No. 20-1514

In the United States Court of Appeals for the Second Circuit

DR. MUKUND VENGALATTORE,
Plaintiff-Appellant,

v.

CORNELL UNIVERSITY; BETSY DEVOS, Secretary of Education, U.S. Department of Education; UNITED STATES DEPARTMENT OF EDUCATION,
Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of New York
No. 3:18-cv01124; Hon. Gary L. Sharpe

APPELLANT'S OPENING BRIEF

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APPELLANT'S OPENING BRIEF

INTRODUCTION

Appellant Mukund Vengalattore is one of the nation's leading experts in his field—atomic, molecular, and optical physics. He holds a Ph.D. from the Massachusetts Institute of Technology and completed a postdoctoral research fellowship at the University of California, Berkeley. He was hired as a tenure-track Assistant Professor of Physics by Appellee Cornell University in 2009 and was repeatedly recommended for tenure by his peers. But as a result of a fundamentally unfair disciplinary proceeding conducted by Cornell in a sexually and racially discriminatory manner, Dr. Vengalattore is unable to continue in his profession.

The disciplinary proceeding involved false claims by a disgruntled graduate student that she and Dr. Vengalattore had a consensual sexual encounter in 2010-11 at a time when she was working under Dr. Vengalattore. She later decided that the initial encounter was nonconsensual.

She first made her claim in September 2014, years after she had been asked to leave his laboratory because of subpar academic performance; she made her later "nonconsensual" claim more than four years after the alleged encounter. Indeed, Roe's allegation of sexual impropriety came as part of an escalating effort to derail Dr. Vengalattore's career following her ouster from the program.

Immediately after she was removed, Roe vowed to another faculty member that "if I have my way, Dr. Vengalattore will have a hard time getting tenure."

Once she learned that the tenure review committee had recommended that he be granted tenure, Roe made good on her promise through a series of escalating lies. Initially, in a letter she sent to the review committee while it was deliberating, Roe made an outlandish claim that Dr. Vengalattore had thrown a heavy piece of equipment (a five-pound power supply) at her in the laboratory. But when questioned by another faculty member, she immediately retreated and admitted that she had wildly exaggerated her story. Several other professors and students also refuted her claim in submissions to the committee, and Dr. Vengalattore was recommended for the promotion.

Undeterred, she concocted a new story (two days after the tenure recommendation) that she had a consensual relationship with Dr. Vengalattore, and she shared that story with a faculty member who had been involved in the tenure review process. Only after meeting with Title IX investigators did she then change her story yet again, to suggest that she had been unable to consent to any relationship because of the perceived power differential between her and Dr. Vengalattore.

Dr. Vengalattore at all times denied a sexual relationship with the graduate student because it never occurred. But Cornell denied him a meaningful opportunity to rebut the charge. It denied his repeated requests for a hearing and an opportunity to confront his accuser. It named two investigators to serve simultaneously as both prosecutors and fact-finders. It hired an advisor to assist the accuser in putting together her claim while offering no assistance to Dr. Vengalattore. The investigators consulted regularly with the accuser and her advisor, to let them know where the investigation stood, while denying similar access to Dr. Vengalattore. They failed to interview many of the witnesses that emphatically denied that Dr. Vengalattore had done anything inappropriate. They also disregarded witnesses who said that Roe had a history of making false accusations against other students. The investigation violated numerous Cornell policies designed to ensure fair proceedings.

The investigation also swept Roe's inappropriate behavior under the rug so that it could arrive at its preordained outcome. Other students and faculty came forward to detail how Roe had bragged that she was "sexist against men," had tried to deny male students opportunities in the lab, and had a history of making fake accusations against other male students, including baselessly calling one a "stalker" and falsely accusing another of using marijuana in the lab after he had

succeeded on a project that he took over from Roe. Students and faculty noted that Roe "was not on the level," "not honest," and had lied about the power-supply incident, as well as other alleged instances of Dr. Vengalattore having been angry in the lab.

Others came forward to note how Roe had behaved improperly, even "flipping off" Dr. Vengalattore in front of other students. Indeed, other students detailed how Roe herself made sexually and racially inappropriate comments in the lab—unwantedly touching several male students while calling them "darling," "honey," and "babe" after they had repeated asked her not to, while also saying that the lab was full of "Indians, who are hardworking like Chinese" and accusing Indian students of gaining favor with Dr. Vengalattore because "You are all Indians. Of course you stick together." As one faculty member put it, "[Roe] is someone who I me[ ]t a number of times over the years and I have to say, that I always felt that she did not treat Mukund with proper professionalism or respect. She often made unprofessional and disrespectful comments (and I also have to say that I seriously doubt she would have behaved this way to a US-born, white professor)."

But the investigators either refused to interview the witnesses about their concerns or dismissed them outright as being irrelevant to the investigation.

The investigators ultimately found, by a preponderance of the evidence and without ever holding a hearing, that Dr. Vengalattore had entered into a consensual romantic or sexual relationship with a graduate student he directly supervised, in violation of Cornell's "Romantic and Sexual Relationships Between Students and Staff" policy. But they did not find (as alleged by Roe) that the alleged initial encounter was nonconsensual. Without questioning any witnesses or hearing any additional evidence, Gretchen Ritter, the Dean of Cornell's College of Arts and Sciences, adopted those findings. Based on those findings, she suspended Dr. Vengalattore for two weeks without pay.

As a result of the fallout from the investigation, Cornell ultimately denied Dr. Vengalattore tenure, and his academic appointment ended in 2018. The unfounded inappropriate-sexual-relationship finding, which Cornell sends to universities to which Dr. Vengalattore has submitted employment applications, prevents him both from obtaining new employment and from securing lab support for his research projects.

The Amended Complaint includes detailed factual allegations supporting his claims that Cornell discriminated against him on the basis of sex and race and that the disciplinary proceedings violated his rights under the Due Process Clause. The trial court nonetheless dismissed those claims on the pleadings. It based its

ruling on faulty interpretations of relevant federal law. In particular, contrary to the holding of virtually every federal appellate court that has addressed the issue, the trial court erroneously held that Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq*., does not authorize a private right of action for claims of employment discrimination.

Cornell's decision to employ unfair and discriminatory disciplinary procedures did not arise totally out of the blue. Rather, the school acted at the extremely strong urging of Defendant U.S. Department of Education (ED). ED issued a series of guidance documents between 2001 and 2014 that threatened Title IX enforcement actions against colleges and universities that failed to adopt procedures for handling sexual misconduct complaints akin to the procedures ultimately adopted by Cornell—and it followed through on that threat on a number of occasions. ED issued the documents in violation of federal law. Dr. Vengalattore plausibly alleges that he suffered injury due to issuance of the guidance documents, which Cornell explicitly cited in adopting new procedures for handling sexual misconduct complaints.

The trial court dismissed the claims against ED, finding that Dr. Vengalattore lacked standing. It concluded that he failed to plausibly allege traceability—that is, a causal connection between the guidance documents and his

injuries. It said that Cornell might have decided to eliminate procedural protections for those accused of sexual misconduct even if ED had not prodded it to do so.

But Dr. Vengalattore's traceability claim is not mere speculation. The evidence demonstrates that virtually all major universities responded to ED's threats precisely as Cornell did. Given that consistent pattern of responses, Dr. Vengalattore has more than adequately alleged a causal connection between ED's conduct and his injuries.

JURISDICTIONAL STATEMENT

On May 1, 2020, the U.S. District Court for the Northern District of New York entered final judgment against Plaintiff-Appellant and in favor of Defendants-Appellees on all claims. Plaintiff-Appellant filed a notice of appeal on May 8, 2020. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Does Title IX of the Education Amendments of 1972 provide a private right of action for victims of sex-based employment discrimination, as at least four other federal appeals courts have held?

2. Did Dr. Vengalattore allege facts sufficient to render plausible his race/color/national-origin discrimination claim under Title VI of the Civil Rights Act of 1964?

3. Does the Due Process Clause of the Fourteenth Amendment apply to Cornell, a university directly affiliated with the State of New York?

4. Does Dr. Vengalattore possess standing to challenge Title IX guidance documents issued by the U.S. Department of Education and implemented by his employer Cornell?

5. If one or more of Dr. Vengalattore's federal causes of action are reinstated, should the Court vacate and remand for reconsideration the district court's decision not to exercise jurisdiction over Dr. Vengalattore's state-law defamation claim?

STATEMENT OF THE CASE

The district court granted judgment to Cornell and ED on the pleadings. J.A. 117-144. Accordingly, for purposes of this appeal, all well-pleaded allegations in the Amended Complaint must be accepted as true.

Jane Roe Begins Work in the Lab. While employed as an Assistant Professor of Physics at Cornell, Dr. Vengalattore conducted long-term experiments in his lab. In the spring of 2009, he began recruiting graduate student

assistants to work in his lab on an experiment related to ultracold atomic gases. Am. Compl. ¶ 199. "Jane Roe," a Cornell graduate student, became the first of several graduate and undergraduate students to work on the experiment. *Id.* ¶ 201. Throughout her tenure, Roe struggled with certain aspects of the project and told Dr. Vengalattore that she was having difficulty keeping up with her workload. *Id.* ¶¶ 203-04, 210-11, 275, 278. During a visit in July 2010, a colleague of Dr. Vengalattore observed that Roe worked far fewer hours than even the undergraduate students and appeared to be far less knowledgeable about the project than other students. *Id.* ¶ 215.

