# 20-1514

*To be Argued by:* KAREN FOLSTER LESPERANCE

## United States Court of Appeals
**FOR THE SECOND CIRCUIT**
**Docket No. 20-1514**

DR. MUKUND VENGALATTORE,
*Plaintiff-Appellant,*
v.
CORNELL UNIVERSITY,
*(case caption continued on reverse)*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

**BRIEF FOR APPELLEES BETSY DEVOS, SECRETARY OF EDUCATION U.S. DEPARTMENT OF EDUCATION, AND UNITED STATES DEPT OF EDUCATION**

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CASE CAPTION, *continued*

BETSY DEVOS, SECRETARY OF EDUCATION
U.S. DEPARTMENT OF EDUCATION, UNITED
STATES DEPARTMENT OF EDUCATION,
*Defendants-Appellees.*

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# United States Court of Appeals
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DR. MUKUND VENGALATTORE,
*Plaintiff-Appellant,*

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CORNELL UNIVERSITY, BETSY DEVOS, SECRETARY OF EDUCATION U.S. DEPARTMENT OF EDUCATION, UNITED STATES DEPARTMENT OF EDUCATION,
*Defendants-Appellees.*

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## STATEMENT OF THE ISSUES PRESENTED

1. Whether Dr. Mukund Vengalattore has standing to challenge Department of Education guidance documents under the Administrative Procedure Act (APA) or the Spending Clause of the United States Constitution.

2. To the extent Vengalattore has standing, whether the dismissal of the complaint should be affirmed on the alternative grounds that

Vengalattore failed to state a claim under either the APA or the Spending Clause.

## STATEMENT OF THE CASE

Vengalattore appeals from a judgment in favor of defendants-appellees Cornell University, Betsy Devos, as Secretary of Education, and the United States Department of Education,[1] resulting from a decision and order of the United States District Court for the Northern District of New York (Sharpe, S.J.), granting Cornell's motion for judgment on the pleadings and/or for summary judgment and granting the Department's motion to dismiss for lack of subject matter jurisdiction.

This action stems from two personnel actions affecting Vengalattore's employment with Cornell University: (1) Cornell's decision in May 2016 to deny Vengalattore tenure; and (2) Cornell's October 2015 determination that Vengalattore violated its policy regarding Sexual and Romantic Relationships Between Students and Staff (the

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[1] Secretary DeVos was sued in her official capacity. J.A. 12 at ¶ 10. DeVos and the United States Department of Education will be collectively referred to herein as "the Department."

Citations to the Joint Appendix filed in this Court (Document No. 38) are cited herein as "J.A. __." Citations to the district court docket are cited as "Dkt. #__."

"Relationships Policy"), and the resultant imposition of a two-week suspension. After unsuccessfully challenging these personnel decisions in state court, Vengalattore commenced this action against Cornell in federal court, alleging discrimination on the basis of race and gender in violation of Title IX of the Education Amendments of 1972 (Title IX), Title VI of the Civil Rights Act of 1964 (Title VI), and 42 U.S.C. § 1982, as well as a state law defamation claim. From Cornell, he seeks to obtain a reversal of the denial of his tenure and collect economic and compensatory damages.

Vengalattore also asserted claims against the Department, alleging that certain Department guidance documents interpreting Title IX's prohibition against sex discrimination at educational institutions that receive federal funding violated the APA and the Spending Clause of the Constitution. He seeks a declaratory judgment that the guidance documents violate the APA and Spending Clause, and an injunction prohibiting the Department from issuing substantially similar guidance or rules in the future.

The Department moved to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure, asserting that Vengalattore lacked standing to challenge the Department's guidance documents. Alternatively, the Department argued that even if

Vengalattore had standing, he failed to state a claim under either the APA or the Spending Clause, warranting dismissal under Federal Rule of Civil Procedure 12(b)(6). Dkt. # 36.

Cornell filed an answer, attaching exhibits to support its denial of a number of allegations, and then filed a motion for judgment on the pleadings pursuant to Rule 12(c). Dkt. #40, 41.

By Decision and Order dated May 1, 2020, the district court granted both motions, holding that Vengalattore did not have standing to challenge the Department's guidance, J.A. 124-132, and that he failed to state a plausible claim against Cornell. J.A. 132-43. Judgment in favor of defendants entered the same day. J.A. 145. Vengalattore filed a timely notice of appeal on May 8, 2020. J.A. 146.

## STATEMENT OF FACTS

### A. Statutory and Regulatory Background

Title IX provides that "[n]o 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). Title IX provides two mechanisms for ensuring compliance with its nondiscrimination mandate. First, individuals injured by discriminatory practices can sue recipients of federal funds directly. *See Cannon v.*

*Univ. of Chicago,* 441 U.S. 677, 704-08 (1979). Second, the Department is authorized to issue rules, regulations, and orders to effectuate Title IX, including initiating proceedings to terminate federal funding if voluntary compliance cannot be secured, or to enforce compliance by any other means authorized by law. 20 U.S.C. § 1682.

In 1975, the Department's predecessor (the Department of Health, Education, and Welfare (HEW)) promulgated, and President Ford approved, regulations to effectuate Title IX. *See Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance: Nondiscrimination on the Basis of Sex,* 40 Fed. Reg. 24,128 (June 4, 1975). Those regulations remain in effect today, subject to amendments not relevant here. *See* 34 C.F.R. § 106.4. Among other things, the regulations incorporate Title IX's nondiscrimination mandate, *id.* § 106.31(a), identify specific actions that constitute discrimination, *id.* § 106.31(b), and require assurances from recipients that their programs and activities comply with regulatory requirements, *id.* § 106.4(a). Recipients found to have discriminated on the basis of sex must "take such remedial action as the Assistant Secretary [for Civil Rights] deems necessary to overcome the effects of such discrimination." *Id.* § 106.3(a).

## B. The Department's Guidance Documents

Since the adoption of the Title IX implementing regulations, the Department's Office for Civil Rights (OCR) has issued various guidance documents to explain how OCR interprets and applies the statutory and regulatory requirements in its enforcement of Title IX. Several OCR guidance documents have addressed how Title IX and the Department's regulations apply to sexual harassment, which courts have recognized as a form of sex discrimination prohibited under Title IX. *See, e.g., Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 649-50 (1999); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 281 (1998).

