IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

ALYSSA REID, Plaintiff, v. JAMES MADISON UNIVERSITY, A Public University, and JONATHAN R. ALGER, sued in his official and Individual capacities; HEATHER COLTMAN, sued in her official and individual capacities; ROBERT AGUIRRE, sued in his official and individual capacities; and AMY M. SIROCKY-MECK, sued in her official and individual capacities, and JANE or JOHN DOES 1-5, sued in their official and individual capacities, Defendants.	CIVIL ACTION NO.: **5:21cv00032**

PLAINTIFF'S RESPONSE TO DEFENDANTS' RENEWED MOTION TO DISMISS

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INTRODUCTION

Plaintiff Alyssa Reid filed the present action on May 3, 2021, asserting twelve causes of action. Counts I–IV and Count XII were asserted against the James Madison University ("JMU" or "the University") and its various officials both in their official and individual capacities, whereas Counts V–XI were asserted against Department of Education and the Secretary of Education. ECF 1.[1] On June 2, 2021, JMU and its officials filed a motion to dismiss for lack of timeliness and failure to state a claim. ECF 9–10. Reid responded on July 2, 2021, ECF 17, and JMU and its officials replied on July 23, 2023. ECF 22. On March 29, 2022, this Court granted Defendants' motion to dismiss, holding that Reid's claim is untimely, but without opining on Defendants' other arguments. *See* ECF 29 at 12–16.[2] Reid appealed.

In her opening brief to the United States Court of Appeals for the Fourth Circuit, Reid argued that this Court erred in finding her claim untimely and (because appellate review is "not limited to evaluation of the grounds offered by the district court to support its decision, [and an appellate court] may affirm on any grounds apparent from the record," *United States v. Smith*, 395 F.3d 516, 519 (4th Cir. 2005)) that her claims must survive the Defendants' motion to dismiss under Fed. R. Civ. P. 12(b)(6). In their responsive brief, Defendants argued that the Fourth Circuit should not pass on these arguments and suggested that "in the event that the Court [of Appeals] were to conclude that Reid's claims are not time-barred, the Court [of Appeals] should remand for the district court to consider [these] additional arguments for dismissal in the first instance."

[1] Following briefing, the counts against the Department of Education and its Secretary were dismissed on March 29, 2022. ECF 29–30. Reid chose not to appeal this part of the Court's order and therefore the judgment of dismissal with respect to Counts V-XI is final. As a result, only JMU and its officials remain as defendants in this action.

[2] Reid's breach of contract claim (Count XII) was voluntarily dismissed. *See* ECF 17 at 21, n.5.

On January 9, 2024, the Fourth Circuit reversed this Court's previous judgment that Plaintiff's complaint is time-barred. *See Reid v. James Madison Univ.*, 90 F.4th 311 (4th Cir. 2024).[3] As requested by Defendants (and agreed to by Reid), the Court of Appeals did not address Plaintiff's or Defendants' Rule 12(b)(6) arguments.

Once the matter was returned to the District Court, Defendants renewed their motion to dismiss on those grounds that this Court (and the Court of Appeals) left unaddressed in previous orders. ECF 52.[4]

STATEMENT OF FACTS

Given the previous extensive briefing and the Court's own prior opinion in this matter, the Court is familiar with the facts of this case. *See Reid v. James Madison Univ.*, No. 5:21-cv-00032, 2022 WL 909845, at *1–*5 (W.D. Va. Mar. 29, 2022), *rev'd and remanded by* 90 F.4th 311 (4th Cir. 2024). Accordingly, Reid highlights only those facts that are particularly salient to the present motion.

First, it is not disputed that in adjudicating the "complaint"[5] against Reid, JMU proceeded under a policy that was not in existence at the time the complained-of conduct took place. The Hearing Committee's Report and Recommendation (as affirmed by Defendants Robert Aguirre, Dean of JMU's College of Arts and Letters and Heather Coltman, University Provost) concluded that Reid was "Responsible for a violation of Policy 1340 Sexual Misconduct 5.6 Non-consensual relationships." ECF 1-8, PageID# 187 (original orthography preserved). Policy 1340 did not exist until 2016,[6]

[3] On January 10, 2024, the Fourth Circuit issued an amended opinion to correct the affiliation designation of Plaintiff's counsel. No other changes to the opinion were made.

