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July 6, 2020

VIA TRUEFILING

Chief Justice Tani Cantil-Sakauye
and Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Re: Request for Depublication
Boermeester v. Carry
Supreme Court Case No. S_____
Court of Appeal Case No. B290675
Opinion filed: May 28, 2020

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Pursuant to rule 8.1125 of the California Rules of Court, respondents Ainsley Carry and the University of Southern California (USC) respectfully request that this Court order depublication of the Court of Appeal's opinion in the event USC's concurrently filed petition for review is denied. If this Court grants USC's petition for review, it should order that the Court of Appeal's opinion is not citable pending review. (See Cal. Rules of Court, rule 8.1115(e)(3).)

Introduction

USC student Matthew Boermeester grabbed his ex-girlfriend, USC student Jane Roe, by the neck and pushed her against a wall. An eyewitness reported the incident to USC, and Roe initially confirmed the details before ultimately recanting, which is common among victims of domestic violence.¹

After conducting an exhaustive investigation and affording Boermeester the opportunity to review the evidence and tell his side of the story, USC decided to expel

¹ The Court of Appeal used the terms "intimate partner violence" and "domestic violence." (Typed opn. 2; dis. typed opn. 1.) We use "domestic violence" for consistency.

Boermeester for violating its policy against domestic violence. The superior court denied Boermeester's petition for a writ of administrative mandate and he appealed.

The Court of Appeal reversed in a two-to-one published opinion. The majority held that USC should have afforded Boermeester the opportunity to cross-examine witnesses at a live hearing even though he never requested cross-examination and declined USC's invitation to propose questions to be asked of Roe. (Typed opn. 2, 13, 23-26, 30-34.) The dissent would have held that USC's procedure was fair and its decision supported by substantial evidence. (Dis. typed opn. 1, 6, 23.)

While there are "no fixed criteria for depublication," this Court has most often depublished opinions where the Court of Appeal's decision was "wrong on a significant point" or the opinion "was too broad and could lead to unanticipated misuse as precedent." (Eisenberg, Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2019) ¶ 11:180.1, p. 11-74.) Both of these criteria are satisfied here. Depublication is warranted because the majority opinion is wrong in two key respects and lends itself to future misuse that could have serious adverse consequences for universities and their students.

First, the Court of Appeal faulted USC for failing to afford Boermeester the opportunity to cross-examine witnesses at a live hearing even though he never sought cross-examination and rejected the opportunity to present questions to be asked of Roe. (Typed opn. 2, 13, 23-26, 30-34.) As the dissent explained, the majority thus misapplied principles of waiver and forfeiture that are fundamental to the appellate process. (Dis. typed opn. 9-16.) In doing so, the Court of Appeal reached out to decide an issue of great consequence that was not raised below and was not applicable to the facts of the case.

Second, the majority held that cross-examination at an in-person hearing is required not only in certain cases of sexual misconduct, as prior decisions have held, but also in cases of domestic violence where the accused student faces a severe sanction and the credibility of witnesses is central to the university's determination. (Typed opn. 27-33.) That holding overlooks key differences between claims of sexual misconduct and domestic violence and threatens serious harm to both universities and their students.

In addition to these analytical errors, the majority opinion includes passages that counsel for accused students in a wide array of disciplinary proceedings could misinterpret to sweep even more broadly, suggesting that cross-examination is also

required in other situations unrelated to sexual misconduct and domestic violence. This Court should grant depublication to ensure that this broad language is not misapplied in future cases—contrary to the Court of Appeal’s clear intent—to require cross-examination at live hearings in disciplinary proceedings for entirely unrelated types of student misconduct, such as alcohol abuse, hazing, and academic integrity violations. USC sought rehearing to fix the overbroad language in the Court of Appeal’s opinion, but the court denied the petition.

Expanding cross-examination this broadly could seriously interfere with all California universities’ ability to provide an educational environment that is safe for survivors of sexual assault, domestic violence, or other forms of bullying or abuse. The increased burden on university resources caused by requiring live hearings in all cases would divert resources from educational programs. Requiring cross-examination in all cases could also have a chilling effect on survivors’ reporting of domestic violence.

The majority opinion runs afoul of this Court’s precedent, deepens existing splits of authority in an evolving area of the law, is wrongly decided, creates confusion in the existing law, and will have an adverse impact on both universities and their students. If this Court denies USC’s petition for review, it should order the Court of Appeal’s opinion depublished.

The Court of Appeal’s opinion should be depublished.