### 1. The 2001 Guidance

In 2001, OCR released *Revised Sexual Harassment Guidance: Harassment of Students By School Employees, Other Students, or Third Parties* (the 2001 Guidance). Dkt. #36-2.[2] The 2001 Guidance replaced earlier guidance from 1997 to account for intervening U.S. Supreme Court decisions, including *Davis,* which established that private individuals may sue for dmages under Title IX if recipients are deliberately indifferent to known student-on-student sexual harassment, including sexual assault, that creates a hostile educational environment. *Id.* at 3.

[2] The 2001 Guidance was rescinded in 2020, but was operable at all times relevant to this case.

### 2. The 2011 Dear Colleague Letter

On April 4, 2011, OCR issued a "Dear Colleague Letter" (the 2011 Letter) to "supplement[] the 2001 Guidance by providing additional guidance and practical examples regarding the Title IX requirements as they relate to sexual violence." Dkt. #36-3 at 4. The 2011 Letter discusses, among other things, a recipient's duty to respond to reports of sexual harassment, including sexual violence, while recognizing that the specific steps in an investigation and complaint resolution process will vary according to, *inter alia,* the nature of the allegations. *Id.* at 5, 12. It reiterates that the Department's regulations require schools to adopt grievance procedures that provide for prompt and equitable resolution of sex discrimination complaints. *Id.* at 8.

### 3. The 2014 Q&A

On April 29, 2014, OCR issued a document entitled *Questions and Answers on Title IX and Sexual Violence* (the 2014 Q&A) to provide "additional guidance" to schools and postsecondary institutions "concerning their obligations under Title IX to address sexual violence as a form of sexual harassment." Dkt. #36-4 at 3.

**4. The 2017 Guidance**

Following a change in administration, OCR issued a Dear Colleague Letter on September 22, 2017 (the "2017 Letter"), withdrawing "the statements of policy and guidance reflected in" the 2011 Letter and the 2014 Q&A. Dkt. #36-5 at 1. OCR explained that the 2011 Letter and 2014 Q&A "'interpreted Title IX to impose new mandates" and that the documents "imposed these regulatory burdens without affording notice and the opportunity for public comment." *Id.* at 1-2.

The 2017 Letter was accompanied by a *Q&A on Campus Sexual Misconduct* (the "2017 Q&A"). Dkt. #36-6. The 2017 Letter also committed to future rulemaking "to develop an approach to student sexual misconduct that responds to the concerns of stakeholders and that aligns with the purpose of Title IX to achieve fair access to educational benefits." *Id.* at 2. In the interim, OCR referred schools to the 2001 Guidance, a prior 2006 Dear Colleague Letter, and the 2017 Q&A. The 2017 Letter and 2017 Q&A (collectively, the "2017 guidance") do "not add requirements to applicable law." Dkt. #36-5 at 2. [3]

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[3] The Department has since amended the Title IX regulations relating to sexual harassment and rescinded the 2017 Guidance. *See* Title IX Final Rule, 85 FR 30026 (May 19, 2020), available at https://www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf.

### C. Cornell's Policies Relating to Sex Discrimination and Sexual Misconduct

#### 1. Cornell's Title IX Policy

In 2012, Cornell promulgated Policy 6.4 as an "exclusive means" for adjudicating claims pursuant to Title IX alleging bias, discrimination, harassment and sexual and related misconduct, whether committed by faculty, other students, or third parties. J.A. 27-28 at ¶¶ 129-135; Dkt. #60-4.

#### 2. The Relationships Policy

Cornell maintains a Faculty Handbook, which contains a series of *University Policies Applicable to Faculty*. J.A. 32 at ¶ 173. One such policy, adopted as University policy in 1996, is entitled *Romantic and Sexual Relationships Between Students and Staff*. *Id.* at ¶ 174; Dkt. #40-6. It provides that "[n]o member of the university community should simultaneously be romantically or sexually involved with a student whom he or she teaches, advises, coaches, or supervises in any way." Dkt. #40-6.

## D. Cornell's Personnel Actions Relating to Vengalattore

### 1. The Denial of Tenure

In 2009, Cornell hired Vengalattore as a tenure-track professor of Physics. J.A. 34 at ¶ 196. Shortly thereafter, graduate student Jane Roe began working with Vengalattore as a research assistant in his laboratory. J.A. 35 at ¶¶ 199-202. She continued working as Vengalattore's graduate research assistant until November 2012, when she withdrew from his research project. J.A. 41 at ¶ 283.

In the fall of 2014, Cornell initiated the tenure review process for Vengalattore by assembling a tenure review committee within the physics department. J.A. 42 at ¶ 293. As part of this process, a member of the faculty review committee solicited the opinions of Vengalattore's students. In May 2014, Roe submitted a letter that was critical of the way Vengalattore interacted with his research assistants, including an allegation that on one occasion Vengalattore became so inpatient with her that he picked up a power supply – a metal box weighing five pounds – and threw it at her. J.A. 43 at ¶¶ 309-10. Other students shared both positive and negative experiences with Vengalattore, with some students noting that Vengalattore did not communicate well and was belittling and unprofessional. In September 2014, despite some concerns with Vengalattore's

interactions with students, the department committee ultimately recommended that he be granted tenure. J.A. 44 at ¶ 320.

Vengalattore alleges that Roe was informed of the committee's conclusion by e-mail on September 22, 2014. J.A. 45 at ¶322. On or about September 24, 2014, Roe alleged for the first time that in December 2010, she had a non-consensual sexual encounter with Vengalattore, J.A. 45 at ¶ 324, and that thereafter they were engaged in a consensual relationship for approximately one year. J.A. 47 at ¶¶ 344-51.

Following the department's tenure recommendation, Gretchen Ritter, the Dean of the College of Arts and Sciences, convened an ad hoc committee to review the tenure dossier and provide a tenure recommendation. In October 2014, the ad hoc committee unanimously recommended against granting tenure, and Ritter informed Vengalattore of her preliminary decision to deny tenure. However, the physics department requested, and was granted, additional time to conduct a study of the environment in Vengalattore's laboratory based upon the issues raised by Roe and other students. Following this review as well as a positive recommendation from a professor who previously worked in the physics department, in December 2014, Ritter nonetheless affirmed her preliminary decision to deny tenure.