Others who worked in the lab were critical of Roe's personal conduct. She repeatedly referred to them and Dr. Vengalattore by names like "honey," "hon," "darling," and "babe" despite repeated requests that she not do so. *Id.* ¶¶ 225-229. She had difficulty working with Srivatsan Chakram, another graduate student. *Id.* ¶ 230. She repeatedly made racially insensitive remarks, telling Dr. Vengalattore during one meeting involving other graduate students, "You are all Indians. Of course you stick together"; and telling another graduate student, Yogesh Patil, that he, Chakram, and Dr. Vengalattore could be expected to work long hours because "they are Indians, who are hardworking, like Chinese." *Id.* ¶¶ 258-260.

Roe was also disrespectful and disruptive in the lab. She would often raise her voice, and during one lab meeting "flipped off" Dr. Vengalattore and left. *Id.* ¶¶ 256-57. As one professor noted later, "she never displayed any sort of professional respect for" Dr. Vengalattore. *Id.* ¶ 287. The professor also said, "Roe is someone who I me[ ]t a number of times over the years and I have to say, that I always felt that she did not treat Mukund with proper professionalism or respect. She often made unprofessional and disrespectful comments (and I also have to say that I seriously doubt she would have behaved this way to a US-born, white professor)." *Id.* ¶ 315.

Nevertheless, in December 2011 (after the end of the sexual relationship Roe later alleged to have existed in 2010-11), she praised her advisor. While Dr. Vengalattore was being reviewed, she submitted a review to a faculty committee saying, "Professor Vengalattore is an amazing advisor, teacher and mentor. ... Overall, I think I made the best decision when I choose [sic] Prof. Vengalattore as an advisor and mentor my first year." *Id.* ¶¶ 264-65.

But Roe continued to struggle with her work. She also admitted to another female graduate student that she was "sexist against men," and the other student saw Roe attempt to "deny undergraduate men the opportunity of joining the lab." *Id.* ¶¶ 270-71.

To try to address Roe's failing performance, in the fall of 2012 Dr. Vengalattore assigned Chakram to assist Roe with her work. *Id.* ¶ 278. Two days later, Roe informed Dr. Vengalattore that she would be leaving his project; she formally withdrew from the project in November 2012. *Id.* ¶¶ 279, 283.

Unbeknownst to Dr. Vengalattore, Roe at the same time contacted two other professors to complain about his conduct. She vowed to one, "if I have my way, [Dr. Vengalattore] will have a hard time getting tenure." *Id.* ¶ 292. While Dr. Vengalattore was being considered for tenure, Roe told a professor that would be reviewing the application that Dr. Vengalattore had become enraged at her and thrown a power supply at her head while working in the lab. *Id.* ¶ 284, 299. She then wrote a letter to the faculty review committee saying, "Prof. Vengalattore became so impatient with my position that he picked up the power supply in dispute—a metal box weighing five pounds—and threw it at me." *Id.* ¶ 310. A professor questioned Roe about this accusation and she immediately backed down, saying that Dr. Vengalattore had merely put a "small piece of electronics on the table" that "slid in [Roe's] general direction." *Id.* ¶ 313. Several professors and students also wrote to the faculty committee, saying Roe's allegation was "unbelievable" and not physically possible. *Id.* ¶¶ 316, 319.

Dr. Vengalattore Is Considered for Tenure. As noted above, the power-supply allegation became an issue when Dr. Vengalattore was being considered for tenure in May 2014. Dr. Vengalattore formally denied the allegation. The professor whose letter to the committee described Roe's allegation as "unbelievable" (based on her experiences in Dr. Vengalattore's lab) also related to the committee a conversation she had with Roe in 2013 in which Roe told her that "if I have my way, [Dr. Vengalattore] will have a hard time getting tenure." *Id.* ¶¶ 309-319.

In September 2014, the tenure review committee dismissed the allegation regarding the thrown power supply and voted to recommend that Dr. Vengalattore be granted tenure on the strength of Dr. Vengalattore's academic work. *Id.* ¶ 320. Roe was informed of the recommendation by email on September 22, 2014. *Id.* ¶ 321. Two days later, Roe contacted another professor and, for the first time, accused Dr. Vengalattore of maintaining a sexual relationship with her beginning in December 2010 and continuing into 2011—nearly four years earlier. *Id.* ¶ 324. Soon thereafter, Alan Mittman, Director of Cornell's Office of Workforce Policy and Labor Relations, began an investigation of the allegation. *Id.* ¶¶ 326-27.

Mittman shared the allegation with Dean Ritter, who was still considering the tenure recommendation. Based on the allegation, Dean Ritter recommended

that Dr. Vengalattore be denied tenure. *Id.* ¶¶ 333, 336. Another faculty committee, the Faculty Advisory Committee on Tenure Appointment (FACTA), was convened, and it adopted Dean Ritter's recommendation that Dr. Vengalattore be denied tenure. *Id.* ¶¶ 337–38. The FACTA committee's report included the following insensitive and racially prejudiced statement from one of its members, Professor Paulette Clancy:

> I found [Dr. Vengalattore's] interactions with the graduate students to be unacceptable and unsupportable by a major research university like Cornell. Clearly the only students who are prepared to take the abuse he dishes out are both men and they are both from the Indian subcontinent, where perhaps the culture between advisor and protégé is different.

Id. ¶ 339. On February 13, 2015, Dean Ritter overruled the original faculty vote and accepted the FACTA committee's recommendation to deny Dr. Vengalattore's promotion to tenured professor. *Id.* ¶ 342.

In December 2015, Cornell's Tenure Appeals Committee upheld Dr. Vengalattore's appeal from Dean Ritter's decision. In February 2016, a new tenure review committee recommended that he be granted tenure. Dean Ritter overruled that recommendation and again denied tenure, and Cornell's Provost upheld her decision in May 2016. *Id.* ¶¶ 624-631.

Cornell's decision to deny tenure is not at issue in this lawsuit; the tenure issue was put to rest by state-court litigation. In a November 2016 decision, the

trial judge held that the tenure review process was "flawed, secretive, [and] unfair" and ordered Cornell to grant Dr. Vengalattore a new tenure determination. *Id.* ¶¶ 633, 634. In March 2018, the New York Supreme Court, Appellate Division reversed the trial court. Applying a highly deferential standard of review, the Appellate Division upheld Cornell's decision to deny tenure on the ground that it was not arbitrary and capricious. *Matter of Vengalattore v. Cornell Univ.*, 161 A.D.3d 1350 (3d Dep't 2018).

Dr. Vengalattore's Disciplinary Proceedings. With Dean Ritter's approval, Cornell in February 2015 began a full-fledged investigation of Roe's sexual misconduct allegation. Mittman and Sarah Affel, Cornell's Title IX coordinator, were assigned to lead the investigation. During a February 2015 phone interview, Roe told them that: she went to Dr. Vengalattore's house uninvited one evening in December 2010; he invited her inside and began kissing her; she initially resisted but then agreed to have sex with him; in retrospect she considered this encounter to be nonconsensual; and she later had a secret consensual relationship with Dr. Vengalattore that lasted for several more months. Am. Compl. ¶¶ 344-351. These allegations were fabricated; Dr. Vengalattore never engaged in a sexual relationship with Roe, consensual or otherwise. *Id.* ¶¶ 366, 441. Dr. Vengalattore even provided lab records showing that he could not have been alone with Roe at

the times she alleged. *Id.* ¶¶ 242-46, 543-44. And she never told anyone about this alleged relationship until she invented it in September 2014. She admitted to the investigators that she first brought up the alleged relationship only after a professor "informed her that the department voted to give [Dr. Vengalattore] tenure. *Id.* ¶ 360.

Had a sexual misconduct complaint been lodged against Dr. Vengalattore before 2012, it would have been governed by Cornell's Campus Code of Conduct. The Code provided accused individuals with broad procedural rights similar to those required by the U.S. Constitution in criminal proceedings. Those rights are set out in detail in the Amended Complaint. *Id.* ¶¶ 104-128. Among the more important protections: investigations could be opened only if the complaint involved activity occurring within the past year; the investigator was required to provide the accused with timely notice of the charges and the written statements of any witnesses; findings were to be made by a separate University Hearing Board (composed of three faculty members, one student, and one nonfaculty employee); the accused was entitled to present evidence and witnesses to the Board and to question the complainant and opposing witnesses; and any determination against the accused had to be based on "clear and convincing" evidence.

Those procedural protections were wiped away when Cornell in April 2012 (well after the supposed sexual relationship had ended) adopted Policy 6.4, a policy governing investigations into allegations of bias, discrimination, harassment, and sexual and related misconduct. Cornell adopted Policy 6.4 under pressure from ED; indeed, Cornell officials who advocated for Policy 6.4 claimed that the change was necessary to bring Cornell into compliance with ED's 2011 "Dear Colleague" Letter on Title IX. *Id.* ¶¶ 129-133. Policy 6.4 provides that its reduced procedural protections are to apply to *all* proceedings involving sexual misconduct, including those arising under the Code of Conduct. *Id.* ¶¶ 134-36.

Policy 6.4 abandons the Code of Conduct's adversarial model. It empowers a single investigator to both conduct a formal investigation into allegations and then make findings of fact and recommend an appropriate sanction. It requires the accused to cooperate with the investigator and requires the investigator to provide the complainant with updates on additional information uncovered but does not require the investigator to provide similar information to the accused or even to provide him formal written notice of the charges. *Id.* ¶¶ 137-152. Policy 6.4 explicitly prohibits adversarial hearings—including confrontation, cross-examination by the parties, and active advocacy by attorneys; it does not require investigators to disclose evidence favorable to the accused; it does not guarantee

that the accused will have the right to present evidence and witnesses on his behalf; it does not require that any interviews be recorded or transcribed or made available to the accused; it mandates that matters be decided on the basis of a "preponderance of the evidence"; and it imposes no burden of proof on the complainant. *Id*. ¶¶ 154-169.

