No. 19-3342

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN DOE

Plaintiff-Appellant,

v.

OBERLIN COLLEGE

Defendant-Appellee

Appeal from the United States District Court
for the Northern District of Ohio,
Case No. 1:17-cv-01335-SO

BRIEF OF APPELLANT JOHN DOE

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CORPORATE DISCLOSURE STATEMENT

John Doe is not an affiliate or subsidiary of a publicly owned corporation, nor is there a publicly owned corporation not a party to this appeal with a financial interest in the outcome.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Plaintiff-Appellant requests oral argument. This case involves a rapidly developing area of law. Oral argument will aid the Court by allowing the parties to explore the issues presented in this appeal and respond to any inquiries raised by the Court.

STATEMENT OF JURISDICTION

This is an appeal from a district court decision granting a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). This Court has jurisdiction under 28 U.S.C. § 1291. A timely notice of appeal was filed on April 16, 2019.

STATEMENT OF THE ISSUES

1. Did the district court err in concluding that Mr. Doe failed to plead facts supporting a plausible inference that his expulsion from Oberlin College was motivated in part by gender bias, as required to state an "erroneous outcome" claim under 20 U.S.C. § 1681(a) (commonly referred to as Title IX)?

2. Did the district court, after refusing to exercise supplemental jurisdiction over Mr. Doe's state law claims, err in dismissing Mr. Doe's state law claims where Mr. Doe separately pled diversity jurisdiction?

STATEMENT OF THE CASE

Mr. Doe filed an original complaint on June 23, 2017, and he was granted leave to file an Amended Complaint on February 26, 2018. The Amended Complaint advanced three claims stemming from Mr. Doe's wrongful expulsion from Oberlin for sexual assault: a state law claim for breach of contract alleging that Oberlin had violated its own student conduct policies in finding Mr. Doe guilty of the assault; a state law claim for negligence alleging that Oberlin had negligently conducted his disciplinary proceeding; and an "erroneous outcome" claim under Title IX, alleging that gender bias had at least partly motivated his conviction and expulsion. Mr. Doe pled both supplemental and diversity jurisdiction as bases for the district court's jurisdiction over his state law claims.

Oberlin moved to dismiss the Amended Complaint in its entirety on March 23, 2018. Mr. Doe opposed the motion on April 6, 2018, and Oberlin filed a reply in support of the motion on April 13, 2018. On September 11, 2018, Mr. Doe filed a Notice of Supplemental Authority regarding this Court's decision in *Doe v. Baum*, 903 F.3d 575, 586 (6th Cir. 2018), reversing a district court's dismissal of an erroneous outcome claim.

The court heard no oral argument on the motion before March 31, 2019. On that day it filed an order granting Oberlin's motion to dismiss, which order was entered on the docket at 12:02 a.m. on April 1. The order dismissed Mr. Doe's Title IX claim on its merits and with prejudice, concluding that Mr. Doe had failed to plead facts supporting an inference that his expulsion was motivated by gender bias. The court then dismissed Mr. Doe's state law claims without prejudice, stating that it was declining to exercise supplemental jurisdiction over them. Mr. Doe filed a timely notice of appeal on April 16, 2019.

FACTUAL ALLEGATIONS

A. Title IX at Oberlin

In late 2012, a female Oberlin student who had been sexually assaulted publicly complained that Oberlin had not punished the perpetrator severely enough and that the process had taken too long. RE 21-2, Amended Complaint, PageID #479, ¶ 36. Less than a month later, Oberlin's president convened a task force that

would spend 18 months revamping Oberlin's Sexual Misconduct Policy. RE 21-2, Amended Complaint, *id.*, ¶ 37. Professor Meredith Raimondo was appointed to the task force, and before its work was finished she was named Oberlin's Title IX Coordinator, the person who "'oversees the College's central review'" of sexual misconduct allegations "'and coordinates the College's compliance with Title IX.'" *Id.* ¶ 38. She would remain in that position until July 1, 2016, then supervised the Interim Title IX Coordinator who replaced her through the time that Mr. Doe's appeal was denied. *Id.*

The new policy was adopted on May 1, 2014. *Id.*, PageID #480, ¶ 40. Two months earlier, when the task force issued a draft of the new Policy, Ms. Raimondo commented that "[o]ne large emphasis of the policy . . . is to ensure that the needs of survivors are met" and that "a broad goal of the revisions" was to combat "rape culture." *Id.* ¶ 39. The ensuing fight against rape culture on behalf of survivors consisted primarily in instilling an unwavering belief in the truth of sexual misconduct allegations. Through at least March of 2015, Oberlin's faculty guides instructed faculty simply to believe claims of sexual assault, full stop. Am. *Id.*, PageID #480-81, ¶¶ 41-44. Even *after Rolling Stone*'s now-infamous "A Rape on Campus" had been discredited, Oberlin's student newspaper, *The Oberlin Review*, argued that doing anything but "believing" its protagonist, "Jackie," "would have been to play into rape culture." *Id.*, PageID #482-83, ¶¶ 46-47. And as of the

filing of the Amended Complaint, its counseling center continued to instruct faculty and students that "[i]f someone feels assaulted, she or he has been, regardless of the 'objective facts' surrounding the incident." *Id.*, PageID #481, ¶ 45.

One month after *The Oberlin Review* insisted for the second time that doubting "Jackie's" allegations against her male "attackers" would have played into rape culture, Ms. Raimondo made the first of several public statements indicating that gender bias informed her work as Oberlin's Title IX Coordinator. On May 26, 2015, she stated, "I come to this work as a feminist committed to survivor-centered processes." *Id.* PageID #488, ¶ 59. Then the next month, she stated in a panel discussion, in response to a panelist's discussion about the "middle category" of cases – "where we're not talking about predators . . . or sex with someone who is fundamentally unconscious" – that those cases were often called "grey areas," but "I myself am uncomfortable with that [term] ***because I think it's used too often to discredit particularly women's experiences of violence***." *Id.* She said on that same panel that Title IX serves to "visibilize [sic] gender-based harms and the ways in which that has predominantly affected women," and she identified the first goal of a Title IX hearing as providing "a safe supportive space for someone to ask, 'What are the harms you experienced and

how can we address them so you can continue your education?'" *Id.*, PageID #477, ¶ 57.

While Ms. Raimondo was overseeing Oberlin's new Policy, the federal government was placing extraordinary pressure upon schools nationwide to crack down hard on sexual assault, particularly on claims brought by women against men. *Id.*, PageID #484-86, ¶¶ 49-51. From July 2014 through at least October 2016, the head of the Education Department's Office for Civil Rights, Catherine Lhamon, threatened to cut schools' federal funding if they failed to do so. *Id.* ¶ 50. And on November 24, 2015, OCR brought that pressure directly to bear upon Oberlin, initiating a "systematic investigation" of its Title IX enforcement regime. *Id.*, PageID #483-84, ¶ 48.

B. The Incident

Not four months later, in the midst of that extraordinary pressure, Ms. Roe accused Mr. Doe of sexual assault. The two had met and danced together at a party in December 2015, after which they had consensual sex. *Id.*, PageID #490, ¶ 69. They had little interaction after that until the morning of February 28, 2016, *id.* ¶ 70, when Doe texted Roe to see what she was doing, *id.*, PageID #491-92, ¶ 72. They texted back and forth for 30 minutes, and Roe asked if she could come to Doe's room. *Id.* Roe's responses were prompt and coherent and she made just a single typo. *Id.*

On March 9, however, Roe would report to Ms. Raimondo that Doe had sexually assaulted her, because she had been too intoxicated to consent to sexual activity. *Id.*, PageID #493, ¶ 79. Oberlin's Policy does not prohibit all drunken sex; like almost every school, it prohibits sex only when someone is "incapacitated," an extreme state that Oberlin defines as being so "extremely drunk or extremely high" that one is "unable to control [one's] body or no longer understand[] who [one is] with or what [one is] doing." *Id.*, PageID #471, ¶¶ 20-21. To be responsible for sexual assault, it must be true that the student, "'or a sober, reasonable person in [his or her] position, knew or should have known that the Reporting Party was incapacitated." *Id.* ¶ 21.

Oberlin's investigation and hearing showed that Roe exhibited no signs of incapacitation immediately before the encounter. "Her 'speech was not slurred and she was steady on her feet,' according to one friend." *Id.*, PageID #492, ¶ 74. Another friend who knew her well asked her, "You good?" when she learned Roe intended to go to Doe's room, and was satisfied with Roe's answer: "Yeah." *Id.* She then watched Roe "mosey" to Doe's room by herself. *Id.*, PageID #495-96, ¶ 89. Roe herself testified that she exhibited no outward signs of intoxication in Doe's room; she testified to being coherent, in control of her body, and responding in real time to what was taking place. *Id.*, PageID #496-98, ¶¶ 90-103. After she and Doe engaged in small talk, they kissed for 10-15 minutes on his bed and then

had vaginal intercourse with a condom for another 15 minutes. *Id.*, PageID #492, ¶¶ 75-76. Roe then said that the sex was uncomfortable because she was "'dry down there.'" *Id.*, PageID #493, ¶ 77. "'I'm not very sober right now,'" she said by way of explanation. *Id.* When later asked at the hearing how Doe might have known she was incapacitated, Roe herself identified just a single thing: her statement, after approximately 45 minutes of talking and sexual activity, that she was "not very sober right now." *Id.*, PageID #497, ¶ 100.