[4] Defendants filed their renewed motion on March 4, 2024. The Court approved the parties' scheduling agreement permitting Plaintiff to file her response by April 4, 2024, and Defendants to file their reply (if any) by April 26, 2024.

[5] Plaintiff takes this opportunity to again highlight for the Court that Kathryn "Katie" Lese—the complainant in JMU's Title IX process—did not actually file a formal complaint and instead provided Defendant Amy Sirocky-Meck with an unsigned, undated, and unsworn "Title IX statement." ECF 1-5, PageID# 176–80.

[6] Policy 1340 was amended in 2018; however, Rule 5.6 remained unchanged save for the change in title from "Consensual Relationship" to "Non-Consensual Relationship."

whereas the relationship between Reid and Lese began, by Lese's own account in November of 2015, *see* ECF 1-5, PageID# 178, *i.e.*, nine months before Policy 1340 came into being. By August of 2016, Lese was no longer a student at JMU and therefore Policy 1340, by its own terms, did not apply to the Reid-Lese relationship.

Second, once JMU activated the Title IX process, and certainly once the process was completed, Reid suffered tangible negative consequences. Reid plausibly alleged that as a result of the investigation itself she was denied an opportunity to be considered for a promotion to Director of Individual Events, although prior to the launch of the process against her, she was very much in the running for this position. *See* ECF 1, ¶534. Additionally, Reid alleged that the letter of reprimand is now a part of her permanent file which the University discloses to any of Reid's future potential employers, with such disclosure working to the detriment of Reid's ability to secure employment.

PENDING CLAIMS FOR RELIEF

Four counts of the original complaint remain pending against all remaining defendants, including JMU officials in their official and individual capacities. They are as follows:

- Count I: Violation of Due Process (42 U.S.C. § 1983 and Va. Const. Art 1 §§ 11 and 15) – Refusal to Enforce the Correct University Policy;
- Count II: Violation of Due Process (42 U.S.C. § 1983 and Va. Const. Art 1 §§ 11 and 15) – Refusal to Allow Confrontation and Cross-Examination;
- Count III: Violation of Due Process (42 U.S.C. § 1983 and Va. Const. Art 1 §§ 11 and 15) – Retroactive Application of University Policy; and
- Count IV: Violation of Title IX.

For reasons that follow, all of these counts survive Defendants' motion to dismiss.

STANDARD OF REVIEW

"A motion to dismiss under Rule 12(b)(6) tests the sufficiency of a complaint; importantly, it does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Republican Party of N.C. v. Marti*, 980 F.2d 943, 952 (4th Cir. 1992)). A court must not dismiss the complaint "unless it appears to a certainty that the plaintiff would not be entitled to relief under any legal theory which might plausibly be suggested by the facts alleged." *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999). In other words, a complaint survives a motion to dismiss so long as plaintiff's allegations "state a claim to relief that is plausible on its face," *Doe v. Va. Polytechnic Inst. and State Univ.*, 400 F.Supp.3d 479, 487 (W.D. Va. 2019) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)), *i.e.*, whenever plaintiff's allegations, taken as true, "show that the plaintiff has stated a claim entitling him to relief," *id.* (cleaned up). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

ARGUMENT

I. NONE OF THE CLAIMS IS BARRED BY SOVEREIGN IMMUNITY

Defendants' arguments that Reid's claims are barred by sovereign immunity, *see* ECF 10 at 14–15, PageID# 250–51; ECF 52, at 3–4, PageID# 1439–40, are wholly without merit and squarely foreclosed by *Ex parte Young*, 209 U.S. 123 (1908).