Cornell Disregards Policy 6.4. Cornell's adoption of Policy 6.4 greatly impaired Dr. Vengalattore's ability to defend against the false sexual misconduct charge. But his defense was made even more difficult because Cornell simply ignored Policy 6.4's limits (as well as other existing university rules) whenever it served Cornell's purposes to do so. For example, Policy 6.4 authorizes investigation of student sexual-misconduct complaints filed within one year after the student is no longer under the faculty member's supervision or within three years from the date of the alleged misconduct. *Id.* ¶ 140. Roe reported her nonconsensual-sex allegation long after the authorized investigation period had expired, but Dean Ritter nonetheless told Mittman and Affel to go ahead with their Policy 6.4 investigation. *Id.* ¶ 582.

She also told them to proceed with an investigation of whether Dr. Vengalattore violated Cornell's policy governing "Romantic and Sexual Relationships Between Students and Staff" (by engaging in a sexual relationship

with a student he directly supervised), even though that policy falls well outside the purview of Policy 6.4. Enforcement of that policy instead falls within the exclusive jurisdiction of the Committee on Professional Status, a group of faculty members charged with investigating potential policy violations and making fact-finding determinations by majority vote. *Id.* ¶¶ 176-183. According to Cornell's Faculty Handbook, the review procedures of that committee "*must* comport with the basic precepts of due process." *Id.* ¶ 180.

A strong inference of sex discrimination arises from Cornell's decision to reduce procedural rights for individuals accused of sexual misconduct but not for other types of misconduct. In the overwhelming majority of sexual misconduct cases, the accused is male and the complainant is female; 50 out of 54 Policy 6.4 cases resolved by Cornell between 2014 and 2017 fit that description. *Id.* ¶ 670a. One of Cornell's principal purposes in adopting Policy 6.4 was to increase the likelihood that males accused of sexual misconduct would be found responsible. *Ibid.*

That inference of sex discrimination is strengthened in Dr. Vengalattore's case by the cavalier manner in which Cornell disregarded basic procedural fairness in conducting its investigation. For example, Cornell hired an advisor to assist Roe in putting together her case; it offered no similar assistance to Dr.

Vengalattore. *Id.* ¶¶ 382-83. Roe was permitted to review the testimony of other witnesses; Dr. Vengalattore was not. *Id.* ¶ 419. Following interviews with investigators Mittman and Affel, Roe and friendly witnesses were permitted to review and edit the investigators' notes of their statements. *Id.* ¶ 422-24. Investigators asked Dr. Vengalattore to account for his whereabouts every evening in December 2010 but refused to tell him the date on which Roe alleged the nonconsensual sexual encounter to have occurred—suggesting that they wished to provide Roe an opportunity to conform her story to Dr. Vengalattore's known schedule. *Id.* ¶¶ 438-40. Although Dr. Vengalattore provided investigators a lengthy list of witnesses who could undermine Roe's claims, they never bothered to contact many of those witnesses. *Id.* ¶ 500. They refused Dr. Vengalattore's repeated requests that he be presented with "all of the charges under investigation along with the evidence supporting them," as required by Policy 6.4. *Id.* ¶ 461.

Despite this secretive process, students and faculty rallied around Dr. Vengalattore, coming forward with evidence of Roe's dishonesty and history of racially and sexually inappropriate behavior. Male students explained that Roe often spoke about inappropriate personal issues in the lab and touched them against their wishes, after repeatedly being asked to stop, and called them things like "honey" and "babe," which made them "uncomfortable." *Id.* ¶¶ 397-98, 409.

Another professor corroborated these accounts, saying that she witnessed Roe, even after leaving the lab, "making inappropriate statements for a professional workplace" that were both "sexual" and "too casual." *Id.* ¶ 530. Students also emphatically denied Roe's accusations that Dr. Vengalattore had ever behaved improperly, noting that Roe had lied about a specific incident where Roe had said that Dr. Vengalattore made a student "cry" in the lab. *Id.* ¶¶ 395, 405, 478, 506. Faculty also repeated that Roe was "not believable" and had grossly "exaggerated" the power supply incident. *Id.* ¶¶ 429, 488. One professor said he "doubts that [Roe] would have treated a big white guy like himself the same way that she treated [Dr. Vengalattore]." *Id.* ¶ 486.

Students also noted that Roe had previously made false accusations against other students. She lied and said that one student had smoked marijuana in the lab in an effort to derail his academic success. *Id.* ¶¶ 231, 407, 420. A female student also said that Roe was "not on the level" and had falsely accused yet another student of being a "stalker." *Id.* ¶¶ 221, 496.

Dr. Vengalattore, meanwhile, "was very careful and politically correct." *Id.* ¶ 436. Students emphasized that Dr. Vengalattore was always courteous and professional, "was not any of the things that [Roe] said he was," and that a

"relationship" between Dr. Vengalattore and Roe was "clearly not happening." *Id.* ¶¶ 494, 497, 499.

Cornell Credits Roe's False Accusation. In September 2015, Mittman and Affel issued a report summarizing their recommended findings for Dean Ritter. The report stated that the preponderance of the evidence supported the conclusion that Dr. Vengalattore had a romantic or sexual relationship with Roe. It recommended that "no specific finding be made as to whether the first sexual encounter rises to the level of sexual assault as defined by Policy 6.4." *Id.* ¶ 576. One reason for that recommendation: the investigation of the sexual assault allegation was "time-barred by Policy 6.4," a conclusion they reached at the very beginning of the investigation in February 2015. *Id.* ¶ 581. So why did they continue with an investigation they knew to be unauthorized? They did so at the request of Dean Ritter. *Id.* ¶ 582.

The investigators stated that they were authorized to conduct the investigation by the "Romantic and Sexual Relationships" policy and Policy 6.4. They added that their recommendations were "guided" by Title IX guidance documents issued by ED in 2011 and 2014—including the documents' suggested presumption that any relationship between faculty and a student constitutes sexual harassment. *Id.* ¶¶ 577-78.

The investigators effectively imposed the burden on Dr. Vengalattore to disprove that he had a sexual relationship with Roe. They cited evidence suggesting that Roe may have engaged in sexual intercourse with someone on December 30, 2010. They concluded that her partner likely was Dr. Vengalattore because he could not (unsurprisingly, given his lack of knowledge of her personal life) identify another potential partner. *Id.* ¶¶ 594-601. They also faulted Dr. Vengalattore's evidence (including his extensive laboratory log) because it had not "definitively excluded" every date in December 2010 as a possible date for a sexual encounter between him and Roe. *Id.* ¶ 612. Instead, the investigators sought out and relied on "rumors" and gossip that they had solicited from witnesses. *Id.* ¶¶ 449, 482.

Instead of discounting Roe's testimony in light of her inappropriate sexual and racial comments, the investigators defended Roe's use of such language, even though it was unwanted—writing that she used the term "honey" "when speaking to many people because she is from the South." *Id.* ¶¶ 604-05. The investigators also dismissed Roe's lies about the power-supply incident, her false accusations of abusive lab behavior, and the prior false accusations against other students as simply irrelevant to the investigation. *Id.* ¶¶ 613-15, 618. They wrote that Roe's lies did "not weigh into the investigators' analysis of [Roe's] general credibility or

make it more or less likely that there was a romantic or sexual relationship." *Id.* ¶ 618.

The decision whether to adopt the recommendations was up to Dean Ritter—the same individual who previously ordered Mittman and Affel to undertake a sexual misconduct investigation she knew to be time-barred by Policy 6.4. On October 6, 2015, while the appeal from Dean Ritter's decision to deny tenure was pending before the Tenure Review Committee, Dean Ritter issued a letter adopting the investigators' recommendations. The letter stated:

> I find that a preponderance of evidence supports the claim that you were involved in a sexual relationship with your former graduate student over a period of several months while also serving as her graduate advisor. As a result, I find that you have violated the university's 'Romantic and Sexual Relationships' policy by engaging in such conduct. I also find that there is not significant evidence to support the claim that the initial sexual encounter between you and the graduate student involved a sexual assault. ... Given the finding of an inappropriate sexual relationship, I also find that in your denial of a sexual relationship you have lied to the investigators in this case.

Id. ¶ 622.

The letter stated that she "intend[ed] to impose significant sanctions" on Dr. Vengalattore, which would be "suspend[ed]" pending the outcome of the tenure appeal. *Id.* ¶ 623. On February 6, 2017, Dean Ritter imposed the promised sanction: suspension without pay for a period of two weeks. *Id.* ¶¶ 637-38.

Dr. Vengalattore Suffers Severe Injuries. Cornell's finding that Dr. Vengalattore engaged in "an inappropriate sexual relationship" has caused him severe harm. He has been unable to continue his research since leaving Cornell, despite obtaining several million dollars of grant money from a variety of sources to fund his research projects. *Id.* ¶¶ 648-49. Since leaving Cornell, Dr. Vengalattore has been unsuccessful in his efforts to obtain academic employment at another university and to secure lab support from other institutions. *Id.* ¶¶ 651-52.