Before the hearing Roe had thrice said that after engaging in intercourse for some time, Doe asked her to perform oral sex on him. *Id.*, PageID #497, 513, ¶¶ 100, 119, 168, 169. At the hearing, however, when she was directly asked whether Doe had requested that she perform oral sex, she responded, "No." *Id.*, PageID #503, ¶ 126. She then claimed, for the very first time, that Doe had grabbed her neck and forced her mouth on his penis. *Id.* At the hearing, the investigator identified this change as the sole contradiction made by either party vis-à-vis their investigation testimony. *Id.*, PageID #508, ¶ 149.

A friend of Roe's testified that, after the incident, Roe was "'disappointed and upset" that she had chosen to hook up with Doe, as she was interested in someone else. *Id.*, PageID #500-01, 506, ¶¶ 116, 140. That friend testified to no obvious outwards signs of Roe's intoxication and instead described a lengthy,

coherent interaction inconsistent with any notion that Roe was so drunk as to be incapacitated. *Id.*, PageID #501, 505, ¶¶ 117, 138-39.

Despite evidence uniformly showing that Roe did not appear incapacitated before, during, or after the encounter; and despite Ms. Roe's contradictory testimony, Mr. Doe's hearing panel found him responsible for having received oral sex from Ms. Roe. *Id.*, PageID #511, ¶ 163. It refused to credit her 11th hour testimony that Doe physically forced her to perform oral sex, yet it concluded that Roe's single statement, "I am not very sober right now," should have told Mr. Doe that Ms. Roe was not just intoxicated, but so intoxicated as to be incapacitated. *Id.*, PageID #472, ¶ 7. The panel ordered Doe expelled from the university. *Id.*, PageID #511. ¶ 163.

C. Ms. Raimondo's Influence as Title IX Coordinator

As Title IX Coordinator, Ms. Raimondo oversaw and influenced every part of Oberlin's Title IX regime, including Mr. Doe's proceeding. Even before she was coordinator, she helped to draft the policy and structure the initial training its administrators received. *Id.*, PageID #479, ¶¶ 37-38. As coordinator, she lead the team that decided whether cases should go through formal resolution, RE 28-2, Exhibit A to Oberlin's Motion to Dismiss (Sexual Misconduct Policy), PageID #662, and she then "overs[aw] the investigation[s]," *id.* at PageID #663. At the end of each investigation she consulted with the Hearing Coordinator to determine

whether the case should be sent for adjudication. *Id.* at PageID #664. Those adjudications were conducted by "specially trained Hearing Panel[s]," RE 21-2, Amended Complaint, PageID #477, ¶ 27, comprised of members who received "annual training" on "the factors relevant to a determination of credibility," "*evaluation of consent and incapacitation,*" and "the preponderance of the evidence standard." RE 28-2, Exhibit A to Oberlin's Motion to Dismiss (Sexual Misconduct Policy), PageID #677 (emphasis added). That training was "*coordinated by the Title IX Coordinator*." *Id.*

In the seven months preceding the day that Ms. Raimondo charged Mr. Doe with sexual assault, Oberlin had convicted 100% of the respondents that Ms. Raimondo had sent through its formal resolution process. RE 21-2, Amended Complaint, PageID #486-87, ¶ 54. Of the 100 reports of alleged sexual misconduct Oberlin received in that period, "'[m]ost'" involved parties who requested that Oberlin take no action and refrain even from notifying the accused. *Id.*, PageID #486 ¶ 53. As to the remaining 20%, half of those were sent through Oberlin's formal process. *Id.* Those that were sent through its informal process necessarily resulted in no findings, because informal resolution "does not result in disciplinary action against the Responding Party." RE 28-2, Exhibit A to Oberlin's Motion to Dismiss (Sexual Misconduct Policy), PageID #662. In the 10 or so

cases where an actual finding was made, that finding was "responsible" on at least one charge. RE 21-2, Amended Complaint, PageID #486-87, ¶ 54.

STANDARD OF REVIEW

This Court reviews the denial of a motion to dismiss under Rule 12(b)(6) *de novo*. *Baum*, 903 F.3d at 580. "A plaintiff shows that he is entitled to relief by 'plausibly suggesting' that he can meet the elements of his claim." *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)). When evaluating a complaint's sufficiency, courts use a three-step process:

> First, the court must accept all of the plaintiff's factual allegations as true. *Logsdon v. Hains*, 492 F.3d 334, 340 (6th Cir. 2007). Second, the court must draw all reasonable inferences in the plaintiff's favor. *Id.* And third, the court must take all of those facts and inferences and determine whether they plausibly give rise to an entitlement to relief. *Iqbal*, 556 U.S. at 679, 129 S.Ct. 1937.

Id. at 581. A plaintiff's allegations "do not have to give rise to the *most* plausible explanation—they just have to give rise to one of them." *Id.* at 587 (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)) (emphasis in original). "If it is at all plausible (beyond a wing and a prayer) that a plaintiff would succeed if he proved everything in his complaint, the case proceeds." *Id.* at 581.

SUMMARY OF THE ARGUMENT

The district court fundamentally erred in concluding that Mr. Doe failed adequately to plead that his expulsion by Oberlin was motivated by gender bias. Mr. Doe pled evidence of gender bias from multiple significant sources, evidence

that exceeds what this Court found sufficient in its two published decisions on the matter, *Doe v. Miami University*, 882 F.3d 579 (6th Cir. 2018), and *Doe v. Baum*. He pled that Oberlin, at the very time it was drafting and first implementing the Policy, was under nationwide pressure from OCR to zealously prosecute claims of sexual assault brought by women against men or risk the loss of its federal funding, RE 21-2, Amended Complaint, PageID #484-85, ¶ 49-50, evidence that the *Miami University* court found probative of gender bias, 882 F.3d at 594. Then in November of 2015, just four months before Mr. Doe would be charged, OCR targeted that pressure directly upon Oberlin, initiating a "systemic investigation" into Oberlin's Title IX enforcement regime that remained open throughout the entirety of Mr. Doe's disciplinary proceeding, RE 21-2, Amended Complaint, PageID #483-84, ¶ 48, evidence even more probative of gender bias given its intensity. *See Baum*, 903 F.3d at 586; *Doe v. Cummins*, 662 Fed. Appx. 437, 453 (6th Cir. 2016) (targeted pressure from OCR investigation more probative of gender bias than nationwide pressure). And in that same time period, from August 2015 through February 2016, Oberlin convicted 100% of the respondents it sent through its formal resolution process, the vast majority of whom, if not all, were men, RE 21-2, Amended Complaint, PageID #486-87, ¶¶ 54-55,—further powerful evidence of gender bias. *Miami Univ.*, 882 F.3d at 593.

But most importantly of all, less than a year before she charged Mr. Doe, Meredith Raimondo, who spearheaded the drafting of Oberlin's Sexual Misconduct Policy, oversaw its implementation, and trained Mr. Doe's hearing panelists on how to evaluate consent and incapacitation, openly stated that she "come[s] to this work as a feminist committed to survivor-centered processes," and furthermore that gender considerations affect the way she thinks about consent in "grey area" cases like Mr. Doe's that do not involve the most extreme kinds of allegations. RE 21-2, Amended Complaint, PageID #488, ¶ 59. Mr. Doe's expulsion, when there was no evidence showing how he could have known that Ms. Roe was incapacitated, is exactly the result one would expect when a hearing panel is trained to evaluate consent and incapacitation informed by gender bias.

Taken together, that is powerful evidence of gender bias, and it is evidence the district court largely failed to address. Some of that evidence the district court simply ignored. Other parts of it—including the most probative piece—it acknowledged but never actually confronted. And still more of Mr. Doe's evidence it held to legal standards that directly conflict with this Court's holdings in *Miami University* and *Baum*, and which would put Title IX jurisprudence completely out of sync with the wider body of anti-discrimination law. Its reasoning, if applied widely, would close the courts to persons like Mr. Doe who

have been clearly harmed by schools' well-intentioned, but at times overzealous, efforts to tackle a problem that went unaddressed for far too long.

The district court also erred in dismissing Mr. Doe's state law claims after dismissing the Title IX claim, because Mr. Doe pled both diversity jurisdiction and pendant jurisdiction over those claims. RE 21-2, Amended Complaint, PageID #471, ¶ 3.

ARGUMENT

I. THE AMENDED COMPLAINT STATES A CLAIM FOR VIOLATION OF TITLE IX.

Title IX mandates that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). It "is a broadly written general prohibition on discrimination." *Jackson v. Birmingham Bd. of Educ.,* 544 U.S. 167, 175 (2005).

