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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Unknown Party,
Plaintiff,
v.
Arizona Board of Regents, et al.,
Defendants.

No. CV-18-01623-PHX-DWL
ORDER

Pending before the Court are a pair of related motions filed by Defendant Arizona Board of Regents (“ABOR”): (1) a motion to exclude the opinions and testimony of Dr. Lance Kaufman (Doc. 159); and (2) a motion for reconsideration of the Court’s August 30, 2022 summary judgment ruling (Doc. 227). For the following reasons, both motions are denied.

RELEVANT BACKGROUND

The parties are familiar with the background details of this case, so only a brief recap is necessary here.

In April 2016, Plaintiff John Doe, then a student-athlete at Arizona State University (“ASU”), and another man had a three-way sexual encounter with ASU student Jane Roe at an off-campus party. Roe immediately reported the incident to the police, who declined to pursue criminal charges against Doe after reviewing videotape footage of the incident (which the other male participant had surreptitiously created). Several months later, Roe reported the incident to ASU, claiming she had been too intoxicated to consent. Doe was

1 suspended by ASU and, after an investigation, expelled for violating various provisions of
2 the ASU Student Code of Conduct, including provisions related to sexual misconduct.

3 In this action, Doe initially asserted an array of claims against an array of
4 defendants, but his sole remaining claim is a Title IX claim against ABOR. Additionally,
5 as this case was proceeding, Doe prevailed in a separate state-court action in which he
6 sought review of ASU's expulsion decision. There, the Arizona Court of Appeals held that
7 the sexual misconduct findings against Doe were "not supported by substantial evidence"
8 and thus vacated the expulsion order. *Doe v. Ariz. Bd. of Regents*, 2019 WL 7174525, *9
9 (Ariz. Ct. App. 2019).

10 Following the close of discovery, ABOR filed a motion for summary judgment on
11 Doe's Title IX claim (Doc. 155) and both sides filed motions to exclude or limit expert
12 testimony, including ABOR's pending motion regarding Dr. Kaufman (Docs. 158, 159,
13 161, 164, 165).

14 The Court first addressed ABOR's summary judgment motion, concluding in an
15 August 30, 2022 order that summary judgment should be denied because "Doe's proffered
16 evidence could lead a reasonable juror not only to conclude that his disciplinary proceeding
17 was marred by an array of procedural irregularities, but also that ASU's disciplinary
18 process generates statistical anomalies that raise an inference of gender bias." (Doc. 209
19 at 60.) Although this conclusion was premised on a finding that "Dr. Kaufman's statistical
20 evidence is relevant and creates a genuine issue of material fact about whether ASU's Title
21 IX disciplinary process was infected by gender bias," the Court acknowledged that ABOR
22 had raised various challenges to the admissibility of Dr. Kaufman's statistical evidence in
23 one of its pending exclusion motions. (*Id.* at 52-54.) Accordingly, during oral argument,
24 the Court clarified that "I plan to address the *Daubert* motions in the near future. And if
25 for whatever reason I were to exclude Kaufman's opinions, at that point [ABOR] could
26 come back and seek reconsideration of the summary judgment [ruling]." (Doc. 228 at 47.)

27 On August 30, 2022, the Court also issued a tentative ruling addressing the parties'
28 motions to exclude expert testimony. (Doc. 210.) It included a section addressing ABOR's

1 motion to exclude Dr. Kaufman. (*Id.* at 15-25.) However, before oral argument, ABOR
2 filed the pending motion for reconsideration of the August 30, 2022 summary judgment
3 order. (Doc. 227.) As discussed in more detail below, the reconsideration motion includes
4 various arguments regarding the admissibility and evidentiary value of Dr. Kaufman’s
5 statistical evidence. (*Id.* at 2-10.) Accordingly, in the final version of the order addressing
6 the parties’ motions to exclude expert testimony, which was issued on September 27, 2022,
7 the Court explained that it would “defer ruling on the motion to exclude Dr. Kaufman until
8 it reviews Doe’s response to the motion for reconsideration . . . [which] will also serve as
9 a supplemental brief regarding the motion to exclude Dr. Kaufman.” (Doc. 223 at 1 n.1.)

10 On October 13, 2022, Doe filed his response/supplemental brief. (Doc. 241.)

11 On October 25, 2022, ABOR filed a reply. (Doc. 247.)¹

12 DISCUSSION

13 I. ABOR’s Motion To Exclude Dr. Kaufman (Doc. 159)

14 A. **Legal Standard**

15 “The party offering expert testimony has the burden of establishing its
16 admissibility.” *Bldg. Indus. Ass’n of Wash. v. Wash. State Bldg. Code Council*, 683 F.3d
17 1144, 1154 (9th Cir. 2012). Rule 702 of the Federal Rules of Evidence governs the
18 admissibility of expert testimony. It provides:

19 A witness who is qualified as an expert by knowledge, skill, experience,
20 training, or education may testify in the form of an opinion or otherwise if:

- 21 (a) the expert’s scientific, technical, or other specialized
22 knowledge will help the trier of fact to understand the evidence
23 or to determine a fact in issue;
- 24 (b) the testimony is based on sufficient facts or data;
- 25 (c) the testimony is the product of reliable principles and methods;
26 and
- 27 (d) the expert has reliably applied the principles and methods to
28 the facts of the case.

¹ ABOR’s request for oral argument on its motion for reconsideration is denied because the issues are fully briefed and have been addressed in extensive detail in earlier orders and oral arguments. *See* LRCiv 7.2(f).

1 As for the threshold requirement that an expert witness be qualified “by knowledge,
2 skill, experience, training, or education,” “Rule 702 contemplates a broad conception of
3 expert qualifications.” *Hangarter v. Provident Life & Acc. Ins. Co.*, 373 F.3d 998, 1015
4 (9th Cir. 2004) (internal quotation marks and emphasis omitted). Years of relevant
5 experience can establish the necessary “minimal foundation.” *Id.* at 1015-16. “Disputes
6 as to the strength of [an expert’s] credentials . . . go to the weight, not the admissibility, of
7 his testimony.” *Kennedy v. Collagen Corp.*, 161 F.3d 1226, 1231 (9th Cir. 1998) (first
8 alteration in original) (internal quotation marks omitted).

9 A district court’s decision to admit or exclude expert testimony is guided by a two-
10 part test that focuses on the opinion’s relevance and reliability. *Daubert v. Merrell Dow*
11 *Pharm., Inc.*, 509 U.S. 579, 589 (1993). “The inquiry envisioned by Rule 702 is . . . a
12 flexible one.” *Id.* at 594. “The focus, of course, must be solely on principles and
13 methodology, not on the conclusions that they generate.” *Id.* at 595.

14 Evidence is relevant if it has “any tendency to make the existence of any fact that is
15 of consequence to the determination of the action more probable or less probable than it
16 would be without the evidence.” *Id.* at 587 (quoting Fed. R. Evid. 401). “The Rule’s basic
17 standard of relevance thus is a liberal one.” *Id.*

18 The basic standard of reliability is similarly broad. “Shaky but admissible evidence
19 is to be attacked by cross examination, contrary evidence, and attention to the burden of
20 proof, not exclusion.” *Primiano v. Cook*, 598 F.3d 558, 564 (9th Cir. 2010). “Basically,
21 the judge is supposed to screen the jury from unreliable nonsense opinions, but not exclude
22 opinions merely because they are impeachable.” *Alaska Rent-A-Car, Inc. v. Avis Budget*
23 *Grp., Inc.*, 738 F.3d 960, 969 (9th Cir. 2013). *See also* Fed. R. Evid. 702, advisory
24 committee’s note to 2000 amendment (“[P]roponents do not have to demonstrate to the
25 judge by a preponderance of the evidence that the assessments of their experts are correct,
26 they only have to demonstrate by a preponderance of evidence that their opinions are
27 reliable. . . . The evidentiary requirement of reliability is lower than the merits standard of
28 correctness.”) (alteration in original) (internal quotation marks omitted).

1 Nevertheless, courts serve an important “gatekeeper” role when it comes to
2 screening expert testimony. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 142 (1997). “Unlike
3 an ordinary witness, an expert is permitted wide latitude to offer opinions, including those
4 that are not based on firsthand knowledge or observation.” *Daubert*, 509 U.S. at 592
5 (citation omitted). “Presumably, this relaxation of the usual requirement of firsthand
6 knowledge . . . is premised on an assumption that the expert’s opinion will have a reliable
7 basis in the knowledge and experience of his discipline.” *Id.* This “general ‘gatekeeping’
8 obligation . . . applies not only to testimony based on ‘scientific’ knowledge, but also to
9 testimony based on ‘technical’ and ‘other specialized’ knowledge.” *Kumho Tire Co., Ltd.*
10 *v. Carmichael*, 526 U.S. 137, 141 (1999).

11 The Court has “broad discretion,” both in deciding whether the evidence is reliable
12 and in deciding how to test for reliability. *United States v. Hankey*, 203 F.3d 1160, 1168
13 (9th Cir. 2000). In *Daubert*, the Supreme Court listed various factors that might apply,
14 including whether the expert’s technique or theory (1) can be tested; (2) has been peer
15 reviewed or published; (3) has a known or potential basis for error; and (4) is generally
16 accepted in the pertinent scientific community. 509 U.S. at 593-94. However,
17 “[t]he *Daubert* factors were not intended to be exhaustive nor to apply in every case.”
18 *Hankey*, 203 F.3d at 1168. In particular, “[t]he *Daubert* factors . . . simply are not
19 applicable to [testimony] whose reliability depends heavily on the knowledge and
20 experience of the expert, rather than the methodology or theory behind it.” *Id.* at 1169. *See*
21 *also* Fed. R. Evid. 702, advisory committee’s note to 2000 amendment (“Some types of
22 expert testimony will be more objectively verifiable, and subject to the expectations of
23 falsifiability, peer review, and publication, than others. Some types of expert testimony
24 will not rely on anything like a scientific method, and so will have to be evaluated by
25 reference to other standard principles attendant to the particular area of expertise.”). The
26 bottom line is that “[t]he trial judge in all cases of proffered expert testimony must find that
27 it is properly grounded, well-reasoned, and not speculative before it can be admitted. The
28 expert’s testimony must be grounded in an accepted body of learning or experience in the

1 expert's field, and the expert must explain how the conclusion is so grounded." *See* Fed.
2 R. Evid. 702, advisory committee's note to 2000 amendment.

3 **B. The Kaufman Report**

4 Dr. Kaufman possesses a Ph.D. in economics, has been recognized as an "expert in
5 the field of economics," and has "over 15 years of experience performing economic
6 research and modeling." (Doc. 159-1 at 22.) Dr. Kaufman has provided expert witness
7 testimony on "forecasting, production cost modeling, and labor costs," and his hourly rates
8 range from \$350 to \$500 per hour. (*Id.* at 22.)

9 Dr. Kaufman's opinions in this case can be divided in two categories: (1) opinions
10 relating to the enforcement of ASU's student code, or "whether ASU's sanctions are gender
11 neutral"; and (2) opinions relating to Doe's alleged economic loss, or "the economic harm
12 resulting from [ABOR's] unlawful expulsion of Doe." (*Id.* at 5.)

13 1. Student Code Enforcement Disparity

14 Dr. Kaufman explained in his report that ABOR produced certain "summary
15 records," which he refers to as "SCC Charge Data," during discovery in this case that
16 contain information about ASU's history of student code enforcement concerning alcohol
17 ("F-15") and sexual misconduct ("F-23") violations. (*Id.* at 6.) Dr. Kaufman stated that
18 the information was categorized by: (1) incident ID, (2) gender of respondent, (3) incident
19 type, (4) date and time of incident, (5) date of report, (6) "SCC Charge Code," (7) Dean of
20 Students' decision, (8) sanctions, (9) whether the decision was appealed, (10) hearing
21 board's recommendation, and (11) University Vice President's decision. (*Id.* at 6-7.) For
22 F-23 violations, the SCC Charge Data also noted (1) respondent's student athlete status,
23 (2) gender of counter party, (3) charge investigator, (4) date of decision, and (5) date of
24 review of decision. (*Id.* at 7.)

25 At the outset of his report, Dr. Kaufman noted that the "SCC Charge Data provide
26 several different types of sanctions. These sanctions can be grouped and ranked in order
27 of severity. I rank warnings as the mildest sanction, expulsion and suspension as severe
28 sanctions, and all other sanctions as mild sanctions." (*Id.*) Having developed this

1 convention, Dr. Kaufman found that of 161 male F-23 respondents, 3 received no sanction,
2 79 received a mild sanction, 27 were suspended, and 52 were expelled. (*Id.*) Of 10 female
3 F-23 respondents, 1 received no sanction, 9 received a mild sanction, none received a
4 suspension, and none were expelled. (*Id.*) Dr. Kaufman concluded that “males tend to
5 receive more severe sanctions than females” and described his “statistical analysis of the
6 disparity between male and female Respondents.” (*Id.*) As a preface, Dr. Kaufman
7 explained:

8 In cases concerning the disparate impact on protected classes, outcomes for
9 the protected class are compared to the rates for other individuals to
determine if the difference is statistically significant.

10 A disparity is considered statistically significant if it would occur so rarely
11 in a nondiscriminatory situation that we can rule out that it occurred by
12 chance. . . . [T]he courts typically require a demonstration . . . that the
13 disparity is large enough that it would occur by chance less than 5 percent of
the time, or in less than one in 20 non-discriminatory events.

