

No. 21-3991

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

TIMOTHY MOXLEY, et al.,

Plaintiffs-Appellants,

v.

OHIO STATE UNIVERSITY,

Defendant-Appellee

On Appeal from the United States District Court for the Southern
District Of Ohio
No. 2:21-cv-03838 (Hon. Michael H. Watson)

**BRIEF OF NATIONAL CENTER FOR VICTIMS OF CRIME
AS *AMICUS CURIAE* IN SUPPORT OF
PLAINTIFFS-APPELLANTS**

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**AMICUS CURIAE’S IDENTITY, INTEREST,
AND AUTHORITY TO FILE¹**

The National Center for Victims of Crime (NCVC), a nonprofit organization based in Washington, D.C., is a leading resource and advocacy organization for all victims of crime. The mission of NCVC is to forge a national commitment to help victims of crime rebuild their lives. Dedicated to serving individuals, families, and communities harmed by crime, NCVC, among other efforts, advocates laws and public policies that create resources and secure rights and protections for crime victims. To that end, NCVC has filed amicus curiae briefs in cases across the country to advance the rights and interests of crime victims, including victims of sexual abuse.

This case involves issues that directly impact the victims of Dr. Strauss at The Ohio State University (“OSU”) and which are fundamental to the rights and interests of all sexual abuse victims. Amicus curiae submits this brief to assist the Court in understanding the prevalence of physicians sexually abusing patients and the complicated impact such abuse can have on the psyche of those victims. NCVC therefore aims to help this Court to understand that many patient-victims fail to recognize or understand that they have even been sexually abused due to the nuances and complications inherent in the physician-patient context.

¹ No counsel for any party authored this brief in whole or in part and no entity or person, aside from amici curiae and their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION

Sexual abuse is a problem endemic to society. Each year, hundreds of thousands of individuals are subject to sexual abuse, and among them, thousands suffer such abuse at the hands of a physician entrusted to care for their well-being. Abuse in this context is particularly harmful and confusing for victims. “It’s the sensitivity and confidentiality of a doctor’s visit, combined with the deference paid to people who work in white coats, that can leave a patient so confused and harmed when a physician abuses instead of heals, experts say.”² In fact, many patient-victims even fail to realize that they have been abused by physicians because such abuse was perpetrated under the guise of necessary medical care.³ A physician in a doctor-patient relationship holds a position of authority and they have specialized medical knowledge which the patient is seeking and relying upon. Therefore, the typical layperson would not necessarily be aware that medical treatment provided by a

² Ariel Hart & Carrie Teegardin, *Hurt that Doesn’t Heal*, ATL. JOURNAL-CONST., https://doctors.ajc.com/patient_stories_sexual_abuse_doctors/ nav (last visited Feb. 6, 2022).

³ See James M. Dubois, et al., Sexual Violation of Patients by Physicians: A Mixed-Methods, Exploratory Analysis of 101 Cases, 31 (5) SEXUAL ABUSE 503, 504 (2017) (“Most patient-victims do not report sexual violations Reasons for failing to report may include . . . being confused as to whether abuse occurred (e.g., not realizing that an ungloved vaginal exam was unnecessary.”); Carrie Teegardin, et al., *License to Betray*, ATL. JOURNAL-CONST., https://doctors.ajc.com/doctors_sex_abuse/?ecmp=doctorssexabuse_microsite_nav (last visited Feb. 1, 2022) (analyzing 100,000 disciplinary documents of physicians’ sexual misconduct and finding that some patients “didn’t realize at first what had happened because the doctor improperly touched them or photographed them while pretending to do a legitimate medical exam”).

trusted doctor was in fact actionable abuse nor the cause of any emotional trauma they may experience afterwards.⁴ Failure to recognize sexual abuse in the physician-patient framework is therefore both a pervasive and insidious problem.

The ruling of the district court below fails to recognize the reality of the above-described phenomenon. Further, its ruling fundamentally denies access to justice for survivors of sexual abuse. Survivors face enough hurdles as it is, including simply recognizing that they were in fact abused in the first place. If the district court's decision is upheld, it would codify a flawed understanding of the experiences of survivors and discredit the lived, and shared, experiences of victims of physician-inflicted sexual abuse.