In *Yusuf v. Vassar College*, the Second Circuit, borrowing heavily from case law applying Title VII of the Civil Rights Act of 1964, concluded that male students disciplined by funding recipients for sexual misconduct could state a claim under Title IX alleging that gender bias resulted in an erroneous finding of guilt ("erroneous outcome"). *Yusuf v. Vassar College*, 35 F.3d 709, 715 (2d Cir. 1994). A plaintiff states an erroneous outcome claim where he alleges (1) "particular facts sufficient to cast some articulable doubt on the outcome of the

disciplinary proceeding," and (2) "a particularized . . . causal connection between the flawed outcome and gender bias," meaning "particular circumstances suggesting that gender bias was a motivating factor behind the erroneous finding." *Id*.; *Miami Univ.*, 882 F.3d at 592 (citing *Cummins*, 662 Fed. App'x at 452; and *Yusuf*, 35 F.3d at 715).

Courts across the country have adopted *Yusuf*'s "erroneous outcome" theory of liability under Title IX. This Court first did so in *Miami University*, after having applied the theory in unpublished decisions for more than a decade. *See Miami University*, 882 F.3d at 592 (adopting theory and citing *Yusuf*); *Doe v. Cummins*, 662 Fed. App'x at 451; (applying *Yusuf*); *Mallory v. Ohio Univ.*, 76 Fed. App'x 634, 638 (6th Cir. 2003) (applying *Yusuf*). It has since applied it in a second published opinion, *see Baum*, 903 F.3d at 585, and in another unpublished opinion, *see Doe v. Univ. of Dayton*, 766 Fed. App'x 275, 281 (6th Cir. 2019).

The Amended Complaint amply states an erroneous outcome claim under those precedents. It casts more than "some articulable doubt" on the accuracy of the outcome: It calls the outcome so thoroughly into question that Oberlin has resorted in these court proceedings to defending it with testimony from Roe that the hearing panel itself refused to rely on, almost surely because it was *identified at the hearing as contradictory to Roe's repeated prior statements by the investigator himself*. RE 21-2, Amended Complaint, PageID #508, ¶ 149. The Amended

Complaint also pleads overwhelming evidence from which to infer that gender bias was a motivating factor in the outcome, much of which the district court opinion simply ignored.

A. The Amended Complaint Casts Substantial Doubt on the Accuracy of the Outcome.

A plaintiff's "'pleading burden'" with respect to the first element of an erroneous outcome claim "is not heavy.'" *Baum*, 903 F.3d at 586 (quoting *Yusuf*, 35 F.3d at 715). It may be satisfied by "alleg[ing] particular evidentiary weaknesses behind the finding of an offense," "a motive to lie on the part of a complainant or witnesses," or "particular procedural flaws affecting the proof," among other elements. *Yusuf*, 35 F.3d at 715.

Mr. Doe's Complaint sails over this low bar. He alleges more than just "evidentiary weaknesses" in the case against him: He maintains there was almost no evidence that Roe was incapacitated in the first place, and no evidence at all that he could have known it if she were. RE 21-2, Amended Complaint, PageID #471-72, ¶¶ 6-9. He pleads facts suggesting "a motive to lie on the part of [the] complainant": her regret at having slept with Doe while being interested in someone else. *Id.*, PageID #517, ¶ 189. And he alleges "procedural flaws affecting the proof" in the form of Oberlin's blatant misapplication of various provisions in its Policy. Oberlin's only effort to defend the hearing panel's decision involved resorting to the 11th hour evidence of force that the panel itself

never relied on. RE 28-1, Memo in Support of Motion to Dismiss, PageID #621. The district court rightly concluded that Mr. Doe satisfied this first prong of his erroneous outcome claim. *See also Doe v. Brown Univ.*, 166 F. Supp. 3d 177, 187 (D.R.I. 2016).

B. The Amended Complaint Pleads Ample Evidence, From Multiple Significant Sources, From Which To Infer Gender Bias.

The Amended Complaint readily satisfies the second prong of an erroneous outcome claim as well: It "allege[s] particular circumstances suggesting that gender bias was a motivating factor behind the erroneous finding." *Yusuf*, 35 F.3d at 715. Allegations that support such an inference "can be of the kind that are found in the familiar setting of Title VII cases" and "might include, *inter alia*, statements by members of the disciplinary tribunal, statements by pertinent university officials, or patterns of decision-making that also tend to show the influence of gender." *Yusuf*, 35 F.3d at 715. Factors that courts commonly consider in other contexts to determine whether "discriminatory purpose was a motivating factor" in a decision include (1) "the impact of the official action" and whether it "bears more heavily on" a protected group; (2) "[t]he historical background of the decision"; (3) "[t]he specific sequence of events leading up to the challenged decision"; (4) "[d]epartures from the normal procedural sequence"; and (5) "[s]ubstantive departures too," "particularly if factors usually considered important by the decisionmaker strongly favor a decision contrary to the one

reached." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977) (internal citations and quotation marks omitted).

As in other contexts, the question under Title IX is not whether a "single factor," standing alone, supports an inference of discriminatory bias, but whether "the totality of circumstances" does. *U.S. v. City of Birmingham, Mich.*, 727 F.2d 560, 565 (6th Cir. 1984); *Baum*, 903 F.3d at 586 (combination of targeted external pressure and crediting of witnesses supported inference of gender bias); *Miami University*, 882 F.3d at 593 (combination of disparate impact evidence and generic nationwide pressure supported inference of gender bias).[1] Nor must gender bias be the sole, or even primary, motivation behind the decision; it is enough that gender bias motivate the decision "at least in part." *Doe v. Columbia Univ.*, 831 F.3d 46, 56 (2d Cir. 2016) (plaintiff stated erroneous outcome claim where allegations made it plausible to infer that "biased attitudes were, at least in part, adopted to refute criticisms . . . that Columbia was turning a blind eye to female students' charges of sexual assaults"); *cf. Vill. of Arlington Heights*, 429 U.S. at 265 (1977) (Equal Protection Clause "does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes").

[1] *See also Doe v. The George Washington University*, 366 F. Supp. 3d 1, 3 (D.D.C. 2018) ("combination of" evidence sufficed "to avoid dismissal at this point in the litigation"); *Doe v. Univ. of Miss.*, 361 F. Supp. 3d 597, 608 (S.D. Miss. 2019) ("taken together," combination of evidence "state[d] a plausible claim of gender bias").

The Amended Complaint pleads ample facts supporting such an inference. It pleads *both* the kind of external and internal pressure upon the school that drove the analysis in *Baum*, *and* the kind of statistical evidence of discrimination that all but carried the day in *Miami University*. And on top of that, it pleads specific statements of gender bias by Ms. Raimondo, the person responsible for training Oberlin's hearing panel members on the "evaluation of consent and incapacitation," RE 28-2, Exhibit A to Oberlin's Motion to Dismiss (Sexual Misconduct Policy), PageID #677—the very question at issue in Mr. Doe's hearing, and as to which the panel's rationale is completely unsupported. It is, at a bare minimum, plausible to infer that gender bias partly motivated that outcome.

1. Ms. Raimondo's Statements Are Sufficient Evidence of Gender Bias Standing Alone.

It is the "'rare' case[] where there is 'direct evidence from the lips of the defendant proclaiming'" his or her discriminatory bias. *Buckeye Cmty. Hope Found. v. City of Cuyahoga Falls*, 263 F.3d 627, 634 (6th Cir. 2001) (quoting *Weberg v. Franks*, 229 F.3d 514, 523 (6th Cir. 2000)). Ms. Raimondo's statements come about as close to that as one might expect to see from someone in her position. She has made several statements that betray a biased understanding of her role as the keeper of Oberlin's Title IX enforcement regime, particularly in the type of case at issue here. Had she written those words into Oberlin's Policy, rather than spoken them at conferences and in interviews, there is little doubt as to

how the Policy would be viewed. At a minimum, it is plausible to infer from them that Mr. Doe's expulsion, in the face of so much evidence to the contrary, was caused at least in part by gender bias.

a. Ms. Raimondo Implemented Oberlin's Policy With Gender Bias, And She Had a Critical Hand in Every Complaint That Resulted in Discipline.

As discussed above, Ms. Raimondo came to the work of drafting and implementing Oberlin's Sexual Misconduct Policy in late 2012, after the publicized complaint by a female Oberlin student that her male attacker had not been punished severely enough. RE 21-2, Amended Complaint, PageID #479, ¶¶ 36-37; *Vill. of Arlington Heights*, 429 U.S. at 267 ("historical background" of a decision is relevant evidence of discriminatory bias). Since then she has made repeated statements from which it is plausible to infer that she implements Oberlin's Policy with gender bias. *See id.*, PageID 487-88, ¶¶ 57-59. Two of those statements merit special attention, because they show most clearly that gender bias shapes the process. In the light of those statements, additional statements made by Ms. Raimondo offer further plausibility to an inference of gender bias.

