No. _____

In the Supreme Court of the United States

THE OHIO STATE UNIVERSITY,
Petitioner,
v.
STEVE SNYDER-HILL, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688, prohibits discrimination on the basis of sex in educational programs or activities that receive federal financial assistance. Title IX does not express a private right of action, but in *Cannon v. University of Chicago*, 441 U.S. 677 (1979), this Court implied one. Because Title IX lacks an express right of action, it does not specify a statute of limitations. As a result, the length of the limitations period is governed by analogous state law, whereas the date on which the limitations period begins to run—i.e., when the Title IX claim "accrue[s]"—"is a question of federal law that is *not* resolved by reference to state law." *Wallace v. Kato*, 549 U.S. 384, 387-88 (2007).

In the decision below, a divided panel of the Sixth Circuit—in conflict with the decisions of other circuits—devised an extreme new "discovery rule" for Title IX that permitted respondents to assert Title IX claims based on conduct that occurred more than 20 to 40 years before they filed suit. The court also interpreted Title IX's private right of action to extend beyond current or prospective students or employees to essentially anyone who steps foot on a college campus. The questions presented are:

1. Whether, or to what extent, a Title IX claim accrues after the date on which the alleged injury occurred.

2. Whether, or to what extent, Title IX's implied private right of action extends to individuals who are not current or prospective students or employees.

PARTIES TO THE PROCEEDING

Petitioner (defendant-appellee below) is The Ohio State University.

Respondents (plaintiffs-appellants below) are:

- Steve Snyder-Hill, Ronald McDaniel; David Mulvin; William Brown; Kurt Huntsinger; William Rieffer; Steve Hatch; Kelly Reed; Melvin Robinson; Douglas Wells; James Khalil; Jerrold L. Solomon; Joseph Bechtel; Michael Murphy; John David Faler; Matt McCoy; Gary Avis; Robert Schriner; Michael Montgomery; John Doe 1; John Doe 2; John Doe 3; John Doe 4; John Doe 5; John Doe 6; John Doe 7; John Doe 8; John Doe 9; John Doe 10; John Doe 11; John Doe 12; John Doe 13; John Doe 14; John Doe 15; John Doe 16; John Doe 17; John Doe 18; John Doe 19; John Doe 20; John Doe 21; John Doe 22; John Doe 25; John Doe 27; John Doe 29; John Doe 30; John Doe 31; John Doe 32; John Doe 33; John Doe 34; John Doe 35; John Doe 36; John Doe 37; John Doe 39; John Doe 40; John Doe 41; John Doe 42; John Doe 43; John Doe 44; John Doe 45; John Doe 46; John Doe 47; John Doe 49; John Doe 52; John Doe 54; John Doe 56; John Doe 57; John Doe 58; John Doe 59; John Doe 60; John Doe 62; John Doe 63; John Doe 64; John Doe 66; John Doe 67; John Doe 68; John Doe 69; John Doe 70; John Doe 71; John Doe 72; John Doe 73; John Doe 74; John Doe 75; John Doe 76; and John Doe 77 (plaintiffs-appellants in the court of appeals in No. 21-3981); and
- Timothy Moxley; Ryan Callahan; John Jackson, Jr.; James Carroll; Patrick Murray;

Everett Ross; John Doe 78; John Doe 82; John Doe 83; John Doe 84; John Doe 88; John Doe 89; John Doe 90; John Doe 91; John Doe 92; John Doe 94; John Doe 95; John Doe 97; John Doe 98; John Doe 99; John Doe 101; John Doe 103; and John Doe 104 (plaintiffs-appellants in the court of appeals in No. 21-3991).

The following parties were plaintiffs-appellants in the court of appeals in No. 21-3991 but dismissed their appeals: Jeffrey Rohde; John Doe 79; John Doe 80; John Doe 81; John Doe 85; John Doe 86; John Doe 87; John Doe 93; John Doe 100; John Doe 102; and John Doe 105.

The following parties were plaintiffs in the district court but did not participate in the proceedings in the court of appeals: Hugh Dyer; John Doe 24; John Doe 26; John Doe 38; John Doe 48; John Doe 51; John Doe 53; John Doe 55; and John Doe 61 (plaintiffs in the district court in No. 18-cv-736); and John Doe 96 (plaintiff in the district court in No. 21-cv-3838).

RELATED PROCEEDINGS

United States Court of Appeals (6th Cir.):

Snyder-Hill v. Ohio State Univ., No. 21-3981 (Sept. 14, 2022), *reh'g denied* (Dec. 14, 2022)

Moxley v. Ohio State Univ., No. 21-3991 (Sept. 14, 2022), *reh'g denied* (Dec. 14, 2022)

United States District Court (S.D. Ohio):

Snyder-Hill v. Ohio State Univ., No. 18-cv-736 (Sept. 22, 2021)

Moxley v. Ohio State Univ., No. 21-cv-3838 (Oct. 25, 2021)

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PETITION FOR A WRIT OF CERTIORARI

The Ohio State University respectfully petitions this Court for a writ of certiorari to review the judgments of the United States Court of Appeals for the Sixth Circuit in these cases. Pursuant to this Court's Rule 12.4, Ohio State is filing a "single petition for a writ of certiorari" for these cases because the judgments below are from "the same court and involve identical or closely related questions."

OPINIONS BELOW

The opinion of the court of appeals in these consolidated cases (App. 1a-68a) is reported at 48 F.4th 686. The order of the court of appeals denying rehearing (App. 69a-109a) is reported at 54 F.4th 963. The opinion of the district court in No. 18-cv-736 (App. 110a-12a) is available at 2021 WL 7186148. The opinion of the district court in No. 21-cv-3838 (App. 113a-14a) is available at 2021 WL 7186269.

JURISDICTION

The court of appeals entered its judgments on September 14, 2022, and denied rehearing on December 14, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688, are reproduced at App. 140a-46a.

INTRODUCTION

Statutes of limitations—and the idea that a claim must be brought within a fixed period of time—are almost as old as the law itself. As this Court recently reiterated, they "provide 'security and stability to

human affairs'" and thus are "'vital to the welfare of society.'" *Gabelli v. SEC*, 568 U.S. 442, 448-49 (2013) (quoting *Wood v. Carpenter*, 101 U.S. 135, 139 (1879)). But effective statutes of limitations require clear rules governing the date on which a claim accrues and the limitations period begins to run. The threshold question in this case—on which the circuits are split—is when does a claim under Title IX accrue?

The underlying Title IX cases here present that issue in stark terms. Respondents allege that they were sexually abused by a doctor, Richard Strauss, who was employed by Ohio State between 1978 and 1998, and that Ohio State was deliberately indifferent to Strauss's abuse at the time. But respondents did not file suit against Ohio State until 2018 and 2021—more than 20 to 40 years after the alleged abuse occurred, 20 years after Strauss stopped working at Ohio State, and long after they had graduated from or left Ohio State. The district court held that these actions were untimely under the two-year statute of limitations that undisputedly applies to these claims (as borrowed from Ohio law). But a divided Sixth Circuit panel reversed, holding that respondents' claims did not accrue as a matter of federal law until 2018—after Ohio State announced an independent investigation into Strauss's misconduct. The Sixth Circuit denied rehearing en banc, over the dissents of Judges Guy, Thapar, Readler, and Bush.

The dissenters explicitly called for this Court's review—"before more jurisprudential damage is done." App. 86a (Readler, J., joined by Bush, J., dissenting from denial of rehearing en banc). As they explained, the Sixth Circuit's ruling deepens a "circuit split" over the proper accrual rule for Title IX claims. *Id.* at 97a; *see id.* at 49a (Guy, J., dissenting). The

Tenth Circuit has held that Title IX claims are subject to the standard "occurrence rule," under which a claim accrues when the plaintiff is injured. Other circuits have adopted the "discovery rule," under which a claim accrues when the plaintiff becomes aware he is injured or has sufficient information to know he has been injured. And, in this case, the Sixth Circuit adopted an extreme new position—a "injury-and-deliberate-indifference discovery rule," *id.* at 47a (Guy, J., dissenting), which delays accrual until the plaintiff "knows or has reason to know" of their injury *and* the educational institution's "deliberate indifference," *id.* at 32a-33a (majority opinion). This circuit conflict alone warrants certiorari.

As the dissenters explained, the Sixth Circuit's position also is profoundly mistaken. This Court has repeatedly stressed that the occurrence rule is the "standard rule" of accrual that governs federal claims, absent unambiguous statutory text to the contrary. *Wallace v. Kato*, 549 U.S. 384, 388 (2007) (citation omitted); *see also, e.g.*, *Rotkiske v. Klemm*, 140 S. Ct. 355, 360 (2019). That should have ended the inquiry, since Title IX does not express any contrary accrual rule. And even when the discovery rule applies, this Court has been "emphatic" that "discovery of the injury, not discovery of the other elements of a claim, is what starts the clock." *Rotella v. Wood*, 528 U.S. 549, 555 (2000). The Sixth Circuit's extreme new discovery rule, however, extends beyond injury and delays accrual until the plaintiff also "discovers" all of the facts underlying the defendant's deliberate indifference. The upshot is that the Sixth Circuit's decision "effectively nullifies any statute of limitations for Title IX claims based on sexual harassment." App. 43a (Guy, J., dissenting).

The conflict and confusion over such a basic aspect of Title IX litigation—the accrual date for the applicable statute of limitations—benefits neither victims nor schools, and is especially intolerable "in view of the 'federal interests in uniformity, certainty, and the minimization of unnecessary litigation' surrounding statutes of limitations." *Id.* at 100a (Readler, J., dissenting) (citation omitted). And the importance of that issue is only heightened by a separate ruling by the divided Sixth Circuit below "drastically expanding" Title IX's implied right of action to "cover virtually anyone who sets foot on campus, no matter the reason." *Id.* at 85a, 101a (Readler, J., dissenting). That ruling exposes an even more fundamental problem with the Sixth Circuit's ruling on both questions—it casts aside the restraint this Court has stressed is required in interpreting the contours of any implied private right of action.

Ohio State condemns the reprehensible conduct underlying these lawsuits, has committed substantial resources to preventing and addressing sexual misconduct on campus, and is a fundamentally different institution today than it was 25 years ago. But the questions presented are purely legal and thus transcend the particular circumstances alleged here. No federally funded educational institution should be subjected to "this distorted application of Title IX," under which "cases may reach back to conduct over 40 years old." *Id.* at 85a-86a. The petition should be granted.

STATEMENT OF THE CASE

A. Legal Background

Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from

participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Congress enacted Title IX pursuant to the Spending Clause. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287 (1998). Its "only express enforcement mechanism" is an "administrative procedure" for the withdrawal of federal funding. *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 255 (2009) (citing 20 U.S.C. § 1682). In *Cannon v. University of Chicago*, 441 U.S. 677 (1979), however, this Court implied a private right of action for Title IX. In such suits, plaintiffs may seek injunctive relief and damages against schools receiving federal funds. *See Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 76 (1992).

Because Title IX rests on a "contractual framework" that ties its non-discrimination mandate to the receipt of federal funds, *Gebser*, 524 U.S. at 286, the Court has stressed that "private damages actions" under Title IX "are available only where recipients of federal funding had adequate notice that they could be liable for the conduct at issue," *Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 640 (1999); *see, e.g.*, *Cummings v. Premier Rehab Keller, P.L.L.C.*, 142 S. Ct. 1562, 1569-70 (2022). In addition, to establish liability under Title IX for sexual harassment, a plaintiff must show, in addition to other elements, that an educational institution has "actual knowledge" of, and acts with "deliberate indifference" to, the "sexual harassment." *Davis*, 526 U.S. at 641-43 (citing *Gebser*, 524 U.S. at 290-91).

Because Title IX lacks an express private right of action, it lacks an express statute of limitations governing that action. When a federal cause of action

lacks an express limitations period, the length of the period is determined by "the law of the State in which the cause of action arose." *Wallace*, 549 U.S. at 387. Here, all agree that the relevant limitations period under applicable Ohio law is two years. App. 19a; *see* Ohio Rev. Code § 2305.10(A). But the "accrual date" on which the limitations period begins to run "is a question of federal law that is *not* resolved by reference to state law." *Wallace*, 549 U.S. at 388.

B. Factual Background

The abuse alleged in these cases occurred decades ago. From 1978 to 1998, Richard Strauss was employed by Ohio State as a physician at the University's Student Health Center and as a team physician for multiple athletics teams. App. 2a-3a. In these capacities, Strauss sexually abused hundreds of young men, often while performing medical examinations. This abuse occurred in various settings on campus and at Strauss's home. *See id.* at 2a-5a, 9a, 15a; *id.* at 45a-47a (Guy, J., dissenting).

Plaintiffs allege that Strauss's abusive behavior was well known among Ohio State students and staff, including members of Ohio State's athletics department and staff at the Student Health Center. *Id.* at 6a-7a, 10a (majority op.). Ohio State ultimately placed Strauss on administrative leave in 1996 and, after investigating his conduct, terminated his position with University athletics. *Id.* at 3a. Strauss retired from the University in 1998 and died in 2005. *Id.*; *id.* at 43a (Guy, J., dissenting).

In April 2018, after a former Ohio State wrestler reported to the University that Strauss had abused him decades earlier, Ohio State launched an external, independent investigation led by Perkins Coie LLP.

Id. at 5a (majority op.). This investigation was comprehensive: Ohio State contacted more than 115,000 alumni and student-athletes and reached an additional 147,000 people through University-wide notifications to inform them of the investigation and encourage them to share any information they had with investigators. Ohio State also created a webpage dedicated to the investigation and has released thousands of pages of records relating to Strauss.[1]

In May 2019, Ohio State publicly released a 182-page report prepared by Perkins Coie summarizing the investigation and its findings. *See* Caryn Trombino & Markus Funk, Perkins Coie LLP, *Report of the Independent Investigation: Sexual Abuse Committed by Dr. Strauss at The Ohio State University* (May 15, 2019).[2] The report found that Strauss sexually abused at least 177 men, nearly all students, between 1978 and 1998. *Id.* at 1, 43. The report also found that, despite "persisten[t], serious[], and regular[]" complaints, "no meaningful action was taken by the University to investigate or address the concerns until January 1996." *Id.* at 3.

In the wake of this investigation, Ohio State has been committed to reconciling with its former students and alumni who were impacted by Strauss. For example, Ohio State has repeatedly and unequivocally condemned Strauss's abuse and its own failure to prevent that abuse, and expressed its regret and sincere apologies to each person impacted by Strauss's abuse. Ohio State also has offered to cover

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[1] *See Strauss Investigation*, Ohio State Univ., https://compliance.osu.edu/strauss-investigation.html (last visited Mar. 13, 2023).

[2] https://compliance.osu.edu/assets/site/pdf/Revised_report.pdf.

the cost of professionally certified counseling services and treatment for anyone affected by Strauss, and established a task force on sexual abuse composed of leading experts and sexual-abuse survivors.

C. Proceedings Below

1. After the announcement of the investigation and issuance of the Perkins Coie report, hundreds of plaintiffs filed Title IX claims against Ohio State in the Southern District of Ohio. This petition concerns two lawsuits that were consolidated for appeal: *Snyder-Hill v. Ohio State University*, No. 21-3981 (6th Cir.), and *Moxley v. Ohio State University*, No. 21-3991 (6th Cir.). The *Snyder-Hill* suit was filed in July 2018, and the *Moxley* suit was filed in June 2021. App. 17a-18a; *see id.* at 110a, 113a. The plaintiffs—respondents in this Court—are 103 former Ohio State students and student-athletes; two individuals who refereed wrestling matches on Ohio State's campus; and two former high-school students who visited campus, one to see a relative and the other to attend a summer camp. *See id.* at 5a, 38a.

Respondents allege that Strauss abused them while he was employed at Ohio State, and that Ohio State officials were deliberately indifferent to that abuse. *Id.* at 1a-2a. While respondents' complaints describe the various acts of abuse in detail, all of the "abuse occurred between 1978 and 1998"—20 to 40 years before respondents filed suit, and decades after they had graduated from or left Ohio State. *Id.* at 2a; *see id.* at 43a (Guy, J., dissenting).

2. The district court granted Ohio State's motions to dismiss, holding that respondents' claims are time-barred under the applicable two-year limitations period. *Id.* at 110a-14a. In both *Snyder-Hill* and

Moxley, the court incorporated the reasoning from its opinion in *Garrett v. Ohio State University*, 561 F. Supp. 3d 747 (S.D. Ohio 2021) (reproduced at App. 115a-39a), *vacated*, 60 F.4th 359 (6th Cir. 2023), a case brought by other Strauss victims asserting Title IX claims.[3] *See* App. 111a, 113a-14a.

In *Garrett*, the district court held that the plaintiffs' Title IX claims are untimely, regardless of whether those claims accrued under the "occurrence rule" or the "discovery rule." *Id.* at 121a-33a. Under the "occurrence rule," the court explained, the claims accrued no later than when the plaintiffs separated from the University (between 1978 and 1999), since that is "the latest moment they were deprived of access to educational opportunities or benefits provided by Ohio State as a result of Ohio State's deliberate indifference." *Id.* at 125a-26a. Likewise, the court continued, even if the discovery rule applied, that would not change the accrual date, because the plaintiffs were "aware of" their injuries when the injuries occurred, and the "latest date of notice for each [p]laintiff . . . occurred well before two years prior to filing [suit]." *Id.* at 126a-33a.

3. A divided panel of the Sixth Circuit reversed. *Id.* at 1a-68a.

a. Writing for the majority, Judge Moore recognized as undisputed that the abuse at issue occurred between 1978 and 1998, and that Ohio's two-year statute of limitations governs respondents' claims. *Id.* at 2a, 19a. But the majority held, based on Sixth Circuit precedent and Title IX's "broad

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[3] The Sixth Circuit's decision in *Garrett* is the subject of the petition for certiorari in *Ohio State University v. Gonzales*, which presents the same threshold issue as this petition.

remedial purpose," that the "discovery rule," not the "occurrence rule," governs the accrual of Title IX claims. *Id.* at 20a-22a. According to the majority, the decisions of this Court and other circuits adopting the occurrence rule as the default rule for federal causes of action are "inapposite." *Id.* at 22a-25a.

The majority then held that, under the discovery rule, a Title IX claim accrues only when the plaintiff "knows or has reason to know that they were injured and that the defendant [educational institution] caused their injury" through its "deliberate indifference." *Id.* at 25a-35a. In the majority's view, a plaintiff's "knowledge that he was abused," that the abuser was "employed" by the educational institution, and that other students and staff were aware of the abuse is "not enough to start the clock." *Id.* at 34a. Rather, according to the majority, the limitations period does not begin to run until the plaintiff "knows or should have known" of the institution's "deliberate indifference"—i.e., that school "administrators 'with authority to take corrective action' knew of [the abusive] conduct and failed to respond appropriately." *Id.* at 33a-35a (citation omitted).

Applying that rule to respondents' allegations, the majority held that, at the time of their injuries, respondents may have "lacked reason to know . . . the underlying facts about Ohio State's alleged deliberate indifference." *Id.* at 33a. According to the majority, "Ohio State is a vast institution," and it is "difficult" for "a student to know what appropriate persons within the Ohio State administration knew." *Id.* at 34a. The majority also suggested that respondents may not have been able to discover Ohio State's deliberate indifference because it was "concealed," and that respondents may not have realized that

Strauss's "extreme[ly] distress[ing]" conduct "medically" constituted "abuse." *Id.* at 35a-38a.

The majority also rejected Ohio State's separate argument that the claims filed by four respondents could not proceed in any event because they were not students or employees at the time of the abuse. *Id.* at 38a-42a. According to the majority, "we have never limited the availability of Title IX claims to employees or students." *Id.* at 39a. The court held that non-students and non-employees may bring suit under Title IX if they were allegedly subjected to "discrimination" in an "'education program or activity,'" which it "defined broadly" to "extend[] to situations in which individuals are, for example, accessing university libraries or other resources, or attending campus tours, sporting events, or other activities." *Id.* at 41a (citation omitted).

b. Judge Guy dissented. *Id.* at 43a-68a. He explained that the majority's adoption of the discovery rule, rather than the occurrence rule, for Title IX claims contravenes this Court's precedents and exacerbates a "circuit split." *Id.* at 47a-55a. Moreover, Judge Guy added, the majority improperly adopted "a new injury-and-deliberate-indifference discovery rule" that also conflicts with precedent from this Court and other circuits, and ultimately "renders meaningless any limitations provision for Title IX claims." *Id.* at 47a, 55a-65a. Finally, Judge Guy explained that the majority compounded its errors by expanding Title IX to cover the four non-student plaintiffs, noting that "none of [the plaintiffs at issue] alleges that they were 'denied equal access to an educational program or activity.'" *Id.* at 65a-67a (citation and internal alteration omitted).

4. The Sixth Circuit denied panel rehearing and rehearing en banc, over multiple dissents. *Id.* at 69a-109a. Judge Guy dissented for the reasons in his panel dissent. *Id.* at 70a. Judge Thapar dissented in light of the "tension between Sixth Circuit and Supreme Court precedent about when a claim accrues." *Id.* at 83a. And Judge Readler, joined by Judge Bush, dissented in a lengthy opinion. *Id.* at 70a, 84a-109a. Among other things, Judge Readler explained that the panel decision "deepened" a "circuit split" over the proper accrual rule, *id.* at 97a, and it "ignored" "multiple lines of Supreme Court authority," *id.* at 84a-85a, 92a; *see id.* at 88a-100a. He expressly urged this Court to grant review. *Id.* at 86a.

REASONS FOR GRANTING THE PETITION

This petition readily satisfies this Court's criteria for certiorari. The divided Sixth Circuit decision below deepens a circuit conflict on when Title IX claims accrue. It directly contravenes this Court's claim-accrual precedents, while exacerbating the problems associated with expanding implied private rights of action. If left to stand, it will produce enormous uncertainty for educational institutions as well as victims of alleged abuse on the accrual of Title IX claims, and effectively penalize schools for investigating decades-old misconduct. The Sixth Circuit's ruling extending Title IX's judicially implied cause of action to essentially anyone who steps foot on a university campus underscores the implications of the Sixth Circuit's extreme decision and the need for this Court's intervention. Certiorari is warranted.

I. THE SIXTH CIRCUIT'S CLAIM-ACCRUAL RULING WARRANTS REVIEW

A. The Decision Below Deepens A Circuit Split Over When Title IX Claims Accrue

The Sixth Circuit's divided decision "deepened" a "circuit split" over the proper accrual rule for Title IX claims based on harassment. App. 97a (Readler, J., dissenting); *see id.* at 49a (Guy, J., dissenting) (noting the "circuit split"); *Bannister v. Knox Cnty. Bd. of Educ.*, 49 F.4th 1000, 1014 (6th Cir. 2022) ("Circuit courts have adopted different approaches to the accrual rules for Title IX claims.").

1. The Tenth Circuit has adopted the "occurrence" (or "injury occurrence") rule for the accrual of Title IX claims, holding that "accrual occurs [for Title IX claims] when the plaintiff has a complete and present cause of action," such that "'the plaintiff can file suit and obtain relief.'" *Varnell v. Dora Consol. School Dist.*, 756 F.3d 1208, 1215-17 (10th Cir. 2014) (quoting *Wallace v. Kato*, 549 U.S. 384, 388 (2007)); *see* App. 49a (Guy, J., dissenting) ("*Varnell* applied the injury occurrence rule"); *id.* at 97a (Readler, J., dissenting) ("*Varnell* expressly recognized that the occurrence rule serves as the default rule"); *Bannister*, 49 F.4th at 1014 (recognizing that *Varnell* applied the standard occurrence rule).

The plaintiff in *Varnell* asserted a Title IX deliberate-indifference claim against her former high school, alleging that she had been sexually abused by a coach while she was a student, along with a Section 1983 claim based on the same abuse. 756 F.3d at 1215. Heeding this Court's reasoning in *Wallace*, the Tenth Circuit looked to the "accrual date for the common-law tort most analogous" to the plaintiff's

claims—"'battery'"—which is "'complete upon physical contact, even though there is no observable damage at the point of contact.'" *Id.* at 1215-16 (citation omitted). Accordingly, the court held that the plaintiff's claims "accrued no later than the last sexual abuse by [the coach]"—in 2007, well outside the applicable limitations period. *Id.* at 1216-17.

The court observed that, "even if the discovery rule applied," as the plaintiff argued, the plaintiff's claims would still be untimely. *Id.* at 1216. As it explained, the plaintiff "knew long before she filed suit all the facts necessary to sue and recover damages"—even if "she may not have known *how harmful* [the] abuse was." *Id.* (emphasis added). But at both the beginning and end of its claim-accrual analysis, the court held that, under *Wallace*, the *occurrence rule* is the "standard rule" in this context, and that the plaintiff's Title IX claim was untimely under that rule. *Id.* at 1215, 1217.

2. In conflict with the Tenth Circuit, other circuits have held that the "discovery rule" governs the accrual of claims under Title IX.

The Fifth Circuit has held that a Title IX claim accrues when "the plaintiff *becomes aware* that he has suffered an injury or has sufficient information to know that he has been injured." *King-White v. Humble Indep. Sch. Dist.*, 803 F.3d 754, 762 (5th Cir. 2015) (emphasis added) (citation omitted). Unlike the occurrence rule, this discovery rule focuses on the "plaintiff's awareness" of "the existence of the injury" and "the connection between the injury and the defendant's actions." *Id.* (citation omitted). But the Fifth Circuit held in *King-White* that, in the context of a Title IX deliberate-indifference claim, the claim accrues upon a plaintiff's "aware[ness] of the abuse"

and of the abuser's "connection" to the educational institution; the plaintiff need not *also* be aware of the institution's own "conduct" or "policies" reflecting its "deliberate indifference to the abuse." *Id.* at 762-63. In so holding, the Fifth Circuit explicitly "'decline[d]'" to "adopt a 'delayed accrual' rule" tethered to the plaintiff's knowledge of the institution's "policies or customs." *Id.* at 763 (citation omitted).

The Ninth Circuit has likewise held that a Title IX claim "accrues when a plaintiff knows or has reason to know of the injury which is the basis of his action." *Stanley v. Trustees of the Cal. State Univ.*, 433 F.3d 1129, 1136 (9th Cir. 2006) (citation omitted). Thus, when the alleged injury is a "depriv[ation] of educational opportunities and benefits" resulting from sexual abuse, the claim accrues when the plaintiff "'knows or has reason to know'" of the abuse and associated deprivation. *Samuelson v. Oregon State Univ.*, 725 F. App'x 598, 599 (9th Cir. 2018) (quoting *Stanley*, 433 F.3d at 1136). Applying that rule in a case where the plaintiff—who dropped out of college following an on-campus sexual assault—claimed that the university had been "deliberate[ly] indifferen[t] to a prior report of sexual assault," the Ninth Circuit held that the claim accrued "when [the plaintiff] dropped out of school." *Id.* At that point, the court reasoned, the plaintiff was "fully aware of the injury and its consequences." *Id.*

The Second Circuit has taken a similar approach in an unpublished opinion. *Twersky v. Yeshiva Univ.*, 579 F. App'x 7, 9-10 (2d Cir. 2014), *cert. denied*, 575 U.S. 935 (2015). In *Twersky*, the court explained that, even assuming a discovery rule applies to Title IX claims, the limitations period begins to run when plaintiffs are "aware of (1) their injuries,

(2) their abusers' identities, and (3) their abusers' prior and continued employment at [the educational institution]." *Id.* A plaintiff need not also have actual knowledge of "the school's awareness of and indifference to the abusive conduct." *Id.* at 10.

3. In this case, the Sixth Circuit held that the accrual of Title IX claims is governed by the discovery rule, not the occurrence rule. App. 20a-22a. Then it adopted an extreme version of that rule—creating a *third* position on when Title IX claims accrue.

The Sixth Circuit below held that a Title IX claim does not accrue until the plaintiff "knows or has reason to know that they were injured *and that the* [*educational institution*] *caused their injury*." *Id.* at 32a (emphasis added). As a result—unlike in the Second, Fifth, and Ninth Circuits, which have applied a discovery rule for Title IX claims—in the Sixth Circuit a plaintiff's "knowledge that he was abused" and that the abuser is "employed" by the educational institution is "not enough to start the clock." *Id.* at 34a. Rather, in the Sixth Circuit, the limitations period does not begin to run until the plaintiff "knows or should have known" of the institution's "deliberate indifference"—i.e., that school "administrators 'with authority to take corrective action' knew of [the abusive] conduct and failed to respond appropriately." *Id.* at 32a-35a (citation omitted).

As Judge Guy observed in dissent, this "injury-and-deliberate-indifference discovery rule" sets the Sixth Circuit apart from every other circuit to address the issue in the Title IX context. *Id.* at 65a.[4]

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[4] The Sixth Circuit majority relied on a First Circuit case addressing claim accrual under Section 1983. App. 30a (citing *Ouellette v. Beaupre*, 977 F.3d 127, 140 (1st Cir. 2020)). But in

4. This three-way circuit conflict is outcome-determinative here. Had respondents filed suit in the Tenth Circuit, their claims would have been untimely under the occurrence rule, because the last instance of sexual abuse alleged by any respondent occurred decades before they filed suit. The same goes if respondents had filed suit in the Second, Fifth, or Ninth Circuits, because respondents *knew or had reason to know* of their injuries and Strauss's connection to Ohio State at the time it occurred, decades ago—thus triggering the discovery rule adopted by those circuits. Only under the Sixth Circuit's extreme version of the discovery rule—which requires knowledge of an institution's alleged deliberate indifference—could respondents' claims be timely decades after the abuse and any loss of educational opportunity occurred.

This clear circuit conflict warrants certiorari.

B. The Sixth Circuit's Decision Is Wrong

The Sixth Circuit's position also contravenes "multiple lines of Supreme Court authority" governing claim accrual. App. 92a (Readler, J., dissenting); *see id.* at 48a-52a, 55a-64a (Guy, J., dissenting); *id.* at 83a (Thapar, J., dissenting).

1. For starters, the decision below flouts this Court's decisions stressing that the occurrence rule, not the discovery rule, is the default rule governing the accrual of federal causes of action.

a. This Court has repeatedly admonished that the occurrence rule—under which the limitations period

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the Section 1983 context, "*Ouellette* stands alone" among the circuits. *Id.* at 65a (Guy, J., dissenting). The majority's reliance on *Ouellette*, therefore, only deepens the conflict.

begins to run when "the plaintiff has a complete and present cause of action"—is the "standard [accrual] rule" for federal claims. *Wallace*, 549 U.S. at 388 (quoting *Bay Area Laundry & Dry Cleaning Pension Tr. Fund v. Ferbar Corp. of Cal., Inc.*, 522 U.S. 192, 201 (1997)); *see, e.g.*, *Rotkiske v. Klemm*, 140 S. Ct. 355, 360 (2019); *McDonough v. Smith*, 139 S. Ct. 2149, 2155 (2019); *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 580 U.S. 328, 337 (2017); *Green v. Brennan*, 578 U.S. 547, 554 (2016); *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 670 (2014); *Gabelli v. SEC*, 568 U.S. 442, 448 (2013); *Merck & Co. v. Reynolds*, 559 U.S. 633, 644 (2010); *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 418 (2005); *United States v. Kubrick*, 444 U.S. 111, 120 (1979); *Clark v. Iowa City*, 87 U.S. (20 Wall.) 583, 589 (1874).

Rooted in "common-law tort principles," *Wallace*, 549 U.S. at 388, the occurrence rule has "governed since the 1830s," *Gabelli*, 568 U.S. at 448 (citing cases). Accordingly, "Congress has been operating against th[is] background rule . . . for a very long time," *TRW Inc. v. Andrews*, 534 U.S. 19, 38 (2001) (Scalia, J., concurring in the judgment)—long before Congress enacted Title IX. This rule therefore governs the accrual of federal causes of action unless Congress provides otherwise. *See, e.g.*, *Rotkiske*, 140 S. Ct. at 360; *Graham Cnty.*, 545 U.S. at 418-19.

Under this "standard rule," the limitations period begins to run as soon as the allegedly "'wrongful act or omission results in damages'"—i.e., when the alleged injury "occur[s]" and the plaintiff can file suit. *Wallace*, 549 U.S. at 388, 391 (citations omitted). Accrual is not "postpone[d]" merely because the plaintiff "has no knowledge of his right to sue, or of

the facts out of which his right arises." *TRW*, 534 U.S. at 37 (Scalia, J., concurring in the judgment) (quoting 2 H.G. Wood, *A Treatise on the Limitation of Actions at Law and in Equity* § 276c(1), at 1411 (4th ed. 1916)); *see Wallace*, 549 U.S. at 391. The occurrence rule thus "sets a fixed date" for claim accrual, "advancing 'the basic policies of all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities.'" *Gabelli*, 568 U.S. at 448 (citation omitted).

The "discovery rule"—under which accrual is delayed until "the injury is or reasonably could have been discovered" by the plaintiff—is "an 'exception' to the standard rule." *Id.* at 449, 451 (quoting *Merck*, 559 U.S. at 644). It originally arose as an "equity-based doctrine" for "fraud actions," *Rotkiske*, 140 S. Ct. at 361, based on the recognition that plaintiffs who have "'been injured by fraud'" may be "unaware that they have been harmed" because the "injury is self-concealing," *Gabelli*, 568 U.S. at 449-51 (quoting *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946)). But aside from this "historical exception for suits based on fraud," this Court has "deviated from the traditional rule and imputed an injury-discovery rule to Congress on only one occasion"—a suit under the Federal Employers' Liability Act seeking "recovery for latent medical injuries" arising from the accumulated inhalation of coal dust. *TRW*, 534 U.S. at 37 (Scalia, J., concurring in the judgment) (citing *Urie v. Thompson*, 337 U.S. 163, 170 (1949)).[5]

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[5] In a handful of cases, the Court has "simply observed (without endorsement)" that lower courts applied a discovery rule. *TRW*, 534 U.S. at 37 n.2 (Scalia, J., concurring in the

As Judge Guy explained below, Title IX suits against educational institutions are "not akin to any of those cases." App. 53a-54a (dissenting). This is not a fraud action. Nor does it involve a latent medical disease, where the injury is "inherently unknowable" to the plaintiff until "'the accumulated effects of the deleterious substance manifest themselves.'" *Urie*, 337 U.S. at 169-70 (citation omitted). Accordingly, there is no basis to depart from the "'standard rule'" of accrual—a Title IX claim accrues when the alleged injury "occur[s]," at which point the plaintiff has "'a complete and present cause of action.'" *Wallace*, 549 U.S. at 388 (citation omitted). And here, the possible injuries—"the 'sexual abuse' and loss of 'educational opportunities'"—all "occurred between 1978 and 1998," at which point respondents had a "'complete and present cause of action.'" App. 48a-49a (Guy, J., dissenting) (citation omitted). Under the occurrence rule, respondents' claims are thus plainly time-barred.

b. Instead of following this Court's precedent, the Sixth Circuit invoked its *own* precedent and declared that "the 'discovery rule'"—not the occurrence rule—is the "'general federal rule'" that applies "absent a statutory directive to the contrary." App. 20a (quoting *Bishop v. Children's Ctr. for Developmental Enrichment*, 618 F.3d 533, 536 (6th Cir. 2010)). But as Justice Scalia observed decades ago, circuit precedent suggesting a "'general federal [discovery] rule'" is a "bad wine of a recent vintage," *TRW*, 534 U.S. at 35-37 (Scalia, J., concurring in the judgment), in light of this Court's recognition that the "'*standard*

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judgment) (citing cases involving medical malpractice and RICO claims); *see Petrella*, 572 U.S. at 670 n.4 (copyright claims).

rule [is] that the limitations period commences when the plaintiff has a complete and present cause of action,'" *id.* at 36 (quoting *Bay Area Laundry*, 522 U.S. at 201). The wine has only gotten worse since then, as this Court has reiterated that the occurrence rule is the "standard rule," *Wallace*, 549 U.S. at 388 (quoting *Bay Area Laundry*, 522 U.S. at 201), whereas the discovery rule is a narrow "exception," *Gabelli*, 568 U.S. at 449.