In accordance with Cornell's review process, the tenure dossier and Ritter's decision were forwarded to the University Interim Provost, who referred the matter to the Faculty Advisory Committee on Tenure Appointment. This committee voted to deny tenure to Vengalattore. The Interim Provost agreed with the Faculty Advisory Committee's recommendation and returned the matter to Ritter for final review. In February 2015, Vengalattore was notified that his request for promotion to associate professor with tenure was denied.

Vengalattore appealed to Cornell's Appeals Committee, which concluded that Roe's May 2014 letter should not have been considered as part of the tenure review process given the conflict of interest posed by her relationship with Vengalattore and her allegations of sexual misconduct. Thus, Ritter redacted Roe's letter and any reference to her allegations from Vengalattore's tenure dossier and convened a new ad hoc committee. The new committee reviewed the redacted tenure dossier and, in February 2016, recommended granting tenure.

Notwithstanding such recommendation, Ritter affirmed her decision denying Vengalattore tenure. The redacted tenure dossier was then provided to the University Provost for a final tenure determination. In May 2016, the Provost accepted Ritter's negative tenure determination.

**2. Disciplinary Suspension**

Independent of the tenure review process, Cornell conducted an investigation into Roe's allegations of sexual misconduct. Because the allegations were made more than one year after the alleged misconduct, they were time-barred under Title IX and Policy 6.4. J.A. 69 at ¶ 581, Dkt. #40-13 at 4. Accordingly, the investigation focused primarily on whether Vengalattore violated Cornell's Relationships Policy. Dkt. #40-13 at 4.

After a lengthy investigation including witness testimony and over 1000 pages of documentary evidence, the investigation committee submitted a final report "recommend[ing] that the Dean find that a preponderance of the credible evidence supports the conclusion that [Vengalattore], a faculty member, had a romantic or sexual relationship with [Roe], a student he directly supervised." Dkt. #40-13 at 63. The report cited the Department's 2001 Guidance to the extent it advised:

> In cases involving secondary students there will be a strong presumption that sexual conduct between an adult school employee and a student is not consensual. In cases involving older secondary students, subject to the presumption, OCR will consider a number of factors in determining whether a school employee's sexual conduct could be

> considered welcome. In addition, OCR will consider these factors in all cases involving postsecondary students in making those determinations. The factors include the following:
>
> - The nature of the conduct and the relationship of the school employee to the student, the degree of influence (which could, at least in part, be affected by the student's age), authority, or control the employee has over the student.

Dkt. #40-13 at 63 (citing the 2001 Guidance).

Dean Ritter concurred with the findings of the investigation and adopted the committee's recommendation, concluding that Vengalattore had engaged in a romantic and sexual relationship with Roe that violated the University's Relationships Policy. J.A. 74 at ¶ 622; Dkt. #40-7. Ritter directed Vengalattore not to undertake supervision of any female graduate students, and not to have any communications with Roe, to include declining invitations to speak at or attend academic conferences that Roe was attending. *Id.* Ritter suspended the imposition of any further sanctions pending the outcome of Vengalattore's tenure appeal. *Id.*

In February 2017, after the conclusion of the internal appeal process relating to the denial of Vengalattore's tenure, Ritter imposed additional sanctions, including a two-week suspension without pay. Dkt. #40-8. Vengalattore did not appeal either the finding that he violated the Relationships Policy or the sanctions imposed.

### 3. The Prior State Court Proceedings

In June 2016, Vengalattore filed a petition in the Supreme Court for the State of New York, Schuyler County, pursuant to New York Civil Practice Law and Rules (CPLR) Article 78 seeking a reversal of the tenure denial and a *de novo* tenure review, and expungement of the disciplinary finding that he violated the Relationships Policy. The state court granted that portion of the petition that requested a *de novo* tenure review, and denied the remainder of the petition. Cornell appealed from that portion of the c]ourt's order that granted Vengalattore's request to reverse his tenure denial. Vengalattore did not cross-appeal the denial of the remainder of his petition.

On March 30, 2018, the New York State Supreme Court Appellate Division, Third Department found in favor of Cornell, finding that the tenure decision was not arbitrary, capricious or made in bath faith, nor was it improperly influenced by Roe's allegations of sexual misconduct. J.A. 77 at ¶ 645; *Vengalattore v. Cornell Univ.*, 161 A.D.3d 1350, 1352 (2018).

Vengalattore's academic appointment at Cornell ended on June 30, 2018. J.A. 77 at ¶ 647.

#### 4. Vengalattore's Claims Against the Department

On September 18, 2018, Vengalattore commenced this action against Cornell and the Department. Dkt. #1. With respect to the Department, he contends that its Title IX guidance documents "coerced Cornell and many other universities to adopt unfair and sex-biased complaint-resolution procedures for sexual misconduct complaints." App. Br. at 51.

Vengalattore's complaint sought to set aside the 2001 Guidance, the 2011 Letter and the 2014 Q&A (collectively, the "Guidance Documents") pursuant to the APA and the Spending Clause. Specifically, he contends that the Guidance Documents are unlawful and should have been set aside pursuant to: (1) 5 U.S.C. § 706(2)(D) because they constituted "rule making" within the meaning of the APA but were promulgated without notice and an opportunity for comment; (2) 5 U.S.C. § 706(2)(C) because they exceeded the statutory jurisdiction of Title IX; (3) 5 U.S.C. § 706(2)(A) because they were arbitrary and capricious; and (4) the Spending Clause of the United States Constitution because they unlawfully conditioned payment of federal funds on state and local actors' engaging or refusing to engage in certain behaviors.

The district court dismissed Vengalattore's claims against the Department for lack of subject matter jurisdiction, finding that Vengalattore failed to establish a causal connection between the Guidance Documents and his claimed injuries because "the injuries he alleges – a two-week suspension, and reputational harms flowing therefrom – arise directly, and only, from Ritter's findings that he violated [the Relationships Policy], which had been in effect since September of 1996, prior to the Guidance Documents." J.A. 127. Moreover, the claimed reputational injuries were the result of Cornell's alleged republication of the disciplinary findings to other institutions, and not due to any action by the Department. J.A. 128.

