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Separate and Unequal: The Genesis of a Gender-Biased Campus Disciplinary System for Sexual Violence Survivors in California

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TITLE IX SYMPOSIUM

SEPARATE AND UNEQUAL: THE GENESIS OF A GENDER-BIASED CAMPUS DISCIPLINARY SYSTEM FOR SEXUAL VIOLENCE SURVIVORS IN CALIFORNIA

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INTRODUCTION

Title IX is a federal civil rights law enacted forty-nine years ago as part of the Education Amendments of 1972 to combat gender discrimination in education. The key text of Title IX is short: "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 educational program or activity receiving Federal financial assistance . . . ."[1] Title IX's purpose is clear: protect students at federally funded schools from discriminatory practices based on sex or gender so they may fully and equally benefit from their educational experience.[2]

Yet, in the last five years, California's Courts of Appeal have issued a string of decisions creating a system for on campus disciplinary proceedings that does just the opposite, one that discriminates against individuals who raise sexual violence complaints by imposing onerous procedural requirements, including live cross-examination, not present in any other type of campus disciplinary proceeding, even those with similarly severe sanctions at stake. This

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1. 20 U.S.C. § 1681(a).

2. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 286–87 (1998); *See generally* 20 U.S.C. § 1681.

has created two separate but unequal tracks to justice—one for gender-based violence claims and another for all other cases. This unfair dual system feeds into and lends credence to harmful and false narratives that survivors of gender-based violence are inherently untrustworthy and perpetrators need additional procedures to be protected from these "false" allegations.

Specifically, allowing a perpetrator to confront their victim so they can "be destroyed by a scathing cross-examination" will deter reporting of sexual assault and intimate partner violence on school campuses.[3] Underreporting is already a pernicious problem on campuses, where only 20% of female students who experience gender-based violence report it.[4] Academic research, jurisprudence, and federal law refute the dangerous assumption that cross-examination and confrontation are necessary in a non-criminal campus disciplinary proceeding. This assumption tellingly reflects an unfounded and biased mistrust of the investigatory nature of Title IX proceedings.

This article will first review the problem of gender-based violence on school campuses, focusing on the pervasiveness and harm that stems from sexual assault and intimate partner violence. It will then review the string of decisions issued by the California Courts of Appeal over the last five years that have extended unnecessary and harmful procedures that burden survivors, furthering damaging narratives that survivors are not to be trusted and perpetrators of sexual violence must be protected against their accusers. It will then review the upcoming California Supreme Court case of *Boermeester v. Carry*, in which the state's highest court will have the opportunity to review and reverse this harmful dual-track that has infected the school-based disciplinary investigation system with gender bias.

I. GENDER-BASED VIOLENCE ON SCHOOL CAMPUSES

Gender-based violence is a widespread issue on school campuses throughout the country. Approximately one in four female

3. Boermeester v. Carry, 49 Cal. App. 5th 682, 710 (2020), *depublished by* 472 P.3d 1062 (2020).

4. *See Recommendations for Improving Campus Student Conduct Processes for Gender-Based Violence*, A.B.A. 1 (2019), https://www.americanbar.org/content/dam/aba/publications/domestic-violence/campus.pdf [A.B.A *Recommendations*].

undergraduates and one in fourteen male undergraduates will experience sexual assault while enrolled in their college or university.[5] Thirteen percent of undergraduate and graduate students "experience rape or sexual assault through physical force, violence, or incapacitation."[6] "Among undergraduate students, 26.4% of females and 6.8% of males experience rape or sexual assault through force, violence, or incapacitation."[7] Transgender students experience an elevated risk of physical harm: one survey of students at thirty-three colleges showed nearly 23% of undergraduate transgender, nonbinary, or gender-questioning students experienced nonconsensual sexual contact involving physical force or incapacitation.[8]

In addition to sexual assault, another form of sexual violence continues to infect college campuses. Intimate partner violence—also called domestic violence, interpersonal violence, or dating violence—is a pervasive problem on school campuses. Reports of intimate partner violence begin as early as middle school and high school. According to the 2013 National Youth Risk Behavior Survey, nearly 20.9% of female high school students who date experience some form of dating violence.[9] Particularly notable is that young individuals are more likely to be victimized by a peer or someone they know, foreshadowing similar dynamics that spill over once students move on to college campuses. Of those who experienced sexual violence as a

5. *Statistics at a Glance*, CULTURE RESPECT, https://cultureofrespect.org/sexual-violence/statistics-at-a-glance/ (last visited Jan. 27, 2021) (citing David Cantor et al., *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct*, ASS'N AM. U. 1 (2019), https://www.aau.edu/key-issues/campus-climate-and-safety/aau-campus-climate-survey-2019.

6. *Campus Sexual Violence: Statistics*, RAINN, https://www.rainn.org/statistics/campus-sexual-violence (last visited Jan 27, 2021) (citing Cantor, *supra* note 5)..

7. *Id.*

8. *Id*.

9. Kevin J. Vagi et al., *Teen Dating Violence (Physical and Sexual) Among US High School Students: Findings From the 2013 National Youth Risk Behavior Survey*, 169(5) JAMA PEDIATRICS 474, 477 (2015), (discussing survey results in which surveyed students reported experiences with some form of dating violence within the twelve month period before the survey was conducted).

teen, 43.6% report they were victimized by someone they knew.[10] The rates of violence only increase after a student leaves high school. The number of students who experience intimate partner violence among college couples is higher than any other age group.[11] Between 21% to 32% of college students[12] and 43% of female college students experience intimate partner violence.[13] These rates are disproportionately higher for LGBTQ students and students of color.[14] Moreover, about 43% of college women in the United States who have dated report experiencing violent and abusive dating behaviors at some point, including physical, sexual, technology-facilitated, verbal, or other form of controlling abuse.[15] More than 57% of college students who report having experienced dating violence had that experience while in college.[16]

Intimate partner violence is widespread in colleges across the country, and California is no exception. According to the California Women's Health Survey, approximately 40% of women in California experience intimate partner violence at some point in their life.[17] These numbers are especially stark among young adults. In fact, individuals between the ages of eighteen and twenty-four experience a higher rate of domestic and interpersonal violence than any other age

10. *Teenagers & Sexual Violence*, NAT'L SEXUAL VIOLENCE RES. CTR. 2 (2018), https://www.nsvrc.org/sites/default/files/publications/2019-02/Teenagers_508.pdf.

11. Sadguna Anasuri, *Intimate Partner Violence on College Campuses: An Appraisal of Emerging Perspectives* 5 J. EDUC. & HUM. DEV. 2, 74 (2016).

12. *Id*.

13. *Teen Campus & Dating Violence*, NAT'L COAL. AGAINST DOMESTIC VIOLENCE 1 (2015), https://assets.speakcdn.com/assets/2497/dating_abuse_and_teen_violence_ncadv.pdf.

14. LAURA KANN ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, YOUTH RISK BEHAVIOR SURVEILLANCE 52–55, 86, 92–93 (2017), https://www.cdc.gov/healthyyouth/data/yrbs/pdf/ trendsreport.pdf.

15. *Statistics*, KNOW YOUR IX, https://www.knowyourix.org/issues/statistics/ (last visited Jan. 27, 2020).

16. *Id*.

17. Zipora Weinbaum et al., Cal. Dep't of Health Servs., *Women Experiencing Intimate Partner Violence, California, 1998-2002*, *in* WOMEN'S HEALTH : FINDINGS FROM THE CALIFORNIA WOMEN'S HEALTH SURVEY, 1997-2003, at 12-1, 2–4 (2006), https://fhop.ucsf.edu/sites/fhop.ucsf.edu/files/wysiwyg/whs_violence.pdf.

group at 11.0%, a level almost double the average rate of domestic violence experienced by all California women.[18]

Students who experience sexual violence face harm beyond the physical and mental trauma of the experience itself. These effects permeate into and affect a student's entire educational experience. Numerous studies demonstrate the harm that sexual harassment, assault, and interpersonal violence have on a survivor's academic outcomes. For example, sexual assault and intimate partner violence survivors are more likely to drop out of school.[19] Of those survivors who do not drop out, their GPA drops by an average of 0.23 points.[20]

Despite its prevalence, intimate partner violence among students on college campuses is vastly underreported, and thus, underacknowledged.[21] Most statistics on intimate partner violence only capture incidents that are reported, meaning the actual frequency that students experience this type of violence is even higher. Indeed, one report on dating violence on college campuses concluded "[f]ew students report incidents of dating violence to campus officials. About half of all victims tell no one, not even a friend or relative." [22] Another study found that the most common reasons college students fail to report are "fear of retaliation by the perpetrator and lack of faith in the criminal justice and institutional disciplinary systems."[23] Some reports suggest only 15% of students who experience intimate partner violence reported the violence to their Title IX office, campus police, local law enforcement, health care providers, victim services, or other

18. *Id*.

19. Cecilia Mengo & Beverly M. Black, *Violence Victimization on a College Campus: Impact on GPA and School Dropout*, 18 J. COLL. STUDENT RETENTION RSCH. THEORY & PRAC. 1, 9 (2016).

