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 REPLY BRIEF

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APPELLANT'S REPLY BRIEF

INTRODUCTION

Appellant Mukund Vengalattore's professional livelihood has been destroyed by a completely false accusation from a bitter graduate student upset that her academic performance was judged unsatisfactory. Others aware of her situation backed Dr. Vengalattore's denial that he had any sexual contact (consensual or otherwise) with the graduate student. But Cornell conducted an investigation into the accusation (first raised *four years* after the alleged assault) in a fundamentally unfair, sexually and racially discriminatory manner. A biased Cornell official credited the false accusations and imposed severe discipline—even though she lacked authority to do so under Cornell's Bylaws. As a result, Dr. Vengalattore's once-stellar academic career stands in disarray.

Cornell argues (and the district court so held) that Dr. Vengalattore should be denied his day in court, that his federal claims should not be permitted to proceed beyond the pleadings stage. But that argument is based on a crabbed interpretation of Title IX of the Education Amendments of 1972. Title IX provides that no "person"—a term that includes both students and employees—shall be subjected to sex discrimination "under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). The Supreme Court has held that Title IX provides a private right of action to

those injured by violations of Title IX, but Cornell argues that the private right of action should be limited to students and not include employees. That limiting construction of Title IX has been rejected by the overwhelming majority of federal appeals courts and is inconsistent with Supreme Court Title IX case law.

On appeal, Cornell raises two alternate grounds for affirming the district court's dismissal of the Title IX claims, but the district court relied solely on Cornell's no-private-right-of-action argument in dismissing the claims. It did not consider Cornell's two alternative arguments. This Court's distinctly preferred practice is not to affirm a district court's decision on a theory not considered below, but rather to remand such issues for consideration by the district court in the first instance.

In any event, both of Cornell's alternative arguments lack merit. Cornell contends that issues decided in a separate state-court proceeding collaterally estop Dr. Vengalattore from challenging Cornell's sexual-misconduct finding. But Cornell has failed to identify *any* issue decided by the state courts that it deems essential to the federal claims raised here. Indeed, the state trial court ruled largely in Dr. Vengalattore's favor and explicitly found that Cornell failed to follow its own procedures when investigating the misconduct claims, a central allegation in this case.

Cornell also argues that the factual allegations of the Amended Complaint are insufficient to state a claim under Title IX. That argument is amply rebutted by the Amended Complaint's numerous allegations of bias and irregularities in the manner in which Cornell conducted its investigation. Cornell contends that it adhered to its own procedural rules, but that contention is rebutted by the very documents submitted by Cornell in its Supplemental Appendix.

Those procedural irregularities also suffice to support Dr. Vengalattore's claim that Cornell violated Title VI of the Civil Rights Act of 1964 by discriminating against him on the basis of race and national origin. That claim is significantly strengthened by racially prejudicial statements made by individuals central to these proceedings. Cornell attempts to explain away these statements as "stray comments," but the key decision-maker's response (accepting the testimony and recommendations of those making the racist statements while failing even to comment on the statements) at the very least raises the "minimal" inference of racial discrimination necessary to survive a motion to dismiss.

Cornell's response to Dr. Vengalattore's due-process claims is similarly unavailing. Cornell argues that the Amended Complaint fails to allege facts sufficient to support a plausible inference that Cornell is a state actor. But Cornell does not dispute the principal factual allegations: that Cornell includes four

"statutory" colleges that are, in essence, branches of the University of the State of New York; that New York provides a significant portion of Cornell's operating budget; that several of the University's trustees are appointed by the State; and that New York has been pushing for the very sort of truncated administrative proceedings in sexual-misconduct cases adopted by Cornell in this instance. The Supreme Court has made clear that whether an ostensibly private organization's conduct should be deemed state action in a given instance is an intensely fact-bound determination, and that "no one fact" is dispositive of that determination. *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288, 295-96 (2001). As such, the state-action issue is not appropriately determined at the pleadings stage, before Dr. Vengalattore has been permitted to engage in discovery.

Finally, Cornell disingenuously expresses confusion regarding what Dr. Vengalattore is challenging in this appeal; it suggests that he may be continuing to challenge Cornell's decision to deny him tenure as a physics professor. Dr. Vengalattore has repeatedly made very clear that this case is *not* about tenure, yet Cornell continues to rehash tenure issues throughout its brief. The sole focus of this case is the highly improper procedures employed by Cornell in falsely

branding him guilty of sexual misconduct—procedures adopted by Cornell at the insistence of Appellee U.S. Department of Education (ED).

ED argues that Dr. Vengalattore lacks standing because his injuries are not directly traceable to the various ED regulations and guidance documents of which he complains. But that argument is contradicted by Cornell, which asserts that in 2012 it adopted Policy 6.4 (governing procedures for handling sexual-misconduct allegations) in direct response to a 2011 ED guidance document (the "Dear Colleague Letter" or "DCL"). The DCL told educational institutions that Title IX required them to take "immediate action" to eliminate sexual misconduct on campus, including adoption of complainant-friendly procedural rules. ED's later withdrawal of the challenged policies does not negate the strong causal connection between ED's actions and Cornell's subsequent violation of Dr. Vengalattore's rights. And given the incoming Administration's promise to reinstate the challenged policies, ED cannot demonstrate that Dr. Vengalattore's claims are moot.

