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

REPLY BRIEF OF APPELLANT JOHN DOE

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Other Authorities

INTRODUCTION

If Oberlin had its way, schools would literally be able to discriminate openly, with impunity, so long as they masked their bias in any particular proceeding or refrained from discriminating in *every* single case. Under Oberlin's theory, a plaintiff's case should be dismissed even if a school's president, or Dean of Students, or Title IX Coordinator openly declared that its facially neutral sexual misconduct policy would be applied in a discriminatory manner, so long as no one said anything exhibiting bias in a given proceeding. Schools could openly instruct adjudicators to rule against every male, or to apply heightened standards to them, and those who are punished would have no recourse so long as no administrator in the proceeding said anything overtly biased.

Imagine if Oberlin had argued that as to any other protected class—that it may openly announce an intent to discriminate based on race, for example, and could get away with it, provided its actions and statements evincing bias were all made prior to a given proceeding. That kind of argument would have Oberlin laughed, or perhaps shamed, out of court. Yet that is the kind of argument Oberlin offers here. It maintains that it is not even *plausible* to infer that it acted with gender bias unless there is overt evidence of bias in plaintiff's particular proceeding, no matter how directly its bias outside the proceeding can be traced to the outcome. Response Br., Doc. 18 at Pages 36-38. And it maintains that Ms.

Raimondo's declaration that gender considerations affect her views on consent in grey area cases cannot be evidence of gender bias simply because she leaves open the possibility that *not all* respondents will be convicted. *Id.* at Page 33.

Those results are absurd, and they are unsupported in the law. Title IX is violated in this Circuit any time there is a particularized causal connection between gender bias and a disciplinary decision, *Doe v. Miami Univ.*, 882 F.3d 579, 592 (8th Cir. 2018), including when the evidence of bias is outside the proceeding, *Doe v. Baum*, 903 F.3d 575, 586-87 (6th Cir. 2018); *see also Robinson v. Runyon*, 149 F.3d 507, 509 (6th Cir. 1998) (Title VII). Here, the link between gender bias outside the proceeding and individual adjudications is straightforward: Ms. Raimondo has gendered views on how to analyze consent, and she trained everyone at Oberlin on how to analyze incapacitation and consent. That is a direct line into the adjudicators' decisionmaking here, and her bias need only have plausibly affected the decision in part.

The evidence of gender bias within Mr. Doe's proceeding is just as straightforward: Mr. Doe's panel analyzed incapacitation and consent in ways not explainable by the evidence. That not only is evidence of bias on its own, it also shows just how plausible it is to infer that Ms. Raimondo's biased views informed Oberlin's training. That conclusion is only confirmed by the 100% conviction rate she presided over and the fact that she did so against the backdrop of so much

government pressure. The Amended Complaint, for all of those reasons, overwhelmingly states an erroneous outcome claim.

ARGUMENT

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

Oberlin waives argument with respect to the first prong ("articulable doubt") of an erroneous outcome claim. Response Br., Doc. 18 at Page 26. It argues instead that the Amended Complaint fails to plead that gender bias motivated the outcome. Its arguments fail in fundamental ways, often in ways that directly undermine its own position.

A. Ms. Raimondo's Statements Betray Overt Gender Bias and Disclose That She Brings It To Bear On Her Work.

Oberlin has little to say about the clearest evidence of gender bias in the case: Ms. Raimondo's statement in June 2015 that gender considerations affect the way she thinks about consent in "grey area" cases, and her statement one month earlier that she "come[s] to this work as a feminist committed to survivor-centered processes," dispelling any doubt that her views on gender (such as how it affects grey area cases) are brought to bear in Oberlin's Title IX proceedings. RE 21-2, Amended Complaint, PageID #488, ¶ 59. Oberlin offers nothing to explain why it is implausible to take those statements at face value. *Baum*, 903 F.3d at 580; *Menaker v. Hofstra Univ.*, No. 18-3089-cv (2d Cir. August 15, 2019) at 16 n. 38

(attached as Ex. 2) ("inference of sex-based discriminatory intent" need only be "one of several possible inferences").

