No. _____

In the Supreme Court of the United States

THE OHIO STATE UNIVERSITY,
Petitioner,

v.

EDWARD GONZALES, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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[Additional Captions Listed on Inside Cover]

THE OHIO STATE UNIVERSITY,
Petitioner,
v.
JOHN DOE 174, ET AL.,
Respondents.

THE OHIO STATE UNIVERSITY,
Petitioner,
v.
JOHN DOE 195,
Respondent.

THE OHIO STATE UNIVERSITY,
Petitioner,
v.
JOHN DOE 162,
Respondent.

QUESTION PRESENTED

Whether, or to what extent, a claim under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688, accrues after the date on which the alleged injury occurred.

PARTIES TO THE PROCEEDING

Petitioner (defendant-appellee below) is The Ohio State University.

Respondents (plaintiffs-appellants below) are:

- Edward Gonzales; John Antognoli; Kent Kilgore; Roger Beedon; Adam Plouse; Daniel Ritchie; Michael Schyck; Dr. Mark Chrystal; Joel Davis; John Doe 1; John Doe 2; John Doe 4; John Doe 5; John Doe 6; John Doe 8; John Doe 10; John Doe 11; John Doe 12; John Doe 13; John Doe 14; John Doe 15; John Doe 17; John Doe 19; John Doe 21; John Doe 22; John Doe 23; John Doe 24; John Doe 25; John Doe 27; John Doe 29; John Doe 30; John Doe 31; John Doe 32; John Doe 33; John Doe 35; John Doe 36; John Doe 37; John Doe 38; John Doe 39; John Doe 40; John Doe 41; John Doe 42; John Doe 43; John Doe 44; John Doe 45; John Doe 46; John Doe 48; John Doe 50; John Doe 51; John Doe 53; John Doe 56; John Doe 57; John Doe 58; John Doe 59; John Doe 61; John Doe 62; John Doe 64; John Doe 69; John Doe 75; John Doe 77; John Doe 85; John Doe 86; John Doe 88; John Doe 89; John Doe 90; John Doe 91; and John Doe 92 (plaintiffs-appellants in the court of appeals in No. 21-3972);
- Rocky Ratliff (plaintiff-appellant in the court of appeals in No. 21-3974);
- Eric Smith; Mark Coleman; William Knight; Jack Cahill; Scott Overholt; Elmer Long; Ryan Henry; Michael Glane; Christopher Perkins; Michael Caldwell; Thomas Roehlig; Brian Roskovich; Rick Monge; Thomas Lisy; Anastacio Tito Vazquez, Jr.; John MacDonald,

Jr.; Maroon Mondalek; Leo Disabato; Peter Nathanson; Jeffrey Ladrow; Anthony Sentieri; John Doe 1; John Doe 2; John Doe 3; John Doe 4; John Doe 5; John Doe 6; John Doe 7; John Doe 8; John Doe 9; John Doe 10; John Doe 11; John Doe 12; John Doe 13; John Doe 14; John Doe 15; John Doe 17; John Doe 18; and John Doe 19 (plaintiffs-appellants in the court of appeals in No. 21-3982);

- Michael Alf; Gary Till; Allen Novakowski; Chris Armstrong; John Doe 93; John Doe 94; John Doe 95; John Doe 96; John Doe 97; John Doe 99; John Doe 100; and John Doe 101 (plaintiffs-appellants in the court of appeals in No. 21-4070);
- John Doe 174; John Doe 176; John Doe 182; John Doe 183; and Jane Doe 1 (plaintiffs-appellants in the court of appeals in No. 21-4109);
- John Doe 195 (plaintiff-appellant in the court of appeals in No. 21-4116);
- John Doe 162 (plaintiff-appellant in the court of appeals in No. 21-4121); and
- Michael Canales and John Doe 20 (plaintiffs-appellants in the court of appeals in No. 21-4128).

John Doe 98 was a plaintiff-appellant in the court of appeals in No. 21-4070 but dismissed his appeal.

The following parties were plaintiffs in the district court but did not participate in the proceedings on appeal: Brian Garrett; John "Hunter" Shepard; John Doe 7; John Doe 9; John Doe 26; John Doe 28; John Doe 47; John Doe 49; John Doe 52; John Doe 54; John Doe 55; John Doe 60; John Doe 63; John Doe 65; John

Doe 66; John Doe 67; John Doe 68; John Doe 70; John Doe 71; John Doe 72; John Doe 73; John Doe 74; John Doe 76; John Doe 78; John Doe 79; John Doe 80; John Doe 81; John Doe 82; John Doe 83; John Doe 84; and John Doe 87 (plaintiffs in the district court in No. 18-cv-692); Nicholas Nutter; Dunyasha Yetts; Adam DiSabato; Michael Rodriguez; Matthew Dalgleish; Vincent DiSabato; and John Doe 16 (plaintiffs in the district court in No. 19-cv-2462); John Doe 151; John Doe 152; John Doe 153; John Doe 154; John Doe 155; John Doe 156; John Doe 157; John Doe 158; John Doe 159; John Doe 160; John Doe 161; John Doe 163; John Doe 164; John Doe 165; and John Doe 166 (plaintiffs in the district court in No. 20-cv-3817); John Doe 172; John Doe 173; John Doe 175; John Doe 177; John Doe 178; John Doe 179; John Doe 180; John Doe 181; John Doe 184; John Doe 185; John Doe 186; John Doe 187; John Doe 188; John Doe 189; John Doe 190; and John Doe 191 (plaintiffs in the district court in No. 21-cv-2121); and John Doe 192; John Doe 193; John Doe 194; John Doe 196; John Doe 197; John Doe 198; John Doe 199; John Doe 200; John Doe 201; John Doe 202; John Doe 203; John Doe 204; John Doe 205; John Doe 206; John Doe 207; John Doe 208; John Doe 209; John Doe 210; John Doe 211; John Doe 212; John Doe 213; John Doe 214; John Doe 215; John Doe 216; and John Doe 217 (plaintiffs in the district court in No. 21-cv-2527).

RELATED PROCEEDINGS

United States Court of Appeals (6th Cir.):

Garrett v. Ohio State Univ., No. 21-3972 (Feb. 15, 2023)

Ratliff v. Ohio State Univ., No. 21-3974 (Feb. 15, 2023)

Nutter v. Ohio State Univ., No. 21-3982 (Feb. 15, 2023)

Alf v. Ohio State Univ., No. 21-4070 (Feb. 15, 2023)

Doe 174 v. Ohio State Univ., No. 21-4109 (Dec. 16, 2022)

Doe 195 v. Ohio State Univ., No. 21-4116 (Dec. 16, 2022)

Doe 162 v. Ohio State Univ., No. 21-4121 (Dec. 16, 2022)

Canales v. Ohio State Univ., No. 21-4128 (Feb. 15, 2023)

United States District Court (S.D. Ohio):

Garrett v. Ohio State Univ., No. 18-cv-692 (Sept. 22, 2021)

Ratliff v. Ohio State Univ., No. 19-cv-4746 (Sept. 22, 2021)

Nutter v. Ohio State Univ., No. 19-cv-2462 (Sept. 22, 2021)

Doe 151 v. Ohio State Univ., No. 20-cv-3817 (Oct. 25, 2021)

Doe 172 v. Ohio State Univ., No. 21-cv-2121 (Oct. 25, 2021)

Doe 192 v. Ohio State Univ., No. 21-cv-2527 (Oct. 25, 2021)

Alf v. Ohio State Univ., No. 21-cv-2542 (Oct. 25, 2021)

Canales v. Ohio State Univ., No. 21-cv-2562 (Oct. 25, 2021)

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PETITION FOR A WRIT OF CERTIORARI

The Ohio State University respectfully petitions this Court for a writ of certiorari to review the judgments of the United States Court of Appeals for the Sixth Circuit in these cases. Pursuant to this Court's Rule 12.4, Ohio State is filing a "single petition for a writ of certiorari" for these cases because the judgments below are from "the same court and involve identical or closely related questions."

OPINIONS BELOW

The opinion of the court of appeals in Nos. 21-3972, 21-3974, 21-3982, 21-4070, and 21-4128 (App. 1a-21a) is reported at 60 F.4th 359. The relevant opinions of the district court in those cases (App. 31a-73a, 80a-83a) are available at 561 F. Supp. 3d 747, 2021 WL 7186198, 2021 WL 7186149, 2021 WL 7186208, and 2021 WL 7186260.

The opinion of the court of appeals in No. 21-4109 (App. 22a-24a) is available at 2022 WL 17730528. The opinion of the district court in that case (App. 76a-77a) is available at 2021 WL 7186246.

The opinion of the court of appeals in No. 21-4116 (App. 25a-27a) is available at 2022 WL 17730532. The opinion of the district court in that case (App. 78a-79a) is available at 2021 WL 7186262.

The opinion of the court of appeals in No. 21-4121 (App. 28a-30a) is available at 2022 WL 17730529. The opinion of the district court in that case (App. 74a-75a) is available at 2021 WL 7186267.

JURISDICTION

The court of appeals entered its judgments in Nos. 21-4109, 21-4116, and 21-4121 on December 16, 2022; and its judgments in Nos. 21-3972, 21-3974, 21-3982,

21-4070, and 21-4128 on February 15, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688, are reproduced at App. 84a-90a.

STATEMENT OF THE CASE

This petition presents the same threshold claim-accrual question that is presented by the petition in *Ohio State University v. Snyder-Hill* (filed March 14, 2023). This petition should therefore be held pending the Court's decision in *Snyder-Hill*.

1. The background underlying these cases is set forth in detail in the *Snyder-Hill* petition. In short, these cases are among several lawsuits filed against Ohio State by plaintiffs alleging that they were sexually abused by Richard Strauss, a physician employed by Ohio State in various capacities between 1978 and 1998. *See* App. 3a. During that time, Strauss sexually abused numerous young men, the vast majority of them Ohio State students and student-athletes. *Id.* Following multiple reports of abuse, Ohio State placed Strauss on administrative leave in 1996, and he ended his employment with Ohio State in 1998. *Id.* He died in 2005.

In April 2018, after a former Ohio State wrestler reported to the University that Strauss had abused him decades earlier, Ohio State launched an external, independent investigation helmed by Perkins Coie LLP. *Id.* A year later, in May 2019, Ohio State publicly released a 182-page report prepared by Perkins Coie summarizing the investigation and its findings. *See* Caryn Trombino & Markus Funk, Perkins Coie LLP, *Report of the Independent*

Investigation: Sexual Abuse Committed by Dr. Strauss at The Ohio State University (May 15, 2019).[1] The report found that Strauss sexually abused at least 177 men between 1978 and 1998. *Id.* at 1, 43. The report also found that, despite "persisten[t], serious[], and regular[]" complaints, "no meaningful action was taken by the University to investigate or address the concerns until January 1996." *Id.* at 3.

2. Between 2018 and 2021, more than 500 plaintiffs—nearly all of whom were former students who had graduated from or left Ohio State decades earlier—filed Title IX claims against Ohio State alleging that they were abused by Strauss between 1978 and 1998, and that Ohio State was deliberately indifferent to Strauss's abuse. *See* App. 5a; *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290-91 (1998) (interpreting Title IX's implied right of action to permit claims against a Title IX educational institution for its "actual knowledge" of and "deliberate indifference" to "sexual harassment" of a student).

a. In each case, the district court dismissed the Title IX claims as untimely, based on the applicable two-year statute of limitations borrowed from Ohio law. App. 7a. In its decision in *Garrett v. Ohio State University*, the district court explained that, with respect to the accrual of the plaintiffs' Title IX claims, the claims are untimely under both the "occurrence rule," under which the limitations period begins to run when the injury occurs; and the "discovery rule," under which the limitations period begins to run when the plaintiff discovers the injury. App. 37a-46a.

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[1] https://compliance.osu.edu/assets/site/pdf/Revised_report.pdf.

Under the "occurrence rule," the court explained, the claims accrued at the latest when the plaintiffs left the University (between 1978 and 1999), as that is "the latest moment they were deprived of access to educational opportunities or benefits provided by Ohio State as a result of Ohio State's deliberate indifference." *Id.* at 41a-42a. In addition, the court held that, even if the discovery rule applied, it would not change the date of accrual, because the plaintiffs were "aware of" their injuries when the injuries occurred. *Id.* at 42a-49a.

The district court applied its reasoning in *Garrett* in dismissing the other suits as well. *See id.* at 56a-83a; *Snyder-Hill v. Ohio State Univ.*, No. 18-cv-736, 2021 WL 7186148 (S.D. Ohio Sept. 22, 2021); *Moxley v. Ohio State Univ.*, No. 21-cv-3838, 2021 WL 7186269 (S.D. Ohio Oct. 25, 2021). Several plaintiffs appealed.

b. In *Snyder-Hill v. Ohio State University*, 48 F.4th 686 (6th Cir. 2022), a divided Sixth Circuit panel reversed the district court's dismissal in two suits concerning Strauss's abuse (*Snyder-Hill* and *Moxley*). The panel majority held that the accrual of the Title IX claims is governed by the "discovery rule," rather than the "occurrence rule." *Id.* at 698-99. The majority then held that, under the discovery rule, a Title IX claim accrues only when the plaintiff "knows or has reason to know that they were injured and that the defendant [educational institution] caused their injury" through its "deliberate indifference." *Id.* at 704. Applying that rule, the majority held that, at the time of their injuries, the plaintiffs may have "lacked reason to know . . . the underlying facts about Ohio State's alleged deliberate indifference." *Id.* at 704-07.

Judge Guy dissented from the panel opinion, explaining that the majority's approach to claim-

accrual for Title IX claims exacerbates a "circuit split," conflicts with precedent from this Court, and ultimately "renders meaningless any limitations provision for Title IX claims." *Id.* at 711-19.

The Sixth Circuit denied panel rehearing and rehearing en banc, over dissents from Judges Guy, Thapar, Readler, and Bush. *See Snyder-Hill v. Ohio State Univ.*, 54 F.4th 963 (6th Cir. 2022). Ohio State has filed a petition for certiorari in *Snyder-Hill*.

3. This petition seeks certiorari in several Strauss-related cases subsequently decided by the Sixth Circuit on the basis of its *Snyder-Hill* decision. These cases, which present the same claim-accrual issue presented in *Snyder-Hill*, fall into two categories.

a. The first category consists of five suits that were consolidated for purposes of appeal: *Garrett v. Ohio State University*, No. 21-3972 (6th Cir.); *Ratliff v. Ohio State University*, No. 21-3974 (6th Cir.); *Nutter v. Ohio State University*, No. 21-3982 (6th Cir.); *Alf v. Ohio State University*, No. 21-4070 (6th Cir.); and *Canales v. Ohio State University*, No. 21-4128 (6th Cir.).

These lawsuits were filed between 2018 and 2021: *Garrett* was filed in July 2018, *Nutter* was filed in June 2019, *Ratliff* was filed in October 2019, *Alf* was filed in May 2021, and *Canales* was filed in May 2021. *See* App. 5a. The plaintiffs in each case, all of whom are former Ohio State students or student-athletes, asserted Title IX claims against Ohio State based on allegations that they were abused by Strauss between 1978 and 1998. *Id.* And as noted above, the district court dismissed each of these cases as untimely, concluding that the Title IX claims are barred by the

applicable two-year limitations period. *Id.* at 33a-55a (*Garrett*); *id.* at 56a-58a (*Nutter*); *id.* at 59a-73a (*Ratliff*); *id.* at 80a-81a (*Alf*); *id.* at 82a-83a (*Canales*).

On appeal, the Sixth Circuit vacated the district court's decisions and remanded in light of its *Snyder-Hill* opinion, explaining that "[t]he holding in *Snyder-Hill* applies equally to these plaintiffs' claims." App. 2a; *see id.* at 7a-11a.[2]

b. The second category consists of three additional cases: *Doe 162 v. Ohio State University*, No. 21-4121 (6th Cir.); *Doe 174 v. Ohio State University*, No. 21-4109 (6th Cir.); and *Doe 195 v. Ohio State University*, No. 21-4116 (6th Cir.).

These lawsuits were filed in 2020 and 2021: *Doe 162* was filed in July 2020, *Doe 174* was filed in April 2021, and *Doe 195* was filed in May 2021.[3] As in the other cases, the plaintiffs in these cases asserted Title IX claims against Ohio State based on allegations that they were abused by Strauss between 1978 and 1998. And, as in the other cases, the district court dismissed these cases on the ground that the Title IX claims are untimely. App. 74a-79a.

On appeal, the Sixth Circuit issued three materially identical opinions in which it vacated the district court's decisions and remanded in light of its *Snyder-Hill* opinion. *Id.* at 22a-30a.

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[2] The Sixth Circuit also affirmed the district court's dismissal of certain plaintiffs' retaliation claims and the district court's denial of plaintiffs' motions for recusal and transfer of venue. App. 11a-21a. Those rulings are not at issue in this petition.

[3] *See Does 151-166 v. Ohio State Univ.*, No. 20-cv-3817 (S.D. Ohio filed July 29, 2020); *Does 172-191 v. Ohio State Univ.*, No. 21-cv-2121 (S.D. Ohio filed Apr. 28, 2021); *Does 192-217 v. Ohio State Univ.*, No. 21-cv-2527 (S.D. Ohio filed May 14, 2021).

REASONS FOR GRANTING THE PETITION

This petition presents the same threshold question presented in the petition in *Ohio State University v. Snyder-Hill*: Whether, or to what extent, a Title IX claim accrues after the date on which the alleged injury occurred. Because that question is the subject of a "circuit split," and because the Sixth Circuit's answer to that question in *Snyder-Hill* contravenes this Court's precedent in a way that "effectively nullifies any statute of limitations for Title IX claims based on sexual harassment," this Court's review is warranted. 48 F.4th at 709, 712 (Guy, J., dissenting); *see also Snyder-Hill*, 54 F.4th at 971 (Readler, J., joined by Bush, J., dissenting from denial of rehearing en banc) (urging this Court's review). This Court should therefore grant the petition in *Snyder-Hill* and hold this petition pending the Court's disposition in that case.

