

20-3234-CV

United States Court of Appeals
for the
Second Circuit

NICOLE CHASE,

Plaintiff-Appellee,

– v. –

MARK J. PENNEY, CHRISTOPHER ARCIERO,
JOHN GOMPER, NODINE’S SMOKEHOUSE, INC., CALVIN NODINE,

Defendants,

TOWN OF CANTON,
JOHN COLANGELO, ADAM GOMPPER,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

**BRIEF FOR THE NATIONAL WOMEN’S LAW CENTER,
AND 30 ADDITIONAL ORGANIZATIONS, AS AMICI
CURIAE SUPPORTING PLAINTIFF-APPELLEE
NICOLE CHASE**

ADAM S. LURIE
PATRICK C. ASHBY
SO MIN LEE
LINKLATERS LLP
1290 Avenue of the Americas
New York, New York 10104
(212) 903-9000
adam.lurie@linklaters.com
patrick.ashby@linklaters.com
somin.lee@linklaters.com

EMILY MARTIN
SUNU P. CHANDY
JENNIFER L. MONDINO
NATIONAL WOMEN’S LAW CENTER
11 Dupont Circle, Suite 800
Washington, DC 20036
(202) 588-5180
emartin@nwlc.org
schandy@nwlc.org
jmondino@nwlc.org

Attorneys for Amici Curiae

ADDITIONAL *AMICI CURIAE*

American Civil Liberties Union

American Civil Liberties Union of Connecticut

A Better Balance

Bold Futures NM

California Women Lawyers

Gender Justice

GLBTQ Legal Advocates & Defenders

Hadassah, the Women's Zionist Organization of America

Human Rights Campaign

Idaho Coalition Against Sexual & Domestic Violence

In Our Own Voice: National Black Women's Reproductive Justice Agenda

Kentucky Association of Sexual Assault Programs

KWH Law Center for Social Justice and Change

LatinoJustice PRLDEF

Legal Aid at Work

Legal Momentum, the Women's Legal Defense and Education Fund

National Asian Pacific American Women's Forum

National Association of Social Workers (NASW)

National Association of Women Lawyers

National Network to End Domestic Violence

National Organization for Women Foundation

Partnership for Working Families

Religious Coalition for Reproductive Choice

Reproaction Education Fund

The Women's Law Center of Maryland

Women Lawyers On Guard Inc.

Women's Bar Association of the District of Columbia

Women's Bar Association of the State of New York

Women's Institute for Freedom of the Press

Women's Law Project

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the proposed *amicus curiae* parties of the instant brief make the following disclosures:

1. The proposed *amicus curiae* parties, individually and collectively, have no parent corporation(s); and
2. There is no publicly held corporation that owns more than 10 percent of stock in the proposed *amicus curiae* parties, either individually or collectively.

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	iii
STATEMENT OF INTEREST.....	1
SUMMARY OF ARGUMENT.....	2
STATEMENT OF KEY FACTS	3
ARGUMENT	7
I. GENDER BIAS IN LAW ENFORCEMENT’S RESPONSE TO SEXUAL ASSAULT IMPOSES ADDITIONAL HARM ON SURVIVORS.....	7
A. Survivors Face Multiple Barriers to Reporting Sexual Assault, Including Gender Bias by Law Enforcement	7
B. Gender-Biased Responses to Sexual Assault by Law Enforcement Can Violate the Equal Protection Clause.	12
II. PLAINTIFF’S RESPONSE TO HER SEXUAL ASSAULT IS CONSISTENT WITH THE RANGE OF BEHAVIORS OF SEXUAL ASSAULT SURVIVORS.	15
A. Power Imbalances Between an Abuser and a Survivor May Impact Survivors’ Responses.	15
B. Shame, Fear, and Trauma Relating to Sexual Assault May Impact a Survivor’s Reporting and Recounting of the Assault.	18
III. DEFENDANTS’ RESPONSE TO PLAINTIFF’S SEXUAL ASSAULT REFLECTED UNLAWFUL RELIANCE ON GENDER BIAS.	21

A.	Defendants’ Investigation of Plaintiff’s Reports of Sexual Assault Reflected Gender Bias Throughout, Including by Sharp Deviation from Generally Accepted Law Enforcement Standards.	21
B.	Defendants Are Not Entitled to Qualified Immunity as to Plaintiff’s Equal Protection Clause Claim.	27
	CONCLUSION.....	30

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Alfano v. Costello</i> , 294 F.3d 365 (2d Cir. 2002)	14
<i>Balistreri v. Pacifica Police Dep’t</i> , 901 F.2d 696 (9th Cir. 1990)	15
<i>Benn v. Kissane</i> , 510 F. App’x 34 (2d Cir. 2013)	28
<i>Chase v. Nodine’s Smokehouse, Inc.</i> , Case No. 20-3234 (2d Cir. 2020).....	24, 27
<i>DeShaney v. Winnebago Cty. Dep’t of Social Servs.</i> , 489 U.S. 189 (1989).....	14
<i>Doe v. Calumet City</i> , 641 N.E.2d 498 (Ill. 1994).....	15
<i>Frontiero v. Richardson</i> , 411 U.S. 677 (1973).....	13
<i>Golino v. City of New Haven</i> , 950 F.2d 864 (2d Cir. 1991)	28
<i>Malley v. Briggs</i> , 475 U.S. 335 (1986).....	29
<i>Myers v. Cty. of Orange</i> , 157 F.3d 66 (2d Cir. 1998)	14
<i>Naumovski v. Morris</i> , 934 F.3d 200 (2d Cir. 2019)	14
<i>Plyler v. Doe</i> , 457 U.S. 202 (1982).....	13
<i>Price Waterhouse v. Hopkins</i> , 490 U.S. 228 (1989).....	12, 14

Reed v. Reed,
404 U.S. 71 (1971).....13

Reedy v. Evanson,
615 F.3d 197 (3d Cir. 2010)28, 29

Snyder v. Smith,
7 F. Supp. 3d 842 (S.D. Ind. 2014).....28, 29

Thurman v. City of Torrington,
595 F. Supp. 1521 (D. Conn. 1984).....14

United States v. Virginia,
518 U.S. 515 (1996).....12, 13

Whren v. United States,
517 U.S. 806 (1996).....14

Yick Wo v. Hopkins,
118 U.S. 356 (1886).....14

Other Authorities

Adam Walsh Reauthorization Act of 2016, 162 Cong. Rec. 18, S3043-S3047 (daily ed. May 3, 2016)8

Alfred Avins, *Equal Protection against Unnecessary Police Violence and the Original Understanding of the Fourteenth Amendment: A Comment*, 19 Buff. L. Rev. 599 (1970)13

Amanda Taub, *After Sarah Everard’s Killing, Women’s Groups Want Change, Not More Policing*, N.Y. Times (Mar. 21, 2021).....9

Andrea J. Ritchie, *Invisible No More* (Beacon Press 2017)8

Anne Lawton, *The Emperor’s New Clothes: How the Academy Deals with Sexual Harassment*, 11 Yale J.L. & Feminism 75 (1999).....15

Beverly Engel, *Why Don’t Victims of Sexual Harassment Come Forward Sooner?* Psychology Today (Nov. 16, 2017), <https://www.psychologytoday.com/us/blog/the-compassion-chronicles/201711/why-dont-victims-sexual-harassment-come-forward-sooner>9

Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y. Univ. L. Rev. 83 (Apr. 2010)13

Catrin Einhorn & Rachel Abrams, *The Tipping Equation*, N.Y. Times (Mar. 12, 2018), <https://www.nytimes.com/interactive/2018/03/11/business/tipping-sexual-harassment.html>.....18

Chai R. Feldblum & Victoria A. Lipnic, *Select Task Force on the Study of Harassment in the Workplace*, U.S. EEOC (June 2016), https://www.eeoc.gov/select-task-force-study-harassment-workplace#_Toc453686298.....15

Claire R. Gravelin, et al., *Blaming the Victim of Acquaintance Rape: Individual, Situational, and Sociocultural Factors*, 9 Frontiers in Psychol. 2422 (Jan. 21, 2019), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6348335/>10