14 To assess the evidence of gender bias in sanctions, respondents are classified
15 by two criteria, whether they are a member of the protected class or not, and
16 whether they were severely sanctioned or not. . . . If the disparity in sanction
17 rates between two groups is not sufficiently large, or if the direction of the
disparity varies substantially across subgroups, the disparity will not be
statistically significant.

18 (*Id.* at 8.)

19 Dr. Kaufman also described the “Chi-Square Analysis,” which posits that, if males
20 are a certain proportion of all respondents, a gender-neutral process will lead to a similar
21 proportion of males actually being punished, as compared to the overall pool of students
22 punished. (*Id.* at 9.) Dr. Kaufman explained that this test “gives us a way of determining
23 what proportion is ‘high enough’ to conclude that sanctions were not gender-neutral.” (*Id.*)
24 Separately, Dr. Kaufman discussed the “Mantel Haenszel Peer-Group Analysis,” which is
25 a method of peer-group analysis that informs Dr. Kaufman’s use of respondent charges to
26 create peer groups with the same combination of charges, controlling for the type and
27 number of violations. (*Id.* at 9-10.)

28 Dr. Kaufman performed four analyses. (*Id.* at 10.) First, he compared the Dean of

1 Students' decisions for male and female respondents in cases involving F-15 and F-23
2 charges and determined that males are found in violation more often than females. (*Id.*)
3 Second, he compared the sanctions imposed against male and female F-23 respondents and
4 found that males receive severe sanctions at a higher rate than females. (*Id.*) Third, he
5 compared the severity of sanctions for F-15 only charges between males and females and
6 found that males are given more severe sanctions. (*Id.* at 10, 12.) Fourth, he compared the
7 sanctions imposed in F-23 cases involving male and female complainants and found that
8 incidents involving male complainants (unlike female complainants) never lead to severe
9 sanctions. (*Id.* at 10.)

10 Based on these analyses, Dr. Kaufman formed the following three opinions:
11 (1) male respondents are found in violation of F-15 and F-23 charges more often than
12 female respondents, at a rate that is statistically significant; (2) male F-23 respondents are
13 sanctioned with expulsion and suspension at a higher rate than female F-23 respondents, at
14 a rate that is statistically significant; and (3) F-23 charges involving male complainants
15 result in expulsion and suspension at lower rates than F-23 charges involving female
16 complainants. (*Id.* at 14.) Dr. Kaufman noted that “[w]here possible my analysis controls
17 for peer-groups by grouping respondents according to charge or combination of charges”
18 but acknowledged that “even within combination of charges there may be non-gender
19 factors that affect the severity of sanctions.” (*Id.*)

20 2. Economic Loss

21 Assuming that ABOR's “actions interrupted Doe's education and competitive
22 sports career [which] modified Doe's career trajectory and diminished his lifetime earning
23 capacity,” Dr. Kaufman estimated “the economic impact by comparing Doe's economic
24 situation in a hypothetical (‘But-for’) world absent [ABOR's] unlawful actions with Doe's
25 current expected economic situation (‘Actual’).” (*Id.* at 15.) Dr. Kaufman based his
26 calculations on some of the opinions (*e.g.*, Doe was an elite freestyle wrestler, and coaching
27 at an NCAA Division I program requires elite competitive wrestling experience) of Owen,
28 who is another of Doe's experts, and on Doe's testimony that he planned to become a

1 college wrestling coach after his competitive career. (*Id.* at 15-16.)

2 Based on those assumptions, and accounting for various other sources of income,
3 Dr. Kaufman concluded that Doe’s economic loss could range from \$631,490 in a scenario
4 in which Doe became a Division II or III coach to \$5,543,579 in a scenario in which Doe
5 became a Division I coach. (*Id.* at 20.)

6 **C. Student Code Enforcement Disparity Opinions**

7 In its motion to exclude and motion for reconsideration, ABOR raises an array of
8 arguments related to Dr. Kaufman’s student code enforcement disparity opinions. Below,
9 the Court has grouped those arguments into four broad categories.

10 It should be noted that many of the arguments related to Dr. Kaufman in ABOR’s
11 reconsideration motion seem to address both the relevance/admissibility of Dr. Kaufman’s
12 opinions and the evidentiary weight (if any) those opinions should have been afforded for
13 purposes of evaluating ABOR’s entitlement to summary judgment. Accordingly, in this
14 part of the order, the Court addresses ABOR’s arguments to the extent they are intended
15 as relevance/admissibility objections (because such objections go to whether Dr.
16 Kaufman’s opinions should be excluded, as requested in ABOR’s motion at Doc. 159). In
17 Part II of this order, the Court addresses the related but sometimes distinct question of
18 evidentiary weight (which goes to ABOR’s reconsideration request at Doc. 227).

19 1. F-23 Opinions—Failure To Consider Underlying Facts

20 a. **ABOR’s Arguments**

21 Two of Dr. Kaufman’s opinions are intended to establish the existence of gender-
22 based disparities in the sanctions imposed against ASU students found responsible for
23 violations of section F-23 (*i.e.*, “sexual misconduct”) of the Code of Student Conduct.
24 Those opinions are that (1) male F-23 respondents are sanctioned with expulsion and
25 suspension at a statistically significant higher rate than female F-23 respondents; and (2)
26 F-23 charges involving male complainants result in expulsion and suspension at lower rates
27 than F-23 charges involving female complainants. (Doc. 159-1 at 14.)

28 Most of ABOR’s challenges focus on those opinions. (Doc. 159 at 5-11; Doc. 227

1 at 2-10.) ABOR’s overarching position is that because “sexual misconduct” is defined
2 under section F-23 as encompassing a wide range of conduct,² yet Dr. Kaufman made no
3 effort to control for the specific types of sexual misconduct at issue in the cases on which
4 his F-23 statistics and opinions are based, it follows that those statistics and opinions are
5 irredeemably flawed. (*See, e.g.*, Doc. 159 at 6 [“In view of the wide range of actions that
6 fall within the definition of ‘sexual misconduct,’ a valid (reliable) comparison of sanctions
7 given to male and female students found responsible for violating F-23 of the Code cannot
8 be made without specific information as to the type of conduct at issue in each instance.”].)

9 In its motion to exclude, ABOR characterizes this flaw both as a problem of
10 reliability, because the analysis was not based on sufficient facts and data, and as a problem
11 of relevance, because only comparisons of “similarly situated” individuals are relevant in
12 a gender discrimination case. (Doc. 159 at 2-7; Doc. 196 at 1-7.) ABOR also contends
13 that it provided the necessary factual information to Doe during the discovery process, in
14 the form of a “Title IX Case Tracking Report” that “detailed the particular allegations
15 against students alleged to have violated [F-23] and other Code violations,” but Doe
16 inexplicably “failed to provide it to Dr. Kaufman for analysis.” (Doc. 159 at 7-8.)
17 Meanwhile, in its motion for reconsideration, ABOR elaborates on these arguments by
18 advancing what the Court perceives to be seven related reasons why Dr. Kaufman’s F-23
19 opinions should be considered flawed:

20 (1) Because the Ninth Circuit has recognized that statistical evidence is
21 “inherently slippery” and can be exaggerated and distorted, it was manifestly erroneous for
22 the Court to rely on Dr. Kaufman’s opinions as part of the basis for denying summary
23 judgment. (Doc. 227 at 2-3; Doc. 247 at 1.)

24 _____
25 ² Under section F-23, “sexual misconduct” is defined as follows: “a. Sexual violence
26 and other non-consensual sexual contact—actual or attempted physical sexual acts
27 perpetrated against a person by force or without consent; or b. Sexual harassment—
28 unwelcome conduct of a sexual nature that is sufficiently severe or pervasive as to create
an intimidating, hostile, or offensive environment; or c. Other unwanted or non-consensual
sexual conduct including but not limited to indecent exposure, sexual exploitation or
voyeurism, or non-consensual photographing or audio-recording or video-recording or
another in a state of full or partial undress or while engaged in sexual activity, or publishing
or disseminating such materials.” (Doc. 189-2 at 16-17.)

1 (2) Dr. Kaufman’s acknowledgement that non-gender factors may affect the
2 severity of sanctions is an “admission that renders [his] opinions unreliable and
3 inadmissible to establish intentional gender bias under binding Ninth Circuit precedent,”
4 as recognized in *Gay v. Waiters’ and Dairy Lunchmen’s Union, Local No. 30*, 694 F.2d
5 531 (9th Cir. 1982), *Aragon v. Republic Silver State Disposal, Inc.*, 292 F.3d 654 (9th Cir.
6 2002), *Rose v. Wells Fargo & Co.*, 902 F.2d 1417 (9th Cir. 1990), and *I.V. v. Wenatchee*
7 *School District No. 246*, 342 F. Supp. 3d 1083 (E.D. Wash. 2018). (Doc. 227 at 3-4; Doc.
8 247 at 2, 5.)³

9 (3) To properly exercise its “role as gatekeeper,” the Court must determine that
10 the comparators at issue in Dr. Kaufman’s statistics are “similarly situated” to Doe, as the
11 Ninth Circuit did in *Freyd v. University of Oregon*, 990 F.3d 1211 (9th Cir. 2021), and it
12 is an “abdicat[ion]” of that gatekeeping role to characterize the dispute over similarity as
13 an argument going to weight rather than admissibility. (Doc. 227 at 4-6.)

14 (4) Because Dr. Kaufman had access to the information necessary to determine
15 whether the alleged comparators were similar (*i.e.*, the Title IX Case Tracking Report) but
16 failed to utilize it, “[t]his renders his analysis unreliable and insufficient” under *Pottenger*
17 *v. Potlach Corp.*, 329 F.3d 740 (9th Cir. 2003). (Doc. 227 at 6; Doc. 247 at 2-8.)

18 (5) The Court’s determination in the summary judgment order that it was
19 reasonable for Dr. Kaufman to treat all F-23 violations as comparable because ASU itself
20 has decided that all F-23 violations are unified by a population of similarly situated
21 respondents in some material respect (Doc. 209 at 59-60) was factually incorrect, violates
22 the principle of party presentation (because Doe never made that argument), and would
23 “lead to arbitrary variations in the application and enforcement of Title IX” and
24 “incentivize universities to ensure the unnecessary expense of redrafting their codes of
25 conduct.” (Doc. 227 at 7-8.)

26 _____
27 ³ As an example of a non-gender factor that may affect the severity of sanctions,
28 ABOR points to “the ASU Procedures themselves,” which “provide that, in determining
the appropriate sanction to impose, the Dean considers ‘any mitigating or aggravating
factors, including any prior violations of the Student Code of Conduct.’” (Doc. 227 at 6-
7.)

1 (6) ABOR was not required to affirmatively demonstrate the factual dissimilarity
2 of the F-23 incidents underlying Dr. Kaufman’s statistics, and any argument to the contrary
3 would amount to impermissible burden-shifting. (Doc. 227 at 8-9.)

4 (7) A new exhibit prepared by ABOR, which is enclosed as Exhibit 3 to its
5 reconsideration motion, shows that the “great majority” of female F-23 respondents
6 discussed in Dr. Kaufman’s statistics “were alleged to have engaged in either sexual
7 harassment . . . or incident exposure” and that the one female alleged to have engaged in
8 non-consensual sexual conduct was still “not comparable to the circumstances here,” and
9 thus “[n]one of the females on which Kaufman relied are valid comparators, and
10 Kaufman’s calculation is irrelevant.” (Doc. 227 at 9-10; Doc. 247 at 8.)

11 **b. Analysis**

12 Dr. Kaufman’s opinions related to gender-based disparities in F-23 enforcement,
13 although impeachable in various respects, are sufficiently reliable and relevant to qualify
14 for admission at trial.

15 As an initial matter, and contrary to ABOR’s assertion that “Kaufman’s analysis is
16 not evidence of gender bias” (Doc. 247 at 1), the Ninth Circuit has suggested that
17 enforcement-disparity statistics such as Dr. Kaufman’s can support an inference of gender
18 bias in a Title IX case. *Schwake v. Ariz. Bd. of Regents*, 967 F.3d 940, 949 (9th Cir. 2020)
19 (plaintiff’s “allegations of a pattern of gender-based decisionmaking against male
20 respondents in sexual misconduct disciplinary proceedings” were “relevant” and bolstered
21 plausibility of Title IX claim); *Doe v. Regents of the University of California*, 23 F.4th 930,
22 938 (9th Cir. 2022) (“Doe alleges that the respondents in Title IX complaints that UCLA
23 decided to pursue from July 2016 to June 2018 were overwhelmingly male (citing specific
24 statistics for each of those years) Doe also alleges that the University ‘has never
25 suspended a female for two years based upon these same circumstances’ As we noted
26 in *Schwake*, these are precisely the type of non-conclusory, relevant factual allegations that
27 the district court may not freely ignore.”). ABOR makes much of the fact that *Schwake*
28 and *Doe* were decided at the motion-to-dismiss stage (Doc. 227 at 3; Doc. 247 at 2 n.1),

1 but it doesn't follow that they are inapplicable here. ABOR's motion to exclude questions
2 whether Dr. Kaufman's challenged opinions should be admitted under Rule 702, and one
3 of the admissibility considerations under Rule 702—which ABOR expressly disputes in its
4 motion papers—is relevance. The Court interprets *Schwake* and *Doe* as recognizing that
5 statistical evidence establishing a pattern of gender-based decisionmaking against male
6 respondents in sexual misconduct disciplinary proceedings is, in general, relevant in a Title
7 IX case such as this one. Accordingly, and without prejudging ABOR's more specific
8 arguments as to why the manner in which Dr. Kaufman conducted his statistical analysis
9 was flawed, the Court agrees with *Doe* that the challenged opinions satisfy Rule 702's
10 "basic standard of relevance," which "is a liberal one." *Daubert*, 509 U.S. at 587.

