No. 21-3981

In the United States Court of Appeals for the Sixth Circuit

STEVE SNYDER-HILL; RONALD MCDANIEL; DAVID MULVIN; WILLIAM BROWN; KURT HUNTSINGER; WILLIAM RIEFFER; STEVE HATCH; KELLY REED; MELVIN ROBINSON; DOUGLAS WELLS; JAMES KHALIL; JERROLD L. SOLOMON; JOSEPH BECHTEL; MICHAEL MURPHY; JOHN DAVID FALER; MATT CCOY; GARY AVIS; ROBERT SCHRINER; MICHAEL MONTGOMERY; JOHN DOES, 1-22, 25, 27, 29-37, 39-47, 49, 52, 54, 56-60, 62-64, AND 66-77,

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. 2:18-cv-00736
The Honorable Michael H. Watson, Judge Presiding

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INTRODUCTION

Nothing in OSU's brief can change the well-pleaded, individualized allegations in the Complaint:

(1) Seventy-five Plaintiffs did not know they were sexually abused by Dr. Strauss;

(2) Neither OSU's own doctors, its administrators, nor its law firm believe Plaintiffs should have known they were sexually abused;

(3) Not one Plaintiff knew of OSU's deliberate, institutional indifference that caused Strauss' pattern of abuse; and

(4) Nor could they have known, because OSU successfully hid its knowledge, notice, and complicity through decades of lies, obfuscation, document destruction, and fraud.

Given these allegations, OSU can only defend the decision below by ignoring the allegations (as the District Court did) or rewriting them. OSU also asks this Court to abolish the discovery rule, reverse itself, and create a circuit split.

But OSU is entitled to no special dispensation from this Court. It is not entitled to rewrite the Complaint or rewrite the law. It is not entitled to discuss settlement in an appellate brief. It is not entitled to cite its own website as some sort of authority on a motion to dismiss. OSU must face the facts and the law like any other litigant. The allegations in the Complaint and well-settled law compel only one outcome: reversal.

ARGUMENT

I. OSU'S SELF-CONGRATULATORY REPRESENTATIONS FROM OUTSIDE THE COMPLAINT ARE IRRELEVANT

Unable to deal with the merits, OSU spends pages citing its own website, offering self-congratulations for its paltry mediation efforts and response to these lawsuits. Appellee Br. ("Opp.") 3-5. Unlike OSU, Plaintiffs will stick to the record, the allegations in their Complaint, and the legal questions before this Court. OSU's recent actions in the press and in settlement talks are irrelevant and inaccurate. So is its false claim that Plaintiffs hired lobbyists to support an Ohio bill that, though not necessary for their claims to survive, would have removed any possible doubt as to the statute of limitations issue.

OSU's attempt to pollute the appellate record is appalling. Surely OSU would not think this Court's analysis of the timeliness of Plaintiffs' claims would be influenced by, of all things, settlement offers. On a motion to dismiss, "[m]atters outside the pleadings are not to be considered." *Hammond v. Baldwin*, 866 F.2d 172, 175 (6th Cir. 1989). To explain why OSU's characterization of recent events is grossly and knowingly inaccurate, Plaintiffs would have to call upon facts beyond the Complaint, including some protected by the mediation privilege. *See* S.D. Ohio Civ. R. 16.3(c) (explaining mediation communications are confidential). The Court should disregard OSU's irrelevant posturing.

II. PLAINTIFFS' CLAIMS ARE TIMELY BECAUSE THE DISCOVERY RULE APPLIES

Because the discovery rule applies, OSU cannot demonstrate the Complaint "affirmatively show[s] that the claim[s are] time-barred." *Stein v. Regions Morgan Keegan Select High Income Fund, Inc.*, 821 F.3d 780, 786 (6th Cir. 2016). Nothing in OSU's brief changes that.[1]

A. The Discovery Rule Applies

1. This Court applies the federal discovery rule to statutes that, like Title IX, do not specify a statute of limitations in their text. Opening Br. 21-22. At least six other appeals courts do the same. *Id.* at 22-23. No circuit disagrees. Under this rule, "the statute of limitations begins to run when the reasonable person knows, or in the exercise of due diligence should have known, both his injury and the cause of that injury." *Bishop v. Children's Ctr. for Developmental Enrichment*, 618 F.3d 533, 536 (6th Cir. 2010).

This Court should not overrule itself and create a circuit split by misreading *Rotkiske*. As Plaintiffs explained, Opening Br. 24, *Rotkiske*'s reasoning was rooted

[1] OSU protests Plaintiffs' statement of the motion to dismiss standard. That quotation is drawn from a 2021 opinion. *See* Opening Br. 20 (citing *Meriwether v. Hartop*, 992 F.3d 492, 498 (6th Cir. 2021)). No matter. The parties agree that, to defeat a Rule 12(b)(6) motion, Plaintiffs must plead non-conclusory facts that, viewed in the most favorable light, give rise to a claim. *Bishop v. Lucent Techs., Inc.*, 520 F.3d 516, 519 (6th Cir. 2008).

firmly in the FDCPA's *text*: Because Congress had specified that the FDCPA's statute of limitations would begin to run "from the date on which the violation occurs," courts were bound by that legislative judgment. *Rotkiske v. Klemm*, 140 S. Ct. 355, 358-61 (2019); *see Sohm v. Scholastic Inc.*, 959 F.3d 39, 50 n.2 (2d Cir. 2020) (*Rotkiske* is based in the FDCPA's text). *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." *Navarro v. Procter & Gamble Co.*, 515 F. Supp. 3d 718, 760 (S.D. Ohio 2021) (emphasis added).

