
A Tale of Two Title IXs: Title IX Reverse Discrimination Law and Its Trans-Substantive Implications for Civil Rights

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In recent years, male students and staff disciplined for sexual harassment have brought Title IX lawsuits against their schools, arguing that they experienced anti-male gender discrimination. Several circuits have allowed these students' reverse-discrimination suits to sidestep the usual barriers erected to throw traditional civil rights suits out of court. Specifically, these courts have allowed these plaintiffs, and these plaintiffs alone, to treat alleged mistreatment of a non-sex-based class as sex discrimination; to ignore strict, judicially-imposed limits on the use of comparators to show discrimination; and to rely on evidence of alleged bias lacking any nexus to an adverse action. This Article traces an emerging trend among lower courts by which Title IX has become a more powerful tool for men accused of sexual harassment than for victims and other members of marginalized groups.

Some courts justify this apparent double standard by arguing that federal enforcement of Title IX creates an actionable climate of anti-male sex discrimination. This backward reasoning suggests that civil rights enforcement is a form of discrimination against dominant groups. As this Article argues, this reasoning is both incorrect and dangerous: If courts continue treating civil rights agencies' work to remedy discrimination as

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evidence of discrimination against dominant groups, they will frustrate the enforcement and promise of all anti-discrimination statutes.

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INTRODUCTION

Over the last few years, one particular class of anti-discrimination plaintiffs has experienced startling success in federal courts. They have convinced judges to see, in their pleadings, plausible inferences of discrimination where other anti-discrimination plaintiffs have failed. They have spurred a rapidly-developing body of case law clearing the way past the usual barriers that plaintiffs face in surviving motions to dismiss their discrimination suits.

These cases do not concern what many would consider the standard fact pattern of an anti-discrimination suit: mistreatment of members of marginalized groups, such as people of color, women, and religious minorities. Rather, these cases object to treatment of people *accused* of discrimination, specifically men sanctioned by their schools for committing sexual harassment. These plaintiffs, often referred to as “respondents” (because they “respond” to the sexual harassment allegation), allege they were disciplined on the basis of their sex in violation of Title IX of the Education Amendments of 1972. And, at surprising rates, courts agree they have stated a claim for relief sufficient to survive a motion to dismiss.

The growing case law arising from these “reverse discrimination” suits poses a puzzle to anti-discrimination advocates. It might be frustrating that courts have been particularly sympathetic to these men, and so willing to disregard some of the usual barriers that spell defeat for other discrimination suits brought by members of non-dominant groups. But perhaps this reverse discrimination case law can be useful for all — even the people whom the respondent-plaintiffs are alleged to have victimized.

In this Article, we describe how these reverse discrimination suits, in co-opting Title IX for their own purposes, have overcome legal barriers faced by other anti-discrimination plaintiffs, at least on motions to dismiss.¹ As Part I explains, many students who are sexually harassed

¹ So far, respondents’ surprising victories have been mostly limited to surviving motions to dismiss; nearly all the pro-respondent opinions we discuss in this article arise in that posture. That may be because this wave of litigation is still relatively new and many of the suits have not yet made their way past discovery. However, some of respondent-plaintiffs’ more noteworthy losses have arisen on summary judgment. *See, e.g.,* *Rossley v. Drake Univ.*, 979 F.3d 1184, 1197 (8th Cir. 2020) (denying summary judgment for respondent-plaintiffs’ Title IX sex discrimination claim); *Doe v. Univ. of Denver*, 952 F.3d 1182, 1197 (10th Cir. 2020) (same); *Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56, 66-73 (1st Cir. 2019) (denying summary judgment for respondent-plaintiff’s violation of due process claim). *But see, e.g.,* *Sheppard v. Visitors of Va. State Univ.*, 993 F.3d 230, 240 (4th Cir. 2021) (granting motion to dismiss against respondent-plaintiff); *Austin v. Univ. of Or.*, 925 F.3d 1133, 1139-40 (9th Cir. 2019)

in school often struggle to overcome harsh judge-made standards to hold their schools accountable for ignoring sexual harassment. Part II argues that, by contrast, courts have allowed suits by respondents to proceed in the face of at least three issues that courts ordinarily would use to dismiss lawsuits brought by traditional anti-discrimination plaintiffs — that is, by members of minority or subordinated, rather than dominant, groups. First, these courts have conflated “respondents accused of sexual misconduct” with “men,” allowing alleged antipathy to the former to constitute actionable discrimination against the latter. Second, courts have abandoned the requirement that a comparator be “similarly situated” to a plaintiff. Third, some courts have declined to require a causal nexus between alleged indicia of discrimination and the adverse action taken against the plaintiff.

As Part III shows, courts justify these departures based on a supposed backdrop of ambient anti-male sex discrimination created by robust federal enforcement of Title IX. These courts do not explain how such gender-neutral civil rights enforcement gives rise to purported anti-male bias. Rather, they take it as a given that efforts to enforce the rights of sexual harassment survivors inherently come at men’s expense, and unfairly so. Part IV explains how subordinated plaintiffs might benefit from the growing respondent case law, then warns that there is reason to believe they will not succeed in doing so. We argue that a hostile judiciary may avoid extending such plaintiff-friendly developments beyond reverse discrimination plaintiffs. Part V analyzes the dangerous incentives these cases create, including discouraging government agencies from enforcing anti-discrimination law. Part VI proposes strategies for marginalized plaintiffs to make the best of the respondent cases.

I. TITLE IX PATHWAYS

Title IX of the Education Amendments of 1972 guarantees that no person “shall, on the basis of sex, be excluded from participation in, be

(same); *Plummer v. Univ. of Hous.*, 860 F.3d 767, 778 (5th Cir. 2017) (same). There may be an interesting story to tell there — either about how courts view the same alleged evidence of sex discrimination on motions to dismiss versus motions for summary judgment or, perhaps, a widespread mismatch between respondent-plaintiffs’ allegations and the facts as developed in discovery. *See, e.g., Doe v. Loh*, 767 F. App’x 489, 491 (4th Cir. 2019) (affirming grant of motion to dismiss where plaintiff-respondent “asserted ‘that “virtually all” claims at [the University] are lodged by female victims,’ but later ‘admitted that he had no factual basis to support such a sweeping pronouncement’”). At this stage, though, there are too few summary judgment opinions in these reverse discrimination suits to draw firm conclusions.

denied the benefits of, or be subjected to discrimination under any education program or activity” receiving federal funds.² Courts have long recognized that the landmark law’s promise of gender equality grants students the right to go to school free from gender-based harassment, including sexual assault.³ Despite Title IX’s promise, however, sexual violence remains pervasive in schools.⁴ This is, in part, because courts have established onerous standards that plaintiffs must meet to hold schools liable for deficient responses to sexual harassment reports.⁵

A. Sexual Harassment as Sex Discrimination

In *Meritor Savings Bank, FSB v. Vinson*, the Supreme Court first recognized that workplace sexual harassment — the “requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work” — was sex discrimination prohibited by Title VII of the Civil Rights Act of 1964.⁶ Six years later, in *Franklin v. Gwinnett County Public Schools*, the Supreme Court first recognized that a school’s failure to address sexual harassment violates Title IX’s sex equality guarantee, reasoning that when a teacher sexually harasses a student, that teacher “discriminates on the basis of sex.”⁷

² 20 U.S.C. § 1681-88 (2018).

³ See *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 637-38 (1999); *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 72-73 (1992).

⁴ See Nick Anderson, Susan Svrluga & Scott Clement, *Survey Finds Evidence of Widespread Sexual Violence at 33 Universities*, WASH. POST (Oct. 15, 2019), https://www.washingtonpost.com/local/education/survey-finds-evidence-of-widespread-sexual-violence-at-33-universities/2019/10/14/bd75dcde-ee82-11e9-b648-76bcf86eb67e_story.html [<https://perma.cc/2NH3-2EW5>] (“The survey showed that 25.9 percent of female undergraduates had experienced nonconsensual contact through physical force or because they were unable to give consent. For male undergraduates, the share was 6.8 percent.”); Colleen Flaherty, *Worse Than It Seems*, INSIDE HIGHER ED (July 18, 2017, 3:00 AM), <https://www.insidehighered.com/news/2017/07/18/study-finds-large-share-cases-involving-faculty-harassment-graduate-students-are> [<https://perma.cc/F8AP-6GK4>] (discussing harassment of graduate students); Samantha Schmidt, *‘If Not Us, Who Will?’*, WASH. POST (June 14, 2019), <https://www.washingtonpost.com/graphics/2019/local/teenagers-fight-sexual-harassment-high-schools-in-metoo-era/> [<https://perma.cc/2G94-ADMC>] (“One study found that nearly half of all students between grades 7 and 12 reported experiencing some type of sexual harassment.”).

⁵ See *infra* Part I.B.

⁶ *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) (citing *Henson v. City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982)).

⁷ *Franklin*, 503 U.S. at 75 (citing *Meritor*, 477 U.S. at 64). The first suit in which plaintiffs successfully argued that sexual harassment constitutes sex discrimination was *Alexander v. Yale*, in which the court recognized that the school’s absence of a procedure

Half a decade later, in *Gebser v. Lago Vista Independent School District* and *Davis v. Monroe County Board of Education*, the Supreme Court created the legal framework for sexual harassment survivors suing their schools for money damages.⁸ *Gebser* and *Davis* held that a school would not be vicariously liable for harassment by a teacher or student.⁹ Rather, a school committed intentional sex discrimination through its “own decision to remain idle in the face of known” sex-based harassment.¹⁰ The *Davis* court analogized harassment, and a school’s failure to respond, to male students physically blocking “female students from using a particular school resource [such as] an athletic field or computer lab.”¹¹ The male students’ actions would deprive their female classmates “equal access to an institution’s resources and opportunities,” contravening Title IX’s promise of sex equality.¹² These female students could sue because the school’s “knowing refusal to take any action” in response to such sex discrimination would violate Title IX, even if the school’s failure to do so stemmed from a gender-neutral explanation.¹³

Finally, in *Alexander v. Sandoval*, the Supreme Court dramatically abridged private rights of action for disparate impact discrimination.¹⁴ In the years since, lower courts have held or assumed that plaintiffs cannot bring Title IX actions for disparate impact discrimination.¹⁵

for responding to harassment violated the sex equality protections provided by Title IX. See *Alexander v. Yale*, 459 F. Supp. 1, 4 (D. Conn. 1977).

⁸ *Gebser* set forth institutional liability principles for sexual harassment by teachers. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998). The Supreme Court extended *Gebser*’s holding to sexual harassment by peers one year later in *Davis*. *Davis*, 526 U.S. at 644-45.

⁹ See *Davis*, 526 U.S. at 642; *Gebser*, 524 U.S. at 283, 287-88.

¹⁰ *Davis*, 526 U.S. at 641.

¹¹ *Id.* at 650-51.

¹² *Id.*

¹³ *Id.*

¹⁴ *Alexander v. Sandoval*, 532 U.S. 275, 280-81, 293 (2001).

¹⁵ See, e.g., *Poloceno v. Dall. Indep. Sch. Dist.*, 826 F. App’x 359, 362-63 (5th Cir. 2020) (“[O]nly intentional discrimination, not disparate impact, is actionable under Title IX.”); *Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56, 75 (1st Cir. 2019) (“We have never recognized a private right of action for disparate-impact discrimination under Title IX.”); *Doe v. Ohio State Univ.*, 239 F. Supp. 3d 1048, 1065 (S.D. Ohio 2017) (“Although Title IX prohibits intentional gender discrimination, it does not support claims of disparate impact.”); *Nungesser v. Columbia Univ.*, 169 F. Supp. 3d 353, 363 (S.D.N.Y. 2016) (“[C]ourts have held that a private right of action based on the alleged disparate impact of a policy on a protected group is not cognizable under Title IX.”); *Doe v. Brown Univ.*, 166 F. Supp. 3d 177, 184-85 (D.R.I. 2016) (“[A] title IX claim may not be premised on the ‘disparate impact’ a policy has with respect to a protected group.”).

Thus, although sexual harassment overwhelmingly pushes women and LGBTQ students out of school, harassment victims alleging Title IX violations have had to do so under a disparate treatment, rather than disparate impact, theory.

B. Steep Barriers to Holding Schools Accountable for Sexual Harassment

Even as the Supreme Court reaffirmed that sexual harassment violated Title IX's sex equality guarantee, it established onerous standards for plaintiffs seeking to vindicate their Title IX rights through the law's implied private right of action. In *Gebser* and *Davis*, the Supreme Court held that, to prevail in a suit for money damages, a plaintiff who experiences sexual harassment must ordinarily establish that (1) the harassment they experienced was so "severe, pervasive, and objectively offensive" that it effectively denied the plaintiff access to their education; (2) a school official with authority to take corrective action had "actual notice" of the harassment; and (3) the school was "deliberately indifferent" to the misconduct.¹⁶ Each of these three judicially-created hurdles has proved challenging for plaintiffs to clear.

First, plaintiffs who cannot convince a court that their harassment was severe *and* pervasive will be thrown out of court.¹⁷ Title IX's "and" test is even more stringent than Title VII's severe *or* pervasive test for

¹⁶ *Davis*, 526 U.S. at 633; *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 277 (1998). Most student harassment victims must conform to these requirements, but courts have recognized that some victims may be able to establish sex discrimination in alternative ways, including by establishing the school had an "official policy" of deliberate indifference that caused their assault, even if the school did not have actual knowledge of the harassment the plaintiff experienced, or the substantial risk thereof. See *Karasek v. Regents of the Univ. of Cal.*, 956 F.3d 1093, 1112 (9th Cir. 2020); *Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170, 1175-79 (10th Cir. 2007). A plaintiff could also presumably make out a Title IX claim by showing that their report of sexual harassment was treated differently because of their sex — for example, if, as occurred in one case, a school said that it would have taken a report of forced penetration more seriously if the victim had been a girl rather than a boy. See Brief of Plaintiff at 37-42, *Doe v. Indep. Sch. Dist. No. 5*, 5:18-cv-00271-JD (W.D. Okla. June 5, 2020), <https://www.publicjustice.net/wp-content/uploads/2018/06/Brief-in-Support-of-Motion-for-Partial-Summary-Judgment.pdf> [<https://perma.cc/UW6W-A6Y4>]. Alexandra Brodsky, one of the authors of the piece, was co-counsel on this case, which settled before the court delivered an opinion concerning summary judgment. Finally, *Gebser* and *Davis* establish difficult standards for plaintiffs seeking money damages, but their exact impact on cases "seeking exclusively equitable relief[] is not resolved." See Catharine A. MacKinnon, *In Their Hands: Restoring Institutional Liability for Sexual Harassment in Education*, 125 YALE L.J. 2038, 2064 n.110 (2016) (citing *Frederick v. Simpson Coll.*, 160 F. Supp. 2d 1033, 1035-38 (S.D. Iowa 2001)).

¹⁷ See *Davis*, 526 U.S. at 633; *Gebser*, 524 U.S. at 277; *Hill v. Cundiff*, 797 F.3d 948, 968-69 (11th Cir. 2015).

(generally adult) workers.¹⁸ Some courts have made it nearly impossible for sexual harassment victims to meet the *Gebser* and *Davis* standard. For example, the Eleventh Circuit considered a case in which eight-year-old girls alleged that a male classmate frequently made overt, unwelcome sexual comments to them, chased them on the playground to touch their chests and kiss them, tried to look up one girl's skirt, and grabbed one girl at a bus stop and "rub[bed] his body on hers."¹⁹ The court held that such harassment was not "so severe, pervasive, and objectively offensive"²⁰ that the school could be held liable — even though the girls began missing school in order to avoid the harasser.²¹ In an extreme case, the Sixth Circuit held in 2019 that a single instance of severe harassment, even rape, could not satisfy this requirement.²² This decision is, thankfully, a minority rule.²³

Second, the actual notice requirement also frustrates plaintiffs' suits. To meet this standard, a plaintiff must show that an "appropriate person" — a senior official with authority to take corrective action — knew of the sexual harassment or an allegation thereof.²⁴ The "precise

¹⁸ See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986).

¹⁹ *Hawkins v. Sarasota Cnty. Sch. Bd.*, 322 F.3d 1279, 1281 (11th Cir. 2003).

²⁰ *Id.* at 1288.

²¹ *Id.* at 1289.

²² *Kollaritsch v. Mich. State Univ. Bd. of Trs.*, 944 F.3d 613, 620 (6th Cir. 2019); see also *Ross v. Corp. of Mercer Univ.*, 506 F. Supp. 2d 1325, 1358 (M.D. Ga. 2007) (holding as a matter of law that a single instance of rape, "however traumatic to its victim, is not likely to be pervasive, or to have a systemic effect on educational activities").

²³ See, e.g., *Lopez v. Metro. Gov't of Nashville & Davidson Cnty.*, 646 F. Supp. 2d 891, 913 (M.D. Tenn. 2009) ("Most courts which have addressed the issue have concluded that even a single incident of rape is sufficient to establish that a child was subjected to severe, pervasive, and objectively offensive sexual harassment for purposes of Title IX."); *T.Z. v. City of New York*, 634 F. Supp. 2d 263, 271 (E.D.N.Y. 2009) ("[A] sufficiently serious one-time sexual assault may satisfy the 'pervasiveness' requirement."); *Doe v. Dall. Indep. Sch. Dist.*, No. CIV.A.3:01-CV-1092-R, 2002 WL 1592694, at *6 (N.D. Tex. July 16, 2002) ("[O]ne single instance of a forced manual penetration of one's vagina seems to qualify as a 'sufficiently severe one-on-one peer harassment.'"); Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students or Third Parties, 66 Fed. Reg. 5512, at 6 n.45 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> [<https://perma.cc/ZU3G-PNHK>] ("[A] single or isolated incident of sexual harassment may, if sufficiently severe, create a hostile environment."); see also *Doe v. Fairfax Cnty. Sch. Bd.*, 1 F.4th 257, 274 (4th Cir. 2021) (holding that a single act of severe sexual harassment can support a Title IX claim); *Spencer v. Univ. of N.M. Bd. of Regents*, No. 15-CV-141 MCA/SCY, 2016 WL 10592223, at *6 (D.N.M. Jan. 11, 2016) (same). Alexandra Brodsky, one of the authors of the piece, is co-counsel on the case against the Fairfax County School Board cited here.

²⁴ *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998).

boundaries” of the actual notice requirement are not clearly defined and vary among lower courts, but actual “knowledge must encompass either actual notice of the precise instance of abuse that gave rise to the case at hand or actual knowledge of at least a significant risk of sexual abuse.”²⁵ Here, too, the *Gebser/Davis* standard imposes even harsher burdens on students’ sexual harassment suits than workers’ sexual harassment suits: Employers may be held liable for harassment that they *should* have known about under Title VII’s constructive knowledge requirement.²⁶

Generally, reporting sexual harassment to the low and mid-level employees that students and families might naturally turn to — for example, school guidance counselors — will not satisfy the actual notice requirement.²⁷ Even where a student manages to report to the right person, an insufficiently detailed report — exactly the kind a child might be expected to make — may fail to establish actual notice. In one case, the Tenth Circuit held that a young, disabled student’s report that “the boys were bothering her” was insufficient to give the school actual notice — although no one at the school asked any follow-up questions.²⁸ Had school officials done so, they might have learned those boys were orally raping her.²⁹ In other cases, a school may not receive actual notice of harassment because students do not understand how to use the school’s reporting avenues, fear the school will not protect them against harassment, or because students know the school’s investigations are ineffective.³⁰ In other words, the actual notice

²⁵ *Mercer Univ.*, 506 F. Supp. 2d at 1348.

²⁶ *See, e.g., Ocheltree v. Scollon Prods., Inc.*, 335 F.3d 325, 333-34 (4th Cir. 2003) (en banc) (In a case about harassment by a co-worker, “the employer may be liable in negligence if it knew or should have known about the harassment and failed to take effective action to stop it.”).

²⁷ *See, e.g., Warren ex rel. Good v. Reading Sch. Dist.*, 278 F.3d 163, 173-74 (3d Cir. 2002) (holding that a school guidance counselor was not an “appropriate person” whose knowledge of alleged sexual abuse made the school liable under Title IX).