DataUSA, *Restaurants and Food Services*, <https://datausa.io/profile/naics/restaurants-food-services#workforce> (last visited Mar. 20, 2021)17, 18

David Lisak, et al., *False Allegations of Sexual Assault: an Analysis of Ten Years of Reported Cases*, 16 Violence Against Women 1318 (2010).....11

Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. Pa. L. Rev. 1 (2017)10, 11

Deborah Tuerkheimer, *Underenforcement as Unequal Protection*, 57 B.C.L. Rev. 1287 (2016).....13

Elaine Lewis, *Who Is at Highest Risk of Sexual Harassment?* ACLU (Jan. 2018), <https://www.aclu.org/blog/womens-rights/womens-rights-workplace/who-highest-risk-sexual-harassment>17

Elizabeth Kennedy, *Victim Race and Rape: a Review of Recent Research*, Feminist Sexual Ethics Project (2003), <https://www.brandeis.edu/projects/fse/slavery/united-states/slavery-us-articles/kennedy-full.pdf>9, 14

False Reporting: Overview, NSVRC (2012),
https://www.nsvrc.org/sites/default/files/Publications_NSVRC_Overview_False-Reporting.pdf11

Hilary M. Schor, *Storytelling in Washington, D.C.: Fables of Love, Power, and Consent in Sexual Harassment Stories*, 65 S. Cal. L. Rev. 1347 (1992)15

How Gender Stereotyping Affects the Enjoyment of Human Rights, United Nations Office of the High Commissioner on Human Rights,
<https://ohchr.org/EN/Issues/Women/WRGS/Pages/WrongfulGenderStereotyping.aspx> (last visited Mar. 20, 2019).....13

IACP Law Enforcement Policy Center, *Investigating Sexual Assaults, End Violence Against Women Int’l* (updated Oct. 2017),
<https://evawintl.org/wp-content/uploads/IACPConceptsandIssuesPaper2017.pdf>.....27

IACP Law Enforcement Policy Center, *Investigating Sexual Assaults, End Violence Against Women Int’l* (updated Oct. 2017),
<https://evawintl.org/wp-content/uploads/IACPConceptsandIssuesPaper2017.pdf>.....22

Identifying and Preventing Gender Bias in Law Enforcement Response to Sexual Assault and Domestic Violence, U.S. Dep’t of Justice (2015), <https://www.justice.gov/opa/file/799366/download>12, 22, 24

Jennifer C. Nash, *Black Women and Rape: A Review of the Literature*, Brandeis Univ. Feminist Sexual Ethics Project (June 12, 2009),
<https://www.brandeis.edu/projects/fse/slavery/unitedstates/slav-us-articles/nash2009.pdf>9

Jennifer Gentile Long, *Explaining Counterintuitive Victim Behavior in Domestic Violence and Sexual Assault Cases*, APRI (2006),
<http://www.ncdsv.org/images/Explaining%20Counterintuitive%20victim%20behavior.pdf>.....20

Jocelyn Frye, *Not Just the Rich and Famous: The Pervasiveness of Sexual Harassment across industries affects all workers*, Center for American Progress (Nov. 20, 2017), <https://www.americanprogress.org/issues/women/news/2017/11/20/443139/not-just-rich-famous/>16, 17

Kimberly A. Lonsway, et al., *False Reports: Moving Beyond the Issue to Successfully Investigate and Prosecute Non-Stranger Sexual Assault* (2009), <https://www.nsvrc.org/sites/default/files/publications/2018-10/Lisak-False-Reports-Moving-beyond.pdf> 11

Kimberly A. Lonsway, *The Use of Expert Witnesses in Cases Involving Sexual Assault*, Violence Against Women Online Resources (Mar. 2005), <https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.208.7193&rep=rep1&type=pdf>20

Lori Haskell & Melanie Randall, *The Impact of Trauma on Adult Sexual Assault Victims*, Dep’t of Justice Canada (2019), https://www.justice.gc.ca/eng/rp-pr/jr/trauma/trauma_eng.pdf.21

Nancy Luna, *Report: Gender Gap Widens in Key Food Industry Leadership Roles*, National Restaurant News (Mar. 8, 2019), <https://www.nrn.com/workforce/report-gender-gap-widens-key-food-industry-leadership-roles>.....17

National Intimate Partner and Sexual Violence Survey: 2015 Data Brief – Updated Release, CDC (2018), <https://www.cdc.gov/violenceprevention/pdf/2015data-brief508.pdf>.....7, 8

Out of the Shadows: An Analysis of Sexual Harassment Charges Filed by Working Women, NWLC (Aug. 2018), <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2018/08/SexualHarassmentReport.pdf>.....16, 18

Patricia Frazier, *The Role of Attributions and Perceived Control in Recovery from Rape*, 5 J. of Pers. & Interpersonal Loss 203 (2000)19

Patricia L. Fanflik, *Victim Responses to Sexual Assault: Counterintuitive or Simply Adaptive?*, Am. Prosecutors Research Inst., Nat’l Dist. Attorneys Ass’n (2007), https://www.nsvrc.org/sites/default/files/publications/2018-10/pub_victim_responses_sexual_assault.pdf.....19, 20

Protected and Served? Police, Lambda Legal (2014), <https://www.lambdalegal.org/protected-and-served/police>.....9

Rachel E. Morgan & Jennifer L. Truman, *Criminal Victimization, 2019*, U.S. Dep’t of Justice, Bureau of Justice Statistics (Sept. 2020), <https://www.bjs.gov/content/pub/pdf/cv19.pdf>.....8

Rape, Abuse, and Incest National Network (RAINN), *Scope of the Problem: Statistics*, <https://www.rainn.org/statistics/scope-problem> (last visited Mar. 20, 2021).....7

Rape in the United States: The chronic Failure to Report and Investigate Rape Cases: Hearing Before the Subcomm. On Crime and Drugs of the Senate Comm. On the Judiciary, 111th Cong., 2d Sess. (Sept. 14, 2010).....12

Restaurant Opportunities Centers United and Forward Together, *The Glass Floor: Sexual Harassment in the Restaurant Industry* (Oct. 7, 2014), <https://forwomen.org/wp-content/uploads/2015/09/The-Glass-Floor-Sexual-Harassment-in-the-Restaurant-Industry.pdf>.....16

Richard Felson & Paul Philippe Parè, *The Reporting of Domestic Violence and Sexual Assault by Nonstrangers to the Police*, 67-3 J. of Marriage and Family 597 (Aug. 2005).....10

Robin West, *Toward an Abolitionist Interpretation of the Fourteenth Amendment*, 94 W. VA. L. Rev. 111 (1991)13

Samone Ijoma, *False Promises of Protection: Black Women, Trans People & the Struggle for Visibility as Victims of Intimate Partner and Gender Violence*, 18 U. Md. L.J. of Race, Relig., Gender & Class 255 (2018)8

Sexual Assault Survivors’ Rights Act, 114th Cong. Pub. L. 236 (2016)8

Sexual Violence & Individuals Who Identify as LGBTQ, National Sexual Violence Resource Center (NSVRC) (2012), https://www.nsvrc.org/sites/default/files/Publications_NSVRC_Research-Brief_Sexual-Violence-LGBTQ.pdf.....9

Sexual Violence by any Perpetrator, The National Intimate Partner and Sexual Violence Survey: 2010 Summary Report, (Nov. 2011), https://www.cdc.gov/violenceprevention/pdf/NISVS_Report2010-a.pdf10

Shirley Kohsin Wang, et al., Research Summary- *Rape: How Women, the Community and the Health Sector Respond*, Sexual Violence Research Initiative (2007), <https://svri.org/sites/default/files/attachments/2016-01-19/Rapehowwomenbooklet.pdf>.....19

Stefanie K. Johnson & Juan M. Madera, *Sexual Harassment Is Pervasive in the Restaurant Industry. Here’s What Needs to Change*, Harv. Bus. Rev. (Jan. 18, 2018), <https://hbr.org/2018/01/sexual-harassment-is-pervasive-in-the-restaurant-industry-heres-what-needs-to-change>.....18

