No. 22-416

IN THE

Supreme Court of the United States

TUHIN KUMAR BISWAS, *Petitioner*

v.

ETHAN ROUEN, SURESH NALLAREDDY, UROOJ KHAN, FABRIZIO FERRI, DORON NISSIM, and COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK, *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

Tuhin Kumar Biswas

Petitioner, *Pro Se*

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QUESTIONS PRESENTED

1. Is Copyright Act the only Federal Cause of Action under which Plagiarism can be adjudicated?

2. Whether Columbia University and related parties can be regarded as state actors for an action under 42 U.S.C. § 1983 for First Amendment purposes?

3. Did the United States Court of Appeals for the Second Circuit err by not considering points of law raised for the first-time on appeal?

LIST OF PROCEEDINGS

- *Biswas v. Rouen, et al.*, No. 1:18-cv-09685-RA, United States District Court for the Southern District of New York. Judgement entered October 18, 2019.

- *Biswas v. Rouen*, No. 19-3452, United States Court of Appeals for the Second Circuit. Judgement entered June 9, 2020.

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PETITION FOR A WRIT OF CERTIORARI

Tuhin Kumar Biswas, a *pro se* petitioner, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The Second Circuit's Summary Order (App. 1a – 7a) is published in the following electronic databases:

- https://casetext.com
- https://www.casemine.com
- https://www.courtlistener.com

with citation *Biswas v. Rouen*, 19-3452 (2d Cir. Jun. 9, 2020).

The Memorandum Opinion and Order of the District Court for the Southern District of New York (App. 8a – 20a) is published in the following electronic databases:

- https://casetext.com
- https://www.casemine.com
- https://law.justia.com

with citation *Biswas v. Rouen*, 18-CV-9685 (RA) (S.D.N.Y. Oct. 16, 2019)

The Endorsement of the Magistrate Judge (App. 21a – 24a) is unpublished.

The Second Circuit's order of denying discretionary *en banc* review (App. 25a – 26a) is unpublished.

JURISDICTION

The Second Circuit entered judgment on June 9, 2020 (App. 1a). A timely petition for rehearing *en banc* was denied on July 31, 2020 (App. 25a).

On Thursday, March 19, 2020, this Court passed an order (ORDER LIST: 589 U.S.) extending the time to file petition for a writ of certiorari to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing. The original paid Writ of Certiorari was shipped on Thursday, December 24, 2020 via DHL courier, and hence was timely. As per Proof of Service of the courier, it was delivered on 04 January 2021 at 09.15 and signed at/by DOOR MARBURY. After repeated phone calls and subsequent voice-mails to the Court Clerk's number since then, email correspondence from the Clerk's Office was received on August 30, 2022 stating that no petition has been received together with notification to re-submit the petition and all accompanying documents.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULE(S) INVOLVED

The relevant constitutional provisions, statutes, and rule(s) involved are produced in the appendix to this petition (App. 27a – 34a).

STATEMENT OF THE CASE

This lawsuit commenced on October 17, 2018 when Plaintiff Tuhin Kumar Biswas (henceforth, Petitioner), appearing *Pro Se* from India, filed the complaint, along with the requisite court fee via courier, with the United States District Court, Southern District of New York (henceforth, district court). Petitioner, in his one-time filed complaint, which was never allowed to be amended (App. 6a, 19a – 20a), listed his grievances as intellectual property violation in the form of Plagiarism under oath of his research paper (produced in an extremely hostile environment) by members (faculties and PhD student) of the Accounting Department of Columbia Business School (henceforth, CBS), Columbia University in the City of New York (henceforth, Columbia); breach of trust and fraud first by the members of the Accounting Department of CBS and then by Columbia University Research Compliance & Training

(henceforth, RCT) who were supposed to inquire, investigate, and adjudicate the Plagiarism case; destruction of evidence in the form of purging of the Petitioner's CBS emails (which formed the bulk of case history and evidence) and non-access of the same account without any prior notice from May 2016; and fraudulent, highly one-sided, and prejudiced procedure by RCT in handling of the Plagiarism case and suspected conniving with the Respondents in producing manufactured evidence to deal with the plagiarism complaint.

This lawsuit was brought against Respondents — then Accounting PhD student in CBS and co-author of the plagiarizing paper (i.e., the derived paper) Ethan Rouen (henceforth, Rouen); then Assistant Professor of Accounting in CBS and co-author of the plagiarizing paper Suresh Nallareddy (henceforth, Nallareddy); then Assistant Professor of Accounting in CBS and co-author of the plagiarizing paper Urooj Khan (henceforth, Khan); then Associate Professor of Accounting in CBS and Accounting PhD Coordinator Fabrizio Ferri (henceforth, Ferri), then Professor of Accounting in CBS and Accounting Department Chair Doron Nissim (henceforth, Nissim); and Columbia.

The Petitioner, being *pro se* and having no experience in filing a complaint with any court, filed the complaint stating his grievances, injuries, and relief sought, with a chronology of events pertaining to the case. The case was filed by the district court as 440 Civil Rights - Other Civil Rights, with the cause being stated as 28:1331 Fed. Question.

