No. 22-897

In The
Supreme Court of the United States

THE OHIO STATE UNIVERSITY,

Petitioner,

vs.

EDWARD GONZALES, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Title IX of the Education Amendments of 1972 prohibits federal fund recipients from subjecting any person to discrimination on the basis of sex, including sexual abuse and harassment. 20 U.S.C. § 1681(a). A school "subjects" a student to sex-based discrimination under Title IX if the school's deliberate indifference "cause[s a plaintiff] to undergo harassment" or makes them "vulnerable to it." *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 644–45 (1999) (internal quotations modified). A plaintiff may state a claim against a school for sexual harassment by a school employee only if an "appropriate person" at the school had "actual knowledge" of harassment and was deliberately indifferent to it. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 285, 290 (1998). A Title IX claim thus has two separate components, characterized by the conduct of two different actors: (1) "actionable harassment" by someone associated with the federal fund recipient, and (2) "deliberate indifference" by a federal fund recipient with actual notice to an appropriate person. *Davis*, 526 U.S. at 642–43, 651–52.

The question presented is:

> Did the court of appeals correctly hold, in line with all other circuits and this Court's precedent, that a Title IX claim cannot be alleged and, thus, cannot accrue before the plaintiff knew or should have known of the University's deliberate indifference to sexual abuse by its employee?

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INTRODUCTION

This case centers on facts first unearthed in a year-long, multi-million-dollar independent investigative report, commissioned in 2018 and published in 2019, revealing that Petitioner Ohio State had received complaints about sexual misconduct by its sports team physician, Dr. Richard Strauss, beginning as early as his first year in 1979, but rather than take action to stop Strauss, Ohio State covered up the abuse, destroyed evidence, and falsified records. It went to great lengths to conceal Strauss's misconduct and its own, from its students, the public, and even from itself, at the time of the first reported abuse and for the following forty years.

The Sixth Circuit confirmed that Respondents (Plaintiffs below), who alleged they were sexually abused by Strauss as students, stated a timely Title IX claim against the Ohio State University by plausibly alleging that, until 2018 at the *earliest*, "they did not know and lacked reason to know that Ohio State caused their injury," and by plausibly alleging that "even if they had investigated further, they could not have learned" of Ohio State's misconduct—as opposed to Strauss's misconduct. *Gonzales* Pet. App. 9a.

Ultimately, the Sixth Circuit held that the question of "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

we cannot resolve on a motion to dismiss." *Id*. at 10a–11a.

In so holding, the Sixth Circuit applied an earlier panel's decision in a related case, *Snyder-Hill v. Ohio State Univ.*, 48 F.4th 686 (6th Cir. 2022) (the subject of Ohio State's petition for certiorari in Case No. 22-896), which had thoughtfully considered—and soundly rejected—the merits arguments that drive Ohio State's petition here: (1) that the "occurrence" rather than the "discovery" rule governs Title IX claim accrual and, if not, (2) the accrual date for Title IX claims under the discovery rule is tied to the date of discovery of the underlying sexual abuse—not discovery of the federal fund recipient's deliberate indifference—as a matter of law.[1]

In its petition, Ohio State seeks this Court's review by miscasting the *Snyder-Hill* decision as "directly contraven[ing] this Court's claim-accrual precedents"; "conflict[ing] with the decisions of other circuits"; and staking out an "extreme new position." *Snyder-Hill* Pet. 12; *id*. at i; *id*. at 3; *see also Gonzales* Pet. 5, 7. The *Snyder-Hill* decision does *none* of these things. Contrary to Ohio State's exaggerated and misleading claims, the decision is consistent with this Court's precedent and is aligned with all circuit court decisions to rule directly on this issue.

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[1] In addition to its order in *Garrett*, the Sixth Circuit issued *Per Curiam* orders for several of the Respondents, vacating the district court's decisions in the various cases in light of the earlier *Snyder-Hill* decision.

The disconnect between the petition's disingenuous arguments of conflict and the Sixth Circuit's actual holding is reason alone to deny review. Indeed, Ohio State fails to identify a single decision of this Court or any circuit court that has considered the issue and reached a different conclusion.

