IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

STEVE SNYDER-HILL, *et al*., Plaintiffs, v. THE OHIO STATE UNIVERSITY, Defendant.	Case No. 2:18-cv-00736-MHW-EPD

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

> "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."[1]

PRELIMINARY STATEMENT

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 v. Children's Ctr. for Developmental Enrichment*, 618 F.3d 533, 536 (6th Cir. 2010). A plaintiff "cannot maintain an action before she knows she has one." *City of Aurora,* 599 F.2d at 387-88. 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).

Injury: OSU admits "students could not have known Dr. Strauss was abusing them." Admits patients need medical training to recognize doctor abuse and face "confusion as to whether sexual abuse, in fact, occurred." Admits that its own lawyers, hired to investigate sexual abuse by Dr. Strauss, deemed it "*essential*" to consult "suitably qualified medical experts" to "discern *whether* . . . Strauss' physical examinations" were "appropriate or medically necessary." OSU then capitalized on Plaintiffs' confusion and lack of medical training or expertise by normalizing and concealing Dr. Strauss' misconduct for 40 years.

Yet OSU would have this Court determine, as a matter of fact and law, that confused students knew or should have known their trusted university doctor sexually abused them.

Students should know. Perkins Coie needs experts. That is OSU's argument.

Cause of the Injury: OSU claims it had no idea, *even in 2018*, that Strauss abused anyone. Dr. Strauss' bosses at OSU claim they had no idea. OSU covered up its own complicity for 40 years, lying to students, shredding Strauss' medical records, falsifying his employment evaluations, peddling Strauss as an "exceptional" doctor who showed great "care and concern for athletes," and keeping the misconduct secret from students, the Medical Board, the police, and the public.

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[1] *City of Aurora v. Bechtel Corp.*, 599 F.2d 382, 387-88 (10th Cir. 1979).

Yet OSU would have this Court determine, as a matter of fact and law, that students knew or should have known in the 1970s, 1980s, and 1990s that OSU (i) knew of and (ii) was deliberately indifferent to Strauss' sexual misconduct.

Students should have known 30-40 years ago. OSU did not know in 2018. This is OSU's attempt to prove an affirmative defense "beyond doubt." *Ricco v. Potter,* 377 F.3d 599, 602 (6th Cir. 2004).

Eighty-three Plaintiffs did not know until 2018 that they were sexually abused. None knew OSU's role in causing that abuse. That is the complaint. Those are the allegations. They are taken as true, not false. OSU ignores its every admission, ignores hundreds of allegations in the complaint, and construes what allegations it does address in the light most favorable to itself. OSU treats this motion like a jury trial, where only OSU gets to offer evidence.

Failing to advance any credible argument, OSU has the audacity to make a *settlement offer* in a merits brief, apparently to give the Court comfort that, even if the case is dismissed, OSU will (in its words) "do the right thing." It is difficult to justify OSU's betrayal of the confidentiality of mediation and settlement discussions. It is difficult to understand why OSU's brief mentions "mediation" ten times, but the controlling case law not once.

OSU cannot run away from the allegations, the facts, or the law. For 40 years, this school sent a clear message to its students: trust Dr. Strauss and trust us. So the students did. Now OSU would dismiss its students' Title IX claims because they were too trusting.

Shame on them.

FACTUAL BACKGROUND

Dr. Strauss' Sexual Misconduct: Insidious, Requires "Qualified Experts" to Identify, Largely Unknown to Victims

Plaintiffs are 93 of the hundreds of former OSU students and survivors whom Dr. Strauss sexually assaulted or abused over a period of two decades. Second Am. Compl. ("SAC") (Dkt. 123) ¶ 1. OSU employed Dr. Strauss to provide medical care and treatment to its students, especially its student-athletes, making him the official physician for OSU's sports teams, a professor of medicine, a part-time physician with Student Health Services, and a

"Professor Emeritus" upon his retirement. *Id.* ¶¶ 126-34. As OSU's official sports team physician for nearly two decades, Dr. Strauss had regular contact with male student-athletes in at least 16 sports. *Id.* ¶¶ 7, 131. As a physician at OSU's student health center for at least four years, he had access to the entire male student population. *Id.* ¶ 132.

Dr. Strauss used his position of trust and confidence at OSU to sexually abuse male students on a regular basis throughout his 20-year tenure, from 1978 to 1998. *Id.* ¶¶ 2, 135. Dr. Strauss' sexual abuse and harassment included one or more of the following: performing invasive and medically unnecessary examinations of students' genitals; groping and fondling their genitalia, often without gloves; performing unnecessary rectal examinations and digitally penetrating their anuses; and making inappropriate comments about their bodies, including comments on their physical appearance, heritage, skin tone, and physique. *Id.* ¶¶ 3, 139-41, 146.

As OSU and its agents have admitted, Dr. Strauss' abuse was difficult to identify—so difficult that only a panel of "suitably qualified medical experts" could answer the question. *Id.* ¶¶ 153-160. OSU's commissioned 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.* ¶ 154.[2] 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.* ¶ 155 (emphasis added). As late as 2018/2019, 22 of the 177 students interviewed for the OSU-commissioned investigation *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 Dr. Strauss was abusing them." *Id.* ¶ 156 (emphasis added). OSU witnesses "admit that patients do not know what is a 'normal exam' because patients have a 'lack of information'

[2] Perkins Coie claims in related court filings that it acted as OSU's attorney when it prepared and wrote the Report. *See In re: Subpoena to Perkins Coie LLP*, 2:19-mc-00038-ALM-CMV, Dkt. 2 at 8 (asserting attorney-client privilege over communications with OSU). If Perkins Coie is telling the truth, then the Report is a party admission by OSU's agent. *See Williams v. Union Carbide Corp.*, 790 F.2d 552, 556 (6th Cir. 1986) (statement by attorney is a party admission against the client).

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 the patient's genitals, the patient trusts the doctor's experience and medical training; he trusts that it is medically appropriate to touch his genitals." *Id.*

OSU retained Perkins Coie to investigate Dr. Strauss' abuse and OSU's response to the abuse. OSU paid this law firm of highly competent professionals $6.2 million, specifically to investigate sexual abuse by this doctor. *Id.* ¶ 275. Yet by OSU's admission, these trained professionals could not determine whether Dr. Strauss abused anyone. To the contrary, OSU's agent deemed it "*essential*" to its 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.* ¶ 157 (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 or not Dr. Strauss abused a given patient:

> Q. Because this investigative team, a bunch of lawyers at a law firm, they're not going to know what's medically appropriate or what's not medically appropriate, correct?
> A. Yes.
> Q. They *need* to consult medical experts to make that determination?
> A. Yes.

Id. ¶ 158 (emphasis added). Dr. John Lombardo, OSU's 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.* ¶ 159.

Not one Plaintiff had been trained in medicine. SAC *passim*; *cf. id.* ¶ 159. Not one Plaintiff was a "qualified medical expert" in sexual abuse. SAC *passim*; *cf. id.* ¶ 157. Though it

provided an entire panel of sexual abuse experts to a multimillion dollar law firm, for 40 years OSU never provided Plaintiffs with any "suitably qualified medical expert[]" to determine whether Dr. Strauss abused them. SAC *passim*.

Dr. Strauss took advantage of Plaintiffs' youth, inexperience, lack of medical training, and lack of expertise in 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, without their knowledge. An accomplished sexual abuser, Dr. Strauss groomed his victims into believing his conduct was normal and medically appropriate. When students questioned Dr. Strauss about the genital exams, he gave a clinical explanation for why the exams were needed. Dr. Strauss told John Doe 17 he needed prolonged genital exams because one of his testicles was larger than the other and needed monitoring. *Id.* ¶¶ 1222, 1224. Dr. Strauss told John Doe 23, who sought treatment for a sore throat, he needed to check the lymph nodes in the student's genitals to make sure they were not swollen. *Id.* ¶ 1428. Dr. Strauss explained to Douglas Wells, who sought treatment of a hamstring injury, he was required to examine the student's entire body. *Id.* ¶¶ 611-12. Students believed Dr. Strauss' conduct could not be sexual abuse because his invasive exams were common knowledge among their teammates and coaches and yet Dr. Strauss faced no repercussions; OSU granted him nearly unfettered access to students. *Id.* ¶¶ 7, 132, 137; *see also* Appendix 1. When students told coaches about Dr. Strauss' invasive exams, they were ignored,[3] laughed off,[4] told "that's just Strauss,"[5] or heard coaches normalize Dr. Strauss' behavior with jokes and nicknames.[6] These responses—from trusted OSU coaches, teammates, and Dr. Strauss himself—caused students to discount their discomfort and blame themselves, instead of Dr. Strauss. *See, e.g., id.* ¶¶ 615, 621

[3] *See* SAC ¶¶ 1087 (John Doe 13), 1299 (John Doe 19), 1832 (John Doe 43), 1894 (John Doe 46), 1951 (John Doe 49), 2085 (John Doe 56), 2281 (John Doe 65).

[4] *See* SAC ¶¶ 361 (McDaniel), 411 (Reed).

[5] *See* SAC ¶¶ 501 (Huntsinger), 1817 (John Doe 42).

[6] *See* SAC ¶¶ 650 (Dyer), 690 (Bechtel), 814-15 (John Doe 4), 876-77 (John Doe 7), 1227-29 (John Doe 17), 1753 (John Doe 38).