Reid does not seek any relief (monetary or injunctive) from *the State* or any of its instrumentalities. Nor does she seek monetary damages from any of the Defendants in their *official* capacity. Instead, she is bringing suit against state officials (all remaining Defendants save for JMU itself) in their official capacities for prospective injunctive relief only. Under *Young*, "suits against state officials who violate federal law are not suits against the state." *Biggs v. N.C. Dep't of Pub. Safety*, 953 F.3d 236, 242 (4th Cir. 2020). "The Eleventh Amendment permits suits for prospective injunctive relief against state officials acting in violation of federal law." *Frew ex rel. Frew v. Hawkins*, 540 U.S.

431, 437 (2004). The relief Reid seeks is expungement of her disciplinary record, removing the letter of reprimand from her employment file, and destruction of the complaint against her. J.A. 117–18, ¶¶ (iii)–(iv), PageID# 111–12. This relief can (and should) be provided via declaratory judgment and, if necessary, a properly crafted injunction. The Fourth Circuit has held that "requests for expungement [of an allegedly illegally entered grade] would relate to an ongoing violation of federal law and the relief granted would be prospective in nature," and therefore not barred by the Eleventh Amendment. *Shepard v. Irving*, 77 F. App'x 615, 620 (4th Cir. 2003) (unpublished). This case is no different, so JMU's sovereign immunity argument should be rejected.

Nor is Defendants' argument well-taken that sovereign immunity shields them from Reid's causes of action under the Virginia Constitution. *See* ECF 52 at 4, PageID# 1440 (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106, 124-25 (1984)). *Pennhurst* merely held that the intervention of *federal* courts in enforcing solely *state* law treads on that state's sovereign interests. 465 U.S. at 106 ("A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law."). *Pennhurst*, however, is simply inapplicable to the case at bar, because there, in crafting the remedial order, the Court of Appeals relied solely on a "state statute … and therefore did not reach the … issues of federal law." *Id.* at 95-96. *Pennhurst* further held that "[a] federal court must examine *each claim* in a case to see if the court's jurisdiction over that claim is barred by the Eleventh Amendment." *Id.* at 121 (emphasis added). Here, Reid does not bring a separate *claim* for violation of Virginia state law. Rather, Claims I–III are three separate claims each for "Violation of Due Process" under *both* 42 U.S.C. § 1983 *and* the Virginia Constitution. Thus, in

examining each *claim*, the Court will easily find that each of them raises issues of federal law, thus conferring jurisdiction on this Court.[7]

II. REID SUFFICIENTLY ALLEGED THAT DEFENDANTS VIOLATED HER CONSTITUTIONAL DUE PROCESS RIGHTS

Defendants next argue that Claims I–III (each of which alleges a violation of due process) failed to state a claim because Reid voluntarily resigned. *See* ECF 52 at 3, PageID# 1439; ECF 10 at 16–25, PageID# 252–61. Defendants argue that a) Reid failed to allege a protected property or liberty interest; b) Reid was not deprived of whatever interest she had by a state actor; c) Reid received all the process she was due; and d) individual defendants are entitled to qualified immunity. None of these arguments holds water.

It is well and long established that government employees are entitled to due process of law *prior to* having any discipline imposed on them. *See, e.g.*, *Goss v. Lopez*, 419 U.S. 565, 573 (1975) ("[A] state employee who under state law, or rules promulgated by state officials, has a legitimate claim of entitlement to continued employment absent sufficient cause for discharge may demand the procedural protections of due process."); *see also Doe v. Univ. of Cincinnati*, 872 F.3d 393, 399 (6th Cir. 2017) ("State universities must afford students minimum due process protections before issuing significant disciplinary decisions."); *Doe v. Purdue Univ.*, 928 F.3d 652, 663 (7th Cir. 2019) ("When a right is protected by the Due Process Clause, a state 'may not withdraw [it] on grounds of misconduct absent[ ] fundamentally fair procedures to determine whether the misconduct has occurred.'") (quoting *Goss*, 419 U.S. at 574). This right stems from the Fourteenth Amendment's prohibition on