By contrast, the accrual rule Ohio State seeks *would* be an unprecedented and extreme rule for Title IX pre-assault claims, tethering accrual, as a matter of law, to the date of the perpetrator-employee's underlying act of sexual abuse. Citing occurrence-rule accrual cases, Ohio State entirely disregards that in a Title IX case, sexual abuse by the underlying tortfeasor is distinct from deliberate indifference resulting in deprivation of educational benefits by the institution. However, deliberate indifference cannot be proven by *respondeat superior*, so even assuming that Plaintiffs knew they had been sexually abused by Strauss, this fact does not create Title IX liability for Ohio State. Nor does it mean any Plaintiff would have known *Ohio State* had injured them. And Ohio State, of course, can only be sued for *its own* misconduct. *See Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 640 (1999) ("a recipient of federal funds may be liable in damages under Title IX only for its own misconduct."); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 291 (1988) (holding that a recipient of federal funds is not liable for its employees' independent actions, but for its own deliberate indifference to known acts of sexual harassment by a teacher). Ohio State's proposed rule would depart from federal civil rights claims-accrual

jurisprudence up to this point; would contradict the express purpose of Title IX; and would create a perverse incentive for federal fund recipients to ignore and/or conceal underlying abuse until the clock runs, all while stripping "blameless[ly] ignoran[t]" victims of any remedy for the recipient's deliberate indifference, *Urie v. Thompson*, 337 U.S. 163, 169 (1949)—a result that would essentially eliminate the private cause of action that this Court recognized over forty years ago in *Cannon v. Univ. of Chicago*, 441 U.S. 677, 709 (1979).

There is no precedent that supports such a draconian federal accrual rule in civil rights cases. The Sixth Circuit correctly rejected Ohio State's invitation to adopt one. Instead, it applied established federal claims-accrual precedent to harmonize itself with all circuits having addressed the question, by applying the discovery rule to determine accrual under Title IX when the factual allegations call for it—as they do here. Review is not warranted and the petition should be denied.

STATEMENT OF THE CASE

I. Background of Respondents' Title IX Claims.

1. The salient facts for determining the federal accrual of the statute of limitations under the motion

to dismiss standards are the factual allegations in Respondents' (Plaintiffs below) operative complaints.[2]

Strauss was employed by Ohio State as an associate professor, physician, and sports team doctor from 1978 to 1998, during which time he harassed, molested, assaulted, and sodomized many hundreds of male students and student-athletes. *Gonzales* Pet. App. 3a.

As first revealed by the Report published by Perkins Coie LLP, Ohio State officials were put on notice that Strauss was conducting sexually inappropriate examinations beginning "as early as Strauss's first year as team physician in 1979." *Gonzales* Pet. 4a (citing Markus Funk and Caryn Trombino, Perkins Coie LLP, *Report of the Independent Investigation, Sexual Abuse Committed by Dr. Richard Strauss at The Ohio State University*, May 15, 2019 (Perkins Coie Report)), and students continued to try

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[2] Where necessary, citations for factual allegations will be made to the operative Consolidated Class Action Complaint in *Garrett v. Ohio State Univ.*, No. 18-692 (S.D. Ohio), available at docket number 157 in the district court and identified as "Compl." Note: Plaintiff Brian Garrett, who was singled out in Ohio State's motion to dismiss in the district court, was not a party to the appeal although the decision bore his name. The *Garrett* case is restyled in this Court as *Gonzales*.

Although all Respondents jointly file this Brief in Opposition, their cases remain separate at the district court level and on a motion to dismiss each Complaint must be assessed for the factual allegations plead by the respective plaintiffs, some of which vary across the cases. However, the underlying facts relevant to the statute of limitation and accrual question in the petition are generally similar across all of Respondents' cases.

to report sexual abuse over the next twenty years, although many were unaware that the medical exams they had received were not medically appropriate. *Gonzales* Pet. App. 3a–4a.

However, during these two decades, from 1978 to 1998, Ohio State protected Strauss, legitimized his conduct, and enabled him to continue preying on students. *Gonzales* Pet. App. 4a. Ohio State took no action to investigate, to intervene, to share, to escalate, to publicize, to remove, to discipline, to report, or to otherwise protect students from Strauss. *Gonzales* Pet. App. 4a. Strauss's personnel file was devoid of reports of misconduct and instead contained glowing performance reviews; most of his colleagues knew nothing of any reports against him—thus, no students were aware (nor could they have uncovered) such reports. *Gonzales* Pet. App. 4a; *Snyder-Hill* Pet. App. 7a.[3] Ohio State allowed Strauss to quietly retire in

[3] Nor could any student know how many in university leadership were aware of complaints and had failed to take any action that would have prevented their abuse, the hallmark of a pre-assault deliberate indifference/heightened risk claim. *See Gonzales* Pet. App. 4a; *see also* Compl. ¶ 6, 7, 9 (Dr. Ted Grace, former Director of OSU Student Health Services, and Dr. Roger Miller, former Chief of Preventative Medicine and Lead Physician at OSU student Health Services, both testified that they did not know how any student would have learned that Ohio State had notice of prior reports; Dr. Miller and Dr. Trent Sickles, Medical Director, OSU Sports Medicine and Family Health, testified they didn't know until the Perkins Coie Report that there had been student complaints about their colleague, Strauss).