For a background on the case, Petitioner joined CBS, Columbia as a PhD student from India on F-1 visa in August 2012. Rouen was the other incoming PhD student in Accounting. Rouen had completed his executive MBA from CBS sometime in 2011 and prior to that had a masters in journalism from Columbia. First year of the program went quite well other than some questionable means taken by Rouen in some of the coursework, particularly the PhD Math Methods II class (introductory regression analysis at PhD level) from Professor Assaf Zeevi, then Vice-Dean of Research at CBS. Incidentally, both the Petitioner and Rouen had to take an on-line plagiarism certificate supervised by the then CBS Director of PhD Program Professor, Costis Maglaras (henceforth, Maglaras) sometime in the fall of 2012. In the summer of 2013, it was announced that the then PhD Coordinator Associate Professor Gil Sadka (henceforth, Sadka) will be replaced by Ferri as the new PhD Coordinator. For reasons not known to the Petitioner, Ferri was occasionally quite rude to the Petitioner as has been mentioned in papers filed with the district court. As Petitioner was interested in innovative empirical research, Petitioner signed up for PhD Financial Econometrics class from Nobel Laureate Professor Robert Engle at Stern School of Business, New York University in fall 2013. There was an understanding between CBS and Stern whereby PhD students from either institute could take one or two classes for credit at the other. It was quite usual for PhD students from CBS to avail this facility. While the Petitioner was

taking perhaps the world's most advanced Econometrics class, Rouen was again taking the Math Methods II class from Professor Assaf Zeevi under a different call number along with a few incoming first year PhD students.

From early 2014, Petitioner started working on his research paper. Petitioner discussed his preliminary idea with the then Accounting Department Chair Professor Stephen Penman (henceforth, Penman), Sadka, and Nallareddy. Sadka suggested to think something from a time series perspective (Sadka was known to be a time-series researcher in Accounting) and Penman also said to think in the aggregate (i.e. time-series) but cautioned that nobody has done this type of work perhaps because none of the coefficients will load in a statistically significant manner. Incidentally, Nallareddy had suggested to take a cross-section approach. Inspired by Penman and Sadka, and obviously Professor Engle's class (one of the most advanced time-series econometrics class dealing with financial markets), the Petitioner took a time-series approach in the aggregate in his paper. Like Penman had mentioned, none of the regressions had any meaningful coefficients, whence it suddenly struck the Petitioner to look for structural breaks / shifts / changes in the data as Professor Engle had urged in one of his class lectures to look for structural breaks when dealing with economic data in the aggregate. He had devoted considerable time in teaching his class how to conduct advanced structural break tests using the econometrics software EViews. When the Petitioner applied

those structural break techniques to his data, suddenly everything started working and deep economic and accounting insights started coming to the Petitioner's mind from the resulting regressions.

A sequence of events happened in the summer of 2014 which altered the future of Petitioner at Columbia. Sometime in the summer of 2014 Penman took sabbatical for a year and Nissim became the Department Chair. Sadka was also on the verge of leaving Columbia and left in July 2014. With Penman on sabbatical and Sadka on the verge of leaving, Petitioner discussed the progress of his paper a few times with Nallareddy. Then, in early June 2014, email notification was sent to PhD students regarding availability for Research Assistant (RA) work for Nissim. Since, the PhD qualifying exams were around the corner and burdened with three mandatory Accounting PhD classes along with the uphill task of turning in two research papers (one being the paper mentioned above and the other for a PhD Empirical Corporate Finance class that the Petitioner took in the Spring of 2014), the Petitioner conveyed that he will be available after the Qualifying exams in July 2014. It was not a big deal and often PhD students convey their non-availability due to various reasons. Besides the Petitioner, some other PhD students also conveyed their non-availability. The entire Accounting Department became palpably hostile from this point onwards. Khan said in his summer class that he had heard from one of his colleagues that one of the students taking his class has refused

Nissim's RA work. Then, he came to the Petitioner and asked about his preparation for the Qualifiers. Incidentally, there was an incident in Khan's summer class regarding the map of India showing full Kashmir as part of India as is usual for a map of India taken from an Indian source. Petitioner was selected by Khan to present this paper which had this map and Khan voiced the issue regarding the full map of India which the Petitioner defended through reasoning. Meanwhile, in a meeting Nallareddy conveyed his anxiety regarding the Petiioner's Qualifiers and warned him that Nissim is a person who can do immense damage to someone's career. All three Accounting faculty members who were taking the three respective Accounting PhD classes over the summer, Khan, Ferri, and a visitng professor, became extremely hostile from this point on. Incidentally, none had tenure at Columbia then. All three were rewarded with promotions and/or chairs and/or tenures subsequently at CBS.

The Petitioner was disqualified in the PhD Qualifying Exam, specifically by these three faculty members whose classes were being taken over the summer. Petitioner met Ferri to inquire about the reasons as Petitioner was certain that the exams didn't go bad. Petitioner was told that he could not be passed because he was in the borderline category (i.e., could have been qualified, could have been disqualified) and had not yet turned in his summer research paper. Petitioner was told that lot of people do poor in the PhD qualifying exams but if such students have a paper, they pass them; since

PhD is about writing a paper. Incidentally, another PhD transfer student (a 3rd year economics PhD transfer from Stanford), who had joined the Accounting PhD program in fall 2013 and who was allowed to take the Qualifiers with the then 2nd year Accounting PhD students (the Petitioner and Rouen), also had not produced any paper by then. He presented his paper which he co-authored with an Accounting faculty outside Columbia after the Qualifiers. Rouen had presented his summer research paper prior to the Qualifiers which he had co-authored with two Accounting faculty members, one from CBS and the other from outside Columbia. Incidentally, there was a notification from the PhD office stating that a PhD student's summer paper has to be solo-authored, it need not be anything special but something of at least twenty pages on any topic in their academic area, just to get started. Such a paper may not be co-authored with any faculty and certainly not with any outside faculty. The Petitioner was writing his first full research paper in life and that too solo with minimal guidance due to circumstances. Ferri told the Petitioner as to why the Petitioner had not worked with Nissim as that could have been something great. Ferri then told the Petitioner that since he has been disqualified he could no longer be placed for tenure-track positions at top schools like Chicago and Harvard and one of the objectives set for Ferri when he was appointed as the PhD Coordinator was to prepare students for top schools only. As such the Petitioner would be provided with a terminal master degree and would have to leave

the program. When the Petitioner asked that as per rules isn't there a second chance with the Qualifiers, Ferri relented and said okay. He further instructed to present the summer research paper before the 2nd Qualifying exam.

