No. 19-3342

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOHN DOE

Plaintiff-Appellant,

v.

OBERLIN COLLEGE

Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of Ohio,
The Honorable Solomon Oliver, Jr., U.S. District Judge

PETITION OF DEFENDANT-APPELLEE OBERLIN COLLEGE FOR REHEARING EN BANC

July 13, 2020

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RULE 35(b)(1) STATEMENT

Petitioner Oberlin College seeks en banc review for two reasons:

1. The panel majority created a new pleading standard for an erroneous outcome Title IX claim that conflicts with the standard adopted by this Court in *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018), and *Doe v. Miami Univ.*, 882 F.3d 579 (6th Cir. 2018). *See* Fed. R. App. P. 35(b)(1)(A). Under *Baum* and *Miami*, a court cannot sit in judgment of a college's Title IX decision so long as the outcome is not due to gender bias. The Court will not second-guess the correctness of a decision; it only will ensure the fairness of the process. The majority's view is the opposite. It decided that the "strongest evidence [of gender bias] is perhaps the merits of the [College's] decision itself[.]" Slip Op. at 12. The en banc Court should reject the majority's outcome-driven standard, which purported to reach the merits of whether Oberlin College arrived at the correct result, instead of whether the College's process for reaching that decision was unlawfully biased based on gender.

2. The majority opinion created a "question[] of exceptional importance" because colleges and universities have legal and ethical duties to help protect their students from sexual misconduct, including sexual assault. *See* Fed. R. App. P. 35(b)(1)(B). This duty requires balancing the interests among the accused, the alleged victim, and the broader campus community. If left undisturbed, the

majority opinion will lead schools to find individuals responsible for misconduct in only the most egregious of cases in order to avoid judicial review. It will be too risky to find misconduct in "close calls," thus hindering the ability of the hundreds of colleges and universities within this Circuit to provide an environment free of sexual misconduct.

INTRODUCTION

This case concerns the issue of whether a Title IX plaintiff can state a claim that a disciplinary proceeding was unlawfully biased based on gender merely by attacking the outcome of that process without alleging facts showing gender bias in his particular proceeding.

The parties do not dispute that Doe satisfied the first of his two-prong pleading requirement, which is to "cast some articulable doubt on the accuracy of the disciplinary proceeding's outcome[.]" *Baum*, 903 F.3d at 585. And the majority left this prong unchanged. Slip Op. at 9-10. Before the decision in this case, the second prong was satisfied only if a plaintiff alleged facts sufficient to "demonstrate a particularized causal connection between the flawed outcome and gender bias." *Baum*, at 585 (internal quotation marks and ellipses omitted). Plaintiffs had to show that bias in their proceeding caused an incorrect result.

The majority reinterpreted "particularized causal connection" to include the most general allegations—public comments made by the College's former Title IX

coordinator not in connection with any specific case, statistical evidence of the outcomes of about ten other sexual misconduct complaints, and an ongoing investigation by the Department of Education's Office of Civil Rights ("OCR") of the College's Title IX processes. Slip Op. at 10 (the bias does not have to "be unique to the plaintiff's own case"). The majority's decision directly conflicts with three recent opinions of this Circuit, all of which decided motions to dismiss based on whether the plaintiffs alleged facts *in their specific proceeding* that raised a plausible inference of gender bias. *See Baum*, at 586; *Miami*, 882 F.3d at 592-94; *Doe v. Univ. of Dayton*, 766 F.App'x 275, 281-82 (6th Cir. 2019). The majority also conflated the two prongs by holding that "when the degree of doubt passes from 'articulable' to grave," then the decision itself supports an inference of gender bias. Slip Op. at 12 (citation omitted).

Respectfully, the majority opinion got it wrong. As the Supreme Court made clear, courts should not "second-guess[] the disciplinary decisions made by school administrators." *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 648 (1999). It is also "'well established [within this Circuit] that school-disciplinary committees are entitled to a presumption of impartiality, absent a showing of actual bias.'" *Miami*, at 601 (quoting *Doe v. Cummins*, 662 F.App'x 437, 449 (6th Cir. 2016)).

Judge Gilman's dissent conforms with this precedent. He identified that the panel majority "reads out the causal requirement in Title IX." Slip Op. at 22 (Gilman, J., dissenting). The majority thus violated the presumption of impartiality afforded to Title IX disciplinary proceedings "'absent a showing of *actual bias*,' and that '[a]ny alleged prejudice on the part of the [decisionmaker] must be evident from the record and cannot be based in speculation or reference.'" *Id.* (quoting *Cummins*, 662 F.App'x at 449-50). And that is what the majority did: speculate. *Id.*

This is not a case where the majority panel merely decided a case incorrectly, which does not typically lead to en banc review. *See Mitts v. Bagley*, 626 F.3d 366, 366 (6th Cir. 2010) (Sutton, J., concurring in denial). Here, the majority altered and lowered the binding pleading standard adopted by this Court two years ago in *Miami* and *Baum* in two ways. First, in conflict with this Circuit's precedent, a plaintiff can bypass the second prong if the outcome is "gravely" erroneous because that outcome raises an inference of gender bias. *See* Slip Op. at 12 ("Doe's strongest evidence is perhaps the merits of the decision itself in his case."). Second, the requirement of a "particularized causal connection" is rendered meaningless because any evidence of gender bias generally can state a claim without any allegation that the procedures in plaintiff's proceeding or the decision-makers or investigators involved in the outcome acted with gender bias. By doing so, the majority upset the "rule" of this Circuit that a published panel

decision "'remains controlling authority unless . . . this Court sitting en banc overrules the prior decision.'" *Kerman v. C.I.R.*, 713 F.3d 849, 866 (6th Cir. 2013) (citation omitted).

If left uncorrected, this conflict will leave district courts in doubt as to whether or how they should apply the second prong or, as the majority did here, if they can find that a plaintiff states a Title IX claim by casting "grave" doubt on the outcome, which, respectfully, is an unworkable, subjective framework. The majority opinion also leaves schools unsure over how to conduct their Title IX proceedings, including whether they must abandon the preponderance of the evidence standard to avoid judicial review of the outcome. Under the majority's theory, even the most thinly pleaded complaint will survive dismissal and require expensive and time-consuming discovery. Title IX processes will grind to a halt.

This Court should rehear this case en banc and restore consistency to the pleading standard of this Circuit so that schools can meet their obligations under Title IX.

BACKGROUND

Doe and Roe had a sexual encounter in the early morning hours of February 28, 2016. Slip Op. at 4. Nine days later, Roe filed a report with Dr. Meredith Raimondo, the College's then-Title IX coordinator, accusing Doe of sexual assault. R.35, Order, at 2. A week later, the College notified Doe of the allegations and

hired an outside attorney who investigated Roe's allegations by interviewing 11 people with knowledge of the events surrounding the sexual encounter. *Id.*; R.21-2, Am. Compl., ¶ 84. The investigative report was released on July 7, 2016, after Raimondo had left her role as Title IX Coordinator. R.21-2, ¶¶ 38, 83.

Prior to their sexual encounter, Roe drank alcohol and smoked marijuana in different locations on campus. R.35, Order, at 1. During intercourse, Roe complained that the sex was uncomfortable for her, telling Doe, "I'm not sober." *Id.* at 2. The two then stopped having intercourse. *Id.* Doe claims that he asked Roe to perform oral sex on him, and that she agreed to do so. *Id.* Roe told the investigator that Doe had asked her to perform oral sex and that during oral sex Doe "kept pushing her head down and causing her to gag." Slip Op. at 6.

At a hearing before a three-member panel on October 5, 2016, Roe reiterated that Doe used physical force during the encounter. *Id.* at 6-7. She testified that Doe did not ask her to perform oral sex, but that "Doe simply grabbed her neck and forced her mouth onto his penis after he stopped having vaginal intercourse with her." *Id.* at 7.

