App.5th 44, 56 [238 Cal. Rptr. 3d 843] (*UC Santa Barbara*); *Pomona College v. Superior Court* (1996) 45 Cal.App.4th 1716, 1729–1730 [53 Cal. Rptr. 2d 662].) Courts have applied the right to fair procedure to disciplinary proceedings involving sexual misconduct by students at private universities.[7] These opinions uniformly hold

7. Unlike private universities, the requirements for disciplinary hearings at public universities are grounded in constitutional due process principles. (*Allee, supra*, 30 Cal.App.5th at p. 1061.) Some courts have observed that the common law requirements for a fair disciplinary hearing at a private university "mirror"

the disciplinary proceedings need not include all of the safeguards and formalities of a criminal trial and the formal rules of evidence do not apply. (*Allee, supra*, 30 Cal.App.5th at p. 1062; *UC Santa Barbara, supra*, 28 Cal. App.5th at p. 56.) Instead, fair hearing requirements are "'flexible,'" and do not mandate any "'rigid procedure.'" (*Allee, supra*, 30 Cal.App.5th at p. 1062.)

Courts also agree fundamental fairness requires the accused be given """a full opportunity to present his defenses."""" (*Allee, supra*, 30 Cal.App.5th at p. 1062, quoting *Doe v. Regents of University of California* (2016) 5 Cal.App.5th 1055, 1104 [210 Cal.Rptr.3d 479] (*UC San Diego*).) A university must balance its desire to protect victims of sexual misconduct with an accused's need to adequately defend himself or herself. Added to these competing interests is the university's desire to avoid diverting its resources and attention from its main calling, which is education. (*Claremont McKenna, supra*, 25 Cal. App.5th 1055, 1066.) "'Although a university must treat students fairly, it is not required to convert its classrooms into courtrooms.'" (*UC San Diego, supra*, 5 Cal.App.5th at p. 1078.)

In examining what kind of hearing comports with fair procedure, California courts have concluded a university

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the due process protections that must be afforded a student at a public university. (*Ibid.*) Other courts merely find due process jurisprudence "instructive" in cases involving private universities. (*Doe v. Claremont McKenna College* (2018) 25 Cal.App.5th 1055, 1067, fn. 8 [236 Cal.Rptr.3d 655].) In either case, we may rely on cases involving public university disciplinary proceedings.

must provide the following to the parties involved in a sexual misconduct disciplinary proceeding: notice of the charges and the university's policies and procedures (*USC I, supra*, 246 Cal.App.4th at p. 241); compliance with those policies and procedures (*UC San Diego, supra*, 5 Cal.App.5th at p. 1078); access to the evidence (*UC Santa Barbara, supra*, 28 Cal.App.5th at pp. 57–59); an in-person hearing that includes testimony from critical witnesses and written reports of witness interviews (*Doe v. Westmont College* (2019) 34 Cal.App.5th 622, 637 [246 Cal. Rptr. 3d 369] (*Westmont College*); and direct or indirect cross-examination of critical witnesses in cases where credibility of the witnesses is central to a determination of misconduct (*Doe v. Occidental College* (2019) 40 Cal. App.5th 208, 224 [252 Cal. Rptr. 3d 646] (*Occidental College*); *Allee, supra*, 30 Cal.App.5th at p. 1039).

B. USC's Sexual Misconduct Policy in 2017

USC's student handbook includes its policies and procedures governing investigations into student sexual misconduct.[8] Stalking and intimate partner violence were identified as some of the prohibited conduct. USC's policy dictated an investigation was to be a "neutral, fact-finding process. Reports [were] presumed made in good faith. Further, Respondents [were] presumed not responsible." The presumption of nonresponsibility was overcome when a preponderance of evidence established the respondent committed the prohibited conduct.

8. USC's sexual misconduct policy has been amended since 2017. However, we review the policy as it existed at the time of the disciplinary proceedings against Boermeester.

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The handbook required the Title IX office to contact the reporting party and the respondent at the initiation of an investigation to explain their rights and to schedule a meeting.[9] An investigator was assigned to the matter and interviewed witnesses and assembled other evidence.

The rules of evidence and discovery generally did not apply. Sexual history was relevant "[w]hen there [was] evidence of substantially similar conduct by a Respondent, regardless of a finding of responsibility." (Italics omitted.) The sexual history evidence could be used "in determining the Respondent's knowledge, intent, motive, absence of mistake, or modus operandi."

After the investigation, the parties could review the evidence in a process known as "Evidence Review." Once the parties completed Evidence Review, the Title IX coordinator and assigned investigator conducted separate hearings, known as "Evidence Hearings," where each party could present a statement or evidence at the Title IX offices. Each party was permitted to submit questions to be asked by the Title IX coordinator at the other party's Evidence Hearing. The Title IX coordinator had discretion to exclude inflammatory, argumentative, or irrelevant questions. Any "new information" shared by a party during the Evidence Hearing was relayed to the other party for a response.

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9. Regardless of who reported the student misconduct, USC designated the individual who experienced the prohibited conduct as the "reporting party." The "respondent" was the individual accused of committing the misconduct.

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After the Evidence Hearing, the Title IX office prepared a summary administrative review (SAR), which presented and analyzed the information collected. The investigator made findings of fact in consultation with the Title IX coordinator and using a preponderance of the evidence standard, determined whether a violation occurred.

A "Misconduct Sanctioning Panel," comprised of three members of the USC community, determined the appropriate discipline after review of the SAR. The parties could appeal the disciplinary action to USC's vice-president for student affairs. An appellate panel, comprised of three anonymous individuals from the USC community, reviewed the appeal and made a recommendation to the vice-president for student affairs, who could accept or reject the recommendation.

C. Forfeiture

We address the threshold issue of whether Boermeester has preserved his right to assert on appeal that he was improperly denied cross-examination of witnesses at a live evidentiary hearing. We find he has.

USC contends Boermeester forfeited the issue when he failed to request cross-examination of third party witnesses and waived it when he refused to submit written questions for Roe. We decline to fault Boermeester for failing to request cross-examination of other witnesses because such an objection was not supported by the law at the time and would have been futile in any case. (*People*

v. Brooks (2017) 3 Cal.5th 1, 92 [219 Cal. Rptr. 3d 331, 396 P.3d 480] ["'[R]eviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence.'"]; see also *Corenbaum v. Lampkin* (2013) 215 Cal.App.4th 1308, 1334 [156 Cal. Rptr. 3d 347] ["An appellant may challenge the admission of evidence for the first time on appeal despite his or her failure to object in the trial court if the challenge is based on a change in the law that the appellant could not reasonably have been expected to foresee."].)

At the time of these disciplinary proceedings in 2017, neither the law nor USC's sexual misconduct policy contemplated cross-examination of third party witnesses at an in-person hearing. *Allee*, which extends cross-examination rights to third party witnesses, was not published until January 4, 2019. In 2016, the existing law on this point was set forth in *USC I*, which cited with approval a case that held, "'[a]lthough we recognize the value of cross-examination as a means of uncovering the truth [citation], we reject the notion that as a matter of law every administrative appeal … must afford the [accused] an opportunity to confront and cross-examine witnesses.'" (*USC I, supra*, 246 Cal.App.4th at p. 245.) Under these circumstances, Boermeester could not reasonably have been expected to foresee *Allee*'s holding.[10]

10. The dissent asserts Boermeester could have foreseen *Allee* because his attorney also represented the accused student in *Allee*. In 2019, Boermeester's attorney persuaded the *Allee* court to rely on *Doe v. University of Cincinnati* (S.D. Ohio 2016) 223 F.Supp.3d 704, 711, which held that cross-examination was essential in student

Moreover, any objection would have been futile because the Title IX office had made it clear they were not going to deviate from USC's sexual misconduct policy and procedures. This is demonstrated by USC's denial of Boermeester's request that Roe's answers to his questions at the Evidence Hearing be transmitted to him "unfiltered," meaning verbatim, and prior to the SAR. The Title IX coordinator replied, "The process does not afford that. Please review our policy." It is reasonable to conclude a request to question other witnesses would likewise have been denied and an objection is futile under such circumstances. (See *People v. Hopkins* (1992) 10 Cal. App.4th 1699, 1702 [13 Cal. Rptr. 2d 451] [after mistrial objection overruled on a legal ground, defense counsel could reasonably have believed further objections would be fruitless]; *In re Antonio C.* (2000) 83 Cal.App.4th 1029, 1033 [100 Cal. Rptr. 2d 218] ["[W]here an objection would have been futile, the claim is not waived."].)

Because we conclude Boermeester did not forfeit his right to cross-examine third party witnesses, we likewise conclude there was no waiver of his right to an in-person hearing.

We also decline to find forfeiture based on Boermeester's refusal to submit questions for Roe. The

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disciplinary proceedings. As discussed above, however, California authority was to the contrary when Boermeester's proceedings occurred. (*USC I, supra*, 246 Cal.App.4th at p. 245.) Boermeester's attorney in 2017 could not have foreseen that California law would change in 2019 as a result of an Ohio case. We decline to charge attorneys with such foresight.

record shows Boermeester did object to the process by which Roe would be questioned. Specifically, he asked for Roe's answers to be relayed to him "unfiltered" or word for word so he could use them in his formal statement to USC. He explained, "The failure to record or transcribe any of the interviews and the admission by at least one witness that he lied during his initial interview [referring to MB2] have shaken our confidence in the accuracy of this investigation." Boermeester declined to submit questions for Roe only after his request was rejected.

Given these circumstances, Boermeester did not waive the right to raise the issue of Roe's cross-examination on appeal. (See *Warner Constr. Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, 299–300, fn. 17 [85 Cal. Rptr. 444, 466 P.2d 996] [no waiver where objection was overruled and objecting party attempted to minimize impact of admission of evidence].) To the extent USC contends Boermeester's objection was insufficiently specific, that is, he failed to object on the ground he could not question Roe at an in-person hearing, we conclude that objection was not supported by the law at the time and would have been futile for the same reasons specified above.

We do not find persuasive the dissent's invited error analysis. An error is invited when a party purposefully induces the commission of error. (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 403 [87 Cal. Rptr. 2d 453, 981 P.2d 79].) The doctrine of invited error bars review on appeal based on the principle of estoppel. (*Ibid.*) The doctrine is intended to prevent a party from misleading a trial court to make a ruling, and then profit from it in the appellate court. (*Ibid.*)

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The dissent accuses Boermeester of making a tactical decision when he refused to submit questions for Roe. The record shows Boermeester only declined to question Roe further after his request to receive verbatim answers before the SAR was denied. The record does not demonstrate it was a tactical decision designed to induce USC to make an erroneous decision that Boermeester could then challenge on appeal. Instead, the record demonstrates a disagreement about the process by which Roe would be questioned.

It is clear Boermeester merely abided by USC's established rules and procedures. USC's policy did not allow for Roe to be questioned at an in-person hearing that Boermeester could attend. Neither did it contemplate questioning third party witnesses at an in-person hearing. The doctrine of invited error does not apply when a party, while making the appropriate objections, acquiesces to an established procedure such as this one. (See *K. G. v. County of Riverside* (2003) 106 Cal.App.4th 1374, 1379 [131 Cal. Rptr. 2d 762] [""""An attorney who submits to the authority of an erroneous, adverse ruling after making appropriate objections or motions, does not waive the error in the ruling by proceeding in accordance therewith and endeavoring to make the best of a bad situation for which he was not responsible.'" [Citations.]""].) Here, Boermeester objected to the format of his questions to Roe and we find that any request to question third party witnesses would have been futile. Boermeester did not invite the error by acquiescing to USC's sexual misconduct procedure.

Finally, we reject the contention Boermeester forfeited this issue when he failed to raise it in his administrative appeal. Boermeester was prohibited from arguing the proceedings were unfair in his administrative appeal. An appeal on this basis would have been futile. (*In re Antonio C., supra*, 83 Cal.App.4th at p. 1033.)

D. Merits

We now reach the merits of Boermeester's challenge to the fairness of the disciplinary proceedings against him. Relying on *Allee, supra*, 30 Cal.App.5th at page 1039, he primarily takes issue with the investigator's "overlapping and conflicting" roles in the proceedings and the denial of his right to cross-examine witnesses. (*Id.* at p. 1070.)

Allee involved a student's expulsion from USC for nonconsensual sex with another student. Division 4 of this court concluded USC's disciplinary procedure failed to provide the accused student with a fair hearing. (*Allee, supra*, 30 Cal.App.5th at p. 1039.) The *Allee* court held that "when a student … faces severe disciplinary sanctions, and the credibility of witnesses (whether the accusing student, other witnesses, or both) is central to the adjudication of the allegation, fundamental fairness requires, at a minimum, that the university provide a mechanism by which the accused may cross-examine those witnesses, directly or indirectly, at a hearing at which the witnesses appear in person or by other means [e.g., videoconferencing] before a neutral adjudicator with the power independently to find facts and make credibility assessments." (*Id.* at p. 1069.)

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At the time of the disciplinary proceedings in *Allee*, USC's sexual misconduct policy did not require an in-person hearing and the Title IX investigator served multiple roles in the proceedings. (*Allee, supra*, 30 Cal. App.5th at p. 1069.) The *Allee* court found fault with the investigator's "unfettered" discretion to conduct the investigation, determine credibility, make findings of fact, and impose discipline. (*Id.* at p. 1070.)