Petitioner presented the slides of his paper "Accounting Factors Driving Book-to-Market in Predicting Aggregate Stock Returns" on September 8, 2014. After the presentation which ended with applause from the audience, when the Petitioner visited Ferri's office for feedback, he verbally attacked the Petitioner saying everybody was asking him why he failed the Petitioner and asked the Petitioner to distribute the paper as soon as possible. The Petitioner circulated the first draft of his paper among the Accounting Department members of CBS on September 29, 2014. The Petitioner took the 2nd Qualifying exam in early October 2014. The result was the same and this time Ferri conveyed that the paper is a sub-par paper, i.e., something which will not get published in top academic journals, and the Petitioner would be provided with a terminal master degree and leave the program. Ferri said that the Petitioner should take the remaining time at Columbia to look for jobs in the industry and can continue to develop his paper for professional purposes. One of the reasons cited by both Nissim and Ferri for not going forward with the Petitioner in the PhD program at CBS was that no one does time-series based research in Accounting at CBS.

In April 13, 2015 a paper "On the Disparity between Corporate Profits and Economic Growth"

was circulated among the Department members. This paper was co-authored by Khan, Nallareddy, and Rouen. This paper was presented in the department by Nallareddy on April 15, 2015. This paper had some key concepts and empirical applications from the Petitioner's paper very skilfully adapted without citing the Petitioner's paper or the papers that the Petitioner referenced. Thus, the latter paper (i.e., the KNR Paper) was the Plagiarizing Paper (i.e., the derived paper) from the Petitioner's paper (i.e., Biswas Paper). Plagiarism of concepts and ideas of structural break / change / shift in time-series application in Accounting and plagiarism of analysis and application in the form of similar structural break date based on similar sample period using justification from the Petitioner's paper, when such a justification was not applicable to the plagiarizing paper.

The Petitioner's revised draft of the paper got accepted at two reputed global conferences in late spring / early summer 2015 — the Trans-Atlantic Doctoral Conference (TADC) at London Business School (held in May 2015) and the 2nd Conference of the International Association of Applied Econometrics (IAAE) in Greece (held in June 2015). While the Petitioner was allowed to attend the former conference, when informed about the latter, Ferri became extremely hostile and said that the Petitioner has no chance anymore at Columbia and can take the paper to get a job or join another PhD program.

The plagiarizing paper also got accepted at the TADC where Rouen presented it. When questions

on some of the concepts taken from the original paper were asked, Rouen had no answer. The plagiarizing paper was also presented at multiple other conferences in the US and India till January 2016. Most notably while the Petitioner was dissuaded from time-series based research in Accounting at CBS, the plagiarists, particularly Rouen, were promoted worldwide as a budding scholar in time-series oriented research dealing in structural breaks / changes / shifts in Accounting. The co-authors subsequently wrote a cover-up paper titled "The Role of Taxes in the Disparity between Corporate Performance and Economic Growth" dated December 2015. As can been seen from the discussion above, the PhD Qualifiers, being an apparatus of the conspiratorial, anti-competitive and discriminatory design and activities of the perpetrators, has no validity.

The Petitioner graduated from Columbia in October 2015 and moved back to India. After backing up his emails the Petitioner filed complaints of hostile discrimination and plagiarism with Columbia Office of Equal Opportunity and Affirmative Action (EOAA) and CBS in April 2016. Soon EOAA ceased to look into the case and the matter moved entirely into the hands of CBS under the then CBS Director of PhD Program Maglaras who kept procrastinating the plagiarism issue. Meanwhile, Petitioner noticed that he could no longer access his CBS email account and was informed later that the account has been purged. When the Petitioner took the matter out of Columbia by reporting to the American Accounting

Association (AAA) in late August 2016, Columbia RCT contacted the Petitioner via email and took over the plagiarism case to start their version of procrastination and cover-up strategies (details of which are in the documents filed with the lower courts). After Columbia gave up the matter (just after Rouen graduated with PhD) in May 2017, the Petitioner reported the matter to the U.S. Department of Justice, Civil Rights Division, Education Section and also to the Department of Homeland Security, without any benefit.

Then, the lawsuit commenced as stated at the beginning of this section. Within one year of filing, the District Judge, who had a conflict of interest[1], dismissed the one-time filed *pro se* complaint with prejudice citing no possible federal cause of action other than US Copyright Law to try plagiarism, following a motion to dismiss by the Respondents (App. 8a – 20a). The order of the Magistrate Judge granting Petitioner's petition to file an amended complaint once the decision on the motion to dismiss is arrived at (App. 21a – 24a) was also overridden in the process. The case docket was closed and so no post judgement motion could be filed with the district court. Appeal with the Second Circuit followed which was decided via a Summary Order (App. 1a – 7a) and subsequent petition for rehearing *en banc* was also denied (App. 25a – 26a). This lawsuit, in the process, has raised some

[1] 28 U.S.C. § 455

fundamental and deep legal questions that remain to be answered.

REASONS FOR GRANTING THE PETITION

A. This Court should grant review to decide whether Copyright Act is the only Federal cause of action under which Plagiarism can be adjudicated.

There exists significant ambiguity regarding adjudication of Plagiarism under Federal Copyright Act among courts in various circuits. Some courts have held that any Plagiarism trial necessitates existence of registered Copyright by the Plaintiff and such a trial can proceed as long as such instance of Plagiarism intrinsically falls within the Copyright Act (App. 4a, 16a – 18a) or can be construed to belong to the same [*Joshi-Tope v. Cold Spring Harbor Lab*; Case 2:07-cv-03346-ERK-WDW Document 53, EDNY – Report and Recommendation dated April 14, 2008 ("to the extent that the claim is construed as one sounding in copyright infringement", Pg. 13)].

Others have held that Plagiarism is not covered by the Copyright Act.