1998 and decorated his legacy by granting him emeritus status. *Gonzales* Pet. App. 3a.[4]

Strauss's rampant abuse and Ohio State's own failures remained buried for the next two decades, from 1998 to 2018-19. In the spring of 2018, a whistleblower first publicized what Strauss had done to him, spurring Ohio State to announce, on April 5, 2018, that it was undertaking an investigation to determine what had happened and who, at Ohio State, knew what and when about Strauss. *See Gonzales* Pet. App. 3a–4a, 10a; *Snyder-Hill* Pet. App. 5a, 12a–13a, 34a.[5]

In May 2019, the Perkins Coie Report was publicly released, having uncovered that over the course of Strauss's tenure at Ohio State at least *sixty-seven* agents of Ohio State (almost all of whom were "appropriate persons" for purposes of Title IX)[6] had

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[4] In its petition, Ohio State asserts simply (and misleadingly) that, "[f]ollowing multiple reports of abuse, Ohio State placed Strauss on administrative leave in 1996." *Gonzales* Pet. 2. But this closed-door decision, and the reasons for it, were not publicized and Strauss remained a tenured faculty member. Compl. ¶¶ 142, 350–353, 358, 368, 399, 402–03, 477.

[5] Compl. ¶¶ 4, 10, 208, 388, 440–46, 487, 507, 664.

[6] Compl. ¶¶ 505-21 (cataloguing the Report's recitation of Ohio State agents with knowledge as including at least two (2) Ohio State Athletic Directors, two (2) Ohio State Head Team Physicians, six (6) Ohio State Assistant Athletic Directors, five (5) Ohio State Team Physicians, twenty-two (22) Ohio State Coaches, one (1) Ohio State Athletic Training Director, four (4) Ohio State Athletic Trainers, eighteen (18) Ohio State Student Trainers, four (4) Ohio State Student Health Officials, three (3) Ohio State Student Health employees, and unknown others).

received reports about Strauss's misconduct but that the University had undertaken no meaningful investigation or action. *Gonzales* Pet. 4a. Between 2018 and 2021, Strauss's victims filed suit under Title IX, 20 U.S.C. §§ 1681, *et seq*.,[7] (the earliest they could do so consistent with Rule 11) against Ohio State for its deliberately indifferent misconduct—misconduct that was inherently unknowable due to the University's concealment. *Gonzales* Pet. App. 5a; *see* Fed. R. Civ. P. 11(b)(3).

Because of Ohio State's "key and active" cover-up and whitewashing of Strauss's personnel file, *Gonzales* Pet. App. 4a, Strauss's victims never knew and had no way to know that Ohio State had been deliberately indifferent to Strauss's prolonged history of sexual abuse—until Ohio State itself spent millions of dollars on the year-long independent investigation by Perkins Coie, which interviewed over 550 witnesses, reviewed over 800 boxes of hard copy documents, and retained

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[7] The operative date of the filing of the Title IX claims for each and every member of the class (named and unnamed) is July 16, 2018, the date of the original class action complaint in *Garrett v. Ohio State Univ.*, No. 18-692 (S.D. Ohio). The filing tolls the statute of limitations until class certification is denied. *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974) (footnote omitted) ("[T]he commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action."); *see also Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 346–47 (1983) (extending doctrine, holding "all members of the putative class [may] file individual actions in the event that class certification is denied, provided . . . that those actions are instituted within the time that remains on the limitations period.").

medical experts, to uncover the truth of deliberate indifference as reflected in the Report. *Id.*; *Snyder-Hill* Pet. App. 8a.