The court reasoned, "The notion that a single individual, acting in these overlapping and conflicting capacities, is capable of effectively implementing an accused student's right of cross-examination by posing prepared questions to witnesses in the course of the investigation ignores the fundamental nature of cross-examination: adversarial questioning at an in-person hearing at which a neutral fact finder can observe and assess the witness' credibility." (*Allee, supra*, 30 Cal. App.5th at p. 1068.) The court concluded, "a right of 'cross-examination' implemented by a single individual acting as investigator, prosecutor, factfinder and sentencer, is incompatible with adversarial questioning designed to uncover the truth. It is simply an extension of the investigation and prosecution itself." (*Ibid.*)

Since *Allee*, Divisions 6 and 7 of this court have reached similar conclusions regarding the need for some form of cross-examination at a live hearing. In *Westmont College, supra*, 34 Cal.App.5th 622, a student was suspended after a three-member panel determined the evidence supported an accusation he sexually assaulted another student. The trial court granted the accused student's petition for a writ

of administrative mandamus on the ground the college did not give him a fair hearing. (*Id.* at p. 625.)

Division 6 affirmed, finding the college's investigation and adjudication of the complainant's accusation "was fatally flawed." (*Westmont College, supra*, 34 Cal.App.5th at p. 625.) The Court of Appeal found fault with the panel's failure to hear testimony from critical witnesses, even though it relied on their prior statements to corroborate the complainant's account and to impeach the accused's credibility. It also found the panel improperly withheld material evidence from the accused that its own policies required it to turn over and did not give the accused the opportunity to propose questions to be asked of the complainant and other witnesses. (*Id.* at pp. 625–626, 636–639.) Because the record indicated two panel members relied on the credibility determination of the investigator, who was the third panel member, the court also held each member of the panel must hear from the critical witnesses—in person, by videoconference, or some other method—before assessing credibility. (*Id.* at p. 637.)

In *Occidental College, supra*, 40 Cal.App.5th 208, Division 7 applied the holding in *Westmont* and found a student expelled for sexual assault had received a fair hearing. In *Occidental College*, an external adjudicator heard testimony from the parties, the investigator, and five witnesses during a live hearing. The adjudicator recommended disciplinary action after considering the testimony, summaries of witness interviews, and the investigative report. (*Occidental College, supra*, at p. 219.) The court found "Occidental's policy complied with all the

procedural requirements identified by California cases dealing with sexual misconduct disciplinary proceedings: both sides had notice of the charges and hearing and had access to the evidence, the hearing included live testimony and written reports of witness interviews, the critical witnesses appeared in person at the hearing so that the adjudicator could evaluate their credibility, and the respondent had an opportunity to propose questions for the adjudicator to ask the complainant." (*Id.* at p. 224; accord *Claremont McKenna, supra*, 25 Cal.App.5th at p. 1070 ["where the accused student faces a severe penalty and the school's determination turns on the complaining witness's credibility … the complaining witness must be before the finder of fact either physically or through videoconference or like technology to enable the finder of fact to assess the complaining witness's credibility in responding to its own questions or those proposed by the accused student"].)

We agree with the above authorities: In a case such as this one, where a student faces a severe sanction in a disciplinary proceeding and the university's decision depends on witness credibility, the accused student must be afforded an in-person hearing in which he may cross-examine critical witnesses to ensure the adjudicator has the ability to observe the witnesses' demeanor and properly decide credibility. (*Occidental College, supra*, 40 Cal.App.5th at p. 224; *Claremont McKenna, supra*, 25 Cal.App.5th at p. 1070; *Allee, supra*, 30 Cal.App.5th at p. 1066.) In reaching this conclusion, we agree with the prevailing case authority that cross-examination of witnesses may be conducted directly by the accused

student or his representative, or indirectly by the adjudicator or by someone else. (*Ibid.*) We further agree the cross-examiner has discretion to omit questions that are irrelevant, inflammatory, or argumentative. (*UC San Diego, supra*, 5 Cal.App.5th at pp. 1086–1087.)

Although we refer to an "in-person hearing," we do not mean to say that the witnesses must be physically present to allow the accused student to confront them. Instead, the witnesses may appear in person, by videoconference, or by another method that would facilitate the assessment of credibility. (*Claremont McKenna, supra*, 25 Cal.App.5th at p. 1070; *Doe v. University of Cincinnati* (6th Cir. 2017) 872 F.3d 393, 406 (*University of Cincinnati*) [university's procedures need only provide "a means for the [review] panel to evaluate an alleged victim's credibility, not for the accused to physically confront his accuser."].)

Boermeester did not receive this type of hearing under USC's 2017 sexual misconduct policy. USC's policy to hold separate Evidence Hearings and limit cross-examination does not meet the fair procedure requirements identified in *Allee*, *Westmont College*, *Occidental College*, and *Claremont McKenna*.

Under the separate Evidence Hearing procedure, the reporting party could respond to the evidence collected and answer any questions submitted by the respondent without the respondent's presence. This procedure effectively denied Boermeester a hearing. An accused student is not given a meaningful opportunity to respond to the evidence against him if he is not allowed to attend

the very hearing at which the evidence is presented. (*Goldberg v. Regents of University of Cal.* (1967) 248 Cal. App.2d 867, 882 [57 Cal. Rptr. 463] [due process requires students be "given ample opportunity to hear and observe the witnesses against them"].)

Even if the Evidence Hearings were not separate and Boermeester was allowed to attend, the limited cross-examination afforded by USC prevented him from fully presenting his defense, as required by fair procedure. (*UC San Diego, supra*, 5 Cal.App.5th at p. 1104.) Under the sexual misconduct policy, Boermeester could only submit questions for Roe to be asked by the Title IX coordinator at the Evidence Hearing. Boermeester had no opportunity to question any other witness or ask follow-up questions of Roe. These limitations prevented Boermeester from fully presenting his defense, which was that the eyewitnesses misunderstood what happened between him and Roe on January 21, 2017. Allowing Boermeester to submit questions for critical witnesses, such as AB, MB2, DH, and TS, at a live hearing would further truth finding by allowing him to test their recollection, their ability to observe the incident, and any biases they may have. It is well established "'cross-examination has always been considered a most effective way to ascertain truth.'" (*University of Cincinnati, supra*, 872 F.3d at p. 401.)

In short, an in-person hearing coupled with indirect or direct cross-examination would enable the adjudicator to better assess witness credibility in a case where credibility is central to a determination of sexual misconduct. (*University of Cincinnati, supra*, 872 F.3d at pp. 401–402;

Elkins v. Superior Court (2007) 41 Cal.4th 1337, 1358 [63 Cal. Rptr. 3d 483, 163 P.3d 160] ["Oral testimony of witnesses given in the presence of the trier of fact is valued for its probative worth on the issue of credibility, because such testimony affords the trier of fact an opportunity to observe the demeanor of witnesses."]; *Doe v. Baum* (6th Cir. 2018) 903 F.3d 575, 586.)

USC contends the holdings in *Allee* and the other university sexual misconduct cases should not be extended to an intimate partner violence case on the ground those cases only apply to sexual assault or similar sexual misconduct. According to USC, cross-examination is required in sexual misconduct cases because the misconduct takes "place behind closed doors, with no witnesses other than the parties, and the key issue in dispute [is] consent." USC claims the situation is different here because the misconduct "took place in public, was witnessed by at least two individuals, and was captured on video."

The dissent similarly distinguishes a university sexual misconduct case from an intimate partner violence case. In a sexual misconduct case, according to the dissent, the accused seeks cross-examination to "shake" the accuser's story that their sexual encounter was not consensual. The dissent asserts the sexual misconduct case is different because it does not involve a domestic relationship and the victim does not recant.

We disagree. Sexual misconduct cases may also arise from domestic relationships and victims also recant in

such cases. Further, from a procedural standpoint, we see little difference between a sexual misconduct case such as that described by USC and the dissent and an intimate partner violence case such as this one. Both cases require the university to make credibility determinations based on conflicting statements. It is irrelevant to us whether the conflict exists because the man and the woman have competing narratives or the man and woman's narrative competes with that of third party witnesses.

USC was presented with two versions of the January 21 incident. On the one hand, Roe and Boermeester claimed it was playful and not violent. On the other hand, the third party witnesses and Roe, in her initial statement, claimed it was violent and not playful. Given this conflict, "the credibility of witnesses (whether the accusing student, other witnesses, or both) is central to the adjudication of the allegation" in this case, just as it was in *Allee* and the other university sexual misconduct cases. (*Allee, supra*, 30 Cal.App.5th at p. 1069; see also *Claremont McKenna, supra*, 25 Cal.App.5th at p. 1070.)

We acknowledge the dissent's point that Roe had recanted and it may or may not have benefitted Boermeester to question her further. However, as USC indicates, it was not Roe, but the eyewitnesses, who were pivotal to USC's decision. According to USC, they provided the necessary support for Roe's initial account. Thus, even absent cross-examination of Roe, Boermeester should have been able to cross-examine the third party witnesses to test their recollection, their ability to observe the incident, and any biases they may have had against him.

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USC claims credibility of witnesses was not central to the adjudication in this case due to the extensive corroborating evidence, including the video tape. USC overstates the evidence. The surveillance video is not conclusive. The picture is grainy and there is no audio. The video camera is positioned approximately two buildings away from Roe and Boermeester. They are small figures in the frame of the video. Additionally, there is a light on the left side of the frame, which renders the interaction between Boermeester and Roe when they are near the wall barely visible. At best, the video corroborates Roe's initial statement, MB2's second statement, and DH's statement of what occurred on January 21, 2017. However, both Roe and MB2 recanted their initial statements to the investigator. Contrary to USC's assertion, adjudication of this matter rests on a determination of the credibility of inconsistent witnesses, just as in *Allee*, *Occidental College*, and *Westmont College*. Accordingly, these authorities apply to this intimate partner violence case.

We likewise find unpersuasive USC's argument that sexual assault and other sexual misconduct violations are different from violations involving intimate partner violence and thus should be treated differently. USC's own student handbook describes only four "categories" of student misconduct: (1) nonacademic violations; (2) academic integrity violations; (3) admissions violations; and (4) sexual, interpersonal, and protected class misconduct cases. Under the "University's Policy and Procedures on Student Sexual, Interpersonal, and Protected Class Misconduct," the same investigative and adjudicative procedure applies to each violation, including "sexual

assault and non-consensual sexual contact," harassment, stalking, and intimate partner violence. In short, USC does not treat sexual misconduct and intimate partner violence cases differently. Neither does fair procedure.

E. Harmless Error

Lastly, USC asserts any error was harmless, arguing, "[n]o amount of additional process would change what can be plainly observed on the security footage and confirmed in Boermeester's own statements." We are not convinced. As we have discussed, USC overstates what the surveillance video shows. At best, it corroborates Roe's initial statement. Moreover, although Boermeester admits he put hands on Roe's neck while she was positioned against the wall, he asserts it was playful. This is hardly a confession to intimate partner violence.

At bottom, this case rests on witness credibility. Even if Roe had not recanted, USC was still faced with conflicting accounts of the incident: Boermeester disputed the characterization of the incident as violent, contending they were merely "horsing around." MB2, an eyewitness to the incident, admitted he lied in his initial statement. Given these conflicting statements, we cannot say the record contains such overwhelming evidence as to render harmless the errors identified in this case.

DISPOSITION

The judgment is reversed and the matter remanded to the superior court with directions to grant Boermeester's

petition for writ of administrative mandate. Should USC choose to proceed with a new disciplinary hearing, it should afford Boermeester the opportunity to directly or indirectly cross-examine witnesses at an in-person hearing. Each party to bear his or its own costs on appeal.

BIGELOW, P. J.

I Concur:

STRATTON, J.

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WILEY, J., Dissenting.

Unaccountably, in California's first appellate student discipline case about domestic violence, the aggressor emerges as the *victim*. But the university was right to discipline this man. Substantial evidence shows he committed domestic violence. All procedures were fair. Overturning this discipline is unwarranted.

I

Substantial evidence reveals a textbook case of domestic violence. I append the victim witness interview and invite readers to examine it. (See appendix, *post*, pp. 725–738.)

A

I summarize the victim's interview.

After midnight, a drunken man called the woman he lived with. It was in the early hours of Saturday, January 21, 2017. He wanted her to come get him at a party and drive him home. She obeyed.

He was the drunkest she had seen him. She brought her dog Ziggy along in a cage in the car. The man was mean to Ziggy, and the dog was shaking. The man yelled at the dog, which cowered in the cage.

They got home and went to the alley. He wanted her to drop Ziggy's leash but she did not want to. The man

wanted to see Ziggy running off the leash. The woman did not want Ziggy off the leash.

The man grabbed the back of the woman's hair hard and said "drop the fucking leash." She said no. The man grabbed the woman harder. It hurt, so she dropped the leash.

The man grabbed the woman by the front of her neck. He had done this before. He did it to "freeze her" when he wanted to stop her. When he did this, it sometimes scared her.

When he grabbed her by the throat this time, it was harder. His grip was tight. She could breathe but it hurt and she coughed.

He let go and laughed.

The man chose this moment to comment about *Westworld*. This sci-fi show is about a theme park where robots look like humans. Humans pay to enter and do as they please to the robots. The humans can be violent and abusive without consequences because the robots' programming forbids harm to humans.

The man told the woman about *Westworld*: "you can hurt the robots because they aren't well."

The man took her by the neck and pushed her hard against the concrete wall. Her head hit the wall. He let go and then did it again.

A neighbor came into the alley. The man told the neighbor they were just playing around.

B

The man and the woman were students at the University of Southern California (USC). The man is Matthew Boermeester. The woman is Jane Roe.

USC has student conduct rules. One USC rule prohibits intimate partner violence. The rule says intimate partner violence is also known as domestic violence and includes causing physical harm to another person.

USC's rule against violence does not contain a playing around defense.