1. As to Ms. Raimondo's statement that speaking of "grey areas" of consent can discredit "women's experiences of violence" in the "middle category" of cases, Oberlin fails even to try to offer a plausible alternative interpretation of what that statement could mean. The Response Brief avoids addressing the actual contents of that statement, or how the ideas it expresses could produce a system that treats men and women equally on questions of consent. Oberlin instead tries just one thing to dodge its import: It notes that later in the talk, Ms. Raimondo implied that *some* respondents might not be found responsible. Response Br., Doc. 18 at Page 33 (quoting Ms. Raimondo that hearings are meant to ask respondents, "how you can be responsible for the harm you've done to others, if in fact that was the result of your conduct?"). That is damning by faint praise, to put things mildly. Put aside that Ms. Raimondo's "acquitted respondent" possibility is satisfied by cases with male complainants, and therefore says nothing about her views on "grey area" cases involving "women's experiences of violence." If all that Ms. Raimondo's gender bias did was to make it *more difficult, but not impossible*, for men to prove their innocence in "grey area" cases with female complainants, that still amounts to obvious claim discrimination. The argument would be tantamount, in the employment context, to an employer setting higher entry requirements for

minorities or women based on race or gender, an obvious act of discrimination even if some in the affected groups could meet the heightened requirements. It does not absolve Ms. Raimondo, or Oberlin, to say that in grey area cases they "merely" put a (very large) thumb on the scale to favor female complainants but did not predetermine such cases outright. Liability attaches—under Title VI, under Title VII, under the Equal Protection Clause, and under Title IX—when discriminatory bias motivates the outcome "at least in part." *Doe v. Columbia Univ.*, 831 F.3d 46, 56 (2d Cir. 2016); *Doe v. Purdue Univ.*, 928 F.3d 652, 669 (7th Cir. 2019).

Oberlin offers no reason why Ms. Raimondo would not act on her belief that gender should affect the analysis in "grey area" cases with female complainants. It is implausible to think that a powerful academic administrator, with passionate beliefs on an issue, who publicly affirmed that she brings her feminism to bear on her work, chose not to implement those beliefs when she had a chance to do so, even though the environment in which she operated (as evidenced by the faculty training guides, the Counseling Center, and student sentiment) was highly conducive to the implementation of those beliefs. It is at least plausible to believe that she did so.

The fact that Oberlin can offer no alternative, plausible, bias-free interpretation of Ms. Raimondo's statement, proves just how plausible it is to infer

gender bias from her "grey area" statement.[1] Given her role in training Oberlin's administrators on how to evaluate incapacitation and consent, that statement alone is sufficient evidence of gender bias to state a claim here.

2. As to Ms. Raimondo's second overt statement of bias—that she "come[s] to this work as a feminist committed to survivor-centered processes," Oberlin's responds only that being a feminist is not evidence of bias, which is both true and irrelevant. It ignores what Ms. Raimondo actually said—that she affirmatively brings feminism to bear upon her Title IX work. Oberlin's resort to a dictionary definition of feminism, *see* Response Br., Doc. 18 at Page 31, does not address the problem and also is not evidence that Ms. Raimondo held that dictionary's particular view. Oberlin cannot actually seem to decide which dictionary's definition to attribute to Ms. Raimondo, having relied on a *different* dictionary's definition in moving to dismiss Mr. Doe's original complaint below. *See* Motion to Dismiss, PageID #162 (relying on Merriam Webster). It swapped Merriam Webster out for its dictionary du jour undoubtedly because Merriam Webster's second definition of "feminism" suggests that it entails achieving

[1] Two district courts recently denied *summary judgment* to universities on Title IX counts in part due to administrators basing decisions, in ambiguous cases, on gendered assumptions far less stark than Ms. Raimondo's. *See Doe v. Quinnipiac Univ.,* 2019 WL 3003830 *38 (D. Conn. July 10, 2019); *Doe v. Grinnell College,* No. 4:17-cv-00079, ECF 151, slip op. at 25-26 (S.D. Iowa July 9, 2019) (attached as Ex. 1).

equality through gendered means—precisely the kind of "bringing feminism to bear" that Oberlin yearns to avoid in defining the term. *See* RE 12, Opposition to Motion to Dismiss (Sept. 20, 2017), PageID #272 (noting Merriam-Webster's second definition of feminism as "organized activity on behalf of women's rights and interests"). The end may be gender-neutral, but under *that* definition (and as disclosed by Ms. Raimondo), the means are not. What matters in a Title IX claim is not whether gendered actions are borne from 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; *Purdue Univ.*, 928 F.3d at 668.

No dictionary Oberlin cites can negate that Ms. Raimondo testified not simply to being a feminist, or researching feminist issues in her academic publications, *see Miami Univ.*, 882 F.3d at 601, but to bringing those views to bear upon a neutral factfinding process. Her subsequent statement that she analyzes consent in "grey area" cases with a view towards women's experiences of violence confirms it.