(Wells "questioned himself and his perception of the examination" and "thought his reaction might have been from his own naiveté").

As a result, except in the most egregious of examples, the vast majority of Plaintiffs did not know they were sexually abused. *See* Appendix 1 (listing allegations of 83 Plaintiffs who did not know they were sexually abused).

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." SAC ¶ 265. Multiple OSU administrators testified that even *they* did not know that (i) Dr. Strauss was a serial predator; or (ii) OSU was on notice of Strauss' predation; or (iii) OSU was deliberately indifferent to Strauss' predation. For example, the Director of Student Health Services and Dr. Strauss' boss, Dr. Grace, "claimed to have no knowledge of these widespread complaints about Dr. Strauss." *Id.* As to OSU students, 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. ¶ 266 (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.* ¶ 267 (emphasis added).

These allegations are all taken as true on this motion. 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." *See* SAC *passim*.

Even the OSU of 2018 claimed it did not know whether it knew of Strauss' abuse. To the contrary, OSU retained Perkins Coie to evaluate "whether 'the University' had knowledge of such allegations against Strauss." *Id.* ¶ 274. It then 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.* ¶¶ 275-276. Yet OSU now expects students and survivors to have known in 1978-1998 what it took a seasoned law firm $6.2 million and 12 months to figure out in 2018: OSU was complicit in Strauss' serial abuse.

For Forty Years, OSU Concealed Its Complicity in Dr. Strauss' Sexual Abuse

How did OSU keep secret its complicity in Strauss' predation for 40 years? Through fraud, deceit, and a total lack of interest in the well-being of its students. Among other acts, OSU:

- "Employed Dr. Strauss for nearly two decades," "put Dr. Strauss in Student Health Services," "expos[ed] thousands of students to him," "made Dr. Strauss the official doctor for no fewer than five sports teams," "gave him regular access to student-athletes in at least 16 sports," and "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," all of which normalized and facilitated Strauss and his abuse, SAC ¶ 7;
- Failed to address "Strauss' repeated sexual abuse of his patients . . . for nearly the length of his tenure at Ohio State," *id.* ¶ 8;

- Never reported Strauss to the State Medical Board of Ohio, the police, 911, a prosecutor, or any law enforcement, *id.* ¶¶ 5, 10, ensuring that OSU students and the public would never learn about OSU's complicity in Strauss' predation;

- Repeatedly promoted Strauss, let him retire voluntarily, and gave him emeritus status, *id.* ¶¶ 127, 16, normalizing Strauss and masking OSU's support of a serial sexual predator, *id.* ¶ 258;

- "Never sought to identify, counsel, or support Dr. Strauss' victims," leaving them in the dark as to Strauss' abuse and OSU's role in perpetrating that abuse, *id.* ¶ 17. "OSU did not attempt to identify . . . male athletes so it could conceal the extent of Dr. Strauss' abuse and how the university had enabled his predation," *id.* ¶ 247;

- Never "informed students or the public" about Strauss' abuse or OSU's role in facilitating that abuse, *id.* ¶ 222;

- "[D]estroyed patient health records of those examined by Dr. Strauss," thereby destroying evidence of OSU's complicity, *id.* ¶¶ 18, 248;

- Allowed OSU doctors to take records of Strauss' abuse off campus, then shred them, *id.* ¶ 2571;

- Told students that "Dr. Strauss' examinations were appropriate and there was no reason to complain," *id.* ¶ 511;

- Rebuffed and ignored complaints, stating that OSU trainers and physical therapists who witnessed Dr. Strauss' examinations treated them as normal, *id.* ¶¶ 557-58, 272;

- Lied about prior complaints against Dr. Strauss, telling Plaintiff Snyder-Hill in writing that "we had never received a complaint about Dr. Strauss before, although we have had several positive comments," *id.* ¶ 320;

- Whitewashed Dr. Strauss' personnel file, *id.* ¶ 327;

- Knowing of Strauss' sexual abuse, gave him "exceptional" and "excellent" performance evaluations, because, as set forth in a June 1996 memo to OSU's counsel and to an administrator who reported directly to OSU's President, "For legal reasons, we would never mention a serious allegation against a physician on their evaluation form, which was a permanent part of their personnel record," *id.* ¶¶ 226-27;

- Had a policy "that you would not mention a serious allegation, such as sexual misconduct, in an evaluation form," in order to "cover-up the abuse, prevent the public (including OSU students) from learning about the abuse, and protect the doctor, in this case, Dr. Strauss," *id.* ¶¶ 228-29;

- "Fail[ed] to train its employees to prevent, investigate, or report the sexual abuse of students," *id.* ¶ 2574(s);

- "Fail[ed] to have a policy of investigating or reporting staff who sexually abused students," *id.* ¶ 2574(t);

- Did nothing to stop Strauss' abuse for almost 20 years: no "meaningful investigation," no "serious attempt to monitor Strauss with other students or patients," no "follow[] up with Strauss to see if he was doing appropriate examinations," and no discipline of Dr. Strauss, *Ii.* ¶¶ 222, 2592;

- "[C]oncealed the reason that it [i] did not renew Dr. Strauss' Student Health Services contract"; (ii) "terminated Dr. Strauss' employment in the Athletics Department"; and (iii) suspended Strauss as a treating physician, and "did not document the findings of the June 1996 disciplinary hearing, . . . though it would have been standard to do so," *id.* ¶¶ 243-244;

- Failed to "inform the Athletics Department why [Strauss'] Student Health contract was not renewed," to "protect Dr. Strauss and itself," *id.* ¶¶ 244-245; and

- As late as *2005*, lauded Strauss as "one of the leaders in sports medicine," highlighting "his care and concern for athletes," *id.* ¶ 268.

2018: OSU Announces an Investigation

Although Dr. Strauss' abuse spanned two decades and began over 40 years ago, only on April 5, 2018 did OSU announce it would open an investigation into his sexual misconduct. SAC ¶¶ 270-71. A few months earlier, in January 2018, another university sports physician, Larry Nassar, was criminally convicted for similar conduct, and female gymnasts and other survivors publicly shared their experiences of Dr. Nassar's sexual abuse. As a result of the publicity on one or the other of these events, 83 of the 93 Plaintiffs realized for the first time that Dr. Strauss' medical examinations were, in fact, sexual abuse.

The Perkins Coie Report

OSU's Report found: University "personnel had knowledge of Strauss' sexually abusive treatment of male student-patients as early as 1979." *Id.* ¶ 278. "For decades, Dr. Strauss' abuse was well known among at least fifty OSU employees in the athletic department." *Id.* ¶ 6. "Multiple Student Health Directors were also told about Dr. Strauss' abuse for years, as were OSU's counsel and multiple administrators in Student Affairs. . . . Dr. Strauss' inappropriate touching was a frequent topic of discussion and well known among OSU's trainers, coaches, and athletic directors." *Id.* Yet "no meaningful action was taken by the University to investigate or address the concerns until January 1996." *Id.*

Plaintiffs' Title IX Claims

In their Second Amended Complaint, all Plaintiffs allege that OSU violated Title IX of the Education Amendments of 1972 ("Title IX"), 20 U.S.C. § 1681, *et seq*., in two different ways. First, all Plaintiffs allege that OSU created, and acted with deliberate indifference to, a sexually hostile culture in its athletic and student health programs, which substantially heightened the risk that the Plaintiffs and other students would be sexually harassed (the "heightened-risk claim"). SAC ¶¶ 2553-77.[7] Second, all of the Plaintiffs allege that OSU could have prevented their abuse by Dr. Strauss, had OSU taken appropriate action on students' prior complaints about his conduct (the "pre-assault claim"). SAC ¶¶ 2578-89.[8]

Standard of Review: OSU Must Prove Its Affirmative Defense "Beyond Doubt"

Three basic principles must inform the Court's analysis of OSU's motion.

First, "a Rule 12(b)(6) motion should not be granted 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." *Ricco,* 377 F.3d at 602 (emphasis added). The court must "construe the complaint in the light most favorable to the plaintiff, accept all well-pleaded factual allegations in the complaint as true, and draw all reasonable inferences in favor of the plaintiff." *Courtright v. City of Battle Creek*, 839 F.3d 513, 518 (6th Cir. 2016). The factual allegations must merely "be enough to raise a right to relief above the speculative level." *BAC Home Loans Servicing LP v. Fall Oaks Farm LLC*, 848 F. Supp. 2d 818, 822 (S.D. Ohio 2012).

Second, "[b]ecause the statute of limitations is an affirmative defense, the burden is on the defendant to show that the statute of limitations has run." *Lutz v. Chesapeake Appalachia, L.L.C.*, 717 F.3d 459, 464 (6th Cir. 2013). To prove the statute of limitations has run, a

[7] *See Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170, 1184-85 (10th Cir. 2007) (Title IX claim arises where school had "general knowledge of the serious risk of sexual harassment and assault during college-football recruiting efforts," such that there was an "'obvious'" "'need for more or different training [of player-hosts]'" (citing *Canton v. Harris,* 489 U.S. 378, 390 (1989))).