11 These considerations also foreclose ABOR's first reconsideration argument, which
12 is that courts must pay careful attention before admitting statistical evidence due to its
13 "inherently slippery nature." As noted, *Schwake* and *Doe* expressly contemplate the use
14 of statistical evidence such as Dr. Kaufman's to prove bias in a Title IX case. So does *Gay*,
15 which is one of the cases on which ABOR relies heavily in its reconsideration motion. In
16 *Gay*, the plaintiffs brought claims alleging "discrimination on the basis of race in the hiring,
17 promotion, and transfer of black male waiters and applicants by . . . several well-known
18 San Francisco hotels and restaurants." 694 F.3d at 534. Following a bench trial, the district
19 court ruled in the defendants' favor. *Id.* On appeal, the plaintiffs limited their challenge
20 to the district court's rejection of their claims under 42 U.S.C. § 1981. *Id.* at 536. As an
21 initial matter, the Ninth Circuit clarified that such claims "require proof of intentional racial
22 discrimination" and are analyzed similarly to disparate treatment claims under Title VII.
23 *Id.* at 537-38.⁴ On the merits, the court noted that that plaintiffs "were unable to produce
24 any 'smoking gun' evidence of overt discrimination" but emphasized that "[t]his failure
25 was not fatal to their case . . . since it is settled that a prima facie showing of disparate
26 treatment may be made without any direct proof of discriminatory motivation." *Id.* at 546.

27 _____
28 ⁴ As ABOR notes, Title IX claims such as *Doe*'s are analyzed like Title VII disparate
treatment claims. (Doc. 227 at 6 nn.5-6.) Thus, the analysis of the Title VII disparate
treatment claim in *Gay* is instructive here.

1 The court also emphasized “that proof of the four *McDonnell Douglas* criteria is not the
2 only way to establish a prima facie case of disparate treatment” and that, “if reliable,
3 generalized statistical data is relevant and admissible at the prima facie case stage of a
4 disparate treatment employment discrimination lawsuit.” *Id.* at 550. The court added:
5 “This is true whether or not the statistical data introduced is sufficient of itself to establish
6 a prima facie case. Since the question is one of inferring discriminatory intent, the district
7 court should make a sensitive inquiry into such circumstantial and direct evidence of intent
8 as may be available. . . . [A]ll evidence, both direct and circumstantial, statistical and
9 nonstatistical, relevant to that question should be assessed on a cumulative basis.” *Id.*
10 (citation omitted). Later, the court elaborated: “[T]he best prima facie case utilizing
11 statistical data, one allowing the strongest inference of intentional discrimination outside
12 the *McDonnell Douglas* framework, is that in which the plaintiff’s statistical proof is
13 ‘bolstered’ by other circumstantial evidence of discrimination bringing the cold numbers
14 convincingly to life.” *Id.* at 553 (citation omitted). Applying these standards, the court
15 stated that the district court had properly considered the plaintiffs’ statistical evidence,
16 notwithstanding “the hotels’ attempts to impeach the waiters’ statistical evidence by
17 demonstrating a lack of qualified blacks in the general labor pool and a relative lack of
18 blacks in the ‘applicant flow,’” but had also properly concluded that the statistical evidence
19 was not, alone, sufficient to establish a prima facie case of discriminatory treatment
20 because “the degree of disparate impact shown by the waiters’ statistical data was
21 insufficient Although statistical data may, in a proper case, be sufficient *alone* to raise
22 a prima facie case, the statistics must be considerably more stark than those involved here.”
23 *Id.* at 552 (emphasis added). In support of this conclusion, the court noted that “[i]n order
24 to establish a prima facie case of disparate treatment based *solely* on statistical evidence,
25 the plaintiff must produce statistics showing a clear pattern, unexplainable on grounds other
26 than race.” *Id.* (citation omitted and emphasis added). Finally, although the plaintiffs
27 attempted to identify other circumstantial evidence, apart from their statistical evidence, to
28 support their claim, the court concluded that “[t]his circumstantial evidence . . . does not

1 appreciably bolster the waiters' weak statistical proof." *Id.* at 554.

2 *Gay* tends to undermine, rather than support, ABOR's position for two reasons.
3 First, contrary to ABOR's first reconsideration argument (*i.e.*, statistical evidence in a
4 discrimination case should be viewed with disfavor due to its slippery nature), *Gay*
5 recognizes that "reliable, generalized statistical data is relevant and admissible at the prima
6 facie case stage of a disparate treatment employment discrimination lawsuit," "whether or
7 not the statistical data introduced is sufficient of itself to establish a prima facie case." *Id.*
8 at 550. Indeed, *Gay* touts the potential value of statistical evidence in this context, noting
9 that when it is combined with "other circumstantial evidence of discrimination," this
10 combination can "bring[] the cold numbers convincingly to life." *Id.* at 553. Second,
11 contrary to ABOR's second reconsideration argument (*i.e.*, if the proponent of statistical
12 evidence acknowledges that the disparities may be explained by non-discriminatory
13 factors, the evidence is irrelevant and inadmissible), *Gay* merely holds that when a plaintiff
14 seeks to prove disparate treatment based "solely" on statistical evidence or on statistical
15 evidence "alone," the evidence is legally insufficient if the statistical disparities may be
16 explained by reasons other than discrimination. *Id.* at 552. But here, Doe does not rely
17 solely on statistical evidence to prove his claim—as discussed in more detail in Part II
18 below, he seeks to rely on the combined weight of Dr. Kaufman's statistical evidence and
19 evidence of various irregularities. At any rate, the passage from *Gay* that ABOR block-
20 quotes in its motion (Doc. 227 at 3-4) and re-quotes in its reply (Doc. 247 at 5) is not a
21 statement about the *relevance and admissibility* of statistical evidence—it is a statement
22 about how to conduct a *sufficiency-of-the-evidence review* in an intentional discrimination
23 case where (unlike here) the plaintiff seeks to rely "solely" on statistical evidence but
24 cannot eliminate other possible explanations for statistical disparities. The passage does
25 not suggest that such evidence would be irrelevant or inadmissible, and indeed other
26 portions of *Gay* suggest that the district court properly considered the plaintiffs' statistical
27 evidence notwithstanding the fact that it was arguably impeachable and was ultimately
28 deemed insufficient to support the plaintiffs' claims. *Id.* at 551-52 (noting that "[t]he

1 district judge undertook an exhaustive analysis of the statistical evidence introduced by the
2 waiters” and “rejected the hotels’ attempts to impeach the waiters’ statistical evidence by
3 demonstrating a lack of qualified blacks in the general labor pool and a relative lack of
4 blacks in the ‘applicant flow’”).

5 *Aragon*, which is another case on which ABOR relies (Doc. 247 at 3), reinforces
6 these points. In *Aragon*, a white employee of a waste disposal company brought a Title
7 VII race discrimination claim premised on the allegation that he and other “white or white-
8 looking” employees were terminated, while similarly situated black employees were not,
9 and the reasons given for his termination were pretextual. 292 F.3d at 657-58. The
10 plaintiff’s sole evidence of pretext was that “three of the four [employees] singled out for
11 lay off that night were white.” *Id.* at 663. *See also id.* (“*Aragon*’s statistics . . . stand
12 precariously unsupported by other probative evidence of race discrimination.”) (cleaned
13 up). Although the Ninth Circuit recognized in a footnote that this statistical evidence was
14 relevant,⁵ it held that the evidence was insufficient to create a triable issue of fact as to
15 pretext for two reasons: (1) “the sample size is so small” that it fails to establish a “stark
16 pattern”; and (2) “nor does it account for possible nondiscriminatory variables, such as job
17 performance.” *Id.* (citations omitted).

18 Like *Gay*, *Aragon* undermines ABOR’s broad relevance objection to Dr. Kaufman’s
19 statistical evidence as well as ABOR’s first and second reconsideration arguments.
20 Although ABOR cites those cases for the proposition that “Ninth Circuit precedent”
21 requires statistical evidence to “show a clear pattern, unexplainable on grounds other than
22 gender,” and “eliminate non-discriminatory explanations” (Doc. 247 at 2), this supposed
23 admissibility requirement does not exist—ABOR creates it by lifting out-of-context
24 passages from *Aragon* and *Gay* that address how to conduct a sufficiency-of-the-evidence
25 review in an intentional discrimination case where (unlike here) the plaintiff seeks to rely
26 solely on statistical evidence. Additionally, whereas the statistical evidence in *Aragon* was

27 _____
28 ⁵ *Aragon*, 292 F.3d at 663 n.6 (“[S]tatistical evidence of a company’s general hiring
patterns, *although relevant*, carries less probative weight than it does in a disparate impact
case.”) (emphasis added).

1 based on an inadequate sample size, here Dr. Kaufman opines that the enforcement
2 disparities he describes are statistically significant.⁶

3 Yet another case cited by ABOR, *Rose*, undermines rather than supports ABOR's
4 position on these points for the same reasons. *Rose* was an age discrimination case where
5 the plaintiff submitted "a statistical analysis of Wells Fargo's employment decisions
6 [suggesting] that the single most important factor in predicting retention or termination
7 . . . was age." 902 F.2d at 1423. The Ninth Circuit found "these statistics insufficient *in*
8 *themselves* to create a triable issue of fact of intent to discriminate" because "to show a
9 prima facie case of disparate treatment *based solely on statistics* [plaintiffs] must show a
10 stark pattern of discrimination unexplainable on grounds other than age." *Id.* (citation
11 omitted and emphases added). Again, this is a statement about sufficiency of the evidence
12 in a discrimination case premised solely on statistical evidence, not a statement about the
13 admissibility and relevance of that evidence (let alone the admissibility and relevance of
14 that evidence where, as here, it simply forms one component of the plaintiff's proof).⁷

15 ⁶ In a footnote in its reconsideration motion, ABOR suggests that Dr. Kaufman's
16 sample sizes are too small. (Doc. 227 at 9 n.11.) Not only is this undeveloped argument
17 forfeited—to the extent ABOR wished to seek exclusion on this ground, it needed to do so
18 in its *Daubert* motion—but it also fails on the merits. Dr. Kaufman opines that at least
19 some of the results he generated are statistically significant. *Freyd*, 990 F.3d 1225-26
20 ("Our prior cases stated a general principle about the reliability of small data sets, but it
21 does not establish a firm rule about denominators. And although there must be some floor
22 for the sample size a party must evaluate in order to reach statistical significance, this is
23 not an appropriate case in which to set such a floor; at least not on this record, where the
24 expert witnesses themselves disagree about sample size's relevance. . . . The number of
25 data points surely goes to the probative value of [plaintiff's] evidence. But that is a matter
26 for the experts to debate and the jury to resolve.") (citations omitted).

27 ⁷ For similar reasons, the out-of-circuit decisions cited in ABOR's reply in support of
28 its exclusion motion (Doc. 196 at 4 n.3) do not require exclusion here. In *Haidak v.*
University of Massachusetts-Amherst, 933 F.3d 56 (1st Cir. 2019), the First Circuit held
that the Title IX plaintiff's statistical evidence was alone insufficient to survive summary
judgment due to his expert's "fail[ure] to address an array of alternative explanations" for
the gender-based disparity in enforcement outcomes in assault cases, including the
possibility that the "male students . . . committed more serious assaults." *Id.* at 75. *Haidak*,
like the Ninth Circuit cases discussed above, is not a case about admissibility under Rule
702 and does not address whether statistical-disparity evidence may be used in conjunction
with other circumstantial evidence of discriminatory intent (as Doe seeks to use it here) to
survive summary judgment. Meanwhile, in *Doe v. University of Denver*, 952 F.3d 1182
(10th Cir. 2020), the statistical evidence did not address disparate enforcement outcomes
but whether the school's "decisions regarding the *initiation* of sexual-misconduct
proceedings were motivated by considerations of gender." *Id.* at 1195 (emphasis added).
Additionally, the court was only addressing the legal sufficiency of the statistical evidence

1 Indeed, elsewhere in the opinion, the Ninth Circuit suggested that the statistical evidence
2 was relevant. *Id.* (“[E]ven if the statistical evidence and the evidence of replacement six
3 months following the merger arguably support an inference of discrimination with respect
4 to Reed, we find that evidence insufficient to support a jury verdict on the ultimate question
5 of discrimination.”).⁸

6 Having addressed some of ABOR’s broader objections to Dr. Kaufman’s F-23
7 opinions, the Court now turns to Dr. Kaufman’s failure to consider the factual
8 circumstances underlying each F-23 incident. ABOR’s overarching contention—which it
9 identified as both a reliability and relevance problem in its motion to exclude and
10 developed in more depth in its third and fifth reconsideration arguments—is that because
11 “sexual misconduct” is defined so broadly under F-23, it is meaningless to compare the
12 outcomes in F-23 enforcement proceedings without more information about the specific
13 conduct giving rise to each proceeding.