The panel concluded that Doe had violated Oberlin's Sexual Misconduct Policy (the "Policy") because "'the preponderance of the evidence established that effective consent was not maintained for the entire sexual encounter[.]'" *Id.* at 8. The panel found that Roe was incapacitated and unable to give consent from the

time she told Doe that she was "not sober." *Id.* Based on this statement and "the corroborating statements of" Roe's witnesses who testified about her intoxicated state around the time of the encounter, the panel determined that Roe was "incapacitated and not capable of giving effective consent when asked to perform oral sex." R.21-2, Am. Compl., ¶¶ 157-158. Doe appealed the panel's decision. Slip Op. at 8. The College rejected his appeal and upheld his expulsion. *Id.* at 9.

Doe filed suit against the College, seeking money damages under Title IX and an order requiring the College to erase any mention of the findings and sanctions against Doe from his records. The district court granted the College's motion to dismiss. R.35, Order.

The district court examined the same evidence as the panel majority—public comments made by Dr. Raimondo, a retweet by Doe's hearing advisor, statistical evidence, and the ongoing OCR investigation. *Id.* at 9-16. Unlike the majority, however, the district court considered the "entire video" containing Dr. Raimondo's comments, concluded that they do not suggest Oberlin's Policy is motivated by gender bias, and found that the retweet indicated "victims should be taken seriously, not that males should be railroaded." *Id.* at 9-11.

With respect to the statistical evidence, the district court recognized that Doe did not allege that Oberlin finds *only* men responsible for sexual misconduct, or that the College fails to investigate sexual assault allegations against women. *Id.* at

12. Accordingly, the fact that all ten of the sexual misconduct cases that went to formal adjudication during the 2015-16 academic year—out of about 100 complaints received—resulted in a finding of responsibility as to at least one charge did not raise an inference of gender bias. *Id.* By adhering to *Miami* and *Baum*, the district court concluded that, "taken together," Doe's generalized allegations did not satisfy his pleading burden because he did not couple them with "circumstantial evidence of gender bias found during his specific hearing." *Id.* at 9, 14-15 (discussing *Miami* and *Baum*).

ARGUMENT

I. The Majority Opinion Conflicts with Sixth Circuit Precedent.

Until now, this Circuit held that an erroneous outcome claim survives a motion to dismiss only when the complaint raises a plausible inference of gender bias in *plaintiff's specific proceeding*, which the district court correctly applied. *Miami*, at 592-594; *Baum*, at 586; *Dayton*, 766 F.App'x at 281-282; R.35, Order.

First, in *Miami*, both parties had consumed alcohol prior to the sexual encounter and were found to have engaged in non-consensual sexual acts, yet the university only investigated, let alone disciplined, the male student. 882 F.3d at 592-94. Next, in *Baum*, this Circuit likewise reversed dismissal of a Title IX claim by holding that pubic attention regarding the university's response to allegations of sexual misconduct provided a "backdrop that, when combined with other

circumstantial evidence of bias *in Doe's specific proceeding*, gives rise to a plausible claim." 903 F.3d at 586 (emphasis added). This case-specific evidence included that plaintiff's hearing body disagreed with the findings of the initial investigator—who found in Doe's favor—based on "exclusively female testimony," even though the reason given for discrediting the men (membership in Doe's fraternity) applied equally to the women (all members in Roe's sorority). *Id.* This Circuit concluded that the "specific allegation of adjudicator bias" in his case made Doe's claim plausible. *Id.*

Most recently, this Circuit affirmed the dismissal of an erroneous outcome claim based on broad allegations of gender bias, which did not satisfy the requirement in *Baum* and *Miami* for a plaintiff to "point to some hint of gender bias in their own disciplinary proceedings." *Dayton*, at 281. The majority opinion excises this mandate.

Further, this Circuit has previously rejected any attempt to lower the two-prong pleading standard. In reference to an out-of-Circuit decision, this Circuit stated that, "to the extent that the decision [*Doe v. Columbia Univ.*, 831 F.3d 46 (2d Cir. 2016)] reduces the pleading standard in Title IX claims, it is contrary to our binding precedent." *Miami*, at 589.

The panel majority did the opposite of what *Miami* instructed. It relied on an out-of-Circuit opinion for the proposition that courts can second-guess the outcome

of Title IX proceedings based on the merits of the decision, which can raise an inference of gender bias. Slip Op. at 12. The majority stated that "when the degree of doubt passes from 'articulable' to grave, the merits of the decision itself, as a matter of common sense, can support an inference of sex bias," and that a "'perplexing' basis of decision can support an inference of sex bias." *Id.* (quoting *Doe v. Purdue Univ.*, 928 F.3d 652, 669 (7th Cir. 2019)). As Judge Gilman's dissent points out, *Purdue* does not use the word "articulable," and it does not provide any guidance as to when the degree of doubt passes from "articulable" to "grave." Slip Op. at 14 (Gilman, J., dissenting). Nor did the use of the word "perplexing" lead the Seventh Circuit to hold that a perplexing decision can generally support an inference of gender bias. *See Purdue*, at 669. The facts of *Purdue* were also extreme, including that the administrator credited Roe's account of the sexual encounter "without hearing directly from her," and that the advisory committee "made up their minds without reading the investigative report and before even talking to [Doe]." *Id.*; Slip Op. at 14. Here, the hearing panel heard from both Doe and Roe, as well other witnesses, and it took this testimony and the report of the investigator into account.

The majority criticized the College's hearing panel for not commenting on the contradiction between Roe's statements to the investigator and hearing testimony as to whether Doe asked her to perform oral sex. Slip Op. at 11.

Allegations of sexual assault often involve credibility determinations. Oberlin's Policy ensures that sexual misconduct complaints are scrutinized properly through the presumption of innocence, interrogation in the investigation and hearing processes, and the application of the preponderance of the evidence standard. Slip Op. at 6-8; R.21-2, Am. Compl., ¶ 136. To permit courts to second-guess such an outcome "absent a showing of actual bias" runs counter to this Circuit's precedent. *Miami*, at 601. Moreover, the hearing panel had grounds on which to find Doe responsible for sexual misconduct, based on Roe's statement that she was "not sober" when forced to perform oral sex and the corroborating statements of her witnesses. R.21-2, ¶¶ 157-158.

As examined below, the other allegations of a purported "particularized causal connection" the majority examined either do not relate to Doe's specific proceeding or do not raise an inference that the outcome was motivated by gender bias, which is discrimination based on Doe's sex. *See* 20 U.S.C. § 1681(a).

Length of the proceedings. The majority found that since Doe's proceeding exceeded the amount of time it "usually" takes to adjudicate a matter, this raised "an inference of sex bias in his particular proceeding." Slip Op. at 10. Under its Policy, the College aspires to resolve all complaints within 60 business days, but "explicitly notes that individual cases might require a longer time frame." *Id.* at 15-16 (Gilman, J., dissenting). The College did not notify *either* Doe or Roe

of the delay. Nor did Doe allege any link between this delay (which spanned the College's summer recess), lack of notice, and gender bias. In fact, the majority pointed out that a *female* student previously criticized the College for its delay in resolving the sexual assault proceeding in which she was involved. *Id.* at 10. In the absence of any such link, the College's delay in resolving Doe's proceeding cannot raise an inference of gender bias at all, let alone a "particularized causal connection" between gender bias and the outcome of the proceeding.

OCR investigation. At the time of Doe's proceeding, OCR was investigating the College's compliance with Title IX "policies, procedures, and practices with respect to its sexual harassment and sexual assault complaint process." *Id.* at 11. The College "welcomed" this investigation, which the majority found "could cut either way." *Id.* But the law of this Circuit makes clear that such external pressure on its own cannot suffice to state a claim, but instead "provides a backdrop that, when combined with other circumstantial evidence of bias in Doe's specific proceeding, gives rise to a plausible claim." *Baum*, at 586. And for good reason. At the time of Doe's case, OCR's investigation of Oberlin was "one of hundreds being conducted by OCR" at schools nationwide. R.21-2, ¶ 49.

