

No. _____

**In The
SUPREME COURT OF THE UNITED STATES**

OLAOLUWA FAPARUSI,
Petitioner,

v.

**CASE WESTERN RESERVE UNIVERSITY,
GEORGE O'CONNELL, Administrative Hearing
Officer; and KIMBERLY SCOTT, Title IX
Investigator,**
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether CASE WESTERN RESERVE UNIVERSITY's use of the preponderance of evidence standard in the sexual misconduct hearing that found the Petitioner liable comprised state action, to establish a right to recover under 42 U.S.C. § 1983, as articulated by this Court's decision in *Blum v. Yaretsky*, 457 U.S. 991 (1982), in that the mandate by the Department of Education's Office of Civil Rights (OCR) 2011 Title IX guidance ("the Dear Colleague Letter"), that schools must use the lowest burden of proof in sexual harassment and sexual assault adjudications, as a condition of receiving federal funding, and the subsequent threat by the OCR that schools that were not in compliance would lose all their federal funding, was the State's exercise of coercive power such that the choice of law must be deemed that of the State?
2. Whether CASE WESTERN RESERVE UNIVERSITY's use of the preponderance of evidence standard in its sexual misconduct hearing that found the Petitioner liable comprised state action, to establish a right to recover under 42 U.S.C. § 1983, as articulated by this Court's decisions in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), and *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288 (2001), in that the OCR's 2011 Title IX guidance mandated that schools must use the lowest burden of proof in sexual harassment and sexual

assault adjudications as a condition of receiving federal funding, and that Case Western Reserve University, as a nominal private university that could reject government funding but willingly accepted the financial inducement given by the State to enforce the contents of the 2011 OCR guidance letter, was a willful participant in joint activity with the State?

3. Does the Sixth Circuit's decision, that the Constitution's Due Process does not bind private colleges, violate the Equal Protection Clause of the Fourteenth Amendment, specifically with regards to Title IX sexual harassment and sexual assault adjudications, in light of the OCR's 2011 Title IX guidance that mandated that schools, both public and private, must use the lowest burden of proof as a condition of receiving federal funding, to the extent the decision excludes students of private colleges, such as the Petitioner, from Due Process protection on the same terms and conditions as students of public universities, similar to the rationale of this Court's holding in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015)?

List of Parties

- 1. OLAOLUWA FAPARUSI, Plaintiff and Petitioner;**
- 2. CASE WESTERN RESERVE UNIVERSITY, Defendant and Respondent;**
- 3. GEORGE O'CONNELL, Administrative Hearing Officer, Defendant and Respondent; and**
- 4. KIMBERLY SCOTT, Title IX Investigator, Defendant and Respondent.**

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Petitioner Olaoluwa Faparusi respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The order of the Sixth Circuit denying rehearing, filed October 18, 2017, is reprinted in the Appendix hereto, pp. A-35.

The opinion of the Sixth Circuit wherein the Court affirmed the order of the United States District Court for the North District of Ohio, Eastern Division, filed on October 4, 2017, is unpublished and is reprinted in the Appendix hereto, pp. A-1 – A-17.

The memorandum order of the United States District Court for the North District of Ohio, Eastern Division, filed on February 28, 2017, granting Respondents' Motion to Dismiss, is reprinted in the Appendix hereto, pp. A-18 – A-34.

JURISDICTION

On June 23, 2016, Petitioner brought suit, *pro se*, against Respondents in the United States District Court for the North District of Ohio, Eastern Division, alleging four counts of violations of the Due Process Clause of the Fourteenth Amendment and a breach of contract claim under state law. The Respondents filed a Motion to Dismiss the complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

On November 30, 2016, the Honorable William H. Baughman Jr., Magistrate Judge for the United States District Court for the North District of Ohio, filed his report and recommendations wherein he recommended the complaint of the Petitioner be dismissed. On February 28, 2017, the District Court adopted the report and recommendations and dismissed Petitioner's complaint. *See App.*, p. A-34. On March 1, 2017, the Petitioner appealed the dismissal of his complaint to the United States Court of Appeals for the Sixth Circuit.