²⁸ *Rost ex rel. K.C. v. Steamboat Springs RE-2 Sch. Dist.*, 511 F.3d 1114, 1119 (10th Cir. 2008).

²⁹ *Id.* at 1117-18.

³⁰ *See, e.g.,* DAVID CANTOR, BONNIE FISHER, SUSAN CHIBNALL, REANNE TOWNSEND, HYUSHIK LEE, CAROL BRUCE & GAIL THOMAS, REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT 36 (2015), https://www.aau.edu/sites/default/files/%40%20Files/Climate%20Survey/AAU_Campus_Climate_Survey_12_14_15.pdf [<https://perma.cc/F7VF-T63T>] (finding that nearly one-third of campus rape survivors did not report the violence because they “did not think anything would be done about it”); Jill Schwarz, Sandy Gibson & Carolynne Lewis-Arévalo, *Sexual Assault on College Campuses: Substance Use, Victim Status Awareness, and Barriers to Reporting*, 1 BUILDING HEALTHY ACAD. CMTYS. J. 45, 51-52, 54 (2017), <https://library.osu.edu/ojs/>

standard allows schools to escape Title IX liability, even when the lack of actual notice results from a school's own failure to address sexual harassment of students.³¹

Finally, the deliberate indifference standard allows schools to escape liability for sexual harassment, even when their response to harassment "is concededly callous, incompetent, unresponsive, inept, and inapt."³² If a school that is on actual notice of sex-based misconduct does "literally nothing," the school will typically be held liable if the misconduct continues.³³ But so long as a school investigates the incident in some way, it will be difficult for sexual harassment plaintiffs to plead facts showing that the school's response is "clearly unreasonable in light of the known circumstances."³⁴ Courts regularly hold that school-defendants were not deliberately indifferent even when a sexual harassment plaintiff pleads that the school's response was woefully inadequate to stop further abuse and there were serious procedural deficiencies in the school's handling of the case (including violations of the school's own policy).³⁵

For example, in *K.F. ex rel. CF v. Monroe Woodbury Central School District*, the Second Circuit heard a case brought by a high school student who was harassed for two years and sexually assaulted twice by a classmate, causing her so much distress that she stopped attending high school.³⁶ The Second Circuit held that the school was not deliberately indifferent to the harassment because — although it did nothing to allow the plaintiff to return to a safe, equitable school environment — the school recommended the plaintiff transfer to an out-of-district alternative school "attended by students with serious disciplinary records."³⁷

[index.php/BHAC/article/viewFile/5520/4811 \[https://perma.cc/N9MC-5TLU\]](https://perma.cc/N9MC-5TLU) (explaining that fears of retaliation lead to underreporting). If students do not report harassment because they do not know how to do so, because they fear retaliation, or because they believe the school will do nothing, then they will not provide the school actual notice via a formal report.

³¹ See Nancy Chi Cantalupo, *Burying Our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence*, 43 LOY. U. CHI. L.J., 205, 227-33 (2011).

³² MacKinnon, *supra* note 16, at 2041.

³³ *Id.* at 2079.

³⁴ *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 648 (1999).

³⁵ MacKinnon, *supra* note 16, at 2079-85.

³⁶ *K.F. ex rel. CF v. Monroe Woodbury Cent. Sch. Dist.*, 531 F. App'x 132, 133 (2d Cir. 2013).

³⁷ *Id.* at 133-34.

C. Pleading Sex-Based Discrimination Against Respondents

The U.S. Department of Education (“ED”) has at times been willing to enforce Title IX more meaningfully than have the courts. Since 1997, its Office for Civil Rights (“OCR”) has issued guidance documents laying out its interpretation of Title IX’s requirements related to sexual harassment.³⁸ The Obama administration’s enforcement was particularly robust, marked by additional policy guidance³⁹ and systemic investigations into schools that were allegedly flouting their Title IX obligations to survivors.⁴⁰ In response, some schools — primarily colleges and universities — that had historically failed to investigate and sanction alleged harassers began to do so.⁴¹

³⁸ See Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 66 Fed. Reg. 5512 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> [<https://perma.cc/ZU3G-PNFK>]; Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034, 12,040 (Mar. 13, 1997); Letter from Russlyn Ali, Assistant Sec. for Civ. Rts., to Colleague (Oct. 26, 2010), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf> [<https://perma.cc/SDM6-MXA8>]. The Department of Education has done the same for harassment based on race and disability. See, e.g., Racial Incidents and Harassment Against Students at Educational Institutions, Investigative Guidance, 59 Fed. Reg. 11448 (Mar. 10, 1994), <https://www2.ed.gov/about/offices/list/ocr/docs/race394.html> [<https://perma.cc/PEE4-YWWZ>] (explaining schools’ obligations to address racial harassment pursuant to Title VI); Letter from Norma V. Cantu, Assistant Sec. for Civ. Rts., & Judith E. Heumann, Assistant Sec., Off. of Special Ed. & Rehab. Servs., to Colleague (July 25, 2000), <https://www2.ed.gov/about/offices/list/ocr/docs/disabharassltr.html> [<https://perma.cc/UZR2-HTGT>] (explaining section 504 and Title II protect students against disability-based harassment and schools’ obligation to address and prevent it).

³⁹ See U.S. DEP’T OF EDUC., OFF. FOR CIV. RTS., QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE (2014), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> [<http://perma.cc/XD5P-RRTJ>]; Letter from Russlyn Ali, Assistant Sec. for Civ. Rts., to Colleague (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [<https://perma.cc/9FTV-UL4F>] [*hereinafter* 2011 Dear Colleague Letter].

⁴⁰ See, e.g., Blake Emerson, *The Claims of Official Reason: Administrative Guidance on Social Inclusion*, 128 YALE L.J. 2122, 2177-78 (2019) (noting the number of open investigations initiated in 2011 as a response to a “deluge of complaints”); MacKinnon, *supra* note 16, at 2101-02 (noting the “aggressive administrative enforcement” that occurred during the Obama administration “spurred some changes in policies and procedures on campuses around the country”).

⁴¹ See *Doe v. Purdue Univ.*, 928 F.3d 652, 668 (7th Cir. 2019); see also, e.g., Press Release, U.S. Dep’t of Educ., Off. for Civ. Rts., Maryland’s Frostburg State University Found in Violation of Title IX, Reaches Agreement with U.S. Education Department to Address, Prevent Sexual Assault and Harassment (Sept. 9, 2016), https://www.legistorm.com/stormfeed/view_rss/1003483/organization/69539/title/marylands-frostburg-state-university-found-in-violation-of-title-ix-reaches-agreement-with-us-education-department-to-address-prevent-sexual-assault-and-harassment.html [<https://perma.cc/AZ64-UX8M>] (explaining

A number of critics decried that these schools' new efforts were unfair to students and staff accused of sexual harassment.⁴² Much of the criticism focused on the procedures that colleges and universities used to investigate allegations.⁴³ Some alleged that, where schools had once been biased against victims, now they were biased against the accused.⁴⁴

that OCR's investigation discovered that "off-campus incidents and incidents involving non-student victims or perpetrators that were not investigated or were not fully investigated," and that, pursuant to a voluntary resolution agreement, the school would now "conduct adequate investigations"); Letter from Thomas J. Hibino, Reg'l Dir., Off. for Civ. Rts., to Anthony P. Monaco, President, Tufts Univ. (Apr. 28, 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/01102089-a.html> [https://perma.cc/95QB-WFAR] (explaining that OCR's investigation revealed that "neither [the Tufts University Police Department] nor anyone else at the University ever investigated and resolved [the reporting student's] complaints under Title IX" and that, pursuant to a voluntary resolution agreement with OCR, Tufts University would adopt new procedures to ensure a prompt and equitable response to reports of harassment); Letter from Anurima Bhargava, Dep't of Just. Civ. Rts. Div., to Royce Engstrom, President of the Univ. of Mont. in Missoula (May 9, 2013), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/10126001-a.pdf> [https://perma.cc/E88P-6KFF] (explaining that, pursuant to the resolution agreement, the school would update its sexual harassment policy to clearly require investigation of off-campus sexual harassment).

⁴² See, e.g., Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61,462, 61,464 nn.2-3 (Nov. 29, 2018), <https://www.govinfo.gov/content/pkg/FR-2018-11-29/pdf/2018-25314.pdf> [https://perma.cc/629M-FAR3] (collecting criticism).

⁴³ See, e.g., Elizabeth Bartholet, Scott Brewer, Robert Clark, Alan Dershowitz, Christine Desan, Charles Donahue, Einer Elhauge, Allan Ferrell, Martha Field, Jesse Fried, Nancy Gertner, Janet Halley, Bruce Hay, Philip Heymann, David Kennedy, Duncan Kennedy, Robert Mnookin, Charles Nesson, Charles Ogletree, Richard Parker, Mark Ramseyer, Davis Rosenberg, Lewis Sargentich, David Shapiro, Henry Steiner, Jeannie Suk, Lucie White & Davis Wilkins, *Rethink Harvard's Sexual Harassment Policy*, BOS. GLOBE (Oct. 14, 2014, 9:00 PM), <https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html> [https://perma.cc/PNZ4-6E2E] (criticizing Harvard University's procedure for investigating reports of sexual harassment); Emily Yoffe, *The College Rape Overcorrection*, SLATE (Dec. 8, 2014, 11:53 PM), http://www.slate.com/articles/double_x/doublex/2014/12/college_rape_campus_sexual_assault_is_a_serious_problem_but_the_efforts.html [https://perma.cc/9AGW-6T6V] (arguing that schools' procedures for investigating sexual harassment are generally unfair to men accused of harassment).

⁴⁴ See, e.g., David G. Savage & Timothy M. Phelps, *How a Little-Known Education Office Has Forced Far-Reaching Changes to Campus Sex Assault Investigations*, L.A. TIMES (Aug. 17, 2015, 3:00 AM PT), <https://www.latimes.com/nation/la-na-campus-sexual-assault-20150817-story.html> [https://perma.cc/D9VS-2NVC] (quoting professor's diagnosis of an "over-correction"); Yoffe, *supra* note 43 (arguing that college procedures for investigating harassment "abrogate the civil rights of men").

Advocates for student survivors disputed this diagnosis.⁴⁵ But some public accounts of botched investigations were undoubtedly alarming.⁴⁶

In the years since the Obama-era sea-change, students and university employees sanctioned for committing sexual harassment have challenged their discipline in private litigation. Some have brought suit for violations of their due process and contractual rights, a natural and appropriate route for procedural complaints.⁴⁷ Many, though, have brought less expected claims: sex discrimination suits under Title IX.⁴⁸ They allege not just that they were treated unfairly, but that they were treated unfairly because they are men.⁴⁹ By necessity, these suits look very different than the suits brought by victims: Respondents do not claim that their schools were deliberately indifferent to sex discrimination by a third party (such as a classmate or teacher), but that their sanctions are the result of the school's own sex-based animus.⁵⁰

⁴⁵ See, e.g., Letter from Know Your IX, Carry That Weight, No Red Tape, Our Harvard Can Do Better, Cal Arts Sexual Respect Task Force, 7,000 in Solidarity: A Campaign Against Sexual Assault & Phoenix Survivors Alliance at the University of Chicago, to University Presidents (Apr. 15, 2015), <https://www.knowyourix.org/letter-university-presidents/> [<https://perma.cc/XEM7-WYNJ>] (“Some who advocate for accused students’ rights have done so at the cost of truth and justice, confusing student discipline for criminal law and perpetuating a myth that universities now favor alleged victims over respondents — a myth we affirmatively reject.”).

⁴⁶ See, e.g., Letter from Beth Gellman-Beer, Supervisory Att’y, Off. for Civ. Rts., to Robert E. Clark II, President, Wesley Coll. (Oct. 12, 2016), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/03152329-a.pdf> [<https://perma.cc/9HYM-F2JG>] (summarizing facts of government investigation into unfair treatment of a student accused of sexual misconduct).

⁴⁷ See, e.g., *Doe v. Univ. of Ark.-Fayetteville*, 974 F.3d 858, 866 (8th Cir. 2020) (considering student’s due process claims against the university); *Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56, 66 (1st Cir. 2019) (same); see also Sage Carson & Sarah Nesbitt, *Balancing the Scales: Student Survivors’ Interests and the Mathews Analysis*, 43 HARV. J.L. & GENDER 319, 321 (2020).

⁴⁸ See, e.g., *infra* notes 50–58 and accompanying text (discussing various claims of reverse discrimination). Occasionally, male school employees terminated for sexual harassment have filed similar claims challenging sanctions under Title VII, which prohibits sex discrimination in employment. See, e.g., *Menaker v. Hofstra Univ.*, 935 F.3d 20, 32 (2d Cir. 2019) (stating that “the very same pressures that may drive a university to discriminate against male *students* accused of sexual misconduct may drive a university to discriminate against male *employees* accused of the same” and give rise to a Title VII claim).

⁴⁹ See *infra* notes 50–58 and accompanying text.

⁵⁰ Typically, these suits are brought by men who claim that their schools were motivated by anti-male bias. For characteristic examples, see *Doe v. Cummins*, 662 F. App’x 437, 453 (6th Cir. 2016); *Yusuf v. Vassar Coll.*, 35 F.3d 709, 715 (2d Cir. 1994). A handful of such suits, though, have been brought by women. See *infra* note 226.

Circuits have adopted varying tests to evaluate these reverse sex discrimination lawsuits, but each test can ultimately be distilled to the same question: whether a respondent was wrongly sanctioned “*on the basis of his sex*.”⁵¹ In a series of early, influential opinions, the Second Circuit identified two ways respondents may show sex-based animus. First, a respondent may bring an “erroneous outcome” suit, in which he must show that he was “innocent and wrongly found to have committed an offense.”⁵² Alternately, a respondent may bring a “selective enforcement” claim, under which he must prove that “regardless of the student’s guilt or innocence, the severity of the penalty and/or the decision to initiate the proceeding was affected by the student’s gender.”⁵³ Over the last three years, several circuits have adopted the Second Circuit’s framework,⁵⁴ while others have adopted other doctrinal tests through which respondents can plead sex discrimination.⁵⁵ Some of these theories of liability rely on allegations of procedural irregularities in school discipline, but some (including the “selective enforcement” test recognized in several circuits) do not.⁵⁶

As then-Judge Amy Barrett explained in *Doe v. Purdue University*, all of these tests “simply describe ways in which a plaintiff might show that sex was a motivating factor in a university’s decision to discipline a student.”⁵⁷ Several circuits have therefore held that there is “no need to

⁵¹ See, e.g., *Doe v. Purdue Univ.*, 928 F.3d 652, 667-68 (7th Cir. 2019) (discussing various doctrinal tests applied in Title IX reverse discrimination cases and stating that “[a]ll of these categories simply describe ways in which a plaintiff might show” that the university’s decision to discipline the student was “on the basis of sex”).

⁵² *Yusuf*, 35 F.3d at 715.

⁵³ *Id.*

⁵⁴ See, e.g., *Doe v. Miami Univ.*, 882 F.3d 579, 592 (6th Cir. 2018) (applying the erroneous outcome test); *Plummer v. Univ. of Hous.*, 860 F.3d 767, 777-78 (5th Cir. 2017) (applying the *Yusuf* selective enforcement test).

⁵⁵ The Sixth Circuit, for instance, adopted the *Yusuf* categories and recognized two potential additional theories of liability: “deliberate indifference” and “archaic assumptions.” *Miami Univ.*, 882 F.3d at 589. However, the Sixth Circuit has since sent mixed messages about the viability of the “archaic assumptions” theory of liability in the context of disciplinary proceedings for sexual harassment. Compare *Doe v. Baum*, 903 F.3d 575, 587-88 (6th Cir. 2018) (declining to extend the archaic assumptions theory to disciplinary proceedings), with *Doe v. Univ. of Dayton*, 766 F. App’x 275, 280 (6th Cir. 2019) (noting that the Sixth Circuit has recognized “archaic assumptions” as a theory of Title IX liability “in cases alleging gender bias in university disciplinary proceedings”).

⁵⁶ See, e.g., *Doe v. Univ. of Scis.*, 961 F.3d 203, 209-11 (3d Cir. 2020) (discussing selective enforcement claim); *Purdue Univ.*, 928 F.3d at 667 (collecting cases establishing tests for Title IX reverse discrimination cases in other circuits).

⁵⁷ *Purdue Univ.*, 928 F.3d at 667. With their references to sex as a “motivating factor,” *Purdue* and *Yusuf* appear to adopt a causation requirement akin to a Title VII

superimpose doctrinal tests” on Title IX; rather, at the motion to dismiss stage, courts may simply ask “whether the alleged facts, if true, raise a plausible inference that the university discriminated against the plaintiff on the basis of sex[.]”⁵⁸

II. A STRIKING DEPARTURE

Plaintiffs suing under civil rights statutes typically face a series of harsh obstacles to holding schools, workplaces, or government actors liable for discrimination. Respondents suing under Title IX would be expected to encounter the same barriers. Yet courts have undertaken unusual — and unusually generous — analyses of respondent-plaintiffs’ claims.

In this Part, we identify three traditional barriers to anti-discrimination plaintiffs successfully vindicating their rights. These same barriers emerge in employment and education civil rights cases brought under a range of statutes, including Title VII, Title IX, the Americans with Disabilities Act, section 504 of the Rehabilitation Act (which prohibits disability discrimination in education), Title VI of the Civil Rights Act of 1964 (which prohibits race discrimination in education), and the Age Discrimination in Employment Act (“ADEA”).⁵⁹ We document how, in many circuits, each hurdle has been

“mixed motive” claim. *See id.*; *Yusuf*, 35 F.3d at 715. The Fourth Circuit has recently rejected this position, instead requiring but-for causation. *See Sheppard v. Va. State Univ.*, 993 F.3d 230, 235-38, 237 n.7 (4th Cir. 2021).

⁵⁸ *Schwake v. Ariz. Bd. of Regents*, 967 F.3d 940, 947 (9th Cir. 2020) (internal alterations and quotation marks omitted) (quoting *Purdue Univ.*, 928 F.3d at 667 and *Doe v. Columbia Coll. Chi.*, 933 F.3d 849, 854-55 (7th Cir. 2019)); *see also Univ. of Scis.*, 961 F.3d at 209; *Doe v. Univ. of Ark.-Fayetteville*, 974 F.3d 859, 864 (8th Cir. 2020) (“To state a claim, therefore, Doe must allege adequately that the University disciplined him on the basis of sex — that is, because he is a male.” (citing *Purdue Univ.*, 928 F.3d at 667-68)); *Rossley v. Drake Univ.*, 979 F.3d 1184, 1192 (8th Cir. 2020).

⁵⁹ Although these civil rights statutes vary in text and application, courts frequently apply standards and case law that developed under one of these statutes in evaluating a case brought under another. *See, e.g., Consol. Rail Corp. v. Darrone*, 465 U.S. 624, 630-31 (1984) (referring to Title VI to interpret section 504 of the Rehabilitation Act); *Cannon v. Univ. of Chi.*, 441 U.S. 677, 694-99 (1979) (explaining that Title IX is “interpreted and applied” in parallel with “its companion,” Title VI); *Tumminello v. Father Ryan High Sch., Inc.*, 678 F. App’x 281, 284 (6th Cir. 2017) (stating that the court “turn[s] to prior Title VII decisions to aid our interpretation of Title IX’s ‘on the basis of sex’ requirement.”); *Papelino v. Albany Coll. of Pharm. of Union Univ.*, 633 F.3d 81, 89 (2d Cir. 2011) (applying “Title VII principles” to interpret Title IX); *Lanman v. Johnson Cnty.*, 393 F.3d 1151, 1155-56 (10th Cir. 2004) (importing Title VII case law into an ADA case because of the laws’ parallel text, purposes, and remedial structures); *Bryant v. Indep. Sch. Dist. No. 1-38 of Garvin Cnty.*, 334 F.3d 928, 930 (10th Cir. 2003) (noting that “courts often use Title VII proof scheme for Title VI

smoothed, or entirely removed, for male plaintiffs asserting “reverse” sex discrimination claims under Title IX. First, we demonstrate how courts have conflated “respondents accused of sexual misconduct” with “men,” thereby allowing unactionable discrimination against the former to constitute actionable discrimination against the latter.⁶⁰ Second, we examine courts’ abandonment of the requirement that a comparator be “similarly situated” to a plaintiff.⁶¹ Third, we assess courts’ departure from causal nexus requirements.⁶²

A. *The Geduldig Problem*

A common problem for anti-discrimination plaintiffs is showing that a plaintiff experienced discrimination *because of* their sex (or another protected characteristic), rather than because of an unprotected characteristic that happens, or tends, to be more common among people of a particular gender (or other protected class).