[7] In any event, dismissing Counts I–III only to the extent that they rest on Virginia law does not change the viability of those same counts insofar as they allege violation of federal due process rights. Thus, an opinion on whether *Pennhurst* does or does not apply would in no way change the outcome of Defendants' motion, *i.e.*, it would be a purely advisory opinion. *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) ("[A] federal court has neither the power to render advisory opinions nor to decide questions that cannot affect the rights of litigants in the case before them.") (cleaned up).

deprivation "of life, liberty, or property, without due process of law." U.S. Const. amend. XIV.[8] While Defendants are correct that "[t]o allege a procedural due process claim, a plaintiff must show 1) that she had a property[9] or liberty interest, 2) of which a state actor deprived her, 3) without due process of law." ECF 10 at 15, PageID# 251 (citing *Stone v. Univ. of Md. Med. Sys. Corp.*, 855 F.2d 167, 172 (4th Cir. 1998)), their arguments that Reid failed to allege these factors cannot withstand even cursory scrutiny.

A. Reid Has a Liberty Interest in Her Good Name and Reputation of Which JMU Deprived Her

As far back as Blackstone, the law has recognized that "[t]he right of personal security consists in a person's … reputation." 1 William Blackstone, Commentaries on the Laws of England, *129.

> The Due Process Clause also forbids arbitrary deprivations of liberty. 'Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him,' the minimal requirements of the Clause must be satisfied. … It is apparent that the claimed right of the State to determine unilaterally and without process whether that misconduct has occurred immediately collides with the requirements of the Constitution.

Goss, 419 U.S. at 574–75 (quoting *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971)). True enough, "injury to reputation by itself [is] not a 'liberty' interest protected under the" Due Process Clause. *Siegert v. Gilley*, 500 U.S. 226, 233 (1991). "Instead, a plaintiff must demonstrate that his reputational injury was accompanied by a state action that 'distinctly altered or extinguished' his legal status if he wants to succeed." *Shirvinski v. U.S. Coast Guard*, 673 F.3d 308, 315 (4th Cir. 2012) (quoting *Paul v. Davis*, 424 U.S. 693, 711 (1976)); *see also Purdue Univ.*, 928 F.3d at 661.

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[8] Virginia's Constitution has an identical provision. Va. Const. art. I, § 11; *see also id.* § 15.

[9] While Reid does not abandon her constructive discharge claim, to the extent that the Court concludes that Reid was not constructively discharged, such a conclusion does not affect or diminish her property interest in fair and reasonable application of JMU's own policies and procedures. *See* ECF 17 at 55–57, PageID# 1151–53. Thus, to the extent that Defendants argue that Reid was not deprived of her *job* by a state actor, see ECF 10 at 20–21, PageID# 256–57; *cf.* ECF 52 at 3, PageID# 1439, that argument is not relevant to the rest of Reid's claims.

Addressing these requirements in turn, it is beyond cavil that Reid has a reputational interest in not being branded as a sexual miscreant who engages in *nonconsensual* sexual relationships. "A finding of responsibility for a sexual offense can have a 'lasting impact' on a [person]'s personal life, in addition to his 'educational and employment opportunities … .'" *Doe v. Miami Univ.*, 882 F.3d 579, 600 (6th Cir. 2018) (quoting *Univ. of Cincinnati*, 872 F.3d at 400). As the Sixth Circuit observed, "[a]n individual accused of sexual misconduct 'will see his own rights curtailed. … [H]e may face severe restrictions, similar to being put on a sex offender list, that curtail his ability to gain a higher education degree'" or future employment. *Id.* (quoting Emma Ellman–Golan, *Saving Title IX: Designing More Equitable and Efficient Investigation Procedures*, 116 Mich. L. Rev. 155, 175 (2017)).[10]