This Court's sister circuits agree that, where a statute is silent on accrual, the discovery rule still applies. *E.g.*, *Sohm*, 959 F.3d at 50 n.2; *see also Ouellette v. Beaupre*, 977 F.3d 127, 140 (1st Cir. 2020) (applying federal discovery rule after *Rotkiske*); *Johnson v. Chudy*, 822 F. App'x 637, 638 (9th Cir. 2020) (same); *Lupole v. United States*, No. 20-1811, 2021 WL 5103884, at *1 (4th Cir. Nov. 3, 2021) (same). *No* appeals court has read *Rotkiske* to foreclose the discovery rule's application absent a specific statutory directive. Although this Court has not directly addressed *Rotkiske* for statutes without express statutes of limitations, it recently acknowledged the discovery rule's continued vitality. *Norton v. Baker*, No. 21-5893, 2022 WL 837976, at *2 (6th Cir. Feb. 16, 2022) (in a § 1983 case, "[t]he statute of limitations starts to run either 'when the plaintiff has a complete and present cause of action' or 'when the plaintiff discovered (or should have discovered) the cause of

action'" (quoting *Dibrell v. City of Knoxville*, 984 F.3d 1156, 1162 (6th Cir. 2021) (noting, but not answering, question of whether *Rotkiske* affects § 1983 limitations period)).

Facing this wall of authority, OSU does not even try to explain how *Rotkiske*'s text-based reasoning would apply to a statute like Title IX that lacks an express statute of limitations. Instead, it pretends *Rotkiske*, a case about the importance of statutory text, has nothing to do with statutory text. Opp. 25. OSU further mischaracterizes the opinion. *Rotkiske* did not say that the discovery rule itself is a "bad wine of recent vintage." *Id.* After all, the discovery rule is nothing new. *See Urie v. Thompson,* 337 U.S. 163, 169 (1949). Rather, the "bad wine" was the expansion of the discovery rule to conflict with the "plain meaning of [a statute's] text." *Rotkiske*, 140 S. Ct. at 360 (emphasis added). Where, as in Title IX, a statute has no statute of limitations *at all*, the discovery rule is a fine wine of old vintage.

2. OSU relies on inapposite case law. In *El-Khalil v. Oakwood Healthcare, Inc*., 23 F.4th 633 (6th Cir. 2022), for example, this Court correctly read *Rotkiske* to require courts to look to a statute's text for congressional direction as to accrual, *id.* at 635-36—not, as OSU claims, to abolish the discovery rule. *El-Khalil* distinguished the False Claims Act from § 1983, noting that § 1983 claims accrue according to the discovery rule. *Id.* at 636.

Neither *Wallace* nor *McDonough* mentions the discovery rule because the plaintiffs did not invoke it. *Wallace v. Kato*, 549 U.S. 384, 390-92 (2007) (explaining plaintiff's argument); *McDonough v. Smith*, 139 S. Ct. 2149, 2156 (2019) (same). That a given § 1983 case does not apply or discuss the discovery rule does not mean the discovery rule is bad law; it just means those cases didn't implicate the rule. The same is true for OSU's repeated citation to Title IX cases dismissed as untimely for reasons unrelated to the dispute here. *See, e.g.*, Opp. 22-23, 23 n.8 (collecting inapposite cases).

OSU is also wrong to claim *Guy v. Lexington Urban County Government*, 488 F. App'x 9 (6th Cir. 2012), a non-precedential § 1983 case, stands for a general rule that the discovery rule is inapplicable to sex abuse suits. The *Guy* court accepted the plaintiffs' invitation to root its claim-accrual analysis in Kentucky law. 488 F. App'x at 15. *Guy* is thus wrong and distinguishable: it erroneously relied on state rather than federal law in interpreting the federal discovery rule, *Children's Ctr.*, 618 F.3d at 536, and Kentucky accrual law differed from federal and Ohio law, *see Schmitz v. NCAA*, 122 N.E.3d 80, 85 (Ohio 2018) (Ohio applies discovery rule).

3. OSU also speculated that if Congress *had* inserted a limitations period into Title IX's text, it would have adopted an occurrence rule. But OSU's only evidence is Ohio's statute of limitations, which provides no insight into federal legislators' states of mind. The best indication of Congress's intent, of course, is Title IX's text

itself. *See, e.g.*, *Rotkiske*, 140 S. Ct. at 360. With full knowledge of the federal discovery rule—and full intent to create a private right of action, *Cannon v. Univ. of Chi.*, 441 U.S. 677, 694 (1979)—legislators decided not to include a statute of limitations when they passed Title IX in 1972 and then amended it in 1987. Opening Br. 26. OSU offers no theory as to why this Court should assume Congress was unaware of Supreme Court precedent endorsing the discovery rule—despite the Supreme Court's directive to trust Congress is aware of caselaw when legislating, *Merck & Co. v. Reynolds*, 559 U.S. 633, 648 (2010). Application of the discovery rule to Title IX claims is most faithful to Congress's intent.