On October 4, 2017, the Sixth Circuit issued an opinion affirming the District Court's Order. *See App.*, p. A-17. Petitioner filed a petition for rehearing to the Sixth Circuit. On October 18, 2017, the Sixth Circuit issued an order denying Petitioner's petition for rehearing. *See App.*, p. A-35.

The jurisdiction of this Court to review the Judgment of the Sixth Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND POLICIES AT ISSUE

The Due Process Clause Of The Fourteenth Amendment To The United States Constitution

... nor shall any State deprive any person of
life, liberty, or property, without due process
of law ...

**The Equal Protection Clause Of The
Fourteenth Amendment To The
United States Constitution**

No State shall...deny to any person within its
jurisdiction the equal protection of the laws.

**United States Department Of Education Office
Of Civil Rights Title IX Guidance Letter Dated
April 4, 2011 (Relevant Section on page 11)**

OCR uses a preponderance of the evidence standard when it resolves complaints against recipients...OCR also uses a preponderance of evidence standard in its fund termination administrative hearings. *Thus, in order for a school's grievance procedures to be consistent with Title IX standards, the school must use a preponderance of the evidence standard (i.e., it is more likely than not that sexual harassment or violence occurred).* The "clear and convincing" standard (*i.e., it is highly probable or reasonably certain that the sexual harassment or violence occurred*), currently used by some schools, is a higher standard of proof. Grievance procedures that use this higher standard are inconsistent with the standard of proof established for violations of the civil right laws, and are equitable under Title IX. Therefore, preponderance of the evidence is the appropriate standard for investigating allegations of sexual harassment or violence. [Emphasis added].

STATEMENT OF THE CASE

A. Facts Giving Rise To The Case

On April 4, 2011, the Assistant Secretary for Civil Rights, Russlynn Ali, who oversaw the Department of Education's Office of Civil Rights (OCR), issued a Title IX guidance ("the Dear Colleague Letter"). The Title IX guidance mandated that schools must use the lowest burden of proof in sexual harassment and sexual assault adjudications, as a condition of receiving federal funding, and the subsequent threat by the OCR that schools that were not in compliance would lose all their federal funding.

Petitioner, then an 18-year old, African American male with a *prominent "afro" hairstyle*, was a sophomore in the Department of Biomedical Engineering of Case Western Reserve University during the Spring Semester of the 2015 – 2016 academic year. On the morning of March 1, 2016, Petitioner was studying for his Physics final and went to Raymond House on the campus of Case Western Reserve University because his lab mate lived there on the third floor. Petitioner's intention was to study with his lab mate at some point in time. Petitioner initially studied on the fourth floor because he knew several students on that floor and later went down to the third floor hoping to run into his lab mate with the goal of studying together.

Petitioner was very pressed and wanted to quickly use the restroom so he went to the restroom

on the third floor. Of note, the restroom on the third floor is a women's restroom, however, co-ed use of the restrooms was a common practice amongst the students and the Petitioner's use of that restroom was never an issue raised during the sexual misconduct administrative hearing.

Later that day, a female student reported seeing a black male with *short hair* extending his phone under one of the bathroom stalls. In the evening of same day, three campus police officers came to Petitioner's dorm room following up on a report of an incident checked his phone individually and did not find any photos. On the same day, Petitioner was notified in writing, by Darnell T. Parker, the University Title IX Coordinator, that the Office of Title IX would be conducting an investigation on the report it received earlier in the day. Two days later, Petitioner was expelled from campus housing, with immediate effect, while the investigation was ongoing.

