CASE NO. 21-3981

In the United States Court of Appeals for the Sixth Circuit

STEVE SNYDER-HILL, ET AL.,

Plaintiffs-Appellants,

– v.–

THE OHIO STATE UNIVERSITY,

Defendant-Appellee.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

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STATEMENT PURSUANT TO FED. R. APP. P. 29(a)(4)(E)

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), proposed *amici curiae* state as follows: no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparation or submission of the brief; and no person other than counsel for proposed *amici curiae* contributed money that was intended to fund preparation or submission of the brief.

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INTEREST OF THE *AMICI CURIAE*

Amici curiae are seventeen law professors: Pamela Bookman (Fordham), Guy Uriel Charles (Harvard), Kevin M. Clermont (Cornell), Brooke Coleman (Seattle), Robin Effron (Brooklyn), Helen Hershkoff (NYU), William H. J. Hubbard (Chicago), Tom Mayo (SMU), Arthur R. Miller (NYU), Portia Pedro (BU), Cassandra Burke Robertson (Case Western), Elizabeth M. Schneider (Brooklyn), Michael E. Solimine (Cincinnati), Adam N. Steinman (Alabama), Elizabeth G. Thornburg (SMU), Charles E. Wilson (OSU), and Adam Zimmerman (Loyola).[1] They, collectively, research, write and teach about civil procedure, federal courts, and complex litigation.

Amici believe their understanding of this area of law can assist this Court in considering the issues presented on this appeal. First, as law professors, *amici* have an interest in civil procedure law, and a particular interest in the proper and consistent application of civil procedure principles by federal courts. Second, as educators, *amici* have a strong interest in educational environments free from harassment and sexual violence; they therefore have a strong interest in the proper application of Title IX and the full enforcement of its private right of action.

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[1] *Amici*'s biographies are included in the accompanying motion for leave; institution names are provided for purposes of identification only. The views expressed in this brief do not reflect the views of the institutions with which *amici* are affiliated.

SUMMARY OF ARGUMENT

Title IX is a remedial civil rights provision enacted to combat sex discrimination, including sexual abuse, in education programs or activities that receive federal financial assistance. A Title IX claim can only be asserted against an education institution, not individuals, and because there is no *respondeat superior* liability under Title IX, merely employing a sexual predator does not give rise to a Title IX claim.

Because Title IX contains no congressionally enacted limitations period, federal courts must use federal common law to fill that void, generally by borrowing a state time period. They do so as a matter of judicial discretion guided by well-developed principles, among them that such interstices cannot be filled with law that frustrates or interferes with the federal right. Consistent with that practice, in this Circuit, Ohio-based Title IX claims are governed by the two-year limitations period applicable to claims for bodily injuries.

The crux of this appeal concerns when that two-year period starts to run. Even when borrowing a state time period to fill a limitations gap, federal courts employ a federal common law accrual rule. For federal claims, like Title IX, where essential facts may be unknown to the plaintiff, the federal discovery rule provides that the limitations period does not begin running until the plaintiff knows or, by the exercise of reasonable diligence should have known, that he had been injured by the *conduct*

of the defendant. For a Title IX claim, the relevant "conduct of the defendant" is not the physical injury visited on the plaintiff by the sexual abuser. Rather, the "conduct of" an institution that creates a Title IX claim is (a) actual knowledge of abuse and (b) deliberate indifference to it. Until both of these requirements are met, a Title IX claim does not arise. Similarly, a claim under 42 U.S.C. § 1983 does not arise against a municipality simply because an employee allegedly violates the plaintiff's civil rights; instead, to assert a § 1983 claim against a municipality, the plaintiff must plead (and ultimately prove) the facts required by Monell v. Department of Social Services of the City of New York, 436 U.S. 658 (1978). For both Title IX and § 1983, merely pleading that an institution employs a sexual abuser fails to state a claim against the employer.

The court below misapplied the applicable federal common law accrual rule. Instead, it both divorced the Ohio time period it borrowed from its context and misapplied the generally applicable federal common law discovery rule to produce a result that renders illusory Title IX claims by wrongly reaching a factual finding at the pleadings stage that, despite the complaint's allegations to the contrary, every plaintiff knew that Dr. Strauss's medical treatment was in fact sexual abuse and that their knowledge that Strauss was employed by the university alone meant they knew, or should have known, that the university was both aware of his sexual abuse and deliberately indifferent to it.