The Sixth Circuit reasoned that it could disregard that precedent because "Title IX's text contains no statute of limitations at all." App. 23a. But *Wallace* and *McDonough* addressed the accrual of claims under Section 1983, which also lacks a federal statute of limitations. *See id.* at 52a (Guy, J., dissenting). And yet, in that context, the Court held that the occurrence rule is the "'standard rule'" under "common-law" principles and thus "normally" applies. *Wallace*, 549 U.S. at 388 (citation omitted); *see McDonough*, 139 S. Ct. at 2155 (occurrence rule "presumptively" applies). Moreover, the Court has applied the occurrence rule when the text of an express statute of limitations does not dictate a particular rule of accrual. *See, e.g.*, *Gabelli*, 568 U.S. at 447-48; *Graham Cnty.*, 545 U.S. at 418.

By insisting that, "absent a statutory directive to the contrary, the 'discovery rule' applies," App. 20a, the Sixth Circuit got it exactly backwards: "[I]n the absence of an unambiguous statutory" directive requiring a discovery rule, the "standard occurrence rule" applies. *Id.* at 93a-94a (Readler, J., dissenting). And because Title IX lacks an express statute of limitations, it certainly does not expressly adopt any discovery rule. Importing a discovery rule into Title IX is thus "'[a]textual judicial supplementation' all

the same." *Id.* at 51a (Guy, J., dissenting) (quoting *Rotkiske*, 140 S. Ct. at 361); *cf. Credit Suisse Sec. (USA) LLC v. Simmonds*, 566 U.S. 221, 229 (2012) ("Congress' silence, while permitting an inference that Congress intended to apply *ordinary* background tort principles, cannot show that it intended to apply an unusual modification of those rules." (citation omitted)).

The Sixth Circuit's reliance on Title IX's "silen[ce]" to justify a discovery rule, App. 23a, is particularly misguided. Title IX lacks an express statute of limitations because Title IX lacks an express cause of action. Although this Court implied a private right of action for Title IX in *Cannon*, it has since stressed that implied causes of action "must [be] give[n] 'narrow dimensions.'" *Janus Cap. Grp., Inc. v. First Derivative Traders*, 564 U.S. 135, 142 (2011) (citation omitted). The "watchword is caution." *Hernández v. Mesa*, 140 S. Ct. 735, 742 (2020); *see Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1402-03 (2018). Instead of caution, the Sixth Circuit simply invoked "Title IX's broad remedial purpose" in order to invent the most expansive accrual rule possible. App. 22a.

The Sixth Circuit's creation of this extreme rule represents the very affront to the separation of powers this Court has repeatedly admonished against when it comes to implied rights of action. *See id.* at 84a-85a, 91a-92a (Readler, J., dissenting); *Franklin*, 503 U.S. at 78 (Scalia, J., concurring in the judgment) ("[W]hatever the merits of 'implying' rights of action may be, there is no justification for treating [congressional] silence as the equivalent of the broadest imaginable grant of remedial authority." (citation omitted)). The Sixth Circuit's attempt to turn back the clock on the judicial leeway to fashion—

and expand—implied rights of action underscores the need for review.

2. Even if the discovery rule could apply to Title IX claims, the Sixth Circuit's extreme version of that rule is egregiously wrong on its own terms.

a. Under the "discovery rule," the limitations period begins to run "when the injury is or reasonably could have been discovered." *Gabelli*, 568 U.S. at 451. The Court has "been at pains to explain that discovery of the injury, not discovery of the other elements of a claim, is what starts the clock." *Rotella v. Wood*, 528 U.S. 549, 555 (2000). That is true even when those other elements are "complex, concealed, or fraudulent"—"discovery" of other elements "is not required before the statute starts running." *Id.* at 556. Thus, in *Rotella*, for example, the Court held that the limitations period for a RICO claim begins to run even if the plaintiff has not "discovered the pattern of predicate acts" constituting "racketeering." *Id.* at 556-59. In so holding, the Court was "emphatic" that the "discovery rule does not extend beyond [discovery of] the injury." *Id.* at 555.

Here, each respondent "knew of their 'injury' between 1978 and 1998," when the injury occurred. App. 57a (Guy, J., dissenting). Respondents' detailed allegations about their traumatic experiences—including dozens of respondents who fled the scene and refused to be examined by Strauss, dozens who complained about the abuse, and more than 100 who allegedly suffered decades of traumatic life experiences because of the abuse—confirm their awareness of the injuries and of Strauss's connection to Ohio State at the time of the abuse. *See id.* at 56a-57a; *see also id.* at 45a-47a. Accordingly, under the discovery rule, their claims are untimely too.

b. The Sixth Circuit majority reached the contrary conclusion by distorting the inquiry, holding that the discovery rule delays accrual until the "plaintiff knows or has reason to know that they were injured *and that the defendant* [*educational institution*] *caused their injury*." *Id.* at 32a (emphasis added). From this premise, the majority declared that the limitations period does not begin to run until the plaintiff "kn[ows] or has reason to know" of the institution's "'deliberate[] indifferen[ce]'"—i.e., that "administrators 'with authority to take corrective action' knew of [the abusive] conduct and failed to respond appropriately." *Id.* at 32a-35a (citations omitted). In other words, "the limitations period does not commence until the plaintiffs discover *all* aspects of the institution's intentional misconduct." *Id.* at 100a (Readler, J., dissenting) (emphasis added).

The Sixth Circuit's extreme version of the discovery rule flies in the face of *Rotella*'s holding that the discovery rule is limited to "discovery of the injury, not discovery of the other elements of a claim." 528 U.S. at 555. Causation is "one of 'the other elements' of a Title IX claim." App. 62a (Guy, J., dissenting); *see Rotella*, 528 U.S. at 556-57 (explaining the plaintiff's responsibility to "investigate *the cause* of his injuries" (emphasis added)). The same is true of deliberate indifference. App. 62a (Guy, J., dissenting). A Title IX plaintiff's awareness of "a school's deliberate indifference," *id.* at 32a (majority op.), is indistinguishable from a RICO plaintiff's awareness of a defendant's "pattern of predicate acts," *Rotella*, 528 U.S. at 556 (emphasis added)—which is not required to trigger the statute of limitations. The fact that this deliberate indifference

may have been "concealed" thus makes no difference to the question of claim accrual. *Id.*; *contra* App. 35a.

Nor does *Kubrick* support the Sixth Circuit's extreme rule. App. 26a-27a. In *Kubrick*, this Court simply acknowledged (without endorsement) that the court of appeals there had applied a discovery rule for "medical malpractice cases," under which the limitations period did "not begin to run until the plaintiff has discovered both his injury and its cause." 444 U.S. at 120-21 (citation omitted). But the unique concerns present in that context—where a particular ailment may be the product of any number of "causes" unknown to the plaintiff—are absent here. Moreover, the Court stressed that, even under that rule, a plaintiff need only know "that he has been hurt and who has inflicted the injury"—and *not* that the conduct was "improper" or "legally blameworthy." *Id.* at 121-22; *see Rotella*, 528 U.S. at 555 (stressing that even in "medical malpractice" cases, the "discovery rule does not extend beyond [discovery of] the injury").[6]

Ultimately, the Sixth Circuit's "injury-and-deliberate-indifference discovery rule . . . renders meaningless any limitations provision for Title IX claims." App. 47a (Guy, J., dissenting). This case proves the point: The claims were filed "more than 20 to 40 years after the alleged sexual abuse occurred," "more than 20 years after Strauss stopped working at [Ohio State]," and "more than 13 years after Strauss" died. *Id.* at 43a. Allowing those stale claims to

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[6] *Kubrick* thus forecloses the Sixth Circuit's theory that the limitations period did not begin to run until respondents became aware that Strauss's conduct was not "medically appropriate." App. 36a-38a; *see id.* at 58a-60a (Guy, J., dissenting).

proceed "thwart[s] the basic objective of repose underlying the very notion of a limitations period." *Gabelli*, 568 U.S. at 452 (quoting *Rotella*, 528 U.S. at 554). The fact that the Sixth Circuit had to bulldoze this Court's precedents to reach that startling result only bolsters the need for this Court's review.

C. The Accrual Rule For Title IX Claims Is Exceptionally Important And Warrants Review In This Case

1. The rule governing when a Title IX claim for sexual harassment accrues is exceptionally important—as evidenced by the multiple judges and "amici universities with a collective enrollment of over 200,000 students" that have already urged further review. App. 85a-86a (Readler, J., dissenting); *see id.* at 83a (Thapar, J., dissenting); *id.* at 70a (Guy, J., dissenting); Amici Br. of Multiple Institutions of Higher Education, 6th Cir. No. 21-3981 (Nov. 1, 2022) (Univ. CA6 Br.).

As the amici universities explained below, the Sixth Circuit's decision will have the perverse consequence of discouraging educational institutions from "seek[ing] to right past wrongs of their own volition" through independent investigations. Univ. CA6 Br. 10-11. In the Sixth Circuit's view, respondents' Title IX claims did not accrue until sometime in 2018, after Ohio State announced that it would undertake a comprehensive and transparent independent investigation into Strauss's misconduct. App. 32a-34a. This investigation was integral to uncovering the extent of the abuse, facilitating reconciliation with survivors, and preventing

anything like this from happening again.[7] But if the price of such investigations is an onslaught of Title IX damages suits based on decades-old allegations, schools may be deterred from undertaking them.

More fundamentally, statutes of limitations are "vital to the welfare of society" as a whole. *Gabelli*, 568 U.S. at 448-49 (quoting *Wood v. Carpenter*, 101 U.S. 135, 139 (1879)). They "'promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared,'" ultimately "provid[ing] 'security and stability to human affairs.'" *Id.* (citations omitted). Just as vital is the rule for claim accrual, as "any period of limitation is utterly meaningless without specification of the event that starts it running." *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 199 (1997) (Scalia, J., concurring in part and concurring in the judgment). Given these vital interests, it is not surprising that this Court has repeatedly granted review to resolve confusion about the accrual of federal causes of action. *See supra* at 18.

This case highlights the importance of those interests. The claims were filed more than 20 to 40 years after the abuse occurred, 20 years after the perpetrator stopped working at Ohio State and 13 years after his death, and a decade after the plaintiffs graduated from or left the University. Yet the Sixth Circuit held that the claims could proceed. If the Sixth Circuit's decision is left to stand, there is

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[7] *See* Michael V. Drake, President, Ohio State Univ., *A Message from President Drake: Strauss Investigation Report* (May 17, 2019), https://president.osu.edu/story/strauss-investigation-report.

essentially no limit on the stale claims that could be brought. *See* App. 43a (Guy, J., dissenting). No matter the urge to address past wrongs, no system of true justice can operate on such terms. *See Gabelli*, 568 U.S. at 448-49.

The importance of Title IX itself heightens the need for this Court's intervention. Title IX is a sweeping federal statutory program. More than 100,000 educational institutions—with collective enrollment of nearly 70 million students—receive federal funds and are thus potentially subject to Title IX.[8] The confusion and division in the lower courts over such a basic component of this statutory program—the accrual date for the applicable limitations period—is intolerable, particularly "in view of the 'federal interests in uniformity, certainty, and the minimization of unnecessary litigation' surrounding statutes of limitations." App. 100a (Readler, J., dissenting) (quoting *Wilson v. Garcia*, 471 U.S. 261, 275 (1985)). And because the Title IX cause of action was implied by this Court, it is incumbent on this Court to police its limits.

The inevitable increase in costs associated with litigating stale Title IX claims also will divert funds allocated for educational programs and activities, ultimately harming students. And universities will not be the only institutions who suffer from this regime. The decision below extends beyond

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[8] *See* U.S. Dep't of Educ., Nat'l Ctr. for Educ. Statistics, *Digest of Education Statistics*, Table 105.50 (2021), https://nces.ed.gov/programs/digest/d21/tables/dt21_105.50.asp; U.S. Dep't of Educ., Nat'l Ctr. for Educ. Statistics, *Fast Facts—Back to School Statistics* (2022), https://nces.ed.gov/fastfacts/display.asp?id=372.

universities—it reaches all Title IX institutions, including elementary and secondary schools. And for the many non-university institutions "charged each day with educating millions of children" on extremely constrained budgets, the additional "cost of defending against" these decades-old claims "alone could overwhelm [them]." *Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 680 (1999) (Kennedy, J., dissenting). The increase in litigation costs borne by schools could divert funding from other public programs.

2. This case is an ideal vehicle for resolving the accrual question. That question is a threshold issue unimpeded by any jurisdictional or preliminary disputes. And as the case comes to the Court, the relevant facts are uncontested. The question for this Court is purely legal—when do Title IX claims accrue? That question, moreover, was fully ventilated in the courts below, which debated the application of this Court's and other circuit's claim-accrual precedents across several opinions and reached different conclusions. And by allowing claims that "reach back to conduct over 40 years old" to proceed, this case crystalizes just how much "jurisprudential damage" the Sixth Circuit's decision has done. App. 85a-86a (Readler, J., dissenting).

II. THE SIXTH CIRCUIT'S RULING EXPANDING THE SCOPE OF TITLE IX'S IMPLIED PRIVATE RIGHT ALSO MERITS REVIEW

Certiorari is warranted for all of the foregoing reasons. But the Sixth Circuit's separate ruling that the implied right of action under Title IX "broadly . . . extends" to "'members of the public'" who merely visit

campus for "campus tours, sporting events, or other activities," App. 40a-41a (citation omitted), amplifies the need for this Court's review. As Judge Readler observed, that ruling "drastically expand[s] Title IX's reach"—and the universe of potential Title IX plaintiffs—to virtually "anyone who has ever stepped foot on school grounds," a holding that "no [other] circuit" has adopted. *Id.* at 101a, 107a (Readler, J., dissenting). That ruling flies in the face of this Court's precedents cautioning against the expansion of implied causes of action from a bygone era. And, if left uncorrected, it will exacerbate the consequences of the Sixth Circuit's flawed claim-accrual ruling.

A. All of the "[c]oncerns with the judicial *creation* of a private cause of action caution against its *expansion*." *Janus Capital*, 564 U.S. at 142 (emphasis added) (citation omitted); *see, e.g.*, *Jesner*, 138 S. Ct. at 1402 ("The Court's recent precedents cast doubt on the authority of courts to extend or create private causes of action . . . ."). Thus, the Court has generally refused to "extend judicially created private rights of action" beyond existing precedent absent a congressional command to do so. *Jesner*, 138 S. Ct. at 1402; *see, e.g.*, *Ziglar v. Abbasi*, 582 U.S. 120, 135 (2017) ("[The Court] has 'consistently refused to extend *Bivens* to any new context or new category of defendants.'" (citation omitted)); *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 165 (2008) ("Though it remains the law, the [implied] private right [of action under Section 10(b) of the Securities Exchange Act] should not be extended beyond its present boundaries.").

The Sixth Circuit's expansion of the Title IX cause of action "runs up against the understanding that [courts] are not to expand upon implied causes of

action absent express congressional direction." App. 103a (Readler, J., dissenting). This Court has recognized a cause of action under Title IX based on alleged sexual harassment in only two circumstances: (1) "cases involving a teacher's sexual harassment of a student," *Gebser*, 524 U.S. at 281 (citing *Franklin*, 503 U.S. at 74-75); and (2) cases involving a student's "sexual harassment [of] another student," *Davis*, 526 U.S. at 632. These cases, in other words, all involve "sexual harassment of students." *Id.* at 651.

By its terms, Title IX is limited to "person[s]" who are, "on the basis of sex," "excluded from participation in," "denied the benefits of," or "subjected to discrimination under any [federally funded] education program or activity." 20 U.S.C. § 1681(a). As the Court has recognized, "[t]he terms 'subjec[t]' and 'under' impose limits" on Title IX's scope. *Davis*, 526 U.S. at 646 (alteration in original). "[P]erson" also has to be read in context. App. 105a (Readler, J., dissenting). As relevant here, these textual limits confirm that "Title IX extends only to those persons participating in an education program or activity, not to anyone who has ever stepped foot on school grounds." *Id.* at 107a. In any event, extending the existing right of action beyond current or prospective students and employees to "virtually anyone visiting a university campus"—even a stadium full of 100,000 fans who descend upon campus on game day—is a job for Congress, not the courts. *Id.* at 85a, 102a.

The Spending Clause nature of Title IX reinforces this point. *See Gebser*, 524 U.S. at 287. "Unlike ordinary legislation, which 'imposes congressional policy' on regulated parties 'involuntarily,' Spending Clause legislation operates based on consent: 'in return for federal funds, the [recipients] agree to

comply with federally imposed conditions.'" *Cummings v. Premier Rehab Keller, P.L.L.C.*, 142 S. Ct. 1562, 1570 (2022) (citation omitted). Thus, "private damages actions are available only where recipients of federal funding had adequate notice that they could be liable for the conduct at issue," *Davis*, 526 U.S. at 640, such that a court can be "confident that the recipient 'exercise[d its] choice knowingly, cognizant of the consequences of [its] participation' in the federal program," *Cummings*, 142 S. Ct. at 1570 (alterations in original) (citation omitted).

Nothing in Title IX suggests that, as a condition of accepting federal funds, schools knowingly consented to damages claims under Title IX by anyone who visits campus or has only an indirect or limited connection to a program or activity offered to students. And the staleness of these claims only compounds the notice problem. Indeed, John Doe 47 was abused by Strauss while visiting his aunt, an Ohio State employee, in 1981, *see* App. 66a-67a (Guy, J., dissenting); *Snyder-Hill* D. Ct. Doc. 123, at ¶ 43 (May 27, 2020)—more than a decade before this Court first recognized *any* sort of claim under Title IX for sexual harassment, *see Franklin*, 503 U.S. at 70.

Likewise, neither John Doe 47 nor the three other non-student plaintiffs (*see supra* at 8) alleges that they were "den[ied] . . . equal access to an educational program or activity." App. 66a-67a (Guy, J., dissenting) (alterations in original) (quoting *Davis*, 526 U.S. at 652); *see id.* at 105a-06a (Readler, J. dissenting). Yet, as the very case invoked by the Sixth Circuit in extending Title IX to these plaintiffs (App. 41a) explains, Title IX is keyed on "acts of sexual harassment or assault *that undermine* [*the plaintiff's*]

educational experience." *Doe v. Brown Univ.*, 896 F.3d 127, 132 (1st Cir. 2018) (emphasis added).

B. This aspect of the majority's decision will also have significant implications for educational institutions in the Sixth Circuit. As Judge Readler explained in his dissent, because the majority's decision lacks any limiting principle, it sets a blueprint for claims by "virtually anyone who sets foot on campus"—even "vendors, friends and family who frequent campus, and every person that descends on campus each fall on football Saturdays." App. 85a, 106a-07a. As Judge Readler put it, do the 100,000 fans packed into Ohio Stadium on gameday "go home with a Title IX claim against the University for being indifferent to crude spectators"? *Id.* at 107a. Modern universities like Ohio State are visited by countless individuals daily; there is no end to the variations on this hypothetical that could arise.

The potential disruption created by this sweeping expansion of Title IX's scope is only exacerbated by the majority's extreme claim-accrual rule. Together, these rulings arm virtually anyone who has visited Ohio State over the past 40 years with a potential Title IX claim *today*. That shocking result would revolutionize Title IX's private right of action in a way that neither Congress in 1972 nor this Court in *Cannon* could have conceived, much less intended.

All of this explains why the dissenters below called out for this Court's review, "before more jurisprudential damage is done." *Id.* at 86a.

CONCLUSION

The petition for a writ of certiorari should be granted.

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APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 21-3981/3991

STEVE SNYDER-HILL; RONALD MCDANIEL; DAVID MULVIN; WILLIAM BROWN; KURT HUNTSINGER; WILLIAM RIEFFER; STEVE HATCH; KELLY REED; MELVIN ROBINSON; DOUGLAS WELLS; JAMES KHALIL; JERROLD L. SOLOMON; JOSEPH BECHTEL; MICHAEL MURPHY; JOHN DAVID FALER; MATT MCCOY; GARY AVIS; ROBERT SCHRINER; MICHAEL MONTGOMERY; JOHN DOES 1–22, 25, 27, 29–37, 39–47, 49, 52, 54, 56–60, 62–64, AND 66–77 (21-3981); TIMOTHY MOXLEY; RYAN CALLAHAN; JOHN JACKSON, JR.; JAMES CARROLL; JEFFREY ROHDE; PATRICK MURRAY; EVERETT ROSS; JOHN DOES 78–95 AND 97–105 (21-3991),

Plaintiffs-Appellants,

v.

THE OHIO STATE UNIVERSITY,

Defendant-Appellee.

Argued: July 26, 2022
Decided and Filed: September 14, 2022

[48 F.4th 686]

Before: GUY, MOORE, and CLAY, Circuit Judges.

KAREN NELSON MOORE, Circuit Judge.

In his role as university physician and athletic team doctor at the Ohio State University, Dr. Richard Strauss allegedly abused hundreds of young men

under the guise of performing medical examinations. The abuse occurred between 1978 and 1998, but it did not become public until 2018. After the allegations became public, survivors of this abuse—including the plaintiffs in these cases—brought Title IX suits against Ohio State, alleging that Ohio State was deliberately indifferent to their heightened risk of abuse. The district court found that the plaintiffs' claims were barred by the statute of limitations.

The district court erred. The plaintiffs adequately allege that they did not know and could not reasonably have known that Ohio State injured them until 2018. Thus, at the motion-to-dismiss stage, we cannot say that their claims accrued before then. We **REVERSE** and **REMAND** for further proceedings consistent with this opinion.

I. BACKGROUND

A. Factual Allegations[1]

1. Strauss's Conduct

Richard Strauss served on the Ohio State faculty starting in 1978.[2] He soon became a team physician. In that capacity, he "had regular contact with male student-athletes" in at least seventeen different

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[1] At the motion-to-dismiss stage, we "accept all plausible well-pled factual allegations as true." *Lutz v. Chesapeake Appalachia, L.L.C.*, 717 F.3d 459, 464 (6th Cir. 2013). We therefore describe the factual allegations as they are laid out in the complaints.

[2] *Snyder-Hill* R. 123 (Second Am. Compl. ("SAC") ¶¶ 126–27) (Page ID #2012); *Moxley* R. 16 (Am. Compl. ¶¶ 67–68) (Page ID #217–18).

sports.[3] He also served as a physician at Ohio State's Student Health Center.[4] Strauss served in these roles until 1996, when Ohio State placed him on administrative leave, investigated his conduct, and ultimately declined to renew his appointments with Student Health Services and terminated his employment agreement with the Athletics Department.[5] It did not publicly provide reasons for these decisions. Ohio State conducted a hearing but did not notify students or give them an opportunity to participate.[6]

Strauss remained a tenured faculty member. When he retired in 1998, Ohio State gave him emeritus status.[7] He opened a private men's clinic near Ohio State to treat "common genital/ urinary problems," advertised the clinic in Ohio State's student newspaper, and continued to see and treat Ohio State students.[8] The vice dean for the College of

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[3] *Snyder-Hill* R. 123 (SAC ¶ 131) (Page ID #2012–13); *Moxley* R. 16 (Am. Compl. ¶ 72) (Page ID#218).

[4] Snyder-Hill R. 123 (SAC ¶ 132) (Page ID #2013); *Moxley* R. 16 (Am. Compl. ¶ 73) (Page ID #218–19).

[5] *Snyder-Hill* R. 123 (SAC ¶¶ 133–34) (Page ID #2013); *Moxley* R. 16 (Am. Compl. ¶¶ 74–75)(Page ID #219).

[6] *Snyder-Hill* R. 123 (SAC ¶¶ 133) (Page ID #2013); *Moxley* R. 16 (Am. Compl. ¶ 74) (Page ID #219).

[7] *Snyder-Hill* R. 123 (SAC ¶ 134, 252–56) (Page ID #2013, 2033–34); *Moxley* R. 16 (Am. Compl. ¶¶ 75, 194–98) (Page ID #219, 240–41).

[8] *Snyder-Hill* R. 123 (SAC ¶¶ 262–63) (Page ID #2034–35); *Moxley* R. 16 (Am. Compl. ¶¶ 202–05) (Page ID #241–42).

Medicine told Strauss that "there would be no problem" with this arrangement.[9]

In his roles at Ohio State, Strauss regularly abused male students during medical examinations, committing at least 1,429 sexual assaults, and 47 rapes.[10] He "groped and fondled students' genitalia"[11]; "performed unnecessary rectal examinations and digitally penetrated students' anuses"[12]; "pressed his erect penis against students' bodies"[13]; "drugged[14] and anally raped students"[15];

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[9] *Snyder-Hill* R. 123 (SAC ¶ 261) (Page ID #2034); *Moxley* R. 16 (Am. Compl. ¶ 203) (Page ID #241).

[10] *Snyder-Hill* R. 123 (SAC ¶¶ 1, 3) (Page ID #1988–89); *Moxley* R. 16 (Am. Compl. ¶¶ 1, 3) (Page ID #205).

[11] *See, e.g.*, *Snyder-Hill* R. 123 (SAC ¶¶ 309, 345, 374, 405, 435, 468–71, 496–97, 528–30, 554, 651, 669, 706, 749–752, 767–72, 930–31, 982–84, 1026, 1081–84, 1147) (Page ID #2043, 2050, 2054, 2058, 2061, 2065, 2068, 2071, 2074, 2085, 2087, 2092, 2098, 2100–01, 2121, 2128, 2133, 2139, 2147); *Moxley* R. 16 (Am. Compl. ¶¶ 246, 248–50, 253, 268, 271, 298, 336–38, 439) (Page ID #249–251, 254, 258, 263, 279).

[12] *See, e.g.*, *Snyder-Hill* R. 123 (SAC ¶¶ 308–09, 710, 733, 748–52, 770, 1516, 1681, 1890–91, 2061, 2117, 2501) (Page ID #2042–43, 2092, 2096–98, 2101, 2194, 2218, 2247–48, 2276, 2285, 2339); *Moxley* R. 16 (Am. Compl. ¶¶ 296–97, 359, 455, 583, 666) (Page ID #258, 266, 281, 300, 313). At least two plaintiffs allege that Strauss performed this conduct while the plaintiff was unconscious. *See Snyder-Hill* R. 123 (SAC ¶ 1122, 1947) (Page ID #2144, 2256–57).

[13] *See, e.g.*, *Snyder-Hill* R. 123 (SAC ¶¶ 311, 1492, 2384, 2523) (Page ID #2043, 2191, 2322–23, 2342); *see also id.* ¶¶ 1076–78 (Page ID #2139) (Strauss rubbed his testicles against patient's thigh).

[14] *See, e.g.*, *Snyder-Hill* R. 123 (SAC ¶¶ 937, 1751) (Page ID #2122, 2227).

[15] *See, e.g.*, *id.* ¶ 1947 (Page ID #2256–57).

"masturbated during or after the exams"[16]; and engaged in other sexually abusive behavior. *Snyder-Hill* R. 123 (Second Am. Compl. ("SAC") ¶¶ 135–46) (Page ID #2013–14); *Moxley* R. 6 (Am. Compl. ¶¶ 81–87) (Page ID #220). Each plaintiff alleges that Strauss abused him between 1979 and 2000; all but four were Ohio State students during this time.[17]

An independent investigation commissioned by Ohio State in 2018 and undertaken by the law firm Perkins Coie substantiates the plaintiffs' allegations of abuse. *See* Caryn Trombino & Markus Funk, Perkins Coie LLP, *Report of the Independent Investigation: Sexual Abuse Committed by Dr. Richard Strauss at The Ohio State University*, (May 15, 2019) (hereinafter "Perkins Coie Report"). The Perkins Coie Report found that Strauss sexually abused at least 177 male student patients, the majority of whom were student athletes.[18] Perkins Coie Report at 1, 43.

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16 *See, e.g.*, *id.* ¶¶ 1492, 2395 (Page ID #2191, 2324).

17 *Id.* ¶¶ 30–122 (Page ID #1996–2011); *Moxley* R. 16 (Am. Compl. ¶¶ 30–63) (Page ID #212–17).

18 This number is lower than the number of alleged instances of sexual abuse in the complaint. The difference is explained by (1) allegations that Strauss abused some athletes more than once; and (2) certain limitations of the report, which noted: "it is impossible for us to determine with any certainty the total number of students that Strauss sexually abused" but "that Strauss abused additional students whose accounts are not captured here." Perkins Coie Report at 39.

2. Ohio State's Conduct

The plaintiffs allege that Ohio State knew about, facilitated, and covered up Strauss's sexual abuse.[19] Many students complained to Ohio State about Strauss's abuse,[20] and more than 50 members of the Athletics Department Staff knew about Strauss's inappropriate sexual conduct.[21] Staff at the Student Health Center were also aware of and received many complaints about Strauss's examinations of male students.[22] For example, during Strauss's first year working at Ohio State, a wrestler complained to staff at the Student Health Center "that Dr. Strauss had examined his genitals for 20 minutes and appeared to be trying to get him excited."[23] In addition, Dr. Murphy, the head team physician had received at least five written reports about Strauss's misconduct.[24]

The plaintiffs allege that, despite this knowledge, Ohio State took no action to prevent the abuse.[25] At times, Ohio State falsely told student athletes, as well

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[19] *Snyder-Hill* R. 123 (SAC ¶¶ 161–264, 278–79) (Page ID #2017–35, 2037–38); *Moxley* R. 16 (Am. Compl. ¶¶ 5–11) (Page ID #205–07).

[20] *See, e.g., Snyder-Hill* R. 123 (SAC ¶¶ 162–64, 168, 172, 198, 209, 217) (Page ID #2017–19, 2025, 2027); *Moxley* R. 16 (Am. Compl. ¶¶ 11, 13, 103–09) (Page ID #207–08, 224–25).

[21] *See, e.g., Snyder-Hill* R. 123 (SAC ¶¶ 167, 172) (Page ID #2018–19); *Moxley* R. 16 (Am. Compl. ¶¶ 6, 113) (Page ID #206, 225).

[22] *See, e.g., Snyder-Hill* R. 123 (SAC ¶ 174–176, 183–84, 186) (Page ID #2019–23); *Moxley* R. 16 (Am. Compl. ¶ 115) (Page ID #226).

[23] *Moxley* R. 16 (Am. Compl. ¶ 88) (Page ID #220).

[24] *Id.* ¶ 117 (Page ID #226–27).

as some staff members, that it had not received prior complaints about Strauss or that all complaints were maintained in an appropriate file.[26] At other times, Ohio State employees had limited conversations with Strauss about his behavior but failed to follow up, investigate, report, or meaningfully address the concerns.[27] Despite the complaints of abuse, Strauss's supervisors rated Strauss's performance as "exceptional" and "excellent" in his evaluations and had a policy of never mentioning allegations of sexual misconduct on evaluations.[28] All the while, Ohio State required students to be examined and treated by Strauss, often explicitly or implicitly making students feel that they risked their scholarships or athletic opportunities if they refused.[29]

The Perkins Coie Report substantiates the plaintiffs' claims that Ohio State knew of and facilitated this abuse. The report found that although Ohio State received "persisten[t], serious[ ], and regular[ ]" complaints from students, it took "no meaningful action . . . to investigate or address the concerns until January 1996" when it quietly

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[25] *See, e.g., Snyder-Hill* R. 123 (SAC ¶¶ 164–66, 173, 177, 184, 187, 210, 216–17, 222) (Page ID #2018–23, 2027–28); *Moxley* R. 16 (Am. Compl. ¶¶ 118, 163) (Page ID #227, 235).

[26] *See, e.g., Snyder-Hill* R. 123 (SAC ¶¶ 162, 221, 230, 319–25) (Page ID #2017–18, 2028, 2030, 2045–46); *Moxley* R. 16 (Am. Compl. ¶¶ 103, 162) (Page ID #224, 234).

[27] *See, e.g., Snyder-Hill* R. 123 (SAC ¶¶ 181–83, 188–91, 193) (Page ID #2021, 2023–25).

[28] *See, e.g., id.* ¶¶ 226–29, 231 (Page ID #2029–30); *Moxley* R. 16 (Am. Compl. ¶¶ 167–70) (Page ID #236).

[29] *See, e.g., Snyder-Hill* R. 123 (SAC ¶¶ 199–201, 352–53, 429–30, 476) (Page ID #2025, 2051, 2061, 2065); *Moxley* R. 16 (Am. Compl. ¶¶ 141–42, 633, 720) (Page ID #232, 308, 323).

suspended Strauss. Perkins Coie Report at 3; *see id.* at 87–162.Even after Ohio State completed its perfunctory investigation in 1996, at which time it ultimately suspended and terminated Strauss, it "hid the *reason* why it was investigating Strauss and placing him on leave"; "actively concealed Dr. Strauss' abuse by not investigating or attempting to identify the students Dr. Strauss harmed"; "further concealed Dr. Strauss' abuse by destroying medical records";[30] and shredded files related to Strauss's sexual abuse.[31]

3. What the Plaintiffs Knew

Because the central issue at this stage is when the plaintiffs' claims accrued, the most relevant allegations relate to what the plaintiffs knew or had reason to know regarding Strauss's and Ohio State's conduct and when they knew or had reason to know it. These allegations vary among the different plaintiffs, but the plaintiffs all allege a significant gap between what they know now and what they knew before the allegations about Strauss's conduct became public.

