IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN DOE, and

OKLAHOMA WESLEYAN UNIVERSITY,

Plaintiffs,

v.

CATHERINE E. LHAMON, in her official capacity as Assistant Secretary for Civil Rights, United States Department of Education, *et al.*,

Defendants.

Case No. 1:16-cv-01158 (RC)

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

On April 4, 2011, the Education Department's Office for Civil Rights ("OCR") issued a Dear Colleague Letter ("2011 DCL") that required every college in the country to adopt a newly mandated burden of proof for deciding cases of sexual misconduct. Any school that refused to adopt the newly mandated standard—preponderance of the evidence—was publicly threatened with harsh reprisal, up to and including the loss of its federal funding. *See* 20 U.S.C. § 1682. As Defendant Lhamon herself warned a group of college administrators in 2014, "Do not think it's an empty threat."[1] Since 2011, OCR has consistently enforced the new evidentiary requirement against schools that did not previously use it—including some of the richest and most powerful schools in the nation, such as Harvard University and Princeton University. Other schools, such as the University of Virginia (UVA), saw the mandate for what it was and changed their policies soon after the 2011 DCL's release. UVA subsequently applied the new, OCR-mandated burden of proof in a complaint brought against Plaintiff John Doe. The retired state Supreme Court justice who found Mr. Doe responsible said that she did so because the evidence "slightly" tipped in favor of responsibility and that she was "require[d]" by "the Office of Civil Rights and the Department of Education" to apply "the weakest standard of proof" available, which she noted is satisfied whenever the evidence is "tipped very slightly" in favor of responsibility.

Plaintiff John Doe was subjected to the new mandate in a case that, by the adjudicator's own plain language, would have come out the other way if UVA had applied the higher burden

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[1] *See, e.g.*, Rachel Axon, *Feds Press Colleges on Handling of Sex Assault Complaints*, USA TODAY (July 14, 2014), http://www.usatoday.com/story/sports/ncaaf/2014/07/14/college-sexual-assaults-dartmouth-summit/12654521/; Robin Wilson, *2014 List: Enforcer*, THE CHRON. OF HIGHER EDUCATION (Dec. 15, 2014), http://www.chronicle.com/article/Enforcer-Catherine-E-Lhamon/150837/; Tyler Kingkade, *Colleges Warned They Will Lose Federal Funding For Botching Campus Rape Cases*, THE HUFFINGTON POST (July 14, 2014), http://www.huffingtonpost.com/2014/07/14/funding-campus-rape-dartmouth-summit_n_5585654.html.

of proof that it used before the 2011 DCL—"clear and convincing evidence." Plaintiff Oklahoma Wesleyan University ("OKWU") is well aware that it could be next on OCR's list of institutions under investigation and that it has only until April 4, 2017, to challenge the preponderance mandate; after that, the six-year statute of limitations will expire.

Yet the government nonetheless argues that Mr. Doe lacks standing and that OKWU's claim is not ripe. It suggests that Mr. Doe does not have standing because he cannot conclusively prove what a third party, UVA, will do if he wins this case. But the quality of redressability is not so strained. In cases where redressability turns on the action of a third party not legally bound by the court, the case law uniformly requires that a plaintiff need only show that winning the case would "generate a significant increase in the likelihood" that the third party would change its behavior. *Americans for Safe Access v. Drug Enf't Admin.*, 706 F.3d 438, 448 (D.C. Cir. 2013); *see also Town of Barnstable, Mass. v. F.A.A.*, 659 F.3d 28, 32, 34 (D.C. Cir. 2011) (noting that "courts have often found standing where there was no binding legal mechanism by which the challenged action might be redressed"). Here, UVA changed its policy in direct response to compulsion by OCR. Remove the compulsion, and the chance that UVA will reconsider Mr. Doe's case under its former burden of proof is, almost by definition, "significant[ly] increase[d]." As for OKWU, it is truly now or never: It is currently in open defiance of the 2011 DCL's preponderance mandate; given that the statute of limitations expires in five months, it cannot wait any longer to act. Moreover, the threat of enforcement—so proudly touted by OCR—could hardly be clearer.

If John Doe does not have standing to challenge the 2011 DCL, which directly caused him to be found responsible for sexual misconduct, then no student does. If OKWU—a directly regulated party that has seen even schools as wealthy as Harvard and Princeton cave to OCR's

demands once investigated—does not have a ripe claim, then OCR has essentially a blank check: It could permanently enact any rules it chooses without public participation and without risk of legal challenge, simply by waiting six years to actively enforce them. That is precisely the kind of government action that the APA was intended to prevent.

BACKGROUND

The 2011 DCL was not subjected to notice-and-comment rulemaking, even though it contained a new provision that has all the hallmarks of a legislative rule requiring notice and comment: a mandate that schools "*must* use a preponderance of the evidence standard" in resolving sexual misconduct claims (emphasis added). OKWU, as a recipient of federal funds, is directly regulated by the 2011 DCL.

So too is every college in the country that receives federal funding. Indeed, consistent with the 2011 DCL's mandate, UVA "announced major revisions to its sexual misconduct policy," including adoption of the preponderance of the evidence standard, in May of 2011—just "a few weeks after getting OCR's [2011 Dear Colleague] letter."[2] In the ensuing two years, OCR enforced Title IX, its implementing regulations, and other mandates at approximately the same rate as it had before the 2011 DCL's promulgation. *See* Ex. 1 (Chart of OCR Investigations) (noting new OCR investigations at eight different schools in 2010, 14 in 2011 and 11 in 2012). In August of 2013, however, Defendant Lhamon assumed office as the Assistant Secretary for Civil Rights, and OCR enforcement activities exploded. In 2013 alone, new investigations were opened at 31 schools—just one fewer than in the preceding three years combined. *Id.* Yet even that number now looks small; in 2014, new investigations were opened at 70 schools, and in 2015, at 89. *Id.* As of October 31, 2016, there had been new investigations

[2] *See* C-VILLE Writers, *Burden of Proof: UVA's Sexual Assault Policy Under Fire*, c-ville.com (Nov. 20, 2012), http://www.c-ville.com/burden-of-proof-uvas-sexual-assault-policy-under-fire/#.WBYSqDLMxsM.

opened at 83 different schools, which puts OCR on pace for new investigations at 99 schools this year. *Id.*

That explosion in investigations was accompanied by an explicit threat from Defendant Lhamon, in July of 2014, that OCR would terminate the federal funding of schools that fail to comply with its mandates. "Do not think it's an empty threat," she said at a Dartmouth conference on sexual assault that was attended by more than 50 schools. "It's one I've made four times in the 10 months I've been in office."[3]

At the very time Defendant Lhamon announced that threat, OCR was actively investigating two of the country's most prominent institutions of higher education, Princeton University and Harvard Law School, for failing to comply with its mandates, including the 2011 DCL's preponderance mandate. OCR insisted that both institutions replace the evidentiary standards they had been using to resolve sexual misconduct complaints ("clear and persuasive evidence" for Princeton, "clear and convincing evidence" for Harvard Law School, *see* ECF No. 16 (Amended Complaint) ["Am. Compl."] ¶¶ 49-50) with the preponderance of the evidence standard. On November 5, 2014, Princeton signed a "Resolution Agreement" requiring that it do so. *Id.* ¶ 49. Harvard Law School did the same on December 30, 2014. *Id.* ¶ 50.

OCR also published another new guidance document in 2014. On April 29 of that year, it issued "Questions and Answers on Title IX and Sexual Violence" ("2014 Questions and Answers"). *See* ECF No. 19-3. That document, among other things, states repeatedly that fund recipients "must" use the preponderance standard in resolving claims of sexual misconduct. *Id.* at 13, 14, 26.

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[3] *See* Kingkade, *supra* n.1.

The 2011 DCL thus dramatically changed the Title IX landscape. While the threat of enforcement was real even before the 2011 DCL was published, *see* Ex. 1, it has grown by leaps and bounds since mid-2014. And one of the targets of that massive expansion in enforcement has been compliance with the 2011 DCL's preponderance mandate.