[8] *See Williams v. Bd. of Regents of Univ. Sys. of Ga*, 477 F.3d 1282, 1304-05 (11th Cir. 2007) (Title IX claim arises where school knew of student's past sexual misconduct, yet did "nothing to monitor or counsel" student, which "preceded, and proximately caused, her sexual assault and rape").

defendant must establish when the plaintiff's claims accrued. *See Nat'l Credit Union Admin. Bd. v. Jurcevic*, 867 F.3d 616, 625 (6th Cir. 2017) ("It was [the defendant's] burden to show that the [plaintiff] should have discovered his fraudulent conduct before the relevanttime period, not the [plaintiff's] burden to plead around the possibility.").

For this reason, Rule 12(b)(6) is ordinarily an "inappropriate vehicle for dismissing a claim based upon the statute of limitations" because "a plaintiff generally need not plead the lack of affirmative defenses to state a valid claim." *Cataldo v. U.S. Steel Corp.*, 676 F.3d 542, 547 (6th Cir. 2012). Dismissal is only warranted if "the allegations in the complaint affirmatively show that the claim is time-barred." *Id.*; *see also Walburn v. Lockheed Martin Util. Servs., Inc.*, 443 F. App'x 43, 47 (6th Cir. 2011) (noting that the facts must be "definitively ascertainable from the pleadings and conclusively establish the affirmative defense").

Finally, Title IX is a broad remedial civil rights statute that courts interpret broadly. "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) (internal quotation marks omitted); *see 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").

ARGUMENT

I. OSU CANNOT PROVE ITS STATUTE OF LIMITATIONS DEFENSE "BEYOND DOUBT"

A. Under Settled Precedent, Plaintiffs' Claims Did Not Accrue Until 2018

1. A Claim Does Not Accrue Until 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 the Sixth Circuit 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) (quoting *Campbell v. Grand Trunk W. R.R. Co.*, 238 F.3d 772, 775 (6th Cir. 2001)); *see also Fonseca v. Consol. Rail Corp*., 246 F.3d 585, 588 (6th Cir. 2001) ("a cause of action is deemed to have accrued when the plaintiff reasonably should have discovered *both* cause *and* injury") (emphasis added); *Owner Operator Indep. Drivers Ass'n, Inc. v. Comerica Bank*, 540 F. Supp. 2d 925, 932 (S.D. Ohio 2008) (same).

Other circuits, including the First, Second, Fifth, Ninth, Eleventh, and D.C. Circuits, agree with the Sixth Circuit: the 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 v. City of Houston*, 237 F.3d 567, 576 (5th Cir. 2001);[9] *see also United States v. Kubrick*, 444 U.S. 111, 113, 121 (1979) (in Federal Torts Claims Act case, 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"). Courts in this Circuit apply the delayed accrual rule where plaintiff could not have discovered the injury and cause.[10]

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[9] *See, e.g.*, *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) (holding that 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) (the test is whether plaintiff knows, or in the exercise of reasonable diligence should have known, the factual basis of the cause of action, including the fact of the 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)).

[10] *See, e.g., Coate v. Montgomery Cty., Kentucky*, 234 F.3d 1267, at *3 (6th Cir. 2000) (holding, in § 1983 case, that prisoner's claim did not accrue when she was denied medical diagnostic testing, including colonoscopy, but only accrued when she was diagnosed with colon cancer because "the existence of colon cancer is not obvious to an individual who is suffering from it"; reversing grant of summary judgment because "genuine issue of material fact exists as to when the statute of limitations began to run"); *Hogan v. United States*, 42 F. App'x 717 (6th Cir. 2002) (FTCA claim accrued when plaintiff knew "of his 'injury' for his property damage claim—that

As this Court held in *Owner Operator*, "[t]he problem with [defendant's] argument is that just because Plaintiffs knew they had been harmed as of June 30, 1997, hardly means that they knew of the identity of *all* the wrongdoers." 540 F. Supp. 2d at 933. "Under the federal discovery rule," until and unless "information was disclosed . . . that would have alerted Plaintiffs to [defendant's] allegedly wrongful conduct," the statute of limitations does not accrue. *Id.*

In claiming otherwise, OSU cites cases that either do not discuss accrual at all[11] or hold that, under the particular facts in that case, that Plaintiff knew or should have discovered his claim at the time of the assault,[12] or both. Not one sets out a *per se* rule precluding delayed

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his property contained [radioactive material]—and its 'cause'—that it was from metal sold to him by the government"); *Redmond v. United States*, 194 F. Supp. 3d 606 (E.D. Mich. 2016) (denying summary judgment and holding that delayed accrual was warranted where no evidence that "decedent knew, or had any reason to know, before March 2013, that he had metastatic liver cancer, or that the cancer could have been caused by the failure of the defendant's medical staff to recommend and provide treatment for his liver disease"); *Craft v. Vanderbilt Univ.*, 18 F. Supp. 2d 786, 797 (M.D. Tenn. 1998) (applying discovery accrual rule to find § 1983 claims timely by plaintiffs "misled" to be unconsenting subjects of radiation experiments in 1940s, because jury could find that "Plaintiffs neither knew that they had been exposed to harmful radiation, nor did they suspect or have reason to suspect, prior to 1993, that radiation had caused them any injuries").

[11] OSU Br. at 7 (citing *Gilley v. Dunaway*, 572 F. App'x 303, 304 (6th Cir. 2014) (in unprecedential decision, plaintiff did not argue that claim did not accrue at time of incident, claimed only fraudulent concealment under Kentucky law, and tolling did not apply because plaintiff *did know* she was injured, as she was in a sexual relationship with her high school coach and "knew of the Board's district investigation" into the ongoing sexual abuse); *Giffin v. Case W. Reserve Univ.*, 181 F.3d 100 (6th Cir. 1999) (no discussion of delayed accrual or dispute that plaintiff knew of the abuse at the time); *Adams v. Ohio Univ.*, 300 F. Supp. 3d 983, 991 (S.D. Ohio 2018) (no dispute over accrual); *Clifford v. Regents of Univ. of California*, No. 2:11-CV-02935-JAM, 2012 WL 1565702, at *6 (E.D. Cal. Apr. 30, 2012), *aff'd*, 584 F. App'x 431 (9th Cir. 2014) (same); *Johnson v. Gary E. Miller Canadian Cty. Children's Juvenile Justice Ctr.*, No. CIV-09-533-L, 2010 WL 152138, at *3 (W.D. Okla. Jan. 14, 2010) (plaintiff "concede[d]" accrual at time of incident)). Additionally, in *Giffin*, 181 F.3d at *1, the plaintiff did not claim that the university knew about her abuser's history of misconduct but instead claimed it did not have a "procedure for the resolution of complaints of sexual harassment," without any explanation for why plaintiff would not have known about the university's allegedly-deficient procedures shortly after she complained.

[12] OSU Br. at 7 (citing *Bowling v. Holt Pub. Sch.*, No. 1:16-CV-1322, 2017 WL 4512587, at *2 (W.D. Mich. May 26, 2017) (plaintiff "knew of Defendants' inaction" to protect her the time of the assault); *Anderson v. Bd. of Educ. of Fayette Cty.*, 616 F. Supp. 2d 662, 671 (E.D. Ky. 2009) ("Given the very nature of the injuries alleged by Plaintiffs, Plaintiffs were sufficiently aware of facts that should have aroused their suspicion of the claims against Defendants."); *Wilmink v. Kanawha Cty. Bd. of Educ.*, 214 F. App'x 294, 297 (4th Cir. 2007) (plaintiff presented no

accrual. To the contrary, OSU's cases state that a claim does not accrue until the Plaintiff has knowledge of both injury and defendant's causal role.[13]

2. OSU's Reliance on *Rotkiske* Is Misplaced

Against the overwhelming backdrop of this federal discovery rule, OSU relies on *Rotkiske v. Klemm*, 140 S. Ct. 355, 360-61 (2019), an inapposite plain language case. That case addressed the Fair Debt Collection Practices Act, which states that claims must be filed "within one year from the date on which *the violation* occurs." 15 U.S.C. § 1692k(a) (emphasis added). 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.

What *Rotkiske* has to do with this case is a mystery. 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 has no plain language to interpret. It says nothing about the statute of limitations. Absent language in a federal statute, the federal discovery rule applies. *See* § I(A)(1), *supra*; *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 "violation" language, whereas the Copyright Act states

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"evidence justifying her delay in discovering the causal connection between her injuries and defendants' actions"); *Doe v. Howe Military Sch.*, 227 F.3d 981, 988-89 (7th Cir. 2000) (erroneously applying Indiana state law; claim untimely because plaintiffs knew they were abused at the time and only argument for delayed accrual was that they were not aware of their " psychological injuries"); *Monger v. Purdue Univ.*, 953 F. Supp. 260, 264 (S.D. Ind. 1997) (no argument supporting delayed accrual).

[13] *See e.g.*, *King-White v. Humble Indep. Sch. Dist.*, 803 F.3d 754, 762 (5th Cir. 2015) ("[A] plaintiff's awareness [for a claim to accrue] encompasses two elements: (1) the existence of the injury; and (2) causation, that is, the connection between the injury and the defendant's actions."); *Twersky v. Yeshiva Univ.*, 579 F. App'x 7, 9 (2d Cir. 2014) (claim accrues when plaintiff "discover[s] the critical facts of both his injury and its cause"); *Varnell v. Dora Consol. Sch. Dist.*, 756 F.3d 1208, 1216 (10th Cir. 2014) (claim accrues when "plaintiff knew or should have known the facts necessary to establish her cause of action, such as the fact that a surgeon left a sponge in the plaintiff's abdomen after an operation").

that claims must be "commenced within three years after the claim accrued," and "accrued" is undefined).