Successful Trauma Informed Victim Interviewing, Int’l Association of Chiefs of Police (IACP), <https://www.theiacp.org/sites/default/files/2020-06/Final%20Design%20Successful%20Trauma%20Informed%20Victim%20Interviewing.pdf>20, 22

Susanne Schwarz, et al., (*Sex*) *Crime and Punishment in the #MeToo Era: How the Public Views Rape*, Pol. Behav. (May 6, 2020), <https://doi.org/10.1007/s11109-020-09610-9>10

Timothy Hart & Callie M. Rennison, *Reporting Crime to the Police, 1992-2000*, U.S. Dep’t of Justice, Bureau of Justice Statistics (2003), <https://www.bjs.gov/content/pub/pdf/rcp00.pdf>10

U.S. Const. amend. XIV, § 213, 14

U.S. Dep’t of Justice, Bureau of Justice Statistics, *National Crime Victimization Survey, 2018* (2019), <https://www.bjs.gov/content/pub/pdf/cv18.pdf>7

STATEMENT OF INTEREST

The National Women’s Law Center (“NWLC”) is a nonprofit legal advocacy organization, founded in 1972, that fights for gender justice in the courts, in public policy, and in society. NWLC advocates to ensure that women can live free of sexual harassment, including assault, in the workplace, schools, healthcare settings, and beyond. NWLC has participated as counsel or *amicus curiae* in a range of cases before the Supreme Court and the federal Courts of Appeals to ensure that all individuals may enjoy the protections against sex discrimination as promised by the law. The NWLC Fund houses and administers the TIME’S UP Legal Defense Fund, which improves access to justice for those facing workplace sex harassment, including through grants to support legal representation.¹ NWLC submits this brief alongside 30 organizations committed to gender justice in support of Plaintiff-Appellee Nicole Chase.² This brief highlights barriers faced by sexual assault survivors and the gender bias, including harmful sex-based stereotypes, that often

¹ The Fund has provided support for Plaintiff-Appellee’s representation in this matter.

² No party’s counsel authored this brief in whole or in part. No party or party’s counsel contributed money intended to fund preparing or submitting the brief. Counsel for the opposing parties have consented to the filing of this brief. Terry Fromson of Women’s Law Project; NWLC staff including Maya Raghu, Julie Vogtman, Diana Ramirez, Elizabeth Tang, Phoebe Wolfe, and Samone Ijoma; and Pam Shores, Stephanie Sebastian, Mary Han, and Kunal Kanodia of Linklaters LLP also contributed to this brief.

underlie law enforcement's response to sexual assault, as demonstrated by this case. Amici urge the Second Circuit to affirm the district court's decision.

SUMMARY OF ARGUMENT

Sexual assault is widespread in the United States, as detailed herein, and millions of survivors live with resulting trauma. This trauma is often compounded by gender bias in institutional responses to sexual assault, including by law enforcement. Survivors are often disbelieved, shamed, and punished for coming forward. In the law enforcement context, gender bias may lead to serious failures to protect sexual assault survivors—the majority of whom are women—and violate the Constitution's protections against sex discrimination.

In this case, Chase reported her sexual assault to law enforcement in order to protect her safety and seek accountability for her assailant. Instead of investigating, Defendants assumed from the outset that she was lying and ultimately punished Chase by bringing criminal charges *against her* for allegedly making a false statement. In this brief, amici highlight: (1) the scope and impact of sexual assault on women; (2) how gender bias can impact law enforcement's response to sexual assault; (3) how Chase's behavior is consistent with a range of behaviors of sexual assault survivors; and (4) how Defendants' response to Chase's sexual assault reflected unlawful reliance on gender bias. Amici ask this Court to affirm the district court's opinion that a jury could reasonably conclude that Defendants' response

evidences unlawful motivation by gender bias, and that, accordingly, Defendants are not entitled to qualified immunity on Plaintiff's equal protection claim.³

STATEMENT OF KEY FACTS

On May 6, 2017, Chase ("Plaintiff-Appellee" or "Plaintiff"), a 27-year-old single mother, was sexually assaulted by Calvin Nodine, the owner of Nodine's Smokehouse, the restaurant where she worked. (J.A. 564-65; J.A. 699). Nodine had repeatedly made offensive sexual comments to her and grabbed her buttocks during her shift. (J.A. 258-59; J.A. 563-64, 585). As she was about to leave after her shift, Nodine tried to hug her and asked, in an offensive and sexual manner, if there was "anything else" she wanted; she said no. (P.S.A. 38). Hearing another employee nearby, Nodine physically pulled Chase into the men's bathroom, locked the door, and told her to be quiet. (J.A. 568). He then exposed his penis, told her to "suck it," and repeatedly pushed his penis into her face. (J.A. 568; P.S.A. 40). Feeling fearful and powerless to resist her boss's advances, Chase engaged in nonconsensual oral sex. (J.A. 699). Chase then pushed Nodine away and fled. (J.A. 568-69).

That night, Chase told a friend and her mother about the incident (J.A. 342-343; J.A. 922); worried about their reactions, however, she did not mention the nonconsensual oral sex. (J.A. 699). The following morning, she reported the

³ Amici seek affirmance of the district court opinion as to all remaining claims and focus this brief on the equal protection claim.

incident to the Canton Police Department, again without including this aspect. (J.A. 561-92). Officer Adam Gompper interviewed Chase in the police station lobby and in front of her mother. (J.A. 561-92; J.A. 179:2-13 (Chase Deposition Tr.)). Chase told Gompper that she was unsure about filing a complaint because it would mean losing her job and that she feared facing Nodine in court because “he’s a rich man.” (J.A. 568-69). Gompper said he didn’t think “it reaches the level of a sex assault” and she would need to make a formal report for the police to investigate. (J.A. 575).

On May 11, 2017, Chase gave the police a written statement that Nodine verbally sexually harassed her, grabbed her buttocks, and physically pulled her into the men’s room to try to force his penis into her mouth. (J.A. 258-60). Beyond that, she did not describe the nonconsensual oral sex in this statement. Two co-workers also provided statements corroborating Chase’s account of Nodine’s offensive and harassing conduct in the hours before her assault. (J.A. 262 (Archer’s Statement); J.A. 278 (Rouleau’s Statement)).

On May 18, 2017, Detective John Colangelo interviewed Nodine, with his attorney. Colangelo’s approach was friendly: he discussed golf, bragged about how he had brought false statement charges against a woman reporting sexual assault, and suggested that he could do the same here. (J.A. 815-19, 871). Addressing Chase’s allegations, he asked, “what’s this girl’s deal?” and described Nodine’s

offensive sexual comments as “flirtation.” (J.A. 823, 853; S.A. 10). Nodine initially claimed that he had no sexual contact with Chase and said Chase’s allegation that he pulled her into the bathroom and exposed himself was “bullshit.” (J.A. 838). Colangelo then suggested that Nodine could say, instead, that the sex was consensual, and that Chase was trying to get money from him. (J.A. 841-42).

After consulting with his attorney, Nodine offered a radically different story: that *Chase* pulled *Nodine* into the men’s bathroom and performed oral sex on him. (J.A. 848-49). Colangelo accepted this account, and suggested, sympathetically, that he understands that married men lie to him to conceal affairs. (J.A. 841, 882-83). Colangelo then asked for an invitation to play golf at Nodine’s attorney’s country club. (J.A. 888). Colangelo reassured Nodine, “you’re not a menace to society,” and that Chase’s complaint didn’t “have to be pushed through.” (J.A. 890).

In a second police interview on June 21, 2017, through tears, Chase described submitting to nonconsensual oral sex, and explained that she had omitted this aspect because she was scared and ashamed. (J.A. 699, 702). She also told Colangelo she was suicidal. (J.A. 700). In response, Colangelo told her that making a sworn false statement is a crime. (J.A. 728-29).