Ironically, if this case could have been brought in Ohio state courts, they would likely refuse to apply the rule the court below embraced in light of Schmitz v. National Collegiate Athletic Association, 122 N.E.3d 80 (Ohio 2018). There, consistent with the federal common law discovery rule, the Ohio Supreme Court held that the "[d]iscovery of physical injury alone is insufficient to start the [two-year bodily injury limitations period from] running if at that time there is no indication of tortious conduct [of the defendant] giving rise to a legal claim." Schmitz, 122 N.E.3d at 87 (citation omitted). The effect of the rule adopted below, Schmitz held, would "provide[] the plaintiff with only an illusory opportunity to litigate his or her claim." Id. at 86 (quoting Liddell v. SCA Servs. of Ohio, Inc., 635 N.E.2d 1233, 1239 (Ohio 1994)).

This Court should reverse the ruling below. The complaint ("SAC") alleged that none of the plaintiffs knew, or with the exercise of diligence could have known, sufficient facts to plead a Title IX claim against the defendant ("OSU") until 2018, when an extensive investigation into Dr. Strauss was launched in the wake of press stories about another physician's abuse of athletes at another university, ultimately revealing that OSU had actual knowledge of Strauss's abuse and was deliberately indifferent to it. A proper application of the applicable federal discovery rule required denying OSU's Rule 12(b)(6) motion; whether the SAC's lack of

knowledge allegations will be persuasive after discovery is something to be tested at summary judgment or trial.

ARGUMENT

I. Title IX's History, Purpose, and Scope

Title IX of the 1972 Education Amendments to the Civil Rights Act, 20 U.S.C. § 1681 *et seq.*, prohibits sex discrimination, including sexual abuse, in education programs or activities that receive federal financial assistance. "[L]ike its model," Title VI of the Civil Rights Act of 1964, Title IX was enacted "to accomplish two related, but nevertheless somewhat different, objectives. First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices." Cannon v. Univ. of Chicago, 441 U.S. 677, 704 (1979). Although neither statute explicitly authorizes a private remedy, Cannon held there was an implied private cause of action under Title IX. See id. at 717. Further, ten years after Cannon, Congress implicitly affirmed a private right of action under Title IX when it passed the Civil Rights Restoration Act of 1987 to broaden the definition of the "program or activity" language in Title IX to cover all operations of an entity receiving federal financial assistance. Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60, 73 (1992).

Title IX is meant to "provide[] 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) (citations omitted), and is to be read expansively: "Title IX's application should be accorded 'a sweep as broad as its language.'" Doe v. Claiborne Cnty., Tenn. By & Through Claiborne Cnty. Bd. of Educ., 103 F.3d 495, 513-14 (6th Cir. 1996) (citation omitted); see also Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 175 (2005) ("'Discrimination' is a term that covers a wide range of intentional unequal treatment; by using such a broad term, Congress gave the statute a broad reach.") (citation omitted).

Unlike claims brought under 42 U.S.C. § 1983, Title IX claims can only be brought against institutions. "Title IX does not provide for individual liability; only 'a recipient of federal funds may be liable in damages under Title IX' and '*only for its own misconduct*.'" Bose v. Bea, 947 F.3d 983, 988 (6th Cir. 2020), cert. denied, 141 S. Ct. 1051 (2021) (emphasis added) (quoting Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 640 (1999). See also Soper v. Hoben, 195 F.3d 845, 854 (6th Cir. 1999).

An institution has no Title IX liability merely because it employs an abuser; there is no *respondeat superior* liability under Title IX. See Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 285, 292-93 (1998). Instead, to survive dismissal, a Title IX claim must plead that the relevant institution had actual knowledge of the sexual abuse and was deliberately indifferent to it. See id. As this Court has explained:

> In *Gebser*, 524 U.S. at 287-88, 118 S. Ct. 1989, the Supreme Court rejected vicarious liability and constructive notice as bases for Title IX liability. For a plaintiff to proceed on a claim against an educational institution under Title IX, a plaintiff must establish a prima facie case showing that: 1) she was subjected to *quid pro quo* sexual harassment or a sexually hostile environment; b) she provided actual notice of the situation to an 'appropriate person,' who was, at a minimum, an official of the educational entity with authority to take corrective action and to end discrimination; and c) the institution's response to the harassment amounted to 'deliberate indifference.'

Klemencic v. Ohio State Univ., 263 F.3d 504, 510 (6th Cir. 2001) (citation omitted).