Petitioner was accused of recording in the female bathroom despite all physical description being inconsistent with his features (*e.g.* allegation said black male with short hair whereas appellant had an afro hairstyle). The 3rd Respondent, Kimberly Scott, interviewed the accusers using leading questions aimed at ensuring that Petitioner would be found liable.¹ Furthermore, she materially

¹ In Q.3, Kimberly Scott asked a second "accuser", "*Can you describe the individual you saw in the bathroom?*" after she had stated she never saw the male or the cell phone, in response to Q.2.

altered inconsistent "witness" accounts from her initial investigation such that all witness accounts were now consistent in her summary report.²

On March 18, 2016, the 2nd Respondent, George O'Connell, held a Sexual Misconduct Hearing. However, prior to that hearing, George O'Connell had conducted an ex parte hearing with the complainants and he relied almost solely on this ex parte hearing to make his decision. At the hearing with the Petitioner, the 2nd Respondent was asked how he would decide and *George O'Connell affirmatively answered that he would adjudicate using the preponderance of evidence standard.* Petitioner was found liable for the charges of sexual misconduct and disorderly conduct and separated till June 2017. Of note is that Petitioner was found liable for the disorderly conduct despite the fact that he was never accused of it to start with.

On March 23, 2016, Petitioner appealed to Louis Stark, Vice President for Student Affairs based on two asserted grounds: (i) new information not available to the panel which, if available at the time of the hearing, would have significantly affected the decision; and (ii) evidence that established procedures were not followed in a manner that would have significantly affected the decision. Under (i) above, Petitioner raised the issue of mistaken identity, specifically that both complainants described someone with short hair. Petitioner also

² The "witness" interviewed stated she did not see the cell phone because *she was not in the bathroom when the incident occurred.*

raised the issue of wrong description of his clothing by the complainants and the “witness” that day, since the University had access to and reviewed surveillance video from that day. On April 6, 2016, Plaintiff was informed that the Appeal Panel upheld the outcome of the hearing.

B. The District Court Proceedings

On June 23, 2016, Petitioner filed a complaint, *pro se*, in the United States District Court for the Northern District of Ohio, Eastern Division against Case Western Reserve University, George O’Connell and Kimberly Scott. In his complaint, the Petitioner alleged four violations of the Due Process Clause of the Fourteenth Amendment and a breach of contract claim arising under Ohio law. The Respondents filed a Motion to Dismiss the complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

On November 30, 2016, the Magistrate Judge issued his report and recommended that Respondents’ motion to dismiss Petitioner’s complaints be granted. However, the Magistrate Judge noted:

Here the complaint plausibly alleges in sufficient factual detail that Faparusi was innocent of the charges against him and CWRU wrongly found grounds for Faparusi’s suspension. Specifically, as noted above, the complaint alleges, with supporting factual detail, a plausible basis to conclude that Faparusi was the victim of mistaken identity

and or that there is sufficient incongruity in witness descriptions of the alleged perpetrator and in the details of the offense itself “to cast articulable doubt on the accuracy of the outcome of the disciplinary proceeding... Faparusi’s complaint contains sufficient factual allegations to create a plausible inference that CWRU’s disciplinary procedure was flawed and that administrators within that procedure were indifferent to flaws – such as reliance on ex parte communications- that may have worked to the detriment of Faparusi’s defense. [Emphasis added]

Following a timely objection by the plaintiff, on February 28, 2017, District Court gave its Order adopting the Magistrate Judge’s report and recommendation granting Respondents’ motion to dismiss Petitioner’s complaint and further ordered that all counts in Petitioner’s complaint be dismissed with prejudice. *See App.*, p. A-34.

C. The Appellate Court Proceedings

On March 1, 2017, the Petitioner appealed the dismissal of his complaint to the United States Court of Appeals for the Sixth Circuit. On October 4, 2017, the Sixth Circuit issued an opinion affirming the District Court’s Order. *See App.*, p. A-17. Petitioner filed a petition for rehearing to the Sixth Circuit for two reasons. Firstly, the panel held that the Respondents were not state actors for the purpose of being subject to the Due Process challenges of the

Fourteenth Amendment, but Petitioner argued that the Respondents were state actors when analyzed under both the state compulsion and nexus tests. Secondly, the panel opined the contact between the second Respondents and the accusers was more investigation than hearing and hence not a breach, whereas the Petitioner argued that the contact was in fact a hearing. On October 18, 2017, the Sixth Circuit issued an order denying Petitioner's petition for rehearing. *See App.*, p. A-35.

