No. 21-3991

In the United States Court of Appeals for the Sixth Circuit

TIMOTHY MOXLEY; RYAN CALLAHAN; JOHN JACKSON, JR.; JAMES CARROLL; JEFFREY ROHDE; PATRICK MURRAY; EVERETT ROSS; JOHN DOES 78-95; JOHN DOES 97-105,

Plaintiffs-Appellants,

v.

THE OHIO STATE UNIVERSITY,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Ohio at Columbus, No. 2:21-cv-03838
The Honorable Michael H. Watson, Judge Presiding

BRIEF OF PLAINTIFFS-APPELLANTS

ADELE P. KIMMEL
ALEXANDRA Z. BRODSKY
PUBLIC JUSTICE
1620 L Street NW
Suite 630
Washington, DC 20036
(202) 797-8600

SCOTT ELLIOT SMITH
SCOTT ELLIOT SMITH, LPA
5003 Horizons Drive
Suite 101
Columbus, OH 43220
(614) 846-1700

ILANN M. MAAZEL
DEBRA L. GREENBERGER
MARISSA R. BENAVIDES
EMERY CELLI
BRINCKERHOFF ABADY
WARD & MAAZEL
600 Fifth Avenue, Tenth Floor
New York, New York 10020
(212) 763-5000

Counsel for Plaintiffs-Appellants
Timothy Moxley, Ryan Callahan, John Jackson, Jr., James Carroll, Jeffrey Rohde, Patrick Murray, Everett Ross, John Does 78-95 and *John Does 97-105*

CP COUNSEL PRESS · (866) 703-9373 PRINTED ON RECYCLED PAPER

CORPORATE DISCLOSURE STATEMENT

Pursuant to Sixth Circuit Rule 26.1, Plaintiffs-Appellants state that they are individuals not a corporation, nor a subsidiary or affiliate of a publicly owned corporation.

TABLE OF CONTENTS

PAGE NO.

TABLE OF AUTHORITIES

PAGE NO.

Cases

Statutes

Other Authorities

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Oral argument is warranted because this case involves multiple issues of immense public import. Thirty-four Plaintiffs seek to hold Ohio's flagship state university accountable under Title IX of the Education Amendments of 1972 for enabling a serial sexual predator for two decades. The District Court dismissed this case and related cases brought by hundreds of other survivors. It held that each and every Plaintiff's claim was untimely notwithstanding the federal discovery rule, which delayed accrual of the Title IX claims, and state law equitable tolling for fraudulent concealment.

This case raises important questions of federal law about applying delayed accrual where a patient did not realize he was being sexually abused by a doctor because the abuse occurred under the guise of a medical exam. Oral argument will aid the Court in parsing the thousands of specific factual allegations in this case detailing, for each Plaintiff who did not know he was abused, the context and basis for that lack of knowledge.

This case also raises important questions of federal law about when a Title IX claim accrues against a university that enables a serial sexual predator on its staff: does it accrue when the plaintiff has a basis to allege fault on the part of the university or does it accrue (as the District Court held) when a plaintiff knows the abuser was a university employee?

Finally, the District Court's rejection of the state law toll for fraudulent concealment, despite crediting allegations that the university concealed evidence of its own misconduct for nearly forty years, warrants elucidation through argument.

Thirty-four survivor Plaintiffs are directly affected by this appeal. Hundreds of survivors who filed this and related cases before the District Court will be affected by this Court's resolution. Plaintiffs respectfully request the opportunity for their chosen counsel to be heard by the Court.

DIFFERENCE BETWEEN *MOXLEY* AND *SNYDER-HILL* BRIEFING

The undersigned are also counsel of record to the plaintiffs in *Snyder-Hill*. The operative complaints in both this case and *Snyder-Hill* share the same general allegations and causes of action. The *Moxley* complaint was filed after the parties had fully briefed the motion to dismiss in *Snyder-Hill*. The decisions on appeal are also effectively the same. The District Court issued a three-page decision in *Snyder-Hill* and a two-page decision in *Moxley*; in both cases, it referred to longer decisions in the *Garrett* and *Ratliff* cases. *Garrett v. OSU*, No. 2:18-cv-692 (S.D. Ohio), R.197 at 1494; *Ratliff v. OSU*, No. 2:19-cv-4746 (S.D. Ohio), R.39 at 474.

To conserve judicial resources and avoid burdening the Court by having it read the same argument twice, the undersigned have drafted the *Snyder-Hill* Appellants' brief (on behalf of eighty-four Plaintiffs) as the main brief for both cases ("*Snyder-Hill* Appellants' Brief"). *Snyder-Hill, et al., v. The Ohio State University*, No. 21-3981. This brief (on behalf of thirty-four Plaintiffs) asserts the same legal arguments made in the *Snyder-Hill* Appellants' Brief except where specifically noted. There are four material differences, as noted below: (a) in citing common (not plaintiff-specific) allegations, which are identical in both complaints, this brief cites the relevant paragraphs of the *Moxley* complaint; (b) this brief highlights allegations specific to the thirty-four *Moxley* Plaintiffs; (c) all *Moxley* Plaintiffs alleged that they did not know Dr. Strauss was abusing them in the guise of a medical exam; and (d) there are differences in the procedural history.

STATEMENT OF JURISDICTION

The District Court had original jurisdiction over Plaintiffs' claims against the Ohio State University ("OSU") under 28 U.S.C. §§ 1331 and 1343. Amended Complaint ("Complaint" or "AC") ¶ 26, R.16 at 211.[1] The District Court issued an Opinion and Order ("Decision") granting Defendant's motion to dismiss for failure to state a claim on October 25, 2021, dismissing all claims. Decision, R.26 at 511-12. Plaintiffs timely filed a notice of appeal on October 26, 2021. Notice of Appeal, R.28 at 514.

STATEMENT OF ISSUES

The Statement of Issues mirrors the issues in *Snyder-Hill:*

1. Did the District Court improperly find each Plaintiff knew he was abused, even though each Plaintiff individually alleged he did not know Strauss' medical exams were sexual abuse?

2. Did the District Court erroneously hold that Plaintiffs' mere knowledge that OSU employed Strauss triggered accrual of their claims against OSU, where Title IX prohibits *respondeat superior* liability and requires that the school's own discrimination caused Plaintiffs' sexual abuse?

3. Did the District Court err in holding that none of the Plaintiffs' claims were tolled by fraudulent concealment, even though OSU concealed Strauss' abuse for decades and made affirmative misrepresentations to one Plaintiff about the legitimacy of Strauss' exams?

[1] In accordance with Sixth Circuit R. 28(a)(1), citations to the lower court record include the record entry ("R.") number followed by the Page ID # citation to the relevant portion of the document.

INTRODUCTION

For forty years, OSU successfully concealed serial sexual abuse by its official team doctor, Student Health Services physician, and Professor of Medicine, Dr. Richard Strauss.[2] Strauss was an accomplished and cunning predator. He disguised abuse as medical exams, provided medical reasons for his work, calmly allayed any patient questions or concerns, and took advantage of young, vulnerable, inexperienced students who reasonably believed his actions were medically necessary. OSU was equally cunning in hiding its complicity. It lied to students, shredded documents, whitewashed Strauss' personnel record, falsified Strauss' employment evaluations, failed to inform students, the public, the Medical Board or the police of Strauss' misconduct, and lionized Strauss even after his death.

Having skillfully duped its students for four decades, OSU now seeks the ultimate legal reward for its mendacity: the dismissal of this lawsuit. The law permits no such thing.

The "statute of limitations begins to run" only once a "reasonable person knows, or in the exercise of due diligence should have known, *both* his injury *and* the cause of that injury."[3] All thirty-four Plaintiffs in this action did not know they were sexually abused. They were duped by Strauss.[4] All thirty-four Plaintiffs did

---

[2] This Introduction mirrors the *Snyder-Hill* Appellants' Brief, citing the equivalent citations for the *Moxley* Complaint.

[3] *Bishop v. Children's Ctr. for Developmental Enrichment*, 618 F.3d 533, 536 (6th Cir. 2010) (emphasis added).

[4] *See* Appendix 1 to Pls.' Opp. Mot. Dismiss (App 1), R.24-1 *passim* (identifying respective individual allegation for each Plaintiff).

not know *OSU* caused that injury. They were duped by OSU.[5] These are the allegations in the 936-paragraph complaint. They are not merely plausible, but overwhelming—supported by admissions from OSU's own doctors,[6] administrators,[7] and official report.[8]

The district court failed to address even one of these allegations and lumped all Plaintiffs into a one-size-fits-all approach to grant dismissal. But allegations matter on a motion to dismiss. This Court should vacate, remand, and let these survivors finally have their day in court.

STATEMENT OF THE CASE

I. COMPLAINT ALLEGATIONS

The allegations described in this section mirror those in the *Snyder-Hill* Appellants' Brief except this brief (a) appends the equivalent citations to the *Moxley* Complaint for the general allegations common to both the *Moxley* and *Snyder-Hill* Complaints and (b) describes the client-specific allegations pleaded by the thirty-four *Moxley* Plaintiffs.

A. Strauss' Insidious Sexual Abuse

Plaintiffs are thirty-four of the hundreds of former OSU students and survivors whom Strauss sexually assaulted or abused over a period of two decades. AC ¶ 1, R.16 at 204. OSU employed Strauss to provide medical care and treatment to its students; it made him the official physician for OSU's sports

[5] *Id.* (identifying respective individual allegations for each Plaintiff).
[6] AC, R.16 ¶¶ 97, 99-100 at 222-23.
[7] *Id.*
[8] *Id.* ¶¶ 95-96 at 222.

teams, a professor of medicine, a part-time physician with Student Health Services, and a Professor Emeritus upon his retirement despite his wrongdoing. *Id.* ¶¶ 67-75 at 217-219. As OSU's official sports team physician, Strauss had regular contact with male student-athletes in at least sixteen sports. *Id.* ¶¶ 7 at 206; 72 at 218. As a physician at OSU's student health center for at least four years, he was granted target-rich access to the entire male student population. *Id.* ¶ 73 at 218-19.