First, most plaintiffs allege that they did not know

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[30] *Snyder-Hill* R. 123 (SAC ¶¶ 244, 247–48) (Page ID #2032); *Moxley* R. 16 (Am. Compl. ¶¶ 186, 189–90) (Page ID #238–39). Ohio State's policy was to destroy medical records that were more than seven years old unless there was a reason to maintain them. *Snyder-Hill* R. 123 (SAC ¶ 248) (Page ID #2032). Although complaints of abuse should have given Ohio State a reason to keep the records, Ohio State nonetheless destroyed them. *Id.*

[31] *Snyder-Hill* R. 123 (SAC ¶ 2571) (Page ID #2350); *Moxley* R. 16 (Am. Compl. ¶ 918) (Page ID #355).

they were abused until 2018.[32] At the time of the abuse, they were teenagers and young adults and did not know what was medically appropriate.[33] Strauss gave pretextual and false medical explanations for the abuse. For example, he stated the abuse was necessary to perform a hernia check;[34] check for muscle and bone anomalies;[35] check for STIs;[36] perform a prostate exam;[37] perform a rectal exam;[38] monitor a patient's testicles that were different sizes;[39] check a patient's lymph nodes;[40] or treat a skin infection on a patient's penis.[41]

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[32] *See Snyder-Hill* R. 123 (SAC ¶¶ 153–60) (Page ID #2016–17); *Moxley* R. 16 (Am. Compl. ¶¶ 94–101) (Page ID #222–23).

[33] *See Snyder-Hill* R. 123 (SAC ¶¶ 153–60) (Page ID #2016–17); *Moxley* R. 16 (Am. Compl. ¶¶ 97) (Page ID #222–23).

[34] *See, e.g.*, *Snyder-Hill* R. 123 (SAC ¶¶ 554–55, 897, 993, 1368, 1463–64, 1522, 1569, 2215) (Page ID #2074–75, 2117, 2129, 2175, 2187, 2195, 2201, 2298); *Moxley* R. 16 (Am. Compl. ¶¶ 248–49, 337–38, 374, 488, 616, 666, 832) (Page ID #250–51, 263, 268–69, 285, 305, 313, 341).

[35] *See, e.g.*, *Snyder-Hill* R. 123 (SAC ¶¶ 554–55) (Page ID #2074–75).

[36] *See, e.g.*, *id.* ¶¶ 1300, 1552 (Page ID #2166, 2199); *Moxley* R. 16 (Am. Compl. ¶ 537) (Page ID #291–92).

[37] *See, e.g.*, *Snyder-Hill* R. 123 (SAC ¶¶ 2211–12) (Page ID #2298); *Moxley* R. 16 (Am. Compl. ¶ 583) (Page ID #300).

[38] *See, e.g.*, *Snyder-Hill* R. 123 (SAC ¶ 2061) (Page ID #2276); *Moxley* R. 16 (Am. Compl. ¶ 616) (Page ID #305).

[39] *See, e.g.*, *Snyder-Hill* R. 123 (SAC ¶¶ 1222, 1224, 2183) (Page ID #2156, 2294).

[40] *See, e.g.*, *id.* ¶ 1428 (Page ID #2182); *Moxley* R. 16 (Am. Compl. ¶ 752) (Page ID #328–29).

[41] *See, e.g.*, *Moxley* R. 16 (Am. Compl. ¶ 279) (Page ID #255).

Thus, the plaintiffs allege, even students who felt "very uncomfortable during Dr. Strauss' examination[s]" often "did not understand or believe that Dr. Strauss had sexually abused [them]."[42] This was true even of many students who complained about Strauss's conduct at the time.[43] Additionally, many students believed that because the conduct was so widely known and talked about, it could not have been abuse.[44] Similarly, many believed that Ohio State would not have made Strauss the athletic team doctor unless his examinations were legitimate, and thus, that the conduct was medically appropriate even if it was uncomfortable.[45]

The plaintiffs allege that Ohio State witnesses, including physicians, conceded in sworn testimony that the students could not have known Strauss abused them because "patients do not know what is a 'normal exam' because patients have a 'lack of information' about what is medically appropriate."[46] Ohio State witnesses acknowledged that this is due in part to the fact that "it is normal for patients to be naked in front of doctors and for doctors to touch them, that 'doctors are in a position of superior knowledge and authority' to patients, and that

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42 *Snyder-Hill* R. 123 (SAC ¶ 391) (Page ID #2056); *see also id.* ¶¶ 444, 477, 542 (Page ID #2062, 2065, 2072); *Moxley* R. 16 (Am. Compl. ¶ 256) (Page ID #252).

43 *See, e.g.*, *Snyder-Hill* R. 123 (SAC ¶ 391) (Page ID #2056).

44 *Id.* ¶¶ 451–52 (Page ID #2063).

45 *Id.* ¶¶ 450, 480–81 (Page ID #2063, 2066).

46 *Id.* ¶ 156 (Page ID #2016).

patients, including OSU students, trusted their doctor to do what was medically appropriate."[47]

The plaintiffs point to the Perkins Coie Report to support these allegations. Perkins Coie decided that "it was essential for the Investigative Team to consult with suitably qualified medical experts" "to discern whether, and to what extent, Strauss' physical examinations of student-patients exceeded the boundaries of what was appropriate or medically necessary" because the abuse "occurred in the context of a student's purported medical examination." Perkins Coie Report at 12.[48] The Perkins Coie Report also noted that, in general, patients may have "confusion as to whether sexual abuse, in fact, occurred." Perkins Coie Report at 11.[49]

Although most plaintiffs allege that they did not know that Strauss's conduct was abuse, nine allege that they did. For example, plaintiffs Snyder-Hill and Reed quickly recognized Strauss's conduct as abuse and promptly complained.[50] John Doe 9 learned the conduct was abusive when his primary care physician told him that Strauss's actions "were inappropriate and not medically necessary."[51] John Doe 19 realized that Strauss had abused him when he learned about proper physician-patient conduct while attending medical school.[52]

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47 *Id.*

48 *See Snyder-Hill* R. 123 (SAC ¶ 157) (Page ID #2017); *Moxley* R. 16 (Am. Compl. ¶ 98) (Page ID #223).

49 *See Snyder-Hill* R. 123 (SAC ¶ 155) (Page ID #2016).

50 *Id.* ¶¶ 313–14, 407–12 (Page ID #2043–44, 2058–59).

51 *Id.* ¶¶ 939–40 (Page ID #2122).

52 *Id.* ¶ 1318 (Page ID #2168).

Although plaintiffs differ as to whether they knew at the time that Strauss abused them, *all* allege that they could not have known about Ohio State's responsibility for the abuse.[53] They did not have reason to know that others had previously complained to Ohio State about Strauss's conduct, let alone how Ohio State had responded to any previous complaints.[54] Two Ohio State employees—Dr. Ted Grace, who was the director of Ohio State's Student Health Services, and Dr. Miller, who was Strauss's direct supervisor—stated that they did not know of "any way" that "any Ohio State student" could have known that Ohio State knew about Strauss's abuse and nonetheless failed to "get rid of" him.[55] Further, each plaintiff alleges that, even if he had investigated, further inquiry would have been futile because Ohio State controlled their access to information.[56] In short, although plaintiffs allege that Ohio State administrators knew of the abuse at the time, the

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[53] *See, e.g.*, *id.* ¶¶ 265–69, 272, 329 (Page ID #2035–37, 2047); *Moxley* R. 16 (Am. Compl. ¶¶ 258, 260, 285, 304, 323) (Page ID #252, 256–57, 259, 261).

[54] *See, e.g.*, *Snyder-Hill* R. 123 (SAC ¶¶ 364, 420, 451, 482, 516, 544, 637) (Page ID #2052, 2060, 2063, 2066, 2070, 2073, 2083); *see also id.* ¶¶ 320–21, 323 (Page ID #2045–46) (Ohio State falsely informed complainant that it had not received any previous complaints about Strauss).

[55] *Snyder-Hill* R. 123 (SAC ¶¶ 265–66) (Page ID #2035); *Moxley* R. 16 (Am. Compl. ¶¶ 207–08) (Page ID #242).

[56] *See, e.g.*, *Snyder-Hill* R. 123 (SAC ¶¶ 335, 367, 482, 678, 740, 854, 1066) (Page ID #2048, 2053, 2066, 2088, 2096–97, 2112, 2137); *Moxley* R. 16 (Am. Compl. ¶¶ 324, 350, 366, 388, 405, 426) (Page ID #261, 265, 267, 271, 274, 277); *see also Snyder-Hill* R. 123 (SAC ¶¶ 243–48) (Page ID #2031–32) (Ohio State actively concealed information).

plaintiffs allege that *they* did not know until 2018 that Ohio State administrators knew or that they enabled and perpetuated the abuse.

In addition to the general allegations related to Ohio State's conduct—such as hiding what it knew, falsifying evaluations, and destroying records—some plaintiffs offer further specific allegations of concealment. For example, after Snyder-Hill demanded a meeting to address Strauss's conduct, Grace sent him a letter falsely stating that Ohio State had never before received a complaint about Strauss.[57] It had, in fact, received multiple complaints, including one just three days earlier.[58] Grace also falsely told Snyder-Hill that all complaints would be kept in Strauss's personnel file.[59] In reality, Strauss's personnel file had no record of Snyder-Hill's or any other complaint.[60] And, although Grace agreed to inform Snyder-Hill about any future complaints, Grace never did, even in 1996 when the Ohio State investigator determined that Strauss had been "performing inappropriate genital exams on male students" "for years."[61]

Although the plaintiffs allege that they had no reason to know that *Ohio State* knew of Strauss's abuse, they allege varying degrees of knowledge about whether *others* knew of Strauss's conduct. Some had never heard others discuss Strauss's conduct and did

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57 *Snyder-Hill* R. 123 (SAC ¶¶ 320–21, 323) (Page ID #2045–46).

58 *Id.*

59 *Id.* ¶ 323, 334 (Page ID #2046, 2048).

60 *Id.* ¶ 327 (Page ID #2047).

61 *Id.* ¶¶ 319, 328 (Page ID #2045, 2047).

not know that Strauss had behaved similarly toward other students.[62] Others allege that Strauss's conduct was common knowledge among student athletes, who joked about it and discussed it amongst themselves.[63] Some discussed Strauss's conduct only with other student athletes and were not aware whether their coaches knew about this conduct.[64]

Others allege that they knew that coaches or other staff were aware of Strauss's conduct. Tennis coach John Daly "regularly joked about Dr. Strauss' examinations of male athletes," and "threatened student-athletes that they would have to see Dr. Strauss, if they did not do what the coach asked."[65] Members of other teams likewise joked and complained about Strauss's examinations in front of coaches and trainers, who treated Strauss's methods as "normal."[66]

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62 *See, e.g.*, *id.* ¶ 674 (Page ID #2088).

63 *See, e.g.*, *id.* ¶¶ 170–71, 194, 442, 474, 552, 784, 836, 901, 926, 986–87, 1173, 1483 (Page ID #2019, 2025, 2062, 2065, 2074, 2103, 2110, 2118, 2120–21, 2128, 2150, 2190); *Moxley* R. 16 (Am. Compl. ¶¶ 473, 636, 673–74, 719, 736) (Page ID #283, 308, 314, 323, 326).

64 *See, e.g.*, *Snyder-Hill* R. 123 (SAC ¶ 389) (Page ID #2056).

65 *Id.* ¶ 197 (Page ID #2025); *see id.* ¶¶ 876–77 (Page ID #2115); *Moxley* R. 16 (Am. Compl. ¶ 138) (Page ID #231).

66 *See, e.g.*, *id.* ¶¶ 501–03, 661, 1297 (Page ID #2068, 2086, 2165) (swim team); *id.* ¶¶ 552, 572–77, 589, 712 (Page ID #2074, 2076–77, 2093) (track and field team); *id.* ¶ 690, 694–95 (Page ID #2090) (hockey team); *id.* ¶ 1005 (Page ID #2130) (fencing team); *id.* ¶¶ 1028, 1423 (Page ID #2133, 2181–82) (wrestling team); *id.* ¶ 1129 (Page ID #2145) (soccer team); *id.* ¶¶ 1226–30, 1340–41) (Page ID #2156–57, 2171) (gymnastics team); *id.* ¶¶ 167, 2581 (Page ID #2018, 2354) (general allegations); *see*

Although most of Strauss's abuse took place in private exam rooms, Strauss abused some athletes in full view of various adults and student bystanders. For example, one plaintiff alleges that, in full view of trainers and bystanders, Strauss instructed a player—who came to Strauss for a toe infection—to drop his pants, and then Strauss started groping the player's penis and testicles.[67] Another plaintiff alleges that "[o]n occasion" training staff saw Strauss perform unwarranted "testicular exams" on him that would last around 15–20 minutes.[68] Other plaintiffs allege that various trainers and staff witnessed Strauss's examinations, including those in which he touched the plaintiffs' genitals.[69] Coaches and trainers also regularly witnessed Strauss showering with athletes or sitting in lockers staring at the athletes as they showered or changed.[70]

When student athletes complained, coaches typically dismissed their complaints. For example, one swimmer alleges that when he told his coach that Strauss made him uncomfortable, the coach told him to "[s]hut the fuck up and get in the water."[71] The same coach told another student "that Dr. Strauss'

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also Moxley R. 16 (Am. Compl. ¶¶ 254, 559, 586, 618 (Page ID #251–52, 295, 300, 3055).

67 *Snyder-Hill* R. 123 (SAC ¶ 688) (Page ID #2089).

68 *Id.* ¶ 789 (Page ID #2104).

69 *See, e.g.*, *id.* ¶¶ 557–58 (Page ID #2075).

70 *See, e.g.*, *Moxley* R. 16 (Am. Compl. ¶¶ 540–42) (Page ID #292–93).

71 *Snyder-Hill* R. 123 (SAC ¶ 1299) (Page ID #2166); *see also Moxley* R. 16 (Am. Compl. ¶ 419) (Page ID #276) (trainers were present during examination in which Strauss repeatedly stroked patient's nipples).

examinations were appropriate and there was no reason to complain."[72] Various coaches "laughed off" student complaints,[73] made excuses,[74] or ignored or brushed aside student complaints.[75]

The plaintiffs who observed Ohio State's coaches' and staff's widespread acceptance of Strauss's conduct allege that their coaches' normalization of Strauss's conduct led them to reasonably believe that it was not abuse.[76] For example, one plaintiff "stopped questioning the need for the genital examinations because Dr. Strauss always said they were necessary, and coaching staff showed no concern despite the athletes' frequent comments about the genital exams."[77]

Many likewise allege that the widespread acceptance of the abuse meant that they had no reason to know that other athletes had complained to

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72 *Snyder-Hill* R. 123 (SAC ¶ 511) (Page ID #2069).

73 *Id.* ¶¶ 411, 690, 1227–29, 1753 (Page ID #2058, 2090, 2156–57, 2228); *Moxley* R. 16 (Am. Compl. ¶¶ 872, 874) (Page ID #347–48).

74 *See, e.g.*, *Snyder-Hill* R. 123 (SAC ¶ 501) (Page ID #2068) (trainer told athlete "That's just what Dr. Strauss does"); *id.* ¶ 2085 (Page ID #2280) (trainer told athlete that "some doctors are just really into the human body").

75 *See, e.g.*, *id.* ¶¶ 272, 1894, 1951, 2141, 2281, 2524 (Page ID #2036–37, 2248, 2257–58, 2288, 2308, 2342); *Moxley* R. 16 (Am. Compl. ¶¶ 273, 282–83, 579–80, 618, 637, 759) (Page ID #254–56, 299, 305, 308, 330).

76 *See, e.g.*, *Snyder-Hill* R. 123 (SAC ¶¶ 695, 716–17, 795–96, 821–22, 882–83, 1014–15, 1230, 1341–42, 1758, 2090–91) (Page ID #2090–91, 2093, 2104, 2108, 2115–16, 2132, 2157, 2171–72, 2228, 2281); *Moxley* R. 16 (Am. Compl. ¶¶ 283, 348, 586–87, 761, 876) (Page ID #256, 264, 300, 330, 348).

77 *Snyder-Hill* R. 123 (SAC ¶ 1429) (Page ID #2183).

Ohio State about the abuse or that Ohio State had covered up any abuse or student complaints.[78] They further allege that this widespread acceptance of Strauss's conduct led them to believe that there was no reason to investigate further: their coaches' reactions "reinforce[d] [their] reasonable belief that pursuing the matter would not be productive."[79]

B. Procedural History

In the years after Strauss's rampant abuse was publicly exposed, many survivors filed suit against Ohio State. This appeal involves two of these lawsuits: *Snyder-Hill v. Ohio State University*, No. 2:18-cv-736 (S.D. Ohio), and *Moxley v. Ohio State University*, No. 2:21-cv-3838 (S.D. Ohio). The *Snyder-Hill* plaintiffs filed their complaint on July 26, 2018. *Snyder-Hill* R. 1. The district court designated the case as related to *Garrett v. Ohio State University*, No. 2:18-cv-692 (S.D. Ohio), a case that had been filed ten days earlier. *Snyder-Hill* R. 3 (Related Case Mem.) (Page ID #57–58). Ohio State moved to dismiss, *Snyder-Hill* R. 19 (Mot. to Dismiss) (Page ID #140–58), and the district court referred the case to mediation, *Snyder-Hill* R. 42 (Order) (Page ID #695). After mediation was unsuccessful, the *Snyder-Hill* plaintiffs filed an amended complaint. *Snyder-Hill* R. 123 (SAC) (Page ID #1988–2358). Ohio State again moved to dismiss. *Snyder-Hill* R. 128 (Mot. to Dismiss) (Page ID #2377–99).

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[78] *See, e.g.*, *id.* ¶¶ 1040–41, 1135–36, 1252–53, 1352–54) (Page ID #2134–35, 2146, 2159, 2173).

[79] *Id.* ¶¶ 823, 884, 1899 (Page ID #2108–09, 2116, 2249); *see also id.* ¶ 1441 (Page ID #2184).

While the motions to dismiss in *Snyder-Hill* and the related cases were pending, the *Moxley* plaintiffs filed a separate case on June 28, 2021, and amended their complaint on August 12, 2021. *Moxley* R. 1; *Moxley* R. 16. They designated the *Moxley* case as related to the *Snyder-Hill* case. *Moxley* R. 1-1 (Civil Cover Sheet) (Page ID #145). The district court consolidated *Moxley* with both *Snyder-Hill* and *Garrett*. *Moxley* R. 10 (Related Case Mem.) (Page ID #172–73).

The district court granted Ohio State's motions to dismiss in each of the consolidated cases. *See Garrett v. Ohio State Univ.*, 561 F. Supp. 3d 747 (S.D. Ohio 2021); *Ratliff v. Ohio State Univ.*, No. 2:19-cv-4746, 2021 WL 7186198 (S.D. Ohio Sept. 22, 2021); *Snyder-Hill v. Ohio State Univ.*, No. 2:18-cv-736, 2021 WL 7186148 (S.D. Ohio Sept. 22, 2021); *Moxley v. Ohio State Univ.*, No. 2:21-cv-3838, 2021 WL 7186269 (S.D. Ohio Oct. 25, 2021). The district court reasoned that the plaintiffs' claims were barred by the statute of limitations because the abuse happened more than two years ago, and the plaintiffs knew or had reason to know that they were injured at the time that the abuse occurred. *See Garrett*, 561 F. Supp. 3d at 754–62; *Snyder-Hill*, 2021 WL 7186148, at *1; *Moxley*, 2021 WL 7186269, at *1. The plaintiffs timely appealed. *Snyder-Hill* R. 160 (Notice of Appeal) (Page ID #2778); *Moxley* R. 28 (Notice of Appeal) (Page ID #514).

II. ANALYSIS

A. Standard of Review

"We review de novo the district court's order dismissing plaintiffs' complaint pursuant to Rule 12(b)(6)." *Lutz v. Chesapeake Appalachia, L.L.C.*, 717

F.3d 459, 464 (6th Cir. 2013). "[W]e construe the complaint in a light most favorable to plaintiffs, accept all plausible well-pled factual allegations as true, and draw all reasonable inferences in plaintiffs' favor." *Id.*

Because at the motion-to-dismiss stage, we may consider only the allegations in the complaint, a 12(b)(6) motion is generally "an 'inappropriate vehicle' for dismissing a claim based upon a statute of limitations." *Id.* (quoting *Cataldo v. U.S. Steel Corp.*, 676 F.3d 542, 547 (6th Cir. 2012)). "However, dismissal is warranted if 'the allegations in the complaint affirmatively show that the claim is time-barred.'" *Id.* (quoting *Cataldo*, 676 F.3d at 547). "[T]he statute of limitations is an affirmative defense," and it is the defendant's burden to show that the statute of limitations has run. *Id.* (quoting *Campbell v. Grand Trunk W. R.R. Co.*, 238 F.3d 772, 775 (6th Cir. 2001)).

B. Accrual Date in Title IX Claims

"Title IX does not contain its own statute of limitations." *Lillard v. Shelby Cnty. Bd. of Educ.*, 76 F.3d 716, 728 (6th Cir. 1996). Title IX thus borrows from Ohio's two-year statute of limitations for personal injury claims. *Id.* at 729. Although state law determines the limitations period, "federal standards govern when the statute begins to run." *Sharpe v. Cureton*, 319 F.3d 259, 266 (6th Cir. 2003) (citing *Wilson v. Garcia*, 471 U.S. 261, 267, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985)); *see Bishop v. Child.'s Ctr. for Developmental Enrichment*, 618 F.3d 533, 536 (6th Cir. 2010) (citing *Wallace v. Kato*, 549 U.S. 384, 388, 127 S.Ct. 1091, 166 L.Ed.2d 973 (2007)). This

question—when did the statute start to run—is at the heart of this appeal.

1. Whether the Discovery Rule Applies

"The general federal rule is that 'the statute of limitations begins to run when the reasonable person knows, or in the exercise of due diligence should have known, both his injury and the cause of that injury.'" *Bishop*, 618 F.3d at 536 (quoting *Campbell*, 238 F.3d at 775). In other words, absent a statutory directive to the contrary, the "discovery rule" applies, and the clock starts only when a plaintiff knows or should have known certain facts related to their injury. This contrasts with the occurrence rule, under which a claim accrues at the moment of injury.

In line with the general principle articulated in *Bishop* and elsewhere, we have long held that the discovery rule applies in the § 1983 context. *See, e.g.*, *id.* at 536–37; *Roberson v. Tennessee*, 399 F.3d 792, 794 (6th Cir. 2005); *Hughes v. Vanderbilt Univ.*, 215 F.3d 543, 548 (6th Cir. 2000); *Sevier v. Turner*, 742 F.2d 262, 273 (6th Cir. 1984). Our application of the discovery rule in the § 1983 context guides our analysis here because "[t]he analysis concerning when the statute of limitations [for a Title IX claim] began to run is the same as [for a § 1983 claim]." *Haley v. Clarksville-Montgomery Cnty. Sch. Sys.*, 353 F. Supp. 3d 724, 734 (M.D. Tenn. 2018); *see King-White v. Humble Indep. Sch. Dist.*, 803 F.3d 754, 759 (5th Cir. 2015) ("Title IX should be treated like § 1983 for limitations purposes." (collecting cases)).

Applying the discovery rule in Title IX cases accords with the discovery rule's purposes. The discovery rule seeks to protect plaintiffs who, through no fault of their own, lacked the information to bring

a claim. We have explained that "the discovery rule is applied . . . if the cause of an injury is not apparent." *Fonseca v. Consol. Rail Corp.*, 246 F.3d 585, 588 (6th Cir. 2001); *see Hicks v. Hines, Inc.*, 826 F.2d 1543, 1544 (6th Cir. 1987). This rule "protects plaintiffs who are . . . struggling to uncover the underlying cause of their injuries from having their claims time-barred before they could reasonably be expected to bring suit." *A.Q.C. ex rel. Castillo v. United States*, 656 F.3d 135, 140 (2d Cir. 2011).

The discovery rule recognizes that, without certain information, a plaintiff has no viable claim. "That he has been injured in fact may be unknown or unknowable until the injury manifests itself; and the facts about causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain." *United States v. Kubrick*, 444 U.S. 111, 122, 100 S.Ct. 352, 62 L.Ed.2d 259 (1979). This lack of knowable information leaves the plaintiff "at the mercy of" the defendant and unable to file suit. *Id.* "To say to one who has been wronged, 'You had a remedy, but before the wrong was ascertainable to you, the law stripped you of your remedy,' makes a mockery of the law." *City of Aurora v. Bechtel Corp.*, 599 F.2d 382, 387–88 (10th Cir. 1979) (citation and emphasis omitted). The discovery rule ensures that plaintiffs in this position still have a remedy.

Applying the discovery rule in the Title IX context is also consistent with the remedial purposes of Title IX. Title IX "provides relief broadly to those who face discrimination on the basis of sex in the American education system." *Doe v. Univ. of Ky.*, 971 F.3d 553, 557 (6th Cir. 2020) (citing *NCAA v. Smith*, 525 U.S. 459, 466 n.4, 119 S.Ct. 924, 142 L.Ed.2d 929 (1999)).

Applying the more restrictive occurrence rule would be counter to Title IX's broad remedial purpose.

Finally, we observe that other circuits that have reached this issue have applied the discovery rule in Title IX cases. *See, e.g.*, *King-White*, 803 F.3d at 762; *Doe v. Howe Mil. Sch.*, 227 F.3d 981, 988 (7th Cir. 2000); *Stanley v. Trs. of Cal. State Univ.*, 433 F.3d 1129, 1136 (9th Cir. 2006); *but see Twersky v. Yeshiva Univ.*, 579 F. App'x 7, 9 (2d Cir. 2014) (order) (declining to decide whether the discovery rule applies); *Varnell v. Dora Consol. Sch. Dist.*, 756 F.3d 1208, 1216 (10th Cir. 2014) (same). In adopting the discovery rule in Title IX cases, we note that any contrary holding would create an unnecessary circuit split.

Ohio State's arguments urging us to reject the discovery rule are not persuasive. Ohio State primarily points to the Supreme Court's decision in *Rotkiske v. Klemm*, —— U.S. ——, 140 S. Ct. 355, 205 L.Ed.2d 291 (2019), a case that addressed the accrual of Fair Debt Collection Practices Act (FDCPA) claims. Unlike Title IX, the FDCPA's text contains a statute of limitations: FDCPA actions must be brought "within one year from the date on which the violation occurs." *Id.* at 358 (quoting 15 U.S.C. § 1692k(d)). The Supreme Court held that the discovery rule did not apply to FDCPA suits. *Id.* at 360–61.

Rotkiske is inapposite. In *Rotkiske*, the Court's analysis both started and ended with the text of the FDCPA, which expressly states that the statute of limitations starts on "the date on which the violation occurs." *Id.* at 358 (quoting 15 U.S.C. § 1692k(d)). The Court therefore concluded that importing the discovery rule would amount to "[a]textual judicial supplementation." *Id.* at 361; *see also id.* at 360 ("We

must presume that Congress 'says in a statute what it means and means in a statute what it says there.'" (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992))). In short, *Rotkiske* was a straightforward case of text-based statutory interpretation.

Thus, *Rotkiske* has no bearing on a case about the accrual of Title IX claims because Title IX's text contains no statute of limitations at all. *See Lillard*, 76 F.3d at 728. We agree with the Second Circuit that *Rotkiske*'s reasoning is limited to the FDCPA's text, and that *Rotkiske* does not affect "the continuing propriety of the discovery rule." *Sohm v. Scholastic, Inc.*, 959 F.3d 39, 50 & n.2 (2d Cir. 2020); *see also Navarro v. Procter & Gamble Co.*, 515 F. Supp. 3d 718, 760 (S.D. Ohio 2021) (applying the discovery rule in light of pre-*Rotkiske* precedent because "*Rotkiske* has little to say about which [rule] should apply" when statute is silent). Other circuits have likewise continued to apply the discovery rule in other contexts post-*Rotkiske*. *See, e.g.*, *Ouellette v. Beaupre*, 977 F.3d 127, 136 (1st Cir. 2020) (applying discovery rule to § 1983 claim); *Johnson v. Chudy*, 822 F. App'x 637, 638 (9th Cir. 2020) (same); *Lupole v. United States*, No. 20-1811, 2021 WL 5103884, at *1 (4th Cir. Nov. 3, 2021) (applying discovery rule to FTCA claim). And, albeit only in nonprecedential decisions, we have done the same. *Norton v. Barker*, No. 21-5893, 2022 WL 837976, at *2 (6th Cir. Feb. 16, 2022) (order) (§ 1983 case); *B&P Littleford, LLC v. Prescott Mach., LLC*, No. 20-1449/1451, 2021 WL 3732313, at *7 (6th Cir. Aug. 24, 2021) (Defend Trade Secrets Act case). No appellate court has held that *Rotkiske* did away with the common-law discovery rule when a statute is silent.

True, we have previously speculated, in dicta, that *Rotkiske* might prompt reconsideration of the discovery rule. *See Dibrell v. City of Knoxville*, 984 F.3d 1156, 1162 (6th Cir. 2021).[80] Unfortunately, as is often the case with such musings, our earlier dicta overlooked important context in *Rotkiske*. *Rotkiske* did not state that "*[a]ny presumption* favoring th[e] discovery rule . . . represents a 'bad wine of recent vintage.'" *Id.* (emphasis added) (quoting *Rotkiske*, 140 S. Ct. at 360). Instead, the "bad wine" discussed in *Rotkiske* was the use of the discovery rule to override clear statutory text. *See Rotkiske*, 140 S. Ct. at 360. As we have recognized, applying the discovery rule as a common-law accrual principle "says nothing" about how to determine the meaning of specific statutory language. *See El-Khalil v. Oakwood Healthcare, Inc.*, 23 F.4th 633, 636 (6th Cir. 2022). The converse is also true.

Nor do *Wallace v. Kato*, 549 U.S. 384, 127 S.Ct. 1091, 166 L.Ed.2d 973 (2007), or *McDonough v. Smith*, —— U.S. ——, 139 S. Ct. 2149, 204 L.Ed.2d 506 (2019), change our analysis. In these cases, the Supreme Court applied the occurrence rule to § 1983 claims. No party in these cases raised the discovery rule, and the Court did not discuss the issue at all. Because the issue is not jurisdictional, the Court's silence in these two cases does not impact our analysis one way or the other. In fact, binding post-*Wallace* cases—even those cases explicitly relying on

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[80] To be clear, any discussion of the discovery rule in *Dibrell* is dicta because *Dibrell* stated that it "need not resolve this tension [between the discovery rule and the occurrence rule] now because Dibrell's claims would be untimely either way." 984 F.3d at 1162.

Wallace—have continued to apply the discovery rule in the § 1983 context. *See, e.g.*, *Cooey v. Strickland*, 479 F.3d 412, 416 (6th Cir. 2007) (citing *Wallace* but continuing to apply the discovery rule in the § 1983 context); *D'Ambrosio v. Marino*, 747 F.3d 378, 384 (6th Cir. 2014) (same). Moreover, *McDonough* recognized that "[t]he Court has never suggested that the date on which a constitutional injury first occurs is the only date from which a limitations period may run." 139 S. Ct. at 2160. Ohio State's reliance on *Wallace* and *McDonough* is unavailing.

Likewise, three of our unpublished decisions—*Guy v. Lexington-Fayette Urban County Government*, 488 F. App'x 9 (6th Cir. 2012), *Gilley v. Dunaway*, 572 F. App'x 303 (6th Cir. 2014), and *Giffin v. Case Western Reserve University*, 181 F.3d 100 (6th Cir. 1999) (table)—do not move the needle. *Guy* and *Gilley* interpret Kentucky law, which is of no use to our analysis of when a claim accrues under federal law. And *Giffin* offers no discussion of the discovery rule and no analysis that sheds light on claim accrual.

Ultimately, we conclude that applying the discovery rule aligns with precedent, the rule's purpose, and Title IX's broad remedial purpose. We therefore agree with every other circuit to decide the issue and hold that the discovery rule determines the accrual of Title IX claims.

2. The Scope of the Discovery Rule

Having concluded that the discovery rule applies, we next examine the precise scope of the discovery rule. In line with our earlier cases, we hold that, when the discovery rule applies, a claim accrues when a plaintiff knows or has reason to know that the

defendant injured them: in other words, they must discover both their injury and its cause.

We have previously explained that, under the discovery rule, a claim accrues "when the reasonable person knows, or in the exercise of due diligence should have known, both his injury and the cause of that injury." *Bishop*, 618 F.3d at 536 (quoting *Campbell*, 238 F. 3d at 775); *accord Amburgey v. United States*, 733 F.3d 633, 636 (6th Cir. 2013); *Fonseca*, 246 F.3d at 588. This approach is the same as the seven other circuits to address this issue. *See Ouellette*, 977 F.3d at 136; *Kronisch v. United States*, 150 F.3d 112, 121 (2d Cir. 1998); *Miller v. United States*, 932 F.2d 301, 303 (4th Cir. 1991); *Piotrowski v. City of Houston*, 237 F.3d 567, 576 (5th Cir. 2001); *In re Copper Antitrust Litig.*, 436 F.3d 782, 789 (7th Cir. 2006); *Bibeau v. Pac. Nw. Rsch. Found. Inc.*, 188 F.3d 1105, 1108 (9th Cir. 1999); *Chappell v. Rich*, 340 F.3d 1279, 1283 (11th Cir. 2003).

This approach follows the Supreme Court's lead in *Kubrick*, 444 U.S. 111, 100 S.Ct. 352. In *Kubrick*, the Supreme Court distinguished between "a plaintiff's ignorance of his legal rights," which *did not* affect the accrual date, and a plaintiff's "ignorance of the fact of his injury or its cause," which *did* affect accrual. 444 U.S. at 122, 100 S.Ct. 352. In other words, "the [Supreme] Court was careful to distinguish between ignorance of the facts, including an injury and its cause, and ignorance of the law." *Ouellette*, 977 F.3d at 136 (citing *Kubrick*, 444 U.S. at 122, 100 S.Ct. 352). The "critical facts" that start the clock are "that [the plaintiff] has been hurt and who has inflicted the injury." *Kubrick*, 444 U.S. at 122, 100 S.Ct. 352. If a plaintiff has no reason to know who injured them, their claim has not accrued.

Ignoring *Kubrick*, Ohio State zooms in on a single sentence in *Rotella v. Wood*, in which the Supreme Court stated that it has "been at pains to explain that discovery of the injury, not discovery of the other elements of a claim, is what starts the clock." 528 U.S. 549, 555, 120 S.Ct. 1075, 145 L.Ed.2d 1047 (2000). This language, Ohio State argues, means that a claim accrues once a plaintiff knows or has reason to know of their injury, regardless of whether they have reason to know who or what caused the injury. But *Rotella*'s very next sentence points to *Kubrick*'s explanation that "the justification for a discovery rule does not extend beyond the injury" because "a plaintiff's ignorance of his legal rights" is different from "his ignorance of the fact of his *injury or its cause*." *Rotella*, 528 U.S. at 555–56, 120 S.Ct. 1075 (emphasis added) (quoting *Kubrick*, 444 U.S. at 122, 100 S.Ct. 352). In seamlessly transitioning between knowledge of an "injury" and knowledge of the "injury or its cause," the Supreme Court distinguished both injury and cause from a plaintiff learning of their legal rights. *This* discovery—learning of "legal rights"—includes the "other elements of a claim" that *Rotella* tells us do not affect accrual. In other words, discovering that a defendant caused an injury is *part of* discovering the injury. *Rotella* does not undercut *Kubrick*'s understanding that a plaintiff must have discovered that *the defendant harmed them* for a claim to accrue.