Even OSU conceded in its 2019 motion to dismiss briefing that a Title IX claim accrues upon "discovery of the injury." Dkt. 34 at 6. Nothing in OSU's *Rotkiske* sideshow changes the basic point: the federal discovery rule applies.

3. Title IX and Related Section 1983 Cases Consistently Apply the Federal Discovery Rule[14]

Title IX claims, and similar § 1983 school sex abuse cases, follow the federal accrual discovery rule. *See, e.g.*, *Lozano v. Baylor Univ.*, 408 F. Supp.3d 861, 900-01 (W.D. Tex. 2019) (motion to dismiss Title IX claim on statute of limitations grounds denied); *Doe 1 v. Baylor Univ.*, 240 F. Supp. 3d 646, 661 (W.D. Tex. 2017) (same); *Hernandez v. Baylor Univ.*, 274 F. Supp. 3d 602, 616-617 (W.D. Tex. 2017) (same); *Jameson* v. *Univ. of Idaho*, 3:18-cv-00451-DCN, 2019 WL 5606828, at *7-8 (D. Idaho Oct. 30, 2019) (same); *T.R. v. Boy Scouts of Am.*, 181 P.3d 758, 763 (Or. 2008) (motion for directed verdict on § 1983 claim on statute of limitations grounds denied); *Sowers v. Bradford Area Sch. Dist.*, 694 F. Supp. 125, 138 (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) (motion to dismiss § 1983 claim on statute of limitations grounds denied); *Doe v. Bd. of Educ. of Hononegah Cmty. High Sch. Dist No. 207*, 833 F. Supp. 1366 (N.D. Ill. 1993) (same).[15]

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[14] Neither Title IX and § 1983 contains an express limitations period, so courts apply the same federal accrual rule for both statutes. *See, e.g.*, *Haley v. Clarksville-Montgomery Cty. Sch. Sys.*, 353 F. Supp. 3d 724, 734 (M.D. Tenn. 2018) ("analysis concerning when the statute of limitations began to run [for Title IX claim] is the same as for [§ 1983 claim]"); *Lillard v. Shelby Cty. Bd. of Educ.*, 76 F.3d 716, 729 (6th Cir. 1996) (citing § 1983 cases to determine limitations period for Title IX claims). The underlying deliberate indifference standard for both statutes is also "substantially the same." *Williams ex rel. Hart v. Paint Valley Local Sch. Dist*., 400 F.3d 360, 369 (6th Cir. 2005).

[15] These Title IX cases are consistent with cases 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 merely when he discovered the injury itself. *See*, *e.g.*, *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" as a result of press reports);

The three Baylor University cases are instructive: in each, sexual assault victims brought Title IX claims, and courts denied motions to dismiss on the exactly the same grounds OSU now asserts. In *Doe 1 v. Baylor University*, 240 F. Supp. 3d 646, 661 (W.D. Tex. 2017), plaintiffs alleged that "Baylor knew of and permitted a campus condition rife with sexual assault; that sexual assault was rampant on Baylor's campus; that Baylor mishandled and discouraged reports of sexual assault; and that Baylor's response to these circumstances substantially increased the risk that Plaintiffs and others would be sexually assaulted." 240 F. Supp. 3d at 661. The court held that their heightened-risk claims could not be dismissed on statute of limitations ground, explaining:

> Plaintiffs assert . . . that they had no reason to 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. At that point, Plaintiffs allege, they had reason to further look into whether Baylor had a policy of intentionally discriminating against women who reported sexual assault. While it is plausible that Plaintiffs were aware of their heightened-risk claims at the time of their assaults, it is also plausible that they did not have reason to further investigate those claims until 2016. Thus, accepting the allegations in the Complaint as true, the claims for heightened-risk liability did not accrue until spring 2016.

Id. at 663 (emphasis added); *Hernandez*, 274 F. Supp. 3d at 616-617 (plaintiff's Title IX claim for a 2012 assault did not accrue until 2016 when she learned of university's indifference to multiple previous complaints of assault by her assailant by release of university-commissioned

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Piotrowski, 237 F.3d at 577 (claim against City arising out of shooting by criminal did not accrue at time of shooting but only when plaintiff should have known "that the City, as opposed to individual officers, had actively protected and/or assisted" that criminal); *Barrett v. United States*, 689 F.2d 324, 330 (2d Cir. 1982) ("It is illogical to require a party to sue the government for negligence at a time when the Government's responsibility in the matter is suppressed in a manner designed to prevent the party, even with reasonable effort, from finding out about it."); *S.W. ex rel. Marquis-Abrams v. City of New York*, 46 F. Supp. 3d 176, 189 (E.D.N.Y. 2014) ("Even assuming that plaintiffs can be charged with awareness of their injuries as of their [foster] placement date, the pertinent question is when plaintiffs knew, or should have known, that the agency defendants had committed the conduct that plaintiffs allege led to their placement with [their abusive foster parent]."); *see also Browning v. Burt*, 613 N.E.2d 993, 1006 (Ohio 1993) (statute of limitations for medical malpractice claim against *hospital* did not accrue until plaintiffs saw TV program and learned that their doctor "may have committed a number of harmful . . . surgeries" such that the hospital's credentialing practices "could reasonably be brought into question").

report). In *Lozano v. Baylor University*, similar to here, "it [wa]s not evident from the complaint that Lozano was aware of facts that would cause a reasonable person to conclude that there was a causal connection between her assaults and the conduct of Baylor staff and officials." Plaintiff only knew after "release of Baylor's Findings of Fact and the subsequent media coverage"; the claim did not accrue until then. 408 F. Supp. 3d at 900–01.

In *Board of Education of Hononegah Community High School*, 833 F. Supp. at 1376, the plaintiff was abused by her teacher, knew it was abuse, and her mother reported the abuse at the time to school administrators. But she did not bring suit until years later, when the media reported on the school's knowledge of the teacher's abuse of other students. Her claim was timely: a jury could find it "reasonable for plaintiff to believe that the sexual abuse was caused by nothing more than the teacher's improper and self-serving motivation without her having any reason to suspect that the school board or its administrators had been responsible in any way for the teacher's conduct." *Id.* at 1375-76. As the court explained, the notice that triggers claim accrual "must not be of harm but of governmental harm." *Id.* at 1376.

Or take *Sowers*. There, plaintiff "knew that she had been sexually assaulted" at the time, but did not "necessarily" have "reason to know of an ongoing policy of reckless indifference to numerous complaints of sexual abuse by teachers which might have been a proximate cause of her own injury." 694 F. Supp. at 137-38. Her § 1983 claim accrued only when the teacher's "history of sexual abuse was revealed to the [school] community" and she learned that the school district had "fostered an environment of deliberate indifference toward teacher abuse of female students." *Id.*; *see also Jameson,* 2019 WL 5606828*,* at *6-8 (Title IX claim did not accrue until 2018 because Plaintiff "was unaware of her underlying injury until it was publicly disclosed in 2018 [when University of Idaho issued a "Independent Report" about its handling of Title IX cases which revealed] that UI had failed to investigate two [prior] complaints" against her abuser); *T.R.*, 181 P.3d at 762, 766 (teenager sexually abused by a police officer had timely claim against city, because reasonable jury could find that "plaintiff did not suspect the city itself of causing him harm" until years after abuse and city is not liable "merely because it employs a

tortfeasor"); *Armstrong v. Lamy*, 938 F. Supp. 1018, 1033 (D. Mass 1996) (denying summary judgment on statute of limitations grounds where teacher sexually abused student because "the evidence in this case does not indicate the date on which the plaintiff knew, or should have known, that the alleged acts and omissions on the part of the Municipal Defendants were a proximate cause of his injury, even assuming that he knew he had been injured by [teacher]"); *see also 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 at time of abuse but only when plaintiff "was armed with sufficient, critical information regarding the wrong done to both her and her daughter, not just by [the abuser], but also—potentially—by a government that may have been able to protect [victim] . . . but failed to do so").

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

4. When a Claim Accrues Is a Factual Question for the Jury

What a plaintiff knew or should have known "is a question for the trier of fact to resolve." *In re Arctic Express Inc.*, 636 F.3d at 803 (Sixth Circuit affirmance of denial of summary judgment on accrual question); *Kehoe Component Sales Inc. v. Best Lighting Prods., Inc.*, 933 F. Supp. 2d 974, 1016 (S.D. Ohio 2013) ("[T]he determination of when a cause of action accrues is to be decided by the trier of fact.").

To prevail on this motion, OSU must therefore (i) meet its affirmative burden, *Lutz*, 717 F.3d at 464, (ii) to prove "beyond doubt," *Ricco,* 377 F.3d at 602, and "draw[ing] all reasonable inferences in favor of the plaintiff," *Courtright*, 839 F.3d at 518, that (iii) every reasonable factfinder, *In re Arctic Express Inc.*, 636 F.3d at 802, must find that Plaintiffs knew or reasonably should have known *both* that they were sexually abused *and* that OSU's deliberate indifference to known, pervasive sexual abuse caused the abuse.

OSU does not come remotely close to meeting its burden.