The stories of victims are therefore presented to highlight the realities of abuse occurring within the doctor-patient context. Common threads run through their experiences. They are reliant upon doctors for necessary medical care; that reliance fosters a sense of trust in the doctor that he has their best interests at heart; trust leads to deference to the doctor, who is in a position of authority over the patient and in possession of superior medical knowledge; abuse occurs under the guise of providing necessary medical treatment; discomfort or doubt associated with an abusive act is then discounted as a medical exam or procedure the patient unfortunately needed to undergo; and the patient typically remains unaware that they

are even a victim until some event—usually other victims making their abuse known to them or to the public—enables them to fully understand what happened to them.

The complexities of sexual abuse occurring in this context, especially the inability of victims to even recognize abuse and the difficulties associated with making arrests and bringing cases to a successful prosecution, are therefore exploited by physicians who are able to become serial predators. In fact, the physicians discussed herein have abused hundreds if not thousands of men, women, and children—sometimes even in the presence of their parents in a medical examination room. Ultimately, the district court’s ruling rejects a vitally important distinction: one may experience emotional distress without understanding what caused such an injury, especially when it is injury inflicted by a trusted medical professional purported to be in the course of providing necessary medical treatment. Therefore, the district court’s ruling must be reversed.

ARGUMENT

I. Failure to recognize sexual abuse in the physician-patient context is a pervasive and insidious problem

Millions of people see their doctors every day across the country, so the opportunity for sexual misconduct and sexual abuse to occur in that context is staggering. However, until the Atlanta Journal-Constitution (“AJC”) published its national investigation of doctor sexual abuse cases in 2016, there was no accurate data about the extent of this problem. After analyzing more than 100,000 medical

board documents, the AJC found that more than 3,100 doctors had faced public accusations of sexual misconduct from just 1999 to 2015.⁵

This number obviously only takes into account those instances wherein patient-victims (1) recognize that they have been abused and (2) disclose that abuse to the state medical boards and (3) where the boards have made the allegation available for public review. In fact, many violations never come to the attention of state regulators as hospitals, clinics, and other doctors fail to report sexual misconduct. Moreover, the availability information regarding doctor-patient sexual abuse is sometimes arbitrarily limited by state medical boards: some states deal with sex cases in private and issue no public findings; others only have a few years' worth of orders on their websites; some post only sanctions without information regarding the nature of the underlying violation; other states use vague language or euphemisms to hide the true nature of disciplinary boards; and some state medical boards cease investigations altogether if an accused doctor surrenders his medical license.

However, the most important factor which would skew statistics regarding the phenomenon of doctor-patient abuse is the fact that many patients do not realize they have even been abused. Generally, “sexual assault survivors don’t report attacks by doctors to authorities—or even to loved ones—out of embarrassment or shame. Or

⁵ Carrie Teegardin, *supra* n.3.

out of pure shock, as was the case with 45 percent of women in our [Women’s Health-Rape, Abuse, and Invest National Network (RAINN)] survey.”⁶ But the lack of reporting is especially high in the doctor-patient abuse context. “The notion of the all-knowing, totally trustworthy doctor is so ingrained in our collective psyche that it makes some victims doubt their own judgment: Nearly 35 percent in our survey said they weren’t positive that anything wrong had actually happened.”⁷

Doctors are entrusted to care for the well-being of their patients. Physicians are especially trusted to both look at and physically examine the nude bodies of their patients. This places patient-victims in an especially vulnerable position because of the dynamics of this relationship. Many victims never think to question the behavior of their doctors and even when some second-guess their physician’s conduct, the inherent authority that their doctor possesses as a trusted medical professional overrides any doubt that what might have made the patient uncomfortable is actually actionable abuse. For instance, how is a patient to know when a doctor’s touch crosses the line into groping or fondling? What type of touch is never medically

⁶ Abigail Pesta, “First, Do No Harm,” WOMEN’S HEALTH, (Mar. 2, 2017), <https://www.womenshealthmag.com/life/a19642000/sexual-assault-by-doctors/>. In a survey conducted by Women’s Health and RAINN, of 500 women, 27 per cent indicated that they had been violated by a doctor—reporting everything from lewd comments to masturbation, inappropriate touching, and even rape. *Id.*

⁷ *Id.*

appropriate? When is discomfort with a medically necessary examination actually trauma inflicted by sexual abuse?

The firsthand accounts of victims are therefore essential to understand the complications inherent in the doctor-patient context. Their lived experiences illuminate the reality that victims of doctor sexual abuse regularly fail to recognize themselves as victims in the first place.