Defendants immediately concluded, without further investigation, that there was no probable cause to arrest Nodine and closed their case against him. (J.A. 921;

J.A. 928; *see also* J.A. 613-14 (Garcia Report)). Instead, on July 7, 2017, Colangelo signed an affidavit for an arrest warrant *for Chase*, for making a False Statement in the Second Degree. (J.A. 517-25). After many attempts to speak with Defendants to update her initial written statement went ignored, Chase e-mailed a revised statement to Defendants on July 31, 2017. (J.A. 957-60). Yet, Colangelo continued to pursue charges against Chase.⁴

On April 17, 2018, Chase brought a case in state court⁵ against the Town of Canton, Connecticut; Colangelo; and Gompper (the “Town Defendants”); as well as Nodine’s Smokehouse and Nodine (J.A. 25, 80); raising Constitutional claims for false arrest, malicious prosecution, and equal protection, and state law claims. (J.A. 65-77). The Town Defendants moved for summary judgment, relying, in part, on qualified immunity as a defense. (J.A. 113-15). The district court denied the motion, concluding that the Town Defendants’ response to Plaintiff’s sexual assault

⁴ Without any previous warning by Defendants that she was the target of a criminal investigation and that a warrant had been drafted against her, Chase was arrested on September 8, 2017. After an initial court appearance by Chase on October 8, 2017, the criminal charges against Chase were ultimately resolved through the State Attorney’s Office entering a *nolle prosequi* on November 8, 2017. The *nolle prosequi* was not the product of a plea agreement or negotiations.

⁵ The case was removed to federal court on July 23, 2018.

was so unreasonable and indicative of gender bias that they were not entitled to qualified immunity as to Plaintiff's equal protection claim.⁶ (S.A. 42-43, 47-48, 53).

ARGUMENT

I. GENDER BIAS IN LAW ENFORCEMENT'S RESPONSE TO SEXUAL ASSAULT IMPOSES ADDITIONAL HARM ON SURVIVORS.

A. Survivors Face Multiple Barriers to Reporting Sexual Assault, Including Gender Bias by Law Enforcement

Sexual assault is widespread; in the United States, someone is sexually assaulted every 73 seconds, and, on average, 433,648 individuals are sexually assaulted each year.⁷ Over 90 percent of sexual assault victims are women.⁸ More than one-third of women in the United States reported unwanted sexual contact in their lifetime, compared to one-fifth of men.⁹ Approximately one in five women report experiencing completed or attempted rape in their lifetime, compared to 2.6

⁶ The Town Defendants appealed the district court's decision, and thus are Defendants-Appellants in this action, and referred to herein as the Defendants.

⁷ Rape, Abuse, and Incest National Network (RAINN), *Scope of the Problem: Statistics*, <https://www.rainn.org/statistics/scope-problem> (last visited Mar. 20, 2021), citing the U.S. Dep't of Justice, Bureau of Justice Statistics, *National Crime Victimization Survey, 2018*, (2019), <https://www.bjs.gov/content/pub/pdf/cv18.pdf>.

⁸ *National Intimate Partner and Sexual Violence Survey: 2015 Data Brief – Updated Release*, CDC (2018), <https://www.cdc.gov/violenceprevention/pdf/2015data-brief508.pdf>.

⁹ *Id.*

percent of men.¹⁰ Sexual assault in the United States is also significantly underreported to law enforcement.¹¹ Only 33.9 percent of rape and sexual assault incidents were reported to law enforcement in 2019,¹² compared to 46.5 percent of all violent crimes, excluding simple assault.¹³ Survivors may not report sexual assault to law enforcement because of fear of reprisal, economic or emotional dependence on their assailant, or distrust in the criminal justice system for a variety of reasons.¹⁴ Survivors may also expect that their experiences will be discounted or

¹⁰ *Id.*

¹¹ *Sexual Assault Survivors' Rights Act* (incorporated into *Adam Walsh Reauthorization Act of 2016*), 114th Cong. Pub. L. 236 (2016) (establishing federal statutory rights for survivors of sexual assault and rape by changing how rape kits are processed and creating a bill of rights for victims); *Adam Walsh Reauthorization Act of 2016*, 162 Cong. Rec. 18, S3043-S3047 (daily ed. May 3, 2016). Sexual assault is “one of the most difficult crimes to prosecute. For starters, it is the most underreported crime in our country. The Department of Justice estimates that nearly 70 % of attacks go unreported and only a small percentage of perpetrators go to prison.” *Id.* (statement of Sen. Jeanne Shaheen).

¹² Rachel E. Morgan & Jennifer L. Truman, *Criminal Victimization, 2019*, U.S. Dep't of Justice, Bureau of Justice Statistics, 8, Tbl. 6 (Sept. 2020), <https://www.bjs.gov/content/pub/pdf/cv19.pdf>.

¹³ *Id.*

¹⁴ For example, survivors of color and LGBTQ survivors may also distrust the criminal justice system because of police violence against Black and brown people and bias against LGBTQ survivors. *See, e.g.*, Samone Ijoma, *False Promises of Protection: Black Women, Trans People & the Struggle for Visibility as Victims of Intimate Partner and Gender Violence*, 18 U. Md. L.J. of Race, Relig., Gender & Class 255, 281-83 (2018) (“The strained relationship between Black women and law enforcement, resulting from a long history of violence at the hands of police officers, makes many Black women who are abused by their significant others hesitant to call the police at all.” (citing Andrea J. Ritchie, *Invisible No More*, 253 n.1 (Beacon Press 2017)) (highlighting the strained

disbelieved.¹⁵ Shame is also a significant deterrent that may make survivors reluctant to come forward,¹⁶ or cause them to minimize or deny the abusive behavior.¹⁷

relationship between police and women of color)); *Sexual Violence & Individuals Who Identify as LGBTQ*, National Sexual Violence Resource Center (NSVRC) (2012), https://www.nsvrc.org/sites/default/files/Publications_NSVRC_Research-Brief_Sexual-Violence-LGBTQ.pdf; *Protected and Served? Police*, Lambda Legal (2014), <https://www.lambdalegal.org/protected-and-served/police>; Amanda Taub, *After Sarah Everard's Killing, Women's Groups Want Change, Not More Policing*, N.Y. Times (Mar. 21, 2021), <https://www.nytimes.com/2021/03/21/world/europe/sarah-everard-police-uk.html?action=click&module=Top%20Stories&pgtype=Homepage> (discussing rising frustrations in the U.K. after the killing of Sarah Everard and noting reasons women may distrust the criminal justice system).

¹⁵ This expectation, and its impact as a barrier to reporting, is even more pronounced for women of color, and particularly Black survivors, as their reports are even less likely to be believed than those of white survivors. See Jennifer C. Nash, *Black Women and Rape: A Review of the Literature*, Brandeis Univ. Feminist Sexual Ethics Project, 1, 7 (June 12, 2009), <https://www.brandeis.edu/projects/fse/slavery/unitedstates/slav-us-articles/nash2009.pdf> (stating “jurors are more likely to believe that a white survivor’s assailant is guilty than a black woman’s assailant” and noting a “lengthy cultural history of disbelieving black women”). See also Elizabeth Kennedy, *Victim Race and Rape: a Review of Recent Research*, Feminist Sexual Ethics Project (2003), <https://www.brandeis.edu/projects/fse/slavery/united-states/slav-us-articles/kennedy-full.pdf> (noting that some studies indicate that African American rape victims are often perceived as less credible than white victims).

¹⁶ Beverly Engel, *Why Don't Victims of Sexual Harassment Come Forward Sooner?* Psychology Today (Nov. 16, 2017), <https://www.psychologytoday.com/us/blog/the-compassion-chronicles/201711/why-dont-victims-sexual-harassment-come-forward-sooner>.

¹⁷ *Id.*

Contrary to popular belief, most abusers in sexual assault cases are individuals known to survivors. For example, 51.1 percent of female survivors are assaulted by an intimate partner and 40.8 percent by an acquaintance.¹⁸ Additionally, the already low reporting rate to law enforcement decreases to 27 percent where the abuser is a friend or acquaintance, and to 24 percent where the abuser is an intimate partner.¹⁹ Survivors are less likely to be believed when they report abuse by someone known to them,²⁰ and in that context, have an even greater fear of retaliation.²¹

While sexual assault is common, some law enforcement officers are predisposed to believe that women lie about sexual assault.²² The statement of one Georgia police officer—quoted in an academic article about the impact of sex-based

¹⁸ *Sexual Violence by any Perpetrator*, The National Intimate Partner and Sexual Violence Survey: 2010 Summary Report, 68 (Nov. 2011), https://www.cdc.gov/violenceprevention/pdf/NISVS_Report2010-a.pdf.