B. Plaintiffs Plausibly Alleged They Did Not Understand Strauss Abused Them Until Recently, and That a Reasonable Person Would Not Have Earlier Understood Otherwise

1. The District Court and OSU do not bother to analyze the allegations of even a single Plaintiff in this case, instead treating all eighty-four individuals as a mass undifferentiated subsidiary of the *Garrett* case. Yet seventy-five Plaintiffs individually alleged that, until recent reporting, they did not know Strauss had abused them. Opening Br. 28-32. They also alleged why their misunderstanding was reasonable and expected. For example, the Complaint describes specific ways Strauss was able to keep his victim in the dark, such as by disguising his abuse as medical exams. *E.g.*, *id.* at 28-29. Plaintiffs' opening brief highlights a handful of specific Plaintiffs' allegations that demonstrate they did not know they were abused,

and should not have been expected to know because of Strauss' deceit. *Id.* Yet OSU does not engage with any of these or other Plaintiffs' individual allegations, mimicking the District Court's error.

For instance, OSU does not explain why, as a matter of law, John Doe 23 should have known he was abused when Strauss said he needed to check the lymph nodes around his genitals for swelling due to illness. *Id.* at 28. It does not explain why, as a matter of law, John Doe 24 should have known Strauss' "hernia check"—an exam he'd never experienced before—was abusive. Second Am. Compl. ("SAC") ¶ 1462, R.123 at 2187. It does not explain why, as a matter of law, John Doe 62 should have known Strauss' digital penetration of his anus was not, as the doctor said, a "prostate exam"—even though "John Doe 62 did not know what a prostate exam was." *Id.* ¶¶ 2212-13 at 2298.

The Complaint also includes assessments from doctors and investigators that underscore the reasonableness of Plaintiffs' misunderstanding. These include Perkins Coie investigators' and former OSU doctors' assertions that patients would generally be *unable* to distinguish Strauss' abuse from medical procedures. Opening Br. 8-9. Psychologists and other *amici* detail that Plaintiffs' allegations are consistent with scientific research and the experience of other patients and athletes. NCVC Amicus Br., Dkt. 48, at 6-18; Psychology and Psychiatry Scholars Amicus Br., Dkt. 44, at 13-18; NWLC Amicus Br., Dkt. 50, at 7-23. Even Perkins Coie lawyers, with

full knowledge of Strauss' pattern, had to consult with doctors to determine whether Strauss' treatment of any given patient was abusive. SAC ¶¶ 157-58, R.123 at 2017.

OSU dismisses these allegations as "second hand," Opp. 27-38, but fails to explain why they are irrelevant to what a reasonable person should have understood—or why OSU's self-serving assertions to the contrary should be credited as a matter of law. If only "firsthand" allegations—allegations about how Strauss patients understood his conduct—were relevant, that would only help Plaintiffs, because nearly all of them did not recognize Strauss' abuse at the time. Opening Br. 10.

Having failed to find a single amicus to support its position, OSU may in discovery try to find some expert to refute the scholarly research demonstrating that survivors may be gravely injured by abuse they do not even recognize. *See* Psychology and Psychiatry Scholars Amicus Br., Dkt. 44, at 10-26. At trial, OSU may attempt, as it does here, to pit survivors against one another, arguing that *all* Plaintiffs should have recognized abuse because a *few* did. *But see* Opening Br. 29 (explaining why this is wrong). But at this stage, the Court must take Plaintiffs' allegations as true.

2. Knowing this, OSU tries to rewrite Plaintiffs' Complaint. Most egregiously, OSU pretends the post-2018 evidence Plaintiffs discovered—the new information that allowed them to file suit—was known by each Plaintiff while he was at OSU

decades ago. Opp. 34-35. OSU asserts, for example, that Plaintiffs knew they were abused because "all Plaintiffs alleged . . . that 'Dr. Strauss' modus operandi during medical exams was always similar'" and "reports of the abuse by other students were 'widespread,' 'persistent,' and 'regular.'" *Id.* at 35. But that is what Plaintiffs know *now*, after reading public reports. *E.g.*, SAC ¶¶ 6, R.123 at 1990 (quoting Perkins Coie report); 13 at 1992 (same); 264 at 2035 (same); *see also* ¶ 272 at 2036 (2018 public investigation enabled discovery of abuse). Nowhere does the Complaint suggest that, at or near the time of their abuse, Plaintiffs knew of Strauss' "modus operandi" or that other students had complained to OSU officials. To the contrary, the Complaint alleges that specific Plaintiffs—athletes and non-athletes alike—did not know that others "had previously complained to OSU." *E.g.*, *id.* ¶¶ 451 at 2063; 482 at 2066; 516 at 2070. That is no wonder, given that OSU "hid . . . the repeated complaints [it] received." *Id.* ¶ 265 at 2035.

