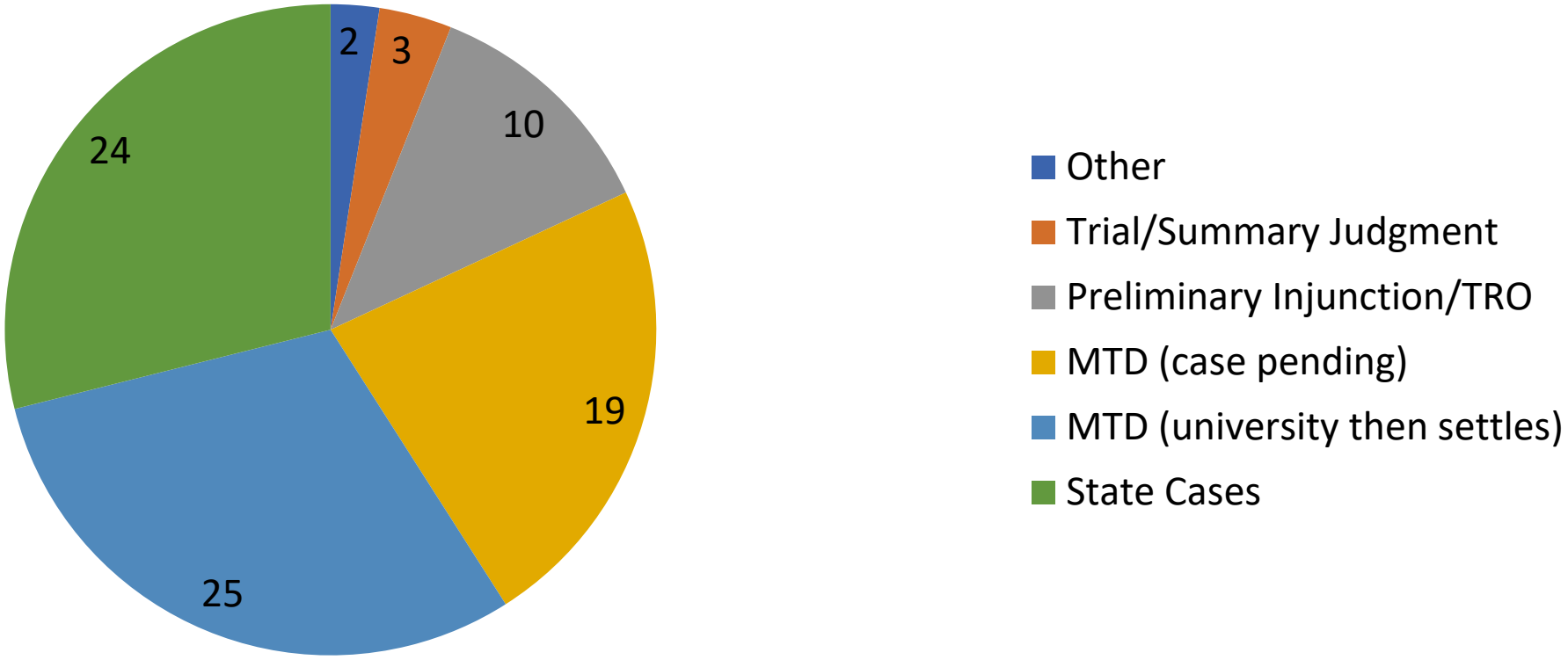
TITLE IX LITIGATION OVERVIEW



-KC Johnson, 4th Annual Symposium on Representing Students Accused of Sexual Assault (March 23, 2018)