Consider, for instance, discrimination against pregnant people. In its now-infamous rulings in *Geduldig* and *Gilbert*, the Supreme Court held that the exclusion from employers’ disability insurance plans of pregnancy-related conditions — conditions that almost exclusively affect women’s bodies — did not constitute sex discrimination.⁶³ “While it is true that only women can become pregnant,” the Court reasoned in *Geduldig*, “the [challenged] program divides potential [benefits] recipients into two groups — pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes.”⁶⁴ Because nonpregnant persons could be both men and women, there was no gender-based discrimination.⁶⁵ Thus, the

claims”); *Brown v. Brody*, 199 F.3d 446, 456 n.10 (D.C. Cir. 1999) (“Courts of appeals routinely apply the same standards to evaluate Title VII cases as they do ADA claims, ADEA claims, and even ERISA claims.”); *Preston v. Va. ex rel. New River Cnty. Coll.*, 31 F.3d 203, 206-07 (4th Cir. 1994) (collecting cases indicating that “Title VII principles should be applied to Title IX actions”); *Lopez v. Regents of Univ. of Cal.*, 5 F. Supp. 3d 1106, 1126 n.12 (N.D. Cal. 2013) (“Title VI claims are held to the same standard as Title IX claims.”).

⁶⁰ See *infra* Part II.A.

⁶¹ See *infra* Part II.B.

⁶² See *infra* Part II.C.

⁶³ *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 134-47 (1976); *Geduldig v. Aiello*, 417 U.S. 484, 494-98 (1974).

⁶⁴ *Geduldig*, 427 U.S. at 496 n.20.

⁶⁵ *Id.*

Court concluded, the insurance plans did not violate the Equal Protection Clause⁶⁶ or Title VII.⁶⁷

Although Congress later amended Title VII to ban pregnancy discrimination explicitly,⁶⁸ it remains good law that discrimination against a group comprised mostly or even exclusively of one sex (or other protected class) is not actionable discrimination *per se*. The Eighth Circuit has held, for example, that it is not sex discrimination to exclude contraceptive coverage from employer health plans,⁶⁹ despite the fact that “[w]omen are uniquely and specifically disadvantaged” by such policies.⁷⁰

Despite the *Geduldig* line of cases, a growing number of appeals courts have accepted that alleged bias against male students accused of sexual misconduct is, inherently, bias against men — even though not all accused students are men, and victims of harassment include both men and women.⁷¹ For instance, courts frequently treat facially sex-neutral procedural deficiencies as evidence of anti-male bias. In *Doe v. Oberlin*, the Sixth Circuit held that the length of time Oberlin spent investigating the sexual assault allegations against respondent-plaintiff Doe (120 days, rather than the promised 60 days) raised an inference of anti-male bias.⁷² Likewise, the Ninth Circuit in *Schwake v. Arizona Board of Regents* concluded that the respondent-plaintiff’s allegations that the school failed to consider his exculpatory evidence and, as a matter of policy, did not offer an appeal for sanctions short of suspension suggested bias against men.⁷³ In *Doe v. University of Arkansas*, the

⁶⁶ *Id.* at 494.

⁶⁷ *Gilbert*, 429 U.S. at 145-46.

⁶⁸ 42 U.S.C. § 2000e(k) (1964); Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, § 1, 92 Stat. 2076 (1978).

⁶⁹ *In re Union Pac. R.R. Emp. Pracs. Litig.*, 479 F.3d 936, 943-45 (8th Cir. 2007). Under the Affordable Care Act’s implementing regulations, most employers must provide insurance that covers contraceptives, though not — formally, at least — to ensure sex equality. See *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2373-74 (2020).

⁷⁰ *In re Union Pac.*, 479 F.3d at 949 (Bye, J., dissenting).

⁷¹ See, e.g., *Doe v. Univ. of Denver*, 952 F.3d 1182, 1196-97 (10th Cir. 2020) (“[B]oth men and women can be respondents.”); *Doe v. Cummins*, 662 F. App’x 437, 453 (6th Cir. 2016) (“[S]exual-assault victims can be both male and female.”); Lara Stemple & Ilan H. Meyer, *Sexual Victimization by Women Is More Common than Previously Known*, SCI. AM. (Oct. 10, 2017), <https://www.scientificamerican.com/article/sexual-victimization-by-women-is-more-common-than-previously-known> [<https://perma.cc/6RH5-26HN>] (noting that, although “male-perpetrated sexual victimization remains a chronic problem,” women also perpetrate sexual violence and men are also victims).

⁷² *Doe v. Oberlin Coll.*, 963 F.3d 580, 586-87 (6th Cir. 2020).

⁷³ *Schwake v. Ariz. Bd. of Regents*, 967 F.3d 940, 950-51 (9th Cir. 2020).

Eighth Circuit concluded that the fact that the university punished the respondent-plaintiff *less* than other students found responsible for sexual assault was evidence of sex bias against *him*.⁷⁴ And, in another case, the Eighth Circuit reasoned that a school's purported bias against the football team — evinced by an administrator's previously expressed concern about misconduct on the team — implied gender bias against men.⁷⁵

Perhaps some of these alleged procedural deficiencies reflect a bias against respondents. But how do they reflect bias based on gender? That is, how is it that anti-respondent policies or practices in any way suggest anti-male bias?⁷⁶

The courts that have made the inferential leap from anti-respondent policies to anti-male bias do so in two ways, both of which are unsatisfying (and deeply troubling). First, some courts simply conflate anti-respondent practices with anti-male bias without any analysis at all — and, in collapsing the category of “accused sexual assailant” with “men,”⁷⁷ arguably enact the very bias and stereotyping they purport to condemn.⁷⁸ Other courts attempt, weakly, to explain the leap by reasoning that because most respondents are men, discrimination against respondents is necessarily discrimination against men.⁷⁹

Doe v. Oberlin exemplifies both moves.⁸⁰ There, the Sixth Circuit determined that the respondent-plaintiff's allegation that “pressure

⁷⁴ *Doe v. Univ. of Ark.-Fayetteville*, 974 F.3d 858, 865 (8th Cir. 2020) (“Whereas the complaint says that a student found responsible for sexual assault by force [like Doe] typically has been expelled, the University allowed Doe to graduate and required only Title IX training, community service, and an online course.”).

⁷⁵ *Does 1-2 v. Regents of the Univ. of Minn.*, 999 F.3d 571, 577-78 (8th Cir. 2021).

⁷⁶ Recall from Part I.A that *Sandoval* presumptively foreclosed Title IX disparate impact suits, so respondent-plaintiffs' anti-male bias claims must survive on disparate treatment analysis alone. *See supra* notes 14–15.

⁷⁷ *See, e.g., Doe v. Purdue Univ.*, 928 F.3d 652, 668-69 (7th Cir. 2019) (conflating “a more rigorous approach to campus sexual misconduct allegations” with discrimination against “males accused of sexual assault” (emphasis added)).

⁷⁸ *See, e.g., id.* at 669 (construing an article entitled “*Alcohol Isn't the Cause of Campus Sexual Assault. Men Are.*” as reflecting anti-male bias because it blamed men as a class for sexual assault).

⁷⁹ *See, e.g., Doe v. Oberlin Coll.*, 963 F.3d 580, 587 (6th Cir. 2020) (finding an inference of gender bias based on high rate of findings of responsibility because plaintiff alleged “most if not all” respondents are male); *Doe v. Mia. Univ.*, 882 F.3d 579, 593 (6th Cir. 2018) (finding inference of gender bias where plaintiff alleged “nearly ninety percent of students found responsible for sexual misconduct . . . have male first-names”); *see also Yusuf v. Vassar Coll.*, 35 F.3d 709, 716 (2d Cir. 1994) (finding inference of gender bias where plaintiff alleged that “males invariably lose when charged with sexual harassment at [the college]”).

⁸⁰ *See Oberlin Coll.*, 963 F.3d at 586-88.

from the government to combat vigorously sexual assault on college campuses” yielded an inference of anti-male bias.⁸¹ Such a move conflated anti-respondent bias with anti-male bias. But the court also found anti-male bias because — of the ten complaints of sexual misconduct that made it to a disciplinary hearing⁸² — “most if not all the respondents were male” and all ten complaints “resulted in a decision that the accused was ‘responsible’ (i.e., guilty).”⁸³

This logic is troubling for at least three reasons. First, it simply cannot be squared with *Geduldig* and its progeny, which stand for the proposition that it is not sufficient to show discrimination against a group comprised primarily but not entirely of one gender in order to prevail on a disparate treatment theory. Pregnancy, after all, is much more closely linked to gender than is sexual assault, which is suffered and perpetrated by people of all genders.⁸⁴ Indeed, men are far more likely to be *victims* of sexual violence than they are to be falsely accused.⁸⁵ Were courts to apply Supreme Court precedent faithfully, they would be bound to conclude, as the Tenth Circuit did, that “[c]lassification as a sexual-misconduct respondent is not a classification based on gender. It is gender-neutral because both men and women can be [and are] respondents. Accordingly, by itself, evidence of a school’s anti-respondent bias does not permit a reasonable

⁸¹ *Id.* at 587; *see also infra* Part III.A.

⁸² In dissent, Judge Gilman explained that only ten percent of complaints “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.” *Oberlin Coll.*, 963 F.3d at 592 (Gilman, J., dissenting). He noted further, that in the ten cases in which the accused was found responsible, “the ‘penalties’ ranged widely — from ‘education’ to expulsion.” *Id.*

⁸³ *Id.* at 587. There is something of an irony in courts conflating anti-respondent bias and anti-male bias — presumably based on a presumption that all respondents are men, or that men are inherently predisposed to sexual violence — only to then express shock when men are disproportionately accused of sexual assault.

⁸⁴ Nearly half of women and one in four men experience sexual violence in their lifetimes. *See* SHARON G. SMITH, XINJIAN ZHANG, KATHLEEN C. BASILE, MELISSA T. MERRICK, JING WANG, MARCIE-JO KRESNOW & JIERU CHEN, CTRES. FOR DISEASE CONTROL & PREVENTION, THE NATIONAL INTIMATE PARTNER & SEXUAL VIOLENCE SURVEY: 2015 DATA BRIEF — UPDATED RELEASE 2-3 (2018), <https://www.cdc.gov/violenceprevention/pdf/2015data-brief508.pdf> [<https://perma.cc/C8PR-H8WM>]; *see also* Lara Stemple & Ilan H. Meyer, *The Sexual Victimization of Men in America: New Data Challenge Old Assumptions*, 104 AM. J. PUB. HEALTH (2014), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4062022> [<https://perma.cc/U97Z-KMNG>].

⁸⁵ Tyler Kingkade, *Males Are More Likely to Suffer Sexual Assault than to Be Falsely Accused of It*, HUFF POST (Dec. 8, 2014, 8:44 PM ET), https://www.huffpost.com/entry/false-rape-accusations_n_6290380 [<https://perma.cc/F5EK-SFTC>].

inference of discrimination based on gender.”⁸⁶ Or, in the words of a different Sixth Circuit panel, a plaintiff’s allegations of procedural deficiencies “at most show a disciplinary system that is biased in favor of alleged victims and against those accused of misconduct. But this does not equate to gender bias because sexual-assault victims can be both male and female.”⁸⁷ After all, courts do not treat “victim of sexual assault” as a sex-based classification; as described in Part I.B., a school’s deliberate indifference to sexual harassment is sex discrimination *not* because most victims are women but because (and only if!) the underlying harassment itself is (proved to be) sex-based.⁸⁸

⁸⁶ *Doe v. Univ. of Denver*, 952 F.3d 1182, 1196-97 (10th Cir. 2020).

⁸⁷ *Doe v. Cummins*, 662 F. App’x 437, 453 (6th Cir. 2016); *see Doe v. St. Joseph’s Univ.*, 832 F. App’x 770, 774 (3d Cir. 2020) (“[E]ven if these investigatory choices show bias, a jury would have no basis to conclude that this bias was gender motivated.”); *see also Johnson v. Marian Univ.*, 829 F. App’x 731, 733 (7th Cir. 2020) (“At most, [the challenged comments] demonstrate a pro-victim bias, but both women and men can be victims of sexual assault.”); *Doe 2 v. Fairfax Cnty. Sch. Bd.*, 832 F. App’x 802, 805 (4th Cir. 2020) (noting “other plausible explanations for an erroneous but lawful outcome, such as . . . a desire to believe all accusers, male or female” — none of which “necessarily involve[] any sort of improper gender discrimination”); *Univ. of Denver*, 952 F.3d at 1196 (collecting cases); *Gendia v. Drexel Univ.*, No. CV 20-1104, 2020 WL 5258315, at *3 (E.D. Pa. Sept. 2, 2020) (noting alleged procedural errors are not evidence of sex discrimination without more); *Doe v. Rider Univ.*, No. 3:16-cv-4882-BRM-DEA, 2018 WL 466225, at *10 (D.N.J. Jan. 17, 2018) (“[A]llegations of a bias against the alleged perpetrator in favor of the victim is insufficient to show an inference of gender bias.”); *Sahm v. Mia. Univ.*, 110 F. Supp. 3d 774, 778 (S.D. Ohio 2015) (“Demonstrating that a university official is biased in favor of the alleged victims of sexual assault claims, and against the alleged perpetrators, is not the equivalent of demonstrating bias against male students.”); *King v. DePauw Univ.*, No. 2:14-cv-70-WTL-DKL, 2014 WL 4197507, at *10 (S.D. Ind. Aug. 22, 2014) (“[T]he fact that a vast majority of those accused were found liable might suggest a bias against accused students, but says nothing about gender.”); *Haley v. Va. Commonwealth Univ.*, 948 F. Supp. 573, 579 (E.D. Va. 1996) (“[T]hese allegations at best reflect a bias against people accused of sexual harassment and in favor of victims and indicate nothing about gender discrimination.”).

⁸⁸ *See Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 646-47 (1999). In the context of proving harassment is sex-based, plaintiffs often face a high bar. Courts have declined to find harassment based on sex even where the victim was called a “bitch,” “slut,” and “whore.” *See Doe v. Round Valley Unified Sch. Dist.*, 873 F. Supp. 2d 1124, 1128, 1136-38 (D. Ariz. 2012) (noting that the female victim was harassed by classmates, called a “whore,” and taunted that she was “pregnant with [her alleged abuser’s] child”); *Benjamin v. Metro. Sch. Dist. of Lawrence Twp.*, IP 00-0891-C-T/K, 2002 WL 977661, at *3-4 (S.D. Ind. Mar. 27, 2002) (noting that the female victim was taunted by classmates about her sexual activity); *see also Frazer v. Temple Univ.*, 25 F. Supp. 3d 598, 605-06, 614 (E.D. Pa. 2014) (noting that the female victim was stalked and threatened by her ex-boyfriend, who stated, “[I]f I can’t have you[,] no one can have you.”).

Second, why should the allegation in *Oberlin* that “most if not all the respondents were male” (especially with a sample size of ten)⁸⁹ tell us anything about the school’s gender bias? As Judge Gilman noted in dissent, the genders of those accused of sexual assault provide “no information regarding the gender breakdown between who was found responsible and who was not.”⁹⁰ Rather, such data reflects solely “what is reported to the University, and not the other way around.”⁹¹

Finally, it is black letter law that “[w]hen the statistical evidence does nothing to eliminate [the] obvious, alternative explanations for the disparity, an inference that the disparity arises from gender bias on the part of the school is not reasonable.”⁹² In *Oberlin* and the other reverse discrimination cases, obvious, alternate reasons abound: “[M]ales are

⁸⁹ A statistical sample size must be large enough to provide meaningful results. See, e.g., *Fallis v. Kerr-McGee Corp.*, 944 F.2d 743, 746 (10th Cir. 1991) (rejecting nine-person sample size because “such a small statistical sample carries little or no probative force to show discrimination”); *Simpson v. Midland-Ross Corp.*, 823 F.2d 937, 943 (6th Cir. 1987) (same, with sample size of seventeen); *Sengupta v. Morrison-Knudsen Co.*, 804 F.2d 1072, 1076 (9th Cir. 1986) (same, with sample size of twenty-eight); *Haskell v. Kaman Corp.*, 743 F.2d 113, 121 (2d Cir. 1984) (same, with sample size of ten).

⁹⁰ *Doe v. Oberlin Coll.*, 963 F.3d 580, 593 (6th Cir. 2020) (Gilman, J., dissenting). Some other cases have read anti-male bias from the fact that most students disciplined for sexual misconduct are men. See, e.g., *Doe v. Mia. Univ.*, 882 F.3d 579, 593-94 (6th Cir. 2018) (reasoning that Doe’s allegation that “nearly ninety percent of students found responsible for sexual misconduct . . . have male first-names” constituted “evidence that Miami University impermissibly makes decisions on the basis of a student’s gender”). But that, too, cannot demonstrate schools’ bias without evidence that those rates reflect anything more than the gendered breakdown of reports lodged.

⁹¹ *Doe v. Trs. of Bos. Coll.*, 892 F.3d 67, 91-92 (1st Cir. 2018).

⁹² *Univ. of Denver*, 952 F.3d at 1194; see also *Rossley v. Drake Univ.*, 979 F.3d 1184, 1195 (8th Cir. 2020) (“[T]he statistical ‘data fail to address an array of alternative explanations’ for the disparity between the number of males and females charged with sexual assault.” (quoting *Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56, 75 (1st Cir. 2019))); *United States ex rel. Integra Med Analytics, LLC v. Baylor Scott & White Health*, 816 F. App’x 892, 898 (5th Cir. 2020) (“[S]tatistical data cannot meet [plausibility] pleading requirements if, among other possible issues, it is also consistent with a legal and obvious alternate explanation.”); *Cummins*, 662 F. App’x at 453 (affirming grant of motion to dismiss because plaintiff-appellants “fail to eliminate the most obvious reasons for the disparity between male and female respondents”); *Eclectic Props. East, LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 996 (9th Cir. 2014) (“When considering plausibility, courts must also consider an ‘obvious alternative explanation’ for defendant’s behavior.” (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 567 (2007))); *Reynolds v. Barrett*, 685 F.3d 193, 202 (2d Cir. 2012) (“Statistics alone do not suffice to establish an individual disparate treatment claim”); *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 257 (3d Cir. 2014) (holding that no factfinder could conclude that egregious racial statistical disparity in “low achievement classes” constituted evidence of race discrimination).

less likely than females to report sexual assaults,”⁹³ “assaults committed by women [a]re reported less often,”⁹⁴ and a university may have “only received complaints of male-on-female sexual assault.”⁹⁵

Indeed, the most poignant (and probable) explanation of the disparity is that we live in a country in which “over 95% of sexual assaults are perpetrated by males, while fewer than 3% are by females”⁹⁶ — a reality the Sixth Circuit in *Oberlin* would have us forget. Thus, it should be no surprise that “most if not all respondents”⁹⁷ at Oberlin were male: That such a disparity exists reflects misogyny in the world, not discrimination against men in school.

B. *The Goldilocks Comparator*

Generally, a plaintiff who seeks to show that those outside her class were treated more favorably than she must identify a comparator who is sufficiently “similarly situated” to her. Thus, a plaintiff asserting that she suffered discipline because of her sex or race must show that her proposed comparator “‘engaged in comparable rule or policy violations’ and received more lenient discipline.”⁹⁸ The standard is exacting: Courts have rejected comparators who violated “one or more” but not “all” of the disciplinary policies the plaintiff violated,⁹⁹ those who had not previously “amassed a record of misconduct comparable” to the plaintiffs,¹⁰⁰ and even those who — although committing the same underlying offense as the plaintiff, physical assault — had assaulted *different people* than the plaintiff had.¹⁰¹ In sum, “[s]imply showing that [a proposed comparator] was caught engaging in discipline-worthy conduct . . . is not enough to make him an adequate comparator without

⁹³ *Cummins*, 662 F. App’x at 453.