> "Both DeMoulin and KCI ask the Court to determine as a threshold legal issue whether "plagiarism" is different from "copyright infringement." DeMoulin contends that claims of copyright infringement and plagiarism are

legal equivalents such that a finding of no copyright infringement, as a matter of law, means that no plagiarism occurred." *Kindergartners Count, Inc. v. DeMoulin*, 249 F. Supp. 2d 1233 (D. Kan. 2003). "Accordingly, the Court finds that a finding of plagiarism is not contingent upon a finding of copyright infringement." *Id.*

Incidentally, a reading of the Copyright Act, especially 17 U.S.C. § 102 (App. 27a – 28a), gives the impression that Plagiarism is not covered by the Copyright Act. The latter position has also been corroborated by an opinion of this Court. In fact, this Court has defined Plagiarism as, "plagiarism — the use of otherwise unprotected works and inventions without attribution" *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 36 (2003). Here, this Court has not only defined Plagiarism, but has also placed it outside the ambit of the Copyright Act.

The above analysis shows that plagiarism is not necessarily litigable under the federal Copyright Act. Consequently, the subsidiary question that naturally follows is whether there are alternate federal causes of action through which plagiarism can be adjudicated, especially if such an activity has been done in violation of some agreement, contract, or oath. According to 17 U.S.C. § 301(d) (App. 28a), Federal Copyright Act does not limit nor annul any other rights or remedies that can be applied to an issue in question. This can be interpreted as even if a plagiarism case has aspects which can be

adjudicated under the Copyright Law, if such a case has aspects which can be litigated under alternate causes of action, be federal or state, then such alternate causes of action should be applicable. As such, the following analysis will show that alternate federal causes of action can be applied to adjudicate plagiarism, especially when done in violation of some oath or other form of agreement or contract.

i. Section 1 of the Sherman Act: Plagiarism by more than one individual/entity involved in the plagiarizing co-authored work, in general, can ideally be adjudicated under 15 U.S.C. § 1 (App. 29a). This form of intellectual property violation has all the ingredients that come under this cause of action. The plagiarizing (i.e., the derived non-attributive) co-authored work itself is the most conspicuous evidence of the agreement, contract, or combination towards the conspiracy. No further evidence is required. Thus, the existence of the agreement, contract, or combination, i.e., the first criterion to bring a suit under 15 U.S.C. § 1, is satisfied. Even for a single-authored plagiarizing work, when such work gets promoted through the help of other individuals/entities, that act of promotion itself is the evidence of the agreement, contract, or combination towards the conspiracy. "Applying these precedents, we conclude that there can be sufficient evidence of a combination or conspiracy when one conspirator lacks a direct interest in

precluding competition, but is enticed or coerced into knowingly curtailing competition by another conspirator who has an anticompetitive motive." *Spectators' Comm. v. Colonial Country Club*, 253 F.3d 215, 222 (5th Cir. 2001). Now, at the pleading stage a plausible indication of the existence of some form of agreement, contract, or combination is sufficient to survive a motion to dismiss a lawsuit brought under 15 U.S.C. § 1.

> "In applying these general standards to a § 1 claim, we hold that stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Bell Atl. Corp. v Twombly*, 550 U.S. 544, 556 (2007).

With the existence of an agreement, contract, or combination being highly likely, to the extent of being almost certain, in a plagiarism case, it needs to be argued that plagiarism also imposes unreasonable restraints on trade or competition. Plagiarism, by its very nature and intent, is so detestable, that it satisfies the per se standard of the second clause of 15 U.S.C. § 1. And, if the said act of plagiarism is done in violation of some oath or agreement, then it magnifies its illegality considerably.

There can be no objective competitive justification for plagiarism. The market for the plagiarizing work often tends to be similar to that of the plagiarized (i.e., the original) work. Plagiarism robs the identity of the original author/creator and thus has highly deplorable effects not only on the original author/creator, but also on the market for both the plagiarized as well as the plagiarizing work. Plagiarism has very harmful effects on the consumers of such works. Plagiarism does not stimulate competition in any sense of the word. On the contrary it harms competition. Terming plagiarism to be pro-competitive is akin to exhorting future researchers, creators, authors, and consumers of such works to plagiarize! The above analysis implies that pro-competitive effect of plagiarism is less than or equal to zero; which in effect makes plagiarism to come under the per se category. Further, in academic plagiarism in higher research, it severely restricts the output of citations of the plagiarized (i.e., the original) work. This restricting of output of citations is more anti-competitive if the conspiracy aims at getting rid of the original work in the first place, similar to what occurred in the current case.

ii. Violation of the First Amendment of the United States Constitution (App. 27a): One of the exceptions of First Amendment is plagiarism of copyrighted material (from: *Which types of speech are not protected by the*

First Amendment?, Freedom Forum Institute; and Willingham, A.J. 2018, *The First Amendment doesn't guarantee you the rights you think it does*, CNN, September 6). Point to be noted here is as per U.S. Copyright law, copyright is automatically obtained when an original work of authorship is put in a tangible medium of expression and copyright notice accompanying the same is not required for works produced post March 1, 1989[2]. Thus, both the original paper and the plagiarizing paper have respective copyrights. To bring infringement suit under the federal Copyright law one needs registration, but nowhere does it state that to bring the same suit for First Amendment violation for plagiarism of copyrighted material one needs copyright registration. Hence, in the current context, where the Respondents acted in their official capacity in an institution which is subject to First Amendment (to be elaborated in section B), a plagiarism suit can be adjudicated for violation of First Amendment.

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[2] "Procedure for Getting Protection

- Copyright protection arises automatically when an original work of authorship is fixed in a tangible medium of expression. Registration with the Copyright Office is optional (but you have to register before you file an infringement suit).
- The use of copyright notice is optional for works distributed after March 1, 1989."