14 Although this argument is not without force, it does not require the exclusion of Dr.
15 Kaufman’s challenged opinions. ABOR may be correct that Dr. Kaufman’s statistics

16

for purposes of surviving summary judgment, not the relevance and admissibility of the
17 evidence under Rule 702.

18 ⁸ ABOR’s reliance on *I.V. v. Wenatchee School District No. 246*, 342 F. Supp. 3d
19 1083 (E.D. Wash. 2018), is even more misplaced. There, the plaintiff (IV) was a middle-
20 school student who had been the victim of a series of bullying incidents over a period of
21 years committed by a fellow student (YAF). *Id.* at 1087-91. In an ensuing Title IX action
22 against the school district, the plaintiff’s expert sought to offer “an opinion as to the
23 motivation behind YAF’s conduct (*i.e.*, whether it was ‘because of’ sex).” *Id.* at 1091.
24 This expert “opine[d] that the bullying IV experienced was ‘unquestionably sexually
25 driven.’” *Id.* at 1092. The district court excluded this opinion on a variety of grounds,
26 including that (1) it was “not based on adequate information” because the expert, among
27 other things, “did not know whether YAF pushed, kicked, or hit other kids in the class”
28 and thus did “not consider the full constellation of facts, as is required for the issue at
hand”; and (2) the expert “failed to set down an principles connecting the data and her
conclusion” and instead simply offered “her own *ipse dixit*.” *Id.* at 1092-93. Here, in
contrast, Dr. Kaufman does not purport to offer the opinion that the decisionmakers in
Doe’s case were, in fact, subjectively motivated by gender bias—an opinion that would
impermissible for a host of reasons, as recognized by the *I.V.* court. Instead, Dr. Kaufman
merely seeks to offer opinions about the statistical significance of certain data he compiled,
while leaving it to the factfinder to decide whether an inference of discriminatory intent
should be drawn from those statistics. (Doc. 159-1 at 6 [“Males receive severe sanctions
of expulsion and suspension at a higher rate than females charged with the same violations.
This different is statistically significant.”].) Nothing in *I.V.* suggests that the use of
statistics in this fashion is improper, and the cases discussed elsewhere in this order suggest
this is a permissible use.

1 would have been *more* useful had he considered the factual circumstances giving rise to
2 the F-23 cases he analyzed, but statistical evidence is not rendered irrelevant and
3 inadmissible simply because other, even better statistics are available. *Cf. J.SH Sec. Indus.*
4 *D.C.S., Ltd. v. Bartech Sys. Int'l, Inc.*, 2010 WL 11575538, *5 (D. Nev. 2010) (“Prior
5 dealings involving refrigerators would be more relevant, but it cannot be said that JSH’s
6 prior dealings with safe orders from LVS are irrelevant.”). Thus, while again
7 acknowledging that it would have been even more relevant for Dr. Kaufman to analyze the
8 outcomes of F-23 cases involving the specific type of “sexual misconduct” that Doe was
9 accused of (*i.e.*, sex by force and/or without consent), it remains relevant that gender-based
10 disparities exist in ASU’s enforcement of “sexual misconduct” cases more generally. In
11 *Austin v. University of Oregon*, 925 F.3d 1133 (9th Cir. 2019), the Ninth Circuit suggested
12 that female students “accused of sexual misconduct” would qualify as “similarly situated
13 students” who had “been accused of comparable misconduct” in a case involving a Title
14 IX claim brought by a male student. *Id.* at 1138. As discussed in the summary judgment
15 order, although this passage from *Austin* is not dispositive here (because the Ninth Circuit
16 was not addressing the question of admissibility under Rule 702), it still “supports the
17 conclusion that Dr. Kaufman’s statistics qualify, at a minimum, as relevant evidence that a
18 reasonable juror could construe as supporting Doe’s Title IX claim.” (Doc. 155 at 55-57.)
19 As also discussed in the summary judgment order, “this is not a situation where Dr.
20 Kaufman made up his own definition of ‘sexual misconduct’ in an attempt to create some
21 sort of cherry-picked statistic. . . . [S]ection F-23’s definition of ‘sexual misconduct’ is a
22 definition both created and used by ASU, which suggests that ASU has already decided it
23 unifies a population of similarly situated respondents in some material respect.” (*Id.* at 59.)

24 Given this backdrop, the Court is satisfied that Dr. Kaufman’s challenged opinions
25 fall within Rule 702’s broad conception of relevance. Female students found responsible
26 for committing “sexual misconduct” in violation of F-23 are similar enough to Doe, who
27 was also found responsible for committing “sexual misconduct” in violation of F-23, that
28 a comparison of the two sets of cases (Dr. Kaufman’s first challenged F-23 opinion) is

1 relevant here. Similarly, male students found responsible for committing “sexual
2 misconduct” in violation of F-23 against a male complainant are similar enough to Doe,
3 who was found responsible for committing “sexual misconduct” in violation of F-23
4 against a female complainant, that a comparison of the two sets of cases (Dr. Kaufman’s
5 second challenged F-23 opinion) is also relevant here.

6 In the summary judgment order, the Court reached the same conclusion, holding
7 that “[t]o the extent ABOR argues [Dr. Kaufman’s first F-23] statistic is misleading
8 because it involves a comparison of episodes of ‘sexual misconduct’ that may be factually
9 dissimilar, and thus does not involve a comparison of similarly situated male and female
10 students, this is an argument as to the weight of the evidence that ABOR can pursue at trial
11 through cross-examination.” (Doc. 155 at 57.) In its third reconsideration argument,
12 ABOR contends that “[t]his approach violates the Court’s role as gatekeeper” and cites
13 *Freyd* as a case supporting its position. (Doc. 227 at 4-6.) Accordingly, before addressing
14 the merits of ABOR’s argument, it is helpful to summarize *Freyd*.

15 There, a female professor at the University of Oregon brought claims under the
16 Equal Pay Act, Title VII, and Title IX after discovering that “the University pays [her]
17 several thousand dollars less per year than it does four of [her] male colleagues, despite
18 their being of equal rank and seniority.” 990 F.3d at 1214. The district court granted
19 summary judgment in the university’s favor on all of Freyd’s claims but the Ninth Circuit
20 reversed in part. As for the Equal Pay Act claim, the analysis turned on whether Freyd and
21 the four male professors held “substantially equal” jobs, such that the male professors could
22 be considered relevant comparators. The district court held “that Freyd and her
23 comparators’ jobs are rendered unequal by the differences in the research that they do,
24 centers that they run, and funding that they obtain” but the Ninth Circuit reversed, holding
25 that “the evidence here is not so one-sided as to mandate this conclusion as a matter of law”
26 and that “[w]e do not have the tools to resolve the dispute without intruding on the civil
27 jury’s function. . . . [A] reasonable jury could find that Freyd and her comparators did
28 substantially equal work. Accordingly, the district court’s grant of summary judgment on

1 this claim was in error.” *Id.* at 1220-23. Next, as for the Title VII disparate impact claim,
2 the Ninth Circuit again reversed, holding that the district court erred by finding “as a matter
3 of law that Freyd’s statistical evidence was insufficient to sustain a claim of disparate
4 impact” and that “[w]e do not think that we can resolve this dispute among the experts.”
5 *Id.* at 1225. In contrast, the Ninth Circuit affirmed the district court’s grant of summary
6 judgment on Freyd’s Title VII disparate treatment claim. *Id.* at 1228-29. As for that claim,
7 Freyd’s theory was that “similarly situated individuals outside her protected class were
8 treated more favorably than her.” *Id.* The Ninth Circuit held that Freyd’s evidence was
9 insufficient with respect to this theory because “Freyd’s comparators engaged in retention
10 negotiations with the University and were granted substantial salary increases as a result,”
11 whereas “Freyd has never engaged in retention negotiations,” and thus Freyd had “not
12 presented evidence sufficient to establish a prima facie case under the *McDonnell Douglas*
13 framework because she has not shown that similarly situated individuals outside of her
14 protected class were treated more favorably than her.” *Id.* Finally, the court affirmed the
15 district court’s grant of summary judgment on Freyd’s Title IX claim for the same reason,
16 holding that “[a]s with her Title VII disparate treatment claim, because Freyd has presented
17 no evidence of intentional discrimination, there is no genuine issue of material fact here.”
18 *Id.* at 1229.

19 In the Court’s estimation, *Freyd* does not undermine (and, arguably, supports) the
20 conclusion in the summary judgment order that the parties’ dispute over whether the
21 comparators selected by Dr. Kaufman were sufficiently similar to Doe is a question of fact
22 that should be decided by the jury at trial. Indeed, in *Freyd*, the Ninth Circuit reversed the
23 district court’s conclusion that the male professors were too dissimilar to qualify as relevant
24 comparators for purposes of the plaintiff’s Equal Pay Act claim, emphasizing that because
25 “the evidence here is not so one-sided as to mandate this conclusion as a matter of law,”
26 the district court had “intrud[ed] on the civil jury’s function” by concluding otherwise. *Id.*
27 at 1220-23. This approach is consistent with Court’s approach here. *See also Alaska Rent-*
28 *A-Car*, 738 F.3d at 968-70 (affirming district court’s admission of expert testimony, where

1 the expert “compared Avis’s . . . experience with [Alamo’s] experience after Cerberus
2 bought Alamo out of bankruptcy” and the opposing party objected on the ground “that
3 differences between Alamo and Budget . . . made Alamo an invalid comparison,” because
4 the challenge to “using Alamo as the comparator” was a challenge that “go[es] to the
5 weight of the testimony and its credibility, not its admissibility”). Finally, although it is
6 true that *Freyd* affirmed the district court’s grant of summary judgment on the plaintiff’s
7 intentional discrimination claims under Title VII and Title IX, on the ground that the
8 plaintiff’s comparators were not similarly situated for purposes of those claims, the Court
9 agrees with Doe (Doc. 241 at 6) that this portion of the decision turned on fact-specific
10 considerations that shed little light on the dispute here. Even accepting that professors who
11 engaged in retention negotiations are dissimilar to professors who never engaged in
12 retention negotiations, it doesn’t follow that ASU students accused of “sexual misconduct”
13 as that term is defined in F-23 are too dissimilar from each other to provide a relevant basis
14 for comparison.⁹ The Court also notes that the passages from *Freyd* on which ABOR relies,
15 like the passages from *Gay*, *Aragon*, and *Rose* discussed above, do not address the
16 relevance and admissibility of statistical evidence but the sufficiency of that evidence for
17 purposes of surviving summary judgment. This further undermines ABOR’s reliance on
18 *Freyd* as a basis for seeking the exclusion of Dr. Kaufman’s statistics on relevance grounds
19 under Rule 702.

20 Nor is there any merit to ABOR’s fifth reconsideration argument, which attacks the
21 portion of the summary judgment order noting that Dr. Kaufman did not make up his own
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23 ⁹ For similar reasons, ABOR’s reliance on *Moran v. Selig*, 447 F.3d 748 (9th Cir.
24 2006) is misplaced. There, the Ninth Circuit concluded that the members of a class of
25 “virtually all Caucasian former MLB players who played in the Major Leagues for less
26 than four years between 1947 and 1979 and were accordingly denied MLB pension and
27 medical benefits” were not “similarly situated to . . . the former Negro League players who
28 also played in the Major Leagues between 1947-79 but receive[d] medical and
supplemental income benefits under the Negro League Plans” for the “basic” reason that
“in order to qualify for the benefits under the Negro League Plans, the players to whom
[plaintiffs] seek to equate themselves must have played in the Negro Leagues—a
qualification that [plaintiffs] indisputably lack.” *Id.* at 751, 755-56. This fact-specific
ruling sheds little light on the comparability of ASU students accused of sexual misconduct
in violation of F-23.

1 definition of “sexual misconduct” but instead utilized the definition created and utilized by
2 ASU. To the extent ABOR accuses the Court of “creat[ing] this argument on behalf of”
3 Doe, who “never made this argument” himself (Doc. 227 at 7), this accusation is belied by
4 the record. In response to the motion to exclude, Doe argued as follows: “ABOR has not
5 presented any evidence that the respondents reflected in the F-23 spreadsheets are not
6 similarly situated. . . . The data produced by ABOR categorizes all F-23 charges into a
7 single category of sexual misconduct. ABOR does not and cannot provide any support for
8 its allegation that the various conduct constituting ‘sexual misconduct’ under its own Code
9 is somehow ‘less’ serious than other harms.” (Doc. 188 at 6.) Elsewhere, Doe argued:
10 “ABOR argues that for purposes of a gender discrimination claim, ‘similarly situated’
11 means that the misconduct in which the comparators are alleged to have engaged must be
12 of ‘comparable seriousness.’ This threshold is met—all violated F-23, the same sexual
13 misconduct violation under the Code.” (*Id.* at 8-9.) The analysis in the summary judgment
14 order reflected the Court’s acceptance and agreement with these arguments, albeit while
15 using slightly different phrasing. It is disappointing that ABOR would accuse the Court of
16 stepping outside the judicial role and acting as Doe’s advocate under these circumstances.