Our precedent supports this understanding of *Rotella* and *Kubrick*. Although we have been clear that discovery refers to both injury and cause, we have also stated that the clock starts "when the plaintiff knows or has reason to know of the injury which is the basis of his action." *Hughes*, 215 F.3d at

548; *accord Johnson v. Memphis Light Gas & Water Div.*, 777 F.3d 838, 843 (6th Cir. 2015); *Roberson*, 399 F.3d at 794. The Fifth Circuit has done the same. Explaining that "the [limitations] period begins to run the moment the plaintiff becomes aware that he has suffered an injury or has sufficient information to know that he has been injured," the Fifth Circuit emphasized that a plaintiff must be able to know "the facts that would ultimately support a claim." *Piotrowski*, 237 F.3d at 576 (internal quotation marks and citations omitted). Thus, "[a] plaintiff's awareness encompasses two elements: (1) [t]he existence of the injury; and (2) causation, that is, the connection between the injury and the defendant's actions." *Id.* (internal quotation marks and citations omitted). In other words, discovery of injury and cause are both *a part of* discovering the injury that is the basis of the action.

In deciding when a plaintiff discovers the injury that is the basis of their action, "courts look 'to what event should have alerted the typical lay person to protect his or her rights.'" *Johnson*, 777 F.3d at 843 (quoting *Roberson*, 399 F.3d at 794); *accord Cooey*, 479 F.3d at 416; *Kuhnle Bros., Inc. v. County of Geauga*, 103 F.3d 516, 520 (6th Cir. 1997). Individuals cannot be alerted to protect their rights without knowledge about causation. For example, a person who suffers a latent injury, knowing that they are sick, cannot reasonably be expected to protect their rights without knowing what caused their sickness. Just as an employee needs to know that their employer exposed them to toxic materials before they can bring suit, a student must know that their

school exposed them to a heightened risk of harassment before they have a viable claim.[81]

Moreover, our requirement that a plaintiff discover "the injury which is the basis of [their] action," *Hughes*, 215 F.3d at 548, necessarily requires us to look at what the basis of their action is. In a Title IX case, a plaintiff's cause of action is against the school based on the school's actions or inactions, not the actions of the person who abused the plaintiff. *See Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 640, 119 S.Ct. 1661, 143 L.Ed.2d 839 (1999) ("[A] recipient of federal funds may be liable in damages under Title IX only for its own misconduct."); *Bose v. Bea*, 947 F.3d 983, 988 (6th Cir. 2020) (same). The *institution's* conduct is therefore the "the act providing the basis of" a plaintiff's legally cognizable Title IX injury. *Garza v. Lansing Sch. Dist.*, 972 F.3d 853, 867 n.8 (6th Cir. 2020) (quoting *Collyer v. Darling*, 98 F.3d 211, 220 (6th Cir. 1996)); *see Doe ex. rel. Doe #2 v. Metro. Gov't of Nashville & Davidson Cnty.*, 35 F.4th 459, 466 (6th Cir. 2022) ("[I]n a successful 'before' claim, a school's deliberate indifference to known past acts of sexual misconduct must have caused the misconduct that the student currently alleges."). In other words, a plaintiff could not have been "alerted . . . to protect his or her rights" through a Title IX suit unless they had reason to believe that the *institution* did something (or failed to

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[81] Thus, in the context of the discovery rule, "injury" means something more than "harm." Although injury and harm may sometimes be synonymous, that's not always the case. Here, "injury" means "[t]he violation of another's legal right" or "[a]nything said or done in breach of a duty not to do it, if harm results." *Injury*, Black's Law Dictionary (11th ed. 2019).

do something) that caused their injury. *See Johnson*, 777 F.3d at 843.

The First Circuit applied similar logic in *Ouellette*. There, the plaintiff alleged that a police officer sexually abused him decades earlier when the plaintiff was a teenager. The plaintiff did not know at the time that the police department had received prior complaints that the officer had abused other teenagers. 977 F.3d at 132. The plaintiff's knowledge that the officer abused him and that his abuser was employed by the police department did not trigger accrual because, as is also true in the Title IX context, "[a] constitutional tortfeasor's employment with a municipality or supervision by a superior state officer does not, on its own, give rise to a 'complete and present' § 1983 cause of action." *Id.* at 140. Because there is no respondeat superior liability, "[a]ny knowledgeable attorney that Ouellette consulted around the time of his alleged abuse" would have told him not to file a lawsuit against the city "in the absence of additional information suggesting that they were also a cause of his injury." *Id.* Thus, his claim had not accrued at that time. *Id.*; *see also Barrett v. United States*, 689 F.2d 324, 330 (2d Cir. 1982) ("It is illogical to require a party to sue the government for negligence at a time when the Government's responsibility in the matter is suppressed in a manner designed to prevent the party, even with reasonable effort, from finding out about it.").

We are persuaded by *Ouellette*'s reasoning and adopt it fully. We are also persuaded by two sets of well-reasoned district court opinions that adopt similar logic in the Title IX context. In *Karasek v. Regents of University of California*, the court reasoned

that the " 'touchstone' of accrual is notice of the 'injury which is the basis of [the plaintiff's] action,'" and that, unlike in cases with direct respondeat superior liability in which a defendant's liability is easily discernable, an assault does not give a plaintiff knowledge of an *institution's* conduct. 500 F. Supp. 3d 967, 979 (N.D. Cal. 2020) (quoting *Stanley*, 433 F.3d at 1136). Thus, the court ultimately "conclude[d] that a plaintiff's Title IX pre-assault claim accrues when the plaintiff knows or has reason to know of the school's policy of deliberate indifference that created a heightened risk of harassment." *Id.* at 978. Similarly, in a series of cases arising from a sex-abuse scandal at Baylor University, the district court reasoned that the plaintiffs' knowledge that their assailants had previously assaulted other women was "insufficient to demonstrate that [they] would have been put on notice to look into *Baylor's* knowledge of [the assailant]'s history or *Baylor's* conduct in administering its football program prior to [the] assault[s]." *Hernandez v. Baylor Univ.*, 274 F. Supp. 3d 602, 616–17 (W.D. Tex. 2017) (emphasis added); *see Doe 1 v. Baylor Univ.*, 240 F. Supp. 3d 646, 663 (W.D. Tex. 2017); *Lozano v. Baylor Univ.*, 408 F. Supp. 3d 861, 901 (W.D. Tex. 2019). What the plaintiffs knew or had reason to know was an issue of fact: "[w]hile it is plausible that Plaintiffs were aware of their heightened-risk claims at the time of their assaults, it is also plausible that they did not have reason to further investigate those claims until [the allegations became public]." *Doe 1*, 240 F. Supp. 3d at 663. Thus, the court declined to dismiss the pre-assault claims.

These cases illustrate that a pre-assault heightened-risk claim may not accrue until well after

a post-assault Title IX claim. A plaintiff will typically know or have reason to know that a school mishandles their own report of an assault close to the time of the school's inadequate response. But that same plaintiff may have no reason to know of a school's deliberate indifference that gave rise to their heightened-risk claim. It would be "unreasonable to conclude . . . that a plaintiff's knowledge that [their] *individual* complaint was mishandled would reveal that the University has a broad de facto policy of deliberate indifference generally." *Karasek*, 500 F. Supp. 3d at 981. This difference distinguishes the plaintiffs' claims from *King-White*, 803 F.3d at 763, in which the Fifth Circuit held that the plaintiffs' *post*-assault claims accrued when their complaints to the school administrations went "unheeded." In short, even if a plaintiff has reason to know that a school responded improperly to their complaint, they may still lack reason to know that others had complained before them or that the school was deliberately indifferent to any prior complaints.

To summarize, we agree with seven of our sibling circuits, and we expressly hold that, pursuant to the discovery rule, a claim accrues when a plaintiff knows or has reason to know that they were injured and that the defendant caused their injury. In the Title IX context, this means that the claim does not accrue until the plaintiff knows or has reason to know that the *defendant institution* injured them.

C. Accrual of the Plaintiffs' Claims

We next must decide whether the plaintiffs adequately allege that their claims did not accrue until 2018. We hold that the plaintiffs' allegations are

plausible. Thus, the district court erred in dismissing their cases.

Although the plaintiffs need not have known or had reason to know of the *legal* elements of their claims, they must have known or had reason to know of the *facts* underpinning their claims before the statute of limitations begins to run. *Kubrick*, 444 U.S. at 122, 100 S.Ct. 352. Thus, the plaintiffs' claims accrued when they knew or had reason to know that Ohio State was "deliberately indifferent to sexual harassment, of which [Ohio State had] actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school." *Davis*, 526 U.S. at 650, 119 S.Ct. 1661.

The plaintiffs' allegations that they lacked reason to know that Ohio State injured them are plausible. It would be difficult for "typical lay person" in the plaintiffs' position to know the underlying facts about Ohio State's alleged deliberate indifference. The plaintiffs allege that none of them knew or had reason to know that Ohio State administrators were on notice of Strauss's abuse.[82] And how could they know? Both Dr. Grace, who was the director of Ohio State's Student Health Services, and Dr. Miller, who was Strauss's direct supervisor, stated that they did not know of "any way" that "any [Ohio State] student" could have known that Ohio State knew about Strauss's abuse and nonetheless failed to get rid of

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[82] *Snyder-Hill* R. 123 (SAC ¶ 267) (Page ID #2035–36); *Moxley* R. 16 (Am. Compl. ¶ 209) (Page ID #242–43).

him.[83] And when Ohio State hired Perkins Coie in 2018 to investigate both the allegations of abuse and "whether [Ohio State] had knowledge of such allegations against Strauss," it took $6.2 million and 12 months for Perkins Coie to issue its final conclusions.[84] Ohio State is a vast institution, and the plaintiffs' allegations underscore how difficult it is for a student to know what appropriate persons within the Ohio State administration knew.

A plaintiff's knowledge that he was abused is not enough to start the clock. *See Ouellette*, 977 F.3d at 140 (knowledge of abuse is not the same as knowledge of institutional conduct). Knowledge that Ohio State employed Strauss is not enough. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 285, 118 S.Ct. 1989, 141 L.Ed.2d 277 (1998) (no respondeat superior claims for Title IX claims of employee-student harassment). Knowledge that other students knew of Strauss's conduct is not enough. *See id.* at 290, 118 S.Ct. 1989 (Title IX requires "notice to an 'appropriate person' and an opportunity to rectify any violation" (citing 20 U.S.C. § 1682)). Knowledge that coaches or trainers knew is not enough. *See Kesterson v. Kent State Univ.*, 967 F.3d 519, 528–29 (6th Cir. 2020) (knowledge of abuse by coaches and assistant coaches does not satisfy knowledge requirement of Title IX). Instead, the clock starts only once the plaintiff knows or should have known that Ohio State administrators "with authority to take corrective action" knew of

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[83] *Snyder-Hill* R. 123 (SAC ¶¶ 265–66) (Page ID #2035); *Moxley* R. 16 (Am. Compl. ¶¶ 207–08) (Page ID #242).

[84] *Snyder-Hill* R. 123 (SAC ¶¶ 273–75) (Page ID #2037); *Moxley* R. 16 (Am. Compl. ¶¶ 215–18) (Page ID #244).

Strauss's conduct and failed to respond appropriately. *Gebser*, 524 U.S. at 290, 118 S.Ct. 1989.

Should the plaintiffs' snippets of knowledge "have alerted the typical lay person to protect his or her rights" by investigating further? *Johnson*, 777 F.3d at 843 (quoting *Roberson*, 399 F.3d at 794). We cannot say. This is a question of fact—one that is improper to resolve at the motion-to-dismiss stage. *See Lutz*, 717 F.3d at 464 (a motion to dismiss is typically "an 'inappropriate vehicle' for dismissing a claim based upon a statute of limitations").

But the answer to this question may not ultimately matter because the plaintiffs adequately allege that if they had investigated the abuse, they would not have discovered that Ohio State injured them. A plaintiff's duty to investigate does not trigger accrual. Instead, "the limitations period does not begin to run until the plaintiff thereafter discovers or a reasonably diligent plaintiff would have discovered 'the facts constituting the violation.'" *Merck & Co. v. Reynolds*, 559 U.S. 633, 653, 130 S.Ct. 1784, 176 L.Ed.2d 582 (2010). In other words, even if the plaintiffs should have investigated, the clock does not start if the plaintiffs would not have learned that Ohio State injured them. The plaintiffs allege that Ohio State concealed Strauss's abuse and Ohio State's knowledge of it, destroyed records, gave Strauss false performance reviews, and actively misled students by, for example, telling complainants that no one had ever previously complained about Strauss. *See* Section I.A.2, *supra*. The plaintiffs plausibly allege a decades-long cover up. Given these plausible allegations, the plaintiffs adequately allege that they could not have reasonably discovered Ohio State's

conduct. This alone provides sufficient grounds to delay the accrual of their Title IX claims.

The above reasons apply to all plaintiffs, and these reasons alone warrant reversal. But the *Moxley* plaintiffs and all but nine of the *Snyder-Hill* plaintiffs adequately allege an additional ground that provides a separate and independent basis for our holding: they did not know they were abused. The district court felt that these allegations were implausible, pointing to other allegations "that Plaintiffs were concerned by Strauss's abuse and felt violated by it, discussed the abuse with teammates, classmates, or family members, reported the abuse themselves, or that the abuse caused them immediate mental and emotional distress." *Garrett*, 561 F. Supp. 3d at 759 n.7. In the district court's view, the plaintiffs' distress belies their claims that they did not know Strauss's conduct was abuse.

At this early stage, the district court was incorrect to dismiss the plaintiffs' allegations by holding that they were implausible as a matter of law. The plaintiffs plausibly allege that experiencing distress—even extreme distress—does not mean that they knew or should have known that they were abused. Strauss gave pretextual medical explanations for his abuse, such as conducting a hernia check or doing an evaluation for sexually transmitted infections. *See* Section I.A.1, *supra*. The plaintiffs further allege that physician-patient abuse is particularly difficult to identify because physicians, unlike other professionals, are expected to touch a person's sexual organs, and laypeople lack the training to know whether an examination is medically appropriate. *Id.* On top of that, the plaintiffs were young, untrained, and inexperienced,

Ohio State gave Strauss its stamp of approval, and trusted adult professionals routinely told the plaintiffs that Strauss's conduct was normal. *Id.*

Amici shed light on the plausibility of the plaintiffs' claims. A significant body of literature shows that (1) many people do not recognize that they have been sexually abused, particularly if they were abused by someone on whom they depend; and (2) people suffer serious harms resulting from their abuse, even if they do not recognize it as abuse. *See* Psychology & Psychiatry Scholars Br. at 10–26. Example after example highlights the unique difficulties of recognizing whether a physician's conduct is abusive. *See* National Center for Victims of Crime Br. at 4–18. And recognizing abuse—especially physician-patient abuse—can be even harder in the context of college athletics because of the insular nature of teams, the immense trust and authority placed in coaches, and the culture of college athletics, including the role of coaches and trainers in setting norms. *See* National Women's Law Center Br. at 9–23.

Medical procedures, including necessary ones such as colonoscopies, are often uncomfortable. That does not mean that they are abusive. As a result, discomfort does not mean that plaintiffs *should know* that they are being abused. *See Doe v. Pasadena Hosp. Ass'n*, No. 2:18-cv-08710, 2020 WL 1244357, at *6 (C.D. Cal. Mar. 16, 2020) (plaintiffs' failure to discover physician's abuse was reasonable when physician "touch[ed] their legs in a sexual manner, conduct[ed] unexpected vaginal exams, and unnecessary breast exams" because physician misrepresented "that his 'acts were for a legitimate medical purpose'"). Instead, even if a patient is

uncomfortable, whether they knew or should have known that they were abused is an issue of fact for the jury.

Ultimately, we hold that the plaintiffs' claims survive Ohio State's motion to dismiss for three independent reasons. First, the plaintiffs plausibly allege that they did not know and lacked reason to know that Ohio State caused their injury. Second, they plausibly allege that even if they had investigated further, they could not have learned of Ohio State's conduct. Third, most plaintiffs plausibly allege that they did not know that they were abused. Alone, each of these grounds is sufficient to delay accrual.

D. Non-Student Plaintiffs

Finally, Ohio State argues that four non-student plaintiffs in the *Snyder-Hill* case cannot bring a Title IX claim. John Doe 30 and John Doe 42 were contract referees; John Doe 47 was a fifteen-year-old high-school student visiting Ohio State's campus; and John Doe 49 was a fourteen- or fifteen-year-old high-school student who attended an Ohio State wrestling camp.[85]

Title IX provides that "[n]o *person* . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a) (emphasis added). "Congress easily could have substituted 'student' or 'beneficiary' for the word 'person' if it had wished to restrict the scope of

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[85] *Snyder-Hill* R. 123 (SAC ¶¶ 1613, 1812, 1903, 1940) (Page ID #2208, 2236, 2250, 2255).

[Title IX]." *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521, 102 S.Ct. 1912, 72 L.Ed.2d 299 (1982). It did not limit the statute in this way and thus, Title IX's plain language sweeps more broadly.

Contrary to Ohio State's assertions, we have never limited the availability of Title IX claims to employees or students. The two cases on which Ohio State relies prove this point. In *Doe v. University of Kentucky*, 971 F.3d at 558, the court held that "although Doe[ ] was not enrolled as a student at the University, she has shown that . . . there remain genuine disputes as to whether she was denied the benefits of an 'education program or activity' furnished by the University." The court pointed to the fact that she paid the University directly for housing in its residence halls, paid for a dining hall and student fees, and alleged that she hoped to enroll at the University after beginning her education at the Community college. *Id.* Although we explained that Doe's relationship with the school was akin to a student, this analysis was relevant only because Doe brought a claim for student-on-*student* sexual harassment. *Id.* at 557–58. The inquiry was not relevant to whether individuals can bring Title IX claims more generally.

In *Arocho v. Ohio University*, No. 20-4239, 2022 WL 819734, at *3 (6th Cir. Mar. 18, 2022), we recognized that "a nonstudent like [the plaintiffs] may bring a Title IX claim, if [they] w[ere] excluded from or discriminated against under a[n] 'education program or activity.'" In *Arocho*, the plaintiff did not have a Title IX claim because "the full extent of Arocho's relationship with Ohio University was her participation in career day" and she did "not allege that she intended to partake in any Ohio University education program or activities in the future." *Id.* at

*4. The barrier to Arocho's suit was *not* that she was a nonstudent; it was instead that she could not point to any education program or activity of which she was denied the benefit.

Because none of these four plaintiffs was a student or regular employee of Ohio State, we must decide whether they were discriminated against under an education program or activity. We have no binding authority that establishes a framework for this analysis.

Doe v. Brown University, 896 F.3d 127 (1st Cir. 2018), persuasively analyzes the issue. Doe, a student at Providence College, was sexually assaulted by three Brown students on Brown's campus. *Id.* at 128–29. She reported the assault, and later alleged that Brown responded inappropriately by abandoning its investigation into the assault. *Id.* at 129. The First Circuit read the Supreme Court's decision in *Bell* to "impl[y] that, in order for a person to experience sex 'discrimination under an education program or activity,' that person must suffer unjust or prejudicial treatment on the basis of sex while participating, or at least attempting to participate, in the funding recipient's education program or activity." *Id.* at 131. The First Circuit held that Doe failed to state a Title IX claim because she did not experience discriminatory treatment while participating or attempting to participate in any educational program provided by Brown. *Id.* at 133.

At the same time, the First Circuit recognized that "members of the public" can bring a Title IX claim if they are "avail[ing] themselves of the services provided by educational institutions receiving federal funding," for example by "access[ing] university libraries, computer labs, and vocational resources," or

"attend[ing] campus tours, public lectures, sporting events, and other activities at covered institutions." *Id.* at 132 n.6. Similarly, both the Second and Third Circuits have held that something can be considered "an '*education* program or activity' under § 1681(a) if it has 'features such that one could reasonably consider its mission to be, at least in part, educational." *Doe v. Mercy Cath. Med. Ctr.*, 850 F.3d 545, 555 (3d Cir. 2017) (quoting *O'Connor v. Davis*, 126 F.3d 112, 117 (2d Cir. 1997)).

We adopt the reasoning of the First Circuit and hold that a non-student and non-employee can bring a Title IX claim if they were subject to discrimination "while participating, or at least attempting to participate, in the funding recipient's education program or activity." *Doe v. Brown*, 896 F.3d at 131. We further hold that "education program or activity" is defined broadly and extends to situations in which individuals are, for example, accessing university libraries or other resources, or attending campus tours, sporting events, or other activities.

Under this framework, John Doe 49's claim clearly survives the motion to dismiss. John Doe 49 alleges that he "was at OSU for OSU's summer wrestling camp," which was "an education program or activity offered to young athletes not yet old enough to attend OSU, which was staffed by OSU employees and student-athletes."[86] This camp was an educational program that provided training for young wrestlers. John Doe 49 was participating in it and was denied its benefits when Strauss abused him.

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86 *Snyder-Hill* R. 123 (SAC ¶ 1940) (Page ID #2255).

John Does 30 and 42 likewise state Title IX claims. They were contract referees when Strauss abused them.[87] Thus, they were "attending" or participating in "sporting events." *Doe v. Brown*, 896 F.3d at 132 n.6. And Strauss "gave John Doe 47 a long tour of the athletics facilities," and assaulted him "under the guise that he would show John Doe 47 the types of medical exams athletes had to get to be cleared to play for OSU."[88] Even if this was not a bona fide education activity because it was merely a guise for Strauss's abuse, John Doe 47 was "*attempting* to participate in an education program" because he believed that he was receiving a bona fide tour of Ohio State's facilities, offered by an Ohio State employee. *Doe v. Brown*, 896 F.3d at 132 (emphasis added).

III. CONCLUSION

We **REVERSE** the district court's orders granting Ohio State's motions to dismiss, and we **REMAND** for further proceedings consistent with this opinion.

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87 *Id.* ¶¶ 1613, 1812 (Page ID #2208, 2236).

88 *Id.* ¶¶ 1906–11 (Page ID #2251).

RALPH B. GUY, JR., Circuit Judge, dissenting.

Today's decision effectively nullifies any statute of limitations for Title IX claims based on sexual harassment. In these two appeals, 110 male plaintiffs (84 plaintiffs in *Snyder-Hill* and 33 plaintiffs in *Moxley*) assert Title IX claims against The Ohio State University.[1] In the *Snyder-Hill* plaintiffs' 371-page complaint and the *Moxley* plaintiffs' 159-page complaint, each plaintiff describes the obscene details of how Dr. Richard Strauss sexually abused them in the school's locker room or showers, at Strauss's home, or during physical examinations. All agree that the alleged sexual abuse occurred between 1978 and 1998. (Maj. Op. 1). And all agree that plaintiffs' Title IX claims are subject to Ohio's *two-year* statute of limitations for general personal injury claims. *See, e.g.*, *Lillard v. Shelby Cnty. Bd. of Educ.*, 76 F.3d 716, 729 (6th Cir. 1996); *see Owens v. Okure*, 488 U.S. 235, 250, 109 S.Ct. 573, 102 L.Ed.2d 594 (1989); Ohio Rev. Code § 2305.10(A); (Maj. Op. 17).

These two lawsuits were filed in July 2018 and June 2021—more than 20 to 40 years after the alleged sexual abuse occurred (1978 to 1998), more than 20 years after Strauss stopped working at the university (1998), and more than 13 years after Strauss committed suicide (2005).[2] As Judge Watson correctly concluded, plaintiffs' Title IX claims accrued, and the statute of limitations expired, long ago.

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[1] After oral argument, some plaintiffs voluntarily dismissed their appeal.

[2] *Snyder-Hill* (R. 123, ¶¶ 2, 268); *Moxley* (R. 16, ¶¶ 2, 210).

In reversing, the majority opinion does not rely on a tolling doctrine to revive plaintiffs' claims. It accepts plaintiffs' allegations that their Title IX claims did not *accrue*, and thus the two-year limitations period did not start running, until sometime *after* April 2018—when the university announced it had hired the law firm Perkins Coie to conduct an internal "investigation into student athletes' allegations of sexual misconduct by Dr. Strauss dating back to the late-1970s."[3]

"Statutes of limitations are not simply technicalities." *Bd. of Regents v. Tomanio*, 446 U.S. 478, 487, 100 S.Ct. 1790, 64 L.Ed.2d 440 (1980). Rather, the Supreme Court has repeatedly explained:

> Statutes of limitations are intended to "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348–49, 64 S.Ct. 582, 88 L.Ed. 788 (1944). They provide "security and stability to human affairs." *Wood v. Carpenter*, 101 U.S. 135, 139, 25 L.Ed. 807 (1879). We have deemed them "vital to the welfare of society," *ibid.*, and concluded that "even wrongdoers are entitled to assume that their sins may be forgotten," *Wilson v. Garcia*, 471 U.S. 261, 271, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985).

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[3] *See, e.g.*, *Snyder-Hill* (R. 123, ¶¶ 153, 270; Appellant Br. 10, 19, 28); *Moxley* (R. 16, ¶¶ 94, 212; Appellant Br. 11, 18, 26 & n.19).

Gabelli v. SEC, 568 U.S. 442, 448-49, 133 S.Ct. 1216, 185 L.Ed.2d 297 (2013). The hard reality is that "there comes a point at which the delay of a plaintiff in asserting a claim is sufficiently likely either to impair the accuracy of the factfinding process or to upset settled expectations that a substantive claim will be barred without respect to whether it is meritorious." *Tomanio*, 446 U.S. at 487, 100 S.Ct. 1790; *see also Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974). Here, the alleged sexual abuse and alleged failure of the university to take corrective action are egregious and reprehensible. But that is not a license to ignore well-established principles regarding when certain claims *accrue*. Because plaintiffs' Title IX claims are time-barred, I would affirm.

I.

Start with the full picture of what plaintiffs allege. Plaintiffs recount in graphic detail that Strauss's abuse included: "fondling their testicles and penises," "often without gloves" for a "prolonged" or "extended period of time";[4] "masturbating [them] to erection[5]

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[4] *Snyder-Hill* (R. 123, ¶¶ 309, 647, 651, 733, 787, 1026, 1030, 1392, 1462-65, 1595, 1696, 1875, 1981, 2004, 2082, 2118, 2210, 2337, 2460, 2500, 2516, 2519, 2521); *Moxley* (R. 16, ¶¶ 246, 248, 253, 268, 271, 275, 279, 317, 338, 357, 439, 454, 470-71, 488-89, 504, 520, 535, 537, 613-14, 616, 630-31, 651, 666, 668-69, 687, 691, 694, 697, 713-14, 718, 733, 780, 795, 831, 847, 869).

[5] *Snyder-Hill* (R. 123, ¶¶ 528, 751, 767–72, 951, 1294, 1428, 1571, 1663, 1769, 1926-28, 2138, 2260, 2316, 2356, 2500, 2522, 2540-41); *Moxley* (R. 16, ¶¶ 336, 374-75, 396-97, 415, 558, 575-78, 598, 733-34, 750, 752, 775, 781, 815, 887).

and ejaculation";[6] masturbating himself "during or after the exams";[7] "drugging[8] and anally raping them";[9] "unnecessar[ily]" "penetrating their rectums" with his fingers, often for a "prolonged" time and without gloves;[10] and "rubbing his testicles on" or "press[ing] his erect penis against [plaintiffs'] bodies";[11] "touching their bodies in other inappropriate ways, making inappropriate comments about their bodies, and asking improper, sexualized questions." *Snyder-Hill* (R. 123, ¶¶ 3, 138-46, 2561); *Moxley* (R. 16, ¶¶ 3, 79-87, 908). In many cases, plaintiffs experienced a combination of these acts on one or more occasions. But the majority opinion does not mention some of the most obscene sexual conduct that plaintiffs allege occurred.

Nor is the alleged sexual abuse confined to the context of a medical exam (as the majority opinion suggests). The abuse also occurred in the university's locker room, in the showers, or at Strauss's home. For example, the complaints allege: Strauss came into the locker room wearing only a towel and masturbated John Doe 9 (*Snyder-Hill* R. 123, ¶¶ 949-51); Strauss

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6 *Snyder-Hill* (R. 123, ¶¶ 1301, 1492, 1667, 1727, 1730, 1855-56, 2164, 2368, 2386, 2408, 2410, 2414, 2436); *Moxley* (R. 16, ¶¶ 3, 908; *id.*, ¶¶ 298, 396-97, 696).

7 *Snyder-Hill* (R. 123, ¶¶ 1492, 2395).

8 *Snyder-Hill* (R. 123, ¶¶ 937, 1751).

9 *Snyder-Hill* (R. 123, ¶¶ 1946-48, 1959, 1122).

10 *Snyder-Hill* (R. 123, ¶¶ 309, 609, 710, 752, 770, 1516, 1599-1600, 1681, 1890-91, 2061, 2117, 2213, 2394, 2501); *Moxley* (R. 16, ¶¶ 616, 249-50, 253, 296, 359, 455, 583, 666, 713-14, 753, 776).

11 *Snyder-Hill* (R. 123, ¶¶ 311, 1076-76, 1492, 2384, 2523, 2360).

showered with John Doe 17, John Doe 42, and John Doe 98, and masturbated while staring at each plaintiff (*id.*, ¶¶ 1815, 1240; *Moxley* R. 16, ¶ 754); Strauss masturbated while he watched John Doe 8 shower (*Snyder-Hill* R. 123, ¶¶ 907, 910); Strauss entered the sauna nude and masturbated, sometimes while sitting behind John Doe 98 (*Moxley* R. 16, ¶ 756); Strauss gave John Doe 19 a ride home and attempted to kiss him and repeatedly tried to fondle his genitals, took nude photographs of plaintiff at Strauss's home, followed plaintiff into the locker room, began massaging him, and then "kissing John Doe 19's neck and back" (*Snyder-Hill* R. 123, ¶ 1307-10); at Strauss's home, Strauss gave John Doe 70 a massage, penetrated plaintiff's anus with his finger, and then straddled plaintiff's lower back, masturbated, and ejaculated onto plaintiff's back. (*Id.*, ¶¶ 2392-95). This is just a sampling.

II.

If Congress does not provide a statute of limitations for a federal cause of action, we look to "state law for tolling rules, just as we [do] for the length of statutes of limitations"—but the "accrual date" of the cause of action "is a question of federal law that is *not* resolved by reference to state law." *Wallace v. Kato*, 549 U.S. 384, 388, 394, 127 S.Ct. 1091, 166 L.Ed.2d 973 (2007) (claim under 42 U.S.C. § 1983). When it comes to the accrual question, there are two possible answers under federal law: the "injury occurrence rule" (which the university argues applies) or the "injury discovery rule." The court's opinion here, however, adopts an injury-and-deliberate-indifference discovery rule that renders meaningless any limitations provision for Title IX claims.

1.

The injury occurrence rule "presumptively" applies. *McDonough v. Smith*, —— U.S. ——, 139 S. Ct. 2149, 2155, 204 L.Ed.2d 506 (2019) (§ 1983 claim); *see also, e.g.*, *Gabelli*, 568 U.S. at 448, 133 S.Ct. 1216; *Wallace*, 549 U.S. at 388, 391, 127 S.Ct. 1091 (§ 1983); *Clark v. Iowa City*, 87 U.S. (20 Wall.) 583, 22 L.Ed. 427 (1875). But the majority concludes otherwise, even while stating that the accrual analysis for Title IX claims should be the same as for § 1983 claims. (Maj. Op. 17-18).

Time and again, the Supreme Court has explained that the "time at which a [federal] claim accrues . . . 'conform[s] in general to common-law tort principles.'" *McDonough*, 139 S. Ct. at 2155 (quoting *Wallace*, 549 U.S. at 388, 127 S.Ct. 1091). "Under those principles, it is 'the standard rule that accrual occurs when the plaintiff has a complete and present cause of action,' that is, when 'the plaintiff can file suit and obtain relief.'" *Wallace*, 549 U.S. at 388, 127 S.Ct. 1091 (cleaned up); *see also Gabelli*, 568 U.S. at 448, 133 S.Ct. 1216. As *Wallace* further explains, "[u]nder the traditional rule of accrual . . . the tort cause of action accrues, and the statute of limitations commences to run, *when the wrongful act or omission results in damages*. The cause of action accrues even though the full extent of *the injury is not then known or predictable*." *Wallace*, 549 U.S. at 391, 127 S.Ct. 1091 (cleaned up; emphasis added).

By that measure, plaintiffs' claims are untimely. To be sure, the most analogous common-law tort is battery, and a "battery is complete upon physical contact, even though there is no observable damage at the point of contact." Restatement (Second) of

Torts § 899, comment. c (Am. L. Inst. 1979); *accord Varnell v. Dora Consol. Sch. Dist.*, 756 F.3d 1208, 1215-16 (10th Cir. 2014) (Title IX). Despite what this court's opinion says, *Varnell* applied the injury occurrence rule, and thus there is at present a "circuit split." (Maj. Op. 19, 22). Under the injury occurrence rule, each plaintiff's Title IX claim "accrued no later than the last sexual abuse by" Strauss (1978 to 1998). *Varnell*, 756 F.3d at 1216-17.

But even taking the elements of a Title IX claim at face value, the result is the same. After all, the cognizable *injury* or *damages* is "sexual harassment . . . that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students [were] effectively denied equal access to an institution's resources and opportunities." *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 651, 119 S.Ct. 1661, 143 L.Ed.2d 839 (1999). That is, the "Injury" element under Title IX is "the deprivation of 'access to the educational opportunities or benefits provided by the school.'" *Kollaritsch v. Mich. State Univ. Bd. of Trs.*, 944 F.3d 613, 622 (6th Cir. 2019) (quoting *Davis*, 526 U.S. at 650, 119 S.Ct. 1661); *see also Foster v. Bd. of Regents*, 982 F.3d 960, 965 (6th Cir. 2020) (en banc); *Doe v. Miami Univ.*, 882 F.3d 579, 590 (6th Cir. 2018) (Title IX hostile-environment claim). Plaintiffs indeed seek "damages" for *inter alia* the "sexual abuse" and loss of "educational opportunities" that occurred between 1978 and 1998.[12]

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[12] *Snyder-Hill* (R. 123, PgID 2357); *Moxley* (R. 16, PgID 361).

Accordingly, under the injury occurrence rule, plaintiffs' Title IX claims are time-barred because their claims accrued no later than the last occasion that they were harmed by Strauss (1978 to 1998). *See Varnell*, 756 F.3d at 1216-17. To conclude otherwise, would put "the supposed statute of repose in the sole hands of the party seeking relief." *Wallace*, 549 U.S. at 391, 127 S.Ct. 1091.