20. *Id*. at 9.

21. *See* Sofi Sinozich & Lynn Langton, *Rape and Sexual Assault Victimization Among College-Age Females, 1995-2013*, U.S. DEP'T OF JUST. 1, 9 (2014), https://www.bjs.gov/content/pub/ pdf/rsavcaf9513.pdf (finding only 20% of female student victims of rape and sexual assault report to police).

22. Cressida Wasserman, *Dating Violence on Campus: A Fact of Life*, NAT'L CTR. FOR VICTIMS OF CRIME 19, (Fall 2003–Winter 2004), http://www.ncdsv.org/images/NCVC_DVonCampusFactOfLife_Fall2003-Winter2004.pdf.

23. *Id*.

agencies.[24] It is no surprise that the remaining 85% of students who experience this type of violence fail to report, given the trauma often involved in pursuing criminal or civil penalties, and the failure of Title IX departments to adequately protect students from this trauma during on-campus disciplinary investigations.

For a survivor of sexual violence, even the prospect or idea of facing cross-examination from their abuser and their abuser's attorney can be significantly traumatizing. That fear, and the likely reality of actually being re-traumatized, is why many victims do not report to law enforcement. Imitating the courtroom cross-examination environment in an administrative university discipline investigation will lead to even more trauma and even less reporting.[25]

During cross-examination, an abuser is able to weaponize their knowledge of the survivor and verbally assert power over them, even if that is through an attorney. For a domestic violence survivor, confrontation by an abuser "is not only an intimidating and difficult process, but can provide the abuser with an additional opportunity to exert power and control over the victim, often by coopting the features and personages of our justice system, including judges, clerks, and lawyers."[26] The risk of re-traumatization is high even when a courtroom is victim-friendly because "abusers are typically well-versed in verbal abuse and how to use emotional content to intimidate and humiliate their survivors. Put simply, abusers are better positioned to use the intimate and personal information gained from the intimate partner[s'] relationship as a sword."[27]

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24. DAVID CANTOR ET AL., WESTAT, REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT 35 (2017), https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/AAU-Campus-Climate-Survey-FINAL-10-20-17.pdf.

25. A survey administered to legal and social service providers working with survivors of intimate partner violence illustrates the re-traumatizing effects the legal system has on these survivors. Over 81% of the providers reported that "many, most, or all of their clients identified the actions of the abuser or the abuser's associates as a source of retraumatization," while 60% indicated that "many, most, or all of their clients experienced retraumatization as a result of the behavior, statements, or actions of court personnel," and 83% of providers stated that "many, most, or all of their clients reported retraumatization due to court procedures and outcomes." Negar Katirari, *Retraumatized in Court*, 62 ARIZ. L. REV. 81, 92–93, 96 (2020).

26. *Id*. at 85.

27. *Id*. at 103.

Accordingly, it is no surprise that permitting live cross-examination in Title IX investigations leads to a chilling effect on reporting. Even one survivor's negative experience can "infect an entire community, resulting in distrust and reluctance to access the courts on the part of a large number of survivors."[28] Each survivor's experience in the courtroom "can have a large-scale chilling effect. As one advocate described it, 'A judge discredits one woman, and it's like a bomb that goes off in the community, affecting a hundred women. Within many communities, these stories spread like wildfire.'"[29] In the courtroom, women face devaluation and gaslighting, which discourages efforts to seek continued systemic support.[30] This creates ripple effects into the wider community, showcasing the more general idea that adverse experiences in court-like proceedings can have a broad impact not just on the survivor but on other survivors making the difficult choice about whether to come forward.

The traumatic impact of live cross-examination is widely acknowledged.[31] Victims are often deterred from seeking help from the social systems designed to support them, believing the system itself is unable to protect them from further harm and is unable to improve their well-being.[32] Interviews with survivors show that declining to seek help from legal, medical, mental health systems, or crisis centers post-assault is a form of self-protection due to a lack of faith in the system and a fear that enduring the process would be

28. *Id*. at 96.

29. Deborah Epstein & Lisa A. Goodman, *Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences*, 167 U. PA. L. REV. 399, 452 (2019).

30. *Id*. at 451, 453, 459.

31. Nicole Bedera, Seth Galanter, & Sage Carson, *A New Title IX Rule Essentially Allows Accused Sexual Assailants to Hide Evidence Against Them*, TIME (August 14, 2020, 12:58 PM), https://time.com/5879262/devos-title-ix-rule/ (explaining that "the fear of sitting on the stand before your rapist and the tendency for defense attorneys to victim blame are known to deter survivors from reporting.").

32. Debra Patterson, Megan Greeson, & Rebecca Campbell, *Understanding Rape Survivors' Decisions Not to Seek Help from Formal Social Systems*, 34 HEALTH & SOC. WORK 2, 130 (May 2009), https://responsesystemspanel.whs.mil/public/docs/meetings/20131107/Background_Materials/Rebecca_Campbell/Understanding_Rape_Survivors_Dec_Not_Seek_Help_Frml_Social_Sys_2009.pdf.

harmful.[33] In particular, survivors believe that they would feel exposed and vulnerable after answering invasive questions, and having to recount the details of their rape.[34] Survivors are fearful that this kind of questioning, as often occurs in live cross-examinations, would bring out traumatizing memories from the assault.[35]

The fear of being traumatized again has severe implications for the ever-rising number of assaults on college campuses, where the proximity and social cohesion of a school environment makes it probable the victim will have social ties to the perpetrator. Sexual violence survivors may refuse services to guard against the pain of possible rejection.[36] Live-cross examination of survivors in Title IX investigations removes one of the few safe harbors for victims. It also perpetuates the fear of re-traumatization that prevents survivors from seeking help in the first place. Mandatory cross-examination is also contradictory to the purpose and goal of Title IX. When it comes to sexual harassment and violence, the purpose of Title IX is to eliminate hostile environments. The prospect of cross-examination in gender-based university disciplinary proceedings will inevitably perpetuate sexual violence on campus, directly undermining the very purpose of Title IX.

Due to the concern that survivors would be re-traumatized and reporting would continue to drop, the Department of Education's Office for Civil Rights advised against cross-examination in 2011. The Obama Administration's 2011 Dear Colleague Letter, later rescinded by the Trump Administration, stated that "[a]llowing an alleged perpetrator to question an alleged victim . . . may be traumatic or intimidating, thereby possibly escalating or perpetuating a hostile environment."[37] Many schools followed this guidance by either eliminating cross-examination or putting mechanisms in place so students did not directly question one another.[38] Removing cross-

33. *Id*. at 132.

34. *Id.*

35. *Id*.

36. *Id*. at 133.

37. Dear Colleague Letter from Russlynn Ali, Assistant Sec'y for Civil Rights, 12 (Apr. 4, 2011), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf (letter rescinded by the Department of Education).

38. Sandra R. Levitsky, Elizabeth A. Armstrong & Kamaria Porter, *Opinion: Why the Cross-Examination Requirement in Campus Sexual Assault Cases is*

examination from Title IX investigations is critical to effectuating Title IX's purpose of protecting individuals from gender-based discrimination.[39]

II. THE LEGAL PATH: THE STRING OF DECISIONS THAT LED US HERE

In 2016, the California Courts of Appeal began incrementally imposing onerous procedural requirements on university disciplinary proceedings arising out of sexual violence.[40] In the five years since, the Courts of Appeal have held that a "fair" adjudication of sexual misconduct allegations on school campuses requires universities to: conduct live hearings with testimony from key witnesses, including the survivor;[41] permit the cross-examination of witnesses whose credibility is deemed critical;[42] and have a single adjudicator physically observe every witness whose credibility may be key.[43] These additional hurdles do not apply to any other type of disciplinary proceeding on a school campus and only exist for victims of sexual violence.[44] This section will discuss the cases imposing these requirements in chronological order to give a full picture of the Courts of Appeal's path to get to this point. Each of these cases has moved the Court of Appeal further along the road of minimizing the voices of survivors, while simultaneously amplifying the false narrative that perpetrators need and deserve protecting more than the survivors themselves.

Irresponsible, WASH. POST (May 7, 2020, 11:04 AM), https://www.washingtonpost.com/opinions/2020/05/07/what-education-department-gets-wrong-its-rules-campus-sexual-assault/.

39. *See id*. (explaining that "cross-examination in a live hearing can re-traumatize survivors and further deter survivors from reporting sexual misconduct").

40. *See* Doe v. Univ. of S. Cal., 246 Cal. App. 4th 221, 224–25 (2016).

41. Doe v. Westmont Coll., 34 Cal. App. 5th 622, 637 (2019); Doe v. Claremont McKenna College, 25 Cal. App. 5th 1055, 1057 (2018).