ARGUMENT

I. CORNELL'S NO-PRIVATE-RIGHT-OF-ACTION ARGUMENT IGNORES THE TEXT OF TITLE IX AND SUPREME COURT CASE LAW

Title IX states, "*No person* in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to

discrimination under any educational program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a) (emphasis added). Federal regulations implementing Title IX, adopted in 1975, state expressly that "discrimination in employment" is among the activities prohibited by Title IX. 34 C.F.R. § 106.51(a)(1). In *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512 (1982), the Supreme Court upheld those regulations and unequivocally rejected claims that Title IX does not apply to employment discrimination. *Id.* at 530.

The Supreme Court held in *Cannon v. University of Chicago*, 441 U.S. 677 (1979), that Title IX provides a private right of action for victims of sex discrimination. Cornell nonetheless argues that the right of action recognized by *Cannon* should be limited to students and should not include employees discriminated against on the basis of their sex. Cornell Br. 34. But it cites nothing in *Cannon* to support its asserted distinction between protections for students and protections for employees. And that distinction is inconsistent with the broad statutory text of Title IX, which provides protection for all "person[s]."

Later Supreme Court Title IX decisions are fully consistent with *Cannon*'s recognition of a broad-ranging private right of action. *See, e.g., Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 73 (1992) (recognizing that the Title IX private right of action encompasses claims both for injunctive relief and

for damages); *North Haven*, 456 U.S. at 531 (recognizing authority of federal regulators to initiate Title IX enforcement proceedings against educational institutions on behalf of individual employees).

Most importantly, Cornell fails to distinguish *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005), which explicitly recognized a private right of action by a high school employee who alleged that his employer violated his Title IX rights. Cornell argues that *Jackson* is distinguishable because the employee in that case claimed that he was retaliated against for complaining about sex discrimination against others, not (as in our case) that he himself was subject to sex discrimination. Cornell Br. 35. But that alleged distinction serves only to strengthen Dr. Vengalattore's case. If (as *Jackson* held) the *Cannon* private right of action extends so broadly as to cover employees who were not, in fact, victims of sex discrimination, then it surely includes employees who allege that they were "subjected to discrimination ... on the basis of sex." 20 U.S.C. § 1681(a).[1]

Cornell complains that recognizing a Title IX private right of action for employees "would undermine Title VII's comprehensive remedial scheme."

[1] Cornell argues that, unlike Dr. Vengalattore, the plaintiff in *Jackson* did not have the option of seeking employment-discrimination relief under Title VII of the Civil Rights Act of 1964. Cornell Br. 35. But the Supreme Court never stated in *Jackson* that its interpretation of the Title IX private right of action depended on the availability of alternative remedies for the plaintiff. And Cornell points to nothing in Title IX's text that would support such a distinction.

Cornell Br. 37–41. But that argument overlooks that "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*, 456 U.S. at 535 n.26). There is no reason to conclude that Congress *sub silentio* excluded employees from coverage under the Title IX right of action simply because Congress also granted those employees a right of action under Title VII, particularly because Congress has impliedly authorized private employment discrimination claims under other statutes.

For example, as explained in Dr. Vengalattore's opening brief (at 37), 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 to create an implied private right of action to individuals alleging race-based employment discrimination—even though suing for employment discrimination under § 1981 permits plaintiffs to side-step procedural requirements imposed on Title VII claims. *See, e.g., Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). The first Supreme Court decision to recognize a private right of action under § 1981 for employment discrimination claims, *Johnson v. Railway Express Agency, Inc.,* 421 U.S. 454 (1975), explicitly rejected arguments that Congress intended to make Title VII the exclusive vehicle for employees raising such

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)).[2]

Lacking support for its position in the statutory text, Cornell turns to legislative history. It argues that recognizing a private right of action for employees "would be contrary to the legislative history underlying the statute." Cornell Br. 41-43. Cornell points to a 1972 amendment to Title VII that eliminated a statutory exemption for employees of educational institutions, and argues that it "defies logic" to read Title IX as creating a private right of action for employment-discrimination claims while Congress was simultaneously creating a

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[2] In an effort to distinguish *Johnson*, Cornell asserts that, unlike Title IX, a private right of action for employment discrimination "is found *explicitly* in the text of § 1981." Cornell Br. 38 (emphasis added). That assertion is incorrect; the text of § 1981 contains *no* language regarding a right of action. Originally enacted as part of the Civil Rights Act of 1866, § 1981 reads in pertinent part, "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens." Indeed, for the first century following § 1981's enactment, courts consistently interpreted it as providing *no* rights to sue private citizens for discriminatory refusal to enter into contracts. Rather, § 1981 was understood as a measure designed to require Southern States to open their courts to permit former slaves to sue to enforce contractual rights. *See, e.g., Jones v. Alfred H. Mayer Co.*, 379 F.2d 33 (8th Cir. 1967) (Blackmun, J.), *rev'd*, 392 U.S. 409 (1968).

similar right under Title VII. *Id.* at 43. But the Supreme Court rejected a substantially similar legislative-history argument in *North Haven* when it concluded that Title IX prohibits sex-based employment discrimination. 456 U.S. at 522-530.[3] In any event, legislative history is of very little relevance in the absence of *any* statutory language indicating that the private right of action recognized by *Cannon* should extend only to some of the individuals protected by Title IX and not extend to employees.