Reid has alleged all these consequences in spades, and at a motion to dismiss stage, her allegations must be treated as true with all the inferences drawn in favor of the plaintiff. *Matherly v. Andrews*, 859 F.3d 264, 274 (4th Cir. 2017). For example, in ¶ 540 and ¶ 613 of the Complaint, Reid alleged that JMU's "actions have called into question Plaintiff's good name, reputation, honor and integrity in such a manner as to have made it impossible for her to continue her employment with JMU and to have made it virtually impossible for her to find new employment in her chosen field." ECF 1, ¶¶ 540, 613. In ¶ 545 and ¶ 618, she further alleged that because JMU's "false findings have been communicated to prospective employers, Plaintiff Reid has been unable to find suitable academic employment despite being fully qualified." ECF 1, ¶¶ 545, ¶ 618. These allegations also support an inference that the loss of reputation was a result of JMU's (constitutionally deficient) Title IX process.

[10] The fact that the imposed sanction may not be particularly severe only "slightly diminishe[s]" the individual liberty interest. *See Doe v. Cummins*, 662 F. App'x 437, 446 (6th Cir. 2016) (unpublished). It is not exactly clear why the interest is diminished *at all*, because the reputational harm stems from "[a] finding of responsibility for a sexual offense," *Miami Univ.*, 882 F.3d at 600, and not from any particular sanction. At the same time, it is plausible that the lower the sanction, the less opprobrium will be experienced by the individual. Whatever the right answer, a mild sanction clearly does not "zero out" Reid's liberty interest in her reputation.

The only remaining question with respect to this prong of the test then is whether JMU's actions "distinctly altered or extinguished h[er] legal status." *Shirvinski*, 673 F.3d at 315 (internal quotations omitted). The answer to this question is just as clear as the previous one and the Seventh Circuit, in an opinion by now-Justice Amy Coney Barrett, addressed a similar set of facts in *Doe v. Purdue University*. There, plaintiff alleged that Purdue University wrongly found him liable for sexual misconduct and in doing so "inflicted reputational harm by wrongfully branding him as a sex offender; that Purdue changed his legal status by suspending him … and that these actions impaired his right to occupational liberty by making it virtually impossible for him to seek employment in his field of choice, the Navy." 928 F.3d at 661. In rejecting Purdue University's attempt to dismiss the former student's complaint for failure to state a claim, now-Justice Barrett wrote that Purdue's

> determination [that Doe was guilty of sexual misconduct] changed John's status: he went from a full-time student in good standing to one suspended for an academic year. … And it was this official determination of guilt, not the preceding charges or any accompanying rumors, that allegedly deprived John of occupational liberty. It caused his expulsion from the Navy ROTC program (with the accompanying loss of scholarship) and foreclosed the possibility of his re-enrollment in it.

Id. at 662–63.[11] On the basis of these facts, the Seventh Circuit found that the plaintiff there "satisfied the 'stigma plus' test." *Id.* at 663.

Reid's case is no different. First, as a result of JMU's Title IX process, Reid was prohibited from teaching any classes or otherwise participating in campus life. J.A. 83, ¶ 533. Thus, her status as a member of JMU's academic community changed *on mere complaint* of misconduct. Furthermore, as a result of the suspension and investigation, the University refused even to consider Reid's

[11] Much like Reid, who resigned from JMU, the plaintiff in *Purdue University* also resigned from the Navy ROTC, rather than being expelled from it, but the court in that case concluded that in effect, the resignation was involuntary. 928 F.3d at 658 ("A few weeks after his second appeal was denied, John involuntarily resigned from the Navy ROTC, which has a 'zero tolerance' policy for sexual harassment.").

application for promotion to Director of Individual Events, whereas prior to being subjected to the Title IX process, she was actively being considered for the position. This too indicates that her legal status within the university was "distinctly altered." Third, as a result of the letter of reprimand now being part of Reid's employment record, the University, when queried about Reid's status, consistently discloses it, leading to loss of future employment opportunities. In other words, much like John Doe in *Purdue University*, Reid's legal status as a former employee who left "in good standing" was "distinctly altered" by having her disciplinary record blemished falsely. Hence, much like John Doe in that case, Reid "has satisfied the 'stigma plus' test." 928 F.3d at 663.