42. Doe v. Occidental Coll., 40 Cal. App. 5th 208, 224 (2019); Doe v. Allee, 30 Cal. App. 5th 1036, 1069 (2019).

43. Doe v. Univ. of S. Cal., 29 Cal. App. 5th 1212, 1233–34 (2018).

44. *See* Patel v. Touro Univ., No. A140764, 2015 WL 8827888, at *8 (Cal. Ct. App. Dec. 15, 2015); Patel v. Touro Univ., No. A140764, 2015 WL 8827888, at *8 (Cal. Ct. App. Dec. 15, 2015); Berman v. Regents of Univ. of Cal., 229 Cal. App. 4th 1265, 1267–68 (2014).

A. A Fair Hearing: Doe v. University of Southern California *(2016)*

John Doe and Jane Doe met at a party, where they went to a bedroom and had consensual sex. Later, Jane and John went back into the bedroom to have sex while there were several other men in the bedroom. Although Jane was very intoxicated, Jane and John began to have consensual sex, then the other men began to have intercourse with Jane without her consent. All of the men made degrading comments about Jane's body. Jane began to cry when the other men "got rough" and slapped her on the buttocks.[45] At that point, all of the men, including John, left the room.[46]

The University of Southern California (USC) suspended John Doe for two years after finding John violated USC's student conduct code. John appealed. USC found that although there was insufficient evidence to show John sexually assaulted Jane, John nonetheless violated two sections of the student conduct code and should be suspended for one year. [47] John petitioned to the Superior Court for a writ of mandate, which the court rejected. It held substantial evidence supported the USC Appeals Panel's finding that John violated one of the provisions. John then appealed the writ denial to the Court of Appeal, arguing he was denied a fair hearing and did not violate the school code.[48] The Court agreed, holding John was not provided with notice of the full factual basis for the charges laid against him in the investigation, even though the university provided the two student conduct code sections John allegedly violated. Because of the lack of notice and the initial investigation's focus on Jane's consent to sexual activity, the Court of Appeal also held USC did not afford John adequate opportunity to defend himself against the actions that formed the basis for the violation.[49]

Additionally, the Court also found John was denied a fair hearing because he was not provided an evidentiary hearing. Apparently

45. Doe v. Univ. of S. Cal., 246 Cal. App. 4th 221, 227 (2016).

46. *Id*.

47. USC found John violated § 11.44C and § 11.32 of USC's student conduct policy. Section 11.44C of USC's student conduct policy forbids a student from encouraging or permitting nonconsensual behavior, while section 11.32 bars a student from putting another in danger. *Id*. at 225, 237.

48. *Id*. at 224–25.

49. *Id*.

finding no California precedent, the Court relied on a Fifth Circuit case, *Dixon v. Alabama State Board of Education*. *Dixon* held a "student should be given the names of the witnesses against him and an oral or written report on the facts to which each witness testifies."[50] According to the *Dixon* court, a student should have an opportunity to present their defense against the allegations and to provide oral testimony or written affidavits of witnesses testifying on their behalf to the Board of Education or to a college administrative official.[51] Finally, the Court stated that "if the hearing was not before the Board directly, the results and findings of the hearing should be presented in a report open to the student's inspection."[52]

Adopting the Fifth Circuit's reasoning, the Court found USC did not provide such information because John had to request access to the evidence against him, which the Court held did not comply with either constitutional due process or common law requirements.[53] Thus, this case started the Court's trip down the path leading to *Boermeester* by requiring the underlying facts and the theory of the case be provided to the perpetrator in a Title IX investigation, in addition to notice of the student conduct code sections that are alleged to have been violated, to fulfill the notice standard for a fair hearing. This case placed the first bump in the road for survivors seeking justice in California.

B. Complainant's Credibility and the Need for Testimony: Doe v. Claremont McKenna College *(2018)*

In *Doe v. Claremon McKenna College*, Jane Roe, a student at Scripps College, reported that John Doe, a Claremont McKenna College (CMC) student, raped her. At a party, Jane contacted John and the two met near a fountain.[54] They went to John's room and began having consensual sex, but at one point, Jane claimed John started hurting her. Jane reported that she asked John to stop, but he did not.[55] There were conflicting accounts by both parties. The

50. 294 F.2d 150, 159 (5th Cir. 1961).
51. *Id*.
52. *Id*.
53. *Id*. at 246, 248.
54. Doe v. Claremont McKenna Coll., 25 Cal. App. 5th 1055, 1058 (2018).
55. *Id*. at 1059.

colleges ultimately found that Jane's account was the most credible, and CMC suspended John for one year.[56]

John appealed his suspension through the university, but his appeal was denied.[57] His petition for writ of mandate to the Superior Court was also denied. John appealed this denial to the Court of Appeal, arguing CMC did not provide him a fair hearing partly because Jane did not appear at the hearing.[58]

The Court of Appeal held that because John was facing "potentially severe consequences" and CMC's decision against him turned on believing Jane, CMC's procedures should have included an opportunity for CMC to assess Jane's credibility.[59] Further, the Court held that in cases where the accused is facing a severe penalty, the accused should have the ability to question the complainant directly or indirectly.[60] Because CMC did not provide those opportunities to John, the Court reversed the suspension.

The Court deviated from *Doe v. USC*,[61] which rejected the requirement that allowed the accused to confront or cross-examine witnesses.[62] Instead, the Court relied on *Doe v. Regents of University of California*,[63] which stated the accused may question complainants when the accused faces significant consequences and the complainant's credibility may impact a school's findings.[64] The Court also relied on a Sixth Circuit case, *Doe v. University of Cincinnati*, which held that where the case turns on credibility, witnesses must give testimony in front of the adjudicative body.[65]

Thus, the *Claremont* Court held the one-year suspension was a severe consequence and this case turned on the credibility of the witnesses, so Jane should have testified in front of the adjudicatory

56. *Id*. at 1063–64.
57. *Id*. at 1064.
58. *Id*. at 1057.
59. *Id*. at 1057-58 (reasoning Jane should have appeared in-person or by videoconference to answer questions from John or CMC).
60. *Id*. at 1070.
61. *See generally* 246 Cal. App. 4th, 221 (2016).
62. *Id*. at 248.
63. *See generally* 5 Cal. App. 5th 1055 (2016).
64. *Id*. at 1084.
65. 872 F.3d 393, 402 (6th Cir. 2018).

panel, and John should have been given the opportunity to question Jane.[66] The Court commented that a university may protect the accuser from the accused by "granting the fact finder discretion to exclude or rephrase questions as appropriate and ask its own questions [and] parties may be physically separate, including one or both parties appearing remotely via appropriate technology."[67]

With *Claremont*, the Court further departed from its prior precedent by requiring a survivor to appear either in person or via video at a hearing for questioning but noted that such questioning could be executed indirectly by someone who was not the perpetrator or his representative.[68] Another barrier for victims of sexual violence seeking justice on campus was set in place.

C. Adjudicators and Witness Credibility: Doe v. USC *(2018)*

Shortly after the Claremont decision, another sexual violence case arose at USC. In *Doe v. USC* (2018), Jane Roe and John Doe were both students at USC.[69] They met at a party and both became very intoxicated.[70] After the party, Jane and John went to Jane's room. Jane told Dr. Allee, a USC Title IX investigator, and ultimately the adjudicator for Jane's Title IX case, that she blacked out while John had vaginal intercourse with her, and that she only woke up when John flipped her over and began to have anal intercourse with her.[71] At that point, she was in great pain.[72] Jane told Dr. Allee that she and her mattress were covered in blood from the assault.[73]

Jane filed a Title IX complaint against John, and USC notified John.[74] Dr. Allee found John violated the USC student code of conduct and expelled him.[75] John appealed within the university, but

66. Doe v. Claremont McKenna Coll., 25 Cal. App. 5th 1055, 1073 (2016).
67. *See Id*.
68. *Id*.
69. Doe v. Univ. of S. Cal., 29 Cal. App. 5th 1212, 1214–15 (2018).
70. *Id*. at1216–17.
71. *Id*. at 1218.
72. *Id*.
73. *Id*. at 1220.
74. *Id*. at 1222–23.
75. *Id*. at 1225–26.

the university denied his appeal.[76] John then petitioned for a writ of mandate.[77] The trial court denied John's petition, finding USC provided fair notice and had substantial evidence to support the expulsion.[78] John appealed.

The Court of Appeal held USC denied John a fair hearing.[79] The Court relied on *Claremont* and Sixth Circuit precedent in holding that "[w]here a student faces a potentially severe sanction from a student disciplinary decision and the university's determination depends on witness credibility, the adjudicator must have the ability to observe the demeanor of those witnesses in deciding which witnesses are more credible."[80]

The Court held USC's procedure did not satisfy this burden because the investigator had interviewed critical witnesses, while Dr. Allee, who was the adjudicator, relied on the investigator's account of the witness statements instead of speaking to the witnesses directly.[81] The Court pointed out that two witnesses gave conflicting accounts of whether there was blood in Jane's room, but Dr. Allee did not interview them individually and she chose to believe one over the other.[82] Further, the Court stated that there was a lack of corroborating evidence on the issue of whether Jane had bled.[83] This discrepancy made interviewing witnesses more important.[84]

Thus, in this case, the procedural requirements were again stretched to now require a single adjudicator to physically observe each and every witness whose credibility may be key in an investigation of alleged sexual violence. Yet another obstacle was placed in a survivor's path to justice on campus.