"Deliberate indifference, as the phrase suggests, presents a 'high bar' to imposing Title IX liability on a university," Foster v. Bd. of Regents of Univ. of Mich., 982 F.3d 960, 965 (6th Cir. 2020) (en banc) (citation omitted), one that is not met merely because the institution employed the abuser. Rather, a Title IX claim "has two separate components, comprising separate-but-related torts by separate-and-*un*related tortfeasors: (1) 'actionable harassment' by [someone] . . . ; and (2) a deliberate-indifference intentional tort by the school." Kollaritsch v. Mich. State Univ. Bd. of Trs., 944 F.3d 613, 619-20 (6th Cir. 2019) (emphasis in original) (citations omitted) (post-assault claim). Therefore, a Title IX claim does not arise until, and will not survive merits dismissal unless, the plaintiff can plead facts plausibly alleging (a) abuse, and (b) the defendant institution's deliberate indifference.

II. Filling Gaps in Federal Legislation

For more than a century, federal courts applied state law to fill lacunae in federal legislation based on a mistaken belief that they were compelled to do so by the Rules of Decision Act ("RDA"), 28 U.S.C. §1652.[2] In 1939, the Supreme Court corrected that reading of the RDA, holding that filling gaps in federal legislation was not a matter of legislative compulsion but judicial discretion informed by the nature of the claim and an analysis of available options.[3] In exercising that discretion, courts often look to state law, which generally has the benefit of an established track record, and accordingly minimizes unintended consequences flowing from adopting a rule that has not been exposed to the tests of time.[4] Because filling gaps in federal law is a matter of judicial discretion, federal courts are not bound to borrow any particular rule. Rather, they must analyze both the nature of the federal right in

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[2] See, e.g., M'Cluny v. Silliman, 28 U.S. 270 (1830); Campbell v. City of Haverhill, 155 U.S. 610 (1895). See generally M. Lowenthal, et al., Special Project, Time Bars in Specialized Federal Common Law: Federal Rights of Action and State Statutes of Limitations, 65 CORNELL L. REV. 1011, 1024-38 (1980) (hereinafter "Time Bars").

[3] Bd. of Comm'rs v. United States, 308 U.S. 343, 351-52 (1939); Holmberg v. Armbrecht, 327 U.S. 392, 395-96 (1946); Reed v. United Transp. Union, 488 U.S. 319, 323-24 (1989); N. Star Steel Co. v. Thomas, 515 U.S. 29, 33-34 (1995); Wilson v Garcia, 471 U.S. 261, 271-73 (1985). See generally Time Bars, supra note 2, at 1038-42.

[4] Time Bars, supra note 2, at 1043-45.

question and potential gap-fillers, and select law that best fits with the national policies embodied in the federal right.[5]

Further, the Supremacy Clause compels federal courts to reject borrowing any law that would undermine or discriminate against the federal right. Felder v. Casey, 487 U.S. 131, 151 (1988) (rejecting borrowing laws that "impose unnecessary burdens upon rights of recovery authorized by federal laws") (citation omitted); Occidental Life Ins. Co. v. Equal Emp. Opportunity Comm'n, 432 U.S. 355, 367 (1977) (rejecting borrowing law that would "frustrate or interfere with the implementation of national policies").[6] Accordingly, federal courts will not fill gaps

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[5] Felder v. Casey, 487 U.S. 131, 139 (1988) ("Any assessment of the applicability of a state law to federal civil rights litigation, therefore, must be made in light of the purpose and nature of the federal right."). See Time Bars, supra note 2, at 1057-78.

[6] See, e.g., Reed v. United Transp. Union, 488 U.S. 319, 324 (1989) ("'State legislatures do not devise their limitations periods with national interests in mind,' however, 'and it is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies.'") (quoting Occidental, 432 U.S. at 367); Battle v. Ledford, 912 F.3d 708, 715 (4th Cir. 2019) (refusing to apply Virginia's general no-tolling rule to a prisoner seeking to bring a § 1983 claim, because to do so would "frustrate[] the goals of § 1983 and is thus clearly 'inconsistent' with settled federal policy") (citation omitted); Donovan v. Square D Co., 709 F.2d 335, 337 (5th Cir. 1983) (explaining that "state limitations periods will not be borrowed if their application would 'frustrate or interfere with the implementation of national policies'") (quoting Occidental, 432 U.S. at 367). See generally, Time Bars, supra note 2, at 1045-55.

in Congressional legislation with law that undermines or interferes with the applicable federal right.