B. The Title IX Process to Which Reid Was Subjected Does Not Comport with Constitutional Requirements

Defendants' argument that Reid received all the process that she was due is risible. At a minimum, due process requires that (1) "individuals should have an opportunity to know what the law is and to conform their conduct accordingly," *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994), (2) "notice of the reasons for the [discipline,] and [(3)] a meaningful opportunity to rebut the charges," *Lentsch v. Marshall*, 741 F.2d 301, 305 (10th Cir. 1984). The process to which Reid was subjected fails to meet *any* of the above criteria.

First, by applying the 2016–18 version of Policy #1340, JMU deprived Reid of an "opportunity to know what the law is and to conform [her] conduct accordingly." It is undisputed that at the time Reid and Lese began their relationship, Policy #1340 was not yet in effect, and employees' sexual conduct was governed by Policy #1324 (reproduced at ECF 1-2, PageID# 123–32). Policy #1324 plainly did not prohibit relationships of the type that Reid was engaged in with Lese. Instead, Policy #1324 was targeted solely at *quid pro quo* harassment. *See* ECF 1-2, PageID# 125–26. JMU never alleged that Reid engaged in such conduct. It is also undisputed that by the time Policy #1340 was promulgated (whether one references the 2016 or the 2018 version), Lese had graduated, so the Reid-Lese relationship could not then qualify (if it ever could) as a

"supervisor-subordinate" relationship within the meaning of that new policy. *See* ECF 1-3, PageID# 139. And it remains undisputed that it was the alleged violation of Policy #1340 for which the University found Reid liable.

The application of a policy that did not exist at the time the conduct took place violates "[e]lementary considerations of fairness," and is inconsistent with principles that are "deeply rooted in our jurisprudence, and … a legal doctrine centuries older than our Republic." *Landgraf*, 511 U.S. at 265. That government should not be able to apply disciplinary rules retroactively is so self-evident that Lewis Carroll rightly mocked it in *Alice in Wonderland*—a book for children! Lewis Carroll, *Alice's Adventures in Wonderland* 180 (MacMillan 1992) (1st ed. 1866) ("'Well, I shan't go, at any rate,' said Alice; 'besides, that's not a regular rule: you invented it just now.'"). In reading this passage, we instantly recognize that "Wonderland is deficient in all of the generally agreed-upon characteristics of legality." Mary Liston, *The Rule of Law Through the Looking Glass*, 21 L. & Literature 42, 54 (2009). This Court should not permit JMU to turn Carroll's dystopian Wonderland into modern reality.

Second, Reid never received adequate notice of the nature of the charges against her. As the complaint alleges—and again, at this stage, the allegations must be taken as true, *Matherly*, 859 F.3d at 274—JMU did not provide Reid with a copy of Lese's "Title IX Statement" until *after* Defendants interviewed Reid's supporting witnesses while Lese's witnesses were aware of the claims made in it. ECF 1, ¶¶ 338–43. Nor did JMU share the statement Lese submitted to the hearing panel *in lieu of* making a personal appearance. ECF 1, ¶¶ 372–81. Nor were the statements of "witnesses" who supported Lese's case provided to Reid to be rebutted. ECF 1, ¶¶ 399–407. Thus, Reid had no ability to know that the University was accusing her of engaging in sexual conduct with someone whom the University was alleging she supervised. Up until the very last moment, all Reid knew is that she was being accused of a "nonconsensual relationship" with Lese in violation of § 5.6 (of the *ex post facto* policy). However, § 5.6 is quite broad and defines "nonconsensual relationship" as anything from a

situation where one "must submit to unwelcome sexual conduct in order to accept or continue employment, achieve an employment or educational benefit" to an otherwise consensual relationship between two members of the community with "a power differential" even if no "educational or employment decision will be based on … submission to [the] sexual conduct." ECF 1-3, PageID# 139; ECF 1-4, PageID# 159. Given the breadth of the policy and lack of specificity of the allegation, Reid could not sufficiently know of what the University was accusing her.