Oberlin's final resort is to argue that Ms. Raimondo made her statements 16 months prior to Mr. Doe's hearing, Response Br., Doc. 18 at Page 30, as if that means she must have changed her views. The Amended Complaint offers no basis for that conclusion. The outcome in Mr. Doe's case suggests just the opposite—

that she continued to train others to analyze consent in grey area cases in ways shaped by gender. And Oberlin's argument overlooks the key fact that under the Policy, Ms. Raimondo was required to train Oberlin's adjudicator's *annually* and would have had to train them before Mr. Doe's hearing, RE 28-2, Exhibit A to Oberlin's Motion to Dismiss (Sexual Misconduct Policy), PageID #677, perhaps as recently as four months before the hearing. Even if the time gap was the full 16 months, the record readily supports an inference of gender bias. *Roebuck v. Drexel University*, 852 F.2d 715, 717 (3d Cir. 1988) (single excluded statement by university president five years before plaintiff's denial of tenure was evidence of racial bias for Title VII claim); *Baum*, 903 F.3d at 586 (OCR investigation initiated two years before proceeding supported inference of gender bias).

Oberlin further argues that Ms. Raimondo could not have infected Mr. Doe's proceeding with gender bias because she stopped being Title IX Coordinator on July 1, 2016, three months before Mr. Doe's hearing. Response Br., Doc. 18 at Page 29. The Amended Complaint undermines the argument at every turn, which is probably why Oberlin didn't make it below. *Baum*, 903 F.3d at 582 (court "must draw all reasonable inferences in the plaintiff's favor"). From July 1 through the end of Mr. Doe's proceeding, Ms. Raimondo took on a *higher* role at Oberlin, in which she served as the direct supervisor of her replacement, who then was merely an interim Title IX Coordinator. RE 21-2, Amended Complaint,

PageID #479, ¶38. The investigative report was issued just six days later, on July 7, *id.*, PageID #494, ¶83; it is highly likely, and certainly reasonable to infer, that Ms. Raimondo had a direct hand in advising her brand new interim replacement and supervisee on whether to refer the matter for a formal hearing. It also is highly implausible that anyone but Ms. Raimondo could have been responsible for training Mr. Doe's hearing panelists. A reasonable inference—the most reasonable, even if there are others—is that the "annual training" the panelists received on evaluation incapacitation and consent occurred in one of the nine months that year in which Ms. Raimondo was the Title IX Coordinator (October 2015 through July 1, 2016) rather than the three in which she was not (July 2 through October 5, the date of the hearing). And *even if* the training had occurred in those final three months, it is surpassingly unlikely that an interim coordinator, *while* an interim, would do away with the training developed by an architect of the Policy, a national speaker on the issue and her direct superior. *Roebuck*, 852 F.2d at 717 (university president's mere status as president sufficed to allow factfinder to conclude that discriminatory statement made five years earlier had effect on tenure denial decision); *Oliver v. Univ. of Tex. Sw. Med. Sch.,* 2019 WL 536376, at *57-58 (N.D. Tex. February 11, 2019) (statements by non-decisionmakers can supply evidence of gender bias).

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

Ms. Raimondo's role as Title IX trainer gave her a direct influence in the deliberations of every Title IX proceeding. To bypass that inconvenient fact, Oberlin wants to create a special rule saying that evidence of bias must manifest itself within the temporal confines of a plaintiff's specific proceeding. Response Br., Doc. 18 at Pages 36-38. Such a rule would let schools discriminate with impunity, so long as they buried the discrimination in places like annual trainings that occur outside of any particular proceeding. The proposed rule's absurdity speaks for itself. It also isn't the law, as the *Baum* Court's reliance on *Amherst College* and *Lynn University* proves. *Baum*, 903 F.3d at 586-87; *see also Purdue Univ.*, 928 F.3d at 669-70 (plaintiff sufficiently pled gender bias where hearing contained no overt evidence of bias). Oberlin trips over itself in trying to explain away *Amherst College* and *Lynn University*, and digs itself a deeper hole in the process.

As to *Amherst College*, Oberlin states that "the court relied on allegations of 'adjudicator bias' in declining to dismiss an expelled student's Title IX claim, including that the investigator failed to obtain [relevant] text messages." Response Br., Doc. 18 at 39-40 (citing *Amherst Coll.*, 238 F. Supp. 3d at 214, 222). But the court identified neither of those as evidence of gender bias; discussion of gender

bias does not even start in the opinion until page 223. The stated evidence of gender bias relied on by the court—and quoted by *Baum*—was pressure put on the school outside the proceeding by a student movement. *Id.* a 223; *Baum*, 903 F.3d at 586-87. The phrase "adjudicator bias" appears nowhere in the *Amherst College* opinion, despite appearing in quotes in Oberlin's brief, and none of the "procedural flaws" discussed in the opinion pertain in any way to alleged biases held by the adjudicators. *Amherst Coll.*, 238 F. Supp. 3d at 222. The plaintiff in fact believed that the adjudicators *acted in good faith*, attributing the wrongful outcome to procedural flaws by others that "prevented the Hearing Board from considering all of the evidence" or led to them being "misadvised about the requirements under the *Policy* and *Procedures*." *Id.* at 222-23. The court expressly noted that the plaintiff did not "challenge the Hearing Board's exercise of discretion in weighing the credibility of the evidence that was actually before it." *Id.* Coining the phrase "adjudicator bias," putting it in quotes, and then claiming that *Amherst College* relied on it could not be more misleading.