Strauss used his position of trust and confidence to sexually abuse male students continuously throughout his twenty-year tenure, from 1978 to 1998. *Id.* ¶¶ 2 at 205; 76 at 219. In nearly every case, Strauss disguised his abuse as medical care. *Id.* ¶¶ 3 at 205, 97 at 222-23 This abuse generally included one or more of the following: invasive, medically unnecessary examinations of students' genitals involving groping and fondling their genitalia, often without gloves; unnecessary rectal examinations involving digitally penetrating their anuses; and inappropriate comments about their bodies. *Id.* ¶¶ 3 at 205, 80-82, 87 at 220.

When a few Plaintiffs questioned Strauss about his genital exams regardless of the complaint, he gave a clinical, authoritative, and believable explanation. Strauss told John Doe 99, who was directed to Strauss for evaluation of an arm injury, that his prolonged genital exam and digital probing of John Doe 99's anus were necessary since it was his first exam of John Doe 99. *Id*. ¶¶ 774-77 at 332-33. Strauss told John Doe 87, who sought treatment for an ankle injury, that he was obligated to evaluate John Doe 87 for sexually transmitted diseases ("STDs"). *Id*. ¶ 537 at 291-92. Strauss told John Doe 101, who was participating

in an alleged study run by Strauss, that he needed to measure John Doe 101's penis and testicles. *Id*. ¶ 813 at 338. Strauss told John Doe 102 that he was conducting a hernia check because hernias are a common medical issue. *Id.* ¶ 832 at 341. Each of these Plaintiffs and others, many of whom were immature teenagers—as highlighted in Appendix 1 to Plaintiffs' opposition to OSU's motion to dismiss—trusted Strauss' representations that the exams were medically necessary and not abusive. *Id.* ¶¶ 547 at 293-94 (John Doe 87); 784 at 333 (John Doe 99); 818 at 339 (John Doe 101); 836 at 341-42 (John Doe 102); *see* App 1, R.24-1 *passim*.

As OSU and its agent recently admitted, because Strauss disguised his abuse as medical care, it was difficult to identify—so difficult that only a panel of "suitably qualified medical experts" could know whether any given conduct was medically necessary or sexual abuse. *Id.* ¶¶ 94-101 at 222-23. As a $6.2 million 2019 report OSU commissioned from Perkins Coie ("Report") concedes, "[t]his case present[s] an intersection of two specific types of sexual abuse, both of which have generally not been associated with common conceptions of sexual abuse[:] doctor-patient sexual abuse and the sexual abuse of adult males." *Id.* ¶ 95 at 222. OSU's Report admits that "[p]atients often do not report sexual abuse committed by their doctors due to . . . *confusion as to whether sexual abuse, in fact, occurred*." *Id.* ¶ 96 (emphasis added). Even when Perkins Coie conducted its investigation, twenty-two of the 177 students it interviewed *still* did not understand Strauss' conduct constituted abuse, though the Report found they were abused. *Id.*

Multiple OSU administrators "conceded in sworn testimony that students could not have known Strauss was abusing them." *Id.* ¶ 97 (emphasis added). OSU witnesses "admit that patients do not know what is a 'normal exam' because patients have a 'lack of information' about what is medically appropriate, 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 patients including OSU students trusted their doctor to do what was medically appropriate." *Id.* For example, "when a doctor tells a patient with a sore throat that he needs to check the lymph nodes in his genitals, the patient trusts the doctor's experience and medical training; he trusts that it is medically appropriate to touch his genitals." *Id.*

The trained professionals at Perkins Coie deemed it "essential" to their investigation 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." *Id.* ¶ 98 at 223 (emphasis added).

Dr. Ted Grace, OSU's former Director of OSU Student Health Services and Strauss' former boss, agreed that experts are necessary to determine whether Strauss abused a given patient. Grace admitted that Perkins Coie lawyers hired by OSU to investigate would not know what's medically appropriate or what's not medically appropriate so would "need to consult medical experts to make that determination." *Id.* ¶ 99 (emphasis added). Dr. John Lombardo, former Head Team Physician/Medical Director of the OSU Sports Medicine and Family Health

Center, agreed: only someone "trained in medicine" could know what is "medically appropriate." *Id.* ¶ 100.

Strauss took advantage of Plaintiffs' youth, inexperience, lack of medical training, and lack of knowledge about sexual abuse, as well as his position of authority and power as an OSU doctor and team physician, to abuse hundreds and perhaps thousands of OSU students for decades, usually without their knowledge. An accomplished sexual abuser, Strauss groomed his victims into believing his conduct was normal and medically appropriate. Many Plaintiffs also alleged that they believed Strauss' conduct could not be sexual abuse because his invasive exams were common knowledge among their teammates and coaches, and yet Strauss faced no repercussions; OSU granted him nearly unfettered access to students. *Id.* ¶¶ 7 at 206; 73, 77-78 at 218-220; *see also* App 1, R.24-1 *passim*. When students told coaches about Strauss' invasive exams, they were ignored,[9] advised to deal with it,[10] told "[t]hat's just Strauss,"[11] or heard coaches normalize Strauss' behavior with jokes and nicknames.[12] These responses—from trusted OSU coaches, teammates, and Strauss himself—caused students to discount their discomfort and blame themselves, instead of Strauss. *See, e.g.*, AC ¶¶ 344, 346, R.16 at 264 (Rohde did not realize he had been assaulted or could complain about

[9] *See* AC ¶¶ 273, R.16 at 254 (Callahan); 361 at 266 (Murray); 579-80 at 299 (John Doe 89); 637 at 308 (John Doe 92).

[10] *See id.* ¶¶ 282 at 256 (Callahan); 618 at 305 (John Doe 91); 759 at 330 (John Doe 98).

[11] *See id.* ¶ 715 at 322-23 (Ross).

[12] *See id.* ¶¶ 420 at 276 (John Doe 80); 559 at 295 (John Doe 88); 759 at 330 (John Doe 98); 872 at 347 (John Doe 104).

Strauss' "strange" conduct because "everyone seemed to know about Dr. Strauss' conduct and accepted it as normal.")

As a result, no Plaintiff knew he was sexually abused until 2018. *See* App 1, R.24-1 *passim*.

In 2018, a few student-athletes spoke out about what Strauss did to them. AC ¶¶ 212-213, R.16 at 243. In April 2018, OSU publicly launched an investigation, conducted by Perkins Coie. *Id.* The firm investigated both Strauss' alleged sexual abuse and OSU's role in enabling that abuse. *Id.* ¶¶ 215-16 at 244. From this publicity, Plaintiffs became aware of OSU's culpability and realized for the first time that Strauss' medical examinations were, in fact, sexual abuse. App 1, R.24-1 *passim*. For example, only upon learning of OSU's investigation "did [one] student realize that his discomfort had been justified, his instincts correct: Strauss had sexually abused him. He was relieved to learn that he wasn't 'crazy' for thinking something had been wrong." AC ¶ 93, R.16 at 221.

B. OSU Facilitated Strauss' Sexual Abuse and Hid its Complicity for Forty Years

From as early as 1979, "OSU knew Dr. Strauss was abusing male students," as Plaintiffs alleged and Perkins Coie concluded. *Id.* ¶ 2 at 205. Athletics knew: "Dr. Strauss' abuse was well known among at least fifty OSU employees in the athletic department." *Id.* ¶ 6 at 206. Student Health knew: "Multiple Student Health Directors were also told about Dr. Strauss' abuse for years." *Id.* The complaint details the many concerns OSU employees raised. *Id.* ¶¶ 102-206 at 224-42.

Despite this widespread knowledge among OSU employees, "no meaningful action was taken by the University to investigate or address the concerns until January 1996." *Id.* ¶ 206 at 242. OSU did no "meaningful investigation," made no "serious attempt to monitor Strauss with other students or patients," had no "follow[] up with Strauss to see if he was doing appropriate examinations," and did not discipline Strauss. *Id.* ¶¶ 163 at 235.

"Instead of stopping Dr. Strauss' serial sexual abuse, OSU facilitated it. OSU employed Dr. Strauss for nearly two decades. OSU put Dr. Strauss in Student Health Services, exposing thousands of students to him. OSU made Dr. Strauss the official doctor for no fewer than five sports teams and gave him regular access to student-athletes in at least 16 sports. OSU forced student-athletes to see Dr. Strauss for annual physicals and medical treatment in order to participate in university sports and maintain their athletic scholarships." *Id.* ¶ 7 at 206. All this normalized and facilitated Strauss and his abuse.

In January 1996, "OSU belatedly placed Dr. Strauss on administrative leave and conducted an investigation" based on three sexual misconduct complaints it had received since November 1994. *Id.* ¶ 919 at 355-56. OSU hid those complaints from Strauss' personnel file and held a secret disciplinary hearing in June 1996—without informing Strauss' victims and without issuing disciplinary findings. *Id.* ¶ 918 at 355. In August 1996, without explanation, OSU declined to renew Strauss' appointment with Student Health, and the Athletic Department terminated his employment agreement. *Id.* ¶ 75 at 219. OSU kept Strauss as a tenured faculty member until 1998 when it let him voluntarily retire

and gave him the honorific of emeritus status, normalizing Strauss and masking OSU's support of a serial sexual predator. *Id.* ¶¶ 16 at 208; 68 at 218; 200 at 241.

OSU concealed its complicity in Strauss' predation for 40 years. OSU lied about prior complaints against Strauss, writing Plaintiff Snyder-Hill stating they had never received a complaint about Strauss before and that they only received positive comments. *Id.* ¶¶ 162 at 234, 921(f) at 357. It "destroyed patient health records of those examined by Dr. Strauss," thereby destroying evidence of OSU's complicity. *Id.* ¶¶ 18 at 209; 190 at 239. It gave Strauss "excellent" performance evaluations, because "you would not mention a serious allegation, such as sexual misconduct, in an evaluation form," to "cover-up the abuse, prevent the public (including OSU students) from learning about the abuse, and protect the doctor." *Id.* ¶¶ 169-70 at 236.

Even after the 1996 disciplinary hearing, OSU actively "concealed" the termination of Strauss' employment with Student Health and Athletics, to "protect Dr. Strauss and itself," including "not document[ing] the findings of the June 1996 disciplinary hearing, . . . though it would have been standard to do so." *Id.* ¶¶ 185-187 at 238-39. OSU did not report Strauss to the State Medical Board of Ohio or any law enforcement, *id.* ¶¶ 5 at 205; 10 at 207, ensuring that OSU students and the public would never learn about OSU's complicity in Strauss' predation. It "[n]ever sought to identify, counsel, or support Dr. Strauss' victims," "so it could conceal the extent of Dr. Strauss' abuse and how the university had enabled his predation." *Id.* ¶¶ 17 at 208; 189 at 239. As late as *2005*, OSU lauded Strauss as

"one of the leaders in sports medicine," highlighting "his care and concern for athletes." *Id.* ¶ 210 at 243.

