

No. 17-1081

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 Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit*

RESPONDENTS' BRIEF IN OPPOSITION

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**PARTIES TO PROCEEDING
AND RULE 29.6 STATEMENT**

The caption of the case contains the names of all the parties.

Respondent Case Western Reserve University (“CWRU”) is not a publicly-held corporation; it has no parent company; and no publicly held company owns 10% or more of its stock.

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RULES INVOLVED

Rule 12(b) of the Federal Rules of Civil Procedure provides:

(b) How To Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

- (1) lack of subject-matter jurisdiction;
- (2) lack of personal jurisdiction;
- (3) improper venue;
- (4) insufficient process;
- (5) insufficient service of process;
- (6) failure to state a claim upon which relief can be granted; and
- (7) failure to join a party under Rule 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

Respondents respectfully oppose Petitioner Olaoluwa Faparusi's Petition for Writ of Certiorari to review the judgment in this case of the United States Court of Appeals for the Sixth Circuit (the "Petition").

INTRODUCTION

The Petition should be denied because it fails to present any compelling reason for this Court's review. Mr. Faparusi seeks to have this Court review the decision of the Sixth Circuit affirming the District Court's dismissal of his pro se Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to allege sufficient facts to state plausible claims for relief. Dissatisfaction with the Sixth Circuit's application of the Iqbal-Twombly pleading standards is not grounds for granting certiorari. While Mr. Faparusi offered three Questions for review before this Court, **none** of those Questions were argued before or addressed by the courts below. Moreover, Mr. Faparusi has not identified any actual conflict between the Sixth Circuit's decision in this case and the decisions of any state court of last resort, any other Circuit Court, or this Court. Finally, in so far as Mr. Faparusi argues that his case presents some compelling question of national importance, his arguments pertain to a private university's application of the Department of Education, Office of Civil Rights ("OCR") April 4, 2011 Dear Colleague Letter (the "2011 OCR Guidance") that has since been withdrawn, making such arguments moot.

Therefore, pursuant to Supreme Court Rule 10, Mr. Faparusi's Petition should be denied.

STATEMENT OF THE CASE

CWRU is a private university based in Cleveland, Ohio. Mr. Faparusi is a former CWRU student. (Pet. at 4). CWRU maintained a Sexual Misconduct Policy (the “Policy”). (Pet. App. B at A-32). On or about March 1, 2016, a female student filed a complaint under the Policy after confronting Mr. Faparusi in the women’s bathroom and accusing him of taking pictures of female students under the wall of a bathroom stall. (Pet. App. A at A-2). Pursuant to the Policy, CWRU, by and through Respondent Kimberly Scott, investigated the alleged conduct. (Id. at A-3). Following the investigation, CWRU conducted a hearing, over which Respondent George O’Connell presided as the hearing officer. (Id.). At the hearing, CWRU applied the preponderance of the evidence standard, which the 2011 OCR Guidance identified as the appropriate standard for investigating allegations of sexual misconduct or violence. (Pet. at 3). CWRU (through Mr. O’Connell) concluded that Mr. Faparusi violated the Policy, finding him liable for both sexual exploitation and disorderly conduct. (Pet. App. A at A-3). Mr. Faparusi filed an appeal of the decision, and, on April 6, 2016, CWRU’s Appeal Panel upheld the decision. (Id. at A-3-A-4). As a result, CWRU suspended Mr. Faparusi from school. (Id. at A-4). Thereafter, Mr. Faparusi, proceeding pro se, initiated this lawsuit alleging due process violations and breach of contract related to the investigation and hearing. (Id. at A-4).

Respondents filed a Rule 12(b)(6) Motion to Dismiss the Complaint, which the District Court referred to the Magistrate Judge for Report and Recommendation. (Pet. Supp. App.). The Magistrate Judge issued a

Report and Recommendation recommending the Complaint be dismissed in its entirety, with prejudice. (Id.). As to the due process claims at issue here, the Magistrate Judge concluded the claims arose under Title IX and that Mr. Faparusi failed to allege sufficient facts to state a plausible claim for relief under any of the four Title IX standards for relief. (Id. at SA-4-SA-19).