First, in May of 2015, Ms. Raimondo stated, in a panel discussion on Title IX enforcement, "I come to this work as a feminist committed to survivor-centered processes." *Id.* ¶ 59. That is direct evidence from which it is plausible to infer that

gender bias shapes Oberlin's Title IX regime. It is far different than simply "*being* a feminist or researching topics that affect women," an allegation this Court has rightly rejected as not indicative of gender bias. *Miami Univ.*, 882 F.3d at 601 n. 6 (emphasis added). It is one thing to hold or research certain views, whether religious, political, or civic, and to put them aside when participating in an objective process. It is another thing altogether to intentionally bring them to bear on an enterprise, and use them to "center" that enterprise on one side ("the survivor"), and that is precisely what Ms. Raimondo has said that she does. It is the difference, for example, between a judge being a Democrat or a Republican, on the one hand, and saying, "I come to this work as a Democrat" or "I come to this work as a Republican," on the other. What matters under Title IX is not whether gendered actions are borne of an evil motive, but simply whether "a policy of bias favoring one sex over the other in a disciplinary dispute" has been adopted, "even temporarily," no matter the reason. *Columbia Univ.*, 831 F.3d at 58 n. 11.[2] When an administrator—the key administrator—openly declares that she brings feminism to bear upon her administration of a sexual misconduct policy, and uses it to favor the side she expects to be populated mostly by women, one plausible inference, even if there are others, *Baum*, 903 F.3df at 58, is that there is gender bias.

[2] Just today, the Seventh Circuit issued an opinion reversing the dismissal of an erroneous outcome claim and making this same point. *See* Exhibit 2 at 27.

That is especially true in the light of what Ms. Raimondo said in a similar panel discussion the following month. On June 13, 2015, she stated, in response to a panelist's discussion about the "middle category" of cases – "where we're not talking about predators . . . or sex with someone who is fundamentally unconscious" – that she is uncomfortable referring to those cases as "grey areas" of consent because that tends "to discredit particularly women's experiences of violence." RE 21-2, Amended Complaint, PageID #488, ¶ 59. That, too, is direct evidence from which to plausibly infer gender bias, especially in those "grey area" cases, which Mr. Doe's undoubtedly was. It also adds further plausibility to inferring gender bias from Ms. Raimondo's statement that she "come[s] to this work as a feminist committed to survivor-centered processes" and provides a concrete example of exactly what that means. Her "come to this work" statement, in turn, is evidence that Ms. Raimondo does not segregate this "grey area" view from her work, but instead "come[s] to th[e] work" with it.

Ms. Raimondo's role in that work is both broad and deep. She helped to draft the policy and structure the initial training its administrators received. *Id.*, PageID #479, ¶¶ 37-38. She leads the team that decides whether cases should go through formal resolution, RE 28-2, Exhibit A to Motion to Dismiss, (Sexual Misconduct Policy) at PageID #661, and she "oversee[s] the investigation," *id.* at PageID #662. At the end of each investigation she consults with the Hearing

Coordinator to determine whether the case should be sent for adjudication. *Id.* at PageID #663. Perhaps most critically, adjudications are conducted by "specially trained Hearing Panel[s]," RE 21-2, Amended Complaint, PageID #477, ¶ 27, comprised of members who receive "annual training" on "the factors relevant to a determination of credibility," "*evaluation of consent and incapacitation,*" and "the preponderance of the evidence standard"—which training is "*coordinated by the Title IX Coordinator*." RE 28-2, Exhibit A to Motion to Dismiss, (Sexual Miscondct Policy) at PageID #677 (emphasis added). Even if Ms. Raimondo had not stated that she "come[s] to" this work as a feminist, it would still be reasonable to infer that Ms. Raimondo, like most people, acts on her beliefs. It is especially reasonable to infer that given that she says she does as to this work.

Imagine if Oberlin's Policy formally stated, "This Policy is implemented according to principles of feminism that result in processes that favor survivors. We do not believe in 'grey areas' of consent, because doing so tends to discredit particularly women's experiences of violence, and we apply the Policy accordingly." Would there be any legitimate doubt that it would be plausible to infer gender bias in all but the most extreme cases? Given Ms. Raimondo's role in shaping and implementing the Policy, from its drafting on down to the training of its adjudicators, the result is no different here.

Mr. Doe's own case proves what it looks like when hearing panels apply Oberlin's Policy without grey areas. Despite Roe's 11th hour claim—contradicting all of her earlier claims—that Doe physically forced her to perform oral sex on him, the panel ignored this revision and concluded only that Roe had been too incapacitated to consent to sexual activity, making it exactly the kind of "grey area" case Ms. Raimondo prefers not to characterize as such. And it then pretended that a single statement from Roe—"I am not sober right now"—that came after 45 minutes of completely sober-seeming talk, kissing and intercourse, *see* RE 21-2, Amended Complaint, PageID #472, ¶ 9, was enough to tell Mr. Doe that Roe was incapacitated—that she was "'extremely drunk,'" and "'no longer underst[ood] who [she was] with or what [she was] doing.'" *Id.*, PageID #475, ¶ 21 (quoting Oberlin's definition of incapacitation). There was no possible "grey area" for the panel: *Any* indication at all that Roe was intoxicated, no matter how slight, meant that Mr. Doe had to be punished as though her incapacity were clear. And not with some kind of moderate punishment either, but expelled—there, too, the process did not permit grey areas. That is not some aberration in Oberlin's process; that is the natural and foreseeable result of a survivor-centered process implemented by someone who believes that speaking of "grey areas" of consent discredits "particularly women's experiences of violence." Or so, at a minimum, it is plausible to infer.

In the light of these two clear statements of gender bias, additional statements by Ms. Raimondo add further plausibility to an inference of gender bias. *See, e.g.*, *Doe v. Marymount Univ.*, 297 F. Supp. 3d 573, 586-87 (E.D. Va. 2018) (adjudicator's gendered-biased statement allowed further plausibility of gender bias to be drawn from other acts, such as the "failure to consider evidence that supported Doe's claims," the length of the proceeding, and the crediting of the complainant's "implausible allegations"); *Doe v. Lynn Univ., Inc.*, 235 F. Supp. 3d 1336, 1341-42 (S.D. Fla. 2017). Ms. Raimondo's statements about the survivor-centered nature of the process (which she directly linked to her feminism), RE 21-2, Amended Complaint, PageID #488, ¶ 59; its fight against rape culture, *id.*, PageID #480, ¶¶ 39-47; and the prototypical gender of parties to such proceedings, *id.*, PageID #488, ¶ 59, add further plausibility to an inference of gender bias here.

Ms. Raimondo helped establish, and then administered, the entire Title IX system at Oberlin, including the training that its decisionmakers receive on how to apply the Policy. She then sent Mr. Doe through the formal resolution process whose decisionmakers she had trained. It is at least plausible, and in reality highly likely, that she trained them consistent with those stated beliefs. That is evidence of a direct causal link between her gendered views and the outcome of Mr. Doe's case. *Marymount Univ.*, 297 F. Supp. 3d at 585 (single statement by adjudicator in subsequent proceeding sufficed to support inference of gender bias); *Doe v.*

Washington & Lee University, No. 6:14-CV-00052, 2015 WL 4647996, at *10 (W.D. Va. Aug. 5, 2015) (prior statements by one of two investigators, neither of whom were decisonmakers, betraying gender bias sufficed to state claim in conjunction with minimal additional evidence of bias); *Roebuck v. Drexel University*, 852 F.3d 715, 717 (3d Cir. 1988) (single statement by university president five years before plaintiff's denial of tenure would support inference of racial bias, even though president was non-decisionmaker in initial decision to deny tenure, because jury could infer he "had a significant influence on the attitudes and procedures of the tenure decisionmakers" by virtue of his position).

b. Erroneous Outcome Claims, Like Other Antidiscrimination Claims, Do Not Require Evidence of Bias in a Plaintiff's Specific Proceeding.

Another panel of this court, in an unpublished decision, recently held that "we have generally required plaintiffs to point to some hint of gender bias in their own disciplinary proceedings." *Univ. of Dayton*, 766 F. App'x at 281. That's neither consistent with *Baum* nor with the wider body of antidiscrimination law, including Title VII, on which the "erroneous outcome" test was based. *Baum* identified five cases as illustrating the kind of evidence that supports an inference of gender bias, and it excerpted the language from each showing it. *Baum*, 903 F.3d at 586-87. *None* of that excerpted language involved evidence from the actual proceedings in those cases. And two of those cases cited no evidence of gender

bias from the plaintiff's own proceeding in finding that gender bias had been adequately pled.

First, in *Doe v. Lynn University, Inc.*, the evidence of gender bias consisted in (1) the generic nationwide pressure exerted upon schools by the Education Department's 2011 Dear Colleague Letter, and (2) a single news media report critical of the school's handling of a separate allegation of assault *seven months before* the plaintiff was charged and *ten months* before his hearing. *Lynn Univ., Inc.*, 235 F. Supp. 3d at 1340-41. None of the evidence of gender bias came from his "own disciplinary proceeding." *Univ. of Dayton*, 766 Fed. App'x at 281.

Second, in *Doe v. Amherst College*, the sole piece of evidence of gender bias supporting erroneous outcome was the allegation that the school was trying to appease a biased student-led reform movement in which the complainant was involved. *Amherst Coll.*, 238 F. Supp. 3d 195, 223 (D. Mass. 2017). The *Amherst College* court believed that gender bias did not have to come from a plaintiff's own proceeding to state an erroneous outcome claim, and *Baum* relies on that case precisely for the evidence that did not come from the plaintiff's proceeding.