On January 20, 2016, Plaintiff John Doe was the subject of a disciplinary hearing at UVA, under procedures that applied the preponderance standard that UVA adopted just weeks after promulgation of the 2011 DCL. The adjudicator in that matter—a retired justice of the Supreme Court of Pennsylvania—called it a "very close" and "very difficult case." Am. Compl. ¶ 63. She found Mr. Doe responsible, she said, because the evidence "slightly" tipped in favor of responsibility, and she was "require[d]" by "the Office of Civil Rights and the Department of Education" to apply "the weakest standard of proof" available—preponderance of the evidence. *Id.* She also explained that two other commonly used evidentiary standards—the "clear and convincing" evidence standard and the "reasonable doubt" standard—would "tip the scale much more," thereby indicating that, but for UVA's mandated use of the preponderance standard, Mr. Doe would not have been found responsible. Am. Compl. ¶ 64.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(1) provides for dismissal of an action when a court lacks subject matter jurisdiction. "The D.C. Circuit has explained that a motion to dismiss for lack of standing constitutes a motion under Rule 12(b)(1) of the Federal Rules of Civil Procedure because 'the defect of standing is a defect in subject matter jurisdiction.'" *Matthew A. Goldstein, PLLC v. U.S. Dep't of State*, 153 F. Supp. 3d 319, 330 (D.D.C. 2016) (quoting *Haase v. Sessions*, 835 F.2d 902, 906 (D.C. Cir.1987)). Motions to dismiss for lack of ripeness are likewise analyzed under Rule 12(b)(1). *Id.* When more than one party raises identical claims,

the court need only satisfy itself that one party has standing to pursue them. *Delta Air Lines, Inc. v. Export-Import Bank of U.S.*, 85 F. Supp. 3d 250, 260 (D.D.C. 2015) (citing *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1232 (D.C. Cir. 1996)).

"Because subject matter jurisdiction focuses on the Court's power to hear a claim, the Court must give the plaintiff's factual allegations closer scrutiny than would be required for a 12(b)(6) motion for failure to state a claim." *Id.* Therefore, "the Court is not limited to the allegations contained in the complaint. Instead, where necessary, the court may consider the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Id.* (internal citations and quotations marks omitted). Nevertheless, "'the Court must 'treat the complaint's factual allegations as true . . . and must grant plaintiff[s] the benefit of all inferences that can be derived from the facts alleged.'" *Delta Air Lines, Inc.*, 85 F. Supp. 3d at 259 (quoting *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1113 (D.C. Cir. 2000)). Indeed, when evaluating a standing challenge, a court must *assume* that the plaintiff's claims have merit. *See Schnitzler v. United States*, 761 F.3d 33, 40 (D.C. Cir. 2014) ("[T]he Supreme Court has made clear that when considering whether a plaintiff has Article III standing, a federal court must assume *arguendo* the merits of his or her legal claim.") (internal quotation marks and citations omitted).

ARGUMENT

I. JOHN DOE HAS STANDING TO CHALLENGE THE 2011 DEAR COLLEAGUE LETTER.

"To satisfy the requirements of Article III standing in a case challenging government action, a party must allege an injury-in-fact that is fairly traceable to the challenged government action, and it must be likely, as opposed to merely speculative, that the injury will be redressed

by a favorable decision." *Americans for Safe Access*, 706 F.3d at 442–43 (internal citations and quotation marks omitted). The government effectively concedes that Mr. Doe meets the first and second of the three requirements—injury-in-fact and traceability. The only real dispute between the parties is whether his injury is redressable in this litigation.

A. John Doe Has Suffered a Cognizable Injury-in-Fact.

John Doe alleges two concrete, ongoing injuries from OCR's imposition of a preponderance of the evidence standard: First, he "suffers a lifetime ban from all UVA property and activities." Am. Compl. ¶ 72. Though it seeks refuge in adverbs, the government all but concedes that such a concrete injury can give rise to standing. *See* ECF No. 19-1 at 23 (acknowledging that "UVA's ban on Doe from University property and activities *arguably* causes Doe an ongoing injury that *theoretically* could be remedied by some form of equitable relief") (emphasis added).

Second, John Doe alleges that he "is unjustly labeled as someone who has committed sexual misconduct." Am. Compl. ¶ 72. That reputational injury gives rise to standing. *See, e.g.*, *Foretich v. U.S.*, 351 F.3d 1198, 1211 (D.C. Cir. 2003) ("Appellees concede, as they must, that injury to reputation can constitute a cognizable injury sufficient for Article III standing."). There can be no real doubt that being labeled a sexual offender by a government body harms one's reputation. *See, e.g.*, *Doe v. Rector & Visitors of George Mason Univ.*, 149 F. Supp. 3d 602, 613 (E.D. Va. 2016) ("Here, the undisputed record facts reflect that plaintiff was expelled from GMU on a charge of sexual misconduct. Such a charge plainly calls into question plaintiff's 'good name, reputation, honor, or integrity.'"); *Starishevsky v. Hofstra Univ.*, 612 N.Y.S.2d 794, 801 (Sup. Ct. 1994) (acknowledging "the stigmatizing (unfortunate as this observation may be, it is true) nature of" university sexual misconduct complaints); *cf. Albert v. Carovano*, 824 F.2d

1333, 1338 n.6 (2d Cir. 1987) (holding that a protected liberty interest was at stake because of the "stigma" attached to disciplinary suspension from college).[4] A variety of people know that John Doe has been so labeled. His family knows it; everyone involved in his disciplinary process at UVA knows it; members of the Virginia State Bar, including its character and fitness board, know it (Am. Compl. ¶ 70); and his employer, whom he was only recently able to start working for while awaiting his character and fitness review (Am. Compl. ¶¶ 70-71), knows it. The finding is having obvious and concrete effects on his career and will continue to do so. That reputational harm is an independent injury that gives rise to standing. *See McBryde v. Comm. to Review Circuit Council Conduct & Disability Orders of Judicial Conference of U.S.*, 264 F.3d 52, 57 (D.C. Cir. 2001) (holding that a reprimand that constituted "official characterization" of the plaintiff as having engaged in "a pattern of abusive behavior" inflicted "direct injury to his reputation" and thus gave rise to standing).

Defendants don't deny that this label can constitute an injury-in-fact. Instead, they question "the source of [Mr. Doe's] supposed obligation to disclose and explain UVA's finding against him" and suggest that it is "entirely unclear" why "Doe would need to explain the finding against him to 'future friends,' 'family members' who are not already aware of it, or 'anyone else who asks.'" ECF No. 19-1 at 26 (quoting Am. Compl. ¶ 72). But the harm to Mr. Doe is anything but "unclear." Mr. Doe's law school found him responsible for sexual misconduct, and he missed almost a year of school while that process unfolded.[5] He had to disclose it to the

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[4] Defendants, it should be noted, did not oppose John Doe's Motion to Proceed Under Pseudonym, which relied on this very point. *See* ECF No. 2 at 3-4.

[5] The government also argues that, because the delay was not caused by the 2011 DCL, Doe cannot complain of it here. *Id.* But that misses the point. The reputational harm to John Doe is not the delay; it is the finding of responsibility that was made at the end of the delay. Because of OCR's imposition of the preponderance standard, what he has to disclose, when asked about the delay, is not just that he was *investigated* for sexual misconduct, but that he was *found responsible* for it.

Virginia State Bar, just as he will have to disclose it to any future state bar he seeks to join—including the District of Columbia Bar, to which he is in the process of applying now. Anyone who asks to see his law school transcript—hardly an uncommon request among legal employers—will notice the gap and ask him why it's there. These inevitable disclosures will work further reputational harm to John Doe, and they are therefore actionable now. *See Pennell v. City of San Jose*, 485 U.S. 1, 8 (1988) (holding that injury-in-fact exists when there exists a "'realistic danger of sustaining a direct injury'") (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1978)). John Doe also currently suffers those same harms, and they are an independent injury that gives rise to standing.

B. John Doe's Injuries Are Traceable to the 2011 DCL.

The 2011 DCL required virtually every college in the country to adopt the preponderance standard. UVA obeyed that mandate and then applied the new standard directly to Mr. Doe. And the person who applied it *most* directly to him—the retired State Supreme Court justice who found Mr. Doe responsible—essentially acknowledged that, were it not for the policy change, Mr. Doe's case would have come out the other way. It is hard to get more traceable than that.

"For standing purposes, petitioners need not prove a cause-and-effect relationship with absolute certainty; substantial likelihood of the alleged causality meets the test." *Competitive Enter. Inst. v. Nat'l Highway Traffic Safety Admin.*, 901 F.2d 107, 113 (D.C. Cir. 1990). "This is true even where the injury hinges on the reactions of third parties . . . to the agency's conduct. In such cases, the alleged injury must be traced back through the actions of the intermediary parties to the challenged government decision." *Id.*

John Doe has met that burden here. The Amended Complaint alleges that the 2011 DCL's mandate caused UVA to adopt the preponderance of the evidence standard (Am. Compl.

¶¶ 56-57) and that, absent that standard, John Doe would not have been found responsible for sexual misconduct (*id.* ¶¶ 63-66). Defendants don't dispute either of those things in their motion, and the causal connection is quite clear: Since at least 2005, UVA had used a "clear and convincing evidence" standard in resolving sexual misconduct claims. *See* Ex. 2 ("Procedures for Cases of Sexual Assault," March 15, 2005) at 7-8.[6] Yet in May of 2011, just "a few weeks after getting OCR's [2011 Dear Colleague] letter, UVA announced major revisions to its sexual misconduct policy," including adoption of the preponderance of the evidence standard.[7] As explained above, the 2011 DCL, the 2014 Questions and Answers document explaining it, and OCR's own resolution agreements since the 2011 DCL consistently and unequivocally state that schools receiving federal funding "must" use a preponderance of the evidence standard when resolving claims of sexual misconduct. Mr. Doe has alleged that OCR has treated the 2011 DCL as binding law. Assuming that allegation is true, which is appropriate at this stage, *see Schnitzler*, 761 F.3d at 40, then the causation and inquiry requirements are easily satisfied.