2.

The injury discovery rule applies only in a few well-defined situations. This case is not one of them. The so-called injury discovery rule "arose in fraud cases as *an exception to the general limitations rule*," and the Supreme Court has held that it applies "where a plaintiff has been *injured by fraud* and remains in ignorance of it without any fault or want of diligence or care on his part," *Merck & Co. v. Reynolds*, 559 U.S. 633, 644-45, 130 S.Ct. 1784, 176 L.Ed.2d 582 (2010) (citations omitted; emphasis added); *see also Rotkiske v. Klemm*, —— U.S. ——, 140 S. Ct. 355, 361, 205 L.Ed.2d 291 (2019); *Gabelli*, 568 U.S. at 449-50, 133 S.Ct. 1216; *Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 22 L.Ed. 636 (1875). But this is not a fraud case.

The discovery rule also applies when "Congress has enacted statutes that expressly include the language . . . setting limitations periods to run from the date on which the violation occurs *or the date of discovery of such violation*." *Rotkiske*, 140 S. Ct. at 361 (citing statutes); *see also, e.g.*, *Cal. Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.*, —— U.S. ——, 137 S. Ct. 2042, 2047, 2050, 198 L.Ed.2d 584 (2017) (discovery rule); *Merck*, 559 U.S. at 637, 644-48, 130 S.Ct. 1784 (discovery rule). On the other hand, where, as here,

Congress does not provide a statute of limitations that expressly includes "discovery" rule language, the Court applies the "standard" injury occurrence rule. *See, e.g.*, *Rotkiske*, 140 S. Ct. at 358, 360; *Gabelli*, 568 U.S. at 448-49, 454, 133 S.Ct. 1216; *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 134 S. Ct. 1962, 1969, 188 L.Ed.2d 979 (2014); *Wallace*, 549 U.S. at 388, 391, 127 S.Ct. 1091 (§ 1983); *McDonough*, 139 S. Ct. at 2155-56 (§ 1983).

Congress omitted any statute of limitations in Title IX. Thus, it did not silently intend to adopt a discovery rule—"a question that, on everyone's account, [Congress] never faced." *Henson v. Santander Consumer USA Inc.*, —— U.S. ——, 137 S. Ct. 1718, 1725, 198 L.Ed.2d 177 (2017). The Court has reiterated that adopting a discovery rule is "particularly inappropriate" because "Congress has shown that it knows how to adopt the omitted language *or provision*." *Rotkiske*, 140 S. Ct. at 361 (emphasis added). "[R]eading in a provision stating that [a] limitations period begins to run on the date an alleged [federal law] violation is discovered," *id.*, is an "expansive approach to the discovery rule [and] is a 'bad wine of recent vintage.'" *Id.* (quoting *TRW Inc. v. Andrews*, 534 U.S. 19, 37, 122 S.Ct. 441, 151 L.Ed.2d 339 (2001) (Scalia, J., concurring in the judgment)).

It is thus improper to implant a discovery rule into Title IX merely "because Title IX's text contains no statute of limitations at all." (Maj. Op. 20). This is "[a]textual judicial supplementation" all the same. *See Rotkiske*, 140 S. Ct. at 361. If anything, it is more problematic given that we are dealing with a "judicially implied" cause of action. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 284-85, 118

S.Ct. 1989, 141 L.Ed.2d 277 (1998). Title IX is not a blank page for politically unaccountable judges to write in whatever rule seems to further "the remedial purposes of Title IX." (Maj. Op. 19). "Indeed, it is quite mistaken to assume . . . that 'whatever' might appear to 'further the statute's primary objective must be the law.'" *Henson*, 137 S. Ct. at 1725 (cleaned up). "Legislation is, after all, the art of compromise, the limitations expressed in statutory terms often the price of passage, and no statute yet known 'pursues its stated purpose at all costs.'" *Id.* (cleaned up).

No less than twice the Supreme Court has told courts what to do when there is no federal statute of limitations at all. *Wallace*, 549 U.S. at 388-91, 127 S.Ct. 1091 (false arrest claim under § 1983); *McDonough*, 139 S. Ct. at 2155-56 (malicious prosecution claim under § 1983 based on fabricated evidence). The majority opinion admits that in both *Wallace* and *McDonough* "the Supreme Court applied the occurrence rule to § 1983 claims." (Maj. Op. 21-22). In both cases, the Court explained in detail how the occurrence rule applied and the reasons why. *Cf. Ramos v. Louisiana*, —— U.S. ——, 140 S. Ct. 1390, 1404 & n.54, 206 L.Ed.2d 583 (2020); *see also Direct Mktg. Ass'n v. Brohl*, 814 F.3d 1129, 1148 (10th Cir. 2016) (Gorsuch, J., concurring). But because the Court did not "discuss" the discovery rule or mention whether a party advocated for the discovery rule, the majority opinion takes the view that the Court's application of the occurrence rule was a mere suggestion that "does not impact our analysis." (Maj. Op. 22). It is a mistake, however, to require the Court to explicitly state that the discovery rule does not apply to cases under § 1983 or Title IX.

To the extent this court has applied the injury discovery rule to § 1983 claims, *Sevier v. Turner*, 742 F.2d 262, 273 (6th Cir. 1984), this court recently questioned whether "our cases imbibing this 'bad wine' warrant reconsideration in light of the Supreme Court's recent teachings," *Dibrell v. City of Knoxville*, 984 F.3d 1156, 1162 (6th Cir. 2021). *Dibrell* decided not to "resolve this tension" because plaintiff's § 1983 claims were untimely under both accrual rules. *Id.* With this in mind, we should not import the same "bad wine" into the new context of Title IX claims.

Other than "the historical exception for suits based on fraud," the Court has "deviated from the traditional rule and imputed an injury-discovery rule to Congress on only one occasion." *TRW*, 534 U.S. at 37, 122 S.Ct. 441 (Scalia, J., concurring in the judgment) (citing *Urie v. Thompson*, 337 U.S. 163, 169-71, 69 S.Ct. 1018, 93 L.Ed. 1282 (1949) (involving pulmonary silicosis caused by inhaling coal dust)). The Court did so in *Urie* because the Court "could not imagine that legislation as 'humane' as the Federal Employers' Liability Act" (FELA) "would bar recovery for latent medical injuries." *Id.* Because *Urie* refused to count "each inhalation of silica dust" as "a separate tort giving rise to a fresh 'cause of action,'" *Urie* held that "the afflicted employee can be held to be 'injured' only when the accumulated effects of the deleterious substance manifest themselves." 337 U.S. at 169-70, 69 S.Ct. 1018 (citation omitted). "[I]n one other case [the Court] simply observed (without endorsement) that several Courts of Appeals had substituted injury-discovery for the traditional rule in medical-malpractice actions under the Federal Tort Claims Act" (FTCA). *TRW*, 534 U.S. at 37 n.2, 122 S.Ct. 441 (Scalia, J., concurring in the judgment) (citing *United*

States v. Kubrick, 444 U.S. 111, 120 & n.7, 100 S.Ct. 352, 62 L.Ed.2d 259 (1979)). "[I]n two other cases" involving civil RICO actions, the Court "observed (without endorsement) that lower federal courts 'generally apply' an injury-discovery rule." *Id.* (citing *Rotella v. Wood*, 528 U.S. 549, 555, 120 S.Ct. 1075, 145 L.Ed.2d 1047 (2000); *Klehr v. A. O. Smith Corp.*, 521 U.S. 179, 191, 117 S.Ct. 1984, 138 L.Ed.2d 373 (1997)). This case is not akin to any of those cases.

Yet the court's opinion here relies on FTCA and FELA cases to justify adopting a discovery rule. (Maj. Op. 18, 23). This case is not like one of the "medical-malpractice cases [under the FTCA] in which the plaintiff has little reason to suspect anything other than natural causes for his injury." *Amburgey v. United States*, 733 F.3d 633, 637 (6th Cir. 2013) (cleaned up); *see also Kronisch v. United States*, 150 F.3d 112, 121 (2d Cir. 1998); *Miller v. United States*, 932 F.2d 301, 303 (4th Cir. 1991). Nor does this case involve claims for "latent" injuries or diseases under FELA. *See, e.g.*, *Campbell v. Grand Trunk W. R.R. Co.*, 238 F.3d 772, 773 (6th Cir. 2001); *Fonseca v. CONRAIL*, 246 F.3d 585, 586, 589 (6th Cir. 2001); *Hicks v. Hines Inc.*, 826 F.2d 1543, 1544 (6th Cir. 1987).[13] Even in FELA cases, we have held that "if

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[13] This court stated the injury-*and-cause* discovery rule in *Bishop v. Children's Center for Developmental Enrichment*, 618 F.3d 533, 536 (6th Cir. 2010), a § 1983 case. But *Bishop* is quoting *Campbell*, 238 F.3d at 775, a FELA case involving bone joint injuries allegedly caused by using certain equipment for over two decades. *Id.* at 773-74. *Bishop* does not offer any explanation for doing so, and the causation part of the rule that is unique to our FELA and FTCA cases played no part in the court's brief analysis. *See Bishop*, 618 F.3d at 537 ("Plaintiffs' claims accrued . . . when they knew that CB had been expelled

greater than de minimus harm is discernable at the time of the tortious event," the "time of event rule" (i.e., injury occurrence rule) applies. *Fonseca*, 246 F.3d at 588 (quoting *Hicks*, 826 F.2d at 1544).

The court's opinion here, however, makes the leap in logic that a Title IX claim is like a "latent injury" claim, asserting that "[j]ust as an employee needs to know that their employer exposed them to toxic materials before they can bring suit, a student must know that their school exposed them to a heightened risk of harassment before they have a viable claim." (Maj. Op. 25). But a Title IX *injury* is not the result of "the accumulated effects of [a] deleterious substance" that only becomes "manifest" decades later. *Urie*, 337 U.S. at 169-70, 69 S.Ct. 1018 (citation omitted).

Given there is no textual or historical reason to graft a discovery rule onto the implied right of action under Title IX, I would decline to do so.

3.

Even assuming the "injury discovery rule" applies, plaintiffs' claims are untimely. Under the injury "discovery rule," the statute of limitations will begin to run "only when the *injury* is or reasonably could have been discovered." *Gabelli*, 568 U.S. at 451, 133 S.Ct. 1216 (emphasis added); *accord Johnson v. Memphis Light Gas & Water Div.*, 777 F.3d 838, 843 (6th Cir. 2015). The trigger date is the "event" that "should have alerted the typical lay person to protect his or her rights." *Johnson*, 777 F.3d at 843 (citation omitted). This is a simple, "objective inquiry." *Id.*

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from [school] . . . . [R]edress was available at the time of the injury.").

By that standard, plaintiffs' claims accrued when plaintiffs admittedly knew Strauss *injured* them between 1978 and 1998. How can it be otherwise? Plaintiffs claim that a cognizable Title IX "injury" occurred by virtue of being subjected to "sexual harassment . . . that is so severe, pervasive, and objectively offensive, and that so undermine[d] and detract[ed] from the [their] educational experience, that the [plaintiffs were] effectively denied equal access to [the university]'s resources and opportunities" between 1978 and 1998. *Davis*, 526 U.S. at 651, 119 S.Ct. 1661; *see also Kollaritsch*, 944 F.3d at 622.[14] Plaintiffs cannot, and indeed do not, simultaneously claim that at the time of Strauss's misconduct they did not know or have "reason to know of the *injury* which is the basis of [their] action." *Johnson*, 777 F.3d at 843 (citation omitted; emphasis added). The majority opinion does not solve this enigma.

Lest there is any doubt, plaintiffs allege they were subjected to obscene sexual abuse in the school's locker room or showers, at Strauss's home, or during physical exams. *Supra* Section I. At least 28 plaintiffs fled from the situation and/or later refused to be examined by Strauss or be anywhere near Strauss.[15] At least 25 plaintiffs allege that they complained to university administration, coaches, trainers, health center staff, and/or other physicians

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[14] *Snyder-Hill* (R. 123, ¶¶ 2576, 2588); *Moxley* (R. 16, ¶¶ 923, 935).

[15] *Snyder-Hill* (R. 123, ¶¶ 562-63, 810, 1003, 1152, 1579, 1713, 2217, 2296-97, 2329, 2358); *Moxley* (R. 16, ¶¶ 253, 273-80, 318-19, 340, 361, 377, 398, 430, 538, 541, 552, 598, 616-17, 634, 682, 781, 789, 805, 816, 833, 882).

about Strauss's conduct.[16] Of the 2 plaintiffs who complained to physicians, one physician replied, "That seems really odd . . . It's not normal." *Snyder-Hill* (R. 123, ¶¶ 382-83). The other physician responded, "Dr. Strauss' actions were inappropriate and not medically necessary," and the physician wrote a note "to excuse John Doe 9 from further physicals by Dr. Strauss." (*Id.*, ¶¶ 939-40).

Remarkably, 104 plaintiffs claim Strauss's abuse has *caused* decades of suffering and many other tragedies in life (e.g., drugs, alcohol abuse, emotional disorders, relationship problems, intimacy issues, divorce, and attempted suicide).[17] And they seek damages for these harms. *Id.*

It is beyond debate that plaintiffs knew of their "injury" between 1978 and 1998. *Gabelli*, 568 U.S. at 451, 133 S.Ct. 1216; *Johnson*, 777 F.3d at 843. Because the facts on the face of the complaint show that plaintiffs' claims are untimely, "dismissing the claim[s] under Rule 12(b)(6) is appropriate.'" *Stein v.*

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[16] *Snyder-Hill* (R. 123, ¶¶ 314-20, 347-51, 360-62, 382-86, 409-11, 414-16, 501-03, 572-73, 589-90, 690, 792, 814-17, 822-23, 883-84, 1086, 1095, 1226-30, 1311-12, 1429, 1832-33, 1894, 1949-51, 2085-86, 2472); *Moxley* (R. 16, ¶¶ 273, 361, 579, 618, 715, 872).

[17] *Snyder-Hill* (R. 123, ¶¶ 339, 369, 396, 425, 456, 486, 548, 630, 641, 664, 680, 698, 723, 743, 763, 782, 800, 843, 969-72, 1044-45, 1069, 1107, 1140, 1167, 1199, 1257, 1283, 1325, 1358, 1382, 1407, 1452, 1478, 1504, 1540, 1591, 1611, 1626, 1658, 1675, 1691, 1708, 1721, 1739, 1762, 1780, 1794, 1811, 1825, 1868, 1885, 1902, 1939, 1959, 1995, 2041, 2057, 2076, 2095, 2112, 2131, 2153, 2177, 2231, 2254, 2276, 2291, 2330, 2347, 2379, 2402, 2423, 2446, 2468, 2510, 2534); *Moxley* (R. 16, ¶¶ 262, 289, 308, 327, 353, 369, 391, 408-09, 430-32, 482, 499, 552, 569, 592, 607, 626, 645, 661, 682, 707, 727, 744, 789-90, 805, 826, 841, 863, 882).

Regions Morgan Keegan Select High Income Fund, Inc., 821 F.3d 780, 786 (6th Cir. 2016) (citation omitted); *see also* Fed. R. Civ. P. 12(b)(6); *Jones v. Bock*, 549 U.S. 199, 215, 127 S.Ct. 910, 166 L.Ed.2d 798 (2007); *Bishop v. Lucent Techs., Inc.*, 520 F.3d 516, 520 (6th Cir. 2008).

Yet the court's opinion concludes that all 110 plaintiffs' Title IX claims are not time-barred for "three independent reasons." (Maj. Op. 34).

First, the majority is willing to say that only 9 *Snyder-Hill* plaintiffs "allege that they did know that Strauss's conduct was abuse," (Maj. Op. 9-10, 32), but that is only because these 9 plaintiffs concede in their brief that they "knew Strauss abused them." *Snyder-Hill* (Appellant Br. 28 n.15). The opinion otherwise accepts the bald allegation of the other 75 *Snyder-Hill* plaintiffs and all 34 *Moxley* plaintiffs that, because they "were not trained in medicine and did not know what was medically appropriate," they "did not understand or believe that Dr. Strauss had *sexually abused*" them until sometime *after* the university publicized its investigation in April 2018.[18] (Emphasis added); *see* (Maj. Op. 32-34 ("[P]eople suffer serious harms resulting from their abuse, even if they do not recognize it as abuse.")). As stated, nowhere do plaintiffs allege they did not know they were "injured," nor could they.

This conflates "injury" with what qualifies as "sexual abuse." Under the discovery rule, it is irrelevant whether plaintiffs labeled Strauss's

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[18] *See, e.g.*, *Snyder-Hill* (R. 123, ¶¶ 153-60, 267, 270-72, 390, 448, 454, 480, 484, 514, 518, 542, 546, 588, 591; Appellant Br. 10, 19, 28); *Moxley* (R. 16, ¶¶ 94-101, 209, 212-14, 256, 260; Appellant Br. 11, 18, 26 & n.19).

conduct as "sexual abuse." It is "discovery of the *injury*" alone that "starts the clock." *Rotella*, 528 U.S. at 555, 120 S.Ct. 1075 (emphasis added). For example, "identifying professional negligence may also be a matter of real complexity, and its discovery is not required before the statute starts running" for a medical malpractice claim. *Rotella*, 528 U.S. at 556, 120 S.Ct. 1075 (citing *Kubrick*, 444 U.S. at 122, 124, 100 S.Ct. 352). The same goes for any other legal label for conduct, e.g., excessive force, defamation, or sexual abuse. The "'accrual' of a claim" does not "await awareness by the plaintiff that his injury was . . . inflicted" in a way that constitutes sexual abuse. *Kubrick*, 444 U.S. at 123, 100 S.Ct. 352. Plaintiffs, "armed with the facts about the *harm* done to [them], can protect [themselves] by seeking advice in the medical and legal community. To excuse [them] from promptly doing so by postponing the accrual of [their] claim[s] would undermine the purpose of the limitations statute[.]" *Id.* (emphasis added); *see also Rotella*, 528 U.S. at 555-56, 120 S.Ct. 1075.

Just as the individual "suffering from inadequate treatment is thus *responsible for determining within the limitations period then running whether the inadequacy was malpractice*," here the limitations period started running decades ago and plaintiffs had two years to determine whether Strauss's conduct was sexual abuse and whether the university was deliberately indifferent. *Rotella*, 528 U.S. at 556, 120 S.Ct. 1075 (emphasis added).

The majority then points to the statement that "[g]enerally, a motion under Rule 12(b)(6) . . . is an 'inappropriate vehicle' for dismissing a claim based upon a statute of limitations." *Lutz v. Chesapeake Appalachia, L.L.C.*, 717 F.3d 459, 464 (6th Cir. 2013).

From this, it is inaccurate to summarily conclude that "whether [plaintiffs] knew or should have known that they were abused is an issue of fact for the jury." (Maj. Op. 31, 34).

That conclusion is also erroneous for another reason, even assuming plaintiffs must recognize the misconduct as "sexual abuse." Plaintiffs detailed and obscene allegations belie their assertion that they did not know Strauss's misconduct was sexual abuse. Only "factual allegations in the complaint" are taken as true; "conclusory statements" and "legal conclusions," even if "couched as a factual allegation," are "not entitled to be assumed true." *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79, 681, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (cleaned up). Judges cannot throw "judicial experience and common sense" out the window simply because plaintiffs assert that they did not know Strauss's conduct was, by definition, *sexual abuse*. *Id.* at 679, 129 S.Ct. 1937. If that were enough, the statute of limitations would be extended indefinitely because the issue would always be consigned to a jury trial. "Repose would hinge on speculation about what the [plaintiffs] knew, when [they] knew it, and when [they] should have known it." *Gabelli*, 568 U.S. at 452, 133 S.Ct. 1216; *see Jones*, 549 U.S. at 215, 127 S.Ct. 910.

Second, the court's opinion stitches out a new injury-and-deliberate-indifference discovery rule: "[T]he clock starts only once *the plaintiff knows* or should have known *that Ohio State administrators 'with authority to take corrective action' knew* of Strauss's conduct and failed to respond appropriately." (Maj. Op. 31-32) (emphasis added). Recall that the institution must somehow make this showing to invoke the statute of limitations defense.

How exactly is that possible at any stage in litigation, especially decades after the critical events? And even if a plaintiff will "know or have reason to know that a school mishandle[d] their own report of an assault," that will not be enough to trigger accrual for a "heightened-risk claim," so long as the plaintiff claims that they did not "know that others had complained before them or that the school was deliberately indifferent to any prior complaints." (Maj. Op. 28-29).

Third, and relatedly, the opinion adds that even if a plaintiff was alerted to investigate further, that will "not ultimately matter," so long as the plaintiff claims "that if they had investigated the abuse, they would not have discovered" the institution's deliberate indifference. (Maj. Op. 31-32). But when will that not be the case? With that, the opinion concludes that all 110 plaintiffs plausibly allege that they did not "know the underlying facts about Ohio State's alleged deliberate indifference." *Id.* at 30, 34.

But the Supreme Court was emphatically clear: "[I]n applying a discovery accrual rule, we have been at pains to explain that discovery of the *injury*, not discovery of the other elements of a claim, is what starts the clock." *Rotella*, 528 U.S. at 555, 120 S.Ct. 1075 (emphasis added). *Rotella* reminds us yet again that even in the context of "medical malpractice, where the cry for a discovery rule is loudest," the "discovery rule does not extend beyond the injury." *Id.* At issue in *Rotella* was the accrual of civil claims under the Racketeer Influenced and Corrupt Organizations Act (RICO). *Id.* at 551, 120 S.Ct. 1075. The Court rejected plaintiff's (and this circuit's then-prevailing) "injury and pattern discovery rule," "under which a civil RICO claim accrues only when the claimant discovers, or should discover, both an

injury and a pattern of RICO activity." *Id.* at 551, 553, 120 S.Ct. 1075 (collecting cases).

Civil "RICO has a unique pattern requirement" to state a claim. *Rotella*, 528 U.S. at 556, 120 S.Ct. 1075.[19] And "a pattern of predicate acts may well be complex, concealed, or fraudulent," "and involve harm to parties wholly unrelated to an injured plaintiff." *Rotella*, 528 U.S. at 555, 559, 120 S.Ct. 1075. Even so, *Rotella* refused to adopt plaintiff's "less demanding" discovery rule. *Rotella*, 528 U.S. at 557, 120 S.Ct. 1075. "A RICO plaintiff's ability to investigate *the cause of his injuries* is no more impaired by his ignorance of the underlying RICO pattern than a malpractice plaintiff is thwarted by ignorance of the details of treatment decisions or of prevailing standards of medical practice." *Id.* at 556-57, 120 S.Ct. 1075 (emphasis added). As such, *Rotella* held that the limitations period began at the "the point of injury or its reasonable discovery"—not when the plaintiff reasonably "discovered the pattern of predicate acts" for his civil RICO claim. *Id.* at 558-59, 120 S.Ct. 1075.

Rotella's rationale governs here (assuming the discovery rule applies). An institution's deliberate indifference is one of "the other elements" of a Title IX claim, not the "injury" element that "starts the clock." *Rotella*, 528 U.S. at 555, 120 S.Ct. 1075; *see, e.g.*, *Kesterson v. Kent State Univ.*, 967 F.3d 519, 527 (6th Cir. 2020); *Kollaritsch*, 944 F.3d at 619-22. Causation is yet another element. *Kollaritsch*, 944 F.3d at 622;

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[19] To state a civil RICO claim, a plaintiff must allege "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985).

see also e.g., *Connick v. Thompson*, 563 U.S. 51, 59 n.5, 131 S.Ct. 1350, 179 L.Ed.2d 417 (2011) (noting that a plaintiff who has "satisfied the deliberate indifference requirement" does not automatically "satisfy the causation requirement"); *Bd. of Comm'rs of Bryan Cnty. v. Brown*, 520 U.S. 397, 404-05, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997).

It makes no difference that an institution's policy or practice of deliberate indifference to prior acts of sexual harassment "might well be complex, concealed, or fraudulent, and involve harm to parties wholly unrelated to an injured plaintiff." *See Rotella*, 528 U.S. at 559, 120 S.Ct. 1075. Of course, the "difficulty in identifying" such conduct is "inherent" in deliberate indifference claims. *See id.* These matters often (if not always) involve secret conduct, private disciplinary meetings, inaccessible personnel files, and conduct that may not be recorded at all. But that "only reinforces" the reasons for refusing to inject the "complexity" of deliberate indifference into the injury discovery rule. *See id.* To hold otherwise, "would bar repose, prove a godsend to stale claims, and doom any hope of certainty in identifying potential liability." *Id.*

On that score, plaintiffs' Title IX claims accrued between 1978 and 1998 when each plaintiff possessed the "critical facts that he has been hurt and who has inflicted the injury." *Twersky v. Yeshiva Univ.*, 579 F. App'x 7, 9-10 (2d Cir. 2014) (quoting *Kubrick*, 444 U.S. at 122, 100 S.Ct. 352). Namely, "they were unquestionably aware of (1) their injuries, (2) their [abuser's] identit[y], and (3) their [abuser's] prior and continued employment at [the university]." *Id.*

Rotella also put to rest plaintiffs' objection that without evidence of the university's deliberate indifference, plaintiffs could not file suit at the time

of the abuse because they "could not overcome Rule 11, let alone Rule 12(b)(6)."[20] The Court acknowledged that RICO claims often involve fraud and therefore must be pleaded with "particularity" under Rule 9(b)—unlike plaintiffs' Title IX claims—and yet the Court saw no reason to expand the injury discovery rule. *Rotella*, 528 U.S. at 560, 120 S.Ct. 1075. And as in *Rotella*, plaintiffs' argument "ignores the flexibility provided by Rule 11(b)(3), allowing pleadings based on evidence reasonably anticipated after further investigation or discovery." *Id.*

In fact, plaintiffs took advantage of Rule 11 in filing suit here. The university announced its investigation in April 2018. At that time, plaintiffs knew nothing more about the university's deliberate indifference than they *allegedly* did for the past several decades. And yet the *Snyder-Hill* plaintiffs managed to file suit in July 2018. Under the majority's reasoning, however, plaintiffs' claims still had yet to accrue. After all, it was not until 12 months later, in May 2019, that the Perkins Coie report publicly aired the university's dirty laundry.[21]

If there were any lingering doubt that Title IX and § 1983 deliberate indifference claims will never accrue until the plaintiff says so decades later, the majority opinion justifies its rule because the First

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[20] *Snyder-Hill* (Appellant Br. 49); *Moxley* (Appellant Br. 44).

[21] *See, e.g.*, *Snyder-Hill* (R. 123, ¶¶ 271-75; *id.*, ¶ 25 n.10 (citing Michael V. Drake, *A Message from President Drake: Strauss Investigation Report*, The Ohio State University (May 17, 2019), https://president.osu.edu/presidents/drake/news-andnotes/2019/strauss-investigation-report-campus-wide-email html)).

Circuit did just that with a § 1983 claim against a city in *Ouellette v. Beaupre*, 977 F.3d 127, 130, 139-40 (1st Cir. 2020). (Maj. Op. 27 ("We are persuaded by *Ouelette*'s reasoning and adopt it fully.")).

But contrary to the majority opinion's suggestion, "seven of our sibling circuits" have not adopted an injury-and-deliberate-indifference discovery rule. (Maj. Op. 23, 29). *Ouellette* stands alone—the other six cases cited do not even discuss the accrual of deliberate indifference claims. Nor does the opinion mention the circuits that have refused "to adopt a 'delayed accrual' rule" for Title IX and § 1983 claims against an institution, even though "the claims against [the institution] are necessarily based on official 'policies or customs'" or deliberate indifference to prior misconduct "that could not have been known at the time of [plaintiff's] abuse." *King-White v. Humble Indep. Sch. Dist.*, 803 F.3d 754, 763 (5th Cir. 2015) (Title IX and § 1983); *see Twersky*, 579 F. App'x at 9-10 (Title IX); *Lawson v. Rochester City Sch. Dist.*, 446 F. App'x 327, 329 (2d Cir. 2011) (§ 1983); *see also Tengood v. City of Philadelphia*, 529 F. App'x 204, 210 & n.5 (3d Cir. 2013) (§ 1983).

III.

The court's opinion then goes on to expand the *scope* of Title IX. Although the university argues that four plaintiffs—John Doe 30, John Doe 42, John Doe 47, and John Doe 49—fail to state a Title IX claim because they were "neither students nor employees" of the university, and they were not denied the benefits of any "education program or activity" of the university, *Snyder-Hill* (Appellant Br. 51), today's decision rejects that argument.

This court has explicitly held that the right to bring suit under Title IX is limited to "those circumstances where a plaintiff is so closely tied to a university that the individual is essentially a student of that university." *Doe v. Univ. of Ky.*, 971 F.3d 553, 559 n.4 (6th Cir. 2020). In the majority opinion's view, that rule is "not relevant" because that case involved student-on-student sexual harassment and this is a case about employee-on-student harassment. (Maj. Op. 35). But that does not change Title IX's coverage. Title IX does not distinguish between students and teachers as harassers: The statute prohibits "discrimination *under any education* program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a) (emphasis added).

Satisfied that it is freed from the bonds of precedent, the majority opinion concludes that "'members of the public' can bring a Title IX claim" if they are subject to discrimination when they are, "for example, accessing university libraries or other resources, or attending campus tours, sporting events or other activities." (Maj. Op. 37). That conclusion rests on dictum from a footnote in *Doe v. Brown University*, 896 F.3d 127, 132 n.6 (1st Cir. 2018), a case in which the court *rejected* a Title IX claim brought by "a freshman at Providence College, [who] was sexually assaulted by three students of Brown University . . . on Brown's campus." *Id.* at 128.

Here, John Doe 30 and John Doe 42 were contract referees paid by the university, and they experienced a single instance of sexual harassment before or after they had refereed a wrestling match. *Snyder-Hill* (R. 123, ¶¶ 75, 87, 1612-13, 1812). John Doe 49 was a high school student attending a summer wrestling camp at the university. (*Id.*, ¶¶ 94, 1940). John Doe

47 was a high school student and "was on [the university]'s campus visiting his aunt, a university employee." (*Id.*, ¶ 1903). "*While hanging around the athletics department by himself*, John Doe 47 was approached by Dr. Strauss," who "gave John Doe 47 a long tour of the athletics facilities and subjected him twice during that day to sexually abusive 'medical exams.'" (*Id.*, ¶¶ 1904-06) (emphasis added).

Even if any of these four plaintiffs were sufficiently tied to the university, none of them alleges that they were "den[ied] . . . equal access to an educational program or activity." *Davis*, 526 U.S. at 652, 119 S.Ct. 1661; *see also Meriwether v. Hartop*, 992 F.3d 492, 511 (6th Cir. 2021). That is, plaintiffs do not allege that they quit refereeing, quit the wrestling camp or intended to attend again but did not do so, or had planned to attend the university and decided not to do so. *Arocho v. Ohio University*, 2022 WL 819734, at *3-4 (6th Cir. 2022) (dismissing Title IX claims even though a university officer "sexually assaulted [a high school student] during his 'work hours and at work-related locations,' and in his Ohio University police cruiser"). Nor have the four plaintiffs even alleged that Strauss's abuse seriously "undermine[d] and detract[ed] from" their experience participating in any university activity. *Davis*, 526 U.S. at 651, 119 S.Ct. 1661; *see also Kollaritsch*, 944 F.3d at 622 (noting examples of an impaired experience).

"Emotional harm standing alone is not a redressable Title IX injury." *Kollaritsch*, 944 F.3d at 622; *see also Cummings v. Premier Rehab Keller, P.L.L.C.*, —— U.S. ——, 142 S. Ct. 1562, 1569, 1576, 212 L.Ed.2d 552 (2022).

* * *

In the end, this court's opinion grants the plaintiffs what the democratic process has effectively denied them. In 2019, Ohio legislation was proposed to grant the right to "bring a civil action against a land grant university to recover damages for any injury . . . proximately caused by sexual misconduct against the victim that was committed between January 1, 1978, and December 31, 2000, by a physician who was an employee of the university during that period of time." H.B. 249, 133rd Gen. Assemb., Reg. Sess. (Ohio. 2019). The proposal specifically provided that "there is no period of limitations for a civil action brought by [such] a victim." *Id.* But H.B. 249 failed to pass the introduction stage. Michigan, under similar circumstances, has enacted more measured legislation, and additional legislation is being considered.[22]

I respectfully dissent.

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[22] *See* 2018 Mich. Pub. Act No. 183, §§ 5805(2)-(6), 5851b(1)-(3) (codified as amended at Mich. Comp. Laws §§ 600.5805, 600.5851b); *see also* H.B. 5962, 101st Leg., Reg. Sess. (Mich. 2022); H.B. 4306, 101st Leg., Reg. Sess. (Mich. 2021).

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 21-3981/3991

STEVE SNYDER-HILL; RONALD MCDANIEL; DAVID MULVIN; WILLIAM BROWN; KURT HUNTSINGER; WILLIAM RIEFFER; STEVE HATCH; KELLY REED; MELVIN ROBINSON; DOUGLAS WELLS; JAMES KHALIL; JERROLD L. SOLOMON; JOSEPH BECHTEL; MICHAEL MURPHY; JOHN DAVID FALER; MATT MCCOY; GARY AVIS; ROBERT SCHRINER; MICHAEL MONTGOMERY; JOHN DOES 1–22, 25, 27, 29–37, 39–47, 49, 52, 54, 56–60, 62–64, AND 66–77 (21-3981); TIMOTHY MOXLEY; RYAN CALLAHAN; JOHN JACKSON, JR.; JAMES CARROLL; JEFFREY ROHDE; PATRICK MURRAY; EVERETT ROSS; JOHN DOES 78–95 AND 97–105 (21-3991),

Plaintiffs-Appellants,

v.

THE OHIO STATE UNIVERSITY,

Defendant-Appellee.

On Petition for Rehearing En Banc

Decided and Filed: December 14, 2022

[54 F.4th 963]

Before: GUY, MOORE, and CLAY, Circuit Judges.

The panel issued an order denying the petition for rehearing en banc. MOORE, J. (pp. 3-10), delivered an opinion concurring in the denial of rehearing en banc. THAPAR (pg. 11) and

READLER, JJ. (pp. 12–28), delivered separate opinions dissenting from the denial of the petition for rehearing en banc, in which BUSH, J., joined the latter.

ORDER

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. Less than a majority of the judges* voted in favor of rehearing en banc.

Therefore, the petition is denied.

Judge Guy would grant rehearing for the reasons stated in his dissent.

* Judge Murphy recused himself from participation in this ruling.

KAREN NELSON MOORE, Circuit Judge, concurring in the denial of rehearing en banc.