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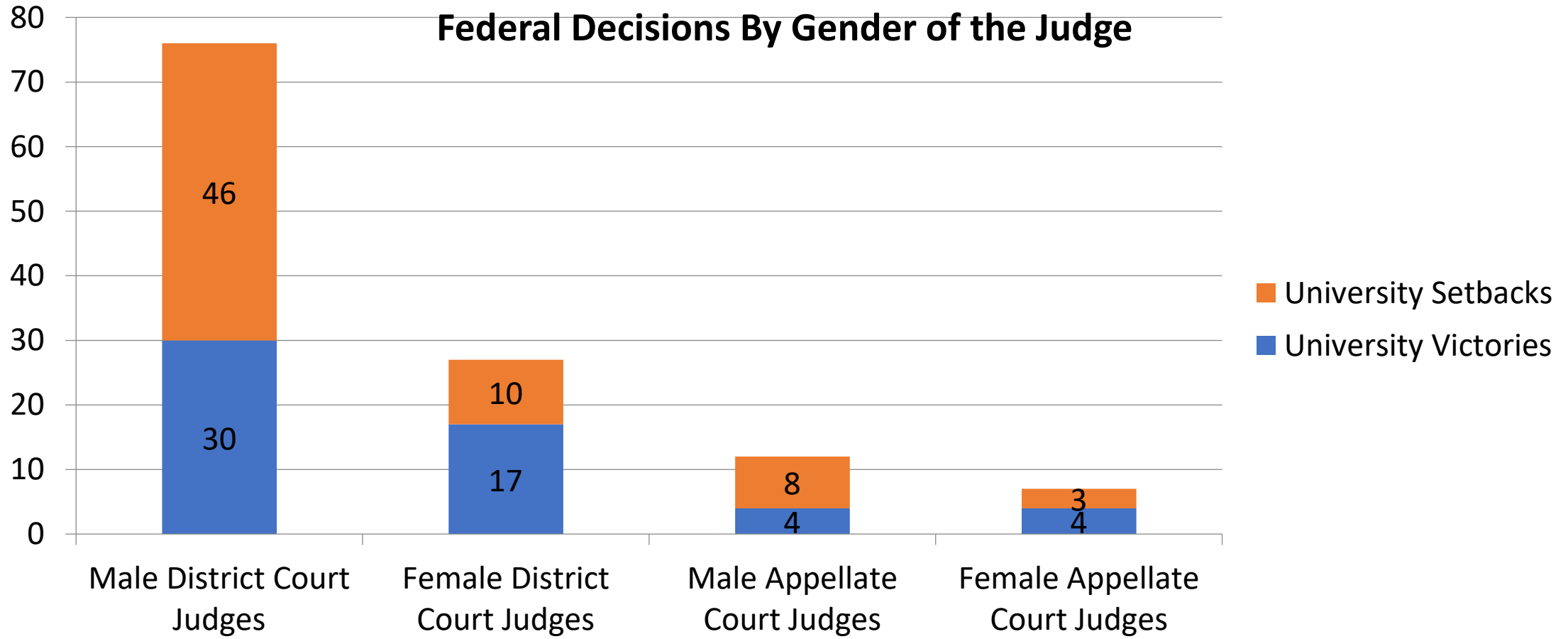