The lack of sufficient notice and timely access to the "witness" statements on which the hearing committee ultimately relied precluded Reid from properly challenging the assertions that "graduate students were not considered coworkers," or that "students would have seen Alyssa Reid and [her supervisor] Lee Mayfield as equals for coaching and team decision-making purposes." ECF 1-8, PageID# 187. This, combined with the lack of opportunity to question not just Lese, but *any* of the complainant's witnesses, deprived Reid of a meaningful opportunity to be heard.

As the Sixth Circuit recently explained in another Title IX case, "[d]ue process requires cross-examination in circumstances [where a person is accused of sexual misconduct] because it is 'the greatest legal engine ever invented' for uncovering the truth." *Doe v. Baum*, 903 F.3d 575, 581 (6th Cir. 2018) (quoting *Univ. of Cincinnati*, 872 F.3d at 401–02). Similarly, the Third Circuit opined that "notions of fairness … include providing the accused with a chance to test witness credibility through some form of cross-examination and a live, adversarial hearing during which he or she can put on a defense and challenge evidence against him or her." *Doe v. Univ. of the Sciences*, 961 F.3d 203, 214 (3d Cir. 2020).[12] At a bare minimum, the University should have had *some process* to permit Reid to examine

[12] Although the Third Circuit was applying Pennsylvania law on procedural fairness, these notions are universal. As the court itself stated, "[p]rocedural fairness is a well-worn concept." 961 F.3d at 214; *see also Baum*, 903 F.3d at 581.

Lese's and her "witnesses'" credibility. *See Purdue Univ.*, 928 F.3d at 664 (noting that Purdue's failure "to make any attempt to examine [accuser]'s credibility is … troubling").

The key questions in this case (even assuming that Policy #1340 could be lawfully applied to Reid) are not whether Lese and Reid engaged in a sexual relationship—no one disputes that they did—but whether Lese felt pressured to remain in the relationship, whether other students perceived that Lese was being treated differently because of that relationship, whether graduate students were or were not considered co-workers, and whether Reid and Mayfield were perceived by anyone as "equals." And "it is particularly concerning that [Provost Coltman, Dean Aguirre,] and the committee concluded that [Lese and her "witnesses"] w[ere] the more credible witness[es]—in fact, that [they] w[ere] credible at all—without ever speaking to [any of them] in person." *Id.*

In many ways, this case is similar to *Vengalattore v. Cornell Univ.*, 36 F.4th 87 (2d Cir. 2022), recently decided by the Second Circuit. There, a former professor alleged that, *inter alia*, "investigators summoned [him] to respond to Roe's allegations on one day's notice, without a written statement of the charges or identification of the complainant." *Id.* at 107. Vengalattore also alleged that Cornell applied incorrect policy and "rejected numerous requests by Vengalattore that they interview certain witnesses or ask certain questions that could have produced information favorable to him." *Id.* The Second Circuit held that these allegations were sufficient to survive a motion to dismiss because they "made it plausible that the outcome of the investigation was the result of bias." *Id.* at 108. Reid's case is no different. She plausibly alleged that JMU, by "using parts of a policy that was known to be inapplicable," "avoiding inquiries that might support" her version of the nature of the relationship with Lese and her role within her academic department, and giving her very limited time to respond to the amorphous allegations, caused the "procedures followed by [JMU] in dealing with [Lese]'s allegations [to be] fundamentally skewed." *Id.* at 107–08.

JMU's process that punished Reid before even conducting a hearing, subjected her to an investigation for conduct that had already been investigated and for which she had already been cleared, punished her under a policy that did not exist at the time that the condemned conduct took place, denied her timely notice of the charges against her, a meaningful opportunity to be heard, and the ability to confront her accuser and cross-examine witnesses, "looks more like Calvinball than the rule of law." *United States ex rel. Sheldon v. Allergan Sales, LLC*, 24 F.4th 340, 356, *opinion vacated on reh'g en banc by* 49 F.4th 873 (4th Cir. 2022), and *cert. granted, judgment vacated by* 143 S. Ct. 2686 (2023); *see also* Bill Watterson, *The Calvin & Hobbes Tenth Anniversary Book* 129 (1995) ("People have asked how to play Calvinball. It's pretty simple: you make up the rules as you go."). Combined, these failings violated Reid's constitutional due process guarantees.