In that, *Baum* is simply being consistent with the wider body of anti-discrimination law. In *Robinson v. Runyon*, for instance, this Court reversed a jury verdict in favor of the Postal Service on an employee's Title VII claim after she was fired for recklessly operating her postal vehicle. *Runyon*, 149 F.3d 507, 509

(6th Cir. 1998). The investigation on which the firing was based was "cursory at best" but revealed no express evidence of racial bias. *See id.* at 509-10 (describing investigation). The court nevertheless held that it was reversible error for the trial court to have excluded evidence of racist statements by non-decisionmakers outside the process and remanded the matter for a new trial. *Id.* at 514 ("'discriminatory comments by non-decisionmakers, or statements temporally remote from the decision at issue, may properly be used to build a circumstantial case of discrimination'") (quoting *Abrams v. Lightolier Inc.,* 50 F.3d 1204, 1214 (3d Cir.1995)). A finding in favor of the plaintiff, in other words, could stand based on evidence of discrimination outside the plaintiff's process, provided it could be shown to be a motivating factor in her termination.

Not surprisingly, courts considering erroneous outcome claims have likewise found sufficient evidence of gender bias where it was alleged that policies and procedures were motivated at a high level by gender bias, even though the plaintiff's proceeding itself contained no obvious evidence of that bias. *See, e.g.*, *Brown Univ.*, 166 F. Supp. 3d at 189 (evidence of gender bias consisted in testimony from school employees that school generally "treats male students as 'guilty until proven innocent'" and that "culture of thinking" on campus is that "males are bad and females are victims"); *Harris v. St. Joseph's Univ.*, Civ. A. No. 13-3937, 2014 WL 12618076, at *2 n. 3 (E.D. Pa. Nov. 26, 2014) (plaintiff stated

erroneous outcome claim where only evidence of gender bias was administrator's statement to plaintiff's father that school had "adopted a policy favoring female accusers as [the university] was concerned about Title IX charges by female students"). That is analogous to what Mr. Doe alleges here—that Ms. Raimondo has inserted gender bias at a high level that pervades Oberlin's regime.

Even absent such statements of high-level, pervasive bias, courts find sufficient evidence of gender bias to state a claim when none of it comes from the plaintiff's proceeding itself. *See, e.g.*, *George Washington Univ.*, 366 F. Supp. 3d at 13 (combination of OCR investigations, campus demonstrations, and statement by administrators about recent conviction rates "are sufficient to avoid dismissal at this point in the litigation"); *Doe v. The Trustees of the Univ. of Pennsylvania*, 270 F. Supp. 3d 799, 823 (E.D. Pa. 2017) (sufficient evidence of gender bias where training materials "encourage the employees to believe the accuser"; complainants referred to as "victims/survivors"; "University personnel" advocate for "victim-centered respons[es]"; and two newspaper articles accused school of not handling complaints by females fairly).

Barring Title IX claims where no evidence of bias happened to expressly manifest itself in a plaintiff's disciplinary proceeding would be anomalous, and the result would be disastrous. It would allow schools to discriminate so long as they did so pervasively enough and buried the evidence in places not discussed in

investigations or hearings, like a school's training materials. It would allow the most systematic kinds of bias to go unremedied even when there is concrete evidence of it outside the proceeding. That is not common sense and it is not the law.

c. The District Court Simply Ignored the Statements By Ms. Raimondo That Most Clearly Show Her Bias.

The district court failed to address Ms. Raimondo's two most blatant statements showing gender bias. As to the first, it leaves out the part where Ms. Raimondo says that she "come[s] to this work as a feminist," and then, after having excised that part, accuses Mr. Doe of "jump[ing] to the conclusion" that a survivor-centered approach "would have to be biased against men." RE 35, Order Granting Motion to Dismiss, PageID #813. Precisely why it is no "jump" is because Ms. Raimondo has said that she brings her feminism to bear upon that survivor-centered process. That does not mean her survivor-centered approach "would *have to be* biased against men"—Mr. Doe does not advance that straw man. It means that a *plausible inference*, perhaps among others, is that gender bias—quite possibly well-intentioned—motivates the process. That is all that is required at this early stage.

As to Ms. Raimondo's statement about "grey areas" of consent, the district court offers a rhetorical head fake that addresses that statement in name only. The district court acknowledges that Ms. Raimondo made the statement, but purports to

discount it after having "viewed the entire video" where the statement was made. *Id*. The two bases on which it purports to do that, however, are no evidence at all of the meaning of that statement. The district court says first and foremost that "none of her comments" in the video "spoke directly about Plaintiff or his case in particular." *Id.* That, not surprisingly, is true, because the panel discussion in the video occurred nine months before Mr. Doe was charged and eight months before the actual incident. But it is a misstatement of the law, in any event, to conclude that an administrator's statements are probative of gender bias only when they are made about the plaintiff or in the plaintiff's specific proceeding, as explained above.

The second item offered by the district court is no explanation at all—it is the conclusory statement, "Nor did the video suggest that Oberlin's Policy is motivated by gender bias." *Id*. The district court identifies no testimony at all that supports that conclusion, let alone testimony that walks back Ms. Raimondo's belief that considerations of gender should play a role in evaluating consent in "grey area" cases. Ms. Raimondo may very well believe that considerations of gender are required in order to fairly adjudicate "grey area" cases. But gender-based considerations that partly motivate an outcome are gender bias all the same, whether inspired by an evil heart or not. *Columbia Univ.*, 831 F.3d at 58 n. 11.

* * *

Taken together, Ms. Raimondo's statements make it at least plausible to infer that gender bias partly motivated the erroneous outcome in Mr. Doe's case. Her work was occasioned by the complaint of a female student that her male attacker was not punished severely enough, and Ms. Raimondo approached that work as a feminist. She then disclosed that considerations of gender inform her view of "grey area" cases like Mr. Doe's, shedding further light on what it means that she approached her work as a feminist. And that work, by the terms of the Policy, positioned her (1) to train everyone who administered the Policy, including on the application of "consent" and "incapacitation"; and (2) to decide which cases to send through formal resolution and its 100% conviction rate. These statements by Ms. Raimondo alone are enough to reasonably infer that gender bias is one plausible explanation for why Mr. Doe was found responsible despite the overwhelming evidence to the contrary.

2. Oberlin Faced External And Internal Pressure To Find Against Men Accused of Sexual Assault By Women.

Ms. Raimondo's statements, and her work in implementing a survivor-centered process inspired by her feminism, did not occur in a vacuum. They came at a time when Oberlin was under extreme pressure, both external and internal, to appear tough at all cost on claims of sexual assault, especially claims brought by women against men. Oberlin felt the nationwide pressure exerted by the Education Department's Office for Civil Rights, which was enforcing a gendered view of

Title IX and threatening schools with loss of federal funding. RE 21-2, Amended Complaint, PageID #484-85, ¶¶ 49-50; *Miami University*, 882 F.3d at 594 (nationwide pressure from OCR is some evidence of gender bias). It also was experiencing targeted pressure from OCR, which opened a systematic investigation into Oberlin's Title IX regime just four months before Mr. Doe was charged by Ms. Raimondo, an investigation that remained open during Mr. Doe's proceeding. RE 21-2, Amended Complaint, PageID #483, ¶ 48; *Baum*, 903 F.3d at 586 (active OCR investigation is evidence of gender bias); *Cummins*, 662 Fed. Appx. at 453 (active OCR investigation more probative of gender bias than generic nationwide pressure). And it was under pressure from a campus culture, and student sentiment centered on a woman's claims of assault, demanding that claims of sexual assault not be challenged. RE 21-2, Amended Complaint, PageID #481-83, ¶¶ 41-47; *Amherst College*, 238 F. Supp. 3d at 223 (pressure from student movement supported inference of gender bias); *Brown Univ.*, 166 F. Supp. 3d at 189 ("culture of thinking" on campus was some evidence of gender bias). *Noakes v. Syracuse Univ.,* 369 F. Supp. 3d 397, 416 (N.D.N.Y. 2019) (adjudication occurred amidst "public criticism of the University's handling of sexual abuse complaints against males"). Against that backdrop, little more evidence of bias is required to state a claim. *Baum*, 903 F.3d at 586.

a. Nationwide Pressure From the Education Department Supplies Evidence of Gender Bias.

In *Miami University*, this Court held that a plaintiff disciplined for sexual misconduct adequately pled gender bias based on two things: (1) statistical evidence of disparate impact in case initiation and outcome at Miami, *Miami University*, 882 F.3d at 593; and (2) external pressure upon Miami "that caused it to discriminate against men," *id.* at 594. As to the latter, the "external pressure" consisted of just two things: (1) generic nationwide pressure from the federal government upon all schools "to combat vigorously sexual assault on college campuses and the severe potential punishment—loss of all federal funds—if it failed to comply," and (2) a single lawsuit brought by a female student the year before maintaining that her attacker should have been expelled before he assaulted her. *Id.* Prior to then, courts (including this one) had generally held that nationwide pressure of that nature failed to supply evidence of gender bias. *See, e.g.*, *Cummins*, 662 Fed. Appx. at 453. *Miami University* sensibly concluded that nationwide pressure could combine with other sources of gender bias to state an erroneous outcome claim.