C. Plaintiffs Could Not and Did Not Know of the University's Title IX Violation

"OSU hid the extent of Dr. Strauss' abuse, the repeated complaints OSU received, and its indifferent response from its students." AC ¶ 207, R.16 at 242. Grace admitted:

> Q. Is there any way any Ohio State student could have known that their university failed on the job for 20 years to get rid of this sexual predator?
>
> A. I don't know of any way.

Id. Another Strauss supervisor, Dr. Miller, conceded:

> Q. And is there *any* way OSU – *any* OSU student could have known that Dr. Strauss was a sexual predator against students for over 20 – for approximately 20 years before OSU got rid of him?
>
> A. I don't believe they would have known.

Id. ¶ 208 (emphasis added).

These OSU witnesses are correct. "*None* of the Plaintiffs knew, or had reason to know, of OSU's role in Dr. Strauss' sexually abusive medical examinations. *None* of the Plaintiffs knew, or had reason to know, that OSU had received complaints—for years—about Dr. Strauss' conduct. *None* of the Plaintiffs knew, or had reason to know, that OSU failed to appropriately investigate, remedy, and respond to years of complaints. *None* of the Plaintiffs knew, or had reason to know, that OSU failed to adequately supervise Dr. Strauss, even after learning that he posed a substantial risk to the safety of male students

and student-athletes. *None* of the Plaintiffs knew, or could have known, that in 1996, OSU declined to renew Strauss' appointment with Student Health and the Athletic Department terminated his employment agreement because OSU 'recogniz[ed] . . . the severity and pervasiveness of Strauss' abuse.' . . . *None* of the Plaintiffs knew, or had reason to know, that OSU administrators were on notice of Dr. Strauss' pervasive sexual abuse, or that OSU administrators were deliberately indifferent to that pervasive sexual abuse." *Id*. ¶ 209 at 243-44 (emphasis added).

These allegations are all taken as true on this appeal. In addition, each Plaintiff individually alleges that he "did not know, or have reason to know . . . that OSU had known about Dr. Strauss' serial sexual abuse, or that OSU had failed to take appropriate steps to stop Dr. Strauss' abuse." *Id. passim*.

Multiple OSU administrators testified that even *they* did not know that (i) Strauss was a serial predator; or (ii) OSU was on notice of Strauss' predation; or (iii) OSU was deliberately indifferent to Strauss' predation. *Id.* ¶¶ 97-100 at 222-23; 207-11 at 242-43.

Even in 2018, OSU claimed it was unsure whether it had known of Strauss' abuse. OSU retained Perkins Coie to evaluate "whether 'the University' had knowledge of such allegations against Strauss." *Id.* ¶ 216 at 244. It took Perkins Coie "$6.2 million and 12 months," "review[ing] 825 boxes of records from OSU" and "interview[s of] 520 witnesses," just to answer that question. *Id.* ¶¶ 217-18.

D. Investigations in 2018 and 2019 Detail Decades of OSU's Complicity

After expending significant resources and hiring medical experts, Perkins Coie found that OSU *knew* Strauss was abusing "male student-patients as early as 1979," his abuse was "well known" among many OSU employees; yet OSU did nothing until 1996 and even then, covered up the extent of his abuse and its complicity. *Id.* ¶¶ 6 at 206; 15-18 at 208-09; 174-85 at 237-38; 220 at 244.

In 2019, the Ohio Medical Board investigated and reached similar conclusions. It found that OSU supervising physicians knew of concerns about Strauss' exams but never "unraveled Strauss' 'medical' defenses of his abuse." *Id.* ¶¶ 5, 8 at 205, 207. It found that even after OSU "recogniz[ed] that the severity and pervasiveness of Strauss' abuse compelled the withdrawal of authority to see patients and the nonrenewal of his contract," OSU destroyed patient health records and did not report his abuse to the Medical Board or law enforcement. *Id.* ¶¶ 14, 18 at 208-09.

II. PROCEDURAL HISTORY[13]

On June 28, 2021, Plaintiffs filed this Title IX action and amended on August 12, 2021, bringing claims for seven identified Plaintiffs and John Does 78-95 and John Does 97-105.[14] Compl., R.1 at 204. This case was filed as related to *Snyder-Hill, et al. v. The Ohio State University*, Case No. 2:18-cv-00736. The

[13] This Procedural History section is specific to the *Moxley* case and differs from the *Snyder-Hill* Appellants' Brief.

[14] Plaintiff Everett Ross brought this action under the pseudonym John Doe 96 in the original Complaint. AC n.1, R.16 at 204. In the Amended Complaint, he chose to move forward with his claims under his true name of Everett Ross. To avoid confusion, the pseudonym John Doe 96 was intentionally omitted.

same counsel represent the Plaintiffs in this action and the *Snyder-Hill* action, and the *Snyder-Hill* action includes John Does 1-77. This case was filed while the motion to dismiss in the *Snyder-Hill* case was *sub judice*.

The District Court also deemed this case related to *Garrett v. OSU,* No. 2:18-cv-692 (S.D. Ohio), a case filed by other Strauss victims ten days prior to the filing of the *Snyder-Hill* action. Rel. Case Mem. Order, R.10 at 172.

On September 22, 2021, the District Court issued a 25-page decision dismissing the *Garrett* case, No. 2:18-cv-692 (S.D. Ohio), R.197 at 1494 ("Garrett-Decision"), a 15-page decision in *Ratliff v. OSU*, No. 2:19-cv-4746 (S.D. Ohio), R.39 at 474 (addressing legal theories Plaintiffs here did not assert), and a three-page decision in the *Snyder-Hill* case.

On October 25, 2021, the District Court issued a two-page decision in this case. The Decision states that the reasons prompting dismissal of *Garrett* and *Ratliff* "apply equally" to this case and entered judgment for OSU—lumping all Plaintiffs together despite different factual allegations. Decision at 2, R.26 at 512; Judgment, R.27 at 513. It did not discuss the many differences between the complaints or engage with Plaintiffs' allegations. This appeal followed.

SUMMARY OF THE ARGUMENT

A "statute of limitations begins to run" only once a "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. A plaintiff "cannot maintain an action before she knows she has one." *City of Aurora v. Bechtel Corp.,* 599 F.2d 382, 387-88 (10th Cir. 1979). What a plaintiff knew or should have known "is a

question for the trier of fact." *In re Arctic Express Inc.*, 636 F.3d 781, 803 (6th Cir. 2011). The Decision ignored these basic precepts and must be reversed.

The District Court erred in ignoring Plaintiffs' allegations, focusing instead on the *Garrett* complaint, even as OSU conceded the pleadings were materially different. All thirty-four Plaintiffs alleged that they did not know Strauss abused them in the guise of a medical exam.[15] These allegations were consistent with the Perkins Coie report, admissions by OSU's own witnesses, and the experience of other victims of doctor-patient abuse. Whether a plaintiff has knowledge triggering claim accrual is a classic jury factual question. *In re Arctic Express Inc.*, 636 F.3d at 803. The District Court erroneously made these factual determinations in OSU's favor at the pleadings stage.

It further erred in holding irrelevant Plaintiffs' lack of knowledge about defendant *OSU*'s role in causing their injury. Without knowledge that OSU had enabled Strauss' sexual abuse, Plaintiffs would have had no basis to bring a Title IX claim against OSU. The District Court held that Plaintiffs' claim accrued when Strauss abused them, merely because Plaintiffs knew he was an OSU employee. But Title IX does not permit *respondeat superior* liability; knowing Strauss' employer is insufficient. Plaintiffs' claims did not accrue until 2018, when they could acquire evidence of OSU's *own* wrongdoing, as the First, Second, and Fifth Circuits (and many trial courts) have held in analogous circumstances. *Ouellette v. Beaupre*, 977 F.3d 127 (1st Cir. 2020); *Barrett v. United States*, 689 F.2d 324,

[15] This differs from the *Snyder-Hill* Appellants' Brief in that *all Moxley* Plaintiffs alleged they did not know Dr. Strauss was abusing them in the guise of a medical exam.

330 (2d Cir. 1982); *Piotrowski v. City of Hous.*, 237 F.3d 567, 577 (5th Cir. 2001). The Complaint also plausibly alleges that any earlier reasonable inquiry into OSU's culpability would have been fruitless.

Finally, the District Court erred in denying one Plaintiff the benefit of Ohio's equitable toll for fraudulent concealment.[16] The District Court did not dispute the ample allegations that OSU fraudulently concealed evidence of Strauss' abuse and its role in enabling his predation. It erred in finding that OSU's affirmative misrepresentations were immaterial because that Plaintiff knew OSU employed Strauss. Again, merely employing a predator is insufficient to allege a Title IX violation.

STANDARD OF REVIEW

This Court reviews *de novo* a District Court's Rule 12(b)(6) dismissal. *Marsh v. Genentech, Inc.*, 693 F.3d 546, 549 (6th Cir. 2012).

A Rule 12(b)(6) motion relying on an affirmative defense such as untimeliness cannot be granted unless "*the plaintiff's own allegations* show that a defense exists that legally defeats the claim for relief." *Cataldo v. U.S. Steel Corp.*, 676 F.3d 542, 554-55 (6th Cir. 2012) (emphasis added).

This Court "must reverse the district court's dismissal unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Meriwether v. Hartop*, 992 F.3d 492, 498 (6th Cir. 2021) (cleaned up). "Because the statute of limitations is an affirmative defense, the burden is on the defendant to show that the statute of limitations has

[16] This paragraph differs from the *Snyder-Hill* Appellants' Brief in that one *Moxley* Plaintiff asserts equitable tolling.

run," including when the claim accrued. *Lutz v. Chesapeake Appalachia, L.L.C.*, 717 F.3d 459, 464 (6th Cir. 2013).