Although his significant academic and scientific contributions and his ability to attract federal grants would ordinarily make him an extremely attractive employment candidate, the blot on his reputation caused by Cornell's unwarranted "inappropriate sexual relationship" finding has blocked all job prospects. When universities to which he applies have contacted Cornell concerning his employment history, Cornell provides them false information: that Dr. Vengalattore was involved in an inappropriate sexual relationship with his former graduate student over a period of several months while also serving as her graduate advisor, that he lied to investigators about that relationship, and that he was temporarily suspended from his duties for this misconduct. *Id.* ¶ 654.

Dean Ritter's sanction prompted an outcry from the academic community because of its transparent unfairness. On May 8, 2017, law professor Kevin Clermont wrote a letter to Cornell's University Counsel, describing the investigation against Dr. Vengalattore as a "miscarriage of justice" "so outrageous as to leave him ashamed of Cornell." *Id.* ¶ 639. In his estimation, the investigation's "procedural path" raised it to "the stratosphere of injustice" because it "followed no procedure at all." *Id.* ¶ 640.

Proceedings Below. Dr. Vengalattore filed this suit in federal district court in September 2018. He asserts four claims against Cornell, all based on its conduct of an unfair and unreliable disciplinary proceeding and its false finding that he engaged in "an inappropriate sexual relationship": (1) intentional discrimination on the basis of sex, in violation of Title IX of the Education Amendments of 1972; (2) intentional discrimination on the basis of race, color, and national origin, in violation of Title VI of the Civil Right Act of 1964; (3) deprivation of his right to due process of law, in violation of the Fourteenth Amendment; and (4) a state-law defamation claim. He asserts claims against ED and Secretary Betsy DeVos (collectively, ED) based on ED's issuance of Title IX guidance documents that coerced Cornell and many other universities to adopt unfair and sex-biased complaint-resolution procedures for sexual misconduct

complaints. The Amended Complaint alleges that ED issued the guidance documents in violation of the Administrative Procedure Act (APA) and Article I, § 8, cl. 1 of the U.S. Constitution—the Spending Clause.

In June 2019, ED filed a motion to dismiss under Fed.R.Civ.P. 12(b)(1) and 12(b)(6), alleging *inter alia* that Dr. Vengalattore lacked standing to challenge the guidance documents. Cornell filed its answer in July 2019. It simultaneously filed a motion for judgment on the pleadings under Fed.R.Civ.P. 12(c) and a motion for summary judgment under Fed.R.Civ.P. 56.

The district court granted the motions and dismissed the case on May 1, 2020.[1] The court dismissed the Title IX sex-discrimination claims against Cornell, holding that an implied right of action does not exist under Title IX for employees alleging gender discrimination in the terms and conditions of their employment. J.A. 133. The court did not explain its reasoning, other than to assert that a majority of reported decisions in district courts within the Second Circuit have reached the same conclusion. *Id.* The court failed to note that an overwhelming majority of federal appellate courts that have addressed the issue have reached the opposite conclusion.

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[1] The court did not address Cornell's highly premature request for summary judgment, which it sought even before discovery commenced. Rather, by focusing on the alleged inadequacy of Dr. Vengalattore's complaint, the court made clear that it was granting Cornell judgment on the pleadings under Rule 12(c).

The court dismissed the Title VI race/color/national origin discrimination claims on the ground that the Amended Complaint "fails to set forth facts from which the court can plausibly infer that the decisionmakers at Cornell intentionally discriminated against him on the basis of his race in resolving Roe's complaints about him." J.A. 138. The court said that racially discriminatory intent was not a plausible inference that could be drawn from Cornell's failure to adhere to its own rules when conducting the disciplinary proceedings. J.A. 140-41.

The court dismissed the due process claim on the ground that Cornell is not a state actor and thus is not subject to the Due Process Clause. J.A. 141-42. In reaching that conclusion, the court failed to discuss Cornell's unique status as a quasi-private institution closely affiliated with the State of New York. Having dismissed the federal claims against Cornell on the pleadings, the court declined to exercise supplemental jurisdiction over Dr. Vengalattore's state-law defamation claim. J.A. 143.

The district court dismissed the claims against ED under Rule 12(b)(1) for lack of subject matter jurisdiction, ruling that Dr. Vengalattore lacks standing to challenge the Title IX guidance documents. J.A. 125-132. It held that he failed to demonstrate that his injuries were directly traceable to the challenged guidance documents. It held that his injuries "arise directly, and only, from Ritter's findings

that he violated Cornell's 'Romantic and Sexual Relationships' policy, which had been in effect since September of 1996, prior to the Guidance Documents." J.A. 127. The court held alternatively that Dr. Vengalattore failed to satisfy a separate standing requirement: a showing that the relief he seeks from ED would likely redress his injuries. It held that Dr. Vengalattore could only speculate that his requested relief would reduce his reputational injuries. J.A. 130.

SUMMARY OF ARGUMENT

The U.S. Supreme Court held in *Cannon v. University of Chicago*, 441 U.S. 677 (1979), that Title IX provides a private right of action for individuals who are discriminated against on the basis of sex by education programs that receive federal funds. And there is no dispute that Dr. Vengalattore sufficiently pled a cause of action for gender discrimination in employment. The district court nonetheless held (in conflict with *Cannon*) that the Title IX right of action does not extend to victims of employment discrimination; nothing in *Cannon* and subsequent Supreme Court case law supports creation of such an exception. Indeed, the great majority of federal appellate courts that have addressed the issue have concluded that victims of employment discrimination are entitled to seek relief under Title IX, and federal regulations explicitly recognize that right.

Some district courts have created an employment exception to the Title IX right of action, reasoning that any such right would merely duplicate remedies available under Title VII of the Civil Rights Act of 1964. But as the Third Circuit recently explained in a well-reasoned decision, that is no reason to infer that Congress *sub silentio* created an employment exception, because "Congress has provided a variety of remedies, at times overlapping, to eradicate employment discrimination." *Doe v. Mercy Catholic Medical Center*, 850 F.3d 545, 561 (3d Cir. 2017) (quoting *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 535 n.26 (1982)).

The district court also erred in concluding that the Amended Complaint "fails to set forth facts from which the court can plausibly infer that the decisionmakers at Cornell intentionally discriminated against him on the basis of his race in resolving Roe's complaints about him." J.A. 138. That conclusion was based on the court's erroneous understanding of the allegations necessary to state a plausible employment discrimination claim. In rejecting a heightened pleading standard in employment discrimination cases, the Supreme Court has explained that, under Fed.R.Civ.P. 8(a)(2):

> [A] complaint must only include "a short and plain statement of the claim showing that the pleader is entitled to relief." Such a statement must simply give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.

Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002) (citation omitted). A complaint need do no more than demonstrate that the discrimination claim is "plausible," *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); the plaintiff is not required to allege facts which, if proved at trial, would entitle him to relief.

The Amended Complaint provides Cornell ample notice of the grounds for his Title VI claim (that the unfair and irregular disciplinary process to which Cornell subjected Dr. Vengalattore was motivated in part by an intent to discriminate on the basis of race, color, and national origin) and alleges facts more than sufficient to render his claim plausible. For example, it cites statements by key players in the case demonstrating that they harbored racist views toward those of Indian descent. Those statements by themselves do not suffice to entitle Dr. Vengalattore to relief, but they certainly render his Title VI claims plausible.

The Amended Complaint also describes in detail Cornell's numerous unexplained deviations from its established rules governing misconduct investigations—and all those deviations decreased Dr. Vengalattore's ability to defend himself against an unfounded "inappropriate sexual relationship" allegation. *See, e.g.,* Am. Compl. ¶¶ 140, 176-183, 382-83, 419, 422-24, 438-40, 461, 500, 581-82, 594-601. This Court recognizes that procedural deficiencies in a university's investigation and adjudication of a sexual assault complaint raise an

inference that the university was motivated, at least in part, by bias. *Doe v. Columbia University*, 831 F.3d 46, 56-57 (2d Cir. 2016).

The district court also erred in dismissing Dr. Vengalattore's claim that Cornell violated his due process rights by depriving him of his ability to mount an effective defense to false charges. The district court concluded that Cornell is not a state actor subject to the constraints of the Due Process Clause. J.A. 141-42. But that conclusion overlooks Cornell's unique status as a quasi-private institution closely affiliated with the State of New York. It also overlooks Cornell's explicit promise, in its Faculty Handbook, that proceedings conducted to consider charges that a faculty member violated the "Romantic and Sexual Relationships" policy "*must* comport with the basic precepts of due process." Am. Compl. ¶ 180 (emphasis in original).

The Court should also reinstate Dr. Vengalattore's claims against ED. The district court held that he lacked standing to raise those claims because he supposedly failed to allege a causal connection between ED's guidance documents and his injuries (his suspension and the reputational injuries flowing from Cornell's finding that he engaged in "an inappropriate sexual relationship"). J.A. 127. The district court held that Dr. Vengalattore failed to establish causation because his injuries "arise directly, and only, from Ritter's findings that he

violated Cornell's 'Romantic and Sexual Relationships' policy, which had been in effect since September of 1996, prior to the Guidance Documents." *Ibid*. That statement is a *non sequitur* and misses the thrust of Dr. Vengalattore's claims. He does not allege that the ED guidance documents caused Cornell to adopt its "Romantic and Sexual Relationships" policy. Rather, he alleges that ED's guidance documents caused Cornell to significantly restrict procedural rights available to individuals charged with sexual misconduct, which in turn directly deprived Dr. Vengalattore of the ability to mount an effective defense to Roe's false allegation.