The AJC's investigative report highlights the stories of several victims of physician sexual abuse.⁸ One victim featured, Yvonne Vazquez, has filed a complaint in Cook County, Illinois, against Dr. Charles DeHaan, specifically alleging that the doctor saw her "under the guise of treating certain medical conditions" and that DeHaan "used his position of power as a licensed medical doctor and the person in control of her physical well-being to sexually assault her."⁹ Vazquez asserted that DeHaan pulled her shirt up and felt her breast while using a stethoscope. In her AJC interview, Ms. Vazquez explained informing her daughter of what occurred and recalls being laughed at; she immediately reconsidered what happened and assumed she must have been mistaken about what occurred.¹⁰ When media attention began focusing on DeHaan, Vazquez was able to recognize his conduct as abusive. In fact, DeHaan was accused of molesting numerous women

⁸ Hurt & Teegardin, *supra* n.2.

⁹ *Id.*

¹⁰ *Id.*

during medical appointments at their residences or in nursing homes and later pled guilty to aggravated battery in connection with those assaults.¹¹

Another survivor featured is Latoya “Koco” Davis, who was abused by Dr. Narendra K. Gupta.¹² Ms. Davis was groped by Dr. Gupta during a medical exam and recounted: “Honestly, even after him groping my breasts, some part of me still wanted to give him another chance. It was still like, ‘OK, no, Koco, you’re tripping. He did not just do that.’ Even though you just slapped his hands, because you did not feel comfortable, you still wanted to give him another chance because this is your doctor. He can help save your life. It will literally mess your head up. It will make you second question yourself on everything you do.”¹³ Ms. Davis was inappropriately touched and, even though her instinct was to literally swat her doctor’s hand away from her chest, she failed to recognize this as abuse in the moment. Moreover, she felt compelled to remain a patient of her abuser because he was providing necessary medical care to her. The specific kind of dependency and confusion a patient-victim experiences after doctor sexual abuse is unique to this dynamic.

¹¹ Robert McCoppin, “Former Doctor Accused of Molesting Patients Gets 9 Years After Pleading Guilty to Aggravated Battery; Already in Prison for Medicare Fraud,” CHICAGO TRIBUNE, (June 18, 2019), <https://www.chicagotribune.com/news/breaking/ct-former-doctor-gets-9-years-for-molesting-patients-20190618-aweq3qj3b5hl3d76qir4cr6kqy-story.html>.

¹² Hurt & Teegardin, *supra* n.2.

¹³ *Id.*

The complications presented by doctor-patient abuse is recognized, to an extent, by law enforcement because making arrests and bringing these types of cases to a successful prosecution is often times even more difficult than it would otherwise be with sexual abuse in another context. For instance, Dr. Jose A. Rios was accused by multiple women of groping them during medical exams and some of those women also contended that Rios abused their children as well.¹⁴ Specifically, one victim stated that Rios touched two brothers' genitals every time they had their annual exams, and their mother thought it was normal until she took one of them to another doctor who did not touch him there at all.¹⁵

Another woman detailed that the doctor would touch her son's testicles and pull his foreskin during physicals, and once opened her 1-year-old daughter's vagina with two fingers and touched her clitoris.¹⁶ Even though these women thought such practices were strange, they did not recognize such conduct as abuse and continued to take their children to Rios for years. One woman, who estimated that Rios examined her children's genitals about three to five times per year, was confused about the necessity of the practice but did not consider it actionable abuse: "I

¹⁴ Johnny Edwards, "Some Moms Accusing Doctor of Groping Say He Violated Kids, Too," ATL. JOURNAL-CONST., (Dec. 28, 2016), <https://www.ajc.com/news/local/some-moms-accusing-doctor-groping-say-violated-kids-too/UN4eITZsOITgu4IuNphQJM/>

¹⁵ *Id.*

¹⁶ *Id.*

thought, but why does he have to check his penis when I've brought him in because of a pain in his bones? Or for a fever?"¹⁷

Police tasked with investigating the accusations lodged against Dr. Rios went on record to say, "This is a pediatrician doing a medical exam on a child To prove that it was anything other than him doing his job is virtually impossible. . . ." ¹⁸

One investigator indicated they could not make a fair assessment of Rios's exams of these children since the investigator was not a doctor, and neither were the mothers leveling the accusation: "It's going to be hard to show that a doctor, when he's examining a child and touching their genitalia, was doing it for any other reason than for medical purposes."¹⁹ In fact, in civil lawsuits filed against Rios for this behavior, he raised the affirmative defense that any touching of minors was "standard procedure in a routine health maintenance physical examination."²⁰