Such would be the result if, for example, Ohio had adopted a limitations period explicitly applicable to Title IX claims that would start running from the moment the plaintiff was sexually abused. Without the facts needed to plead the wrongful "conduct of the defendant" – the institution's actual knowledge and deliberate indifference – the plaintiff could not successfully file a Title IX claim. Because there is no vicarious liability under Title IX, merely pleading that the defendant employed the abuser would, as a matter of law, be insufficient to survive a motion to dismiss. Forcing the plaintiff to file a dismissible claim before he can plead a viable one unduly burdens the federal right and renders it illusory. Accordingly, if using that hypothetical Ohio law to fill the Title IX limitations gap would lead to that outcome, federal courts could not borrow that law.

While this appeal does not require the Court to determine what Ohio would do if this case were filed in Ohio courts, actual Ohio law does not appear to pose the dilemma the hypothetical law would. The Ohio Supreme Court recently held that in cases like this one – where the plaintiff cannot plead a viable claim because he does not know the institution committed an actionable wrong against him – the two-year bodily injury period contained in R.C. § 2305.10(a) does not begin to run until the plaintiff knows or should have known "'that he had been injured by *the conduct of*

the defendant.'" Schmitz, 122 N.E.3d at 86 (emphasis added) (quoting O'Stricker v. Jim Walter Corp., 447 N.E.2d 727, 727 (Ohio 1983)). A contrary rule – like the one adopted by the court below – leaves "'the plaintiff with only an illusory opportunity to litigate his or her claim.'" Schmitz, 122 N.E.3d at 86 (quoting Liddell, 635 N.E.2d at 1239).

Here, the trial court (1) applied the Ohio two-year period but severed it from when the Ohio Supreme Court itself held that period starts to run, and (2) misapplied the federal discovery rule in two ways, (a) by wrongly assuming that all Plaintiffs knew that Strauss abused them, when the vast majority alleged they lacked any such knowledge, and (b) by holding that mere knowledge that OSU employed Strauss meant that all Plaintiffs were, or should have been, aware that OSU had perpetrated a Title IX wrong against them, even though the SAC pleads that no Plaintiff knew OSU was aware of Strauss's abuse, much less knew that OSU condoned and enabled that abuse. As a result, scores of sexually abused plaintiffs have been deprived of their day in court. This is neither consistent with Title IX's remedial purposes nor compelled by any legislative act, or the failure of a legislature to act, but is instead the result of an incorrect application of settled law.

III. Plaintiffs Timely Filed Their Federal Title IX Claims

A. The Federal Common Law Discovery Rule

Title IX is a federally created right of action. For Ohio-based Title IX claims, federal courts borrow Ohio's two-year limitations period for bodily injury claims, R.C. § 2305.10(A), Lillard v. Shelby Cnty. Bd. of Educ., 76 F.3d 716, 729 (6th Cir. 1996), and apply a federal common law discovery rule to determine when the claim accrues and thus the limitations period starts to run. See Wallace v. Kato, 549 U.S. 384, 388 (2007); Rotella v. Wood, 528 U.S. 549, 555 (2000) ("Federal courts . . . generally apply a discovery accrual rule when a statute [lacks a limitations period]") (citation omitted).

"The general federal [discovery] 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 [a] his injury and [b] the cause of that injury.'" Bishop v. Child.'s Ctr. for Developmental Enrichment, 618 F.3d 533, 536-37 (6th Cir. 2010) (quoting Campbell v. Grand Trunk W. R.R. Co., 238 F.3d 772, 775 (6th Cir. 2001)).

The discovery rule is intended to further the national policies embodied in the applicable federal right. While a legislature can choose to cabin narrowly a right it creates (such as by enacting repose periods, discussed below), when courts must supply limitations law because of Congressional silence, and particularly when such rights are remedial, as with Title IX, the law courts apply must further, rather than

restrict or narrow, the federal right. The federal discovery rule furthers these policies.

First, a rule that would bar a right of action before a plaintiff even could plead the claim cannot "be reconciled with the traditional purposes of statutes of limitations," Urie v. Thompson, 337 U.S. 163, 170 (1947), which include two counter-balanced promotional interests. "On the one hand, they provide plaintiffs with an incentive to bring suit quickly; on the other, they allow plaintiffs enough time to vindicate their rights." Time Bars, supra note 2, at 1018.