ARGUMENT

I. TITLE IX OF THE EDUCATION AMENDMENTS OF 1972 PROVIDES A PRIVATE RIGHT OF ACTION FOR VICTIMS OF SEX-BASED EMPLOYMENT DISCRIMINATION

Title IX of the Education Amendments of 1972 states that "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). There is no dispute that Cornell is an education program that receives Federal financial assistance. Cornell *does not dispute* that Dr. Vengalattore has adequately set out a claim for violation of his Title IX rights.

Cornell's concessions are unsurprising. As detailed in the Amended complaint, for the express purpose of avoiding enforcement from ED, Cornell adopted Policy 6.4 as a means of ensuring that more male students and faculty would be found responsible for misconduct. Am. Compl. ¶¶ 670. The investigators also disregarded the few procedural protections provided by the policy, refusing to give Dr. Vengalattore notice of the charges yet imposing the burden of proof on him, and providing Roe with a special advisor who worked with the investigators to concoct her allegations. *Id.* ¶ 699(b)(viii). And the investigators turned a blind eye to the numerous witnesses who refuted Roe's story and also pointed out that Roe had a long history of making false allegations to get her way and had made numerous students uncomfortable with overly familiar language, unwanted touching, and racially insensitive language. *Id.* ¶¶ 669(c), 670. Cornell's process was designed for one thing—to ensure that Dr. Vengalattore would be found responsible for *something* because of his gender.

The Supreme Court held in *Cannon* that Title IX provides a private right of action for those injured by violation of the statute. *Cannon*, 441 U.S. at 709. The district court nonetheless held that no private right of action exists under Title IX for *employees* alleging sex discrimination in the terms and conditions of their employment. J.A. 132-33. The court supplied no rationale for carving out this

employee exception to *Cannon*, other than to assert that a majority of reported decisions in district courts within the Second Circuit have reached the same conclusion. *Id.* at 133. The no-private-right-of-action decision is erroneous; Supreme Court case law makes clear that the Title IX private right of action created by *Cannon* applies to *all* victims of sex discrimination.

Cannon involved a Title IX claim asserted by a student, but the Court never suggested that the right of action it recognized was *limited* to students. On the contrary, *Cannon* described the class possessing a private right of action under Title IX broadly, as coextensive with the class of "persons benefitted by [the] legislation." 441 U.S. at 717; *see also id*. at 694 ("persons discriminated against on the basis of sex"); *id* at 703 ("victims of illegal discrimination"). And while the plaintiff in *Cannon* sought injunctive relief only, the Supreme Court later held that the Title IX private right of action recognized in that case extends to claims for damages. *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 73 (1992).

Moreover, the Supreme Court has long held that *employees* of an education program are among those entitled to Title IX's anti-discrimination protections. *North Haven*, 456 U.S. at 531 (upholding Title IX regulations issued by the Department of Health, Education, and Welfare that prohibited employment discrimination by covered educational institutions and authorized HEW to initiate administrative

enforcement proceedings on behalf of employees). No provision of Title IX can plausibly be interpreted as authorizing selective denial of a private right of action to individuals otherwise entitled to all the protections of Title IX. Because employees are protected by Title IX, *Cannon* dictates that they fall within the class of those who possess a private right of action. 441 U.S. at 717.

Any doubt on that score was put to rest by the Supreme Court's decision in *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005). *Jackson* involved a high school employee who filed a Title IX suit against his employer. He claimed that the school fired him as coach of the girls' basketball team in retaliation for his complaint that the team was treated less well than the boys' team. The Court reversed the appeals court's dismissal of the claim, holding that the private right of action recognized by *Cannon* extends to Title IX retaliation claims filed by employees. 544 U.S. at 173-74. The opinion contains no suggestion that employees' private right of action extends only to retaliation claims and not to other Title IX protections. Rather, the Court repeatedly emphasized the statute's "broad reach." *Id.* at 175.

At least four federal appeals courts—the First, Third, Fourth, and Sixth Circuits—recognize that Title IX provides a private right of action for sex-based employment discrimination. *Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881, 896-97 (1st Cir. 1988); *Doe v. Mercy Catholic Medical Center*, 850 F.3d 545, 560 (3d Cir.

2017); *Preston v. Virginia ex rel. New River Community College*, 31 F.3d 203, 206 (4th Cir. 1994); *Ivan v. Kent State Univ.*, 92 F.3d 1185, 1196 WL 422496 at *2 (6th Cir. 1996) (unpublished). District courts within the Second Circuit have held likewise. *Henschke v. New York Hospital-Cornell Medical Center*, 821 F. Supp. 166, 192 (S.D.N.Y. 1993); *AB v. Rhinebeck Central School Dist.*, 224 F.R.D. 144, 153 (S.D.N.Y. 2004).[2]

Lakoski v. James, 66 F.3d 751 (5th Cir. 1995), is the only federal appeals court decision that unequivocally rejects a private right of action for employees—and it limited its holding to Title IX claims for money damages. But that 25-year-old decision was decided eight years before *Jackson* and thus did not have access to *Jackson*'s rationale for expanding the Title IX private right of action to an employee's retaliation claim. There is good reason to question whether the Fifth Circuit would affirm *Lakoski* if the issue were again to come before that court.

Lakoski concluded that Congress *sub silentio* created an employee exception to the Title IX private right of action because, it reasoned, permitting employment

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[2] This Court declined to decide the issue in a recent case because it had been "barely briefed" by the parties and because it did not affect the case's ultimate resolution. *Summa v. Hofstra Univ.*, 708 F.3d 115, 131 (2d Cir. 2013). The Court nonetheless noted that the U.S. Department of Justice takes the position that there is a private right of action for employment discrimination under Title IX. *Id.* at 131 n.1. The United States took that same position in an *amicus curiae* brief filed in the Third Circuit in *Doe v. Mercy Catholic*.

discrimination claims for damages "would disrupt [Title VII's] carefully balanced remedial scheme for redressing employment discrimination." 66 F.3d at 754. Noting that Title VII of the Civil Rights Act of 1964 imposes a variety of restrictions on suits alleging sex-based employment discrimination, the Fifth Circuit concluded that "Congress did not intend Title IX to create a mechanism by which individuals could circumvent the pre-existing Title VII remedies." *Id.* at 757.

But that rationale overlooks that "Congress has provided a variety of remedies, at times overlapping, to eradicate employment discrimination." *Doe v. Mercy Catholic*, 850 F.3d at 561 (quoting *North Haven*, 456 U.S. at 535 n.26). For example, 42 U.S.C. § 1981, which grants "all persons" the same right to make and enforce contracts "as is enjoyed by white persons," has been construed by the Supreme Court as creating a private right of action to individuals alleging race-based employment discrimination. *See, e.g., Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). Recognizing a Title IX right of action for victims of sex-based employment discrimination is no more disruptive of Title VII's remedial scheme than is § 1981.

Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975), a decision that addressed a § 1981 claim, explicitly rejected arguments that Congress intended to make Title VII the exclusive vehicle for employees raising employment discrimination claims. The Court explained that Title VII "manifests a congressional

intent to allow an individual to pursue independently his rights under both Title VII and other applicable" federal laws. 421 U.S. at 459 (quoting *Alexander v. Gardner-Denver Co*., 415 U.S. 36, 48 (1974)).

The Third Circuit's *Mercy Catholic* decision persuasively demonstrates the deficiencies in the Fifth Circuit's analysis. 850 F.3d at 560-63. The Third Circuit noted that *Lakoski*: (1) failed to address the Supreme Court's *Johnson* decision; (2) failed to consider *North Haven*'s rejection of the "policy-based rationales" (regarding the interplay of Title VII and Title IX) that Cornell advances in this case; and (3) was "decided a decade before the Supreme Court handed down *Jackson*, which explicitly recognized an employee's private claim under *Cannon*." *Id.* at 563.

In sum, the district court's decision that Title IX does not provide Dr. Vengalattore a private right of action for sex discrimination is inconsistent with Title IX's broad statutory language and applicable Supreme Court case law.[3]

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[3] In the district court, Cornell sought dismissal of Dr. Vengalattore's claims on several alternative grounds. It asserted, for example, that *res judicata* barred the claims—even though Dr. Vengalattore's state-court action addressed only the tenure issue, not the sexual misconduct proceeding. The district court dismissed all claims on the pleadings without reaching these other issues. If the Court reverses the district court's Title IX private-right-of-action holding, it should remand the case to the district court for consideration of these other issues. As the Court has repeatedly explained, "Although we are empowered to affirm a district court's decision on a theory not considered below, it is our distinctly preferred practice to remand such issues for consideration by the district court in the first instance." *Schonfeld v. Hilliard*, 218 F.3d 164, 184 (2d Cir. 2000). In any event, Cornell's alternative arguments for dismissal are all without merit.

II. THE COMPLAINT ALLEGES FACTS SUFFICIENT TO RENDER PLAUSIBLE DR. VENGALATTORE'S CLAIM THAT CORNELL DISCRIMINATED AGAINST HIM ON THE BASIS OF RACE, COLOR, AND NATIONAL ORIGIN, IN VIOLATION OF TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

The district court agreed that Dr. Vengalattore possesses a private right of action to assert a race discrimination claim under Title VI of the Civil Rights Act of 1964. But it dismissed that claim on the pleadings, finding that the Amended Complaint "fails to set forth facts from which the court can plausibly infer that the decisionmakers at Cornell intentionally discriminated against him on the basis of his race in resolving Roe's complaints about him." J.A. 31. That decision should be reversed; it was based on a fundamental misunderstanding of the minimal pleading burden imposed on plaintiffs by Rule 8(a).