ARGUMENT

I. THE FEDERAL DISCOVERY RULE APPLIES

A. Under the Discovery Rule, A Claim Only Accrues When A Plaintiff Knows or Should Have Known of His Injury *and* the Defendant's Role in Causing that Injury

Title IX is silent on the statute of limitations. When a federal statute is silent, "the action[] accrue[s] and the statutory period begins to run according to federal law." *Bishop*, 618 F.3d at 536-37. As this Court has held repeatedly, "[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.'" *Id*. (emphasis added); *Fonseca v. Consol. Rail Corp*., 246 F.3d 585, 588 (6th Cir. 2001) (same); *Coate v. Montgomery Cnty., Ky.*, 234 F.3d 1267, at *3 (6th Cir. 2000) (prisoner's § 1983 claim did not accrue until cancer diagnosis because "existence of colon cancer is not obvious" to patient);[17] *Parsons v. CSX Transp., Inc.*, 477 F. App'x 304, 305 (6th Cir. 2012) (jury properly instructed claim accrued on knowledge of both injury and causation); *Hogan v. United States*, 42 F. App'x 717, 724-25 (6th Cir. 2002) (FTCA claim accrued when plaintiff knew of "injury" and "cause"—that property damage was from "metal sold to him by the government").

[17] As neither Title IX nor § 1983 contains an express limitations period, courts apply the same limitations analysis. *Lillard v. Shelby Cnty. Bd. of Educ.*, 76 F.3d 716, 729 (6th Cir. 1996) (analogizing to § 1983 cases in determining Title IX limitations period).

This "discovery rule" furthers justice: "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*, 599 F.2d at 387-88.

Other circuits, including the First, Second, Fifth, Ninth, Eleventh, and D.C. Circuits, agree with the Sixth Circuit: a statute of limitations does not accrue until the plaintiff knows both of (1) "[t]he existence of the injury;" *and* (2) "the connection between the injury and the defendant's actions." *Piotrowski*, 237 F.3d at 576; *see also Momenian v. Davidson,* 878 F.3d 381, 388 (D.C. Cir. 2017) ("cause of action accrues when a plaintiff knew or should have known through the exercise of reasonable diligence of: (1) the existence of the injury, (2) its cause in fact, and (3) some evidence of wrongdoing"); *Gregg v. Haw., Dep't of Pub. Safety*, 870 F.3d 883, 887 (9th Cir. 2017) ("The general common law principle is that a cause of action accrues when the plaintiff knows or has reason to know of the injury that is the basis of the action *and* the cause of that injury." (emphasis added)); *A.Q.C. ex rel. Castillo v. United States*, 656 F.3d 135, 140 (2d Cir. 2011) (claim accrues at the time when, "with reasonable diligence," the plaintiff "has or . . . should have discovered the critical facts of both his injury *and* its cause" (emphasis added)); *In re Copper Antitrust Litig.,* 436 F.3d 782, 789 (7th Cir. 2006) (under the discovery rule, the statute of limitations does not begin running until the plaintiff discovers that he has been injured *and* who caused the injury); *Cascone v. United States*, 370 F.3d 95, 104 (1st Cir. 2004) (must know or have reason to know of the fact of injury *and* the injury's causal connection); *Chappell*

v. Rich, 340 F.3d 1279, 1283 (11th Cir. 2003) (claim does not "accrue, and thereby set the limitations clock running, until the plaintiffs know or should know (1) that they have suffered the injury that forms the basis of their complaint *and* (2) who has inflicted the injury" (emphasis added)).

The Supreme Court has also recognized that mere knowledge of the existence of the injury—without knowledge of who caused the injury—is insufficient for accrual, holding that the statute of limitations does not "accrue[]" where "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, 113, 122 (1979).

Courts throughout the country apply the discovery rule to allow sexual abuse plaintiffs to bring claims years after the underlying conduct, where plaintiffs did not contemporaneously know they were abused or defendants' causal role. *Infra* Argument II.B.

B. There Is No Basis to Reconsider the Longstanding Application of the Discovery Rule

The District Court speculated that this Court might cast aside the longstanding discovery rule in light of *Rotkiske v. Klemm*, 140 S. Ct. 355, 360-61 (2019). But *Rotkiske* provides no basis to do so. *Rotkiske* addressed the plain language of the Fair Debt Collection Practices Act ("FDCPA"), which states that claims must be filed "within one year from the date on which the violation occurs." *Id*. at 357 (citing 15 U.S.C. § 1692k(a)). The Court held that "within one year from the date on which the violation occurs" means "within one year from the date on which the violation occurs." *Id.* at 358. The language was "unambiguous"; even

the plaintiff "d[id] not contest the plain meaning," and that ended the inquiry. *Id.* at 360.

Unlike the FDCPA, Title IX does not define accrual as "the date on which the violation occurs." Unlike the FDCPA, Title IX does not define accrual at all. Unlike the FDCPA, Title IX is silent on the statute of limitations; it has no plain language to interpret. Absent plain language in a federal statute on the limitations period, the federal discovery rule applies. *Supra* Argument I.A.

Appellate courts continue to adhere to the discovery rule post-*Rotkiske*. *See, e.g.*, *Sohm v. Scholastic Inc.*, 959 F.3d 39, 50 & n.2 (2d Cir. 2020) ("*Rotkiske* is inapposite" and did not affect "the continuing propriety of the discovery rule" because it interpreted the FDCPA's express "violation" language); *Ouellette*, 977 F.3d at 140 (applying federal discovery rule after *Rotkiske*); *Johnson v. Chudy*, 822 F. App'x 637, 638 (9th Cir. 2020) (same); *see also Navarro v. Procter & Gamble Co.*, 515 F. Supp. 3d 718, 760 (S.D. Ohio 2021) (*Rotkiske* "said only that a discovery rule will not displace an occurrence rule when Congress clearly expresses a preference *in the statutory text* for the latter" (emphasis added)).

The District Court misunderstood the concerns motivating *Rotkiske*'s statement that the discovery rule is a "bad wine of recent vintage." 140 S. Ct. at 360 (quoting *TRW Inc. v. Andrews,* 534 U.S. 19, 37 (2001) (Scalia, J., concurring); cited in Garrett-Decision, R.197 at 1501). *Rotkiske* concerned judicial restraint in interpreting an *express* statute of limitations in the FDCPA. It would be an "atextual" judicial "enlargement" of Congress' statute for the Court to invent

"absent provisions" that conflict with the text. *Rotkiske*, at 360-61; *see also TRW Inc.,* 534 U.S. at 37 (interpreting Fair Credit Reporting Act).

Here, we are not in the world of "atextual" judicial "enlargement" of an express limitations period. To the contrary, Congress placed *no time limit* on Title IX suits. *Courts* inserted a limitations period into the statute. Once the court creates a limitations period, it cannot deprive Plaintiffs of the benefit of the federal discovery rule.

The discovery rule also ensures that Title IX does not create an illusory right. "There is no doubt that if we are to give [Title IX] the scope that its origins dictate, we must accord it a sweep as broad as its language." *N. Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 521 (1982) (cleaned up); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005) ("Congress gave the statute a broad reach."); *id.* at 183 (courts have "consistently interpreted Title IX's private cause of action broadly"). "Congress's desire to provide a civil remedy would be poorly served if the cause of action could arise before the plaintiff even had reason to know of the violation." *Tijerina v. Walters*, 821 F.2d 789, 797-98 (D.C. Cir. 1987).

When Congress passed Title IX in 1972, then amended it in 1987 to reinforce its "broad" application,[18] it did so against the backdrop of Supreme Court caselaw delaying accrual where necessary to ensure federal legislation does not "afford [plaintiff] only a delusive remedy." *Urie v. Thompson,* 337 U.S. 163, 169 (1949) (delaying accrual of Federal Employers' Liability Act claim because statutes of limitations "traditionally" and "conventionally require the assertion of

[18] Civil Rights Restoration Act of 1987, Pub. L. No. 100-259 (1988).

claims within a specified period of time after notice of the invasion of legal rights"); *Kubrick*, 444 U.S. 111 (same for Federal Torts Claims Act); *see also Merck & Co. v. Reynolds*, 559 U.S. 633, 648 (2010) ("when Congress enacts statutes, it is aware of relevant judicial precedent").

There is no basis to depart from longstanding Circuit and Supreme Court precedent applying the discovery rule.

II. THE DISTRICT COURT ERRED IN DISMISSING DETAILED ALLEGATIONS THAT PLAINTIFFS DID NOT KNOW STRAUSS SEXUALLY ABUSED THEM

Notwithstanding Plaintiffs' allegations, the District Court held as a matter of law that every Plaintiff knew he was sexually abused. The Court reached this conclusion in a footnote.

The District Court did not take Plaintiffs' allegations as true. It ignored that it is a *defendant's* burden to show the claim accrued "before the relevant time period, not the [plaintiff's] burden to plead around the possibility." *Nat'l Credit Union Admin. Bd. v. Jurcevic*, 867 F.3d 616, 625 (6th Cir. 2017).

The District Court erroneously resolved on the pleadings what Plaintiffs did and did not know, but "it is the jury's role to resolve any disputes of fact, including disputed inferences, as to when a plaintiff discovered or should have discovered her cause of action." *Cutter v. Ethicon, Inc.*, No. 20-6040, 2021 WL 3754245, at *4 (6th Cir. Aug. 25, 2021) (reversing grant of summary judgment); *Elam v. Menzies*, 594 F.3d 463, 470 (6th Cir. 2010) (same).

A. The District Court Ignored Specific, Plausible Allegations that Each Plaintiff Reasonably Did Not Know these Medical Exams Were Abuse

Each Plaintiff alleged he did not know medical exams were abuse.[19] Also in the Amended Complaint, OSU's own witnesses and investigators concurred that patients often cannot determine whether a doctor's conduct is medically appropriate or abusive. The District Court ignored each and every one of these allegations, as if they did not exist.

For example:

- When John Doe 99 questioned Strauss why the doctor inspected his anus for an arm injury, "Strauss replied that he needed to check 'everything' since it was his first exam of John Doe 99." *Id*. ¶¶ 774-77 at 332-33.
- When John Doe 87 sought treatment for an ankle injury, Strauss told him that because John Doe 87 had a girlfriend, Strauss "was obligated to examine him for STDs." *Id*. at 291-92 ¶ 537.
- When John Doe 101, who was participating in an alleged study run by Strauss, "asked why he had to take off his pants," for the study, Strauss replied: "as part of his research, he had to measure John Doe 101's penis and testicles." *Id*. at 338 ¶ 813.
- John Doe 102 sought treatment for an STD. When Strauss fondled John Doe 102's penis and testicles check, he questioned Strauss: "What are you

[19] This section differs from the *Snyder-Hill* Appellants' Brief in that (1) all *Moxley* Plaintiffs allege they did not know Strauss' medical exams were abusive; and (2) individual allegations refer to the Plaintiffs in this case, not the *Snyder-Hill* Plaintiffs.

doing?" "Dr. Strauss replied that he was conducting a hernia check because hernias "are a common medical issue." *Id*. at 341 ¶ 829-32.