The difficulties associated with prosecuting medical doctors who abuse patients and the failure of victims to even recognize abuse may contribute to the fact that some physicians become serial abusers who perpetrate assaults on multiple patients across many years.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

Dr. George Tyndall is a former gynecologist who practiced in Los Angeles working for the University of Southern California (“USC”). While at USC, he treated thousands of young women over the years, and was often many young women’s first time seeing a gynecologist. He was the subject of the largest sexual abuse investigation by one perpetrator in the history of the LAPD. He was arrested in 2019, and since then, hundreds of women have come forward alleging sexual abuse by Dr. Tyndall.²¹

Tyndall is currently facing 12 felony counts of sexual battery by fraud and 23 felony counts of sexual penetration of an unconscious person for the abuses he inflicted on patients over the course of years.²² One victim of Tyndall, who was subject to unnecessary breast and pelvic exams in which Tyndall did not even wear gloves, recently testified at Tyndall’s preliminary hearing, stating “I was embarrassed and horrified that this was happening I was telling myself, ‘You’re just being sensitive . . . He’s a professional, he’s not going to be doing anything weird.’”²³ This survivor further testified that she realized what Tyndall was doing

²¹ Harriet Ryan, et al., “Must Reads: A USC Doctor was Accused of Bad Behavior with Young Women for Years. The University Let Him Continue Treating Students,” LA TIMES (May 16, 2018), <https://www.latimes.com/local/california/la-me-usc-doctor-misconduct-complaints-20180515-story.html>.

²² City News Service, “2 Women Testify Against George Tyndall, Former USC Gynecologist Accused of Multiple Sexual Assaults,” ABC7, (Dec. 1, 2021), <https://abc7.com/usc-gynecologist-victims-testimony/11289860/>.

²³ *Id.*

"felt wrong," but was convinced his conduct could not be wrong "because Tyndall was a medical professional."²⁴

Dr. Robert Hadden was also a serial abuser gynecologist who worked primarily out of Columbia University Medical Center and New York-Presbyterian Hospital. He abused at least 79 women over his years as a physician, and is now a convicted felon for his actions as a doctor. The hospitals jointly settled with 79 victims for 71.5 million dollars in 2019.²⁵ One survivor of Hadden's abuse described her experience: "I believed that everything he was doing was medically necessary and giving me the best care . . . It wasn't until after the fact that I realized this was not what it was supposed to be."²⁶ Hadden had instructed the victim that he needed to inspect her Brazilian wax for "red sports and irritation," performed inappropriate breast examinations wherein he pinched her nipples for long periods of time, and

²⁴ *Id.*

²⁵ Sonia Moghe, "Some Victims of Former New York Gynecologist Robert Hadden Reach \$71.5 Million Settlement," CNN, (Dec. 1, 2021), <https://www.cnn.com/2021/12/01/us/hadden-columbia-university-gynecologist-settlement/index.html>.

²⁶ Kathy Fang & Elizabeth Karpen, "175 Women Alleged Sexual Abuse Against a Columbia Gynecologist. Five Years After His Conviction, They're Still Fighting to be Heard," COLUMBIA SPECTATOR, (Mar. 26, 2021), <https://www.columbiaspectator.com/news/2021/03/26/175-women-alleged-sexual-abuse-against-a-columbia-gynecologist-five-years-after-his-conviction-theyre-still-fighting-to-be-heard/>.

improperly administered an HPV vaccination to her by injecting it into her buttocks instead of her arm.²⁷

Dr. Robert Anderson was employed at the University of Michigan (“UM”) as a physician and the director of University Health Services from 1966 until 2003. During that time, Anderson abused over 1,000 students who sought medical attention from him in what can be considered the largest example of sexual exploitation by one person in U.S. history.²⁸ A number of Anderson’s victims, most prominently former football players, have publicly told stories of the physician fondling them and repeatedly performing unnecessary rectal and genital exams during their years at the school. Former UM football player Jon Vaughn recalled that he did not understand Anderson’s medical examinations to be abusive at the time they occurred: “We trusted our doctors, and especially trusted UM doctors—who wouldn’t? Now in 2021, as a 51-year-old man, I know that we were abused, assaulted, raped.”²⁹ Experts commenting on the sheer breadth of Anderson’s abuse

²⁷ *Id.*

²⁸ Larry Bernstein, “In Larry Nassar’s Shadow, a Larger Sex Abuse Case at the University of Michigan,” WASH. POST (Sept. 23, 2021), https://www.washingtonpost.com/health/robert-anderson-university-of-michigan-sex-abuse/2021/09/22/4fc38052-f541-11eb-9068-bf463c8c74de_story.html.