1. As explained in the *Snyder-Hill* petition, the question presented necessitates this Court's review.

First, the circuits are divided over the applicable rule of accrual for Title IX claims. *Snyder-Hill* Pet. 13-17. The Tenth Circuit has held that the standard occurrence rule governs the accrual of Title IX claims, under which the limitations period begins to run when the injury occurs. *Varnell v. Dora Consol. Sch. Dist.*, 756 F.3d 1208, 1215-17 (10th Cir. 2014). Other circuits apply a discovery rule, which delays accrual until "'the plaintiff becomes aware that he has suffered an injury or has sufficient information to know that he has been injured.'" *King-White v. Humble Indep. Sch. Dist.*, 803 F.3d 754, 762 (5th Cir. 2015) (citation omitted). In *Snyder-Hill*, the Sixth Circuit staked out a new position by "adopt[ing] an

injury-and-deliberate-indifference discovery rule," 48 F.4th at 711 (Guy, J., dissenting), which delays accrual until the plaintiff "knows or has reason to know that they were injured *and* that the [educational institution] caused their injury" through its "deliberate indifference," *id.* at 704 (majority op.) (emphasis added). That three-way conflict warrants this Court's review.

Second, the Sixth Circuit's approach is fundamentally misguided. *Snyder-Hill* Pet. 17-26. This Court has repeatedly stressed that the occurrence rule—not the discovery rule—is the "standard rule" of accrual that governs federal claims absent unambiguous statutory text to the contrary. *Wallace v. Kato*, 549 U.S. 384, 388 (2007) (citation omitted); *see, e.g.*, *Rotkiske v. Klemm*, 140 S. Ct. 355, 360 (2019). The Sixth Circuit directly contravened those decisions by adopting a discovery rule for Title IX claims without any statutory directive to do so. Moreover, even if the discovery rule could apply to Title IX claims, this Court has been "emphatic" that "discovery of the injury, not discovery of the other elements of a claim, is what starts the clock." *Rotella v. Wood*, 528 U.S. 549, 555 (2000). The Sixth Circuit flouted that admonition as well by delaying accrual until the plaintiff "discovers" the injury *and* the educational institution's deliberate indifference.

Third, the question of claim-accrual is exceptionally important. *Snyder-Hill* Pet. 26-29. The approach adopted by the Sixth Circuit in *Snyder-Hill* defeats the vital objectives served by statutes of limitations. And it will perversely discourage schools from undertaking independent and transparent investigations as to past misconduct. Furthermore, the federal courts' confusion and division over the

accrual date for Title IX claims is intolerable "in view of the 'federal interests in uniformity, certainty, and the minimization of unnecessary litigation' surrounding statutes of limitations." *Snyder-Hill*, 54 F.4th at 977 (Readler, J., dissenting) (citation omitted). And litigation spawned by the Sixth Circuit's flawed ruling ultimately will divert resources from educational programs and activities.

Ohio State condemns the reprehensible conduct alleged in these lawsuits, has committed substantial resources to preventing and addressing sexual misconduct on campus, and is a fundamentally different university today than it was 25 years ago. But the question presented is purely legal and thus transcends the particular circumstances alleged here. This Court's resolution of that question is vitally important for any educational institution subject to Title IX.

2. The Sixth Circuit held below that its decision in *Snyder-Hill* dictated the outcome in these cases. *See supra* at 5-6. Accordingly, this Court should grant the petition in *Snyder-Hill* and hold this petition pending the decision in *Snyder-Hill*. Doing so would enable the Court to fully decide all aspects of the claim-accrual issue—which was extensively debated by the parties and the Sixth Circuit judges in *Snyder-Hill*—while minimizing the potential for unnecessary duplication in briefing and argument if the Court were to grant both petitions and consolidate the cases for merits review. If the Court reverses or vacates in *Snyder-Hill*, the Court should grant this petition, vacate the decisions below, and remand for further proceedings in light of that disposition.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's disposition of the petition in *Ohio State University v. Snyder-Hill* (filed March 14, 2023). If the Court grants certiorari in *Snyder-Hill*, this petition should be held pending a decision in that case and then disposed of as is appropriate. Alternatively, the petition should be granted.

Respectfully submitted,

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March 14, 2023

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 21-3972/3974/3982/4070/4128

BRIAN GARRETT; NICHOLAS NUTTER, et al.,*
Plaintiffs,

EDWARD GONZALES, JOHN ANTOGNOLI, KENT KILGORE, ROGER BEEDON, ADAM PLOUSE, DANIEL RITCHIE, MICHAEL SCHYCK, DR. MARK CHRYSTAL, JOEL DAVIS, and JOHN DOES 1–2, 4–6, 8, 10–15, 17, 19, 21–25, 27, 29–33, 35–46, 48, 50–51, 53, 56–59, 61, 62, 64, 69, 75, 77, 85–86, and 88–92, individually and on behalf of all others similarly situated (21-3972); ROCKY RATLIFF (21-3974); ERIC SMITH, MARK COLEMAN, WILLIAM KNIGHT, JACK CAHILL, SCOTT OVERHOLT, ELMER LONG, RYAN HENRY, MICHAEL GLANE, CHRISTOPHER PERKINS, MICHAEL CALDWELL, THOMAS ROEHLIG, BRIAN ROSKOVICH, RICK MONGE, THOMAS LISY, ANASTACIO TITO VAZQUEZ, JR., JOHN MACDONALD, JR.; MAROON MONDALEK, LEO DISABATO, PETER NATHANSON, JEFFREY LADROW, ANTHONY SENTIERI, and JOHN DOES 1–15 and 17–19 (21-3982); MICHAEL ALF, GARY TILL, ALLEN NOVAKOWSKI; CHRIS ARMSTRONG, AND JOHN DOES 93–97 and 99–101, individually and on behalf of all others similarly situated (21-4070); MICHAEL CANALES and JOHN DOE 20 (21-4128),
Plaintiffs-Appellants,

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* Brian Garrett was the lead plaintiff in 18-cv-00692, the underlying case to appeal 21-3972. Nicholas Nutter was the lead plaintiff in 19-cv-02462, the underlying case to appeal 21-3982. Neither Garrett nor Nutter is a party on appeal.

v.

THE OHIO STATE UNIVERSITY,
Defendant-Appellee.

Argued: October 25, 2022
Decided and Filed: February 15, 2023

[60 F.4th 359]

Before: GUY, WHITE, and LARSEN, Circuit Judges.

LARSEN, Circuit Judge.

From the late 1970s to the late 1990s, Dr. Richard Strauss sexually abused hundreds of students at The Ohio State University. In 2018, former Ohio State student-athletes came forward alleging that Strauss had abused them and that Ohio State had covered it up. Hundreds of survivors sued Ohio State under Title IX, including the two groups of plaintiffs before us. The district court dismissed the claims as time-barred. Before we heard this appeal, another panel of this court reversed the district court's order as it pertained to two other groups of plaintiffs. *See Snyder-Hill v. Ohio State Univ.*, 48 F.4th 686 (6th Cir. 2022). The holding in *Snyder-Hill* applies equally to these plaintiffs' claims, so we VACATE the district court's dismissal of plaintiffs' claims as untimely. Plaintiffs before us also bring two other claims: one group of plaintiffs appeals the dismissal of their Title IX retaliation claims, and all plaintiffs appeal the district court's denial of their motions for recusal. On those claims we AFFIRM. We REMAND to the district court for further proceedings consistent with this opinion.

I.

The disturbing facts of these cases began in 1978 when Ohio State hired Dr. Richard Strauss, M.D., as an assistant professor of medicine.[1] From 1978 to 1996, Strauss treated students and student-athletes in various capacities, including as the "official team doctor for as many as fourteen sports" and as an on-campus student health center physician. Strauss was also a tenured professor at Ohio State. When Strauss voluntarily and "quietly" retired in 1998, the university designated him as an Emeritus Professor even though he had been "quietly placed on administrative leave" in January 1996 following multiple reports of abuse. While Strauss was employed by Ohio State "[p]laintiffs, as well as hundreds of other former students, suffered unspeakable sexual abuse by Strauss."

In April 2018, former student-athletes publicly accused Ohio State of covering-up Strauss's abuse. On April 5, 2018, Ohio State hired the law firm Perkins Coie, LLP to investigate Strauss's conduct and the extent to which Ohio State knew about it. Ohio State released Perkins Coie's report in May 2019; the report concluded that Strauss had sexually abused at least 177 male student-patients, the majority of whom were student-athletes.[2] *See* Caryn Trombino & Markus Funk, Perkins Coie LLP, *Report of the Independent Investigation: Sexual Abuse*

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[1] Because this case is at the motion to dismiss phase, we take the factual allegations in the plaintiffs' complaints as true. *See Doe v. Miami Univ.*, 882 F.3d 579, 588 (6th Cir. 2018).

[2] The report is dated May 15, 2019, but some plaintiffs allege that it was not publicly released by Ohio State until May 17, 2019.

Committed by Dr. Richard Strauss at The Ohio State University (Perkins Coie Report) at 1, 43 (May 15, 2019).

Plaintiffs allege that, as documented in the Perkins Coie Report, Ohio State knew about Strauss's abuse and, at minimum, failed to meaningfully investigate it. Ohio State "legitimized Strauss's conduct as ordinary medical care," as various university officials ignored student complaints—including one as early Strauss's first year as team physician in 1979—and continued to employ and promote Strauss, failed to investigate numerous complaints about Strauss's sexual abuse, hid or failed to maintain records of abuse complaints and failed to inform students and some Ohio State staff of the abuse until 2018. Plaintiffs allege that Ohio State played a "key and active role" in "normalizing and perpetuating" Strauss's abuse over the course of decades and that there was a "widespread and intentional culture of silence, cover-up, and deliberate indifference to sex crimes" within the university. Plaintiffs say that they now know that Strauss's harassment and abuse was reported to the head coaches of multiple sports, university administrators, university physicians and medical directors, and to the head of the Athletic Department—only for each of those officials to "turn[] a blind eye to the abuse." But some plaintiffs allege that they did not and could not have known about Ohio State's knowledge, and cover-up, of their abuse until the release of the Perkins Coie Report in 2019. Others allege that the earliest they could have known about Ohio State's role was in 2018, but that they did not know the full extent of the university's involvement until the release of the Perkins Coie Report in 2019.

In all, 532 plaintiffs brought 37 separate cases against Ohio State relating to Strauss's abuse and the university's response. This appeal concerns five of those suits, consolidated into two appeals that we hear together. On July 16, 2018, a group of plaintiffs led by Brian Garrett filed a class action complaint against Ohio State related to Strauss's abuse, *Garrett, et al. v. The Ohio State University*, No. 21-3972. On May 14, 2021, the Garrett class members filed a "copy-cat class action," *Alf, et al. v. The Ohio State University*, No. 21-4070. The Garrett and Alf cases were consolidated on appeal. The Garrett and Alf plaintiffs are former Ohio State students or student-athletes who allege they were abused by Strauss between 1978 and 1998. Rocky Ratliff, the plaintiff in *Ratliff*, serves as counsel in his own case, *Ratliff v. The Ohio State University*, No. 21-3974, and in two others: *Nutter, et al. v. The Ohio State University*, No. 21-3982, and *Canales, et al. v. The Ohio State University*, No. 21-4128. Those cases were filed on October 25, 2019, June 12, 2019, and May 17, 2021, respectively. All the *Ratliff*, *Nutter*, and *Canales* plaintiffs are former Ohio State student-athletes.

Judge Michael Watson handled all cases relating to Strauss in the Southern District of Ohio. Judge Watson told the parties at a status conference in January 2019 that he was teaching a class at The Ohio State University Moritz College of Law, and he thought "every member of this bench probably, have at one time or another served as an adjunct professor of Ohio State." At the same status conference, Judge Watson also told the parties, "I say that only because if you want to take shots, you can take shots. I'm thinking that my intention is to stay on the case and, nonetheless, I'm letting you know in case you want to

raise something." At the same hearing, Judge Watson told the parties that he knew the chairman of the Ohio State Board of Trustees and that the president was "a man of his word." No party brought a recusal motion at that time.

On September 9, 2021, Judge Watson called an emergency status conference after a reporter contacted the court's public information specialist, inquiring about a business relationship between Ohio State and a store Judge Watson's wife owns. Judge Watson explained that "ethical considerations are the utmost importance to me personally, to the parties and to the public, as well as the federal judiciary as a whole." He explained that his wife owns a store that sells and manufactures flags, including Ohio State flags; the business has a licensing agreement with Ohio State; and the business pays a 12% royalty to Ohio State for every Ohio State trademarked product the business sells. Judge Watson told the parties that he had not disclosed the licensing agreement previously—and he still did not believe disclosure was required—but that neither he nor his wife had a financial interest in Ohio State as defined by the Code of Conduct for judges or relevant advisory ethics opinions. Nonetheless, because "a member of the public" had inquired about the store, he "believe[d] that Canon 3 of the Code of Ethics, the appearance of impropriety may be implicated" so he wanted to formally disclose the fact on the record and give parties a chance to move for recusal.

All plaintiffs before us filed motions for recusal and to transfer venue based on the above and Judge Watson's other connections to Ohio State (namely, his participation in the "annual Buckeye Cruise for Cancer"). The district court denied the motions in a

detailed opinion. *See Garrett v. Ohio State Univ.*, No. 2:18-CV-692, 2021 WL 7186381 (S.D. Ohio Sept. 22, 2021).

Ohio State filed motions to dismiss in each case. The district court granted the motions, concluding that all plaintiffs' Title IX claims were time-barred by Ohio's two-year statute of limitations, whether measured by a discovery rule or an occurrence rule.

The *Ratliff*, *Nutter*, and *Canales* plaintiffs also brought a Title IX retaliation claim against Ohio State. They asserted that reporting Strauss's sexual abuse and Ohio State's cover-up was protected activity. And they alleged that current and former Ohio State employees and others connected to Ohio State made public comments on the radio and private statements via phone, email or text, in a retaliatory attempt to "silence" plaintiffs. The district court dismissed the retaliation claims for a failure to state a claim.

All plaintiffs now appeal.

II.

A. Claim Accrual

We review de novo the grant of a motion to dismiss on statute of limitations grounds. *Am. Premier Underwriters, Inc. v. Nat'l R.R. Passenger Corp.*, 839 F.3d 458, 461 (6th Cir. 2016). Ohio law supplies the statute of limitations,[3] but federal law governs when

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[3] The *Garrett* and *Alf* plaintiffs argue that Ohio's two-year statute of limitations should not govern their Title IX claims. They urge that any limitations period must be set by federal law, and that because Title IX does not contain an express limitations period, it has "no limitations, except the common law laches doctrine." It is, of course, not surprising that Title IX contains no express limitations period, as it also contains no "express

the claims accrue, that is, "when the statute begins to run." *Snyder-Hill*, 48 F.4th at 698 (quoting *Sharpe v. Cureton*, 319 F.3d 259, 266 (6th Cir. 2003)).

The accrual question was the centerpiece of these appeals. But before we heard this appeal, another panel of this court heard the appeal of a different group of Ohio State plaintiffs, whose cases had been consolidated with these cases in the district court and whose cases were dismissed by the same order from which the current plaintiffs appeal. *See Snyder-Hill v. Ohio State Univ.*, 48 F.4th 686 (6th Cir. 2022). That panel held that the discovery rule applies to Title IX claims, meaning that a plaintiff's claim accrues when he "knows or has reason to know" not only that he was injured but also that "the defendant caused" his injury. *Id.* at 704. For a Title IX case like this one, a plaintiff's claim does not accrue until he "knows or has reason to know that the defendant institution," here Ohio State, injured him. *Id.* (emphasis omitted). So "the clock starts only once the plaintiff knows or should have known that Ohio State administrators 'with authority to take corrective action' knew of Strauss's conduct and failed to respond appropriately." *Id.* at 705 (quoting *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998)). In addressing claims substantially similar to those

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cause of action that allows students to sue." *Bannister v. Knox Cnty. Bd. of Educ.*, 49 F.4th 1000, 1013 (6th Cir. 2022). Instead, "the Supreme Court created an implied right of action that permits students to seek damages." *Id.* And we, like our sister circuits, have held "that Title IX (like § 1983) adopts the forum state's statute of limitations for personal-injury actions." *Id.* (citing decisions from the Second, Fifth, and Ninth Circuits). So Ohio's two-year statute of limitations for personal injury claims applies. *Snyder-Hill*, 48 F.4th at 698.

presented here, *Snyder-Hill* held that "the plaintiffs' claims survive Ohio State's motion to dismiss for three independent" reasons: until 2018, when the allegations of abuse became public, (1) "plaintiffs plausibly allege that they did not know and lacked reason to know that Ohio State caused their injury," (2) "they plausibly allege that even if they had investigated further, they could not have learned of Ohio State's conduct," and (3) some "plaintiffs plausibly allege that they did not know that they were abused." *Id.* at 706–07.

When this case was briefed, the parties did not have the benefit of the *Snyder-Hill* opinion; but once that opinion was released, the parties submitted some supplemental briefing on the effect of *Snyder-Hill* in connection with the plaintiffs' motion to cancel oral argument. We denied that motion. At oral argument, we invited the parties to explain any ways in which they thought *Snyder-Hill* did not govern the accrual question.

Ohio State argued that the *Garrett* and *Alf* plaintiffs' cases could be distinguished from *Snyder-Hill* because the *Garrett* and *Alf* plaintiffs conceded in their reply brief that they knew of their abuse when it occurred. But this concession does not distinguish the *Garrett* and *Alf* plaintiffs from all of the *Snyder-Hill* plaintiffs. The *Snyder-Hill* opinion noted that nine plaintiffs in that case likewise knew they were being abused at the time. *See id.* at 694, 706. *Snyder-Hill* still found those claims timely because the plaintiffs had plausibly alleged that they did not know or have reason to know, until 2018, about *Ohio State's* conduct. *Id.* at 704–05.