As detailed in Dr. Vengalattore's opening brief, the overwhelming majority of federal appeals courts to address the issue (as well as several district courts within the Second Circuit) has recognized that Title IX provides a private right of action for employment discrimination. No appeals court decisions issued after the Supreme Court's 2005 *Jackson* decision have concluded otherwise. The district court's decision that Title IX does not provide Dr. Vengalattore a private right of

[3] *North Haven* affirmed a decision of this Court, which concluded that the legislative history supported the federal government's view that Title IX prohibits sex-based employment discrimination and which stated, "Nor is it particularly noteworthy that employment discrimination in educational institutions is now prohibited by Title VII and the Equal Pay Act. Overlapping jurisdiction in the area of employment discrimination is well recognized." *North Haven Bd. of Education v. Hufstedler*, 629 F.2d 773, 784 (2d Cir. 1980). Recent scholarship largely agrees that the legislative history of Title IX supports the conclusion that Title IX's private right of action encompasses employment-discrimination claims. *See, e.g.,* Lynn R. Zehrt, *Title IX and Title VII: Parallel Remedies in Combatting Sex Discrimination in Educational Employment*, 102 Marq. L. Rev. 701 (2019).

action for sex discrimination is inconsistent with Title IX's broad statutory language and applicable Supreme Court case law.

II. CORNELL'S ALTERNATIVE ARGUMENTS FOR AFFIRMING DISMISSAL OF THE TITLE IX CLAIMS SHOULD BE DISREGARDED BECAUSE THE DISTRICT COURT DID NOT CONSIDER THEM AND, IN ANY EVENT, THEY ARE UNPERSUASIVE

In the district court, Cornell sought dismissal of the Title IX claims on two additional grounds. First, Cornell invoked collateral estoppel, alleging that Dr. Vengalattore's Title IX claims are barred because legal issues central to those claims supposedly were decided adversely to him in earlier state-court proceedings between him and Cornell. Second, Cornell asserted that the Title IX claim should be dismissed because the Amended Complaint failed to state a claim on which relief can be granted. The district court did not reach either of those arguments. Instead, it dismissed the Title IX claim based solely on its erroneous finding that Title IX does not recognize a private right of action for employment discrimination. JA 132-134.

Notwithstanding the district court's failure to address these additional arguments, Cornell asserts that they provide this Court with alternative grounds to affirm the district court's judgment. Cornell Br. 43-47. But the Court's longstanding practice is to defer deciding a contested issue until after it has been

addressed initially by the trial court, even when the issue was briefed by the parties below.

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); accord, *Fulton v. Goord*, 591 F.3d 37, 45 (2d Cir. 2009); *S.A.R.L. Galarie Enrico Navarra v. Marlborough Gallery Inc.*, 751 Fed. App'x 39, 43 (2d Cir. 2018) (unpublished). Accordingly, 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 two additional Title IX issues. Alternatively, if the Court decides to address the two additional issues, it should still reverse dismissal of the Title IX claim, as neither of Cornell's arguments is persuasive.

A. "Issue Preclusion" Is Inapplicable Here Because the New York Courts Did Not Decide Issues Essential to These Proceedings

Cornell's argument regarding issue preclusion (referred to in its brief as "collateral estoppel") focuses on litigation initiated in 2016 by Dr. Vengalattore against Cornell in New York state court. Cornell Br. 44-45, 18-21. The lawsuit, filed under New York CPLR Chapter 78 (a New York statute authorizing court actions for relief previously obtained by writs of certiorari, mandamus, or

prohibition), sought two forms of relief: (1) an order overturning Cornell's decision to deny him tenure; and (2) an order expunging the determination of Gretchen Ritter (Dean of Cornell's College of Arts and Science) that Dr. Vengalattore engaged in an improper sexual relationship with a graduate student under his supervision.

The November 2016 decision of the trial judge, Justice Richard Rich of the Supreme Court of the State of New York, largely favored Dr. Vengalattore. Justice Rich found that the procedures employed by Cornell in considering (and ultimately rejecting) Dr. Vengalattore's tenure application were "flawed, secretive, unfair and violated Professor Vengalatorre's due process rights to such an extent as to be arbitrary and capricious." JA 243. His decision held, "The previous tenure determination on Professor Vengalattore is vacated and the matter is returned to Cornell University for a de novo review in accord with this order." JA 244. The decision includes the following findings of fact regarding Dean Ritter's October 2015 misconduct determination:

> Dean Ritter concluded that Professor Vengalattore did have a romantic relationship with the student and had lied to the WPLR [Division of Workplace Policy and Labor Relations] concerning that relationship. Instead of relaying the matter to the Provost with sanctions recommendations, Dean Ritter withheld imposition of sanctions pending the outcome of the tenure appeal. If upon review, the Provost had brought charges in order to impose sanctions, Professor Vengalattore would have been entitled to a hearing.

JA 241. However, the decision includes no mention of Dr. Vengalattore's request that the court expunge the sexual-relationship finding.

In August 2017, a different trial judge denied Dr. Vengalattore's motion to clarify or amend Justice Rich's November 2016 decision (in order to provide for expungement of the sexual-relationship finding under Chapter 78), determining that Justice Rich's failure to address the expungement request in his decision was the equivalent of a denial of that request. Supplemental Appendix (SA)-2 to SA-3. In the meantime, Cornell appealed from Justice Rich's order overturning the denial of tenure.

In May 2018, the Appellate Division reversed Justice Rich's decision, finding that Cornell did not act arbitrarily and capriciously in denying tenure. *Vengalattore v. Cornell Univ.*, 161 A.D.3d 1350, 1354 (3d Dept. 2018). It explained, "[G]iven that an academic institution's decision regarding tenure is accorded deference, Supreme Court erred in annulling the University's determination to deny petitioner tenure." *Id.* at 1355. Dr. Vengalattore had not appealed the trial court's failure to expunge the sexual-relationship finding, and the Appellate Division's opinion includes no mention of that finding.