The district court further held that Vengalattore lacked standing because he failed to establish redressability. The court noted that Vengalattore "only speculates that the requested relief would result in Cornell altering its independent choice to find him in violation of [the Relationships Policy] and therefore improve his career prospect and his position with respect to Cornell, which is inadequate." J.A. 130. Moreover, the court held that Vengalattore failed to establish redressability because he did not plausibly allege that Cornell found him in violation of the Relationships Policy "*because of* the Guidance Documents." J.A. 131 (emphasis in original).

Accordingly, the district court granted the Department's motion to dismiss for lack of

standing, and did not reach the merits of the APA or Spending Clause claims. J.A. 132.

## SUMMARY OF ARGUMENT

The district court correctly concluded that Vengalattore lacked standing to bring his APA claims against the Department, because he cannot establish that his asserted injury is "fairly traceable" to the Department's actions, or that it would be redressed by the relief sought. Vengalattore alleges reputational harm as the result of Dean Ritter's finding that he engaged in an inappropriate sexual relationship with a graduate student he supervised, and that he lied about the relationship during the investigation. He cannot establish causation between this injury and the Department's Guidance Documents, particularly in light of the fact that Roe's allegations of an inappropriate relationship were adjudicated pursuant to Cornell's Relationships Policy, which has been in effect since 1996 and was not changed in reaction to any of the challenged Guidance Documents. Moreover, the harm that befell Vengalattore's reputation as the result of these findings would not be redressed by a declaratory judgment that the Guidance Documents violated the APA. In addition, Vengalattore's claims against the Department are moot because the Guidance Documents have been rescinded.

Even if Vengalattore had standing to assert his APA claims, this Court should nonetheless affirm

the dismissal of the complaint for failure to state a claim. The Guidance Documents are not reviewable under the APA because they are not final agency action without an alternative remedy. Moreover, because the Guidance Documents are interpretations of existing statutes, they are mere guidance and not legislative rules. As such, they are within the Department's authority to promulgate and did not require notice and comment.

Finally, Vengalattore does not have a private right of action against the Department under the Spending Clause, and the dismissal of this claim should be affirmed accordingly.

## ARGUMENT

### POINT I: Vengalattore Lacks Standing to Challenge the Department's Title IX Guidance Documents.

### A. Standard of Review

This Court reviews *de novo* a district court's dismissal of a complaint under Federal Rule of Civil Procedure 12(b)(1) for lack of subject-matter jurisdiction. *Ford v. D.C. 37 Union Local 1549*, 579 F.3d 187, 188 (2d Cir. 2009). "Generally, standing is a federal jurisdictional question determining the power of the court to entertain the suit." *Cacchillo v. Insmed, Inc.*, 638 F.3d 401, 404 (2d Cir. 2011) (internal quotation marks and alterations

omitted). In particular, "a plaintiff must demonstrate standing for each claim and form of relief sought." *Baur v. Veneman*, 352 F.3d 625, 642 n.15 (2d Cir. 2003). *See also W.R. Huff Asset Mgmt. Co. v. Deloitte & Touche LLP*, 549 F.3d 100, 106 (2d Cir. 2008) (noting that this Court reviews *de novo* whether a plaintiff has constitutional standing to sue).

**B. Governing Law**

It is axiomatic that in order to meet the "case or controversy" requirement of Article III of the Constitution, a plaintiff must establish that it has standing. U.S. Const. art. III, cl. 2; *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992); *Valley Forge Christian College v. Ams. United for Separation of Church and State Inc.,* 454 U.S. 464, 471 (1982). To establish standing, a plaintiff must establish three "irreducible" elements: (1) an injury-in-fact, which is a "concrete and particularized" harm to a "legally protected interest"; (2) causation in the form of a "fairly traceable" connection between the asserted injury-in-fact and the alleged actions of the defendant; and (3) redressability, or a non-speculative likelihood that the injury can be remedied by the requested relief. *W.R. Huff,* 549 F.3d at 106-07 (citing *Lujan,* 504 U.S. at 560-61). These requirements ensure that a plaintiff has a sufficiently personal stake in the outcome of the suit so that the parties are adverse. *See Baker v. Carr,* 369 U.S. 186, 204 (1962). A plaintiff "must

demonstrate standing separately for each form of relief sought" and "for each claim he seeks to press." *DaimlerChrysler Corp. v. Cuno,* 547 U.S. 332, 352 (2006).

Because courts are generally "reluctan[t] to endorse standing theories that rest on speculation about the decisions of independent actors," *Clapper v. Amnesty Int'l,* 568 U.S. 398, 414 (2013), in cases where redressability hinges on the response of the regulated third party to the government action, "much more is needed." *Lujan,* 504 U.S. at 562. Indeed, "when the plaintiff is not himself the object of the government action or inaction he challenges, standing . . . is ordinarily 'substantially more difficult' to establish." *Id.* (citing *Allen v. Wright,* 468 U.S. 737, 758 (1974); *Simon v. Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26, 44–45 (1976); *Warth v. Seldin,* 422 U.S. 490, 505 (1975)).

**C. Discussion**

**1. Vengalattore Failed to Sufficiently Allege Causation**

Vengalattore's claims were properly dismissed for the simple reason that he was not injured by any policy that was changed or modified as a result of the Department's Title IX guidance. As discussed above, the record in this case confirms that Vengalattore was disciplined for his violation of Cornell's Relationships Policy, not Policy 6.4.

The Relationships Policy was enacted in 1996, and it was not changed as a result of the Department's 2001 Guidance, the 2011 Letter, or the 2014 Q&A. J.A. 246 at ¶ 4, 247 at ¶ 8. As the court below correctly observed, "the injuries [Vengalattore] alleges—a two-week suspension, and reputational harms flowing therefrom—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.