A few facts do distinguish the complaints in the present cases from *Snyder-Hill*, however. According

to *Snyder-Hill*, the plaintiffs in those cases alleged that they could not have known that Ohio State injured them until 2018, when the allegations of abuse became public. *Id.* at 689–90, 695. In the present cases, the *Garrett* and *Alf* plaintiffs assert that the spring of 2018 was the *earliest* they could have known about Ohio State's role in causing their injury; but they contend that they did not and could not have known of Ohio State's full involvement until the Perkins Coie Report was released in 2019. For the *Alf* plaintiffs, the 2019 date may be critical, absent tolling.[4] They have conceded that they knew Strauss's actions constituted abuse at the time they occurred, and their suit was not filed until May 14, 2021 (less than two years from the Perkins Coie Report's release, but more than two years from Ohio State's investigation announcement). The 2019 date, and indeed the particular day in May, might also matter to the *Canales* plaintiffs, who filed suit on May 17, 2021. They allege that the Perkins Coie Report was "issued" or "released" on May 15, 2019, but that they did not know either of their abuse or Ohio State's role in it until May 17, 2019, when the university's President and Chair of the Board of Trustees issued a public letter, "which resulted in extensive nationwide media coverage."

Just when the plaintiffs knew or should have known that Strauss's conduct was abuse, and when they knew or should have known about Ohio State's role in causing their injuries are questions of fact that

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[4] The plaintiffs argued below that the *Garrett* class filing on July 16, 2018, tolled their statute of limitations. *See Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 551, 553 (1974); *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 353–54 (1983).

we cannot resolve on a motion to dismiss. *See Am. Premier Underwriters*, 839 F.3d at 464 (cautioning that "courts should not dismiss complaints on statute-of-limitations grounds when there are disputed factual questions relating to the accrual date"); *Lutz v. Chesapeake Appalachia, L.L.C.*, 717 F.3d 459, 476 (6th Cir. 2013) (in the tolling context, stating that questions about a plaintiff's duty to investigate "are questions for summary judgment or for trial, and they should not be resolved on a motion to dismiss"). For now, we conclude that the *Ratliff*, *Nutter*, and *Canales* plaintiffs have plausibly alleged all three independent reasons supporting *Snyder-Hill*'s holding, and the *Garrett* and *Alf* plaintiffs have plausibly alleged the first two. That is enough for their claims to survive Ohio State's motion to dismiss.

B. The *Ratliff*, *Nutter*, and *Canales* Plaintiffs' Retaliation Claim

The district court found that the *Ratliff*, *Nutter*, and *Canales* plaintiffs had failed to state a Title IX retaliation claim. Reviewing that decision de novo, *see Doe v. Miami Univ.*, 882 F.3d 579, 588 (6th Cir. 2018), we agree. The Supreme Court has held that a "funding recipient" may be liable for retaliating "against a person because he complains of sex discrimination." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 174 (2005) (emphasis omitted). But plaintiffs have failed to plead a retaliation claim. At a minimum, they have failed to allege that the funding recipient, Ohio State, retaliated against them. They broadly claim retaliation by "OSU employees, faculty, staff, former employees of OSU, friends and/or benefactors of OSU" in the form of public interviews, emails, texts and calls to some

plaintiffs. But there is neither individual liability nor respondeat superior liability under Title IX; instead "an educational institution is responsible under Title IX only for its 'own official decision[s].'" *Bose v. Bea*, 947 F.3d 983, 991 (6th Cir. 2020) (quoting *Gebser*, 524 U.S. at 290–91). So the *Ratliff*, *Nutter*, and *Canales* plaintiffs must adequately allege a claim against Ohio State as an institution. They have not done so.

The plaintiffs attempt to avoid this conclusion by stating that Ohio State has not taken any action against the Ohio State-affiliated individuals, so Ohio State has ratified their actions. But we have not recognized a claim for deliberate indifference to retaliation, *see Bose*, 947 F.3d at 993; and, even if we were to do so, plaintiffs have not adequately pleaded that anyone within Ohio State, with power to stop the alleged retaliatory actions, had any knowledge of them, *see id.* at 989–90 (citing *Gebser*, 524 U.S. at 290). And, for Ratliff himself, we also do not know what, if any, harm resulted. *Cf. Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006) (Title VII case) ("The antiretaliation provision protects an individual not from all retaliation, but from retaliation that produces an injury or harm."). The *Ratliff*, *Nutter*, and *Canales* plaintiffs' vague allegations are insufficient to state a claim for Title IX retaliation.

C. Recusal

Finally, all plaintiffs before us appeal the district court's denial of their motions to recuse the district judge and to transfer the case to a judge in a different division of the Southern District of Ohio. We review both motions for an abuse of discretion. *Alemarah v. Gen. Motors, LLC*, 980 F.3d 1083, 1086 (6th Cir. 2020)

(per curiam); *Stanifer v. Brannan*, 564 F.3d 455, 456 (6th Cir. 2009). "An abuse of discretion occurs when a district court commits a clear error of judgment, such as applying the incorrect legal standard, misapplying the correct legal standard, or relying upon clearly erroneous findings of fact." *King v. Harwood*, 852 F.3d 568, 579 (6th Cir. 2017) (internal quotation marks omitted) (quoting *Info-Hold, Inc. v. Sound Merch., Inc.*, 538 F.3d 448, 454 (6th Cir. 2008)).

Recusal Standard. Federal judges are bound by the recusal standard in 28 U.S.C. § 455(a): "Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." And a judge "shall also disqualify himself" when "[h]e knows that he . . . or his spouse . . . has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding." *Id.* § 455(b)(4). We cannot say that Judge Watson abused his discretion in determining that § 455 did not require his recusal.

Section 455(b)—Financial Interest. Both sets of plaintiffs argue that Judge Watson was subject to automatic recusal because he and/or his wife has a financial interest in Ohio State. A "financial interest" is "ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party." *Id.* § 455(d)(4). Plaintiffs argue that Judge Watson's wife's store, which sells flags to and has licensing agreements with many entities, including Ohio State, gives the judge or his wife a financial interest in Ohio State. They also suggest that Judge Watson's salary as an adjunct professor at Ohio State's law school

gives him a financial interest in the university. Neither claim is correct. Neither Mrs. Watson's ownership of the store nor Judge Watson's adjunct professorship gave Judge Watson or his wife "ownership of a legal or equitable interest" in Ohio State; nor did they establish either of them as a "director, adviser, or other active participant in the affairs of" the university. *Id.* And neither position entailed an "interest that could be substantially affected by the outcome of the proceeding." *Id.* § 455(b)(4).

Section 455 "does not require the judge to 'accept as true the allegations made by the party seeking recusal.'" *Scott v. Metro. Health Corp.*, 234 F. App'x 341, 353 (6th Cir. 2007) (quoting *In re Martinez-Catala*, 129 F.3d 213, 220 (1st Cir. 1997)). The parties do not challenge Judge Watson's factfinding, so we proceed on the facts as found below. *See In re Martinez-Catala*, 129 F.3d at 220 ("It might seem odd that recusal issues should be decided by the very judge whose recusal is in question. But there are other considerations at work, including a desire for expedition and a concern to discourage judge shopping.").

The district court found that "[n]either the [s]tore, Defendant's licensing agreements, nor Defendant's vendor relationships are at issue in the underlying lawsuits or implicated in Plaintiffs' allegations of wrongdoing." *Garrett*, 2021 WL 7186381, at *2. It also found that in the time the cases had been pending before the court, the store's sales to Ohio State made up at most 0.89% of its total sales in a given year, and that the combination of these direct sales and sales of Ohio State "licensed products to the public . . . never exceeded 2.4% of the [s]tore's total sales." *Id.* at *6.

And the court concluded that the store will not be "affected by the outcome of these proceedings." *Id.* at *2; 28 U.S.C. § 455(b)(4). Based on these findings, the district judge did not abuse his discretion in declining to recuse. *See Scott*, 234 F. App'x at 357 ("[D]isqualification is not required on the basis of . . . remote, contingent, indirect or speculative [financial] interests." (quoting *United States v. Bayless*, 201 F.3d 116, 127 (2d Cir. 2000))).

Section 455(a)—Reasonable Grounds to Question Impartiality. The *Ratliff*, *Nutter*, and *Canales* plaintiffs also argue that the district court erred in denying their motions for recusal based on § 455(a). Under that section, a judge must recuse "in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). As these plaintiffs point out, the question is whether, given the facts, an objective "reasonable person perceives a significant risk that the judge will resolve the case on a basis other than the merits." Ratliff Br. at 22 (quoting *Hook v. McDade*, 89 F.3d 350, 354 (7th Cir. 1996)); *see also Ragozzine v. Youngstown State Univ.*, 783 F.3d 1077, 1079 (6th Cir. 2015) ("[A] judge [must] recuse 'if a reasonable, objective person, knowing all of the circumstances, would have questioned the judge's impartiality.'" (quoting *Hughes v. United States*, 899 F.2d 1495, 1501 (6th Cir. 1990))). "The standard is an objective one; hence, the judge need not recuse himself based on the 'subjective view of a party' no matter how strongly that view is held." *United States v. Sammons*, 918 F.2d 592, 599 (6th Cir. 1990) (citation omitted).

First, the plaintiffs argue that Judge Watson's role as an adjunct professor leads to reasonable questions about his impartiality. In his detailed opinion

denying the recusal motions, Judge Watson relied on the Guide to Judiciary Policy, Vol. 2, Ch. 3, Compendium of Selected Opinions, § 3.4-3(a), which provides guidance to judges on recusal matters. That guidance says that a judge who teaches at a law school need not recuse from every case involving the university as a whole. Instead, a judge should consider "the size and cohesiveness of the university, the degree of independence of the law school, the nature of the case, and related factors." *Id.* This kind of "opinion" is not binding, but here we think the factors it directs judges to consider are sound. In line with that guidance, Judge Watson determined that his adjunct professorship at Moritz College of Law did not require his recusal from these cases involving the university. He reasonably explained that Ohio State "is one of the largest universities in the country, and Moritz is 'one small and virtually autonomous part.'" *Garrett*, 2021 WL 7186381, at *5 (quoting *Meng Huang v. Ohio State Univ.*, No. 2:19-CV-1976, 2020 WL 8461547, at *2 (S.D. Ohio Oct. 26, 2020), *aff'd*, 2020 WL 8461560 (S.D. Ohio Nov. 4, 2020)). And Moritz "is not involved in any of the allegations at issue in these cases." *Id.* We join our sister circuits in concluding that recusal is not required just because a judge serves as an adjunct professor at the law school of a party-university. *See, e.g.*, *Sessoms v. Trs. of Univ. of Penn.*, 739 F. App'x 84, 90 (3d Cir. 2018) (concluding that the district court judge who served as an adjunct professor at the defendant university's law school did not abuse its discretion in declining to recuse in a case against the university); *Roe v. St. Louis Univ.*, 746 F.3d 874, 887 (8th Cir. 2014) (affirming decision not to recuse in a case against the university where district judge was an alumnus of the

undergraduate school and law school, taught at the law school, and made "positive comments about the school"); *Wu v. Thomas*, 996 F.2d 271, 275 (11th Cir. 1993) (holding that district judge's "status as an adjunct professor [at law school] and his past contributions to the [u]niversity" did not require recusal in a case against the university). The district court did not abuse its discretion by denying the motions for recusal on this basis.

The *Ratliff*, *Nutter*, and *Canales* plaintiffs also suggest that Mrs. Watson's ownership of the flag store creates a reasonable ground to question the judge's impartiality. It is true that the flag store has a licensing agreement to sell Ohio State-branded merchandise; that it prominently advertises that merchandise; and that it even sells some of that merchandise to Ohio State. *See Garrett*, 2021 WL 7186381, at *2. But, as noted above, the flag store does not create a financial interest either in the university or in the outcome of this lawsuit, that would require Judge Watson's recusal under § 455(b). And the store's financial relationships with Ohio State are too de minimis to raise reasonable questions concerning impartiality under § 455(a). The *Ratliff*, *Nutter*, and *Canales* plaintiffs' only other argument—that the store advertises its long history of supplying flags to the Ohio State football cheerleaders—is insufficient. The store's advertising would not cause a reasonable, informed observer to believe that Judge Watson would resolve this case on a basis other than the merits. *See Hook*, 89 F.3d at 354 (citing *In re Mason*, 916 F.2d 384, 385–86 (7th Cir. 1990)).

The *Ratliff*, *Nutter*, and *Canales* plaintiffs also point to Judge Watson's and his wife's involvement with the "Buckeye Cruise for Cancer," a fundraising

event for the Ohio State University Comprehensive Cancer Center. *Garrett*, 2021 WL 7186381, at *2. The district court found that the cruise raises money to support the Cancer Center, which is an "independent entity;" and that the event is not organized by the university and raises no funds for the university itself. *Id.* at *2, *7. Plaintiffs do not challenge these findings on appeal. And, as Judge Watson pointed out, *id.* at *7, Canon 4 of the Code of Conduct for United States Judges, which provides guidance on "extrajudicial activities," expressly permits judges to "participate in . . . [a] charitable . . . organization." *Available at* https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges#e. Plaintiffs seem to concede this point, repeatedly calling the couple's fundraising efforts "noble."

Plaintiffs nonetheless argue that the cruise created a reasonable basis for questioning the judge's impartiality because the cruise was filled with Ohio State "notables," and because Judge Watson and his wife were recognized both onboard and on social media for their fundraising efforts. But plaintiffs do not contend that Judge Watson discussed these lawsuits with anyone on the cruise; and plaintiffs' own exhibits show that the recognition came from the Cancer Center, not from Ohio State. The district court did not abuse its discretion in denying the motion for recusal on this basis.

Lastly, the *Ratliff*, *Nutter*, and *Canales* plaintiffs suggest either that Judge Watson's "full involvement" with Ohio State, or his failure to timely disclose it, creates an objective basis to question the judge's impartiality. We don't doubt that "the whole is sometimes greater than the sum of [its] parts." *In re Martinez-Catala*, 129 F.3d at 221. "The cumulative

effect of a judge's individual actions, comments and past associations could raise some question about impartiality, even though none (taken alone) would require recusal." *Id.* But considered against the backdrop of this court's caselaw, we cannot say that such is the case here. *See Easley v. Univ. of Mich. Bd. of Regents*, 906 F.2d 1143, 1145–46 (6th Cir. 1990) (concluding that the judge, presiding over a case involving the law school, was not required to recuse where he was "an alumnus of the Law School," a past "volunteer fundraiser for the Law School Fund," a "member of the [Law School's] Committee of Visitors . . . the purposes of which are essentially social and informational," and a "member of The University of Michigan Club of Detroit through which he participates in athletics-related social events"). Just as we determined that it was not abuse of discretion for Judge Watson to deny plaintiffs' motions for recusal on any of the above grounds, we also conclude that he did not abuse his discretion when considering these factors in combination.

Nor is Judge Watson's failure to timely disclose these purported conflicts indicative of partiality. First, as plaintiffs acknowledge, Judge Watson did disclose his adjunct professorship, and his acquaintance with the chairman of the Board of Trustees, more than two years before plaintiffs filed their recusal motions, and he specifically invited any recusal motions at that time. Next, given the unchallenged factual findings below, we cannot say that Judge Watson was under any obligation to disclose his charitable, and already public, efforts on behalf of the Cancer Center. That leaves the matter of the flag store. While the flag store creates no "financial interest" requiring recusal under

§ 455(b)(4), and plaintiffs have established no reasonable basis to question Judge Watson's impartiality on this ground, the better course would have been to disclose the store's licensing agreement and direct sales at the outset of the litigation. As Judge Watson himself acknowledged, the fact that a judge's "spouse or the spouse's business has a business relationship with an entity that appears in an unrelated proceeding before the judge usually does not require the judge's recusal"—but sometimes it may. *Garrett*, 2021 WL 7186381, at *5 (citing Guide to Judiciary Policy, Vol. 2, Ch. 2, Advisory Opinion No. 107). Nevertheless, in light of the circumstances—including Judge Watson's emergency status conference concerning the issue and his renewed receptiveness to recusal motions thereafter—we cannot say that the timing of Judge Watson's disclosure raises objective impartiality concerns.

Judge Watson, who sits in Columbus, Ohio, undoubtedly had a number of points of contact with Ohio State, its affiliates, and hangers-on. That is neither surprising, nor necessarily undesirable. The Judicial Code of Conduct counsels that the "complete separation of a judge from extrajudicial activities is neither possible nor wise; a judge should not become isolated from the society in which the judge lives." Code of Conduct for United States Judges, Commentary, Canon 4. The question under § 455(a) is whether the judge's personal or community associations are of such a character that they would cause an informed, reasonable observer to believe that the judge "could not set [them] aside when judging the dispute." *Liteky v. United States*, 510 U.S. 540, 557–58 (1994) (Kennedy, J., concurring). An

impartial judiciary—and the appearance of an impartial judiciary—is of the utmost importance. At the same time, "needless recusals exact a significant toll"; "a change of umpire mid-contest may require a great deal of work to be redone . . . and facilitate judge-shopping." *In re U.S.*, 572 F.3d 301, 308 (7th Cir. 2009) (quoting *Matter of Nat'l Union Fire Ins. Co. of Pitt.*, 839 F.2d 1226, 1229 (7th Cir. 1988)). So, "[t]here is as much obligation upon a judge not to recuse himself when there is no occasion as there is for him to do so when there is." *Easley v. Univ. of Mich. Bd. of Regents*, 853 F.2d 1351, 1356 (6th Cir. 1988) (quoting *In re Union Leader Corp.*, 292 F.2d 381, 391 (1st Cir. 1961)).

We may reverse the denial of a recusal motion "only where [we are] left with a 'definite and firm conviction that the trial court committed a clear error of judgment.'" *United States v. Angelus*, 258 F. App'x 840, 842 (6th Cir. 2007) (quoting *In re Triple S Rests., Inc.*, 422 F.3d 405, 418 (6th Cir. 2005)). We have no such conviction here. And because we conclude that Judge Watson did not abuse his discretion in denying the motion for recusal, we also conclude that he did not abuse his discretion in denying the motions for transfer. *See Liteky*, 510 U.S. at 551 ("It has long been regarded as normal and proper for a judge to sit in the same case upon its remand . . . .").