The dissent from denial of rehearing recycles the same arguments put forth in the panel dissent to accuse this court of ignoring Supreme Court precedent in order to expand the scope of Title IX when, in fact, the panel's decision was firmly rooted in both this court's and the Supreme Court's long-standing precedents. Despite the en banc petition's and the dissent's claims to the contrary, the panel's opinion did *not* eliminate the statute of limitations for Title IX claims, nor did it improperly broaden the reach of Title IX. Instead, this court straightforwardly applied the discovery rule to the plaintiffs' claims, in line with both our precedent and the plain language of Title IX. The panel correctly decided this case for the reasons explored at length in our original opinion. I write separately to reiterate that our decision conformed with Supreme Court precedent, our precedent, the precedents of our sibling circuits, and the text of Title IX.

In *Snyder-Hill v. Ohio State Univ.*, 48 F.4th 686 (6th Cir. 2022), this court held that the plaintiffs' Title IX claims against the Ohio State University were not barred by the statute of limitations because the plaintiffs adequately alleged that they did not know, and could not have reasonably known, that they were injured by Ohio State until 2018. *Id.* at 690. This case arose from the allegations that Dr. Richard Strauss, a university physician and athletic team doctor at Ohio State, abused hundreds of young men between 1978 and 1998 under the guise of performing medical examinations. *Id.* at 689. The allegations became public only in 2018, following Ohio State's

commissioning of an independent investigation undertaken by the law firm Perkins Coie, which substantiated the plaintiffs' allegations of abuse. *Id.* at 691. After the allegations became public, the plaintiffs filed Title IX suits against Ohio State, alleging that Ohio State was deliberately indifferent to their heightened risk of abuse. *Id.* at 689–90. Because the plaintiffs, in the context of a motion to dismiss, plausibly alleged that Ohio State engaged in a decades-long cover up regarding Strauss's behavior, which prevented them from reasonably being able to discover Ohio State's actions in enabling their abuse, this court held that their Title IX claims against Ohio State did not accrue until 2018, and that the claims therefore were not barred by the two-year statute of limitations. *Id.* at 690, 705–06.

All of the plaintiffs have plausibly alleged that they could not have known about Ohio State's responsibility for their abuse, because they had no "reason to know that others had previously complained to Ohio State about Strauss's conduct, let alone how Ohio State had responded to any previous complaints." *Id.* at 694. Indeed, two physicians employed by Ohio State "stated that they did not know of 'any way' that 'any Ohio State student' could have known that Ohio State knew about Strauss's abuse and nonetheless failed to 'get rid of' him." *Id.* That is because Ohio State administrators engaged in a long-standing cover up of Strauss's behavior by hiding what they knew about his abuse, falsifying Strauss's performance reviews, destroying medical records, shredding files relating to Strauss's abuse, and actively misleading students about Strauss and Ohio State's knowledge of his abuse. *Id.* at 692–94, 705.

Some plaintiffs alleged yet more specific instances of concealment: Snyder-Hill alleged that the director of Ohio State's Student Health Services "sent him a letter falsely stating that Ohio State had never before received a complaint about Strauss," even though the administration had "received multiple complaints, including one just three days earlier." *Id.* at 695. The director then "agreed to inform Snyder-Hill about any future complaints" about Strauss but never did so. *Id.* The director also "falsely told Snyder-Hill that all complaints would be kept in Strauss's personnel file," but the file "had no record of Snyder-Hill's or any other complaint." *Id.* In short, although the plaintiffs argue that Ohio State administrators knew about Strauss's abuse as it was occurring, the plaintiffs also "allege that *they* did not know until 2018 that Ohio State administrators knew or that they enabled and perpetrated the abuse." *Id.* And because Ohio State's conduct was the cause of the plaintiffs' injury under Title IX, their claims did not accrue until they reasonably could have discovered that conduct. *Id.* at 705–06.

Even though Ohio State may have mishandled the plaintiffs' individual reports of Strauss's abusive conduct, until 2018 the plaintiffs had no reason to know that the mishandling of their reports was part of a much broader policy of deliberate indifference towards Strauss's abuse. *Id.* at 704. Because the plaintiffs bring their Title IX claims on a theory of deliberate indifference, Ohio State's prolonged cover up and enabling of Strauss's severe, pervasive, and ongoing sexual assaults of students, which put the plaintiffs at heightened risk of abuse, constituted the cause of their injury under Title IX. *See id.* Thus, the plaintiffs had no reason to know that Ohio State

injured them until Ohio State's conduct became public. This court accordingly held that the plaintiffs' claims survived Ohio State's motion to dismiss "for three independent reasons." *Id.* at 707. In sum, this court concluded that:

> First, the plaintiffs plausibly allege that they did not know and lacked reason to know that Ohio State caused their injury. Second, they plausibly allege that even if they had investigated further, they could not have learned of Ohio State's conduct. Third, most plaintiffs plausibly allege that they did not know that they were abused. Alone, each of these grounds is sufficient to delay accrual.

Id. The panel therefore provided several independently adequate grounds for its holding.

The panel's application of the discovery rule fully comports with our precedent and Supreme Court precedent. This court has held that "[t]he general federal rule is that 'the statute of limitations begins to run when the reasonable person knows, or in the exercise of due diligence should have known, both his injury and the cause of that injury.'" *Bishop v. Child.'s Ctr. for Developmental Enrichment*, 618 F.3d 533, 536 (6th Cir. 2010) (quoting *Campbell v. Grand Trunk W. R.R. Co.*, 238 F.3d 772, 775 (6th Cir. 2001)). In other words, the "discovery rule" applies absent a statutory directive to the contrary. Because "Title IX does not contain its own statute of limitations," *Lillard v. Shelby Cnty. Bd. of Educ.*, 76 F.3d 716, 728 (6th Cir. 1996), our precedent dictates that the discovery rule determines when a Title IX claim will accrue. The panel's opinion thus straightforwardly applied this general federal rule to the facts of this

case. As the panel explained, "we have long held that the discovery rule applies in the § 1983 context." *Snyder-Hill*, 48 F.4th at 698 (collecting cases). And "every other circuit to have considered the matter in a published opinion has concluded that Title IX is subject to the same limitations period as § 1983." *King-White v. Humble Indep. Sch. Dist.*, 803 F.3d 754, 759 (5th Cir. 2015) (collecting cases).

The dissent's reliance on *Rotkiske v. Klemm*, —— U.S. ——, 140 S. Ct. 355, 205 L.Ed.2d 291 (2019), is misplaced, for the reasons explained in depth in the panel opinion. *Rotkiske* involved the accrual of claims under the Fair Debt Collection Practices Act ("FDCPA"), the text of which—unlike Title IX—contains a statute of limitations. 140 S. Ct. at 358. It therefore has no bearing on the application of the discovery rule when a statute is silent as to accrual, and no circuit has applied *Rotkiske* to Title IX. *See, e.g.*, *Ouellette v. Beaupre*, 977 F.3d 127, 136 (1st Cir. 2020); *Sohm v. Scholastic Inc.*, 959 F.3d 39, 50 & n.2 (2d Cir. 2020); *Johnson v. Chudy*, 822 F. App'x 637, 638 (9th Cir. 2020); *Lupole v. United States*, No. 20-1811, 2021 WL 5103884, at *1 (4th Cir. Nov. 3, 2021). As the panel opinion noted, "[n]o appellate court has held that *Rotkiske* did away with the common-law discovery rule when a statute is silent." *Snyder-Hill*, 48 F.4th at 700. Had the panel adopted the reading of *Rotkiske* urged by the dissent, it would have made our circuit the outlier and risked creating a circuit split where there currently is none.

The dissent relies on *Dibrell v. City of Knoxville*, 984 F.3d 1156 (6th Cir. 2021), to claim that the panel disregarded this court's precedent in applying the discovery rule. But *Dibrell* plainly declined to decide which rule applied to the accrual of the plaintiff's

§ 1983 claim, because his claim was untimely under either rule. 984 F.3d at 1162 ("We need not resolve this tension now because Dibrell's claims would be untimely either way."). Any other commentary in *Dibrell* regarding whether *Rotkiske* altered our application of the discovery rule was therefore mere dicta, and it overlooked the fact that *Rotkiske*'s complaint about "bad wine" instead referred to "the use of the discovery rule to override clear statutory text," as was the case with the FDCPA. *Snyder-Hill*, 48 F.4th at 700. Because the text of Title IX is silent as to both the statute of limitations and the accrual of claims, the application of the discovery rule to Title IX claims does not run afoul of *Rotkiske*'s command.

Our sibling circuits also apply the discovery rule in Title IX cases. *See, e.g.*, *King-White*, 803 F.3d at 762; *Doe v. Howe Mil. Sch.*, 227 F.3d 981, 988 (7th Cir. 2000); *Stanley v. Trs. of Cal. State Univ.*, 433 F.3d 1129, 1136 (9th Cir. 2006). The dissent dismisses these cases as irrelevant post-*Rotkiske*, but as the original panel opinion and our sibling circuits have explained, there is no reason to believe that *Rotkiske* changes our analysis of which rule applies to claims pursuant to a statute that is silent as to accrual, as Title IX is. There is therefore also no reason to believe that *Rotkiske* invalidated the logic of our sibling circuits' pre-*Rotkiske* decisions. The sole case cited by the dissent as purportedly following a different rule in fact simply declined to decide whether the discovery rule could apply to the plaintiff's § 1983 and Title IX claims, for much the same reason as *Dibrell*—the claims were untimely either way. *Varnell v. Dora Consol. Sch. Dist.*, 756 F.3d 1208, 1216 (10th Cir. 2014) ("[E]ven if the discovery rule applies to her § 1983 claim, Plaintiff knew long before she filed suit

all the facts necessary to sue and recover damages."). No circuit split exists on this issue. The panel's decision on this point was therefore firmly grounded in the precedent of this circuit, other circuits, and the Supreme Court. The panel embraced no other purpose than staying faithful to existing precedent.

One final point on the panel's decision to apply the discovery rule: the dissent appears to misunderstand our law in claiming that the panel "overr[ode] a limitations period selected by a state legislature." Dissenting Op. at 981. Everyone agrees that Ohio's two-year statute of limitations for personal injury claims applies here. *Snyder-Hill*, 48 F.4th at 698. The discovery rule simply determines when a Title IX claim accrues, which is when the two-year limitations period starts to run. This is firmly in line with our precedent, which holds that, although state law determines the length of the limitations period, "federal standards govern when the statute begins to run." *Sharpe v. Cureton*, 319 F.3d 259, 266 (6th Cir. 2003).

Next, the dissent quarrels with the panel's formulation of the discovery rule, contending that the panel applied an accrual rule "unique to deliberate indifference claims." Dissenting Op. at 977. This is flat wrong. Both this court and the Supreme Court have long held that, under the discovery rule, a claim accrues when a plaintiff knows both their injury and the cause of that injury. *See Bishop*, 618 F.3d at 536 (quoting *Campbell*, 238 F.3d at 775); *United States v. Kubrick*, 444 U.S. 111, 122, 100 S.Ct. 352, 62 L.Ed.2d 259 (1979). The panel simply applied this standard formulation of the discovery rule to the specific contours of a Title IX deliberate-indifference claim. As the panel explained, "[i]n a Title IX case, a

plaintiff's cause of action is against the school based on the school's actions or inactions, not the actions of the person who abused the plaintiff." *Snyder-Hill*, 48 F.4th at 702. Thus, a Title IX plaintiff does not know the cause of their injury until they have knowledge of the institution's action or inaction.

In the context of deliberate indifference, a plaintiff's awareness that their own complaint may have been mishandled does not necessarily give the plaintiff a reason to know that the university has a broader policy of deliberate indifference towards such complaints, which constitutes the cause of the injury in a pre-assault heightened-risk claim. *See Karasek v. Regents of Univ. of Cal.*, 500 F. Supp. 3d 967, 981 (N.D. Cal. 2020). This is what distinguishes the plaintiffs' claims here from *King-White*, which the dissent suggests reached a different conclusion on analogous facts. But the logic of *King-White* does not conflict with the panel's reasoning. *See Snyder-Hill*, 48 F.4th at 704. *King-White* concluded that accrual occurs under the discovery rule upon the plaintiff's awareness of their injury and "causation, that is, the connection between the injury and the defendant's actions." 803 F.3d at 762 (quoting *Piotrowski v. City of Houston*, 237 F.3d 567, 576 (5th Cir. 2001)). *King-White* therefore applied the same formulation of the discovery rule as the panel did here. The difference is that *King-White* dealt with *post*-assault, not pre-assault, claims, *id.* at 756–57, and thus the *King-White* plaintiffs did become aware of the cause of their injury when their complaints went unheeded by the school administration, *id.* at 762. Thus, again, there is no conflict with our sibling circuits. Instead, the panel applied the standard formulation of the discovery rule to the particular facts of this case.

Although the dissent claims that the panel majority dropped the "reasonable person" portion of the discovery-rule inquiry and never addressed whether the plaintiffs ought to have investigated further, the panel opinion in fact covered both of these points. Quoting the Supreme Court for the proposition that the limitations period began to run when "a *reasonably* diligent plaintiff would have discovered 'the facts constituting the violation,'" *Merck & Co. v. Reynolds*, 559 U.S. 633, 653, 130 S.Ct. 1784, 176 L.Ed.2d 582 (2010) (emphasis added), the panel opinion explained that "even if the plaintiffs should have investigated, the clock does not start if the plaintiffs would not have learned that Ohio State injured them." *Snyder-Hill*, 48 F.4th at 705. And because the plaintiffs plausibly alleged that Ohio State engaged in a decades-long cover up by concealing the abuse and their knowledge of it, destroying records, giving Strauss false performance reviews, and actively misleading students, the panel concluded that the plaintiffs could not have reasonably discovered Ohio State's conduct even if they had investigated further. *Id.*

Finally, the dissent incorrectly contends that the panel expanded the scope of Title IX by holding that non-student plaintiffs could bring claims under Title IX. The panel's decision on this point was clearly dictated by the text of Title IX itself. The panel simply held that Title IX means what it says: "[n]o *person* . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." 20 U.S.C. § 1681(a) (emphasis added). Indeed, the Supreme Court has concluded

that "Congress easily could have substituted 'student' or 'beneficiary' for the word 'person' if it had wished to restrict the scope of [Title IX]." *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521, 102 S.Ct. 1912, 72 L.Ed.2d 299 (1982). Congress did not do so. As the panel explained, "Title IX's plain language sweeps more broadly." *Snyder-Hill*, 48 F.4th at 707. To have held otherwise would have conflicted with our precedent, and that of our sibling circuits and the Supreme Court. *See, e.g.*, *Bell*, 456 U.S. at 521, 102 S.Ct. 1912; *Doe v. Claiborne County*, 103 F.3d 495, 513–14 (6th Cir. 1996) (holding that "Title IX's application should be accorded a 'sweep as broad as its language' " (citation omitted)); *Doe v. Brown Univ.*, 896 F.3d 127, 132 n.6 (1st Cir. 2018); *Elwell v. Oklahoma ex rel. Bd. of Regents of Univ. of Okla.*, 693 F.3d 1303, 1311 (10th Cir. 2012) (Gorsuch, J.). The panel's interpretation of Title IX was mandated by the dictates of both Congress and the Supreme Court.

The panel then turned to the final step of the inquiry under Title IX: whether the non-student plaintiffs were discriminated against under an education program or activity. *Snyder-Hill*, 48 F.4th at 707–08. Because there is "no binding authority that establishes a framework for this analysis," *id.* at 708, the panel appropriately turned to our sibling circuits for guidance. The First Circuit has held that a person may bring a Title IX claim if they suffer covered discrimination "while participating, or at least attempting to participate, in the funding recipient's education program or activity." *Doe v. Brown Univ.*, 896 F.3d at 131. A person can participate or attempt to participate by "avail[ing] themselves of the services provided" by covered institutions, such as by "access[ing] university

libraries, computer labs, and vocational resources," or "attend[ing] campus tours, public lectures, sporting events, and other activities." *Id.* at 132 n.6. In the absence of contrary authority, the panel found the First Circuit's reasoning persuasive and adopted this framework, applying it to the non-student plaintiffs' claims.

The dissent asks what education program or activity John Doe 47 was attempting to participate in, a question answered by the panel majority's opinion. John Doe 47 plausibly alleged that Strauss gave him "a long tour of the athletics facilities," and assaulted him "under the guise that [Strauss] would show John Doe 47 the types of medical exams athletes had to get to be cleared to play for OSU." *Snyder-Hill* R. 123 (2d Am. Compl. ¶¶ 1906–11) (Page ID #2251). As the panel explained, "[e]ven if this was not a bona fide education activity because it was merely a guise for Strauss's abuse, John Doe 47 was '*attempting* to participate in an education program' because he believed that he was receiving a bona fide tour of Ohio State's facilities, offered by an Ohio State employee." *Snyder-Hill*, 48 F.4th at 708–09 (quoting *Doe v. Brown Univ.*, 896 F.3d at 132). The panel thus applied the framework provided by the First Circuit to the specific facts alleged by each non-student plaintiff to determine whether they were able to raise Title IX claims against Ohio State.

Ultimately, the panel's decision already considered fully and rejected fairly all of the arguments now re-urged by the dissent. A majority of this court thus correctly determined that no compelling reasons exist to justify rehearing this case en banc. The panel's opinion did not conflict with our precedent, nor with the precedent of our sibling

circuits or the Supreme Court. In fact, had the panel held otherwise, it would have risked *creating* a circuit split. And the holding desired by the dissent would have ignored Title IX's plain language and eviscerated Title IX's purpose by creating a perverse incentive for institutions to run out the clock on the limitations period by covering up sexual abuse. For the reasons explained more fully in the panel majority opinion, this case involved simply a straightforward application of precedent to a highly fact-bound case, and thus this court appropriately declined en banc review. Accordingly, I concur in the denial of rehearing en banc.

THAPAR, Circuit Judge, dissenting from the denial of rehearing en banc.

Because of the tension between Sixth Circuit and Supreme Court precedent about when a claim accrues, I would have granted rehearing en banc. *See Dibrell v. City of Knoxville*, 984 F.3d 1156, 1162 (6th Cir. 2021); *see also infra*, at 972-77 (Readler, J., dissenting from denial of reh'g en banc); *Snyder-Hill v. Ohio State Univ.*, 48 F.4th 686, 711–15 (6th Cir. 2022) (Guy, J., dissenting).

CHAD A. READLER, dissenting from denial of rehearing en banc.

This year marks the 50th anniversary of Title IX's enactment. Over five decades, that groundbreaking law has effectuated many changes in campus life. And with a half-century of history and experience to consider, Congress might fairly contemplate extending the law's reach.

But why wait for Congress? In reversing a decision dismissing a Title IX suit filed against the Ohio State University, our Court took legislative matters into its own hands: it both extended Title IX's scope and effectively lengthened the time a plaintiff has to file suit for purported violations. *See generally Snyder-Hill v. Ohio State Univ.*, 48 F.4th 686 (6th Cir. 2022). Over a vigorous dissent, the majority opinion in *Snyder-Hill* held that Title IX claims tracing back as far as four decades were nonetheless timely according to the "discovery rule" for claim accrual. In reaching that conclusion, the majority opinion leaned on the discovery "rule's purpose" as well as "Title IX's broad remedial purpose." *Id.* at 701. The majority opinion then extended Title IX's application to athletics referees, teenagers visiting campus, and others with no intention of being educated or employed by Ohio State. *Id.* at 708–09.

For many reasons, that decision should not stand. Start with its inattention to Supreme Court precedent. As Judge Guy recognized in dissent, "[n]o less than twice the Supreme Court has told courts what to do" for claim accrual purposes "when there is no federal statute of limitations at all," as is the case for Title IX: apply the occurrence rule, not the discovery rule. *Id.* at 713 (Guy, J., dissenting); *see*

also Wallace v. Kato, 549 U.S. 384, 388, 127 S.Ct. 1091, 166 L.Ed.2d 973 (2007) (describing the occurrence rule as "the standard rule that accrual occurs when the plaintiff . . . can file suit and obtain relief." (cleaned up)). That command deserves particular attention in the context of an implied cause of action, where separation of powers concerns are at their apex. *See Egbert v. Boule*, —— U.S. ——, 142 S. Ct. 1793, 1809, 213 L.Ed.2d 54 (2022) (Gorsuch, J., concurring). Yet the majority opinion ignored the Supreme Court's instructions, an all too common practice in our Circuit. *See Shoop v. Cunningham*, 598 U.S. ——, 143 S.Ct. 37, 44, —— L.Ed.2d —— (2022) (Thomas, J., dissenting from denial of cert.).

Snyder-Hill next distorted Title IX in ways no other circuit has licensed. First, it crafted an accrual rule unique to Title IX deliberate indifference claims. 48 F.4th at 703–04 (majority op.). Then, it read Title IX to cover virtually anyone who sets foot on campus, no matter the reason. *Id.* at 708–09. Even the 100,000 fans attending a Buckeyes football game, it appears. In that respect, the majority opinion is less a "construction of a statute" than it is "an enlargement of it by the court." *See Rotkiske v. Klemm*, —— U.S. ——, 140 S. Ct. 355, 361, 205 L.Ed.2d 291 (2019) (quotations omitted).

Those errors are likely to multiply. Cases arising out of any federal statutory scheme lacking an explicit accrual date risk being tainted by the majority opinion's adoption of the wrong default rule. And if this case is any indicator, those cases may reach back to conduct over 40 years old, older than some members of our Court. Regrettably, the majority opinion has saddled the federally funded educational institutions in our circuit with this distorted

application of Title IX. It is thus no surprise that amici universities with a collective enrollment of over 200,000 students—the University of Michigan, Purdue University, and others—asked us to hear the case en banc. That is on top of the Ohio State University, which itself enrolls 65,000 students. In that way, the majority opinion brought together in shared opposition collegiate rivals that rarely see eye to eye. To those universities' minds, to mine, and, most importantly, to the Supreme Court's, we are to apply the occurrence rule in this and similar settings. As that message was lost on the majority opinion, the Supreme Court should say so yet again, before more jurisprudential damage is done.

I.

The underlying events have been well-documented in the national media and by the majority opinion. *See, e.g.*, Rick Maese, *Ohio State Team Doctor Sexually Abused 177 Students Over Decades, Report Finds*, Wash. Post (May 17, 2019); Artemis Moshtaghian, *Nearly 30 New Alleged Abuse Victims Sue The Ohio State University*, CNN (July 2, 2021); *Survivors of Former Ohio State Team Doctor Richard Strauss Plead for Different Response from University*, ESPN (Nov. 18, 2021). For today's purposes, I accept as true the allegations in plaintiffs' complaint. They tell a disturbing tale.

For over two decades, Ohio State employed Dr. Richard Strauss as an athletic team doctor. He was also a serial sex abuser. During his tenure, Strauss committed roughly 1,500 sexual assaults against nearly 200 patients, most of them Ohio State students. Those acts ranged from fondling to masturbating to anal rape. A few examples make the

point. Strauss digitally penetrated and pressed his erect penis against one plaintiff; groped and pulled another's penis for twenty minutes before asking him if "it ever get[s] hard"; twice attempted to perform oral sex on another; repeatedly attempted to kiss and fondle another; and told yet another that he needed to massage and "milk" the patient's penis "to make sure everything was working properly," before masturbating him until ejaculation. Some victims were well below the age of majority.

Word of Strauss's behavior spread quickly. Ohio State received complaints about Strauss from the very start, a theme that remained constant over the ensuing decades. Coaches, trainers, and administrators often discussed Strauss's abuse, with many having witnessed Strauss shower alongside athletes, ogle them, and make comments about their bodies in the locker room. "At least one coach threatened athletes with having to see Dr. Strauss if they did not listen to the coach."

Strauss's victims also well-understood the nature of his conduct. Athletes would tell their teammates "to watch out for" Strauss, comparing his examinations to "being 'hazed.'" But watching out would not do much good, it seems. After all, as the complaint alleges, "if the [athletes] wanted to keep their scholarships or continue playing for OSU, they had to go to" Strauss.

The University's response was far from heroic. It denied to complaining athletes that others had voiced similar complaints, and it destroyed Strauss's patients' records. No University official reported Strauss to the state medical board, let alone the police. Instead, the University continued to tolerate Strauss's behavior. He was allowed to retain his

faculty appointment. And with the exception of the fencing team—which was assigned a new doctor after the coach forced the issue in 1994—Strauss was allowed to continue to treat Ohio State athletes. It was not until 1996 that the University ultimately removed Strauss as a treating physician after receiving three formal complaints. In 1998, Strauss retired voluntarily. He committed suicide a few years later. In 2018, over two decades after Strauss's removal as a treating physician, the University commissioned an independent investigation and report into Strauss's conduct, which served as the impetus of this lawsuit.

II.

A. From this account, two observations must cross the mind. One, the conduct at issue was alarming—Strauss and Ohio State deserve no praise, and the victims our deepest sympathies. Two, having been gravely harmed by Strauss and Ohio State, and oftentimes aware that others had received similar abuse, the victims nonetheless waited decades to come forward with their civil claims. By the time they did, Ohio's two-year limitations period for personal injury claims had long since expired. *See* Ohio Rev. Code § 2305.10; *Lillard v. Shelby Cnty. Bd. of Educ.*, 76 F.3d 716, 729 (6th Cir. 1996) (applying the personal injury limitations period to assault actions pursued under Title IX). With their dated claims foreclosed, plaintiffs invoked a novel theory of Title IX liability. The district court, as one might expect, dismissed the suit as untimely. To resuscitate plaintiffs' action, the majority opinion, over Judge Guy's dissent, crafted a new accrual rule to govern

plaintiffs' claims, shunning numerous precedents along the way.

1. Ordinarily, such stale claims would fail from the start. By way of background, a fundamental aim of our civil legal regime is to "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Gabelli v. SEC*, 568 U.S. 442, 448–49, 133 S.Ct. 1216, 185 L.Ed.2d 297 (2013) (quoting *R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 348–49, 64 S.Ct. 582, 88 L.Ed. 788 (1944)). To achieve those aims, legislatures and courts employ a limitations period for virtually every kind of civil suit. Even, it bears noting, when the underlying conduct is reprehensible. *See, e.g.*, *King-White v. Humble Indep. Sch. Dist.*, 803 F.3d 754, 758 (5th Cir. 2015) (holding that claims arising out of the repeated sexual abuse of a high school student by a school dance instructor were barred by the statute of limitations); *Doe v. Univ. of Tenn.*, 186 F. Supp. 3d 788, 808–09 (M.D. Tenn. 2016) (holding that a rape-based Title IX claim was untimely where it was pursued after the one-year limitations period expired).

The claims before us are creatures of judicial fiat, not express legislative authorization. *See Cannon v. Univ. of Chi.*, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979). Yet even where we deem the legislative branch to have implied a statutory cause of action, we are not at liberty to conclude that Congress also implied an unending statute of limitations for those claims. *See Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 77–78, 112 S.Ct. 1028, 117 L.Ed.2d 208 (1992) (Scalia, J., concurring). Our marching orders, in fact, are to the contrary.

When dealing with federal statutes that lack an explicit limitations period, we begin by looking to state law to determine the period's length. *See Bd. of Regents of Univ. of State of N.Y. v. Tomanio*, 446 U.S. 478, 484, 100 S.Ct. 1790, 64 L.Ed.2d 440 (1980). We do the same for assessing what circumstances may justify tolling that period. *Id.* at 485, 100 S.Ct. 1790. Federal law also comes into play. To determine a claim's accrual date, we look to federal law, as informed by "common-law tort principles." *Wallace*, 549 U.S. at 388, 127 S.Ct. 1091. Sometimes, Congress is explicit about a claim's accrual date. In Title IX, however, it was silent. In that instance, we turn to the "standard rule" at common law, also known as the occurrence rule: the limitations period begins to run "when 'the plaintiff can file suit and obtain relief.'" *Id.* (quoting *Bay Area Laundry & Dry Cleaning Pension Tr. Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201, 118 S.Ct. 542, 139 L.Ed.2d 553 (1997)); *see also Everly v. Everly*, 958 F.3d 442, 460 (6th Cir. 2020) (Murphy, J., concurring) ("The . . . 'occurrence rule' . . . begins the limitations period on the . . . first day the plaintiff could assert a cause of action for that violation in court."). That instruction is well worn—the Supreme Court has repeated it many times, including just three years ago. *See Rotkiske*, 140 S. Ct. at 360 ("Congress legislates against the 'standard rule that the limitations period commences when the plaintiff has a complete and present cause of action.'" (quoting *Graham Cnty. Soil & Water Conserv. Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 418–19, 125 S.Ct. 2444, 162 L.Ed.2d 390 (2005))); *McDonough v. Smith*, —— U.S. ——, 139 S. Ct. 2149, 2155, 204 L.Ed.2d 506 (2019) (setting the "presumptive[ ]" time of accrual as

"when the plaintiff has a complete and present cause of action" (quotations omitted)).

Viewed through this lens, plaintiffs' claims are untimely. With Strauss's behavior an open secret around campus, plaintiffs, at the time they were abused, could have filed suit against Ohio State for its indifference to Strauss's conduct. *See, e.g.*, *Peguero v. Meyer*, 520 F. App'x 58, 60 (3d Cir. 2013) ("Peguero's cause of action accrued in 2005, when he was allegedly injured by the defendants' deliberate indifference to safety procedures[.]"); *Doe v. Univ. of Tenn.*, 186 F. Supp. 3d at 808–09 (rejecting an argument that pre-assault deliberate indifference claims could not have been brought as of the date of assault). At that point, the underlying events would have allowed plaintiffs to "file suit and obtain relief" based upon the University's disregard of a known, pervasive problem affecting student athletes. But as more than two years passed before plaintiffs pursued them, those claims, the Ohio General Assembly tells us, are untimely. *See* Ohio Rev. Code § 2305.10; *Wallace*, 549 U.S. at 388, 127 S.Ct. 1091; *Dibrell v. City of Knoxville*, 984 F.3d 1156, 1162 (6th Cir. 2021); *Snyder-Hill*, 48 F.4th at 710 (Guy, J., dissenting).

2. The majority opinion had other ideas. It first dismissed the Supreme Court's instruction that federal courts apply the "standard rule" in this setting as not explicit enough. *Snyder-Hill*, 48 F.4th at 700 (majority op.); *id.* at 713 (Guy, J., dissenting) ("[T]he majority opinion takes the view that the Court's application of the occurrence rule was a mere suggestion that 'does not impact our analysis.'"). It then unabashedly employed a disfavored manner of judging to guide the opinion's interpretive course—it embraced Title IX's purported remedial purposes to

expand access to its implied cause of action. *Alexander v. Sandoval*, 532 U.S. 275, 287, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001) (observing that we have "abandoned" the understanding that courts should "provide such remedies as are necessary to make effective the congressional purpose expressed by a statute" (citations omitted)). Title IX's remedial purpose, the majority opinion surmised, is to "provide[ ] relief broadly to those who face discrimination on the basis of sex in the American education system." *Snyder-Hill*, 48 F.4th at 699 (majority op.) (quoting *Doe v. Univ. of Ky.*, 971 F.3d 553, 557 (6th Cir. 2020)). To serve that judge-found purpose, the majority opinion deployed the discovery rule to govern the accrual date for plaintiffs' claims. That gambit allowed the majority opinion to delay the commencement of the limitations period for those claims until a "reasonable person knows, or in the exercise of due diligence should have known, both his injury and the cause of his injury." *Id*. at 701 (quoting *Bishop v. Children's Ctr. for Dev'l Enrichment*, 618 F.3d 533, 536 (6th Cir. 2010)). And as the majority opinion deemed that "discovery" date to have occurred after 2018, when Ohio State commissioned a law firm to investigate and report on historical practices at the University, plaintiffs' decades-old claims were once again timely. *Id.* at 694–95.

The majority opinion's path to that result left multiple lines of Supreme Court authority in its wake. From *Wallace* to *McDonough* to *Rotkiske*, the Supreme Court has made plain that the common law principles governing federal actions that lack express limitations periods almost invariably require accrual at the moment a plaintiff can file suit and obtain relief. *See Rotkiske*, 140 S. Ct. at 360 (reaffirming the

default rule for claim accrual in the absence of contrary congressional direction). We deviate from those principles only when Congress makes clear it had another rule in mind. *See id.*

But deviate the majority opinion did. To shore up its predilection for the discovery rule, the majority opinion brushed aside three Supreme Court decisions, any one of which foreclosed plaintiffs' claims. Application of the occurrence rule in both *Wallace* and *McDonough* has no "impact" on the "analysis" here, we learn, because no party thought to advance the unusual reading of the common law favored by the majority opinion here. And *Rotkiske* likewise "has no bearing" because it involved interpreting the Fair Debt Collection Practices Act, a statute with its own accrual rule. *See Snyder-Hill*, 48 F.4th at 699–700 (majority op.) ("*Rotkiske* has no bearing on a case about the accrual of Title IX claims because Title IX's text contains no statute of limitations at all."). That latter assertion is particularly hard to stomach. After all, before it turned to interpreting the FDCPA, *Rotkiske* made undeniably clear that, in the absence of an unambiguous statutory accrual rule, we do not depart from common law principles, as the majority opinion did here. 140 S. Ct. at 360 ("Congress legislates against the standard rule that the limitations period commences when the plaintiff has a complete and present cause of action." (cleaned up)). That instruction is particularly salient in the context of an implied cause of action, where Congress, by definition, has not spoken in an express, unambiguous manner. *See Gwinnett Cnty.*, 503 U.S. at 78, 112 S.Ct. 1028 (Scalia, J., concurring) ("[C]auses of action that came into existence under the *ancien regime* should be limited by the same logic

that gave them birth. . . . [W]hatever the merits of 'implying' rights of action may be, there is no justification for treating congressional silence as the equivalent of the broadest imaginable grant of remedial authority." (brackets omitted)). Again, those common law principles require us to apply the standard occurrence rule in all instances save for some fraud cases. *Snyder-Hill*, 48 F.4th at 712 (Guy, J., dissenting); *Rotkiske*, 140 S. Ct. at 361 (characterizing the discovery rule as "fraud-specific"); *id.* at 364 (Ginsburg, J., dissenting) ("[T]he fraud-based discovery rule . . . . is an exception to the standard rule that a claim accrues when the plaintiff has a complete and present cause of action." (citations and quotations omitted)). And not even the majority opinion attempts to paint the claims here as sounding in fraud. *See Snyder-Hill*, 48 F.4th at 712 (Guy, J., dissenting).

Our case law too fell victim to the majority opinion's antipathy to precedent. Consider our decision in *Dibrell*, 984 F.3d 1156. There, the parties disputed the accrual date of the plaintiff's false arrest and imprisonment claims under § 1983. *Dibrell* began by acknowledging that "[t]he 'standard' accrual 'rule' for federal claims starts the limitations period 'when the plaintiff has a complete and present cause of action' that can be raised in court." *Id.* at 1162 (quoting *Rotkiske*, 140 S. Ct. at 360). Our circuit, *Dibrell* acknowledged, historically had defaulted to the discovery rule for accrual when Congress had not directed us otherwise. *See id.* But, as *Dibrell* emphasized, the Supreme Court has made plain that a "presumption favoring that discovery rule" is "bad wine of recent vintage." *Id.* (quoting *Rotkiske*, 140 S. Ct. at 360).