The majority ignored the requirement to couple the OCR investigation with evidence of bias in "Doe's specific proceeding." *Baum*, at 586. Moreover, it does not make sense that a college's efforts to *comply* with Title IX while under OCR

investigation can raise an inference of bias. Further, where pressure from the federal government has been found to help raise an inference of gender bias, it has been coupled with other factors not present in this case. Slip Op. at 16-17 (Gilman, J., dissenting) (discussing *Miami*). Otherwise, any school that OCR has investigated could have that fact, regardless of the impetus for the investigation or its result, be sufficient to bypass the gender bias pleading standard.

Statistical evidence. The majority also relied on published statistics showing that, during the 2015-16 academic year, of the approximately 10 sexual misconduct cases at the College that went to a hearing panel, "'every single case' . . . resulted in a decision that the accused was 'responsible' (*i.e.*, guilty) on at least one charge." *Id.* at 11. However, of the roughly 100 complaints of sexual misconduct that Oberlin received during this time, a small number—about 20%—were referred to a full investigation and, of these, one-half, or 10 cases, proceeded to a hearing. *Id.* at 19 (Gilman, J., dissenting). Evidence of "patterns of decision-making" may be used to support a causal connection, *Miami*, at 592, but this small sample size—10 cases, which includes all forms of alleged sexual misconduct, not just sexual assault—is not a statistically significant number to make any inference of gender bias. *See Cummins*, at 454 ("[N]ine cases is hardly a sufficient sample size for this court to draw any reasonable inferences of gender bias from these statistics."). Absent an allegation that accused Oberlin students who are male are

found responsible more frequently than accused female students, these statistics do not allege of a pattern of gender bias. Slip Op. at 20 (Gilman, J., dissenting) (citing cases).

Dr. Raimondo's statements. Dr. Raimondo was not Oberlin's Title IX Coordinator when it was determined that, based on the investigation conducted by an outside attorney, the allegations against Doe should proceed to a hearing. Dr. Raimondo was also not a decision-maker in Doe's case. She did not serve on Doe's hearing panel or as the officer for his appeal.

The majority selectively quotes a comment that Dr. Raimondo made during a panel discussion in 2015 to the effect that she was "'uncomfortable' with the term 'grey areas[,]' because 'I think it's used too often to discredit particularly women's experiences of violence.'" Slip Op. at 4. Yet when the entirety of her remarks are considered, as the district court and Judge Gilman did, "they demonstrate a balanced and thoughtful approach that treats men and women equally." *Id.* at 18 (Gilman, J., dissenting). The majority opinion enables Dr. Raimondo's incomplete and misunderstood statement to raise an inference of anti-male bias in future proceedings, even though she has not been the Title IX coordinator since 2016. In addition, if left unchecked, the majority opinion will discourage college personnel from writing or speaking publicly about Title IX or sexual misconduct out of concern that their comments will be cherry-picked and

used in litigation. This potential to stifle public debate is another reason to grant en banc review.

Assistant Dean Bautista's Re-Tweet. The majority also points out that two weeks after serving as Doe's hearing advisor, Assistant Dean Adrian Bautista retweeted: "To survivors everywhere, we believe you." *Id.* at 7. The only way this retweet can be construed as evidence of anti-male bias is if someone wrongly believes that males cannot be survivors of sexual misconduct. *See Cummins*, at 453 ("[S]exual-assault victims can be both male and female.") (citation omitted).

These generalized allegations do not indicate anti-male bias and demonstrate why this Circuit has required facts sufficient to show a "particularized causal connection" between the outcome and gender bias *in each case* in order to state a claim.

II. This Issue is Exceptionally Important.

Colleges and universities have legal and ethical duties to help protect their students from sexual misconduct, including sexual assault. This important responsibility necessitates balancing the interests among the accused, the alleged victim, and the broader campus community. Oberlin does not shy away from this duty, but meets it head on, as shown by the College revising its Policy in 2013-14. *See* Slip Op. at 2.

This Circuit has recognized that college disciplinary proceedings do not need to resemble legal proceedings. *See Flaim v. Medical College of Ohio*, 418 F.3d 629, 635 n.1 (6th Cir. 2005) ("A university is not a court of law, and it is neither practical nor desirable it be one."). Accordingly, neither Title IX nor this Circuit demand perfection in such proceedings. Judge Gilman identified a non-exhaustive list of human and procedural factors that "might yield a result that seems incorrect or unfair," but that have nothing to do with gender bias. Slip Op. at 22. Yet, absent a showing of "actual bias," school disciplinary committees were previously entitled to a presumption of impartiality that insulates them from the "second-guessing" of judicial review. *Davis*, 526 U.S. at 648; *Miami*, at 601.

This Circuit's application of a "particularized causal connection" between the flawed outcome and gender bias accomplished this goal because plaintiffs had to raise allegations of bias in their "specific proceeding" to survive a motion to dismiss. *Baum*, at 586. The majority opinion did away with this standard.

Now, alleging that the accuracy of the result was in "grave" doubt coupled with generalized allegations of bias suffices. If left undisturbed, district courts will be forced to let the vast majority of Title IX cases proceed to discovery. In turn, colleges will determine to discipline sexual misconduct in only the most flagrant cases to avoid judicial review, thus hindering their ability to provide an environment free of such misconduct.

This Circuit recently recognized the important interest that students, schools, and their stakeholders have in a predictable, even-handed Title IX process by granting en banc review of a majority opinion that overturned summary judgment under the "deliberate indifference" theory. *Foster v. Univ. of Michigan*, No. 19-1314 (May 15, 2020 Order). The interests at stake in pleading an erroneous outcome claim are no less exceptional.

CONCLUSION

The College respectfully requests that the Court rehear this case en banc.

July 13, 2020

/s/ David H. Wallace

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CERTIFICATE OF COMPLIANCE

I hereby certify that this petition for rehearing en banc complies with the type-volume limitation of Federal Rule of Appellate Procedure 35(b)(2)(A) and 40(b)(1) because it contains 3,899 words, excluding the portions exempted by Federal Rule of Appellate Procedure 32(f) and Sixth Circuit Rule 32(b)(1).

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

July 13, 2020

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Petition for Rehearing En Banc of Defendant-Appellee Oberlin College was filed this 13th day of July, 2020, via the CM/ECF system, which will serve all counsel of record.

/s/ David H. Wallace
David H. Wallace

Appendix

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 20a0195p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JOHN DOE,

Plaintiff-Appellant,

v.

OBERLIN COLLEGE,

Defendant-Appellee.

No. 19-3342

Appeal from the United States District Court
for the Northern District of Ohio at Cleveland.
No. 1:17-cv-01335—Solomon Oliver, Jr., District Judge.

Argued: December 12, 2019

Decided and Filed: June 29, 2020

Before: GILMAN, KETHLEDGE, and READLER, Circuit Judges.

COUNSEL

ARGUED: Christopher C. Muha, KAISERDILLON PLLC, Washington, D.C., for Appellant. Aaron M. Herzig, TAFT STETTINIUS & HOLLISTER LLP, Cincinnati, Ohio, for Appellee. **ON BRIEF:** Christopher C. Muha, KAISERDILLON PLLC, Washington, D.C., for Appellant. David H. Wallace, Cary M. Snyder, TAFT STETTINIUS & HOLLISTER LLP, Cleveland, Ohio, for Appellee.

KETHLEDGE, J., delivered the opinion of the court in which READLER, J., joined. GILMAN, J. (pp. 13–22), delivered a separate dissenting opinion.

OPINION

KETHLEDGE, Circuit Judge. Any number of federal constitutional and statutory provisions reflect the proposition that, in this country, we determine guilt or innocence individually—rather than collectively, based on one's identification with some demographic group. That principle has not always been perfectly realized in our Nation's history, but as judges it is one that we take an oath to enforce. Here, the relevant statute is Title IX of the Higher Education Act of 1965, which bars universities that receive federal funds from discriminating against students based on their sex. John Doe argues that his complaint in this case adequately stated a claim that Oberlin College did precisely that when it determined his responsibility on a sexual-assault allegation. We agree, and reverse the district court's decision to the contrary.