Witnesses reported Boermeester's treatment of Roe to USC, which promptly launched an investigation. On Monday, January 23, 2017, accompanied by her adviser Nohelani Lawrence, Roe met with a USC investigator and spoke at length. Roe cried throughout this interview.

C

California law is familiar with domestic violence. USC is too. USC is an established institution of higher education that has promulgated rules about domestic violence and has hired professionals to investigate these cases. These trained professionals work daily in this specialized world. Their firsthand experience supplements their training. It is reasonable and procedurally customary to ascribe

expertise about domestic violence to USC and to its campus specialists.

Boermeester says we should assume USC is ignorant. But he gives neither reason nor legal authority for his self-serving and illogical suggestion.

D

Domestic violence is violence between people living together in an intimate relationship. (*People v. Brown* (2004) 33 Cal.4th 892, 895, fn. 1 [16 Cal. Rptr. 3d 447, 94 P.3d 574] (*Brown*).) USC refers to this type of violence more generally as intimate partner violence.

Domestic violence is a serious social and legal problem in the United States, occurring in every economic, racial, and ethnic group. Compared to other crimes, domestic violence is vastly underreported. Until recent decades, it was largely hidden from public examination. A fundamental difference between domestic violence and other violence (like street violence) is domestic violence happens within ongoing relationships expected to be protective, supportive, and nurturing. The ties between victim and abuser often are strong emotional bonds, and victims frequently feel a sense of loyalty to their abusers. (*Brown, supra*, 33 Cal.4th at pp. 898–899.) Often abusers use psychological, emotional, or verbal abuse to control their victims. (*Id.* at p. 907.)

Victims who report abuse to authorities may later protect the abuser by recanting their own reports. This

presents an exceptional challenge for authorities. (*Brown, supra*, 33 Cal.4th at p. 899.)

In the *Brown* case, an expert explained domestic violence victims, after describing the violence to police, often later repudiate their descriptions. There is typically "'anywhere between 24 and 48 hours where victims will be truthful about what occurred because they're still angry, they're still scared.'" (*Brown, supra*, 33 Cal.4th at p. 897.) But after they have had time to think about it, they commonly change their minds. About 80 to 85 percent of victims recant at some point in the process. Some victims will say they lied to authorities; almost all will attempt to minimize their experience. (*Ibid.*); see also *id.* at p. 903 [quoting another expert who testified that, about 80 percent of the time, a woman who has been assaulted by a boyfriend, husband, or lover will recant, change, or minimize her story].)

Recanting is common because it is logical. The victim may still care for the abuser and may be hoping he will not do it again. (*Brown, supra*, 33 Cal.4th at p. 897.) The abuser or the abuser's family may be pressuring or threatening the victim. (*Ibid.*)

Professionals familiar with domestic violence understand victims logically may recant to protect themselves because recanting can appease the abuser.

The *Brown* opinion held expert testimony about recanting was admissible for the purpose of disabusing jurors of common misconceptions about how victims

behave. (*Brown, supra*, 33 Cal.4th at pp. 905–908.) Part of the court's logic was, "when the victim's trial testimony supports the defendant or minimizes the violence of his actions, the jurors may assume that if there really had been abusive behavior, the victim would not be testifying in the defendant's favor." (*Id.* at p. 906.) In many or even most cases, however, that assumption would be incorrect.

USC presumably knows all this. There is no basis for presuming it is ignorant.

E

Substantial evidence permitted the USC investigator to understand Roe's account as a classic case of domestic violence. Roe's lengthy interview record, which appears at the end of this dissent, is substantial evidence.

Roe's account revealed Boermeester stayed at her apartment for a semester. Boermeester controlled her. He told her when she could speak and when she was too close to him. He used physical abuse when she did not obey. He poked and hit her, causing bruising. He told her to shut up. He kicked her when she got too close. He took her by the neck to "freeze her" when he wanted to stop her.

Boermeester made Roe feel worthless. He told her she was stupid and a lousy tennis player. (Roe was a nationally ranked member of the USC tennis team.) He was rude to her parents and her friends, thus undermining her emotional support system and imposing a me-or-them choice.

Boermeester punished Roe if she misbehaved and made her feel as though problems were her fault, not his. He refused to return her apartment key, despite paying no rent and having no right to be there. He never apologized or took responsibility. When she asked if he would feel bad or sorry if he hurt her, he said no, because she brought it on herself.

In this domestic relationship, Boermeester grabbed Roe by the neck on January 21, 2017. He pushed her hard against a concrete wall, she hit her head, he let go, and then he did it again. He did not stop until a neighbor appeared, and then Boermeester said they were just playing around.

On January 23, 2017, Roe asked USC for an avoidance of contact order against Boermeester. She requested emergency housing. The implication is unmistakable: she was scared of Boermeester and wanted to get away from him.

F

The domestic violence victim recanted. On Tuesday, January 24, 2017, Roe began recanting, and she continued in the following days. On February 7, 2017, Roe tweeted to the media that the charges against Boermeester were false. Roe became increasingly extensive in her recantation, through to the end of USC's investigation.

Appendix B

II

USC's investigation was thorough and fair.

The investigator interviewed 18 witnesses and wrote a 78-page single-spaced report. The report included lengthy statements from Boermeester and from Roe that vigorously asserted his innocence.

The amount of process was considerable. Accompanied by his mother, who is an attorney, Boermeester gave his side of the story during the investigation. Boermeester retained a law firm. On March 10 and 22, 2017—twice—he had the opportunity to review all information and documents the investigator gathered. Boermeester and his retained attorney reviewed this evidentiary record. Boermeester then had the opportunity to submit questions for Roe, but (through his attorney) he declined to do so. After reviewing the evidence, Boermeester had the opportunity to respond to the evidence, to answer questions posed by Roe, and to submit new information. Neither Boermeester nor Roe submitted questions for each other or for anyone else. Both opted to skip their hearings and to submit written statements in lieu of meeting.

USC's process involved four layers of review.

First was the investigation. Upon concluding the extensive investigation, the investigator determined Boermeester was responsible for intimate partner violence.

The second layer was a separate panel. The sanctions panel reviewed the record and decided to expel Boermeester.

The third layer was the misconduct appellate panel. Boermeester appealed to this separate panel. Pages 494 and 495 of the administrative record spell out the duties of this misconduct appellate panel. These rules empowered the misconduct appellate panel to decide whether substantial evidence supported the investigator's factfinding. The misconduct appellate panel also was to determine whether this factfinding supported the investigator's conclusions about policy violations.

This misconduct appellate panel exercised independent judgment. It recommended a two-year suspension rather than expulsion for Boermeester.

The fourth layer was USC's vice-president for student affairs, who was USC's final decision maker on student discipline. This USC vice-president overruled the misconduct appellate panel's recommendation and determined the appropriate sanction was expulsion.

Boermeester applied for a fifth layer of review by filing in the superior court. On March 21, 2018, the trial judge rendered a comprehensive and thoughtful 22-page opinion rejecting Boermeester's claims.

The trial court found substantial evidence supported USC's decision to discipline Boermeester.

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The trial court emphasized the contemporaneous nature of Roe's initial statement on January 23, 2017, noting the law ascribes more reliability to statements made right after a stressful event than to statements made only after witnesses have had time to ponder the consequences of their words.

The judge quoted from the *Brown* case, reciting the established tendency of domestic violence victims to recant as part of the behavior patterns common in abusive relations. The judge wrote the "tendency is so well established that it is admissible, in the form of expert testimony, in prosecutions of domestic violence cases."

The judge canvassed California law and rejected Boermeester's claim that USC had denied him due process. The court found USC accorded Boermeester ample process.

In sum, Boermeester got full notice of the charges and the evidence against him. He had multiple opportunities to respond. The process took more than a year and generated a record exceeding 2,000 pages.

The process's conclusion was Boermeester took Roe by the throat and shoved her against a concrete wall, which was intimate partner violence. USC deliberated about the penalty and decided to expel Boermeester.

USC's process was careful and fair. Its conclusion was straightforward: Boermeester should be disciplined for his domestic violence.

Appendix B

III

Boermeester's least specious argument about his supposedly unfair treatment concerns live witness cross-examination. (I agree Boermeester's notice was ample and his suspension was proper.) But Boermeester *refused* to submit cross-examination questions for Roe. No wonder. His tactical reason was that questioning Roe was the *last* thing Boermeester wanted, now that she had recanted completely and had come over to his side in a public way, on Twitter and all the rest. Questioning Roe—chancing any opportunity for her to modify or to contradict her recantation—offered Boermeester only peril. From Boermeester's perspective, Roe's recantation was perfect as it stood. Additional questioning could only spoil a good thing. So naturally Boermeester's lawyer refused to submit questions for Roe.

That means the cross-examination issue on appeal is entirely manufactured. It is not unfair to deny someone something they did not want.

Lest there be doubt, study the exact words in the record. USC asked Boermeester's attorney to submit questions for Roe and, through counsel, Boermeester refused. In response to USC's invitation to propose questions for Roe, Boermeester's lawyer told USC "*I am not interested in having* [*Roe*] *come in and being put on the spot yet again*." The italics are mine.

Boermeester and his lawyer were free to ask for anything they wanted because the USC investigator

created a continuously productive and collegial working relationship during the investigation. When Boermeester's lawyer peppered USC with e-mail questions, USC responded promptly and professionally.

For example, Boermeester's lawyer e-mailed USC that he could not access a document from his desktop computer. USC wrote back within five minutes: "I just checked and you were granted access. I went ahead and re-invited you. Let me know if it works."

Sometimes USC did not grant Boermeester and his lawyer everything they wanted. But other times USC did accommodate Boermeester and his lawyer. USC's written rules did not mandate or require these accommodations. USC gave them anyway, because it was behaving fairly and reasonably.

For instance, USC offered Boermeester and his lawyer a second time to examine the evidentiary record—an invitation Boermeester and his lawyer accepted. No USC rule required this.

In another situation, Boermeester's lawyer asked USC to give Boermeester access to a telephone while examining evidence because the lawyer had "run into a serious snag here." USC granted his request: "No problem."

It was 4:59 p.m. when Boermeester's lawyer e-mailed this request for a favor. It was 8:09 p.m. that same day when USC granted the favor Boermeester's lawyer requested.

USC literally was working overtime to be responsive to Boermeester and his lawyer.

Through all this free give and take, Boermeester's lawyer *never requested live cross-examination*. Rather, he expressly disavowed it and instead asked that USC e-mail questions to Roe. USC agreed to do that. USC's response was: "You send me the questions and we will ask them of [Jane Roe]."

Boermeester's lawyer wrote "We would want to have questions sent to [Jane Roe] to respond and answers sent to us unfiltered."

USC said it indeed would not filter. It would provide the answers verbatim, and he would get them before any summary administrative review.

The sole difference between Boermeester's lawyer and USC during this e-mail exchange was whether Boermeester would or would not get Roe's answers that same afternoon—an immaterial timing detail Boermeester never mentions in briefing to this court.

Boermeester claims this one exchange about filtering shows he adequately preserved for appeal all issues regarding cross-examination. This is incorrect. USC told Boermeester it would give him Roe's unfiltered answers. True, there was an issue about timing, but Boermeester has abandoned this timing issue. He has never raised it in this appeal. His issue now is cross-examination. But Boermeester wrote USC "I am not interested in having [Roe] come in and being put on the spot yet again."

Grasp the strangeness of this situation. To USC in 2017, Boermeester's lawyer said he did *not* want Roe to come in and be put on the spot again. On appeal in 2020, Boermeester's lawyer now says it is reversible error *because* Roe did not come in and was not put on the spot again.

To rule for Boermeester on this issue in this situation is unusual. Accepting such an argument in this context is unprecedented.

The same goes for witnesses besides Roe. Boermeester never sought those cross-examinations, and for good reason. These witnesses offered Boermeester nothing but danger.

Recall the context. The looming problem was Roe's detailed and damning original statement, the one appended to this opinion. An objective reading of that statement reveals it as the most powerful evidence in the case.

Boermeester admitted the basic physical facts. He told USC "[m]y hand was on her neck, but it was normal." When asked whether Roe made contact with the alley wall, Boermeester responded, "I mean, we were standing next to it. It was a sexual thing."

Given that Boermeester's defense was his actions were mere horseplay—horseplay that Roe understood and accepted—there was no point in cross-examining witnesses besides Roe.

Cross-examining DH could not matter. DH saw Roe pinned against the wall by Boermeester, who had his hand on her. DH did not see or hear Roe hit the wall. DH's account was consistent with Boermeester's version of events.

Cross-examining TS could not matter. TS did not report seeing Boermeester put hands on Roe. TS arrived in the alley after the event. He was not an eyewitness to the disputed event.

Cross-examining MB2 was like cross-examining Roe: a good thing for Boermeester to *avoid.* MB2 initially minimized having seen much in the alley. Then his guilty conscience made MB2 contact USC on his own initiative. MB2 had initially minimized because Roe asked him to protect Boermeester and to downplay the event. But MB2 confessed his initial lie was bothering him. What he had actually seen, he now revealed, was that Boermeester "domestically was abusing [Roe]." He said the "truth is I really wanted to beat the shit out of this guy [Boermeester]."

Cross-examining a witness like that is playing with fire. Boermeester sensibly passed on this opportunity to play Russian roulette. Boermeester's reasonable litigation strategy was to disparage MB2's second statement as a contradiction and to avoid giving MB2 a soapbox on which to vent.

In sum, there is good reason why Boermeester never asked to cross-examine witnesses other than Roe. These

witnesses either did not matter or were hazardous to question further. Boermeester sensibly avoided further questions to these witnesses.