Source: https://corporate.findlaw.com/intellectual-property/copyright-law.html/

iii. 42 U.S.C. § 1981. Equal rights under the law: Plagiarism in the current context can also be adjudicated under 42 U.S.C. § 1981 (App. 29a – 30a). This is because both Petitioner and Rouen were made to take an online plagiarism oath and obtain a plagiarism certificate. This was on the insistence of the PhD office and supervised by the then PhD Director of CBS, Maglaras. Thus, in addition to the plagiarism-period Department Head Nissim and the plagiarism-period PhD Coordinator Ferri, Maglaras also had responsibility and supervisory authority to make and enforce this plagiarism certificate vis-à-vis both the then PhD/graduate students Petitioner and Rouen. Incidentally, Petitioner and Rouen were the only two entering Accounting PhD students in the Fall of 2012. Now, all four of Rouen, Ferri, Nissim, and Maglaras are white men. Only, Petitioner is non-white and of Asian race/ethnicity, specifically of Bengali-Indian ethnicity. There is no other apparent cause from a Civil Rights discriminatory parameter standpoint for this violation of the plagiarism under oath. Sex, i.e., gender, is not a factor as all five players vis-à-vis this particular plagiarism under oath were males. Nationality cannot be inferred to be a factor as all were of different national origins — Petitioner of Republic of India origin, Rouen of United States origin, Maglaras of Greek origin, Nissim of Israeli origin, and Ferri of Italian origin. Religious identity is neither

quite apparent nor identified in a Business School academic setting and can at best be inferred from name and/or ethnicity and/or national origin. Only thing that can possibly be inferred about the religion of the individuals in this setting is that they can have disparate faiths. Hence, race is the only factor that stands out for this discrimination pertaining to the plagiarism under oath violation. Also, the facts in the above discussion have either been mentioned in or can easily be inferred from the documents filed with the District Court. Thus, we see a classic case of race-based discrimination which satisfies the "but-for" standard of this particular cause of action, as has been corroborated by a recent decision of this Court. "Held: A §1981 plaintiff bears the burden of showing that the plaintiff's race was a but-for cause of its injury, and that burden remains constant over the life of the lawsuit." *Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media*, No. 18-1171, (U.S. Mar. 23, 2020).

iv. Ninth Amendment of the United States Constitution: Plagiarism in higher education can also be adjudicated under the Ninth Amendment (App. 27a) of the United States Constitution. This is because the fundamental tenet in academics, especially scholarly research, is integrity. If this integrity is lost then the main pillar on which academics and scholarship stand collapses. This is the reason in almost all educational institutions of higher

> learning some sort of academic honor code, such as the plagiarism certificate in this case, is mandatory. Right of a scholar's original work to survive is similar to right to live. If university supported Plagiarism is conducted to promote a derived work without citing the original, then such an act is equivalent to killing the original scholar's work, which has been the case over here. Thus, free standing or penumbral to another amendment of the U.S. Constitution, such as the First Amendment, Plagiarism in higher education can certainly be adjudicated as a violation of the Ninth Amendment of the U.S. Constitution. "The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. See *Poe v. Ullman*, 367 U.S. 497, 516-522 (dissenting opinion)." *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

Only when a plagiarism claim has copyrightable aspects, or in other words, only when a plagiarism claim has elements which comes within the purview of the federal Copyright Act, can a trial under the same law proceed. This latter position has also been the contention of the Petitioner from the onset of this lawsuit both in the district court and the circuit court, which has not been accepted both by the district court as well as the circuit court. By merely stating that the Petitioner argues that Plagiarism can be adjudicated outside the

Copyright Act but not coming to any conclusion with respect to the same, despite detailed elaboration on alternate Federal causes of action to adjudicate Plagiarism both in the Appeal Brief and the Reply Appeal Brief, the Second Circuit in effect sanctioned the legal error of the district court. Thus, we see a situation where the Second Circuit has entered a decision which is ambiguous with decisions of courts in other circuits and most importantly has decided a federal question in a way that defies a relevant opinion of this Court. As such, by Rules 10 (a) and (c) [Rules of the Supreme Court of the United States (Adopted April 18, 2019; Effective Jul 1, 2019)] this Court should grant review.

B. This Court should grant review to decide whether Columbia University and related parties can be regarded as state actors for an action under 42 U.S.C. § 1983[3] for First Amendment purposes.

Columbia has certain specific characteristics with respect to First Amendment (App. 27a) which sets it apart from most other private institutions. It has been a champion of First Amendment both on and off campus. To that extent, it actively implements First Amendment on campus[4] in the form of freedom of expression

[3] App 30a

[4] "Like most universities, University President Lee Bollinger has said, Columbia voluntarily abides by the First Amendment." (Buzbee, E. 2019, *Trump executive order to*

and its Senate has formally adopted a resolution to this effect[5,6]. Columbia is run by President Lee Bollinger, an avid First Amendment advocate and scholar who espouses First Amendment on the University's campus, especially for the students.[7,8] It promotes itself to the outside world through press releases and other promotional activities as a stringent advocate and defender of First Amendment. Recently, it has set up a First Amendment Institute to actively promote and uphold freedom of speech and press, particularly in state activities, through strategic litigation

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protect campus free speech has unclear impact on Columbia, experts say, Columbia Daily Spectator, March 26).

[5] "The University Senate unanimously passed a resolution in support of freedom of expression on campus at the Senate plenary meeting last Friday." (Xia, K. 2018, *University Senate passes resolution on freedom of expression, creates forum for open discussion*, Columbia Daily Spectator, April 1).

[6] "After months of debate, the University Senate passed a resolution in support of academic freedom of speech at the Senate plenary meeting last Friday." (Nakhla, A. 2018, *Senate passes long-anticipated resolution on academic freedom of speech*, Columbia Daily Spectator, February 5).

[7] Leib, H. 2009, *Lee C. Bollinger*, The First Amendment Encyclopedia, Middle Tennessee State University.