REASONS WHY CERTIORARI SHOULD BE GRANTED

I.

**Review Is Warranted Because The Decision By
The Majority Panel Of The Sixth Circuit
Conflicts With This Court's In *Blum v.*
Yaretsky, *Lugar v. Edmondson Oil Co.*, And
Brentwood Acad. v. Tenn. Secondary Sch.
*Athletic Ass'n.***

A three-judge panel of the Sixth Circuit Court of Appeals concluded that Case Western Reserve University was not a state actor for the purpose of establishing a Due Process right to recover under 42 U.S.C. § 1983. While, it is the current law that the Constitution's Due Process generally does not bind private entities because they are not ordinarily state actors, this Court has also announced exceptions to the rule whereby acts by a nominally private actor may comprise state action. In addition, the State must be directly involved in the disciplinary

proceedings challenged, such as in this case, where the Department of Education's Office of Civil Right, through its Assistant Secretary for civil rights, mandated the use of the lowest burden of proof for Title IX adjudications in its April 4, 2011 guidance ("the Dear Colleague Letter").

In *Blum v. Yaretsky*, 457 U.S. 991 (1982), this Court announced that state action may be found if the activity carried out by the nominally private entity is subject to governmental coercion. *Id.* at 1004. This is similar in principle to the state compulsion test, as articulated by the Sixth Circuit requiring that a state "exercise such coercive power or provide such significant encouragement, either overt or covert, that in law the choice of the private actor is deemed to be that of the state." *Wolotsky v. Huhn*, 960 F.2d 1335 (6th Cir. 1992).

The Office of Civil Rights hereinafter "OCR" is the enforcement agency of the Department of Education. The 2011 OCR guidance letter included mandates that schools *must* use the lowest burden of proof in sexual harassment and sexual assault adjudications,³ as a condition of receiving federal funding, and the subsequent threat by the OCR that schools that were not in compliance would lose all their federal funding.⁴ At the hearing of the

³ "...Thus, in order for a school's grievance procedures to be consistent with Title IX standards, the school **MUST** use a preponderance of the evidence standard (*i.e.*, it is more likely than not that sexual harassment or violence occurred)". OCR Guidance letter, April 4, 2011, at p.11.

⁴ "...When a recipient does not come in compliance voluntarily,

Petitioner, the second Respondent, George O'Connell, stated that he would be using the required preponderance of evidence standard to make a decision. The 2011 OCR guidance letter, dictating and lowering the burden of proof to the lowest level, preponderance, was an exercise of coercive power such that the actions of Case Western Reserve University (hereinafter "CWRU") in the Petitioner's Title IX proceeding could be deemed as those of the Department of Education.

In *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), and *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288 (2001), this Court announced that state action may be found if the nominally private entity is "willingly engaged in joint action with the government". *Brentwood Acad.* at 295-96. Title IX was passed to Congress's power under Constitution's Spending Clause. Since Congress does not have the plenary power to directly regulate educational institutions, it exercises its powers indirectly. Title IX is therefore a "joint venture" where an educational institution like CWRU voluntarily agrees to comply with the statute's mandate, and 2011 OCR guidance, in order to be eligible to receive federal funding.

CWRU, as a nominal private university attempting to use the "private entity" status to shield itself from Due Process litigation in this case,

OCR may initiate proceedings (using the preponderance of evidence standard to adjudicate) to withdraw Federal funding by the Department or refer the case to U.S. Department of Justice for litigation." *Id.* at p.16.

could also reject government funding, but willingly accepts federal funding as inducement to stand in lieu of and act in the place of the Department of Education's OCR. Our argument is not based on government funding in general, but rather centered on the financial inducement given to CWRU to enforce the contents of the 2011 OCR guidance letter, in particular the use of the preponderance of evidence standard in Title IX adjudication. As such, the financial inducement given to CWRU to enforce the contents of the 2011 OCR guidance letter creates "sufficiently close nexus between the state and the challenged action of the regulated entity." It is akin to pay for play.