The failure of the New York courts to expressly address the sexual-relationship issue is fatal to Cornell's issue-preclusion argument. The preclusive

effect of a New York state-court judgment in a later federal-court proceeding is dictated by New York preclusion law. *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985). Under New York law, "[i]ssue preclusion, also known as collateral estoppel, bars the relitigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment." *Paramount Pictures Corp. v. Allianz Risk Transfer AG*, 31 N.Y.3d 64, 72 (N.Y. 2018) (internal quotation omitted). No issue of fact or law essential to Dr. Vengalattore's sex-discrimination claim (or any of his federal claims) was decided adversely to him by virtue of Justice Rich's failure to expunge Dean Ritter's sexual-relationship finding.

Cornell claims, "[T]he state courts soundly rejected Vengalattore's assertion that Cornell failed to follow its policies in the investigation of Roe's complaint." Cornell Br. 19. That false claim is plainly refuted by Justice Rich's findings of fact: he held that although Dean Ritter concluded that Dr. Vengalattore had a sexual relationship with a graduate student, Cornell policies did not authorize Dean Ritter to impose sanctions on her own, and that those policies entitled Dr. Vengalattore to a hearing before any sanctions could be imposed. JA 241.[4]

[4] At the time Justice Rich issued his ruling in November 2016, Dean Ritter had not yet imposed any sanction on Dr. Vengalattore for his alleged violation of Cornell's Romantic and Sexual Relationships Policy. She instead had deferred a decision on any sanctions because of the pendency of court proceedings

Justice Rich's decision does not disclose his reasons for declining to expunge the sexual-relationship finding at the same time that he held that Cornell had acted arbitrarily and capriciously in denying tenure. But there is no reason to conclude, as Cornell asserts without evidence, that the "necessary implication" of his decision is a finding that Cornell did not act with discriminatory intent. Cornell Br. 20. Given that discriminatory intent was not an issue in the state-court proceedings, it is far more plausible that Justice Rich declined to issue an expungement order based on one of the many issues that was actually litigated.[5] Alternatively, he may have concluded that an expungement order was premature, given that Cornell had not yet decided what sanction, if any, to impose based on Dean Ritter's finding. In any event, Cornell has failed to demonstrate *any* of the prerequisites (identified by this Court in *Leathers v. Eyck*, 180 F.3d 420 (2d Cir. 1999)) for application of issue preclusion: (1) the issues in both proceedings must be identical; (2) the relevant issues must have been actually litigated and decided

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challenging the denial of tenure. Dean Ritter later imposed sanctions on Dr. Vengalattore in February 2017—without providing him the hearing to which Justice Rich held he was entitled.

[5] Justice Rich, for example, might have credited Cornell's argument that the four-month statute of limitations imposed by New York CPLR § 217 barred an Article 78 challenge to the sexual-relationship finding. Dean Ritter made her finding in October 2015. Dr. Vengalattore filed his state-court proceeding eight months later, in June 2016.

in the prior proceeding; (3) there must have been full and fair opportunity for the litigation of the issues in the prior proceeding; and (4) the issues must have been necessary to support a valid and final judgment on the merits. *Id.* at 426. Indeed, Cornell has not even taken the first step toward establishing an issue preclusion claim: it has not specifically identified the issues of fact or law that it claims were decided against Dr. Vengalattore in the state-court proceedings and whose relitigation it wishes to preclude in this proceeding.

B. The Amended Complaint States a Claim that Cornell Discriminated on the Basis of Sex, in Violation of Title IX

Cornell argues alternatively that the Amended Complaint should be dismissed because it "fails to support an inference of gender discrimination." Cornell Br. 45-49. It asserts, "Many of the allegations [of sex discrimination] are contradicted by the Amended Complaint and incorporated documents. Based on his remaining allegations, Vengalattore's Title IX claim does not rise to the level of plausibility." *Id.* at 45.

A fair reading of the Amended Complaint—which contains detailed allegations demonstrating that Cornell employed disciplinary procedures that uniquely disadvantaged men and repeatedly ignored its own rules in its investigation of Dr. Vengalattore—refutes Cornell's no-plausible-Title-IX-claim argument. The documents submitted to the Court by Cornell serve only to

substantiate Dr. Vengalattore's allegation that Cornell failed to follow its own procedures—an allegation that creates a strong inference that Cornell acted with discriminatory intent. *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").[6]

Chief among the discriminatory disciplinary procedures employed by Cornell was Policy 6.4, which targeted men and replaced procedures that had provided far more protection to faculty accused of misconduct. But Dr. Vengalattore's Title IX allegations reach far beyond his claims regarding Policy 6.4. The Amended Complaint sets out more than 70 separate factual allegations that create an inference that Cornell discriminated against Dr. Vengalattore on the basis of sex, both in the manner in which it conducted its investigation and in finding that he was guilty of sexual misconduct. JA 80-89.