²⁹ Kate Weiland, “Anderson and Nassar Survivors Testify at Hearing, Express Support for House Bills Protecting Survivors of Abuse,” MICH. DAILY (Sept. 30, 2021), <https://www.michigandaily.com/news/administration/anderson-and-nassar-survivors-testify-at-hearing-express-support-for-house-bills-protecting-survivors-of-abuse/>.

noted that the common thread that runs through survivors' accounts was that they deferred to Anderson because he was a doctor; his unique position of authority and the context in which he perpetrated his assaults thus enabled him to abuse so many for so long. "Medicine is unique among professions in that every physician has the right to say, 'Please undress, we're going to be alone in a room together and I'm going to touch you Every physician has the means to abuse that other professionals do not.'"³⁰

Numerous patients whom Dr. Larry Nassar sexually abused have spoken publicly about the struggle they faced to recognize his actions as abuse because he presented it as legitimate medical treatment. Rachael Denhollander, the first victim to come forward, noted that he abused her while her mother accompanied her on medical visits while she was a minor—contributing to her sense that the actions constituted treatment. In some cases, mothers who were in the room while he abused their children helped convince those children that what had happened had been treatment. Donna Markham testified that she told her crying daughter, "Chelsea, I was right there in room," dismissing her obvious distress after a visit.³¹ Even without

³⁰ Bernstein, *supra* n.28 (quoting James DuBois, director of the Bioethics Research Center at Washington University in St. Louis, who has conducted one of the few recent reviews of physicians who commit sexual abuse).

³¹ Sonia Moghe and Lauren Del Valle, *Larry Nassar's abuse victims, in their own words*, CNN (Jan. 17, 2018), <https://www.cnn.com/2018/01/16/us/nassar-victim-impact-statements/index.html>.

a parent dismissing their feelings, many of his victims, like Jennifer Rood Bedford, noted that that they'd personally "rationalized—he's a doctor, he's treating you, he didn't mean for that to happen"—instead of recognizing his actions as abuse.³²

As with other doctors affiliated with colleges, Nassar's position of authority at Michigan State University facilitated his abuse by reinforcing the idea that his actions constituted legitimate treatment. Carrie Hogan, whom Nassar abused when she was a softball player at Michigan State University, noted that on campus it was a "privilege" to be treated by Nassar because of his reputation there as "the best of the best."³³ A coach testified to sending "well over 100 kids to him over the years," an endorsement and imprimatur that built trust with victims, lent credence to the guise of treatment, and heightened the resulting betrayal.³⁴ Sometimes the endorsement was far more explicit. One victim who tried to report, Amanda Thomashow, testified that "Michigan State University, the school I loved and trusted, had the audacity to tell me that I did not understand the difference between sexual assault and a medical manipulator."³⁵

And as with other doctors, like Tyndall, Nassar's victims often did not realize that they had been assaulted until years later. Jessica Thomashow testified that she

³² *Larry Nassar Case: the 156 women who confronted a predator*, BBC News (Jan. 25, 2018), <https://www.bbc.com/news/world-us-canada-42725339>.

³³ *Id.*

³⁴ *Larry Nasser's abuse victims, in their own words*, *supra* n.31.

³⁵ *Id.*

did not “put the pieces together and realize[] I was molested” until “the first Indy Star article came out,” decades after Nassar had begun abusing girls and women.³⁶ Another, Olivia Cowan, explained feeling “disbelief” when she “realized that what I had thought was medical treatment over 10 years” was actually sexual abuse.³⁷ Another, Kate Mahon, explained that she had even initially thought that the first “women that reported the sexual assault must be mistaken,” before realizing that it was not legitimate treatment and that “I had also gone through the same abuse.”³⁸ The commonality of that reaction only underscores the frequency with which victims do not realize they have suffered abuse, often for years, and especially in situations involving abuse by medical doctors presented as legitimate treatment.