Second, the discovery rule furthers Title IX by dis-incentivizing institutions from covering up their misconduct in the hopes of running out the limitations clock. See Norgard v. Brush Wellman, Inc., 766 N.E.2d 977, 981 (Ohio 2002) ("By applying the discovery rule as we do, we take away the advantage from employers who conceal harmful information from their employees until it is too late for their employees to use it.").

Third, the discovery rule comports with basic notions of fairness. It is fundamentally unfair for a court to bar a victim from pursuing a remedy when, through no fault of his own, the victim is unaware – because essential facts are unknown to him – that he has a right of action in the first place. "We do not think the humane legislative plan intended such consequences to attach to blameless ignorance." Urie, 337 U.S. at 170. This is particularly true given Title IX's remedial

purposes. "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, Colo. v. Bechtel Corp., 599 F.2d 382, 387-88 (10th Cir. 1979) (citation omitted). See Oliver v. Kaiser Cmty. Health Found., 449 N.E.2d 438, 441 (Ohio 1983) ("[u]se of the discovery rule eases the unconscionable result to innocent victims who by exercising even the highest degree of care could not have discovered the cited wrong").

B. Under the Federal Discovery Rule, a Limitations Clock Does Not Start Until a Plaintiff Knows or Should Have Known Both His Injury and that the Defendant Caused It

Bishop held that a federal claim does not accrue for limitations purposes under the federal discovery rule until the plaintiff can, or should be able to, plead "both his injury and the cause of that injury." 618 F.3d at 536 (citation omitted). Thus, "[a] plaintiff's awareness [under the discovery rule] encompasses two elements: '(1) The existence of the injury; and (2) causation, that is, the connection between the injury and the *defendant's* actions.'" Piotrowski v. City of Houston, 237 F.3d 567, 576 (5th Cir. 2001)) (emphasis added) (citation omitted). See also Amburgey v. United States, 733 F.3d 633, 636 (6th Cir. 2013) (claim accrues "when [plaintiff] 'knows both the existence and the cause of his injury'") (quoting United States v. Kubrick, 444 U.S. 111, 113 (1979)). Accord Ouellette v. Beaupre, 977 F.3d 127, 136 (1st Cir. 2020) ("[P]ursuant to the federal discovery rule, accrual is delayed until the

plaintiff knows, or should know, of those acts. Specifically, a plaintiff must, or should, be aware of both the fact of his or her injury and the injury's likely causal connection with the putative defendant.") (citations omitted); A.Q.C. ex rel. Castillo v. United States, 656 F.3d 135, 140 (2d Cir. 2011) ("The diligence-discovery rule sets the accrual date at the time when, 'with reasonable diligence,' the plaintiff 'has or ... should have discovered the critical facts of both his injury and its cause.'") (citation omitted).

Title IX creates a federal cause of action that does not arise merely because a sexual predator abuses a victim. Rather, it arises only once the institution is both aware of abuse and demonstrates "deliberate indifference" to it. Gebser, 524 U.S. at 290. The "injury" Title IX remedies, therefore, is not simply the employee's sexual abuse, but the injury that flows from the conduct of the defendant institution – its culpable knowledge of, and indifference to, that abuse. Under the federal discovery rule, therefore, only when the victim of the abuse both knows, or should have known, (a) that he was abused, and (b) that the defendant knew of the abuse and was deliberately indifferent to it, does the Title IX claim ripen, and the limitations clock then starts to run.

C. The Court Below Wrongly Cast Doubt on the Viability of the Federal Discovery Rule

As discussed in section *D* below, the trial court misapplied Bishop. It also suggested that Rotkiske v. Klemm, 140 S. Ct. 355 (2019), questioned whether the federal discovery rule should continue to be applied when federal rights lack a limitations period. That, too, was error. Rotkiske was interpreting a limitations period *enacted by Congress*, which provided that Fair Debt Collection Practices Act ("FDCPA") claims 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 interpreted those words to mean that Congress intended the limitations clock to start once there is a violation, even if the plaintiff cannot then plead a claim. Thus, the Court read those words as providing an outside date for bringing suit, like that species of limitations periods enacted by legislatures – not created by courts – that are periods of repose. Id. at 360 ("The FDCPA limitations period begins to run on the date the alleged FDCPA violation actually happened. We must presume that Congress 'says in a statute what it means and means in a statute what it says there.'") (citation omitted). See CTS Corp. v. Waldburger, 573 U.S. 1, 9 (2014) ("[s]tatutes of repose effect a *legislative judgment* that a defendant should 'be free from liability after the legislatively determined period of time'") (emphasis added) (citation omitted).