Mr. Faparusi objected to the Report and Recommendation on several grounds, including that his due process claims did not arise under Title IX, but rather arose under the Fourteenth Amendment. (Pet. App. B at A-23). The District Court adopted the Magistrate Judge's recommendation that, properly viewed as Title IX claims, the due process claims failed to state a claim for relief under the four Title IX standards of relief. (Id. at A-28.) The District Court went on to explain that, even if the due process claims were construed as Fourteenth Amendment claims, they would fail because: (1) Mr. Faparusi had not brought the claims pursuant to 42 U.S.C. § 1983; and (2) pursuant to Ashcroft v. Iqbal, 556 U.S. 662 (2009) and Bell Atlantic v. Twombly, 550 U.S. 544 (2007), Mr. Faparusi's Complaint failed to allege any plausible facts to support the bare assertion that CWRU is a state actor or acted under color of state law. (Id. at A-28, A-29-A-31).

Mr. Faparusi appealed, and the Sixth Circuit affirmed the District Court's dismissal. (Pet. App. A). The Sixth Circuit, reviewing the claims de novo, also concluded that Mr. Faparusi's claims failed because he did not allege any facts to establish CWRU was a state actor. (Id. at A-12). The Sixth Circuit further noted

that, to date, no case has been found in which a court determined that a private school's compliance with Title IX regulations makes the school a state actor for the purpose of a Fourteenth Amendment due process claim and, therefore, "even with dramatically more artful pleading," Mr. Faparusi's due process claims would still fail. (Id. at A-14).

Mr. Faparusi thereafter filed a petition for rehearing, which was denied. (Pet. App. C at A-35).

I. CORRECTION OF POTENTIAL MISSTATEMENTS IN THE PETITION FOR WRIT OF CERTIORARI

A. Supreme Court Rule 15.2 Obligates Respondents To Correct Any Perceived Misstatement In The Petition For Writ Of Certiorari.

Although a respondent is not required to file a brief in opposition to a petition for writ of certiorari, Rule 15.2 requires a respondent to report any perceived misstatement in a petition of writ of certiorari:

Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition. Any objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the Court's attention in the brief in opposition.

SUP. CT. R. 15.2. Accordingly, Respondents address only the clear misstatements in Mr. Faparusi's Petition for Writ of Certiorari, and reserve their substantive arguments for later briefing, if ordered.

B. Mr. Faparusi's Petition For Writ Of Certiorari Contains Several Misstatements.

1. *Mr. Faparusi's Petition Misstates the Basis of the Sixth Circuit's Decision Affirming the Dismissal of His Due Process Claims.*

In his Petition, Mr. Faparusi asserted the Sixth Circuit "held that the Respondents were not state actors for the purpose of being subject to the Due Process challenges of the Fourteenth Amendment," and that "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." (Pet. at 8-9). These statements are misleading and inaccurate, in so far as Mr. Faparusi suggested that the Sixth Circuit made a broad pronouncement that CWRU can never be deemed a state actor for purposes of recovery pursuant to 42 U.S.C. § 1983. Rather, the Sixth Circuit merely concluded that "Faparusi does not bother to allege *any* facts that would establish CWRU as a state actor **in this case**" and further noted that "nowhere in Faparusi's brief does he explain why this court should find CWRU acted under color of state law." (Pet. App. A at A-11-A-12) (emphasis added).

2. None of the Questions Raised in Mr. Faparusi's Petition Were Addressed by the Lower Courts.

In his Petition, Mr. Faparusi presented three Questions for review by this Court, but **none** of the Questions related to issues that were actually argued and addressed before the courts below.

The first two Questions asked whether CWRU can be deemed a state actor due to its utilization of the preponderance of the evidence standard the 2011 OCR Guidance identified as appropriate for sexual misconduct proceedings because, Mr. Faparusi argued, complying with the 2011 OCR Guidance can be viewed either as the state's exercise of coercive power over CWRU or CWRU's willful participation in joint activity with the state. (Pet. at i-ii).