Under Fed.R.Civ.P. 8(a)(2), a complaint must only include "a short and plain statement of the claim showing that the pleader is entitled to relief." A complaint need do no more than demonstrate that the discrimination claim is "plausible." *Doe v. Columbia*, 831 F.3d at 54 (citing *Iqbal*, 556 U.S. at 678). The plaintiff is not required to allege facts that, if proved at trial, would entitle him to relief; at the pleadings stage, he "needs to present only minimal evidence supporting an inference of discrimination in order to prevail." *Ibid*; *Littlejohn v. City of New York*, 795 F.3d 297, 311 (2d Cir. 2015).

When a plaintiff alleges that an employer illegally discriminated against her by failing to offer employment, the plaintiff provides sufficient "minimal evidence" of discriminatory intent by alleging that she was qualified for the position sought and that the employer continued to seek applicants for the position. *Littlejohn*, 795 F.3d at 308 (citing *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)). Obviously, such minimal evidence is far from sufficient to establish at trial that the employer discriminated against her in violation of federal law. The employer might well have decided not to hire the plaintiff for a wide variety of non-discriminatory reasons; *e.g.*, it might have concluded that it could not meet the plaintiff's salary demands. But, as the Court has explained, imposing only a "minimal" pleading burden on discrimination claimants is justified by the difficulty they face in gathering evidence of discriminatory intent before the defendant has been required to provide *any* explanation for its conduct:

> Ultimately, the plaintiff will be required to prove that the employer-defendant acted with discriminatory motivation. However, in the first phase of the case, the prima facie requirements are relaxed. Reasoning that fairness required that the plaintiff be protected from early-stage dismissal for lack of evidence demonstrating the employer's discriminatory motivation before the employer sets forth its reason for the adverse action it took against the plaintiff, the Supreme Court ruled [in *McDonnell-Douglas* and related cases] that, in the initial phase of the case, the plaintiff can establish a prima facie case without evidence sufficient to show discriminatory motivation.

Littlejohn, 795 F.3d at 307. The plaintiff can survive a motion to dismiss on the pleadings by alleging facts (such as those cited above) that provide "at *least minimal support* for the proposition that the employer was motivated by discriminatory intent." *Id.* at 311 (emphasis added). The Court emphasized that the facts alleged need not actually bear on the ultimate question of the employer's liability:

> The facts required by *Iqbal* to be alleged in the complaint need not give plausible support to the ultimate question of whether the adverse employment action was attributable to the discrimination. They need only give plausible support to the minimal inference of discriminatory motivation.

Ibid.

Dr. Vengalattore has alleged facts that, by themselves, are insufficient to establish that Cornell acted with racially discriminatory intent. But those facts certainly provide "at least minimal support" for his claim. For example, Professor Paulette Clancy, a member of the FACTA committee (the only tenure review committee that recommended against giving tenure to Dr. Vengalattore) wrote the following racist statement in support of her decision to recommend against tenure:

> I found [Dr. Vengalattore's] interactions with the graduate students to be unacceptable and unsupportable by a major research university like Cornell. Clearly the only students who are prepared to take the abuse he dishes out are both men and they are both from the Indian subcontinent, where perhaps the culture between advisor and protégé is different.

Id. ¶ 339. Dean Ritter relied on the FACTA committee's recommendation in making her initial decision to deny tenure.

One might reasonably expect a university dean who does not share those racist views to take exception to such statements in reports submitted to her, to remove Professor Clancy from the FACTA committee, and to ask it to make a new recommendation. The fact that Dean Ritter followed the recommendation of Professor Clancy without comment raises at least a "minimal" inference that she shared Professor Clancy's views about those "from the Indian subcontinent" and that she might have allowed those views to carry over to her decision on the sexual misconduct complaint. The inference raised by Professor Clancy's statement is more than sufficient to satisfy Dr. Vengalattore's "minimal" pleading burden.

Dr. Vengalattore also submitted evidence that Jane Roe was racially prejudiced against those of Indian descent. For example, she told Dr. Vengalattore and her fellow graduate students at one meeting, "You are all Indians. Of course you stick together"; and she told another graduate student, Yogesh Patil, that he, Srivatsan Chakram, and Dr. Vengalattore could be expected to work long hours because "they are Indians, who are hardworking, like Chinese." *Id.* ¶¶ 258-260. Dean Ritter ended up crediting Roe's testimony and did so without ever commenting on whether Roe's racially prejudicial attitudes might have provided

her with a motivation for making false claims against Dr. Vengalattore. That response raises at least a "minimal inference" that Dean Ritter shared Roe's attitudes and that those attitudes affected the manner in which she handled the investigation into Roe's allegation. Dr. Vengalattore should be permitted to explore that possibility during discovery.

The Amended Complaint also describes in detail Cornell's numerous unexplained deviations from its established rules governing misconduct investigations—all of which worked against Dr. Vengalattore's interests and decreased his ability to defend himself against an unfounded allegation. Perhaps most egregiously, the investigation conducted by Mittman, Affel, and Dean Ritter never should have begun because it was time-barred by Policy 6.4, a bar Mittman and Affel recognized at the very beginning of their investigation. Am. Comp. ¶¶ 140, 581. But they nonetheless proceeded with their investigation at the direction of Dean Ritter. *Id.* ¶ 582. She also directed them to investigate whether Dr. Vengalattore violated the "Romantic and Sexual Relationships" policy, even though enforcement of that policy falls outside her jurisdiction—Cornell's Faculty Handbook places enforcement of that policy within the exclusive jurisdiction of the Committee on Professional Status. *Id.* ¶¶ 176-183. This Court recognizes that procedural deficiencies in a university's investigation and adjudication of a sexual

misconduct complaint raise an inference that the university was motivated, at least in part, by bias. *Doe v. Columbia*, 831 F.3d at 56-57; *Menaker v. Hofstra Univ.*, 935 F.3d 20, 33 (2d Cir. 2019) (stating that "once a university has promised procedural protections to employees, the disregard or abuse of those procedures may raise an inference of bias"). If Dean Ritter has a nondiscriminatory rationale for flouting Cornell's promised procedural rules in order to seize control over an investigation outside her jurisdiction, she will have an opportunity explain that rationale during discovery.

The Amended Complaint relates numerous instances in which Mittman and Affel conducted their investigation in an unjust manner not authorized by Cornell's procedural rules. For example, Cornell hired an advisor to assist Roe in putting together her case while offering no similar assistance to Dr. Vengalattore, Am. Compl. ¶ 382-83; the investigators never bothered to contact many of the individuals whom he identified as corroborating witnesses, *id.* ¶ 500; they refused repeated requests that he be presented with all of the charges under investigation along with the evidence supporting them, *id.* ¶ 461; they permitted Roe to review the testimony of other witnesses while denying that right to Dr. Vengalattore, *id.* ¶ 419; they permitted Roe to review and edit their notes of her statements, *id.* ¶¶ 422-24; they asked Dr. Vengalattore to account for his whereabouts every

evening in December 2010, but they refused to tell him the date—because Roe was unable to specify one—on which Roe alleged that she initially resisted but then agreed to have sex with him, *id.* ¶¶ 438-440; and they effectively imposed on Dr. Vengalattore the burden of disproving Roe's accusations. *Id.* ¶¶ 594-601. Indeed, there was only one apparent purpose for asking him his whereabouts on every evening in December 2010: to allow Roe to conform her story to Dr. Vengalattore's schedule. These repeated, unexplained, and one-sided deviations from Cornell's prescribed rules create a strong inference of bias and, in the absence of other explanations, create at least a minimal inference of racial bias.

The trial court sought to excuse these allegations of procedural irregularities, stating, "The mere fact that an employer failed to follow its own internal procedures does not necessarily suggest that the employer was motivated by illegal discriminatory intent." J.A. 141. That statement is accurate; this evidence of massive irregularities does not "necessarily" suggest illegal discriminatory intent. But that is not the appropriate test; the test is whether Dr. Vengalattore's allegations raise at least "minimal support" for his discrimination claim and thereby render his claim plausible. *Littlejohn*, 795 F.3d at 311. *Doe v. Columbia* and *Menaker* demonstrate that the answer is "yes"—the procedural irregularities in this case are more than sufficient to establish the "minimal

inference" of discrimination needed for a complaint to survive a motion for judgment on the pleadings. Because the trial court applied the wrong pleading standard, its dismissal of Dr. Vengalattore's Title VI claims should be reversed.

III. CORNELL IS SUBJECT TO THE CONSTRAINTS OF THE DUE PROCESS CLAUSE

With its adoption of Policy 6.4 in 2012, Cornell severely restricted the procedural protections previously afforded students and faculty subjected to a Title IX sexual-misconduct disciplinary proceedings. Before 2012, Cornell provided procedural rights to accused individuals similar to those required by the U.S. Constitution in criminal proceedings, including the right to a hearing before a disinterested fact-finder at which the accused could present evidence and witnesses, confront his accuser, and cross-examine opposing witnesses. Am. Compl. ¶¶ 104-128. All of those protections were wiped away by Policy 6.4, which also empowers a single individual both to conduct the formal investigation and to make findings of fact. The new policy does not require investigators to disclose evidence favorable to the accused, or to provide the accused with copies of witness statements or with updates on additional information uncovered during the investigation—even though they are required to provide such information to the complainant. *Id*. ¶¶ 137-169.

Invoking 42 U.S.C. § 1983, Count III alleges that this severe restriction on Dr. Vengalattore's procedural protections violated his Fourteenth Amendment right to due process of law by making it impossible to defend adequately against Roe's false charges. Cornell responded not by defending Policy 6.4's compliance with due-process principles but by arguing that it is not subject to the Due Process Clause because it is not a state actor.