I.

Given that this appeal comes to us on a motion to dismiss, we take as true all the factual allegations in Doe's complaint, and make all reasonable inferences in his favor. *See Doe v. Baum*, 903 F.3d 575, 581 (6th Cir. 2018).

A.

Oberlin overhauled its sexual-assault policy in 2013-14, in response to a "very public complaint" by a female student. That student had two complaints in particular: that the College had taken too long to resolve her claim of sexual assault—thereby harming her emotionally—and that her assailant had received too light a punishment (he was suspended rather than expelled). The College formally adopted its revised Sexual Misconduct Policy in May 2015. Relatedly, Oberlin instructed its faculty, "via an online resource guide," that they should "[b]elieve" students who report sexual assault, because "a very small minority of reported sexual assaults prove to be false reports."

The Policy adopted in May 2015 defines "Sexual Assault" as "[h]aving or attempting to have intercourse or sexual contact with another individual without consent." Intoxication precludes consent only when it results in "incapacitation," which the Policy defines as a condition where the person "lack[s] conscious knowledge of the nature of the act" or "is physically helpless." Examples include when a person is "asleep, unconscious, or otherwise unaware that sexual activity is occurring." A website maintained by Oberlin's "Office of Equity, Diversity and Inclusion" reiterates that "[i]ncapacitation describes a level of intoxication in which a person is unable to control their body or no longer understands who they are with or what they are doing." Charges of sexual assault based upon incapacitation also require "an assessment of whether a Responding Party [*i.e.*, the person accused], or a sober, reasonable person in the Responding Party's position, knew or should have known that the Reporting Party was incapacitated."

Allegations of sexual assault are handled by the school's "Title IX Team," which is led by the school's Title IX Coordinator. Members of the Title IX Team receive "annual training in strategies to protect parties who experience sexual misconduct[,]" but no training as to "how to conduct impartial fact-finding proceedings." If the Title IX Team "determines that a claim must be resolved through formal resolution," a Hearing Coordinator "facilitate[s] the adjudication" through a Hearing Panel. The Title IX Coordinator then oversees an investigation, which the Policy says will "usually" be completed "within 20 business days." If an investigation takes longer, the Policy says, the College will "notify all parties of the reason(s) for the delay and the expected adjustment in time frames."

Upon receiving a report of the investigation, the Title IX Coordinator and the Hearing Coordinator together decide whether to send the matter "to a Hearing Panel for resolution." Hearing panels have three members, and "make factual findings, determine whether College policy was violated, and recommend appropriate sanctions and remedies." The Title IX Coordinator and Hearing Coordinator then determine what sanction, if any, to impose. The entire process, the Policy recites, should normally be completed "within 60 business days"; if the resolution takes longer, the Policy says again, the College will notify the parties "of the reason(s) for the delay and the expected adjustment in time frames."

B.

Professor Meredith Raimondo was named Oberlin's Title IX Coordinator in 2013, while the new Policy was being drafted. In 2014 she said she came to her work "committed to survivor-centered processes." During a panel discussion in 2015—in response to another speaker's comment about a "middle category" of cases, "where we're not talking about . . . sex with someone who is fundamentally unconscious"—Raimondo said that she is "uncomfortable" with the term "grey areas[,]" because "I think it's used too often to discredit particularly women's experiences of violence."

In November 2015, the federal Department of Education's Office of Civil Rights notified Oberlin that the Office was investigating the College "to determine whether it had violated Title IX in a recent sexual assault disciplinary proceeding." That investigation was "not limited to the complaint that occasioned it," but was "a systemic investigation of the College's policies, procedures, and practices with respect to its sexual harassment and sexual assault complaint process." The investigation soon became "the focus of local media attention." Shortly before that notification, the Office's director, Catherine Lhamon, told a national media publication that "'[w]e don't treat rape and sexual assault as seriously as we should,'" citing data "about the rate of unwanted sexual activity experienced specifically by college women." Lhamon had also recently warned university administrators that they could lose all their federal funding if they did not heed the Office's mandates, and elsewhere cited "'a need to push the country forward.'"

C.

The incident at issue here occurred during the pendency of the Office's investigation—in the early morning of February 28, 2016. The complainant, referred to in this litigation as Jane Roe, and the accused, referred to as John Doe, were both undergraduates at Oberlin. (Doe was then a junior; the complaint does not specify when Roe matriculated.) The two students had met at a party in December 2015, after which they spent the night in Doe's room and had consensual intercourse without a condom. For the next two months they had little interaction. On February 27, 2016, Roe went to a concert and then to at least one party afterward, where she consumed alcohol. At 1:02 a.m. on February 28, Doe texted Roe, asking "what are you up to tonight?"

The two then exchanged nine texts during the next 30 minutes. Roe texted that she was "about to smoke [marijuana]" in the residence hall where Doe had a room, and asked him, "[c]ool if I come up in a bit?" Doe replied "yea" and the two arranged to meet in his room.

Roe arrived around 1:45 a.m. The two "briefly engaged in small talk" before making out for "10-15 minutes" in Doe's bed and taking off their clothes. Then, at Roe's request, Doe put on a condom, and the two had vaginal sex. They stopped when Roe said she was thirsty, at which point Doe took off his condom, wrapped a towel around himself, and got some water for her in the hallway. Then they resumed having sex, this time without a condom, until Roe said she was "dry down there[,]" explaining, "I'm not sober." Doe stopped the vaginal sex and asked Roe if she would perform oral sex on him. Roe agreed. Afterward they engaged in small talk and Roe left, saying she had a lot to do the next day.

Nine days later, Roe went to Raimondo and said that Doe had sexually assaulted her. Raimondo did not inform Doe of the charge until a week later, when she told him, via email, only that "the College is investigating a report" that Doe had sexually assaulted Roe "on 2/27/16 while she was incapacitated due to alcohol and unable to consent to sexual activity."

Two days later, Raimondo appointed Joshua D. Nolan to investigate Roe's allegations. Even though the College's policy states that investigation of a sexual-assault claim should usually take no more than 20 days and resolution of the entire matter should take no more than 60, Nolan took 120 days just to issue an investigative report. Sixty-one days after the process began, Doe emailed Raimondo as follows:

> I really do feel as though I am at my wits end. . . . I have had sleepless nights, eating problems and have been constantly thinking about this for the past months. This has consumed my life. My grades have slipped and I am a shell of my former self. . . . I cannot get in contact with Josh [Nolan] who has seemingly disappeared. I have emailed him twice in the past week. . . . Finals is around the corner and I simply cannot go through them with this looming over my head. . . . Please help me.

Raimondo did not respond with any information—notwithstanding the Policy's assurances that, in such circumstances, the College will notify the parties "of the reason(s) for the delay and the expected adjustment in time frames."

Doe did not learn the substance of the allegations against him until July 7, 2016—more than four months after the charge was made—when Nolan finally submitted his report. Nolan had interviewed ten people "with knowledge of the events of February 27/28"—including Roe and Doe—in addition to interviewing Raimondo. For the most part Roe's account of what happened in the room was consistent with Doe's account, described above. But there were several differences, which included Roe's statement that, before the two engaged in vaginal sex, Doe had asked her for oral sex, and Roe responded by asking him if he had a condom. Roe did not mention saying she was thirsty or that Doe had gotten her water. She did say that Doe "asked" her for oral sex again after they stopped having intercourse, and that she said, "okay, but I'm not very sober right now"; and that during oral sex Doe "kept pushing her head down and causing her to gag." Separately, the report noted that, in a personal journal entry soon after the incident, Roe wrote that Doe had "asked" her "to go down on him."

Most of the other interviewees were friends of Roe. One said that Roe was "intoxicated" that night but not "overly" so, and that Roe's "speech was not slurred and she seemed steady on her feet." Another friend said Roe was "out of it" and "very distant." A third friend, who saw Roe immediately before the incident, said that she asked Roe, "You good?" Roe said "yes" and walked off to Doe's room.