⁹⁴ *Haidak*, 933 F.3d at 75.

⁹⁵ *Cummins*, 662 F. App’x at 453.

⁹⁶ *Doe v. Oberlin Coll.*, 963 F.3d 580, 593 (6th Cir. 2020) (Gilman, J., dissenting) (quoting *Doe v. Univ. of Dayton*, No. 3:17-CV-134, 2018 WL 1393894, at *9 (S.D. Ohio Mar. 20, 2018)).

⁹⁷ *Id.* at 587.

⁹⁸ *Coleman v. Donahoe*, 667 F.3d 835, 850 (7th Cir. 2012) (citation omitted); see also *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973); *Coleman*, 667 F.3d at 850 n.2 (compiling cases).

⁹⁹ *Miller-Goodwin v. City of Panama City Beach*, 385 F. App’x 966, 973 (11th Cir. 2010).

¹⁰⁰ *Leong v. Potter*, 347 F.3d 1117, 1124 (9th Cir. 2003); see also *Timmerman v. U.S. Bank, N.A.*, 483 F.3d 1106, 1120-21 (10th Cir. 2007) (rejecting proposed comparator because she had not engaged in misconduct the same number of times as the plaintiff).

¹⁰¹ *Perez v. Tex. Dep’t of Crim. Just., Institutional Div.*, 395 F.3d 206, 214 (5th Cir. 2004).

demonstrating how serious his misconduct was in comparison to [the plaintiffs].”¹⁰²

In the Title IX reverse discrimination suits, however, some courts have accepted wildly dissimilar comparators, effectively abandoning the “comparable seriousness” requirement. Consider the Third Circuit’s decision in *Doe v. University of the Sciences*.¹⁰³ In that case, John Doe, who had been accused of sexual misconduct by two female classmates (“Roe 1” and “Roe 2”),¹⁰⁴ alleged that his school (“USciences”) had singled him out for investigation and expulsion because of his sex.¹⁰⁵ He offered three comparators in support of his claim: the two alleged victims (Roe 1 and Roe 2) and a female witness (“Witness 1”). Each, he contended, had violated a school policy but was not investigated or disciplined.¹⁰⁶

Roe 1 and Witness 1’s alleged offense was violating the school confidentiality policy, which authorized USciences to discipline “anyone involved in a report or complaint” who “shared information with another.”¹⁰⁷ Because USciences neglected to discipline Roe 1 and Witness 1 for the confidentiality infraction, while punishing Doe for sexual misconduct, the Third Circuit concluded that Doe had sufficiently alleged that his discipline was sex-motivated.¹⁰⁸ Yet, in so doing, the court undertook no analysis whatsoever of the “comparable seriousness” of the comparators’ alleged offenses. If it had, it would have been hard pressed under its own case law to find that the alleged confidentiality infraction constituted an offense of comparable seriousness to the alleged sexual assault.¹⁰⁹

¹⁰² *Presley v. Ohio Dep’t of Rehab. & Corr.*, 675 F. App’x 507, 516 (6th Cir. 2017); see also *Coleman*, 667 F.3d at 852 n.5 (collecting scholarly work critical of courts’ ever-stricter comparator requirements).

¹⁰³ *Doe v. Univ. of the Scis.*, 961 F.3d 203, 211 (3d Cir. 2020). By way of disclosure: one of the authors of this article, Alexandra Brodsky, represented amici supporting the (unsuccessful) petition to rehear this case.

¹⁰⁴ *Id.* at 207.

¹⁰⁵ *Id.* at 210.

¹⁰⁶ *Id.* at 210-11.

¹⁰⁷ *Id.* at 211. The two women had reportedly discussed Roe 1’s complaint in order “to find other women willing to make a complaint against.” *Id.* at 207-08.

¹⁰⁸ *Id.* at 211.

¹⁰⁹ See, e.g., *Wilcher v. Postmaster Gen.*, 441 F. App’x 879, 882 (3d Cir. 2011) (rejecting proposed comparators because they “were subjected to disciplinary action for different types of misconduct than [the plaintiff]”); *Ade v. KidsPeace Corp.*, 401 F. App’x 697, 705 (3d Cir. 2010) (rejecting proposed comparator because “[a]ll of the allegations regarding [the comparator] related to sexually explicit comments made to female employees” — without physical touching — while the plaintiff allegedly “forced himself on top of [a co-worker]”); *Opsatnik v. Norfolk S. Corp.*, 335 F. App’x 220, 223

The Third Circuit also accepted Doe's other alleged victim, Roe 2, as a suitable comparator. Doe contended, and the court agreed, that "[a]lthough both [he] and [Roe] 2 had been drinking [during the party], [USciences] identified [Doe] as the initiator of sexual activity, notwithstanding the comparable intoxication of both participants,"¹¹⁰ and thus disciplined him, but not her, for "engaging in sexual intercourse without . . . affirmative consent."¹¹¹ Although at first blush Roe 2 might appear a viable comparator, Doe had never actually accused Roe 2 of sexual assault. To the contrary, he had described their sexual encounter as *consensual*.¹¹² In other words, Roe 2 was never accused of an offense comparable to his because she was never accused of any offense at all. The university, then, disciplined a student who was accused of sexual misconduct and did not discipline a student who was not. Where could be the gender bias in that?

Indeed, the First Circuit, working on facts more damning of the university-defendant in *Haidak v. University of Massachusetts-Amherst*, found no gender bias.¹¹³ In that case, two months after James Haidak was accused by his female classmate, Lauren Gibney, of alleged physical assault, he "expressed interest" in filing a disciplinary complaint against her for alleged assault but, ultimately, declined to do so.¹¹⁴ When Haidak later brought suit alleging anti-male bias under Title IX, he offered Gibney as a comparator, reasoning that the university initiated charges against him, but not her, because of his sex.¹¹⁵ The First Circuit held that the two were simply not similarly situated: She had "affirmatively contacted the university to report her charges and to seek relief," while his accusation "came second in time and arose only defensively."¹¹⁶ If anything, the First Circuit reasoned, the plaintiff "has alleged that the university pursued [the alleged victim's] case instead of

(3d Cir. 2009) ("[W]hile 'similarly situated' does not mean identically situated, purported comparators must have committed offenses of 'comparable seriousness.'" (citation omitted)); *Walsifer v. Borough of Belmar*, 262 F. App'x 421, 425-26 (3d Cir. 2008) (rejecting proposed comparator because, unlike the plaintiff, "[he] made no effort to encourage other individuals to register to vote and responded only to [the plaintiff's] active solicitation").

¹¹⁰ *Univ. of Scis.*, 961 F.3d at 210.

¹¹¹ *Id.* at 208.

¹¹² *Id.* at 210 n.4.

¹¹³ See *Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56, 76 (1st Cir. 2019).

¹¹⁴ *Id.* at 63, 74.

¹¹⁵ *Id.* at 73-74.

¹¹⁶ *Id.* at 74.

his because [she] made the allegation first — *not* because [his] sex influenced the university.”¹¹⁷

A host of other courts have followed the First Circuit’s lead, faithfully applying their comparator case law in the reverse discrimination context (including a different Third Circuit panel).¹¹⁸ Yet *USciences* is

¹¹⁷ *Id.*

¹¹⁸ See *Doe v. St. Joseph’s Univ.*, 832 F. App’x 770, 773 (3d Cir. 2020) (concluding that a female staff member who kissed a male student who “stated that he ‘was not uncomfortable,’ and that the kiss was ‘a non-event,’ ‘non-sexual,’ and ‘not . . . unwelcomed’” was not a viable comparator for respondent-plaintiff who allegedly sexually assaulted and strangled another student); *Rowles v. Curators of Univ. of Mo.*, 983 F.3d 345, 360 (8th Cir. 2020) (declining, on motion to dismiss, to accept female alleged victim as a viable comparator); *Austin v. Univ. of Or.*, 925 F.3d 1133, 1138 n.6 (9th Cir. 2019) (concluding, on a motion to dismiss, that a female student who allegedly threatened another student with a knife was not an appropriate comparator to students accused of sexual misconduct); *Plummer v. Univ. of Hous.*, 860 F.3d 767, 778 (5th Cir. 2017) (declining, on motion to dismiss, to accept as a comparator the “passed out” female student “touch[ed] . . . in private areas” by plaintiff-respondent); *Doe v. Brown Univ.*, 505 F. Supp. 3d 65, 79 (D.R.I. 2020) (determining that the respondent-plaintiff’s alleged sexual assault victim was not an appropriate comparator because he only accused her *after* learning she had complained against him and he never lodged a formal complaint against her); *Gendia v. Drexel Univ.*, No. 20-1104, 2020 WL 5258315, at *4 (E.D. Pa. Sept. 2, 2020) (applying, on motion to dismiss, the “general principle” of anti-discrimination law — “that different sanctions for similar conduct may raise an inference of discrimination, but that different sanctions for different conduct generally do not” — to conclude that the heavier discipline issued against male student found responsible for two batteries, compared to female student found responsible for one attempted battery, did not create inference of gender bias); *Whitaker v. Bd. of Regents of Univ. Sys. of Ga.*, No. CV 118-141, 2020 WL 4939118, at *7 (S.D. Ga. Aug. 24, 2020) (concluding, on a motion to dismiss, that female victim, who allegedly violated a school no-contact order, was not an appropriate comparator to student accused of sexual misconduct); *Doe v. Wash. Univ.*, 434 F. Supp. 3d 735, 757-58 (E.D. Mo. 2020), *reconsideration denied*, No. 4:19 CV 300 (JMB), 2020 WL 1308209 (E.D. Mo. Mar. 19, 2020) (declining, on motion to dismiss, to accept alleged victim as viable comparator “because no charge was ever filed against [her] and thus she is not similarly situated”); *Doe v. Fairfax Cnty. Sch. Bd.*, 403 F. Supp. 3d 508, 516 (E.D. Va. 2019) (determining that female victim, who sent “sexually suggestive” but “welcome[.]” messages to another student, was not appropriate comparator to student accused of sending unwelcome sexual messages); *Haynes v. Clarion Univ. of Pa.*, No. 2:15-CV-01389-BRW, 2018 WL 11206626, at *3 (W.D. Pa. June 27, 2018) (concluding that plaintiff-respondent failed to identify any “student charged with committing a violent felony against another student being treated differently than [the university] treated” the plaintiff-respondent); *Stenzel v. Peterson*, No. 17-580 (JRT/LIB), 2017 WL 4081897, at *6 (D. Minn. Sept. 13, 2017) (finding, on motion to dismiss, no gender bias where accused student “did not formally report sexual violence to initiate an investigation” against his alleged victim); *Doe v. Ohio State Univ.*, 239 F. Supp. 3d 1048, 1067-68 (S.D. Ohio 2017), *on reconsideration in part*, 323 F. Supp. 3d 962, 972 (S.D. Ohio 2018) (holding, on motion to dismiss, that female alleged victim was inapt comparator because she was never “accused of violating OSU’s Code of Student Conduct”); see also *Does 1-2 v. Regents of*

no outlier either. District¹¹⁹ and appeals¹²⁰ courts alike have accepted dissimilar comparators, easing the path for reverse discrimination claims under Title IX.

C. Nexus of Discriminatory Animus

In some recent cases asserting biased school procedures, Title IX reverse discrimination plaintiffs prevailed by presenting thin evidence of anti-male bias with limited (if any) relevance to the allegedly discriminatory discipline.¹²¹ These cases illustrate another striking double standard, given how hostile courts have been in recent years to traditional civil rights plaintiffs alleging that (clear) evidence of animus motivated school or workplace discipline.¹²²

Generally, to plead that discriminatory animus motivated an institutional decision, “a plaintiff must raise a plausible inference that an ‘invidious discriminatory purpose was a motivating factor’ in the relevant decision.”¹²³ Potential evidence of discriminatory animus includes “disparate impact on a particular group, departures from the normal procedural sequence, and contemporary statements” by decisionmakers.¹²⁴

the Univ. of Minn., 999 F.3d 571, 581 (8th Cir. 2021) (rejecting race discrimination claim because “[i]t goes almost without saying that a sexual assault complainant and those she accuses of sexual assault are not similarly situated as complainants”) (internal quotation marks omitted); Yusuf v. Vassar Coll., 35 F.3d 709, 716 (2d Cir. 1994) (concluding that the student accused of a different offense was not a proper comparator).

¹¹⁹ See, e.g., Doe v. Rollins Coll., 352 F. Supp. 3d 1205, 1211 (M.D. Fla. 2019) (accepting female alleged victim as appropriate comparator for male accused student); Doe v. Amherst Coll., 238 F. Supp. 3d 195, 223 (D. Mass. 2017) (same).

¹²⁰ See, e.g., Doe v. Mia. Univ., 882 F.3d 579, 593 (6th Cir. 2018) (“Lastly, John points to his own situation, in which the University initiated an investigation into him but not Jane . . .”).

¹²¹ See *infra* notes 149–159 and accompanying text.

¹²² See, e.g., Sandra F. Sperino, *Disbelief Doctrines*, 39 BERKELEY J. EMP. & LAB. L. 231, 233 (2018) (describing the stray remarks doctrine, in which courts “declare that certain discriminatory remarks are not relevant to an underlying claim of discrimination”); Kerri Lynn Stone, *Shortcuts in Employment Discrimination Law*, 56 ST. LOUIS U. L.J. 111, 114-18 (2011) (noting that “the law of employment discrimination remains as confused and unfocused as ever, seemingly moving away from, rather than towards[,] the statutes’ goals of eradicating workplace discrimination”).

¹²³ Dep’t of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1915 (2020) (quoting Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977)).

¹²⁴ *Id.* (internal quotations and citation omitted).

In practice, courts applying this test set a high bar — often impossibly so — for plaintiffs seeking to prove that discriminatory animus motivated a decision. In the employment context, most circuits have adopted a “stray remarks” doctrine under which racist, sexist, or ableist statements made in the workplace are not evidence of employment discrimination unless they have a clear nexus to an adverse employment action, like being fired or denied a promotion.¹²⁵ Without such a nexus, courts often characterize employers’ or supervisors’ racist or sexist statements as mere “stray remarks” that — though they may show discriminatory animus generally — do not prove that a *particular* adverse employment action against a *particular* plaintiff was motivated by bias.¹²⁶ Generally, in determining whether a comment is a mere “stray remark” that is “inadequate to support an inference of discrimination” — or instead genuine evidence of animus — courts consider factors including whether the remark was related to the employment decision at issue; whether it was made by people who have a role in deciding whether to take an adverse employment action, like firing a plaintiff; whether the statements are unambiguously discriminatory; and whether the comments are close in time to the challenged action.¹²⁷

¹²⁵ See, e.g., *Dandy v. United Parcel Serv., Inc.*, 388 F.3d 263, 272 (7th Cir. 2004) (“Racial epithets or stray remarks may be direct or circumstantial evidence of intentional discrimination if they are sufficiently connected to the employment decision, i.e., made by the decisionmaker, or those who influence the decisionmaker, and made close in time to the adverse employment decision.”); *Patten v. Wal-Mart Stores E., Inc.*, 300 F.3d 21, 25 (1st Cir. 2002) (extending the stray remarks doctrine to ADA cases); *O’Connor v. Consol. Coin Caterers Corp.*, 56 F.3d 542, 548-49 (4th Cir. 1995), *rev’d on other grounds*, 516 U.S. 972 (1995) (holding that a direct supervisor’s statement “[i]t’s about time we get some young blood in this company” was not evidence of a discriminatory intent to terminate an older employee); *Ajisefinni v. KPMG LLP*, 17 F. Supp. 3d 28, 35, 44 (D.D.C. 2014) (holding that a former supervisor’s comment to the Nigerian plaintiff regarding whether Nigerian universities “teach[] all Nigerians how to be armed robbers and thieves” was not evidence of race discrimination); *Beeck v. Fed. Express Corp.*, 81 F. Supp. 2d 48, 53 (D.D.C. 2000) (holding that supervisors’ alleged comments — that plaintiff was an “old man,” “need[ed] his rest,” and should “think about retiring” — were not direct evidence of age discrimination). See generally *Stone*, *supra* note 122, at 131-34 (explaining courts’ use of the stray remark doctrine to foreclose plaintiffs’ employment discrimination claims at the summary judgment stage).

¹²⁶ See *Stone*, *supra* note 122, at 158-59; see also, e.g., *Straughn v. Delta Air Lines, Inc.*, 250 F.3d 23, 36 (1st Cir. 2001) (distinguishing “statements directly related to the challenged employment action” from stray remarks); *Diaz v. Jiten Hotel Mgmt., Inc.*, 762 F. Supp. 2d 319, 335 (D. Mass. 2011) (critiquing *Straughn*’s expansion of the stray remarks doctrine).

¹²⁷ See *Ortiz-Rivera v. Astra Zeneca LP*, 363 F. App’x. 45, 47 (1st Cir. 2010); *Auguster v. Vermilion Par. Sch. Bd.*, 249 F.3d 400, 405 (5th Cir. 2001); see also

Courts applying these factors frequently hold that discriminatory remarks are insufficient to show that the challenged action was motivated by discriminatory animus.¹²⁸ For example, in *Bahl v. Royal Indemnification Company*, an Indian plaintiff alleged that he was fired because of his national origin.¹²⁹ He offered evidence that two senior managers “made derogatory comments” about the plaintiff in the workplace, including “criticizing [the plaintiff’s] English” and claiming he had to “think Indian first” before “thinking in English.”¹³⁰ According to the plaintiff’s supervisor, “[s]hort of actually coming out and saying the words we just want to get rid of him because he’s an Indian, [the senior managers] said everything else.”¹³¹ The plaintiff was ultimately fired for demonstrably pretextual reasons by one of the managers who made the discriminatory remarks.¹³² Yet the Seventh Circuit held that such “isolated, stray workplace remarks” were “not clearly linked to the decision to terminate Mr. Bahl’s employment” — and granted the defendants summary judgment.¹³³ In another case, the Seventh Circuit

Mondero v. Salt River Project, 400 F.3d 1207, 1213 (9th Cir. 2005) (“Stray remarks not acted upon or communicated to a decision maker are insufficient to establish pretext.”); *Dandy*, 388 F.3d at 272 (same); *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 355 (6th Cir. 1998); *Ostrowski v. Atl. Mut. Ins. Cos.*, 968 F.2d 171, 182 (2d Cir. 1992). Some circuits apply these factors differently from others. *Compare* *Dominguez-Curry v. Nev. Transp. Dep’t*, 424 F.3d 1027, 1031-32, 1038 (9th Cir. 2005) (holding that sexist comments made over a five-year period were not stray remarks), *with* *Hollins v. Premier Ford Lincoln Mercury, Inc.*, 766 F. Supp. 2d 736, 750 (N.D. Miss. 2011) (holding that comments made the day an employee was terminated were not stray remarks but that comments made two years prior were).

¹²⁸ See, e.g., *Auguster*, 249 F.3d at 401, 404-05 (holding that a school superintendent’s comments that he “had bad luck with black men” and that the school had had “a problem . . . with past black coaches, and if there was another problem, no matter what it was, that he would do his best to get rid of [plaintiff],” were insufficient to survive summary judgment in a Black plaintiff’s employment discrimination claim because “there is no substantial evidence that the comments related to [the superintendent’s] ultimate decision not to renew [the plaintiff’s] contract”); *Chappell v. Bilco Co.*, No. 3:09CV00016 JLH, 2011 WL 9037, at *9 (E.D. Ark. Jan. 3, 2011), *aff’d sub nom.* *Chappell v. Bilco Co.*, 675 F.3d 1110 (8th Cir. 2012) (stating that a supervisor’s comments that Black workers were “lazy,” “worthless,” and “just here to get paid” were, “[a]bsent a causal link between [the] racial comments and the adverse employment [decision],” not probative of race discrimination).