5. OSU Cannot Prove "Beyond Doubt" That Plaintiffs Knew or Should Have Known Before 2018 That OSU Facilitated Dr. Strauss' Sexual Abuse

Not one Plaintiff knew, should have known, or could have known that OSU's deliberate indifference to known, pervasive sexual abuse caused Dr. Strauss to abuse them. SAC ¶ 267 & Appendix 1. OSU's own witnesses admit there is no way Plaintiffs *could* have known of OSU's causal role. SAC ¶ 265 ("I don't know of any way."); SAC ¶ 266 ("I don't believe they would have known"). OSU's motion ignores these allegations and ignores these admissions *by their own witnesses*. But Plaintiffs' allegations are taken as true on this motion. At trial, the jury will be entitled to evaluate both Plaintiffs' testimony and OSU's admissions.

Of course Plaintiffs were in the dark. 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. *See* Facts at 6-9, *supra*. This campaign was masterful, effective, and appalling.

Even OSU claims it had no idea of its own complicity, as late as *2018*. OSU says it hired Perkins Coie to evaluate "*whether* 'the University' had knowledge of such allegations against Strauss." SAC ¶ 274 (emphasis added). If, in 2018, OSU did not know about its causal role, how could individual OSU students have known about OSU's role before 2018? In evaluating what a reasonable Plaintiff could or should have known, a reasonable factfinder can consider OSU's claim that *it did not know anything in 2018*. Plaintiffs look forward to exploring that issue with the jury.

Only in 2018 did Plaintiffs begin to learn of OSU's causal role.[16]

[16] While OSU lists different dates in 2018, 2019, and 2020 that various Plaintiffs' claims were filed, the filing of the *Garrett v. OSU* class action complaint, 18-cv-00692 (S.D. Oh.), on July 16, 2018, tolled the statute of limitations for all Plaintiffs/putative class members who had not yet filed by that date. *See Am. Pipe & Constr. Co. v. Utah,* 414 U.S. 538, 551, 553 (1974). That tolling continues today. *Id.*

Failing to meet its burden to prove Plaintiffs' knowledge of causation, OSU claims it is enough that Plaintiffs knew OSU employed Dr. Strauss. In the Title IX context, this is wrong. Under Title IX, there is no *respondeat superior* liability. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 285 (1998). Schools are not automatically responsible for harm caused by their employees. *Id*. They are only responsible if they act with deliberate indifference to sexual harassment known by an official with authority to take correction action. *Id*. at 290; *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 645 (1999) (same).

In a number of the cases cited *supra—Board of Education of Hononegah Community High School, Sowers*, *Armstrong*, and the others—the plaintiffs also knew the abuser was employed by the defendant. That did not matter at all. *See* § I(A)(3), *supra*.

Assume, then, that a plaintiff knew he was abused and sought legal advice pre-2018 "to discover whether []he had a viable legal claim." OSU Br. at 15. Any competent lawyer would have advised that it is not enough that Dr. Strauss worked for OSU. The lawyer would ask: "Was there pervasive sexual abuse?" "Were there prior complaints?" "Did OSU administrators know that Dr. Strauss was abusing students?" "Has OSU shown deliberate indifference to known abuse?" 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").

Nor do OSU's cases help them. *King-White v. Humble Independent School District*, 803 F.3d 754 (5th Cir. 2015), agreed with the Sixth Circuit that plaintiffs must know of both their injury *and* the "connection between the injury and the [school's] actions." *Id.* at 762. In *King-White*, however, the plaintiffs *did* know the connection because the mother "personally complained to . . . School Officials" and "administrators" about the abuse "that had gone unheeded." *Id.* at 762-63. The *King-White* plaintiffs challenged the school's response *after* the abuse, so the mother's knowledge that the complaint went "unheeded" was dispositive; here, plaintiffs bring analytically-distinct *pre*-abuse claims. *King-White* distinguished another Fifth

Circuit case, *Piotrowski v. City of Houston*, 237 F.3d 567, 577 (5th Cir. 2001), in which the court held that a plaintiff shot by a "hired criminal" could not have known that the City had "actively protected" that criminal; the claim against the City only accrued when plaintiff learned of the City's role. *King-White,* 800 F.3d at 763. Just so here. Plaintiffs did not know that OSU officials knew that Dr. Strauss abused students; OSU successfully hid its culpability. What student could have known that his beloved OSU received complaint after complaint about Dr. Strauss but nonetheless "actively protected" him instead of terminating him? Even Strauss' own boss, Dr. Grace, claims to have known nothing. SAC ¶ 265.

Similarly inapposite is *Twersky v. Yeshiva University*, 579 F. App'x 7, 9 (2d Cir. 2014), an unpublished summary order. First, the case "do[es] not have precedential effect." Second Circuit Local Rule 32.1.1(a). Second, unlike the vast majority of Plaintiffs here, the *Twersky* plaintiffs complained to administrators about a teacher's abuse, knew that "administrators rebuffed their complaints or otherwise failed to take adequate remedial action," and knew of the school's indifference. *Id.* at 10. Third, even if the *Twersky* analysis were relevant to a *post*-assault claim—challenging the school's response to a student's complaint—it is the wrong inquiry for a pre-assault or heightened risk claim. 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. There is no allegation that Sowers knew of the defendants' handling of previous sex abuse complaints against teachers." 694 F. Supp. at 138. Fourth, unlike in *Twersky,* the few Plaintiffs who did raise concerns did not *know* they were being "rebuffed"—they reasonably believed that OSU employees dismissed their concerns because Dr. Strauss' conduct was acceptable given the uniqueness of doctor-patient abuse (which *Twersky* did not involve) or, at least, believed OSU's claim that there was no prior complaint and, thus, nothing OSU could have done to have prevented the assault (as Dr. Grace told Plaintiff Snyder-Hill). It is the indifference to prior complaints that is relevant to a heightened risk and pre-assault claim. Even those Plaintiffs who expressed concerns were made to believe that OSU *did care* and was not indifferent; there was just nothing to care about.

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 Dr. Strauss' abuse, it would lie. *See, e.g., 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"); *T.R.*, 181 P.3d at 763-64 ("[W]hen a duty to investigate exists, the statute of limitations only begins to run if the investigation would have disclosed the necessary facts"; the party asserting limitations defense "must prove that an investigation would have disclosed those facts"); *see also Piotrowski*, 51 F.3d at 577 n.13 (statute of limitations tolled "[w]hen a defendant controls the facts surrounding causation such that a reasonable person could not obtain the information even with a diligent investigation").

At minimum, the issues of what should have alerted the Plaintiffs to OSU's role in Dr. Strauss' abuse, and whether an investigation by the Plaintiffs would have disclosed OSU's role, are fact-intensive inquiries inappropriate for this motion. *In re Arctic Express Inc.*, 636 F.3d at 802; *Kehoe*, 933 F. Supp. 2d at 1016.

Finally, in none of OSU's cases did the defendant's own witnesses admit there was no way Plaintiffs could have known about defendant's complicity or causal role. SAC ¶¶ 265-66. In none did the defendant claim *it* did not know of its own causal role. In none did the defendant pay millions to a law firm just to investigate an answer to that question. All of these admissions create fact issues that cannot be resolved until trial.

6. OSU Cannot Prove "Beyond Doubt" That 83 of the Plaintiffs Knew or Should Have Known That Dr. Strauss Sexually Abused Them

OSU and its witnesses admit that patient victims of sexual abuse by their doctor "often" face "confusion as to whether sexual abuse, in fact, occurred." SAC ¶ 155. OSU and its witnesses concede "in sworn testimony that students could not have known Dr. Strauss was abusing them." *Id.* ¶ 156. They admit it is "essential" 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.* ¶¶ 157-58. Not "helpful," "*essential*." They "admit that patients do not know what is a 'normal exam.'" *Id.* ¶ 156. They admit only someone "trained in medicine" could know what is "medically appropriate." *Id*. ¶ 159.

Where is any of this in OSU's motion? Why, when OSU has the burden to prove its affirmative defense, and every allegation is construed in the light most favorable to Plaintiffs, would OSU omit every single inconvenient fact, allegation, and admission by its doctors, its administrators, and its own law firm?[17]

The answer is plain enough: any one of these admissions creates "a question for the trier of fact to resolve." *In re Arctic Express Inc.*, 636 F.3d at 803.

83 of 93 Plaintiffs—David Mulvin, William Rieffer, William Brown, Kurt Huntsinger, Steve Hatch, Melvin Robinson, Douglas Wells, Joseph Bechtel, Michael Murphy, John David Faler, John Does 1-8, John Does 10-18, John Does 20-36, John Does 38-40, and John Does 42-77—did not know until 2018 that Dr. Strauss' "medical care" was sexual abuse.[18] SAC ¶ 272. It took media reports in 2018 about OSU's investigation into Dr. Strauss' behavior, and Larry Nassar's criminal sentencing for similar behavior, for any of these Plaintiffs to begin to realize that Strauss' medical exams were sexual harassment and/or abuse. *See, e.g.*, *id.* ¶¶ 272, 1099 (John Doe 13), 1349 (John Doe 20), 2051 (John Doe 54), 2146 (John Doe 59), 2269 (John Doe 64).