Repose periods generally run from an external, objectively determinable event, like the date of a public offering, see 15 U.S.C. § 77m (2022) ("In no event shall any such action be brought to enforce a liability created under [section 11 of the Securities Act] more than three years after the security was bona fide offered to the public"), or "from the date of the last culpable act or omission of the defendant." Waldburger, 573 U.S. at 8. "A statute of repose 'bar[s] any suit that is brought after a specified time . . . even if this period ends before the plaintiff has suffered a resulting injury." Id. (citation omitted). "The statute of repose limit is not related to the accrual of any cause of action; the injury need not have occurred, much less have been discovered." Id. (citation omitted). That is because "a repose period is fixed and its expiration will not be delayed by estoppel or tolling." 4 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1056 (4th ed. 2021) (footnote omitted). Accordingly, when a repose period has run, the claim is untimely – even if the plaintiff lacks knowledge of the facts needed to timely file suit – because a repose period is "equivalent to 'a cutoff,'" an "'absolute . . . bar' on a defendant's temporal liability.'" Waldburger, 573 U.S. at 8 (citations omitted); Cal. Pub. Emps.' Ret. Sys. v. ANZ Secs., Inc., 137 S. Ct. 2042, 2049-50 (2017). The effort to engraft the discovery rule onto Congressional language imposing such an absolute time bar is what Rotkiske called "'bad wine of recent vintage.'" 140 S. Ct. at 360 (citation omitted).

Rotkiske thus has no application here. Because there is no Congressional limitations period for Title IX claims, applying the well-established federal discovery rule to such claims would engraft nothing onto words enacted by Congress, much less alter, or frustrate, a result Congress intended. Indeed, courts continue to apply the discovery rule to claims when statutes are silent as to the limitations period. See, e.g., Ouellette, 977 F.3d at 136 (continuing to apply "the federal discovery rule" that the "accrual is delayed until the plaintiff knows, or should know, of those acts" for § 1983 claims); Karasek v. Regents of Univ. of Cal., 500 F. Supp. 3d 967, 978 (N.D. Cal. 2020) (concluding that a "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").

Dibrell v. City of Knoxville, 984 F.3d 1156 (6th Cir. 2021), a § 1983 case decided two years after Rotkiske, reinforces this conclusion. There – as against the law enforcement officers who allegedly falsely imprisoned the plaintiff – the Court held that the limitations clock began to run when the plaintiff was arrested. But Dibrell did *not* find the claims asserted against Knoxville to be untimely. That claim – like a Title IX claim against OSU – required not just an injury to the plaintiff by the city's employee but, also, pleading and proving facts required by Monell showing a causal connection between the city's policies and customs and the "violation of the plaintiff's constitutional rights." Dibrell, 984 F.3d at 1165 (citing

Monell, 436 U.S. at 694-95). Thus, the false arrest alone did not trigger the limitations clock on the claim asserted *against Knoxville*. Rather, that claim was, on summary judgment, dismissed on the merits because the Monell-required facts were not proven. As in Dibrell, the Title IX claims against OSU required pleading not just that the plaintiff was the victim of sexual abuse (or false arrest), but that OSU (like Knoxville) was culpable – that OSU knew about Strauss's abuse and was deliberately indifferent to it (or that Knoxville's policies and practices led to the false arrest).

D. Properly Applying the Discovery Rule, Plaintiffs' Claims Were Wrongly Dismissed

The Plaintiffs assert "pre-assault" Title IX claims, alleging that OSU knew about and was indifferent to *prior* assaults by Strauss and the consequent creation of a hostile environment. They do not allege Title IX claims based on OSU's response to the Plaintiffs' report of their own abuse, which would be a post-assault claim. The district court, however, treated these distinct theories as identical for limitations purposes. But the post-assault claim's focus is the institution's response to the victim's *own* report of an assault, and the victim would know what response he received from the institution. The focus in pre-assault claims, in contrast, is the institution's knowledge of and response to *prior* assaults, of which the victims may not – and as alleged here did not – know.