Oberlin's position that the investigator's failure to secure text messages is evidence of *gender* bias is just as damning, because Oberlin can now no longer claim that terms and acts that are facially neutral as to gender cannot supply evidence of gender bias. *See, e.g.*, Response Br., Doc. 18 at Page 31 (arguing that "survivor-centered process" is gender neutral term that does not support inference

of bias); *id.* at Page 38 ("concern for alleged victims 'does not equate to gender bias because sexual-assault victims can be both male and female.'" *Id.* at Page 38 (quoting *Doe v. Cummins*, 662 Fed. Appx. 437, 453 (6th Cir. 2016))). There is nothing overtly gendered about refusing to collect text message evidence; it could just as easily be said, to paraphrase Oberlin, that "[failing to collect text messages] does not equate to gender bias because [those needing such texts] can be both male and female." Normally that leads Oberlin to argue there can be no gender bias, because that is usually the more convenient position for it. To salvage *Amherst College*, Oberlin now says the opposite and hopes that the Court won't notice the contradiction. If failing to collect text messages can be evidence of gender bias, then so too can every unfair thing that happened to Mr. Doe in his proceeding, including the extreme delay he was forced to endure, being assigned an advisor with heavy pro-complainant leanings, and the completely unfounded rationale that Oberlin gave for finding him responsible. *See, e.g.*, *Menaker*, Ex. 2 at 16 ("procedural deficiencies" supported inference of gender bias); *Doe v. Marymount Univ.*, 297 F. Supp. 3d 573, 586-87 (E.D. Va. 2018).

The same logic undermines Oberlin's treatment of *Lynn University*. Oberlin argues that *Lynn University* involved evidence of gender bias in the proceeding itself because the complainant wrongly had an attorney advocating for her and the hearing officer's questioning was imbalanced. Response Br., Doc. 18 at Page 40.

Under Oberlin's normal logic, neither of those could be evidence of gender bias because they could happen to both sexes. *See id.* at Page 38. Worse still for Oberlin, the court *expressly rejected* these alleged "procedural irregularities" as supplying evidence of gender bias in that particular case. *Lynn Univ.*, 235 F. Supp. 3d at 1342. It held that the only evidence of such bias was OCR's nationwide pressure upon schools coupled with targeted external pressure from local media and parents. *Id.* at 1341-42.

Oberlin strangely offers that *Lynn University* differs from this case because there, "the university's administrators were instructed 'to take a hard line toward male students accused . . . by female students, while not prosecuting any female students.'" Response Br., Doc. 18 at Page 40 (quoting *Lynn Univ.*, 235 F. Supp. 3d at 1341). But that is a perfect parallel to what happened here: "the [College's] administrators were instructed" by Ms. Raimondo "to take a hard line toward male students accused . . . by female students," by analyzing consent in ways that favored the female students. In both cases administrators were instructed to take expressly biased views in adjudications. It established an obvious causal connection in *Lynn University*, and it does so here as well.

Amherst College and *Lynn University* contain the kinds of allegations that this Court has identified as supporting a plausible inference of gender bias. Evidence of overt gender bias *in the proceeding itself* is not required under Title

IX, just as it is not required in other anti-discrimination contexts. The requirement is simply that a "particularized causal connection" be drawn, *Miami Univ.*, 882 F.3d at 592, meaning that gender motivated the outcome at least in part, *Columbia Univ.*, 831 F.3d at 56. What matters is whether the connection can plausibly be drawn, not where the evidence comes from that is used to draw it.[2]

C. Oberlin Drafted and Implemented the Policy Under the Threat of OCR's Nationwide Pressure.

Oberlin's response to *Miami University*'s holding that nationwide pressure from OCR supplies some evidence of gender bias is schizophrenic. It cites cases that predate *Miami University* to argue that "[a]llegations of [n]ationwide [p]ressure . . . [d]o [n]ot [s]upply [e]vidence of [g]ender [b]ias," Response Br., Doc. 18 at Page 41-42 (citing *Doe v. Coll. of Wooster*, 243 F. Supp. 3d 875, 887 (N.D. Ohio 2017)), yet then concedes, as it must, that *Miami University* found nationwide pressure to supply some evidence of gender bias. Response Br., Doc. 18 at Page 42-43. When that pressure combines with other evidence, it can support a plausible inference of gender bias *See, e.g.*, *Lynn Univ.*, 235 F. Supp. 3d at 1342