OSU points to allegations that some student-athletes gave Strauss "sexually suggestive nicknames and warned other students about Strauss." Opp. 33. But not all Plaintiffs heard these nicknames or warnings: athlete Plaintiffs played different sports, at different times; other Plaintiffs were not athletes. *E.g.*, SAC ¶¶ 299-302, R.123 at 2046; 744-46 at 2097. Further, a reasonable inference from these allegations, when combined with Strauss' position as an esteemed doctor, was that jokes about Strauss only normalized his conduct. *E.g.*, *id.* ¶¶ 694-95 at 2090-91

(jokes "reinforced Bechtel's reasonable belief that Dr. Strauss' conduct was not sexual abuse"); 1340-41 at 2171 (same; John Doe 20); 1395-97 at 2178 (same; John Doe 22); 1954 at 2258 (same; John Doe 49); NWLC Amicus Br., Dkt. 50, at 19 (explaining how jokes about Strauss' conduct made it harder for survivors to recognize abuse).

After treating all Plaintiffs as an undifferentiated class, OSU ignores the one way their collective experience *should* inform the assessment of any individual's knowledge: given that virtually all Plaintiffs did not know they were abused or know to seek out a second opinion, the Complaint, taken as a whole, gives rise to a plausible inference they reacted reasonably. "[T]he hypothetical 'reasonable person' must be 'similarly situated' to the specific plaintiff invoking the discovery rule and must have access to the same information that was available to the plaintiff." *Ouellette*, 977 F.3d at 137. Although their allegations differ, the seventy-five Plaintiffs' similar ignorance of Strauss' abuse is a powerful indicator of what a similarly situated person at the time would have understood.

3. OSU also ignores the particular challenges of identifying doctor-patient abuse. "Many victims never think to question the behavior of their doctors," who "have specialized medical knowledge" and are trusted to "examine the nude bodies of their patients." NCVC Amicus Br., Dkt. 48, at 1, 6 (detailing litany of cases where doctors concealed abuse under guise of medical exams). Reasonable people in

Plaintiffs' situation, then, would not necessarily have divined they had been abused or had sufficient notice of that likelihood to trigger a "duty to inquire," *Ouellette*, 977 F.3d at 137.

Further, even if a Plaintiff had inquiry notice sufficient to trigger such a duty, the Complaint does not establish that his diligent investigation would have revealed Strauss' conduct as abusive, given that sexual abuse by doctors looks much like legitimate exams. Inquiry notice alone does not trigger accrual; a reasonable investigation must have been able to reveal sufficient information to sue. *E.g.*, *Ouellette*, 977 F.3d at 138; RAINN Br. 15-17. And it is far from "definitively ascertainable from the pleadings" that, had Plaintiffs sought a second opinion, doctors would have recognized as abuse *every one* of the vastly different "exams" each Plaintiff experienced. *Walburn v. Lockheed Martin Util. Servs.*, 443 F. App'x 43, 47 (6th Cir. 2011).

Although Plaintiffs had no burden to "plead around the possibility" that they should have discovered the abuse, *Nat'l Credit Union Admin. Bd. v. Jurcevic*, 867 F.3d 616, 625 (6th Cir. 2017), they have: the Complaint alleges that when professionals learned about Strauss' conduct at the time, they failed to recognize it as abuse. SAC ¶¶ 313-14, 318, R.123 at 2043-45; 557-58 at 2075; 688 at 2089. That is unsurprising, given how difficult it is to distinguish between doctors' appropriate touching of naked patients and abuse. NCVC Amicus Br. 6.

At summary judgment, OSU would first have to prove each Plaintiff had a duty to investigate, based on the specifics of his exam. Then, to prove that Plaintiff's reasonable investigation would have been fruitful, OSU would need to find expert witness doctors to evaluate each individual Plaintiff's experience, and conclusively establish that any doctor would have identified his exam as abuse, even absent any knowledge about Strauss' broader pattern. Those are matters for a later day, not a motion to dismiss.

C. Plaintiffs Plausibly Alleged They Did Not Know, and Could Not Have Known, About OSU's Deliberate Indifference

1. All Plaintiffs have alleged that they did not know about OSU's causal role in Strauss' abuse until recent public reporting. Opening Br. 40. They also alleged that, even if they had suspected OSU's deliberate indifference, they would have been unable to discover it through diligent investigation. *Id.* at 41-42. Accordingly, their claims did not accrue until they learned about OSU's deliberate indifference decades later. *Id.* at 40-48.

OSU does not dispute that, under the discovery rule, a claim does not accrue until "a plaintiff must, or should, be aware of both the fact of his or her injury and the injury's likely causal connection with the putative defendant." *Ouellette*, 977 F.3d at 136. Instead, it contends that the relevant "cause" in a Title IX case is not the school's deliberate indifference but rather the "abuse" that "caused the injury." Opp.

39 (cleaned up). That view cannot be squared with the basics of Title IX liability or the logic of the discovery rule.