With Dibrell's claims untimely under either rule, nothing more needed to be said. *Id.* But *Dibrell* is not a lone voice. Elsewhere, we have similarly recognized that the Supreme Court has "squelched this circuit evolution [towards the discovery rule], criticizing the expansive approach to the discovery rule as a bad wine of recent vintage." *See Everly*, 958 F.3d at 460–61 (Murphy, J., concurring) (cleaned up). Instead, the Supreme Court has "reaffirmed that Congress legislates against the standard rule that the limitations period commences when the plaintiff has a complete and present cause of action." *Id.* (cleaned up); *see also El-Khalil v. Oakwood Healthcare, Inc.*, 23 F.4th 633, 636 (6th Cir. 2022) (citing *Dibrell* for the proposition that there is tension between our former § 1983 approach and "several Supreme Court decisions"); *Benzemann v. Houslanger & Assocs.*, 924 F.3d 73, 81 n.42 (2d Cir. 2019) ("[W]e have previously observed that federal courts generally employ the discovery rule. There might be reason to question this presumption." (citing *TRW Inc. v. Andrews*, 534 U.S. 19, 27, 122 S.Ct. 441, 151 L.Ed.2d 339 (2001), and noting the pendency of *Rotkiske*)).

How did the majority opinion treat *Dibrell*, the *Everly* concurrence, and other likeminded cases? It dismissed their conclusions as mere "musings." *Snyder-Hill*, 48 F.4th at 700 (majority op.). It then colored those musings as having "overlook[ed] important context," in particular, in how these cases utilized the "bad wine" analogy from *Rotkiske*. *Id.* The majority opinion ties that phrase to the Supreme Court's condemnation of the "atextual judicial supplementation" advocated for in *Rotkiske*. *Id.* at 699–700 (citing *Rotkiske*, 140 S. Ct. at 360). In truth, that analogy came directly from Justice Scalia's

concurrence in *TRW*, 534 U.S. at 37, 122 S.Ct. 441 (Scalia, J., concurring). And Justice Scalia's pen rarely left the context unclear. In *TRW*, Justice Scalia began by acknowledging that, in the underlying proceeding, the "Court of Appeals [had] based its decision on what it called the 'general federal rule . . . that a federal statute of limitations begins to run when a party knows or has reason to know that she was injured.'" *Id.* at 35, 122 S.Ct. 441. Although the Supreme Court reversed that determination, Justice Scalia criticized the majority opinion for declining to "say whether that expression of the governing general rule is correct." *Id.* To his well-trained eyes, there was "little doubt that it is not." *Id.* at 36, 122 S.Ct. 441. After all, he noted, the Supreme Court "held, a mere four years ago, that a statute of limitations which says the period runs from 'the date on which the cause of action arose' 'incorporates *the standard rule* that the limitations period commences when the plaintiff has a complete and present cause of action.'" *Id.* (citation omitted) (emphasis in original). To buttress the point, Justice Scalia colorfully observed that the "injury-discovery rule applied by the Court of Appeals is bad wine of recent vintage. Other than our recognition of the historical exception for suits based on fraud, we have deviated from the traditional rule and imputed an injury-discovery rule to Congress on only one occasion." *Id.* at 37, 122 S.Ct. 441 (citation omitted). How one could read the context there in any other fashion is lost on at least this reader.

The majority opinion could be forgiven for momentarily drinking from this fount of bad wine. But viewing the opinion as a whole, something more appears to be afoot. Take, for instance, the majority opinion's claim that using the occurrence rule here

"would create an unnecessary circuit split." *Snyder-Hill*, 48 F.4th at 699. The circuit decisions the majority opinion cites all predate *McDonough* and *Rotkiske*, leaving them with questionable value. *Id.* (citing *King-White*, 803 F.3d at 762; *Doe v. Howe Mil. Sch.*, 227 F.3d 981, 988 (7th Cir. 2000); *Stanley v. Trs. of Cal. State Univ.*, 433 F.3d 1129, 1136 (9th Cir. 2006)). Other circuits, it bears noting, have charted a different course. With an eye on binding Supreme Court precedent, for example, the Tenth Circuit, in *Varnell v. Dora Consolidated School District*, applied the occurrence rule, not the discovery rule, for both § 1983 and Title IX claims. 756 F.3d 1208, 1215–17 (10th Cir. 2014) (recognizing *Wallace* as requiring that approach). The majority opinion dismissed *Varnell* as "declining to decide" the issue. *Snyder-Hill*, 48 F.4th at 699. Not so. *Varnell* expressly recognized that the occurrence rule serves as the default rule, adding that "even if" the plaintiff was correct in claiming that the discovery rule applied, she would still lose. 756 F.3d at 1216; *see also Snyder-Hill*, 48 F.4th at 711–12 (Guy, J., dissenting). All things considered, the majority opinion, far from avoiding a circuit split, instead only deepened one. *Compare Varnell*, 756 F.3d at 1215–17; *MSPA Claims 1, LLC v. Tower Hill Prime Ins. Co.*, 43 F.4th 1259, 1265 (11th Cir. 2022) ("Put more directly, in the absence of a clear Congressional directive or a self-concealing violation, the court should not graft a discovery rule onto a statute of limitations." (cleaned up)), *with Ouellette v. Beaupre*, 977 F.3d 127, 139 (1st Cir. 2020) ("[A] § 1983 claim will accrue once a plaintiff is armed with the necessary factual predicate to file suit, including knowledge of both an injury and

the injury's likely causal connection with the putative defendant.").

Not only that, but the majority opinion also managed to confound more than one branch of government. By employing its preferred accrual rule over the default one, the majority opinion both supplanted its view for that of Congress, which did not impose a discovery rule for Title IX claims, and ignored plain direction from the Supreme Court. *See Egbert*, 142 S. Ct. at 1810 (Gorsuch, J., concurring). Those transgressions are not without consequence. In this case, they served to drastically extend the time in which plaintiffs can bring Title IX actions. And going forward, the majority opinion seemingly binds us to do the same in other statutory settings, all, it is no exaggeration to say, at justice's expense. *Gabelli*, 568 U.S. at 448–49, 133 S.Ct. 1216 (quoting *R.R. Telegraphers*, 321 U.S. at 348–49, 64 S.Ct. 582).

B. If there is any lingering doubt over the outcome-oriented nature of the majority opinion, consider its application of the discovery rule. Assuming that rule did apply here, under the rule's traditional formulation, accrual occurs "when the reasonable person knows, or in the exercise of due diligence should have known, both his injury and the cause of his injury." *Bishop*, 618 F.3d at 536. In an analogous case—so much so that it was relied upon by the majority opinion in elevating the discovery rule over the occurrence rule—the Fifth Circuit held that claims similar to those here were untimely under the discovery rule. *King-White*, 803 F.3d at 759, 762–63. "'[A]wareness' for accrual purposes," the Fifth Circuit explained, requires the existence of "circumstances [that] would lead a reasonable person to investigate further." *Id.* at 762–63. There, the plaintiffs' claims

were deemed untimely as the plaintiffs were "sufficiently aware of the facts that would ultimately support their claims" well before they were filed, in part due to the fact that "a reasonable person . . . who had already lodged complaints with administrators that had gone unheeded, would have investigated further." *Id.* (quotations omitted); *see also Doe v. Univ. of Tenn.*, 186 F. Supp. 3d at 808–09.

For today's plaintiffs, however, the majority opinion had other ideas. To its mind, "a pre-assault heightened-risk claim" like the kind asserted here "may not accrue until well after a post-assault Title IX claim," the more traditional grounds for asserting Title IX liability. *Snyder-Hill*, 48 F.4th at 704 (majority op.). Assuming that could ever be the case, how would a reasonable person, after becoming aware that university coaches and administrators were ignoring complaints against Strauss, as plaintiffs' complaint alleges, not think to "investigate further" into Ohio State's pre-assault conduct? *Cf. King-White*, 803 F.3d at 759, 762–63. Rather than offering an answer, the majority opinion rewrites the question. First, it quietly drops the "reasonable person" component of the inquiry. *See Snyder-Hill*, 48 F.4th at 705 ("[T]he clock starts only once the plaintiff knows or should have known that Ohio State administrators 'with authority to take corrective action' knew of Strauss's conduct and failed to respond appropriately."). Then, it smuggles into the accrual analysis tolling and estoppel considerations, an entirely separate inquiry altogether (one, it bears reminding, that is governed by state, not federal, law). *See Wilson v. Garcia*, 471 U.S. 261, 269, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985) ("[Q]uestions of tolling and application[ ] are to be governed by state law."

(footnote omitted)). By so overhauling the discovery rule, the majority opinion in essence exempted deliberate indifference plaintiffs from the due-diligence requirement inherent in the rule. *Snyder-Hill*, 48 F.4th at 703–04. Under the majority opinion's formulation of that rule, the limitations period does not commence until the plaintiffs discover all aspects of the institution's intentional misconduct. For in the mind of the majority opinion, any delay in filing can be justified simply by the plaintiffs alleging that, even if they were diligent, they would not have been able to discover the misconduct at the time. *Id.* at 705–06.

For all its ingenuity, devising an accrual rule unique to deliberate indifference claims raises more questions than it purports to answer. Among them, why should we differentiate between Title IX causes of action for accrual purposes? That is not how we treat § 1983 actions, for example. In that setting, we customarily use one "simple, broad characterization of all" claims under that statute in view of the "federal interests in uniformity, certainty, and the minimization of unnecessary litigation" surrounding statutes of limitations. *Wilson*, 471 U.S. at 272, 275, 105 S.Ct. 1938; *see Owens v. Okure*, 488 U.S. 235, 242–43, 109 S.Ct. 573, 102 L.Ed.2d 594 (1989); *see also Jackson v. City of Cleveland*, 925 F.3d 793, 811–12 (6th Cir. 2019) (extending *Wilson* to survival actions and elaborating on how § 1983 claims should be treated). For those same reasons we should treat these plaintiffs as we would any others pursuing Title IX claims.

III.

The above errors, if corrected, would resolve this case. But the majority opinion's flawed conclusion propelled it to commit perhaps an even more invasive error: drastically expanding Title IX's reach.

"No person," Title IX instructs, "shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." 20 U.S.C. § 1681(a). Title IX's text authorizes federal agencies to promulgate regulations that, if flouted, allow those agencies to deny federal disbursements and grants to recipient institutions. *See N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 514–15, 102 S.Ct. 1912, 72 L.Ed.2d 299 (1982) (discussing 20 U.S.C. § 1682). By implication, Title IX also authorizes private rights of action. *See, e.g.*, *Cannon*, 441 U.S. at 709, 99 S.Ct. 1946.

How broadly does Title IX's statutory prohibition sweep? The Supreme Court has generally defined the law's contours. A "person" includes everyone not "expressly nor impliedly exclude[d] . . . from its reach," "unless other considerations counsel to the contrary." *Bell*, 456 U.S. at 521, 102 S.Ct. 1912; *see, e.g.*, *id.* (employees); *Cannon*, 441 U.S. at 709, 99 S.Ct. 1946 (applicants); *Doe v. Univ. of Ky.*, 971 F.3d at 558–59 (de facto students). Federally funded institutions run afoul of Title IX by excluding a person from participation in, denying a person the benefits of, or subjecting a person to discrimination under their educational program or activity on the basis of sex, as well as, in some cases, by failing to act to prevent or stop such behavior. *Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S.

629, 639–40 & 648, 119 S.Ct. 1661, 143 L.Ed.2d 839 (1999); *see also id.* at 639–40 & 642, 119 S.Ct. 1661 (applying Title IX's prohibitions to one's deliberate indifference to severe harassment of a "person"). And an "education program or activity" for Title IX purposes is defined to include "all of the operations of a college, university, or other postsecondary institution, or a public system of higher education." 20 U.S.C. § 1687; *see also Horner v. Ky. High Sch. Athletic Ass'n*, 43 F.3d 265, 271 (6th Cir. 1994) (reading "education program or activity" to include competitive athletic programs).

Plaintiffs asked the panel to extend the law's reach. Their complaint construed Title IX to encompass virtually anyone visiting a university campus, from a referee officiating a sporting event to a teenager with no stated intent of becoming a student. The majority opinion complied. *See Snyder-Hill*, 48 F.4th at 708 (holding that all "situations in which individuals are, for example, . . . attending campus tours, sporting events, or other activities" are protected by Title IX).

Interpreting Title IX in this unending fashion has obvious flaws. As a starting point, it misreads the statutory text. Participating or benefitting from an institution's "education program or activity" has natural limits. As a textual matter, the impacted person must "participate" (meaning "take part") in or "benefit" (meaning "receive help or an advantage") from, *see* Merriam Webster (last visited Nov. 29, 2022), an institution's education program or activity, which Title IX defines as the institution's "operations," 20 U.S.C. § 1687. It is difficult to see how an institution's football fans or others who pass through now and again fall within the law's reach.

Equally true, reading the law in that respect runs up against the understanding that we are not to expand upon implied causes of action absent express congressional direction. *Ziglar v. Abbasi*, —— U.S. ——, 137 S. Ct. 1843, 1855–56, 198 L.Ed.2d 290 (2017); *see also Miller v. Bruenger*, 949 F.3d 986, 991–92 (6th Cir. 2020) (following *Ziglar*); *Ohlendorf v. United Food & Com. Workers Int'l Union, Local 876*, 883 F.3d 636, 640–41 (6th Cir. 2018) (same). This is no passing fancy. The Supreme Court has repeatedly rejected calls to provide or expand independent causes of action for violations of statutes without express remedies or the clear and unambiguous implication of a remedy. *See Nestlé USA v. Doe*, —— U.S. ——, 141 S. Ct. 1931, 1938–39, 210 L.Ed.2d 207 (2021); *Jesner v. Arab Bank, PLC*, —— U.S. ——, 138 S. Ct. 1386, 1402, 200 L.Ed.2d 612 (2018); *id.* (Gorsuch, J., concurring in part); *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, —— U.S. ——, 140 S. Ct. 1009, 1015–16, 206 L.Ed.2d 356 (2020); *cf. Me. Cmty. Health Options v. United States*, —— U.S. ——, 140 S. Ct. 1308, 206 L.Ed.2d 764 (2020) (interpreting the Affordable Care Act's language that the United States "shall pay" as a congressional implication of a cause of action). Yet the majority opinion did exactly that.

It is difficult to square that approach with the modern-day abandonment of "the expansive rights-creating approach" of days past. *See Gwinnett Cnty.*, 503 U.S. at 77, 112 S.Ct. 1028 (Scalia, J., concurring). But the majority opinion made little effort to harmonize its holding with Supreme Court authority or Title IX's text. More persuasive, it seems, was another circuit's dicta. *See Snyder-Hill*, 48 F.4th at 708 (citing *Doe v. Brown Univ.*, 896 F.3d 127, 132 n.6 (1st Cir. 2018)). In *Doe v. Brown University*, the First

Circuit held that a non-student who was drugged at a bar, brought to campus, and sexually assaulted was not able to allege that "she participated or even would have participated in any of Brown's educational programs or activities." 896 F.3d at 133. That was so, the First Circuit observed, because a person claiming sex discrimination under Title IX must be "a participant, or at least have the intention to participate, in the defendant's educational program or activity." *Id.* at 131–32 (discussing *Bell*, 456 U.S. at 521, 102 S.Ct. 1912). Although the case was decided on this basis, the First Circuit remarked in a footnote that "members of the public are either taking part or trying to take part [in] a funding recipient institution's educational program or activity" when they access "libraries, computer labs, and vocational resources and attend campus tours, public lectures, sporting events, and other activities at covered institutions." *Id.* at 132 n.6.

By and large, that footnote was all it took for the majority opinion to avoid dismissing even one claim against Ohio State. *Snyder-Hill*, 48 F.4th at 708–09. Take, for example, John Doe 47, a fifteen-year-old high school student who had no express interest in attending Ohio State. According to the complaint, on a visit to see his aunt (a University employee who had spoken positively about Ohio State), the teenager went to "hang[ ] around the [Ohio State] athletics department." As he did, Strauss came along and told him he "would show him 'what you have to go through to be an athlete' at OSU." Strauss then subjected him to "the types of exams that he did for different athletes on the various sports teams"—including grabbing his penis, spreading his butt apart, and rubbing his anus and genitals.

Why Title IX would apply to John Doe 47 is entirely unclear. To start, he arguably is not a "person" who can bring a Title IX action. While that term is encompassing in nature, "other considerations" can guide us to a narrower conclusion. *Bell*, 456 U.S. at 521, 102 S.Ct. 1912. For a plaintiff claiming he was deprived of university services on account of his sex, a necessary consideration is whether the plaintiff had any intention of availing himself of those services. *See, e.g.*, *Conviser v. DePaul Univ.*, 532 F. Supp. 3d 581, 583 (N.D. Ill. 2021) ("Plaintiffs do not have Title IX statutory standing, because they are neither employees of an educational program or activity nor deprived of access to an educational program or activity."); *Oldham v. Pa. State Univ.*, No. 4:20-cv-02364, 2022 WL 1528305, at *18 (M.D. Pa. May 13, 2022) ("[P]laintiffs who are not the direct beneficiaries of programs covered by Title IX or who are deprived of only an economic benefit lack statutory standing to sue under Title IX." (cleaned up)); *Williams v. Pinellas Park Elementary Sch.*, No. 8:21-cv-1559, 2021 WL 4125764, at *3 (M.D. Fla. Aug. 24, 2021) ("Title IX extends statutory standing to two classes of plaintiffs: (1) employees of an education program or activity; and (2) those who are denied access to an education program or activity."). Otherwise, Title IX seemingly knows no bounds, its text notwithstanding. If a teenager with no intent to form a connection with a university is not excluded from Title IX, is anybody?

It also bears asking what education program or activity John Doe 47 was trying to participate in or enjoy the benefits of. Nothing in the complaint suggests he was considering becoming an Ohio State student or student-athlete. If so, then nothing in the

complaint could suggest that Strauss's abuse caused the type of harm Title IX addresses, that is, discrimination in or deprivation of educational opportunity on the basis of sex. Two of the three panel members in today's case recognized that very point earlier this year: "a plaintiff cannot simply assert that a federally-funded educational program discriminated against him or her on the basis of sex and automatically meet[ ] the 'under any education program or benefit' requirement. Rather, a plaintiff must assert not only that the defendant provided educational programs or activities, but also that the *plaintiff was denied* access to or participation in those programs or activities." *Arocho v. Ohio Univ.*, No. 20-4239, 2022 WL 819734, at *3 n.2 (6th Cir. Mar. 18, 2022) (brackets and citations omitted) (emphasis in original). What was true then should be true now. Otherwise, if someone with no intention of availing himself of university services is not prevented from claiming discrimination in or deprivation of educational opportunity on the basis of sex, who is?

In this way, the majority opinion transformed Title IX into a one-size-fits-all right of action. Who, to the majority opinion's mind, is foreclosed from bringing a Title IX suit other than one who is drugged and dragged onto campus? *See Doe v. Brown Univ.*, 896 F.3d at 133. If John Doe 47 was approached at a bar by a student who wanted to show him her campus dorm, only to be assaulted, would he have a potential Title IX action? By the majority opinion's logic, he would. *Cf. Arocho*, 2022 WL 819734, at *3 n.2. So too for contract athletics referees and anyone else "attending" "sporting events." *Snyder-Hill*, 48 F.4th at 708 (including referees). *Cf. Conviser*, 532 F. Supp. 3d at 583. And likewise for vendors, friends and

family who frequent campus, and every person that descends on campus each fall on football Saturdays. Does Ohio State need to police Ohio Stadium to ensure that no gendered language is used in severely harassing ways, say, to heckle an opposing team or its fans? Does every fan, win or lose, go home with a Title IX claim against the University for being indifferent to crude spectators?

Other than the majority opinion, no circuit has read Title IX's purpose to be so sweeping. Nor could one, if its interpretive method centered on a fair reading of Title IX's text. A statute's purpose is to be found by examining its text. *See Gundy v. United States*, —— U.S. ——, 139 S. Ct. 2116, 2124, 204 L.Ed.2d 522 (2019). Here, the "traditional tools of statutory interpretation" confirm that Title IX extends only to those persons participating in an education program or activity, not to anyone who has ever stepped foot on school grounds. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127, 134 S.Ct. 1377, 188 L.Ed.2d 392 (2014). Individuals so plainly outside Title IX's "zone of interests" are not proper plaintiffs under that law. *See id.* at 130–31, 134 S.Ct. 1377.

In that respect, the majority opinion is a classic example of legislating by non-legislators. It should go without saying that "the Legislature," not the judiciary, "is in the better position to consider if the public interest [is] served by imposing a new substantive legal liability." *Ziglar*, 137 S. Ct. at 1857 (cleaned up). Given the delicate balancing involved in weighing those policy considerations, we expect—indeed require—that Congress be explicit in identifying those who may bring suit when their federal statutory rights have been violated. *Id.* at

1856–57; *Ohlendorf*, 883 F.3d at 640–41 ("If Congress wishes to create new rights enforceable under an implied private right of action, it must do so in clear and unambiguous terms." (brackets omitted) (quoting *Gonzaga Univ. v. Doe*, 536 U.S. 273, 290, 122 S.Ct. 2268, 153 L.Ed.2d 309 (2002))). We will not do Congress's work for it. *See Snyder-Hill*, 48 F.4th at 713 (Guy, J., dissenting) (refusing to treat Title IX as "a blank page for politically unaccountable judges to write in whatever rule seems to further the [law's] remedial purposes," even if those purposes are well-meaning (quotations omitted)). The court's pen, in other words, should not replace the legislature's.

* * *

The majority opinion is a vivid reminder that the choices one makes often "depend[ ] a good deal on where you want to get to." Lewis Carroll, *Alice's Adventures in Wonderland* 53 (Sterling Pub. Co. 2015). The destination here seemingly was never in doubt. But the majority opinion's path was not easy. What all did it require? Overriding a limitations period selected by a state legislature. Embracing a law's purported purpose, not its text. Dismissing an unbroken line of cases from the Supreme Court. Rejecting our own colleagues' conclusions as mere musings. Favoring a sister circuit's decision only to snub that decision at the first opportunity, thereby ensuring that every last plaintiff can circumvent the statute of limitations. Penalizing a university for commencing a fresh look into past misdeeds. And wielding a law furthering educational gender equality to propel lawsuits by those with no connection to an educational program. All of this to revive claims no one bothered to pursue for decades.

A more straightforward path would have led to the right conclusion: affirming the district court's dismissal of plaintiffs' complaint.

[Filed September 22, 2021]
[2021 WL 7186148]

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Steve Snyder-Hill, *et al.*, Plaintiffs,	Case No. 2:18-cv-736
v.	Judge Michael H. Watson
The Ohio State University, Defendant.	Magistrate Judge Preston Deavers

OPINION AND ORDER

In this case, sixteen named plaintiffs and seventy-seven unnamed plaintiffs (together, "Plaintiffs") sue The Ohio State University ("Ohio State") based on sexual abuse they suffered at the hands of Dr. Strauss ("Strauss") while students at the University. Second Amend. Compl., ECF No. 123. They sue Ohio State under the following theories of Title IX liability: (1) hostile environment/heightened risk; (2) deliberate indifference to prior sexual harassment; and (3) deliberate indifference to a report of sexual harassment. *Id.* ¶¶ 2553–97. It appears Plaintiffs base each Title IX theory on both the abuse by Strauss and Ohio State's contemporaneous response—or lack thereof—when it learned about Strauss's abusive behavior. *Id.* Ohio State moves to dismiss all claims. Mot. Dismiss, ECF No. 128. Plaintiffs responded, Resp. ECF No. 133, and Ohio State replied. Reply, ECF No. 135.

The Court **GRANTS** Ohio State's motion to dismiss for the reasons set forth in the Opinions and Orders issued in *Garrett* and *Ratliff*. Case Nos. 2:18-cv-692 and 2:19-cv-4746. The reasons requiring dismissal in those cases apply equally to this case. *See, e.g.*, Second Amend. Compl. ¶¶ 2, 5, 13–14, 16, 30–122, 126–28, 130, 132–34, 162, 164, 175–76, 178–80, 182–84, 189, 196–99, 203, 205–08, 213, 217–18, 226–27, 232–33, 239–40, 248–51, 260, 262, 264, 299–2552, ECF No. 123.

In addition to the analyses in *Garrett* and *Ratliff*, the Court wishes to address Plaintiffs' argument that the Court should not dismiss a claim on a statute of limitations defense via a Rule 12(b)(6) motion. As the Court explained in *Garrett*, statute-of-limitations defenses may be properly raised in a motion to dismiss. *See Gibson v. Am. Bankers Ins. Co.*, 289 F.3d 943, 946 (6th Cir. 2002). Indeed, "[d]ismissal under Fed. R. Civ. P. 12(b)(6) based on a statute-of-limitations bar is appropriate when the complaint shows conclusively on its face that the action is indeed time-barred." *Allen v. Andersen Windows, Inc.*, 913 F. Supp. 2d 490, 500 (S.D. Ohio 2012). Here, the Second Amended Complaint provides all the information the Court needs to conclude that Plaintiffs' claims are barred by the statute of limitations.

Moreover, Plaintiffs' reliance on the "beyond doubt" standard is misplaced. The "beyond doubt" standard has not been the applicable standard for a Rule 12(b)(6) motion since the Supreme Court of the United States' decisions in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544 (2007). Thus, Plaintiffs' reliance on that standard is without merit.

Finally, the Court does not address the standing arguments. Whether the non-student Plaintiffs have standing to sue under Title IX is irrelevant in light of the Court's conclusion that the claims are barred by the statute of limitations.

The Clerk is **DIRECTED** to close the case.

IT IS SO ORDERED.

/s/ Michael H. Watson
MICHAEL H. WATSON, JUDGE
UNITED STATES DISTRICT COURT

[Filed October 25, 2021]
[2021 WL 7186269]

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Timothy Moxley, *et al.*, Plaintiffs,	Case No. 2:21-cv-3838
v.	Judge Michael H. Watson
The Ohio State University, Defendant.	Magistrate Judge Preston Deavers

OPINION AND ORDER

In this case, seven named plaintiffs and twenty-seven unnamed plaintiffs (collectively "Plaintiffs") sue The Ohio State University ("Ohio State") based on sexual abuse they suffered at the hands of Dr. Strauss ("Strauss") while students at Ohio State. Amend. Compl., ECF No. 16. They sue Ohio State under the following theories of Title IX liability: (1) hostile environment/heightened risk; and (2) deliberate indifference to prior sexual harassment. *Id.* ¶¶ 900–36. It appears Plaintiffs base their Title IX claims on the abuse by Strauss, the sexually charged environment at Larkins Hall, and Ohio State's contemporaneous response—or lack thereof—when it learned about both. *Id.* Ohio State moves to dismiss all claims. Mot. Dismiss, ECF No. 17. Plaintiffs responded, Resp. ECF No. 24, and Ohio State replied. Reply, ECF No. 25.

The Court **GRANTS** Ohio State's motion to dismiss for the reasons set forth in the Opinions and

Orders issued in *Garrett* and *Ratliff*. Case Nos. 2:18-cv-692 and 2:19-cv-4746. The reasons requiring dismissal in those cases apply equally to this case. *See, e.g.*, Amend. Compl. ¶¶ 2, 6, 16, 30–63, 67, 73, 76, 88–89, 92–93, 108–13, 120–22, 130, 137–39, 146–49, 153–57, 241–899, ECF No. 16.

The Court notes that Plaintiffs' response to Ohio State's motion to dismiss in this case is virtually identical—almost word for word—to the response filed in *Snyder-Hill, et al. v. Ohio State University*, Case No. 2:18-cv-736 ("*Snyder-Hill*"). *Compare* Resp., ECF No. 133, Case No. 2:18-cv-736 *with* Resp., ECF No. 24, Case No. 2:21-cv-3838. Accordingly, to the extent Plaintiffs in this case assert any claims or raise any arguments that are not addressed in the *Garrett* and *Ratliff* Opinions and Orders, the Court has addressed such claim or argument in the *Snyder-Hill* Opinion and Order.

The Court hopes that, notwithstanding the Court's ruling on the statute of limitations issue and fact that Ohio State's voluntary settlement program has closed, Ohio State will stand by its promise to "do the right thing," and continue settlement discussions with Plaintiffs.

The Clerk is **DIRECTED** to enter judgment for Ohio State and close the case.

IT IS SO ORDERED.

/s/ Michael H. Watson
MICHAEL H. WATSON, JUDGE
UNITED STATES DISTRICT COURT

[Filed September 22, 2021]
[561 F. Supp. 3d 747]

**UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

Brian Garrett, *et al.*, Plaintiffs,	Case No. 2:18-cv-692
v.	Judge Michael H. Watson
The Ohio State University, Defendant.	Magistrate Judge Preston Deavers

OPINION AND ORDER

Plaintiffs sue The Ohio State University ("Ohio State") under Title IX, 20 U.S.C. § 1681, alleging Ohio State was deliberately indifferent to the sexual abuse Plaintiffs suffered at the hands of Doctor Richard Strauss ("Strauss"). Consol. Compl., ECF No. 157. Ohio State moves to dismiss Plaintiffs' claim under Federal Rule of Civil Procedure 12(b)(6) as barred by the applicable statute of limitations. Mot. Dismiss, ECF No. 162.

I. INTRODUCTION

It is beyond dispute that Plaintiffs, as well as hundreds of other former students, suffered unspeakable sexual abuse by Strauss. It is also true that many Plaintiffs and other students complained of Strauss's abuse over the years and yet medical doctors, athletic directors, head and assistant coaches, athletic trainers, and program directors failed to protect these victims from Strauss's

predation. For decades, many at Ohio State tasked with protecting and training students and young athletes instead turned a blind eye to Strauss's exploitation. From 1979 to 2018, Ohio State utterly failed these victims.

Plaintiffs beseech this Court to hold Ohio State accountable, but today, the legal system also fails Plaintiffs. Plaintiffs' pain and suffering is neither questioned nor overlooked by this Court; indeed, their claims cry out for a remedy. As explained below, Plaintiffs' Title IX claims are barred by the existing statute of limitations. If there is a viable path forward for Plaintiffs on their claim against Ohio State, it starts with the legislature rather than the judiciary.

II. FACTS[1]

Plaintiffs are all former Ohio State students and student-athletes. Compl. ¶ 33, ECF No. 157. Ohio State is and was at all relevant times a state-owned and -operated public university that received federal financial assistance. *Id.* ¶ 134.

All of Plaintiffs' causes of action arise from Strauss's sexual abuse that they endured while at Ohio State.[2] *Id.*, *passim*.

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[1] The Court accepts Plaintiffs' factual allegations in their Complaint as true for purposes of Ohio State's motion to dismiss.

[2] The specific allegations of the types of sexual abuse that Strauss perpetrated on Plaintiffs and other student-athletes have been extensively detailed in this and related cases, as well as in the media. The detailed allegations are, unfortunately, irrelevant to the legal issues in this order. For that reason, and out of respect for Plaintiffs' privacy, the Court will not further discuss the allegations in this Opinion and Order.

III. STANDARD OF REVIEW

A claim survives a motion to dismiss under Rule 12(b)(6) if it "contain[s] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (citation omitted). This standard "calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of [unlawful conduct]." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007). A pleading's "[f]actual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the [pleading] are true (even if doubtful in fact)." *Id.* at 555 (internal citations omitted). While the court must "construe the [pleading] in the light most favorable to the [non-moving party]," *Inge v. Rock Fin. Corp.*, 281 F.3d 613, 619 (6th Cir. 2002), the non-moving party must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555; *see also Iqbal*, 556 U.S. at 678.

IV. ANALYSIS

A. Background of Title IX

Title IX of the Education Amendments of 1972 is a federal statute designed to prevent sexual discrimination and harassment in educational institutions receiving federal funding. It provides: "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under

any educational program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a).

Although the text of the statute does not mention a private right of action, Title IX implies a private right of action, *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979), which "encompasses intentional sex discrimination in the form of a recipient's deliberate indifference to a teacher's sexual harassment of a student." *Jackson v. Birmingham Bd. of Edu.*, 544 U.S. 167, 173, 125 S.Ct. 1497, 161 L.Ed.2d 361 (2005) (citing *Franklin v. Gwinnett Cty. Pub. Schs.*, 503 U.S. 60, 72–73, 112 S.Ct. 1028, 117 L.Ed.2d 208 (1992) and *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290–91, 118 S.Ct. 1989, 141 L.Ed.2d 277 (1998)).

To prove a deliberate indifference[3] claim under Title IX, the plaintiff must "plead, and ultimately

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[3] Plaintiffs also arguably allege a separate theory of Title IX liability based on Ohio State's creation and perpetuation of a sexually hostile environment. The Sixth Circuit has stated that "[h]ostile environment [Title IX] claims are distinct from deliberate indifference [Title IX] claims." *Doe v. Univ. of Ky.*, 959 F.3d 246, 251 n.3 (6th Cir. 2020). "A Title IX hostile-environment claim is analogous to a Title VII hostile-environment claim," and, to state such a claim, a plaintiff "must allege that his educational experience was permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive [so as] to alter the conditions of [his] educational environment." *Doe v. Miami Univ.*, 882 F.3d 579, 590 (6th Cir. 2018) (internal quotations marks and citations omitted). Here, the statute of limitations analysis for Plaintiffs' deliberate indifference claim applies with equal force to any separately asserted hostile-environment theory of liability because Plaintiffs were certainly aware by the time they graduated that their educational experiences were permeated by a sexually hostile environment. Indeed, any claim would fail on the merits were Plaintiffs unaware. *Doe v. Univ. of Dayton*, 766 F. App'x 275, 283 (6th Cir. 2019) ("We hesitate to deem an

prove, that the school had actual knowledge of actionable sexual harassment and that the school's deliberate indifference to it resulted in further actionable sexual harassment against the student-victim, which caused the Title IX injuries."[4] *Kollaritsch v. Mich. State Univ. Bd. of Trustees*, 944 F.3d 613, 618 (6th Cir. 2019). In other words, the plaintiff must establish "two separate components, comprising separate-but-related torts by separate-and-*un*related tortfeasors: (1) 'actionable harassment' by [someone associated with the school]; and (2) a deliberate-indifference intentional tort by the school." *Id.* at 619–20; *see also Davis v. Monroe Cty. Bd. of Edu.*, 526 U.S. 629, 633 (1999); *Foster v. Bd. of Regents of Univ. of Mich.*, 982 F.3d 960, 965 (6th Cir. 2020).

The actionable sexual harassment must be "so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational

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environment hostile to a plaintiff when there is no evidence that plaintiff was aware of what occurred." (internal quotation marks and citation omitted)). Accordingly, the Court does not undertake a separate statute of limitations analysis with respect to Plaintiffs' Title IX claim to the extent it is based on a sexually hostile environment theory.