76. *Id*. at 1227–28.
77. *Id*. at 1228.
78. *Id*. at 1229.
79. *Id*. at 1232.
80. *Id*. at 1234 (citing Doe v. Baum, 903 F.3d 575, 581 (6th Cir. 2018); Doe v. Univ. of Cincinnati, 872 F.3d 393, 401 (6th Cir. 2017); Doe v. Claremont McKenna Coll., 25 Cal. App. 5th 1055 (2018)).
81. *Id*. at 1235.
82. *Id*. at 1235–35.
83. *Id*. at 1236–37.
84. *Id*.

D. Cross-Examination of the Complainant: Doe v. Allee *(2019)*

After having drinks with her roommate, Jane Roe went to John Doe's place to smoke marijuana. After Roe arrived, Roe and Doe walked to a taco stand, during which time Roe claimed Doe kept touching her inappropriately and she kept pushing his hand away.[85] Roe claimed that when she and Doe returned to Doe's apartment, Doe raped her. Doe claimed the sex was consensual.[86]

In *Doe v. Allee*, USC expelled John Doe for violating the Student Code of Conduct.[87] Doe appealed his denied petition for writ of mandate, claiming he was denied a fair hearing and the adjudicators were biased against him.[88] The Court of Appeal held that Doe failed to prove the university was biased against him, but the Court did agree USC failed to provide a fair hearing.[89]

In holding Doe's hearing was unfair, the Court once again deviated from historical precedent, which maintained the minimal requirements were merely notice and a hearing.[90] Instead, the Court relied on *Doe v. Regents of University of California*, which stated a hearing must provide the accused with "a full opportunity to present his defenses."[91] The Court also relied on other appellate cases, stating courts must balance the competing interests of the accused, the protection of the accuser, and the university's resources. However, the Courts of Appeal cases that the *Allee* Court relied on[92] and the Sixth Circuit cases[93] asserted that where there was an issue of credibility between the accused and the accuser, the adjudicators must themselves hear directly from the accuser and the accused, and the accused must have an opportunity to question the accuser.[94] The

85. Doe v. Allee, 30 Cal. App. 5th 1036, 1043 (2019).
86. *Id*. at 1044–45.
87. *Id.* at 1039.
88. *Id*.
89. *Id*. at 1039.
90. *Id*. at 1062.
91. Doe v. Regents of Univ. of Cal., 5 Cal. App. 5th 1055, 1104 (2016).
92. *See generally* Doe v. Claremont McKenna Coll., 25 Cal. App. 5th 1055 (2018); Doe v. Regents of Univ. of Cal., 28 Cal. App. 5th 44 (2018).
93. *See generally* Doe v. Univ. of Cincinnati, 872 F.3d 393 (6th Cir. 2017); Doe v. Baum, 903 F.3d 575 (6th Cir. 2018).
94. Claremont McKenna Coll., 25 Cal. App. 5th at 1066.

Court commented that "[t]he accuracy of [the school's] determination can be safeguarded by the sorts of procedural protections traditionally imposed under the Due Process Clause."[95]

The Court deviated from California precedent, which stated that "an administrative procedure in which a single individual or body investigates and adjudicates does not, 'without more,' violate due process."[96] Instead, the Court of Appeal held that where the accused student faces severe disciplinary sanctions and credibility is at issue, the adjudicator must have the independence to determine facts and credibility. Further, the adjudicator may not be the university's Title IX investigator. [97] The Court concluded that, because Doe's case turned on credibility, Doe was denied a fair hearing when the adjudicators did not hear from all of the witnesses. It also reprimanded USC for having the Title IX investigator take part in adjudication and "sentencing" of the student.[98]

With *Doe v. Allee*, the Court extended its previous rulings to now permit cross-examination of the complainant and any other witnesses whose credibility is critical. Another barrier on the road to justice.

E. Doubling Down on Cross-Examination: Doe v. Westmont College *(2019)*

Jane Roe and John Doe, both students at Westmont College (Westmont), were at the same off-campus party. That night, the pair went on a walk during which John grabbed Jane and put his hands down her pants. Jane told him to stop and physically pulled his arm away from her. Jane reported that moments later, he raped her.[99] John claimed he never had sex with Jane and had never been alone with her.[100]

Westmont suspended John for two years for violating its sexual harassment policy. Westmont denied John's appeal. In a petition for writ of administrative mandate, the trial court held Westmont did not

95. *Id*. at 1065.
96. *Id*. at 1067.
97. *Id*. at 1069.
98. *Id*. at 1070–71.
99. Doe v. Westmont Coll., 34 Cal. App. 5th 622, 627–28 (2019).
100. *Id*. at 628–29.

give John a fair hearing and ordered a new hearing for John to adequately hear and respond to evidence. The trial court also required Westmont to provide an opportunity for John to question witnesses, even indirectly. The Court also precluded the investigator from participating as an adjudicator.[101] Westmont appealed, claiming the hearing provided to John was fair. The Court of Appeal ultimately held that Westmont did not provide a fair hearing and did not comply with its own policies and procedures.[102]

The Court of Appeal found that the hearing was unfair because of the investigator's role as an adjudicator and because the other panel members approved the credibility determinations of the investigator without hearing from critical witnesses themselves.[103] The Court relied on *Doe v. USC* (2106) and (2018) in finding the oral testimony of witnesses is invaluable to a finding of credibility, and in finding each adjudicator must hear from critical witnesses before determining credibility. The Court also held the hearing was unfair because John could not propose questions for certain non-testifying witnesses. The Court held the accused must have the ability to question the accuser and other witnesses when decisions turn on witness credibility.[104]

Thus, the Court again confirmed a fair hearing must allow a respondent to cross-examine the accuser and other witnesses whose credibility is deemed critical, confirming that barrier could not be moved in a survivor's path to justice on campus.

F. Confirming the Extension of Process: Doe v. Occidental College *(2019)*

In this case, Jane Doe returned to her dorm room after a night of heavy drinking.[105] That same night, John Doe also became extremely intoxicated in his room in the same dormitory.[106] Jane went to John's room that night. Her roommates followed her because she was drunk, and they found John and Jane kissing and dancing. Jane's friend told

101. *Id*. at 633–34.
102. *Id*. at 625.
103. *Id*. at 637.
104. *Id*. at 638–39.
105. Doe v. Occidental Coll., 40 Cal. App. 5th 208, 213 (2019).
106. *Id*.

Jane to stop drinking and that she was too drunk. Jane's friend believed John heard her say this.[107] Jane's friends later brought her back to her room because she was incoherent. Later, Jane went to John's room and they had sex.[108] The next day, Jane filed a complaint against John, claiming that she had been incapacitated and unable to give consent when they had sex.[109]

Occidental's Title IX team investigated the accusations.[110] The hearing coordinator then reviewed the Title IX team's investigative report, including summaries of witness interviews, and recommended a hearing.[111] At the hearing, the witnesses, including Jane, appeared in person and were questioned by an external adjudicator.[112] John proposed questions for the adjudicator to ask, but not all were asked. After hearing the evidence, the adjudicator determined John had violated the policy and should be expelled from Occidental.[113]

John unsuccessfully appealed within the college, then filed a petition for writ of mandate in the trial court.[114] The trial court denied the petition, John appealed, and the Court of Appeal affirmed the trial court's order denying John's petition for a writ of mandate.[115]

On appeal, John argued the adjudicator's refusal to ask Jane twenty-nine of the thirty-eight of his written cross-examination questions showed bias and antagonism toward him.[116] The Court found under Occidental's policy, the adjudicator had the discretion to refuse to ask inappropriate, irrelevant, or cumulative questions, and that this was not an unfair policy.[117] John also claimed the procedure was cumulatively unfair.[118] The Court held there was sufficient

107. *Id*. at 214.
108. *Id*. at 216.
109. *Id*. at 217.
110. *Id*. at 219.
111. *Id*.
112. *Id*.
113. *Id*. at 220.
114. *Id*. at 211.
115. *Id*. at 231.
116. *Id*. at 228.
117. *Id*.
118. *Id*. at 230.

evidence to support the finding that Jane was incapacitated and unable to consent.[119]

In holding that Occidental's policy complied with the cases reviewed above—that have created additional procedural requirements only in sexual misconduct proceedings—the Court summarized how those requirements were met here. Namely, because the critical witnesses appeared in person at the hearing, and the respondent had an opportunity to propose cross-examination questions for the adjudicator ask the complainant, fair process was provided under the school's policy.[120]

In *Doe v. Occidental*, while the Court affirmed John's suspension, it also confirmed a hearing in sexual misconduct cases (and only in such cases) must be in-person and a perpetrator must have the opportunity to cross-examine critical witnesses, solidifying precedent.