Nolan also interviewed three of Roe's friends who had talked to her after the incident. One lived in the same residence hall as Doe; Roe visited her shortly after the incident, saying "I can't believe I was with" Doe and that she was "disappointed and upset that she had done something." This friend said that Roe's speech was "slower" than usual but "not slurred[.]" A second friend told Nolan that, on February 29, Roe told her that she had been "too intoxicated to consent" to sex with Doe. Neither of these two friends said anything about Roe saying that Doe had used force against her. A third friend said that, three or four days after the incident, Roe asserted that Doe had "sexually assaulted" her by "forc[ing] oral sex on her."

D.

The College thereafter sent the matter to a hearing panel, which set a hearing date of October 5, 2016. A few days before that date, Doe asked the Title IX Team to assign him an

"advisor" for the hearing. Such an advisor, the College conceded at oral argument, is supposed to serve the best interests of the accused at the hearing. The Title IX Team appointed Assistant Dean Adrian Bautista as Doe's advisor.

At the hearing itself, Roe testified mostly along the lines of what she had told Nolan, with one major change: when asked whether Doe asked her to perform oral sex on him, she said "No"—that he had not. Instead, she said at the hearing, "Doe simply grabbed her neck and forced her mouth onto his penis after he stopped having vaginal intercourse with her." As for incapacitation, when asked how Doe would have known she was intoxicated, Roe said only, "I made the statement, 'I am not sober right now.'" In addition, when asked to "speak a little more about why" she had asked Doe for a condom, she said, "[w]e were no longer clothed and I felt that if anything was to continue happening, I wanted a condom."

Three of Roe's friends testified on her behalf. One was the friend whose room Roe had visited after the incident; she testified consistently with her statement to Nolan, except that she added that Roe was "not making sense with the sentences she was saying[.]" She also said that Roe was upset about being with Doe, because she had a crush on a different student. A second witness was the friend who asked Roe, "You good?"; in addition to what she had told Nolan, this friend said that, in her observation, the situation "seemed pretty normal" and not "a potentially bad situation." A third friend testified as to how much Roe had drank that night, but said nothing about whether she appeared incapacitated.

Doe's testimony mirrored what he told Nolan. He specifically denied using any force on Roe. Nolan himself also testified, and was asked whether he had "heard any testimony that contradicted what he had been told [during] the investigation." Nolan responded that he had "heard just one contradiction": namely, Roe's testimony that Doe "had not asked her to perform oral sex on him." Nolan explained that, during the investigation, Roe testified that Doe "had in fact asked this of her."

As for advisor Bautista, he "left the hearing early." Two weeks later, he retweeted: "To survivors everywhere, we believe you."

On October 6, 2016—about 240 days after Roe's complaint—the hearing panel issued a decision in which it found Doe responsible for sexual misconduct because "the preponderance of the evidence established that effective consent was not maintained for the entire sexual encounter that occurred on February 28, 2016." Consent was absent, the panel found, because Roe was incapacitated, as the Policy defined it, from the moment she told Doe that she was "not sober." The panel cited no other behavior supporting a finding either that Roe was incapacitated as defined by the Policy or that Doe would have had any reason to think she was. Nor did the panel mention the contradiction cited by Nolan, between what Roe told him (and several friends) and what she told the hearing panel, as to whether Doe had "asked" for oral sex. As a sanction, the panel recommended the most severe one: expulsion. The College accepted that recommendation and ordered Doe expelled.

Doe appealed two weeks later, challenging on three grounds the panel's findings. The first was the newly discovered testimony of J.B., who had been Roe's "best friend" before the incident and was only "an acquaintance" of Doe. Roe had told J.B. (a male) about the incident two days after it occurred, and asked J.B. to accompany her to her interview with Nolan, "as her designated support person." During that interview, J.B. was alarmed that Roe's account to Nolan differed dramatically from what she had told J.B. shortly after the incident. J.B. did not comment during the interview on those differences, because doing so would have been "awkward[,]" and because Nolan "had already told him he would call him back at some point to interview him alone." But "Nolan never did." J.B. emailed Raimondo as soon as he heard about the panel's decision, saying that Roe had told him that Doe did not use force on her and that her hearing testimony mischaracterized the nature of their interaction in other ways. Raimondo apparently never responded. In support of the appeal itself, J.B. wrote a handwritten statement in which he said, among other things, that he felt "morally compelled to come forward at this time"; that "I know [Roe] provided false testimony"; and that Roe had told him that Doe "asked her to 'go down' on him and that she agreed to do so."

A second ground of the appeal was a statement by H.H., a mutual friend of Roe and Doe, who said that, as Roe was about to leave for Doe's room, she "did not appear drunk" and that her "speech was normal[.]" She too said that Roe had told her after the incident that Doe "asked"

Roe to "go down on him." The third ground was a letter from Dr. Judith Esman, who stated, as an expert, that Roe's behavior that night gave Doe no reason to think she was incapacitated as defined by the Policy. Doe also challenged his sanction as too severe.

The College denied Doe's appeal about a month later, dismissing the statements of J.B. and H.H. as largely cumulative, and Dr. Esman's letter as largely irrelevant. The College also upheld the sanction of expulsion, "with almost no explanation."

E.

Doe thereafter brought this lawsuit, claiming that the College's "egregious misapplication of the Policy's definition of 'incapacitation'" was the result of sex discrimination in violation of Title IX. Doe also brought claims for breach of contract (the Policy itself being the contract) and negligence under Ohio law. The district court dismissed Doe's claim under Title IX for failure to state a claim, and declined to exercise supplemental jurisdiction over the state-law claims (mistakenly, all agree, given that the court had diversity jurisdiction over those claims). This appeal followed.

II.

We review de novo the district court's dismissal of Doe's complaint. *See Baum*, 903 F.3d at 580. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted).

Doe sued Oberlin under Title IX, which bars universities that receive federal funds "from discriminating against students on the basis of sex." *Baum*, 903 F.3d at 585. Doe asserts in particular an "erroneous outcome" claim, which is that a university reached "an erroneous outcome in a student's disciplinary proceeding because of the student's sex." *Id.* To state a claim under that theory, "a plaintiff must plead facts sufficient to (1) cast some articulable doubt on the accuracy of the disciplinary proceeding's outcome, and (2) demonstrate a particularized causal connection" between the flawed outcome and sex discrimination. *Id.* (internal quotation marks and ellipses omitted).

Here, everyone agrees that Doe pled facts casting doubt on the accuracy of his proceeding's outcome. The question, then, is whether he pled facts plausibly suggesting that outcome was caused by sex bias.

As an initial matter, Oberlin argues that, to show a "particularized causal connection" between the flawed outcome and sex bias, Doe must identify some bias unique to his own proceeding. But that argument misreads our precedents. We have never held that, to be "particularized" in this sense, the effects of the causal bias must be limited to the plaintiff's own case. To the contrary, for example, we have held that "*patterns* of decision-making" in the university's cases can show the requisite connection between outcome and sex. *Doe v. Miami Univ.*, 882 F.3d 579, 593 (6th Cir. 2018) (emphasis added). Otherwise, a university that categorically discriminates against men or women in sexual-assault proceedings could escape liability in erroneous-outcome cases. What Doe must show here, rather, is simply that he alleged facts supporting an inference of sex bias in his particular proceeding.