C. John Doe Has Established That an Order Invalidating the 2011 DCL's Preponderance Mandate Would Significantly Increase the Likelihood That His Injuries Would Be Redressed.

The government argues that because UVA would not be *required* to give Mr. Doe a "do-over" even if he won this case, he cannot show that winning this case would redress his injuries. But that argument overstates the showing that is required—particularly where, as here, the plaintiff's injury is so clearly traceable to the defendant's own actions. To be sure, when the conduct of a third party not before the court is the direct cause of injury, a plaintiff must establish that the choices of any "independent" third party actors "have been or will be made in such a manner as to produce causation and permit redressability." *Lujan v. Defenders of Wildlife*, 504

[6] *See also* C-VILLE Writers, *supra* n.2 ("For decades, many schools—UVA included—had used a 'clear and convincing standard.'").
[7] *See* C-VILLE Writers, *supra* n.2.

U.S. 555, 562 (1992). But to make that showing, a party need not establish that it is certain, or even that it is more likely than not, that the third party will act in the way it desires. Rather, it "will suffice for standing" for a party to show that a favorable court decision would produce "'[a] significant increase in the likelihood that the plaintiff would obtain relief that directly redresses the injury suffered.'" *Nat'l Parks Conservation Ass'n v. Manson*, 414 F.3d 1, 6-7 (D.C. Cir. 2005) (quoting *Utah v. Evans,* 536 U.S. 452, 464 (2002)); *see also Americans for Safe Access*, 706 F.3d at 448 ("The issue is only whether rescheduling marijuana would 'generate a significant increase in the likelihood' that Krawitz could obtain completed state medical marijuana forms from the VA."); *Klamath Water Users Ass'n v. F.E.R.C.*, 534 F.3d 735, 739 (D.C. Cir. 2008); *see also F.E.C. v. Akins*, 524 U.S. 11, 25 (1998) (finding standing to obtain a court determination that an organization was a "political committee," where that determination would make the agency more likely to require reporting, despite the agency's discretion not to order reporting).

Here, the government compelled UVA to change a rule, which UVA then directly applied to Mr. Doe, injuring him. Assuming that is true—which this Court must for the standing analysis—then winning this case will redress Mr. Doe's injury in at least two ways. First, it stands to reason that UVA, which had another rule for years before the government forced it to change, might be willing to reevaluate Mr. Doe's case under the old rule, if not change the burden of proof for all sexual misconduct cases. Indeed, given that the adjudicator all but said that Mr. Doe would have been found not responsible under a higher standard, UVA might be willing to toss out the finding on the current record, or at least end the ongoing sanctions against him. Second, a declaration by this Court that OCR unlawfully required UVA to apply the preponderance mandate in his case would redress his injury even if UVA itself did nothing, as he

would be able to tell future employers (and others) that UVA had found him responsible under an invalid rule that the government had wrongly required UVA to apply to his case. Under either scenario, Mr. Doe clears the redressability bar.

Courts evaluate the likelihood of a "significant increase" in redressability in practical terms—the more direct the causal link between the government action and the third party's action, the more likely redressability will be found. *See Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 942 (D.C. Cir. 2004) (noting that with "formidable evidence of causation . . . [a] court is easily able to discern redressability," but finding that the plaintiffs did not have standing because, *inter alia*, they did not prove a strong enough link between the government's Title IX regulations and several schools' decisions to eliminate their wrestling programs). That is because when the government issues a mandate, third parties usually comply with it. Removing the mandate thus produces a "significant increase in the likelihood" that the third party will take steps that will redress the injury. That is especially true where, as here, the plaintiff wants the third party to act as it did before the government made it change its behavior. As discussed below, this is precisely how this and other circuits have analyzed redressability in situations where the government coerced or mandated a third party to act in ways that harmed the plaintiff.

1. **Cases Involving Government *Pressure* (But Not Mandates) on Third Parties**

The D.C. Circuit has repeatedly found the redressability requirement satisfied because of the strength of the causal link where government actions powerfully *influenced*, but (unlike here) stopped short of *mandating*, the decisions of third parties.

In *Americans for Safe Access*, petitioners sought review of the Drug Enforcement Administration's denial of their petition to have marijuana classified as a Schedule III, IV, or V

drug instead of a Schedule I drug. 706 F.3d at 439-40. The Department of Veterans Affairs (VA) had issued a directive forbidding its clinicians from completing state medical marijuana forms. As a result, plaintiff Michael Krawitz was not able to get the requisite paperwork to obtain medical marijuana in his home state of Oregon. *Id.* at 440. The court concluded that Mr. Krawitz had standing to challenge the DEA's classification—even though the VA, a non-party, was the immediate cause of his harm—due to the strong causal link between the DEA's classification and the VA's directive. Though the VA was not required by the classification to issue its directive, the classification was "an authoritative value judgment that surely was meant to affect the policies of third-party federal agencies." *Id.* at 447-48. The court therefore concluded that the "causation" element of standing was satisfied. *Id.* at 448.

Given the strength of the causal link, the government there, as it does here, "focuse[d] most on redressability in contesting Krawitz's standing." *Id.* Even if the classification were invalidated, the government argued, the VA retained full discretion to continue forbidding its clinicians from completing such forms, and the government argued that the VA was unlikely to alter its directive absent "approval by the Food & Drug Administration." *Id.* at 448. Yet the court concluded that invalidating the classification would "generate a significant increase in the likelihood" that the VA would revise its directive, and that was sufficient for standing. *Id.* Here, of course, the causal link is even stronger than that: UVA was not simply *pressured* to adopt the preponderance standard, but was *ordered* to do so—which, again, this Court must assume at the motion-to-dismiss stage.

Eight years before *Americans for Safe Access*, the D.C. Circuit similarly analyzed the questions of causation, redressability, and injury by a third party in *National Parks Conservation Association v. Manson*. There, plaintiffs sued the Interior Department after it withdrew a letter to

Montana's Department of Environmental Quality ("DEQ") that had concluded that a proposed power plant would have an adverse environmental impact. 414 F.3d at 3-4. The Montana DEQ had "*discretionary authority* to conduct an *independent evaluation* when it receive[d] a federal adverse impact report" and ultimate authority to grant or deny the permit. *Id.* at 6 (emphasis added). But because the Montana DEQ "relied on Interior's reversal of positions" in granting the permit, *id.*, plaintiffs had standing to challenge Interior's withdrawal of its letter—even though "a federal district court ruling in favor of National Parks would not directly determine whether" the permit would be issued. *Id.* at 6. "The court found that "[a] district court order setting [the letter] aside … would significantly affect" the terms of interaction between the third party and the plaintiff. *Id.* at 6-7. As in *Americans for Safe Access*, the causal connection—which was strong, but certainly not as strong as it is in this case—sufficed to establish that a favorable decision would produce "[a] significant increase in the likelihood that the plaintiff would obtain relief," which was "enough to satisfy redressability." *Id.* at 7.

The D.C. Circuit's decisions in *Americans for Safe Access* and *National Parks* built directly on two earlier cases, *Tozzi v. U.S. Department of Health and Human Services*, 271 F.3d 301 (D.C. Cir. 2001), and *Block v. Meese*, 793 F.2d 1303 (D.C. Cir. 1986), both of which paint a consistent picture of this Circuit's treatment of redressability in the face of a strong causal connection between government pressure and third-party action.

In *Tozzi*, the court held that the plaintiff, a manufacturer of products that release the chemical dioxin when incinerated, had standing to challenge the Department of Health and Human Services' decision to classify dioxin as a known carcinogen, which, the plaintiff alleged, caused municipalities and healthcare providers to limit the use of some of the manufacturer's products. 271 F.3d at 304. The court held that invalidating the HHS classification would

sufficiently redress the plaintiff's economic injury because the government's classification of dioxin as a carcinogen is what caused third parties to limit the use of certain products, and the HHS classification was the only such government classification. *Id.* at 309-10. Although setting aside the HHS classification would not force any third parties to change—they were free to deem dioxin dangerous and refuse to use it no matter what HHS said—doing so would make regulation of those products "less likely," which was enough for redressability. *Id.* at 310. Notably, the *Tozzi* court did not rely on any evidence that any particular third party would reverse course should the HHS classification be invalidated; it simply concluded, logically, that no longer classifying something as a "known carcinogen" would make people more likely to use it. *Id.*

Meese predates the Supreme Court's holding in *Lujan*, but its analysis is in step with this Circuit's post-*Lujan* jurisprudence. In *Meese*, the plaintiff owned the distribution rights to a movie that the government classified as political propaganda, a classification that the plaintiff sought to invalidate. *Id*. at 1308. He produced affidavits showing that the government classification deterred customers from purchasing the movie. *Id.* The court concluded there the plaintiff had standing based on this causal connection, without separately asking whether there was evidence that invalidating the classification would cause any customers to purchase the movie despite any lingering stigma from its erstwhile classification.