[8] Romano, C. 2010, *When the First-Amendment Scholar Runs the University*, THE CHRONICLE of Higher Education, February 21.

and other viable means.[9,10] The First Amendment Institute has successfully litigated against U.S. President Donald Trump with respect to blocking some people from the President's official Twitter account. *Knight First Amendment Inst. at Columbia Univ. v. Trump*, No. 18-1691-cv (2d Cir. Jul. 9, 2019). Columbia through its First Amendment Institute, thus, effectively altered a state action through litigation; and this is not one time litigation but one of First Amendment Institute's professed missions. Thus, we see Columbia to be satisfying the condition laid out in the seminal decision of this court. "Held: 1. Where private individuals or groups exercise powers or carry on functions governmental in nature, they become agencies or instrumentalities of the State and subject to the Fourteenth Amendment." *Evans v. Newton*, 382 U.S. 296, (1966). The above discussion also meets the first condition (which is rarely satisfied) of the "entwinement test" from the case *Grogan v. Blooming Grove Volunteer Ambulance Corps*, 768 F.3d 259 (2d Cir. 2014) (henceforth, *Grogan*) mentioned in the Summary Order (App. 4a). *Grogan* specifies two tests to determine state action — "the public function test" and "the

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[9] *Knight Foundation, Columbia University Launch First Amendment Institute, $60 Million Project to Promote Free Expression in the Digital Age*, Columbia News, February 01, 2017.

[10] Banchiri, B. 2016, *Champions of free speech launch $60-million First Amendment Institute*, The CHRISTIAN SCIENCE MONITOR, May 17.

entwinement test". The public function test draws from *Evans v. Newton* and Columbia, by formally adopting free speech on campus, through its leadership and practice, and through the First Amendment Institute, does implement a function which is a prerogative of the state, thus satisfying this test. According to *Grogan*, the entwinement test has two conditions and satisfying either would do the job. "Under that theory, state action may exist when a private entity "is entwined with governmental policies, or when government is entwined in its management or control." *Brentwood Academy*, 531 U.S. at 296, 121 S.Ct. 924" *Grogan v. Blooming Grove Volunteer Ambulance Corps*, 768 F.3d 259, 268 (2d Cir. 2014). Columbia University happens to satisfy both the conditions. As has been discussed above, Columbia through active and successful litigation in shaping governmental First Amendment decisions is indeed entwined with governmental policies. It happens to satisfy the second condition of the entwinement test as well. For this purpose a narration of the argument from the *en banc* petition would suffice. Columbia being a wilful member of Association of American Colleges & Universities (AAC&U), is bound by its 1940 Statement of Principles on Academic Freedom and Tenure.[11] Now, AAC&U

[11] "The purpose of this statement is to promote public understanding and support of academic freedom ... Freedom in research is fundamental to the advancement of truth. Academic freedom in its teaching aspect is fundamental for

is governed by its Board of Directors, a majority of whom (for the five out of last seven years since 2020, including the year 2020) are from U.S. public colleges, universities, and institutions, which effectively imparts AAC&U the color of a public organization. This, effectively makes a public organization managing and controlling Columbia's First Amendment academic freedom of expression and speech on campus, thus satisfying the second clause of the "entwinement test" as well. A similar case which was decided in favor of state action applicability is the U.S. Supreme Court case, *Brentwood Academy v. Tennessee Secondary School Ath. A.*, 531 U.S. 288, 121 S. Ct. 924 (2001). "The nominally private character of the Association is overborne by the pervasive entwinement of public institutions and public officials in its composition and workings, and there is no substantial reason to claim unfairness in applying constitutional standards to it." *Id.* at 298. Here AAC&U, through the composition of its Board of Directors, acquires a public character and Columbia being a wilful member of AAC&U satisfies the second clause of the "entwinement test" as well.

Thus, we see a situation where the Second Circuit has decided a federal question in a way that deviates from relevant opinions of this Court. As such, by Rule 10 (c) [Rules of the

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the protection of the rights of the teacher in teaching and of the student to freedom in learning." *1940 Statement of Principles on Academic Freedom and Tenure.*

Supreme Court of the United States (Adopted April 18, 2019; Effective Jul 1, 2019)] this Court should grant review.

C. This Court should grant review to decide whether the Second Circuit erred by not considering points of law raised for the first time on appeal.

The U.S. Supreme Court case which is considered as the guidance on issues raised for the first time on appeal is *Singleton v. Wulff*, 428 U.S. 106 (1976). There, this Court does not prescribe a general rule and leaves it to the discretion of the appellate courts to decide on such issues depending on the facts of the individual case. However, this Court stresses two important areas where such appellate discretion on consideration can be affirmative —

> "Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt, see *Turner v. City of Memphis*, 369 U.S. 350 (1962), or where "injustice might otherwise result." *Hormel v. Helvering*, 312 U.S., at 557" *Singleton v. Wulff*, 428 U.S. 106, 121 (1976).

In *Hormel v. Helvering*, 312 U.S. 552 (1941) this Court had previously stressed in clear terms that points of law raised for the first time on appeal, especially when cause of justice would otherwise be defeated, need to be looked into by

appellate courts. "There may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below." *Id.* at 557. Drawing mainly on these two cases, various circuits have developed their criteria for considering issues not raised below. The Second Circuit's precedents conform to the above guidelines as can be seen below from the following case excerpts taken from the petition for *en banc* review:

1. 'Even assuming that the government failed to raise the argument below, the rule against considering arguments raised for the first time on appeal "is prudential, not jurisdictional," and we are free to exercise our "discretion to consider waived arguments." *Sniado v. Bank Austria AG*, 378 F.3d 210, 213 (2d Cir.2004). Exercise of that discretion is particularly appropriate where an argument presents a question of law and does not require additional fact finding. *Id.* As the issue of the Wetterling Act presents a question of law, and requires no additional fact finding.' *United States v. Brunner*, 726 F.3d 299, 304 (2d Cir. 2013). "Under these circumstances, it would not promote the interests of justice to vacate Brunner's unquestionably valid conviction because the government failed to refer to the Wetterling Act in the district court or its brief

to this Court. We therefore exercise our discretion to consider the issue here, and find Brunner bound by Kebodeaux." *Id.*