G. A Separate Path in Place for Victims of Gender Violence on Campus

The common thread running through each of the preceding cases, and fully affirmed in *Occidental*, is gender violence. Each case was disciplinary in nature, and in each decision, the Court imposed procedural hurdles that currently only apply in disciplinary hearings involving sexual violence. Under the Court's precedent, other university disciplinary proceedings—even those involving physical violence and similar severe consequences for the respondent—do not have the same procedural requirements nor do they impose the same barriers for complainants. This has created two separate and unequal paths to justice in university disciplinary proceedings: a steep, windy, rocky track for survivors of gender-based violence, and an even, straight, sleek track for all other types of disciplinary cases involving sanctions.

Indeed, the California Courts of Appeal has explicitly considered other types of disciplinary cases in nongender-based violence cases, with similar sanctions in place, and has declined to apply similar procedural hurdles in those on-campus investigations.

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119. *Id*.

120. *Id*. at 224 (citing Doe v. Westmont Coll., 34 Cal. App. 5th 622, 635 (2019)).

For example, in *Doe v. University of Southern California,* the Court of Appeal held a student who was suspended for one year after cheating on a test was provided a fair hearing by merely allowing the student to review a faculty report explaining the charge, the evidence supporting the charge, and the professors who initiated the disciplinary action.[121]

Similarly, in *Patel v. Touro University*, the university expelled a student for stalking a professor. The Court of Appeal held the expelled student received due process even though the student was unable to confront or cross-examine his accusers.[122] In this case, the expelled student and professor had no prior relationship, and the stalking did not amount to intimate partner abuse.[123]

Again, in *Berman v. Regents of University of California*, the Court of Appeal held due process requirements were satisfied where a college sanctioned a graduate student with a two-quarter suspension after striking another student while intoxicated.[124] The Court upheld the suspension even though the Dean imposed a greater penalty than recommended by the board and did not provide the student a hearing.[125]

In *Wells v. Biola University, Inc.*, the Court of Appeal held due process requirements were satisfied when a graduate student was expelled for intoxication in violation of the student code, even though she claimed the evidence relied upon consisted of hearsay and prejudiced testimony.[126] The student was not provided an opportunity to cross-examine, and the student did not object to the proceedings on that basis.

Even the first Court of Appeal decision that led to the overt gender bias in California law explained that "[i]n administrative cases addressing sexual assault involving students who live, work, and study on a shared college campus, cross examination is especially fraught

121. Doe v. Univ. of Cal., 28 Cal. App. 5th 26, 39–40 (2018).

122. Patel v. Touro Univ., No. A140764, 2015 WL 8827888, at *8 (Cal. Ct. App. Dec. 15, 2015).

123. *Id*. at *3.

124. Berman v. Regents of Univ. of Cal., 229 Cal. App. 4th 1265, 1267–68 (2014).

125. *Id.* at 1270, 1274–75.

126. Wells v. Biola Univ., Inc., No. B184265, 2006 WL 1633475, at *5–7 (Cal. Ct. App. Jun. 14, 2006).

with potential drawbacks."[127] Five years later, the Court of Appeal appears to have all but forgotten this concern. Instead, it has erected barriers only for sexual assault victims, and in *Boermeester v. Carry*, it extended those hurdles beyond sexual assault to apply to intimate partner violence as well.

III. THE BOERMEESTER CASE

On September 16, 2020, the California Supreme Court granted USC's Petition for Review of the Court of Appeal's decision in *Boermeester v. Carry* and agreed to full briefing and consideration of the following issues in the case:

> (1) Under what circumstances, if any, does the common law right to fair procedure require a private university to afford a student who is the subject of a disciplinary proceeding with the opportunity to utilize certain procedural processes, such as cross-examination of witnesses at a live hearing?
> (2) Did the student who was the subject of the disciplinary proceeding in this matter waive or forfeit any right he may have had to cross-examine witnesses at a live hearing?
> (3) Assuming it was error for the university to fail to provide the accused student with the opportunity to cross-examine witnesses at a live hearing in this matter, was the error harmless?[128]

Below is an in-depth review of the facts, procedure and legal arguments in *Boermeester* at each state court level, followed by an analysis of why the California Supreme Court must reverse.

A. Factual Background

Matthew Boermeester was a student-athlete at USC. One night, he became violent with his ex-girlfriend, Jane Roe, another student-athlete at USC. A student witnessed the event and reported it to the men's tennis coach, who then told USC's Title IX Coordinator,

127. Doe v. Univ. of S. Cal., 246 Cal. App. 4th 221, 245 (2016).

128. Boermeester v. Carry, No. S263180, 2020 Cal. LEXIS 7104 (Oct. 14, 2020).

Gretchen Means, about the incident.[129] This triggered a Title IX investigation.

The Title IX Investigator, Lauren Helsper, interviewed Roe two days after the incident.[130] Roe's advisor was present at the interview and Roe recounted what happened.[131] Roe reported Boermeester attended a party where he consumed a large amount of alcohol.[132] He asked Roe to pick him up from the party; they got some food and went back to Roe's house.[133] As they got out of the car, Boermeester told Roe to drop her dog's leash.[134] When she did not comply, Boermeester grabbed the back of Roe's hair and demanded that she drop the leash.[135] After resisting again, Roe dropped the leash because Boermeester grabbed her harder.[136] Then, Boermeester grabbed Roe by the neck, only letting her go after she started coughing. Boermeester laughed and eventually grabbed her again, shoving Roe against a concrete wall and banging her head repeatedly.[137] Roe's neighbors came out to check on her.[138] When the neighbors asked what happened, Boermeester told them that they were just playing around.[139] The next day Roe told Boermeester that he scared her neighbors because it looked bad when he pushed her and had his hands around her neck.[140] He replied that it was a joke and told her to tell them to calm down.[141] Roe asked Boermeester if he

129. Boermeester v. Carry, No. BS170473, 2018 Cal. Super. LEXIS 13336, at *5 (Apr. 12, 2018).
130. *Id*. at *6.
131. *Id*.
132. *Id*.
133. *Id*.
134. *Id*.
135. *Id*.
136. *Id*.
137. *Id*.
138. *Id*. at *7.
139. Boermeester v. Carry, 49 Cal. App. 5th 682, 710 (2020), *depublished by* 472 P.3d 1062 (2020).
140. *Id*. at 688.
141. *Id*.

would feel bad if he hurt her.[142] He responded that he would not because if he hurt her, she brought it on herself.[143]

During the meeting with Roe, Helsper explained Roe could request an avoidance of contact order (AOC), prohibiting Boermeester from contacting her.[144] Roe stated she wanted the AOC and temporary emergency housing because Boermeester had a key to her house.[145] Although she knew the situation was bad, Roe was conflicted because she cared for Boermeester. She did not want to participate in the investigation, but the Title IX office informed Roe it was obligated to proceed, even if she chose not to participate.[146] After the interview with Roe, the Title IX office served Boermeester with notice of the investigation, the AOC, and his interim suspension.[147]

Helsper conducted interviews with Roe, Boermeester, two neighbor witnesses, and friends of Roe, among other people. In his initial interview, one of the neighbors stated he heard arguing and saw Roe and another person standing together.[148] During this interview, the neighbor stated he did not see any violence.[149] A month later, the neighbor left a message for Helsper saying he had not been completely truthful in his initial interview because he wanted to respect Roe.[150] He stated "he heard laughing and screaming sounds coming from the alley."[151] The neighbor explained he then went outside and saw that Boermeester had both of his hands around Roe's neck, pushing her against the wall and that Roe was gagging.[152] The neighbor said he asked the two how things were going and then Boermeester and Roe walked back into her house.[153]

142. *Id*.
143. *Id*.
144. *Id*.
145. *Id*.
146. *Id*.
147. Boermeester v. Carry, No. BS170473, 2018 Cal. Super. LEXIS 13336, at *6 (April 12, 2018).
148. *Id*. at *9.
149. *Id*.
150. *Id*.
151. *Id*.
152. *Id*.
153. *Id*. at *10.