Each of these men alleged that they did not know Strauss' conduct was abuse. *Id.* ¶¶ 547 at 293-94 (John Doe 87); 784 at 333 (John Doe 99); 820 at 339 (John Doe 101); 836 at 341-42 (John Doe 102), A jury can credit these plausible allegations.

Sexual abuse by a physician is insidious in part because, unlike teachers, coaches, and priests, doctors are permitted and expected to touch a person's body and sexual organs. As Perkins Coie wrote and Lombardo testified, only doctors and experts have the training to determine whether an invasive exam is medically necessary or abuse. *Id.* ¶¶ 98, 100 at 223. As the Ohio Medical Board found, OSU supervising doctors never "unraveled Strauss' 'medical' defenses of his abuse." *Id.* ¶ 8 at 207.

This Court in *Cutter* instructed that in applying "the discovery rule, a court must give special consideration to the patient's perspective because her lack of medical knowledge may impede her ability to discover her injury." *Cutter*, 2021 WL 3754245, at *5 (cleaned up). Yet the District Court gave the Plaintiffs' "lack of medical knowledge" no such consideration in erroneously holding that every Plaintiff knew he was abused.

The point is not that Plaintiffs "did not realize the extent of [their] psychological injury until shortly before filing suit." Garrett-Decision at 10, R.197 at 1510, *citing. Varnell v. Dora Consol. Sch. Dist.*, 756 F.3d 1208, 1216 (10th Cir.

2014). These Plaintiffs *did not know they were abused at all*. *See* App 1, R.24-1 *passim*.

These Plaintiffs—many only college freshmen, some minors—had just replaced the security and guidance of their parents with that of OSU and its doctors. Their lack of training and immaturity meant that they could not "discern whether, and to what extent, Strauss' physical examinations of student-patients exceeded the boundaries of what was appropriate or medically necessary." AC ¶¶ 98-99, R.16 at 223. They did not know whether a doctor should examine groin lymph nodes, or would be concerned by disparate sized testicles, or would need to examine ejaculate.

It took media reports in 2018 about OSU's investigation into Strauss' serial behavior for any of these Plaintiffs to begin to realize that Strauss' medical exams were sexual abuse.

Plaintiffs' experiences track OSU's many witnesses' admissions, cited in the AC, and ignored by the District Court. "Patients do not know what is a 'normal exam.'" *Id.* ¶ 97 at 222. Exactly because "laypersons can find it difficult to ascertain what conduct constitutes physician sexual abuse," Perkins Coie determined it "essential" to "consult with suitably qualified medical experts." *Id.* ¶ 98 at 223. Not "helpful," but "*essential*." Victims of sexual abuse by their doctor "often" face "confusion as to whether sexual abuse, in fact, occurred." *Id.* ¶ 96 at 222. OSU and its witnesses admitted in sworn testimony that "students could not have known Dr. Strauss was abusing them." *Id.* ¶ 97. They admit that only

someone "trained in medicine" could know what is "medically appropriate." *Id.* at 223 (¶ 100).

Strauss' clinical explanations provided cover for his abuse. At least ten other factors prevented Plaintiffs, and an objectively reasonable Plaintiff in their position, from understanding the true nature of Strauss' conduct:

(1) Strauss' trusted position as a medical doctor;

(2) the imprimatur this trusted university gave Strauss as an official team doctor, university health services doctor, and professor;

(3) Plaintiffs' youth;

(4) Plaintiffs' inexperience with medical exams and team physicals;

(5) Plaintiffs' lack of medical training;

(6) OSU employees' flippant, casual response to questions about the exams, making Plaintiffs discount their discomfort and blame themselves instead of Strauss, *see id*. ¶¶ 618 at 305 (John Doe 91); 759 at 330 (John Doe 98); 715 at 322-23 (Ross); 420 at 276 (John Doe 80); 559 at 295 (John Doe 88); 759 at 330 (John Doe 98); 872 at 347 (John Doe 104);

(7) OSU's assurance that "Dr. Strauss' examinations were appropriate,"

(8) OSU's requirement that student-athletes see Strauss for physicals and medical treatment, all of which normalized Strauss' conduct;

(9) OSU's failure to take any action, though Strauss' exams often appeared to be common knowledge among teammates and coaches, again normalizing his conduct; and

(10) OSU employees' indifference to Strauss' habit of lingering around student-athletes, including watching and showering with them and taking their photographs during practice.

Each of these factors is highly specific, posing "a question for the trier of fact to resolve." *In re Arctic Express Inc.*, 636 F.3d at 803. The District Court did not and could not evaluate any Plaintiff's credibility. The court failed to cite, much less analyze, a single one of these allegations.

B. The Statute of Limitations only Begins When, *Inter Alia*, a Patient Knew or Should Have Known He Was Abused

A patient's claim accrues only, *inter alia*, when he knew or should have known a medical exam was abuse. Here, it took the publicity surrounding OSU's April 5, 2018 investigation announcement to make Plaintiffs aware of Strauss' misconduct. *See Hughes v. Vanderbilt Univ.*, 215 F.3d 543, 548 (6th Cir. 2000) (widespread press coverage can trigger a plaintiff's discovery of their injury); *Lozano v. Baylor Univ.*, 408 F. Supp. 3d 861, 900-01 (W.D. Tex. 2019) (claim did not accrue until "release of Baylor's Findings of Fact and the subsequent media coverage"); *Jameson v. Univ. of Idaho*, No. 3:18-cv-00451, 2019 WL 5606828, at *1 (D. Idaho Oct. 30, 2019) (claim did not accrue until "Independent Report" on university's "handling of Title IX cases" was made public); *Doe v. Pasadena Hosp. Ass'n*, No. 2:18-cv-08710, 2020 WL 1244357, at *6 (C.D. Ca. Mar. 16, 2020) (only media story put plaintiffs on notice of doctor abuse). It was only then that the limitations period began.

In *Pasadena Hospital Association*, for example, a court refused to dismiss as untimely claims of patients victimized by Dr. Sutton, an obstetrician-

gynecologist. 2020 WL 1244357. Like OSU, the defendant-hospital argued that the plaintiffs' allegations that Sutton was "touching their legs in a sexual manner, conducting unexpected vaginal exams, and unnecessary breast[] exams" meant that plaintiffs knew they were assaulted "when it occurred." *Id.* at *6. The court disagreed. Plaintiffs' belated discovery was "a question of fact," inappropriate for resolution on a motion to dismiss: "Sutton's position and authority as a physician, and the circumstances supporting the alleged conduct"—along with his claims that his actions were for "legitimate medical purposes"—made "reasonable" plaintiffs' failure to recognize the abuse until a recent media "story describing Sutton's sexual misconduct." *Id.*; *see also Simmons v. United States*, 805 F.2d 1363, 1367 (9th Cir. 1986) (psychiatric malpractice claim accrued when plaintiff discovered that what she believed was romantic relationship was "misconduct" by therapist); *Torres v. Sugar-Salem Sch. Dist.,* No. 4:17-cv-00178, 2019 WL 4784598, at *13-14 (D. Idaho, Sept. 30, 2019) (where plaintiff "believed she was in a legitimate relationship" with high school therapist who sexually abused her, dispute about accrual date precluded summary judgment for school); *Doe v. Cherwitz*, 518 N.W.2d 362, 364 (Iowa 1994) (patient's claim that doctor sexually assaulted her during pelvic exam accrued when plaintiff knew, or should have known, she was abused).

The District Court ignored this caselaw, which Plaintiffs highlighted in their briefing below.

C. The District Court Made Improper Inferences in Rejecting Each Plaintiff's Factual Allegations that They Did Not Know They were Abused

Instead, the District Court rejected Plaintiffs' allegations in a footnote citing the *Garrett* complaint: "The Complaint is replete with allegations that Plaintiffs were concerned by Strauss' 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-Decision at 18 n.7, R.197 at 1518. The Complaint in this case alleges no such thing.[20] The District Court erred in three ways, described below.

1. The Court Distorted the Allegations and Did Not Analyze Any Plaintiff's Individual Experience

Nowhere in the *Moxley* Complaint did any of the Plaintiffs allege they were concerned by *abuse*, or discussed *abuse*, or reported *abuse,* or were distressed because they experienced *abuse*. OSU itself highlighted the difference between *Garrett* and *Snyder-Hill* in its briefing below, writing that, "in contrast to the *Snyder-Hill* plaintiffs, the [*Garrett*] plaintiffs here do not even attempt to seriously challenge . . . [t]hat they knew Strauss sexually abused them at the time of the abuse." *Garrett v. OSU,* No. 2:18-cv-692, OSU Reply on Mot. Dismiss at 2, R.170 at 1236. That concession applies equally to the *Moxley* Plaintiffs, each of whom have *also* specifically pleaded that they did not know Strauss sexually abused them at the time. The District Court made no mention of these distinctions or OSU's concession. Instead, it simply stated that the "reasons requiring dismissal in

[20] This section II.C. differs from the *Snyder-Hill* Appellants' Brief in setting forth the experience of *Moxley* Plaintiffs and citing *Moxley* allegations.

[*Garrett* and *Ratliff*] apply equally to this case," citing, without explanation, hundreds of paragraphs of the *Moxley* Complaint in a single string cite. Decision at 2, R.26 at 512. The *Moxley* opinion did not tie any allegation to any specific basis for dismissal.

Allegations matter. Whatever the *Garrett* plaintiffs experienced or alleged cannot be a basis to dismiss any Plaintiff in *this* case. What each Plaintiff experienced was different. What each Plaintiff understood was different. Each Plaintiff requires an individual inquiry. Some Plaintiffs never discussed or reported what Strauss did.[21] Others discussed what happened but did not know Strauss abused them.[22] Each Plaintiff had his own reason for not believing he was abused at the time.[23] One Plaintiff's knowledge cannot be exported to another. The District Court erroneously treated Plaintiffs as an undifferentiated mass. But they are people with individual experiences and allegations, entitled under our legal system to individual consideration.