¹⁹ Timothy Hart & Callie M. Rennison, *Reporting Crime to the Police, 1992-2000*, U.S. Dep't of Justice, Bureau of Justice Statistics (2003), <https://www.bjs.gov/content/pub/pdf/rcp00.pdf>.

²⁰ Cf. Susanne Schwarz, et al., *(Sex) Crime and Punishment in the #MeToo Era: How the Public Views Rape*, Pol. Behav. (May 6, 2020), <https://doi.org/10.1007/s11109-020-09610-9>; Claire R. Gravelin, et al., *Blaming the Victim of Acquaintance Rape: Individual, Situational, and Sociocultural Factors*, 9 *Frontiers in Psychol.* 2422 (Jan. 21, 2019), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6348335/> (noting that survivors of acquaintance rape are more likely to be blamed for their assault).

²¹ Richard Felson & Paul Philippe Parè, *The Reporting of Domestic Violence and Sexual Assault by Nonstrangers to the Police*, 67-3 *J. of Marriage and Family* 597, 607 (Aug. 2005).

²² See Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 *U. Pa. L. Rev.* 1, 29 (2017).

stereotypes on law enforcement's response to sexual assault—is illustrative of such false and harmful assumptions: “[m]ost of these sexual assaults are women waking up the next morning with a guilt complex. . . . That ain’t rape, that’s being stupid. When the dust settles, it was all consensual.”²³ At the same time, false sexual assault complaints are exceedingly rare; it is estimated that only between two and eight percent of all complaints of sexual assault are false.²⁴ Despite this evidence, police often assume that survivors are lying and wrongly dismiss reports as false, and in some cases, as in this one, even pursue charges against survivors for false reports.²⁵ These gender-biased practices and assumptions greatly undermine law enforcement's response to sexual assault and create even more barriers for survivors to reporting assault.²⁶

²³ *Id.* at 11.

²⁴ See Kimberly A. Lonsway, et al., *False Reports: Moving Beyond the Issue to Successfully Investigate and Prosecute Non-Stranger Sexual Assault*, 2-3 (2009), <https://www.nsvrc.org/sites/default/files/publications/2018-10/Lisak-False-Reports-Moving-beyond.pdf>; David Lisak, et al., *False Allegations of Sexual Assault: an Analysis of Ten Years of Reported Cases*, 16 *Violence Against Women* 1318 (2010).

²⁵ Lisak, at 1318, 1321.

²⁶ *False Reporting: Overview*, NSVRC (2012), https://www.nsvrc.org/sites/default/files/Publications_NSVRC_Overview_False-Reporting.pdf.

B. Gender-Biased Responses to Sexual Assault by Law Enforcement Can Violate the Equal Protection Clause.

Gender bias refers to sex-based assumptions and stereotypes that may affect perceptions, actions, or decision-making.²⁷ See, e.g., *United States v. Virginia*, 518 U.S. 515, 516 (1996); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251–52 (1989). In the law enforcement context, such bias may be predicated on sex-based stereotypes about survivors: for example, false and harmful assumptions that survivors are typically lying. Gender bias may affect law enforcement’s perceptions of, and consequently, their responses to, reports of sexual assault.²⁸ Such gender bias may present as failures to adequately investigate sexual assault complaints, misclassification or undercounting of sexual assault cases, and treating victims and witnesses as suspects rather than as legitimate sources of information.²⁹ Such biased practices harm sexual assault survivors, who are predominantly women.

The Equal Protection Clause of the Fourteenth Amendment prohibits states from “deny[ing] to any person within its jurisdiction the equal protection of the

²⁷ *Identifying and Preventing Gender Bias in Law Enforcement Response to Sexual Assault and Domestic Violence*, U.S. Dep’t of Justice, 3 (2015), <https://www.justice.gov/opa/file/799366/download> (hereinafter *DOJ Guidance*).

²⁸ See *id.*; *Rape in the United States: The chronic Failure to Report and Investigate Rape Cases: Hearing Before the Subcomm. On Crime and Drugs of the Senate Comm. On the Judiciary*, 111th Cong., 2d Sess., 6-7 (Sept. 14, 2010) (statement of Carol E. Tracy, Executive Director, Women’s Law Project).

²⁹ See *DOJ Guidance*, *supra* n.27.

laws.” U.S. Const. amend. XIV, § 2; *see also Plyler v. Doe*, 457 U.S. 202, 216 (1982) (“[A]ll persons similarly circumstanced shall be treated alike.”) (internal citation omitted). This provision empowers federal courts “to make certain that state officials performed their duty of protection” against vulnerable groups.³⁰ The state’s protection against private violence lies at the heart of the Equal Protection Clause,³¹ which also protects against sex discrimination. *See, e.g., Reed v. Reed*, 404 U.S. 71 (1971); *Virginia*, 518 U.S. at 515. Sex-based classifications animated by harmful sex stereotypes fail constitutional muster. *See Virginia*, 518 U.S. at 516; *Frontiero v. Richardson*, 411 U.S. 677, 685 (1973). When the state acts based on harmful stereotypes about women, it “perpetuate[s] the legal, social, and economic inferiority of women.” *Virginia*, 518 U.S. at 534.³² Sex discrimination thus includes conduct

³⁰ Alfred Avins, *Equal Protection against Unnecessary Police Violence and the Original Understanding of the Fourteenth Amendment: A Comment*, 19 Buff. L. Rev. 599, 600-01 (1970).

³¹ Deborah Tuerkheimer, *Underenforcement as Unequal Protection*, 57 B.C.L. Rev. 1287, 1299 (2016), <http://lawdigitalcommons.bc.edu/bclr/vol57/iss4/>; Robin West, *Toward an Abolitionist Interpretation of the Fourteenth Amendment*, 94 W. VA. L. Rev. 111, 141 (1991) (“Drastically unequal police protection quite directly implies drastically unequal protection of the laws. . . .”).

³² *See* Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y. Univ. L. Rev. 83, 145 (Apr. 2010); *How Gender Stereotyping Affects the Enjoyment of Human Rights*, United Nations Office of the High Commissioner on Human Rights, <https://ohchr.org/EN/Issues/Women/WRGS/Pages/WrongfulGenderStereotyping.aspx> (last visited Mar. 20, 2019).

that is motivated by sex-based stereotypes. *See, e.g., Hopkins*, 490 U.S. at 251–52.³³ Evidence of sex discrimination may include “some circumstantial or other basis for inferring that incidents that may appear sex-neutral on their face were in fact discriminatory.” *Alfano v. Costello*, 294 F.3d 365, 378 (2d Cir. 2002).

Additionally, the constitutional right to have “police services administered in a non-discriminatory manner” is violated when a state actor denies such protection to disfavored persons. *Whren v. United States*, 517 U.S. 806, 813 (1996); *DeShaney v. Winnebago Cty. Dep’t of Social Servs.*, 489 U.S. 189, 197 n.3 (1989); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Myers v. Cty. of Orange*, 157 F.3d 66 (2d Cir. 1998). This right extends to women, who because of the high incidence of sexual violence against them, are uniquely vulnerable to police failures (and as here, retaliation) in the face of sexual violence.³⁴ *See, e.g., Thurman v. City of Torrington*, 595 F. Supp. 1521, 1527 (D. Conn. 1984) (finding that police failure to protect women victims of sexual assault was “tantamount to an administrative classification used to implement the law in a discriminatory fashion”). Police officers’ statements may also be

³³ Federal courts’ analysis of sex discrimination under the Equal Protection Clause follows the analysis regarding sex discrimination claims brought under Title VII. *See, e.g., Naumovski v. Morris*, 934 F.3d 200, 212 (2d Cir. 2019).