Helsper also interviewed the other neighbor witness.[154] He informed Helsper he heard someone screaming, "a male yelling loudly, and a female talking."[155] When the neighbor looked outside his window, he saw Boermeester and Roe in the alleyway for about three seconds.[156] Boermeester had Roe "pinned against the wall with his hand on her chest or neck."[157] The neighbor became alarmed when he saw Roe's dog running around the street because "he knew Roe did not usually allow her dog to run around."[158] He woke up his roommate, told him Boermeester and Roe were fighting, and the two went outside to bring Roe back to their room.[159] They invited Roe to stay in their apartment for the night, but she declined because she did not want to make Boermeester more upset.[160] The two roommates later reported the incident to the men's tennis coach.[161]

Helsper also interviewed two of Roe's friends. One friend told Helsper that when Roe told her about the incident she said Boermeester got drunk, they got into an argument, and he grabbed her by the neck and threw her against the wall.[162] She also told Helsper that Roe was scared initially, but later determined she wanted to take it back because she felt bad for Boermeester.[163] Roe's other friend told Helsper that she advised Roe to take pictures of her injuries. Roe told her friend she was aware what Boermeester did was wrong and had the bruises as proof.[164]

Additionally, surveillance footage of the alleyway captured the incident. The video showed Boermeester shoving Roe from the area adjacent to the house into the alleyway.[165] Boermeester appeared to be holding Roe's neck or upper body area; he grabbed Roe by the

154. *Id*.
155. *Id*.
156. *Id*.
157. *Id*.
158. *Id*.
159. *Id*.
160. *Id*.
161. *Id*. at *5.
162. *Id*. at *11.
163. *Id*.
164. *Id*.
165. *Id*. at *12.

neck and pushed her toward the alley's wall.[166] Roe's head and body arched backwards.[167] Then, Boermeester and Roe were against the wall and barely visible.[168] The two re-entered the camera's view and proceeded to push each other.[169] Boermeester moved toward Roe and appeared to be pushing her against the wall. The footage shows a dog running across the alley.[170] A third party entered the camera's view and walked in the direction of Boermeester and Roe; at that moment, Boermeester and Roe walked away from the wall and back toward the house.[171]

Helsper interviewed Boermeester on January 30, 2017, with his mother present as his advisor.[172] Boermeester reported he was at the water polo house the night he asked Roe to come get him.[173] The two of them got food and went back to Roe's house.[174] Roe had her dog on a leash, and he asked her to drop the leash.[175] He admitted he put his hand on her neck, but said they were not arguing. Boermeester also stated he was not choking Roe nor slamming her head against the wall.[176] Boermeester said they often played around that way.[177] He admitted it would look bad for a bystander to see him like that, and he learned not to behave in that manner in public.[178] Boermeester believed that the eyewitnesses misinterpreted what they saw.[179]

Eventually, Roe recanted her story. When she met with Helpser again, she told Helsper she had reservations about the investigation. Roe felt the investigation was more about punishing Boermeester than

166. *Id*.
167. *Id*.
168. *Id*.
169. *Id*.
170. *Id*.
171. *Id*.
172. *Id*. at *8.
173. *Id*.
174. *Id*.
175. *Id*.
176. *Id*.
177. *Id*.
178. *Id*.
179. Boermeester v. Carry, 49 Cal. App. 5th 682, 710 (2020), *depublished by* 472 P.3d 1062 (2020).

her well-being.[180] Roe expressed she felt her voice was not heard.[181] In addition, Roe felt the AOC attempted to control who she talked to, and she requested it be lifted.[182] Roe also stated she did not feel like she was in danger; she thought Boermeester should be mandated to go to counseling and be on probation.[183] Despite Roe's apprehension, the investigation continued.

Helsper completed her investigation and drafted a fifty-four page Summary Administrative Review (SAR) recounting, in detail, the evidence she gathered in her investigation.[184] The SAR concluded that Boermeester engaged in conduct that caused physical harm because he had grabbed Roe by the neck, pushed her head against a wall more than once, and communicated with Roe through different means although the university's interim measure prohibited him from contacting her."[185] The Misconduct Sanctioning Panel met and recommended a sanction of expulsion for Boermeester.[186] Boermeester appealed USC's determination to a Title IX Appeal Panel.[187] The Appeal Panel issued a Memorandum to Ainsley Carry, the Vice President for Student Affairs, concluding substantial evidence supported Helpser's conclusions but found there was one legitimate basis for appeal.[188] The Memorandum concluded the expulsion was grossly disproportionate to the violations found and recommended, instead, a two-year suspension and the completion of a fifty-two-week domestic violence batterers program.[189]

Later, Carry issued a letter to Boermeester stating he approved Helsper and the Appeal Panel's findings.[190] However, Carry rejected the Appeal Panel's recommendation for a two-year suspension and

180. *Id*. at 689.
181. *Id.*
182. *Id*.
183. *Id*.
184. Boermeester v. Carry, No. BS170473, 2018 Cal. Super. LEXIS 13336, at *5 (April 12, 2018).
185. *Id*.
186. *Id*.
187. *Id*.
188. *Id*.
189. *Id*. at *13–14.
190. *Id*. at *14.

imposed the sanction of expulsion.[191] Carry contended that the Appeal Panel's concern that it was not clear whether Boermeester's conduct was intentional or simply reckless was not a mitigating factor for Boermeester because intent to cause harm is not a required element of the charges brought against Boermeester.[192] After receiving the decision from USC, Boermeester sought a writ of mandate directing USC to set aside its decision to expel him.[193]

B. Trial Court

Boermeester's petition for writ of mandate was brought pursuant to California Code of Civil Procedure (CCP) section 1094.5.[194] Boermeester contended the procedure leading to his expulsion violated his due process rights and complained that the decision was not supported by sufficient evidence.[195] The Superior Court of California denied the petition.[196] It found Boermeester did not establish a denial of due process. Boermeester argued he was deprived of due process in part because: (1) Helsper and Means failed to accurately record witness testimony; (2) he did not receive a formal evidentiary hearing; (3) USC's procedures were unfair; (4) the investigator failed to presume that he was not responsible; (5) the Appeal Panel improperly decided procedural issues using a substantial evidence standard; and (6) the Appeal Panel failed to address his allegations that the Title IX office mishandled the investigation by, among other things, violating a policy against proceeding with an investigation after an alleged victim refused to cooperate.[197]

The Superior Court noted fair process in student disciplinary proceedings requires informal give and take between the student and

191. *Id*.
192. *Id*.
193. *Id*.
194. *Id*. at *2. CCP section 1094.5 is a mandamus provision outlining the procedure for judicial review of adjudicatory decisions rendered by administrative agencies. "Under CCP section 1094.5(b), the pertinent issues are: (1) whether the respondent proceeded without jurisdiction; (2) whether there was a fair trial; and (3) whether there was a prejudicial abuse of discretion." *Id.* at *15.
195. *Id*.
196. *Id*.
197. *Id*. at *17–18.

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."[198] The trial court reasoned though, that the hearing does not need to include all the procedural safeguards required in a criminal trial. The trial court also concluded USC provided Boermeester notice and the opportunity to be heard as required under the law. USC informed Boermeester of the charges and provided him an opportunity to respond to those charges.[199] Specifically, Boermeester met with Helsper on January 30, 2017, and had the opportunity to share his side and characterize his conduct.[200] He also had the ability to review all documents and information gathered in the investigation.[201] After reviewing the evidence, he had the chance to answer questions posed by Roe and submit new information at an evidentiary hearing.[202] Boermeester chose to submit a written statement rather than attend the evidence hearing.[203] Finally, at the close of the investigation, Boermeester was able to appeal the decision to a Title IX Appeal Panel.[204]

The court found USC was not obligated to provide Boermeester with a formal evidentiary hearing because he had an opportunity to present his side of the story to Helsper and to respond to all the evidence gathered in the investigation.[205] Boermeester claimed USC denied him the opportunity to question the actual complainant or any complaining witness, but there was no evidence in the record that he made any request to pose questions to the witnesses.[206] Boermeester was unable to establish that Helsper and Means were motivated by bias or that the university was biased in its investigation. He argued it was unfair for Helsper to make the initial factual findings, credibility assessments, and determination of responsibility because the "Title IX

198. *Id*. at *21 (quoting Doe v. Univ. of S. Cal. 246 Cal. App. 4th 221, 245–46 (2016)).
199. *Id*. at *19.
200. *Id*.
201. *Id*.
202. *Id*.
203. *Id*.
204. *Id*. at *19–20.
205. *Id*. at *21–22.
206. *Id*. at *22.

Officer's initial opinion of responsibility remained steadfast throughout the investigation even after the reporting party objected to the Title IX office's agenda."[207] But, the trial court found due process does not require a separation of powers, and in some cases, a single individual may act as investigator, prosecutor, and decision maker.[208] To prove bias, the court noted a petitioner must introduce affirmative evidence of prejudice against him.[209] Boermeester was unable to produce such evidence.

C. Court of Appeal

Boermeester appealed the trial court's denial of his writ of mandate to the Court of Appeal. Boermeester first contended he was denied notice and that the interim measures were improper.[210] Boermeester claimed USC denied him notice because he was unaware the investigation would extend to prior conduct in past relationships to find a pattern of intimate partner violence (IPV). On this issue, the Court held that the university not only provided notice of the facts, but the school also provided an opportunity for Boermeester to respond.[211]

The Court explained a fair procedure merely requires "notice reasonably calculated to apprise interested parties of the pendency of the action . . . and an opportunity to present their objections" and the accused only "must be given *some* kind of notice and afforded *some* kind of hearing."[212] It held, therefore, the written notice of Boermeester's policy violation, which included the specific occurrences in question, sufficiently complied with the notice requirements under the law.[213] The Court also found Boermeester had notice of the specific details that USC was investigating because he was apprised of the content of the investigation as it was unfolding.[214]

207. *Id*. at *23.
208. *Id*. at *24.
209. *Id*.
210. Boermeester v. Carry, 49 Cal. App. 5th 682, 694 (2020), *depublished by* 472 P.3d 1062 (2020).
211. *Id*. at 696.
212. *Id.* at 695 (quoting Doe v. Univ. of S. Cal., 246 Cal. App. 4th 221, 240 (2016)).
213. *Id*. at 696.
214. *Id*.