There was no deprivation of a right to confrontation. Rather, there was no request for it. This was a thoughtful litigation strategy by competent counsel to avoid confrontation and to leave the record as it stood. As it stood, the record was not pretty, but defense counsel had to play the hand his client dealt him. Adding questioning—adding confrontation—was not going to help. It was likely to backfire. The choice was to argue the case as it stood or to risk making the record worse. Counsel chose to steer clear of the risk. That was reasonable. But that also should have shut off any appeal on the topic.

Boermeester claims futility. He says it would have been futile to ask for what he now says was indispensable. That is incorrect. His attorney was vigilant and aggressive. When he wanted something, he asked for it. Sometimes USC accommodated him; sometimes not. Every institution is free to depart from written procedures when both sides agree that is the fair and reasonable thing to do. Nothing barred Boermeester from asking for further questions for any witness.

Boermeester did not ask for questions, not because it was futile to do so, but because he did not want further questions. As we have seen, the record contradicts his claim it was futile for him to request questioning.

Boermeester cites *In re Antonio C.* (2000) 83 Cal. App.4th 1029, 1033 [100 Cal. Rptr. 2d 218], but there the

prosecution conceded futility. That also is true of *People v. Hopkins* (1992) 10 Cal.App.4th 1699, 1702 [13 Cal. Rptr. 2d 451], where there is no sign the parties contested the issue of futility and consequently no analysis of the issue. These cases are irrelevant.

To show it is futile to object, counsel generally must show it is costly to assert your rights. (E.g., *People v. Hill* (1998) 17 Cal.4th 800, 820 [72 Cal. Rptr. 2d 656, 952 P.2d 673].) There was nothing like that in the civil and productive working relationship between Boermeester and USC. To reverse USC for failing to grant Boermeester something he never requested is unwarranted. It would be unprecedented, and an unwise retreat from the usual rule.

The usual rule is you must ask for something you later claim on appeal was vital, so the school can know what you want and can resolve your issue short of litigation. (*Doe v. Occidental College* (2019) 37 Cal.App.5th 1003, 1018 [249 Cal. Rptr. 3d 889] (*Occidental I*) [issue must be raised in the first instance at the hearing or appellant forfeits it]; *Doe v. Occidental College* (2019) 40 Cal.App.5th 208, 225 [252 Cal. Rptr. 3d 646] (*Occidental II*) ["By failing to make the argument until his appeal to this court, [the complaining student] forfeited it."; collecting forfeiture authorities].)

The rationale for this rule is fairness and efficiency. A school is entitled to learn the contentions of interested parties before litigation is instituted so it can gain the opportunity to act and to render litigation unnecessary. (See *Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 535 [78 Cal. Rptr. 3d 1].)

Boermeester asks to be excused from this rule of fairness and efficiency, so on appeal he can get what he never requested during the school's proceedings.

I would stick with the usual rule: if you want something, ask for it. Stockpiling secret grievances should not be acceptable.

Boermeester also makes a different argument than futility. This argument is unforseeability. Boermeester now claims he could not reasonably have been expected to foresee the holding in *Doe v. Allee* (2019) 30 Cal.App.5th 1036 [242 Cal. Rptr. 3d 109] (*Allee*) requiring cross-examination. Boermeester makes this unforseeability argument as another excuse for attacking USC about the cross-examinations he never asked USC to give him.

Boermeester's unforseeability argument is insupportable. In *2016*, before the events in Boermeester's case, a court already had held "cross-examination was essential to due process" in a student discipline case. (*Doe v. University of Cincinnati* (S.D.Ohio 2016) 223 F.Supp.3d 704, 711.) This ruling was affirmed on appeal. Represented by the same lawyer now representing Boermeester, student Doe in the *Allee* case relied heavily on this *University of Cincinnati* precedent. The *Allee* court followed this lawyer's lead, repeatedly citing and discussing both the trial and appellate rulings in the *University of Cincinnati* case. (*Allee, supra*, 30 Cal. App.5th at pp. 1059, 1061, 1062, 1064, 1066, 1068.)

In short, Boermeester's lawyer in *2017* indeed could have foreseen something written into law in *2016*.

So the strangeness remains. Boermeester's lawyer was comfortable asking USC for favors because USC was responsive and professional. Boermeester's lawyer had legal authority for demanding cross-examination. Yet this lawyer never requested cross-examination. It was the opposite: Boermeester's lawyer wrote *he did not want it*. But now Boermeester's lawyer says USC treated him unfairly for not giving him what he did not want. That is strange.

IV

Boermeester seeks to import precedents into this domestic violence setting from outside it, but his suggestion is unsound. These precedents involve cross-examination when a woman and a man tell conflicting stories: he said nothing bad happened; she said oh yes it did. In those cases, disciplinarians had to decide which speaker to believe. The accused man wanted cross-examination to shake the woman's story. Here, by contrast, the two versions came from one witness: Roe's witness statement close to the event versus Roe's later recantations. Boermeester did not want to cross-examine Roe because that tactic could only harm him.

Boermeester cites precedents, but they never deal with a victim of domestic violence who recants. His citations do not apply here, because the worth of cross-examination to an accused changes fundamentally when the victim recants. An accused wants to confront accusers steadfast in their accusations to shake the force of their accusations. But when a domestic violence victim has

publicly recanted, the accused already has all he wants. Further questioning offers him only hazard.

Boermeester's precedents follow a common fact pattern inapplicable to this case. The common fact pattern involves two people who do not live together: they are not cohabitants. They are not in a *domestic* relationship. And there is no domestic *violence*. Rather, there is some short-lived and unhappy sexual encounter, with the woman and the man maintaining different versions afterwards about what happened. There is never recantation. Thus there is never the situation where the accused wants to sustain, not to shake, the recantation.

There are 11 such cases.

1. *Occidental II, supra*, 40 Cal.App.5th at pages 211–220 (woman and man lived separately and disagreed about whether she was too incapacitated to consent to sexual relations after a fraternity party; no mention of domestic violence or a recanting witness);

2. *Occidental I, supra*, 37 Cal.App.5th at pages 1006–1013 (woman and man lived separately; sexual penetration after a party; man said woman consented; woman said she did not consent; no mention of domestic violence or a recanting witness)];

3. *Doe v. Westmont College* (2019) 34 Cal.App.5th 622, 627–629 [246 Cal. Rptr. 3d 369] (*Westmont*)

(woman and man lived separately and disagreed about whether they had intercourse during a college party; no mention of domestic violence or a recanting witness);

4. *Allee, supra*, 30 Cal.App.5th at pages 1043–1053 (woman and man lived separately; one episode of intercourse; man said woman consented; woman said she did not consent; no mention of domestic violence or a recanting witness);

5. *Doe v. University of Southern California* (2018) 29 Cal.App.5th 1212, 1216–1229 [241 Cal. Rptr. 3d 146] (*USC 2018*) (woman and man lived separately and disagreed about whether the woman was too drunk to consent to a night of sexual activity; no mention of domestic violence or a recanting witness);

6. *Doe v. Regents of University of California* (2018) 28 Cal.App.5th 44, 46–55 [238 Cal. Rptr. 3d 843] (woman and man lived separately and disagreed about whether they had sexual relations during a birthday party; no mention of domestic violence or a recanting witness);

7. *Doe v. Claremont McKenna College* (2018) 25 Cal.App.5th 1055, 1058–1064 [236 Cal. Rptr. 3d 655] (woman and man lived separately and disagreed about whether the woman consented to intercourse; no mention of domestic violence or a recanting witness);

8. *Doe v. Regents of University of California* (2016) 5 Cal.App.5th 1055, 1058–1072 [210 Cal. Rptr. 3d 479] (woman and man lived separately and disagreed about whether they had consensual sexual relations; no mention of domestic violence or a recanting witness);

9. *Doe v. University of Southern California* (2016) 246 Cal.App.4th 221, 224–238 [200 Cal. Rptr. 3d 851] (woman and man lived separately and disagreed about whether the man failed to protect the woman from sexual assault by other men at a fraternity party; no mention of domestic violence or a recanting witness);

10. *Doe v. Baum* (6th Cir. 2018) 903 F.3d 575, 578–580 (*Baum*) (woman and man lived separately and disagreed about whether she was too incapacitated to consent to sexual relations at a fraternity party; no mention of domestic violence or a recanting witness);

11. *Doe v. University of Cincinnati* (6th Cir. 2017) 872 F.3d 393, 396–399 (woman and man lived separately and disagreed about whether their one episode of sexual relations was consensual; no mention of domestic violence or a recanting witness).

In sum, Boermeester asks this court to do what no court has done: overturn student discipline because the accused student did not get a chance to question a recanter,

which is something the accused said he did not want and something that could have done him no good.

The same is true for Boermeester's new theory that the real problem was his inability to cross-examine secondary witnesses like MB2 and DH. If Boermeester has cited holdings to that effect, I have missed them. I am not familiar with a holding that discipline will be overturned when a school does not entertain cross-examination that is never requested.

The cases to date all concern the right of confrontation when it could possibly have done the man some good. No precedent deals with a situation where the man wanted to *avoid* confrontation because it offered him only peril.

V

It mystifies me how California Courts of Appeal have concluded the federal due process clause applies when there is no state action. Intermediate appellate courts have announced a state common law rule that procedures in private schools should mirror the federal constitution. That is a leap. State law governing private schools can depart from constitutional rules that govern state institutions. (E.g., *Doe v. Trustees of Boston College* (1st Cir. 2019) 942 F.3d 527, 533–534.)

Someday the California Supreme Court may choose to trace and to evaluate this rule's rise in the lower California courts.

If this happens, it may be notable that the present is a time of ferment in the field of student misconduct discipline.

A

The law is in ferment.

Boermeester contends it is unconstitutional for schools to use a disciplinary process departing from a fully adversarial model. USC designed a less adversarial model we can call an investigatory, as opposed to an adversarial, approach.

It may be some esteemed institutions of higher education prefer an investigatory approach to an adversarial one. (See Lave, *A Critical Look at How Top Colleges and Universities Are Adjudicating Sexual Assault* (2017) 71 U.Miami L.Rev. 377, 393–394.)

Perhaps there are good reasons why.

Some courts condemn the investigatory approach. (See *Baum, supra*, 903 F.3d at pp. 581–585; *Allee, supra*, 30 Cal.App.5th at pp. 1067–1069 [citing *Baum*].)

But this position is controversial. (See *Haidak v. University of Massachusetts-Amherst* (1st Cir. 2019) 933 F.3d 56, 68–71 [criticizing *Baum*; U.S. law considers the inquisitorial or investigatory model "fair enough for critical administrative decisions like whether to award or terminate disability benefits. See *Sims v. Apfel* [(2000)]

530 U.S. 103, 110–[1]11 [147 L. Ed. 2d 80, 120 S. Ct. 2080] … (explaining that Social Security proceedings are inquisitorial rather than adversarial)."]; *Westmont, supra*, 34 Cal.App.5th at p. 637 [combining investigative and adjudicative functions does not, without more, deprive a student accused of sexual misconduct of a fair hearing]; *USC 2018, supra*, 29 Cal.App.5th at p. 1235, fn. 29 [although investigator held dual roles as the investigator and adjudicator, the combination of investigative and adjudicative functions does not, without more, constitute a due process violation].)

In sum, there is a nationwide legal debate about the right way to investigate claims of student misconduct. There is little consensus.

B

The facts are in ferment. At this moment there is considerable procedural experimentation. On hundreds or thousands of campuses across the land, informed and thoughtful people are discussing the right way to handle these cases. This discussion is in good faith and is wide open. There is ongoing innovation and little consensus.

The American Law Institute (ALI) launched a project in 2015 to evaluate this debate and to advise school decision makers. By design, the ALI's process is deliberate and thoughtful. The project remains in process.

Appendix B

C

At this moment of discussion, a grave concern is the effect of mandatory cross-examination on the willingness of victims to report abuse.

We are learning a lot recently about why abuse victims may be reluctant to report abuse and to trigger a process leading to more abuse.

Being cross-examined is an unattractive prospect. Skilled cross-examiners take pride in being fearsome. We often say a good cross-examination "destroyed" a witness, that the cross-examination was "scathing." These words are accurate. They are telling.

The prospect of being destroyed by a scathing cross-examination can deter reporting. Fine words in opinions somewhere about all the possible procedural adjustments may mean little to a lonely and traumatized woman anguishing over her options.

Striking the right balance is a challenge. It would be beneficial to tap the ongoing national debate and experimentation before promulgating some mandatory constitutional code of campus procedures. Judge Henry Friendly praised the wisdom of Justice Harlan and quoted his words: "I seriously doubt the wisdom of these 'guideline' decisions. They suffer the danger of pitfalls that usually go with judging in a vacuum. However carefully written, they are apt in their application to carry unintended consequences which once accomplished are not

always easy to repair." (Friendly, *Some Kind of Hearing* (1975) 123 U. Pa. L.Rev. 1267, 1302, quoting *Sanders v. United States* (1963) 373 U.S. 1, 32 [10 L. Ed. 2d 148, 83 S. Ct. 1068] (dis. opn. of Harlan, J.).)

D

Striking the right balance ought to concern courts, but not in this case. This case was never about a denial of cross-examination—not until now, at any rate. At the university level, Boermeester disavowed interest in "putting Roe on the spot again" because his litigation strategy was to sustain her recantation and to avoid roiling it. Nor did Boermeester lift a finger to try to cross-examine other witnesses during USC's process.

Boermeester's counsel has manufactured this cross-examination issue. He has done so because he hopes someone will accept his construct, not because cross-examination was anything he sought at the time. His construct makes Boermeester the victim. USC is the perpetrator.

This is awry. I would not intrude on USC's decisionmaking, which was procedurally proper and is supported by substantial evidence.