³⁴ The impact of such police inaction is likely to be even greater for Black women, who may face intersecting sex discrimination and systemic race discrimination by law enforcement. For example, studies show that prosecutors routinely fail to file charges when the victim is a Black woman (charges filed in 75 percent of cases where an unarmed assailant attacked a white woman compared to 34 percent of cases where the victim was Black). *See Kennedy, supra* n.15.

evidence of gender bias. *See, e.g., Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 701 (9th Cir. 1990) (finding that officer's statement that he "did not blame [the plaintiff's] husband for hitting her, because of the way she was 'carrying on'" was sufficient to show discriminatory intent); *Doe v. Calumet City*, 641 N.E.2d 498, 510 (Ill. 1994) (noting officer's reference to adult female plaintiff as a "girl" as evidence that he discredited her statement based on gender).

II. PLAINTIFF'S RESPONSE TO HER SEXUAL ASSAULT IS CONSISTENT WITH THE RANGE OF BEHAVIORS OF SEXUAL ASSAULT SURVIVORS.

A. Power Imbalances Between an Abuser and a Survivor May Impact Survivors' Responses.

Power disparities between an abuser and a survivor are a key contributor to workplace sexual harassment, including sexual assault.³⁵ Women frequently experience sexual harassment by people in positions of authority, such as their supervisors.³⁶ In this context, because unequal power can undermine "the entire *notion* of consent,"³⁷ traditional conceptions of consent require scrutiny. Power

³⁵ Chai R. Feldblum & Victoria A. Lipnic, *Select Task Force on the Study of Harassment in the Workplace*, U.S. EEOC (June 2016), https://www.eeoc.gov/select-task-force-study-harassment-workplace#_Toc453686298.

³⁶ *See, e.g.,* Anne Lawton, *The Emperor's New Clothes: How the Academy Deals with Sexual Harassment*, 11 *Yale J.L. & Feminism* 75, 86 (1999).

³⁷ Hilary M. Schor, *Storytelling in Washington, D.C.: Fables of Love, Power, and Consent in Sexual Harassment Stories*, 65 *S. Cal. L. Rev.* 1347, 1350 (1992) (emphasis in original).

disparities affect a survivor's ability to counter unwelcome sexual conduct, and force a survivor to choose between submitting to unwelcome sexual advances or risking significant consequences from resisting or reporting.³⁸ Accordingly, a survivor's lack of physical resistance or reluctance to report should not be viewed as indicators of affirmative consent.

Power disparities are particularly relevant to sex harassment in the restaurant industry, where approximately 86 percent of women report receiving unwanted sexual attention from management, with two-thirds experiencing some form of sexual harassment from a restaurant owner, manager, or supervisor.³⁹ From 2012 to 2016, accommodation and food services was one of the top three industries where women filed the highest numbers of sexual harassment, comprising 13.8 percent of all claims filed.⁴⁰ Up to 40 percent of women in the fast food industry have

³⁸ The Restaurant Opportunities Centers United and Forward Together, *The Glass Floor: Sexual Harassment in the Restaurant Industry*, 3 (Oct. 7, 2014), <https://forwomen.org/wp-content/uploads/2015/09/The-Glass-Floor-Sexual-Harassment-in-the-Restaurant-Industry.pdf>.

³⁹ *Id.*

⁴⁰ Jocelyn Frye, *Not Just the Rich and Famous: The Pervasiveness of Sexual Harassment across industries affects all workers*, Center for American Progress (Nov. 20, 2017), <https://www.americanprogress.org/issues/women/news/2017/11/20/443139/not-just-rich-famous/>. See *Out of the Shadows: An Analysis of Sexual Harassment Charges Filed by Working Women*, NWLC 16-17 (Aug. 2018), <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2018/08/SexualHarassmentReport.pdf>.

experienced unwanted sexual behaviors on the job and one-third have experienced multiple forms of harassment, including sexual comments, unwanted touching, sexual assault, and rape.⁴¹

Women with lower minimum wages and lower status are particularly vulnerable to harassment given the frequent consequences of reporting such as loss of income or employment.⁴² And women are especially likely to hold lower status jobs in the restaurant industry; women hold over half of entry-level positions in the industry, but represent only 18 percent of its leadership.⁴³ The nature of pay in the restaurant industry—with low wages and reliance on tips for many workers—exacerbates these inequities. Women restaurant workers typically make 75 cents to every dollar paid to men.⁴⁴ And over half of tipped workers said that because they

⁴¹ *Id.*

⁴² Elaine Lewis, *Who Is at Highest Risk of Sexual Harassment?* ACLU (Jan. 2018), <https://www.aclu.org/blog/womens-rights/womens-rights-workplace/who-highest-risk-sexual-harassment>.

⁴³ Nancy Luna, *Report: Gender Gap Widens in Key Food Industry Leadership Roles*, National Restaurant News (Mar. 8, 2019), <https://www.nrn.com/workforce/report-gender-gap-widens-key-food-industry-leadership-roles>.

⁴⁴ DataUSA, *Restaurants and Food Services*, <https://datausa.io/profile/naics/restaurants-food-services#workforce> (last visited Mar. 20, 2021).

depend on tips for their income, they have tolerated unwelcome customer behaviors.⁴⁵

Consistent with these concerns, Chase, a restaurant worker, repeatedly expressed fear of losing her job if she reported her assault by her boss. (J.A. 569; J.A. 716). As a single mother, she depended on her salary to support her young child. (J.A. 260; J.A. 569). The plainly evident power disparities between Chase and Nodine contributed both to Chase's sexual harassment and assault by Nodine and her initial reluctance to fully disclose the entire scope of the sexual assault.

B. Shame, Fear, and Trauma Relating to Sexual Assault May Impact a Survivor's Reporting and Recounting of the Assault.

Chase initially downplayed the severity of the sexual assault by describing only Nodine's groping, offensive sexual comments, and attempted sexual assault, because she felt shame about the nonconsensual oral sex. (J.A. 700, 729)⁴⁶ She also feared retaliation, given the power imbalance between her and Nodine. Chase's

⁴⁵ *Id.* See also Catrin Einhorn & Rachel Abrams, *The Tipping Equation*, N.Y. Times (Mar. 12, 2018), <https://www.nytimes.com/interactive/2018/03/11/business/tipping-sexual-harassment.html>; NWLC, *supra* n.40, ; Stefanie K. Johnson & Juan M. Madera, *Sexual Harassment Is Pervasive in the Restaurant Industry. Here's What Needs to Change*, Harv. Bus. Rev. (Jan. 18, 2018), <https://hbr.org/2018/01/sexual-harassment-is-pervasive-in-the-restaurant-industry-heres-what-needs-to-change>.

⁴⁶ J.A. 700 ("I didn't want to admit to doing something I didn't want to do."); J.A. 729 ("I've been trying to hide it and all the emotions from everybody because they all don't understand why I'm so stressed out, well, like, nothing happened, so—but, in my head, like, if you only knew.").

reporting of the assault to law enforcement was consistent with the range of behavior of sexual assault survivors. There is no typical behavior of a survivor. Indeed, research reveals a wide range of behaviors and feelings in the aftermath of sexual assault, and it is erroneous to assume that a survivor would exhibit any particular set of behaviors. After an assault, survivors may suffer a variety of physical, psychological, and emotional symptoms, immediately and in the long-term,⁴⁷ including fear, anxiety, anger, self-blame, dissociation, guilt, loss of trust, flashbacks, post-traumatic stress disorder, depression, phobias, panic disorder, and obsessive-compulsive disorder.⁴⁸ A sexual assault survivor may experience all, some, or none of these reactions.⁴⁹

Survivors may behave in a manner that appears counterintuitive, but is in fact a normal expression of some of the many strategies for coping with the stress of

⁴⁷ Patricia L. Fanflik, *Victim Responses to Sexual Assault: Counterintuitive or Simply Adaptive?*, Am. Prosecutors Research Inst., Nat'l Dist. Attorneys Ass'n, 5 (2007) (hereinafter APRI), https://www.nsvrc.org/sites/default/files/publications/2018-10/pub_victim_responses_sexual_assault.pdf (quoting Patricia Frazier, *The Role of Attributions and Perceived Control in Recovery from Rape*, 5 J. of Pers. & Interpersonal Loss 203, 204 (2000)); Shirley Kohsin Wang, et al., Research Summary- *Rape: How Women, the Community and the Health Sector Respond*, Sexual Violence Research Initiative, 2 (2007), <https://svri.org/sites/default/files/attachments/2016-01-19/Rapehowwomenbooklet.pdf>.