The district court simply ignored *Miami University* in that regard. It spent a full page arguing that national pressure from OCR is "'not sufficient'" by itself "'to establish the required causal connection,'" relying on a series of cases that pre-date *Miami University*. RE 35, Order Granting Motion to Dismiss, PageID #816

(quoting *Gischel v. Univ. of Cincinnati*, 302 F. Supp. 3d 961, 973 (S.D. Ohio 2018)). But whether a piece of evidence is sufficient, by itself, to support an inference of gender bias is just the beginning of the inquiry, not the end. The question then becomes whether the evidence supplies some basis for inferring bias, such that it might combine with additional evidence to state a claim. *See, e.g.*, *Village of Arlington Heights*, 429 U.S. at 266. As to the nationwide pressure that OCR exerted upon schools in the wake of the 2011 Dear Colleague Letter, *Miami University* holds that it does. And Oberlin was under that pressure at the very time it was drafting and first implementing its new Sexual Misconduct Policy. RE 21-2, Amended Complaint, PageID #479-80, ¶¶ 36-40.

b. Targeted Pressure From the Education Department Supplies Still Stronger Evidence of Gender Bias.

If generic nationwide pressure is some evidence of gender bias, then an OCR investigation, which simply targets and intensifies a school's threatened loss of federal funds, is strong circumstantial evidence of such bias. Many courts, including this one, recognized that fact before *Miami University*. *See, e.g.*, *Cummins*, 662 Fed. App'x at 453 (active OCR investigation is kind of "supporting fact[]" that supported inference of gender bias but which the plaintiff there simply "d[id] not allege"); *Wells v. Xavier*, 7 F. Supp. 3d at 747, 751 (initiation of OCR investigation six months before plaintiff was charged supported inference of gender bias). In the wake of *Miami University*, there is no basis to deny that an

active OCR investigation at a school is strong circumstantial evidence of gender bias.

Doe v. Baum is Exhibit A in that regard. In *Baum*, this Court held that the plaintiff adequately pled gender bias largely because of the external pressure faced by the school. That pressure consisted of two things: an OCR investigation that had commenced two full years before the plaintiff's hearing, and news attention about the investigation that continued through the time of the hearing. *Baum*, 903 F.3d at 586. The court stated that "[b]oth this public attention and the ongoing investigation put pressure on the university to prove that it took complaints of sexual misconduct seriously," then immediately noted that "[t]he university *stood to lose millions in federal aid if the Department found it non-compliant with Title IX*," identifying the chief source of pressure facing the school. *Id.* (emphasis added). All of that pressure, the court held, did not suffice by itself to plead gender bias, but it came close—it required only the fact that the complainant's sorority sisters were deemed credible while the respondent's fraternity brothers were not. *Id.* *Baum* is powerful evidence of the extent to which an OCR investigation, and the accompanying threat of a loss of federal funding, supplies evidence supporting an inference of gender bias.

Unlike in *Baum*, where the OCR investigation at issue was initiated two years before the plaintiff was disciplined, Oberlin came under OCR investigation

just ten months before the hearing on Jane Roe's charges, RE 21-2, Amended Complaint, PageID #483, 502, ¶¶ 48, 122, and just *four* months before Ms. Raimondo made the critical decision to send Mr. Doe's case through Oberlin's formal resolution process, *id.*, PageID 477, 493, ¶¶ 27, 79, a decision that all but guaranteed his conviction, *id.*, PageID 486-87, ¶ 54. *See also Xavier*, 7 F. Supp. 3d at 751 (initiation of OCR investigation six months before plaintiff was charged supported inference of gender bias). The pressure that this "'systemic investigation of the College's policies, procedures, and practices,'" would bring to bear, RE 21-2, Amended Complaint, PageID #483, ¶ 48, and the threatened loss of federal funding if OCR didn't like what it saw, *id.*. PageID #485, ¶ 50, would have been felt keenly by Oberlin at the time Ms. Raimondo charged Mr. Doe, trained its panelists, and conducted Mr. Doe's hearing.

The district court's treatment of OCR's investigation of Oberlin is utterly lacking. The district court dismissed its significance because it was not alleged to have separately generated much press, as though press coverage accompanying an OCR complaint is the primary source of pressure it brings. RE 35, Order Granting Motion to Dismiss, PageID #817. While negative press certainly adds to it, the great source of pressure is the threat of a loss of federal funding if OCR does not like what it sees when it conducts the "systemic investigation" that an OCR investigation entails. RE 21-2, Amended Complaint, PageID #483-84, ¶¶ 48-50.

That is the threat that *Miami University* rightly identified as the source of pressure in OCR's generic nationwide threat. *Miami University*, 882 F.3d at 594. A targeted investigation is the same kind of pressure, coming from the same place, intensified exponentially. If a generic threat of that nature is some evidence of gender bias, as *Miami University* has held, then targeting that threat upon a particular school, as its enforcement regime is systematically pored over, is strong circumstantial evidence of bias. It is why the pressure in *Miami University* had to be combined with robust statistical evidence of discriminatory impact to state a claim, while in *Baum* little more was required.

c. Targeted Pressure From Other Sources Also Supplies Strong Evidence of Gender Bias.

An OCR investigation is not the only source of targeted pressure that supplies evidence of gender bias: Courts have recognized a wide range of targeted pressures that supply evidence of gender bias. *See, e.g.*, *The Trustees of the University of Pennsylvania*, 270 F. Supp. 3d at 823 (two newspaper articles highlighting school's handling of assault allegations supported inference of gender bias); *Lynn Univ., Inc.*, 235 F. Supp. 3d at 1340-41 (attention stemming from single media item that ran seven months before plaintiff's hearing supported inference of gender bias); *Columbia Univ.*, 831 F.3d at 58 (local protests and campus media articles supported inference of gender bias). Oberlin, the Amended Complaint alleges, received local media attention in connection with its OCR

investigation, including an article published just two months before Ms. Raimondo charged Mr. Doe. RE 21-2, Amended Complaint, PageID #483, ¶ 48. But more pervasively, Mr. Doe plausibly pleads a widespread culture at Oberlin demanding that claims of sexual assault be believed, particularly those brought by women against men.

As described in the Amended Complaint, Oberlin's entire Policy was overhauled when a female student complained that her attacker was not punished severely enough. *Id.*, PageID #479, ¶¶ 36-37. *Vill. of Arlington Heights*, 429 U.S. at 267 ("historical background" of a decision is relevant evidence of discriminatory bias). Oberlin's faculty guides required that faculty believe allegations of sexual assault. RE 21-2, Amended Complaint, PageID #480-81, ¶¶ 41-44. Its Counseling Center continues to preach reflexive belief in such claims, "regardless of the 'objective facts' surrounding the incident." *Id.,* PageID #481, ¶ 45. And its student newspaper demanded that same belief, in multiple articles, when discussing the most infamous campus sexual assault allegations brought by a woman against men in recent times, *even after her claims turned out to be false*. *Id.*, PageID #482-83, ¶¶ 46-47; *The Trustees of the University of Pennsylvania*, 270 F. Supp. 3d at 823 (two newspaper articles critical of treatment of female complainants supported inference of gender bias); *Amherst Coll.*, 238 F. Supp. 3d at 223 (pressure from student movement regarding handling of sexual assault

claims supported inference of gender bias). Doing otherwise would harm future victims and perpetuate "rape culture," RE 21-2, Amended Complaint, PageID #482-83, ¶¶ 46-47, the fight against which Ms. Raimondo had spearheaded with gendered motivations, *id.* ¶ 11. The campus culture at Oberlin demanded that such claims be believed, *see Brown Univ.*, 166 F. Supp. 3d at 189 ("culture of thinking" on campus was some evidence of gender bias), and any administrator inclined to go against it would have expected significant backlash.

All of that is additional strong evidence of gender bias. And as to these allegations of a widespread culture at Oberlin demanding belief in sexual assault claims, especially those by women against men, the district court opinion is conspicuously silent.

* * *

Oberlin was under extreme pressure to find against Mr. Doe at the time of his proceeding, as much pressure as the school in *Baum* was under to find against the plaintiff there. As in *Baum*, Oberlin was under active OCR investigation. It was not the subject of continuing news coverage about the investigation, but its investigation was much younger, and the threatened loss of federal funding turned not on the presence or absence of media coverage. Oberlin was furthermore subjected to pervasive campus pressure to credit all claims of sexual assault, especially those brought against men by women. Under *Baum*, little more

evidence of gender bias is needed. Even if Ms. Raimondo's statements of express bias somehow fail to support an inference of gender bias on their own, they certainly do so in combination with this pressure. They do so all the more in the light of the statistical evidence of bias in the outcomes of Oberlin's formal adjudications, discussed below.

3. Oberlin In Fact Found Against Accused Students in Every Case Where There Was A Finding, And The Impact Was Borne By Males.

In the face of that great internal and external pressure, and consistent with Ms. Raimondo's stated intent to use Oberlin's survivor-centered process to combat rape culture, Oberlin convicted all ten respondents that its Title IX Team referred for investigation in the months before Mr. Doe was charged, a vast majority of whom, if not all, were male. RE 21-2, Amended Complaint, PageID #486, ¶ 54. That is further strong evidence of gender bias. It all but carried the day in *Miami University*, where the remaining evidence of gender bias paled in comparison to what Mr. Doe offers here.

a. Impact Evidence is Widely Accepted as Circumstantial Evidence of Intentional Discrimination.