2. Suffering Discomfort is Not Tantamount, as a Matter of Law, to Knowing You Were Abused

The District Court further erred in concluding that a Plaintiff who feels "distress" or expresses "concern[s]" about a medical exam necessarily knows that exam was sexual abuse. Garrett-Decision at 18 n.7, R.197 at 1518. A patient without medical training may express concern about an unpleasant exam even

[21] *E.g.*, AC ¶¶ 346, R.16 at 264 (Rohde); 360 at 266 (Murray); 522 at 289 (John Doe 86).

[22] *E.g., id.* ¶¶ 300 at 259 (Jackson); 380 at 270 (John Doe 78); 580 at 299 (John Doe 89).

[23] *See* App 1, R.24-1 *passim*.

when it is not abusive or they do not believe it was abusive. Colonoscopies and mammograms, for example, are uncomfortable but not abusive.

In discovery, Plaintiffs will adduce expert psychological and medical testimony that patients—like Dr. Sutton's patients, *supra* at 33-34—can be concerned about a doctor-patient interaction without knowing it rose to abuse. *Cutter*, 2021 WL 3754245, at *7 (citing plaintiff's limited education and lack of medical training as facts jury could consider regarding delayed accrual). As *Gregg* explains, a plaintiff "may have reasonably viewed the embarrassment and humiliation she felt as the ordinary, and hence not harmful, response to [medical treatment]." 870 F.3d at 885 (reversing dismissal of claims alleging injury from prison sexual shame therapy).

Even the small number of Plaintiffs who initially expressed concerns about the propriety of Strauss' exams became convinced those concerns were mistaken due to the ten factors described above. They were assuaged by trusted upperclassmen, coaches, or Strauss himself, convinced by Strauss' prestigious position, self-doubt due to their youth and inexperience, and because doctors are not "associated with common conceptions of sexual abuse." AC ¶¶ 95-96, R.16 at 222; *supra* at 31.

Similarly, the District Court's claim that if the abuse "was enough to deprive them of the educational opportunities," it was necessarily "sufficient to put them on at least inquiry notice that they suffered abuse," is medically and legally baseless. Garrett-Decision at 18 n.7, R.197 at 1518. The court cited no case for this erroneous conclusion. Not even OSU risked making such a flawed argument. At

trial, psychological experts will detail that a victim can suffer severe impact from an abusive experience without connecting the two. *E.g.*, *Simmons*, 805 F.2d at 1367 (expert testimony, credited by factfinder, that plaintiff suffered depression that required hospitalization yet "had no idea . . . her emotional condition had been caused by [counselor's misconduct]"). For example, Strauss abused Jeffrey Rohde, a member of OSU's soccer club team, at his required annual physical; Strauss also regularly showered when Rohde showered. "While student-athletes openly joked about Dr. Strauss' examinations in front of OSU soccer staff, the soccer coaches continued to require Rohde and other athletes to see Dr. Strauss for examinations and treatment." AC ¶ 348, R.16 at 264. Rohde felt that Strauss' conduct was strange, but did not understand it was abuse. He had two options: quit the team or stay and bear it. That he chose the former—quitting after his sophomore year—is evidence of the soccer staff's indifference (and demonstrates severe educational impacts), *not* that he knew he was abused. *Id*. ¶¶ 328-53 at 262-65.

3. Hyper-aware Plaintiffs Who Recognized Strauss' Conduct as Abuse are not the Prototypical "Reasonable Person"

Finally, that a small number of plaintiffs *in other cases* knew that Strauss abused them cannot mean as a matter of law Plaintiffs here *should have* known. First, every Plaintiff had a different experience. To conflate a rape case with a voyeurism case, for example, is absurd. Certain Plaintiffs may also have been highly skilled at spotting a predator masquerading as an esteemed, credentialed OSU physician. But a student hyper-attuned to doctor-patient abuse is hardly, at the pleading stage, a "typical lay person." *Roberson v. Tennessee*, 399 F.3d 792,

794-95 (6th Cir. 2005). To the contrary, as OSU conceded, the typical lay person would be "confus[ed]" whether abuse occurred. AC ¶ 196, R.16 at 222.

***

Plaintiffs now struggle with the recent and horrible realization that Strauss sexually abused them, notwithstanding everything Strauss and OSU led them to believe and concealed. If the District Court were correct—that a reasonable person would immediately recognize all forms of sexual abuse by a medical doctor—then thirty-four Plaintiffs in this case are unreasonable, Perkins Coie is unreasonable, Grace is unreasonable, and Lombardo is unreasonable. The District Court erred.

III. THE DISTRICT COURT ERRED IN FINDING THAT EVERY PLAINTIFF KNEW OR SHOULD HAVE KNOWN BEFORE 2018 THAT OSU FACILITATED STRAUSS' SEXUAL ABUSE

The District Court held that because Plaintiffs knew OSU employed Strauss, they necessarily knew OSU's indifference caused Plaintiffs' injury. That is incorrect as a matter of law.

A. Plaintiffs Did Not and Could Not Know OSU's Causal Role

"None of the Plaintiffs knew, or had reason to know, that OSU failed to appropriately investigate, remedy, and respond to years of complaints. None of the Plaintiffs knew, or had reason to know, that OSU failed to adequately supervise Strauss, even after learning that he posed a substantial risk to the safety of male students and student-athletes." AC ¶ 209, R.16 at 242-43. Multiple OSU witnesses admit there is no way Plaintiffs *could* have known of OSU's causal role. *Id*. ¶¶ 207 at 242 ("I don't know of any way."); 208 ("I don't believe they would have known"). A jury is entitled to credit Plaintiffs' testimony and OSU's

admissions. Taking these allegations as true, OSU's statute of limitations defense fails.

Title IX imposes no *respondeat superior* liability. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 285 (1998). Schools can only be sued for their *own* misconduct, such as an official policy that causes harassment or deliberate indifference to sexual harassment known by an official with authority to take corrective action. *Id*. at 290.

A hypothetical plaintiff who knew he was abused and sought to sue OSU pre-2018 would have failed. Any competent lawyer would have advised that it is not enough that he was abused by an OSU doctor. The lawyer would ask: "Were there prior complaints?" "Did OSU administrators know that Dr. Strauss was abusing students?" "Has OSU shown deliberate indifference to known abuse?" No reasonable inquiry by Plaintiffs would have allowed them to answer affirmatively. *E.g.*, AC ¶¶ 207-11 at 242-43. Without answers to these questions, any asserted Title IX claim would have been sanctionable. *See Stoleson v. United States*, 629 F.2d 1265, 1270 (7th Cir. 1980) (accrual delayed where plaintiff "would have been informed quite correctly [by component legal advice] that she had no claim against the Government"); *Ouellette*, 977 F.3d at 140 ("Any knowledgeable attorney that Ouellette consulted around the time of his alleged abuse . . . would not have advised him to file a lawsuit against [the municipal defendants] in the absence of additional information suggesting that they were also a cause of his injury.").

Plaintiffs were in the dark for good reason. OSU did everything institutionally possible to cover up Strauss' abuse and its own complicity: lying to students, shredding documents, whitewashing Strauss' personnel record, falsifying Strauss' employment evaluations, failing to inform anyone (students, the public, the Medical Board, the police) of Strauss' misconduct, and peddling, promoting, and vouching for Strauss from the 1970s until even after his death. *Supra* Facts I.B. This campaign was masterful, effective, and appalling. What student could have known that his beloved OSU received complaint after complaint about Strauss but nonetheless "actively protected" him instead of terminating him?

Even if the Plaintiffs did have reason to investigate OSU's conduct at the time, their efforts would have been futile. OSU controlled access to information about prior complaints, the information was confidential, and OSU's response to Snyder-Hill's inquiry makes clear that, when asked directly about Strauss' abuse, it would lie. *See, e.g.*, *Merck & Co.*, 559 U.S. at 653 (once inquiry notice triggered, "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,' . . . irrespective of whether the actual plaintiff undertook a reasonably diligent investigation"); *Kubrick*, 444 U.S. at 122 (claim does not accrue because "the facts about causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain").

At minimum, the issues of what should have alerted the Plaintiffs to OSU's role in Strauss' abuse, and whether an investigation by the Plaintiffs would have

disclosed OSU's role, are fact-intensive inquiries inappropriate for resolution on a motion to dismiss. *In re Arctic Express Inc.*, 636 F.3d at 802; *Kehoe*, 933 F. Supp. 2d at 1016.

B. Claims Do Not Accrue Before a Plaintiff Could Know the Defendant-Institution's Complicity

Courts throughout the country hold that when sexual abuse victims seek to hold institutions accountable for their own role in enabling abuse, the claim accrues when plaintiffs should know of the *institution's* misconduct, not when the victim knows he was abused. Plaintiffs' allegations are stronger than those in these cases, given the admissions by Perkins Coie and OSU employees that OSU students could not have known that OSU was complicit in enabling Strauss' abuse. The District Court largely ignored the caselaw and the admissions.

1. Appellate Caselaw Supports Delayed Accrual For Claims Against Institutions that Condoned Misconduct

On analogous facts, the First Circuit held that a plaintiff's sexual abuse claim against a police department did not accrue when he was abused. *Ouellette*, 977 F.3d at 140. Plaintiff Ouellette had been abused by a police officer as a teenager in the 1980s, complained to the police department contemporaneously, but only learned through social media in 2015 that the department knew the officer had abused others. *Id.* at 130. He sued the police department under § 1983, alleging its official policy was to "tacitly condone[]" the officers' sexual misconduct. *Id.* at 134. The district court dismissed the suit on summary judgment, holding that plaintiff's claims accrued at the moment of abuse.

The First Circuit reversed. Carefully analyzing the delayed accrual jurisprudence, it reaffirmed, post-*Rotkiske*, that "pursuant to the federal discovery rule, accrual is delayed until the plaintiff knows, or should know, . . . *both* the fact of his or her injury *and* the injury's likely causal connection with the putative defendant." *Id.* at 136. Only then can a plaintiff "take the necessary steps to take legal action to preserve his or her rights." *Id.* at 138. A jury could reasonably conclude that, when he was abused, plaintiff had no "reason to suspect that the [police department] was not doing its job, or worse, that it was covering up [the abuser's] conduct." *Id.* at 143.