As the district court correctly concluded, Vengalattore "is not himself the object of the government action or inaction he challenges." *See Lujan*, 504 U.S. at 562. Vengalattore contends that the district court's determination "is based on a mistaken understanding of the nature of [his] injuries." App. Br. at 51. He acknowledges that the Relationships Policy has been in effect unchanged since 1996, *id.* at 54, but argues that since 2012, individuals alleged to have violated that policy were "subject to Policy 6.4 and thus lacked the procedural protections necessary to defend themselves effectively." *Id.* at 55. He contends that the Department coerced Cornell into changing its Title IX Policy, and the resultant changes affected the investigation of his alleged violation of the Relationships Policy. But the only changes that Cornell made to its policies as the result of the Guidance Documents related to investigation and adjudication of complaints against students, not faculty, and therefore did not

affect the adjudication of Roe's complaint against him. J.A. 245-47. Indeed, while Policy 6.4 is the "exclusive" means of adjudicating Title IX claims, the investigative method and burden of proof that Cornell has used to adjudicate faculty members' alleged violations of the Relationships Policy has remained unchanged since 1996. J.A. 246 at ¶ 4.

Moreover, Vengalattore does not, and cannot, allege that he was disciplined under Cornell's Title IX Policy. In fact, he acknowledges that Cornell could not proceed against him under that policy, because any such claim was time-barred. J.A. 69 at ¶ 581, Dkt. #40-13 at 4.

As a result, Vengalattore did not allege an injury that was "fairly traceable" to the Department's actions, and the district court correctly held that he lacked standing.

**2. The Relief Sought By Vengalattore Would Not Redress His Injuries.**

Even if Vengalattore could demonstrate an injury that was fairly traceable to the Department's actions, he has not plausibly alleged that his injuries would be redressed by a favorable decision against the Department. Vengalattore alleges that the "principal injury" he suffered was a "devastating injury to his reputation" caused by Cornell's determination that he engaged in an inappropriate sexual relationship with a graduate student under his supervision, and that he lied

about the relationship during the investigation. App. Br. at 59. He further contends that a declaratory judgment that the Guidance Documents were improperly issued "will go a long way toward convincing observers that [he] 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." *Id.* at 60.

Notably, Vengalattore does not allege that if he prevails in his claims against the Department – which are moot, given that the documents he seeks to invalidate have already been rescinded – Cornell will revoke its finding that he violated the Relationships Policy or will reverse the denial of tenure. Rather, his redressability argument presumes that a determination that the Guidance Documents violated the APA will lead "observers" (presumably other universities and the public at large) to assume that (1) Cornell instituted unlawful policies as a result of the Guidance Documents; (2) those unlawful policies unfairly influenced the investigation of his alleged violation of the Relationships Policy (even though that policy remained unaltered by the Guidance Documents); and (3) since the process was unfair, it must be logically assumed that the determination reached by the investigative committee and Dean Ritter was incorrect and, in fact, he did not have a sexual relationship with Roe, thereby repairing the alleged harm to his reputation and allowing him to obtain employment

at a university at which he can resume his research.

It is difficult to conceive of an argument that is more speculative than this. Vengalattore bases his redressability claim on his assumptions as to what unknown third parties may "assume" about the facts surrounding his discipline and upon his speculation as to what they might do with regard thereto. It is not the obligation of the court to "presume" or "predict" that a third party will act in a manner that will redress the plaintiff's injury: it is incumbent on the plaintiff to allege facts "showing that those choices have been or will be made in such a manner as to . . . permit redressability of injury." *Lujan,* 504 U.S. at 562; *see also, e.g.*, *Levine v. Vilsack*, 587 F.3d 986, 992, 993 (9th Cir. 2009) (discussing *Lujan* and stating that the redressability standard "is altered somewhat when third parties not before the court must change their behavior in order for any injury suffered to be redressed"; court will not engage in "speculation" or even "confident speculation"); *Burton v. Cent. Interstate Low-Level Radioactive Waste Compact Comm'n*, 23 F.3d 208, 210 (8th Cir. 1994) (when redressability of injury depends on actions of third parties not before the court, the complaint must contain allegations that the injury is likely to be redressed by a favorable decision; court does not accept "on faith" that the third party will act in a manner that will redress the plaintiff's injuries).

Vengalattore contends that since he has adequately alleged that the Guidance Documents compelled Cornell to adopt Policy 6.4, he has established redressability. App. Br. at 60. However, he acknowledges that the Relationships Policy he was found to have violated was not changed as a result of the now-rescinded Guidance Documents, and he has failed to plausibly allege that the relief he seeks against the Department would cause Cornell to revoke his disciplinary findings or grant him tenure, or would restore his reputation with outside "observers" by leading them to disbelieve that he violated the Relationships Policy and lied to investigators.

Because Vengalattore has failed to allege that the relief he seeks against the Department will redress the injury he claims to have suffered, he lacks standing. Thus, the district court correctly dismissed his claims against the Department.

**3. Because the Guidance Documents Have Been Rescinded, Vengalattore's Claims Against the Department are Moot.**

Article III's narrow limits on federal court jurisdiction are "founded in concern about the proper – and properly limited – role of the courts in a democratic society." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Because Article III courts exist to resolve concrete "cases" and "controversies," U.S. Const. art. III, § 2, "[i]f an intervening

circumstance deprives the plaintiff of a 'personal stake in the outcome of the lawsuit,' at any point during litigation, the action can no longer proceed and must be dismissed as moot." *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 72 (2013) (quoting *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477–78 (1990)). *See also Catanzano v. Wing*, 277 F.3d 99, 107 (2d Cir. 2001); *Martin-Trigona v. Shiff*, 702 F.2d 380, 386 (2d Cir. 1983) ("The hallmark of a moot case or controversy is that the relief sought can no longer be given or is no longer needed.").

Here, Vengalattore seeks a declaratory judgment that the Guidance Documents were unlawful and should be set aside. However, the 2011 Letter and the 2014 Q&A were withdrawn by the 2017 Letter. Dkt. #36-5 at 1. The 2001 and 2017 Guidance were rescinded and superseded by a Final Rule that became effective on August 26, 2020. *See* Title IX Final Rule, 85 FR 30026 (May 19, 2020) https://www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf. As such, Vengalattore's claims are moot because he seeks to invalidate Guidance Documents that have been withdrawn or rescinded. Nor can he establish that he will be injured in the future by the application of the Guidance Documents, or by similar guidance documents if such were issued at some later date. *Shain v. Ellison,* 356 F.3d 211, 215-16 (2d Cir. 2004) (citing *City of Los Angeles v. Lyons,* 461 U.S. 95, 101-102 (1983)). As such, his action to have these Guidance Documents set aside is moot.