17 Next, as for ABOR’s contention that “[t]he Court also manifestly errs because the
18 [summary judgment order] does not cite evidence supporting its supposition that ASU
19 ‘decided’ all F-23 violations were comparable” (Doc. 227 at 7), the Court disagrees for the
20 reasons stated in Doe’s response: “[T]hat ASU grouped all F-23 conduct together by
21 definition in its own student handbook is a fact established by evidence presented by
22 ABOR [including the handbook].” (Doc. 241 at 7.)¹⁰ As Doe further notes, “ABOR does
23 not present any evidence supporting its conclusory argument that [the subsections within
24 F-23] are grouped by severity. . . . ABOR still does not endeavor to rank the seriousness
25 of the acts of sexual misconduct along these lines. Nor can it. Each subsection includes a

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27 ¹⁰ See also *Freyd*, 990 F.3d at 1222 (“The dissent’s conclusion that two faculty
28 members in the same department cannot be compared is inconsistent with the fact that the
University’s own administrators regularly make these comparisons for purposes of setting
salaries. The question is not whether faculty members can be compared, but how they
compare, and the latter comparison is one fraught with judgment, not law.”).

1 range of behavior. . . . For instance, persistent sexual harassment that creates a hostile
2 environment (subsection B) could certainly rise to or past the level of seriousness of non-
3 consensual sexual touch in subsection A.” (*Id.* at 8-9.) Finally, as for ABOR’s contention
4 that the Court’s approach may “incentivize universities to endure the unnecessary expense
5 of redrafting their codes of conduct” (Doc. 227 at 8 n.9), such public policy arguments are
6 unhelpful when evaluating questions of relevance and reliability under Rule 702.

7 Having determined that Dr. Kaufman’s F-23 opinions are relevant despite his failure
8 to consider the specific factual circumstances giving rise to the underlying proceedings, the
9 Court next considers whether Dr. Kaufman followed a reliable methodology when forming
10 those opinions. ABOR’s overarching argument on that issue, which it frames as a failure
11 to consider “sufficient facts and data” in its motion to exclude and further elaborates upon
12 in its fourth reconsideration argument, is Dr. Kaufman’s approach was unreliable because
13 he had access to data setting forth the factual circumstances of the underlying incidents
14 (*i.e.*, the Title IX Case Tracking Report) and simply failed to consider it. ABOR cites
15 *Pottenger* as its best case supporting exclusion in this circumstance.

16 This argument presents a fairly close call. Although it is not clear that Dr.
17 Kaufman’s failure to consider the Title IX Case Tracking Report poses a reliability
18 problem, as opposed to some other type of flaw,¹¹ ABOR is correct that, under *Pottenger*,
19 an expert’s failure to consider a particularly critical set of data can undermine the
20 evidentiary value of the expert’s statistical analysis. In *Pottenger*, a 60-year-old executive
21 at a paper company asserted a claim of age discrimination after he was terminated and
22 replaced by a 43-year-old. 329 F.3d at 744-45. In support of this claim, *Pottenger* offered

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24 ¹¹ The concept of reliability seems like a poor fit here because there was no need for
25 Dr. Kaufman to consider the Title IX Case Tracking Report when formulating his
26 challenged opinions, which simply track the outcomes in cases involving F-23 violations.
27 Because those opinions don’t purport to control for the specific circumstances of the
28 underlying incidents (beyond the fact that each incident involved conduct that fell within
F-23’s broad definition of “sexual misconduct”), it follows that the methodology Dr.
Kaufman used when forming those opinions (*i.e.*, considering the SCC Charge Data) was
reliable. At bottom, ABOR’s criticism is not that Dr. Kaufman used a flawed methodology
when addressing the particular questions he chose to address. Instead, the criticism is that
he addressed the wrong questions. That seems like an argument about relevance, not
reliability.

1 statistical evidence suggesting that “the company’s June 2000 reduction in force [RIF]
2 disproportionately affected older employees.” *Id.* at 747. Nevertheless, the district court
3 granted summary judgment in the employer’s favor and the Ninth Circuit affirmed, holding
4 that the statistical evidence was insufficient to create a genuine issue of fact as to whether
5 the employer’s proffered reason for terminating Pottenger (*i.e.*, “he was not prepared to
6 make the tough decisions necessary to turn around the Idaho Pulp and Paper Division”)
7 was pretextual. *Id.* at 745, 747-48. Although the court recognized that a plaintiff asserting
8 a discrimination claim may, in general, “use statistics to show an intent to discriminate,” it
9 held that Pottenger’s statistical analysis, which “t[ook] into account only two variables—
10 the employee’s age at the time of the RIF and whether the employee was terminated,”
11 should be “treated skeptically” because it “fail[ed] to account for other relevant variables.”
12 *Id.* at 747-48. In particular, the court noted that “the variable most likely to have offered a
13 legally appropriate explanation of why certain employees were selected for lay-off [was]
14 job performance.” *Id.* at 748. The court further noted that Pottenger’s expert was offered
15 access to job-performance data before conducting his analysis but “specifically acquiesced
16 in the suggestion that obtaining data about individual employees’ performance reviews was
17 unnecessary.” *Id.* As a result, the court concluded: “If Pottenger had had access to only
18 two variables, we would be presented with a different case. But here, where Pottenger had
19 or had access to additional relevant data and chose not to use it, we conclude that
20 Pottenger’s statistical analysis is insufficient to raise a triable issue of fact regarding
21 pretext.” *Id.*

22 It is understandable why ABOR would view *Pottenger* as a case supporting its
23 position. From ABOR’s perspective, Dr. Kaufman is just like Pottenger’s expert in that he
24 had access to the variable that was most likely to explain any differences in F-23
25 enforcement (*i.e.*, the specific factual circumstances underlying each F-23 violation, which
26 were set forth in the Title IX Case Tracking Report) yet chose not to consider that data and
27 instead relied on other, less probative data (*i.e.*, the details set forth in the SCC Tracking
28 Data, which were limited to the gender of the respondent/complainant, the outcome of the

1 proceeding, and the bare fact that the respondent was found to have committed an F-23
2 violation). Nevertheless, the Court discerns two reasons why *Pottenger* does not do all of
3 the work that ABOR wants it to do here.

4 First, *Pottenger* is not a case about relevance and admissibility under Rule 702—
5 the Ninth Circuit’s holding was that Pottenger’s statistical evidence was not alone
6 sufficient to create a triable issue of fact on the issue of pretext due to his expert’s failure
7 to consider the most important variable. But it doesn’t necessarily follow, from the fact
8 that a particular piece of evidence is alone insufficient to avoid summary judgment, that
9 the piece of evidence is also irrelevant and inadmissible. Thus, to the extent ABOR seeks
10 to rely on *Pottenger* as a basis for *excluding* Dr. Kaufman’s statistical analysis (as
11 contrasted with contesting the *weight* of that statistical analysis for purposes of evaluating
12 ABOR’s entitlement to summary judgment, which is an issue addressed in Part II below),
13 that reliance is misplaced.¹²

14 Second, there are important differences between *Pottenger* and this case when it
15 comes to the expert’s explanation for not considering the additional data. As noted, in
16 *Pottenger*, the expert “specifically acquiesced in the suggestion” that job performance data
17 was “unnecessary.” 329 F.3d at 748. Here, in contrast, Dr. Kaufman stated in his report
18 that he attempted to obtain “a sample of case files to develop additional controls, but
19 [ABOR] declined to provide such data.” (Doc. 159-1 at 14.)¹³ Additionally, in a
20 declaration prepared several months later (in response to ABOR’s contention that he had

21 ¹² During oral argument on the *Daubert* motions, which occurred shortly after ABOR
22 filed its reconsideration motion and cited *Pottenger* for the first time, the Court suggested
23 that *Pottenger* addresses the admissibility of statistical evidence. (Doc. 243 at 94.) Having
24 now had a chance to more carefully review *Pottenger*, the Court concludes (as stated
25 above) that *Pottenger* is a case about evidentiary weight, not admissibility.

26 ¹³ Here, Dr. Kaufman appears to be referring to a discovery dispute that arose in mid-
27 2021 over whether ABOR’s Rule 30(b)(6) designee needed “to become knowledgeable
28 about the details of hundreds, if not thousands, of individual discipline proceedings
involving ASU students over a period of many years.” (Doc. 143 at 7.) The Court ruled
in ABOR’s favor as to this dispute because “although the general subject area Doe wishes
to explore . . . which Doe describes in his response as ‘how ASU has treated others in the
student disciplinary system, specifically those involving claims of sexual assault’ . . . is
relevant and ought to be fair game for examination, the verbiage he chose to use when
formulating the deposition topics is vague, overbroad, and would place overly burdensome
and disproportionate preparation demands on ABOR.” (*Id.* at 9.)

1 overlooked key details), Dr. Kaufman stated that he had reviewed the Title IX Case
2 Tracking Report before drafting his report but declined to rely on it for two reasons: (1)
3 although the Title IX Case Tracking Report “include[s] high level descriptions of the
4 charges,” it “does not categorize the charges by relative seriousness” and contains a “level
5 of detail” that is “unreliable and incomplete”; and (2) the Title IX Case Tracking Report
6 does not cover the full range of years covered by the SCC Tracking Data¹⁴ and the cases in
7 the Title IX Case Tracking Report are not “randomly sampled from the full incidents
8 reflected on the [SCC Tracking Data].” (Doc. 188-2 ¶¶ 4-6.)¹⁵ Given these details, Doe
9 argues that “[t]he data in the [Title IX Case Tracking Report] is a far cry from the reliable,
10 complete, ranked, and usable data of *Pottenger*” and that “[i]n rejecting the use of the [Title
11 IX Case Tracking Report] in favor of the complete data set sworn by ABOR to be accurate
12 in its interrogatory responses, Kaufman preserved the reliability [of] his analysis.” (Doc.
13 241 at 7.)

14 The Court agrees with Doe that these details distinguish this case from *Pottenger*.
15 Dr. Kaufman did not *ignore* the Title IX Case Tracking Report but instead made a
16 determination, after reviewing it, that it had various flaws that rendered it unhelpful in
17 developing additional controls for his analysis. Although ABOR vigorously disputes Dr.
18 Kaufman’s determination on this point (and, the Court suspects, will be able to use the Title

19 ¹⁴ Dr. Kaufman stated in his declaration that the Title IX Case Tracking Report “only
20 present[s] incidents of sexual misconduct reported to ASU from 2016-17.” (Doc. 188-2 at
21 6.) Doe acknowledges that Dr. Kaufman was mistaken on this point—the Title IX Case
22 Tracking Report actually covers the years 2013 through 2017. (Doc. 241 at 6 n.5.)
23 Nevertheless, it is undisputed that the Title IX Case Tracking Report does not cover the
24 full range of F-23 incidents summarized in the SCC Tracking Data, which cover the years
25 2012 through 2017. (Doc. 247 at 3 [“[T]he Report did not exist prior to the 2013-14
26 academic year.”].)

27 ¹⁵ At times, Doe has suggested that the Title IX Case Tracking Report was produced
28 in a confusing and/or indecipherable manner during discovery, such that ABOR should
bear any blame for Dr. Kaufman’s failure to consider it. (Doc. 243 at 87-89; Doc. 246 at
3 [“[T]he documents were not produced in a searchable format, yet ABOR’s counsel
claimed the opposite during Daubert oral arguments. Presenting the documents in
searchable format would constitute a misrepresentation that would make the data within
the TIX Spreadsheets appear more accessible than it truly is.”].) In response, ABOR has
provided a detailed timeline of its production efforts (Doc. 247 at 3-5) as well as a flash
drive containing the Title IX Case Tracking Report itself (Doc. 248), which the Court has
now reviewed. Based on those submissions, the Court rejects any claim that ABOR is
responsible for Dr. Kaufman’s decision not to consider the Title IX Case Tracking Report.

1 IX Case Tracking Report to great effect when cross-examining Dr. Kaufman), the
2 appropriate way to resolve this dispute is to allow the parties to present their respective
3 positions to the jury at trial. Put in the parlance of Rule 702, Dr. Kaufman’s basis for
4 declining to rely on the Title IX Case Tracking Report may be “impeachable,” but it does
5 not veer into the realm of “unreliable nonsense.” *Alaska Rent-A-Car*, 738 F.3d at 969.
6 And as noted elsewhere in this order, “[s]haky but admissible evidence is to be attacked by
7 cross examination, contrary evidence, and attention to the burden of proof, not exclusion.”
8 *Primiano*, 598 F.3d at 564.

9 This leaves ABOR’s sixth and seventh reconsideration arguments, which the Court
10 views as a matched pair. The former is that it would amount to impermissible burden-
11 flipping to fault ABOR for failing to perform its own analysis of the specific factual
12 circumstances of the underlying F-23 incidents because Doe bears the burden of
13 establishing the admissibility of his expert’s opinions. The latter is that ABOR has, at any
14 rate, now conducted the very analysis that it shouldn’t have been required to perform,
15 which shows that the incidents in which female students were found responsible for F-23
16 violations involved much different (and less serious) forms of “sexual misconduct” than
17 the incident at issue in this case.