Cornell's brief makes no mention of a significant majority of the 70 allegations. Among them: Cornell provided an advisor free-of-charge to Roe during the investigation, but not for Dr. Vengalattore, JA 80; Cornell investigators

[6] Dr. Vengalattore has no objections to the Court's consideration of the documents included in Cornell's Supplemental Appendix and that Cornell contends should be deemed "incorporated" into the Amended Complaint. Those documents detail the procedures that Cornell should have (but failed) to adhere to, when investigating Dr. Vengalattore for alleged sexual assault.

looking into Roe's sexual misconduct allegations interviewed Dr. Vengalattore about his relationship with Roe but failed to disclose the nature of her allegations, *ibid.;* Dean Ritter violated Cornell procedures by failing to appoint a faculty member to serve as co-investigator, *ibid.*; and Dean Ritter asserted the right to serve as the impartial adjudicator of the misconduct allegations, yet she collaborated with the investigators throughout the investigation. JA84. In the absence of a discussion of those factual allegations and the numerous others, Cornell's assertion that the Amended Complaint does not create a plausible inference of sex discrimination rings hollow.

Cornell's response to Dr. Vengalattore's improper-and-biased-procedures allegations is, in essence, as follows: (1) Dr. Vengalattore was investigated and punished under Cornell's Romantic and Sexual Relationships Policy (the "Sexual Relationships Policy"), not other disciplinary procedures (such as Policy 6.4) that (according to Cornell) were inapplicable to the allegations against him; (2) Cornell adopted the Sexual Relationships Policy in 1996, and that Policy has not changed since its adoption; and (3) because Cornell at all times acted in compliance with its longstanding Sexual Relationships Policy, its documentary evidence renders implausible Dr. Vengalattore's allegations that it failed to comply with its own procedures. Cornell Br. 45-47, 24-29.

Appellant notes initially that Cornell's it-was-the-Sexual-Relationships-Policy-not-Rule-6.4 argument is largely beside the point. It completely ignores the detailed allegations demonstrating that, whatever set of procedures Cornell claims to have followed, it proceeded in a highly irregular manner.

Moreover, an examination of the text of the Sexual Relationships Policy (Amended Complaint, Exh. N) suffices to rebut Cornell's contention. It is a very short document (seven sentences) whose essence is encapsulated in a single sentence in the second paragraph: "No member of the university community should simultaneously be romantically or sexually involved with a student whom he or she teaches, advises, or supervises in any way." Contrary to Cornell's contention, the policy itself does not establish *any* procedures for investigating and adjudicating sexual misconduct complaints against faculty members. Jane Roe's fictitious allegation that Dr. Vengalattore sexually assaulted her (and that they later engaged in a consensual sexual relationship) were investigated at length by Cornell. But one must look elsewhere, not the Sexual Relationships Policy, to determine Cornell's established procedures for conducting such investigations.

As explained in the Amended Complaint, before 2012 Cornell afforded considerable procedural protections to any student or faculty member accused of sexual misconduct. JA 25-27. The Campus Code of Conduct then in effect

required, among other procedural rights, a hearing at which the accused was entitled to present evidence and witnesses, and to confront and cross-examine the complainant. JA 27. The standard of proof of a violation was "clear and convincing evidence," and the complainant bore the burden of proof. *Id.*

Procedures for handling complaints against faculty members were (and are) also governed by procedures set forth in the Cornell University Bylaws and the Faculty Handbook. JA 33-34. Pursuant to authority granted by Article XVII, Section 10 of the Bylaws, the Board of Trustees in 2007 adopted detailed procedures governing dismissal/suspension of faculty members; those procedures are included in the Faculty Handbook and are set out at SA-30 to SA-32. They state that investigation of a faculty member charged with serious misconduct (*e.g.*, unwanted sexual contact) should proceed as follows: (1) the dean investigates and then reports to the provost the results of his/her investigation, along with any recommendations; (2) the provost determines whether further proceedings are warranted; if so, the provost provides the faculty member with a "detailed statement of the charges" and any suggested disciplinary action; and (3) the faculty member may request a hearing on the charges, to be conducted by a board consisting of five members of the faculty. SA-30.

In 2012, Cornell adopted a new set of procedures, Policy 6.4, to govern investigations of faculty members accused of the following types of prohibited conduct: (1) prohibited discrimination; (2) protected-status harassment, including sexual harassment; (3) sexual violence, including rape, sexual assault, sexual battery, sexual abuse, and sexual coercion; and (4) retaliation. SA-5 to SA-19. Cornell adopted Policy 6.4 under strong pressure from Appellee ED. JA27. Policy 6.4 provides far fewer procedural protections to faculty members accused of one of the four categories of prohibited conduct than they would be entitled to receive if charged with other forms of misconduct. JA27-31. In particular, Policy 6.4 deprives an accused faculty member of any right to a hearing. JA30. The adoption of the Policy 6.4 procedures for one small subset of charges while maintaining far broader procedural protections for those facing other charges has had a significant disparate impact on males: the accused was male in 48 of the 52 formal complaints resolved under Policy 6.4 between 2014 and 2017. JA86.