[4] *Kollaritsch* involved student-on-student sexual harassment. 944 F.3d at 618. The standard set forth in that case applies to Title IX cases involving teacher-on-student sexual harassment as well, however, because the standards for each type of deliberate indifferent claim are the same. *See Williams ex rel. Hart v. Paint Valley Local Sch. Dist.*, 400 F.3d 360, 367 (6th Cir. 2005) ("It is clear from a reading of *Gebser* and *Davis*, that the Court is discussing only one standard for 'deliberate indifference' in Title IX pupil harassment cases and not . . . one standard for student-on-student harassment and a less stringent standard for teacher-on-student harassment.").

opportunity or benefit." *Foster*, 982 F.3d at 965 (quoting *Davis*, 526 U.S. at 633).

To prove the deliberate indifference tort, the plaintiff must show four elements: "(1) knowledge, (2) an act, (3) injury, and (4) causation." *Kollaritsch*, 944 F.3d at 621. First, the plaintiff must show that the school had "actual knowledge of an incident of actionable sexual harassment that prompted or should have prompted a response." *Id.* Second, the plaintiff must show that the school's response was "'clearly unreasonable in light of the known circumstances,' thus demonstrating the school's deliberate indifference to the foreseeable possibility of *further* actionable harassment of the victim." *Id.* (quoting *Davis*, 526 U.S. at 648). Third and fourth, the school's unreasonable response must cause the specific injury of "deprivation of access to the educational opportunities or benefits provided by the school . . . . Emotional harm standing alone is not a redressable Title IX injury." *Id.* The causation and injury elements are met if the "injury is attributable to the post-actual-knowledge *further* harassment, which would not have happened but for the clear unreasonableness of the school's response." *Id.* at 622 (citing *Davis*, 526 U.S. at 644).

Before reaching the merits of any Title IX claim, however, the Court must determine whether the claim is barred by the statute of limitations.

B. Title IX Statute of Limitations

As a threshold matter, the Court clarifies that statute-of-limitations defenses may be properly raised in a Rule 12(b)(6) motion. *See Gibson v. Am. Bankers Ins. Co.*, 289 F.3d 943, 946 (6th Cir. 2002); *Allen v. Andersen Windows, Inc.*, 913 F. Supp. 2d 490, 500 (S.D. Ohio 2012) ("Dismissal under Fed. R. Civ. P. 12(b)(6) based on a statute-of-limitations bar is appropriate when the complaint shows conclusively on its face that the action is indeed time-barred.").

"Title IX does not contain its own statute of limitations." *Lillard v. Shelby Cty. Bd. of Educ.*, 76 F.3d 716, 728 (6th Cir. 1996). Title IX actions, therefore, borrow the state statute of limitations for personal injuries. *Id.* at 729. Ohio Revised Code § 2305.10 provides for a two-year statute of limitations for personal injury claims. Ohio Rev. Code § 2305.10. Accordingly, Title IX claims in Ohio have a two-year statute of limitations. *See Adams v. Ohio Univ.*, 300 F. Supp. 3d 983, 996 (S.D. Ohio 2018).

Although state law controls the duration of the statute of limitations, federal law governs when the claim accrues. *Sharpe v. Cureton*, 319 F.3d 259, 266 (6th Cir. 2003). "The 'standard rule' is that a cause of action accrues 'when the plaintiff has a complete and present cause of action, that is, when the plaintiff can file suit and obtain relief.'" *D'Ambrosio v. Marino*, 747 F.3d 378, 384 (6th Cir. 2014) (citation omitted).

In order to determine the accrual date for a Title IX claim, the Court needs to determine when a plaintiff has a complete and present cause of action under Title IX. The Sixth Circuit has not considered what triggers the statute of limitations in Title IX cases, but it has considered the issue in cases brought

under 42 U.S.C. § 1983, which, like Title IX, borrows Ohio's personal-injury statute of limitations (for § 1983 claims brought in Ohio). *Browning v. Pendleton*, 869 F.2d 989, 990 (6th Cir. 1989). In the § 1983 context, the Sixth Circuit has adopted the discovery rule, which considers a plaintiff to have a complete and present cause of action "when the plaintiff knows or has reason to know that the act providing the basis of his or her injury has occurred." *E.g.*, *D'Ambrosio*, 747 F.3d at 384 (quoting *Cooey v. Strickland*, 479 F.3d 412, 416 (6th Cir. 2007)); *Sevier v. Turner*, 742 F.2d 262, 273 (6th Cir. 1984). In applying the discovery rule, the Sixth Circuit is "guided by the principle that a plaintiff has reason to know of his injury when he should have discovered it through the exercise of reasonable diligence." *Cooey*, 479 F.3d at 416 (internal quotation marks and citation omitted). Plaintiffs contend the discovery rule governs the accrual date in Title IX cases as well, but Ohio State disagrees.

There is good reason to think the Sixth Circuit might not adopt the discovery accrual rule in Title IX cases. Recently, in *Rotkiski v. Klemm*, 140 S. Ct. 355, 360 (2019), the United States Supreme Court decided whether the statute of limitations in the Fair Debt Collection Practices Act ("FDCPA") was triggered by a discovery rule. Unlike Title IX, the FDCPA contains an explicit statute of limitations; thus, the Supreme Court engaged in statutory interpretation when determining if the FDCPA's statute of limitations was subject to a discovery rule. *Id.* Despite that factual difference, the Supreme Court's analysis in *Rotkiski* is helpful because it assumed that the "standard rule [is] that the limitations period commences when the plaintiff has a complete and present cause of action"

and that Congress legislates against that standard rule. *Id.* (quoting *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 418–19 (2005)). The Supreme Court rejected the appellant's request to read into the FDCPA statute of limitations a general discovery rule, calling such an expansive approach to the discovery rule a "bad wine of recent vintage," *id.* (quoting *TRW Inc. v. Andrews*, 534 U.S. 19, 37 (2001) (Scalia, J., concurring)), and refused to engage in "[a]textual judicial supplementation." *Id.* at 361.

Ohio State argues that *Rotkiski* should be read expansively as holding that the discovery rule *never* applies unless the language of the at-issue statute explicitly mandates it. Mot. 7, ECF No. 162. Because Title IX does not contain any statute of limitations, let alone one that explicitly provides for a discovery rule, Ohio State argues *Rotkiski* demands the Court find Plaintiffs' claim accrued on the date that all of the elements of a Title IX claim came into existence as opposed to the date Plaintiffs knew or should have known of their injuries. *Id.*

The Sixth Circuit has since recognized the tension between the Supreme Court's language in *Rotkiski* and the Sixth Circuit's prior caselaw applying a default discovery rule to the accrual of § 1983 claims. *See Dibrell v. City of Knoxville, Tenn.*, 984 F.3d 1156, 1162 (6th Cir. 2021) (contrasting the occurrence rule with the discovery rule and observing that "[a]ny presumption favoring that discovery rule, the [Supreme] Court recently clarified, represents a bad wine of recent vintage" (internal quotation marks and citations omitted)); *see also Everly v. Everly*, 958 F.3d 442, 460 (6th Cir. 2020) (Murphy, J., concurring)

(maintaining that "[h]istorically, courts used the occurrence rule").

The Sixth Circuit has not yet overturned *Sevier* and other cases holding that the discovery rule is the default rule in the § 1983 context, however. *See Dibrell*, 984 F. 3d at 1162 ("Do our cases imbibing this 'bad wine' warrant reconsideration in light of the Supreme Court's recent teachings? We need not resolve this tension now because [the plaintiff's] claims would be untimely either way."). It is thus unclear whether the Sixth Circuit would continue to apply the discovery accrual rule in § 1983 cases or would adopt the discovery accrual rule in Title IX cases. *Cf. Twersky v. Yeshiva Univ.*, 993 F. Supp. 2d 429, 438–39 (S.D.N.Y. 2014) (recognizing the plaintiffs' request to apply a discovery rule to a Title IX claim "ignore[s] the continuing significance of the 'standard rule' that claims accrue upon existence of a complete and present cause of action" and that the discovery rule "remains—despite certain departures—an exception" to the standard rule but declining to decide whether the occurrence or discovery rule applied); *Varnell v. Dora Consol. Sch. Dist.*, 756 F.3d 1208, 1210, 1215–17 (10th Cir. 2014) ("Plaintiff's federal claims accrued when she could file suit and obtain relief, which was no later than when the abuse stopped, not when she allegedly learned the full extent of the resultant emotional injury."); *Forrester v. Clarencevill Sch. Dist.*, No. 20-12727, 2021 WL 1812700, at *4 (E.D. Mich. May 6, 2021) ("The Supreme Court has repeatedly refused to interpose the 'discovery rule' to accrual standards for federal claims."). This Court need not definitively decide the issue either, though, as Plaintiffs' claim is

untimely under both rules. Indeed, the accrual date is the same under either rule.

1. Plaintiffs' Claims are Barred under the Occurrence Rule

Under the occurrence rule, each Plaintiff's claim against Ohio State accrued, at the latest, when all of the elements of his Title IX claim were established. In other words, each Plaintiff's Title IX claim accrued the moment that Plaintiff suffered the Title IX injury—i.e., was deprived of "access to the educational opportunities or benefits provided by" Ohio State because of post-actual-knowledge harassment by Strauss (which harassment would not have happened but for the clear unreasonableness of Ohio State's response). *Kollaritsch*, 944 F.3d at 621–22; *cf. Twersky*, 993 F. Supp. 2d at 439 (finding Title IX claim accrued under the occurrence rule "when, despite their knowledge of the abuse at the school, the school administrators failed to take corrective actions. In each instance, this occurred before the plaintiffs left the school, which in all cases was more than twenty years before this lawsuit was filed." (citation omitted)); *Forrester*, 2021 WL 1812700, at *4 ("As a matter of law, at the time of the abuse, Plaintiffs had 'a complete and present cause of action,' in that 'the wrongful act or omission [had] result[ed] in damages' and 'the plaintiff[s] [had been] harmed.'" (citations omitted)).

For the majority of Plaintiffs, the latest date on which their Title IX injury could have occurred is the date of their graduation or the date they dropped out of Ohio State, for that is the latest moment they were deprived of access to educational opportunities or benefits provided by Ohio State as a result of Ohio

State's deliberate indifference. *See* Compl. ¶ 439, ECF No. 157 ("OSU's actions and inactions had the systemic effect of depriving Plaintiffs . . . of the educational benefits afforded to them through their enrollment in the University."). Plaintiffs in this case graduated, at the latest, in the late 1990s.[5] *Id.* ¶¶ 35–132. Even assuming the latest Plaintiff graduated in 1999, his claim would need to have been filed within two years of graduation—by sometime in 2001. Plaintiffs did not file their Complaint in this case until July 16, 2018. ECF No. 1. Consequently, under the occurrence rule, Plaintiffs' Complaint was untimely by at least eighteen years.

2. Plaintiffs' Claims are Barred under the Discovery Rule

As the Supreme Court has recognized, when the discovery rule applies, "discovery of the injury, not discovery of the other elements of the claim, is what starts the clock." *Rotella v. Wood*, 528 U.S. 549, 555 (2000); *Amini v. Oberlin College*, 259 F.3d 493, 500 (6th Cir. 2001) (In other words, "[a] plaintiff's action accrues when he discovers that he has been injured, not when he determines that the injury was unlawful." (internal quotation marks and citation omitted)).

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[5] The Court recognizes that lead Plaintiff Brian Garrett's claims arise out of abuse at Strauss's off-campus clinic, rather than abuse on Ohio State's campus. Compl. ¶¶ 369–398, ECF No. 1. Even assuming Mr. Garrett could state a valid Title IX claim for the abuse he endured at Strauss's off-campus clinic, Mr. Garrett was molested in 1996 and graduated from Ohio State in 1998. *Id.* So, under the occurrence rule, Mr. Garrett would have had to file his action by 2000 at the latest.

In Title IX cases, many courts find, for purposes of applying the discovery rule, that the injury is the sexual harassment or abuse such that the claim accrues the moment a plaintiff knows or has reason to know of the sexual harassment or abuse. *See, e.g.*, *Twersky v. Yeshiva Univ.*, 579 F. App'x 7, 9–10 (2nd Cir. 2014) (assuming without deciding that the discovery accrual rule applies and stating, "[w]hen plaintiffs left [Defendant University], more than 20 years before filing this suit . . . , they were unquestionably aware of (1) their injuries, (2) their abusers' identities, and (3) their abusers' prior and continued employment at [Defendant University]. This information was sufficient to put them on at least inquiry notice as to the school's awareness of and indifference to the abusive conduct by its teachers." (citations omitted)); *Varnell*, 756 F.3d at 1216–17 (finding that a plaintiff's Title IX claim accrued even under the discovery rule when the plaintiff knew she was sexually assaulted); *Doe v. Univ. of Cal.*, No. 2:18-cv-7530-SVW-GJS, 2019 WL 4229750, at *4 (C.D. Cal. July 9, 2019) ("Even if Plaintiff generally did not learn until recently about USC's alleged deliberate indifference spanning over approximately thirty years, Plaintiff's understanding of her injury at the time of her examination by Dr. Tyndall means that the statute of limitations period began to run immediately following the examination."); *Adams v. Ohio Univ.*, 300 F. Supp. 3d 983, 996 (S.D. Ohio 2018) (finding the injury in a Title IX deliberate indifference case was the sexual harassment by the faculty member, which started the statute of limitations clock); *Bowling v. Holt Pub. Sch.*, No. 1:16-cv-1322, 2017 WL 4512587, at *2 (W.D. Mich. May 26, 2017) ("[Plaintiff's] claims are based on the sexual assaults

by T.B., the last of which occurred on May 18, 2012. Thus, her claims accrued, at the latest, on May 18, 2012—even if [plaintiff's] claim is based on Defendants' actions or inactions in failing to protect her from T.B. because [plaintiff] knew of Defendant's inaction."); *Anderson v. Bd. of Educ. of Fayette Cty.*, 616 F. Supp. 2d 662, 668 (E.D. Ky. 2009) (finding plaintiffs "were no doubt aware of the underlying injuries of which they complain, the abuse at the hands of employees of the Board, at the time it was allegedly inflicted. This is to say that Plaintiffs' causes of action accrued at the time of the alleged abusive acts."); *Johnson v. Gary E. Miller Canadian Cty. Children's Juvenile Justice Ctr.*, No. Civ-09-533-L, 2010 WL 152138, at *2 (W.D. Okla. Jan. 14, 2010) (finding the Title IX claims "are time barred since they accrued prior to [plaintiff's] last date of attendance" at the defendant school); *Padula v. Morris*, No. 2:05-cv-411-MCE-EFB, 2008 WL 1970331, at *4 (E.D. Cal. May 2, 2008) (finding the statute of limitations on plaintiff's Title IX claim "accrued on the last date Plaintiffs' suffered an incident of sexual harassment relevant to their causes of action." (citation omitted)); *Monger v. Purdue Univ.*, 953 F. Supp. 260, 264 (S.D. Indiana 1997) ("[Plaintiff's] Title IX claim accrued when she knew or had reason to know of her injury—October 29, 1997," the date of the alleged sexual harassment); *Clifford v. Regents of Univ. of Cal.*, No. 2:11-cv-2935, 2012 WL 1565702, at *6 (E.D. Cal. April 30, 2012) (finding Title IX claim accrued on the date of each alleged incident of harassment or the date the university became aware of the same); *cf. Gilley v. Dunaway*, 572 F. App'x 303, 306 (6th Cir. 2014) ("[Plaintiff's] relationship with [the coach-abuser] should have

aroused her suspicion that she was being sexually abused.").

Other courts find the injury occurs at the time the plaintiff is deprived of educational opportunities or benefits by the defendant school. *Samuelson v. Oregon State Univ.*, 725 F. App'x 598, 599 (9th Cir. June 6, 2018) ("Here, [plaintiff's] injury occurred, and she was fully aware of the injury and its consequences, when she dropped out of school in 2000. This event started the two-year clock."); *King-White v. Humble Indep. Sch. Dist.*, 803 F.3d 754, 764 (5th Cir. 2015) (assuming without deciding, for purposes of the discovery rule, that the injury was the school's deliberate indifference rather than the sexual abuse itself).

As explained above, Plaintiffs were abused from the 1970s–1990s. Compl. ¶¶ 35–132, ECF No. 157. So, even if the Court applied the discovery rule and found the claims accrued when Plaintiffs knew or should have known of their abuse, the claims accrued on the latest date of abuse for each Plaintiff, which occurred well before two years prior to the filing of the Complaint. Similarly, if the Court applied the discovery rule and considered the injury to be Plaintiffs' deprivation of the educational opportunities or benefits of Ohio State, Plaintiffs knew or should have known of those injuries by the time they graduated or dropped out of Ohio State.[6] Either way, Plaintiffs' Title IX claims are barred by

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[6] The accrual date under this analysis matches the accrual date under the Occurrence Rule because Plaintiffs were undoubtedly aware of the deprivation of educational opportunities or benefits by the time they graduated or withdrew from Ohio State.

the statute of limitations, even under the discovery rule.

3. Plaintiffs' Arguments are Unavailing

Plaintiffs offer two reasons why their claims are not barred by the statute of limitations: (1) claims do not accrue under the discovery rule until a plaintiff knows or should know about both the injury and cause of the injury; and (2) the statute of limitations is tolled due to Ohio State's fraudulent concealment.

a. Claims Accrue Under the Discovery Rule When a Plaintiff Knows or has Reason to Know of His Injury

First, Plaintiffs argue that knowledge of injury is alone insufficient to trigger accrual under the discovery rule and that, instead, a claim does not accrue under the discovery rule until a plaintiff knows or should know of both his injury and its cause. Resp. 9, ECF No. 169 (quoting *Fonseca v. Consol. Rail Corp.*, 246 F.3d 585, 590 (6th Cir. 2001)). According to Plaintiffs, the "cause" here is Ohio State's deliberate indifference, so their claims did not accrue until they knew or should have known of their injuries and that those injuries were caused by Ohio State's deliberate indifference. Resp. 9, ECF No. 169 ("[T]he relevant inquiry here concerns when the Plaintiffs could have first known that they were injured by OSU, and that OSU played an actionable role in causing their abuse."); *id.* at 1 ("Plaintiffs did not know and ***could not have known*** of OSU's role in causing their abuse until April 2018, at the earliest, when allegations of an OSU cover-up surfaced in the press and OSU retained law firm Perkins Coie to unearth the truth."); *id.* at 2 ("Plaintiffs' Title IX claims accrued within the last two years, as Plaintiffs only recently

discovered—or even could have discovered—OSU's role in causing their injuries."); *id.* at 4 ("[U]ntil the May 2019 PC Report (or the April 2018 announcement of an investigation, at the earliest), none of the Plaintiffs in this case could have known of OSU's role in the abuse they had suffered.").

As the Sixth Circuit recently explained, however, in Title IX cases, " 'causation' means the '[a]ct' caused the '[i]njury,' such that the injury is attributable to the post-actual-knowledge *further* harassment, which would not have happened but for the clear unreasonableness of the school's response." *Kollaritsch*, 944 F.3d at 622. The Sixth Circuit explains that, "[i]mportantly, *Davis* does not link the deliberate indifference directly to the injury (i.e., it does *not* speak of subjecting students to *injury*)[.]" *Id.* In other words, Plaintiffs' Title IX injury (deprivation of educational opportunities or benefits provided by Ohio State) was attributable to Strauss's abuse, and Plaintiffs knew both of the injury and its cause (the abuse), which was sufficient to put them at least on inquiry notice to determine whether the injury would have occurred but for Ohio State's deliberate indifference. *See King-White*, 803 F.3d at 762–63 ("Even if we assume that the relevant injury was the conduct of HISD and the School Officials rather than the sexual abuse itself, [p]laintiffs had sufficient awareness of that conduct prior to the spring of 2011 for their claims to accrue. . . . A.W. was sadly quite aware of the abuse she suffered, and she was also aware that her abuser was her teacher. . . . [A] reasonable person who knew that her daughter was living with a teacher, and who had already lodged complaints with administrators that had gone unheeded, would have investigated further.");

Twersky, 579 F. App'x at 10 ("[P]laintiffs maintain that they could not have discovered defendants' deliberate indifference to sexual abuse before defendant Lamm's admissions in a December 2012 interview . . . . This conclusion is belied by the fact that nine plaintiffs brought their own abuse to the attention of Lamm or other administrators. To the extent these administrators rebuffed their complaints or otherwise failed to take adequate remedial action, plaintiffs were thus aware more than three years before filing this suit of a potential claim for deliberate indifference. Further, these circumstances put plaintiffs at least on inquiry notice as to administrators' knowledge of and deliberate indifference to other abuse." (citation omitted)); *Forrester*, 2021 WL 1812700, at *7 ("[E]ven assuming that Plaintiffs were not aware of all the facts needed to prove that 'the District acted with deliberate indifference to [the] assaults,' Plaintiffs' claims accrued when they became aware of their injuries and the abuse." (citations omitted)); *Anderson*, 616 F. Supp. 2d at 668 ("Plaintiffs' causes of action accrued [under the discovery rule] at the time of the alleged abusive acts.").[7] Plaintiffs' argument that the statute

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[7] As noted above, some cases describe the injury triggering accrual as the abuse itself (rather than the deprivation of educational opportunities and benefits) and thus find a claim accrues on the date a plaintiff knew or should have known he or she was abused. Plaintiffs argue that, if the pertinent inquiry for the discovery rule is when Plaintiffs knew or should have known they suffered abuse, it is not reasonable to infer that Plaintiffs were aware of the abuse prior to 2018. Resp. 18, ECF No. 169. Specifically, Plaintiffs state that "Perkins Coie needed to hire two independent doctors to provide input on the medical necessity or appropriateness of Strauss's reported procedures." *Id.* The Court rejects Plaintiffs' argument that the Complaint

of limitations did not begin to run until they learned of Ohio State's deliberate indifference via the Perkins Coie report is therefore incorrect as a matter of law.[8]

b. Plaintiffs' Claims are not Tolled by the Fraudulent Concealment Doctrine

Plaintiffs also argue that Ohio State's "long-term concealment of its misconduct creates a basis

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plausibly alleges Plaintiffs did not know or should not reasonably have known they were sexually abused until the issuance of the Perkins Coie report. The Complaint is replete with allegations that Plaintiffs were concerned by Strauss's abuse and felt violated by it, discussed the abuse with teammates, classmates, or family members, reported the abuse themselves, or that the abuse caused them immediate mental and emotional distress. *E.g.*, Am. Compl. ¶¶ 168, 182, 205, 214–18, 232, 234–35, 242, 247, 268, 270–71, 280–83, 298, 301, 331–33, 382, 386–87, 444, 483, 503, 543–44, 665, ECF No. 157. All of these allegations directly undercut the notion that Plaintiffs were "not aware that Strauss's conduct was not medically necessary and that it was, in fact, sexual assault" until the Perkins Coie report was published. *Id.* ¶ 391. Unfortunately, the very effect the abuse had on Plaintiffs (i.e., that it was enough to deprive them of the educational opportunities or benefits from Ohio State) was sufficient to put them on at least inquiry notice that they suffered abuse and that the abuse might not have happened but for Ohio State's deliberate indifference.

[8] Plaintiffs' argument that they had no reason to know of Ohio State's deliberate indifference until the announcement in 2018 of its internal investigation is also defeated by the factual allegations in their own Complaint. For example, Plaintiffs allege that Strauss's behavior was an open secret, that athletes would openly "joke" about his abuse, and that rumors of his abuse permeated Ohio State. Resp. 16, ECF No. 169; Compl. ¶¶ 147–48, 246, 284, 475, 519, 646, ECF No. 157. Plaintiffs also knew that Strauss continued to be employed at Ohio State despite this widespread knowledge, which was enough to put them on inquiry notice of Ohio State's deliberate indifference to his horrific and predatory behavior.

for tolling." Resp. 2, ECF No. 169. The fraudulent concealment doctrine tolls a limitations period "where a defendant impermissibly conceals its wrongdoing from the plaintiff." *Lutz v. Chesapeake Appalachia, LLC*, 807 F. App'x 528, 530 (6th Cir. 2020) (citing *Doe v. Archdiocese of Cincinnati*, 849 N.E.2d 268, 278–79 (2006)). To toll the statute of limitations based on fraudulent concealment, a plaintiff must show "(1) a factual misrepresentation, (2) that the misrepresentation is misleading, (3) that the misrepresentation induced actual reliance that was reasonable and in good faith, and (4) that it caused detriment to the relying party." *Lutz*, 807 F. App'x at 530–31 (citing cases). The fourth factor means that fraudulent concealment cannot toll the statute of limitations where the plaintiff "knew or should have known all of the elements of potential causes of action." *Archdiocese of Cincinnati*, 849 N.E.2d at 279; *see also King-White*, 803 F.3d at 764 ("The estoppel effect of fraudulent concealment ends, however, when a party learns of facts, conditions, or circumstances which would cause a reasonably prudent person to make inquiry, which, if pursued, would lead to discovery of the concealed cause of action." (internal quotation marks and citations omitted)); *Anderson*, 616 F. Supp. 2d at 670 (observing, in a discussion of whether fraudulent concealment can toll the statute of limitations that "the plaintiff is always under the duty to exercise reasonable care and diligence to discover whether he has a viable legal claim, and any fact that should arouse his suspicion is equivalent to actual knowledge of his entire claim." (internal quotation marks and citations omitted)).

Even if Plaintiffs had adequately pleaded the first three factors, they have not done so for the fourth. As

explained above, Plaintiffs were aware of all the elements of their cause of action by the late 1990s. That is, they knew of the injury, the identity of the perpetrator, and the perpetrator's employer. *See Archdiocese of Cincinnati*, 849 N.E.2d at 279 (concluding that the fraudulent concealment doctrine was inapplicable where the plaintiff, a victim of sexual abuse, "at all times knew the identity of his alleged perpetrator and knew the employer of his alleged perpetrator"). Because Plaintiffs have known for decades about the elements of their cause of action, any alleged misrepresentation or concealment by Ohio State did not prevent them from investigating or pursuing their claims. The cases on which Plaintiffs rely are inapposite because they do not analyze Ohio law. *See, e.g.*, *Lozano v. Baylor Univ.*, 408 F. Supp. 3d 861, 904 (W.D. Tex. 2019). Therefore, the fraudulent concealment doctrine does not toll the limitations period for Plaintiffs' claims.

c. This Analysis Applies Equally to any Title IX Claims brought under a Theory of Hostile Environment or Heightened Risk

Plaintiffs also arguably allege a separate theory of Title IX liability based on Ohio State's creation and perpetuation of a sexually hostile environment. The Sixth Circuit has stated that "[h]ostile environment [Title IX] claims are distinct from deliberate indifference [Title IX] claims." *Doe v. Univ. of Ky.*, 959 F.3d 246, 251 n.3 (6th Cir. 2020). "A Title IX hostile-environment claim is analogous to a Title VII hostile-environment claim," and, to state such a claim, a plaintiff "must allege that his educational experience was permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or

pervasive [so as] to alter the conditions of his educational environment." *Doe v. Miami Univ.*, 882 F.3d 579, 590 (6th Cir. 2018) (internal quotations marks and citations omitted).

Here, the statute of limitations analysis for Plaintiffs' post-assault deliberate indifference claim applies with equal force to any separately asserted hostile-environment theory of liability because Plaintiffs were certainly aware by the time they graduated that their educational experiences were permeated by a sexually hostile environment. Indeed, any claim would fail on the merits were Plaintiffs unaware. *Doe v. Univ. of Dayton*, 766 F. App'x 275, 283 (6th Cir. 2019) ("We hesitate to deem an environment hostile to a plaintiff when there is no evidence that plaintiff was aware of what occurred." (internal quotation marks and citation omitted)).

Similarly, Plaintiffs purport to assert a Title IX claim based on "pre-assault" deliberate indifference, which Plaintiffs sometimes style as a "heightened risk" claim. Ohio State is correct that Plaintiffs have not cited any case law suggesting the Sixth Circuit recognizes a "heightened risk" theory of Title IX deliberate indifference. The Court has independently found no cases in which the Sixth Circuit has recognized such a theory, although some district courts within the Sixth Circuit have at least recognized the possibility of asserting such a theory of liability. *E.g.*, *Doe v. Hamilton Cty. Bd. of Edu.*, 329 F. Supp. 3d 543 (E.D. Tenn. 2018); *Doe v. Mich. State Univ.*, No. 1:18-cv-390, 2019 WL 5085567 (W.D. Mich. Aug. 21, 2019); *Doe 1 v. Cleveland Metro. Sch. Dist. Bd. of Edu.*, No. 1:20-cv-1695, 2021 WL 1334199 (N.D. Ohio Apr. 9, 2021).

Under this theory, Plaintiffs contend that even if they were aware of Ohio State's deliberate indifference to their own complaints of sexual abuse by Strauss, they had no reason to know that Ohio State's deliberate indifference to the complaints made by *other, prior* students heightened the risk that these Plaintiffs would be assaulted in the first place. They contend that they had no reason to know that Ohio State heightened the risk they would be sexually assaulted until 2018, when Ohio State announced that it hired Perkins Coie to investigate Strauss's wide-spread abuse.

Even if the Sixth Circuit recognizes a heightened risk theory of liability under Title IX, Plaintiffs' claims in this case are barred by the statute of limitations. In cases where the heightened-risk claim is based on a university's deliberate indifference to prior complaints of student-on-student harassment, it makes sense that a plaintiff may have no reason to suspect the school's knowledge of, and deliberate indifference to, prior complaints until a subsequent investigation, admission, or news report breaks.

Here, however, the perpetrator was an employee of Ohio State. Not only that, but Plaintiffs' complaints make clear that Strauss's abuse was widely known amongst both students and faculty. This general knowledge is enough to have put Plaintiffs on notice that Ohio State may have received complaints about Strauss in the past and yet continued employing him. Accordingly, even if the Sixth Circuit recognizes a heightened risk theory of liability, Plaintiffs' claims are time-barred. *Univ. of Cal.*, 2019 WL 4229750, at *4 ("Even if Plaintiff generally did not learn until recently about USC's alleged deliberate indifference spanning over

approximately thirty years, Plaintiff's understanding of her injury at the time of her examination by Dr. Tyndall means that the statute of limitations period began to run immediately following the examination."); *but see, e.g.*, *Hernandez v. Baylor Univ.*, 274 F. Supp. 3d 602 (W.D. Texas Apr. 17, 2017) ("[l]t was not until January 2016 that Plaintiff first knew that, based on her allegations, Baylor could have stopped or prevented her assault. Plaintiff's pre-assault claim is therefore not time-barred."); *Dutchuk v. Yesner*, No. 3:19-cv-136-HRH, 2020 WL 5752848, at *5 (D. Alaska Sept. 25, 2020) (finding heightened risk claim timely because "[p]laintiffs have alleged that they each first became aware of the University of Alaska's deliberate indifference to Yesner's repeated misconduct when a formal report was finally issued in March 2019." (internal quotation marks and citation omitted)); *Jameson v. Univ. of Idaho*, No. 3:18-cv-451-DCN, 2019 WL 5606828, at *8 (D. Idaho Oct. 30, 2019) ("[l]t is plausible that [plaintiff] had no reason to further investigate her heightened-risk claim until after the release of the Independent Report and the subsequent media coverage in 2018.").

V. CONCLUSION

For these reasons, the Court is compelled to dismiss Plaintiffs' claims as barred by the statute of limitations.[9] In the words of the Supreme Court of Ohio:

> We conclude as we began: however reprehensible the conduct alleged, these

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[9] The Court therefore does not address whether Brian Garrett can otherwise state a claim under Title IX or whether punitive damages are available.

> actions are subject to the time limits created by the Legislature. Any exception to be made to allow these types of claims to proceed outside of the applicable statutes of limitations would be for the Legislature, as other States have done.

Archdiocese of Cincinnati, 849 N.E.2d at 279–80 (internal quotation marks and citations omitted). At all times since the filing of these cases, the Ohio legislature had the power, but not the will, to change the statute of limitations for these Plaintiffs. For all the reasons stated above, however, the Court is compelled to **GRANT** Ohio State's motion. The Clerk is **DIRECTED** to enter judgment for Ohio State and close the case.

IT IS SO ORDERED.

/s/ Michael H. Watson
MICHAEL H. WATSON, JUDGE
UNITED STATES DISTRICT COURT

20 U.S.C. § 1681

§1681. Sex

(a) Prohibition against discrimination; exceptions

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

(1) Classes of educational institutions subject to prohibition

in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;

(2) Educational institutions commencing planned change in admissions

in regard to admissions to educational institutions, this section shall not apply (A) for one year from June 23, 1972, nor for six years after June 23, 1972, in the case of an educational institution which has begun the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Secretary of Education or (B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students of only one sex to being an institution which admits students of both sexes, but only if it is carrying out

a plan for such a change which is approved by the Secretary of Education, whichever is the later;

(3) Educational institutions of religious organizations with contrary religious tenets

this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;

(4) Educational institutions training individuals for military services or merchant marine

this section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine;

(5) Public educational institutions with traditional and continuing admissions policy

in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex;

(6) Social fraternities or sororities; voluntary youth service organizations

this section shall not apply to membership practices—

(A) of a social fraternity or social sorority which is exempt from taxation under section 501(a) of title 26, the active membership of which consists primarily of students in

attendance at an institution of higher education, or

(B) of the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth service organizations which are so exempt, the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age;

(7) Boy or Girl conferences

this section shall not apply to—

(A) any program or activity of the American Legion undertaken in connection with the organization or operation of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(B) any program or activity of any secondary school or educational institution specifically for—

(i) the promotion of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(ii) the selection of students to attend any such conference;

(8) Father-son or mother-daughter activities at educational institutions

this section shall not preclude father-son or mother-daughter activities at an educational institution, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided for students of the other sex; and

(9) Institution of higher education scholarship awards in "beauty" pageants

this section shall not apply with respect to any scholarship or other financial assistance awarded by an institution of higher education to any individual because such individual has received such award in any pageant in which the attainment of such award is based upon a combination of factors related to the personal appearance, poise, and talent of such individual and in which participation is limited to individuals of one sex only, so long as such pageant is in compliance with other nondiscrimination provisions of Federal law.

(b) Preferential or disparate treatment because of imbalance in participation or receipt of Federal benefits; statistical evidence of imbalance

Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: *Provided*, That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt

of the benefits of, any such program or activity by the members of one sex.

(c) "Educational institution" defined

For purposes of this chapter an educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department.

20 U.S.C. § 1687

§1687. Interpretation of "program or activity"

For the purposes of this chapter, the term "program or activity" and "program" mean all of the operations of—

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section section[1] 7801 of this title), system of vocational education, or other school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

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1 So in original.

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance, except that such term does not include any operation of an entity which is controlled by a religious organization if the application of section 1681 of this title to such operation would not be consistent with the religious tenets of such organization.