18 These arguments fail to establish that Dr. Kaufman’s F-23 opinions should be
19 excluded. As for the former, ABOR is of course correct that it does not bear the burden of
20 proof in this context, but this observation does nothing to detract from the Court’s
21 conclusion, as discussed in the paragraphs above, the Doe has met his burden of
22 establishing the relevance and reliability of the challenged opinions. As for the latter, the
23 initial problem is that ABOR did not conduct or disclose its new evidence during the
24 discovery process or in support of its motion to exclude—instead, it presented this evidence
25 for the first time as an attachment to its motion for reconsideration. This approach is
26 impermissible for a host of reasons. *Kona Enterprises, Inc. v. Estate of Bishop*, 229 F.3d
27 877, 891 (9th Cir. 2000) (“[A] motion for reconsideration . . . may not be used to raise
28 arguments or present evidence for the first time when they could reasonably have been

1 raised earlier in the litigation.”) (citation and internal quotation marks omitted). More
2 important, even if this new evidence had been timely disclosed to Doe and timely provided
3 to the Court, it would not necessitate the exclusion of Dr. Kaufman’s opinions. Instead, it
4 simply constitutes evidence that ABOR may present at trial in an attempt to impeach Dr.
5 Kaufman and/or persuade the jury that Dr. Kaufman’s opinions do not support the
6 inferences that Doe hopes the jury will draw from them.

7 2. F-23 Opinions—Failure To Control For Other Charges

8 Although most of ABOR’s challenges to Dr. Kaufman’s F-23 opinions turn on his
9 failure to consider the factual details of the underlying incidents, ABOR also raises a
10 distinct challenge in its motion to exclude—that “Dr. Kaufman’s methodology is unreliable
11 because he does not account for the fact that many of the respondents charged with [F-23]
12 violations were also charged with other violations of the Code.” (Doc. 159 at 9.) ABOR
13 acknowledges that Dr. Kaufman purported to control for this variable by relying on the
14 Mantel Haenszel peer group test but argues that, because Dr. Kaufman admits this test does
15 not eliminate the possibility that “non-gender factors [may] effect the severity of the
16 sanctions,” it follows that his methodology is unreliable. (*Id.* at 9-10.) In response, Doe
17 argues that “[t]he Mantel Haenszel test[] is the most widely used method of testing the
18 statistical significance of disparities,” cites other cases approving the use of this test, and
19 argues that ABOR’s reliability challenge is therefore unavailing. (Doc. 188 at 9-10.)

20 Exclusion is not warranted on this basis. Dr. Kaufman sought to control for the
21 existence of other charged violations by applying the Mantel Haenszel test. To the extent
22 ABOR’s position is that the application of this test is insufficient because it does not
23 eliminate the possibility of non-discriminatory explanations for the statistical patterns, this
24 argument fails for the reasons set forth above. Although *Gay*, *Aragon*, and *Rose* recognize
25 that statistical evidence that does not eliminate the possibility of non-discriminatory
26 explanations for the disparity may be legally insufficient to create a triable issue of fact in
27 a discrimination case where the plaintiff seeks to rely solely on that statistical evidence,
28 they do not hold that such statistical evidence is inadmissible and irrelevant. Additionally,

1 and as discussed in more detail in Part II below, Doe does not rely solely on statistical
2 evidence in this case.

3 3. Final F-23 Opinion—Failure To Consider Available Data

4 ABOR next raises a challenge that is specific to Dr. Kaufman’s final F-23 opinion
5 (which, as noted above, compares the severity of sanctions imposed in F-23 cases involving
6 male complainants with the sanctions imposed in F-23 cases involving female
7 complainants). ABOR contends this statistic is unreliable because, although Dr. Kaufman
8 stated that most of the data available to him did not identify a complainant’s gender,
9 information *was* available to him that provided this information. (Doc. 159 at 10.)
10 Specifically, ABOR points to Exhibit 5, row 250 of the Title IX Case Tracking Report.
11 (*Id.*)

12 In the tentative order issue before oral argument, the Court stated that this argument
13 was based on a false premise because row 250 of the cited document (Doc. 159-4 at 20-
14 22) does not identify the complainant’s gender. (Doc. 210 at 23.) In response, ABOR
15 clarified during oral argument that its brief had a typo and that the reference should have
16 been to row 251 of the cited document. (Doc. 243 at 82.) ABOR explained that this row
17 reveals that the underlying incident was “an F-23 incident involving a male complainant
18 and the sanction was expulsion” and thus Dr. Kaufman’s opinion that “incidents involving
19 male complainants never result in severe sanctions” is erroneous. (*Id.*)

20 The Court appreciates this clarification but still concludes that ABOR’s criticisms
21 are fodder for impeachment, not exclusion. Dr. Kaufman’s final challenged opinion is that
22 “F-23 charges involving male complainants result in expulsion and suspension at a lower
23 rate than charges involving female complainants.” (Doc. 159-1 at 14.) The support for
24 this opinion is set forth in Table 5, which states that of the 11 F-23 cases involving a male
25 complainant, zero cases resulted in a severe sanction (0%), whereas of the 98 F-23 cases
26 involving a female complainant, 28 cases resulted in a severe sanction (29%). (*Id.*) If, per
27 row 251, there was actually one F-23 case with a male complainant that resulted in a severe
28 sanction (rather than zero), this would not undermine Dr. Kaufman’s overall opinion that

1 severe sanctions are imposed less frequently in F-23 cases involving male complainants
2 than in F-23 cases involving female complainants.¹⁶

3 More broadly, and as discussed elsewhere in this order, to the extent ABOR believes
4 the information set forth in the Title IX Case Tracking Report is useful in impeaching Dr.
5 Kaufman or otherwise undermining the inferences that Doe intends to ask the jury to draw
6 from Dr. Kaufman's statistics and opinions, ABOR is free to make its case at trial. The
7 potential for such impeachment does not undermine the Court's determination that Dr.
8 Kaufman's challenged opinions are sufficiently relevant and reliable to qualify for
9 admission under Rule 702.

10 4. Alcohol-Related Opinions

11 Although most of ABOR's challenges concern Dr. Kaufman's opinions related to
12 disparities in F-23 proceedings, ABOR's final challenge concerns Dr. Kaufman's opinion
13 regarding disparities in F-15 proceedings.¹⁷ As noted, Dr. Kaufman's opinion on that issue
14 is that "[m]ale respondents are found in violation of F-15 . . . charges more often than
15 female respondents." (Doc. 159-1 at 14.) In its motion to exclude, ABOR argues this
16 opinion is "unreliable and irrelevant" because (1) even though Dr. Kaufman attempted to
17 "control for the 'type' of violation by only including matters in which [F-15] was the sole
18 alleged violation," this attempt was unsuccessful because Dr. Kaufman failed to consider
19 the underlying factual circumstances of each incident and thus failed to "account for the
20 wide variety of conduct that could constitute an [F-15] violation"; and (2) alternatively, by
21 attempting to limit his opinion to disparities in proceedings involving only F-15 violations,
22 "Dr. Kaufman ensured his analysis has no relevance" because "Doe was not solely charged
23 with an [F-15] violation" and thus "[t]here is no issue in this lawsuit about whether the

24 ¹⁶ ABOR may be correct that, in light of this clarification, the title appearing above
25 Table 5, which is "Male Complainants Do Not Result In Severe Sanctions" (Doc. 159-1 at
26 14), is inaccurate. But as discussed above, the opinion that Dr. Kaufman discloses in his
report is a *relative* comparison of the rates of severe sanctions imposed in F-23 cases
involving male and female complainants.

27 ¹⁷ Section F-15 provides that the definition of "Prohibited Conduct" includes:
28 "Violation of the Board or university rules or applicable laws governing alcohol, including
consumption, distribution, unauthorized sale, or possession of alcoholic beverages." (Doc.
155-2 at 55-56.)

1 sanctions imposed on students facing solely [F-15] violations are harsher for females than
2 they are for males.” (Doc. 159 at 11-12.) In response, Doe asserts that Dr. Kaufman’s
3 opinion about F-15 violations is reliable, for similar reasons as his opinions regarding F-
4 23 violations, and relevant, because a juror can infer the presence of gender bias from the
5 fact that men are sanctioned for alcohol violations at a higher rate than women. (Doc. 188
6 at 12-13.) Doe also contends that “the most granular data available on F-15 violations is
7 that presented in the F-15 Spreadsheet created and produced by ABOR.” (*Id.*)

8 Again, ABOR demands too much at the motion-to-exclude stage. If true, the
9 conclusion that ASU sanctions men accused of alcohol violations more often than women
10 accused of alcohol violations is relevant, both because (1) Doe was accused of an alcohol
11 violation and (2) any statistical evidence showing that ASU is biased against men in
12 disciplinary proceedings is at least some evidence supporting Doe’s gender bias claim. The
13 fact that Doe was accused of multiple violations, and that ASU’s record of enforcing
14 alcohol violations may not be as probative of bias as ASU’s record of enforcing sexual
15 misconduct, is fertile territory for cross-examination, but it does not provide a basis for
16 exclusion. Finally, as for Dr. Kaufman’s failure to account for the specific factual
17 circumstances of each underlying alcohol violation, not only does this criticism merely go
18 to whether Dr. Kaufman’s opinion is impeachable (as opposed to inadmissible) for the
19 reasons stated above with respect to Dr. Kaufman’s F-23 opinions, but this criticism does
20 not implicate *Pottenger* in the same way because there is no evidence that these details are
21 tracked by ASU or were provided to Dr. Kaufman, only for him to ignore them.

22 D. Economic Loss Opinions

23 1. The Parties’ Arguments

24 ABOR argues that Dr. Kaufman’s assumptions about Doe’s career progression are
25 unfounded and unreliable because there is no evidence in the record to support those
26 assumptions. (Doc. 159 at 12-14.) Relatedly, ABOR points to Dr. Kaufman’s assertions
27 that Doe “was a Division One wrestler on his way to earning the title of All-American at
28 nationals” and that Doe’s career plan was “consistent with the career paths of other college

1 wrestling coaches” and argues that Dr. Kaufman is not qualified to opine on those issues.
2 (*Id.* at 13 n. 5.) ABOR also asserts that Dr. Kaufman’s assumptions about projected salary
3 data are inaccurate and inapplicable to the facts in this case. (*Id.* at 15-17.)

4 Doe responds that “there is no requirement that Doe unequivocally prove that he
5 would have achieved any of these positions before an expert can opine on his lost earnings
6 The standard for assessing earning capacity is whether the plaintiff had a ‘reasonable
7 probability’ of achieving that career path. . . . Dr. Kaufman is permitted to make
8 assumptions about Doe’s career path so long as there is a reasonable probability that those
9 paths would have . . . or are likely to occur.” (Doc. 188 at 14-15.) Doe also argues that
10 Dr. Kaufman’s sources for his salary projection are reliable and, to the extent there are
11 factual disputes to be had, those issues are either scrivener’s errors or may be addressed
12 during cross-examination. (*Id.* at 15-17.)

13 ABOR replies that Doe has mischaracterized its argument: ABOR argues that “Dr.
14 Kaufman has no expertise or foundational facts to support his assumptions as to Doe’s
15 expected career path.” (Doc. 196 at 9.) ABOR also objects to Dr. Kaufman’s use of
16 median, rather than entry-level, salary figures and contends that the inflated salary
17 information caused Dr. Kaufman’s opinion to be irrelevant. (*Id.* at 10-11.)

18 2. Analysis

19 ABOR’s challenges to Dr. Kaufman’s economic loss opinions lack merit. ABOR’s
20 first objection is that Dr. Kaufman’s assumptions about the trajectory of Doe’s career are
21 unfounded and inaccurate. As for foundation, there is evidence in the record to support the
22 assumption that Doe had a reasonable probability of achieving a wide range of professional
23 outcomes within the wrestling profession. Although the Court has excluded Owen from
24 testifying that Doe would have been one of the nation’s best wrestlers (Doc. 233 at 13-16),
25 the fact that Doe won several wrestling competitions will still be before the jury.
26 Additionally, both Doe’s and ABOR’s experts agree that Doe could have become a
27 Division I coach and simply disagree on where, exactly, Doe’s ceiling would be. (Doc.
28 163-1 at 4, Doc. 165-1 at 10.)

1 As for accuracy, it is irrelevant—for threshold admissibility purposes—that Dr.
2 Kaufman’s assumptions may be proved inaccurate at trial. All that matters is that they
3 have some basis in the record. An expert may, in appropriate circumstances, rely on
4 assumptions when formulating opinions. Fed. R. Evid. 702, advisory committee notes to
5 2000 amendments (“The language ‘facts or data’ is broad enough to allow an expert to rely
6 on hypothetical facts that are supported by the evidence.”). Disagreement with an expert’s
7 assumptions does not, in general, provide a basis for excluding the expert’s testimony. *See,*
8 *e.g., Marsteller v. MD Helicopter Inc.*, 2018 WL 3023284, *2 (D. Ariz. 2018) (“The
9 challenges to Equals’ opinions and the weaknesses in his assumptions are issues to be
10 explored on cross-examination.”). To be sure, “nothing in either *Daubert* or the Federal
11 Rules of Evidence requires a district court to admit opinion evidence that is connected to
12 existing data only by the ipse dixit of the expert. A court may conclude that there is simply
13 too great an analytical gap between the data and the opinion proffered.” *Joiner*, 522 U.S.
14 at 146. Nevertheless, “[s]haky but admissible evidence is to be attacked by cross
15 examination, contrary evidence, and attention to the burden of proof, not exclusion.”
16 *Primiano*, 598 F.3d at 564. “Basically, the judge is supposed to screen the jury from
17 unreliable nonsense opinions, but not exclude opinions merely because they are
18 impeachable.” *Alaska Rent-A-Car, Inc.*, 738 F.3d at 969. *See also* Fed. R. Evid. 702
19 advisory committee’s note to 2000 amendment (“[P]roponents do not have to demonstrate
20 to the judge by a preponderance of the evidence that the assessments of their experts are
21 correct, they only have to demonstrate by a preponderance of evidence that their opinions
22 are reliable The evidentiary requirement of reliability is lower than the merits standard
23 of correctness.” (alteration in original) (internal quotation marks omitted)).