⁴⁸ Wang, *supra* n.47.

⁴⁹ APRI, *supra* n.47, at 5.

assault.⁵⁰ These behaviors may include avoidance strategies, including denying that the assault occurred.⁵¹ A survivor may be more likely to use avoidance strategies if she is overwhelmed by the stress of the assault, engages in self-blame, or was subjected to physical force during the assault.⁵² These avoidance strategies may, in turn, be misperceived by others as deception by the survivor.⁵³

Police officers investigating sexual assault should also understand the impact of trauma on survivors, and adopt trauma-informed practices in their interviews with survivors.⁵⁴ Due to the neurobiological impacts of trauma, for example, survivors often cannot fully or coherently recount details of the assault and may make

⁵⁰ See Jennifer Gentile Long, *Explaining Counterintuitive Victim Behavior in Domestic Violence and Sexual Assault Cases*, APRI, 1 (2006), <http://www.ncdsv.org/images/Explaining%20Counterintuitive%20victim%20behavior.pdf>; Kimberly A. Lonsway, *The Use of Expert Witnesses in Cases Involving Sexual Assault*, Violence Against Women Online Resources, 10 (Mar. 2005), <https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.208.7193&rep=rep1&type=pdf>.

⁵¹ APRI, *supra* n.47, at 15.

⁵² *Id.*, at 16.

⁵³ *Id.*, at 10.

⁵⁴ See, e.g., *Successful Trauma Informed Victim Interviewing*, Int'l Association of Chiefs of Police (IACP), <https://www.theiacp.org/sites/default/files/2020-06/Final%20Design%20Successful%20Trauma%20Informed%20Victim%20Interviewing.pdf> (hereinafter IACP *Successful Trauma Informed-Victim Interviewing*).

incomplete or inconsistent statements; and they may later try to clarify.⁵⁵ Further, research on the neurobiology of trauma and its impact on memory shows that victims may have an “enhanced memory” of specific sensory details,⁵⁶ such as the smell of sweat and semen that Chase repeatedly described to Defendants. (J.A. 259; J.A. 722). Law enforcement should be sensitive to such realities in investigating reports of sexual assault—and not, as Defendants did in this case, punish survivors whose statements are made more complete over time or include inconsistencies. Such retaliation against survivors will not only further discourage others from coming forward, but also hinder law enforcement’s ability to effect justice for those who have overcome the many barriers to reporting sexual assault.

III. DEFENDANTS’ RESPONSE TO PLAINTIFF’S SEXUAL ASSAULT REFLECTED UNLAWFUL RELIANCE ON GENDER BIAS.

A. Defendants’ Investigation of Plaintiff’s Reports of Sexual Assault Reflected Gender Bias Throughout, Including by Sharp Deviation from Generally Accepted Law Enforcement Standards.

Defendants displayed gender bias throughout,⁵⁷ including through sharp deviation from generally accepted law enforcement standards for investigating

⁵⁵ Lori Haskell & Melanie Randall, *The Impact of Trauma on Adult Sexual Assault Victims*, Dep’t of Justice Canada (2019), https://www.justice.gc.ca/eng/rp-pr/jr/trauma/trauma_eng.pdf.

⁵⁶ *Id.*

⁵⁷ *See* J.A. 602-15 (Garcia Report) and J.A. 745-58 (Donegan Report) (detailing the ways in which Defendants’ response to Chase’s sexual assault departed from generally accepted standards for the law enforcement response to sexual assault).

sexual assault.⁵⁸ This bias was apparent, for example, in their statements and attitudes during the interviews of Chase and Nodine, their failures to ask Chase standard questions and adequately investigate the assault, and their offensive and false comments regarding Chase reporting the sexual assault for financial gain. Defendants' statements also reflected the faulty assumptions that survivors are often lying. For example, Colangelo said, "I go back to the #MeToo thing, you know it's people who don't tell the truth who make it so people who actually get sexually assaulted aren't believed." (J.A. 986 (Colangelo IA Interview Tr.)).

Throughout, Defendants were uninterested in Chase's accounting of the assault or her updates, and meanwhile, fed Nodine alternate stories to help his case. After Chase's initial report, Gompper already declared that he didn't think "it reaches the level of a sex assault." (J.A. 575). By contrast, after Nodine first denied outright that any sexual encounter had taken place, Colangelo responded by suggesting that describing it as a consensual sexual encounter would be a better approach. (J.A. 841-

⁵⁸ See, e.g., IACP Law Enforcement Policy Center, *Investigating Sexual Assaults, End Violence Against Women Int'l*, 3-11 (updated Oct. 2017), <https://evawintl.org/wp-content/uploads/IACPConceptsandIssuesPaper2017.pdf> (hereinafter IACP *Investigating Sexual Assaults*); IACP *Successful Trauma Informed-Victim Interviewing*, *supra* n.54; DOJ *Guidance*, *supra* n.27, at 10-22. See also J.A. 602-15 (Garcia Report) and J.A. 745-58 (Donegan Report) (describing generally accepted standards for the law enforcement response to sexual assault, and the ways in which Defendants' response to Chase's sexual assault departs from these standards).

42). After Colangelo’s coaching, Nodine spoke to his attorney and completely changed his story, this time saying that *Chase* had pushed *him* into the bathroom and spontaneously performed oral sex. (J.A. 848-49). Colangelo failed to question this complete flip-flop, even though two witnesses had corroborated Chase’s report of sexual assault. (J.A. 262 (Archer’s Statement); J.A. 278 (Rouleau’s Statement)). Indeed, Defendants continued to credit Nodine’s story even after he failed a private polygraph test and refused to take a police polygraph. (J.A. 156, ¶¶30-31).

In sum, Defendants’ dismissive attitude towards Chase differed spectacularly from their amicability towards Nodine.⁵⁹ A far cry from the type of victim-centered

⁵⁹ Defendants’ argument that the district court erroneously relied on the DOJ Guidance is without merit. Defendants argue that the court’s reliance on the DOJ Guidance does not “deserve the significance the court attaches to it” because Gompper and Colangelo did not *automatically* believe Nodine’s account over Chase’s description of the assault, which Defendants claim is evidenced by Colangelo’s questioning of Chase and her provision of “facts” that supported consensual oral sex. Defendants-Appellants App. Brief at 51-52, *Chase v. Nodine’s Smokehouse, Inc.*, No. 20-3234 (2d Cir. 2020), ECF No. 35. Defendants misconstrue the DOJ Guidance’s directive: “officers should not make statements or engage in acts that...exhibit any bias towards the victim based on gender...includ[ing] automatically believing that alleged assailant’s claim that the sex was consensual. . . .” *See DOJ Guidance, supra* n.27, at 52. The DOJ Guidance does not say, as Defendants mistakenly suggest, that the *only* way gender bias exists in a sexual assault investigation is if law enforcement completely discounts the survivor’s account and instead automatically accepts the assailant’s account. Rather, the DOJ Guidance instructs law enforcement not to make assumptions about the sexual assault nor be unfairly predisposed to disregard or disbelieve the survivor’s account of the events—which is precisely what Defendants did at every stage of their investigation of Chase’s assault.

and trauma-informed interview called for by generally accepted law enforcement standards, Gompper treated Chase with skepticism throughout. (J.A. 756 (Donegan Report); J.A. 609 (Garcia Report)). In stark contrast, Colangelo displayed an immediate affinity for Nodine and his lawyer. Colangelo spent the interview posturing about his police experience and bragging about how he handled prior sexual assault allegations, including turning a victim's sexual assault allegation into a false report case against the victim (J.A. 815-19; 871); he intimated that Chase's report could also be turned into a false report case, and reassured a relieved Nodine that this case "doesn't have to be pushed through, you're not a menace to society." (J.A. 871; J.A. 729; J.A. 890).