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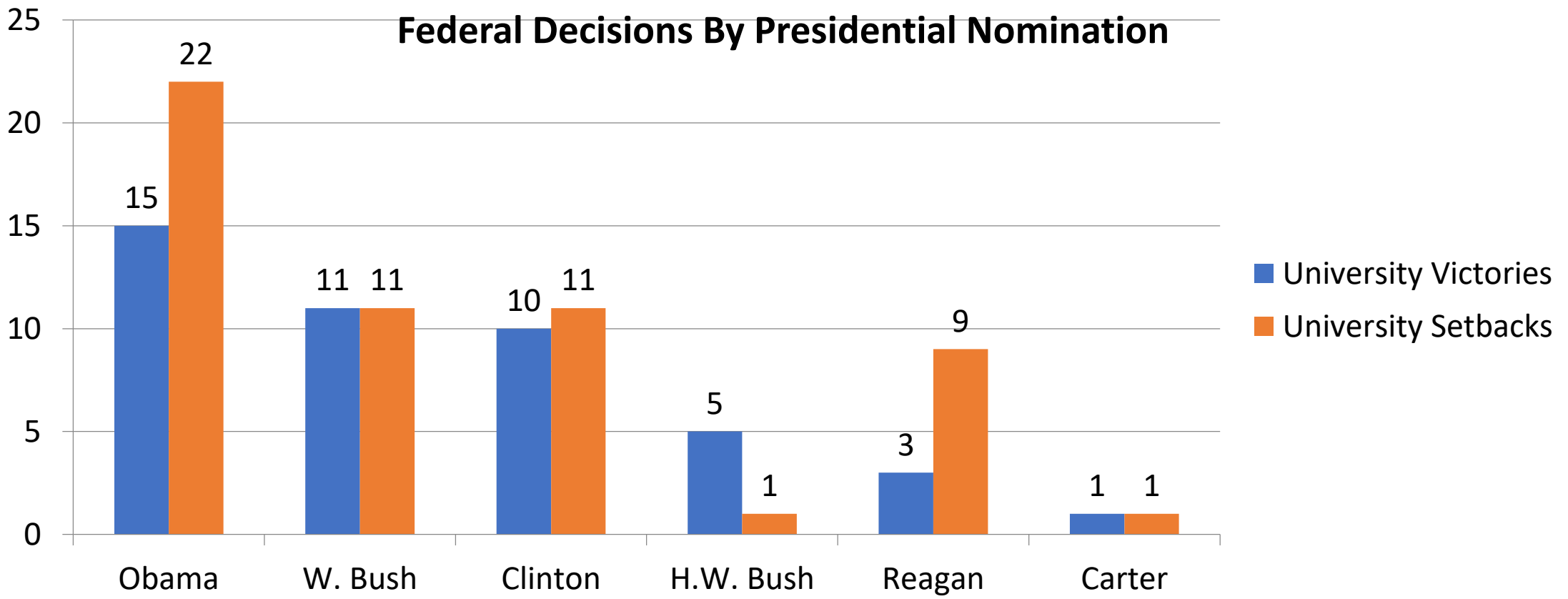

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Doe v Brandeis, 177 F. Supp. 3d 561

Doe v. Brandeis

In recent years, universities . . . have adopted procedural and substantive policies intended to make it easier for victims of sexual assault to make and prove their claims and for the schools to adopt punitive measures in response. That process has been substantially spurred by the Office for Civil Rights of the Department of Education…. demanding that universities do so or face a loss of federal funding…. **The goal of reducing sexual assault, and providing appropriate discipline for offenders, is certainly laudable. Whether the elimination of basic procedural protections—and the substantially increased risk that innocent students will be punished—is a fair price to achieve that goal is another question altogether.**

- 177 F. Supp 3d 561, 572 (D. Mass. 2016)

Doe v. Brandeis

Like Harvard, ***Brandeis*** appears to have substantially impaired, if not eliminated, an accused student's right to a fair and impartial process. And it is not enough simply to say that such changes are appropriate because victims of sexual assault have not always achieved justice in the past. Whether someone is a "victim" is a conclusion to be reached at the end of a fair process, not an assumption to be made at the beginning. **Each case must be decided on its own merits, according to its own facts. If a college student is to be marked for life as a sexual predator, it is reasonable to require that he be provided a fair opportunity to defend himself and an impartial arbiter to make that decision.**

-177 F. Supp 3d 561, 573 (D. Mass. 2016)

PLEADING STANDARDS

Doe v. Columbia

831 F.3d 46, 48 (2d Cir. 2015)

"We conclude that the Complainant meets the low standard…of alleging facts giving rise to a **plausible minimal inference of bias** sufficient to survive a motion to dismiss, which we hold applies in Title IX cases."

Doe v. Miami University

882 F.3d 579, 588-89 (6th Cir. 2017)

"Whatever the merits of the Second Circuit's decision in Columbia University, to the extent that decision reduces the pleading standard…it is contrary to our binding precedent."

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face….A claim has facial plausibility when the plaintiff pleads **factual content that allows the court to draw the reasonable inference that the defendant is liable**…"

PLEADING STANDARDS

Doe v. Miami University
882 F.3d 579, 592 (6th Cir. 2017)

"To plead an erroneous-outcome claim [under Title IX], a plaintiff must allege (1) facts sufficient to cast some articulable doubt on the accuracy of the outcome of the disciplinary proceeding and (2) a particularized causal connection between the flawed outcome and gender bias."