Sexual abuse by a physician is insidious. Unlike teachers, coaches, and priests, doctors are permitted and expected to touch a person's body and sexual organs. As Perkins Coie wrote and Dr. Lombardo testified, only doctors and experts have the training to determine whether an invasive exam is medically necessary or abuse. *Id.* ¶¶ 157, 159.

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[17] OSU now says that "a typical lay person" would recognize sexually harassment or abuse. OSU Br. 10-11. That is not what Dr. Grace, Dr. Lombardo, or Perkins Coie said.

[18] Ten Plaintiffs concede they knew Dr. Strauss abused them, but did not know OSU caused Dr. Strauss' abuse: Snyder-Hill, McDaniel, Reed, Khalil, Dyer, Solomon, and John Does 9, 19, 37, and 41.

At least eleven 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) Strauss' clinical explanations for what seemed to some unusual conduct, *see*, *e.g.*, *id.* ¶¶ 1222, 1224, 1428, 611-12, 1492 (Strauss said he "needed to ejaculate [Plaintiff] to make sure everything was working properly"), 1727; (7) OSU employees' flippant, casual response to questions about the exams, making Plaintiffs discount their discomfort and blame themselves instead of Strauss, *see id*. ¶¶ 361 (McDaniel), 411 (Reed), 501, 511 (Huntsinger), 650 (Dyer), 689 (Bechtel), 811-14 (John Doe 4), 871-72 (John Doe 7), 1087 (John Doe 13), 1227-29 (John Doe 17), 1299 (John Doe 19), 1753 (John Doe 38), 1817 (John Doe 42), 1832 (John Doe 43), 1894 (John Doe 46), 1951 (John Doe 49), 2085 (John Doe 56), 2281 (John Doe 65); (8) OSU's assurance that "Dr. Strauss' examinations were appropriate"; (9) OSU's requirement that student-athletes see Dr. Strauss for physicals and medical treatment, even after a few students raised concerns, all of which normalized Strauss' conduct; (10) OSU's failure to take any action, though Strauss' invasive exams often appeared to be common knowledge among teammates and coaches, again normalizing his conduct; and (11) OSU employees' indifference to Dr. Strauss' habit of lingering around student-athletes, including watching and showering with them and taking their photographs during practice.

Though Strauss made a number of students uncomfortable, discomfort hardly equals knowledge of sexual abuse. *Cf.* OSU Br. at 12-14. All the factors above combined to deprive Plaintiffs of that knowledge. *Courtright*, 839 F.3d 513 at 520 (allegations must be taken as a whole). Plaintiffs were "confus[ed]," just as OSU's lawyers say they should be. SAC ¶ 155.

Even the small number of Plaintiffs who initially expressed concerns about the propriety of Dr. Strauss' exams—a far smaller group than OSU claims[19]—were convinced by coaches, teammates, Dr. Strauss himself, and others at OSU that their concerns were mistaken. It was normal to believe that conduct known to coaches, trainers, and teammates *could not be* abuse. As OSU admits, misconduct by a doctor has "generally not been associated with common conceptions of sexual abuse." SAC ¶¶ 154-55. OSU's position boils down to: "Students should have understood that OSU coaches knew Dr. Strauss was abusing them and did not care." It was reasonable for students to think better of their coaches and other OSU personnel.

Courts recognize the difficulty in identifying sexual misconduct by a doctor. *Doe v. Pasadena Hospital Association*, for example, refused to dismiss as untimely claims of four patients victimized by Dr. Sutton, an obstetrician-gynecologist. No. 2:18-cv-08710, 2020 WL 1244357 (C.D. Ca. March 16, 2020). Like Dr. Strauss, Dr. Sutton had a "pattern" of "inappropriate and not-medically-necessary sexualized touching." *Id.* at *1. Like Strauss, Sutton "misrepresented that his acts and conduct were for legitimate medical purposes." *Id.* Like OSU, Sutton and his 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 of Sutton's sexual assault and sexual battery when it occurred." *Id.* at *6. The Court disagreed: "Sutton's position and authority as a physician, and

[19] In claiming many Plaintiffs "complained," OSU Br. at 9, OSU misconstrues the SAC's allegations. It cites allegations for Plaintiffs who concede they knew Dr. Strauss abused them, *supra* note 18, or never even discussed Dr. Strauss's exam with others (*see* SAC ¶ 754 (John Doe 1), 2113-31 (John Doe 58)); or characterizes as a "complaint" mere locker-room conversations and jokes among teammates about Dr. Strauss' exams (*see id.* ¶¶ 792 (John Doe 3), 1129 (John Doe 14), 1753 (John Doe 38)); or cites informal discussions with coaches and other OSU personnel (*id.* ¶¶ 382-84 (Mulvin), 501, 511 (Huntsinger), 560 (Robinson), 690 (Bechtel), 811-14 (John Doe 4), 871-72 (John Doe 7), 988 (John Doe 10), 1087 (John Doe 13), 1227-29 (John Doe 17), 1493 (John Doe 25), 1618 (John Doe 30), 1817 (John Doe 42), 1832 (John Doe 43), 1894 (John Doe 46), 1951 (John Doe 49), 2085 (John Doe 56), 2281 (John Doe 65), 2524 (John Doe 76)). None of these allegations demonstrates "beyond doubt" that those Plaintiffs believed Dr. Strauss sexually abused them. The few who did make a formal complaint, such as Steve Snyder-Hill, concede they knew they were abused. *See, e.g.*, *id.* ¶¶ 330 (Snyder-Hill), 364 (McDaniel), 420 (Reed).

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.* Like here, the Sutton plaintiffs' belated discovery was "a question of fact," inappropriate for resolution on a motion to dismiss. *Id.*; *see Simmons v. United States*, 805 F.2d 1363, 1367 (9th Cir. 1986) (psychiatric malpractice claim accrued when plaintiff discovered that sexual relationship with therapist caused her psychological injuries); *Torres v. Sugar-Salem Sch. Dist.,* No. 4:17-cv-00178, 2019 WL 4784598, at *13-14 (D. Idaho Sept. 30, 2019) (denying summary judgment: "material disputes exists as to when [Plaintiff] knew, or with reasonable care and diligence should have known, that she had a cause of action against [the high school therapist who groomed and sexually abused her] and the District" because plaintiff reasonably "believed she was in a legitimate relationship"); *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, both of the injury and its cause).

OSU's cases are again off-point. The point is not that Plaintiffs "did not realize the extent of [their] psychological injury until shortly before filing suit." *Cf. Varnell v. Dora Consol. Sch. Dist.*, 756 F.3d 1208, 1216 (10th Cir. 2014), cited by OSU. These 83 Plaintiffs *did not know they were abused at all*.

Similarly inapposite is *Doe v. Pasadena Hospital Association, Ltd.*, No. 2:18-cv-09648, 2020 WL 1529313 (C.D. Cal. March 31, 2020), where, two weeks after holding that four victims of Dr. Sutton had timely claims, the same judge dismissed a different victim's claims as untimely. In this second case, Sutton told plaintiff "[i]f you were not my patient, I would fuck you," asked "[i]f you were not my patient, would you fuck me?," while he made "her feel like he was 'banging' her vagina with his fingers," prompting plaintiff to "call[] the Hospital and ask[] with whom she could file a claim." *Id.* at *1-2. Plaintiff there believed she was abused,

lodged a formal complaint, and no one disabused her of that belief. None of this applies to the 83 Plaintiffs here. *See supra* § I(A)(6).[20]

OSU next says that if *any* Plaintiff knew he was abused, all of them should have known. But as the SAC makes plain, not every Plaintiff had the same experience. To conflate a rape case with a voyeurism case, for example, is absurd. Second, certain Plaintiffs may well have been highly skilled at spotting a predator masquerading as an esteemed, credentialed OSU physician.[21] 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 admits, the typical lay person should be "confus[ed]" whether abuse occurred. SAC ¶ 155.

Plaintiffs are now struggling with the recent and horrible realization that Strauss sexually abused them, notwithstanding everything Strauss and OSU led them to believe. If OSU were correct—that a reasonable person would immediately recognize all forms of sexual harassment or abuse by a medical doctor—then 83 Plaintiffs in this case are unreasonable, Perkins Coie is unreasonable, Dr. Grace is unreasonable, and Dr. Lombardo is unreasonable. The only thing unreasonable here is OSU's argument.

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[20] Also inapposite is *Doe v. University of Southern California*, No. 2:18-cv-09530, 2019 WL 4228371 (C.D. Ca. April 18, 2019). *University of Southern California* dismissed the claim of doctor-patient abuse *without prejudice*, recognizing that though Plaintiff "had a suspicion of wrongdoing" by her gynecologist, and non-abusive gynecological exams in the years since, she "may be able to allege further facts" "suggesting" that she did not "conclude that Dr. Tyndall's conduct fell outside of medically acceptable standards" to support "a theory of delayed discovery." *Id.* at *4, *7. Plaintiffs here have alleged such further facts. Similarly factually distinct is *Doe v. Kipp DC Supporting Corp.*, 373 F. Supp. 3d 1 (D.C. Cir. 2019), where the plaintiff knew she was in a sexual relationship with a teacher, knew that the teacher was terminated as a result, and knew that her mother reported the abuse to the teacher's new school; it was not plausible that she did not realize the relationship's "wrongfulness" until later. *Id.* at 6, 9 (erroneously applying D.C. "state" law). Here, Plaintiffs did not know there was sexual contact at all because of the uniqueness of the doctor-patient relationship.