Second, Boermeester argued his interim suspension was unfair because he did not have a hearing nor see the supporting evidence.[215] The Court applied *Goss v. Lopez* in holding the suspension was fair. It held USC's policy complied with *Goss* by allowing the imposition of an interim suspension if the school believed the accused posed a substantial threat to any member of the university.[216] In this case, the Court found there was sufficient evidence to justify the interim suspension.[217]

Further, the Court pointed out neither *Goss* nor any other authority required separate notice and hearings if interim measures were also imposed.[218] Lastly, the Court held USC provided Boermeester with the evidence supporting his suspension because he was given written notice of the charges, a review of the interim suspension, and he was able to speak to a Title IX investigator about the evidence.[219]

Most importantly, Boermeester contended "he was entitled to a live evidentiary hearing where he [could] cross-examine witnesses."[220] On this issue, the Court of Appeal ultimately held Boermeester's fair hearing argument was supported and reversed.[221] In reaching its holding, the Court overviewed relevant legal authorities—all decisions from the last five years extending constitutional criminal due process requirements to private universities' Title IX procedures for sexual misconduct investigations.[222]

The dissenting opinion argued the due process clause does not apply in cases involving private universities.[223] It noted there is no precedent requiring schools to take an adversarial approach to student discipline instead of an investigatory one.[224] Further, the dissent

215. *Id.*
216. *Id*.
217. *Id*.
218. *Id*.
219. *Id*.
220. *Id.* at 694.
221. *Id*.
222. *Id*. at 698–99.
223. *Id*. at 722 (Wiley, J., dissenting).
224. *Id.*

emphasized that "U.S. law considers the inquisitorial or investigatory model 'fair enough for critical administrative decisions like whether to award or terminate disability benefits.'"[225]

Nevertheless, from the "relevant legal authority," the Court cobbled together its components for a fair hearing: (1) notice of charges and university policies and procedures;[226] (2) compliance with the policies and procedures;[227] (3) evidence access;[228] (4) a live hearing with testimony and written reports from critical witnesses;[229] and (5) ability to cross-examine critical witnesses, directly or indirectly, when misconduct determinations turn on witness credibility. [230]

USC argued, and the dissent agreed, that Boermeester forfeited his right to cross-examine witnesses when he did not request to cross-examine third-party witnesses and refused to submit questions for Roe.[231] USC asked Boermeester's attorney to submit questions for Roe but the attorney refused.[232] The dissent pointed out USC previously accommodated Boermeester's requests even though the accommodations were not required.[233] Therefore, there was no reason why Boermeester would think it would be futile to request cross-examination of Roe or the other witnesses.[234]

In addition, the dissent argued Boermeester did not request these crosses because: (1) Boermeester would not have gained anything from cross-examining two of the witnesses, and (2) cross-examining Roe and the third-party witnesses who had the same story as Roe

225. *Id.* (quoting Haidak v. Univ. of Mass.-Amherst, 933 F.3d 56, 68–71 (1st Cir. 2019)).

226. *Id*. at 275 (citing Doe v. Univ. of S. Cal., 246 Cal. App. 4th 221, 241 (2016)).

227. *Id*. (citing Doe v. Regents of Univ. of Cal., 5 Cal. App. 5th 1055, 1078 (2016)).

228. *Id*. (citing Doe v. Regents of Univ. of Cal., 28 Cal. App. 5th 44, 57–59 (2018)).

229. *Id*. (citing Doe v. Westmont Coll., 34 Cal. App. 5th 622, 637 (2019)).

230. *Id*. (citing Doe v. Occidental Coll., 40 Cal. App. 5th 208, 224 (2019); Doe v. Allee, 30 Cal. App. 5th 1036, 1039 (2019)).

231. *Id*. at 700, 718.

232. *Id*. at 713 (Wiley, J., dissenting).

233. *Id*. at 718.

234. *Id*. (Wiley, J., dissenting).

would hurt his position.[235] Essentially, the dissent concluded failure to request cross-examinations was merely a litigation strategy.[236] On this matter, the dissent concluded, "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 . . . stockpiling secret grievances should not be acceptable."[237]

The majority, however, declined "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."[238] The majority focused on the fact that at the time of USC's investigation, permitting cross-examinations of complainants in sexual violence Title IX proceedings was not yet precedent in California.[239]

In a strange turn, the majority also found "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," as demonstrated by USC's denial of Boermeester's request that Roe's answers be delivered to him unchanged.[240] The dissent asserted the opposite: "USC said it indeed would not filter. It would provide the answers verbatim, and he would get them before any Summary Administrative Review."[241] Further, the majority found Boermeester's refusal to submit questions for Roe was not a waiver of the right because Boermeester objected to USC's denial of the request for unfiltered access to Roe's hearing responses.[242] The Court further echoed *Allee, Westmont College, Occidental College,* and *Claremont*:

> 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'*

235. *Id*. at 717 (Wiley, J., dissenting).
236. *Id.*
237. *Id*. at 718 (Wiley, J., dissenting).
238. *Id*. at 700.
239. *Id*.
240. *Id*. at 701.
241. *Id*. at 716 (Wiley, J., dissenting).
242. *Id*.

> *demeanor and properly decide credibility*. 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*. We further agree the cross-examiner has discretion to omit questions that are irrelevant, inflammatory, or argumentative.[243]

At the time, USC's Title IX proceedings allowed for two evidentiary hearings. One party would be present during each of these hearings and the panel would ask the party questions written by the panel or the opposing party. However, the Court found this was insufficient because students in Boermeester's situation must be "given ample opportunity to *hear and observe* the witnesses against them."[244] According to the Court, Boermeester did not receive a fair hearing because he could not be present in person for Roe's responses and could not question or follow-up with Roe or other witnesses in person.[245] This ruling extended the requirement of in person cross-examination to intimate partner violence hearings on school campuses.

USC and the dissent argued the majority's cited precedent should not be followed because this case, one of intimate partner violence, was distinguishable from the string of cases the majority relied on, which all involved sexual assault.[246] The Court rejected this argument and stated sexual misconduct cases can stem from domestic relationships and accusers may also recant in such circumstances.[247] The Court reasoned both cases required the university to make credibility determinations based on conflicting statements; the video tape was inconclusive; and the same USC policies applied to both sexual misconduct cases generally and IPV cases in particular.[248]

Thus, the Court of Appeal brought us to where we are now, extending the requirement of a school to allow live cross-examination

243. *Id*. at 705 (emphasis added).

244. *Id*. at 706 (quoting Goldberg v. Regents of Univ. of Cal., 248 Cal. App. 2d 867, 882 (1967)) (emphasis added).

245. *Id*.

246. *Id*.

247. *Id*. at 707.

248. *Id*.

beyond the realm of sexual violence investigations to also include intimate partner violence. In doing so, the Court continued to rely on harmful and false assumptions about sexual violence, doubling down on its decisions over the past five years that have created a separate track for disciplinary proceedings on school campuses that has nothing to do with the severity of the sanction at stake. Rather, these onerous and unnecessary requirements only apply to investigations where the misconduct is based on gender. By extending its harmful precedent to intimate partner violence, it has now forced domestic violence victims to navigate its separate and unequal path to on-campus justice.

Notably, the overt gender bias in the Court of Appeal's decision is disturbingly evident before it ever delves into the legal precedent. Indeed, the very *first line* of the factual background written of the Court's opinion introduces Mr. Boermeester by stating that he "kicked the game-winning field goal for USC at the 2017 Rose Bowl."[249] Boermeester's status as a USC football hero is, of course, irrelevant to whether he abused Roe, and the Court's inclusion of this unnecessary and biased fact troublingly suggests that it considered Boermeester's status as a football star relevant in its decision.

D. California Supreme Court

In recognizing the legal error of the Court of Appeal's decision and the harm its ruling would have on survivors across the state, USC filed a Petition for Review with the California Supreme Court on July 6, 2020. The California Women's Law Center and other organizations submitted *amici* letters of support urging the Court to grant the petition. The California Women's Law Center, along with thirteen co-signatories—organizations who combat sexual and intimate partner violence—argued that without the California Supreme Court's intervention, the separate and unequal two-track system the Court of Appeal created will require live cross-examination of parties and witnesses only in gender-based disciplinary proceedings. This separate but unequal system will continue to perpetuate the false adage that women who report their assault, abuse, or rape are lying.

249. *Id*. at 687.

The California Supreme Court granted USC's Petition for Review on September 16, 2020. By agreeing to review this case, the California Supreme Court acknowledged the critical importance of the issues at stake and the impact its decision will have on survivors across the state. It now has the opportunity to reverse the dangerous gender bias that has been infused into California's judicial precedent over the last five years by the Court of Appeal. This section will review key arguments made before the California Supreme Court and argue that the Supreme Court must reverse the Court of Appeal's decision and the flawed decisions preceding it.