The district court agreed and dismissed Count III, stating (without further analysis) that "Vengalattore's constitutional due process allegations are against Cornell, a private institution, not a state actor." J.A. 141-42. But whether Cornell is a state actor (whose conduct constitutes action "under color of state law" for purposes of 42 U.S.C. § 1983) is a fact-intensive issue that cannot be resolved so blithely at the pleadings stage. The Court should reverse the dismissal of Count III and remand to permit the parties to engage in discovery on the issue.

The Supreme Court has long struggled "to plot a line between state action subject to Fourteenth Amendment scrutiny and private conduct (however exceptionable) that is not." *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288, 295 (2001). A group's official designation as private or governmental is not determinative; "the deed of an ostensibly private organization or individual is to be treated sometimes as if a State has caused it to

be performed." *Ibid*. State action may be found "if, though only if, there is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself." *Ibid*. The criteria for determining state action

> lack rigid simplicity. From the range of circumstances that could point toward the State behind an individual face, no one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient, for there may be some countervailing reasons against attributing activity to the government.

Id. at 295-96.

Cornell's relationship with the State of New York is far closer than is the relationship between other "private" universities and the government of the States in which they are located. For example, Cornell includes four "statutory" colleges that are, in essence, branches of the University of the State of New York. New York provides a significant portion of Cornell's operating budget, and several of the University's trustees are appointed by the State.

Whether the nexus between the State of New York and Cornell's adoption of Policy 6.4 is sufficiently close to justify deeming the latter "state action" is a fact-bound issue that can only be determined after discovery. One important factor is whether New York elected officials (and the State's representatives on the Board of Trustees) placed any pressure on Cornell administrators to adopt Policy

6.4. That such pressure was applied is quite plausible; the handling of sexual misconduct investigations on university campuses has become a highly charged political issue in recent years, and the evidence is clear that the *federal* government pressured Cornell to adopt Policy 6.4. New York has filed suit against ED, arguing that the federal government should be applying even *more* pressure on schools to restrict the procedural rights of those accused of sexual misconduct. *See New York v. U.S. Dep't of Education*, 2020 WL 3962110 (S.D.N.Y., Aug. 9, 2020) (denying request for preliminary injunction against ED).

This Court's decision in *Powe v. Miles*, 407 F.2d 73 (2d Cir. 1968) (Friendly, J.), strongly suggests that the hybrid nature of Cornell should be taken into account when undertaking the multi-factor state-action analysis mandated by *Brentwood*. *Powe* held that disciplinary action taken by Alfred University against three students enrolled in its "statutory" college (the New York State College of Ceramics) constituted "state action" subject to limits imposed by the U.S. Constitution. 407 F.2d at 82-83. That the discipline was imposed by Alfred University officials who were not part of the New York State College of Ceramics did not diminish those officials' status as state actors. *Id.* at 83.

Dean Ritter (who imposed disciplinary sanctions on Dr. Vengalattore) is not an official in one of Cornell's four statutory colleges. But as in *Powe*, that fact is

not determinative of the state-action issue. Policy 6.4 was adopted by Cornell on a university-wide basis; it applies to the statutory colleges as well as the College of Arts and Sciences. If Cornell's adoption of Policy 6.4 constituted state action, then its application to any of the University's branches constitutes state action.

Finally, it should be noted that Cornell's policy governing "Romantic and Sexual Relationships" disciplinary proceedings (set forth in the Faculty Handbook) states that the committee conducting those proceedings "*must* comport with the basic precepts of due process." Am. Compl. ¶ 180. That statement is an indication that Cornell itself deemed university-wide disciplinary rules (such as Policy 6.4) to be subject to constitutional limits.

The Court should reverse the dismissal of Count III and remand to permit Dr. Vengalattore to engage in reasonable discovery regarding the state-action issue.[4]

[4] Having dismissed the three federal claims against Cornell on the pleadings, the district court declined to exercise supplemental jurisdiction over Dr. Vengalattore's state-law defamation claim. J.A. 143. If this Court overturns the dismissal of any of the three federal claims, Dr. Vengalattore requests that the Court vacate dismissal of the defamation claim and remand it to the district court for reconsideration.

IV. DR. VENGALATTORE POSSESSES STANDING TO CHALLENGE GUIDANCE DOCUMENTS ISSUED BY THE DEPARTMENT OF EDUCATION

Dr. Vengalattore has also filed claims against the U.S. Department of Education based on ED's issuance of Title IX guidance documents that coerced Cornell and many other universities to adopt unfair and sex-biased complaint-resolution procedures for sexual misconduct complaints. The Amended Complaint alleges that ED issued the guidance documents in violation of the Administrative Procedure Act and Article I, § 8, cl. 1 of the U.S. Constitution—the Spending Clause.

The district court did not reach the merits of those claims. Rather, it granted ED's Rule 12(b)(1) motion to dismiss the claims for lack of jurisdiction, ruling that Dr. Vengalattore lacked standing to challenge the Title IX guidance documents. J.A. 125-132. It held that he failed to demonstrate that his injuries were directly traceable to the challenged guidance documents. It held that his injuries "arise directly, and only, from Ritter's findings that he violated Cornell's 'Romantic and Sexual Relationships' policy, which had been in effect since September of 1996, prior to the Guidance Documents." J.A. 127. That ruling is based on a mistaken understanding of the nature of Dr. Vengalattore's injuries.

At issue here are three separate guidance documents (collectively, the "Guidance Documents") promulgated by ED between 2001 and 2014. On January

19, 2001, ED issued a document entitled, "Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties" (the "2001 Guidance"). It outlined duties imposed on schools by Title IX to investigate and adjudicate allegations of sexual misconduct. It warned schools that they could be held liable for failing to take adequate steps to prevent sexual discrimination or harassment, whether or not they "knew or should have known about it." The 2001 Guidance told schools that any sexual conduct between faculty and students is presumed *not* to be consensual for purposes of Title IX, even if the student is enrolled in a college or university. Am. Compl. ¶ 33.

On April 4, 2011, ED issued a new guidance document known as the "Dear Colleague Letter" or "2011 DCL." As described by this Court, "The 'Dear Colleague' letter 'ushered in a more rigorous approach to campus sexual misconduct allegations' by defining 'sexual harassment more broadly than in comparable contexts' and requiring that 'schools prioritize the investigation and resolution of harassment claims' and adopt a lower burden of proof when adjudicating claims of sexual harassment." *Menaker*, 935 F.3d at 26 (quoting *Doe v. Purdue Univ.*, 928 F.3d 652, 668 (7th Cir. 2019)).

The 2011 DCL imposed many requirements not included in the 2001 Guidance. It told schools that they "must" use a preponderance-of-the-evidence

standard in adjudicating sexual misconduct claims, rather than the clear-and-convincing-evidence standard then in use at Cornell and many other universities. The 2011 DCL "strongly discourage[d] schools from allowing the parties personally to question or cross-examine each other" during the proceedings. Am. Compl. ¶ 46. It warned that ED would initiate proceedings to cut off federal funding to any school that failed to comply with the 2011 DCL. *Id.* ¶ 48.

On April 29, 2014, ED issued a third Title IX guidance document entitled, "Questions and Answers on Title IX and Sexual Violence" (the "2014 Q&A"). The new document strongly affirmed ED's prior determination that Title IX mandated use of the preponderance-of-the-evidence standard in all sexual-misconduct adjudications. It warned, "In cases involving a student who meets the legal age of consent in his or her state, there will still be a strong presumption that sexual activity between an adult school employee and a student is unwelcome and nonconsensual." Am. Compl. ¶ 57. The 2014 Q&A also warned that "even if a school was not on notice [of misconduct], the school is nonetheless responsible for remedying any effects of the sexual harassment and preventing its recurrence." *Id.* ¶ 58.

The Amended Complaint alleges that ED issued the three Guidance Documents in violation of the APA and the Constitution's Spending Clause.

Counts V through XII, ¶¶ 734-846. It seeks a declaratory judgment that the three Guidance Document were issued in violation of federal law and an injunction preventing ED from issuing substantially similar guidance documents in the future. *Id.* pp. 103-105, ¶¶ (vi) - (xv).

ED's issuance of the Guidance Documents injured Dr. Vengalattore significantly. The Guidance Documents—particularly the 2011 Dear Colleague Letter—coerced Cornell into adopting Policy 6.4. Policy 6.4 in turn deprived him of the ability to defend himself effectively from Roe's false allegation, with the result that his reputation has been destroyed, he is unable to find university employment, and he cannot secure lab support for his experiments.

The district court cited two grounds for concluding that Dr. Vengalattore failed to establish a causal connection between ED's wrongdoing and his injuries. First, it held that Dr. Vengalattore's injuries are wholly unconnected to the Guidance Documents but rather "arise directly, and only, from Ritter's findings that he violated Cornell's 'Romantic and Sexual Relationships' policy, which had been in effect since September of 1996, prior to the Guidance Documents." J.A. 127. That holding misapprehends that nature of Dr. Vengalattore's injuries.

Although the substance of the "Romantic and Sexual Relationships" policy was unaffected by issuance of the Guidance Documents, what did change was the

manner in which it was enforced. Before 2012, those accused of violating the policy were afforded broad procedural protections; but after 2012, those charged with violating the policy were subject to Policy 6.4 and thus lacked the procedural protections necessary to defend themselves effectively. But for Policy 6.4, Dr. Vengalattore would never have been falsely determined to have violated the "Romantic and Sexual Relationships" policy. And, as explained in more detail below, the Guidance Documents led directly to adoption of Policy 6.4. Dr. Vengalattore does not object to the substance of the "Romantic and Sexual Relationships" policy, only the means by which it was enforced in his case.