The Fourth Circuit's redressability analysis in *Star Scientific, Inc. v. Beales*, 278 F.3d 339 (4th Cir. 2002), a case where third-party action was "powerfully coerced," is notable for its similarities to this Circuit's precedent. There, a cigarette manufacturer sued to invalidate a "qualifying statute" enacted by the Virginia legislature pursuant to the terms of a Master Settlement Agreement (MSA) entered into by Virginia and 45 other states, on the one hand, and four major tobacco companies, on the other, to resolve the companies' outstanding liability for

tobacco-related health problems. *Id.* at 343. Under the MSA, the tobacco companies agreed without condition to refrain from certain activities, such as advertising their products to children. *Id.* at 345. They also agreed to make certain monetary payments to the states if the states enacted what were called "qualifying statutes." *Id.* at 346. Those statutes forced even tobacco companies that did not join the MSA to make the required monetary payments, which were based on the number of cigarettes the non-signatories sold in each state. *Id.* Star Scientific, which was not a party but nonetheless bound by the MSA, sued to invalidate the MSA. *Id.* at 346-47. Virginia argued that Star Scientific lacked standing to do that "because invalidating the Master Settlement Agreement would not release Star Scientific from its obligations under the qualifying statute," rendering its claim "not redressable." *Id.* at 357. The Fourth Circuit disagreed, not because Star Scientific had proven that Virginia would rescind the qualifying statute should the MSA be invalidated, but instead because the MSA had "powerfully coerced" Virginia to enact the qualifying statute in the first place:

> Similarly, the Master Settlement Agreement, while not technically requiring Virginia to enact a qualifying statute, nevertheless imposes a powerful incentive for it to do so. . . . Because Virginia could face a substantial financial burden if it were not to enact a qualifying statute, the Master Settlement Agreement is coercive in requiring the states to pass such a statute. We conclude that this coercion is significant and that, therefore, Star Scientific's injuries may be fairly traceable to the requirements of the Master Settlement Agreement. Accordingly, we conclude that Star Scientific has standing to challenge the Master Settlement Agreement under the Compact Clause.

Id. at 359. Because the MSA had significantly coerced Virginia into enacting its qualifying statute, redressability would be satisfied by invalidating the MSA.

2. **Cases Involving Mandated Third-Party Action**

The cases discussed above dealt with government action that pressured, but did not technically mandate, action by third parties. Even in those cases, the causation and redressability

requirements were satisfied. More instructive still are cases where, as here, the government actually *forces* a third party to act. When government action requires, rather than simply encourages, third-party action, courts routinely find standing.

In *The Pitt News v. Fisher*, 215 F.3d 354 (3d Cir. 2000), for example, the Third Circuit concluded that the University of Pittsburgh's student newspaper had standing to challenge a 1996 law that barred liquor sellers from advertising in college publications. *Id*. at 361. The only evidence of redressability, however, was the fact that advertisers had previously advertised with the paper and stopped when the law had been passed:

> On these facts, it is not "merely speculative" that *The Pitt News* will see a dramatic increase in its advertising revenues if Act 199 is struck down as unconstitutional. Enforcement of Act 199 clearly led *The Pitt News*' advertisers to cancel their contracts with the student newspaper.

Id. at 361. The court found it irrelevant that the third-party liquor sellers had since chosen to spend their advertising dollars in other publications and would in no way be required to resume advertising with *The Pitt News* were it to win the lawsuit:

> Although these advertisers have since utilized other methods for distributing their message to their target audience, we may assume based on the past revenues generated by *The Pitt News* and the sudden drop-off in those revenues after the enforcement of Act 199 against one of its advertisers, that its past advertisers and/or new businesses are likely to continue to advertise alcoholic beverages in *The Pitt News* if it becomes legal for them to do so.

Id. It was likely enough, in other words, that the third parties who had been ordered to change their behavior (the liquor sellers) would revert back to the *status quo ante* once the legal impediment to their doing so had been lifted.

The First Circuit reached the same conclusion in *Houlton Citizens' Coal. v. Town of Houlton,* 175 F.3d 178 (1st Cir. 1999). There, a trash collector, William Faulkner, sued to invalidate a town ordinance requiring all residents to contract for garbage removal with one of

his competitors, thereby denying him business in the town. *Id.* at 182. Mr. Faulkner did not sue any of the town's residents, so no court order could guarantee that any of them would resume contracting with him if he won his case and the court struck down the ordinance. Nevertheless, the court found that invalidating the ordinance would redress Mr. Faulkner's injury:

> Here, Faulkner, a co-plaintiff, satisfies both the constitutional requirements and the prudential conditions for standing. He has lost the business of his residential customers in Houlton; that injury can be traced directly to the Town's neoteric waste management scheme; and the injury would be adequately redressed *by equitable relief* and/or damages against the Town.

Id. at 183 (emphasis added). No part of the court's analysis turned on whether there was evidence that any of those residents *would* actually re-contract with Mr. Faulkner, instead of continuing with their new service provider. Redressability was satisfied because the government had ordered the change, and invaliding its order would increase the likelihood of restoring the *status quo ante*—to wit, that Mr. Faulkner would regain his business.

In each of these cases, the government had coerced or mandated a third party to act, and the court required little to no evidence of redressability beyond the fact that the government had so obviously caused the third party's actions. Take the government's thumb off the scale, and the scale is likely to rise.

3. Defendants' Cases

Defendants' arguments against redressability rely on far more attenuated links between the complained-of government action and the plaintiff's ability to obtain relief.

Two of these cases they cite, *Bates v. Rumsfeld*, 271 F. Supp. 2d 54 (D.D.C. 2002), and *University Medical Center of Southern Nevada v. Shalala*, 173 F.3d 438 (D.C. Cir. 1999), involved challenges to government *inaction*, not government *action*. *See Bates*, 271 F. Supp. 2d at 57 (challenging the government's decision *not* to label an anthrax vaccine "an investigational

new drug”); *Univ. Med. Ctr.*, 173 F.3d at 439 (challenging HHS’s decision *not* to add the plaintiff hospital to a list of hospitals eligible for drug discounts). The *Bates* court’s conclusion that “plaintiffs have not presented anything that even vaguely suggests that the declaration will have any impact at all in any subsequent proceedings,” 271 F. Supp. 2d. at 63, is perfectly consistent with the binding D.C. Circuit precedents discussed above. In those cases, the coercive government action (not inaction) was what “suggest[ed] that” the relief requested “will have an[] impact” in “subsequent proceedings.” That type of evidence simply isn’t implicated in cases like *Bates* and *University Medical Center*.

Two other decisions relied on by Defendants—*Klamath Water Users Ass’n v. F.E.R.C.*, and *U.S. Ecology, Inc. v. Dep’t of Interior*, 231 F.3d 20, 23-24 (D.C. Cir. 2000)— likewise do not support their argument. In both cases, the government produced unequivocal affirmative evidence that the third parties in question would not act as the plaintiffs hoped even if the plaintiffs won. *See Klamath*, 534 F.3d at 740 (discussing the existence of this affirmative evidence and noting that it was so unequivocal that plaintiff had no response to it in its reply brief); *U.S. Ecology*, 231 F.3d at 23-24 (noting that an outspoken opponent of the permit sought by the plaintiff had become Governor of California since the suit was initially filed and that the state had taken affirmative litigation steps to thwart the permit). *Klamath*, in fact, noted the holding in *National Parks* discussed above and acknowledged that redressability was satisfied there because a favorable decision would result in “a significant increase in the likelihood” of obtaining relief. 534 F.3d at 739.

Defendants rely principally on *National Wrestling Coaches Association v. Department of Education*. *See* ECF No. 19-1 at 18, 19, 22. But it is similarly of no help to them. There, the injury of which the plaintiffs complained—the elimination of college wrestling programs to

satisfy Title IX—couldn't be traced back to the government, because the schools' selected program-cancellation was one of three safe-harbor options for complying with Title IX. *Id.* at 935, 939. There was, in short, no *government mandate* that the colleges choose the specific option they did. Here, by contrast, OCR gives colleges only *one* option when selecting a standard of proof—preponderance of the evidence. Indeed, the *National Wrestling* court itself, citing (among other cases) *Tozzi* and *Block*, acknowledged that "plaintiffs have standing to challenge government action on the basis of injuries caused by regulated third parties where the record presented substantial evidence of a causal relationship between the government policy and the third-party conduct, leaving little doubt as to causation and the likelihood of redress." *Id*. at 941.