WILEY, J.

Appendix B

APPENDIX

Jane Roe Intake Interview
Source: Administrative Record pp. 183–189
Word count: 3404
Notes: "T9" presumably means Title IX
MB presumably means Matthew Boermeester

Jane Roe Intake – (JR)
Date: January 23, 2017
Location: CUB
Advisor: Lani Lawrence
Interviewers: Lauren Elan Helsper (LEH) and Gretchen Means (GM)

JR has been dating Matt since March 2016. Their relationship was on and off for a while but that is when they started seriously seeing each other.

Why are you here today?

- JR knows this is a "bad situation" but she hasn't told anyone. "This is the worst one, the one people know" (regarding the incident over the weekend which prompted her coming to the office)

- "I still care about him"

At the beginning of the relationship JR had bruises on her arm from Matt and her dad found out and wanted her to get a restraining order against him. JR told her father that the bruise was "circumstantial" and his concern died down. Her parents don't like him.

She doesn't know what to do or if she wants to do anything. She knows he can't be in her life

Matt lived with her all fall semester. He got "screwed out" of his rent situation in August and it fell through. He presented it to JR as, "I am here all the time, I am going to live with 'CT' and pay a little there" but stay with JR really. He told her about living with CT and paying money there so they weren't moving in together. He wasn't paying rent to JR or to CT. Matt moved his stuff into her apartment and he was living with her. He never presented it to her though as he was going to move in. He never left. They broke up and he would stay or they would fight and he wouldn't leave.

Now he has his own apartment since Christmas break but he has still been at her apartment.

Matt tells JR that he hates her and is mad at her and when she asks "Why are you here?" He said, "I can do whatever the fuck I want" and tells her to "Shut up."

"There is no arguing with him. He doesn't think he is doing anything wrong." Matt thinks JR deserves it. They broke up because JR went to dinner with her ex and lied about it to Matt and so he sees it as her fault. The other day, JR asked Matt, "What if you hurt me bad. Would you feel bad? If you were playing around and it hurt?" Matt told her "no," because it would have been brought on by her. He gets mad at her if she doesn't back away or stop talking when he tells her too [*sic*].

Appendix B

JR acknowledges that she knows that this is not her fault.

Matt was not nice to her roommates so they didn't like him. One of her roommates tried to get her evicted because he was there. This was in end of October. The roommate went to the landlord instead of talking to JR. The roommate didn't realize that Matt doesn't listen to JR when she tells him to leave and instead tells her that she can leave but it is her house.

She is 5"4-5"'5 [*sic*] and she weighs 130. He is stronger than she is but she doesn't factor that into things.

On Friday they spent the day together. They are not together and haven't been together for a while but he still is at her house often. They had a "good day." MB went to party and was drinking a lot. He called her at 12:30–1am to pick him up so she did. (He often goes out, parties, and calls her to pick him up). They went to get food and came back to her place. He was the drunkest she has ever seen him. He was yelling at people and tried to be funny. There is an alley behind the house and he was yelling in the alley.

They got out of the car and he wanted her to drop Ziggy's leash but she didn't want to. (He is mean to Ziggy and she was shaking in the floor. He yells at her and she cowers in the cage). He grabbed the back of JR's hair hard and said "drop the fucking leash" and she said no. Matt grabbed JR harder and then she dropped the leash because it "hurt." DH heard them yelling.

Matt grabbed JR by the neck (which he has done before but this time it was harder). She was coughing and he let

go and laughed. He made a comment about the show "west world" and how you can hurt the robots because they aren't well. JR didn't really understand it). He grabbed her by the neck, pushed her hard against the [concrete] wall, she hit her head, he let go and then did it again. DH and TS saw and another neighbor came out. He said that they were just "playing around."

DH and TS took her into their apartment and Matt was asleep when she got back to her room.

(Regarding holding her by the neck) - Matt grabbed her from the front. He was holding "tight." She could still breathe but it hurt and she coughed. He has done this before. But he says that he is "messing around." He does it when he is rough housing (not sexually) or to "freeze me" when he wants to stop her. The times they were "messing around" she was sometimes scared.

He hits her or does something to egg her on and tries to get her to play and then he grabs her by the neck to stop her.

This Friday was the "worst." Her head hurt for a little after she hit the wall.

She often has bruises on her legs or arms because "he is always doing something."

If JR didn't stay with Matt after the incident, "he wouldn't understand." For example, the next day he slept all day in her bed. She went to speak to DH and Matt said don't go over there, "tell him to deal with his shit" and Matt

was "freaking out" and said, "what the fuck? Why are you taking that long?" (when it was only 30 minutes)[.] Matt just yells at her. She didn't want to make it worse and so she just does what he says to avoid yelling and conflict.

Bruises on arms – When JR doesn't do what Matt wants she gets bruised. That is a more recent thing (when they were together, he would grab her arm too tight). Recently Matt is "more angry," "I am too close to him or I don't get away fast enough or if I don't stop talking" then he hits her with a pointed finger so she gets bruises. He does that to her arm, leg, lower back, stomach. Sometimes he laughs. She feels like she doesn't respond as "severely" as she should. She says ouch but doesn't laugh, but she "downplays it" and is not firm. She does this to keep it light and because she is uncomfortable. She tried yesterday to be more serious and he said, "stop, I don't care." He didn't take her seriously.

Matt has pulled her hair more than once. He gives her a dead arm/leg (punches in a certain spot so the body goes numb and it hurts but it goes limp). It is a hard hit. He does this when she doesn't do what he wants her to do.

He thinks it is fun to "fight" and wants her to engage and eggs her on or when she doesn't do what he wants. Even when she does engage. (He slaps her 15 times to egg her on and then finally she does it back and says stop and he says stop and then he will do it again and say, he had to get her back). "It is to get her going." JR thinks he thinks it is having fun.

He did it yesterday when they were just watching TV and he started (she doesn't know what starts it) and he starts messing with her, hitting her and she says stop and he will keep going.

"It feels too painful for it to just be playful but the attitude behind it is just being playful." She is not sure if this is what he is used to from his brothers or is not realizing enough is enough.

When Matt first started hurting her, it was not often and it has gotten worse. "I was kind of taken aback." The first time she was scared of him was when they got into a fight at the beginning of the relationship. He was yelling, and "shook me really hard" and threatened to hit her. This was the first time she was scared. This was a while ago. She thought about it like just a fight. "He said that he is only like this because she made him do this, or he can't trust her or they weren't actually together and that "he will get better."

"It then started playful and it hurt but his attitude was confusing and it just got worse and worse and then I was like in it."

Before Matt, JR was with someone else that was a really good guy. They were together for about 2 years. Matt came into her life. He is very manipulative and she believed that she wanted to be with Matt instead. "[T]he highs are very high and the lows are very lows [*sic*]." At that point her relationship with the other guy was "very solid." "Matt was flashy" and took her on crazy dates that the other guy

couldn't give her. She drifted to Matt. He said that at first, he couldn't be nice to her because she was with the other guy and that made sense to her at the time.

They had problems in the relationship. He was mean and always putting her down. He told her how stupid she is. Recently for a 24 hour period she decided to write down every mean thing he said to her on her phone. She read a long list of things. After hearing how dumb she is, how bad she is at tennis, and always being put down, she started to believe it.

JR did not cheat on Matt but "when things got bad" (her ex was always sweet) [s]he sometimes would go to dinner with the other guy because "it was really bad" (with Matt). She slept over her exes [*sic*] house but didn't do anything. She knew it would sabotage the relationship with Matt. The next day, she told Matt and he shook her, Matt was so "mad" and somehow convinced JR that she needed to fix it. He made her feel bad and that she was imagining these problems. "So he would give me one more chance." "[B]ut already then I was on his leash." The whole time she had to prove herself.

In the end of October, her ex said that he had to go back to Brazil and that he wanted to go to dinner with her first. She went without telling Matt but he found out. Matt broke up with her. He told her that she deserved it. He told her that she could still prove her worth and "get me back." He would go out nightly and come back to JR's place and yell at her nightly and she would cry and it was "very intense."

Appendix B

When they broke up (and in her prove herself phase) she hooked up with someone and he was nice to her. Matt found out and thought that, "I did so much wrong that I deserve this."

He still lived in her room and slept in the same bed as JR even though they were broken up. That is when her roommate tried to evict her.

They didn't talk for a week over New Years and then he was at his apartment for a week. He had surgery on his knee, he got sick and came back to JR's because he said, "closer to walk there." Matt told her that he came to stay with her because "You do what I say, I hate you but it is easier." "I need to take care of him he says."

His ego is "through the roof" since the Rose Bowl.

She spent a lot of time over the summer with his family. His dad is super sweet and submissive, his mom runs the family. Mom is a lawyer, she is very nice but in charge of the family.

JR gave a timeline of events:
December 2015–April 2016 Matt was in her life (seeing each other but not dating)
April 2016–end of October 2016 – they were dating
June 2016 (early) – shaking incident
1st August – he officially moved into her house
End of October 2016 – they broke up but he was still at her house. He was going on dates with girls and talking to girls while living with her
Matt moved out the first week of spring 2017

Appendix B

From April to June – there were no physical incidents The shaking incident was in June because she went to dinner with her ex

June to when Matt moved-in to her place in August – the physical contact was not very often maybe once a week if not less. "It was playful but it wasn't that bad. It has gotten stronger. It didn't hurt like now."

Her parents noticed the bruising before the June incident – Matt kicked her when she was in bed because she was coming closer to him and her kicked her arm to get her away. Her parents found out because she was crying and told her ex that she was scared of Matt and he called her parents and told them

Shaking incident – "he was mad because I didn't want to show him my phone so he took it, threw it out the door" and then shook her.

The physical contact "became more often and more hurtful" – "I think it is longer than I really want to remember. In my mind I think it was really recently. But then I had the bruise on [my] arm in May." It has been more often since they broke up if not before then and probably something every day but the degree varies if they spend solid hours together in privacy.

- He did these things privately. She doesn't think anyone knew.

- Her roommates knew but her voice didn't get the urgency to make them think it was bad. They knew he was verbally abusive.

The next day (after the weekend incident) she tried to talk to Matt and she said that he scared DH and TS and they heard him yelling and "it looked really bad when you pushed me and it looked really bad with your hand around my neck." Matt said "it was a joke, we were messing around, tell them to calm down." He said, "tell them you're into that" and he implied that it was foreplay.

Matt is the star child and is very spoiled but if his parents knew they would be very mad. Matt does not talk to her nicely

Mom – [name redacted] (lawyer)

He never forced her during sex or hurt her during sex.

On Saturday he was yelling which got DH and TS's attention, He was just being a loud drunk person. DH at first thought it was a loud drunk person and then he heard JR's voice. At first she was laughing, probably they heard her say no to drop the leash. He woke them up and then they heard her.

He wanted to "toughen me up." He wanted me to call him names back or hit him back. He thought [she] was too submissive because she didn't want to.

Looking back how do you think your roommates might describe you as they thought something was going on?

- Her best friend wanted her out of the relationship for a long time. She was strong and told JR she was "weak."

- DH would say she has been very "preoccupied" she can't do what she wants. She is very controlled.

- People didn't understand the severity but knew that he was treating her badly. They thought she was being weak or stupid. She was she knew because it is hard.

    - "He is very good at making me feel like I need him." He has torn her down so she has become dependent on him.

- Throughout the time, her ex was supportive and telling her she was the best and trying to lift her up but it wouldn't register because Matt was saying negative things to her

- She still had feelings for Matt and she didn't know why. She has been "holding onto the highs even though it has been low for a really long time."

A week before they broke up she went to him to break up because he was mean and disrespecting her parents and but [*sic*] he told her "no, we aren't breaking up." He said "every time we get into a fight, you are going to run? No, we are going to work this out."

He always said that he was the best thing that she was going to get. She started to believe it and she couldn't go anywhere.

Now she is starting to realize how bad it was. She became numb that he treats her bad and isn't worked up like she was in the past. ([T]his is after the break). She made him soup because he told her he was sick and she offered toast. He was so mean about the toast that she cried. But in the past week, she is stronger.

Last night, he said that he is done and that he won't come over anymore. But in the past, she would say, "no, don't go" but she "still can't say get the fuck out." She is less madly in love with him than she was before.

Her best friend is dating RP and he is a great guy. RP told her Matt is 'bad news.' RP asked MB for JR's key back over break and Matt said no.

GM explained her options regarding moving forward:
1. Avoidance of Contact – and we will try to get the key back from him
2. GM explained that we have to investigate what happened on Friday even without her because of the witnesses and the neighbor
    a. This afternoon there is a panel regarding an interim suspension

        i. Clay already knows

She is scared because she didn't want "to burn him." She knows that she didn't bring it to us. GM explained that

people are very scared for her. GM said that it will be clear it was made by T9 and not her.

She graduates in December 2017 and he has one more year at USC.

DH told JR that he is not going to participate

GM offered emergency housing. She wants it to feel safe. She wants it tonight and tomorrow night and then Sunday and Monday when she returns from her team tennis trip.

GM explained

1. The panel will meet re: to discuss whether interim action is necessary to protect JR and restrict him
2. AOC will be served from T9 and Matt will not be allowed to contact apartment – mates (JR stated that she wants the AOC)
3. He will be served with the charge letter for IPV
4. He will be served with everything at once – on Thursday after she goes to Auburn

JR's dad is a professor and if he calls we can explain the process and [what] we are doing.

Matt has the password for her computer and she is going to change it.