2. "Because Sniado raises this alternative theory for the first time on remand from the Supreme Court, we must determine whether to find waiver or to consider his argument on the merits." *Sniado v. Bank Austria AG*, 378 F.3d 210, 212 (2d Cir. 2004). "However, because that rule is prudential, not jurisdictional, we have discretion to consider waived arguments. *Id.* We have exercised this discretion where necessary to avoid a manifest injustice or where the argument presents a question of law and there is no need for additional fact-finding." *Id.* at 213. "Sniado's alternative theory, however, is purely legal and requires no further development of the record. Therefore, we exercise our discretion to reach the merits." *Id.*
3. "As a preliminary matter, Dorfman raises this argument for the first time on appeal." *Baker v. Dorfman*, 239 F.3d 415, 420 (2d Cir. 2000). "'That rule, however, is one of prudence and not appellate jurisdiction. We retain broad discretion to consider issues not raised initially in the District Court." *Lo Duca v. United States*, 93 F.3d 1100, 1104 (2d Cir. 1996). We are more likely to exercise our discretion "(1) where consideration of the issue is necessary to avoid manifest injustice or (2) where the issue is purely legal and there is no

need for additional fact-finding.'" *Id.* "Dorfman's argument presents a pure question of law. We therefore choose to reach the merits." *Id.* at 421.

4. "At the outset, we note that Coogan asserts three arguments apparently for the first time on appeal." *Coogan v. Smyers*, 134 F.3d 479, 486 (2d Cir. 1998). "We reach Coogan's third argument because it is a purely legal issue that is easily resolved." *Id.* at 487.
5. "In this case, Lo Duca's primary contention is that the legal framework established by the extradition statute is unconstitutional. We note at the outset that Lo Duca raises this argument for the first time on appeal." *Lo Duca v. United States*, 93 F.3d 1100, 1104 (2d Cir. 1996). "Since the argument proffered by Lo Duca involves constitutional notions of separation of powers, the Government's response that Lo Duca has waived his claims "cannot be dispositive."" *Id.* "In this case, we think that the constitutional issues advanced by Lo Duca are sufficiently important that they should be assessed on their merits." *Id.*

Similar precedents have been set by other circuits as well. For instance,

for Federal Circuit:

"We have articulated limited circumstances in which considering arguments made for the first time on appeal is appropriate: (1) "[w]hen new legislation is passed while an appeal is pending, courts have an obligation to apply the

new law if Congress intended retroactive application even though the issue was not decided or raised below"; (2) "when there is a change in the jurisprudence of the reviewing court or the Supreme Court after consideration of the case by the lower court"; (3) "appellate courts may apply the correct law even if the parties did not argue it below and the court below did not decide it, but only if an issue is properly before the court"; and (4) "where a party appeared pro se before the lower court, a court of appeals may appropriately be less stringent in requiring that the issue have been raised explicitly below." *Golden Bridge* , 527 F.3d at 1322–23 (quoting *Forshey v. Principi* , 284 F.3d 1335, 1353–57 (Fed. Cir. 2002))." *Hylete LLC v. Hybrid Athletics*, LLC, 931 F.3d 1170, 1174 (Fed. Cir. 2019);

for the Sixth Circuit:

"In *Friendly Farms v. Reliance Ins. Co.*, we clarified that: [T]he Court has discretion to entertain novel questions. The exercise of such discretion is guided by factors such as: 1) whether the issue newly raised on appeal is a question of law, or whether it requires or necessitates a determination of facts; 2) whether the proper resolution of the new issue is clear beyond doubt; 3) whether failure to take up the issue for the first time on appeal will result in a miscarriage of justice or a denial of substantial justice; and 4) the parties' right under our judicial system to have the

> issues in their suit considered by both a district judge and an appellate court." *Scottsdal v. Flowers*, 513 F.3d 546, 552 (6th Cir. 2008).

Similarly, in the current case the issues that were raised for the first time on appeal, i.e., Section 1 of the Sherman Act (App. 6a, 29a) and The District Judge Conflict of Interest (App. 6a, 31a – 34a), were also legal issues which could have been easily resolved from papers filed with the lower court and publicly available information. Not only this, one of the main factors that determine consideration of new issues is whether additional facts are required to be determined or not. One of the main reasons why appellate courts do not consider issues in which additional facts would be required is trial courts (and not appellate courts) are the place where proper vetting of facts takes place through discovery by judge and/or jury. Not only the current suit did not reach the fact-finding stage, but also it was not even allowed for the Petitioner to file an amended complaint (which had incidentally been granted by the Magistrate Judge (App. 21a – 24a, 34a[12]). The District Judge, who had a conflict of interest, not only dismissed the one-time filed *pro se* compliant with prejudice, but also closed the docket (thus over-riding the Magistrate Judge's order granting Petitioner's motion to file an amended complaint after outcome of the Motion to

[12] FRCP 15. Amended and Supplemental Pleadings

Dismiss. This, in effect, made it impossible for the Petitioner to file any post-judgement motion. So, the Petitioner had very little opportunity to raise the issues in the district court itself and hence, had to raise them on appeal.

Besides the above discussion on guidance and practices prevalent in the federal courts in the United States, some other important common-law jurisdictions also follow the norm to allow raising issues on appeal if they are questions of law or are needed to serve the ends of justice. In a landmark case the Supreme Court of India decided that issues can be raised at any stage, even at the Supreme Court stage, if they raise questions of law that would not require additional fact finding or would be needed to avoid injustice.