Renal Physicians Association v. U.S. Department of Health and Human Services, 489 F.3d 1267 (D.C. Cir. 2007), is distinguishable for the same reason: "[A]s in *National Wrestling*," the agency in *Renal Physicians* merely "created a voluntary safe-harbor provision"; various third parties had "independently chosen to take advantage of the safe harbor," and their independent decisions harmed the plaintiffs. *Id.* at 1276. And as in *National Wrestling*, there was no government mandate ordering the third parties to do something that, before the mandate, they hadn't done. Causation thus "remain[ed] uncertain," *id.* at 1277, just as it did in *National Wrestling*. Moreover, the third parties' use of the safe harbor drove down the doctors' market wages and constituted affirmative evidence that those third parties would not revert to the *status quo ante* if the safe harbor were invalidated; people tend not to pay more for a service than they have to. *Id.* The plaintiffs' allegations "regarding injury and causation" therefore made it entirely "speculative" that invalidating the safe harbor would help the plaintiffs. *Id.*

Unlike in *National Wrestling Coaches Association* and *Renal Physicians*, the federal

government here mandated the precise third-party action that injured Mr. Doe. John Doe seeks to invalidate that mandate and thereby return to the *status quo ante* in which UVA is again free to select its evidentiary burden. He does not need to prove that UVA would *definitely* reconsider his case or his sanctions in light of the previous standard (or, obviously, prove that it would use a different standard of proof for other cases). Rather, he simply has to prove that invalidating the 2011 DCL would "generate a significant increase in the likelihood" that those things would happen. *Evans*, 536 U.S. at 464. Given that the government specifically required the burden of proof adopted by UVA—and that UVA could never admit, for fear of reprisal by OCR, that it would revisit Mr. Doe's case under its former standard as long as the 2011 DCL stands—a favorable decision from this Court could not help but "generate a significant increase in the likelihood" that UVA would redress Mr. Doe's injury. *See Bennett v. Spear*, 520 U.S. 154, 170 (1997) (holding that the plaintiff's claims were redressable where the government had pressured a third party to act and the *status quo ante* had been unchanged for nearly a century).

4. John Doe's Reputational Injury Would Be Redressed Even if UVA Took No Further Action After an Order Invalidating the 2011 DCL.

Even if it were known that UVA would do nothing for Mr. Doe if he won this case, he would still have standing to challenge the 2011 DCL based on the *reputational* redress that a victory would secure. If this Court strikes down the 2011 DCL's "preponderance" mandate, that would mean that Mr. Doe's "conviction" at UVA was premised on an invalid law. That conviction has had concrete effects in his life: It put his legal career in jeopardy and required a special appearance before the Virginia State Bar's board of character and fitness. *See* Am. Compl. ¶¶ 68-71. It will undoubtedly have similar effects in his future, including every time he applies for admission to another bar or even for another job. But if he wins, Mr. Doe will be able to tell these people, as well as everyone who already knows about his case, that the finding

against him was based on a federal mandate that was later struck down. That may not constitute complete absolution, but it would still make an enormous difference in his life. He would be able to say that UVA found him responsible for sexual misconduct using a burden of proof that a court later struck down, and the person who made the finding said that without that burden of proof, he would not have been found responsible. To be sure, a decision holding that his process was based on legal error would not redress his reputational harm as completely as one saying that he is being found not responsible for the underlying charges, but *complete* vindication is not required to support standing. It is enough that "at least some of" Mr. Doe's reputational injury would be redressed. *See Tozzi*, 271 F.3d at 310 ("In short, reclassifying dioxin would redress at least some of Brevet's economic injury.").

II. OKWU'S CHALLENGE TO THE 2011 DEAR COLLEAGUE LETTER IS RIPE.

Defendants argue that OKWU's challenge to the preponderance mandate is not ripe for review for two reasons: one, OCR hasn't initiated any enforcement proceedings against OKWU yet, and two, OKWU objects to more than just that provision. The first argument fails as a matter of law, given the long line of cases authorizing pre-enforcement challenges of government mandates in circumstances like these. The government cites no cases at all to support its second argument, which fails as a matter of logic: Just because OKWU may have broader problems with OCR's interpretation of Title IX doesn't mean that it can't bring a narrower challenge to two specific provisions. Finally, given that the statute of limitations to challenge the 2011 DCL expires in April of next year, it is effectively now or never for this challenge.

A. The Preponderance Mandate Is a Substantive Rule That Requires Immediate Compliance and Is Thus Constitutionally Ripe for Review.

The Supreme Court has "long held" that "parties need not await enforcement proceedings before challenging final agency action where such proceedings carry the risk of 'serious criminal

and civil penalties.'" *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1815 (2016) (quoting *Abbott Laboratories v. Gardner,* 387 U.S. 136, 153 (1967)); *see also Lujan v. Nat'l Wildlife Fed.*, 497 U.S. 871, 891-92 (1990) (holding that pre-enforcement challenges to agency regulations are permitted when a plaintiff is challenging "a substantive rule which as a practical matter requires the plaintiff to adjust his conduct immediately. Such agency action is 'ripe' for review at once . . . .") (citation omitted).

OKWU's challenge falls squarely within this rule. The university is directly regulated by OCR and has been ordered, along with every other school in the country that receives federal funding, "to adjust [its] conduct immediately," *id.*, or face sanction by OCR. *See Gardner*, 387 U.S. at 154 ("But there is no question in the present case that petitioners have sufficient standing as plaintiffs: the regulation is directed at them in particular; it requires them to make significant changes in their everyday business practices; if they fail to observe the Commissioner's rule they are quite clearly exposed to the imposition of strong sanctions."); *Sabre, Inc. v. Dep't of Transp.*, 429 F.3d 1113, 1120 (D.C. Cir. 2005) (finding a pre-enforcement challenge to be ripe where the plaintiff "must at present conform its primary conduct to the Department's interpretation of 'deceptive' and 'unfair' or risk civil penalties"). OCR has mandated that regulated entities like OKWU resolve all sexual misconduct cases using a preponderance of the evidence standard. The preponderance mandate is binding on its face (Am. Compl. ¶¶ 31-42), and it has repeatedly been enforced by OCR as such (Am. Compl. ¶¶ 47-51). By refusing to comply with that mandate, OKWU runs the risk that OCR will subject it to an expensive investigation or even bar it from receiving any federal funding, a risk that has existed since 2011 but that has come into much sharper focus in the last two years, as OCR has dramatically ramped up its enforcement

efforts. *See* Background, *supra.* Its claims are therefore ripe for review "at once." *Lujan*, 497 U.S. at 891.

OKWU need not await an enforcement action to challenge it and thus put itself in the following quandary:

> On the one hand they can, as the Government suggests, refuse to comply, continue to distribute products that they believe do not fall within the purview of the Act, and test the regulations by defending against government criminal, seizure, or injunctive suits against them. We agree with the respondents that this proposed avenue of review is beset with penalties and other impediments rendering it inadequate as a satisfactory alternative to the present declaratory judgment action.

Gardner, 387 U.S. at 171-72. Or, as the Court pithily put it in a case decided just last Term, "Respondents need not assume such risks while waiting for EPA to 'drop the hammer' in order to have their day in court." *Hawkes*, 136 S. Ct. at 1815 (quoting *Sackett v. EPA*, 132 S. Ct. 1367, 1372 (2012)).

OKWU faces precisely that dilemma: Its options are to "refuse to comply . . . and test the regulations by defending against them" in an enforcement proceeding, or else implement a set of procedures that it believes will deprive its students of the right to a fundamentally fair disciplinary proceeding. As it was in *Gardner*, the former option is "inadequate as a satisfactory alternative" to a pre-enforcement facial challenge. OKWU need not seek other forms of relief before challenging the mandate. *See Nat'l Ass'n of Home Builders v. U.S. Army Corps of Engineers*, 440 F.3d 459, 465 (D.C. Cir. 2006) ("Each such dredger therefore faces the choice of applying for a permit for activities Industry claims are outside the scope of the Corps' and EPA's authority under section 404 or face civil or criminal enforcement penalties for failing to do so. . . . Thus, the regulation is reviewable as a substantive rule which as a practical matter requires the [appellants] to adjust [their] conduct immediately.") (internal quotation marks omitted).

Defendants' arguments to the contrary fly in the face of both case law and OCR's own enforcement of the 2011 DCL.