Dr. Johnnie Barto is a particularly unnerving yet instructive example of how trusting patients are and how brazen doctors can be in committing sexual abuse because they know patients struggle to discern the difference between misconduct and medical care. Dr. Barto was a pediatrician working primarily in Johnstown, Pennsylvania, who committed countless assaults on children. Unsuspecting families brought their vulnerable children to Barto for years, seeking necessary medical care. Barto has admitted to sexually assaulting more than two dozen children during the

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

four decades he practiced medicine, and that most were victimized in the examination room of Laurel Pediatric Associates.³⁹

For instance, in 2016, a family brought their 4-day-old daughter to Barto for an examination. In the examination room, in full view of the newborn's parents, Barto digitally penetrated the infant's vagina, without gloves, causing her to cry. When the child's parents asked what he was doing to their daughter, Barto reassured them that his ungloved digital penetration was a routine component of newborn checkups. The family brought their daughter back to Barto approximately two weeks later for another check-up. Barto again, in the presence of the child's parents, digitally penetrated the two-week-old infant's vagina without wearing gloves. The family of the child only understood these vile acts to be sexual abuse and not done for any medical purposes when news of Barto's arrest for sexual misconduct made the news.

Unfortunately, and shockingly, this family is not alone in their experiences with Barto. Also in 2016, another family brought their two-year-old daughter to Barto. Barto, again ungloved, digitally manipulated the child's vagina and had her sit on his lap in the examination room on multiple occasions. The child's parent

³⁹ Corky Siemaszko, "For Decades, a Sexual Predator Doctor Groomed this Community to Believe He Could Do No Wrong," NBC News (March 17, 2019), <https://www.nbcnews.com/news/us-news/decades-sexual-predator-doctor-groomed-community-believe-he-could-do-n982131>.

described that, during these check-ups, Barto would examine his daughter's vagina without gloves, and would spread her vagina open to point out different parts of the female genitalia and explain developmental stages of female genitalia to him. This abuse also continued to when the child was three years old. The child's father then discussed this type of "treatment" with other pediatricians who informed him that such behavior was inappropriate. However, he did not recognize it as abusive until news broke regarding the breadth of Barto's sexual abuse. In 2019, Barto pled guilty to multiple counts of aggravated indecent assault and was sentenced to 71 to 158 years in state prison for his criminal conduct involving 31 victims.⁴⁰

II. The district court erred in failing to account for the context in which Plaintiffs were abused, making it less likely that Plaintiffs even realized they had faced sexual abuse

In this case, Plaintiffs brought suit against OSU for the abuse they suffered at the hands of Dr. Strauss while students and athletes at OSU. Beginning in 1978 and over the course of decades, Strauss sexually abused Plaintiffs and hundreds of other OSU students. For years, OSU facilitated, sanctioned, ratified, covered up, and

⁴⁰ Jocelyn Brumbaugh, "Barto Faces at Least 79 Years in Prison; His Wife Says Former Pediatrician's 'Whole Sinister Life' of Child Abuse was a Secret," THE TRIBUNE-DEMOCRAT (Mar. 19, 2019), https://www.tribdem.com/news/watch-video-barto-faces-at-least-79-years-in-prison-his-wife-says-former-pediatricians/article_a486b79a-499e-11e9-9886-436953056979.html.

otherwise permitted this abuse to continue. In 2018 OSU finally announced it was opening an investigation into Strauss's misconduct.

OSU's announcement of this investigation illuminated many things for Plaintiffs: (1) that what Strauss subjected them to years ago was in fact sexual abuse and *not* appropriate conduct done in the course of providing medical treatment;⁴¹ and (2) that Strauss's misconduct was not relegated to them individually, but was a widespread practice that was known to and suppressed by OSU for years. Thus, prior to OSU's 2018 announcement, the vast majority of Plaintiffs were completely unaware that they had a cause of action against anyone, let alone OSU, for Strauss's conduct towards them.

The district court granted OSU's motion to dismiss their complaint on the ground that Plaintiff's Title IX claims were barred by the applicable statute of limitations. The court's decision rationale was finding that Plaintiffs knew or should have known they suffered an injury either during Strauss's abusive medical examinations or shortly thereafter. The court rejected any notion that the Plaintiffs did not comprehend what occurred to them was abuse, citing the fact that a complaint in another, similar, case alleged that some plaintiffs were uncomfortable with their examinations and discussed this discomfort with others as evidence that *all* plaintiffs

⁴¹ In fact, in the present case, Perkins Coie needed to hire two independent doctors to provide input on the medical necessity or appropriateness of Strauss's reported procedures.

knew or should have known that Dr. Strauss's examinations were actionable sexual abuse.