* * *

We VACATE the district court's dismissal of all plaintiffs' Title IX claims and REMAND to the district court for further proceedings consistent with this opinion. We AFFIRM the district court's dismissal of the *Ratliff*, *Nutter*, and *Canales* plaintiffs' retaliation claims and the denial of all plaintiffs' motions for recusal and to transfer venue.

[Filed December 16, 2022]
[2022 WL 17730528]

Case No. 21-4109

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN DOES 174, 176, 182 & 183; JANE DOE 1, Plaintiffs-Appellants, v. THE OHIO STATE UNIVERSITY, Defendant-Appellee,	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO ORDER

Before: CLAY, GIBBONS, and McKEAGUE, Circuit Judges.

PER CURIAM. Between 1978 and 1998, Dr. Richard Strauss, a university physician and athletic team doctor at the Ohio State University, allegedly sexually abused hundreds of individuals under the guise of performing medical examinations. The allegations did not become public until 2018, following Ohio State's commissioning of an independent investigation undertaken by the law firm Perkins Coie, which substantiated the allegations of abuse. After the allegations became public, survivors of this abuse—including Plaintiffs in this case—brought Title IX suits against Ohio State,

alleging that Ohio State was deliberately indifferent to their heightened risk of abuse and that Ohio State actually concealed the abuse. The district court found that Plaintiffs' claims were barred by the statute of limitations and dismissed the action. Plaintiffs timely appealed.

Around the same time that the district court dismissed Plaintiffs' claims, the district court also dismissed claims brought by other alleged survivors of Strauss' abuse. *See Garrett v. Ohio State Univ.*, 561 F. Supp. 3d 747 (S.D. Ohio 2021); *Ratliff v. Ohio State Univ.*, No. 2:19-cv-4746, 2021 WL 7186198 (S.D. Ohio Sept. 22, 2021); *Snyder-Hill v. Ohio State Univ.*, No. 2:18-cv-736, 2021 WL 7186148 (S.D. Ohio Sept. 22, 2021); *Moxley v. Ohio State Univ.*, No. 2:21-cv-3838, 2021 WL 7186269 (S.D. Ohio Oct. 25, 2021). The district court reasoned that the plaintiffs' claims were barred by the statute of limitations because the abuse happened more than two years ago, and the plaintiffs knew or had reason to know that they were injured at the time that the abuse occurred. *See Garrett*, 561 F. Supp. 3d at 754–62; *Snyder-Hill*, 2021 WL 7186148, at *1; *Moxley*, 2021 WL 7186269, at *1. The district court dismissed Plaintiffs' claims in this case for the same reasons.

While Plaintiffs' appeal in this case was pending, this Court decided an appeal involving the lawsuits *Snyder-Hill v. Ohio State University*, No. 2:18-cv-736 (S.D. Ohio) and *Moxley v. Ohio State University*, No. 2:21-cv-3838 (S.D. Ohio). In *Snyder-Hill, et al. v. Ohio State University*, 48 F.4th 686 (6th Cir. 2022), this Court held that the plaintiffs adequately alleged that they did not know, and could not have reasonably known, that they were injured by Ohio State until 2018. Accordingly, this Court held that the plaintiffs'

Title IX claims against Ohio State did not accrue until 2018, and that the claims therefore were not barred by the two-year statute of limitations. *Id.* at 690, 705–06.

On review of Plaintiffs' claims in this case, we conclude that the district court's judgment should be vacated and the action remanded so that the district court may consider in the first instance whether the statute of limitations bars Plaintiffs' claims in light of this Court's decision in *Snyder-Hill*. Accordingly, we **VACATE** the district court's dismissal of Plaintiffs' complaint and **REMAND** the matter for reconsideration in light of *Snyder-Hill*.

IT IS SO ORDERED.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt

Deborah S. Hunt, Clerk

[Filed December 16, 2022]
[2022 WL 17730532]

Case No. 21-4116

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN DOE 195, Plaintiff-Appellant, v. THE OHIO STATE UNIVERSITY, Defendant-Appellee,	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO ORDER

Before: CLAY, GIBBONS, and McKEAGUE, Circuit Judges.

PER CURIAM. Between 1978 and 1998, Dr. Richard Strauss, a university physician and athletic team doctor at the Ohio State University, allegedly sexually abused hundreds of individuals under the guise of performing medical examinations. The allegations did not become public until 2018, following Ohio State's commissioning of an independent investigation undertaken by the law firm Perkins Coie, which substantiated the allegations of abuse. After the allegations became public, survivors of this abuse—including Plaintiff in this case—brought Title IX suits against Ohio State, alleging that Ohio State was deliberately indifferent to their heightened risk of abuse and that Ohio State

actually concealed the abuse. The district court found that Plaintiff's claims were barred by the statute of limitations and dismissed the action. Plaintiff timely appealed.

Around the same time that the district court dismissed Plaintiff's claims, the district court also dismissed claims brought by other alleged survivors of Strauss' abuse. *See Garrett v. Ohio State Univ.*, 561 F. Supp. 3d 747 (S.D. Ohio 2021); *Ratliff v. Ohio State Univ.*, No. 2:19-cv-4746, 2021 WL 7186198 (S.D. Ohio Sept. 22, 2021); *Snyder-Hill v. Ohio State Univ.*, No. 2:18-cv-736, 2021 WL 7186148 (S.D. Ohio Sept. 22, 2021); *Moxley v. Ohio State Univ.*, No. 2:21-cv-3838, 2021 WL 7186269 (S.D. Ohio Oct. 25, 2021). The district court reasoned that the plaintiffs' claims were barred by the statute of limitations because the abuse happened more than two years ago, and the plaintiffs knew or had reason to know that they were injured at the time that the abuse occurred. *See Garrett*, 561 F. Supp. 3d at 754–62; *Snyder-Hill*, 2021 WL 7186148, at *1; *Moxley*, 2021 WL 7186269, at *1. The district court dismissed Plaintiff's claims in this case for the same reasons.

While Plaintiff's appeal in this case was pending, this Court decided an appeal involving the lawsuits *Snyder-Hill v. Ohio State University*, No. 2:18-cv-736 (S.D. Ohio) and *Moxley v. Ohio State University*, No. 2:21-cv-3838 (S.D. Ohio). In *Snyder-Hill, et al. v. Ohio State University*, 48 F.4th 686 (6th Cir. 2022), this Court held that the plaintiffs adequately alleged that they did not know, and could not have reasonably known, that they were injured by Ohio State until 2018. Accordingly, this Court held that the plaintiffs' Title IX claims against Ohio State did not accrue until 2018, and that the claims therefore were not barred

by the two-year statute of limitations. *Id.* at 690, 705–06.

On review of Plaintiff's claims in this case, we conclude that the district court's judgment should be vacated and the action remanded so that the district court may consider in the first instance whether the statute of limitations bars Plaintiff's claims in light of this Court's decision in *Snyder-Hill*. Accordingly, we **VACATE** the district court's dismissal of Plaintiff's complaint and **REMAND** the matter for reconsideration in light of *Snyder-Hill*.

IT IS SO ORDERED.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt

Deborah S. Hunt, Clerk

[Filed December 16, 2022]
[2022 WL 17730529]

Case No. 21-4121

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN DOE 162, Plaintiff-Appellant, v. THE OHIO STATE UNIVERSITY, Defendant-Appellee,	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO ORDER

Before: CLAY, GIBBONS, and McKEAGUE, Circuit Judges.

PER CURIAM. Between 1978 and 1998, Dr. Richard Strauss, a university physician and athletic team doctor at the Ohio State University, allegedly sexually abused hundreds of individuals under the guise of performing medical examinations. The allegations did not become public until 2018, following Ohio State's commissioning of an independent investigation undertaken by the law firm Perkins Coie, which substantiated the allegations of abuse. After the allegations became public, survivors of this abuse—including Plaintiff in this case—brought Title IX suits against Ohio State, alleging that Ohio State was deliberately indifferent to their heightened risk of abuse and that Ohio State

actually concealed the abuse. The district court found that Plaintiff's claims were barred by the statute of limitations and dismissed the action. Plaintiff timely appealed.

Around the same time that the district court dismissed Plaintiff's claims, the district court also dismissed claims brought by other alleged survivors of Strauss' abuse. *See Garrett v. Ohio State Univ.*, 561 F. Supp. 3d 747 (S.D. Ohio 2021); *Ratliff v. Ohio State Univ.*, No. 2:19-cv-4746, 2021 WL 7186198 (S.D. Ohio Sept. 22, 2021); *Snyder-Hill v. Ohio State Univ.*, No. 2:18-cv-736, 2021 WL 7186148 (S.D. Ohio Sept. 22, 2021); *Moxley v. Ohio State Univ.*, No. 2:21-cv-3838, 2021 WL 7186269 (S.D. Ohio Oct. 25, 2021). The district court reasoned that the plaintiffs' claims were barred by the statute of limitations because the abuse happened more than two years ago, and the plaintiffs knew or had reason to know that they were injured at the time that the abuse occurred. *See Garrett*, 561 F. Supp. 3d at 754–62; *Snyder-Hill*, 2021 WL 7186148, at *1; *Moxley*, 2021 WL 7186269, at *1. The district court dismissed Plaintiff's claims in this case for the same reasons.

While Plaintiff's appeal in this case was pending, this Court decided an appeal involving the lawsuits *Snyder-Hill v. Ohio State University*, No. 2:18-cv-736 (S.D. Ohio) and *Moxley v. Ohio State University*, No. 2:21-cv-3838 (S.D. Ohio). In *Snyder-Hill, et al. v. Ohio State University*, 48 F.4th 686 (6th Cir. 2022), this Court held that the plaintiffs adequately alleged that they did not know, and could not have reasonably known, that they were injured by Ohio State until 2018. Accordingly, this Court held that the plaintiffs' Title IX claims against Ohio State did not accrue until 2018, and that the claims therefore were not barred

by the two-year statute of limitations. *Id.* at 690, 705–06.

On review of Plaintiff's claims in this case, we conclude that the district court's judgment should be vacated and the action remanded so that the district court may consider in the first instance whether the statute of limitations bars Plaintiff's claims in light of this Court's decision in *Snyder-Hill*. Accordingly, we **VACATE** the district court's dismissal of Plaintiff's complaint and **REMAND** the matter for reconsideration in light of *Snyder-Hill*.

IT IS SO ORDERED.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt

Deborah S. Hunt, Clerk

[Filed September 22, 2021]
[561 F. Supp. 3d 747]

**UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

Brian Garrett, *et al.*, Plaintiffs, v. The Ohio State University, Defendant.	Case No. 2:18-cv-692 Judge Michael H. Watson Magistrate Judge Deavers

OPINION AND ORDER

Plaintiffs sue The Ohio State University ("Ohio State") under Title IX, 20 U.S.C. § 1681, alleging Ohio State was deliberately indifferent to the sexual abuse Plaintiffs suffered at the hands of Doctor Richard Strauss ("Strauss"). Consol. Compl., ECF No. 157. Ohio State moves to dismiss Plaintiffs' claim under Federal Rule of Civil Procedure 12(b)(6) as barred by the applicable statute of limitations. Mot. Dismiss, ECF No. 162.

I. INTRODUCTION

It is beyond dispute that Plaintiffs, as well as hundreds of other former students, suffered unspeakable sexual abuse by Strauss. It is also true that many Plaintiffs and other students complained of Strauss's abuse over the years and yet medical doctors, athletic directors, head and assistant coaches, athletic trainers, and program directors failed to protect these victims from Strauss's predation. For decades, many at Ohio State tasked

with protecting and training students and young athletes instead turned a blind eye to Strauss's exploitation. From 1979 to 2018, Ohio State utterly failed these victims.

Plaintiffs beseech this Court to hold Ohio State accountable, but today, the legal system also fails Plaintiffs. Plaintiffs' pain and suffering is neither questioned nor overlooked by this Court; indeed, their claims cry out for a remedy. As explained below, Plaintiffs' Title IX claims are barred by the existing statute of limitations. If there is a viable path forward for Plaintiffs on their claim against Ohio State, it starts with the legislature rather than the judiciary.

II. FACTS[1]

Plaintiffs are all former Ohio State students and student-athletes. Compl. ¶ 33, ECF No. 157. Ohio State is and was at all relevant times a state-owned and -operated public university that received federal financial assistance. *Id.* ¶ 134.

All of Plaintiffs' causes of action arise from Strauss's sexual abuse that they endured while at Ohio State.[2] *Id.*, *passim*.

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[1] The Court accepts Plaintiffs' factual allegations in their Complaint as true for purposes of Ohio State's motion to dismiss.

[2] The specific allegations of the types of sexual abuse that Strauss perpetrated on Plaintiffs and other student-athletes have been extensively detailed in this and related cases, as well as in the media. The detailed allegations are, unfortunately, irrelevant to the legal issues in this order. For that reason, and out of respect for Plaintiffs' privacy, the Court will not further discuss the allegations in this Opinion and Order.

III. STANDARD OF REVIEW

A claim survives a motion to dismiss under Rule 12(b)(6) if it "contain[s] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (citation omitted). This standard "calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of [unlawful conduct]." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007). A pleading's "[f]actual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the [pleading] are true (even if doubtful in fact)." *Id.* at 555 (internal citations omitted). While the court must "construe the [pleading] in the light most favorable to the [non-moving party]," *Inge v. Rock Fin. Corp.*, 281 F.3d 613, 619 (6th Cir. 2002), the non-moving party must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555; *see also Iqbal*, 556 U.S. at 678.

IV. ANALYSIS

A. Background of Title IX

Title IX of the Education Amendments of 1972 is a federal statute designed to prevent sexual discrimination and harassment in educational institutions receiving federal funding. It 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 educational program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a).

Although the text of the statute does not mention a private right of action, Title IX implies a private right of action, *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979), which "encompasses intentional sex discrimination in the form of a recipient's deliberate indifference to a teacher's sexual harassment of a student." *Jackson v. Birmingham Bd. of Edu.*, 544 U.S. 167, 173, 125 S.Ct. 1497, 161 L.Ed.2d 361 (2005) (citing *Franklin v. Gwinnett Cty. Pub. Schs.*, 503 U.S. 60, 72–73, 112 S.Ct. 1028, 117 L.Ed.2d 208 (1992) and *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290–91, 118 S.Ct. 1989, 141 L.Ed.2d 277 (1998)).

To prove a deliberate indifference[3] claim under Title IX, the plaintiff must "plead, and ultimately

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[3] Plaintiffs also arguably allege a separate theory of Title IX liability based on Ohio State's creation and perpetuation of a sexually hostile environment. The Sixth Circuit has stated that "[h]ostile environment [Title IX] claims are distinct from deliberate indifference [Title IX] claims." *Doe v. Univ. of Ky.*, 959 F.3d 246, 251 n.3 (6th Cir. 2020). "A Title IX hostile-environment claim is analogous to a Title VII hostile-environment claim," and, to state such a claim, a plaintiff "must allege that his educational experience was permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive [so as] to alter the conditions of [his] educational environment." *Doe v. Miami Univ.*, 882 F.3d 579, 590 (6th Cir. 2018) (internal quotations marks and citations omitted). Here, the statute of limitations analysis for Plaintiffs' deliberate indifference claim applies with equal force to any separately asserted hostile-environment theory of liability because Plaintiffs were certainly aware by the time they graduated that their educational experiences were permeated by a sexually hostile environment. Indeed, any claim would fail on the merits were Plaintiffs unaware. *Doe v. Univ. of Dayton*, 766 F. App'x 275, 283 (6th Cir. 2019) ("We hesitate to deem an

prove, that the school had actual knowledge of actionable sexual harassment and that the school's deliberate indifference to it resulted in further actionable sexual harassment against the student-victim, which caused the Title IX injuries."[4] *Kollaritsch v. Mich. State Univ. Bd. of Trustees*, 944 F.3d 613, 618 (6th Cir. 2019). In other words, the plaintiff must establish "two separate components, comprising separate-but-related torts by separate-and-*un*related tortfeasors: (1) 'actionable harassment' by [someone associated with the school]; and (2) a deliberate-indifference intentional tort by the school." *Id.* at 619–20; *see also Davis v. Monroe Cty. Bd. of Edu.*, 526 U.S. 629, 633 (1999); *Foster v. Bd. of Regents of Univ. of Mich.*, 982 F.3d 960, 965 (6th Cir. 2020).

The actionable sexual harassment must be "so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational

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environment hostile to a plaintiff when there is no evidence that plaintiff was aware of what occurred." (internal quotation marks and citation omitted)). Accordingly, the Court does not undertake a separate statute of limitations analysis with respect to Plaintiffs' Title IX claim to the extent it is based on a sexually hostile environment theory.

[4] *Kollaritsch* involved student-on-student sexual harassment. 944 F.3d at 618. The standard set forth in that case applies to Title IX cases involving teacher-on-student sexual harassment as well, however, because the standards for each type of deliberate indifferent claim are the same. *See Williams ex rel. Hart v. Paint Valley Local Sch. Dist.*, 400 F.3d 360, 367 (6th Cir. 2005) ("It is clear from a reading of *Gebser* and *Davis*, that the Court is discussing only one standard for 'deliberate indifference' in Title IX pupil harassment cases and not . . . one standard for student-on-student harassment and a less stringent standard for teacher-on-student harassment.").

opportunity or benefit." *Foster*, 982 F.3d at 965 (quoting *Davis*, 526 U.S. at 633).

To prove the deliberate indifference tort, the plaintiff must show four elements: "(1) knowledge, (2) an act, (3) injury, and (4) causation." *Kollaritsch*, 944 F.3d at 621. First, the plaintiff must show that the school had "actual knowledge of an incident of actionable sexual harassment that prompted or should have prompted a response." *Id.* Second, the plaintiff must show that the school's response was "'clearly unreasonable in light of the known circumstances,' thus demonstrating the school's deliberate indifference to the foreseeable possibility of *further* actionable harassment of the victim." *Id.* (quoting *Davis*, 526 U.S. at 648). Third and fourth, the school's unreasonable response must cause the specific injury of "deprivation of access to the educational opportunities or benefits provided by the school . . . . Emotional harm standing alone is not a redressable Title IX injury." *Id.* The causation and injury elements are met if the "injury is attributable to the post-actual-knowledge *further* harassment, which would not have happened but for the clear unreasonableness of the school's response." *Id.* at 622 (citing *Davis*, 526 U.S. at 644).