Defendants first maintain that OKWU has suffered no "injury in fact" because there exists only "a speculative threat of enforcement" of its refusal to adopt the preponderance standard. ECF No. 19-1 at 30. But as *Hawkes* and its precursors make clear, pre-enforcement challenges are ripe when they attack substantive rules that require parties to change their conduct. The injury in such cases is both the command itself and its practical consequences. Defendants cite no case holding that an enforcement action must be imminent for a pre-enforcement challenge to be ripe, and in fact the case law says just the opposite: "The 'prospect' of hardship is sufficient to make a claim fit for judicial review," *Harris v. F.A.A.*, 353 F.3d 1006, 1012 (D.C. Cir. 2004), and that "prospect" exists when a regulatory scheme allows for an enforcement action to be commenced upon noncompliance. *See also Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2345 (2014) (allowing a pre-enforcement challenge to an Ohio law banning false statements during a political campaign, even though the initial threat that prompted the suit had subsided, given that "the threat of future enforcement of the false statement statute is substantial," due "[m]ost obviously" to the "history of past enforcement"); *Barrick Goldstrike Mines Inc. v. Browner*, 215 F.3d 45, 49 (D.C. Cir. 2000) (holding a claim to be ripe because the "only alternative to obtaining judicial review now is to violate EPA's directives, refuse to report releases involving waste rock, and then defend an enforcement proceeding on the grounds it raises here").

Matthew A. Goldstein, PLLC, the only case Defendants cite for their claim that OKWU has suffered no injury-in-fact, looks absolutely nothing like this case. There, the threat of enforcement was utterly speculative, as the agency itself (the State Department) had indicated

only that it *might* conclude that certain attorney activities fell within the regulatory definition of "brokering activities." 153 F. Supp. 3d at 334. Indeed, the plaintiff, an attorney, "was unable to point to a single instance in which the services provided by an attorney were subject to an enforcement action or criminal proceeding for violating" the challenged regulation. *Id.* Moreover, the guidance letter the plaintiff received from the agency "was phrased tentatively" and "indicated that an assessment of any potential 'brokering activity' necessarily depends upon case-specific facts, and was not binding upon State." *Id.* at 337. In short, Mr. Goldstein essentially asked this Court for an advisory opinion, so he could be sure he wouldn't run afoul of the new regulations. And this Court refused to give one.

This case could hardly be more different. OCR has repeatedly stated that the use of the preponderance standard is mandatory. *See, e.g.*, 2011 DCL ("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 . . . .") (emphasis added); 2014 Questions and Answers (naming preponderance of the evidence as "the evidentiary standard that *must* be used . . . in resolving a complaint") (emphasis added); Letter to Harvard Law School (Dec. 30, 2014) (stating that the school "improperly used a 'clear and convincing' evidence standard of proof in its Title IX grievance procedures, in violation of Title IX," and that "[t]his higher standard of proof was inconsistent with the preponderance of the evidence standard *required* by Title IX for investigating allegations of sexual harassment or violence") (emphasis added). And OCR has consistently imposed that requirement in resolution agreements after 2011. See Am. Compl. ¶¶ 49-50 (citing OCR's resolution agreements with Harvard and Princeton). Unlike the plaintiff in *Goldstein*, there is no doubt that OKWU's activities place it out of compliance with a regulatory

directive and therefore expose it to immediate agency enforcement.[8]

Defendants' second constitutional ripeness argument is that because OKWU doesn't want to comply with every single part of the 2011 DCL, there can be no causal link between the 2011 DCL and the injury of which OKWU complains. ECF No. 19-1 at 30-32. They base that argument on OKWU's candid admission that it is not in compliance with some of the other parts of the 2011 DCL, and not just the preponderance mandate. *See* Am. Compl. 80. The argument seems to be that, because OKWU also takes issue with *other* parts of the 2011 DCL, and perhaps even with validly enacted Title IX regulations, no injury it suffers can possibly be traced to the 2011 DCL.

But it is irrelevant whether or to what extent OKWU is not in compliance with *other* parts of the 2011 DCL or with *other* OCR mandates. No rule of law bars OKWU from seeking relief from some of OCR's mandates simply because another approach would, if successful, relieve it of all of them. If a law required all companies to both use green paper and provide health insurance, the fact that a company would prefer to use red paper but challenged only the insurance requirement in court would do nothing to defeat standing. Moreover, the legal theories alleged here likely differ from those that could be raised against those other pronouncements: Plaintiffs' argument—that the 2011 DCL was promulgated in violation of the APA—rests primarily on the mandatory nature of the language used to impose the preponderance standard. The 2011 DCL contains other, potentially challengeable provisions that do not use such mandatory language. Challenges to any earlier OCR rules or regulations would thus face substantial uncertainties this suit does not—most notably, the six-year statute of limitations for raising challenges to agency action. *Harris*, 353 F.3d at 1011-13.

[8] Again, it bears noting that the threat of enforcement by OCR has risen dramatically in just the last two years. *See* Background at 4-5*, supra.*

As Defendants' own cases demonstrate, the question, for ripeness purposes, isn't whether agency action changed a plaintiff's behavior, but whether it "substantially increased the risk of regulation or enforcement," *Nat'l Ass'n of Home Builders v. EPA*, 667 F.3d 6, 13-14 (D.C. Cir. 2011), or "altered th[e] new landscape" for a plaintiff, *Atl. Urological Assocs. v. Leavitt*, 549 F. Supp. 2d 20, 28 (D.D.C. 2008). ECF No. 19-1 at 32. The 2011 DCL clearly did both. To the extent that Defendants suggest that *Atlantic Urological Associates* holds that there must be some change in a plaintiff's behavior attributable to a regulation in order to conclude that it caused injury, their position not only contradicts *Atlantic Urological Associates* itself, but *Gardner, Lujan*, and *Hawkes* as well. Under those cases, what creates standing is the *dilemma* that the pre-enforcement plaintiff faces in having to choose either to comply with a harmful or unlawful regulation, on the one hand, or refusing to do so and risking enforcement, on the other. *See Gardner,* 387 U.S. at 171-72; *Nat'l Ass'n of Home Builders*, 440 F.3d at 465. Standing exists when a party chooses not to comply just as much as when it does.

* * *

Defendants' ripeness arguments cannot be squared with *Gardner*, *Lujan*, *Hawkes*, and the long line of cases following them. The preponderance mandate is a substantive rule that imposes legal obligations on schools like OKWU—obligations that OCR, over the past two years, has enforced under the explicit threat that schools that don't comply will lose federal funding. That is enough to establish ripeness. OKWU, like thousands of other schools across the country, must choose to abide by this mandate, which they do not want to follow, or risk an enforcement proceeding and the sanctions that might attend it. Its claim is ripe; Defendants would simply like OKWU—and everyone else—to wait until the statute of limitations has passed.

B. Because This Is a Purely Legal Challenge and the Statute of Limitations Is About to Expire, OKWU's Claim Is Also Prudentially Ripe.

In additional to being constitutionally ripe, OKWU's challenge to the 2011 DCL is prudentially ripe.[9] To determine whether a claim is prudentially ripe, a court evaluates "'(1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration.'" *Shays v. F.E.C.*, 337 F. Supp. 2d 28, 48 (D.D.C. 2004), *aff'd sub nom. Shays v. Fed. Election Comm'n*, 414 F.3d 76 (D.C. Cir. 2005) (quoting *Nat'l Park Hospitality Ass'n v. Dep't of the Interior,* 538 U.S. 803, 808 (2003)). If a court finds that the issues are fit for judicial review, its ripeness analysis stops there. *Am. Petroleum Inst. v. E.P.A.,* 906 F.2d 729, 739 n.13 (D.C. Cir. 1990) ("We reach the issue of hardship, however, only if the fitness of the issue for judicial resolution is in doubt.") (citation and internal quotation marks omitted); *Nat'l Ass'n of Home Builders*, 440 F.3d at 465 (same). If, on the other hand, the fitness of the issues for resolution is in doubt, the court then conducts a balancing test, weighing the two prongs against each other. *Matthew A. Goldstein, PLLC*, 153 F. Supp. 3d at 337; *Nat'l Ass'n of Home Builders*, 440 F.3d at 465.

Whether an issue is fit for judicial review depends on three factors: "whether it is 'purely legal, whether consideration of the issue would benefit from a more concrete setting, and whether the agency's action is sufficiently final.'" *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Engineers*, 417 F.3d 1272, 1281–82 (D.C. Cir. 2005) (quoting *Atl. States Legal Found. v. EPA,* 325 F.3d 281, 284 (D.C. Cir. 2003)). Here, OKWU raises a purely legal challenge

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[9] In recent years, the Supreme Court has questioned "the continuing vitality of the prudential ripeness doctrine," given its "'recent reaffirmation of the principle that a federal court's obligation to hear and decide' cases within its jurisdiction is virtually unflagging.'" *Driehaus*, 134 S. Ct. at 2347 (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.,*134 S. Ct. 1377, 1386 (2014) (internal quotation marks and citation omitted)).

against what is indisputably final agency action by OCR, and there is no conceivable information that could provide "a more concrete setting" for this Court's review. That is enough to end the ripeness inquiry. But even if there were any doubt about the fitness prong, the claims would nevertheless be ripe because of the hardship that OKWU would suffer from delay. The 2011 DCL "create[s] adverse effects of a strictly legal kind, that is, effects of a sort that traditionally would have qualified as harm" because it "command[s] [some]one to do [some]thing" and creates a legal obligation. *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998). It also "inflicts significant practical harm upon the interests that [OKWU] advances," *id.*, by forcing it to choose between complying with a mandate it believes is unlawful and harmful, on the one hand, and risking the prospect of significant sanctions at a time when OCR enforcement investigations have exploded, on the other. *See* Ex. 1. Moreover, the statute of limitations to challenge the 2011 DCL expires in five months—so it is literally now or never.