In so doing, the court improperly conflated Plaintiffs' discomfort and even discussion with others about Strauss's actions with Plaintiffs' full comprehension that the events they were describing were actually abuse and not simply a necessary medical procedure which may have made them upset. Plaintiffs knew they had struggled throughout their lives, but did not understand that the cause of that trauma was the sexual abuse they endured at the hands of Dr. Strauss because they the vast majority did not recognize his actions as abusive.

The fundamental flaw with the district court's decision is that it fails to recognize the context in which Dr. Strauss's abuse of Plaintiffs took place. As described above, sexual abuse in the doctor-patient context can be incredibly nuanced and confusing. Most patient-victims fail to recognize abuse because it is perpetrated by a doctor under the guise of medical treatment. Any discomfort or doubt associated with an abusive act is often discounted because patients exhibit deference towards trusted professionals who have superior knowledge and are purported to have their best interest at heart. Expecting every patient-victim, including Plaintiffs herein, to overcome all of the complications associated with recognizing abuse in this context is simply asking too much of them. It is not

reasonable to expect such understanding and to do so would ignore the reality faced by these victims. Unfortunately, the district court's decision does just that.

The district court based its decision regarding Plaintiffs' knowledge of Strauss's abuse on an erroneous finding that the complaint was replete with allegations that Plaintiffs were concerned and felt violated by Strauss's conduct. However, this is a false equivalence and acts as the faulty foundation upon which the rest of the court's decision is built. None of the factual allegations referenced by the district court are inconsistent with Plaintiffs' contention that they did not realize they had been abused by Dr. Strauss until years later.

The district court's assertion that Strauss's behavior being an "open secret" on campus and that some athletes would joke about his conduct during medical exams amounts knowledge of abuse is a fatal flaw. Again, the court conflates what acts were known and made the subject of jests amongst students—that Strauss would touch male students' genitals during medical exams—with what the vast majority of Plaintiffs understood or knew to be abuse. In truth, the Plaintiffs only knew that they underwent medical examinations which may have made them uncomfortable or confused.

Ultimately, the dynamics of the doctor-patient relationship prevented the vast majority of Plaintiffs from realizing they were abused *and* that they should further investigate the conduct that made them feel so uncomfortable. Dr. Strauss's conduct was not understood to be actionable abuse, so there was absolutely no reason for the

vast majority of Plaintiffs to further inquire about Dr. Strauss or as to OSU's role in causing them any injury.

Plaintiffs' factual allegations are consistent with the lived and shared experiences of patient-victims across the country and the district court failed to recognize the realities inherent in doctor-patient sexual abuse. Simply put, the district court is wrong to have assumed that Plaintiffs should have recognized Dr. Strauss's sexual abuse and further learned that OSU was responsible. The ruling of the district court below, if upheld, would add yet another profound and unwarranted consequence: the impossibility of securing justice for survivors who do not immediately recognize these experiences as sexual abuse. Therefore, the district court's ruling dismissing Plaintiffs' complaint must be reversed.

CONCLUSION

“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, Colorado v. Bechtel Corp.*, 599 F.2d 382, 387-88 (10th Cir. 1979). Plaintiffs in this case suffered sexual abuse under the guise of necessary medical treatment from a trusted physician held out by OSU as fit to administer said treatment when the university was well aware that he was abusing students. The vast majority of Plaintiffs had no reason to know that they were injured by Dr. Strauss.

The nuances and complications of the doctor-patient relationship obscure victims' ability to delineate between medical care and actionable sexual abuse. The district court imposes too great a burden on victims of doctor sexual abuse to recognize and know what is extremely difficult for someone in their position to identify and understand. Its decision fails to acknowledge the realities of sexual abuse committed within this dynamic and improperly assumes that Plaintiffs had the ability to recognize the abuse committed by Dr. Strauss. Despite the discomfort or confusion that some Plaintiffs felt in the wake of their experience with Dr. Strauss, the vast majority Plaintiffs did not realize until 2018 that they were in fact abused *and* that OSU was responsible for it. The district court's judgment must be reversed.

Respectfully Submitted,

Dated: February 9, 2022

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7) because it contains 5,495 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman type.

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CERTIFICATE OF SERVICE

I hereby certify that on February 9, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system.

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