*Genesis Healthcare,* 569 U.S. at 72 (where intervening circumstances deprive plaintiff of a "personal stake in the outcome of the lawsuit," action must be dismissed as moot); *LaRoque v. Holder,* 679 F.3d 905, 909 (D.C. Cir. 2012) (case is moot where plaintiff obtains everything they could recover from lawsuit).

## POINT II: The Dismissal of Vengalattore's Claims against the Department Should Be Affirmed Because They Fail to State a Claim Under the APA and the Spending Clause.

### A. Standard of Review

This Court reviews a district court's grant of a motion to dismiss under Rule 12(b)(6) for failure to state a claim *de novo.* *Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195, 199 (2d Cir. 2017); *Carpenters Pension Tr. Fund of St. Louis v. Barclays PLC*, 750 F.3d 227, 232 (2d Cir. 2014). This Court may affirm on any grounds for which there is a record sufficient to permit conclusions of law, including grounds not relied upon by the district court. *See Steginsky v. Xcelera Inc.,* 741 F.3d 365, 369 (2d Cir. 2014); *ACEquip Ltd. v. Am. Eng'g Corp.*, 315 F.3d 151, 155 (2d Cir. 2003).

## B. Governing Law

### 1. Review of Agency Action Under the APA

The APA provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. However, not every agency action is reviewable; a plaintiff may bring suit under the APA only if the challenged agency action constitutes "final agency action for which there is no other adequate remedy in court." 5 U.S.C. § 704; *see Sharkey v. Quarantillo*, 541 F.3d 75, 87 (2d Cir. 2008).

To constitute a "final agency action," an action must: (1) mark the consummation of the agency's decision making process – it must not be of a merely tentative or interlocutory nature – and (2) it must be one by which rights or obligations have been determined, or from which legal consequences will flow. *U.S. Army Corps of Eng'rs v. Hawkes Co.,* 136 S. Ct. 1807, 1813 (2016) (quoting *Bennett v. Spear,* 520 U.S. 154, 177-78 (1997)). An "adequate remedy in court" exists if plaintiff has another available remedy for his injuries, even if that remedy does not have a direct effect upon the challenged agency action. *See Coker v. Sullivan*, 902 F.2d 84, 90 & n.5 (D.C. Cir. 1990). *See also Niagara Mohawk Power Corp. v. FERC*, 306 F.3d 1264, 1269 (2d Cir.

2002) (plaintiff "cannot maintain an APA claim" where it has an adequate remedy against a third party); *Gillis v. U.S. Dep't of Health & Human Servs.*, 759 F.2d 565, 575 (6th Cir. 1985).

### 2. Actions to Which the APA's Procedural Requirements Apply

There are two types of rules – legislative rules, which have the force of law, and interpretative rules, which inform the public of an agency's construction of statutes it administers. *Hill v. Del. N. Cos. Sportsservice, Inc.,* 838 F.3d 281, 290 (2d Cir. 2016) *(*citing *Perez v. Mortg. Bankers Ass'n,* 135 S. Ct. 1199, 1203-04 (2015)). The procedural requirements of the APA apply to the former category, but not the latter. *See* 5 U.S.C. § 553(b)(3)(A) (procedural requirements apply to proposed rulemaking, but not interpretative rules, general statements of policy, or rules of agency organization, practice or procedure); § 553(d)(2) (exempting interpretative rules and statements of policy from the publication requirements).

### 3. The Spending Clause

The Constitution vests the spending power in Congress alone. U.S. Const. art. I, § 8, cl. 1. Congress may delegate its spending authority to an executive agency, and the agency, in turn, may exercise a degree of discretion in deciding how to spend appropriated funds. *See, e.g.*, *Clinton v. City of New York*, 524 U.S. 417, 466–67 (1998) (Scalia,

J., concurring) (listing examples of spending authority delegated to Executive Branch dating to Founding, and noting that "[t]he constitutionality of such appropriations has never seriously been questioned").

Legislation enacted pursuant to the Spending Clause is contractual in nature: "in return for federal funds, the States agree to comply with federally imposed conditions." *Davis,* 526 U.S. at 640 (citing *Pennhurst State Sch. and Hosp. v. Halderman,* 451 U.S. 1, 17 (1981)); *see also Gebser,* 524 U.S. at 286. The agency, however, must exercise its delegated spending authority consistent with the specific congressional grant; "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred." *Whitman v. American Trucking Assoc.*, 531 U.S. 457, 475 (2001); *see also City of Arlington v. F.C.C.*, 569 U.S. 290, 296-97 (2013) (agency discretion cabined by scope of delegation). An agency may not withhold funds in a manner, or to an extent, unauthorized by Congress. *Train v. City of New York*, 420 U.S. 35, 44–46 (1975); *see City and Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1235 (9th Cir. 2018) ("Absent congressional authorization, [an agency] may not redistribute or withhold properly appropriated funds in order to effectuate its own policy goals [without violating the separation of powers].").

## C. Discussion

### 1. The Guidance Documents Are Not Reviewable, Because They Do Not Constitute Final Agency Action and Another Adequate Remedy Is Available.

#### a. Final Agency Action

The Guidance Documents at issue do not constitute "final agency action" under the APA, because they are not actions "by which rights or obligations have been determined, or from which legal consequences will flow." *Hawkes*, 136 S. Ct. at 1813 (citing *Bennett*, 520 U.S. at 177-78).

First, the Guidance Documents do not determine rights or obligations; they are merely interpretations of existing statutes. The 2001 Guidance was intended to "provide[] the principles that a school should use to recognize and effectively respond to sexual harassment of students in its program as a condition of receiving Federal financial assistance." Dkt. #36-2 at 3. The 2011 Letter and the 2014 Q&A were issued "to provide recipients [i.e, schools] with information to assist them in meeting their obligations." Dkt. #36-3 at 3 n.1; Dkt. #36-4 at 2 n.1. The Guidance Documents do not eliminate the Departments' discretion in enforcing Title IX; investigations into a school's compliance with Title IX will rise and fall with the statute and its

governing regulations, not the Guidance Documents. *See Association of Flight Attendants-CWA v. Huerta,* 785 F.3d 710, 714 (D.C. Cir. 2015).