Title IX does not permit vicarious liability for an employee's harassment; it requires institutional indifference. Opening Br. 40-41. Even to suspect he has a lawsuit against the school, a victim must not only know about the abuse but also about the school's deliberate indifference in permitting the abuse to occur. *Id*. Only then can a plaintiff "take the necessary steps to take legal action to preserve his or her [Title IX] rights." *Ouellette*, 977 F.3d at 138.

OSU's proposed interpretation would render the discovery rule meaningless. By its telling, Plaintiffs' claims accrued once they knew they were abused, because that abuse was the most immediate "cause" of their injuries. Opp. 39-41. But the cause requirement is "the injury's likely causal connection *with the putative defendant*." *Ouellette*, 977 F.3d at 139 (emphasis added); *see also Piotrowski v. City of Houston*, 237 F.3d 567, 576 (5th Cir. 2001) (similar).

The Second Circuit rejected a similar argument in *Barrett*. There, a patient's daughter sued the Army after learning the injection that killed her father decades before had been part of a secret experiment. *Barrett v. United States*, 689 F.2d 324, 326 (2d Cir. 1982). The defendants argued the daughter's claim was time-barred because the "cause" of death was the injection itself, which had long been known. *Id.* at 329. That was wrong, the Second Circuit explained, because the suit wasn't

narrowly about the injection; the "critical facts about causation" were the Army's unethical experimentation that led to it. *Id.* Similarly, in *Piotrowski*, the plaintiff knew at the time that the hit man pulling the trigger was the immediate cause of her injury. 237 F.3d at 567, 576-77. But the § 1983 claim against the municipal defendant did not accrue until plaintiff learned it had "protected and/or assisted" the shooter, and so had a basis to sue the city. *Id*. at 577. In *Ouellette*, a plaintiff's claim did not accrue until he discovered the defendants' deliberate indifference "may have also been a cause of his injury," even though the police officer who sexually abused him was a more immediate contributor. 977 F.3d at 145.

The same applies here. This lawsuit is about OSU's role in causing Strauss' abuses of Plaintiffs. Plaintiffs could not have filed this suit until they knew about OSU's causal role.[2] OSU cannot distinguish *Piotrowski* or *Ouellette* or *Barrett*. Instead, it asks this Court to split from the Fifth, First, and Second Circuits' careful analysis for no reason at all.

2. OSU is wrong that Plaintiffs knew or should have known of OSU's complicity in Strauss' abuse. Like the District Court, OSU imputes knowledge to all

[2] This is true regardless of whether the injury is the abuse itself or the resultant educational deprivation, as OSU suggests. Also, to the extent OSU relies on *Kollaritsch v. Michigan State University Board of Trustees*, 944 F.3d 613 (6th Cir. 2019), this Court has recently held *Kollaritsch*'s holding does not apply to employee-on-student harassment, *Wamer v. Univ. of Toledo*, 27 F.4th 461, 471 (6th Cir. 2022); *see also* Opening Br. 49 (*Kollaritsch* is inapplicable *post*-assault case).

Plaintiffs without ever grappling with their individualized allegations: OSU does not explain how any single Plaintiff's allegations demonstrate, as a matter of law, that he knew or should have known about OSU's causal role.

Once again, OSU's arguments depend on a fiction that every Plaintiff knew every allegation in the Complaint at the time of his abuse. *See supra* Part II.B. For example, OSU contends, without citation, that "Ohio State's dismissive approach toward both Strauss' inappropriate conduct and widespread complaints about such conduct were widely known by Plaintiffs and other students at Ohio State." Opp. 55. But the Complaint says no such thing. OSU also brazenly misquotes the Complaint, which never says OSU's "alleged deliberate indifference to [Strauss' conduct was] 'well known,' 'common knowledge,' a 'frequent topic of discussion,' 'discussed openly,' 'an open secret,' a 'rite of passage,' and 'akin to being "hazed."'" *Id.* at 41. None of the language lifted from the Complaint refers to students' contemporaneous knowledge of OSU's deliberate indifference. SAC ¶¶ 6, R.123 at 1990; 196 at 2025; 198 at 2025; 1354 at 2173. For instance, OSU plucks "well known" from the Complaint's allegation that "Strauss' abuse was well known among at least *fifty* OSU employees in the athletic department," which Plaintiffs only learned from a recent report. *Id*. ¶ 6 at 1990.