¹²⁹ *Bahl v. Royal Indem. Co.*, 115 F.3d 1283, 1285 (7th Cir. 1997).

¹³⁰ *Id.* at 1289.

¹³¹ *Id.*

¹³² See *id.* at 1286, 1289.

¹³³ *Id.* at 1293-94 (holding that although a supervisor often “stated that blacks [sic] complained too much” and “set up lunch schedules for office personnel to prevent black employees from eating together” were not probative of discrimination because they

held that an employer's repeated statements that certain kinds of technical expertise relevant to the job were "more likely to be found in men"¹³⁴ might suggest he held discriminatory beliefs about the labor market writ large, but did not demonstrate he relied on the same stereotype when denying a particular female plaintiff a promotion.¹³⁵

For its part, the Sixth Circuit held that a white supervisor calling a Black employee "boy" could not show that the worker was terminated because of unlawful race discrimination, in part because the statement was too remote in time from the termination.¹³⁶ In a particularly extreme case brought by a Cuban worker who alleged that he was fired because of his national origin, the Eleventh Circuit held that a supervisor's statement, "[N]ew policy in the company: no more Cuban people," was not evidence that the termination was motivated by discrimination.¹³⁷ The court reasoned that, because the supervisor's statement concerned his views about Cuban job *applicants*, it required too large a leap to infer that the policy "extended beyond hiring 'no more Cuban people' . . . to firing those Cubans who were already there."¹³⁸

For reasons related to causal nexus, courts have also sometimes exhibited reluctance to recognize discrimination in disparate treatment claims brought by students. For example, in a 2014 case brought by an Egyptian dental student who claimed that she was barred from graduating because of discrimination, the student alleged that the head of her university's dentistry program referred to her work as "Third World Dentistry," that a supervisor referred to her as "TW," and that students with similar grades and clinical competency scores were permitted to graduate.¹³⁹ The Ninth Circuit held that the plaintiff failed to show discriminatory animus.¹⁴⁰ By similar token, the Fifth Circuit concluded that an Indian student expelled from school did not plead a plausible claim of race discrimination despite a university employee's reference to the plaintiff as "Tandoor chicken" during a key meeting

were not "related to the employment decision in question" (citing *Rush v. McDonald's Corp.*, 966 F.2d 1104, 1116 (7th Cir. 1992)).

¹³⁴ *DuPree v. Lahood*, 493 F. App'x 757, 760 (7th Cir. 2012).

¹³⁵ *Id.* at 761.

¹³⁶ *Worthy v. Mich. Bell Tel. Co.*, 472 F. App'x 342, 347 (6th Cir. 2012). The court also concluded that the statement was not "clearly reflective of discriminatory bias." *Id.* at 348.

¹³⁷ *Fernandez v. Trees, Inc.*, 961 F.3d 1148, 1156 (11th Cir. 2020).

¹³⁸ *Id.*

¹³⁹ *Rashdan v. Geissberger*, 764 F.3d 1179, 1183 (9th Cir. 2014).

¹⁴⁰ *Id.*

about the student's disciplinary status.¹⁴¹ At other points, university employees remarked that India was "a cheap fucking country" and that they "hated" the plaintiff's Indian accent.¹⁴² These were all, the court held, merely "stray remarks."¹⁴³

These cases stand in sharp contrast to several of the Title IX reverse discrimination cases, in which courts held that men alleged discrimination on the basis of attenuated statements by university administrators with little connection to the challenged outcomes in sexual misconduct investigations. In *Doe v. Purdue University*, for instance, the Seventh Circuit held that Doe plausibly alleged that the university punished him because he was a man.¹⁴⁴ The court based its holding, in significant part, on the fact that during the month of Doe's hearing, the university's resource center for sexual violence victims posted a *Washington Post* article on its Facebook page that was titled "*Alcohol isn't the cause of campus sexual assault. Men are.*"¹⁴⁵ Simplistic title aside, the article itself explained that "[w]omen can be aggressors and men can be targets," while noting that men are perpetrators of the "vast majority" of assaults.¹⁴⁶

Writing for the panel, then-Judge Barrett opined that, "[c]onstruing reasonable inferences in [John Doe's] favor," the statement "could be understood to blame men as a class for the problem of campus sexual assault rather than the individuals who commit sexual assault."¹⁴⁷ Accordingly, the Seventh Circuit held that this single Facebook post created a plausible inference that the entire investigation was tainted by discriminatory animus.¹⁴⁸

But the school's resource center was not tasked with investigating the sexual harassment complaint, and the plaintiff never alleged that the unidentified person who posted the article had any role in the school's decision to suspend him. The resource center's only alleged

¹⁴¹ *Pathria v. Serwer*, 599 F. App'x 176, 177 (5th Cir. 2015).

¹⁴² Brief for Appellant at 3, *Pathria v. Serwer*, 599 F. App'x 176 (5th Cir. 2015) (No. 14-50942), 2014 WL 10486713, at *3.

¹⁴³ *Pathria*, 599 F. App'x at 177.

¹⁴⁴ *Doe v. Purdue Univ.*, 928 F.3d 652, 670 (7th Cir. 2019).

¹⁴⁵ *Id.* at 669. The Seventh Circuit also relied on Doe's allegations that the panel investigating the sexual assault was hostile to Doe, believed his alleged victim over him, and failed to interview his witnesses. *Id.*

¹⁴⁶ Lauren R. Taylor & Jessica Raven, *Alcohol Isn't the Cause of Campus Sexual Assault. Men Are.*, WASH. POST (June 10, 2016), <https://www.washingtonpost.com/posteverything/wp/2016/06/10/alcohol-isnt-what-causes-campus-sexual-assault-men-are/> [<https://perma.cc/X4JR-ZLYJ>].

¹⁴⁷ *Purdue Univ.*, 928 F.3d at 669.

¹⁴⁸ *See id.* at 669-70.

involvement in Doe's disciplinary proceeding was that its director provided support to the student who reported the harassment, helping her prepare her written statement — a role that is, by definition, partial.¹⁴⁹

And, of course, *Purdue* is difficult to reconcile with the Seventh Circuit's treatment of discriminatory remarks in other contexts, where the court requires a very close connection between a comment and an adverse action to find a plausible allegation of discriminatory animus.¹⁵⁰ By contrast, in *Purdue*, the Seventh Circuit accepted that a single Facebook post gave rise to a plausible inference of discrimination with no evidence that the post was made by anyone with influence over the decision-making process or who otherwise had any impact on the outcome. The rule in the Seventh Circuit now appears to be that decision-makers' sexist and racist comments are insufficient to suggest discriminatory animus against women and people of color if not unambiguously connected to an adverse action, but no such nexus is required to make out a plausible claim of anti-male bias.

None of this is to say that the *Purdue* plaintiff was treated fairly. If his allegations are true — that the university's disciplinary procedures were faulty, without adequate opportunity for decision-makers to assess the complainant's credibility¹⁵¹ — then Judge Barrett was right to allow his due process claim to advance.

But not all unfairness is unfairness based on sex. Where procedural deficiencies are not motivated by gender, a due process claim (or, at a private school, an analogous state law- or contract-based claim) is the proper vehicle to challenge the discipline in question, not a sex discrimination suit.¹⁵² That is, there are laws that protect students and staff from unfair discipline regardless of the school's motivation, and there are laws that protect students and staff from mistreatment motivated by a school's sex bias; if a school treats a plaintiff unfairly, but not on the basis of sex, he should bring a claim based on the former set of laws, rather than the latter.

¹⁴⁹ See *id.*; see also Amended Complaint at 24, Doe v. Purdue Univ., No. 2:17-cv-33-JPK (N.D. Ind. Sept. 3, 2019), ECF No. 51.

¹⁵⁰ See *DuPree v. Lahood*, 493 F. App'x 757, 761 (7th Cir. 2012); *Bahl v. Royal Indem. Co.*, 115 F.3d 1283, 1292-93 (7th Cir. 1997).

¹⁵¹ See *Purdue Univ.*, 928 F.3d at 659-67.

¹⁵² See, e.g., Erin E. Buzuvis, *Title IX and Procedural Fairness: Why Disciplined-Student Litigation Does Not Undermine the Role of Title IX in Campus Sexual Assault*, 78 MONT. L. REV. 71, 95-106 (2017) (describing due process and other non-Title IX claims brought by students accused of sexual harassment).

Like the Seventh Circuit, the Sixth has allowed respondents to survive motions to dismiss based on “stray remarks” with no connection at all to the adverse action in question. In *Doe v. Oberlin*, the Sixth Circuit held that a respondent had adequately pled an erroneous outcome claim in part because of statements Dr. Meredith Raimondo, a school Title IX coordinator, made at an American Constitution Society panel more than six months before the conduct giving rise to the action began.¹⁵³ The court selectively quoted Raimondo’s statements “to the effect that she was uncomfortable with the term ‘grey areas[,]’ because ‘I think it’s too often used to discredit particularly women’s experience of violence.’”¹⁵⁴ Putting aside the substance of the comments, which do not plausibly evince anti-male bias, the plaintiff had an obvious nexus problem: Raimondo had left her role as a Title IX coordinator by the time the school decided Doe’s case should proceed to a hearing.¹⁵⁵ In fact, the plaintiff did not plead *any* allegations purporting to show sex bias specifically related to the school’s handling of the complaint against him.¹⁵⁶ In the Sixth Circuit, a traditional civil rights plaintiff could not survive dismissal by pointing to remarks that were “general, vague, or ambiguous,” “unrelated to the decision-making process,” or not made by a decisionmaker.¹⁵⁷ But the same rule did not apply to *Oberlin*’s reverse discrimination plaintiff.

On this point, *Oberlin* and *Purdue* are not (yet) a majority rule. Many other courts have faithfully held that comments made by officials with no influence over the school’s disciplinary process and other similar pleadings are insufficient to demonstrate a respondent was disciplined because of his sex.¹⁵⁸ But it is not yet clear which approach will win the day, especially now that Judge Barrett is Justice Barrett.

¹⁵³ *Doe v. Oberlin Coll.*, 963 F.3d 580, 591-92 (6th Cir. 2020) (Gilman, J., dissenting).

¹⁵⁴ *Id.* The majority also ignored similar comments the Title IX Coordinator statements about barriers to men who experienced sexual harassment and other gender-neutral comments. *Id.*

¹⁵⁵ Brief for Defendant-Appellee at *8, 14, 20, *Oberlin Coll.*, 963 F.3d 580 (6th Cir. 2020) (No. 19-3342).

¹⁵⁶ *Oberlin Coll.*, 963 F.3d at 589, 591 (Gilman, J., dissenting).

¹⁵⁷ *Sharp v. Aker Plant Servs. Grp., Inc.*, 726 F.3d 789, 798 (6th Cir. 2013); *see also Daugherty v. Sajar Plastics, Inc.*, 544 F.3d 696, 708 (6th Cir. 2008).

¹⁵⁸ *See, e.g., Rowles v. Curators of Univ. of Mo.*, 983 F.3d 345, 359-60 (8th Cir. 2020) (holding that an allegedly biased remark made by an investigator who was not involved in the plaintiff’s case was a stray remark that did not plausibly demonstrate that he was discriminated against on the basis of his sex); *Doe v. Salisbury Univ.*, 123 F. Supp. 3d 748, 767 (D. Md. 2015) (holding that grants from a private foundation to “end violence against women” and “public notices or newsletters informing the student body writ large about the risk of sexual assault on college campuses” presented “in a gender-

III. LOWERING THE BAR

As described, respondents' reverse discrimination suits have overcome barriers that often prove fatal to discrimination plaintiffs.¹⁵⁹ They survive motions to dismiss even where the discrimination they allege is not against a sex-based class,¹⁶⁰ when their comparators are dissimilar,¹⁶¹ and when evidence of bias is attenuated from the adverse action in question.¹⁶² How do courts justify their unusual willingness to find possible bias?

Nearly all courts explain that they reach their result because of pleadings like those discussed above *combined with* putative outside pressure on a school's decision-making regarding sexual harassment, namely (1) federal Title IX policy guidance or (2) sexual-harassment-related civil rights investigations of the defendant-university.¹⁶³ That is,

neutral tone [and] addressed to all students" cannot support an inference of gender bias in Title IX adjudication); *Gendia v. Drexel Univ.*, No. 20-1104, 2020 WL 5258315, at *3 (E.D. Pa. Sept. 2, 2020) (holding that sexual assault prevention materials that portray "only women as victims of sexual assault and only men as perpetrators" was not evidence of gender bias); *Doe v. Va. Polytechnic Inst. & State Univ.*, 400 F. Supp. 3d 479, 503 (W.D. Va. 2019) (explaining that a statement by a school official did not indicate the plaintiff's suspension was motivated by gender bias because the official did not "play[] any role in the decision to discipline [the plaintiff]"). However, at least some district courts have begun to accept highly attenuated statements as proof that a disciplinary outcome was motivated by sex discriminations. *See, e.g., Doe v. Regents of the Univ. of Cal.*, No. 2:15-cv-02478-SVW-JEM, 2017 WL 4618591, at *51 (C.D. Cal. June 8, 2017), *rev'd on other grounds*, *Doe v. Regents of the Univ. of Cal.*, 891 F.3d 1147 (9th Cir. 2018) (concluding that the fact that the university had received "multiple grants from the [Department of Justice's] Office of Violence Against Women," run sexual assault prevention campaigns, and, as part of those campaigns, put up posters saying "Don't Be That Guy" was evidence of sex discrimination — without explaining why DOJ grants and prevention campaigns to combat sexual violence against women would give rise to an inference of anti-male discrimination); *Neal v. Colo. State Univ.-Pueblo*, No. 16-cv-873-RM-CBS, 2017 WL 633045, at *35 (D. Colo. Feb. 16, 2017) (reasoning that a school official's statements that the school football team had "a problem" with sexual misconduct "amply support" the allegation of anti-male bias).

¹⁵⁹ *See supra* Part II.

¹⁶⁰ *See supra* Part II.A.

¹⁶¹ *See supra* Part II.B.

¹⁶² *See supra* Part II.C.

¹⁶³ *See infra* Parts III.A–B; *see also, e.g., Doe v. Univ. of Scis.*, 961 F.3d 203, 210-11 (3d Cir. 2020) (reasoning that "when [plaintiff's] allegations about selective investigation and enforcement are combined with his allegations related to pressure applied by the 2011 Dear Colleague Letter, we conclude that he states a plausible claim of sex discrimination."); *Doe v. Purdue Univ.*, 928 F.3d 652, 668-69 (7th Cir. 2019) (reasoning that "the [Dear Colleague] letter and accompanying pressure gives [plaintiff] a story about why Purdue might have been motivated to discriminate against males accused of sexual assault"); *Doe v. Mia. Univ.*, 882 F.3d 579, 594 (6th Cir. 2018)

courts appear to recognize that the supposed case-specific indicia of bias offered by respondent-plaintiffs is insufficient on its own, but may be enough if considered alongside federal action to enforce victims' Title IX rights. Such federal civil rights enforcement, courts say, creates a background of ambient anti-male bias that transforms pleadings otherwise insufficient to raise an inference of sex discrimination into viable allegations of anti-male bias.¹⁶⁴ Put another way, a civil rights agency's enforcement efforts are, apparently, evidence of sex discrimination against plaintiffs accused of the very discrimination the agency sought to ameliorate. As a result, these respondent-plaintiffs face a lower bar for making out a claim of sex discrimination, perhaps explaining why pleadings that would be insufficient for other anti-discrimination plaintiffs are sufficient for this select group.¹⁶⁵

Reliance on this "external pressure" may raise nexus problems if a plaintiff cannot demonstrate why the decision-makers in question were themselves under pressure.¹⁶⁶ But an even more fundamental problem with this approach is that the sources of pressure do not themselves evidence sex-based bias.¹⁶⁷ At most, they suggest pressure to discipline

(reasoning that the claim that the University "faced external pressure from the federal government" together with other factual allegations was sufficient to show gender discrimination); *see also* *Menaker v. Hofstra Univ.*, 935 F.3d 20, 33 (2d Cir. 2019) (applying this logic to a Title VII claim).

¹⁶⁴ *See infra* Parts III.A–B.

¹⁶⁵ In his dissent to *Doe v. Oberlin*, Judge Gilman gestured at another possible explanation for some courts' unusually lenient treatment of respondents' reverse discrimination suit: they over-rely on Second Circuit case law. *See Doe v. Oberlin Coll.*, 963 F.3d 580, 588-92 (6th Cir. 2020) (Gilman, J., dissenting). The Second Circuit's respondent opinions, especially *Columbia University* and *Yusuf*, have had an outside influence on other courts' approaches to these cases, providing both a framework and archetypical fact patterns. *See supra* Part I.C. But the Second Circuit, unique among federal appeals courts, uses a sub-*Iqbal* pleading standard for anti-discrimination suits, including Title IX reverse discrimination suits. *See Doe v. Columbia Univ.*, 831 F.3d 46, 53-54 (2d Cir. 2016); *Littlejohn v. City of New York*, 795 F.3d 297, 310-11 (2d Cir. 2015); *see also Austin v. Univ. of Or.*, 925 F.3d 1133, 1137 (9th Cir. 2019) (rejecting Second Circuit's lower anti-discrimination pleading standard); *Mia. Univ.*, 882 F.3d at 588 (same). In adopting the Second Circuit's approach to motions to dismiss respondents' suits, then, other courts might inadvertently import its lower pleading standard, at least for this narrow set of cases. Although the Authors would generally welcome the spread of the Second Circuit's plaintiff-friendly pleading standard, the apparent inconsistency is troubling: in relying heavily on Second Circuit respondent case law, are courts lowering the bar for this one class of reverse discrimination plaintiffs, and them alone?

¹⁶⁶ *See, e.g., Doe v. Baum*, 903 F.3d 575, 591-92 (6th Cir. 2018) (Gilman, J., concurring in part and dissenting in part) ("Doe crucially fails to link general pressure on the University of Michigan to the particular proceedings that he faced.").

¹⁶⁷ *See infra* Parts III.A–B.

students accused of sexual harassment — a class distinct from “men,” as explained above.¹⁶⁸

A. The Dear Colleague Letter

Nearly every court to rule in favor of a respondent-plaintiff relies on the 2011 Dear Colleague Letter (the “Letter”).¹⁶⁹ In that guidance, then-Assistant Secretary for Civil Rights Russlynn Ali shared OCR’s interpretation of federally-funded schools’ responsibility to address sexual harassment under Title IX.¹⁷⁰ For example, the letter advised that “[i]f a school knows or reasonably should know about student-on-student harassment that creates a hostile environment, Title IX requires the school to take immediate action to eliminate the harassment, prevent its recurrence, and address its effects.”¹⁷¹ The Letter explained that “OCR seeks to obtain voluntary compliance from recipients” that violate Title IX, but noted its long-standing power to “initiate proceedings to withdraw Federal funding” if the “recipient does not come into compliance voluntarily.”¹⁷²

In the near-decade since, the Letter has been the subject of considerable public debate. Some welcomed the policy as a much-needed reminder to schools that had long ignored the civil rights of student victims.¹⁷³ Others thought ED’s interpretations were overbroad and encouraged schools to mistreat alleged harassers.¹⁷⁴ In 2017,

¹⁶⁸ See *supra* Part II.A.

¹⁶⁹ 2011 Dear Colleague Letter, *supra* note 39, at 11.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 4.

¹⁷² *Id.* at 16. ED has had the power to do so by law since 1972. 20 U.S.C. § 1682 (2018); 34 C.F.R. § 100.8 (2021). But it has never done so. See Buzuvis, *supra* note 152 at 79 (“Because Title IX is a spending condition, the Department of Education enforces Title IX by leveraging an institution’s federal funding, although the Department has never withdrawn funding from an institution for noncompliance.”).

¹⁷³ See, e.g., S. Daniel Carter, *In Defense of the Title IX Dear Colleague Letter*, HUFF POST (Sept. 16, 2017, 10:45 PM EDT), https://www.huffpost.com/entry/in-defense-of-the-title-ix-dear-colleague-letter_b_59bddb9ae4b06b71800c3a2f [<https://perma.cc/U7X8-5K84>]; Letter from the Leadership Conference on Civil and Human Rights, to Betsy DeVos, Sec., U.S. Dep’t of Educ. (July 13, 2017), https://civilrights.org/resource/sign-on_supporting_title_ix_guidance/ [<https://perma.cc/W8V9-PGKB>].