The Amended Complaint plausibly alleges that Cornell's sexual-assault investigation largely followed the complainant-friendly procedures mandated by Policy 6.4, rather than the procedures (including a hearing) required by the Faculty Handbook.[7] Cornell contends that the investigation did not proceed (and could

[7] As noted in Section I.A, *supra*, Justice Rich made a finding of fact that, under Cornell's procedures governing dismissals or suspensions, Dr. Vengalattore

not have proceeded) under Policy 6.4 because any alleged violations of Policy 6.4 were time-barred by the time the investigation began in late 2014 or early 2015.[8] That contention is a *non sequitur*. Simply because Policy 6.4 did not authorize Cornell to impose sanctions for sexual misconduct alleged to have occurred in the distant past does not mean that a Policy 6.4 investigation could not and did not take place. On the contrary, we know that Cornell undertook such an investigation because Dean Ritter ordered it to go forward—despite being warned by investigators that no sanctions could be imposed under Policy 6.4. SA-36; JA69, ¶¶ 581-82. As detailed in the Amended Complaint and the investigation report (SA-34 to SA-104), a significant portion of the investigation focused on the false allegation that Dr. Vengalattore sexually assaulted Jane Roe in December 2010, an

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was entitled to a hearing before Cornell could impose any sanctions for sexual misconduct. JA241. He also found that Cornell's disciplinary proceedings could move forward only if the provost endorsed Dean Ritter's sexual-misconduct finding, *ibid.*—something that never happened. These findings indicate that Justice Rich believed that investigations into alleged violations of the Sexual Relationships Policy were to be conducted using the procedures specified in the Faculty Handbook (SA-30), not the Policy 6.4 procedures.

[8] Complaints alleging prohibited conduct (*e.g.*, discrimination, harassment, or sexual misconduct) are cognizable under Policy 6.4 only if filed within one year after a student is no longer under the supervision of the faculty member charged with misconduct. SA-11. Jane Roe left Dr. Vengalattore's laboratory in October 2012, more than two years before she filed her complaint.

allegation that not even Cornell contends was cognizable under the supposed "procedures" governing alleged violations of its Sexual Relationships Policy.

Moreover, the investigators recognized that they were operating under Policy 6.4. As alleged in the Amended Complaint, one of the investigators assured Roe in December 2014 that he would work "very aggressively to address issues of access, prevention, and culture change" "under Title IX" in his investigation. JA 46. And in the final report the investigators invoked Policy 6.4 (as well as ED Guidance) as being the source of their authority to conduct the investigation. JA 69.

But Dr. Vengalattore's Title IX claim is not dependent on his allegation that Cornell employed its biased Policy 6.4 procedures when undertaking its sexual misconduct investigation. Quite apart from Cornell's denial of the procedural protections guaranteed to Dr. Vengalattore by the Faculty Handbook, Cornell also failed to adhere to Policy 6.4 itself (or to basic notions of fairness) throughout the course of the investigation. As detailed in the opening brief, Cornell hired an advisor to Roe in putting together her case while offering no similar assistance to Dr. Vengalattore, JA51, ¶¶ 382-83; it failed to appoint a faculty member as a "co-investigator," as required under Policy 6.4, JA30-31, ¶ 160; the investigators never bothered to contact many of the individuals whom he identified as corroborating

defense witnesses, JA61, ¶ 500; they began questioning Dr. Vengalattore about Jane Roe in November 2014, while failing to disclose to him until March 2015 that she had accused him of sexual assault, JA45, ¶¶328-331; they refused repeated requests that he be presented with all of the charges under investigation along with the evidence supporting them, JA58, ¶ 461; they permitted Roe to review the testimony of other witnesses while denying that right to Dr. Vengalattore, JA54, ¶ 419; they permitted Roe to review and edit their notes of her statements, *ibid.*, ¶¶ 422-24; and 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, JA56, ¶¶ 438-440. Indeed, there was only one plausible explanation for asking him his whereabouts on every evening in December 2010: to allow Roe to conform her story to Dr. Vengalattore's schedule.

Moreover, proceeding with an investigation despite the stale nature of Roe's claims was *entirely inconsistent with Policy 6.4*. Cornell began its formal investigation in February 2015, more than four years after Jane Roe alleged a sexual assault had taken place and more than two years after she had voluntarily left Dr. Vengalattore's lab and thus ceased being supervised by him. And Roe did

not make her sexual-assault allegation (or the allegation of a subsequent consensual relationship) until the fall of 2014, just after she learned that Dr. Vengalattore was likely to be granted tenure and long after she publicly vowed to do everything she could to prevent him from being tenured. Policy 6.4 was adopted to require more stringent investigations of sexual-misconduct allegations, but the policy also recognized that faculty members should not be required to defend against inordinately delayed claims. Cornell's decision to nonetheless investigate the long-delayed sexual misconduct allegations under its Sexual Relationships Policy—a policy unaccompanied by any procedural rules governing investigations—creates a strong inference of bias against Dr. Vengalattore.

In sum, the judgment below should not be affirmed based on Cornell's contention that Dr. Vengalattore has not stated a claim for relief under Title IX. The Amended Complaint sets forth facts from which a court can plausibly infer that Cornell discriminated against him on the basis of sex.

III. THE AMENDED COMPLAINT STATES A CLAIM THAT CORNELL DISCRIMINATED ON THE BASIS OF RACE OR NATIONAL ORIGIN, IN VIOLATION OF TITLE VI

The district court dismissed the Title VI claim on the ground that the Amended Complaint fails to state a claim, stating that it "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." JA138. As articulated in Dr. Vengalattore's opening brief (at 39-46), that decision was based on a fundamental misunderstanding of the minimal pleading burden imposed on plaintiffs by Rule 8(a). The Amended Complaint adequately stated a claim under Title VI for the same reasons (as explained in Section II.B., *supra*) it stated a claim under Title IX. In particular, the requisite inference of discriminatory intent can be drawn from Cornell's proceeding against Dr. Vengalattore in a manner that diverged wildly from its established procedural rules.