Before reaching the merits of any Title IX claim, however, the Court must determine whether the claim is barred by the statute of limitations.

B. Title IX Statute of Limitations

As a threshold matter, the Court clarifies that statute-of-limitations defenses may be properly raised in a Rule 12(b)(6) motion. *See Gibson v. Am. Bankers Ins. Co.*, 289 F.3d 943, 946 (6th Cir. 2002); *Allen v. Andersen Windows, Inc.*, 913 F. Supp. 2d 490, 500 (S.D. Ohio 2012) ("Dismissal under Fed. R. Civ. P. 12(b)(6) based on a statute-of-limitations bar is appropriate when the complaint shows conclusively on its face that the action is indeed time-barred.").

"Title IX does not contain its own statute of limitations." *Lillard v. Shelby Cty. Bd. of Educ.*, 76 F.3d 716, 728 (6th Cir. 1996). Title IX actions, therefore, borrow the state statute of limitations for personal injuries. *Id.* at 729. Ohio Revised Code § 2305.10 provides for a two-year statute of limitations for personal injury claims. Ohio Rev. Code § 2305.10. Accordingly, Title IX claims in Ohio have a two-year statute of limitations. *See Adams v. Ohio Univ.*, 300 F. Supp. 3d 983, 996 (S.D. Ohio 2018).

Although state law controls the duration of the statute of limitations, federal law governs when the claim accrues. *Sharpe v. Cureton*, 319 F.3d 259, 266 (6th Cir. 2003). "The 'standard rule' is that a cause of action accrues 'when the plaintiff has a complete and present cause of action, that is, when the plaintiff can file suit and obtain relief.'" *D'Ambrosio v. Marino*, 747 F.3d 378, 384 (6th Cir. 2014) (citation omitted).

In order to determine the accrual date for a Title IX claim, the Court needs to determine when a plaintiff has a complete and present cause of action under Title IX. The Sixth Circuit has not considered what triggers the statute of limitations in Title IX cases, but it has considered the issue in cases brought

under 42 U.S.C. § 1983, which, like Title IX, borrows Ohio's personal-injury statute of limitations (for § 1983 claims brought in Ohio). *Browning v. Pendleton*, 869 F.2d 989, 990 (6th Cir. 1989). In the § 1983 context, the Sixth Circuit has adopted the discovery rule, which considers a plaintiff to have a complete and present cause of action "when the plaintiff knows or has reason to know that the act providing the basis of his or her injury has occurred." *E.g.*, *D'Ambrosio*, 747 F.3d at 384 (quoting *Cooey v. Strickland*, 479 F.3d 412, 416 (6th Cir. 2007)); *Sevier v. Turner*, 742 F.2d 262, 273 (6th Cir. 1984). In applying the discovery rule, the Sixth Circuit is "guided by the principle that a plaintiff has reason to know of his injury when he should have discovered it through the exercise of reasonable diligence." *Cooey*, 479 F.3d at 416 (internal quotation marks and citation omitted). Plaintiffs contend the discovery rule governs the accrual date in Title IX cases as well, but Ohio State disagrees.

There is good reason to think the Sixth Circuit might not adopt the discovery accrual rule in Title IX cases. Recently, in *Rotkiski v. Klemm*, 140 S. Ct. 355, 360 (2019), the United States Supreme Court decided whether the statute of limitations in the Fair Debt Collection Practices Act ("FDCPA") was triggered by a discovery rule. Unlike Title IX, the FDCPA contains an explicit statute of limitations; thus, the Supreme Court engaged in statutory interpretation when determining if the FDCPA's statute of limitations was subject to a discovery rule. *Id.* Despite that factual difference, the Supreme Court's analysis in *Rotkiski* is helpful because it assumed that the "standard rule [is] that the limitations period commences when the plaintiff has a complete and present cause of action"

and that Congress legislates against that standard rule. *Id.* (quoting *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 418–19 (2005)). The Supreme Court rejected the appellant's request to read into the FDCPA statute of limitations a general discovery rule, calling such an expansive approach to the discovery rule a "bad wine of recent vintage," *id.* (quoting *TRW Inc. v. Andrews*, 534 U.S. 19, 37 (2001) (Scalia, J., concurring)), and refused to engage in "[a]textual judicial supplementation." *Id.* at 361.

Ohio State argues that *Rotkiski* should be read expansively as holding that the discovery rule *never* applies unless the language of the at-issue statute explicitly mandates it. Mot. 7, ECF No. 162. Because Title IX does not contain any statute of limitations, let alone one that explicitly provides for a discovery rule, Ohio State argues *Rotkiski* demands the Court find Plaintiffs' claim accrued on the date that all of the elements of a Title IX claim came into existence as opposed to the date Plaintiffs knew or should have known of their injuries. *Id.*

The Sixth Circuit has since recognized the tension between the Supreme Court's language in *Rotkiski* and the Sixth Circuit's prior caselaw applying a default discovery rule to the accrual of § 1983 claims. *See Dibrell v. City of Knoxville, Tenn.*, 984 F.3d 1156, 1162 (6th Cir. 2021) (contrasting the occurrence rule with the discovery rule and observing that "[a]ny presumption favoring that discovery rule, the [Supreme] Court recently clarified, represents a bad wine of recent vintage" (internal quotation marks and citations omitted)); *see also Everly v. Everly*, 958 F.3d 442, 460 (6th Cir. 2020) (Murphy, J., concurring)

(maintaining that "[h]istorically, courts used the occurrence rule").

The Sixth Circuit has not yet overturned *Sevier* and other cases holding that the discovery rule is the default rule in the § 1983 context, however. *See Dibrell*, 984 F. 3d at 1162 ("Do our cases imbibing this 'bad wine' warrant reconsideration in light of the Supreme Court's recent teachings? We need not resolve this tension now because [the plaintiff's] claims would be untimely either way."). It is thus unclear whether the Sixth Circuit would continue to apply the discovery accrual rule in § 1983 cases or would adopt the discovery accrual rule in Title IX cases. *Cf. Twersky v. Yeshiva Univ.*, 993 F. Supp. 2d 429, 438–39 (S.D.N.Y. 2014) (recognizing the plaintiffs' request to apply a discovery rule to a Title IX claim "ignore[s] the continuing significance of the 'standard rule' that claims accrue upon existence of a complete and present cause of action" and that the discovery rule "remains—despite certain departures—an exception" to the standard rule but declining to decide whether the occurrence or discovery rule applied); *Varnell v. Dora Consol. Sch. Dist.*, 756 F.3d 1208, 1210, 1215–17 (10th Cir. 2014) ("Plaintiff's federal claims accrued when she could file suit and obtain relief, which was no later than when the abuse stopped, not when she allegedly learned the full extent of the resultant emotional injury."); *Forrester v. Clarencevill Sch. Dist.*, No. 20-12727, 2021 WL 1812700, at *4 (E.D. Mich. May 6, 2021) ("The Supreme Court has repeatedly refused to interpose the 'discovery rule' to accrual standards for federal claims."). This Court need not definitively decide the issue either, though, as Plaintiffs' claim is

untimely under both rules. Indeed, the accrual date is the same under either rule.

1. Plaintiffs' Claims are Barred under the Occurrence Rule

Under the occurrence rule, each Plaintiff's claim against Ohio State accrued, at the latest, when all of the elements of his Title IX claim were established. In other words, each Plaintiff's Title IX claim accrued the moment that Plaintiff suffered the Title IX injury—i.e., was deprived of "access to the educational opportunities or benefits provided by" Ohio State because of post-actual-knowledge harassment by Strauss (which harassment would not have happened but for the clear unreasonableness of Ohio State's response). *Kollaritsch*, 944 F.3d at 621–22; *cf. Twersky*, 993 F. Supp. 2d at 439 (finding Title IX claim accrued under the occurrence rule "when, despite their knowledge of the abuse at the school, the school administrators failed to take corrective actions. In each instance, this occurred before the plaintiffs left the school, which in all cases was more than twenty years before this lawsuit was filed." (citation omitted)); *Forrester*, 2021 WL 1812700, at *4 ("As a matter of law, at the time of the abuse, Plaintiffs had 'a complete and present cause of action,' in that 'the wrongful act or omission [had] result[ed] in damages' and 'the plaintiff[s] [had been] harmed.'" (citations omitted)).

For the majority of Plaintiffs, the latest date on which their Title IX injury could have occurred is the date of their graduation or the date they dropped out of Ohio State, for that is the latest moment they were deprived of access to educational opportunities or benefits provided by Ohio State as a result of Ohio

State's deliberate indifference. *See* Compl. ¶ 439, ECF No. 157 ("OSU's actions and inactions had the systemic effect of depriving Plaintiffs . . . of the educational benefits afforded to them through their enrollment in the University."). Plaintiffs in this case graduated, at the latest, in the late 1990s.[5] *Id.* ¶¶ 35–132. Even assuming the latest Plaintiff graduated in 1999, his claim would need to have been filed within two years of graduation—by sometime in 2001. Plaintiffs did not file their Complaint in this case until July 16, 2018. ECF No. 1. Consequently, under the occurrence rule, Plaintiffs' Complaint was untimely by at least eighteen years.

2. Plaintiffs' Claims are Barred under the Discovery Rule

As the Supreme Court has recognized, when the discovery rule applies, "discovery of the injury, not discovery of the other elements of the claim, is what starts the clock." *Rotella v. Wood*, 528 U.S. 549, 555 (2000); *Amini v. Oberlin College*, 259 F.3d 493, 500 (6th Cir. 2001) (In other words, "[a] plaintiff's action accrues when he discovers that he has been injured, not when he determines that the injury was unlawful." (internal quotation marks and citation omitted)).

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[5] The Court recognizes that lead Plaintiff Brian Garrett's claims arise out of abuse at Strauss's off-campus clinic, rather than abuse on Ohio State's campus. Compl. ¶¶ 369–398, ECF No. 1. Even assuming Mr. Garrett could state a valid Title IX claim for the abuse he endured at Strauss's off-campus clinic, Mr. Garrett was molested in 1996 and graduated from Ohio State in 1998. *Id.* So, under the occurrence rule, Mr. Garrett would have had to file his action by 2000 at the latest.

In Title IX cases, many courts find, for purposes of applying the discovery rule, that the injury is the sexual harassment or abuse such that the claim accrues the moment a plaintiff knows or has reason to know of the sexual harassment or abuse. *See, e.g.*, *Twersky v. Yeshiva Univ.*, 579 F. App'x 7, 9–10 (2nd Cir. 2014) (assuming without deciding that the discovery accrual rule applies and stating, "[w]hen plaintiffs left [Defendant University], more than 20 years before filing this suit . . . , they were unquestionably aware of (1) their injuries, (2) their abusers' identities, and (3) their abusers' prior and continued employment at [Defendant University]. This information was sufficient to put them on at least inquiry notice as to the school's awareness of and indifference to the abusive conduct by its teachers." (citations omitted)); *Varnell*, 756 F.3d at 1216–17 (finding that a plaintiff's Title IX claim accrued even under the discovery rule when the plaintiff knew she was sexually assaulted); *Doe v. Univ. of Cal.*, No. 2:18-cv-7530-SVW-GJS, 2019 WL 4229750, at *4 (C.D. Cal. July 9, 2019) ("Even if Plaintiff generally did not learn until recently about USC's alleged deliberate indifference spanning over approximately thirty years, Plaintiff's understanding of her injury at the time of her examination by Dr. Tyndall means that the statute of limitations period began to run immediately following the examination."); *Adams v. Ohio Univ.*, 300 F. Supp. 3d 983, 996 (S.D. Ohio 2018) (finding the injury in a Title IX deliberate indifference case was the sexual harassment by the faculty member, which started the statute of limitations clock); *Bowling v. Holt Pub. Sch.*, No. 1:16-cv-1322, 2017 WL 4512587, at *2 (W.D. Mich. May 26, 2017) ("[Plaintiff's] claims are based on the sexual assaults

by T.B., the last of which occurred on May 18, 2012. Thus, her claims accrued, at the latest, on May 18, 2012—even if [plaintiff's] claim is based on Defendants' actions or inactions in failing to protect her from T.B. because [plaintiff] knew of Defendant's inaction."); *Anderson v. Bd. of Educ. of Fayette Cty.*, 616 F. Supp. 2d 662, 668 (E.D. Ky. 2009) (finding plaintiffs "were no doubt aware of the underlying injuries of which they complain, the abuse at the hands of employees of the Board, at the time it was allegedly inflicted. This is to say that Plaintiffs' causes of action accrued at the time of the alleged abusive acts."); *Johnson v. Gary E. Miller Canadian Cty. Children's Juvenile Justice Ctr.*, No. Civ-09-533-L, 2010 WL 152138, at *2 (W.D. Okla. Jan. 14, 2010) (finding the Title IX claims "are time barred since they accrued prior to [plaintiff's] last date of attendance" at the defendant school); *Padula v. Morris*, No. 2:05-cv-411-MCE-EFB, 2008 WL 1970331, at *4 (E.D. Cal. May 2, 2008) (finding the statute of limitations on plaintiff's Title IX claim "accrued on the last date Plaintiffs' suffered an incident of sexual harassment relevant to their causes of action." (citation omitted)); *Monger v. Purdue Univ.*, 953 F. Supp. 260, 264 (S.D. Indiana 1997) ("[Plaintiff's] Title IX claim accrued when she knew or had reason to know of her injury—October 29, 1997," the date of the alleged sexual harassment); *Clifford v. Regents of Univ. of Cal.*, No. 2:11-cv-2935, 2012 WL 1565702, at *6 (E.D. Cal. April 30, 2012) (finding Title IX claim accrued on the date of each alleged incident of harassment or the date the university became aware of the same); *cf. Gilley v. Dunaway*, 572 F. App'x 303, 306 (6th Cir. 2014) ("[Plaintiff's] relationship with [the coach-abuser] should have

aroused her suspicion that she was being sexually abused.").

Other courts find the injury occurs at the time the plaintiff is deprived of educational opportunities or benefits by the defendant school. *Samuelson v. Oregon State Univ.*, 725 F. App'x 598, 599 (9th Cir. June 6, 2018) ("Here, [plaintiff's] injury occurred, and she was fully aware of the injury and its consequences, when she dropped out of school in 2000. This event started the two-year clock."); *King-White v. Humble Indep. Sch. Dist.*, 803 F.3d 754, 764 (5th Cir. 2015) (assuming without deciding, for purposes of the discovery rule, that the injury was the school's deliberate indifference rather than the sexual abuse itself).

As explained above, Plaintiffs were abused from the 1970s–1990s. Compl. ¶¶ 35–132, ECF No. 157. So, even if the Court applied the discovery rule and found the claims accrued when Plaintiffs knew or should have known of their abuse, the claims accrued on the latest date of abuse for each Plaintiff, which occurred well before two years prior to the filing of the Complaint. Similarly, if the Court applied the discovery rule and considered the injury to be Plaintiffs' deprivation of the educational opportunities or benefits of Ohio State, Plaintiffs knew or should have known of those injuries by the time they graduated or dropped out of Ohio State.[6] Either way, Plaintiffs' Title IX claims are barred by

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[6] The accrual date under this analysis matches the accrual date under the Occurrence Rule because Plaintiffs were undoubtedly aware of the deprivation of educational opportunities or benefits by the time they graduated or withdrew from Ohio State.

the statute of limitations, even under the discovery rule.

3. Plaintiffs' Arguments are Unavailing

Plaintiffs offer two reasons why their claims are not barred by the statute of limitations: (1) claims do not accrue under the discovery rule until a plaintiff knows or should know about both the injury and cause of the injury; and (2) the statute of limitations is tolled due to Ohio State's fraudulent concealment.

a. Claims Accrue Under the Discovery Rule When a Plaintiff Knows or has Reason to Know of His Injury

First, Plaintiffs argue that knowledge of injury is alone insufficient to trigger accrual under the discovery rule and that, instead, a claim does not accrue under the discovery rule until a plaintiff knows or should know of both his injury and its cause. Resp. 9, ECF No. 169 (quoting *Fonseca v. Consol. Rail Corp.*, 246 F.3d 585, 590 (6th Cir. 2001)). According to Plaintiffs, the "cause" here is Ohio State's deliberate indifference, so their claims did not accrue until they knew or should have known of their injuries and that those injuries were caused by Ohio State's deliberate indifference. Resp. 9, ECF No. 169 ("[T]he relevant inquiry here concerns when the Plaintiffs could have first known that they were injured by OSU, and that OSU played an actionable role in causing their abuse."); *id.* at 1 ("Plaintiffs did not know and ***could not have known*** of OSU's role in causing their abuse until April 2018, at the earliest, when allegations of an OSU cover-up surfaced in the press and OSU retained law firm Perkins Coie to unearth the truth."); *id.* at 2 ("Plaintiffs' Title IX claims accrued within the last two years, as Plaintiffs only recently

discovered—or even could have discovered—OSU's role in causing their injuries."); *id.* at 4 ("[U]ntil the May 2019 PC Report (or the April 2018 announcement of an investigation, at the earliest), none of the Plaintiffs in this case could have known of OSU's role in the abuse they had suffered.").