The district court cited a second ground for its no-causal-connection finding: Dr. Vengalattore's theory of standing rested on "mere speculation" about how Cornell would react to the Guidance Documents. J.A. 127. In other words, the district court impliedly suggested, Cornell might have adopted Policy 6.4 even if ED had not issued the Guidance Documents.

The district court's "mere speculation" rationale was based on an overly restrictive understanding of standing doctrine. In rejecting the federal government's assertion that plaintiffs lacked standing because their injuries were traceable only to the conduct of independent third parties, the Supreme Court recently explained that plaintiffs meet their traceability burden by "showing that

third parties will likely react in predictable ways" to the challenged government action. *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019). The Court said that the plaintiffs' theory of standing "did not rest on mere speculation" but "instead on the predictable [future] effect of Government action on the decisions of third parties." *Ibid*.

Dr. Vengalattore's standing claim is *far stronger* than that of the plaintiffs in *Department of Commerce*. Those plaintiffs were forced to rely on the opinions of experts regarding how millions of U.S. residents *might* react in the future if a question about citizenship status were added to 2020 census forms. In sharp contrast, we *know* how hundreds of American colleges and universities, including Cornell, reacted following ED's issuance of the Guidance Documents: they revised their rules governing investigation, enforcement, and adjudication of sexual misconduct complaints by sharply reducing procedural protections available to the accused. Policy 6.4 (adopted in 2012) closely followed the dictates of the 2011 DCL: it lowered the burden of proof to a preponderance of the evidence standard, eliminated hearings at which the accused could confront the complainant and cross-examine witnesses, adopted a presumption that students do not consent to sexual relations with a faculty member, and authorized a single

Cornell official to both investigate the complaint and make factual findings. Am. Compl. ¶¶ 137-169.

It is not mere "speculation" for Dr. Vengalattore to allege that Cornell adopted Policy 6.4 in response to the 2011 DCL. Cornell officials who sponsored adoption of Policy 6.4 expressly stated that the change was necessary to bring Cornell into compliance with the 2011 DCL. *Id.* ¶¶ 129-133. Policy 6.4 governed allegations of "harassment and sexual and related misconduct" and was the "exclusive means of adjudicating" these kinds of allegations. *Id.* ¶¶ 130, 134. Cornell maintained that the original Code of Conduct "did not fulfill requirements of Title IX" because it afforded excessive due process protections to the accused. *Id.* ¶ 135. Investigators Mittman and Affel expressly stated that they were "guided" by the Guidance Documents' presumption that "any relationship between faculty and a student constitutes sexual harassment." *Id.* ¶ 578.

Indeed, ED took extraordinary steps to ensure that colleges and universities revised their adjudication procedures to conform to the 2011 DCL's requirements; those steps are described in detail in the Amended Complaint. *Id.* ¶¶ 59-81. Among other things, ED created a list of colleges and universities under investigation "for potential violations of their obligation to comply with Title IX in the implementation of prompt and equitable sexual misconduct grievance

procedures." *Id.* ¶ 61. That list eventually grew to include 223 colleges and universities, including Cornell. *Id.* ¶ 67. Schools that failed to abandon the clear-and-convincing-evidence standard of proof, including Princeton and Harvard Law School, were targeted for special enforcement action. *Id.* ¶¶ 69-76. ED also ordered two schools (on pain of losing federal funding) to adopt procedures that expressly forbid parties from cross-examining each other. *Id.* ¶¶ 78-80. And ED's views on the meaning of Title IX carry considerable weight: in enforcement proceedings, ED repeatedly seeks judicial deference to its views, thereby cementing the causal connection between ED's "guidances" and university policy. In light of these factual allegations, Dr. Vengalattore has adequately demonstrated that Cornell adopted Policy 6.4 in response to the Guidance Documents, and thus that Dr. Vengalattore's injuries are directly traceable to the Guidance Documents.

Moreover, the district court improperly applied a heightened standard for establishing standing. J.A. 128-29 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1991) for the proposition that "[w]hen a plaintiff's injury 'arises from the government's allegedly unlawful regulation ... of someone else, much more is needed.'"). A heightened review standard is inappropriate at the pleadings stage. Both *Lujan* and *Dep't of Commerce* involved Supreme Court review of merits-based judgments in favor of those challenging government action; thus, the

Supreme Court took a very careful look at the plaintiffs' claims that they were injured by government regulation of someone else. But *Lujan* explained that a more relaxed standard applies when, as here, the government is challenging standing at the pleadings stage:

> Since [the elements of federal jurisdiction, including standing] are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation. *At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim.* In response to a summary judgment motion, however, the plaintiff can no longer rest on such "mere allegations," but must "set forth" by affidavit or other evidence "specific facts," Fed.Rule Civ.Proc. 56(e), which for purposes of the summary judgment motion will be taken to be true. And at the final stage, those facts (if controverted) must be supported adequately by the evidence adduced at trial.

504 U.S. at 561 (emphasis added) (citations omitted).

The trial court also held that Dr. Vengalattore lacked standing because there was no evidence that his injuries were likely to be redressed if he were granted his requested relief. J.A. 128-31. But the principal injury suffered by Dr. Vengalattore is the devastating injury to his reputation caused by the false finding that he engaged in "an inappropriate sexual relationship" while teaching at Cornell. That reputational injury will be significantly reduced if he prevails in his claim against ED. A

judgment declaring that the Guidance Documents were improperly issued will go a long way toward convincing observers that Dr. Vengalattore was the victim of gross federal government overreach and that the sexual-misconduct finding should be completely discounted because it was the product of an unfair proceeding unfairly.

The trial court's no-redressability finding was based on the same flawed reasoning as its no-traceability finding: "Vengalattore fails to show how a favorable decision would redress his injuries, because his injuries are a result of Cornell's independent actions, based on Cornell's own policies, not the Guidance Documents." J.A. 129. But, as Dr. Vengalattore demonstrates above, he has adequately alleged—for purposes of surviving a motion to dismiss—that Cornell adopted Policy 6.4 precisely because ED pressured it to do so. Federal courts have repeatedly upheld "standing to challenge government action on the basis of injuries caused by regulated third parties where the record presented substantial evidence of a causal relationship between the government policy and the third-party conduct, leaving little doubt as to causation and the likelihood of redress." *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 941 (D.C. Cir. 2004) (collecting cases). And the possibility of redress of reputational injuries are among the allegations that can support redressability claims. *Foretich v. United States*, 351 U.S. 1198, 1211 (D.C. Cir. 2003); *Parsons v. U.S. Dep't of Justice*, 801 F.3d 701, 717 (6th Cir. 2015).

The district court's standing decision creates a no-win situation for targets of sexual misconduct claims. It permits the federal government—by foisting its policy goals on federal-fund recipients—to achieve those goals while denying injured parties the right to seek redress. Cornell is not subject to suit based on claims that it is an arm of the federal government, while (according to the district court) ED cannot be sued for forcing federal-fund recipients to do what it would not be allowed to do directly. Standing doctrine was never intended to facilitate subterfuge of that sort.[5]

[5] ED argued in the district court that Dr. Vengalattore's claims were moot because ED repealed the 2011 DCL and the 2014 Q&A in 2017. The district court did not reach that argument. The repeal did not moot the claims against ED because the 2011 DCL and the 2014 Q&A were still very much in effect (and relied on by Cornell) when Cornell conducted its sexual misconduct proceeding against Dr. Vengalattore. Damage to reputation that is directly traceable to government action will support standing, and the claim is not moot so long as the immediate source of those damages (in this instance, Cornell's false sexual misconduct finding) remains in place. *Foretich*, 351 F.3d at 1213-14. ED recently issued a new final rule that corrects some of the worst features of the Guidance Documents. ED, "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," 85 Fed. Reg. 30,026 (May 19, 2020), codified at 34 C.F.R. pt. 106. That regulation does not, however, require restoration of the clear-and-convincing evidence standard. And it has been challenged in many federal district courts across the country. Moreover, given the politically polarized nature of this issue, it is highly likely that if there is a change in Administrations following the November 2020 election, ED will seek to repeal the new rule and reinstate the policies set out in the 2011 DCL and the 2014 Q&A. *See Tsombanidis v. West Haven Fire Dep't*, 352 F.3d 565, 574 (2d Cir. 2003) (case was not moot because "a change in the ... administration" might cause the withdrawn action to be reenacted).

CONCLUSION

Dr. Vengalattore respectfully requests that the Court reverse the district court's grant of ED's motion to dismiss and its grant of Cornell's motion for judgment on the pleadings, and remand the case to the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I am an attorney for Appellant Mukund Vengalattore. Pursuant to Fed.R.App.P. 32(a)(7)(C), I hereby certify that the foregoing brief of NCLA is in 14-point, proportionately spaced Times New Roman type. According to the word processing system used to prepare this brief (WordPerfect X8), the word count of the brief is 13,658, not including the table of contents, table of authorities, certificate of service, and this certificate of compliance.

/s/ Richard A. Samp
Richard A. Samp

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of August, 2020, I electronically filed the opening brief of Appellant Mukund Vengalattore with the Clerk of the Court for the U.S. Court of Appeals for the Second Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/CF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Caleb Kruckenberg
Caleb Kruckenberg