1. <u>OKWU's Challenge Is Fit for Review</u>

OKWU will address each of the three fitness factors in turn.

a. Its Claims Are Purely Legal

OKWU raises three claims: that the preponderance mandate should have been subjected to notice-and-comment rulemaking (Am. Compl. ¶¶ 87-92); that imposing an evidentiary standard exceeds OCR's statutory authority (*id.* ¶¶ 93-101); and that OCR's justifications for imposing the preponderance standard are arbitrary and capricious (*id.* ¶¶ 102-114). All three are widely recognized as "purely legal." *See, e.g.*, *Better Gov't Ass'n v. Dep't of State*, 780 F.2d 86, 92 (D.C. Cir. 1986) ("Likewise, BGA's procedural challenge to the guidelines raises the purely legal question of whether State violated section 553(c) of the Administrative Procedure Act ('APA') by its failure to give public notice of, and an opportunity to comment on the

guidelines.");[10] *Nat'l Ass'n of Home Builders*, 417 F.3d at 1282 (holding the same as to claims alleging agency action that is arbitrary and capricious or in excess of statutory authority). OKWU's claims are therefore "presumptively reviewable." *Sabre,* 429 F.3d at 1119 (internal quotation marks and citation omitted).

Defendants maintain that, while OKWU's claims "may be 'purely legal' in nature, at this point they reflect nothing more than 'abstract disagreements over administrative policy'" and thus are not fit for review. ECF No. 19-1 at 34 (citing *Devia v. Nuclear Regulatory Com'n*, 492 F.3d 424-25 (D.C. Cir. 2007)). Defendants' attempt to make this case sound like an academic exercise has no basis in fact. Nothing about this lawsuit is abstract. OCR has required OKWU—and every other regulated school in the country—to use a specific burden of proof in a specific set of cases, and it has publicly and repeatedly threatened every such school with sanctions if they do not comply. And as Mr. Doe's case demonstrates, the mandate can have serious consequences in the lives of real people. The legal question before the court is not an abstract argument about whether the preponderance mandate was a good idea. It is about whether OCR followed the law when promulgating it and, in so doing, requiring schools nationwide to adopt it. If, as Plaintiffs allege—and as this Court must assume at the motion-to-dismiss stage—that the mandate is legislative, then Defendants violated the APA by not going through notice-and-comment procedures. The question before the court is a concrete one about *process*, not an abstract one about substance.

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[10] As the Amended Complaint makes clear, Plaintiffs' challenge to the preponderance mandate as a legislative rule is "largely legal." *Compare* Am. Compl. ¶¶ 18-42 (explaining relevant regulatory history and analyzing language of 2011 DCL and 2014 Questions and Answers) *with* Am. Compl. ¶¶ 47-51 (explaining enforcement of preponderance mandate). Plaintiffs' motion for summary judgment, being filed contemporaneously herewith, makes that even clearer. *Compare* Memorandum in Support of Plaintiff's Motion for Summary Judgment at 14-28, 29-31 *with id*. at 7-9, 28.

The *Devia* case does not help Defendants. In *Devia*, the plaintiffs sought to prevent the Nuclear Regulatory Commission from granting a permit that would allow a private party to build a spent nuclear fuel storage facility on Indian land. *Id.* 422-23. After the suit was filed, however, two *other* federal agencies—the Bureau of Land Management and the Bureau of Indian Affairs—took steps that, as a practical matter, all but ended the party's chance of building the facility. *Id.* at 423. Accordingly, the court reasoned that the case had "all the earmarks of a decision that we may never need to make. The denials of approval by the BLM and BIA appear to block the activity—construction and operation of the facility—that petitioners OGD and Utah contend will concretely affect them." *Id.* at 425 (internal quotation marks and citation omitted). The instant case looks nothing like *Devia*. Here, there are no other parties who can intervene—as the BLM and BIA did in *Devia*—and save OKWU from its injury. Moreover, the government in this case has *already taken* the action that to which Defendants object. Now, OKWU simply has to decide whether to obey what it considers an illegally promulgated mandate requiring an unjust result, or risk severe penalties. That is enough to make its challenge ripe for review. *See MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128–29 (2007) ("Our analysis must begin with the recognition that, where threatened action by *government* is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat—for example, the constitutionality of a law threatened to be enforced. The plaintiff's own action (or inaction) in failing to violate the law eliminates the imminent threat of prosecution, but nonetheless does not eliminate Article III jurisdiction.").

b. The posture of this case is sufficiently concrete to permit judicial review.

Defendants also argue that waiting for OCR to actually enforce its mandate against OKWU would allow development of a factual record that could help this Court decide the case.

They suggest that it might be helpful to develop a factual record "regarding OKWU's procedures for investigating and adjudication complaints of student-on-student sexual violence, as well as the extent to which OKWU adheres to those procedures in practice and the nature of its objections to the 2011 DCL," which would allow Defendants to determine "whether and to what extent OKWU is in violation of Title IX and the Department's regulations." ECF No. 19-1 at 35.

But none of those things are actually relevant to the issue that OKWU is asking this Court to decide: whether OCR's issuance of the preponderance mandate in the 2011 DCL violated the APA. Whether the preponderance mandate is a legislative rule, whether OCR has the statutory authority to impose an evidentiary standard, and whether its justification for imposing this particular standard is reasonable turn *in no way* on whether OKWU is out of compliance with additional OCR mandates. That OKWU does want to use the preponderance standard to adjudicate sexual misconduct cases is the only relevant factual question here, and it is undisputed. Whether the mandate is a substantive rule that should have been subjected to notice and comment will turn on whether it is mandatory on its face and has been treated as such in practice. *See Gen. Elec. Co. v. E.P.A.*, 290 F.3d 377, 383 (D.C. Cir. 2002) ("Our cases likewise make clear that an agency pronouncement will be considered binding as a practical matter if it either appears on its face to be binding, or is applied by the agency in a way that indicates it is binding.") (internal citations and quotation marks omitted). Neither of those factors will be further fleshed out by an examination of OKWU's practices. And tellingly, Defendants spill no ink actually explaining its argument to the contrary. This case is about what OCR did (or, more to the point, didn't do); it's not about what OKWU has or hasn't done, apart from refusing to obey what it considers an unlawfully promulgated mandate. *See Chamber of Commerce of U.S. v. Fed. Election Comm'n*, 69 F.3d 600, 604 (D.C. Cir. 1995) (holding that a pre-enforcement

challenge to agency regulation defining statutory term "members" was ripe, given that "[t]he rule constitutes the purported legal norm that binds the class regulated by statute" and the case "presented [] a relatively pure legal [issue] that subsequent enforcement proceedings will not elucidate"). Finding out more about how OKWU handles sexual misconduct complaints, or how it feels about other OCR-mandated requirements, has absolutely nothing to do with whether OCR violated the APA when it issued the preponderance mandate. It would also impose an unnecessary burden on the plaintiff and this Court, not to mention drag out this litigation, for no reason.

Defendants also maintain that delay would give OCR "the opportunity to apply its expertise and to correct any mistakes it may have made.'" ECF No. 19-1 at 35 (quoting *Pfizer v. Shalala*, 182 F.3d 975, 978 (D.C. Cir. 1999)). But that is true for any pre-enforcement proceeding, and Defendants offer no reason that consideration should apply here. *Pfizer* certainly does not supply it. There, the challenged agency action was not final, *see* 182 F.3d at 978-79, meaning that the time in which the agency was tasked with "applying its expertise" to the question had not closed. Here, by contrast, the agency action is final—and has been applied to schools across the country in investigations, enforcement proceedings, and resolution agreements. An agency cannot evade review by arguing that it may change its mind at some future point. *See Gen. Elec. Co.*, 290 F.3d at 380 ("If the possibility (indeed, the probability) of future revision in fact could make agency action non-final as a matter of law, then it would be hard to imagine when any agency rule—and particularly one that must be updated periodically to reflect advances in science—would ever be final as a matter of law.").