As the Sixth Circuit recently explained, however, in Title IX cases, " 'causation' means the '[a]ct' caused the '[i]njury,' such that the injury is attributable to the post-actual-knowledge *further* harassment, which would not have happened but for the clear unreasonableness of the school's response." *Kollaritsch*, 944 F.3d at 622. The Sixth Circuit explains that, "[i]mportantly, *Davis* does not link the deliberate indifference directly to the injury (i.e., it does *not* speak of subjecting students to *injury*)[.]" *Id.* In other words, Plaintiffs' Title IX injury (deprivation of educational opportunities or benefits provided by Ohio State) was attributable to Strauss's abuse, and Plaintiffs knew both of the injury and its cause (the abuse), which was sufficient to put them at least on inquiry notice to determine whether the injury would have occurred but for Ohio State's deliberate indifference. *See King-White*, 803 F.3d at 762–63 ("Even if we assume that the relevant injury was the conduct of HISD and the School Officials rather than the sexual abuse itself, [p]laintiffs had sufficient awareness of that conduct prior to the spring of 2011 for their claims to accrue. . . . A.W. was sadly quite aware of the abuse she suffered, and she was also aware that her abuser was her teacher. . . . [A] reasonable person who knew that her daughter was living with a teacher, and who had already lodged complaints with administrators that had gone unheeded, would have investigated further.");

Twersky, 579 F. App'x at 10 ("[P]laintiffs maintain that they could not have discovered defendants' deliberate indifference to sexual abuse before defendant Lamm's admissions in a December 2012 interview . . . . This conclusion is belied by the fact that nine plaintiffs brought their own abuse to the attention of Lamm or other administrators. To the extent these administrators rebuffed their complaints or otherwise failed to take adequate remedial action, plaintiffs were thus aware more than three years before filing this suit of a potential claim for deliberate indifference. Further, these circumstances put plaintiffs at least on inquiry notice as to administrators' knowledge of and deliberate indifference to other abuse." (citation omitted)); *Forrester*, 2021 WL 1812700, at *7 ("[E]ven assuming that Plaintiffs were not aware of all the facts needed to prove that 'the District acted with deliberate indifference to [the] assaults,' Plaintiffs' claims accrued when they became aware of their injuries and the abuse." (citations omitted)); *Anderson*, 616 F. Supp. 2d at 668 ("Plaintiffs' causes of action accrued [under the discovery rule] at the time of the alleged abusive acts.").[7] Plaintiffs' argument that the statute

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[7] As noted above, some cases describe the injury triggering accrual as the abuse itself (rather than the deprivation of educational opportunities and benefits) and thus find a claim accrues on the date a plaintiff knew or should have known he or she was abused. Plaintiffs argue that, if the pertinent inquiry for the discovery rule is when Plaintiffs knew or should have known they suffered abuse, it is not reasonable to infer that Plaintiffs were aware of the abuse prior to 2018. Resp. 18, ECF No. 169. Specifically, Plaintiffs state that "Perkins Coie needed to hire two independent doctors to provide input on the medical necessity or appropriateness of Strauss's reported procedures." *Id.* The Court rejects Plaintiffs' argument that the Complaint

of limitations did not begin to run until they learned of Ohio State's deliberate indifference via the Perkins Coie report is therefore incorrect as a matter of law.[8]

b. Plaintiffs' Claims are not Tolled by the Fraudulent Concealment Doctrine

Plaintiffs also argue that Ohio State's "long-term concealment of its misconduct creates a basis

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plausibly alleges Plaintiffs did not know or should not reasonably have known they were sexually abused until the issuance of the Perkins Coie report. The Complaint is replete with allegations that Plaintiffs were concerned by Strauss's abuse and felt violated by it, discussed the abuse with teammates, classmates, or family members, reported the abuse themselves, or that the abuse caused them immediate mental and emotional distress. *E.g.*, Am. Compl. ¶¶ 168, 182, 205, 214–18, 232, 234–35, 242, 247, 268, 270–71, 280–83, 298, 301, 331–33, 382, 386–87, 444, 483, 503, 543–44, 665, ECF No. 157. All of these allegations directly undercut the notion that Plaintiffs were "not aware that Strauss's conduct was not medically necessary and that it was, in fact, sexual assault" until the Perkins Coie report was published. *Id.* ¶ 391. Unfortunately, the very effect the abuse had on Plaintiffs (i.e., that it was enough to deprive them of the educational opportunities or benefits from Ohio State) was sufficient to put them on at least inquiry notice that they suffered abuse and that the abuse might not have happened but for Ohio State's deliberate indifference.

[8] Plaintiffs' argument that they had no reason to know of Ohio State's deliberate indifference until the announcement in 2018 of its internal investigation is also defeated by the factual allegations in their own Complaint. For example, Plaintiffs allege that Strauss's behavior was an open secret, that athletes would openly "joke" about his abuse, and that rumors of his abuse permeated Ohio State. Resp. 16, ECF No. 169; Compl. ¶¶ 147–48, 246, 284, 475, 519, 646, ECF No. 157. Plaintiffs also knew that Strauss continued to be employed at Ohio State despite this widespread knowledge, which was enough to put them on inquiry notice of Ohio State's deliberate indifference to his horrific and predatory behavior.

for tolling." Resp. 2, ECF No. 169. The fraudulent concealment doctrine tolls a limitations period "where a defendant impermissibly conceals its wrongdoing from the plaintiff." *Lutz v. Chesapeake Appalachia, LLC*, 807 F. App'x 528, 530 (6th Cir. 2020) (citing *Doe v. Archdiocese of Cincinnati*, 849 N.E.2d 268, 278–79 (2006)). To toll the statute of limitations based on fraudulent concealment, a plaintiff must show "(1) a factual misrepresentation, (2) that the misrepresentation is misleading, (3) that the misrepresentation induced actual reliance that was reasonable and in good faith, and (4) that it caused detriment to the relying party." *Lutz*, 807 F. App'x at 530–31 (citing cases). The fourth factor means that fraudulent concealment cannot toll the statute of limitations where the plaintiff "knew or should have known all of the elements of potential causes of action." *Archdiocese of Cincinnati*, 849 N.E.2d at 279; *see also King-White*, 803 F.3d at 764 ("The estoppel effect of fraudulent concealment ends, however, when a party learns of facts, conditions, or circumstances which would cause a reasonably prudent person to make inquiry, which, if pursued, would lead to discovery of the concealed cause of action." (internal quotation marks and citations omitted)); *Anderson*, 616 F. Supp. 2d at 670 (observing, in a discussion of whether fraudulent concealment can toll the statute of limitations that "the plaintiff is always under the duty to exercise reasonable care and diligence to discover whether he has a viable legal claim, and any fact that should arouse his suspicion is equivalent to actual knowledge of his entire claim." (internal quotation marks and citations omitted)).

Even if Plaintiffs had adequately pleaded the first three factors, they have not done so for the fourth. As

explained above, Plaintiffs were aware of all the elements of their cause of action by the late 1990s. That is, they knew of the injury, the identity of the perpetrator, and the perpetrator's employer. *See Archdiocese of Cincinnati*, 849 N.E.2d at 279 (concluding that the fraudulent concealment doctrine was inapplicable where the plaintiff, a victim of sexual abuse, "at all times knew the identity of his alleged perpetrator and knew the employer of his alleged perpetrator"). Because Plaintiffs have known for decades about the elements of their cause of action, any alleged misrepresentation or concealment by Ohio State did not prevent them from investigating or pursuing their claims. The cases on which Plaintiffs rely are inapposite because they do not analyze Ohio law. *See, e.g.*, *Lozano v. Baylor Univ.*, 408 F. Supp. 3d 861, 904 (W.D. Tex. 2019). Therefore, the fraudulent concealment doctrine does not toll the limitations period for Plaintiffs' claims.

c. This Analysis Applies Equally to any Title IX Claims brought under a Theory of Hostile Environment or Heightened Risk

Plaintiffs also arguably allege a separate theory of Title IX liability based on Ohio State's creation and perpetuation of a sexually hostile environment. The Sixth Circuit has stated that "[h]ostile environment [Title IX] claims are distinct from deliberate indifference [Title IX] claims." *Doe v. Univ. of Ky.*, 959 F.3d 246, 251 n.3 (6th Cir. 2020). "A Title IX hostile-environment claim is analogous to a Title VII hostile-environment claim," and, to state such a claim, a plaintiff "must allege that his educational experience was permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or

pervasive [so as] to alter the conditions of his educational environment." *Doe v. Miami Univ.*, 882 F.3d 579, 590 (6th Cir. 2018) (internal quotations marks and citations omitted).

Here, the statute of limitations analysis for Plaintiffs' post-assault deliberate indifference claim applies with equal force to any separately asserted hostile-environment theory of liability because Plaintiffs were certainly aware by the time they graduated that their educational experiences were permeated by a sexually hostile environment. Indeed, any claim would fail on the merits were Plaintiffs unaware. *Doe v. Univ. of Dayton*, 766 F. App'x 275, 283 (6th Cir. 2019) ("We hesitate to deem an environment hostile to a plaintiff when there is no evidence that plaintiff was aware of what occurred." (internal quotation marks and citation omitted)).

Similarly, Plaintiffs purport to assert a Title IX claim based on "pre-assault" deliberate indifference, which Plaintiffs sometimes style as a "heightened risk" claim. Ohio State is correct that Plaintiffs have not cited any case law suggesting the Sixth Circuit recognizes a "heightened risk" theory of Title IX deliberate indifference. The Court has independently found no cases in which the Sixth Circuit has recognized such a theory, although some district courts within the Sixth Circuit have at least recognized the possibility of asserting such a theory of liability. *E.g.*, *Doe v. Hamilton Cty. Bd. of Edu.*, 329 F. Supp. 3d 543 (E.D. Tenn. 2018); *Doe v. Mich. State Univ.*, No. 1:18-cv-390, 2019 WL 5085567 (W.D. Mich. Aug. 21, 2019); *Doe 1 v. Cleveland Metro. Sch. Dist. Bd. of Edu.*, No. 1:20-cv-1695, 2021 WL 1334199 (N.D. Ohio Apr. 9, 2021).

Under this theory, Plaintiffs contend that even if they were aware of Ohio State's deliberate indifference to their own complaints of sexual abuse by Strauss, they had no reason to know that Ohio State's deliberate indifference to the complaints made by *other, prior* students heightened the risk that these Plaintiffs would be assaulted in the first place. They contend that they had no reason to know that Ohio State heightened the risk they would be sexually assaulted until 2018, when Ohio State announced that it hired Perkins Coie to investigate Strauss's wide-spread abuse.

Even if the Sixth Circuit recognizes a heightened risk theory of liability under Title IX, Plaintiffs' claims in this case are barred by the statute of limitations. In cases where the heightened-risk claim is based on a university's deliberate indifference to prior complaints of student-on-student harassment, it makes sense that a plaintiff may have no reason to suspect the school's knowledge of, and deliberate indifference to, prior complaints until a subsequent investigation, admission, or news report breaks.

Here, however, the perpetrator was an employee of Ohio State. Not only that, but Plaintiffs' complaints make clear that Strauss's abuse was widely known amongst both students and faculty. This general knowledge is enough to have put Plaintiffs on notice that Ohio State may have received complaints about Strauss in the past and yet continued employing him. Accordingly, even if the Sixth Circuit recognizes a heightened risk theory of liability, Plaintiffs' claims are time-barred. *Univ. of Cal.*, 2019 WL 4229750, at *4 ("Even if Plaintiff generally did not learn until recently about USC's alleged deliberate indifference spanning over

approximately thirty years, Plaintiff's understanding of her injury at the time of her examination by Dr. Tyndall means that the statute of limitations period began to run immediately following the examination."); *but see, e.g.*, *Hernandez v. Baylor Univ.*, 274 F. Supp. 3d 602 (W.D. Texas Apr. 17, 2017) ("[l]t was not until January 2016 that Plaintiff first knew that, based on her allegations, Baylor could have stopped or prevented her assault. Plaintiff's pre-assault claim is therefore not time-barred."); *Dutchuk v. Yesner*, No. 3:19-cv-136-HRH, 2020 WL 5752848, at *5 (D. Alaska Sept. 25, 2020) (finding heightened risk claim timely because "[p]laintiffs have alleged that they each first became aware of the University of Alaska's deliberate indifference to Yesner's repeated misconduct when a formal report was finally issued in March 2019." (internal quotation marks and citation omitted)); *Jameson v. Univ. of Idaho*, No. 3:18-cv-451-DCN, 2019 WL 5606828, at *8 (D. Idaho Oct. 30, 2019) ("[l]t is plausible that [plaintiff] had no reason to further investigate her heightened-risk claim until after the release of the Independent Report and the subsequent media coverage in 2018.").

V. CONCLUSION

For these reasons, the Court is compelled to dismiss Plaintiffs' claims as barred by the statute of limitations.[9] In the words of the Supreme Court of Ohio:

> We conclude as we began: however reprehensible the conduct alleged, these

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[9] The Court therefore does not address whether Brian Garrett can otherwise state a claim under Title IX or whether punitive damages are available.

> actions are subject to the time limits created by the Legislature. Any exception to be made to allow these types of claims to proceed outside of the applicable statutes of limitations would be for the Legislature, as other States have done.

Archdiocese of Cincinnati, 849 N.E.2d at 279–80 (internal quotation marks and citations omitted). At all times since the filing of these cases, the Ohio legislature had the power, but not the will, to change the statute of limitations for these Plaintiffs. For all the reasons stated above, however, the Court is compelled to **GRANT** Ohio State's motion. The Clerk is **DIRECTED** to enter judgment for Ohio State and close the case.

IT IS SO ORDERED.

/s/ Michael H. Watson
MICHAEL H. WATSON, JUDGE
UNITED STATES DISTRICT COURT

[Filed September 22, 2021]
[2021 WL 7186149]

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Nicholas Nutter, *et al.*, Plaintiffs,	Case No. 2:19-cv-2462
v.	Judge Michael H. Watson
The Ohio State University, Defendant.	Magistrate Judge Deavers

OPINION AND ORDER

In this case, twenty-seven named plaintiffs and nineteen unnamed plaintiffs (together, "Plaintiffs") sue The Ohio State University ("Ohio State") based on sexual abuse they suffered at the hands of Dr. Strauss ("Strauss") while students at Ohio State. Am. Compl., ECF No. 33. They sue Ohio State under the following theories of Title IX liability: (1) hostile environment; (2) deliberate indifference; (3) heightened risk; and (4) retaliation (brought by non-party Michael DiSabato and Plaintiff Mark Coleman). *Id.* ¶¶ 479–513; 527–41. It appears Plaintiffs base each Title IX theory on both the abuse by Strauss and the highly sexualized environment that generally existed within Larkins Hall. *Id.* Plaintiffs also assert a stand-alone claim of fraudulent concealment, *id.* ¶¶ 514–26, and a claim for violation of their Fourteenth Amendment Substantive Due Process rights by way of 42 U.S.C. § 1983. *Id.* ¶¶ 542–51. Ohio State moves to dismiss all claims. Mot. Dismiss, ECF No. 36. Plaintiffs

responded and moved in the alternative to amend, Resp. ECF No. 40, and Ohio State replied. Reply, ECF No. 42.

After the motion to dismiss was fully briefed, the Court was notified that the following Plaintiffs elected to settle their claims: Nicholas Nutter, Dunyasha Yetts, Adam DiSabato, Michael Rodriguez, Matthew Dalgleish, Vincent DiSabato, and John Doe 16 ("Settling Plaintiffs"). Accordingly, this Opinion and Order does not apply to Settling Plaintiffs, and they will dismiss their claims in due course.

As to the remaining Plaintiffs, the Court **GRANTS** Ohio State's motion to dismiss for the reasons set forth in the Opinion and Orders issued in *Garrett* and *Ratliff*, Case Nos. 2:18-cv-692, 2:19-cv-4746. The reasons requiring dismissal in those cases apply equally to this case. *See, e.g.*, Am. Compl. ¶¶ 62, 65, 67–68, 83, 85–86, 88, 91, 94, 98, 104, 113–14, 116, 119–23, 125, 128, 132, 136, 141, 144, 148, 150–51, 156, 158–59, 161, 163–64, 166, 174, 176, 179, 186, 189–91, 193, 199, 203, 205, 210, 213, 215–18, 220, 224, 227–29, 231, 233, 234–37, 239, 242, 244–46, 248, 252, 254, 258, 262, 264–65, 268, 274–76, 278–79, 282, 287, 289, 294, 298, 301, 303, 309–11, 313, 314, 319, 322–25, 328, 331–35, 339, 341, 342, 344, 346–47, 349, 356, 359–60, 362, 366, 368, 372–73, 375, 380–82, 384, 386, 393, 395, 402, 407–08, 417, 421, 424, 428, 455, 456, 475–76, 497, 504, 534, 537, ECF No. 33.

The Court notes that Plaintiffs' response to Ohio State's motion to dismiss in this case is virtually identical—almost word for word—to the response filed in *Ratliff*. *Compare* Resp., ECF No. 40, Case No. 2:19-cv-2462 *with* Resp., ECF No. 26, Case No. 2:19-cv-4746. Accordingly, to the extent Plaintiffs in this case assert any claims or raise any arguments that

are not addressed in the *Garrett* Opinion and Order, the Court has addressed such claim or argument in the *Ratliff* Opinion and Order.

Accordingly, the Court **DISMISSES** the claims of all Plaintiffs except the settling Plaintiffs. Settling Plaintiffs shall move to dismiss at the appropriate time. The Clerk is **DIRECTED** to terminate ECF Nos. 36 & 40.

IT IS SO ORDERED.