Contrary to OSU's story, the Complaint alleges that, until public reporting in 2018, Plaintiffs "did not know . . . of OSU's role in Dr. Strauss' sexually abusive

medical examinations of him," or that others "had previously complained [about Strauss] to OSU." *E.g.*, *id.* ¶¶ 364 at 2052; 420 at 2060; 637 at 2083; *see also id.* ¶ 267 at 2035-36 (no Plaintiff knew about OSU's causal role in Strauss' abuse). At the time, Plaintiffs trusted their university would not have knowingly employed a serial sexual predator. *E.g.*, *id.* ¶¶ 391 at 2056; 449 at 2064; 480 at 2066; 514 at 2069-70.[3]

Nor would a reasonable person in Plaintiffs' shoes have assumed that OSU was secretly complicit in his sexual abuse. At the time of their abuse, most Plaintiffs were college students; some were minors as young as fifteen. *Id.* ¶¶ 30-122 at 1996-2011. Yet OSU asks this Court to hold, as a matter of law, that every reasonable person—including every reasonable teenager—would have inferred a significant likelihood that (1) the same employee had abused others; (2) high-level school officials were aware of that abuse; and (3) the school had refused to take action to stop the employee's abuse. How on earth were Plaintiffs supposed to have known all of that? How could a district court hold that it was "definitively ascertainable from the pleadings," *Walburn*, 443 F. App'x at 47, that students should have known

[3] The fact that some athletes and trainers discussed Strauss' exams does not mean every Plaintiff knew OSU's role. Those Plaintiffs who heard jokes and open conversation about Strauss' unusual medical exams inferred the exams must be proper, since they trusted OSU would not put its students in harm's way. *E.g.*, SAC ¶¶ 2011, R.123 at 2266, 2197 at 2296, 2249 at 2303. Many Plaintiffs never heard *any* such discussion. *E.g.*, *id.* ¶¶ 299-339 at 2042-49.

what OSU's own administrators admit they never could have known? SAC ¶¶ 265-66, R.123 at 2035.

OSU also cannot establish, as a matter of law, that Plaintiffs could have discovered its causative role in their abuse even if they *had* suspected it. Inquiry notice does not hasten accrual if a "diligent investigation would *not* have uncovered sufficient information to allow a plaintiff to take action to preserve his or her rights." *Ouellette*, 977 F.3d at 138. That is the case where "a defendant took steps to cover up its involvement or to keep information about the plaintiff's injury and its cause confidential." *Id.*; *see also Barrett*, 689 F.2d at 327-28 (similar).

Plaintiffs allege exactly such a cover-up here. Opening Br. 11-14, 41-42. For example, when Plaintiff Snyder-Hill reported Strauss' abuse, OSU falsely told him that he was the first to do so. SAC ¶¶ 299-321, R.123 at 2042-46. Had that been true, OSU could not have been liable under Title IX for causing Snyder-Hill's abuse: it would not have known the risk Strauss posed to students, as necessary for a pre-assault claim. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 277 (1998). OSU's mendacity, cover-up, and four decades of concealment, obfuscation, and lies were the reason Snyder-Hill and other Plaintiffs could not have filed non-frivolous Title IX suits earlier than 2018.

3. OSU's argument also rests on fundamental misunderstandings of Title IX. It questions whether Plaintiffs' pre-assault Title IX claims are available in the Sixth

Circuit. Opp. 44-45. In doing so, it ignores *Williams ex rel. Hart v. Paint Valley Local School District*, 400 F.3d 360 (6th Cir. 2005), cited in Plaintiffs' opening brief, and the *unanimous* caselaw from other courts of appeals that also accepted such pre-assault claims, *see, e.g.*, Opening Br. 50 (citing cases); *Doe v. Sch. Bd. of Broward Cty.*, 604 F.3d 1248, 1257 (11th Cir. 2010) (holding "no circuit has interpreted [Title IX's] actual notice requirement so as to require notice of the prior harassment [by teacher] of the Title IX plaintiff *herself*" and citing cases).

Poloceno does not disrupt this consensus. Putting aside its errors, the non-precedential Fifth Circuit opinion isn't about sexual harassment at all. *Poloceno v. Dallas Indep. Sch. Dist.*, 826 F. App'x 359, 361 (5th Cir. 2020). And it concerns a specific kind of pre-assault liability—for "official policies" of indifference to a "general," rather than particularized, risk of discrimination—on which Plaintiffs need not rely here. *See id.* at 363.

OSU also wrongly contends that, as a categorical matter, the discovery rule applies differently to student-on-student and teacher-on-student claims. To do so, it must ignore that *neither* kind of Title IX suit arises from *respondeat superior* liability: regardless of the identity of the harasser, a school's liability arises only from its own deliberate indifference, not from the harassment itself. *See supra* Part II.C; *see also Gebser,* 524 U.S. at 290 (explaining, in teacher-on-student harassment

case, that a school may liable "for its own decision . . . not to remedy the violation," not for "its employees' independent actions").

OSU relies on a Western District of Texas opinion, *Hernandez v. Baylor University*, which determined the plaintiff's claim did not accrue until she learned about Baylor University's role in causing her abuse by a fellow student—but suggested that had her harasser been an employee rather than a student, the result may have been different. 274 F.Supp.3d 602, 617 (W.D. Tex. 2017). That dicta is wrong as a matter of basic Title IX principles. *Hernandez* also misreads *King-White v. Humble Indep. Sch. Dist.*, 803 F.3d 754 (5th Cir. 2015), a post-assault teacher-on-student harassment case. That victim's claim accrued at the time of her abuse because she already knew about the school's causal role, not because of the harasser's identity. Opening Br. 52; *see also* Opp. 42 (citing cases where Title IX claims accrued at the time of abuse because of case-specific facts).