Defendants next suggest that waiting for an enforcement action might avoid "piecemeal review" of OKWU's compliance with OCR regulations because it is "not far-fetched" that OCR

might someday conclude that OKWU is out of compliance with Title IX requirements other than the preponderance mandate. ECF No. 19-1 at 35-36. In other words, Defendants are simultaneously arguing that 1) the threat of enforcement against OKWU is so remote that its claims are not ripe, and 2) that this Court should delay review because the threat of enforcement is "not far-fetched." *Id.* at 36. Even putting aside the tension in that argument, it also fails to appreciate the significant uncertainty that any challenge to older OCR rules would face—most notably the six-year statue of limitations for challenging agency actions. *See Harris*, 353 F.3d at 1011-13. Given that the deadline to challenge the 2011 DCL expires in just five months, the odds of piecemeal litigation are nil.

Finally, Defendants suggest that delay might obviate any consideration of OKWU's notice-and-comment claim, claiming that OCR could apply a preponderance mandate in an enforcement action even if it had never done so through the 2011 DCL. ECF No. 19-1 at 36 (arguing that "the Department can apply its interpretation of its regulations in enforcement actions without relying on prior guidance documents"). Defendants' argument proves too much, however, because that would be true in any pre-enforcement situation where an agency failed to adhere to notice-and-comment rulemaking. An agency could always claim, if it illegally promulgated a new binding new rule through a guidance document without going through notice-and-comment, that it had the authority to apply the rule anyway, notwithstanding the guidance document. Not surprisingly, Defendants cite no case where that rationale was used to deem a claim unripe, and in fact the authority goes exactly the other way:

> Nor do we agree with the intervenors' similar suggestion that any alleged harm is ameliorated by the appellants' ability to pursue further agency remedies. To the contrary, the fact of the matter is that in the absence of judicial review the appellants are left with the choices we identified earlier: They must either modify their projects to conform to the NWP thresholds and conditions (as the Corps contemplates they will do) or refrain from building until they can secure

> individual permits. The NWPs therefore affect the appellants' activities in a "direct and immediate" way.

Nat'l Ass'n of Home Builders, 417 F.3d at 1284 (holding that the plaintiff's APA challenge was ripe for review and rejecting the argument that "that any alleged harm is ameliorated by the appellants' ability to pursue further agency remedies") (internal citation and quotation marks omitted).

OCR chose to apply the preponderance mandate to every school at once, through the 2011 DCL, rather than considering their individual circumstances and requiring the preponderance standard, when appropriate, one school at a time. It cannot evade review of that decision simply by arguing that it could have acted differently.

c. OCR's action is final.

There can be no serious dispute that the 2011 DCL constitutes final action by OCR, given how widely OCR has enforced the preponderance mandate nationwide. "As a general matter, two conditions must be satisfied for agency action to be final: First, the action must mark the consummation of the agency's decision-making process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett,* 520 U.S. at 177-78 (internal citation and quotation marks omitted). The preponderance mandate satisfies both of those criteria. Nothing in the 2011 DCL suggests the preponderance mandate is tentative in nature: The DCL repeatedly and unequivocally states that the standard "must" be adopted. *See Nat'l Treasury Employees Union v. Chertoff,* 452 F.3d 839, 854-55 (D.C. Cir. 2006) (concluding there was "no further agency action to be taken with respect to this matter" because "[t]he Final Rule states, without equivocation, that certain subjects are not subject to collective bargaining) (internal quotation marks omitted). Nor has it been revised in the nearly six years since it was

issued. On the contrary, the 2014 Questions and Answers confirms that regulated schools are obligated to use a preponderance of the evidence standard. *See id.* at 13, 14, 26. And OCR has consistently enforced the mandate against schools. *See* Am. Compl. ¶¶ 47-51. It has every hallmark of a final order.

* * *

OKWU's claims are fit for review. Those claims present purely legal challenges to an agency action that is unquestionably final. That action has stood unchanged for almost six years now, and there is a record of its enforcement in concrete settings that confirms its status as a nationwide mandate. There is no reason to believe that resolution of these purely legal issues will be enhanced by waiting until OCR initiates an enforcement action against OKWU. In fact, for the reasons explained below, delaying resolution would work substantial harm upon OKWU.

2. Delaying Review of the Preponderance Mandate Will Work Substantial Harm to OKWU.

As explained earlier, a court need only reach the hardship prong of the ripeness inquiry if it "has doubts about the fitness of the issue for judicial resolution," in which case it "will balance the institutional interests in postponing review against the hardship to the parties that will result from delay." *Nat'l Ass'n of Home Builders*, 440 F.3d at 465. Here, no institutional interests are served by postponing review of OKWU's claims, which are purely legal and ready to be decided now. To the extent that the Court disagrees, however, any such interests are far outweighed by the harms OKWU will suffer on account of delay. Those harms are primarily of two types.

First, OKWU will continue to suffer the harms it has endured for almost six years but that have become especially acute over the past two years: the "paradigmatic hardship situation" of being "put to the choice between incurring substantial costs to comply with allegedly unlawful agency regulations and risking serious penalties for non-compliance." *Nat. Res. Def. Council,*

Inc. v. U.S.E.P.A., 859 F.2d 156, 166 (D.C. Cir. 1988) (citing *Gardner*, 387 U.S. at 152). As explained above, the 2011 DCL imposes legal harm on OKWU by commanding it to comply with an order that conflicts with OKWU's position on how best to run its campus, and the practical harm of a costly enforcement action or loss of federal funding becomes a greater threat with each passing year. *See* Section II.A, *supra*; *cf. Hawkes*, 136 S. Ct. at 1815 ("Nor is it an adequate alternative to APA review for a landowner to apply for a permit and then seek judicial review in the event of an unfavorable decision. As Corps officials indicated in their discussions with respondents, the permitting process can be arduous, expensive, and long."). Those harms will continue without judicial relief.

Second, further delay runs a substantial risk that any future legal challenge to the preponderance mandate will be barred by the statute of limitations, which will expire in just five months—on April 4, 2017, which is the sixth anniversary of the 2011 DCL's release. *See Norwest Bank Minnesota Nat. Ass'n v. F.D.I.C.*, 312 F.3d 447, 451-52 (D.C. Cir. 2002) ("[I]t is doubtless true that Norwest had no immediate financial incentive to raise the issue in 1992. But the action or proceeding could have been brought then, and it has long been settled that statutes of limitations begin running when the wrong has been committed, even if at the time "no more than nominal damages may be proved, and no more recovered . . . .'") (quoting *Wilcox v. Plummer's Ex'rs*, 29 U.S. (4 Pet.) 172, 182 (1830)); *see also Harris*, 353 F.3d at 1011-13 (affirming the district court's ruling that the plaintiffs' APA challenges were barred by the statute of limitations, because "the 1993 Recruitment Notice, which . . . determined the appellants' *future* salaries—notwithstanding their pocketbooks *did not feel it until years later*—constitute[d] final agency action for the purpose of the appellants' APA claim") (emphasis added). The "wrong" here was violating the APA, a procedural injury that became ripe as soon as the 2011

DCL was issued. Indeed, were a school to wait until OCR came calling as the government suggests it should, the government would inevitably cite the six-year statute of limitations, claim that the claim was ripe back in 2011, and move to dismiss the claim as time-barred. And it would be surpassingly naïve to believe that OCR would decide to launch an enforcement action against OKWU *before* the statute of limitations has run. A dismissal for lack of ripeness would be the functional equivalent of a dismissal with prejudice. It is, in short, now or never for OKWU.

Defendants' argument that OKWU will not suffer harm as a result of further delay rests on fundamental mischaracterizations of what the hardship showing requires. Defendants argue that "OKWU does not allege that it has incurred any costs—let alone substantial costs—as a result of the 2011 DCL" or that it "will incur such costs if the Court postpones review." ECF No. 19-1 at 37. But the hardship analysis doesn't ask whether there are costs associated with *non-compliance*; it asks whether a party faces a choice between incurring "substantial costs *to comply*," on the one hand, and risking "serious penalties for non-compliance," on the other. *Nat. Res. Def. Council*, 859 F.2d at 166 (emphasis added). That is precisely the choice put to OKWU.

Defendants also argue that OKWU suffers no hardship because, "[r]ather than feel pressed to take 'immediate action,' OKWU evidently felt 'free to conduct its business as it sees fit' for over five years." ECF No. 19-1 at 37 (quoting *Devia*, 492 F.3d at 427). But Defendants point to no case suggesting that a party must file a lawsuit in support of its noncompliance—let alone that it must do so within a certain period of time—lest its injury be deemed ephemeral. The analysis demanded by *Lujan*, *Gardner*, and *Hawkes*, in any event, is not a subjective one; it asks whether a party faces the objective choice between complying with a law or risking the consequences of noncompliance. A small school like OKWU, *see* Am. Compl. ¶ 75, might

choose to delay litigation, or forgo it altogether, for any number of reasons, the most obvious being its financial cost. One thing is certain: The earlier OKWU had brought this suit, the more vigorously Defendants would have insisted its claims should be delayed. They cannot have it both ways.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that Defendants' Motion to Dismiss the Amended Complaint be denied.

Dated: November 1, 2016

Respectfully submitted,

_____/s/___________________________

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