¹⁷⁴ See, e.g., *Frequently Asked Questions: OCR’s April 4 “Dear Colleague” Guidance Letter*, FIRE (Aug. 15, 2011), <https://www.thefire.org/frequently-asked-questions-ocrs-april-4-dear-colleague-guidance-letter/> [<https://perma.cc/UNX3-D3VG>] (“While several provisions of the OCR letter are unobjectionable or even welcome, others present a significant threat to student rights — specifically, to due process (which generally means having and following fair rules and procedures) and freedom of expression.”). Some of the criticism was based in misinformation about the contents of the 2011 Dear

Secretary of Education Betsy DeVos rescinded the Letter.¹⁷⁵ And in 2020, she implemented new Title IX regulations that limited harassment victims' rights while granting special procedural rights to students accused of sexual harassment, beyond those available to students facing similar disciplinary sanctions for other forms of misconduct.¹⁷⁶

Regardless of the merits of the Dear Colleague Letter, one thing is clear: It is entirely gender-neutral.¹⁷⁷ Where the Letter uses gendered pronouns to describe students, it employs "he or she."¹⁷⁸ Its only references to "women" and "males" occur in its summary of research on statistics about the prevalence of sexual violence against different populations.¹⁷⁹ On its face, the Letter never encouraged schools to adopt

Colleague Letter. For example, many critics wrote, incorrectly, that the Letter forbade live hearings and cross-examination. *See, e.g.,* Shikha Dalmia, *In Defense of Betsy DeVos' Title IX Plan*, WEEK (Dec. 10, 2018), <https://theweek.com/articles/808638/defense-betsy-devos-title-ix-plan> [<https://perma.cc/3PQ3-MTB8>] (incorrectly stating that students should "forget about live hearings" under the Obama Administration). But in reality, the Letter did not do so. Rather, it "discourage[d] schools from allowing the parties *personally* to question or cross-examine each other during the hearing." 2011 Dear Colleague Letter, *supra* note 39, at 12 (emphasis added); *see also* Alexandra Brodsky, *Myths and Misinformation Make for Bad Policy*, AM. PROSPECT (Oct. 27, 2017), <https://prospect.org/education/repealing-title-ix-guidelines-sexual-assault-dialogue> [<https://perma.cc/CV8J-WUZV>] [hereinafter *Myths and Misinformation*].

In other words, the Letter did not discourage cross-examination, but instead advised that schools charge third parties — for example, a party's representative or a neutral board — to conduct the questioning.

¹⁷⁵ Stephanie Saul & Kate Taylor, *Betsy DeVos Reverses Obama-era Policy on Campus Sexual Assault Investigations*, N.Y. TIMES (Sept. 22, 2017), <https://www.nytimes.com/2017/09/22/us/devos-colleges-sex-assault.html> [<https://perma.cc/D4FD-366T>].

¹⁷⁶ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026 (May 19, 2020) (codified at 34 C.F.R. § 106 (2021)); *see also* ALEXANDRA BRODSKY, SEXUAL JUSTICE: SUPPORTING VICTIMS, ENSURING DUE PROCESS, AND RESISTING THE CONSERVATIVE BACKLASH 144-47 (2021) [hereinafter *SEXUAL JUSTICE*].

¹⁷⁷ *Doe v. Univ. of Denver*, 952 F.3d 1182, 1192 (10th Cir. 2020) ("The [Dear Colleague Letter] is gender-neutral on its face . . ."); *Rossley v. Drake Univ.*, 979 F.3d 1184, 1196 (8th Cir. 2020) (noting appellant's "argument ignores the letter's data that both men and women have been victims of campus sexual assault, as well as the letter's use of gender-neutral language"); *Neal v. Colo. State Univ.-Pueblo*, No. 16-cv-873-RM, 2017 WL 633045, at *11 (D. Colo. Feb. 16, 2017) ("[T]he document in itself is written in a gender-neutral manner and notes the DOE's concern regarding sexual assault on campuses regardless of the genders of the assaulter and assaulted."). *See generally* 2011 Dear Colleague Letter, *supra* note 39.

¹⁷⁸ 2011 Dear Colleague letter, *supra* note 39, at 4, 13 n.32, 18 n.45.

¹⁷⁹ *Id.* at 2 ("A report prepared for the National Institute of Justice found that about 1 in 5 women are victims of completed or attempted sexual assault while in college. The report also found that approximately 6.1 percent of males were victims of completed or

more punitive policies or to violate accused students' procedural rights.¹⁸⁰ But even if a court believed the Letter implicitly did so, its gender-neutrality renders implausible plaintiffs' and courts' assertions that it encouraged schools to punish *men* specifically.

The First Circuit recognized this much in *Doe v. Trustees of Boston College*.¹⁸¹ There, a student sanctioned for sexually assaulting a classmate alleged that Boston College had reached an erroneous outcome based on anti-male bias.¹⁸² As evidence of that bias, he pointed to the Dear Colleague Letter. The court dismissed that argument as "both conclusory and meritless."¹⁸³ The student (and his co-plaintiff parents) "ha[d] not explained how the Dear Colleague Letter reflects or espouses gender bias," the court wrote. "This necessarily dooms their argument that the Letter somehow infected the proceedings at issue here with gender bias."¹⁸⁴ The Eighth Circuit has adopted the same position.¹⁸⁵

Other courts, though, have not required that plaintiffs' evidence of anti-male bias actually evince anti-male bias. The Third,¹⁸⁶ Sixth,¹⁸⁷

attempted sexual assault during college Additionally, the likelihood that a woman with intellectual disabilities will be sexually assaulted is estimated to be significantly higher than the general population.").

¹⁸⁰ See BRODSKY, SEXUAL JUSTICE, *supra* note 176, at 130-32; Buzuvis, *supra* note 152, at 72, 82, 84-85; Brodsky, *Myths and Misinformation*, *supra* note 174; Samuel R. Bagenstos, *What Went Wrong with Title IX?*, WASH. MONTHLY (Sept./Oct. 2015), <https://washingtonmonthly.com/magazine/septoct-2015/what-went-wrong-with-title-ix> [<https://perma.cc/P569-VG2R>]. See generally 2011 Dear Colleague Letter, *supra* note 39 (outlining schools' responsibilities to student survivors without calling for increased punishment or violations of accused students' procedural rights). In truth, the Dear Colleague Letter set forth procedural protections for all students implicated in sexual harassment investigations. See *id.* at 8-14. Ironically, even while the plaintiff in the influential *Purdue* case argued that the Dear Colleague Letter mandated unfairness, his complaint relied on Dear Colleague Letter guidelines for fair student discipline to demonstrate he was mistreated. Amended Complaint at ¶¶ 132-33, *Doe v. Purdue Univ.*, 281 F. Supp. 3d 754 (N.D. Ill. 2017) (No. 2:17-cv-00033) (challenging discipline for sexual misconduct in part because the school allegedly did not comply with the Dear Colleague Letter's provisions prohibiting Title IX Coordinators from having a conflict of interest).

¹⁸¹ 892 F.3d 67 (1st Cir. 2019). This opinion, unlike most of the others discussed in this Article, arises on a motion for summary judgment, not a motion to dismiss. But the First Circuit's observations about the sex-neutrality of the Dear Colleague Letter are equally applicable at either stage.

¹⁸² *Id.* at 91.

¹⁸³ *Id.* at 92.

¹⁸⁴ *Id.*

¹⁸⁵ See *Rossley v. Drake Univ.*, 979 F.3d 1184, 1196 (8th Cir. 2020).

¹⁸⁶ See *Doe v. Univ. of Scis.*, 961 F.3d 203, 210 (3d Cir. 2020).

¹⁸⁷ See *Doe v. Mia. Univ.*, 882 F.3d 579, 594 (6th Cir. 2018).

Seventh,¹⁸⁸ and Ninth Circuits¹⁸⁹ have all held that the Dear Colleague Letter, and schools' reactions to it, are "relevant" to Title IX claims brought by respondents.¹⁹⁰ These courts note that the "Letter cannot *alone* support a plausible claim of Title IX sex discrimination."¹⁹¹ But they never sufficiently explain why the Letter is evidence of sex-based animus at all.

The basic logic, as then-Judge Amy Barrett put it for the Seventh Circuit, is that the Dear Colleague Letter "ushered in a more rigorous approach to campus sexual misconduct allegations" during which schools felt they must demonstrate that they were "vigorously investigating and punishing sexual misconduct."¹⁹² As a result, "the [L]etter and the accompanying pressure give [a plaintiff] a story about why [a university] might have been motivated to discriminate against males accused of sexual assault."¹⁹³ Judge Barrett's unexplained logical leap is blatant: How did "males" get in there? In what way did ED pressure schools to punish *men* specifically, separate and apart from respondents as a whole? That she felt the need to slip "males" into her sentence is telling. She clearly understood that "[c]lassification as a sexual-misconduct respondent is not a classification based on gender."¹⁹⁴ The Letter would not support a claim for sex discrimination

¹⁸⁸ See *Doe v. Purdue Univ.*, 928 F.3d 652, 668 (7th Cir. 2019).

¹⁸⁹ See *Schwake v. Ariz. Bd. of Regents*, 967 F.3d 940, 948 (9th Cir. 2020).

¹⁹⁰ *Univ. of Scis.*, 961 F.3d at 210. The Tenth Circuit's position is a little hard to pin down. In *Doe v. University of Denver*, the Tenth Circuit held that the Letter "is gender-neutral on its face, and evidence that a school felt pressured to conform with its guidance cannot alone satisfy Title IX's fundamental requirement that the challenged action be on the basis of gender." *Doe v. Univ. of Denver*, 952 F.3d 1182, 1192-93 (10th Cir. 2020) (internal quotation marks and citations omitted). The Court did not go so far as to say the Letter supported a plaintiff's claim of anti-male bias. But it did suggest that a plaintiff could combine allegations about the Letter with "a particularized something more" to establish a claim, suggesting that the Letter was, in some way, relevant. *Id.* at 1993.

¹⁹¹ *Univ. of Scis.*, 961 F.3d at 210 (emphasis added) (citing *Purdue Univ.*, 928 F.3d at 669; *Doe v. Baum*, 903 F.3d 575, 586 (6th Cir. 2018)).

¹⁹² *Purdue Univ.*, 928 F.3d at 668.

¹⁹³ *Id.* at 669. In *Purdue*, the Seventh Circuit considered the Dear Colleague Letter alongside comments that Assistant Secretary for Civil Rights Catherine Lhamon later made about OCR's enforcement. See *id.* at 668. These comments, too, were gender-neutral. See *Sexual Assault on Campus: Working to Ensure Student Safety: Hearing Before the S. Comm. on Health, Educ., Lab., and Pensions*, 113th Cong. 7 (2014) (statement of Catherine Lhamon, Assistant Sec., Off. for Civ. Rts., U.S. Dep't of Educ.) ("[S]ome schools still are failing their students by responding inadequately to sexual assaults on campus. For those schools, my office and this Administration have made it clear that the time for delay is over.").

¹⁹⁴ *Univ. of Denver*, 952 U.S. at 1196-97.

if ED only pressured schools to “discriminate against *students* accused of sexual assault.”¹⁹⁵ So Judge Barrett added in a single word on which the plaintiff’s whole claim turned. Because of this “background,” she explained, the school’s decision to believe the complainant and that single Facebook message by a victim’s advocacy group, discussed above, sufficiently alleged anti-male discrimination.¹⁹⁶

The Third Circuit took a similar approach in *Doe v. University of the Sciences*.¹⁹⁷ There, readers will recall,¹⁹⁸ the court accepted as comparators three female students who could hardly be said to be “similarly situated”: two classmates accused of violating a school confidentiality rule and another — one of the respondent-plaintiff’s alleged victims — who the plaintiff insisted the school should have investigated for raping *him* even though he had told the university their sexual encounter was consensual.¹⁹⁹ Perhaps recognizing the inapt comparison, the Third Circuit explained that the plaintiff made out a claim for sex discrimination because his “allegations about selective investigation and enforcement are *combined* with his allegations related to pressure applied by the 2011 Dear Colleague Letter.”²⁰⁰ The gender-neutral Dear Colleague Letter, then, permitted the plaintiff to proceed in the absence of appropriate comparators. That is a strange path for a sex discrimination suit.²⁰¹

¹⁹⁵ See, e.g., *Z.J. v. Vanderbilt Univ.*, 355 F. Supp. 3d 646, 682 (M.D. Tenn. 2018) (citations omitted) (“[W]hen courts consider allegations of external pressure, they look to see if a plaintiff has alleged facts demonstrating that it was pressure[d] not only to aggressively pursue sexual assault cases, but to do so in a manner biased against males.”), *appeal dismissed*, No. 19-5061, 2019 WL 3202209 (6th Cir. Apr. 26, 2019); *Doe v. Regents of Univ. of Cal.*, No. 215CV02478SVWJEM, 2017 WL 4618591, at *15 (C.D. Cal. June 8, 2017) (holding that “efforts to vigorously prosecute perpetrators of sexual assault alone” was not evidence of anti-male bias), *rev’d on other grounds*, 891 F.3d 1147 (9th Cir. 2018); *Austin v. Univ. of Or.*, 205 F. Supp. 3d 1214, 1226 (D. Or. 2016) (holding “university’s aggressive responsive to allegations of sexual misconduct” was not evidence of anti-male bias), *aff’d*, 925 F.3d 1133 (9th Cir. 2019).

¹⁹⁶ See *supra* Part II.C (discussing the Facebook post the Seventh Circuit relied on as evidence of anti-male bias).

¹⁹⁷ *Doe v. Univ. of Scis.*, 961 F.3d 203 (3d Cir. 2020).

¹⁹⁸ See *supra* Part II.B.

¹⁹⁹ *Univ. of Scis.*, 961 F.3d at 210-11.

²⁰⁰ *Id.* at 211 (emphasis added).

²⁰¹ It remains to be seen for how long courts will allow respondents to rely on the Dear Colleague Letter, given that it was rescinded in 2017. See 2011 Dear Colleague Letter, *supra* note 39. At least one judge has rejected the possibility that the Letter supports an inference of bias related to events that arose after its rescission. See *Doe v. Loyola Univ.-Chi.*, No. 20 CV 7293, 2021 WL 2550063, at *7 (N.D. Ill. June 22, 2021) (“For starters, Loyola faced no threat of federal investigation or loss of federal funds in

B. Title IX Investigations

Some courts have looked to other action from OCR: federal Title IX investigations into defendant-universities for allegedly mistreating survivors. In *Schwake v. Arizona Board of Regents*, for example, the Ninth Circuit relied on an open OCR investigation into the university that had disciplined the plaintiff for sexual harassment.²⁰² “As [the plaintiff] argues, it is reasonable to infer that such a federal investigation placed tangible pressure on the University,” the panel determined.²⁰³ “It is also ‘entirely plausible’ that such pressure would affect how the University treated respondents in sexual misconduct disciplinary proceedings on the basis of sex.”²⁰⁴ The first sentence is sensible. The logical jump to the second, however, is large and unexplained. Just like the Seventh Circuit, the Ninth offered no reason why pressure on the school to avoid violating survivors’ Title IX rights would cause them to mistreat *men* accused of sexual harassment specifically.²⁰⁵

Yet the court used that leap to justify treating the defendant’s facially sex-neutral policies and alleged procedural errors as evidence of sex discrimination.²⁰⁶ For example, the plaintiff alleged that an administrator had denied him the opportunity to appeal his punishment.²⁰⁷ The University explained that its policies permitted appeals of disciplinary determinations only where a student was suspended, expelled, or his degree was revoked; the plaintiff had been subject to a gentler punishment.²⁰⁸ Regardless of the wisdom of that policy, it was not sex-based. Nonetheless, the court held that “gender bias is a plausible explanation” for the refused appeal “*in light of the background indicia of sex discrimination*” — the investigation and statistical evidence discussed above.²⁰⁹

2020 for failing to adhere to the rescinded 2011 letter . . . [because] the government had abandoned that policy long before Loyola’s investigation of Doe.”).

²⁰² *Schwake v. Ariz. Bd. of Regents*, 967 F.3d 940, 948 (9th Cir. 2020).

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *See id.*

²⁰⁶ *See id.* at 949-50.

²⁰⁷ *Id.* at 950.

²⁰⁸ *Id.* at 945, 950.

²⁰⁹ *Id.* at 950; *see also* *Does 1-2 v. Regents of Univ. of Minn.*, 999 F.3d 571, 578 (8th Cir. 2021) (holding that the University was “motivated” to discriminate against male football players because “[i]n 2014, the OCR investigated the University for potential Title IX violations” after a complaint alleged “that the University discriminated against female athletes by denying them equal funding and resources and by tolerating a male gymnastics coach’s sexual harassment”).

The Sixth Circuit has held on multiple occasions that such federal investigations support a claim of anti-male sex discrimination.²¹⁰ In most of these cases, the court did not even attempt to explain how these investigations created gender-specific pressure.²¹¹ In *Doe v. Baum*, the Sixth Circuit tried to connect an OCR investigation to anti-male bias, but relied on a misrepresentation and shoddy reasoning to do so.²¹² There, the court considered a plaintiff's claims that he had been subject to anti-male discrimination when the University of Michigan had disciplined him for sexual misconduct.²¹³ Two years earlier, the Department of Education had opened a Title IX investigation.²¹⁴ The court characterized that investigation as an inquiry "to determine whether the university's process for responding to allegations of sexual misconduct discriminated against women."²¹⁵ That was not, however, true. In his complaint, the plaintiff alleged (accurately) that OCR "began investigating the University for failing to adequately and promptly respond to complaints of sexual misconduct."²¹⁶ In other words, based on the plaintiff's own pleadings, OCR investigated to determine whether the university's process mistreated alleged victims, not whether it "discriminated against women."

Perhaps recognizing that weakness, the *Baum* court noted that "[t]he university also knew that a female student had triggered the federal investigation[.]"²¹⁷ That much is correct, but — based on the pleadings

²¹⁰ *Doe v. Oberlin Coll.*, 963 F.3d 580, 587 (6th Cir. 2020); *Doe v. Baum*, 903 F.3d 575, 586 (6th Cir. 2018); *Doe v. Mia. Univ.*, 882 F.3d 579, 594 (6th Cir. 2018).

²¹¹ See, e.g., *Oberlin Coll.*, 963 F.3d at 587 ("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."); *Mia. Univ.*, 882 F.3d at 594 (deciding that government pressure to address sexual violence caused the University to discriminate against men without explaining why such a pressure would specifically cause anti-male discrimination).

²¹² *Baum*, 903 F.3d at 575.

²¹³ *Id.*

²¹⁴ *Id.* at 586.

²¹⁵ *Id.*

²¹⁶ Amended Complaint with Jury Demand at ¶ 225, *Doe v. Baum*, No. 2:16-cv-13174 (E.D. Mich. Oct. 3, 2016), ECF No. 36. In its letter opening the investigation, OCR explained that it had received a complaint "alleg[ing] that the University failed to promptly and equitably respond to complaints, reports and/or incidents of sexual violence of which it had notice . . . and, as a result, students . . . were subjected to a sexually hostile environment." Letter from Donald S. Yarab, Team Leader, Off. for C.R. Region XV, to Dr. Mary Sue Coleman, President, Univ. of Mich. (Feb. 21, 2014), <https://publicaffairs.vpcomm.umich.edu/wpcontent/uploads/sites/19/2015/01/OCRNOTIFICATIONLETTER.pdf> [<https://perma.cc/C44H-VT85>].