III. FIVE PLAINTIFFS HAVE ALLEGED FRAUDULENT CONCEALMENT, TOLLING THE STATUTE OF LIMITATIONS

1. Five Plaintiffs' claims were tolled by OSU's fraudulent concealment. Opening Br. 53-58. OSU's fraud went beyond mere silence: OSU affirmatively lied to Plaintiffs, destroyed documents, and falsified Strauss' performance reviews, among other attempts to conceal evidence. *Id*. at 54-56.

Strauss' status as an OSU employee was insufficient to alert them to their claim against OSU. Opening Br. 19, 40-41. Title IX does not permit *respondeat*

superior liability. *Id.* Without knowledge of OSU's deliberate indifference and misled by OSU's affirmative lies, Plaintiffs could not bring claims against the school. *Doe v. Archdiocese of Cincinnati*, 849 N.E.2d 268 (Ohio 2006), is inapposite because it concerned a church's *respondeat superior* liability for priests' sexual abuse, among other torts. *Id*. at 492. Those plaintiffs could bring a claim when they knew the identify of their abuser and the abuser's employer. *Id*. at 493. And the Ohio Supreme Court has since recognized that "[d]iscovery of physical injury alone is insufficient to start the [limitations period] if at that time there is no indication of tortious conduct [of the defendant] giving rise to a legal claim." *Schmitz*, 122 N.E.3d at 97.

2. OSU is wrong that the five Plaintiffs "waived" their fraudulent concealment argument. No one disputes that all Plaintiffs pressed this below in their opposition brief. *See* Pls.' Opp. Mot. Dismiss, R.133 at 28-30. There, they cited to some allegations that applied to all Plaintiffs, *e.g.*, SAC ¶¶ 5, R.123 at 1989-90; 18 at 1993; 23 at 2030; 327 at 2047, and some allegations unique to specific Plaintiffs, *e.g.*, *id.* ¶¶ 11 at 1992; 162 at 2017. In its reply below, OSU raised substantive objections to Plaintiffs' fraudulent concealment argument, but did not contend Plaintiffs had not sufficiently parsed OSU's fraud with respect to each individual victim. R.135 at 16-19.

Because they raised it below, the five Plaintiffs who appeal on this ground unquestionably preserved the argument. *See Hudson v. City of Highland Park,* 943 F.3d 792, 799 (6th Cir. 2019) (litigant preserves an argument when, before the trial court, it "identif[ies] the issue" and "provid[es at least] some minimal level of argumentation"); *Roush v. KFC Nat'l Mgmt. Co.,* 10 F.3d 392, 397 (6th Cir. 1993) (similar). Although Plaintiffs can now develop their individualized arguments in greater detail, that is hardly forfeiture, let alone waiver. *See Lawson v. Sun Microsystems, Inc*., 791 F.3d 754, 761 (7th Cir. 2015) ("[N]o rule prohibits appellate amplification of a properly preserved issue."). Even if Plaintiffs had failed to make this argument in sufficiently detailed form before the District Court, OSU would have forfeited *that* objection by failing to make it below.

3. OSU is also wrong that Plaintiffs cannot establish fraudulent concealment because, by its account, the fraud is "coextensive with the substantive wrongs supporting Plaintiffs' Title IX claims." Opp. 50. First, OSU has not cited any state or federal case applying Ohio law that recognizes such a limitation. OSU's only authority is an unpublished Sixth Circuit case arising out of Michigan. *Id.* at 50 (citing *Cheatom v. Quicken Loans*, 587 F. App'x 276, 281 (6th Cir. 2014)). But there is no dispute Plaintiffs' fraudulent concealment argument is a question of Ohio tolling law, not some general federal rule. *Id.* at 49 n.12.

Second, OSU's conduct giving rise to Plaintiffs' claims is not coextensive with its fraudulent concealment. Consider Plaintiff Snyder-Hill. He can establish his pre-assault claim based on OSU's deliberate indifference to the known risk Strauss posed. SAC ¶¶ 299-313, R.123 at 2042-43. OSU then concealed its role in Snyder-Hill's abuse by falsely claiming it had "never received a complaint about Dr. Strauss before, [only] positive comments," *id.* ¶ 320 at 2045-46, such that it could not have had actual knowledge or been deliberately indifferent. Opening Br. 54-55. Those lies came after Strauss' abuse of Snyder-Hill and are not part of the deliberate indifference on which his claim rests. *See id.* at 49-50 (describing elements of pre-assault claim). But the lies stopped Snyder-Hill from discovering OSU's role in permitting Strauss' abuse, and so from suing any earlier than he did. *Id.* at 54-55.