[2] Mr. Doe *does*, moreover, plead direct evidence of bias in his specific proceeding. The rationale finding him responsible is completely without merit, and that is evidence of gender bias, as Mr. Doe noted in his opening brief. Doc. 15 at Page 60. Ms. Raimondo furthermore was interviewed in the proceeding, RE 21-2, Amended Complaint, PageID #494, ¶84, she appointed Mr. Doe an advisor ill-suited to the role, *id.*, PageID #488-89, ¶¶61-64, and she then oversaw the interim coordinator for the rest of the proceeding, *id.*, PageID #479, ¶38.

(nationwide pressure plus targeted pressure from media and parents sufficed to state a claim for gender bias); *Purdue Univ.,* 928 F.3d at 668 ("Other circuits [citing to *Miami Univ*.] have treated the Dear Colleague letter as relevant in evaluating the plausibility of a Title IX claim.").

Oberlin tries to downplay the heightened significance of OCR's nationwide pressure in this particular case, which came at a time when Oberlin was actually drafting and implementing the Policy. It does so by pretending that paragraphs 36-40 are where the Amended Complaint discusses that pressure. *See* Response Br., Doc. 18 at Pages 41-42 (noting that the Opening Brief cites those paragraphs in discussing nationwide pressure). But those paragraphs merely explain *when* the Policy was drafted—late 2012 through early 2014—to establish that it happened in the period when OCR was exerting this pressure. Oberlin cannot feign ignorance that this pressure came from OCR's famed "Dear Colleague Letter," issued in April 2011. *See, e.g.*, *Miami Univ.*, 882 F.3d at 594 (citing directly to "'Dear Colleague'" (Apr. 4, 2011) in discussion of nationwide pressure). Just as importantly, the Dear Colleague Letter was the express premise of Ms. Raimondo's panel discussion in May 2015, which the Amended Complaint incorporates. *See* RE 21-2, Amended Complaint, PageID #488, ¶59 n. 31 (leading with observation that "[t]here's been so much conversation and controversy . . . in

the last four years since the 'Dear Colleague Letter' went out").[3] Ms. Raimondo herself acknowledged this pressure the following month, before any OCR investigation was commenced at Oberlin. *Id.*, PageID #487, ¶57, n. 30 at 31:25 ("Those of us who are practitioners in the field, I think, are at the point where it's not if OCR comes, it's when."). The Amended Complaint further identifies specific statements by the head of OCR in July 2014, August 2015, and October 2016 threatening to punish schools that didn't comply with the DCL, including by yanking their federal funding. *Id.*, PageID #485, ¶ 50. The district court itself acknowledged that the pressure that comes from OCR investigations is just a targeted form of the nationwide pressure that started with the Dear Colleague Letter in 2011. RE 35, Order Granting Motion to Dismiss, PageID #816 ("Plaintiff also alleges that the investigation and adjudication of the allegations made against him were done within an environment of great scrutiny and pressure created by the 2011 OCR *Dear Colleague* letter."). Even before it came under OCR investigation, Oberlin was under the same nationwide pressure that helped to support an inference of gender bias in *Miami University*, and in fact was under that pressure the entire time it drafted and implemented the Policy through Mr. Doe's proceeding.

[3] The Amended Complaint incorporates that by reference, just as it does her panel discussion that appears on YouTube. *See* Response Br., Doc. 18 at Page 32 n. 3 (acknowledging video is part of complaint).

D. Oberlin Fails to Skirt the Even Greater Evidence of Bias Stemming From Targeted OCR Pressure.

Baum made clear that when OCR's nationwide pressure becomes targeted upon a school through an active OCR investigation, that is a significant source from which to plausibly infer gender bias. *Baum*, 903 F.3d at 586.[4] Oberlin is wrong that "courts do not accept that" OCR investigations are evidence of *gender* bias "[a]bsent public pressure that targets the specific disciplinary hearing or that occurs just prior to or during the disciplinary hearing in question." Response Br., Doc. 18 at Page 44. Courts often find evidence of gender bias in remote OCR investigations unaccompanied by recent pressure. *See, e.g.*, *Wells*, 7 F. Supp. 3d at 751 (OCR investigations initiated seven and six months before hearing supported evidence of gender bias even absent discussion of any other forms of pressure); *Doe v. George Washington Univ.*, 366 F. Supp. 3d 1, 13 (D.D.C. 2018) (OCR investigation opened six months before hearing supplied evidence of gender bias even absent allegations of pressure in the three months preceding hearing); *Cummins*, 662 Fed. Appx. at 453 (stating broadly that OCR investigations support inference of gender bias).