/s/ Michael H. Watson
MICHAEL H. WATSON, JUDGE
UNITED STATES DISTRICT COURT

[Filed September 22, 2021]
[2021 WL 7186198]

**UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

Rocky Ratliff, Plaintiffs, v. The Ohio State University, Defendant.	Case No. 2:19-cv-4746 Judge Michael H. Watson Magistrate Judge Deavers

OPINION AND ORDER

Rocky Ratliff ("Plaintiff") sues The Ohio State University ("Ohio State") based on sexual abuse he suffered at the hands of Dr. Strauss ("Strauss") while a student at Ohio State. Am. Compl., ECF No. 18. Plaintiff brings a Title IX claim under various theories: (1) hostile environment; (2) deliberate indifference; (3) heightened risk; and (4) retaliation.[1] *See, e.g.*, Am. Compl. ¶¶ 114–33, ECF No. 18. It

[1] Plaintiff includes some allegations and arguments that Ohio State failed to report or investigate the complaints about Strauss's abuse. To the extent Plaintiff intends to bring a failure-to-report theory under Title IX, Plaintiff offers nothing to suggest the Sixth Circuit recognizes such a theory separate from the theories Plaintiff already asserts. If, on the other hand, Plaintiff intends to assert a failure-to-report claim under the Clery Act, that cannot succeed because the Clery Act does not provide a private right of action. *See* 20 U.S.C. § 1092(14)(A) ("Nothing in this subsection may be construed to . . . create a cause of action against any institution of higher education or any employee of such an institution for any civil liability.").

appears Plaintiff bases each Title IX theory on both the abuse by Strauss and the highly sexualized environment that generally existed within Larkins Hall. *Id.* Plaintiff also arguably asserts a stand-alone claim of fraudulent concealment, *id.* ¶¶ 134–46, and a claim for violation of his Fourteenth Amendment Substantive Due Process rights by way of 42 U.S.C. § 1983. *Id.* ¶¶ 157–551. Ohio State moves to dismiss the Amended Complaint. Mot. Dismiss, ECF No. 21.

I. Title IX Claims Based on Strauss's Abuse

First, Plaintiff's Title IX claim based on hostile environment, deliberate indifference, and heightened risk fails for the reasons stated in the Opinion and Order in *Garrett v. The Ohio State University*, Case No. 2:18-cv-692, to the extent the claim is based on Strauss's abuse of Plaintiff. The reasoning in the Court's Opinion and Order in *Garrett* applies equally here, as Plaintiff's Amended Complaint alleges that he attended Ohio State from 1995–1997 and was sexually assaulted by Strauss approximately twelve times during his time there. *Id.* ¶¶ 43–44. Plaintiff's Complaint in this case was not filed until October 25, 2019, and, therefore, under either the occurrence rule or the discovery rule, his Title IX claim under these theories is time-barred.

Plaintiff offers two arguments in opposition to dismissal based on the statute of limitations that were either not raised or not fully developed in *Garrett*, so the Court addresses them herein. Namely, Plaintiff argues that his claim is not barred by the statute of limitations under the continuing violations theory and under the equitable doctrine of unclean hands.

The continuing violations doctrine does not save Plaintiff's claims. It is worth noting, first, that it is unclear whether the continuing violations doctrine even applies to Title IX claims. *Doe v. Mercy Cath. Med. Ctr.*, 850 F.3d 545, 566 (3d Cir. 2017) ("Some courts suggest it does. *See, e.g.*, *Stanley v. Trs. of California State Univ.*, 433 F.3d 1129, 1136 (9th Cir. 2006). Others suggest it doesn't. *See, e.g.*, *Folkes v. New York Coll. of Osteopathic Med.*, 214 F. Supp. 2d 273, 288–91 (E.D.N.Y. 2002)."). Plaintiff cites no case where the continuing violations doctrine has been applied to a Title IX claim.[2]

However, even assuming the doctrine does apply in Title IX cases, Plaintiff's allegations would not trigger it. The continuing violations doctrine is "an exception to the ordinary rule regarding the commencement of a statute of limitations, [that] allows for tolling based on continuing unlawful acts." *Norman v. Granson*, No. 18-4232, 2020 WL 3240900, at *2 (6th Cir. Mar. 25, 2020) (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380–81 (1982)). The Sixth Circuit has recognized two categories of continuing violations: "(1) 'those alleging serial

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[2] Plaintiff cites *Bowling v. Holt Pub. Sch.*, No. 1:16-CV-1322, 2017 WL 4512587 (W.D. Mich. May 26, 2017) as a case that "supports a conclusion that the continuing violations theory is applicable to the case at bar and precludes dismissal." Reply 23, ECF No. 26. The Court disagrees with this interpretation. If anything, *Bowling* is another example of the uncertainty regarding whether the continuing violations doctrine applies to Title IX cases, and that court simply analyzes the issue *in case* it does. *See id.* at *2 ("This Court need not decide whether the continuing violation doctrine applies in the context of Title IX, because even if it does, Bowling's allegations show that it does not apply.").

violations' and (2) 'those identified with a long-standing and demonstrable policy of discrimination.'" *Id.* (citing *Sharpe v. Cureton*, 319 F.3d 259, 266 (6th Cir. 2003)). For either category, a continuing violation exists only when three requirements are met: "(1) 'the defendant's wrongful conduct must continue after the precipitating event that began the pattern,' (2) 'injury to the plaintiff must continue to accrue after that event,' and (3) 'further injury to the plaintiff[ ] must have been avoidable if the defendants had at any time ceased their wrongful conduct.'" *Id.* (citing *Tolbert v. Ohio Dep't of Transp.*, 172 F.3d 934, 940 (6th Cir. 1999)).

Plaintiff points to "[Defendant]'s continuing assertion of no wrongdoing by Dr. Strauss, coupled with [Defendant]'s continued failure, until May 2019 to report wrongdoing as required by Title IX and the Clery Act, and its admission in its letter that it did not take action necessary to protect its students over the years" as evidence of a continuing violation. Reply 25, ECF No. 26. Plaintiff argues that "he has been harmed by an actual policy of discrimination held by the Defendant, or a series of acts performed by Defendant, to wit, continued concealment of and/or cover up of and denial and refusal to report sexual abuse and other unlawful conduct," noting that "each day that such a policy is in force is a new violation." *Id.* at 26.

Regardless of which category of continuing violation Plaintiff attempts to invoke, Plaintiff's argument fails because he is unable to identify any specific discriminatory act within the limitations period. Both categories require a specific discriminatory act to have been suffered *during* the applicable limitations period. *Dixon v. Anderson*, 928

F.2d 212, 216 (6th Cir. 1991), *abrogated on other grounds by Sharpe*, 319 F.3d at 268 ("[The first] category requires a 'current' as well as 'continuing' violation: at least one of the forbidden discriminatory acts must have occurred within the relevant limitations period."); *Pittman v. Spectrum Health Sys.*, 612 F. App'x 810, 813 (6th Cir. 2015) (The second category requires, in addition to a longstanding and demonstrable policy of discrimination, that plaintiff allege they have "suffered a specific discriminatory act within the applicable limitations period." (citations omitted)).

Plaintiff relies repeatedly on the Sixth Circuit's opinion in *Roberts v. North American Rockwell Corporation*, 650 F.2d 823, 827 (6th Cir. 1981), to support his continuing violations argument. Specifically, Plaintiff maintains that *Roberts* stands for the proposition that "the statute of limitations begins anew each day that the discriminatory policy remains in existence." Reply 24, ECF No. 26. However, the holding in *Roberts* has since been clarified and limited by the Sixth Circuit. *Roberts* requires that "a plaintiff prove some specific discriminatory act within the limitations period, not merely the existence of a discriminatory policy, to show a continuing violation." *Wellons v. Nw. Airlines, Inc.*, 25 F. App'x 214, 219 (6th Cir. 2001) (citing *Dixon*, 928 F.2d at 217). Plaintiff alleges no such specific act during the statutory limitation period that would spark a continuing violation to make these claims timely. Indeed, all of Plaintiff's allegations relate to his time as a student at Ohio State, where Ohio State's actions caused him to "experience further sexual molestation, assault, abuse, and harassment and/or [become] more vulnerable to it into the

future," be "deprived . . . of access to the educational opportunities or benefits provided by OSU," and which "effectively barred [Plaintiff's] access to educational opportunities and benefits, including a safe educational environment and appropriate medical care." Am. Compl. ¶¶ 115, 116, 119, ECF No. 18. None of these claims by Plaintiff alleges any policy that is presently impacting Plaintiff, or has impacted Plaintiff in the statutory period, and, therefore, these claims cannot justify a continuing violation.

One claim by Plaintiff is pleaded as touching the present. Plaintiff alleges that because of Ohio State's actions:

> Plaintiff has suffered and continues to suffer emotional distress, physical manifestations of emotional distress, mental anguish, fear, depression, anxiety, trauma, disgrace, embarrassment, shame, humiliation, loss of self-esteem, and loss of enjoyment of life, which will continue into the future. Also, Plaintiff was prevented from and continues to be prevented from obtaining the full enjoyment of life. Plaintiff has sustained and continues to sustain loss of earnings and earning capacity. Finally, Plaintiff has incurred various personal expenses.

Am. Compl. ¶ 117, ECF No. 18; *see also id.* at ¶¶ 133, 551. While the Court has no doubt about the truth of Plaintiff's claims, they unfortunately do not make the continuing violations theory applicable in this case. The doctrine is clear that "limitations periods begin to run in response to discriminatory *acts* themselves, not in response to the continuing *effects* of past discriminatory acts." *Dixon*, 928 F.2d at 216 (citing

Delaware State College v. Ricks, 449 U.S. 250, 258 (1980), and *United Airlines v. Evans*, 431 U.S. 553, 557 (1977)). Because Plaintiff's only present allegation regards the continuing effects of acts that occurred while he was a student at Ohio State, outside of the limitations period, these effects do not trigger a continuing violation.

Indeed, the Ninth Circuit addressed a similar continuing violations argument in *Stanley v. Trustees of California State University*, 433 F.3d 1129 (9th Cir. 2006). There, after the plaintiff alleged that she suffered sexual harassment at the hands of Richard Savino, her professor and faculty advisor, she brought suit against the trustees of her university for Title IX claims. *Id.* at 1137. The Ninth Circuit found that the continuing violation doctrine could not save her claims. For her hostile environment Title IX claims, the court noted that the plaintiff "[had] not alleged that the University caused her to undergo, or be vulnerable to, any harassment during the limitations period, a time when she was not present at the University." *Id.* at 1137. The court further noted that "we have never held the presence of an individual in a workplace or institution *where the plaintiff is not present* constitutes a hostile environment. The mere speculation that if she had returned the environment would have been hostile is not sufficient to establish an 'act' by a defendant within the limitations period." *Id.* (emphasis added). While the Sixth Circuit has yet to address the continuing violations doctrine's applicability to Title IX cases, the reasoning from *Stanley* is persuasive. Accordingly, the continuing violations theory is inapplicable to this case.

Neither does the clean hands doctrine aid Plaintiff. Under the clean hands doctrine, "he who

comes into equity must come with clean hands." *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814 (1945). That is, the clean hands doctrine prevents a party from asserting an equitable claim or defense if that party is "tainted with inequitableness or bad faith relative to the matter in which he seeks relief." *Id.*

A statute of limitations defense, however, is a *legal* defense, not an equitable one. *See Grover by Grover v. Eli Lilly & Co.*, 33 F.3d 716, 719 (6th Cir. 1994) (describing the statute of limitations as an "absolute legal defense"); *Allen v. Abbott Labs.*, No. CIV.A. 11-146-DLB, 2012 WL 10508, at *7 (E.D. Ky. Jan. 3, 2012) (noting that the statute of limitations is an "absolute legal defense"); *see also Rushing v. Yazoo Cty.*, No. 3:18CV764TSL-RHW, 2020 WL 4587047, at *8 (S.D. Miss. May 8, 2020), *aff'd sub nom. Rushing v. Yazoo Cty. by & through Bd. of Supervisors of Yazoo Cty.*, No. 20-60462, 2021 WL 2390378 (5th Cir. June 10, 2021) (rejecting an argument that the clean hands doctrine could bar a statute of limitations defense because the statute of limitations is a legal defense). Because the statute of limitations is a legal, not equitable defense, the clean hands doctrine is also inapplicable.

II. Title IX Claims Based on Environment at Larkins Hall

To the extent Plaintiff asserts a Title IX hostile environment, deliberate indifference, or heightened risk claim against Ohio State based on the sexually hostile environment that generally existed in Larkins Hall *apart* from Strauss's abuse, the Court concludes such claim is similarly untimely.

Plaintiff's Amended Complaint states that he and the other wrestlers used Larkins Hall during the time they were enrolled at Ohio State. *See* Am. Compl. ¶ 8, ECF No. 18. It further alleges that, at Larkins Hall, numerous individuals would, *inter alia*, "shower with the wrestlers, stare at the wrestlers, and excessively lather their genital area." *Id.* ¶ 9. Some even masturbated in the shower area. *Id.* ¶ 10. People would also watch the wrestlers from bathroom stalls or while in the sauna, and many would explicitly solicit the victim-students for dates or sexual activity. *Id.* ¶¶ 10–11. "Members of the OSU wrestling team and OSU wrestling coaching staff consistently discovered male on male sexual encounters in the locker room, bathroom, sauna facilities, spiral staircase, and wrestling room." *Id.* ¶ 12. In fact, the hostile environment was so blatant that Plaintiff's head wrestling coach talked to the wrestlers about how "they needed to look out for one another in Larkins Hall" and stated that he was "doing everything possible to get the wrestling team to a new facility and a better training environment." *Id.* ¶ 52.

Accordingly, Plaintiff has pleaded that he was aware of the sexually hostile environment in Larkins Hall—which, by his own admission "was so severe, pervasive, and objectively offensive that it deprived [Plaintiff] of access to his educational opportunities and/or benefits provided by [Ohio State]," *id.* ¶ 123—during the time he was enrolled at Ohio State. He was also on notice that the head coach was attempting to work with the University to secure a new facility for the team given the hostile environment, which is enough to put Plaintiff on notice at that time that Ohio State was likely aware of the complaints regarding the hostile environment. Accordingly, to

the extent Plaintiff's Title IX claims are based on the general environment at Larkins Hall, as opposed to the prolific abuse perpetrated by Strauss specifically, the claim is still untimely for the reasons stated in the *Garrett* Opinion and Order, which apply equally to the general environment at Larkins Hall.

III. Title IX Retaliation Claim

Plaintiff also brings a Title IX retaliation claim based on actions that occurred in 2019. Am. Compl. ¶¶ 148–56. Defendant moves to dismiss the retaliation claim, *inter alia*, on the basis that Plaintiff has not alleged he suffered any adverse school-related action. Mot. Dismiss 17, ECF No. 21.

Defendant is correct. Although the Sixth Circuit has never established the elements of a Title IX retaliation claim in a published case, it has assumed (in both published and unpublished opinions) that "a Title IX plaintiff must show that (1) [s]he engaged in protected activity; (2) [the funding recipient] knew of the protected activity; (3) [s]he suffered an adverse school-related action, and (4) a causal connection exists between the protected activity and the adverse action." *Bose v. Bea*, 947 F.3d 983, 988 (6th Cir. 2020) (internal quotation marks and citation omitted; alterations in original).

Here, Plaintiff does not allege (nor could he) an adverse school-related action because the alleged retaliation took place decades after Plaintiff graduated. *See* Am. Compl. ¶¶ 149–56, ECF No. 18. This claim therefore fails.

IV. 42 U.S.C. § 1983 Claim

Plaintiff's § 1983 claim fails as well because, *inter alia*, Ohio State is entitled to Sovereign Immunity.

The Eleventh Amendment provides, "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another state, or by Citizens or subjects of any foreign State." U.S. Const. Amend. XI. "It has long been settled that the Eleventh Amendment applies not only to suits brought against a State by a citizen of 'another State,' but also to suits brought by a citizen against the State in which he or she resides." *Lee Testing & Eng'g, Inc. v. Ohio Dept. of Transp.*, 855 F.Supp.2d 722, 725 (S.D. Ohio 2012) (citing *Hans v. Louisiana*, 134 U.S. 1(1890)). Thus, the Eleventh Amendment "bars all suits, whether for injunctive, declaratory or monetary relief, against the state and its departments." *Thiokol Corp. v. Mich. Dep't of Treasury*, 987 F.2d 376, 381 (6th Cir. 1993). When suits are filed against state agencies or state officials in their official capacities, they "should be treated as suits against the State." *Hafer v. Melo*, 502 U.S. 21, 25 (1991); *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 70 (1989).

Here, it is undisputed that Ohio State is an arm of the State of Ohio. *See Galli v. Morelli*, 277 F. Supp. 2d 844, 856, n. 13 (S.D. Ohio 2003) ("[T]his Court has repeatedly concluded that OSU is an 'arm or alter ego' of the State of Ohio, and thus protected by the Eleventh Amendment."). Consequently, Ohio State is immune from suit under the Eleventh Amendment.

Plaintiff's arguments to the contrary fail to persuade. First, Plaintiff argues that Congress abrogated Eleventh Amendment immunity when it passed Title IX. The Court agrees with Plaintiff that this is well settled. However, Plaintiff's argument regarding Title IX is irrelevant to whether Ohio State

is entitled to Sovereign Immunity for Plaintiff's § 1983 claim. Plaintiff's contention that Congress abrogated Eleventh Amendment immunity in § 1983 claims is incorrect. *E.g.*, *Will v. Mich. Dept. of State Police*, 491 U.S. 58, 66 (1989) ("That Congress, in passing § 1983, had no intention to disturb the States' Eleventh Amendment immunity and so to alter the federal-state balance in that respect was made clear in our decision in *Quern*.").

Plaintiff next asserts that a state waives Eleventh Amendment immunity for § 1983 claims. This is a misstatement of the law. Although a state *may* waive its sovereign immunity in a § 1983 suit, Ohio State has not done so here and has, instead, specifically invoked sovereign immunity as a defense.

Third, Plaintiff contends that § 1983 allows for monetary damages against state employees. While this is accurate insofar as sovereign immunity is no bar to suits for monetary relief against state employees in their personal capacities, Plaintiff is suing only a state entity, not a state employee. Accordingly, this argument is inapposite.

Finally, Plaintiff argues that the Eleventh Amendment does not bar prospective injunctive relief. It seems that Plaintiff is trying to invoke the *Ex parte Young* exception, under which "a federal court can issue prospective injunctive and declaratory relief compelling a state official to comply with federal law." *S & M Brands, Inc. v. Cooper*, 527 F.3d 500, 507–08 (6th Cir. 2008) (quotation marks and internal citations omitted). However, the *Ex parte Young* exception applies only to state officials, not to state entities. *Id.*; *see also Sims v. Univ. of Cincinnati*, 46 F. Supp. 2d 736, 737 (S.D. Ohio 1999), *aff'd*, 219 F.3d 559 (6th Cir. 2000) (citing *Seminole Tribe of Fla. v.*

Fla., 517 U.S. 44, 58 (1996)) ("The type of relief sought is irrelevant to the issue of whether a suit against the state or a state agency is barred by the Eleventh Amendment."). Because Plaintiff is suing only a state entity—and because he does not seek injunctive relief—he cannot rely on the *Ex parte Young* doctrine to save his claims.