> "HELD (Per Raghubar Dayal and Sikri, JJ.) :
> (i) The High Court was in error in not allowing the appellant to urge the additional ground before it. [669 B-C]
>
> It was a pure question of law not dependent on the determination of any question of the fact and such questions are allowed to be raised for the first time even at later stages. Even though the High Court has discretion to allow or refuse an application for raising an additional ground, the order refusing permission could be interfered with by the Supreme Court, because, it was not in conformity with the principle that a question of pure law can be urged at any stage of a

litigation. [664 H; 666D-F-G]". *Chitturi Subbanna vs. Kudapa Subbanna & Others*, Supreme Court of India (December 18, 1964) (App. 37a).

In drawing this conclusion, the Supreme Court of India relied, among others, on another famous case in Canada:

"When a question of law is raised for the first time in a court of last resort upon the construction of a document or upon facts either admitted or proved beyond controversy, it is not only competent but expedient in the interests of justice to entertain the plea. The expediency adopting that course may be doubted when the plea cannot be disposed of without deciding nice questions of fact in considering which the court of ultimate review is placed in a much less advantageous position than the courts below." *Connecticut Fire Insurance Company v Kavanagh*, (Quebec) Privy Council (30 Jul, 1892). (App. 45a).

The Supreme Court of India further stated,

"We shall deal with the reasons given by the High Court for in rejecting the application and, in so doing, indicate why we consider those reasons not to be good reasons for disallowing the prayer made in the application. In *Rehmat-un-Nissa Begam v. Price*(2) the observations at p.66 indicate that a discretionary order can be justifiably disturbed if the Court acts capriciously or in disregard of any legal principle in the exercise

> of its discretion. This, however, cannot be taken to be exhaustive of the grounds on which the discretionary order is to be interfered with. In this particular case the order passed by the High Court was not in conformity with the principle that a question of pure law can be urged at any stage of the litigation, be it in the court of the last resort." (App. 46a – 47a).

When an issue on appeal is a mixed question of law and fact, giving consideration to such an issue is left to the discretion of the appellate court.

> "In *Ittyavira Mathai v. Varkey Varkey*(1) this Court did not allow the question of limitation to be raised in this Court as it was considered to be not a pure question of law but a mixed question of law and fact. ... The High Court had discretion to allow the application or to refuse it. The discretion exercised by the High Court is certainly not to be interfered with by this Court except for good reasons." (App. 45a – 46a).

The above case is not only important, but also relevant to the current petition. This is because the current lawsuit has citizens of India on both sides — both Petitioner and Nallareddy are/were Indian citizens (App. 5a, 19a). Moreover, the plagiarizing paper (i.e., the derived paper) was presented at the Indian School of Business, Hyderabad, India; thus bringing an aspect of the litigation within Indian sovereign jurisdiction.

Besides, in the Summary Order the Second Circuit has provided a justification of its non-consideration which is not quite relevant to the current lawsuit (App. 5a – 6a). It has justified its non-consideration by citing *Harrison v. Republic of Sudan*, 838 F.3d 86 (2d Cir. 2016). Drawing from the petition for *en banc* review it is noted here that in *Sudan*, 'it was a "factual challenge" (*Id.* at 96) that was presented by Sudan "In its reply in support of its petition for rehearing" (*Id.*).' Thus, contrary to the current suit, "it was neither a legal issue, nor an issue of exceptional importance; and moreover, it" involved a situation that the current suit did not arrive at that point in time.

Thus, by not considering points of law raised for the first time on appeal, the Second Circuit has deviated from relevant norms, precedents, and guidance, be it of this Court, its own precedents, precedents of other circuits, or other relevant common law jurisdictions in the world. Hence, by Rules 10 (a) and (c) [Rules of the Supreme Court of the United States (Adopted April 18, 2019; Effective Jul 1, 2019)] this Court should grant review.

D. This Court should grant review because the questions presented are of immense national and international importance.

This lawsuit delves into substantial aspects of federal law hitherto not quite explored though highly plausible and very aptly applicable to

situations that occur in life. For instance, plagiarism is a recurring problem in creative works. This becomes more problematic when that happens in higher education and research settings. Most institutions have internal mechanisms to deal with such issues, but what happens when the institution itself is part of the problem and that too a very powerful and highly influential private institution like Columbia with alumni and other network members present in important institutions of the state, judiciary, press, and the private. The problem gets compounded multiple times when the affected individual is an international student on a student visa from a different cultural background with highly constrained resources (especially vis-à-vis a private Ivy institution like Columbia with tens of billions of US dollars in endowment). The situation is like a fly against a hurricane. This is probably the only case in human history where an international student has taken a mighty institution like Columbia to the alters of justice in the United States, contesting *pro se* (since highly constrained in resources) from foreign shores using modern telecommunication technology. This lawsuit brings to light a situation international students have/had faced but could do nothing other than quietly accepting the career shattering event as fate and moving back to restart life; with the perpetrators on the lookout for their next sacrificial lamb.

The lawsuit also involves a situation where a private institution becomes a judicial authority of the last resort unto itself. The private institution can deal with issues which had so far been in the penumbral areas of federal law which the private institution can adjudicate with no higher authority to adjudicate it. Thus, the private institution can adjudicate plagiarism but no federal court has jurisdiction over it when it itself becomes a player in plagiarism; since plagiarism mostly has aspects which are not covered by the federal copyright law. The private institution can formally announce and practice and promote First Amendment on campus and outside of that, but when it itself violates First Amendment, it cannot be held accountable because of its private status. Thus, we are seeing a quasi-judicial authority private in nature.

Finally, the lawsuit involves precedents from common law not only prevalent in the United States, but also other common law sovereign jurisdictions such as India and Canada which draw precedents from the Anglo-American tradition.

Thus, this lawsuit can surely be regarded as truly exceptional and hence warrants a review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted

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