[4] *See* RE 21-2, Amended Complaint, PageID #483-84, ¶48 (pressure via OCR investigation through time of investigation); *id.*, PageID #521-22, ¶211 (pressure via OCR investigation spanning time Oberlin treated Doe "more aggressively than it otherwise would").

Wells, *Miami University* and *Baum* all explain why—because the critical pressure schools experience stems not from embarrassing media attention that might ensue, but from the threatened loss of all federal funding. *Wells*, 7 F. Supp. 3d at 751 (OCR investigations pressure schools "to demonstrate to the OCR that Defendants would take action" when women accuse men of sexual assault); *Miami Univ.*, 882 F.3d at 594 (nationwide pressure threatened in "severe potential punishment—loss of all federal funds"); *Baum*, 903 F.3d at 586. Nationwide pressure derives all of its evidentiary weight from the threatened loss of federal funding. OCR investigations simply intensify that pressure upon a school. They may also be accompanied by media attention, which can add further plausibility to an inference of bias, but their primary evidentiary force is the intensified threat of a loss of federal funds. *Baum*, 903 F.3d at 586 (noting that OCR investigation and media attention both put pressure on school, and immediately continuing that school "stood to lose millions in federal aid" if found "non-compliant"). The idea that school administrators might suffer amnesia about so great a threat unless it drops "just before" a hearing, or unless the media reminds them of it every few weeks, is preposterous. So long as an OCR investigation is active, that threat looms heavily over a school. *Baum*, 903 F.3d at 586 (noting threatened loss of

federal funding from OCR investigation open two years before disciplinary proceeding).[5]

Even if more recent pressure upon Oberlin were necessary to infer gender bias, the Amended Complaint shows that OCR's head, Catherine Lhamon, continued to threaten to punish non-compliant schools in 2015 and 2016, including through October 2016—the very month that Mr. Doe's hearing took place and his appeal was submitted. RE 21-2, Amended Complaint, PageID #485, ¶50. That threat, occurring *while* Oberlin was under investigation, would do far more than any local media article to bring the potential consequences of an OCR investigation squarely into focus, if that were even needed. The Seventh Circuit recently recognized as much, noting that the combination of Lhamon's rhetorical threats and two open OCR investigations (but no adverse media coverage) meant that "the pressure on the university to demonstrate compliance was far from abstract," and "may have been particularly acute for [Purdue's] Title IX coordinator, [who] bore some responsibility for Purdue's compliance." *Doe v. Purdue Univ.*, 928 F.3d at 668.

[5] Oberlin's assertions that the Amended Complaint does not plead the gender of the student who initiated the OCR investigation is irrelevant; the ensuing OCR investigation is "systemic," conducted by an OCR with a gendered view of enforcement. RE 21-2, Amended Complaint, PageID #483, ¶48.

E. Mr. Doe's Impact Evidence is Further Powerful Evidence of Gender Bias.

While under the pressure of that OCR investigation, at least through February 2016, Oberlin convicted 100% of the respondents it sent through its formal hearing process, the vast majority of whom are alleged to be male. RE 21-2, Amended Complaint, PageID #486, ¶54.[6] Oberlin claims that record is not evidence of gender bias, because it allegedly "employ[ed] a strict vetting process" that weeded out 90% of all allegations. Response Br., Doc. 18 at Page 23. It can, however, cite to literally nothing in the Amended Complaint or any document it incorporates as evidence of a vetting process. Quite the contrary: the Amended Complaint shows that, in Oberlin's self-described "survivor-centered process," 80% of alleged survivors wanted no action to be taken, and those who did could request informal resolution. RE 28-3, Exhibit B to Oberlin's Motion to Dismiss (2016 Campus Climate Report), PageID #697-98. It is reasonable to infer that Oberlin weighed the merits of few, if any cases except those it sent through formal resolution.

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[6] Oberlin accuses Mr. Doe of trying to amend his pleadings by stating that "'a vast majority'" of convicted respondents at Oberlin, "'if not all, were male,'" Response Br., Doc. 18 at Page 49 (citation omitted). Mr. Doe is not doing so, nor does he have reason to, because the legal analysis does not turn on whether "all" or merely "the vast majority" of those convicted were males. "Vast majority" is precisely what the plaintiff in *Miami University* alleged, in claiming that 90% of convicted respondents were male, *see* 882 F.3d at 593, and "vast majority" is what Mr. Doe alleges here.