An inference of racially discriminatory intent can also be drawn from the racist statements of several people closely associated with the sexual-misconduct investigation. *See* Opening Br. 41-43. Cornell denies that the allegations are sufficient to permit such an inference, but it fails to address the extensive employment-discrimination case law that holds otherwise and that Dr. Vengalattore cited in his opening brief. *See id.* at 39-41 (citing *Littlejohn v. City of New York*, 795 F.3d 297 (2d Cir. 2015); *Doe v. Columbia Univ.*, 831 F.3d 46 (2d Cir. 2016); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); and *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973)). At the pleading stage, an employment-discrimination plaintiff bears only a "minimal" pleading burden and need not

allege facts facially demonstrating discriminatory motivation. *Littlejohn*, 785 F.3d at 307, 311. *Accord, Menaker*, 935 F.3d at 30. Dr. Vengalattore's factual allegations—including allegations that Cornell deviated from its standard procedures throughout its sexual-misconduct investigation and that Dean Ritter (the ultimate decision-maker) credited the views of Jane Roe and Professor Paulette Clancy without ever questioning their racist statements regarding individuals of South Asian descent—more than suffice to meet his minimal Title VI pleading burden.[9]

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

The Amended Complaint alleges that Cornell violated Dr. Vengalattore's Fourteenth Amendment due-process rights by subjecting him to a procedurally deficient investigation, without a hearing, that prevented him from demonstrating the falsity of Jane Roe's charges. JA95-97, ¶¶ 698-721. The district court dismissed the claim, concluding that Cornell is not a state actor subject to constitutional constraints. JA141-42.

[9] Cornell argues that the district court's dismissal of the Title VI claim should be affirmed on the alternative ground that collateral estoppel bars consideration of the claim. Cornell Br. 18-21. For all the reasons cited in Section II, *supra*, the Court should not address the argument in the first instance and, in any event, collateral estoppel is inapplicable to the Title VI claims.

But as Dr. Vengalattore explained in his opening brief, 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 so blithely rejected at the pleadings stage. Indeed, an entity can be deemed a private actor for some purposes but a state actor for other purposes, depending on the circumstances of the action in question. *Brentwood Academy*, 531 U.S. at 295 (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."). *Brentwood* explained that a wide range of circumstances is relevant in making the state-action determination and that "no one fact can function as a necessary condition across the board for finding state action." *Id*. at 295-96.

Cornell, although nominally a private entity, has many attributes of a state actor. In its brief, Cornell does not deny the state-actor attributes cited by Dr. Vengalattore: 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 Cornell's decision to deny basic procedural protections to Dr. Vengalattore and others accused of sexual

misconduct constitutes state action thus likely turns on the role played by New York in that decision. There is some reason to conclude that New York played a significant role. For example, New York has sued the U.S. Department of Education, arguing that the federal government should be applying even *more* pressure on colleges and universities 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., August 9, 2020) (denying request for preliminary injunction against ED).

Cornell cites several court decisions for the proposition that whether a defendant is a state actor can, in some instances, be resolved on a motion to dismiss. Cornell Br. 48. But where, as here, Dr. Vengalattore has alleged facts sufficient to raise a plausible inference that Cornell's actions "may be fairly treated as that of the State itself," *Brentwood*, 531 U.S. at 295, he should be provided an opportunity through discovery to determine the full extent of New York's role in the decision to strip accused individuals of basic procedural rights.

V. 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. JA 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 Sexual Relationships' policy, which had been in effect since September of 1996, prior to the Guidance Documents." JA 127.

As explained in Dr. Vengalattore's opening brief, that ruling is based on a mistaken understanding of the nature of Dr. Vengalattore's injuries. Opening Br. 51-55. Although the substance of Cornell's Sexual Relationships Policy was unaffected by issuance of ED's guidance documents, the procedures employed by Cornell in enforcing that policy changed considerably as a result of ED's actions. Cornell openly acknowledges that it changed its enforcement policies in direct response to ED's issuance of the Dear Colleague Letter in 2011. JA 27, ¶¶ 129-

133. Those changes are precisely the ones that deprived Dr. Vengalattore of the procedural protections necessary to defend himself effectively.

In response, ED argues that Cornell's coerced adoption of Policy 6.4 could not have affected Dr. Vengalattore because "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." ED Br. 22-23. That argument misreads Policy 6.4. *See* SA-5 to SA-22, entitled, "Procedures for Resolution of Reports Against Faculty Under Cornell University Policy 6.4 for the Following Acts of Prohibited Conduct." The very title of that lengthy document suffices by itself to demonstrate that Cornell applied Policy 6.4 to investigations of faculty members. The procedures utilized by Cornell in its investigation of Dr. Vengalattore (*e.g.*, its refusal of his request for a hearing at which adverse witnesses could be confronted and cross-examined and defense witnesses could be presented) were much more closely in line with the procedures specified in Policy 6.4 than with the previously applicable procedures set out in the Faculty Handbook, which provided defendants an opportunity for a fair hearing.

ED argues that Dr. Vengalattore lacks standing for the additional reason that he has not plausibly alleged that his injuries could be redressed by a favorable

judgment. ED Br. 23-26. On the contrary, Dr. Vengalattore has carefully explained how a judgment declaring that ED acted improperly in issuing the guidance documents would redress his injuries. His principal injury is the devastating injury to his reputation caused by the false finding that he engaged in sexual misconduct 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 a grossly unfair proceeding.[10] A response of that sort to a favorable judgment is particularly plausible given Cornell's acknowledgment that it adopted its unfair procedures precisely because of ED's demand that it do so for purposes of complying with the guidance documents. Moreover, dismissal of Dr. Vengalattore's claims for lack of standing is particularly inappropriate because this case remains at the pleadings stage, where he is required to do no more than demonstrate the plausibility of his claims. *Citizens for Responsibility and Ethics in Washington v. Trump*, 953 F.3d 178, 194

[10] Courts have repeatedly held that the possibility of redress of reputational injuries is among the allegations that can support redressability claims. *See, e.g., 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).