She has a hard time relating to the severity for herself and for his consequences

Appendix B

Witness – Best friend is an alum (GO);
She is going to get us the name of the neighbor – MB2

{REDACTED}
Lani's number – GM has

JR is not participating in the investigation. JR and LL completed the FERPA form and the confidentiality agreement

GM explained academic accommodations

Investigator Notes: JR was crying throughout the meeting. She offered information regarding her entire history with MB. After GM told her that T9 was forced to go through an investigation on the Friday incident as there are witnesses, JR said that she understand[s]. JR does not want to participate in the investigation and did not want T9 to charge on the conduct that she divulged other than the Friday incident.

APPENDIX C — OPINION OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES, DATED MARCH 21, 2018

SUPERIOR COURT OF THE STATE
OF CALIFORNIA FOR THE COUNTY
OF LOS ANGELES

Case No.: BS170473

MATTHEW BOERMEESTER,

Petitioner,

v.

AINSLEY CARRY, AN INDIVIDUAL IN HIS OFFICIAL CAPACITY AS VICE PRESIDENT FOR STUDENT AFFAIRS; THE UNIVERSITY OF SOUTHERN CALIFORNIA, A CALIFORNIA CORPORATION; AND DOES 1 TO 20 INCLUSIVE,

Respondents.

ORDER DENYING THE PETITION FOR A WRIT OF MANDATE

Initial Hearing Date: January 3, 2018
Continued Hearing Date: March 21, 2018

Dept.: 86

Petitioner Matthew Boermeester ("Petitioner" or "Boermeester") seeks a writ of mandate pursuant to

Code of Civil Procedure ("CCP") section 1094.5 setting aside Respondent University of Southern California's ("Respondent" or "USC") decision to expel Petitioner. The expulsion was based on an alleged violation of a policy in USC's Student Handbook which prohibits "causing physical harm" to another person. (AR 486, 521.) Petitioner was also charged with violating an avoidance of contact order. Petitioner contends the process leading to his expulsion violated his right to due process and complains the decision to expel was not supported by the evidence.

For the following reasons, the Court DENIES the petition for writ of mandate. The Court also DENIES Petitioner's Request for Judicial Notice.[1]

I. Motion to Augment

Augmentation of the administrative record is strictly controlled by statutory guidelines set forth in Code of Civil Procedure ("CCP") § 1094.5(e). (*Pomona Valley Hospital Medical Center v. Superior Court (Bressman)* (1997) 55 Cal.App.4th 93, 101.) Section 1094.5(e) provides as follows:

> Where the court finds that there is relevant evidence that, in the exercise of reasonable diligence, could not have been produced or that was improperly excluded at the hearing before respondent, it may enter judgment as

1. Although Respondent filed an Opposition to a Motion to Supplement the Administrative Record, the Court has not received Petitioner's Motion to Supplement the Administrative Record or any Declaration filed in connection with it. The Court therefore declines to rule on any motion to supplement.

> provided in subdivision (f) remanding the case to be reconsidered in the light of that evidence; or, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, the court may admit the evidence at the hearing on the writ without remanding the case.

The burden to make either of these showings lies with the proponent of the additional evidence. (*Armondo v. Department of Motor Vehicles* (1993) 15 Cal.App.4th 1174, 1180-1181.)

On January 5, 2018, Petitioner appeared ex parte seeking an order augmenting the administrative record to include a declaration signed by Jane Roe on September 6, 2017. The Court agreed to hear Petitioner's motion to augment the administrative record as a regularly noticed motion. The Court specified that Petitioner's motion would be limited to Jane Roe's September 6, 2017 declaration. On February 27, 2018, Petitioner filed a motion to augment the record not only with the September 6, 2017 declaration, but also with (1) a second declaration by Jane Roe, dated February 27, 2018; (2) a photo of Petitioner's injured knee taken on January 20, 2017; and (3) photos of Petitioner and Jane Roe.

Petitioner's attempt to augment the record with evidence not included in Petitioner's January *5,* 2018 ex parte motion is improper. Nevertheless, considering Petitioner's motion on the merits, Petitioner fails to demonstrate grounds for augmentation under Section 1094.5(e) for any of Petitioner's four exhibits. Petitioner fails to demonstrate

that the information in Jane Roe's declarations "could not have been produced" or was "improperly excluded" during the administrative proceedings. On the contrary, it appears that much of the information in Jane Roe's two declarations was included in her internal appeal of USC's decision. (See AR 192-196; Opp. to Mtn. to Aug. at 7:5-8:2, 10:17-25.) Petitioner also fails to explain why the photos of Petitioner's knee and the photos of Jane Roe and Petitioner could not have been produced below. Given that these photos all pre-date the investigation, it appears that Petitioner could have provided them to USC's Title IX investigator.

Petitioner argues that the Court should augment the record with Jane Roe's declarations because Petitioner could not have included declarations made under penalty of perjury during the administrative process. Petitioner appears to rely on the fact that the statements taken by the Title IX investigator in this case were not made under oath or penalty of perjury. As USC points out, however, Jane Roe could have submitted these declarations to USC and informed USC that she was willing to swear to their accuracy under penalty of perjury.

Because Petitioner fails to demonstrate grounds for augmentation under Section 1094.5(e), the Court DENIES Petitioner's motion to augment.

II. Statement of the Case

A. January 21, 2017 Incident

Just after midnight on January 21, 2017, two students, DH and MB2, observed Petitioner behaving

violently toward Jane Roe ("Roe"). (AR 85, 95.) DH and his roommate, TS, reported the incident to USC Men's Tennis Team Coach, Peter Smith ("Coach Smith"), who in turn reported it to USC's Title IX Coordinator, Gretchen Dahlinger Means ("Means"). (AR 1.) On January 22, 2017, Means spoke with DH and TS to confirm the report by Coach Smith. (AR 1.)

B. January 23, 2017 Interview with Roe

On January 23, 2017, Means, Lauren Elan Helsper ("Helsper"), a Title IX Investigator, and Nohelani Lawrence, Roe's advisor, met with Roe. (AR 1, 183-89.) Roe explained that she and Petitioner started dating in March 2016, but broke up in October 2016. (AR 183, 186.) After they broke up, Petitioner continued to live with her until December 2016. (AR 183.) Roe described that on the evening of January 20, 2017, Petitioner went to a party where he consumed a large amount of alcohol. (AR 184.) Around 12:30 a.m. to 1:00 a.m., Petitioner called Roe and asked her to pick him up, which she did. (*Ibid.*) They bought some food and went back to Roe's place. (*Ibid.*) When they got out of the car, Petitioner told Roe to drop her dog's leash, but she did not want to. (AR 184.) Petitioner then grabbed the back of Roe's hair hard and said "drop the fucking leash," but she refused. (*Ibid.*) Petitioner grabbed her harder and she dropped the leash because it "hurt" (*Ibid.*) Petitioner then grabbed Roe by the neck. (*Ibid.*) When she started coughing, he let go and laughed. (*Ibid.*) Petitioner then grabbed her by the neck and pushed her against a concrete wall causing her head to hit the wall. (*Ibid.*) Petitioner let go of Roe and then did

it again. (*Ibid.*) DH, TS, and MB2 witnessed Petitioner's actions and came out to see what was going on. (AR 184.) DH and TS brought Roe back to their apartment. (AR 184.) Roe admitted that her head hurt for a little while after she hit the wall. (AR 184.)

Roe also described suffering physical harm caused by Petitioner "very privately" on other occasions including bruises caused when he poked her with a pointed finger and incidents when he pulled her hair, punched her hard enough to cause numbness, shaking her, and kicking her. (AR 184 -186.) The notes of interview recount that Means offered Roe emergency housing and Roe wanted it for several nights "to feel safe." (AR 188.)

C. Petitioner Served with Charges and Interviewed

On January 26, 2017, Petitioner was served notice of the Avoidance of Contact ("AOC"), interim suspension, and investigation. (AR 4.) Petitioner was charged with:

> "Engaging in conduct that causes physical harm to a person with whom you have had a previous dating, romantic, intimate, or sexual relationship; specifically, grabbing [Reporting Party] by the neck, and pushing her head into a cinder block wall multiple times on/or about January 21, 2017."

(AR 2, 470-71.) On January 30, 2017, Helsper interviewed Petitioner with his mother present as an advisor. (AR 171.) Petitioner explained that on the evening of January

21, 2017, he was at the Water Polo house when he texted Roe to come and get him. (AR 171.) She picked him up and they went and got food from McDonalds. (AR 171.) At around 1 a.m., Roe had her dog on a leash and Petitioner asked her to "drop it." (AR 171.) Petitioner admitted that he put his hand on Roe's neck, but stated that they were not arguing and that he was not choking her or slamming her head against the wall. (AR 173.) Petitioner explained that he and Roe often play around that way. (AR 171-72.) Petitioner acknowledged that it would have looked bad for a bystander to see him and Roe in an alley at 1:00 a.m. with his hand on her neck. (AR 173.) Petitioner stated that he learned not to display behavior like that in public. (AR 173.)

On February 14, 2017, Petitioner was notified that he was also being charged with violating the Avoidance of Contact Order. (AR 2.)

D. February 3 and March 14. 2017 Interviews with MB2

On February 3, 2017, Helsper interviewed MB2 about the January 21, 2017 incident. (AR 25 131.) MB2 was in his apartment that evening when he heard an argument. (AR 131.) He went outside to take the trash out and saw Roe and another person standing together at the other side of the alley against the wall. (AR 131.) He "vaguely" knew Roe because she was his neighbor. (AR 131.) MB2 saw that they had a dog and thought they might have been arguing about the dog. (AR 131.) At that time, MB2 stated that he did not observe any physical contact between them. (AR 131.)

On March 11, 2017, MB2 left a message for Helsper stating that he had not been completely truthful with her during his interview. On March 14, 2017, Helsper interviewed MB2 a second time. (AR 85-86.) MB2 explained that he "did see everything" that happened between Roe and Petitioner, but did not initially disclose his observations because he wanted to "keep it on the down low" out of respect for Roe. (AR 85.) MB2 stated that on the evening of January 21, 2017, he heard laughing and screaming sounds coming from the alley. (AR 85.) When he went outside, he observed Petitioner with both hands around Roe's neck. (AR 85.) Petitioner was pushing Roe against the wall and Roe was "gagging." (AR 85.) MB2 stated, "truth is, I really wanted to beat the shit out of this guy." (AR 85.) MB2 went down to the alley with his trash bag and asked Roe and Petitioner how things were going. (AR 85.) Petitioner and Roe walked back into her house. (AR 85.)

E. February 14, 2017 Interview with DH

On February 14, 2017, Helsper interviewed DH about the January 21, 2017 incident. (AR 95-96.) On that evening, at around 1 or 2 a.m., DH heard someone screaming. (AR 95.) He then heard a male yelling loudly and a female talking. (AR 95.) When· he looked out his window, he saw Petitioner and Roe near the wall in the alleyway for about three seconds. (AR 95.) Petitioner had her pinned against the wall with his hand on her chest or neck. (AR 95.) DH also saw Roe's dog running around the street, which alarmed DH because DH knew that Roe did not usually allow her dog to run around. (AR 95.) DH woke

up TS and told TS that Roe and Petitioner were fighting. (AR 95.) DH and TS went outside and brought Roe back to their room. (AR 95.) They invited her to stay at their apartment, hut she declined saying, "No, it's going to be fine, I don't want to make him more mad, I will go back over there." (AR 95.)

F. Interviews of SS and GO

Helsper interviewed SS on February 16, 2017. (AR 92.) Her notes of the interview summarize her questions and also summarize SS' answers. The notes indicate that SS has known Roe since Roe was 13, that their families socialize, and that she regards Roe "as like a little sister to me." (AR 92.) SS recounted that when Roe told her about the incident the week before, Roe explained that Petitioner got drunk at a party, they got into an argument, and he grabbed her by the throat and threw her against the wall. (AR 93.) Roe told SS that, in Roe's first statement, she said she was scared when it was happening but that now she wants to take that back because she feels bad for Petitioner. (*Id.*) Roe told SS she wanted to help Petitioner by making this go away. (*Id.*)

Helsper interviewed another friend of Roe's, GO, on February 8, 2017. After learning about the incident, GO advised Roe to take pictures of her injuries. (AR 113.) The notes of the interview quote Roe as telling GO, "I know what he did was wrong and I have the bruises to prove something really did happen," commenting that it "hurt" and that he hit her head against the wall. (*Id.*)

G. Surveillance Video

The record includes surveillance video of the alley on the evening of January 21, 2017. At 12:16:16 a.m., the video shows Petitioner shoving Roe from the area adjacent to the house into the alleyway. At 12:16:50, Petitioner appears to be holding Roe's neck or upper body area. At 12:17:12, Petitioner grabs Roe by the neck and pushes her toward the wall of the alley. At 12:17:13 and 12:17:14, Roe's head and body arch backwards. Between 12:17:16 and 12:17:26, Petitioner and Roe are against the wall and barely visible from the camera. At 12:17:26, Petitioner backs away from the wall and re-enters the camera's view. At 12:17:28, Roe re-enters the camera's view. Roe and Petitioner proceed to push each other. At 12:17:38, Petitioner moves toward Roe and appears to be pushing her against the wall. At 12:17:40, a dog can he seen running across the alley. At 12:17:57, a third party enters the camera's view and walks in the direction of Petitioner and Roe. At that moment, Petitioner and Roe walk away from the wall and back towards the house. At 12:18:19, the third party walks over to the dumpster, places a trash bag inside, and walks back toward the house. (AR 45-46, 190.)

H. Investigation and Appeal

On March 22, 2017, Helsper completed her investigation. Her 54-page Summary Administrative Review (SAR) recounts, in detail, the evidence gathered in her investigation. (AR 1-54) "Applying the evidence to the charges," the SAR made a finding that Petitioner engaged in conduct that causes physical harm "by grabbing [Roe]

by the neck and pushing her head into a cinder block wall multiple times" and communicated with Roe by social media and telephone in violation of the University's interim measure restraining him from contacting her. (AR 54.)