1. *The majority opinion reaches out to decide the important issue of whether to expand, for the first time, the right to cross-examination at a live hearing in a university’s domestic violence disciplinary proceeding where the issue was not raised below and the right would not have benefitted the accused.*

In order to preserve arguments for appeal, litigants must ordinarily raise the arguments below. (*Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 184, fn. 1.) Courts have consistently applied this rule in administrative mandamus challenges to university disciplinary procedures. (See *Doe v. Occidental College* (2019) 40 Cal.App.5th 208, 225 (*Occidental College*); *Doe v. Occidental College* (2019) 37 Cal.App.5th 1003, 1018.) This rule promotes 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.” (Dis. typed opn. 15.)

Here, not only did the majority expand the law to require cross-examination at a live hearing in cases of domestic violence where witness credibility is central, it did so where the accused student neither wanted nor asked for live cross-examination. When USC asked Boermeester's lawyer to submit questions for Roe, the lawyer responded "I am not interested in having [Roe] come in and being put on the spot yet again." (1 AR 293.) Boermeester also never asked to cross-examine witnesses other than Roe, yet the majority reversed USC's disciplinary decision because USC did not afford him the opportunity to do so. (Typed opn. 31.)

Boermeester's failure to request live cross-examination was not due to a mere procedural technicality or accidental forfeiture. Rather, Boermeester had good reasons for eschewing live cross-examination and made a considered choice to do so. Once Roe recanted her accusations of abuse, questioning her further could only hurt his defense. Similarly, because Boermeester himself admitted the physical facts that he grabbed Roe's neck and pushed her (1 AR 60, 172-173), the other witnesses "either did not matter or were hazardous to question further" (dis. typed opn. 13). Thus, "Boermeester sensibly avoided further questions to these witnesses." (*Ibid.*)

In short, the majority concluded that USC was obligated to afford Boermeester the opportunity to cross-examine witnesses at a live hearing even though he disavowed any interest in pursuing cross-examination when given the opportunity to do so. As the dissent put it, USC did not deprive Boermeester of a right to confrontation for the simple reason that he made no request for it. (Dis. typed opn. 13.) "To rule for Boermeester on this issue in this situation is unusual. Accepting such an argument in this context is unprecedented." (Dis. typed opn. 12.)

Given Boermeester's waiver of any right to live cross-examination, the majority below should not have used his case as a platform for expanding the common law of fair procedure. In doing so, the majority took it upon itself to impose substantial and burdensome new requirements on universities in a case in which those requirements would have made no difference, and for which there was an incomplete record upon which to opine on the question because Boermeester never sought live cross-examination. The majority also undermined the established jurisprudence requiring exhaustion of administrative remedies because it permitted a student to raise novel procedural issues in litigation rather than addressing them during the administrative process where the university could act on them in real time.

2. *The majority opinion deviates from this Court's precedent, deepens existing splits of authority in this evolving area, and creates confusion in the law by applying jurisprudence addressing sexual misconduct claims to cases involving domestic violence. It also employs broad language that could be misinterpreted to expand these procedural requirements to all disciplinary proceedings.*

In recent years, differing opinions from the Court of Appeal have articulated increasingly elaborate and burdensome common law procedural requirements applicable in university disciplinary proceedings arising from claims of sexual misconduct where the credibility of witnesses is central to the university's determination. (E.g., *Occidental College*, *supra*, 40 Cal.App.5th at p. 224; *Doe v. Westmont College* (2019) 34 Cal.App.5th 622, 637-639; *Doe v. Allee* (2019) 30 Cal.App.5th 1036, 1066; *Doe v. Claremont McKenna College* (2018) 25 Cal.App.5th 1055, 1057-1058.) The majority opinion here goes further still, applying those precedents in wholesale fashion to a different legal and factual context—domestic violence. The majority's decision to do so creates confusion in the law and lends the majority opinion to being misused as precedent.

To begin with, the majority's application of sexual misconduct precedents to this domestic violence case is legally unsound. Unlike paradigmatic cases of sexual misconduct, domestic violence encompasses a wide range of misconduct whose wrongfulness does not depend upon whether the victim consented to being abused. Moreover, victims of domestic violence often retract their accusations in an effort to mollify the abuser. (Dis. typed opn. 4-5, 16-17.) That is exactly what happened here. In these circumstances, requiring cross-examination is not mandated because the accused student often, as in this case, has no logical reason for cross-examining his accuser.