The First Circuit distinguished FTCA cases where an employer is liable under *respondeat superior*, because under § 1983 (like Title IX), 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. That the abusing officer "may have used [his police captain] role to take advantage of Ouellette hardly supports the inference that [the abuser's] higher-ups condoned his conduct, or even knew about it." *Id.* at 142. Plaintiff's knowledge and diligence were quintessential jury questions that could not be resolved even on summary judgment. *Id.* at 145; *see also McIntyre v. United States*, 367 F.3d 38, 52, 55 (1st Cir. 2004) (victim's family's FTCA claim concerning 1984 murder did not accrue until 1998, when, due to press reports revealing the "causal connection between the government and her injury," family had "a reasoned basis to believe that it was the FBI that had leaked [victim's] identity as an informant").

Ouellette mirrors decisions from the Fifth and Second Circuits holding, outside the sexual abuse context, that a plaintiff's federal claim against the government accrues when he should have discovered that the *government* injured him—not when he discovered the injury. In *Piotrowski*, 237 F.3d at 577, the Fifth Circuit held that a § 1983 claim against the City for "protect[ing]" a criminal who shot plaintiff did not accrue at the time of the shooting, but only when plaintiff learned "the causal connection between her injuries and [the City's] actions," *i.e.*, that the City "had actively protected and/or assisted [the criminal]." *Id.* In *Barrett v. United States*, the Second Circuit held it would be "illogical" to require plaintiff to bring § 1983 and FTCA claims "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." 689 F.2d at 330

2. District Court Caselaw Supports Delayed Accrual of Claims against Universities For Enabling Abuse

District courts have also repeatedly applied the discovery rule to permit sexual abuse victims to bring Title IX or § 1983 claims against universities many years after the abuse.

Dutchuk v. Yesner held that plaintiffs abused by a University of Alaska employee had timely claims against the university because they did not know "until March 2019 that the University had been ignoring complaints of sexual harassment by [its employee] for years and that it was this policy of indifference that caused a heightened risk that they would be sexually harassed." 2020 WL 5752848, No. 3:19-cv-0136-HRH, at *5 (D. Alaska Sept. 25, 2020).

Rejecting Berkeley's statute of limitations defense, *Karasek v. Regents of University of California* distinguished Title IX claims from a negligence claim. 500 F. Supp. 3d 967, 980 (N.D. Cal. 2020). In a negligence case, "the wrongdoer's identity as a federal agent can readily be discovered within the statute of limitations period, and accrual therefore does not depend on that knowledge"; in a Title IX case, "however[,] there is a singular risk that the assault will not alert a reasonable person to *the school's* involvement." *Id.*

The court in *Doe v. Board of Education of Hononegah Community High School* explained that the notice that triggers claim accrual "must not be of harm but of governmental harm." 833 F. Supp. 1366, 1375-76 (N.D. Ill. 1993). Though plaintiff knew she was harmed by a schoolteacher, her claim against the school did not accrue without reason to "suspect that the school board or its administrators had been responsible in any way for the teacher's conduct." *Id*.

In *Doe 1 v. Baylor University*, 240 F. Supp. 3d 646, 661 (W.D. Tex. 2017), plaintiffs alleged they could not "know of Baylor's alleged causal connection to their assaults until the spring of 2016, when media reports regarding the rampant nature of sexual assault on Baylor's campus first came to light." The court "accepted the allegations in the Complaint as true" and denied the motion to dismiss. *Id.* at 663. *See Hernandez v. Baylor Univ.*, 274 F. Supp. 3d 602, 616-17 (W.D. Tex. 2017) (plaintiff's Title IX claim did not accrue until university-commissioned report revealed university's indifference to previous complaints of sexual assault); *Lozano*, 408 F. Supp. 3d at 900-01 (same).

In *Sowers*, though plaintiff "knew that she had been sexually assaulted," her § 1983 claim accrued only when the teacher's "history of sexual abuse was revealed to the [school] community," so she had "reason to know of an ongoing policy of reckless indifference to numerous complaints of sexual abuse." *Sowers v. Bradford Area Sch. Dist.*, 694 F. Supp. 125, 137-38 (W.D. Pa. 1988), *aff'd*, 869 F.2d 591 (3d Cir. 1989), *vacated on other grounds by Smith v. Sowers*, 490 U.S. 1002 (1989); *Jameson,* 2019 WL 5606828*,* at *6-8 (Title IX claim did not accrue until University of Idaho issued "Independent Report" about its handling of Title IX cases, revealing it "had failed to investigate two [prior] complaints" against her abuser); *T.R. v. The Boy Scouts of Am.*, 181 P.3d 758, 762, 766 (Or. 2008) (teenager sexually abused by police officer had timely claim against city, because jury could find "plaintiff did not suspect the city itself of causing him harm" until years after abuse; city not liable "merely because it employs a tortfeasor"); *Armstrong v. Lamy*, 938 F. Supp. 1018, 1033 (D. Mass 1996) (no evidence plaintiff-student should have known that the acts and omissions of the "Municipal Defendants were a proximate cause of his injury, even assuming that he knew he had been injured by [teacher]"); *Cline v. United States*, No. 3:13-CV-776, 2016 WL 2653607, at *7 (M.D. Tenn. May 10, 2016) (FTCA claim did not accrue until plaintiff had "sufficient" information about "wrong done" by *both* abuser and "government that may have been able to protect [victim] . . . but failed to do so").

The University of Alaska, Berkeley, Baylor University, the University of Idaho, and numerous school districts all made the same argument OSU makes here. They lost. OSU should lose, too.

C. The District Court Erred in Holding Plaintiffs' Claims Were Untimely Though Plaintiffs Could Not Know of OSU's Culpability Until Recently

Ignoring the ample allegations that Plaintiffs did not know that OSU's conduct enabled Strauss, the District Court held it was enough that Plaintiffs knew they were abused by an OSU employee. That holding errs for four reasons.

First, it is at odds with the basic structure of Title IX liability, which requires evidence of the university's culpability; there is no *respondeat superior* liability. *Supra* Argument III.A.

Second, without such evidence, a plaintiff who attempted to sue OSU at the time could not overcome Rule 11, let alone Rule 12(b)(6). *Supra id*.

Third, even if Plaintiffs were on inquiry notice (as the Garrett-Decision at one point states, without explanation), no reasonable inquiry would have revealed a basis for a clam against OSU. Neither the District Court nor OSU have identified *any* facts an inquiry would have revealed. *Supra id*.

Fourth, the bulk of the Garrett-Decision analyzed a *post*-assault claim that Plaintiffs are not pursuing, then stated its analysis "applies with equal force" to Plaintiffs' *pre*-assault claims. Garrett-Decision at 21, R.197 at 1521. Pre- and post-assault claims are not interchangeable for a timeliness analysis. In a post-assault Title IX claim, the question is the propriety of the school's *response* to a report of the plaintiff's assault. *Cf.* Garrett-Decision at 11, R.197 at 1511 (citing *Kollaritsch v. Mich. State Univ. Bd. of Trs.*, 944 F .3d 613, 618, 620 (6th Cir. 2019) (post-assault claim requires pleading school's "knowledge of some actionable sexual harassment and that the school's deliberate indifference to it

resulted in *further* actionable harassment" (emphasis added)). But no Plaintiff is challenging OSU's *response* to his own abuse by Strauss.

Plaintiffs instead allege two "*pre*-assault" claims: indifference to prior sexual harassment (Count II) and hostile environment (Count I). At their core, both claims assert that OSU knew about—and enabled—Strauss' sexual abuse *before* a particular Plaintiff was abused. Plaintiffs allege OSU could have prevented Strauss' abuse had it taken appropriate action on other students' prior complaints about Strauss' conduct (the "indifference to prior sexual harassment" claim). AC ¶¶ 925-36, R.16 at 359-61. Plaintiffs also allege OSU created a sexually-hostile culture in athletics and student health, which substantially heightened the risk that Plaintiffs and other students would be sexually harassed (the "heightened-risk claim"). *Id.* ¶¶ 900-24 at 352-59.

The District Court erred in stating this Court has never "recognized such a [pre-assault] theory." Garrett-Decision at 22, R.197 at 1522. *Williams ex rel. Hart v. Paint Valley Local School District* affirmed jury instructions on a pre-assault Title IX claim stemming from a school's failure to protect a student-plaintiff from abuse by a teacher. 400 F.3d 360, 362, 368 (6th Cir. 2005). The teacher had previously been the subject of molestation complaints by at least five other students. Based on those prior complaints, the school would be culpable if it had "actual notice" that the teacher "posed a substantial risk of sexual abuse to children in the school district," yet "responded unreasonably." *Id*. *Paint Valley* is

consistent with decisions from the Ninth, Tenth, and Eleventh Circuits recognizing pre-assault claims.[24]

In this *pre*-assault case, Plaintiffs did not know and could not have known that OSU had "actual notice" that Strauss "posed a substantial risk of abuse" from early on in his tenure, yet "responded unreasonably" by ignoring prior reports about Strauss' abuse. *Paint Valley*, 400 F.3d at 368.

D. The District Court Erred in Relying on Post-Assault and Other Inapposite Cases

The District Court did not consider the litany of cases cited above finding pre-assault Tile IX claims timely where the plaintiff had no basis to allege the school's culpability. *Supra* Argument III.B. Of the four cases it cited in the pre-assault portion of the Garrett-Decision, three support Plaintiffs; just one trial court erroneously held otherwise. Garrett-Decision at 23-24, R.197 at 1523-24. The District Court's dismissal of Plaintiffs' pre-assault claims seemingly relied on its rejection of a post-assault claim Plaintiffs did not bring. That was error.

For example, the District Court cited *Twersky v. Yeshiva University*, 579 F. App'x 7, 9 (2d Cir. 2014), a post-assault claim. There, plaintiffs complained to administrators about the teacher's abuse, knew "administrators rebuffed their complaints," and thus knew of the school's indifference. *Id.* at 10. *Twersky* is the wrong inquiry for *pre*-assault claims. As *Sowers* explained, "the defendant's treatment of Sowers after the assault [including discouraging her from further reporting] was not, and obviously could not have been, a cause of her assault.

[24] *Karasek*, 956 F.3d at 1112; *Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170, 1184-85 (10th Cir. 2007); *Williams v. Bd. of Regents of Univ. Sys. of Ga*, 477 F.3d 1282, 1304-05 (11th Cir. 2007).