It is by now well-settled that an act's or policy's disparate impact upon a protected class not only supports a disparate impact claim (where one is available), but also serves as circumstantial evidence of intentional discrimination. ""[A]n

invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the [practice] bears more heavily on one race than another." *Farm Labor Org. Comm. v. Ohio State Highway Patrol,* 308 F.3d 523, 534 (6th Cir. 2002) (quoting *Washington v. Davis,* 426 U.S. 229, 242 (1976)). The intuition behind the principle is straightforward: When it is known that a decision or policy will disproportionately affect a certain group, proceeding with that decision is at least some evidence of intent to discriminate against it.

In "rare" cases, evidence of impact can suffice, by itself, to establish discriminatory motive. *Vill. of Arlington Heights*, 429 U.S. at 266; *Horner v. Kentucky High Sch. Athletic Ass'n*, 43 F.3d 265, 276 (6th Cir. 1994) ("the type of impact sufficient in itself to prove intentional discrimination is that which is significant, stark, and unexplainable on other grounds") (applying principle to equal protection claim based on gender). In most cases, impact evidence will combine with other evidence of discriminatory bias. *See, e.g.*, *Davis,* 426 U.S. at 242 ("discriminatory purpose may often be inferred from the totality of the relevant facts," including impact). All of that is as true under Title VII as it is under the Equal Protection Clause. *See, e.g.*, *Reid v. Michigan Dep't of Corr.*, 101 F. App'x 116, 121 (6th Cir. 2004) ("statistical evidence may serve as circumstantial evidence of discrimination"); *Equal Employment Opportunity*

Comm'n v. Ball Corp., 661 F.2d 531, 537 (6th Cir. 1981) ("statistical disparity" was "sufficient by itself to establish a prima facie case of disparate treatment"). In an erroneous outcome claim, impact evidence typically takes the form of an "allegation that males invariably lose when charged with sexual harassment," which "provides a verifiable causal connection similar to the use of statistical evidence in an employment case," *i.e.*, a case based on Title VII. *Yusuf*, 35 F.3d at 716.

b. Mr. Doe Pleads Impact Evidence on a Par With the Evidence Pled in *Miami University.*

In *Miami University*, this Court found sufficient evidence of gender bias at the pleading stage based almost entirely on the statistical impact presented by the plaintiff there. Mr. Doe offers essentially the same statistical evidence, and he couples it with far more additional evidence of bias than the plaintiff did there.

The plaintiff in *Miami University* alleged first and foremost "that every male student" in the academic year near the time he was charged "was found responsible," and that the vast majority of those found responsible ("nearly ninety percent") in the three years preceding his charge were men (or at least had traditional male first names). *Miami University*, 882 F.3d at 593. Mr. Doe similarly alleges that every student investigated for and charged with sexual misconduct in the seven-month period immediately preceding his own

investigation was found responsible and that the "vast majority" of them, if not all of them, were males. RE 21-2, Amended Complaint, PageID #486-87, ¶¶ 54-55.

In addition to statistical evidence of bias in case outcomes, the plaintiff in *Miami University* offered two allegations of bias in case initiation: an affidavit memorializing an attorney's experience with case initiation at Miami, and an allegation that Miami had failed to bring parallel charges against the plaintiff's own accuser, even though he, like she, was too intoxicated to consent to sexual activity. *Miami University*, 882 F.3d at 593-94. The affidavit swore to two statistics: (1) that in one prior case, similar parallel charges were not brought; and (2) that the affiant was aware of 12 students being charged with sexual misconduct in a three-year period and none were female. Meloy Affidavit, *Doe v. Miami Univ.*, No. 1:15-cv-00605-MRB, ECF No. 41-5 at 1-2 (S.D. Ohio January 26, 2016) (attached as Exhibit 3).

Mr. Doe likewise pleads evidence of bias in the initiation of investigations at Oberlin, but not just as to a subset of cases, but as to *all* of them. He pleads that Ms. Raimondo, who has openly stated her bias, especially as to "grey area" cases, led the Title IX Team that decided when to initiate investigations, as required by the Policy. RE 21-2, Amended Complaint, PageID #476, ¶ 24. He further alleges that Ms. Raimondo then personally oversaw the investigation and decided whether a student should be charged at the end of it, also as required by the Policy. *Id*.

That is plausible evidence of bias in the initiation of every investigation and hearing at Oberlin, especially in "grey area" cases like Mr. Doe's.

The extent to which the *Miami University* court relied on the impact evidence presented there should not be understated. The only other evidence of gender bias that court relied on was the external pressure felt by the school, and that from two sources (1) the generic pressure that every school felt from the Education Department in the wake of the 2011 Dear Colleague Letter, and (2) a single lawsuit by a female student. *Miami Univ.*, 882 F.3d at 594. In other words, the only evidence of bias unique to Miami, besides the statistics, was the existence of a single lawsuit against it filed the previous year. Statistics of the kind presented in *Miami University*, and here, are not just some evidence of gender bias; they are powerful evidence that all but carry the day at the pleading stage given the climate that schools face.

c. The District Court Erred in Fundamental Ways in Rejecting Mr. Doe's Impact Evidence.

The district court gave four unsupported reasons for rejecting Mr. Doe's statistical evidence. Most sweepingly, it held that "'a Title IX claim may not be premised on the disparate impact a policy has with respect to a protected group.'" RE 35, Order Granting Motion to Dismiss, PageID #815 (quoting *Doe v. College of Wooster*, 243 F. Supp. 3d 875 (N.D. Ohio 2017) and citing *Brown Univ.*, 166 F. Supp. 3d at 184). That is a flat misstatement of the law. It conflates disparate

impact claims, which require no evidence of discriminatory intent, with the use of impact evidence to support claims where intent is required, as under the Equal Protection Clause, Title VI and Title IX. The appropriateness of using impact evidence as evidence of intent was central to the holding in *Village of Arlington Heights* with respect to the Equal Protection Clause. *Vill. of Arlington Heights*, 429 U.S. at 265. And it is true under Title VI, from which the language of Title IX was derived and which likewise requires a showing of intent. *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001) (no disparate impact claims under Title VI); *The Comm. Concerning Cmty. Improvement v. City of Modesto*, 583 F.3d 690, 703 (9th Cir. 2009) (holding, in Title VI case, that discriminatory "intent" in application of "facially neutral" policy can be established with "proof of disproportionate impact on an identifiable group, such as evidence of gross statistical disparities") (internal quotation marks omitted). That is all that *College of Wooster* and *Brown University* mean when they say that "a Title IX claim may not be premised on [] disparate impact." They get that language from *Doe v. Columbia University*, 101 F. Supp. 3d 356, 367 (S.D.N.Y. 2015), which used it precisely in explaining that point.

The district court's second reason for rejecting Mr. Doe's statistical evidence was that "90% of the complaints of discrimination were resolved short of adjudication," which meant, in the district court's view, that the 100% conviction

rate in the ten adjudications could not be evidence of bias. RE 35, Order Granting Motion to Dismiss, PageID #814-15. That fails for two obvious reasons. The first is that it doesn't absolve a system to say that only part of it suffers from gender bias. A "particularized causal connection" exists when gender is "a motivating factor," not just the sole factor, in the outcome. *Yusuf*, 35 F.3d at 715. If the only cases Oberlin sent to formal resolution were those where the evidence of guilt was especially strong, perhaps a 100% conviction rate would not be evidence of bias. But Mr. Doe's own case, where the investigation "turned up almost no evidence that Ms. Roe was incapacitated" in the first place, "and quite literally no evidence suggesting that" a reasonable observer could have known it if she were, RE 21-2, Amended Complaint, PageID #494-95, ¶ 85, undermines that kind of fanciful inference. The only reasonable inference to draw is that Oberlin subjects even the weakest of cases to formal resolution. Its 100% conviction rate is strong evidence of gender bias.

Just as fundamentally, there is no basis for presuming that Oberlin's decision to resolve 90% of its cases short of adjudication says anything about Oberlin's own motivations. It is a "survivor-centered process" in which 80% of those making a report wanted no action to be taken and where a complainant's assent is required for informal resolution. RE 28-3, Exhibit B to Oberlin's Motion to Dismiss (2016 Campus Climate Report), PageID #697-98. The most logical inference (and

certainly a reasonable one) is that those 90% of cases went no further because complainants demanded it. Perhaps discovery will reveal otherwise, but as a private school not subject to public records requests, that information is in Oberlin's sole possession. *Doe v. Coastal Carolina Univ.,* 359 F. Supp. 3d 367, 377 (D.S.C. 2019) ("Given the confidential nature of disciplinary proceedings against students accused of sexual misconduct, it is difficult to imagine how Plaintiff could plead the existence of such proceedings in greater factual detail."); *Doe v. Univ. of Or.*, No. 6:17-cv-1103, 2018 WL 1474531, *15 (D. Or. March 26, 2018) ("the evidence that could show which (if either) inference is correct is for all practical purposes unavailable to plaintiff without the tools of discovery." *Marshall v. Ind. Univ.,* 170 F. Supp. 3d 1201, 1210 (S.D. Ind. 2016) ("Marshall's pleading must be dismissed for failure to identify more particularized facts"); *Brown Univ.*, 166 F. Supp. 3d at 189.