Mr. Faparusi articulated these arguments **for the first time** in his Petition. In objecting to the Magistrate Judge's Report and Recommendation, Mr. Faparusi did not argue that CWRU engaged in state action; rather, he objected to the Magistrate Judge's characterization of his due process claims as Title IX claims. (Pet. App. B at A-25-A-28). Mr. Faparusi also failed to argue that CWRU engaged in state action before the District Court. While the District Court accepted the Magistrate Judge's Report and Recommendation, in light of Mr. Faparusi's objection to the characterization of his due process claims as Title IX claims, the District Court further explained that even if viewed as Fourteenth Amendment due process claims, Mr. Faparusi's claims still failed because: (1) "Faparusi never brought the claims under 42 U.S.C. § 1983 as required to assert such violations on his own

behalf,” and (2) Mr. Faparusi “asserted no facts supporting his allegation that Case Western acted under color of state law other than simply reciting the legal conclusion that Case Western acted under color of law.” (*Id.* at A-28, A-31). Therefore, the District Court did not consider whether CWRU engaged in state action under any applicable test, because it concluded Mr. Faparusi had not alleged any facts or raised any arguments as to why CWRU could be construed as a state actor.

As set forth above in Section I.B.1, the Sixth Circuit, reviewing the District Court’s conclusions de novo, agreed and further explained that, “in light of the requirement to liberally construe Faparusi’s pro se complaint, we assume that his due process claims were properly brought under § 1983,” but the court nevertheless concluded that the due process claims failed at the pleading stage because “Faparusi does not bother to allege *any* facts that would establish CWRU as a state actor in this case.” (Pet. App. A at A-11-A-12).

The Sixth Circuit listed the three tests that may be used to determine whether private action can be fairly attributed to the state, and concluded that, “[b]eyond th[e] conclusory statement,¹ we can find no other facts alleged in the complaint that might be read to suggest state action under the public function, state

¹ The “conclusory statement” referenced by the Sixth Circuit is a reference to Mr. Faparusi’s conclusory assertion in his Complaint that “[a]t all time[s] relevant, Defendants acted under color of state law to enforce the requirements of Title IX.” (*See* Pet. App. A at A-12).

compulsion, or nexus tests,” and further noted that **“nowhere in Faparusi’s brief does he explain why this court should find CWRU acted under color of state law.”** (Id. at A-12 (emphasis added)).

Therefore, because Mr. Faparusi never alleged any facts or articulated any arguments below as to why he believes that CWRU acted under color of state law, there are no record facts or any decisions by either of the lower courts for this Court to review addressing the issues raised in his first two Questions. As a result, Mr. Faparusi’s Questions Nos. 1 and 2 should be dismissed as improperly included in the Petition.

In the third Question presented in the Petition, Mr. Faparusi argued that the failure to provide the same due process protection to public and private university students amounts to a violation of the Equal Protection Clause of the Fourteenth Amendment by creating two unequal classes of students. (Pet. at i). Yet, Mr. Faparusi’s Complaint does not contain an Equal Protection claim, nor did Mr. Faparusi ever raise any allegations or arguments related to the Equal Protection Clause before the District Court or the Sixth Circuit. (See Pet. App. A; Pet. App. B; Pet. Supp. App). Thus, there are no record facts or any decision by either of the lower courts for this Court to review related to Mr. Faparusi’s Equal Protection argument, and Mr. Faparusi’s Question No. 3 should also be dismissed as improperly included in the Petition.

3. Mr. Faparusi's Quotation from the Magistrate Judge's Report and Recommendation is Incomplete and Misleading.

Mr. Faparusi provided an incomplete and misleading quotation from the Magistrate Judge's Report and Recommendation. Despite the fact that Mr. Faparusi objected to the Magistrate Judge's characterization of his due process claims as Title IX claims before the District Court, he quoted the following passage in his Petition:

Here, the complaint plausibly alleges in sufficient factual detail that Faparusi was innocent of the charges against him and that 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 was sufficient incongruity in the witness descriptions of the alleged perpetrator and in the details of the offense itself "to cast some articulable doubt on the accuracy of the outcome of the disciplinary proceeding."

(Pet. at 7-8; Pet. Supp. App. at SA-12 (citation omitted)). Mr. Faparusi, however, failed to include the remainder of the Magistrate Judge's analysis:

But, as stated, Faparusi's complaint must also plausibly allege that CWRU's actions were motivated by "sexual bias" or that its disciplinary hearing process constitutes a

“pattern of decision-making” whereby the procedures are “discriminatorily applied” or “motivated by a chauvinistic view of the sexes.” In this case, I recommend finding that Faparusi’s complaint does not make factual allegations to support such conclusions.