Relying on post-assault Title IX claim opinions, the district court held (in a different case than this one to which the plaintiffs here were not parties) that knowledge of injury – likely a given in a *post*-assault Title IX claim – and that the abuser was known to be a university employee was enough for a *pre*-assault claim to accrue. Opinion & Order at 12-15, 16-19, Garrett v. The Ohio State Univ., No. 2:18-cv-00692-MHW-EPD (E.D. Ohio Sept. 22, 2021), ECF No. 197 (hereinafter "Garrett Decision"). Further, the district court's factual analysis was based upon its review of a pleading in Garrett which had materially different allegations on this very subject than did the complaint in this case. Had the district court properly applied Rule 12(b)(6) and the discovery rule to the claims Plaintiffs actually alleged, it should not have made factual findings inconsistent with the SAC's actual allegations, and it should have denied OSU's motion to dismiss.

i. Until 2018, Plaintiffs allege that virtually none of them knew, or could have known, that Strauss's "treatment" was sexual abuse

Plaintiffs allege that the combination of Strauss's role as their doctor, the school's clear support for Strauss, OSU's requirement that students be examined by him, the students' lack of medical training, their youth, their trust in the university to act on their behalf and protect them, and the casual response with which staff in both the athletics department and student health center responded to comments or

inquiries about Strauss's conduct, among other things, prevented the Plaintiffs from understanding that Strauss's conduct constituted abuse.[7]

Plaintiffs further allege that until 2018 the vast majority of them did not understand that Dr. Strauss's conduct constituted sexual abuse. See, e.g., SAC, R. 123, Page ID ## 2036-2037, ¶ 272. The SAC also alleges, and as OSU's own staff has allegedly admitted, that victims of physician abuse are often confused about whether they were, in fact, abused. See id. at 2016-2017, ¶¶ 153-160. This is because "patients do not know what is a 'normal exam' because patients have a 'lack of information' about what is medically appropriate;" "it is normal for patients to be naked in front of doctors and for doctors to touch them;" "'doctors are in a position of superior knowledge and authority;'" and "patients . . . trust[] their doctor to do what was medically appropriate." Id. at 2016, ¶ 156.

As one plaintiff is alleged to have explained, while he "felt extremely uncomfortable during Dr. Strauss' examination . . . he did not realize at the time that Dr. Strauss was sexually abusing and harassing him" because he "thought he could trust Dr. Strauss, as OSU's team doctor." Id. at 2080, ¶¶ 620, 616. Dr. Strauss allegedly hid his abuse behind the guise of legitimate, necessary medical treatment,

[7] See Appendix 1 to Pls.' Opp. Mot. Dismiss, R. 133-1 passim (identifying specific, relevant allegations for each Plaintiff).

so even those plaintiffs who felt uncomfortable at the time of their examinations did not understand that they were being abused. See, e.g., id. at 2098, ¶ 751 (describing how Dr. Strauss told John Doe 1 that he "want[ed] [John Doe 1's] penis to get erect because it makes it easier for [Dr. Strauss] to feel [him] for any abnormalities.") (quotations omitted).

The court below did not analyze, much less credit, these allegations although it was required to do so on a Rule 12(b)(6) motion. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). Indeed, the pleading must be construed "in the light most favorable to [the non-moving party]." Inge v. Rock Fin. Corp., 281 F.3d 613, 619 (6th Cir. 2002) (citation omitted). Instead, the court below simply asserted that its reasoning in Garrett "appl[ied] equally to this case," Opinion & Order, R. 158, Page ID # 2775, even though the allegations here are different.[8]

ii. Until 2018, Plaintiffs allege that none of them knew, or could have known, that OSU was aware of, and deliberately indifferent to, Strauss's sexual abuse

Plaintiffs allege that *none* of them knew or could have known that OSU was aware that Strauss sexually abused them – and countless others – and was deliberately indifferent to and enabled that abuse. See SAC, R. 123, Page ID ## 2035-2036, ¶ 267; see also Appendix 1 to Pls.' Opp. Mot. Dismiss, R. 133-1 passim.

[8] *Amici* take no position on whether the district court fairly characterized the allegations in the Garrett complaint.

The SAC alleges that OSU went to great lengths to hide the extent and pattern of Strauss's abuse, including falsely denying knowledge of other complaints against Strauss, destroying records evidencing his abuse, falsifying his employment evaluation so that it omitted the many allegations known to officials, failing to document the findings of Strauss's 1996 disciplinary hearing, hiding the reason for Strauss's termination following that hearing, and more. See SAC at 2017-2036, ¶¶ 162-267. If so, OSU appears to have made it impossible for victims to discover the school's deliberate indifference at the time of their abuse. The SAC further alleges that two senior OSU doctors, who had knowledge of some of the allegations at the time, acknowledge that there is no way that victims could have known about OSU's systematic failure to protect them from a known sexual predator. See id. at 2035, ¶ 265. Indeed, according to the SAC, OSU *itself* claims it did not know of its institutional failure until as late as 2018, and only after a law firm's multi-month, multi-million dollar investigation into its role. Id. at 2037, ¶¶ 274-275.