Courts have long recognized that federal agencies should be encouraged to communicate information and advice to their regulated community in an informal manner without judicial interference. For example, courts have recognized that "advisory opinions should, to the greatest extent possible, be available to the public as a matter of routine; it would be unfortunate if the prospect of judicial review were to make an agency reluctant to give them." *Nat'l Automatic Laundry and Cleaning Council v. Shultz*, 443 F.2d 689 (D.C. Cir. 1971)); *see also, e.g.*, *Golden and Zimmerman, LLC v. Domenech,* 599 F.3d 426, 432 (4th Cir. 2010) ("Holding that the publication of the Reference Guide constitutes agency action 'would quickly muzzle any informal communications between agencies and their regulated communities - communications that are vital to the smooth operation of both government and business.'") (quoting *Indep. Equipment Dealers Ass'n v. EPA*, 372 F.3d 420, 428 (D.C. Cir. 2004)); *Peoples Nat'l Bank v. Office of Comptroller*, 362 F.3d 333, 336-37 (5th Cir. 2004) (agency bulletin that changed procedures for review of examination ratings was not final agency action); *American Land Title Ass'n v. Clarke*, 743 F. Supp. 491, 495-497 (1989) (interpretive letters addressing hypothetical questions were not reviewable final agency actions).

Second, there are no legal consequences that flow from the issuance of the Guidance Documents to the aggrieved party – here, Vengalatorre. An agency action has legal consequences "where it can otherwise be said of the action that "[i]t commands, it requires, it orders, [or] it dictates," *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000). "[H]arms caused by agency decisions are not legal consequences if they 'stem from independent actions taken by third parties.'" *Parsons v. DOJ,* 878 F.3d 162, 168 (6th Cir. 2017) (quoting *Flue-Cured Tobacco Cooperative Stabilization Corp. v. EPA,* 313 F.3d 852, 860 (4th Cir. 2002)); *see also Indus. Safety Equip. Ass'n, Inc. v. EPA,* 837 F.2d 1115 (D.C. Cir. 1988) (holding that injury caused by "the reactions and choices of industry customers and workers" does not constitute final agency action). *See also Joshi v. Nat'l Transp. Safety Bd.*, 791 F.3d 8, 11-12 (D.C. Cir. 2015) ("[P]ractical consequences," are "not legal harms that can transform [a] Report[ ] into a final agency order and trigger our jurisdiction."); *Reliable Automatic Sprinkler Co. v. Consumer Prod. Safety Comm'n*, 324 F.3d 726, 732 (D.C. Cir. 2003).

Vengalattore alleges that the Guidance Documents put "coercive pressures on third parties," *Flue-Cured Tobacco*, 313 F.3d at 859, in that Cornell and other universities were compelled by the Guidance Documents to establish or modify existing Title IX policies. However, the consequences of Cornell's policies flow from the

statute itself and from the implementing regulations, and not from the Guidance Documents. Vengalatorre's alleged harm stemmed from the actions of Cornell, and not from the Guidance Documents. These "practical consequences," are not legal harms that trigger APA jurisdiction.[4]

**b. Adequate Alternate Remedy**

Vengalattore's APA claims fail for the additional reason that relief for the harm he alleges may be sought through suits against the third party directly responsible for those injuries – here, Cornell. The APA provides a cause of action only where there is "no other adequate remedy in a court . . . ." 5 U.S.C. § 704.

Here, Vengalattore brought an unsuccessful Article 78 proceeding against Cornell in New York state court, and brings claims directly against Cornell in this action. The availability of this alternate remedy precludes judicial review under the APA. *See Turner v. Sec'y of HUD,* 449 F.3d 536, 539-41 (3d Cir. 2006) (private right of action in state court precluded APA challenge to HUD's processing of plaintiff's discrimination complaint);

[4] Additionally, as discussed above, Vengalattore was not disciplined under Policy 6.4, but rather under the Relationships Policy – which predated (without modification) the enactment of the Guidance Documents.

*Garcia v. Vilsack,* 563 F.3d 519, 523 (D.C. Cir. 2009) (relief adequate where there was a "private cause of action against a third party otherwise subject to agency regulation") (citation omitted); *See also, Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.,* 366 F.3d 930, 945-47 (D.C. Cir. 2004), *abrogated on other grounds, Perry Capital, LLC v. Mnuchin,* 864 F.3d 591, 620 (D.C. Cir. 2017).

**2. Vengalattore's Procedural APA Claim Fails Because the Guidance Documents Are General Statements of Policy and Not Legislative Rules**

Vengalattore alleges that: (1) by issuing the 2011 Letter and 2014 Q&A without notice and comment, the Department ignored procedures required by law, J.A. 99-100 at ¶¶ 729, 732, 734, 743); and (2) the 2001 Guidance forbade covered institutions from allowing consenting adults to participate in consensual romantic or sexual relationships, which exceeded the Department's authority. J.A. 102 at ¶ 754.

Assuming *arguendo* that Vengalattore's allegations concerning the Guidance Documents are not moot (even though the 2011 Letter and the 2014 Q&A were rescinded by the 2017 Letter, and the 2001 Guidance was rescinded on August 26, 2020), to the extent that plaintiff is alleging that the 2011 Letter and/or 2014 Q&A did not comply with the notice and comment requirements of 5 U.S.C. § 553, those claims fail because the

guidance documents at issue are "interpretative rules" or "general statement[s] of policy" that are exempt from the APA's notice-and-comment requirements. 5 U.S.C. § 553(b). Section 553(b) provides in relevant part that general notice of proposed rulemaking shall be published in the Federal Register, but excludes from this requirement interpretative rules, general statements of policy, or rules of agency organization, practice or procedure. 5 U.S.C. § 553(b)(3)(A); *see also* § 553(d)(2) (exempting interpretative rules and statement of policy from the publication requirements).

Here, the Department's Guidance Documents constitute interpretative rules or statements of policy, and they are therefore not subject to the notice-and-comment requirement under 5 U.S.C. § 553(b). They are intended to provide guidance to institutions to assist those institutions to comply with the statutory provisions of Title IX. Statements of policy such as the Guidance Documents at issue here "inform[] the public concerning the agency's future plans and priorities for exercising its discretionary power [and] they serve to 'educate' and provide direction to the agency's personnel in the field, who are required to implement its policies and exercise its discretionary power in specific cases." *Mada-Luna v. Fitzpatrick,* 813 F.2d 1006, 1013 (9th Cir. 1987).