(Pet. Supp. App. at SA-12). Upon analyzing the allegations in Mr. Faparusi’s Complaint, the Magistrate Judge concluded, “to the extent that Counts One, Three and Five are understood as claiming a violation of Title IX under the erroneous outcome test, I recommend finding that these counts do not satisfy the requirements of that standard mandated at the pleading stage, and thus that these claims be dismissed for failure to state a claim upon which relief can be granted.” (Id. at SA-13).

4. Mr. Faparusi’s Petition Misquotes and Misrepresents This Court’s Decision in Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

In an effort to support his argument that the Sixth Circuit’s decision affirming the dismissal of his Complaint violates the Equal Protection Clause of the Fourteenth Amendment, Mr. Faparusi relied upon this Court’s recent decision in Obergefell. (Pet. at 12-15). In Obergefell, this Court held that, under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, same-sex couples may not be deprived of the fundamental right to marry. 135 S. Ct. 2584.

Although Obergefell did not involve institutions of higher education or questions regarding when a private institution may be deemed a state actor for purposes of Fourteenth Amendment due process claims, Mr.

Faparusi's Petition incorrectly implies that Obergefell serves as controlling authority on these issues:

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.

(Pet. at 13). When read in its entirety, however, the passage is entirely inapplicable to the present case: "The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest." 135 S. Ct. at 2602.

Mr. Faparusi similarly misquoted another passage from this Court's opinion to support his proposition that private university students should be afforded the same Fourteenth Amendment due process protections as public university students:

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."

(Pet. at 15). Here, Mr. Faparusi misleadingly lumped together portions of two separate sentences from this Court's opinion and ignored an entire passage between them in which this Court addressed historical sex-based classifications in marriage that had been struck

down. See 135 S. Ct. at 2603-04. Rather, this Court stated, “[i]ndeed, in interpreting the Equal Protection Clause, the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged. . . . Responding to a new awareness, the Court invoked equal protection principled to invalidate laws imposing sex-based inequality on marriage.” Id.

5. Mr. Faparusi Omitted Material Record Facts.

In setting forth the “Facts Giving Rise To The Case,” Mr. Faparusi omitted a material fact that served as the basis of the report filed against him and CWRU’s subsequent investigation and hearing. (Pet. at 4-5). While Mr. Faparusi stated in his Petition that he used the women’s restroom on the third floor of Raymond House, he failed to mention that, while he was in one of the stalls in the women’s restroom, two female students verbally confronted Mr. Faparusi, accused him of taking pictures under the walls of the bathroom stalls, and asked Mr. Faparusi to delete all photos taken while in the women’s restroom. (See Pet. Sup. App. at SA-3; Pet. App. A at A-2; Pet. App. B at A-19-A-20).

II. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

Supreme Court Rule 10 provides that “[a] petition for a writ of certiorari will be granted only for compelling reasons.” SUP. CT. R. 10. Rule 10 lists the following examples of the types of cases in which the Court may grant certiorari:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Id.

The Petition should be denied because it presents no “compelling reasons” for granting certiorari in this case. See Rule 10. As set forth above, none of the Questions presented in the Petition relate to issues that were actually argued and addressed by the lower courts. Moreover, this case does **not** involve (1) a conflict among United States courts of appeals; (2) a conflict between a United States court of appeals and a state court of last resort; or (3) a conflict on an important federal question among state courts of last

resort. Although Mr. Faparusi argued that the Sixth Circuit's decision conflicts with prior decisions of this Court, a closer review of the cases cited demonstrates that no actual conflict exists. Rather, this case involves nothing more than a straightforward Rule 12(b)(6) resolution of a pro se plaintiff's factually deficient claims at the pleading stage.

Rule 10 expressly states that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Id. Here, in claiming that the Sixth Circuit should have found his Complaint sufficiently alleged that CWRU was a state actor (despite the fact that Mr. Faparusi alleged no facts suggesting CWRU was a state actor and made no arguments as to why the lower courts should find CWRU acted under color of state law), Mr. Faparusi's Petition merely argues that there were "erroneous factual findings [and] the misapplication of a properly stated rule of law." (See Pet. App. A at A-12).

Therefore, in the absence of any compelling reasons for review, the Petition should be denied.