For each of the above reasons, Plaintiff's § 1983 claim is barred by sovereign immunity and must be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1).

V. Fraudulent Concealment

Finally, Plaintiff's fraudulent concealment claim fails. To begin, to the extent that Plaintiff asserts a fraudulent concealment claim as an independent cause of action, that claim is dismissed without prejudice. As discussed herein, all of Plaintiff's federal claims have been dismissed. The remaining fraudulent concealment claim is a state-law claim, and so the Court declines to exercise its supplemental jurisdiction over it.

Although the Court does have discretion to maintain supplemental jurisdiction, "a federal court that has dismissed a plaintiff's federal-law claims should not ordinarily reach the plaintiff's state-law claims." *Rouster v. Cty. of Saginaw*, 749 F.3d 437, 454 (6th Cir. 2014); *see also Osborn v. Haley*, 549 U.S. 225, 245 (2007). "When all federal claims are dismissed before trial, the balance of considerations usually will point to dismissing the state law claim. . . ." *Musson Theatrical, Inc. v. Fed. Exp. Corp.*, 89 F.3d 1244, 1254–55 (6th Cir. 1996). A district court shall "consider and weigh several factors" when determining whether to exercise supplemental

jurisdiction, including the "values of judicial economy, convenience, fairness, and comity." *Gamel v. City of Cincinnati*, 625 F.3d 949, 951 (6th Cir. 2010) (citing *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988)). District courts can also consider factors such as: whether the plaintiff engaged in manipulation by dismissing federal claims; whether discovery had been completed; the degree of familiarity the court has with the issues; and if the court had invested significant time in the decision. *Gamel*, 625 F.3d at 952.

On balance, the Court finds the weight of these factors is against the continued exercise of supplemental jurisdiction. Although the Court does have familiarity with this case, the other factors weigh against the continued exercise of supplemental jurisdiction over the state-law claim. First, all federal claims have been dismissed, and only a state-law claim remains. Second, while the Court may have presided over this case for almost two years, the case is still in relative infancy; for example, the parties have not yet submitted a Rule 26(f) report, and no pre-trial deadlines have been set. Third, whether Ohio courts even recognize a stand-alone claim for fraudulent concealment is an unclear issue best left for the state courts to determine. *Compare Richards v. St. Thomas Hosp.*, 492 N.E.2d 821, 824, n.3 (1986) (stating that, outside of statute, there is no claim for fraudulent concealment) *with Milner v. Biggs*, 522 F. App'x 287, 294 (6th Cir. 2013) (analyzing a claim for fraudulent concealment under the same standard as a claim for fraud). Finally, there is "a strong presumption in favor of dismissing supplemental claims" once the federal claims have been dismissed. *Musson Theatrical, Inc.*, 89 F.3d at 1255. These

factors taken together weigh against the continued exercise of supplemental jurisdiction. Accordingly, the Court declines to exercise supplemental jurisdiction over any stand-alone state-law fraudulent concealment claim.

Neither does fraudulent concealment toll the statute of limitations on Plaintiffs' Title IX claim in this case, for the reasons addressed in *Garrett*.

VI. Leave to Amend

Plaintiff's request for leave to amend is denied because amendment would be futile.

VII. Conclusion

For the reasons addressed above, Plaintiff's Title IX claim is **DISMISSED WITH PREJUDICE.** Plaintiff's § 1983 claim and fraudulent concealment claim are **DISMISSED WITHOUT PREJUDICE.** The Clerk shall enter judgment for Defendant and terminate this case.

IT IS SO ORDERED.

/s/ Michael H. Watson
MICHAEL H. WATSON, JUDGE
UNITED STATES DISTRICT COURT

[Filed October 25, 2021]
[2021 WL 7186267]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

John Does 151–166,
Plaintiffs,
v.
The Ohio State University,
Defendant.

Case No. 2:20-cv-3817
Judge Michael H. Watson
Magistrate Judge Preston Deavers

OPINION AND ORDER

Plaintiff 162 ("Plaintiff") is the only remaining plaintiff in this case. Plaintiff sues The Ohio State University ("Ohio State") based on sexual abuse he suffered at the hands of Dr. Strauss ("Strauss") when he visited Ohio State as a high school student. Amend. Compl., ECF No. 28. He sues Ohio State under a Title IX heightened risk theory. *Id.* ¶¶ 156–76. It appears Plaintiff bases his Title IX theory on the abuse by Strauss and Ohio State's contemporaneous response—or lack thereof—when it learned about that abuse. *Id.* Ohio State moves to dismiss all claims. Mot. Dismiss, ECF No. 31. Plaintiff responded, Resp. ECF No. 34, and Ohio State replied. Reply, ECF No. 37.

The Court **GRANTS** Ohio State's motion to dismiss for the reasons set forth in the Opinions and Orders issued in *Garrett* and *Ratliff*. Case Nos. 2:18-cv-692 and 2:19-cv-4746. The reasons requiring

dismissal in those cases apply equally to this case. *See, e.g.*, Amend. Compl. ¶¶ 10, 13, 28, 31, 71–88, 115, 124–25, ECF No. 28.

Finally, the Court does not address the standing arguments. Whether Plaintiff has standing to sue under Title IX as a non-student is irrelevant in light of the Court's conclusion that the claim is barred by the statute of limitations.

The Court hopes that, notwithstanding the Court's ruling on the statute of limitations issue and fact that Ohio State's voluntary settlement program has closed, Ohio State will stand by its promise to "do the right thing," and continue settlement discussions with Plaintiff.

The Clerk is **DIRECTED** to enter judgment for Ohio State and close the case.

IT IS SO ORDERED.

/s/ Michael H. Watson
MICHAEL H. WATSON, JUDGE
UNITED STATES DISTRICT COURT

[Filed October 25, 2021]
[2021 WL 7186246]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

John Does 172–191, *et al.*, Plaintiffs, v. The Ohio State University, Defendant.	Case No. 2:21-cv-2121 Judge Michael H. Watson Magistrate Judge Preston Deavers

OPINION AND ORDER

In this case, twenty plaintiffs ("Plaintiffs") sue The Ohio State University ("Ohio State") based on sexual abuse they suffered at the hands of Dr. Strauss ("Strauss") while students at Ohio State. Amend. Compl., ECF No. 8. They sue Ohio State under the following theories of Title IX liability: (1) heightened risk; and (2) hostile environment. *Id.* ¶¶ 356–384. It appears Plaintiffs base each Title IX theory on the abuse by Strauss, the sexually charged environment at Larkins Hall, and Ohio State's contemporaneous response—or lack thereof—when it learned about both. *Id.* Ohio State moves to dismiss all claims. Mot. Dismiss, ECF No. 9. Plaintiffs responded, Resp. ECF No. 14, and Ohio State replied. Reply, ECF No. 17.

The Court **GRANTS** Ohio State's motion to dismiss for the reasons set forth in the Opinions and

Orders issued in *Garrett* and *Ratliff*. Case Nos. 2:18-cv-692 and 2:19-cv-4746. The reasons requiring dismissal in those cases apply equally to this case. *See, e.g.*, Amend. Compl. ¶¶ 13, 28, 31, 43–270, 310, 312, 319, 321, 345–55, ECF No. 8.[1]

Plaintiffs also argue that the filing of the *Garrett* Complaint tolled their statute of limitations under *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974). Resp. 17–18, ECF No. 14. Given that the Court has already dismissed the claims in *Garrett* as barred by the statute of limitations, this argument is unpersuasive.

The Court hopes that, notwithstanding the Court's ruling on the statute of limitations issue and fact that Ohio State's voluntary settlement program has closed, Ohio State will stand by its promise to "do the right thing," and continue settlement discussions with Plaintiffs.

The Clerk is **DIRECTED** to enter judgment for Ohio State and close the case.

IT IS SO ORDERED.

/s/ Michael H. Watson
MICHAEL H. WATSON, JUDGE
UNITED STATES DISTRICT COURT

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[1] John Doe 182 attended Ohio State from 1981–85, but apparently returned to graduate in 2020. Amend. Compl. ¶ 152, ECF No. 8. However, all of the harms which he experienced occurred during his time at Ohio State in the 1980s. *Id.* ¶¶ 153–55. In spite of his late graduation date, then, the analyses in *Garrett* and *Ratliff* applies equally to him.

[Filed October 25, 2021]
[2021 WL 7186262]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

John Does 192–217,
Plaintiffs,
v.
The Ohio State University,
Defendant.

Case No. 2:21-cv-2527
Judge Michael H. Watson
Magistrate Judge Preston Deavers

OPINION AND ORDER

In this case, twenty-six plaintiffs ("Plaintiffs") sue The Ohio State University ("Ohio State") based on sexual abuse they suffered at the hands of Dr. Strauss ("Strauss") while students at Ohio State. Amend. Compl., ECF No. 14. They sue Ohio State under the following theories of Title IX liability: (1) heightened risk; and (2) hostile environment. *Id.* ¶¶ 414–42. It appears Plaintiffs base each Title IX theory on the abuse by Strauss, the sexually charged environment at Larkins Hall, and Ohio State's contemporaneous response—or lack thereof—when it learned about both. *Id.* Ohio State moves to dismiss all claims. Mot. Dismiss, ECF No. 15. Plaintiffs responded, Resp. ECF No. 20, and Ohio State replied. Reply, ECF No. 23.

The Court **GRANTS** Ohio State's motion to dismiss for the reasons set forth in the Opinions and Orders issued in *Garrett* and *Ratliff*. Case Nos. 2:18-

cv-692 and 2:19-cv-4746. The reasons requiring dismissal in those cases apply equally to this case. *See, e.g.*, Amend. Compl. ¶¶ 13, 28, 31, 43–327, 367, 369, 378, 403–413, ECF No. 14.

Plaintiffs also argue that the filing of the *Garrett* Complaint tolled their statute of limitations under *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974). Resp. 15–16, ECF No. 20. Given that the Court has already dismissed the claims in *Garrett* as barred by the statute of limitations, this argument is unpersuasive.

Finally, the Court does not address the standing arguments. Whether the non-student Plaintiffs have standing to sue under Title IX is irrelevant in light of the Court's conclusion that the claims are barred by the statute of limitations.

The Court hopes that, notwithstanding the Court's ruling on the statute of limitations issue and fact that Ohio State's voluntary settlement program has closed, Ohio State will stand by its promise to "do the right thing," and continue settlement discussions with Plaintiffs.

The Clerk is **DIRECTED** to enter judgment for Ohio State and close the case.

IT IS SO ORDERED.

/s/ Michael H. Watson
MICHAEL H. WATSON, JUDGE
UNITED STATES DISTRICT COURT

[Filed October 25, 2021]
[2021 WL 7186208]

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Michael Alf, *et al.*, Plaintiffs, v. The Ohio State University, Defendant.	Case No. 2:21-cv-2542 Judge Michael H. Watson Magistrate Judge Preston Deavers

OPINION AND ORDER

In this case, thirteen plaintiffs ("Plaintiffs") sue The Ohio State University ("Ohio State") based on sexual abuse they suffered at the hands of Dr. Strauss ("Strauss") while students at Ohio State. Compl., ECF No. 1. They sue Ohio State under Title IX. *Id.* ¶¶ 392–428. It appears Plaintiffs base the Title IX claim on the abuse by Strauss and Ohio State's contemporaneous response—or lack thereof—when it learned about the same. *Id.* Ohio State moves to dismiss all claims. Mot. Dismiss, ECF No. 9. Plaintiffs responded, Resp. ECF No. 13, and Ohio State replied. Reply, ECF No. 14.

The Court **GRANTS** Ohio State's motion to dismiss for the reasons set forth in the Opinions and Orders issued in *Garrett* and *Ratliff*. Case Nos. 2:18-cv-692 and 2:19-cv-4746. The reasons requiring dismissal in those cases apply equally to this case. *See, e.g.*, Compl. ¶¶ 8, 35–47, 58, 63–75, 111, 115, 120–24, 132–34, 219, 248, 258, 272–76, ECF No. 1.

Plaintiffs also argue that the filing of the *Garrett* Complaint tolled their statute of limitations under *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974). Resp. 7–9, ECF No. 13. Given that the Court has already dismissed the claims in *Garrett* as barred by the statute of limitations, this argument is unpersuasive.

Finally, the Court does not address the punitive damages arguments. Whether Plaintiffs could recover punitive damages is irrelevant in light of the Court's conclusion that their claim is barred by the statute of limitations.

The Court hopes that, notwithstanding this ruling on the statute of limitations issue and fact that Ohio State's voluntary settlement program has closed, Ohio State will stand by its promise to "do the right thing," and continue settlement discussions with Plaintiffs.

The Clerk is **DIRECTED** to enter judgment for Ohio State and close the case.

IT IS SO ORDERED.

/s/ Michael H. Watson
MICHAEL H. WATSON, JUDGE
UNITED STATES DISTRICT COURT

[Filed October 25, 2021]
[2021 WL 7186260]

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Michael Canales, *et al*., Plaintiffs, v. The Ohio State University, Defendant.	Case No. 2:21-cv-2562 Judge Michael H. Watson Magistrate Judge Preston Deavers

OPINION AND ORDER

In this case, Michael Canales and John Doe 20 (collectively "Plaintiffs") sue The Ohio State University ("Ohio State") based on sexual abuse they suffered at the hands of Dr. Strauss ("Strauss") while students at Ohio State. Compl., ECF No. 1. Plaintiffs assert the following claims: (1) violations of Title IX; (2) violations of Title IX, deliberate indifference; (3) fraudulent concealment; (4) violations of Title IX, unlawful retaliation; and (5) constitutional rights violations pursuant to 42 U.S.C. § 1983. *Id.* ¶¶ 106–80. It appears Plaintiffs base their claims on the abuse by Strauss, the sexually charged environment at Larkins Hall, and Ohio State's contemporaneous response—or lack thereof—when it learned about both. *Id.* Ohio State moves to dismiss all claims. Mot. Dismiss, ECF No. 9. Plaintiffs responded, Resp. ECF No. 11, and Ohio State replied. Reply, ECF No. 13.

As an initial matter, Plaintiffs move for leave to file their response to Defendant's motion after the deadline to do so. The Court notes that Plaintiffs' motion complies with neither the local rules nor the Undersigned's standing orders. Nonetheless, the motion is **GRANTED,** and the Court considers Plaintiffs' response.

Turning to Defendant's motion to dismiss, the Court **GRANTS** Ohio State's motion for the reasons set forth in the Opinions and Orders issued in *Garrett* and *Ratliff*. Case Nos. 2:18-cv-692 and 2:19-cv-4746. The reasons requiring dismissal in those cases apply equally to this case. *See, e.g.*, Compl. ¶¶ 5, 8–16, 44–55, 67, 82, 92, 94–100,106–180, ECF No. 1.

The Court hopes that, notwithstanding this ruling and the fact that Ohio State's voluntary settlement program has closed, Ohio State will stand by its promise to "do the right thing," and continue settlement discussions with Plaintiffs.

The Clerk is **DIRECTED** to enter judgment for Ohio State and close the case

IT IS SO ORDERED.

/s/ Michael H. Watson

MICHAEL H. WATSON, JUDGE
UNITED STATES DISTRICT COURT

20 U.S.C. § 1681

§ 1681. Sex

(a) Prohibition against discrimination; exceptions

No 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, except that:

(1) Classes of educational institutions subject to prohibition

in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;

(2) Educational institutions commencing planned change in admissions

in regard to admissions to educational institutions, this section shall not apply (A) for one year from June 23, 1972, nor for six years after June 23, 1972, in the case of an educational institution which has begun the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Secretary of Education or (B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students of only one sex to being an institution which admits students of both sexes, but only if it is carrying out

a plan for such a change which is approved by the Secretary of Education, whichever is the later;

(3) Educational institutions of religious organizations with contrary religious tenets

this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;

(4) Educational institutions training individuals for military services or merchant marine

this section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine;

(5) Public educational institutions with traditional and continuing admissions policy

in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex;

(6) Social fraternities or sororities; voluntary youth service organizations

this section shall not apply to membership practices—

(A) of a social fraternity or social sorority which is exempt from taxation under section 501(a) of title 26, the active membership of which consists primarily of students in

attendance at an institution of higher education, or

(B) of the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth service organizations which are so exempt, the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age;

(7) Boy or Girl conferences

this section shall not apply to—

(A) any program or activity of the American Legion undertaken in connection with the organization or operation of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(B) any program or activity of any secondary school or educational institution specifically for—

(i) the promotion of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(ii) the selection of students to attend any such conference;

(8) Father-son or mother-daughter activities at educational institutions

this section shall not preclude father-son or mother-daughter activities at an educational institution, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided for students of the other sex; and

(9) Institution of higher education scholarship awards in "beauty" pageants

this section shall not apply with respect to any scholarship or other financial assistance awarded by an institution of higher education to any individual because such individual has received such award in any pageant in which the attainment of such award is based upon a combination of factors related to the personal appearance, poise, and talent of such individual and in which participation is limited to individuals of one sex only, so long as such pageant is in compliance with other nondiscrimination provisions of Federal law.

(b) Preferential or disparate treatment because of imbalance in participation or receipt of Federal benefits; statistical evidence of imbalance

Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: *Provided*, That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt

of the benefits of, any such program or activity by the members of one sex.

(c) "Educational institution" defined

For purposes of this chapter an educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department.

20 U.S.C. § 1687

§ 1687. Interpretation of "program or activity"

For the purposes of this chapter, the term "program or activity" and "program" mean all of the operations of—

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section section[1] 7801 of this title), system of vocational education, or other school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

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1 So in original.

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance, except that such term does not include any operation of an entity which is controlled by a religious organization if the application of section 1681 of this title to such operation would not be consistent with the religious tenets of such organization.