For any number of reasons, we hold that he did. We begin with the "clear procedural irregularities" in the College's response to the "allegations of sexual misconduct," which, as the Second Circuit has held, "will permit a plausible inference of sex discrimination." *Menaker v. Hofstra Univ.*, 935 F.3d 20, 33 (2d Cir. 2019). The College's own Policy states that usually its investigation will be completed in 20 days, and the matter as a whole will be resolved in 60. But here the investigation alone took 120 days; Doe was not even informed of the specific allegations against him for that same period; and the hearing panel did not reach a decision until about 240 days after the complaint, which was 180 days later than contemplated by the Policy. That delay was compounded by the College's failure to do what the Policy twice promised it would do, namely to notify the parties "of the reason(s) for the delay and the expected time frames." Those omissions were especially strange given that those promises were included in the Policy precisely because, in 2012, a female student had understandably complained about the emotional harm caused by the College's delay in resolving the proceeding in which she was involved. And those omissions were stranger still given that Doe pleaded with Raimondo via email about the emotional devastation wrought by the delays in his proceeding—and received little or no

response. Remarkable as well was advisor Bautista's performance, given that he did not even attend the entire hearing, even though his role was to assist Doe there.

Likewise remarkable—in a proceeding in which the credibility of accuser and accused were paramount—was the failure of the hearing panel even to comment on the flat contradiction, expressly noted by Nolan at the hearing, between what Roe told him during his investigation and what she said during the hearing, regarding whether Doe "asked" for oral sex. *Cf. Baum*, 903 F.3d at 586. And of a piece was the Appeals Officer's failure even to acknowledge the importance of J.B.'s statement as impeachment evidence regarding Roe's claims. Procedural irregularities provide strong support for Doe's claim of bias here.

Doe's claim also finds support from his allegation that—throughout the pendency of his disciplinary proceeding—the federal Department of Education's Office of Civil Rights was engaged in "a systemic investigation of the College's policies, procedures, and practices with respect to its sexual harassment and sexual assault complaint process." For "pressure from the government to combat vigorously sexual assault on college campuses and the severe potential punishment—loss of all federal funds—if [the College] failed to comply" can likewise yield "a reasonable inference" of sex discrimination. *Miami Univ.*, 882 F.3d at 594. Oberlin contended at oral argument that we should reject that inference here, because Raimondo "welcomed" the federal investigation. But on this record, suffice it to say, that fact could cut either way.

Doe's complaint also cites Oberlin's "Spring 2016 Campus Climate Report," which stated that—during the very academic year in which Doe's "responsibility" was determined—"every single case" that went to a hearing panel resulted in a decision that the accused was "responsible" (*i.e.*, guilty) on at least one charge. That statistic likewise supports Doe's claim. *See Miami Univ.*, 882 F.3d at 593. Oberlin responds that only 10 percent of sexual-assault complaints were resolved through a formal hearing that year. But Doe reads that same Report to mean that, in 80 percent of the cases, the complainant herself chose not to pursue the matter formally. In still other cases, the responding party had graduated or otherwise left the College. And in any event the 100 percent responsibility rate—in cases where most if not all the respondents were male—supports an inference regarding bias in the hearings themselves.

But Doe's strongest evidence is perhaps the merits of the decision itself in his case. True, the first element of an erroneous-outcome claim—whether the facts of the case "cast some articulable doubt on the accuracy of the disciplinary proceeding's outcome[,]" *Baum,* 903 F.3d at 585—already takes into account the proceeding's outcome to some extent. But when the degree of doubt passes from "articulable" to grave, the merits of the decision itself, as a matter of common sense, can support an inference of sex bias. *Cf. Doe v. Purdue Univ.*, 928 F.3d 652, 669 (7th Cir. 2019) (reasoning that a "perplexing" basis of decision can support an inference of sex bias). And on the merits here the panel's decision was arguably inexplicable. Per the terms of Oberlin's Policy, intoxication does not negate consent—only "incapacitation" does. The Policy rather precisely defines that term. And the record here provided no apparent basis for a finding that Roe "lack[ed] conscious knowledge of the nature of the act" of oral sex, or that she was "asleep, unconscious, or otherwise unaware that sexual activity [was] occurring[,]" or that she "no longer underst[ood] who [she was] with or what [she was] doing." Nor was there any apparent reason for Doe to perceive that Roe was in such a state. To the contrary, Roe was conscious and aware enough to engage in a coherent exchange of texts, to make small talk, and to reason that, "[w]e were no longer clothed and I felt that if anything was to continue happening, I wanted a condom." Thus, on this record—and making all inferences in Doe's favor at this stage of the litigation—one could regard this as nearly a test case regarding the College's willingness ever to acquit a respondent sent to one of its hearing panels during the 2015-16 academic year. Doe has amply stated a claim for sex discrimination in violation of Title IX.

* * *

The district court's March 31, 2019 Order is reversed, and the case is remanded for further proceedings consistent with this opinion.

DISSENT

RONALD LEE GILMAN, Circuit Judge, dissenting. This circuit has articulated a two-part test that a plaintiff must meet in order to survive a motion to dismiss under the Title IX erroneous-outcome theory. *Doe v. Baum*, 903 F.3d 575, 585 (6th Cir. 2018). Under that test, "a plaintiff must plead facts sufficient to (1) 'cast some articulable doubt' on the accuracy of the disciplinary proceeding's outcome, and (2) demonstrate a 'particularized . . . causal connection between the flawed outcome and gender bias.'" *Id.* (quoting *Doe v. Miami Univ.*, 882 F.3d 579, 592 (6th Cir. 2018)).

I fully agree with the majority that Doe has raised a colorable claim as to the first prong of this test. The key problem that I see with the majority's opinion, however, is that it proceeds to conflate the two prongs. In fact, the opinion flatly states that "Doe's strongest evidence is perhaps the merits of the decision itself in his case." Maj. Op. at 12. But our previous caselaw makes clear that "allegations of a procedurally or otherwise flawed proceeding that has led to an adverse and erroneous outcome combined with a conclusory allegation of gender discrimination is *not* sufficient to survive a motion to dismiss." *Doe v. Cummins*, 662 F. App'x 437, 452 (6th Cir. 2016) (emphasis added) (quoting *Yusuf v. Vassar Coll.*, 35 F.3d 709, 715 (2d Cir. 1994)). And this court has explicitly rejected the lower pleading standard that the majority now adopts. *See Miami Univ.*, 882 F.3d at 589 ("Whatever the merits of the Second Circuit's decision in [*Doe v.*] *Columbia University*, [831 F.3d 46 (2d Cir. 2016),] to the extent that the decision reduces the pleading standard in Title IX claims, it is contrary to our binding precedent."). I therefore dissent from the majority's conclusion that Doe has pleaded facts sufficient to establish an inference of gender bias.

I. The merits of Oberlin's decision as a measure of gender bias

The majority cites *Doe v. Purdue University*, 928 F.3d 652 (7th Cir. 2019), for the proposition that, "when the degree of doubt passes from 'articulable' to grave, as a matter of common sense the merits of the decision itself can support an inference of sex bias," and that

"a 'perplexing' basis of decision can support an inference of sex bias." Maj. Op. at 12 (emphasis in original) (quoting 928 F.3d at 669). But not only is *Purdue University* an out-of-circuit opinion and therefore not binding on this court, it nowhere uses the word "articulable." And *Purdue University* never calibrates the degree of doubt as passing from "articulable" to "grave." The opinion's use of the word "perplexing," moreover, *see* 928 F.3d at 669, did not cause it to hold that a perplexing decision can generally support an inference of gender bias.

Purdue University instead held that the extreme departure from typical adjudicatory norms *in that case* was so perplexing that it supported an inference of gender bias. In *Purdue University*, the administrator "chose to credit Jane's account without hearing directly from her," and "Jane did not even submit a statement in her own words to the Advisory Committee." *Id.* Purdue's advisory committee also "took no other evidence into account. They made up their minds without reading the investigative report and before even talking to John." *Id.* In the present case, in contrast, the hearing committee heard from both Doe and Roe, and it took the report of the investigator—an outside, male, independent attorney—into account. The adjudicatory circumstances before us, in order words, are not near as "perplexing" as those in *Purdue University*.