Even assuming Plaintiffs knew they were molested by Strauss (not a foregone conclusion), it was not until 2018-19 that survivors of Strauss's abuse could have suspected that they were also victims of Ohio State's indifference to prior reports. *Gonzales* Pet. App. 4a.[8]

2. In the operative complaints, Plaintiffs allege that Ohio State's pre-assault failures and its policies and practices put students at heightened risk for sexual assault by Strauss. *Gonzales* Pet. App. 31a. Ohio State filed motions to dismiss the complaints as time-barred by Ohio's two-year statute of limitations for personal-injury claims. *Gonzales* Pet. App. 31a. Ohio State's Rule 12(b)(6) motion did not assert that Plaintiffs failed to plausibly allege a violation of Title IX, only that the claim was untimely. *Id*.

II. District Court's Dismissal of the Claims as Untimely.

1. In its order on Ohio State's motion the district court stated:

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[8] Compl. ¶¶ 392–395, 484–493, 545, 568 (alleging it was not until the Perkins Coie Report came out that survivors knew or could have known of Ohio State's role in the abuse they suffered, how many others suffered, how many and which individuals in Ohio State's leadership had been aware of prior reports and had done nothing, and that, instead of preventing the abuse that happened to each of them, Ohio State had protected Strauss).

> 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.

Gonzales Pet. App. 31a–32a.

Nevertheless, the district court concluded that the Title IX claim against Ohio State was time-barred. It reached this conclusion by focusing solely on the dates of sexual abuse by Strauss—*rather than Ohio State's misconduct*—and ignoring Ohio State's concealment. *See Gonzales* Pet. App. 41a–47a; *see also Gonzales* Pet. App. 57a, 60a, 73a, 74a, 76a, 78a, 80a, 83a (dismissing all complaints based on *Garrett* decision).

The district court specifically rejected Plaintiffs' position that, under the discovery rule, claims do not accrue until a plaintiff knows or should know about the institution's deliberate indifference which contributed to cause the injury. *Gonzales* Pet. App. 49a.

2. All plaintiffs timely appealed. At the Sixth Circuit, two cases were consolidated and proceeded to oral argument first, before a single panel (*Snyder-Hill*),

which issued a decision reversing the district court on September 14, 2022, *see Snyder-Hill* Pet. App. 1a. The trio of *Doe* cases were decided by a different panel on December 16, 2022, without argument, *Gonzales* Pet. App. 22a, 25a, 28a. Five cases including the putative class case were ultimately consolidated for argument before yet another panel, which issued its decision (*Garrett*) on February 15, 2023, *Gonzales* Pet. App. 1a.

III. Sixth Circuit's Reversal of the District Court's Decision.

1. As relevant here, the Sixth Circuit in *Garrett* reversed the district court's dismissal on statute-of-limitations grounds. *Gonzales* Pet. App. 1a–12a. It concluded that questions of fact about when a student knew or should have known that Strauss's conduct was sexual abuse, and when a student knew or should have known about the University's role in causing injury, were "questions of fact that we cannot resolve on a motion to dismiss." *Gonzales* Pet. App. 10a–11a.[9]

2. The *Garrett* holding accords with the Sixth Circuit's decision issued just months before in *Snyder-Hill*, in which the Court of Appeals held:

(1) The discovery rule applies to Title IX claims because it "accords with the discovery rule's purposes" and reflects the decisions of other circuits having

[9] In *Garrett*, Plaintiffs also challenged the district court's dismissal of retaliation claims and refusal to recuse, on which the Sixth Circuit ruled against them, *Gonzales* Pet. App. 11a–21a, and on which no review was sought.

reached the issue. *Snyder-Hill* Pet. App. 20a–22a, 25a; *id.* at 22a (noting that a "contrary holding would create an unnecessary circuit split").

(2) In applying the discovery rule to a Title IX claim, a claim accrues when a plaintiff knows or has reason to know that they were injured *and* that the defendant caused their injury. *Snyder-Hill* Pet. App. 25a–26a ("when the discovery rule applies, a claim accrues when a plaintiff knows or has reason to know that the defendant injured them"); *see id.* at 29a, 34a–35a (noting that because a Title IX action is "against the school based on the school's actions or inactions, not . . . the person who abused [them]," a plaintiff's knowledge of their own abuse, or that of others, or the abuser's employment/supervision by the institution, alone, is "not enough to start the clock"); and

(3) Plaintiffs plausibly alleged their Title IX claims did not accrue until at least 2018, thus surviving dismissal. *Snyder-Hill* Pet. App. 2a; *id.* at 38a (concluding plaintiffs plausibly alleged (i) "they did not know or lacked reason to know that Ohio State caused their injury," (ii) "even if they had investigated further, they could not have learned of Ohio State's conduct," and (iii) some plaintiffs "did not know that they were abused"—and each of these grounds, alone, was sufficient to delay accrual).[10]