A. The Sixth Circuit's Decision Presents No Conflict With Prior Decisions Of This Court.

In an effort to articulate a basis for his Petition consistent with Rule 10, Mr. Faparusi argued, in conclusory fashion, that the Sixth Circuit's decision affirming dismissal of his Complaint pursuant to Rule 12(b)(6) conflicts with this Court's decisions in: (1) Blum v. Yaretsky, 457 U.S. 991 (1982); (2) Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982); (3) Brentwood

Academy v. Tennessee Secondary School Athletic Association, 531 U.S. 288 (2001); and (4) Obergefell v. Hodges, 135 S. Ct. 2584 (2015). (Pet. at 9-13). Mr. Faparusi's arguments lack any merit.

1. Contrary to Mr. Faparusi's Assertion, the Sixth Circuit's Conclusion That Mr. Faparusi Failed to Allege Sufficient Facts to Establish State Action on the Part of CWRU Does Not Conflict With This Court's Opinions in Blum, Lugar, and Brentwood Academy.

The Sixth Circuit properly evaluated the three tests used to determine whether private action can be fairly attributed to the state. (Pet. App. A at A-12). Applying these three tests, the Sixth Circuit determined that Mr. Faparusi alleged no facts to support a claim of state action:

No matter the test, the result is the same: Faparusi's claim fails. **That is because Faparusi does not bother to allege any facts that would establish CWRU as a state actor in this case.** The district court's review of Faparusi's complaint found that Faparusi "asserted no facts supporting his allegation that Case Western acted under color of state law other than simply reciting the legal conclusion that Case Western acted under color of law." R. 24, Op. and Order, at 11, PID 355. Our review of the complaint—and Faparusi's arguments on appeal—compels the same conclusion.

We start with the complaint. Faparusi asserts, "At all time[s] relevant, Defendants acted under

color of state law to enforce the requirements of Title IX.” R. 1, Complaint, at 3, PID 3. **Beyond this conclusory statement, we can find no other facts alleged in the complaint that might be read to suggest state action under the public function, state compulsion, or nexus tests.** Perhaps we could forgive the complaint for these shortcomings, given that it was filed without the assistance of counsel. But we cannot so easily excuse the same omissions in Faparusi’s brief on appeal. **Even after the district court highlighted this failure,** see R. 24, Op. and Order, at 11, PID 355, **nowhere in Faparusi’s brief does he explain why this court should find CWRU acted under the color of state law.**

(Id.)(emphasis added).

The Sixth Circuit went on to explain that the mere fact that CWRU complied with Title IX “by itself would ordinarily be insufficient under Iqbal-Twombly pleading standards to establish CWRU as a state actor.” (Id. at A-13). Given Mr. Faparusi’s pro se status, however, the Court noted that “even if we did Faparusi’s work for him,” “Federal regulation and receipt of federal funds alone, does not convert private conduct to government or state action.” (Id. at A-13 (quoting Doe v. Case W. Reserve Univ., No. 1:17 CV 414, 2017 WL 3840418, at *9 (N.D. Ohio Sept. 1, 2017))).

In his Petition, Mr. Faparusi incorrectly asserted that because the 2011 OCR Guidance identified the “preponderance of the evidence standard” as the applicable standard for Title IX sexual misconduct

hearings, CWRU's private and independent decisions utilizing the preponderance of the evidence standard "could be deemed as those of the Department of Education." (Pet. at 10-11). Mr. Faparusi argued that the Sixth Circuit's conclusion that he failed to establish CWRU functioned as a state actor conflicts with Blum, Lugar, and Brentwood Academy. (Pet. at 9-11). By Mr. Faparusi's line of reasoning, every individual and entity would be considered a state actor, as we are all subject to federal, state, and local laws and regulations.

Blum is the only case referenced that addresses whether government regulation, in and of itself, can turn private action into state action. In Blum, this Court held that the mere fact an entity or institution was subject to government regulation does not establish state action. See 457 U.S. at 1004 ("although it is apparent that nursing homes in New York are extensively regulated, the mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment." (quotation omitted)). In Lugar and Brentwood Academy, this Court determined a private actor's actions may be deemed state action where there is **joint or active participation with a state official**. See Lugar, 457 U.S. at 942 (a private actor's "joint participation" by "invoking the aid of state officials" constitutes state action); Brentwood Academy, 531 U.S. at 298 (finding state action where there was "pervasive entwinement" with state officials). Here, there is no "joint participation" or "pervasive entwinement" with a state official – nor did Mr. Faparusi allege any such governmental involvement.