Purdue University's extreme circumstances were later noted by the Seventh Circuit in *Doe v. Columbia College Chicago*, 933 F.3d 849 (7th Cir. 2019), where the court held that a male plaintiff had not adequately pleaded gender bias on the part of the university that had found him guilty of sexual assault. The court distinguished *Purdue University* by pointing out that "[t]wo members of the panel [in *Purdue University*] candidly stated that they had not read the investigative report. The one who apparently had read it asked John accusatory questions that assumed his guilt. Because John had not seen the evidence, he could not address it." *Id.* at 855 (quoting *Purdue University*, 928 F.3d at 658). In *Columbia College Chicago*, by contrast, these problems were not apparent. *See id.* at 856 (noting that Doe was permitted to access the investigative materials). So too in the present case: Doe was permitted to access the materials and information submitted; it just took longer than he had anticipated. But nowhere does Doe allege that this delay occurred only for male students, or that the process was different for men. *See id.* ("[John did] not allege that females accused of sexual assault were allowed to review

materials or that only female victims were allowed to review them."). Oberlin's delay, without any proof that these delays happened only to male students, cannot support a finding of gender bias.

II. Claims of procedural irregularities

This leaves the majority's two other major points. One addresses Doe's claims of procedural irregularities. The majority cites *Menaker v. Hofstra University*, 935 F.3d 20 (2d Cir. 2019), for the proposition that procedural irregularities can support an inference of gender bias. *Menaker*, in turn, relied on the reasoning of *Columbia University*, 831 F.3d 46, the very case that our circuit has rejected for lowering the Title IX pleading standard. *See Miami Univ.*, 882 F.3d at 589. The majority's reliance on *Menaker* is thus highly questionable, especially because the case is easily distinguishable.

In *Menaker*, a male tennis coach alleged "that Hofstra [University] completely disregarded the process provided for in its written 'Harassment Policy,'" which provided "for a 'Formal Procedure'" to investigate allegations of harassment and assault. 935 F.3d at 34–35. Menaker claimed "that he received none of these procedural protections." *Id.* at 35. He alleged "that he was terminated despite the fact that Hofstra Vice President Jefferey Hathaway *knew* that at least one of the accusations against him was false and believed the complaint to be a 'ploy.'" *Id.* at 34 (emphasis in original). Menaker further claimed "that his supervisor was aware of [his accuser's] frustration regarding her scholarship and her attempts to manipulate the athletic department in the spring of 2016." *Id.* And despite an express promise that Menaker would receive a copy of the investigative report, he never did. *Id.* Against this backdrop, the Second Circuit concluded that the procedural irregularities supported an inference of gender bias. Not so in the present case, where Doe received almost all of the protections and procedures outlined in Oberlin's manual. The process was admittedly not perfect, but Doe had a hearing, received a copy of the investigative report, and was permitted to present his story. In sum, *Menaker* does not support the majority's conclusion that gender bias has been adequately pleaded.

The majority also cites the time frame of the investigation as supporting procedural irregularities. But Oberlin's Sexual Misconduct Policy explicitly notes that individual cases

might require a longer time frame. Admittedly, Oberlin should have notified Doe in writing that the investigation and resolution were taking longer than the 20 days and the 60 days, respectively, stated as goals in the Policy. Oberlin, however, apparently failed to notify *either party* of the reason for the delay.

In fact, the majority points out that Oberlin had previously been criticized by a *female* student for its delay in resolving the sexual-assault proceeding in which she was involved. Maj. Op. at 10. The Policy was ostensibly adopted to address that criticism, but Doe has not alleged any link between the delay or lack of notice and gender bias. In the absence of any such link, Oberlin's delay in resolving his case should have no bearing on our analysis.

III. Alleged pressure from the Department of Education

The majority's other major point involves alleged outside pressure on Oberlin. It cites *Miami University* for the proposition that "'pressure from the government to combat vigorously sexual assault on college campuses and the severe potential punishment—loss of all federal funds—if [the College] failed to comply'—can likewise yield 'a reasonable inference of sex discrimination.'" Maj. Op. at 11 (quoting 882 F.3d at 594). This characterization, in my opinion, overstates the holding of the *Miami University* decision.

Although the court in *Miami University* did consider the pressure from the government as one piece of its analysis, it was just that: one piece. Our caselaw makes clear that "external pressure [from the government] alone is not enough to state a claim that the university acted with bias in [any] particular case. Rather, it provides a backdrop that, when combined with other circumstantial evidence of bias . . . , [can] give[] rise to a plausible claim." *Doe v. Baum*, 903 F.3d 575, 586 (6th Cir. 2018).

In other words, the court can consider whether there was pressure from the federal government, but that pressure alone cannot yield a reasonable inference of gender discrimination. *See Doe v. Univ. of Dayton*, 766 F. App'x 275, 281 (6th Cir. 2019) ("[A]lleging that a university adopted certain procedures due to pressure from the federal government is not enough on its own . . . .") (citing *Doe v. Cummins*, 662 F. App'x 437, 452–53 (6th Cir. 2016)). And in *Miami University*, that pressure was coupled with other key factors that are not present in this case.

One of those key factors in *Miami University* was that both parties to the encounter in question were alleged to have been highly intoxicated. 882 F.3d at 584, 586, 592. Yet the university launched an investigation regarding only the male, and not regarding the female. *Id.* at 593–94. In addition, the accused male in *Miami University* introduced statistical evidence showing that every male accused of sexual misconduct during the past two semesters was found responsible for the alleged violation. *Id.* at 593. He also presented an affidavit from an attorney who had represented many students in disciplinary proceedings, with the attorney alleging a pattern of the university pursuing investigations concerning male students but not female students. *Id.* As discussed more fully below, Doe introduced no comparable statistical evidence in the present case.

In sum, the court in *Miami University* considered the pressure from the federal government as just one factor set against a backdrop of uneven enforcement. *Id.* We have no comparable evidence of uneven enforcement in the case before us.

IV. Lack of a particularized causal connection regarding gender bias

I now turn to the question of whether Doe has sufficiently pleaded an inference of gender bias in accordance with the law of this circuit. Sixth Circuit caselaw makes clear that a plaintiff must allege a particularized causal connection between the flawed outcome and gender bias. *Baum*, 903 F.3d at 585 (quoting *Miami Univ.*, 882 F.3d at 592). Evidence to support such a causal connection "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." *Miami Univ.*, 882 F.3d at 593 (citation omitted). Doe alleges that statements made by Dr. Meredith Raimondo and statistical evidence support this causal connection. But both the record and the law of this circuit are to the contrary.

A. Dr. Raimondo's statements

As to Dr. Raimondo, the majority selectively quotes a statement that she made during a panel discussion in 2015 to the effect that she was "'uncomfortable' with the term 'grey areas[,]' because 'I think it's used too often to discredit particularly women's experiences of violence.'"

Maj. Op. at 4. The majority leaves out, however, the full panel discussion, during which Dr. Raimondo made the following additional remarks:

> What are the spaces, for example, for *men* to come forward and report gender-based harms? . . . When our procedures assume that women are the only people who report, we shut that space down even further.

American Constitution Society, *Sex, Lies and Justice: A Discussion of Campus Sexual Assault, Title IX Compliance, and Due Process*, YouTube (June 23, 2015), https://www.youtube.com/watch?v=EbmfXvd_6gw (33:38–50) (last visited June 15, 2020) (emphasis added). She further stated:

> *All students are our students, regardless of what role they may play in this*, and for me the question and the goal of these processes has to start with this: for a student who comes forward to make a report, a safe, supportive space for someone to ask, what are the harms that you experienced and how can we address them so you can continue your education. *And for the student who is accused, the question is also important and needs to be met I think equally with respect and dignity*, but my question for that student is: What, if anything, in your conduct are you willing to be accountable for and how can you be responsible for the harm you've done to others, *if in fact that was the result of your conduct*? Hearings are a tool or a technique for answering those big questions.

Id. (29:33–30:23) (emphases added). I fail to see how these comments as a whole could support an inference of gender bias against men. If anything, they demonstrate a balanced and thoughtful approach that treats men and women equally.