²¹⁷ *Baum*, 903 F.3d at 586.

and OCR's letter opening the investigation — she did not claim that she would have been treated better if she were a man.²¹⁸ Her concerns, as stated, would have applied equally to survivors of all genders. Following the logic of Supreme Court precedent and longstanding ED guidance, the school's alleged mistreatment of victims of sex-based harassment would have constituted sex discrimination regardless of those victims' genders.²¹⁹

Finally, the court again misrepresented the plaintiff's pleadings with respect to the media attention that followed from the OCR investigation. By the court's telling, "the news media consistently highlighted the university's poor response to female complainants."²²⁰ But the plaintiff had alleged only that "[a]s a result of the OCR Investigation, the university received substantial negative publicity. For instance, one local news station reported that a former University employee believed that the University had a policy of deterring students from filing sexual misconduct complaints."²²¹ Notably absent is any reference to the genders of complainants.

Of course, even if the court's characterizations were accurate — that Michigan was under specific criticism for how it treated female victims — it would take a few logical jumps to view that investigation as a source of pressure to discipline accused *men* specifically. At most, it might encourage schools to discipline people accused of assaulting women, who could be women themselves. The majority, however, jumped to anti-male discrimination: It held that the plaintiff's allegations that the defendant credited the complainant's witnesses rather than his own sufficiently pled anti-male bias "when viewed against the backdrop of external pressures."²²² In a thorough dissent, Judge Gilman demonstrated that nothing in the school's consideration of the witnesses demonstrated anti-male bias.²²³ The majority admitted as much.²²⁴ Yet somehow, by its reasoning, a concurrent gender-neutral civil rights investigation transformed those gender-neutral pleadings into a claim of sex discrimination.²²⁵

²¹⁸ See Letter from Donald S. Yarab to Dr. Mary Sue Coleman, *supra* note 216.

²¹⁹ See *supra* Part I.A (explaining *Gebser/Davis* standard).

²²⁰ *Baum*, 903 F.3d at 586.

²²¹ Amended Complaint with Jury Demand at ¶ 226, *Doe v. Baum*, No. 2:16-cv-131714 (E.D. Mich. Oct. 3, 2016), ECF No. 36 (citations omitted).

²²² *Baum*, 903 F.3d at 587.

²²³ *Id.* at 590-93 (Gilman, J., dissenting).

²²⁴ *Id.* at 587.

²²⁵ *Id.*

It is telling that none of the opinions that treat Title IX investigations or the Dear Colleague Letter as background evidence of sex discrimination stem from suits filed by female students accused of sexual harassment. Although less numerous than litigation by men, such cases do arise.²²⁶ Perhaps female plaintiffs do not plead “external pressures” because, intuitively, it seems unlikely that ED promoted discrimination against women in enforcing Title IX’s protections for victims. In truth, though, that claim is exactly as defensible as a male plaintiff’s claim that ED promoted discrimination against men — which is to say, not at all.²²⁷

The most likely explanation for courts’ uncharacteristic amenability to respondents’ reverse discrimination suits, then, may have little to do with law but instead reflect some judges’ policy-based disapproval of Obama-era Title IX enforcement. Perhaps they take issue with particular parts of the Administration’s policies, or maybe they believe that, as a general matter, efforts to stamp out sexual harassment are prone to hysterical overcorrection that puts the futures of promising

²²⁶ See generally *Warmington v. Bd. of Regents of Univ. of Minn.*, 998 F.3d 789 (8th Cir 2021) (considering Title IX claim brought by women accused of sexual harassment); *Plummer v. Univ. of Hous.*, 860 F.3d 767, 770 (5th Cir. 2017) (same); *Shorter v. Princeton Res. Assocs., Inc.*, No. CV 20-765, 2020 WL 3412570 (E.D. Pa. June 22, 2020) (same); *Massey v. Biola Univ. Inc.*, No. 2:19-cv-09626-CJC-JDE, 2020 WL 2476173 (C.D. Cal. Apr. 10, 2020), *report and recommendation adopted*, No. 2:19-cv-09626-CJC (JDE), 2020 WL 2468765 (C.D. Cal. May 13, 2020) (same); *Biggs v. Edgecombe Cnty. Pub. Sch. Bd. of Educ.*, No. 4:16-CV-271-D, 2020 WL 638820 (E.D.N.C. Feb. 10, 2020) (same); *Doe v. Cal. Inst. of Tech.*, No. 2:19-cv-01005-AB (KSx), 2019 WL 8645652 (C.D. Cal. Aug. 13, 2019) (same).

²²⁷ In this way, the pressure that resulted from Obama-era Title IX investigations or guidance is very different from the pressure at issue in the infamous 2009 Supreme Court case *Ricci v. DeStefano*, which limited employers’ ability to engage in race-conscious decision-making. There, New Haven discarded the result of a promotional exam for firefighters on which white applicants had performed better than applicants of color; the city feared that use of the test would expose it to Title VII liability for disparate impact. See *Ricci v. DeStefano*, 557 U.S. 557, 586 (2009). In doing so, the Supreme Court held, New Haven discriminated against white applicants. *Id.* at 593. So, as in the Title IX reverse discrimination suits, a defendant’s desire to avoid discriminating against one group could, conceivably, lead to discrimination against another. But the similarities end there. In *Ricci*, New Haven’s decision not to certify the exam results was explicitly based on the racial composition of the resultant candidate pool. *Id.* (“[T]he raw racial results became the predominant rationale for the City’s refusal to certify the results.”). The threat of liability for relying on the results was not evidence that the city’s decision was secretly motivated by race; rather, that threat was the city’s given explanation, which the Supreme Court held was insufficient to justify discrimination against white applicants. In sharp contrast, in the respondent cases courts use the existence of federal pressure to characterize facially sex-neutral decisions as sex discrimination, without any meaningful justification.

young men at risk. That is, after all, a fairly common position in American politics and media, especially on the right.²²⁸ But, at least in theory, judges' policy preferences — and biases — should not trump civil rights law.

IV. A RISING TIDE?

The ease with which male respondents survive motions to dismiss stands in sharp contrast to the fate of lawsuits brought by marginalized anti-discrimination plaintiffs, including student sexual harassment victims. As discussed above, victims must plead that a school was deliberately indifferent to their reports of sexual harassment in order to state a Title IX claim.²²⁹ A flawed investigation that does not follow the school's prescribed procedures may be enough for a respondent's suit, but it will generally not constitute deliberate indifference for a victim's.²³⁰ And this is to say nothing of the three common obstacles to traditional disparate treatment claims, identified above.²³¹

Perhaps, though, this reverse discrimination case law will open up new avenues for many discrimination plaintiffs. Some of the Title IX respondent opinions are plainly illogical; the rules they proffer should not be the law of the land, even if they benefit worthy plaintiffs.²³² But, as a whole, this case law errs in a generally pro-plaintiff direction toward which anti-discrimination law could certainly afford to shift. After decades of conservative attack, there is plenty of room between trans-

²²⁸ See, e.g., KATE MANNE, *DOWN GIRL: THE LOGIC OF MISOGYNY* (2017) (discussing "himpathy," Manne's term for kneejerk concern for men accused of hurting women that displaces concern for their victims); Megan Carpentier, *Steubenville and the Misplaced Sympathy for Jane Doe's Rapists*, *GUARDIAN* (Mar. 18, 2013 3:36 PM EDT), <https://www.theguardian.com/commentisfree/2013/mar/18/steubenville-misplaced-sympathy-jane-doe-rapists> [<https://perma.cc/7DNL-BQNL>] (discussing concern for rapists' futures that eclipses concern for their victims'); Mark Landler, *Trump, Saying 'Mere Allegation' Ruins Lives, Appears to Doubt #MeToo Movement*, *N.Y. TIMES* (Feb. 10, 2018), <https://www.nytimes.com/2018/02/10/us/politics/trump-porter-me-too-movement.html> [<https://perma.cc/DJ44-LVAW>] (recounting comments from President Trump); see also *infra* note 241 (collecting statements by President Trump).

²²⁹ *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633 (1999).

²³⁰ See, e.g., *Karasek v. Regents of the Univ. of Cal.*, 956 F.3d 1093, 1108 (9th Cir. 2020) (noting procedural irregularities in investigations into sexual harassment allegations are insufficient for a victim to establish deliberate indifference); *Doe v. Bd. of Educ. of Prince George's Cnty.*, 605 F. App'x 159, 168 (4th Cir. 2015) (same); *Sanches v. Carrollton-Farmers Branch Indep. Sch. Dist.*, 647 F.3d 156, 169 (5th Cir. 2011) (same).

²³¹ See *supra* Part II.

²³² See *id.*

substantive anti-discrimination law principles as they stand today and the respondent case law. Courts could settle on a happy medium.

For instance, courts could take the respondent case law as an invitation to loosen their overly strict comparator analyses. On the causal nexus issue, courts could put more weight on supposed “stray remarks”: For example, without embracing *Purdue* and *Oberlin* entirely, courts could recognize the possible connection between a boss’s racist statement and the plaintiff’s termination a few weeks later. Plaintiffs might succeed in using evidence of systemic bias within the defendant-institution as support for their claims, even in the absence of a clear nexus to their specific grievance. Likewise, although the current Supreme Court may be unlikely to revisit *Geduldig*, courts should feel free to consider robust evidence of disparate impact as part of a holistic disparate treatment analysis. Such a development would be excellent news for those most vulnerable to discrimination, such as women, people of color, LGBTQ individuals, people with disabilities, immigrants, and religious minorities. And while student-survivors’ Title IX deliberate indifference claims vary in meaningful ways from ordinary disparate treatment suits — and so run into unique barriers — perhaps looser rules would allow victims to rely on new types of evidence, and might even open up new legal pathways for victims, separate and apart from *Gebser* and *Davis*. After all, if anti-victim bias, like anti-respondent bias, now functionally amounts to animus based on sex, there is plenty of that to point to in schools.²³³

There is reason, though, to worry the story will not play out this way. The most significant obstacle is likely to be courts’ reliance on OCR enforcement efforts to justify their generous view of the Title IX reverse discrimination suits. Such agency action may provide a way for unfriendly courts to distinguish respondents’ suits from later discrimination cases.

For instance, many civil rights claims brought by marginalized plaintiffs do not involve competing interests between different groups.²³⁴ But even where there may be some competition at play in a

²³³ See, e.g., KNOW YOUR IX, THE COST OF REPORTING: PERPETRATOR RETALIATION, INSTITUTIONAL BETRAYAL, AND STUDENT SURVIVOR PUSHOUT 23-28 (2021), <https://www.knowyourix.org/thecostofreporting> [<https://perma.cc/CF6X-LYWK>] (describing schools’ bias against student survivors).

²³⁴ Courts often do overstate the conflict between complainants’ rights and respondents’ rights; victims have Title IX rights to be treated fairly during an investigation, but not to a particular outcome, so vindication of their rights need not come at the expense of fairness to the accused. See Alexandra Brodsky, *A Rising Tide: Learning About Fair Disciplinary Process from Title IX*, 66 J. LEGAL EDUC. 822, 825-31 (2017). But, at least on a motion to dismiss, respondents have a plausible story to tell:

marginalized plaintiff's suit, that complaint will rarely be able to point to agency action enforcing the rights of dominant groups. With some notable exceptions,²³⁵ civil rights enforcement efforts generally seek to end discrimination against those most likely to face discrimination.²³⁶ And, as a result, the pathway to liability provided in the Title IX reverse discrimination suits will most often not be available to traditional civil rights plaintiffs.

Consider a workplace downsizing because of budget cuts. Among those chosen for lay-offs is a transgender employee. She believes her employer would have chosen a different worker in her stead if not for her recent transition. Perhaps she cannot identify, from among her former colleagues, a particularly close comparator; they all have different jobs or, without discovery, she cannot know whether their job

A school might feel it could avoid liability for its treatment of victims if they ensured outcomes unlikely to attract complainants' criticism; it seems reasonable to assume that a party that "wins" a disciplinary hearing is less likely to complain to the federal government.

²³⁵ Letter from Eric S. Dreiband, Assistant Att'y Gen., C.R. Div., to Peter S. Spivak, Couns., Yale Univ. (Aug. 13, 2020), <https://www.politico.com/f/?id=00000173-e9e9-d1e6-ad77-e9ef12620000> [<https://perma.cc/P45F-HN54>] (pressuring Yale to end its affirmative action policy); Luke Broadwater & Erica L. Green, *DeVos Vows to Withhold Desegregation Aid to Schools over Transgender Athletes*, N.Y. TIMES (Sept. 18, 2020), <https://www.nytimes.com/2020/09/18/us/transgender-students-betsy-devos.html> [<https://perma.cc/4Q5T-3Z3J>] (explaining that Secretary DeVos threatened to withhold federal funds from Connecticut schools that would not discriminate against transgender students); see also *infra* notes 238–241 and accompanying text (discussing possible claims based on new Title IX regulations).

²³⁶ See, e.g., U.S. DEP'T OF EDUC., OFF. FOR C.R., SECURING EQUAL EDUCATIONAL OPPORTUNITY: REPORT TO THE PRESIDENT AND SECRETARY OF EDUCATION (2016), <https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2016.pdf> [<https://perma.cc/X2GK-M46F>] (summarizing OCR action); U.S. EQUAL EMP. OPPORTUNITY COMM'N, STRATEGIC ENFORCEMENT PLAN FOR FY 2013-2016 (2012), <https://www.eeoc.gov/us-equal-employment-opportunity-commission-strategic-enforcement-plan-fy-2013-2016#:~:text=The%20U.S.%20Equal%20Employment%20Opportunity,public%2C%20and%20federal%20sector%20enforcement> [<https://perma.cc/ZW5V-9CGQ>] (identifying EEOC's priorities). Definitionally, there will be more need for agencies to address discrimination that happens more often. Moreover, some civil rights statutes expressly forbid reverse discrimination suits: For example, the Americans with Disabilities Act does not "provide the basis for a claim that an individual without a disability was subject to discrimination because of a lack of disability." 42 U.S.C. § 12201(1)(g) (2018); 28 C.F.R. § 36.201 (2021). And the same administrations that tend to pursue reverse discrimination enforcement also tend to do less civil rights enforcement in general. See, e.g., Erica L. Green, *DeVos Education Dept. Begins Dismissing Civil Rights Cases in Name of Efficiency*, N.Y. TIMES (Apr. 20, 2018), <https://www.nytimes.com/2018/04/20/us/politics/devos-education-department-civil-rights.html> [<https://perma.cc/EDA7-AJQM>] (noting Department of Education's efforts to dismiss civil rights cases under DeVos's leadership).

reviews looked like hers. She might cite Title IX reverse discrimination opinions that accept dissimilar comparators. She might point to transphobic statements made by managers who had no direct role in choosing who to lay off, citing Title IX opinions that soften “nexus” requirements. Hopefully, that will help her case.

A court hostile to her interests, though, may conclude that respondents’ reverse discrimination cases would only govern if she could allege an analogous “background” of external pressure from the federal government. What would that mean? Perhaps a policy guidance on anti-cisgender discrimination would be sufficient, or a recent investigation into the plaintiff’s employer for bias against cisgender workers. For obvious (and good) reasons, neither is likely to be forthcoming. Indeed, from these authors’ review, the EEOC has never taken any action to address alleged discrimination against cisgender employees — perhaps, of course, because such discrimination does not occur.

Courts’ approach to civil rights investigations in the Title IX respondents’ reverse discrimination suits, then, is deeply regressive: It provides a path to liability that will generally only be available to members of dominant groups. The result, then, might be that courts often hold members of dominant groups to a lower pleading standard unavailable to the members of groups most vulnerable to discrimination.²³⁷

Perhaps ironically, one group of marginalized civil rights plaintiffs who might be uniquely well positioned to point to federal pressure to discriminate against them, at least in the short term, are female student sexual harassment victims. These plaintiffs could reasonably plead that the Trump administration’s Title IX regulations and accompanying statements put significant pressure on schools to avoid findings of responsibility for sexual harassment. After all, many have argued persuasively that the rules’ overall purpose and effect is to diminish victims’ rights and expand the rights of accused students, turning Title IX into an obstacle to addressing sexual harassment.²³⁸ And Trump

²³⁷ Anti-discrimination rules that prohibit reverse discrimination while permitting discrimination against marginalized groups are not novel. Reva Siegel argues that the Supreme Court decision to “only appl[y] doctrines of heightened scrutiny to facially explicit race- or sex-based state action” has created a regime that benefits majority groups over marginalized groups. Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1141-43 (1997).

²³⁸ See, e.g., Complaint, Victim Rts. L. Ctr. v. DeVos, No. 1:20-cv-11104 (D. Mass. June 10, 2020), ECF No. 1, <https://nwl.org/wp-content/uploads/2020/06/20-11104-Complaint.pdf> [<https://perma.cc/3F87-X9VW>] (challenging DeVos regulations as in

officials' statements about Title IX are far more explicitly sex-based than the gender-neutral Dear Colleague Letter, expressly casting doubt on the veracity of *women* who report sexual assault.²³⁹ For example, Acting Assistant Secretary for Civil Rights, Candice Jackson, publicly opined that in most school investigations into sexual harassment, "there's not even an accusation that these accused students overrode the will of a young *woman*. ... Rather, the accusations — 90 percent of them — fall into the category of 'we were both drunk,' 'we broke up, and six months later I found myself under a Title IX investigation because *she* just decided that our last sleeping together was not quite right.'"²⁴⁰ At least until the Biden Administration revises Secretary DeVos's regulations, then, a victim *might* be able to reasonably argue that her burden to plead deliberate indifference (or another theory of Title IX liability) should be eased because of a background atmosphere of anti-complainant, and genuinely sexist, bias.²⁴¹

violation of the equal protection component of the Fifth Amendment and the Administrative Procedure Act).

²³⁹ President Trump's own statements on gender and sexual violence also clearly demonstrate gender bias. For instance, Trump infamously bragged about grabbing women by the genitals without their consent. See *Transcript: Donald Trump's Taped Comments About Women*, N.Y. TIMES (Oct. 8, 2016), <https://www.nytimes.com/2016/10/08/us/donald-trump-tape-transcript.html> [https://perma.cc/UM53-PE5K]; Catherine Pearson, Emma Gray & Alanna Vagianos, *A Running List of the Women Who've Accused Donald Trump of Sexual Misconduct*, HUFFPOST, https://www.huffpost.com/entry/a-running-list-of-the-women-whove-accused-donald-trump-of-sexual-misconduct_n_57ffae1fe4b0162c043a7212 (last updated Sept. 17, 2020, 4:31 PM ET) [https://perma.cc/6XRL-QMB5] (explaining that Trump derided women who accused him of sexual harassment by asserting that they were too unattractive to be harassed); Lisa Ryan, *A Brief History of Trump Insulting Women Who Call Him Out*, THE CUT (Mar. 27, 2018), <https://www.thecut.com/2018/03/donald-trump-insulting-women-appearance-history.html> [https://perma.cc/Z4A8-LXQY] (describing an encounter in which Trump told a woman, who asked for a medical break to pump breast milk in a deposition, that she was disgusting; and frequently derides the appearance of women critics).

²⁴⁰ Erica L. Green & Sheryl Gay Stolberg, *Campus Rape Policies Get a New Look as the Accused Get DeVos's Ear*, N.Y. TIMES (July 12, 2017), <https://www.nytimes.com/2017/07/12/us/politics/campus-rape-betsy-devos-title-iv-education-trump-candice-jackson.html> [https://perma.cc/V4HR-DRD4] (emphasis added).

²⁴¹ In March 2020, President Biden ordered the Education Department to review the Trump Administration's Title IX regulations, among others, to "consider suspending, revising, or rescinding" them. Tovia Smith, *Biden Begins Process to Undo Trump Administration's Title IX Rules*, NPR, <https://www.npr.org/2021/03/10/975645192/biden-begins-process-to-undo-trump-administrations-title-ix-rules> (last updated Mar. 10, 2021, 5:27 PM ET) [https://perma.cc/XEL2-DAS2]. The Biden Administration is expected to reform or replace the regulations, fulfilling a campaign promise. Tyler Kingkade, *Biden Wants to Scrap Betsy DeVos' Rules on Sexual Assault in Schools. It Won't Be Easy.*, NBC NEWS (Nov. 12, 2020, 2:04 AM PST), <https://www.nbcnews.com/>

Yet there are at least two reasons to be skeptical that the case law evolving out of respondent lawsuits will also benefit student survivors. First, it is hard to feel optimistic that courts will view Secretary DeVos's new Title IX regulations as unduly pressuring schools to discriminate against women. If judges' views of the Dear Colleague Letter were animated by a view that enforcing victims' rights was a threat to men, they might see DeVos rolling back those rights as a return to a just equilibrium. Or, put less generously, if the Title IX reverse discrimination opinions are motivated not by law or a consistent view of administrative civil rights enforcement, but instead by judges' investment in men's impunity, there is little reason to think courts will be equally generous to sexual harassment victims.