There is no allegation that Sowers knew of the defendants' handling of previous sex abuse complaints against teachers." 694 F. Supp. at 138.

In *King-White v. Humble Independent School District*, 803 F.3d 754 (5th Cir. 2015)—the one precedential circuit decision cited on this point[25]—plaintiffs challenged the school's response *after reporting* the abuse. Because the mother "personally complained to . . . School Officials" about the abuse, plaintiffs' knowledge that the mother's complaint went "unheeded" was dispositive. *Id.* at 762-63. *King-White* is irrelevant to Plaintiffs' pre-assault claims.

Similarly off-point is a non-precedential decision from this Court, *Gilley v. Dunaway*, 572 F. App'x 303, 304 (6th Cir. 2014). In *Gilley*—which considered only tolling for fraudulent concealment under Kentucky law, not federal accrual—plaintiff "knew of the Board's district investigation" into accusations she was being sexually abused *while* her high school coach continued to sexually abuse her. *Id.* at 308-09.

The District Court also cited inapposite trial court decisions where accrual was undisputed, the complaints allege facts evidencing knowledge or inquiry notice of the school's indifference, or the decisions contain scant reasoning. The weight and persuasiveness of authority supports the student-plaintiffs, *see supra* Argument II.B, III.B.

In addition, in none of these cases did defendant's witnesses admit plaintiffs could not have known about defendant's causal role. AC ¶¶ 207-08,

[25] The plaintiff in *Varnell v. Dora Consolidated School District*, 756 F.3d 1208, 1210 (10th Cir. 2014), did not argue she was unaware of the school's role in causing her abuse.

R.16 at 242. In none did the defendant claim *it* did not know of its own causal role. *Id.* ¶ 216 at 244. In none did the defendant pay millions to a law firm just to investigate an answer to that question. All of these admissions create additional fact issues that cannot be resolved on a motion to dismiss.

IV. THE DISTRICT COURT ERRED IN REJECTING A LIMITATIONS TOLL BASED ON OSU'S FRAUDULENT CONCEALMENT

Regardless of when the statute of limitations accrued, OSU's concealment, obfuscation, and fraud equitably tolled the statute for Plaintiff Everett Ross.[26]

"When," as here, "the statute of limitations is borrowed from state law, so too are the state's tolling provisions, except when they are inconsistent with the federal policy underlying the cause of action." *Bishop*, 618 F.3d at 537.

Under Ohio law, equitable tolling applies "where there is some conduct of the adverse party, such as misrepresentation, which excludes suspicion and prevents inquiry," to "conceal evidence of the alleged wrongdoing." *Lutz*, 717 F.3d at 474-75 (fraudulent concealment where energy companies concealed miscalculation of royalty payments). Plaintiffs must have relied on the "misleading" "misrepresentation" to their detriment. *Lutz v. Chesapeake Appalachia, L.L.C.*, 807 F. App'x 528, 530 (6th Cir. 2020); *see Schmitz v. NCAA*, 122 N.E.3d 80, 90 (Ohio 2018) (NCAA's failure to inform football player about "the risks of playing college football and to share material information about those risks" amounted to fraudulent concealment).

[26] This section differs from the *Snyder-Hill* Appellants' Brief in that it sets forth the fraudulent concealment claim of a *Moxley* Plaintiff.

Plaintiff Ross easily meets this standard. What *didn't* OSU do to "conceal evidence of the alleged wrongdoing"? OSU falsified Strauss' performance reviews to "prevent the public (including OSU students) from learning about the abuse," *id.* ¶¶ 170, 172 at 236-37; 918 at 355; destroyed patient records, *id.* ¶¶ 18 at 209; 190 at 239; promised the Medical Board it would look for other Strauss survivors, then did not, *id.* ¶¶ 17 at 208; 189 at 239; failed to discipline Strauss for decades, *id.* ¶ 134 at 230-31; concealed that it held a (belated) private disciplinary hearing in June 1996, then concealed the findings from that hearing, *id.* ¶¶ 134 at 230; 163 at 235; 181-86 at 238; let Strauss retire voluntarily and misrepresented his departure by granting him an emeritus honorific in order to "conceal[] both Dr. Strauss' abuse and the university's role in enabling his predation," *id.* ¶¶ 68 at 218; 185-86 at 238; 200 at 241; 209 at 242-43. The list goes on, *see supra* Facts I.B. OSU hid the abuse from law enforcement, the State Medical Board, students, and the public. *E.g. id.* ¶¶ 11, 13 at 207-08; 209 at 242-43.

Plaintiff Ross was misled into believing he was not abused and had no basis for a claim against OSU, because OSU staff made affirmative misrepresentations indicating Strauss' exams were legitimate. When Plaintiff Ross told OSU football Coach Earle Bruce that "Strauss' physicals went beyond what he had experienced in the past," Coach Bruce "told Ross that 'That's just Strauss. Are you gay? Then how do you know that's what it is?'" *Id.* ¶ 715 at 322-23. Coach Bruce trainer misled him into believing the exam was normal. Ross was "dissuad[ed]" "from pursuing" his initial concerns about Strauss. *Id.* ¶ 717 at 323.

The District Court did not question OSU's affirmative concealment and fraudulent misrepresentations. Yet it rejected Plaintiff Ross' tolling argument because all Plaintiffs were purportedly "aware of all the elements of their causes of action . . . the injury, the perpetrator, and the perpetrator's employer." Garrett-Decision at 20, R.197 at 1520. But Plaintiff Ross was affirmatively misled about whether he was injured at all. And knowing the perpetrator's employer is *not* enough for any plaintiff to bring a Title IX claim. *Supra* Argument III.A. OSU concealed its knowledge of a serial predator and its indifferent response. *See Redwing*, 363 S.W.3d at 465 (applying tolling though victim knew priest was church employee, because church concealed its *own* knowledge of priest's sexual predation).

Courts repeatedly toll claims against institutions that conceal sexual assault. *Lozano*, 408 F. Supp. 3d at 900-01 (fraudulent concealment established where Baylor University "actively conceal[ed]," specific instances where football players committed sexual assault; victim's claim was "inherently undiscoverable" until public investigatory findings);[27] *Redwing v. Cath. Bishop for Diocese of Memphis*, 363 S.W.3d 436, 465 (Tenn. 2012) (equitable tolling where plaintiff abused by priest 30 years ago was "misled by the Diocese with regard to the Diocese's knowledge of Father Guthrie's history and propensity for committing sexual abuse"); *Magnum v. Archdiocese of Phila.*, No. 06-CV-2589, 2006 WL

[27] The District Court disregarded *Lozano* as not applying Ohio law. *See* Garrett-Decision at 21, R.197 at 1514. But Texas's and Ohio's fraudulent concealment standards are materially similar. Compare *Tipton v. Brock*, 431 S.W.3d 673, 681 (Tex. Ct. App. 2014) *with Hoeppner v. Jess Howard Elec. Co.*, 780 N.E.2d 290, 297 (Ohio Ct. App. 2002).

3359642, at *12 (E.D. Pa. Nov. 17, 2006), *aff'd*, 253 F. App'x 224 (3d Cir. 2007) (equitable tolling where plaintiffs in 2002 learned that archdiocese concealed priest abuse since the 1940s).

Having effectively concealed Strauss' abuse of students and its own role in enabling Strauss' predation and affirmatively misled Plaintiff Ross that Strauss' exams were legitimate, OSU cannot assert the statute of limitations now for Ross. The Court should not reward OSU for perpetrating a successful fraud. Whether and how OSU "fraudulently concealed facts, thereby preventing the plaintiff from learning of its injury" are classic "disputed factual questions" that should not be resolved on a motion to dismiss. *Am. Premier Underwriters, Inc. v. Nat'l R.R. Passenger Corp.*, 839 F.3d 458, 464 (6th Cir. 2016).

CONCLUSION

This Court should reverse the District Court's entry of judgment for OSU and remand for further proceedings.

February 2, 2022

EMERY CELLI BRINCKERHOFF
ABADY WARD & MAAZEL LLP

By: */s/ Ilann M. Maazel*

Ilann M. Maazel
Debra L. Greenberger
Marissa R. Benavides
600 Fifth Avenue, 10th Floor
New York, New York 10020
Phone: (212) 763-5000
Fax: (212) 763-5001
E-Mail: imaazel@ecbawm.com
E-Mail: dgreenberger@ecbawm.com
E-Mail: mbenavides@ecbawm.com

SCOTT ELLIOT SMITH, LPA
Scott E. Smith (0003749)
5003 Horizons Drive, Suite 100
Columbus, Ohio 43220
Phone: (614) 846-1700
Fax: (614) 486-4987
E-Mail: ses@sestriallaw.com

PUBLIC JUSTICE, P.C.
Adele P. Kimmel
Alexandra Z. Brodsky
1620 L Street NW, Suite 630
Washington, DC 20036
Phone: (202) 797-8600
Fax: (202) 232-7203
E-mail: akimmel@publicjustice.net
E-mail: abrodsky@publicjustice.net

Attorneys for Plaintiffs

CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), contains 12,874 words. This document 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 document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14-point font.

Dated: February 2, 2022

s/ Ilann M. Maazel
Ilann M. Maazel
Attorney for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 2, 2022, an electronic copy of the Brief of Plaintiffs-Appellants was filed with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. The undersigned also certifies that all participants are registered CM/ECF users and will be served via the CM/ECF system.

s/ Ilann M. Maazel
Ilann M. Maazel

ADDENDUM

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Plaintiffs-Appellants hereby set forth their designation of relevant District Court documents as required by Sixth Circuit Rule 30(g).

Record Entry Number	Description of Document	Page ID#
1	Complaint	1-144
10	Related Case Memorandum Order	172-73
16	Amended Complaint	211-362
24-1	Appendix 1 to Plaintiffs' Opposition to Defendant's Motion to Dismiss	471-489
26	Opinion and Order	511-12
27	Judgment	513
28	Notice of Appeal	514

Plaintiffs-Appellants further set forth their designation of relevant District Court documents in the action related below to the underlying action in this appeal, *Garrett v. OSU*, No. 2:18-cv-692 (S.D. Ohio).

Record Entry Number	Description of Document	Page ID#
151	Order	902-905
170	Defendant OSU's Reply on Motion to Dismiss	1235-1256
197	Opinion and Order	1494-1518