24 Here, Dr. Kaufman takes core assumptions that have a reasonable basis in the record
25 and stretches them to opposing extremes to establish a range of possible outcomes. If
26 ABOR can discredit these assumptions at trial, that will also invalidate the opinion. *See*
27 *generally United States v. Crabbe*, 556 F. Supp. 2d 1217, 1224 (D. Colo. 2008) (“An expert
28 witness may often ‘assume’ a fact for purposes of applying the methodology. . . . If the

1 assumption is in error, the opinion may be entirely invalidated.”). But because the
 2 assumptions about Doe’s future employability do not veer into “unreliable nonsense,” and
 3 ABOR does not dispute Dr. Kaufman’s algebraic methodology of converting a range of
 4 assumptions into a range of potential economic loss, exclusion is not warranted.¹⁸

5 As for Dr. Kaufman’s salary assumptions, largely the same analysis applies. ABOR
 6 objects to Dr. Kaufman’s use of median wages that do not account for school size, stature,
 7 or a coach’s experience, arguing that “Dr. Kaufman shows no connection between the
 8 salary he selected and the facts in this case.” (Doc. 159 at 15-16.) Not so. Dr. Kaufman’s
 9 choice of salary data and analysis thereof may not meet ABOR’s standards for
 10 persuasiveness, but it has a foundation in the record. ABOR also points to actual errors in
 11 Dr. Kaufman’s data, but Doe replies that these are scrivener’s errors which have since been
 12 corrected and do not meaningfully affect Dr. Kaufman’s overall analysis. Scrivener’s
 13 errors that have already been corrected are not grounds for exclusion.

14 ...

15 ...

16 ...

17
 18 ¹⁸ During oral argument, ABOR placed particular emphasis on Dr. Kaufman’s
 19 assumption that Doe might pursue a coaching position at a Division II or Division III
 20 college. (Doc. 243 at 83-86.) However, ABOR’s experts made the same assumption for
 21 purposes of their opinions and calculations. (Doc. 165-1 at 10 [Borrelli report: “In my
 22 opinion, Doe’s likely career path (if he actually pursues it), both in the but-for and actual
 23 worlds, is limited to coaching for small DI schools or schools in DII or DIII (and would
 24 have been limited to small DI schools or schools in DII or DIII even if Doe had not been
 25 expelled from ASU). In my opinion, the disciplinary proceedings against Doe delayed, but
 26 did not preclude, his ability to obtain employment as a DI wrestling coach at one of the
 27 smaller DI schools.”]; Doc. 165-1 at 154 [Duncan report: “[A]fter graduating from ASU,
 28 it is reasonable to assume that Mr. Doe would have secured a position as a Division II/III
 assistant coach, and would likely have remained there for approximately four years.
 Assuming success in that position, Mr. Doe could have then applied for a Division I
 assistant coach position.”].) Additionally, another of Doe’s experts, Owen, opined that
 Doe could have pursued a career as a “collegiate” coach. (Doc. 158-1 at 4 [“I believe the
 two years that Doe lost cost him many achievements and accolades that would have
 allowed him to increase his marketability (sponsorships and employment) and earning
 power down the road, should he choose to make a living as an athlete and then as a coach
 at the collegiate . . . level.”].) The Court has now held that Owen may offer this particular
 opinion at trial. (Doc. 233 at 8-9 [“Owen is qualified to offer opinions about a collegiate
 wrestling coach’s typical qualifications . . . [and] has adequately explained how his
 experiences informed his opinions regarding collegiate coaching qualifications.”].)
 Accordingly, Dr. Kaufman’s assumption has a sufficient enough basis to avoid exclusion.

1 II. ABOR's Motion For Reconsideration (Doc. 227)

2 A. **Legal Standard**

3 "The Court will ordinarily deny a motion for reconsideration of an Order absent a
4 showing of manifest error or a showing of new facts or legal authority that could not have
5 been brought to its attention earlier with reasonable diligence." LRCiv. 7.2(g)(1).
6 Reconsideration is an "extraordinary remedy" that is available only in "highly unusual
7 circumstances." *Kona Enters., Inc.*, 229 F.3d at 890 (internal quotation marks omitted).
8 "Motions for reconsideration are disfavored . . . and are not the place for parties to make
9 new arguments not raised in their original briefs. Nor is reconsideration to be used to ask
10 the Court to rethink what it has already thought." *Motorola, Inc. v. J.B. Rodgers*
11 *Mechanical Contractors*, 215 F.R.D. 581, 582 (D. Ariz. 2003) (citations omitted).

12 B. **Analysis**

13 In the August 30, 2022 order, the Court concluded that ABOR's motion for
14 summary judgment should be denied because "Doe's proffered evidence could lead a
15 reasonable juror not only to conclude that his disciplinary proceeding was marred by an
16 array of procedural irregularities, but also that ASU's disciplinary process generates
17 statistical anomalies that raise an inference of gender bias." (Doc. 209 at 60.) ABOR
18 challenges both of these conclusions in its motion for reconsideration. In Part A, ABOR
19 identifies reasons why it was improper to rely on the statistical anomalies identified by Dr.
20 Kaufman. (Doc. 227 at 2-10.) In Part B, ABOR identifies reasons why it was improper to
21 rely on the alleged irregularities. (*Id.* at 10-17.)

22 1. Statistical Evidence

23 ABOR's seven reconsideration arguments concerning Dr. Kaufman require little
24 additional discussion because they are largely addressed in Part I above. To the extent
25 those arguments are not offered as relevance/admissibility objections but as evidentiary-
26 weight objections, the Court is unpersuaded: (1) it was not manifestly erroneous to rely on
27 Dr. Kaufman's opinions for purposes of evaluating ABOR's entitlement to summary
28 judgment because the Ninth Circuit has repeatedly recognized that statistics such as Dr.

1 Kaufman's are useful and relevant (even if not dispositive) in cases involving allegations
2 of intentional discrimination, including Title IX cases such as this one (*Schake; Doe; Gay*);
3 (2) although Dr. Kaufman's acknowledgement that the statistical disparities may be
4 explained by non-discriminatory factors suggests the statistics are alone insufficient to
5 create a triable issue of fact (*Gay; Aragon; Rose*), that principle does not require
6 reconsideration here because Doe does not rely solely on Dr. Kaufman's statistics; (3) the
7 parties' dispute over whether the comparators chosen by Dr. Kaufman are similarly situated
8 to Doe is a factual dispute to be resolved by the jury at trial, not a basis for disregarding
9 Dr. Kaufman's statistics for summary judgment purposes (*Freyd; Alaska Rent-A-Car*);
10 (4) although Dr. Kaufman's failure to consider the factual details set forth in the Title IX
11 Case Tracking Report may render his F-23 analysis impeachable, the circumstances here
12 are sufficiently distinguishable from *Pottenger* that his statistics retain evidentiary value at
13 summary judgment; (5) there was no error, manifest or otherwise, in the Court's
14 determination that it was reasonable for Dr. Kaufman to treat all F-23 violations as
15 comparable in part because ASU has decided that all F-23 violations are unified by a
16 population of similarly situated respondents in some material respect; (6) ABOR's burden-
17 shifting arguments have no bearing on the summary judgment analysis; and (7) ABOR's
18 new evidence does not provide a basis for reconsideration because ABOR did not provide
19 it in support of its summary judgment motion or in support of its exclusion motion, and
20 instead untimely provided it for the first time as an exhibit to its reconsideration request.

21 2. Roe's December 11, 2016 Statement

22 This leaves ABOR's reconsideration arguments concerning irregularities. The first
23 procedural irregularity identified in the summary judgment order was as follows: "[A]
24 reasonable juror could conclude that it was procedurally irregular for Davis not to share
25 Roe's December 11, 2016 comments with Doe before submitting her final investigative
26 report to the Committee and that it was also procedurally irregular for Davis to assure Doe's
27 counsel that Roe 'did not offer any new evidence' during the December 11, 2016 interview.
28 The former was procedurally irregular because, under § C(5) of the Procedures, '[b]efore

1 concluding the investigation, and upon request, the Dean of Students will provide the
2 parties with an opportunity to respond to all investigative materials.’ The latter was
3 procedurally irregular because, for the reasons discussed above, a reasonable juror could
4 conclude that Roe did, in fact, provide important new evidence during the December 11,
5 2016 interview, by changing her account on several key points.” (Doc. 209 at 38-39.)
6 ABOR now seeks reconsideration of this analysis for four reasons: (1) the Court stepped
7 outside its judicial role by “go[ing] to lengths never attempted by Doe . . . to try to identify
8 ‘evidence’ appearing to create a question of fact” on whether Roe’s December 11, 2016
9 interview contained new information; (2) Roe’s December 11, 2016 interview did not, in
10 fact, contain any new information; (3) even assuming the interview contained new
11 information, “Davis did not violate any Procedure in stating that Roe ‘did not offer any
12 new evidence’”; and (4) even assuming there was some procedural violation, it was
13 harmless. (Doc. 227 at 10-14.)

14 ABOR is not entitled to reconsideration based on these arguments. First, ABOR’s
15 accusation of judicial overreach is, like its earlier accusation on this point, both
16 unsupported by the record and disappointing. In its summary judgment motion, ABOR
17 argued that, to the extent Doe sought to rely on “Davis’s statement to Doe that one of Ms.
18 Roe’s written submissions [from December 11, 2016] did not contain new evidence” as a
19 procedural irregularity, this reliance was misplaced because “[a]t best, this assertion
20 reflects a disagreement between Doe and Ms. Davis as to what constitutes ‘new evidence’”
21 and alternatively because “Doe received the opportunity to respond to all information
22 provided by Ms. Roe and did provide lengthy responses, including on December 21, 2016.”
23 (Doc. 155 at 10.) In response, Doe argued that one of the “egregious irregularities in the
24 disciplinary proceedings” occurred when “[t]he University tried to keep Doe from
25 responding to new evidence and ignored the response after receiving it.” (Doc. 189 at 11,
26 14.) Doe elaborated: “Parties have the right to ‘respond to all investigative materials.’
27 Here, Davis refused to grant Doe that right until he hired an attorney who secured the right.
28 The University claimed no substantive new information was provided, but Doe’s attorney

1 identified substantive, new information presented by Doe, and detail[ed] the egregious
2 flaws, inconsistencies, baseless conclusions, and legal infirmities with the draft report. . . .
3 A reasonable jury can infer gender bias based on the University’s failure to give the male
4 accused an opportunity to review and comment on evidence and granting the female
5 accuser that right” (*Id.* at 14-15.) Doe also included, as an exhibit to his response, a
6 copy of the December 21, 2016 letter from his attorney that purported to identify the new
7 information provided by Roe during the December 11, 2016 interview. (Doc. 189-2 at 52-
8 60.) Among other things, this letter stated that Roe provided new information when she
9 “[d]enie[d] being aware of video/photo being taken” and identified earlier statements in
10 which Roe purportedly made conflicting claims on that issue. (*Id.* at 54.)

11 The parties’ dispute over whether Roe’s December 11, 2016 interview contained
12 new substantive information—and whether ASU engaged in procedural impropriety by not
13 giving Doe a fair opportunity to address that new information—was also the subject of
14 extensive discussion during oral argument. After ABOR’s counsel argued that “Doe does
15 not describe in his papers the supposedly new information in Roe’s comments, or what
16 makes Miss Davis’s statement a misrepresentation at all” (Doc. 228 at 21), the Court posed
17 the following question to Doe’s counsel: “What’s your best piece of new substantive
18 information?” (*Id.* at 74.) Doe’s counsel responded: “I have a list. But the best one is,
19 that was the first time she said that she didn’t know she was being filmed. . . . [J]uxtapose
20 that with her [earlier] statements to the police, that not only did I know I was being filmed,
21 but that I stopped it, and I had the capacity to stop it, is evidence that she wasn’t
22 incapacitated So it’s substantive evidence that was never presented and it was the
23 first time that she presented it.” (*Id.* at 74-75.) In reply, ABOR’s counsel stated: “[Doe’s
24 counsel] said that the biggest inconsistency was [Roe’s] statement about not knowing she
25 was being filmed. There’s nothing in the record where she ever said that she knew she was
26 being filmed and stopped it. The evidence of what she actually said is she saw a flash.
27 That’s been extrapolated—now video was taken. She didn’t know. But once you see a
28 video is taken, all of a sudden she was stopping them from filming. That’s just not in the

1 record.” (*Id.* at 82.)