"A [guidance document] that merely explains how the agency will enforce a statute or regulation

– in other words, how it will exercise its broad enforcement discretion or permitting discretion under some extant statute or rule – is a general statement of policy." *Nat'l Mining Ass'n v. McCarthy,* 758 F.3d 243, 252 (D.C. Cir. 2014). Guidance Documents, such as the ones at issue here, that serve to "appris[e] the regulated community of the agency's intentions" and "inform[] the exercise of discretion by agents and officers in the field," will not be considered legislative rule-making. *Cmty. Nutrition Inst. v. Young,* 818 F.2d 943, 949 (D.C. Cir. 1987). *See also N.Y. City Employees' Ret. Sys. v. SEC*, 45 F.3d 7, 11 (2d Cir. 1995) ("Not all agency issuances are subject to notice and comment requirements."); *Mejia-Ruiz v. INS,* 51 F.3d 358, 363 (2d Cir. 1995) (stating that the notice and comment requirement "applies to legislative rules, but it does not apply to 'interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice'") (quoting 5 U.S.C. § 553(b)(3)(A)); *Metropolitan School Dist. Of Wayne Tp., Marion County, Ind. v. Davila*, 969 F.2d 485, (7th Cir. 1992) ("information letter" was an "interpretive rule that does not trigger the APA's notice and comment requirements").

As such, the Guidance Documents are not legislative rules and were not subject to the notice and comment provisions of the APA. Vengalattore's claims alleging procedural violations of the APA therefore fail, and the

dismissal of those claims should be affirmed accordingly.

### 3. Vengalattore's Spending Clause Claim Fails

Vengalattore alleges that the Department violated the Spending Clause by issuing the Guidance Documents and by engaging in enforcement actions related to covered institutions' campus disciplinary procedures. J.A. 110 at ¶ 839. He contends that the Department altered the terms of Title IX by imposing the terms of the Guidance Documents and through threatened and actual enforcement actions. J.A. 109 at ¶ 829, 830.

Title IX was enacted pursuant to Congress' authority under the Spending Clause, *Davis,* 526 U.S. at 640, and was intended "to avoid the use of federal resources to support discriminatory practices [and] to provide individual citizens effective protection against those practices." *Gebser,* 524 U.S. at 301 (internal marks and citations omitted).

A private right of action is recognized under Title IX against a recipient of federal funds for various forms of sex discrimination. *Jackson v. Birmingham Bd. of Educ.,* 544 U.S. 167, 183 (2005); *Davis,* 526 U.S. at 640. However, the private rights created by Title IX permit an individual to bring an action against a recipient of

federal funds. *See Gebser,* 524 U.S. at 287 ("Title IX focuses more on 'protecting' individuals from discriminatory practices carried out by recipients of federal funds") (citation omitted). No private rights are specifically created for individuals against the Department, *see* 20 U.S.C. §§ 1681, 1682, nor will any be inferred pursuant to the Spending Clause statutes. *Gonzaga Univ. v. Doe,* 536 U.S. 273, 281 (2002) ("Our more recent decisions, however, have rejected attempts to infer enforceable rights from Spending Clause statutes."). Even where a statute references explicit rights-creating terms, a plaintiff suing under an implied right of action must establish that the statute manifests an intent to "create not just a private *right* but also a private *remedy*." *Id.* at 284.

Here, there is no manifestation of intent under Title IX to allow someone such as Vengalattore – a faculty member accused of sexual misconduct – to have a private right or remedy against the Department.

Moreover, Vengalatorre cannot plausibly allege that the Department, through the Guidance Documents, altered the terms of Title IX or threatened Cornell with any enforcement action in violation of the Spending Clause. The Spending Clause allows Congress to "condition [] [the] receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." *Alliance for Open Soc'y*

*Int'l, Inc. v. US. Agency for Int'l Dev.,* 651 F.3d 218, 230 (2d Cir. 2011) quoting *South Dakota v. Dole,* 483 U.S. 203, 206 (1987). Congress is entitled to further policy goals indirectly through its spending power that it might not be able to achieve by direct regulation. *See id.* at 207. Congress's power under the Spending Clause is broad, as "the constitutional limitations on Congress when exercising its spending power are less exacting than those on its authority to regulate directly." *Id.* at 209.

The 2001 Guidance provided the principles that a school should use to recognize and effectively respond to sexual harassment of students in its program as a condition of receiving Federal financial assistance; it assists in achieving Congress' objective to address sexual harassment in educational institutions that receive Federal funding. The 2011 Letter and 2014 Q&A provided information regarding the Department's then-existing interpretation of those principles. Collectively, the Guidance Documents purported to merely interpret Title IX's requirement that "[n]o 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). As such, the Guidance Documents were, when they were in effect, a valid exercise of the Department's powers under the Spending Clause. *See Dole,* 483 U.S. at 211 (1987).

## CONCLUSION

The district court's order dismissing the amended complaint against the Department should be affirmed in all respects.

Dated: Albany, New York
November 20, 2020

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7) of the Federal Rules of Appellate Procedure, the undersigned counsel for the United States hereby certifies that this brief complies with the type volume limitation of Rule 32(a)(7)(B). As measured by the word-processing system used to prepare this brief, there are approximately 8,392 words in the brief.

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**CERTIFICATE OF SERVICE**
**BY NEXTGEN CM/ECF**

VENGALATTORE
v.
CORNELL UNIVERSITY

Docket No. 20-1514

The undersigned hereby certifies that she is an employee of the Office of the United States Attorney for the Northern District of New York, and is a person of such age and discretion as to be competent to serve papers.

She further certifies that on November 20, 2020, she served a copy of the appellee's Brief on the United States Court of Appeals for the Second Circuit and counsel for appellant, Caleb Kruckenberg, Esq. and Margaret A. Little, Esq., by uploading to the Second Circuit's ECF system a Portable Document Format (PDF) version of the Brief.

s/ *Deanna Lieberman*
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