IV. THE FOUR NON-STUDENT PLAINTIFFS MAY STATE A CLAIM

As an alternative ground for affirmance, OSU argues that four Plaintiffs—two wrestling referees, one participant in an OSU summer wrestling program, and one participant in a campus tour—cannot bring Title IX claims because they were not OSU students at the time of their abuse. That is wrong under Title IX's plain text, the starting point of any inquiry into its application. *See, e.g.*, *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1738 (2020). And the Supreme Court has instructed courts to

"accord [Title IX] a sweep as broad as its language." *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982).[4]

Title IX provides that "[n]o *person* in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a) (emphasis added). In using the term "person," the statute's text does not limit plaintiffs to those with a particular relationship to the institution. *E.g.*, *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 179 n.3 (2005) ("Title IX's beneficiaries plainly include all those who are subjected to 'discrimination' 'on the basis of sex.'"); *Elwell v. Oklahoma ex rel. Bd. of Regents of Univ. of Okla.*, 693 F.3d 1303, 1311 (10th Cir. 2012) (Gorsuch, J.) ("Title IX does not limit its coverage at all, outlawing discrimination against any 'person'"). The group of people Title IX protects includes anyone "excluded from participation in, . . . denied the benefits of, or," most broadly, "subjected to discrimination under" an entity covered by Title IX. 20 U.S.C. § 1681(a).

OSU would replace "person" with "student or employee." Opp. 51-52. Rewriting Title IX, though, is Congress's job, not the Court's, and certainly not

[4] The Supreme Court has disapproved as "misleading" the term "standing" to describe the inquiry here. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 n.4 (2014) (cleaned up). OSU does not dispute that Plaintiffs have Article III standing. The question posed is simply whether a plaintiff can state a claim under the statute. Opp. 51-52.

OSU's. *Bostock*, 150 S. Ct. at 1738. No case makes that clearer than *North Haven*, which recognized Title IX protects employees. 456 U.S. at 522. The Supreme Court reasoned that "Congress easily could have substituted 'student' or 'beneficiary' for the word 'person' if it had wished to restrict [Title IX's] scope." *Id.* at 521. But Congress had not. *Id*. Thus, "the statutory language . . . favor[ed] inclusion of employees." *Id.* at 522. The same reasoning applies here for inclusion of independent contractors, campus visitors, and campers.[5]

The Civil Rights Restoration Act (CRRA) confirms Title IX's broad reach in defining "program or activity." 20 U.S.C. § 1687. The CRRA "amended Title IX to require the *entire* entity receiving federal funds to abide by the statute's substantive rules." *United States v. Grossi*, 143 F.3d 348, 350 (7th Cir. 1998) (emphasis added); *see also Doe v. Claiborne Cty.*, 103 F.3d 495, 513 (6th Cir. 1996) (CRRA requires "broad, institution-wide application of" Title IX); *Horner v. Ky. High Sch. Athletic Ass'n*, 43 F.3d 265, 272 (6th Cir. 1994) (similar); *Fox v. Pittsburg State Univ.*, 257 F. Supp. 3d 1112, 1125-26 (D. Kan. 2017) (similar). "[T]he term 'program or activity' . . . mean[s] all the operations of . . . a . . . university," so long as "any part of [the recipient] is extended Federal financial assistance." 20 U.S.C. § 1687. A

[5] *North Haven* makes clear the two referee Plaintiffs can state a claim; nothing in the opinion suggests Title IX's coverage turns on a worker's classification as employee or independent contractor. *See N. Haven*, 456 U.S. at 520-35; *cf. Doe v. Univ. of Ky.*, 971 F.3d 553, 558 (6th Cir. 2020) (Title IX's protections did not depend on whether plaintiff attending classes was technically enrolled).

university, then, is a single "program or activity." *Id.* And since a university is an educational institution, it is an "education program or activity." 20 U.S.C. § 1681(a).[6]

Thus, under Title IX as amended by the CRRA, "[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 [OSU]." *Id.* Plaintiffs are all "persons." 1 U.S.C. § 1. Each alleges he was "subjected to discrimination under" the "education program or activity": all were sexually harassed while availing themselves of OSU's on-campus athletic programs. 20 U.S.C. § 1681(a); SAC ¶¶ 1612-26, R.123 at 2208-10; 1812-25 at 2236-38; 1903-19 at 2250-53; 1940-59 at 2255-59. Each alleges he was "denied the benefits of" OSU, including its facilities, medical services, and athletic tutorials. *Id.*; *see Doe v. Brown Univ.*, 896 F.3d 127, 132 n.6 (1st Cir. 2018) (Title IX protects "[m]embers of the public [who] . . . attend campus tours [and] sporting events" because they "are either taking part or trying to take part of a funding recipient"). They have stated a Title IX claim.

[6] Title IX's use of the word "education" might seem superfluous. But the CRRA defines "program or activity" to encompass various entities, including, for example, private corporations. 20 U.S.C. § 1687(3). In that case, "education" narrows the "programs or activities" subject to Title IX because most corporations are not "education corporations." *See, e.g.*, *Doe v. Mercy Catholic Med. Ctr.*, 850 F.3d 545, 553-63 (3d Cir. 2017).

CONCLUSION

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

May 5, 2022

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CERTIFICATE OF COMPLIANCE

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Dated: May 5, 2022

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 5, 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
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ADDENDUM

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

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

Record Entry Number	**Description of Document**	**Page ID#**
133	Plaintiffs' Opposition to Defendant's Motion to Dismiss	2497-2533
135	Defendant's Reply on Motion to Dismiss	2572-2592