In its merits brief before the Supreme Court, USC argued that common law fair procedure does not require live hearings with cross-examination."[250] Common law fair procedure only requires "private institutions [to] 'retain the initial and primary responsibility' for developing fair procedures."[251] Citing precedent, USC argued common law does not require a school to implement a specific process.[252] In fact, common law fair procedure only requires adequate notice of the charges, and an opportunity to respond.[253] This is in direct contradiction to the Court of Appeal's decision requiring live hearings and the ability to conduct live cross-examination.[254] When reviewing common law fair procedure, courts may only evaluate whether there was a fair administrative procedure.[255] USC went on to explain how it provided Boermeester a fair hearing under common law fair procedure. For example, USC provided Boermeester proper notice, which the Court of Appeal held to be sufficient.[256] In addition, USC provided Boermeester multiple opportunities to respond to the charges against him and to be heard.[257] Lastly, USC provided Boermeester with multiple layers of review.[258]

250. Brief for Respondent at 37–38, Boermeester v. Carry, No. S263180 (filed Dec. 14, 2020).

251. *Id*. at 25 (quoting Pinsker v. Pac. Coast Society of Orthodontists, 12 Cal. 3d 541, 555 (1974)).

252. *Id*. at 25–26.

253. *Id*. at 27.

254. *Id*.

255. *Id*. at 26–27.

256. *Id*. at 30.

257. *Id*. at 30–31.

258. *Id*. at 31.

USC also made arguments related to its status as a private university. USC argued the "California courts should not treat due process principles applicable to state action as 'instructive' or otherwise controlling as to common law fair procedure requirements."[259] USC claimed there are many reasons why constitutional due process and common law fair procedure should not be confused. First, while due process exists to protect the people from the State, fair procedure merely "places rudimentary constraints" on private actors when their decisions can deprive individuals of their right to pursue a livelihood or other vital economic interest."[260] Second, fair procedure is based on flexible common law, whereas due process is based on the rigid Constitution.[261] Third, courts are experts in applying (and, indeed are meant to apply) due process, while they are not competent to manage private affairs.[262]

The preceding legal arguments are well-supported and should lead to reversal. Yet the impact of the Courts of Appeal's ever-expanding precedent—applied statewide only to survivors of sexual violence—is critical in the Court's review of this case. If not reversed, survivors of gender-based violence and intimate partner violence will be unfairly and unnecessarily harmed. In California, every institution of higher learning is required to provide a safe environment for its academic community.[263] Under Title IX, educational institutions are also required to prevent and address sexual harassment, including sexual assault and dating violence. Moreover, educational institutions must eliminate any hostile environment to ensure that students, particularly female students, have equal access to education.[264] Intimate partner violence and other forms of gender-based discrimination impede that goal and have lifelong impacts on survivors and the campus community as a whole. Requiring cross-examination in a live hearing, and only doing so for gender-based violence investigations, gives respondents an opportunity to confront the survivor, exacerbating an

259. *Id*. at 33.
260. *Id*. at 36.
261. *Id*. at 37.
262. *Id*.
263. *See* CAL. EDUC. CODE, §§ 200, 220.
264. *See* 20 U.S.C. § 1681; A.B.A. *Recommendations*, *supra* note 4, at 6.

already grave problem by making survivors less likely to report and re-traumatizing those who do come forward.

Requiring schools to allow live cross-examination in gender-based violence investigations undermines federal and state laws that require schools to eliminate hostile environments. Survivors will be forced to be either re-traumatized through cross-examination or to co-exist with their assailant on campus.[265] Neither option reduces a hostile environment; instead, each perpetuates it. Additionally, the traditional rules of evidence do not apply in on-campus proceedings. So in many instances, respondents can use a survivor's prior sexual history or hearsay statements to attack an already traumatized survivor further.

The Court of Appeal's decision, and the prior decisions it relies upon, are also premised on an erroneous assumption that disciplinary hearings must be treated like criminal trials in America in order to be fair. This assumption is unfounded, and the Supreme Court should consider it.

The ABA's Commission on Domestic and Sexual Violence made Recommendations for Improving Campus Student Conduct Processes for Gender-Based Violence, examining the different models for adjudicating gender-based misconduct at schools, and it recommended *against* importing criminal-style proceedings into classrooms.[266] This report was the culmination of numerous interviews with campus stakeholders across the United States and an extensive peer review process involving law professors, criminal defense attorneys, prosecutors, private family law litigators, gender-based violence

265. While the U.S. Department of Education promulgated new regulations in 2020 governing disciplinary proceedings that impose more onerous procedural requirements in disciplinary proceedings, several states and national non-profit civil rights organizations, including Equal Rights Advocates, have challenged the Final Rules. *See e.g.*, Victim Rights Law Center v. DeVos, No. 1:20-cv-11104 (D. Mass. filed June 10, 2020); Pennsylvania v. DeVos, 480 F. Supp. 3d, 47 (D.D.C. 2020); Know Your IX v. DeVos, No. RDB-20-01224, 2020 WL 6150935 (D. Md. Oct. 20, 2020); New York v. United States Dep't. of Educ., 477 F. Supp. 3d 279 (S.D.N.Y. 2020). And, as USC's Petition notes, "the adverse practical consequences will persist even if the regulations take effect" because the regulations are limited to a certain "range of misconduct" and "do not apply to most instances of off-campus misconduct, like the kind at issue in this very case." Brief for Respondent at 37–38, Boermeester v. Carry, No. S263180 (filed Dec. 14, 2020).

266. *See* A.B.A. *Recommendations*, *supra* note 4 at 62.

experts, and school administrators. The end result was an unequivocal and unanimous recommendation for an *investigative* model without a hearing or an investigation paired with a panel review, *not* a traditional hearing model like those employed in criminal courts. The Commission found the investigative models achieve the comprehensive prevention goal more effectively than other models by:

> • Requiring any party or witness who has experienced trauma to undergo fewer potentially re-traumatizing events. For example, repeated recounting of the traumatic events; contact between complainant and respondent during proceedings; and direct divulgences of deeply private information to the larger number of people inherent in a traditional hearing process. Such disclosures could inevitably affect the complainant's ongoing relationship with others.
> • Promoting greater sustainability as long-term responses to violence due to being more affordable in the long-term for [institutions of higher education].
> • Facilitating post-proceeding psycho-social treatment [of] and education [for] accused students who are found responsible for committing gender-based violence by avoiding the adversarial structure of a traditional hearing.[267]

California also has long recognized the procedural requirements of criminal trials are not necessary in all cases, including other highly consequential court proceedings. For example, the California Welfare and Institutions Code explicitly calls for an investigatory model in juvenile dependency proceedings, where the investigator's report (including hearsay statements of witnesses attesting to abuse or neglect) is admitted into evidence without cross-examination, and the judge questions the parents and the child when needed.[268] The Courts of Appeal have repeatedly recognized that even in such proceedings, where a parent can be stripped of their parental rights and which often involve criminal conduct, rules such as the Fourth Amendment exclusionary rule and the Sixth Amendment right to confrontation do *not* apply.[269]

267. *Id*. at 63.
268. CAL. WELF. & INST. CODE, § 319.
269. *In re* Mary S., 186 Cal. App. 3d 414, 418–20 (1986).

Federal law also considers the investigatory model to be "fair enough for *critical* administrative decisions."[270] For example, Social Security proceedings—which determine an individual's eligibility for essential benefits—are investigatory rather than adversarial.[271] European courts even approve of the investigatory process without cross-examination in *criminal* cases.[272] It cannot be that a system considered sufficient for criminal proceedings in Europe is fundamentally unfair for a university to employ in its disciplinary proceedings.

With *Boermeester*, the California Supreme Court has the chance to repair the unfair dual-track that the Court of Appeal has created by making clear that the procedures of a criminal trial, such as cross-examination of witnesses at a live hearing, are neither required nor favored to resolve disciplinary proceedings in a university setting, and by ensuring that in no instance should these unnecessary procedures only be required in gender-based violence investigations.

CONCLUSION

Gender-based violence is pervasive on school campuses across our country, and Title IX was enacted forty-nine years ago to protect students from this precise danger. Federal and state law confirm that a student cannot fully realize the benefits of their educational experience when sexual discrimination is present. Despite this, the California Courts of Appeal have issued a string of decisions that fail to protect survivors of sexual violence at the expense of ensuring they are able to enjoy the same educational benefits as their peers. By extending additional protections to alleged perpetrators of sexual violence in on-campus disciplinary proceedings, the Courts have created a gender-biased procedural system.

Boermeester gives the California Supreme Court an opportunity to put an end to this harmful and unnecessary movement towards permitting unnecessary and harmful procedural requirements in on-

270. Haidak v. Univ. of Mass.-Amherst, 933 F.3d 56, 68–71 (2019) (emphasis added).

271. *See* Sims v. Apfel, 530 U.S. 130, 110–11 (2000).

272. Abraham S. Goldstein & Martin Marcus , *The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy, and Germany* 87 YALE L.J. 240, 266 (1977).

campus proceedings involving sexual violence. Title IX is not a criminal statute, and its purpose is to protect students from gender discrimination, harassment, and violence at their school. The California Supreme Court should effectuate Title IX's purpose by rejecting the Court of Appeal's attempts to turn classrooms into courtrooms and to only do so for those who experience sexual violence.