Whereas Chase had to recount the details of the sexual assault (i.e., Nodine groping her buttocks, making offensive sexual comments, and exposing his penis to her) in the public lobby of the police station and in front of her mother—subjecting Chase to further humiliation and shame (J.A. 561-92; J.A. 179:2-13 (Chase Deposition Tr.))—Nodine was interviewed in a private room. (S.A. 10 (citing to 05/18/2017 video, 0:52-3:50)). Colangelo even promised that he would not tell Nodine's wife and reassured Nodine, "guys do what guys do, trust me." (J.A. 841). Colangelo also expressed skepticism about Chase's report throughout Nodine's interview, referring to Nodine's offensive sexual comments as "flirtation," and asking, "what's the deal with this girl?" (J.A. 823, 853).

Defendants also failed to ask Chase basic questions. Defendants did not ask how and what Chase felt during her incident with Nodine, including whether she felt force, fear, and coercion, which are all standard questions an officer should ask any sexual assault victim. (J.A. 561-92; J.A. 622-735; *see also* J.A. 608, 612). Nor did they ask questions probing whether she felt pressured to submit to Nodine's advances or to the sexual act, even after Chase's statement that "there was never anything consensual" between her and Nodine, (J.A. 925; J.A. 686-87),⁶⁰ and that she feared losing her job for challenging her wealthy boss if she spoke out about the assault. (J.A. 568-69; J.A. 528).

Defendants also failed to do any follow-up investigation before deciding to exonerate Nodine and bring criminal charges against Chase, including failing to conduct the type of evidence collection that is routine for sexual assault investigations. For example, Defendants took no steps to preserve physical evidence of the assault, such as Chase's clothing (J.A. 609 (Garcia Report); J.A. 753 (Donegan Report)), and even after Chase reported nonconsensual oral sex, Defendants did not take crime scene photos or seek additional witness statements. (J.A. 607, 613 (Garcia Report)). This is especially concerning with a crime like

⁶⁰ *See also* J.A. 686-87 (Colangelo: "was there any relation between you and Calvin that were consensual prior to Saturday?" Chase: "Nothing.").

sexual assault, where there is a risk that evidence may rapidly deteriorate or disappear altogether.

Further, Defendants expressly speculated, unprompted, and falsely, that Chase was bringing this sexual assault claim for financial gain. Gompper suggested to Nodine that “one of the angles [he’s] looking at” is that Chase alleged sexual assault by Nodine in pursuit of money and commiserated that “everyone wants a slice of someone else’s pie.” (J.A. 851).

Accordingly, throughout every step of their response to Chase’s report of sexual assault, Defendants deviated from generally accepted law enforcement standards for responding to sexual assault and clearly demonstrated bias against women.

Finally, and perhaps most striking, rather than pursuing an investigation of Chase’s complaint of sexual assault and treating Nodine as the perpetrator of a violent crime, Defendants *criminally charged Chase* for an offense that she did not commit. Defendants were hyper-focused on how Chase did not include the nonconsensual oral sex aspect of the assault in her initial reports and framed this omission as equivalent to “lying,” and so, charged Chase for making a false statement—just as Colangelo said he had done in another sexual assault case. (J.A. 826, 871). Defendants persisted in pursuing criminal charges against Chase even after learning of the nonconsensual oral sex. (J.A. 285-93, ¶¶31-34).

Defendants' arrest of Chase for 'false reporting' clearly did not comport with required legal standards, and is another example of gender-based bias in this matter.⁶¹

B. Defendants Are Not Entitled to Qualified Immunity as to Plaintiff's Equal Protection Clause Claim.

In the context of law enforcement officers accused of equal protection violations, qualified immunity protects only those law enforcement officers who either did not violate a clearly established right or whose actions were objectively reasonable. *Benn v. Kissane*, 510 F. App'x 34, 37-38 (2d Cir. 2013). Here, the district court detailed multiple instances where Defendants violated clearly established rights and acted in a manner that a jury could find objectively unreasonable. The "right not to be prosecuted absent probable cause is not, and has not for some time, been in question." (S.A. 42 (quoting *Golino v. City of New Haven*, 950 F.2d 864, 870 (2d Cir. 1991))). Defendants "[were] objectively unreasonable" when they arrested Chase for making a false statement following her complaint of sexual assault. (S.A. 42). Accordingly, qualified immunity does not shield Defendants in this matter.

⁶¹ See, e.g., Plaintiff-Appellee App. Brief at 26-29, 39-54, *Chase v. Nodine's Smokehouse, Inc.*, No. 20-3234 (2d Cir. 2020), ECF No. 63; (P.S.A. 1-65). See also IACP *Investigating Sexual Assaults*, supra n.58. See also J.A. 607-08 (Garcia Report); J.A. 751-52 (Donegan Report).

Courts in other circuits have also recognized that qualified immunity does not protect officers who undermine sexual assault investigations based on an affinity for the suspect. *See, e.g., Reedy v. Evanson*, 615 F.3d 197, 224 (3d Cir. 2010) (finding that police officers were not entitled to qualified immunity from the Section 1983 claims of a rape victim who was unlawfully arrested for making false report of rape, theft, and receiving stolen property, as no reasonably competent officer would have concluded that warrant for her arrest should have been issued); *Snyder v. Smith*, 7 F. Supp. 3d 842, 867 (S.D. Ind. 2014). Indeed, courts have found that sabotaging a sexual assault investigation because of an affinity for the alleged perpetrator is so obviously unlawful that an officer would not even need “precedent to tell him that.” *See, e.g., Snyder*, 7 F. Supp. 3d at 867. No reasonable officer could “ever believe in good faith that such conduct was consistent with his duty to enforce the law evenhandedly.” *Id.* The same logic applies here: a reasonable jury could conclude that Defendants’ affinity for Nodine effectively invalidated their investigation of Chase’s sexual assault. (S.A. 35).

While qualified immunity permits officers to make reasonable mistakes, officers “will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have” acted in such a way. *Malley v. Briggs*, 475 U.S. 335, 341 (1986); *cf. Reedy*, 615 F.3d at 224. No reasonably competent officer would assume that a sexual assault survivor who displayed an initial reluctance to disclose

all of the details of a sexual assault was intentionally making false statements—and then persist, despite strong evidence to the contrary, in pursuing criminal charges against the survivor. (S.A. 43). This Court should affirm the district court’s correct conclusion that Defendants were not entitled to qualified immunity.

CONCLUSION

For these reasons and those argued by Plaintiff-Appellee, this Court should affirm the district court's decision, denying Defendants' Motion for Summary Judgment.

Respectfully submitted,
/s/Adam S. Lurie
Adam S. Lurie
Patrick C. Ashby
So Min Lee
LINKLATERS LLP
1290 Avenue of the Americas
New York, NY 10104
(212) 903-9000
adam.lurie@linklaters.com
patrick.ashby@linklaters.com
somin.lee@linklaters.com

Emily Martin
Sunu P. Chandy
Jennifer L. Mondino
NATIONAL WOMEN'S LAW CENTER
11 Dupont Circle, Suite 800
Washington, DC 20036
(202) 588-5180
emartin@nwlc.org
schandy@nwlc.org
jmondino@nwlc.org

CERTIFICATE OF COMPLIANCE

This brief complies with type-volume limitation of Second Circuit Rule 29.1(c) and 32. Federal Rule of Appellate Procedure 29.1(c) and Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7) because this brief contains 6,787 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2002 in Times New Roman 14-point font.

Dated: March 23, 2021

Respectfully submitted,

/s/Adam S. Lurie

Adam S. Lurie

CERTIFICATE OF SERVICE

I, hereby certify that on March 23, 2021 I electronically filed the foregoing Amici Brief In Support Of Plaintiff-Appellee with the Clerk of the Court of the United States Court Of Appeals for the Second Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/Adam S. Lurie

Adam S. Lurie