While CWRU is covered by Title IX, and while CWRU utilized the preponderance of the evidence standard the 2011 OCR Guidance identified as the appropriate standard for colleges and universities to use in sexual misconduct proceedings, the state did not engage in any action. CWRU maintained the Policy. (Pet. App. B at A-32). CWRU received a complaint that Mr. Faparusi was taking pictures in the women's restroom. (*Id.* at A-20). CWRU undertook an investigation. (Pet. App. A at A-2-A-3). CWRU conducted a hearing. (*Id.* at A-3). And, following a hearing and appeal, CWRU suspended Mr. Faparusi from school. (*Id.* at A-3-A-4). As this Court held in Blum, private decisions made by a private actor do not constitute state action simply because they are subject to government regulations and standards. 457 U.S. at 1007-08.

Because Mr. Faparusi did not allege any involvement by a state official (nor was there any), and because government regulation over an entity alone is insufficient to find state action, the lower courts' decisions do not conflict with Blum, Lugar, and Brentwood Academy.

2. The Sixth Circuit's Decision Does Not Conflict with Obergefell.

As set forth above in Section I.B.4, in an effort to support his argument that the Sixth Circuit's decision affirming the dismissal of his Complaint violates the Equal Protection Clause of the Fourteenth Amendment, Mr. Faparusi relied upon this Court's decision in Obergefell, in which this Court held that under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, same-sex couples may not

be deprived of the fundamental right to marry. 135 S. Ct. 2584.

Nothing in the Sixth Circuit’s decision conflicts with Obergefell because: (1) Obergefell did not involve an analysis of when a private actor engages in state action; and (2) Mr. Faparusi did not raise, and the Sixth Circuit did not address, the Equal Protection Clause in analyzing whether Mr. Faparusi’s Complaint could survive Respondents’ 12(b)(6) motion to dismiss. Compare 135 S. Ct. 2584, with (Pet. App. A).

B. Mr. Faparusi’s Petition Does Not Present an Issue of National Importance.

The Petition does not present an issue of “exceptional and national importance” as, at its core, Mr. Faparusi is simply dissatisfied with the lower courts’ application of the well-established Iqbal-Twombly pleading standards. (See Pet. at 12-15). Moreover, Mr. Faparusi’s dispute with CWRU is centered upon CWRU’s compliance with the 2011 OCR Guidance, which provided that “schools must use a preponderance of the evidence standard” in Title IX sexual misconduct hearings. (Pet. at i-ii, 4, 6, 10-13). On September 22, 2017, however, the 2011 OCR Guidance was withdrawn, making Mr. Faparusi’s concerns about the purported violation of the Equal Protection rights of private university students subject to the requirements of the 2011 OCR Guidance moot. (See Resp. App. A).

III. CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court deny Mr. Faparusi's Petition for Writ of Certiorari.

Dated this 23rd day of February, 2018.

Respectfully submitted,

JOHN GERAKE
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APPENDIX

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APPENDIX A

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS



THE ASSISTANT SECRETARY

September 22, 2017

Dear Colleague:

The purpose of this letter is to inform you that the Department of Education is withdrawing the statements of policy and guidance reflected in the following documents:

- Dear Colleague Letter on Sexual Violence, issued by the Office for Civil Rights at the U.S. Department of Education, dated April 4, 2011.
- Questions and Answers on Title IX and Sexual Violence, issued by the Office for Civil Rights at the U.S. Department of Education, dated April 29, 2014.

These guidance documents interpreted Title IX to impose new mandates related to the procedures by which educational institutions investigate, adjudicate, and resolve allegations of student-on-student sexual misconduct. The 2011 Dear Colleague Letter required schools to adopt a minimal standard of proof—the preponderance-of-the-evidence standard—in administering student discipline, even though many schools had traditionally employed a higher clear-and-

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convincing-evidence standard. The Letter insisted that schools with an appeals process allow complainants to appeal not-guilty findings, even though many schools had previously followed procedures reserving appeal for accused students. The Letter discouraged cross-examination by the parties, suggesting that to recognize a right to such cross-examination might violate Title IX. The Letter forbade schools from relying on investigations of criminal conduct by law-enforcement authorities to resolve Title IX complaints, forcing schools to establish policing and judicial systems while at the same time directing schools to resolve complaints on an expedited basis. The Letter provided that any due-process protections afforded to accused students should not “unnecessarily delay” resolving the charges against them.