Oberlin's primary response to Mr. Doe's statistical evidence is that in *Miami University*, "'every male student [at Miami University] *accused* of sexual misconduct in the Fall 2013 and Spring 2014 semesters was found responsible for the alleged violation,'" Response Br., Doc. 18 at Page 52 (quoting *Miami Univ.*, 882 F.3d at 593 (emphasis added by Oberlin)), apparently understanding "accused" to mean accused by another student rather than by the school—*i.e.*, *charged*. The relevant statistical question in an erroneous outcome claim, however, is whether "males invariably lose when *charged with* sexual harassment," *Yusuf*, 35 F.3d at 716 (emphasis added), and that is precisely what was plausibly alleged in *Miami University*. The plaintiff there showed, through public records requests, that Miami found 20 students responsible for sexual misconduct in the 2013-14 time period. *Miami University*, 882 F.3d at 593. But Miami's Clery Act reports, which are publicly available, show that Miami received far more than 20 accusations of sexual misconduct by students in the 2013-14 time period. Just as to acts of "rape, sodomy, sexual assault w/ object, [or] fondling" in locations covered by Clery Act reports—a mere subset of the types and locations of acts prohibited by schools as "sexual misconduct"—there were 32 reports in 2013 and 2014.[7] *Miami University* plausibly alleged that the school found responsible each of the 20 male students of

[7] *See* http://miamioh.edu/_files/documents/campus-safety/2016_ASR.pdf (attached as Ex. 3).

that group—that is, every male student *charged* by Miami during that time period. Oberlin featured exactly the same outcome. *Even if* it were true that every male accused by a Miami student were found responsible, that would not mean that a 100% conviction rate of those "merely" charged with sexual misconduct does not show bias. *Yusuf*, 35 F.3d at 716 (claim that males invariably lose when charge suffices to state claim under Title IX as under Title VII). It would simply mean that the evidence of bias in *Miami University* was even stronger.

F. Oberlin's Repeated Attempts to Salvage the Hearing Panel's Rationale With Facts It Rejected is Further Evidence That It is the Product of Gender Bias.

Mr. Doe's hearing panel relied on a single piece of evidence to conclude that he should have known that Ms. Roe supposedly "lacked conscious knowledge of" what she was doing, was "physically helpless," was "extremely drunk" or was "extremely high," RE 21-2, Amended Complaint, PageID #475, ¶¶21-22: her single statement, after 45 minutes of talking and sexual activity, "I am not sober right now." *Id.*, PageID #472, ¶¶ 7-9. A statement that would be true whether she was barely tipsy, moderately buzzed, or severely intoxicated. A statement that, *by her own admission*, was the only outward sign to Mr. Doe of her intoxication. *Id.*, PageID #472, ¶ 7. That finding is so far divorced from the evidence that it screams gender bias. *Grinnell*, slip op. at 23-24 (Ex. 1). Oberlin's response—to literally mislead the Court into thinking that the panel also relied on the only piece of

contradictory testimony in the proceeding, as though that would make things *better*—further proves the illogical basis of the university's finding.

The Response Brief states that the Amended Complaint "contains a host of evidence from which the hearing panel could—and *did*—conclude that it is 'more likely than not' that Mr. Doe violated the Policy." Response Br., Doc. 18 at Page 56 (emphasis in original). It then immediately recites what it wants the Court to think is the evidence that the hearing panel "could—and *did*" rely on to conclude that Mr. Doe should have known that Ms. Roe did not consent:

> In particular, Ms. Roe testified at the hearing that she told Plaintiff during their sexual encounter, 'I am not sober right now[,]' ***and that she physically resisted Plaintiff's efforts to force her to perform oral sex on him, including by grabbing her neck***.

Id. (emphasis added). The Response Brief clearly wants to suggest that the Board "could and did" rely on this allegation of force in *finding* Mr. Doe responsible. And that assertion simply is contradicted by the face of the outcome letter. RE 21-2, Amended Complaint, PageID #510, ¶156. That Oberlin thinks the Hearing Panel's rationale would have been *better* had it relied on Ms. Roe's 11th hour contradiction, the only one *either party* told, *id.*, PageID #508, ¶149, is as damning an argument as anyone could make about the soundness of the university's original decision.