[21] For example, that one plaintiff later realized in medical school that Dr. Strauss abused him (but could not have understood at the time that OSU was responsible), SAC ¶ 1318 (John Doe 19), does not mean—as a matter of law—that all Plaintiffs who had medical training should have recognized during medical school that what Dr. Strauss did was abuse. That is what discovery is for: to probe the contours of that medical training (training which may have included limited discussion of abuse) and what a reasonable plaintiff would have understood from that training.

It took the publicity surrounding OSU's April 5, 2018 investigation announcement and Larry Nassar's January 2018 criminal sentencing to make Plaintiffs aware of Strauss' misconduct. *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*, 408 F. Supp. 3d at 900–01 (claim did not accrue until "release of Baylor's Findings of Fact and the subsequent media coverage"); *Jameson,* 2019 WL 5606828 at *1 (claim did not accrue until "Independent Report" on university's "handling of Title IX cases" was made public); *Pasadena Hosp. Ass'n*, 2020 WL 1244357 at *6 (only media story put plaintiffs on notice of doctor abuse).

OSU cannot prove its affirmative defense "beyond doubt." The motion should be denied.

B. OSU's Fraudulent Concealment Tolls the Statute of Limitations

Regardless of when the statute of limitations accrued, OSU's concealment, obfuscation, and fraud equitably tolls the statute.

"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 (citing *Bd. of Regents v. Tomanio*, 446 U.S. 478, 485 (1980)); *Guy v. Lexington-Fayette Urban Cty. Gov't*, 488 F. App'x 9, 18 (6th Cir. 2012). Under Ohio law, equitable tolling applies "where there is some conduct of the adverse party . . . which excludes suspicion and prevents inquiry." *Lutz*, 717 F.3d at 474. "[A] plaintiff must show that the defendant engaged in a course of conduct to conceal evidence of the alleged wrongdoing, and that the plaintiff, despite the exercise of due diligence, failed to discover the facts supporting the claim." *Id.* at 475.

What *didn't* OSU do to "conceal evidence of the alleged wrongdoing"? Though OSU knew of Dr. Strauss' abusive practices as early as 1979, SAC ¶ 5, it hid the abuse from law enforcement, the State Medical Board, students, and the public, *e.g. id.* ¶¶ 11, 13, 267; falsified Dr. Strauss' performance reviews, *id.* ¶¶ 231, 327; destroyed patient records, *id.* ¶¶ 18, 248; told the Medical Board of its intent to look for other Strauss survivors, then failed to do so, *id.* ¶¶ 17,

247; lied to students, *id.* ¶ 162; let Strauss retire voluntarily and with emeritus status even after internally admitting "the severity and pervasiveness of Strauss' abuse," *id.* ¶¶ 127, 243, 244, 267; and the list goes on, *see* Facts at 7-9¸ *supra*.

Equitable tolling applies where the school "failed to report numerous incidents of sexual abuse by [an employee]; concealed secret files with information about the known abuse; failed to discipline or sanction the [employee]; and failed to inform students, faculty, and staff of any of these facts." *Gilley*, 572 F. App'x at 308; *cf. Craft v. Vanderbilt Univ.*, 18 F. Supp. 2d 786, 797 (M.D. Tenn. 1998) ("Where a confidential relationship exists, as between a physician and patient, there is an affirmative duty to disclose, and that duty renders silence or failure to disclose known facts fraudulent."). OSU did *all* of this—failed to report the abuse to anyone, concealed and destroyed Strauss' patient records, failed to discipline Strauss, failed to inform students "of any of these facts"—and more. *See* Facts at 7-9, *supra*. OSU "obstructed the prosecution of [the plaintiffs'] cause of action against it by continually concealing the fact that it had knowledge of [Dr. Strauss'] problem well before the plaintiffs [were] abused." *Gilley*, 572 F. App'x at 308.

OSU even helped conceal from abused students that Strauss abused them, legitimizing his conduct as ordinary medical care, *see* Facts at 5, *supra*; ignoring, rebuffing, and laughing at students who raised concerns, *id.*; Appendix 1; and promoting Dr. Strauss as not just a legitimate but an important doctor at the university, *see* Facts at 9, *supra*. *See Lutz*, 717 F.3d at 475 (fraudulent concealment where energy companies concealed miscalculation of royalty payments); *Venture Glob. Eng'g, LLC v. Satyam Computer Servs., Ltd.*, 730 F.3d 580, 588 (6th Cir. 2013) (computer company concealed its own fraud); *State of Ohio ex rel. Fisher v. Louis Trauth Dairy, Inc.*, 856 F. Supp. 1229, 1237 (S.D. Ohio 1994) (dairies fraudulently concealed conspiracy to rig milk contract bidding system).

Courts repeatedly toll claims against institutions that conceal sexual assault. *See Redwing v. Catholic 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 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 covered up sexual abuse by priests since the 1940s).

The Court should not reward OSU for perpetrating a successful fraud on Plaintiffs and the public. The statute of limitations should be tolled.

II. BASED ON TITLE IX'S PLAIN TEXT, THE FOUR NON-STUDENT PLAINTIFFS HAVE STANDING TO SUE OSU

OSU argues that John Does 30, 42, 47, and 49 lack standing to assert Title IX claims because they were not OSU students or employees. OSU Br. 18-20. OSU's argument is wrong under Title IX's plain text and is premised on a decision abrogated by the Supreme Court.

John Doe 49 was a participant in a summer wrestling camp run by OSU on its campus. SAC ¶ 1940. He sought to benefit from trainings by the university's coaches and student-athletes. *Id*. Instead, he was subjected to Dr. Strauss's sexual abuse. *Id.* ¶¶ 1943-48.

John Doe 47 was a 15-year-old campus visitor when he met Dr. Strauss, who offered to teach him about being an OSU athlete. *Id.* ¶¶ 1903-05. During that visit, John Doe 47 participated in a long tour of the athletics facilities provided by Strauss. *Id*. ¶ 1906. John Doe 47 also sought to benefit from the doctor's promised tutorial. *Id*. ¶¶ 1905-07. Dr. Strauss disguised his sexual abuse as lessons about sports medicine. *Id.* ¶¶ 1907-1911.

John Does 30 and 42 were both referees paid by OSU to officiate wrestling matches on campus. *Id.* ¶¶ 1612-13, 1812. Dr. Strauss abused John Doe 30 when he sought medical services before a wrestling meet he had been hired to officiate. *Id.* ¶¶ 1614-16. Dr. Strauss sexually abused John Doe 42 when the referee used OSU's athletic facilities—a locker room and shower—after a match he had officiated. *Id*. ¶¶ 1812-16.

The starting point of any inquiry into a statute's application is its plain language. *Mich. Flyer LLC v. Wayne Cty. Airport Auth*., 860 F.3d 425, 428 (6th Cir. 2017). Title IX provides: "*[n]o person* in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity

receiving Federal financial assistance." 20 U.S.C. § 1681(a) (emphasis added). On its face, the statute's text does not limit the class of protected persons to those with a particular relationship to the institution. *Id.*; *N. Haven Bd. of Educ.*, 456 U.S. at 521; *Doe v. Brown Univ.*, 896 F.3d 127, 132 n.6 (1st Cir. 2018).

In *North Haven*, the Supreme Court held that Title IX applies to school employees—not just students—explaining that courts should "accord [Title IX] a sweep as broad as its language." 456 U.S. at 521. The statute "neither expressly nor impliedly excludes employees from its reach." *Id.* "Congress easily could have substituted 'student' or 'beneficiary' for the word 'person' if it had wished to restrict the scope of" the statute. *Id*.

The same reasoning applies here: If Congress had intended to restrict Title IX's protection to a school's students and employees, Congress would have said so. It did not.

Under the plain text, a plaintiff has standing if, "on the basis of sex," he fits any one of three categories: (1) a "person . . . excluded from participation in . . . any education program or activity"; (2) a "person . . . denied the benefits of . . . any education program or activity"; or (3) a "person . . . subjected to discrimination under *any* education program or activity." 20 U.S.C. § 1681(a) (emphasis added). Here, the four Plaintiffs fit all three.

The third category is the broadest. As the Supreme Court held, it does not require a plaintiff to "participat[e] in" or "benefit[]" from the covered institution. *N. Haven*, 456 U.S. at 520-21. The third category also protects people who *might* participate in a covered institution's educational programs or activities. *Brown Univ.*, 896 F.3d at 132 n.6. ("subjected to discrimination under" means a cause of action may lie where the victim "availed herself of any of [a university's] educational programs in the past . . . or intended to do so in the future").

Furthermore, Title IX's protections extend well beyond a school's core academic functions. The statute defines "program or activity" to include "*all* the operations of" a recipient, so long "any part of [the recipient] is extended Federal financial assistance." 20 U.S.C. § 1687 (emphasis added); *see also Doe v. Claiborne Cty., Tenn.*, 103 F.3d 495, 513 (6th Cir. 1996) (Congress intended that Title IX have "broad, institution-wide application"). Where, as here, the

covered entity is a university, its "education program or activity" includes virtually all its facilities and offerings, such as sporting events, athletic training, and campus tours. *Brown Univ.*, 896 F.3d at 132 n.6 (participating in an "education program or activity" includes "access[ing] university libraries, computer labs, and vocational resources and attend[ing] campus tours, public lectures, [and] sporting events").[22]

Each of the four non-student Plaintiffs is plainly a "person . . . subjected to discrimination under *any* [OSU] education program or activity." SAC ¶¶ 1612-26 (John Doe 30, referee at OSU wrestling match on OSU campus); ¶¶ 1812-25 (John Doe 42, same); ¶¶ 1903-1919 (John Doe 47, student on OSU campus tour); and ¶¶ 1940-59 (John Doe 49, participant in OSU summer wrestling camp).