On May 2, 2017, the Misconduct Sanctioning Panel met and recommended a sanction of expulsion. (AR 216.) "Petitioner appealed USC's determination to a Title IX Appeal Panel. (AR 197-208.) The Panel met in-person on June 13, 14, and 15, 2017. (AR 216.)

On June 22, 2017, the Appeal Panel issued a Memorandum to Ainsley Carry, the Vice President for Student Affairs. The Memorandum concluded Helsper's conclusions were supported by substantial evidence. (AR 217.) The Memorandum nevertheless found "one legitimate ground for appeal," concluding that "the sanction of expulsion recommended by the Misconduct Sanctioning Panel, was grossly disproportionate to the violations found." (AR 220.) Because the Panel found regarded the penalty of expulsion as disproportionate to the violations, the Memorandum recommended a two-year suspension and the completion of a 52-week domestic violence batterers program. (AR 218.)

On July 7, 2017, Carry issued a letter to Petitioner stating that he approved Helsper's and the Appeal Panel's findings. (AR 221.) Carry rejected title Appeal Panel's recommendation for a two year suspension and imposed the sanction of expulsion. (*Id.*) Carry noted the Appeal Panel's concern that "it was not clear whether this

[conduct] was intentional or simply reckless" but concluded that Petitioner's "intent - or alleged lack thereof" was not a mitigating factor because "[i]ntent to cause harm is not a required element" of the charges against him. (*Id.*)

Petitioner now seeks a writ of mandate directing Respondent to set aside its decision to expel him. Respondent opposes.

III. Legal Standard

Code of Civil Procedure ("CCP") § 1094.5 is the administrative mandamus provision providing the procedure for judicial review of adjudicatory decisions rendered by administrative agencies. (*Topanga Ass'n for a Scenic Community v. County of Los Angeles,* (1974) 11 Cal. 3d 506, 514-15.) Section 1094.5(a) states, in pertinent part, that "[w]here the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer, the case shall be heard by the court sitting without a jury." Under CCP § 1094.S(b), the pertinent issues are: (1) whether the respondent has proceeded without jurisdiction; (2) whether there was a fair trial; and (3) whether there was a prejudicial abuse of discretion. An abuse of discretion is established if the respondent has not proceeded in the manner required by law, the decision is not supported by the findings, or the findings are not supported by the evidence. (CCP § 1094.5(b).)

Appendix C

In general, an agency is presumed to have regularly performed its official duties. (Evid. Code § 664.) Therefore, the petitioner seeking administrative mandamus has the burden of proof. (*Steele v. Los Angeles County Civil Service Commission,* (1958) 166 Cal. App. 2d 129, 137; see also *Alford v. Pierno* (1972) 27 Cal.App.3d 682,691 ["[T]he burden of proof falls upon the party attacking the administrative decision to demonstrate wherein the proceedings were unfair, in excess of jurisdiction or showed prejudicial abuse of discretion."].)

To determine what standard of review to apply, courts examine whether the administrative decision "substantially affect[s] vested, fundamental rights." (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 143.) "If the decision of an administrative agency will substantially affect such a right, the trial court not only examines the administrative record for errors of law but also exercises its independent judgment upon the evidence disclosed in a limited trial de novo." (*Id.* at 143.) "If the administrative decision does not involve, or substantially affect, any fundamental vested right, the trial court must still review the entire administrative record to determine whether the findings are supported by substantial evidence and whether the agency committed any errors of law, but the trial court need not look beyond that whole record of the administrative proceedings." (*Id.* at 144.) "The courts must decide on a case-by-case basis whether an administrative decision or class of decisions substantially affects fundamental vested rights and thus requires independent judgment review." (*Id.* at 144.)

California courts have held that there is no fundamental, vested right to higher education. (See *Kirk v. Board of Regents of University of Cal.* (1969) 273 Cal. App.2d 430, 440 ["While we fully recognize the value of higher education, we cannot equate its attainment with food, clothing and shelter."]; *Gurfinkel v. Los Angeles Community College Dist.* (1981) 121 Cal.App.3d 1, 5-7.) This means that, pursuant to section 1094.5(c), the court decides whether substantial evidence supports the administrative findings (rather than whether the weight of the evidence supports the findings). (See *Doe v. Regents of the University of California* (2016) 5 Cal.App.5th 1055, 1073; *Doe v. University of Southern California* (2016) 246 Cal.App.4th 221, 238.) "On substantial evidence review, [the court] do[es] not 'weigh the evidence, consider the credibility of witnesses, or resolve conflicts in the evidence or in the reasonable inferences that may be drawn from it.' [Citation.] '[The administrative agency's] findings come before [the court] 'with a strong presumption as to their correctness and regularity.; [Citation.] [The court] do[es] not substitute [its] own judgment if the [agency's] decision 'is one which could have been made by reasonable people ....' [Citation.]'" (*Doe v. Regents of the University of California* (2016) 5 Cal.App.5th 1055, 1073.)

IV. Analysis

A. Petitioner Has Not Established He Was Denied Due Process

Petitioner argues that he was deprived due process because (1) Helsper and Means failed to accurately

record witness testimony; (2) Petitioner did not receive a formal evidentiary hearing; (3) USC's procedures were unfair; (4) the investigator failed to presume Petitioner not responsible; (5) the Appeal Panel improperly decided procedural issues using a substantial evidence standard; and (6) the Appeal Panel failed to address Petitioner's allegations that the Title IX Office mishandled the investigation by, among other things, violating a policy against persevering with an investigation after an alleged victim refuses to cooperate.

"Generally, a fair procedure requires 'notice reasonably calculated to apprise interested parties of the pendency of the action ... and an opportunity to present their objections.' [Citation.]" (*Doe v. University of Southern California* {2016) 246 Cal.App.4th 221, 240.) "[I]n student disciplinary proceedings, due process requires 'an 'informal give-and-take' between the student and the administrative body dismissing him that would, at least, give the student 'the opportunity to characterize his conduct and put it in what he deems the proper context.'" (*Id.* at 245-46 [citing *Goss v. Lopez* (1975)419 U.S. 565, 581).) "[I]t is clear that the hearing need not include all the safeguards and formalities of a criminal trial. '[P]rocedures for dismissing college students [are] not analogous to criminal proceedings and could not be so without at the same time being both impractical and detrimental to the educational atmosphere and functions of a university.' [Citation.]" (*Doe v. Regents of the University of California* (2016) 5 Cal.App.5th 1055, 1078.)

Appendix C

1. Petitioner Had Notice and an Opportunity to Be Heard

In this case, the evidence in the record demonstrates that Petitioner had notice of the charges and an opportunity to respond. On January 26, 2017, Means notified Petitioner of the charges alleged against him. (AR 470-71.) The notice informed Petitioner of his right to meet with Helsper and his right to obtain free, confidential support through the student counseling center. (*Ibid.*) On January 30, 2017, Petitioner (with his mother present as an advisor) met with Helsper and had an opportunity to share his side of the story and "characterize his conduct." (AR 171-182.) On March 10 and March 22, 2017, Petitioner had an opportunity to review all documents and information gathered as part of the investigation. (AR 47-48, 84-191, 291.) Petitioner also had an opportunity to submit questions for Roe, but declined to do so. (AR 291-95.) After reviewing the evidence, Petitioner then had an opportunity to respond to the evidence, answer questions posed by Roe, and submit new information at an "evidence hearing." (AR 48.) Petitioner chose to submit a written statement in lieu of attending an evidence hearing. (AR 48, 58-66.) After Helsper completed her investigation and determined that Petitioner had violated USC's Student Conduct Code, Petitioner was able to appeal that determination to a Title IX Appeal Panel. (AR 197-208.)

2. Helsper Was Not Required to Electronically Record Interviews

Petitioner argues that Helsper's investigation was flawed because she did not audio record her interviews or

create a verbatim record of the questions and responses. Petitioner fails to cite any case law or University policy requiring an investigator to record interviews as part of a Title IX investigation. Nor is the Court persuaded that Petitioner was prejudiced by the lack of recordings given that the record. Helsper's very detailed notes recording both the interview questions and witness responses underscores the accuracy and thoroughness of the statements made in the interview. Helsper's practice of re-reading her notes to the witness to confirm their accuracy further corroborates the accuracy of the notes. (See, e.g., AR 96, 127.) The Court therefore concludes Petitioner has failed to demonstrate that the failure to electronically record the interviews was unfair or that he suffered prejudice as a result.

Moreover, Roe's subsequent contention she was "manipulated into saying things ... that were greatly exaggerated or totally untrue" is questionable. The University had reasonable grounds to doubt the credibility of the later statement given that it was made after she had an opportunity to reflect on the incident and given that it contradicted her initial account, the accounts of two eyewitnesses, and the video evidence. (AR 67.)

3. USC Was Not Obligated to Provide a Formal Evidentiary Hearing

Petitioner contends USC's process for adjudicating Title IX complaints is flawed as a whole because the process "does not provide for an evidentiary hearing during which impartial adjudicators can observe the parties, witnesses,

and evidence." (OB at 7:27-28.) However, Courts have recognized that in the context of student disciplinary proceeding, a hearing "need not include all the safeguards and formalities of a criminal trial." (*Doe v. Regents of the University of California* (2016) 5 Cal.App.5th 1055, 1078.) Rather, what is required is some type of "informal give-and-take' between the student and the administrative body dismissing him that would, at least, give the student 'the opportunity to characterize his conduct and put it in what he deems the proper context.'" (*Doe v. University of Southern California* (2016) 246 Cal.App.4th 221, 245-46.)

Here, there is no dispute Petitioner had an opportunity present his side of the story to Helsper and to respond to all of the evidence gathered in the investigation. Petitioner's citation to *Doe v. Regents of the University of California* (2016) 5 Cal.App.5th 1055 is unavailing. In that case, the appellate court found that petitioner received a fair hearing in connection with UCSD's decision to suspend him without defining what constitutes a fair hearing. Moreover, UCSD's procedures in that case largely parallel the procedures followed by USC in this case. Under UCSD's procedures, once the Office of Student Conduct receives a complaint about a student, "[t]he director of OSC ... selects a review panel *or review officer* to hear and receive the respondent's and the complainant's information about the incidents, meet with relevant witnesses, determine the responsibility of the respondent, and recommend appropriate sanctions, if any." (*Id.* at 1080, emphasis added.) Similarly, in this case, the Title IX Office assigned a single officer (Helsper) to interview Roe and Petitioner, meet with relevant witnesses, and

determine Petitioner's responsibility. Although Petitioner claims USC denied him any opportunity to question any actual complainant or complaining witness, there is no evidence in the record Petitioner made any request to pose questions to the witnesses (or that such a request was denied). Petitioner's (and Roe's) opportunity to review and comment on the notes of their interviews provided additional due process protection. (AR 59-69.)

4. Petitioner Fails to Establish that Helsper or Means Harbored or Was Motivated by Bias against Petitioner or that the University Was Not Impartial

Petitioner goes on to contend that it was unfair for Helsper to make the initial factual findings, credibility assessments, and determination of responsibility because "the Title IX Office's initial opinion of responsibility ... remain[ed] steadfast throughout the investigation, even after the "reporting party" object[ed] to the Title IX Office's agenda ...." (OB at 9:1-4.) In essence, Petitioner's position is that Helsper's perseverance with the investigation means that she was biased against Petitioner and therefore not an impartial adjudicator.

Due process does not necessarily require a separation of powers between prosecutorial and adjudicative decision makers. "[T]he general rule endorsed by both the United States Supreme Court and [the California Supreme Court] is that '[b]y itself, the combination of investigative, prosecutorial, and adjudicatory functions within a single administrative agency does not create an unacceptable

risk of bias and thus does not violate the due process rights of individuals who are subjected to agency prosecutions.' [Citations.]" (*Today's Fresh Start, Inc. v. Los Angeles County Office of Educ.* (2013) 57 Cal.4th 197, 221.) In some cases, "a single individual may act as investigator, prosecutor, and decision maker." (*Ibid.*) Therefore, the structure of USC's process does not provide a basis for relief.

To prove bias, Petitioner must introduce affirmative evidence of prejudice against him. "To prove a due process violation based on overlapping functions … [a] party must lay a 'specific foundation' for suspecting prejudice that would render an agency unable to consider fairly the evidence presented at the adjudicative hearing [citation]; it must come forward with 'specific evidence demonstrating actual bias or a particular combination of circumstances creating an unacceptable risk of bias' [citations]." (*Ibid.*)

To establish bias, Petitioner first cites the Title IX Office's refusal to withdraw Roe's initial January 23, 2017 statement at her request. (AR 12.) Petitioner cites no authority for the proposition that persevering with an investigation after a witness changes his or her testimony constitutes evidence of bias. In this case, Roe's reason for asking to withdraw her statement was not because of inaccuracy. Roe asked to withdraw the statement because she "was afraid of retaliation and rumors that Respondent would spread about her once he read her statement." (AR 12.) It is therefore not reasonable to infer that USC's continuation of the investigation was motivated by bias against Petitioner.