Requiring cross-examination in university domestic violence cases is also likely to have a particularly pronounced chilling effect on the reporting of such abuse, because survivors of domestic violence are vulnerable to retaliation by their abusers, with whom they have an ongoing relationship. (See Jeanine Percival, *The Price of Silence: The Prosecution of Domestic Violence Cases in Light of Crawford v. Washington* (2005) 79 So. Cal. L. Rev. 213, 242; 1 AR 12, 168-169 [Roe feared that Boermeester would get angry and retaliate if he learned about her role in the investigation].) The majority thus imported procedural rules developed in the context of sexual misconduct allegations to an entirely different factual and legal context. In

doing so, the majority required cross-examination and a live hearing where those procedural requirements could well be counterproductive and costly.

Some passages in the majority opinion sweep even more broadly. Taken out of context, these passages could be used to argue—incorrectly—that the right to cross-examination at an in-person hearing extends not only to sexual misconduct and domestic violence cases, but also to *all* student discipline cases involving potentially severe sanctions where witness credibility is central. Universities deal with a broad range of misconduct on a daily basis, including everything from alcohol abuse, to fraternity hazing, to academic integrity violations. In the context of university disciplinary proceedings, there is no justification for live cross-examination across the board, and, as we explain below, such a requirement would significantly affect the functioning of the institutions.

For example, the majority wrote that “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” (typed opn. 13) without clarifying that such procedures are required *only* in cases of sexual misconduct and domestic violence where witness credibility is central to the university’s decision and the accused faces severe sanctions. Later in the opinion, the majority described its holding in broad terms—“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.” (Typed opn. 30.) Such sweeping language could be argued in the future to require cross-examination in *all* student discipline cases in which the consequences are severe and witness credibility is central. Doing so would completely upend the procedures that have been used effectively and efficiently in universities to date.

USC petitioned the Court of Appeal to modify its opinion or grant rehearing to clarify that its holding applies *only* to cases of domestic violence where the accused student faces a severe sanction and witness credibility is central. (PFRH 5-6, 8-13.) But the Court of Appeal summarily denied the petition and left the sweeping language in the majority opinion untouched. Depublication is warranted to ensure that courts do not misapply the majority opinion in unrelated disciplinary contexts.

The confusion caused by the majority opinion could have serious practical consequences. Going forward, students under investigation for domestic violence

where credibility is *not* central, for example where the violence was substantially corroborated, or students under investigation for unrelated types of misconduct such as bullying or hazing, will attempt to exploit this opinion to argue that cross-examination is required in almost every case. Expanding cross-examination this broadly could seriously interfere with all California universities' ability to provide an educational environment that is safe for survivors of domestic violence and other forms of bullying or abuse, as well as requiring the universities to expend resources to deal with cross-examination and attendant evidentiary objections, and the increased quasi-trial nature of these administrative proceedings in general. The increased burden on university resources caused by requiring live hearings in all cases would divert resources from universities' primary purpose—education.

As discussed above, requiring live cross-examination could also have a chilling effect on survivors' reporting of domestic violence in the university context. As the dissent explained, "a grave concern is the effect of mandatory cross-examination on the willingness of victims to report abuse." (Dis. typed opn. 21.) A critical goal of universities' disciplinary policies is to foster a safe environment in which students can live and learn together as a close-knit academic community. Procedures that chill reporting are thus uniquely detrimental to universities' goals of ensuring no student is deprived of a safe educational environment in which to thrive and also of protecting the student body as a whole. Expanding the right to cross-examination is likely to have an especially acute chilling effect on reporting in the university setting—"In administrative cases addressing sexual assault involving students who live, work, and study on a shared college campus, cross-examination is especially fraught with potential drawbacks." (*Doe v. University of Southern California* (2016) 246 Cal.App.4th 221, 245.)

Depublication is warranted to ensure that the majority's opinion does not sow doctrinal confusion to the detriment of both universities and their students.

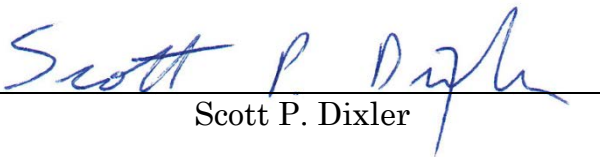
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Conclusion

For the foregoing reasons, if this Court does not grant the petition for review, this Court should order the Court of Appeal's opinion depublished. If review is granted, this Court should order that the opinion is not citable pending review. (See Cal. Rules of Court, rule 8.1115(e)(3).)

Respectfully submitted,

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PROOF OF SERVICE

Boormeester v. Carry et al.

Case No. B290675

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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

On July 6, 2020, I served true copies of the following document(s) described as **LETTER REQUEST FOR DEPUBLICATION** on the interested parties in this action as follows:

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Executed on July 6, 2020, at Valley Village, California.



Serena L. Steiner

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Case No. B290675

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