Thus, we ask this Court to find that Plaintiff has stated claims that his Due Process rights, guaranteed under the Fourteenth Amendment, were violated.

II.

**Review Is Warranted Because Of The
Exceptional And National Importance In
Determining Whether The Continued
Exclusion Of Due Process Protections From
Students Attending Private Schools, In Title IX
Adjudications, Violates The Equal Protection
Clause Of The Fourteenth Amendment.**

The Sixth Circuit's decision, that the Constitution's Due Process does not bind Respondents, violates the Equal Protection Clause of the Fourteenth Amendment because it conflicts with

the principle the Court articulated in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). Specifically, the OCR's 2011 Title IX guidance mandated that schools, both public and private, must use the lowest burden of proof, the preponderance of evidence, for Title IX sexual harassment and sexual assault adjudications, as a condition of receiving federal funding. The decision of the Sixth Circuit excludes students of private colleges, such as the Petitioner, from Due Process protection on the same terms and conditions as students of public universities, thereby creating two unequal classes.

Just as this Court stated in *Obergefell*, the limitation of Due Process protection to students of private universities "may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right" of any student to education opportunities is now obvious. *Id.* The reality today is that the distinction between public and private universities is blurred, since a major factor in distinguishing in the past has been the source of funding. Thus, nominally private universities enjoy benefits such as federal funding like public universities while claiming immunity from Due Process at the same time.

This inconsistency discussed in *Obergefell*, is manifest in a decision by the Sixth Circuit barely a month before it affirmed the Order to dismiss the Petitioner's claim. In *John Doe v. UC, et al.*, involving a student of a public university, the Sixth Circuit agreed "the ability to cross-examine is most critical when the issue is the credibility of the

accuser” but in stark contrast the Sixth Circuit concluded that there was no relief in law for an ex parte hearing held by the Hearing Officer prior to meeting with the Petitioner for his Title IX hearing, with the huge potential for bias in the Petitioner’s case.

In *John Doe v. UC, et al.*, the Sixth Circuit agreed to block the University of Cincinnati’s suspension of a student, saying the institution violated his rights by not allowing him to question the female student who accused him of sexually assaulting her. Quoting *Cummins*, 662 F. App’x at 445, the Sixth Circuit said, “the DP clause guarantees fundamental fairness to “state” university students facing long-term exclusion from the educational process...Suspension “clearly implicates” a protected property interest, and allegations of sexual assault may “impugn [a student’s] reputation and integrity, thus implicating a protected liberty interest.” The Sixth Circuit also said,

Still, a case that “resolve[s] itself into a problem of credibility” cannot itself be resolved without a mutual test of credibility, at least not where the stakes are this high. While protection of victims of sexual assault from unnecessary harassment is a laudable goal, the elimination of such a basic protection for the rights of the accused raises profound concerns. One-sided determinations are not known for their accuracy.

Quoting *Obergefell*, “indeed recognizing that new insights and societal understandings can reveal unjustified inequality within fundamental institutions that once passed unnoticed, this Court has invoked equal protection to invalidate laws imposing inequality...” *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). Furthermore, courts have been willing to apply equal protection to private universities, in cases involving racial discriminatory admission policies.

As such, the Sixth Circuit’s decision, that the Constitution’s Due Process does not bind Respondents, violates the Equal Protection Clause of the Fourteenth Amendment.

CONCLUSION

Based on the forgoing, Petitioner respectfully submits that this Petition for Writ of Certiorari should be granted. The Court may wish to consider summary reversal of the decision of the Sixth Circuit Court of Appeals.

Dated: January 12, 2018

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