Conrad O'Brien

RECENT UNIVERSITY SETBACKS

- *Doe v Marymount Univ.*, 2018 WL 1352158 (Mar 14, 2018)
- *Doe v Miami Univeristy*, 2018 WL 797451 (Feb 9, 2018).
- *Gischel v University of Cincinnati*, No. 17-cv-475 (Jan 23, 2018).
- *Doe v. Univ. of Cincinnati*, No. 16-4693 (Sept 25, 2017).
- *Doe v The Trustees of the Univ. of Pennsylvania*, No. 16-cv-5088 (Sept 13, 2017).
- *Doe v University of Notre Dame*, No. 3:17-cv-298 (May 8, 2017).

UNIVERSITY SETBACKS

Doe v. Marymount University
2018 WL 1352158 (E.D. Va. 2018)

"Specifically, [a University official is quoted] as saying:

> I think the statistics also show that most people who complain about sexual assault are telling the truth. And so if most people who complain about sexual assault on campus are telling the truth and if these cases aren't being handled or aren't being handled appropriately through the criminal system or aren't being taken to conviction through the criminal system then what is happening to these people who are complaining about sexual assault on campus.

Doe also alleges that Marymount's sexual assault policy was influenced by the Dear Colleague Letter and other political forces and that the University's procedures were designed to convict male students of sexual assault, whether they were guilty or not. Specifically, Doe alleges that Marymount's Deputy Title IX Coordinator admitted to Doe's parents during a face-to-face meeting that 'the Title IX process is increasingly politicized, especially in Virginia.' This statement by a senior university official appears to be an implicit acknowledgment that Marymount's sexual assault policies and Title IX procedures were influenced, at least in part, by political pressure to convict respondents in sexual assault cases—respondents who are almost invariably male.

Whether any one of Doe's additional allegations of gender bias, standing alone, would satisfy Doe's pleading burden is irrelevant here as Doe's allegation that his adjudicator demonstrated gender bias in a later case is sufficient to defeat Marymount's motion to dismiss. Moreover, viewing all of Doe's allegations collectively, he has clearly nudged his Title IX claim over the Rule 12(b)(6) bar. Therefore, the University's motion to dismiss Doe's Title IX erroneous outcome claim must be denied.

UNIVERSITY SETBACKS

Doe v. Miami University
882 F.3d 579, 600 (6th Cir. 2017)

"The private interest at stake in this case is substantial. A finding of responsibility for a sexual offense can have a lasting impact on a student's personal life, in addition to his educational and employment opportunities, especially when the disciplinary action involves a long-term suspension. Thus, the effect of a finding of responsibility for sexual misconduct on a person's good name, reputation, honor, or integrity is profound.

When a student faces the possibility of suspension, we have held that the minimum process a university must provide is notice of the charges, an explanation of the evidence against the student, and an opportunity to present his side of the story before an unbiased decision maker. In some circumstances [such as] where factual issues are disputed [and the student is not permitted to attend the adjudication proceeding], notice might also be required to include the names of witnesses and a list of other evidence the school intends to present. Furthermore, if the credibility of an alleged victim is at issue, the university must provide a way for the adjudicative body to evaluate the victim's credibility and to assess the demeanor of both the accused and his accuser. But the protections afforded to an accused, even in the face of a sexual-assault accusation, need not reach the same level that would be present in a criminal prosecution." (internal citations omitted)

UNIVERSITY SETBACKS

Gischel v. University of Cincinnati
2018 WL 705886 (S.D. Ohio 2018)

"However, Gischel has made two allegations that give rise to a plausible inference of gender bias in the circumstances of this case. First, Gischel has pleaded that UC faced pressure not only from the OCR's Dear Colleague Letter, but by the fact the OCR opened a Title IX investigation into whether UC 'discriminated against students based on sex'….Second, Gischel has alleged facts suggesting gender bias on the part of at least [the Investigator] who actively participated in the investigation and had the ability to influence the case presented against Gischel at the disciplinary proceeding.

The existence of the pending OCR investigation of UC for Title IX violations, and the potential gender-based animus [the Investigator] had against Gischel, another male, arising from his alleged romantic interest in [the Victim], a female, are sufficient at the dismissal stage to support a Title IX claim. The Court will not dismiss the Title IX erroneous outcome claim against UC.