Each Plaintiff also satisfies the other two categories of Title IX: "participa[nts]" and "benefi[ciaries]." John Doe 49 was a "participant[]" in an OSU summer wrestling camp and sought to "benefi[t]" from OSU trainings. *Id.* ¶ 1940. John Doe 47 "participa[ted]" in an athletics tour given by Strauss, *id.* ¶ 1906, and sought to "benefi[t]" from the doctor's promised tutorial, *id.* ¶¶ 1905-07. "Members of the public [who] avail themselves of . . . campus tours . . . are either taking part or trying to take part of a funding recipient institution's educational program or activity." *Brown Univ.*, 896 F.3d at 132 n.6.

Wrestling referees John Does 30 and 42 "participa[ted]" in OSU athletics events and "benefit[ted]"—financially, at the least—from their involvement. John Doe 30 also attempted to "benefit" from Strauss' medical services before a wrestling meet, SAC ¶¶ 1614-16, and John Doe 42 attempted to "benefit" from OSU's athletic facilities—a locker room and shower—when Strauss abused him, *id.* ¶¶ 1812-16. *See also Brown Univ.*, 896 F.3d at 132 n.6 (Title IX protects

[22] *See Armstrong v. James Madison Univ.*, No. 5:16-cv-00053, 2017 WL 2390234 at *7 n.14 (W.D. Va. Feb. 23, 2017) (reading "program or activity" broadly to encompass a wide array of university offerings); *Hauff v. State Univ. of N.Y.*, 425 F. Supp. 3d 116, 133 (E.D.N.Y. 2019) (rejecting "suggestion that Congress intended for Title IX to distinguish the [security] staff as any less a part of the university or deserving of protection than faculty"); *Fox v. Pittsburgh State Univ.*, 257 F. Supp. 3d 1112, 1124, 1126 (D. Kan. 2017) (rejecting argument that employee must show a "'nexus' to education in order to qualify for Title IX's remedies" and further rejecting university's suggestion that anything "prohibits groundskeepers or maintenance workers from asserting Title IX claims but allows professors or teachers").

"[m]embers of the public . . . attend[ing] . . . sporting events . . . [because they] are either taking part or trying to take part of a funding recipient institution's educational program or activity.").

How, then, can OSU claim Title IX only protects students and employees? By relying on old, bad law: *Romeo Community Schools v. U.S. Department of Health, Education, & Welfare*, 438 F. Supp. 1021 (E.D. Mich. 1977), *aff'd*, 600 F.2d 581 (6th Cir. 1979); OSU Br. at 18-19. *Romeo* held that Title IX does not protect employees, but only "those persons for whom the federally assisted education programs are established"—namely, students. 438 F. Supp. at 1031-32. But the Supreme Court abrogated *Romeo* in 1982. *See N. Haven*, 456 U.S. at 535, 543.

Ignoring the Supreme Court, OSU next borrows *Romeo*'s rejected reasoning, claiming Title IX protects only "participants" and "beneficiaries," which OSU defines as students and employees. *See* OSU Br. at 19-20. There is no justification for this invented bright-line rule. "While the Court has recognized that this right of action extends to students and employees, it has never expressly restricted it to those two categories of plaintiffs." *Brown Univ.*, 896 F.3d at 130. For example, the Supreme Court has held that an *applicant* (not a student, as OSU claims) could bring a Title IX suit. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 717 (1979). Nor did the two other Supreme Court cases OSU cites limit Title IX's coverage to students and employees; rather, they interpreted Title IX to cover a broader range of people or conduct. *Davis*, 526 U.S. at 633 (Title IX covers student-on-student sexual harassment); *N. Haven*, 456 U.S. at 535 (Title IX covers employees, not just students).

OSU next cites *Arocho v. Ohio University*, No. 2:19-CV-4766, 2020 WL 3469223 (S.D. Ohio June 25, 2020), but (i) the abuse there occurred during a "career day" a university police officer attended at her high school, not a university campus where plaintiffs engaged in university activities and used university facilities; and (ii) the plaintiff in *Arocho* failed to cite 20 U.S.C. § 1681, present the text-based reasoning set forth here, or cite *North Haven*. *Arocho v. Ohio Univ.*, 2:19-cv-4766 (S.D. Ohio), Dkt. 13.

OSU's other cases fare no better. OSU Br. 20 n.5. Some are inapposite.[23] Others ignore Title IX's text or rely on abrogated case law.[24] And one is on appeal to the Sixth Circuit, which heard arguments on the non-student plaintiff's Title IX standing last year. *Doe v. Univ. of Kentucky*, No. 19-5126 (6th Cir.), Dkt. 38.

Under Title IX's plain text, each of the four non-student Plaintiffs has standing.

III. OSU'S SETTLEMENT OFFER IN A MERITS BRIEF IS INAPPROPRIATE

OSU's motion repeatedly refers to confidential mediation discussions, trumpets a settlement it has kept secret from Plaintiffs and the public, and even makes a settlement offer, *in a merits brief*. OSU says it "has attempted to do the right thing with all plaintiffs." OSU Br. 1. It says "OSU hopes the remaining plaintiffs will agree to settle on the same basis as the 162 settled plaintiffs." *Id.* This is the second time OSU has referred to settlement talks in a publicly-filed brief. *See Garrett v. OSU*, 2:18-cv-00692-MHW-EPD, Dkt. 154 at 4-5.

Why is OSU informing the decisionmaker, Your Honor, about a confidential mediation? Why is it making a settlement offer in a merits brief? It is not relevant to the statute of limitations, to the merits, or to anything. Plainly, OSU is using an alleged settlement offer to

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[23] *See Phillips v. Anderson Cty. Bd. of Educ*., 259 F. App'x 842, 843 n.1 (6th Cir. 2008) (parent lacked standing to assert Title IX claims stemming from sex discrimination that only his daughter, not he, experienced); *Glaser v. Upright Citizens Brigade LLC*, No. 18-CV-971 (JPO), 2020 WL 1529309, at *4-5 (S.D.N.Y. Mar. 31, 2020) (comedian accused of sexual harassment whose shows were cancelled by club that offered improvisation classes could not state Title IX claim); *Arora v. Daniels*, No. 3:17-CV-134, 2018 WL 1597705, at *8 (W.D.N.C. Apr. 2, 2018) (woman could not state Title IX claim for harassment by police officer sent to her home by college that employed her husband but with which she had no affiliation).

[24] *See K. T. v. Culver-Stockton Coll*., No. 4:16-CV-165 CAS, 2016 WL 4243965, at *4-6 (E.D. Mo. Aug. 11, 2016) (limiting Title IX protections based on "slippery slope" argument unsupported by text and assumed to be incorrect by appellate court on review), *aff'd*, 865 F.3d 1054 (8th Cir. 2017); *Yan v. Penn. State Univ*., No. 4:14-CV-01373, 2015 WL 3953205, at *13 (M.D. Pa. June 29, 2015) (denying former student's Title IX claim based entirely on *Romeo*), *aff'd*, 623 F. App'x 581 (3d Cir. 2015). OSU also cites a district court opinion for reasoning subsequently rejected on appeal. *Compare Doe v. Brown Univ*., 270 F. Supp. 3d 556, 561-63 (D.R.I. 2017) (erroneously limiting Title IX's private right of action to students and relying on narrow definition of "program or activity" inconsistent with 20 U.S.C. § 1687) *with Brown Univ*., 896 F.3d at 130-33 & n.6 (interpreting Title IX standing to *extend* to non-students but holding the particular non-student Plaintiff had not pled sufficient facts).

influence the Court's decision, sending the not-so-subtle message that it is appropriate to dismiss this case because OSU will in any event "do the right thing" with Plaintiffs.[25]

In a collective 100+ years practicing law, none of the undersigned has seen such a brazen violation of the confidentiality of mediation and settlement discussions. *See* Local Rule 16.3(c) (mediation communications, including "offers to compromise," are confidential unless all parties to mediation "consent in writing"); 28 U.S. Code § 652(d) (courts must "prohibit disclosure of confidential dispute resolution communications"); S.D. Oh. Supplemental Procedures for Alternative Dispute Resolution § 3.5 ("parties . . . may not disclose information regarding the process, including settlement discussion"). It is improper and OSU should be precluded from doing it a third time.

CONCLUSION

OSU's motion to dismiss should be denied.

August 4, 2020

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[25] OSU apparently defines "the right thing" as offering less than 20% of the approximately $1.28 million/survivor in the Michigan State settlement, less than 9% of the approximately $2.9 million/survivor in the Penn State settlement, and the equivalent of 12 days' salary in the contract of OSU's current football coach.

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CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of the foregoing document was filed and served, via the Court's CM/ECF system on August 4, 2020, on all counsel of record.

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