(2d Cir. 2019) (plaintiffs plausibly alleged that granting relief on their claims that President Trump violated the Constitution's Emoluments Clause would redress their injuries, "at least to some extent, which is all that Article III requires"). Each of the standing decisions relied on by ED involved cases that had progressed to the merits stage.

ED also raises several defenses not addressed by the district court. For the reasons explained in Section II, *supra*, the Court should not address those issues but rather (if it reverses the district court's standing-based dismissal of the claims against ED) should remand the case to permit the district court to address those issues in the first instance. In any event, each of ED's additional arguments is unpersuasive.

First, ED asserts that Dr. Vengalattore's claims against ED are moot because it has withdrawn the two guidance documents at issue (the 2011 DCL and the 2014 Q&A) and recently issued a new final rule that supersedes previous Title IX enforcement policies. ED Br. 26-28. *See* Final Rule, "Nondiscrimination on the Basis of Sex in Educational Programs Receiving Federal Financial Assistance," 85 Fed. Reg. 30,026 (May 19, 2020).

But the change in policies does not moot the claims against ED because the 2011 DCL and the 2014 Q&A were still very much in place (and relied on by

Cornell) when Cornell conducted its sexual misconduct proceeding against Dr. Vengalattore, and ED never requested that Cornell rescind the measures it adopted under pressure from ED. Moreover, "courts will find a case moot after a defendant voluntarily discontinues challenged conduct only if (1) it can be said with assurance that there is no reasonable expectation that the alleged violation will recur and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *American Freedom Defense Initiative v. Metropolitan Transp. Authority*, 815 F.3d 105, 109 (2d Cir. 2016). Although the challenged Title IX enforcement policies (which were adopted during the Obama Administration) were partially rescinded during the Trump Administration, there is strong reason to believe that they will be revived during the incoming Biden Administration. *See, e.g.*, Bianca Quilantan, "Biden Vows 'Quick End' to DeVos' Sexual Misconduct Rule," *Politico* (May 6, 2020); Jackie Gharapour Wernz, "What Comes Next? Title IX under a Biden Presidency" (Nov. 9, 2020) (available at www.jdsupra.com/legalnews/what-comes-next-title-ix-under-a-biden-95583). Under those circumstances, ED has not met its burden of demonstrating "with assurance that there is no reasonable expectation that the alleged violation will recur."

Second, ED contends that the Amended Complaint fails to state a claim under the APA. ED Br. 29-39. ED's assertion that the challenged guidance documents do not constitute "final agency action" (because they were never intended to be binding on educational institutions receiving federal funding) blinks reality. The 2011 DCL said that schools subject to Title IX "*must* use a preponderance of the evidence standard" when investigating sexual-misconduct claims and that the "clear and convincing standard" used by Cornell and others was "not equitable under Title IX." Amended Complaint, Exh. B at 11. Ominously, the 2011 DCL warned colleges and universities that ED "may initiate proceedings to withdraw Federal funding" for noncompliance with the DCL. *Id.* at 16.

The 2014 Q&A reaffirmed the mandatory nature of the Department's statements. ED insisted that "schools have no 'flexibility' concerning the evidentiary standard" governing sexual misconduct investigations. Amended Complaint, Exh. C at 13. The document stated at least three times that schools were forbidden from using any standard more protective of the accused than the preponderance-of-the-evidence standard. JA18, ¶¶ 52-54. Only days after issuing the 2014 Q&A, ED publicly released a list of colleges and universities it was investigating for not conforming to the guidance; Cornell was soon included on

that list. JA19, ¶¶ 61-65. Because Cornell (as an educational institution receiving federal financial assistance) had no choice but to change its sexual-misconduct investigation procedures to conform with the 2011 DCL and the 2014 Q&A, the Department's actions had a "sufficiently direct and immediate impact" on Dr. Vengalattore to constitute final agency action. *Parsons v. U.S. Dep't of Justice*, 878 F.3d 162, 167 (6th Cir. 2017).

ED also argues that Dr. Vengalattore may not sue the federal government under the APA because he has an alternative "adequate remedy," 5 U.S.C. § 704—he can sue Cornell for violations of his civil rights. ED Br. 35-36. That argument lacks support either in the text of the APA or in case law. As this Court has explained, the "Supreme Court narrowly construed this limitation [the § 704 "adequate remedy" limitation] to apply only in instances when there are 'special and adequate review procedures' that permit an adequate substitute remedy." *Sharkey v. Quarantillo*, 541 F.3d 75 (2d Cir. 2008) (citing *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988)). Neither the Supreme Court nor this Court has ever applied the "adequate remedy" limitation to eliminate APA review where the only alleged alternative "remedy" for the federal government's misconduct is a claim for damages against a third party.

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 8,464, not including the table of contents, table of authorities, certificate of service, and this certificate of compliance. The Court entered an order on December 11, 2020, authorizing Appellant to file a reply brief of up to 8,500 words.

/s/ Caleb Kruckenberg
Caleb Kruckenberg

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of January, 2021, I electronically filed the reply 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