B. Statistical evidence

The majority opinion also cites the statistic that "'every single case' that went to a hearing panel resulted in a decision that the accused was 'responsible' (*i.e.*, guilty) on at least one charge." Maj. Op. at 11. But as Oberlin points out, approximately 10% of roughly 100 complaints related to sex-based misconduct even made it to the hearing stage. In other words, approximately 90% of cases did not lead to a finding of responsibility or any kind of disciplinary action.

The majority further notes that Doe reads Oberlin's 2016 Campus Climate Report to mean that, in 80% of these complaints, the complainant chose not to formally pursue the matter. Maj. Op. at 11. But the Report says nothing to that effect. It instead states the following:

> Most parties making reports ask for various remedies but also request that the College take no disciplinary action . . . . About 20 percent of all reports in 2015–16 were referred to full investigation, and if appropriate, formal investigation. The threshold to move to formal process was met in around half of investigations . . . .

Although the Report acknowledges that "most parties" requested no disciplinary action, nothing in the Report suggests that a full 80% chose not to formally pursue their complaints. In other words, the 20% of the complaints referred to full investigation in no way implies that the other 80% were dropped because of a lack of pursuit by the complainants.

The majority also states that there is a "100 percent responsibility rate" at the hearing stage. Maj. Op. at 11. But "responsibility" in this context has a very broad meaning. In each of these approximately 10 cases, the accused was found responsible on at least one charge, but not all of them. Only 70% of respondents were found responsible on all charges. And the "penalties" ranged widely—from "education" to expulsion. As the Report states:

> When the threshold was met, findings of responsibility on all charges occurred in 70 percent of processes. In the remaining processes, the responding party was found responsible for some but not all of the conduct charges. Sanctions have ranged from deferred probation and education to dismissal . . . .

In addition, these cases included all forms of potential sex-based misconduct—not only sexual assault, but also discrimination, harassment, retaliation, stalking, and/or intimate partner violence.

I would further note that disciplinary hearings in approximately 10 cases is not a statistically significant number from which this court can make any kind of conclusion about gender bias. *See Doe v. Cummins*, 662 F. App'x 437, 454 (6th Cir. 2016) ("[N]ine cases is hardly a sufficient sample size for this court to draw any reasonable inferences of gender bias from these statistics.").

Finally, we have no information regarding the gender breakdown between who was found responsible and who was not. Doe alleges that the vast majority of the Oberlin students accused of sexual misconduct were men. But, as the district court aptly noted:

> This by itself is not indicative of discrimination or bias against men. Plaintiff does not claim that *only* men were found responsible for misconduct. As outlined in *Doe v. Univ. of Dayton*, this is "not the type of pattern that would show an improper influence of gender. Indeed, this sadly, is just what the court would expect. According to the Department of Justice, over 95% of sexual assaults are perpetrated by males, while fewer than 3% are by females." *Doe v. Univ. of Dayton*, No. 3:17-CV-134, 2018 WL 1393894, at *9 (S.D. Ohio 2018). A pattern that would support a claim of gender bias would involve sexual assault accusations against women that were not investigated or adjudicated by the College. *Id.* Plaintiff makes no such claim here.

(Emphasis in original.)

Our caselaw has repeatedly emphasized the above point. *See, e.g.*, *Cummins*, 662 F. App'x at 453 (explaining that "the most obvious reasons for the disparity between male and female respondents in . . . sexual-misconduct cases . . . [are that the college] has only received complaints of male-on-female sexual assault, and . . . males are less likely than female to report sexual assaults" (citation and internal quotation marks omitted)); *see also Doe v. Univ. of Denver*, 952 F.3d 1182, 1193–94 (10th Cir. 2020) ("The courts that have engaged in this analysis have generally concluded that statistical disparities in the gender makeup of complainants and respondents can readily be explained by 'an array of alternative' nondiscriminatory possibilities, potentially 'reflect[ing], for example, that male students on average . . . committed more serious assaults,' that sexual-assault victims are likelier to be women, or that female victims are likelier than male victims to report sexual assaults.") (collecting cases). Without allegations that accused students who are male are found guilty more frequently than accused students who are female, Doe has failed to allege any pattern of gender bias.

V. The law of other circuits

This brings me to my final point. The Sixth Circuit is far from alone in its requirement that a plaintiff show a particularized causal connection. In fact, the vast majority of other courts that have considered this question have required proof of a causal connection between an alleged

erroneous outcome and gender bias. *See, e.g.*, *Doe v. Trustees of Bos. Coll.*, 892 F.3d 67, 91 (1st Cir. 2018) ("To show this causal link [between an outcome and gender bias], the Does cannot merely rest on superficial assertions of discrimination, but must establish that 'particular circumstances suggest[ ] that gender bias was a motivating factor.'" (citation omitted)); *Doe v. Loh*, Civ. A. No. PX-16-3314, 2018 WL 1535495, at *8 (D. Md. Mar. 29, 2018) ("To sustain what is known as an 'erroneous outcome' claim, Doe must plausibly aver: (1) that he was subjected to a procedurally or otherwise flawed proceeding, (2) which has led to an adverse and erroneous outcome; and (3) the particular circumstances suggest that gender bias is the motivating factor behind the erroneous finding." (citation and internal quotation marks omitted)), *aff'd*, 767 F. App'x 489 (4th Cir. 2019); *Doe v. Univ. of Miss.*, 361 F. Supp. 3d 597, 607 (S.D. Miss. 2019) ("A '[p]laintiff[] who claim[s] that an erroneous outcome was reached must allege particular facts sufficient to cast some articulable doubt on the accuracy of the outcome of the disciplinary proceeding.' Additionally, the plaintiff must 'allege particular circumstances suggesting that gender bias was a motivating factor behind the erroneous finding . . . . Such allegations 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.'" (quoting *Yusuf v. Vassar Coll.*, 35 F.3d 709, 715 (2d Cir. 1994)); *Austin v. Univ. of Or.*, 925 F.3d 1133, 1138 (9th Cir. 2019) ("Even if the outcome of the administrative conference procedure was erroneous, the complaint is missing any factual allegations that show that sex discrimination was the source of any error."); *Doe v. Valencia Coll.*, 903 F.3d 1220, 1236 (11th Cir. 2018) ("[A] student must show both that he was 'innocent and wrongly found to have committed an offense' and that there is 'a causal connection between the flawed outcome and gender bias.'" (citation omitted)); *Robinson v. Howard Univ., Inc.*, 335 F. Supp. 3d 13, 27 (D.D.C. 2018) ("[A]llegations of a procedurally or otherwise flawed proceeding that has led to an adverse and erroneous outcome combined with a conclusory allegation of gender discrimination is not sufficient to survive a motion to dismiss." (citation omitted)), *aff'd sub nom. Robinson v. Wutoh*, 788 F. App'x 738 (D.C. Cir. 2019).

This viewpoint by almost all of the courts that have opined on this issue is unsurprising. Such an approach is fully consistent with the text of Title IX itself, which requires a plaintiff to show that he or she was subjected to discrimination "on the basis of sex." 20 U.S.C. § 1681(a).

There are numerous reasons why a college's disciplinary process might yield a result that seems incorrect or unfair—sloppy analysis by overworked administrators, administrative processes that do not mirror those of the judicial system, details that simply do not make it into the college's disciplinary record—and to assume that those results were the result of gender bias reads out the causal requirement in Title IX. It also conflicts with the well-established principle "that school-disciplinary committees are entitled to a presumption of impartiality, absent a showing of *actual bias*," *see Doe v. Cummins*, 662 F. App'x 437, 449–50 (6th Cir. 2016) (collecting cases) (emphasis added), and that "[a]ny alleged prejudice on the part of the [decisionmaker] must be evident from the record and cannot be based in speculation or inference," *id.* at 450 (brackets in original) (quoting *Nash v. Auburn Univ.*, 812 F.2d 655, 665 (11th Cir. 1987)). Yet, in my opinion, this is exactly what the majority has done here: speculate. Absent an allegation of some particularized facts linking *gender bias* to Oberlin's disciplinary practices or proceedings, I respectfully dissent as to the viability of Doe's Title IX claim.