If so, it appears that Plaintiffs did not and could not have known about OSU's deliberate indifference prior to the 2018 press reports and later findings of the OSU-commissioned investigation, which was first announced in April of 2018 and took a full year to complete. See id. at 2036-2037, ¶¶ 271-275. Indeed, the SAC asserts "none of [the Plaintiffs] knew, or had any reason to know, of the role that OSU played in facilitating Dr. Strauss' abuse. This is because OSU ignored, rebuffed,

and concealed complaints about Dr. Strauss, preventing the Plaintiffs from discovering their claims against OSU." Id. at 2037, ¶ 272.

Again, the court below did not acknowledge, nor credit, these allegations. The closest it came was noting that the Plaintiffs knew that Strauss was an OSU employee, but, as explained above, that alone is insufficient as a matter of law to state a Title IX claim. While the district court appeared to argue that OSU's employment of Strauss was enough to put the Plaintiffs "on inquiry notice," Garrett Decision at 17, whether his mere employment was enough to trigger inquiry notice, and what the result of any such inquiry would have been, were not proper inquiries at the Rule 12(b)(6) stage. When a plaintiff is put on inquiry notice "is necessarily fact intensive," Amburgey v. United States, 733 F.3d 633, 637 (6th Cir. 2013) (citation omitted), and is a question "for summary judgment or for trial" that is "not [to] be resolved on a motion to dismiss." Lutz v. Chesapeake Appalachia, L.L.C., 717 F.3d 459, 476 (6th Cir. 2013). More generally, "[b]ecause the statute of limitations is an affirmative defense," Campbell v. Grand Trunk W. R.R. Co., 238 F.3d 772, 775 (6th Cir. 2001), dismissal on that ground at the pleading stage is proper only if "the allegations in the complaint . . . affirmatively show that the claim is time-barred." Cataldo v. U.S. Steel Corp., 676 F.3d 542, 547 (6th Cir. 2012). At minimum, "constru[ing] the complaint in the light most favorable to the plaintiff[s] and accept[ing] all factual allegations as true," Laborers' Loc. 265 Pension Fund v.

iShares Tr., 769 F.3d 399, 403 (6th Cir. 2014) (citation omitted), the SAC appears to have plausibly pled the timeliness of this action. Finally, the district court asserted that the "factual allegations" *in the Garrett complaint* "defeated" the argument that these plaintiffs lacked knowledge of OSU's deliberate indifference. See Garrett Decision at 19, n.8 (citing allegations). But the district court did not find that the cited Garrett allegations were contained in the SAC.

iii. Properly applying the discovery Rule, Plaintiffs' Title IX claims were timely

The SAC pleads that, prior to 2018, the vast majority of Plaintiffs did not know, and had no reason to know, that the medical treatment Strauss administered was in fact sexual abuse, and that none of them knew, or had reason to know, that OSU was aware that Strauss was abusing them, and was deliberately indifferent to and enabled that abuse. Plaintiffs initiated this lawsuit on July 26, 2018. Complaint & Jury Trial Demanded, R. 1, Page ID ## 1-50. Applying the discovery rule correctly at the motion-to-dismiss stage, Plaintiffs' claims fall well within the appropriately borrowed Ohio two-year statute of limitations. Whether discovery will further, or undermine, the SAC's allegations must be determined later. At the Rule 12(b)(6) stage, however, the SAC was timely filed.

CONCLUSION

The decision below should be reversed.

Dated: February 9, 2022

New York, New York

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CERTIFICATE OF COMPLIANCE

I, Roger A. Cooper, as counsel for *Amici Curiae*, hereby certify pursuant to Fed. R. App. P. 32(a)(7)(B) as follows:

1. This brief complies with the type volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,295 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 6th Cir. Local R. 32(b)(1).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 in Times New Roman 14 point font.

Dated: February 9, 2022
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I certify that this brief was filed electronically on February 9, 2022. Notice of this filing will be sent by operation of this Court's electronic filing system to all parties.

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