Second, a post-*Oberlin* en banc opinion from the Sixth Circuit suggests that courts may raise barriers for survivors suing their schools for deliberate indifference because of respondent lawsuits.²⁴² In *Foster v. Board of Regents of University of Michigan*, the Sixth Circuit adopted for Title IX victims a requirement what might be called "deliberate indifference plus."²⁴³ Writing for the majority, Judge Sutton created a novel "good faith" element of the *Gebser* and *Davis* standard, under which a school's clearly unreasonable response would not be deliberately indifferent unless made in bad faith.²⁴⁴ His reasoning appeared to be that the Sixth Circuit had created such significant Title IX protections for accused students that it would be unfair to hold schools to any higher standard in their treatment of complainants; otherwise, "the day will eventually come in which two different juries will find that the same university loses coming and going over the same incident — by insufficiently protecting the rights of the victim in one case and by insufficiently protecting the rights of the accused in the other."²⁴⁵ (Note that nowhere had the Sixth Circuit required a similar "bad faith" showing to prove anti-male bias against a respondent.)²⁴⁶ Far from opening a path to more generous standards for all plaintiffs,

politics/2020-election/biden-wants-scrap-betsy-devos-rules-sexual-assault-schools-it-n1247472 [https://perma.cc/Q2DL-YTQ5].

²⁴² See *Foster v. Bd. of Regents of Univ. of Mich.*, 982 F.3d 960, 969 (6th Cir. 2020) (en banc).

²⁴³ *Id.*

²⁴⁴ *Id.* at 965.

²⁴⁵ *Id.* at 969.

²⁴⁶ See generally, e.g., *Doe v. Oberlin Coll.*, 963 F.3d 580 (6th Cir. 2020) (setting out standard for Title IX claim by student disciplined for sexual harassment); *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018) (same); *Doe v. Mia. Univ.*, 882 F.3d 579 (6th Cir. 2018) (same).

then, accused harassers' extraordinary Title IX rights came at direct cost to victims' rights.

Finally, putting aside the likely success of these arguments, civil right advocates should not want the courts to extend their erroneous view of agency action beyond the aberrant respondent suits. For reasons discussed in more detail below, there is reason to be gravely worried about courts viewing civil rights enforcement as evidence of discrimination — even if, once in a while, it might help a marginalized plaintiff.²⁴⁷

V. DANGEROUS INCENTIVES

As explained above, the view of civil rights enforcement at the heart of the Title IX reverse discrimination suits will more readily inure to the benefit of plaintiffs from dominant groups, who will have an easier time pleading discrimination than members of marginalized groups.²⁴⁸ That inequality in litigation standards could create terrible incentives for regulated entities.

Imagine a school in the Third Circuit in the years after the Obama Administration's Department of Education and Department of Justice released policy guidance raising the alarm about racially disparate discipline.²⁴⁹ If the *University of the Sciences* rule is dependent on external pressure, suspended Black students at that school will not benefit from its generous standard when trying to make out race discrimination claims. But *white* students may be able to do so, perhaps claiming they were punished in order to balance out the district's discipline statistics. As a result, a school will be more likely to land in costly discovery if it disciplines a white student than if it disciplines a Black student. Such incentives may exacerbate the very disparities the policy guidance sought to ameliorate: A rational administrator thinking

²⁴⁷ See *infra* Part V.

²⁴⁸ See *supra* Part IV.

²⁴⁹ U.S. DEP'T OF EDUC., GUIDING PRINCIPLES: A RESOURCE GUIDE FOR IMPROVING SCHOOL CLIMATE AND DISCIPLINE (2014), <https://www2.ed.gov/policy/gen/guid/school-discipline/guiding-principles.pdf> [<https://perma.cc/SQF8-FAYM>]; Letter from Catherine E. Lhamon, Assistant Sec'y, Off. for C.R., U.S. Dep't of Educ., & Jocelyn Samuels, Acting Assistant Att'y Gen., C.R. Div., U.S. Dep't of Just., to Colleague (Jan. 8, 2014), www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.pdf [<https://perma.cc/S5M9-CJGY>]. The Trump administration rescinded both guidance documents. Francisco Vara-Orta, *It's Official: DeVos Has Axed Obama Discipline Guidelines Meant to Reduce Suspensions of Students of Color*, CHALKBEAT, <https://www.chalkbeat.org/2018/12/21/21106428/it-s-official-devos-has-axed-obama-discipline-guidelines-meant-to-reduce-suspensions-of-students-of-color/> (last updated Dec. 21, 2018, 3:57 PM EST) [<https://perma.cc/W4S9-C45Q>].

about litigation burdens may be more hesitant to discipline a white student than a Black student.

These bad incentives risk emerging — and have perhaps already emerged — in the Title IX context as well. Consider again the Third Circuit. *Post-Doe v. University of the Sciences*, any male student disciplined for sexual assault in the years following the Dear Colleague Letter could survive a motion to dismiss if any female classmate has ever been accused of a disciplinary offense but not sanctioned — which, surely, will be true at any school.²⁵⁰ If external pressure is not necessary, a similar comparator analysis should be available to a victim whose claim was deemed not credible, so long as the school has ever found credible a complaint made by a person of a different gender. If external pressure is necessary, though, the complainant will need to rely on a deliberate indifference theory. So long as a school goes through the motions of an investigation, it will be difficult for a victim to prevail. A school might decide, then, to find against complainants in every case, regardless of the evidence, to reduce the likelihood of costly litigation.²⁵¹ It is worth noting, too, that because *USciences* did not base its finding of plausible sex discrimination on any procedural irregularities, a school could not avoid this double-bind simply by implementing sensible disciplinary procedures. The opinion protects respondents insofar as it encourages impunity, not by encouraging fair adjudications.²⁵²

²⁵⁰ See *supra* pp. 20-21 (describing comparator analysis in *Doe v. Univ. of the Scis.*, 961 F.3d 203 (3d Cir. 2020)).

²⁵¹ At the moment, schools have little reason to fear an ED investigation into their treatment of a victim, which, under the DeVos rules, proceed under roughly the same standards as private litigation. If ED returns to its previous, more generous standards, a school might be more likely to face an investigation for wrongly dismissing a victim's complaint. Those, however, will likely be less costly than litigation. The Education Department will occasionally award minimal costs for out-of-pocket expenses, like tuition lost as a result of a school's mistreatment of a victim, but not compensatory damages akin to private litigation. JARED P. COLE & CHRISTINE J. BACK, CONG. RSCH. SERV., R45685, TITLE IX AND SEXUAL HARASSMENT: PRIVATE RIGHTS OF ACTION, ADMINISTRATIVE ENFORCEMENT, AND PROPOSED REGULATIONS 5 n.37 (2019), <https://fas.org/sgp/crs/misc/R45685.pdf> [<https://perma.cc/5WQ5-UTX2>]. And attorneys' fees are available in Title IX suits, meaning a defendant-school may face a significant bill even where damages are low or even nominal. See, e.g., *Mercer v. Duke Univ.*, 401 F.3d 199, 212 (4th Cir. 2005).

²⁵² The same problem emerges with other opinions that rely on the overrepresentation of men among students accused of sexual harassment; there's no reason to think fair procedures will result in a more gender-balanced pool of respondents. See *supra* Part II.A.

The irony is obvious: Government efforts to stop discrimination will be used to protect dominant groups — in some cases, the exact groups responsible for the discrimination the agencies sought to stop. Civil rights agencies, then, may hesitate to issue policy guidance or conduct investigations out of fear that their actions will ultimately hurt those they mean to protect. It is not outlandish to think that some student victims of sexual harassment might have been better off if ED had never issued the Dear Colleague Letter or investigated their schools — not because those enforcement actions were themselves counter-productive, but because they laid the groundwork for case law that makes it near-impossible for schools in certain circuits to find an alleged harasser responsible without, at least, landing in discovery. And so, it is not unreasonable to fear that a federal agency may hesitate to act again.

Civil rights activists, too, may find themselves in a bind. The authors of this piece were part of a student movement that called on ED to enforce Title IX more meaningfully and apply what one might call “external pressure” on schools to stop mistreating victims. Our success served, in ways we could not possibly have imagined, to shield men accused of sexual harassment from consequences.²⁵³ If the logic of these recent reverse discrimination suits spreads, the decision to pressure civil rights agencies to do their job will become more fraught. Activists have always had to contend with backlash.²⁵⁴ But backlash may now be encoded into the law. And so, organizers may decline to call on the power of civil rights agencies. They may be right to do so.

That would be a real shame. Agency enforcement of civil rights law can be an invaluable tool to protect discrimination victims and correct social injustices. Policy guidance can provide technical assistance to regulated parties, highlight long-ignored social ills, and shape social norms.²⁵⁵ It can jump-start democratic deliberations about new frontiers in the application of old civil rights laws.²⁵⁶ Administrative

²⁵³ See *supra* Part III (discussing court’s use of Education Department enforcement efforts as evidence of anti-male bias).

²⁵⁴ See, e.g., Carlos A. Ball, *The Backlash Thesis and Same-Sex Marriage: Learning from Brown v. Board of Education and Its Aftermath*, 14 WM. & MARY BILL RTS. J. 1493, 1495 (2006); Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 373-74, 388-89 (2007). See generally SUSAN FALUDI, *BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN* (1991) (chronicling anti-feminist backlash in the late twentieth century).

²⁵⁵ See Blake Emerson, *The Claims of Official Reason: Administrative Guidance on Social Inclusion*, 128 YALE L.J. 2122, 2157-63 (2019).

²⁵⁶ See Samuel R. Bagentos, *This Is What Democracy Looks Like: Title IX and the Legitimacy of the Administrative State*, 118 MICH. L. REV. 1053, 1056 (2020); see also *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 350 (7th Cir. 2017) (en banc)

investigations can spur injunctive relief without the legal, economic, and emotional burdens litigation places on plaintiffs.²⁵⁷ And often agencies have legal tools at their disposal unavailable to private litigants. Federal agencies, for example, can enforce Title VI's disparate impact regulations, for which there is no private right of action.²⁵⁸ The EEOC can bring systemic cases without certifying a class under Rule 23.²⁵⁹ One can only hope there is a future for such action in which combatting discrimination does not ultimately inure to the benefit of discriminators.

Given its dangers, anti-discrimination advocates may rightfully wish to cabin the Title IX respondent case law's view of civil rights enforcement to those cases, rather than try to use it for their own purposes. Marginalized plaintiffs might, reasonably, decline to press similar theories even in the unusual circumstances in which they might be able to do so — for example, in the wake of an investigation into a university for discriminating against white applicants, or in the years after the DeVos regulations. The risks of further legitimizing a theory of anti-discrimination enforcement as discrimination, and expanding its reach to other statutes and other contexts, may simply not be worth the slim chance of reward.

VI. STRATEGIES FOR MARGINALIZED PLAINTIFFS

Traditional anti-discrimination plaintiffs will be wise to anticipate that defendants may distinguish their cases from respondent suits because they are unable to point to agency action. And these plaintiffs might seek to present a counterargument that complicates, rather than endorses, the logic of the respondent opinions. One option: marginalized plaintiffs might argue, credibly, that external pressure might be necessary for reverse discrimination claims, but not for theirs. In the context of Title VII litigation, some courts — including the Sixth and Seventh Circuits, whose respondent opinions have been particularly influential — have required an additional showing from

(citing EEOC position on Title VII's application to discrimination based on sexual orientation as support for adoption of same position).

²⁵⁷ See, e.g., *Taking Legal Action Under Title IX*, KNOW YOUR IX, <https://www.knowyourix.org/legal-action/taking-legal-action-title-ix/> (last visited Aug. 26, 2020) [<https://perma.cc/W9JY-ZM2Z>] (describing reasons that student survivors might prefer to file administrative complaints rather than lawsuits).

²⁵⁸ See *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001).

²⁵⁹ See *Gen. Tel. Co. of the Nw. v. Equal Emp. Opportunity Comm'n*, 446 U.S. 318, 333 (1980).

plaintiffs alleging discrimination on the basis of their membership in a dominant group.²⁶⁰

In one oft-cited case, the D.C. Circuit explained that it “allowed majority plaintiffs to rely on the *McDonnell Douglas* criteria²⁶¹ to prove a prima facie case of intentionally disparate treatment when *background circumstances* support the suspicion that the defendant is that unusual employer who discriminates against the majority.”²⁶² As Judge Mikva explained:

The original McDonnell Douglas standard required the plaintiff to show “that he belongs to a racial minority.” Membership in a socially disfavored group was the assumption on which the entire McDonnell Douglas analysis was predicated, for only in that context can it be stated as a general rule that the “light of common experience” would lead a factfinder to infer discriminatory motive from the unexplained hiring of an outsider rather than a group member. Whites are also a

²⁶⁰ See, e.g., *Mastro v. Potomac Elec. Power Co.*, 447 F.3d 843, 851 (D.C. Cir. 2006) (collecting cases); *Mills v. Health Care Serv. Corp.*, 171 F.3d 450, 457 (7th Cir. 1999) (requiring additional showing from plaintiffs alleging discrimination on the basis of their membership in a dominant group); *Duffy v. Wolle*, 123 F.3d 1026, 1036-37 (8th Cir. 1997) (same); *Reynolds v. Sch. Dist. No. 1*, 69 F.3d 1523, 1534 (10th Cir. 1995) (same); *Murray v. Thistledown Racing Club, Inc.*, 770 F.2d 63, 67 (6th Cir. 1985) (same). *But see* *Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321, 1325 n.15 (11th Cir. 2011) (noting Eleventh Circuit’s rejection of “background circumstances” requirement for “majority-member plaintiffs”); *Iadimarco v. Runyon*, 190 F.3d 151, 160 (3d Cir. 1999) (rejecting “background circumstances” analysis). See generally Peter Gene Baroni, Note, *Background Circumstances: An Elevated Standard of Necessity in Reverse Discrimination Claims Under Title VII*, 39 *How. L.J.* 797 (1996) (describing courts’ approach to increased burden for reverse discrimination suits).

²⁶¹ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). *McDonnell Douglas*, an employment discrimination case, explained that the plaintiff could establish a prima facie case of discrimination “by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant’s qualifications.” *Id.* This framework has been extended to other discrimination causes of action. See, e.g., *Hiatt v. Colo. Seminary*, 858 F.3d 1307, 1315 n.8 (10th Cir. 2017) (employing *McDonnell Douglas* burden-shifting framework in Title IX case); *Kazar v. Slippery Rock Univ. of Pa.*, 679 F. App’x 156, 163 (3d Cir. 2017) (same); *Janczak v. Tulsa Winch, Inc.*, 621 F. App’x 528, 534-35 (10th Cir. 2015) (housing); *Ivan v. Kent State Univ.*, 92 F.3d 1185, 1996 WL 422496, at *2 (6th Cir. 1996) (same); *Doe v. Ohio State Univ.*, 239 F. Supp. 3d 1048, 1066 (S.D. Ohio 2017) (same); *Haley v. Va. Commonwealth Univ.*, 948 F. Supp. 573, 579 (E.D. Va. 1996) (same).

²⁶² *Parker v. Balt. & Ohio R.R. Co.*, 652 F.2d 1012, 1017 (D.C. Cir. 1981) (emphasis added).

protected group under Title VII, but it defies common sense to suggest that the promotion of a black employee justifies an inference of prejudice against white co-workers in our present society.²⁶³

The opinions on respondents' reverse discrimination claims do not cite these "background circumstances" cases. They do not acknowledge that a school that discriminates against men would be "unusual." And, as explained at length above, courts appear to use "external pressures" to lower the bar for respondent-plaintiffs, not to justify treating them the same as marginalized plaintiffs.²⁶⁴

Still, the earlier Title VII case law shares some similarities with courts' explanations for the role of "external pressures" in respondents' reverse discrimination suits: that they provide "a story about why [a university] might have been motivated to discriminate against males accused of sexual assault."²⁶⁵ The gender-neutrality of the "external pressures," of course, makes that story unconvincing. But courts will have to figure out how to square these anomalous cases with the larger body of anti-discrimination law, and plaintiffs would be wise to provide explanations that spread the benefit of the respondents' reverse discrimination suits rather than cabining them. One way to do so would be to urge courts to see "external pressure" from ED as a "background circumstance" necessary precisely because the plaintiffs are members of dominant groups. That would mean victims of "traditional" discrimination would not have to make such a showing to benefit from courts' readiness to see bias in respondents' allegations.

If that tack does not work, plaintiffs of marginalized identities should point to "external pressure" far more sinister and pervasive than any government investigation: systemic bias.²⁶⁶ A civil rights-minded court may determine, for example, that centuries of anti-Black racism provide sufficient "background indicia" of racism to render some facially neutral policies or procedures sufficient to state a claim of race discrimination. Imagine, for example, a Black student who files suit after he is suspended from school. He can point to racism throughout his city and school's history. He has statistics demonstrating most of the students his school punishes are Black. Previously, that likely would have been

²⁶³ *Id.*

²⁶⁴ *See supra* Part III.

²⁶⁵ *Doe v. Purdue Univ.*, 928 F.3d 652, 668 (7th Cir. 2019).

²⁶⁶ *But see City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490 (1989).

insufficient, for reasons explained earlier.²⁶⁷ But a court might conclude that, by the logic of the recent reverse discrimination cases, any alleged procedural errors may be the result of race discrimination because of the “background” of racism. He survives the motion to dismiss.

Such a result will require courts to recognize the very existence of systemic discrimination. And if the obstacles to traditional anti-discrimination suits demonstrate anything, it is that many judges are unwilling to do so.²⁶⁸ In fact, in one recent case, a judge on the Southern District of New York rejected a gay male plaintiffs’ argument that he was disciplined for sexual harassment because of his sexual orientation.²⁶⁹ The plaintiff argued that procedural irregularities in a disciplinary investigation supported “an inference of bias” when viewed against the backdrop of invidious stereotypes falsely linking gay men to pedophilia.²⁷⁰ The court dismissed the claim, asserting that longstanding American prejudices about gay men are not akin to the “external pressure” respondents cited in other, more successful sex discrimination suits.²⁷¹ While a single district court decision does not foreclose this line of arguments for future plaintiffs, this opinion suggests that courts may not extend the benefits of Title IX reverse discrimination cases to plaintiffs from marginalized groups. Instead, these reverse discrimination cases risk creating a tale of two Title IXs: one where the plaintiffs most likely to suffer sex discrimination face more hurdles to redress in the federal courts than the plaintiffs alleged to have committed it.

CONCLUSION

Without a doubt, students who are treated unfairly in school discipline — regardless of the type of misconduct at issue — should have legal recourse. But not all alleged unfairness is alleged sex discrimination. And the case law that has developed from Title IX suits filed by students accused of sexual harassment threatens to set up an alarming regime: Anti-discrimination law will primarily serve members of dominant groups accused of discrimination, rather than members of

²⁶⁷ See *supra* Part II.C (describing use of statistical evidence and evidence without clear “nexus” in anti-discrimination suits).

²⁶⁸ See *supra* Part II (describing common reasons anti-discrimination lawsuits are unsuccessful).

²⁶⁹ See *Bergesen v. Manhattanville Coll.*, No. 20-CV-3689 (KMK), 2021 WL 3115170, at *3, *6 (S.D.N.Y. July 20, 2021).

²⁷⁰ *Id.* at *6-7.

²⁷¹ *Id.*

historically oppressed groups usually subject to that discrimination. There is still opportunity, though, for courts to avoid such a gravely erroneous outcome. Perhaps, a decade from now, advocates and scholars will look back on this reverse discrimination case law as a turning point in anti-discrimination jurisprudence, a moment when judges tossed aside usual obstacles for plaintiffs. That would be a welcome development, whatever the origins of the courts' change of heart.