The district court next rejected Mr. Doe's statistical evidence because the fact that the "vast majority" of accused students at Oberlin are men "by itself is not indicative of discrimination or bias against men," and further that a high rate of male respondents "'is just what the court would expect,'" because the Department of Justice supposedly says that "'over 95% of sexual assaults are perpetrated by males.'" RE 35, Order Granting Motion to Dismiss, PageID #815 (quoting *Doe v. Univ. of Dayton*, No. 3:17-cv-134, 2018 WL 1393894, at *9 (S.D. Ohio 2018)).

But few pieces of evidence "by themselves" are "indicative of discrimination," yet that does not somehow make them irrelevant. *See, e.g.*, *Vill. of Arlington Heights*, 429 U.S. at 265 (impact evidence). More importantly, the *Dayton* court's adoption of that 95% statistic is puzzling, lifted as it is from the 2006 edition of DOJ's *Criminal Victimization in the United States*. *Univ. of Dayton*, 2018 WL 1393894, at *9. The more recent 2008 edition (the most recent one that provides this kind of statistic) puts that figure of male perpetrators at a much lower 78.1%, *see* Exhibit 1, Table 38, suggesting a 20% range pursuant to which the rate of male respondents in Oberlin's process would itself be evidence of disproportionate impact in case initiation.

But most important of all, the district court misunderstands the role that a high male respondent rate plays in evaluating disproportionate impact in case *outcome*. Knowledge that an act or policy will predominately affect one race, or one gender, is precisely the kind of knowledge that can make impact evidence probative of discriminatory intent. The higher the expected male respondent rate, the more that a 100% conviction rate raises a reasonable inference of gender bias. When one expects, as Ms. Raimondo does, that sexual misconduct respondents will be males, *see* RE 21-2, Amended Complaint, PageID #488, ¶ 59 and then implements a complainant-centered system that convicts 100% of the respondents that it charges, there is strong circumstantial evidence of gender bias in the

outcome. *See Yusuf*, 35 F.3d at 716 (impact evidence that states erroneous outcome claim takes form of "allegation that males invariably ***lose*** when ***charged*** with sexual harassment") (emphasis added); *Heyne v. Metro. Nashville Pub. Sch.*, 655 F.3d 556, 571 (6th Cir. 2011) (Caucasian plaintiff stated equal protection claim where he alleged, among other things, that school administrator "was aware that MNPS maintained statistics on student discipline, including the race of students subject to discipline," and instructed staff "to be more lenient in enforcing the Code of Conduct against African-American students").

* * *

Mr. Doe's impact evidence, like the evidence in *Miami University*, is powerful evidence of gender bias. And it takes on even deeper significance in combination with the rest of his evidence. It is not a 100% conviction rate that exists in a vacuum: It is produced by a system designed by someone who expects respondents to be male, who has said that she created a "survivor-centered" process because she "come[s] to the work as a feminist," who has expressed other gendered views about consent, and whose system convicts respondents even where, as here, there is no evidence to support the finding. It is at least one plausible inference among others that gender bias partly resulted in Mr. Doe's conviction.

4. The Outcome Itself, As Unfounded As It Is, is Further Circumstantial Evidence of Gender Bias.

Finally, the fact that Oberlin's decision against Mr. Doe is so thoroughly unsupported is further evidence that it was motivated in part by gender. *See Vill. of Arlington Heights*, 429 U.S. at 267 ("Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached."). As discussed above, Mr. Doe's hearing panel effectively ignored Oberlin's definition of "incapacitation" in convicting Mr. Doe based solely on Ms. Roe's statement, "I am not sober." That kind of departure from the Policy is itself some evidence of gender bias. *See, e.g.*, *Doe v., Colgate Univ.*, 760 Fed. App'x 22, 33 (2d Cir. 2019) (acknowledging, in section discussing gender bias, that "it is plausible to infer that disciplinary evaluators were biased against the respondent if 'the evidence substantially favor[ed]' the respondent's version of events but the evaluators 'chose to accept [the complainant's] unsupported accusatory version' instead") (quoting *Columbia Univ.*, 831 F.3d at 57); *Doe v. Syracuse Univ.*, No. 5:18-cv-377-DNH, 2019 WL 2021026 (N.D.N.Y. May 8, 2019) (allegation that outcome was "contrary to the weight of the evidence" was some evidence of gender bias); *Marymount Univ.*, 297 F. Supp. at 587 (decision to credit complainant's testimony given the contrary evidence supported inference of gender bias).

5. Conclusion

Mr. Doe pleads overwhelming evidence of gender bias. He pleads external and internal pressure upon Oberlin on a par with what drove the analysis in *Baum*. He pleads statistical evidence on a par with what all but carried the day in *Miami University*. He pleads statements from the person who trained hearing panelists in the "evaluation of consent and incapacitation" showing that gender bias informs how she thinks about consent. And he himself was then expelled after his hearing panel evaluated consent and incapacitation and somehow concluded that a single statement—"I'm not very sober right now"—made after 45 minutes of talking and sexual activity, and admittedly accompanied by no other signs of incapacity, should have told Mr. Doe that Ms. Roe was *so* intoxicated that she "lack[ed] conscious knowledge of" what she was doing or was "physically helpless." Mr. Doe has more than "a wing and a prayer," *Baum*, 903 F.3df at 581, of showing that gender bias partly motivated that incredible decision.

II. BECAUSE THE AMENDED COMPLAINT PLEADS DIVERSITY JURISDICTION, THE DISTRICT COURT ERRED IN DISMISSING MR. DOE'S STATE LAW CLAIMS.

The district court separately erred in dismissing Doe's state law claims on jurisdictional grounds, *see* RE 35, Order Granting Motion to Dismiss, PageID #819 (dismissing state law claims after refusing to exercise supplemental jurisdiction over them). This is because the Amended Complaint expressly pleads diversity

jurisdiction, an independent source of federal jurisdiction. *See* RE 21-2, Amended Complaint, PageID #471, ¶ 3 ("This Court also has diversity jurisdiction under 28 U.S.C. § 1332 because John Doe and Oberlin College are residents of different states."). Oberlin itself, almost surely for that reason, did not request that the state law claims be dismissed on those grounds; it requested only that the district court reject supplemental jurisdiction as one basis for jurisdiction over those claims:

> If the Court dismisses Plaintiff's Title IX claim, as it should, the Court can decline to exercise supplemental jurisdiction over Plaintiff's remaining state-law claims (Counts I and III). *E.g.*, *Mallory*, 76 Fed. Appx. at 641; *Case Western*, 2015 WL 5522001, at *8.

RE 28-1, Memorandum in Support of Motion to Dismiss, PageID #619, n. 12 (emphasis added).[3] It never asked (even in the alternative) that the state law claims be dismissed without prejudice—the "'usual course'" when supplemental jurisdiction is the only asserted basis for jurisdiction, as the district court recognized. RE 35, Order Granting Motion to Dismiss, PageID #819 (quoting *Mallory*, 76 Fed. App'x at 641). It consistently asked only for dismissal "with prejudice" after challenging those claims on the merits. RE 28-1, Memorandum in Support of Motion to Dismiss, PageID #605, 611, 624.

[3] Even this more limited request was not properly made, raised as it was only in a single footnote that merely cited to two cases without excerpting or applying them in any way. *See, e.g.*, *Calvert v. Wilson*, 288 F.3d 823, 836–37 (6th Cir. 2002) ("'arguments raised in passing in footnotes are waived'") (quoting *U.S. Dept. of Navy v. Fed. Labor Relations Auth.,* 975 F.2d 348, 352 (7th Cir.1992)).

The district court simply missed that the Amended Complaint expressly pleads diversity jurisdiction. Its dismissal of the state law claims on jurisdictional grounds should be reversed.

CONCLUSION

For the foregoing reasons, John Doe respectfully requests that the judgment of the district court be reversed.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the word limit set forth in Fed. R. App. P. 32(a)(7)(B)(i) because, according to the word-count feature of Microsoft Word, it contains 12,779 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I certify that on July 3, 2019, I electronically filed this Brief of Plaintiff-Appellant John Doe with the Clerk of the Court using the CM/ECF system, which sent electronic notification to counsel of record for Oberlin College:

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

1. RE 21-2, Amended Complaint (February 26, 2018), PageID #470-531

2. RE 28-1, Memorandum in Support of Oberlin's Motion to Dismiss (March 23, 2018), PageID #600-25

3. RE 28-2 Exhibit A to Oberlin's Motion to Dismiss (March 23, 2018), Page ID #626-91

4. RE 28-3, Exhibit B to Oberlin's Motion to Dismiss (2016 Campus Climate Report) (March 23, 2018), PageID #692-701

5. RE 29, Opposition to Motion to Dismiss (April 6, 2018), PageID #703-729

6. RE 35, Order Granting Motion to Dismiss (March 31, 2019) PageID #804-819

7. RE 36, Notice of Appeal (April 16, 2019), PageID #820-21