This tactic also puts the Response Brief on a hopeless collision course Oberlin's rejection of Mr. Doe's appeal. The appeals officer's *stated reason* for

rejecting Mr. Doe's strongest appeal evidence was *precisely that* the hearing board did not rely on Ms. Roe's allegation of force. The same day that Mr. Doe was found responsible, J.B., Ms. Roe's "best friend" before the hearing, a student who even accompanied her to her first investigative interview, spoke up. He wrote to Ms. Raimondo to inform her that Ms. Roe had not claimed in that interview that Mr. Doe had used force to make her perform oral sex, but that he "'merely placed his hand on the back of her head." *Id.*, PageID #512, ¶¶165-66. J.B. then submitted a handwritten statement for Mr. Doe's appeal, confirming that Mr. Doe had not used force, but that according to Ms. Roe he had "'asked her to "go down" on him *and that she agreed to do so.*'" *Id.*, ¶167 (emphasis added). The appeals officer rejected that evidence precisely because it "'*did not challenge the factors that led to the determination*,'" *id.*, PageID #514, ¶174 (emphasis added), which was only possible if the "factors that led to the determination" did not include the 11th-hour claim of force.

The only additional facts Oberlin marshals are two pieces of testimony regarding the antecedent question whether Ms. Roe was incapacitated at all. The first piece is a statement from Roe's friend that Ms. Roe was "out of it" before the encounter. Response Br., Doc. 18 at Pages 56-57. But that friend also testified that Ms. Roe "showed her the texts with Mr. Doe" and then said she was "going to go hang out with'" him, was not so affected "that she like couldn't be speaking

with me," that "[t]he whole situation . . . 'seemed pretty normal' to her and not like 'a potentially bad situation,'" that she specifically asked Ms. Roe, "'are you good,'" that Ms. Roe said, "'Yeah,'" and that she then "observed Ms. Roe's gait as she walked to Mr. Doe's room" and didn't testify that she "walked with any difficulty." RE 21-2, Amended Complaint, PageID #506, ¶141. She only knew that Ms. Roe was "out of it" because she knew Ms. Roe's mannerisms well. *Id.*, ¶142. None of that material is consistent with Oberlin's definition of incapacitation.

Oberlin's second piece of testimony is another friend's statement that Ms. Roe was not making "coherent sentences" after the encounter. *Id.*, PageID #505, ¶138. That friend said that they "talked about the evening," *id.*, and Ms. Roe said, "'I can't believe I was with [Mr. Doe]'" and was "'disappointed and upset that she had done something,'" *id.*, PageID #500-01, ¶116. As they talked Ms. Roe "began to cry" and "'wasn't necessarily making coherent sentences' ***as she cried.***" *Id.*, PageID #505, ¶138 (emphasis added). After she "stopped crying," she coherently "'said that she couldn't talk about it right now,'" "'would check in [with this friend] the next day,'" "got up," "collected her things" and then "left," with no reported difficulty in doing so. *Id.* She said nothing the entire time about being assaulted. *Id.*, PageID #500, ¶114. That, too, is completely inconsistent with Oberlin's definition of incapacitation. Oberlin's isolation of one statement from

each of these two friends is the only "cherry-picking" that anyone has done here. Response Br., Doc. 18 at Pages 56-57.

The Hearing Panel's decision is a complete departure from the evidence. It creates at least a plausible inference of gender bias. *Doe v., Colgate Univ.*, 760 Fed. App'x 22, 33 (2d Cir. 2019); *Grinnell*, slip op. at 23 (Ex. 1) (outcome letter's failure to discuss critical parts of investigation record was evidence of gender bias sufficient to survive summary judgment). Oberlin would not run from it otherwise.

II. THE STATE LAW CLAIMS SHOULD PROCEED TO DISCOVERY OR BE SUBJECT TO SUPPLEMENTAL BRIEFING IN THE DISTRICT COURT.

As the above discussion suggests, the allegations in the Amended Complaint persuasively show that Oberlin breached its contract with Mr. Doe, and its common law duty to discipline him with due care, when it found him guilty despite the overwhelming evidence to the contrary. RE 29, Opposition to Motion to Dismiss Amended Complaint, PageID #709-17, 725-28. The case law supporting his position has only grown stronger in the 16 months since briefing on that motion was complete. *See, e.g.*, *Montague v. Yale*, No. 3:16-cv-885 (D. Conn. March 29, 2019) at 20-49 (attached as Ex. 4) (denying school's summary judgment motion on multiple breach of contract counts). There is ample basis for this Court to order those claims to proceed to discovery. Barring that, this Court should send them back to the district court for supplemental briefing.

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 6,493 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 August 16, 2019, I electronically filed this Reply 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 12, Opposition to Motion to Dismiss (Sept. 20, 2017), PageID #254-80

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

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

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

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

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

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

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