Legal commentators have criticized the 2011 Letter and the 2014 Questions and Answers for placing “improper pressure upon universities to adopt procedures that do not afford fundamental fairness.”¹ As a result, many schools have established procedures for resolving allegations that “lack the most basic elements of fairness and due process, are

¹ Open Letter from Members of the Penn Law School Faculty, *Sexual Assault Complaints: Protecting Complainants and the Accused Students at Universities*, WALL ST. J. ONLINE (Feb. 18, 2015), http://online.wsj.com/public/resources/documents/2015_0218_upenn.pdf (statement of 16 members of the University of Pennsylvania Law School faculty).

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overwhelmingly stacked against the accused, and are in no way required by Title IX law or regulation.”²

The 2011 and 2014 guidance documents may have been well-intentioned, but those documents have led to the deprivation of rights for many students—both accused students denied fair process and victims denied an adequate resolution of their complaints. The guidance has not succeeded in providing clarity for educational institutions or in leading institutions to guarantee educational opportunities on the equal basis that Title IX requires. Instead, schools face a confusing and counterproductive set of regulatory mandates, and the objective of regulatory compliance has displaced Title IX’s goal of educational equity.

The Department imposed these regulatory burdens without affording notice and the opportunity for public comment. Under these circumstances, the Department has decided to withdraw the above-referenced guidance documents in order to develop an approach to student sexual misconduct that responds to the concerns of stakeholders and that aligns with the purpose of Title IX to achieve fair access to educational benefits. The Department intends to implement such a policy

² *Rethink Harvard’s Sexual Harassment Policy*, BOSTON GLOBE (Oct. 15, 2014) (statement of 28 members of the Harvard Law School faculty); *see also* ABA CRIMINAL JUSTICE SECTION TASK FORCE ON COLLEGE DUE PROCESS RIGHTS AND VICTIM PROTECTIONS, RECOMMENDATIONS FOR COLLEGES AND UNIVERSITIES IN RESOLVING ALLEGATIONS OF CAMPUS SEXUAL MISCONDUCT (2017); AMERICAN COLLEGE OF TRIAL LAWYERS, TASK FORCE ON THE RESPONSE OF UNIVERSITIES AND COLLEGES TO ALLEGATIONS OF SEXUAL VIOLENCE, WHITE PAPER ON CAMPUS SEXUAL ASSAULT INVESTIGATIONS (2017).

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through a rulemaking process that responds to public comment. The Department will not rely on the withdrawn documents in its enforcement of Title IX.

The Department refers you to the *Q&A on Campus Sexual Misconduct*, issued contemporaneously with this letter, and will continue to rely on its *Revised Sexual Harassment Guidance*, which was informed by a notice-and-comment process and issued in 2001,³ as well as the reaffirmation of that *Guidance* in the Dear Colleague Letter on Sexual Harassment issued January 25, 2006.⁴ As always, the Department's enforcement efforts proceed from Title IX itself⁵ and its implementing regulations.⁶

In the forty-five years since the passage of Title IX, we have seen remarkable progress toward an educational environment free of sex discrimination. That progress resulted in large part from the vigorous enforcement of Title IX by the Office for Civil Rights at the Department of Education. The Department remains committed to enforcing these critical protections and intends to do so consistent with its mission under Title IX to protect fair and equitable access to education.

³ The *Revised Sexual Harassment Guidance* is available at <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html>.

⁴ The 2006 Dear Colleague Letter is available at <https://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html>.

⁵ 20 U.S.C. §§ 1681-88.

⁶ 34 C.F.R. § 106.1 *et seq.*; *see also* 34 C.F.R. § 668.46(k) (implementing requirements of the Violence Against Women Act).

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The Department has determined that this letter is a significant guidance document under the Final Bulletin for Agency Good Guidance Practices of the Office of Management and Budget, 72 Fed. Reg. 3432 (Jan. 25, 2007). This letter does not add requirements to applicable law.⁷

Sincerely,

/s/ Candice Jackson
Acting Assistant Secretary for Civil Rights
U.S. Department of Education

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The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.

⁷ If you have questions or are interested in commenting on this letter, please contact the Department of Education at ocr@ed.gov or 800-421-3481 (TDD: 800-877-8339).