2 Given this backdrop, the Court included, in the summary judgment order, a detailed
3 description of the various statements that Roe made about her awareness of being
4 filmed/videotaped, which included quotations from various documents in the summary
5 judgment record. (Doc. 209 at 38 [“Roe stated on December 11, 2016 that ‘she was not
6 aware that a photo was taken.’ However, during her April 2016 interview with the Tempe
7 Police Department, Roe reported that ‘she saw a camera flash and realized that [Witness
8 1] was taking pictures of her’ Similarly, during Roe’s initial meeting with Davis on
9 September 19, 2016, Roe stated that ‘[d]uring the encounter, she stated to see flashes going
10 off. She asked what it was and was told not to worry about it. She then responded that she
11 did not want to be recorded.’ And during her subsequent meeting with Davis on October
12 27, 2016, Roe stated that ‘the camera was brought out after she said no.’”].) Based on this
13 summary, the Court concluded that “a reasonable juror could conclude that Roe did, in fact,
14 provide important new evidence during the December 11, 2016 interview, by changing her
15 account on several key points.” (*Id.* at 39.) It is difficult to see how ABOR could view
16 this as an example of “assum[ing] Doe’s burden,” “act[ing] as a party’s lawyer,” and
17 deciding “to venture outside the adversarial issues presented to the Court by the parties.”
18 (Doc. 227 at 11, 13, cleaned up.) The Court resolved a factual dispute that both parties
19 expressly raised in their summary judgment papers and expressly raised again during oral
20 argument. Analyzing an expressly disputed issue is not judicial advocacy, but the normal
21 discharge of the judicial role.

22 To the extent ABOR’s claim of judicial advocacy concerns the Court’s
23 identification in the summary judgment order of two other examples of new information
24 provided by Roe during the December 11, 2016 interview—first, Roe’s statement that she
25 was too intoxicated to be aware of what was happening or to remember what happened;
26 and second, Roe’s statement that she did not say stop because she was too intoxicated (Doc.
27 209 at 37-38)—these examples were also identified in Doe’s counsel’s letter (Doc. 189-2
28 at 52-55, 59), which Doe cross-referenced in his summary judgment response (Doc. 189 at

1 14). Accordingly, the inclusion of these examples in the summary judgment order was not,
2 as ABOR argues, an improper attempt to identify evidence “for the first time . . . which
3 Doe did not cite in response to ABOR’s Motion” (Doc. 227 at 11), but the Court’s best
4 effort to fully and fairly address each side’s arguments and proffered evidence.

5 ABOR has also failed to demonstrate that the Court’s resolution of this dispute was,
6 on the merits, manifestly erroneous. A reasonable juror could find that Roe made
7 statements during her December 11, 2016 interview that were inconsistent with her
8 previous statements. Although ABOR attempts in its reconsideration motion to show how
9 all of Roe’s statements can be reconciled with each other (Doc. 227 at 11-12), accepting
10 these arguments would, at a minimum, require the Court to resolve various inferences in
11 ABOR’s favor (which is impermissible at summary judgment).

12 Because a reasonable juror could find that Roe’s statements were inconsistent, a
13 reasonable juror could also find that it was procedurally irregular for Davis to assure Doe’s
14 counsel that Roe “did not offer any new evidence” during the December 11, 2016
15 interview. The Court fully agrees with Doe on this point: “[W]hile ABOR does not need
16 to use any specific language when conveying to a party that no new information was
17 received from the complainant, ASU cannot lie and say no new evidence was offered.”
18 (Doc. 241 at 14.) Without belaboring the issue, Roe’s account of the sexual encounter was
19 perhaps the most important evidence in the proceeding against Doe. Accordingly, evidence
20 bearing on Roe’s credibility—such as whether her description of the encounter varied over
21 time, even if those descriptions were not flatly inconsistent with each other—was critical.
22 *Cf. Doe v. Univ. of Conn.*, 2020 WL 406356, *4 (D. Conn. 2020) (noting that “in any case
23 involving a ‘he said/she said’ dispute, . . . evidence bearing on credibility is critical”). *See*
24 *generally Jencks v. United States*, 353 U.S. 657, 667 (1957) (“Every experienced trial judge
25 and trial lawyer knows the value for impeaching purposes of statements of the witness
26 recording the events before time dulls treacherous memory. Flat contradiction between the
27 witness’ testimony and the version of the events given in his reports is not the only test of
28 inconsistency. The omission from the reports of facts related at the trial, or a contrast in

1 emphasis upon the same facts, even a different order of treatment, are also relevant to the
2 cross-examining process of testing the credibility of a witness' trial testimony.”). The
3 Court thus finds no error, manifest or otherwise, in its determination in the summary
4 judgment order that a reasonable juror could find that it was procedurally irregular for the
5 lead investigator in a sexual misconduct investigation to falsely assure the respondent that
6 the complainant had not offered any new evidence during her last pre-hearing interview
7 and then provide a summary of the last interview to the decisionmakers without first giving
8 the respondent an opportunity to review it.¹⁹

9 Finally, ABOR is not entitled to reconsideration based on its contention that any
10 procedural irregularity can be disregarded on harmlessness grounds. First, and as noted in
11 the summary judgment order, this argument is forfeited because it is a new theory that
12 ABOR did not properly raise in the summary judgment motion. (Doc. 209 at 43.) The
13 words “causation” and “harmless” do not appear anywhere in that motion (Doc. 155),
14 which argued that ABOR was entitled to summary judgment because there was no evidence
15 of external pressure to engage in gender bias (*id.* at 4-5), no evidence of comments
16 reflecting gender bias (*id.* at 5-7), no evidence of any procedural irregularities (*id.* at 7-13),
17 and no admissible expert evidence to support Doe's claim (*id.* at 13-17). The argument
18 that no procedural irregularity occurred is very different from the argument that any
19 procedural irregularity was harmless. Second, even if the argument weren't forfeited, Doe
20 has identified various reasons why a reasonable juror could view the irregularity
21 concerning Roe's December 11, 2016 statement as harmful. (Doc. 241 at 14-15.) Third,
22 and more broadly, the Court is not persuaded that a procedural irregularity in a Title IX

23 ¹⁹ In the summary judgment order, the Court concluded that a reasonable juror could
24 find procedural impropriety not only for the reasons stated above, but also because Davis's
25 approach violated § C(5) of the Code. In the motion for reconsideration, ABOR argues
26 that it was manifestly erroneous to conclude that § C(5) was implicated here. (Doc. 227 at
27 13.) The Court is not necessarily persuaded. True, one of Davis's December 20, 2016
28 emails included the statement “I am happy to have you come in to view her responses”
(Doc. 189-2 at 63), but Davis had already sent the final report to the Dean for review by
the time she made this offer (*id.* at 64). Nevertheless, regardless of any error in the
interpretation of § C(5), the summary judgment order's overall determination that a
reasonable juror could find procedural irregularity as to Davis's treatment of Roe's
December 11, 2016 statement was not manifestly erroneous.

1 case becomes irrelevant if the plaintiff cannot draw a direct causal link between that
2 irregularity and the outcome of the underlying disciplinary proceeding. Here, Doe seeks
3 to rely on an array of circumstantial evidence, including statistical evidence of disparities,
4 various procedural irregularities, and the fact that his expulsion was ultimately overturned
5 based on insufficient evidence, in an attempt to prove the existence of gender bias. As
6 noted in *Gay*, “[s]ince the question is one of inferring discriminatory intent, the district
7 court should make a sensitive inquiry into such circumstantial and direct evidence of intent
8 as may be available. . . . [A]ll evidence, both direct and circumstantial, statistical and
9 nonstatistical, relevant to that question should be assessed on a cumulative basis.” 694
10 F.2d at 550. Disregarding individual procedural irregularities on harmless grounds
11 would, at least under the circumstances of this case, violate this directive to conduct a
12 sensitive inquiry that considers the cumulative impact of all of Doe’s evidence.

13 3. Failure To Disclose “Sex By Force” Theory

14 The second procedural irregularity identified in the summary judgment order was
15 as follows: “A reasonable juror could conclude that the UHB’s decision to find Doe
16 responsible under a sex-by-force theory constituted a procedural irregularity. . . . [T]he
17 summary of the charges provided at the outset of the letter [sent by Dr. Hunter on
18 September 21, 2016] only accused Doe of engaging in sexual acts ‘without her consent’
19 and did not make any separate mention of sex by force. Similarly, during later meetings
20 with Doe, Davis made comments that can be reasonably construed as suggesting the
21 sexual-misconduct investigation was only focused on incapacitation and the lack of
22 consent, not on the presence of force.” (Doc. 209 at 42-43.) ABOR now seeks
23 reconsideration of this analysis for four reasons: (1) the “undisputed evidence” shows that
24 ASU properly disclosed the sex-by-force theory; (2) alternatively, there is no requirement
25 under the Procedures to provide “a detailed description of each theory of sexual
26 misconduct”; (3) finding a disclosure violation under these circumstances would create an
27 “inherent contradiction” with the Court’s relevance and reliability determinations
28 concerning Dr. Kaufman; and (4) any irregularity was harmless. (Doc. 227 at 14-16.)

1 ABOR is not entitled to reconsideration based on these arguments. The first and
2 second arguments are improper because they essentially repeat the same arguments that
3 ABOR made (and the Court rejected) during the summary judgment process. *Motorola*,
4 215 F.R.D. at 582 (“Nor is reconsideration to be used to ask the Court to rethink what it
5 has already thought.”). At any rate, even after considering ABOR’s latest recitation of
6 these arguments, the Court stands by its earlier conclusion. As Doe correctly notes in his
7 response, even though it is undisputed that “Doe was ‘charged’ with ‘Sexual Misconduct’
8 under F-23 . . . the Dean of Students was required to explain those charges, and she did: by
9 explaining that Doe was being accused of engaging in sex with a person who was
10 incapacitated. . . . [T]here is sufficient evidence for a jury to find that the decision to find
11 Doe responsible for sex by force without notice constituted a procedural irregularity.”
12 (Doc. 241 at 16-17; Doc. 209 at 42-43.)

13 Nor does the Court find any inherent contradiction between this conclusion and the
14 analysis regarding Dr. Kaufman. The issue here concerns notice and compliance with
15 procedural regulations—specifically, whether it is procedurally irregular to inform a
16 student that he is being charged with one specific form of “sexual misconduct” under F-
17 23, only to find him responsible for committing an entirely different form of “sexual
18 misconduct” under F-23. The issue as to Dr. Kaufman was whether a statistical analysis
19 of all “sexual misconduct” cases under F-23, irrespective of the underlying facts, would
20 fall within Rule 702’s broad conception of relevance. Although both analyses touch, in a
21 broad sense, on the same subject matter, they turn on very different considerations.

22 Finally, ABOR’s harmlessness arguments as to the sex-by-force issue fail for the
23 same reasons as its harmlessness arguments regarding Roe’s December 11, 2016
24 statements—they are forfeited, factually unsupported for the reasons stated in Doe’s
25 response (Doc. 241 at 17), and legally misplaced.

26 4. Arizona Court Of Appeals Decision

27 The final irregularity identified in the summary judgment order was as follows:
28 “[T]he fact of reversal [by the Arizona Court of Appeals] helps support Doe’s contention

1 that his disciplinary proceeding was infected by irregularities that may, in concert with
2 other evidence, give rise to an inference of gender bias. The clearest support for this
3 conclusion comes from the Ninth Circuit’s recent *Doe* decision, which identified ‘the state
4 court’s ruling . . . in the writ proceeding . . . that the evidence did not support the Regents’
5 findings’ as one of the ‘procedural irregularities’ that could ‘support an inference of gender
6 bias, particularly when considered in combination with allegations of other specific
7 instances of bias and background indicia of sex discrimination.’ That is essentially what
8 happened here—although Dr. Hightower, the UHB, and Dr. Rund all determined that Doe
9 had committed sexual misconduct in violation of section F-23, the appellate court held that
10 no reasonable person could have reached that conclusion. Although the Court agrees with
11 ABOR that the fact of reversal does not, in itself, mean that Doe must prevail on his Title
12 IX claim or even survive summary judgment—there must be other evidence from which a
13 reasonable juror could conclude this irregularity was indicative of gender bias—it would
14 be reasonable for a juror to find *irregularity* based on the reversal.” (Doc. 209 at 45,
15 citations omitted). ABOR now seeks reconsideration of this analysis for two reasons: (1)
16 Doe never disclosed his intent to rely on the Arizona Court of Appeals’ decision as
17 evidence of a procedural irregularity; (2) on the merits, the decision does not qualify as
18 evidence of an irregularity. (Doc. 227 at 16-17.)

19 ABOR is not entitled to reconsideration based on these arguments. First, these are
20 essentially the same arguments that ABOR made (and the Court rejected) during the
21 summary judgment process. *Motorola*, 215 F.R.D. at 582. Second, the Court agrees with
22 Doe (Doc 241 at 18-19) that these arguments fail on the merits—Doe disclosed his intent
23 to rely on the decision (Doc. 155-5 at 100-02) and a reasonable juror could find an
24 irregularity based on the reversal, as recognized by the Ninth Circuit in *Doe*.

25 ...

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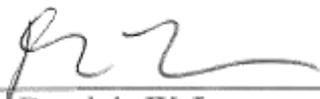
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Accordingly,

IT IS ORDERED that:

1. ABOR’s motion to exclude Dr. Kaufman (Doc. 159) is **denied**.
2. ABOR’s motion for reconsideration (Doc. 227) is **denied**.

Dated this 18th day of November, 2022.



Dominic W. Lanza
United States District Judge