C. Qualified Immunity Does Not Bar Reid's Claims

Defendants next argue that Reid's claims fail on the basis of qualified immunity. *See* ECF 10 at 24–25, PageID# 260–61. Of course, qualified immunity has no application to Reid's claims for declaratory and injunctive relief. *See S.C. State Bd. of Dentistry v. FTC*, 455 F.3d 436, 447 (4th Cir. 2006) ("[N]either qualified nor sovereign immunity operates in cases seeking purely equitable relief."). With respect to claims for money damages, while as a general matter qualified immunity is an available defense, not only have Defendants failed to properly develop it (merely asserting *ipse dixit* that "Reid's allegations fail to demonstrate that Alger, Coltman, Aguirre, and Sirocky-Meck's actions were not objectively reasonable under the circumstances"), adjudication of this issue is inappropriate for this stage of litigation. As already explained in Plaintiff's Memorandum in Opposition to Defendants' original motion to dismiss, ECF 17 at 40–47, PageID# 1136–43, adjudication of Defendants' qualified immunity claim is predicated, at least in part on knowledge and motivations of the individual Defendants—information that will only be available after discovery is complete.

However, were the Court to consider Defendants' assertion of qualified immunity on the merits, it should reach the same conclusion—the defense fails. The basic principle that a punitive law

or rule can have no retroactive application is as old as Magna Carta. To find that somehow individual defendants acted "objectively reasonably" while ignoring this bedrock principle would rob the "objective reasonability" test of all meaning.

III. REID PLEADED A VALID TITLE IX CLAIM

Reid pleaded facts showing that the outcome of the Defendants' Title IX proceeding against her was not only rife with due process violations, but erroneous in its outcome. Defendants' failure to apply the correct procedure and policy, failure to timely provide Reid with the complaint or witness statements, failure to provide Reid with an opportunity to question not just the complainant, but also "witnesses" against her, and consistent failure to follow its own deadlines throughout the process all raise a plausible inference of discrimination against Reid.

It is of course possible that JMU treats *all* accused individuals in the same unlawful manner. If so, that might mean that it doesn't discriminate on the basis of any protected characteristic, but simply fails to abide by constitutional safeguards in every case. Such a state of affairs is certainly a possibility (though not a particularly comforting one, and not one that JMU has alleged to exist). However, at the motion to dismiss stage, courts must "accept as true all well-pleaded facts in a complaint and construe them in the light most favorable to the plaintiff." *Matherly*, 859 F.3d at 274 . Reid's complaint that she was treated differently because of her status as a woman and a member of the LGBTQ community is "plausible on its face." *Iqbal*, 556 U.S. at 678.

Looking again to *Doe v. Purdue University*, the standards are clear—"do the alleged facts, if true, raise a plausible inference that the university discriminated against John 'on the basis of sex'?" 928 F.3d at 667–68. In *Purdue University*, the Seventh Circuit found sufficient, at a motion to dismiss stage, the allegation that the university was biased against the plaintiff because it chose to believe the complainant over him because it was "*plausible* that [university officials] chose to believe [the accuser] because she is a woman and to disbelieve [the plaintiff] because he is a man." *Id.* at 669 (emphasis added). And in the present case, it is *plausible* that JMU chose to apply wrong policy, subjected Reid

to double jeopardy, denied her access to the materials necessary to meaningfully respond to charges, and routinely ignored its own deadlines and procedures because Reid was a woman and a member of the LGBT community. That is all that is required.

CONCLUSION

For all the foregoing reasons, as well as those in Plaintiff's original Memorandum in Opposition to Defendants' motion to dismiss, ECF 17, the Court should deny the motion to dismiss.

April 4, 2024

Respectfully submitted,

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