Moreover, it is a fundamental principle of evidence law that contemporaneous statements describing a startling or stressful event are more credible and reliable than statements made after a witness has time to reflect on the consequences of his or her statement. For that reason, Section 1240 of the California Evidence Code allows admission of contemporaneous statements describing events that would otherwise be inadmissible as hearsay. (See, e.g., *People v. Bryant* (2014) 60 Cal.4th 335, 416 [such statements are trustworthy because" 'in the stress of nervous excitement the reflective faculties may be stilled and the utterance may become the unreflecting and sincere expression of one's actual impressions and belief' [citations]"].) Conversely, California law excludes, as unreliable hearsay, a witness' description of events offered after the stress or excitement of the occurrence has passed. (See, e.g., *People v. Ramirez* (2006) 143 Cal. App.4th 1512, 1521 [excluding statements by a witness made several hours after alleged sexual assault and after the witness had taken a nap].) It was therefore reasonable for the University to doubt the credibility of Roe's later statements. USC also had evidence Roe was biased by a motivation to spare Petitioner from suffering consequences resulting from the incident. Viewing the evidence as a whole, it is not reasonable to interpret Helsper's decision to retain Roe's statement as a product of personal bias against Petitioner.

Second, Petitioner alleges that Means was biased against him because she "made the initial suspension assessment." (OB at 10:1-3.) The record does not support this allegation. According to the record, the decision to

place Petitioner on interim suspension was made by the Office of the Vice President for Student Affairs. (AR 472.) To successfully prove bias violating due process, Petitioner must establish an unacceptable probability of bias on the part of a person having actual decision making authority. (*Breakzone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205, 1237.) There is no evidence Means participated in the decision to suspend Petitioner. Even if she had, her participation would not be probative of bias against Petitioner on the merits of the case against him. Under USC's policies, "[i]nterim measures do not indicate the university has made a decision about the report of prohibited conduct." (AR 480.)

Third, Petitioner asserts that Helsper's perseverance with the investigation even after Roe asked the Title IX Office to stop investigating is evidence of bias. As noted above, Helsper was justified in giving credence to Roe's earliest statements about the occurrence and had reason to doubt Roe's later statements. Moreover, there is no evidence Helsper's perseverance was inconsistent with USC policies. To the contrary, USC's policies permit the Title IX Office to proceed with an investigation notwithstanding a Reporting Party's request to cease the investigation if doing so will "protec[t] the health and safety of the Reporting Party and the university community." (AR 491.) Given the nature of the allegations against Petitioner (an alleged assault and battery) and the contemporaneous evidence Petitioner engaged in such conduct, the Title IX Office's had a legitimate reason to continue the investigation. The University's conduct -- providing temporary emergency housing and informing

Petitioner 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 Petitioner. (AR 12.)

Moreover, as noted in Respondent's Opposition, courts may not infer bias on the part of investigators or hearing officers. (Opp. p. 10-11.) "A party seeking to show bias or prejudice on the part of an administrative decision maker is required to prove the same 'with concrete facts ... ' [citations]." (*Nasha LLC v. City of Los Angeles* (2004) 125 Cal.App.4th 470, 483.) "Bias and prejudice are never implied." (*Breakzone Billiards, supra,* 81 Cal.App.4th at 1237.) Thus, in *Nasha LLC* and in *Woody's Group, Inc. v. City of Newport Beach* (2015) 233 Cal.App.4th 1012, the courts concluded that city council members were biased based on statements they made taking positions opposed to the real estate projects under consideration. By contrast, in this case, Petitioner has not presented evidence that anyone involved in USC's investigatory process made statements opposed to Petitioner. At most, Petitioner has presented evidence that, consistent with its policies, the University took actions adverse to him. This is not sufficient to support a finding that the University (Means or Helsper) was biased against Petitioner.

Petitioner argues, in his reply memorandum, that the University "did not follow its Policy to conduct a neutral fact-finding investigation," citing *Applebaum v. Board of Directors* (1980) 104 Cal.App.3d 648. (Reply, p. 3.) In *Applebaum,* the trial court granted a writ of mandate in favor of a physician who challenged a hospital's revocation

of his obstetrical staff privileges. The appellate court affirmed. In that case, the petitioner was one of three general practitioners with obstetrical privileges for uncomplicated deliveries; two board certified specialists in obstetrics also enjoyed such privileges. One of the two board certified specialists initiated the charges against the petitioner and the other specialist concurred. As a result, the non-specialist members of the ad hoc committee evaluating the charges "were in an extremely difficult position," having to evaluate allegations by "a solid front of the only special expertise available to it." (*Id.* at 659-660.) Five members of the ad hoc investigatory committee also served on the 12 member executive committee and the appeal committee was likewise comprised of doctors from the other departments in the hospital. Under these circumstances, the court affirmed the trial court's determination the proceedings were not impartial, noting that the chances of any decision countermanding the recommendation of the ad hoc committee was "virtually nil."

The circumstances in the *Appleby* case are distinguishable from the circumstances before this Court. In this case, the decision was not made by Petitioner's peers. Unlike the doctors in Appleby, the factfinders were professional investigators who had no previous connection or relationship with Petitioner or Roe. Also, in this case, there is evidence that the decision makers in the University's appeal process acted independently. As noted above, the Appeal Panel disagreed with the SAR and recommended a two year suspension rather than expulsion. Carry rejected that recommendation and concluded Petitioner should be expelled. By contrast

in *Appleby,* the evidence suggested the decision makers had little choice but to defer to the specialists who recommended suspension and sat side by side with the decision makers in the hospital's appellate process.

Petitioner also complains that USC violated the "presumption of non-responsibility" articulated in its Student Handbook, which states:

> "The investigation is a neutral, fact-finding process. Reports are presumed made in good faith. Further. Respondents are presumed not responsible. This presumption is overcome only when a preponderance of the evidence establishes that the Respondent committed the prohibited conduct charged."

The Court is not persuaded by this argument because there is no evidence this policy was disregarded. The Court is not persuaded that the investigator's observation, "Recantation is a recognized pattern of intimate partner violence ... " evidences a disregard for the appropriate standard of proof. (OB p. 9.) As noted above, the tendency of victims to recant is well established and admissible in domestic violence court cases. The fact that Means did not agree to withdraw Roe's initial interview statements and continued to investigate is likewise not evidence the University disregarded its policies.

Petitioner further argues USC violated a policy that "only allows" investigators to continue to investigate without the reporting party's consent in "limited

circumstances" such as when the incident involves a weapon, drugs or multiple victims. (OB p. 10, citing AR 482.) This is not a fair reading of the Handbook. Addressing charges of *sexual misconduct,* the Handbook explains, "[i]n limited circumstances, the *Title IX Office* may be required to investigate an incident of sexual misconduct against the choice of the Reporting Party; for example when the incident involves a weapon or predatory drug use, when multiple victims are involved, or when there is a danger to the greater community." (*Id.*) Because this statement applies to *sexual* misconduct, it is not relevant to the charges against Petitioner. Moreover the language of the provision — describing what the University "may be required" to do — is not reasonably construed as imposing limits on what it may choose to do.

5. The Title IX Appeal Panel Applied the Proper Standard of Review

Lastly, Petitioner argues that he was deprived due process because the Appeal Panel "did not conduct an independent review of the evidence, or look at the unweighed exculpatory evidence, to determine whether the investigator's findings were supported by a preponderance of the evidence." (OB at 13:23-25.) Petitioner argues that whether Helsper's findings were supported by a preponderance of the evidence is a procedural question, framing the issue to suggest that the Appeal Panel should have reviewed the evidence *de novo.* That is not the standard of review. USC's policies plainly state that appeals may only be brought on grounds that "the findings of fact made by the *Title IX Office* are not supported by *substantial evidence.*" (AR 495, emphasis added.)

Petitioner's reliance on *Pomona College v. Superior Court* (1996) 45 Cal.App.4th 1716 is misplaced because that case addressed the unrelated question whether a professor's exclusive remedy for a denial of tenure was administrative mandamus. In affirming a dismissal of the professor's breach of contract claim, the *Pomona* court noted that having a jury decide whether Pomona's tenure review process was procedurally defective would necessarily entail deciding whether the university "gave appropriate 'weight' to the available evidence." (*Id.* at 1727.) Because this decision would necessarily require it to evaluate "de novo" the professor's true abilities as a scholar, the professor's allegation the review process was procedurally rather than substantively deficient presented "a purely semantic distinction without a difference." (*Id.*)

In the case before this Court, the Appeal Panel appropriately applied the substantial evidence standard in reviewing Helsper's decision. It also considered Petitioner's claims that the Title IX Office mishandled the investigation. (See AR 218-219.) The Court accordingly finds there was no denial of due process.

B. Substantial Evidence Supports USC's Decision

With respect to the merits of USC's decision, substantial evidence supports USC's determination that Petitioner violated the Student Conduct Code. As noted above, Petitioner was accused of causing harm to Roe. Petitioner's defense is that he and Roe were 'just horsing around" and that he did not actually cause harm.

Appendix C

There is substantial evidence Petitioner caused harm. In her January 23, 2017 interview, Roe recounted that on the evening of January 21, 2017, while she and Petitioner were in the alley behind her house, he touched her in a forceful manner by (1) grabbing the back of her hair until it "hurt" to compel her to drop her dog's leash; (2) grabbing her by the neck until she started coughing; (3) grabbing her by the neck a second time and pushed her against a concrete wall causing her to hit her head; and (4) grabbing her by the neck a third time and again pushed her against the wall. (AR 184.) These statements establish Petitioner caused harm to Roe. As noted above, her contemporaneous descriptions of events are properly regarded as credible. Moreover, Roe's statements to her friends, SS and GO, were consistent with her statements in the initial interview that she hurt her head when Petitioner pushed her into the cement wall on the night of the incident.

Petitioner argues Roe's statements during the initial interview are superseded by her subsequent written. statements that Petitioner "NEVER hit, choked, kicked, pushed or otherwise physically abused [her]" and that on January 21, she and Petitioner were merely "horsing around." (AR 67-68.) However, Roe's later statement is questionable because it is inconsistent with her description of the multiple acts of pushing, poking and bruising in her January 23, 2017 interview. It is also inconsistent with the statements she made to SS and GO and inconsistent with witnesses' observations of Roe on the night of the incident who described her as "very scared" and "pretty scared." (AR 85, 95.) Moreover, to the extent Roe's later statement implies she consented to physical harm, it does

not appear that USC's policies recognize consent as a defense to the charges in this case. The Student Handbook has extensive provisions addressing consent as a defense to sexual contacts but has no similar provisions for charges of causing physical harm. (AR 485.)

Roe's later statements were also inconsistent with the eyewitness accounts and inconsistent with the videotape evidence. They are also questionable because, after having more time to reflect on the incident, Roe admitted bias in favor of Petitioner on multiple occasions. For example, in a text to TS, Roe admitted she was motivated to protect Petitioner, stating: "Look what I want to say is I'm helping matt (*sic*). I know you won't agree with it but he's already gotten a shit ton of punishment for something I didn't want to happen in the first place ... I literally wanted non [*sic*] of it so what I'm asking as a friend is don't say much ... I trust that he won't ever hurt me again. I just hate that any of this is going on." (AR 122.) In a subsequent interview with Helsper, Roe similarly opined that Petitioner's punishment was "too harsh" and wished it could be reduced to "mandated counseling and probation" (AR 169.) On the other hand, her characterization of the initial interview in her written statement — that she "believed [the] discussion was like a counseling session where [she] was free to vent about [her] relationship or blow off steam" — underscored the unreflective and honest nature of her statements that night. (AR 67.) It is also questionable based on the well-known "tendency of domestic violence victims to recant previous allegations of abuse as part of the particular behavior patterns commonly observed in abusive relations." (*People v. Brown* (2004) 33 Cal.4th

892,905, 907.) The tendency is so well established that it is admissible, in the form of expert testimony, in prosecutions of domestic violence cases. (*Id.*)

Also, as noted above, Roe's initial description of Petitioner's actions on January 21 was corroborated by eyewitnesses whose spontaneous conduct and words demonstrated that they observed an offensive touching and use of force. MB2 testified that he saw Petitioner with both of his hands around Roe's neck and heard Roe gagging. (AR 85.) DH testified that he observed Petitioner pinning Roe against the wall in the alleyway with his hand on her chest or neck. (AR 95.) Both MB2 and DH reacted as if they observed abusive behavior rather than mere horseplay. MB2 quickly went down to the alley to check on Roe and recalled feeling that he "wanted to beat the shit out of [Petitioner]." DH was upset enough by what he saw to wake up his roommate, TS. The two of them were so disturbed that they brought Roe back to their room. She was crying when they encouraged her to stay with them rather than return to her apartment where Petitioner was residing. (AR 126.) In light of the eyewitnesses' contemporaneous conduct and words, it was not reasonable to believe they completely misread the situation they observed on January 21.

The statements by Roe, MB2 and DH were further corroborated by video footage of the alley where the incident occurred. In particular, at 12:16:16 a.m., the video captured Petitioner shoving Roe into the alley. Then, at 12:17:12 a.m., the video captured Petitioner grabbing Roe by the neck and pushing her to the wall in a manner that caused Roe's head and body to arch backwards.

In light of the substantial evidence, Helsper and the Appeal Panel reasonably concluded that Petitioner violated USC's policies against violence on January 21, 2017. This Court cannot say that no reasonable person would have reached the same conclusion. (See *Doe v. Regents of the University of California* (2016) 5 Cal.App.5th 1055, 1073 ("Only if no reasonable person could reach the conclusion reached by the administrative agency, based on the entire record before it, will a court conclude that the agency's findings are not supported by substantial evidence."].)

V. Conclusion

USC's procedures were within norms of due process recognized as acceptable under California law. There is substantial evidence supporting the University's decision. It is not the province of this Court to substitute its judgment for the judgment of a private university that has duly considered an alleged violation of its policies and acted upon evidence of alleged wrongdoing. The Court therefore denies the Petition.

Dated: March 21, 2018

AMY D. HOGUE, JUDGE