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[10] The *Garrett* court noted a single distinguishing factual allegation between the allegations here and those in *Snyder-Hill*: while *Snyder-Hill* tied accrual of the claim to the spring 2018 news reports and announcement of an investigation, the *Garrett*

3. With its two Petitions for Writ of Certiorari, Ohio State requests this Court grant review of *Snyder-Hill* (22-896) and hold the petition for review of the *Gonzales* and *Doe* decisions (22-897) pending that review. *Gonzales* Pet. 2.[11]

Neither of these petitions warrants this Court's review, particularly in their current procedural posture. In contending otherwise, Ohio State misrepresents the decisions below and other relevant case law and fails to accept the reality that these cases are at the motion to dismiss stage, which itself makes them a poor vehicle to address the question before the Court.

REASONS FOR DENYING THE PETITION

The Sixth Circuit's decision does not conflict with any decision of this Court or with any circuit courts of appeals' opinions. Rather, the decision conforms to this Court's admonitions that, unlike a statute of repose—which is really what Ohio State seeks here—the purpose of a statute of limitations is to encourage plaintiffs to "pursue 'diligent prosecution of known claims.'" *CTS Corp. v. Waldburger*, 573 U.S. 1, 8

plaintiffs had asserted that "spring of 2018 was the *earliest* they could have known about Ohio State's role in causing their injury" but as a factual matter, they "did not and could not have known of Ohio State's full involvement until the Perkins Coie Report was released in 2019." *Gonzales* Pet. App. 9a–10a.

[11] *Snyder-Hill* also decided a standing issue that Ohio State challenges in 22-896 but that is not raised in 22-897.

(2014).[12] The decision is consistent with this Court's recognition that a discovery accrual rule may apply where a plaintiff does not know he has been injured or the defendant's causal role. *United States v. Kubrick*, 444 U.S. 111, 122 (1979). And the decision gives effect to the axiom that a party should not be permitted to benefit from its own misconduct. *Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231, 232 (1959).

Consistent with every other circuit court of appeal to have addressed the question, the Sixth Circuit correctly held that the federal discovery rule applies to evaluate accrual of Title IX claims—certainly at the pleading stage where fact questions usually prevent accrual and limitations determinations. In its request for review, Ohio State attempts to manufacture a conflict between this case and the Tenth Circuit's decision in *Varnell v. Dora Consol. Sch. Dist.*, and a conflict between this case and the discovery-rule decisions of other circuit courts, all in an effort to champion its own novel, unworkable, "occurrence" rule for Title IX cases which would tether accrual of a claim, as a matter of law, only to the date of the underlying abuse or harassment. *Gonzales* Pet. 13–16.

Like other circuits facing similar questions on similar facts, the Sixth Circuit applied this Court's

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[12] *See id*. at 10 (discussing equitable tolling, noting that the "main thrust" of statutes of limitations is "to encourage the plaintiff to 'pursue his rights diligently,' and when an 'extraordinary circumstance prevents him from bringing a timely action,' the restriction imposed by the statute of limitations does not further the statute's purpose").

precedent to conclude that the trigger for accrual of Plaintiffs' Title IX claim must be the date when Plaintiffs could have first discovered Ohio State's deliberate indifference. Because Plaintiffs plausibly allege that this date was within Ohio's two-year limitations period from the filing of their complaints, the claims are not barred.

I. The Decision Below Is Consistent with Supreme Court Precedent.

Ohio State does not (and cannot) cite *any* decision of this Court holding that the federal discovery rule does not or should not apply to determine accrual of claims under Title IX or any analogous federal civil rights cases. Instead, this Court has repeatedly acknowledged that "[f]ederal courts . . . generally apply a discovery accrual rule when a statute is silent on the issue." *Rotella v. Wood*, 528 U.S. 549, 555 (2000). The Sixth Circuit's decision to do so here in the Title IX context follows this Court's precedent and does not justify review.

a. This Court has consistently acknowledged application of the federal discovery rule in cases involving federal claims without explicit statutory directives regarding accrual.

With a string citation to cases from this Court, Ohio State erroneously argues that the Sixth Circuit's

decision "flouts" Supreme Court authority that the "occurrence" rule, not the "discovery" rule, is the default rule governing accrual of federal causes of action. *Snyder-Hill* Pet. 17; *see also Gonzales* Pet. 8. But *not one* of the eleven cases Ohio State cites holds that the occurrence rule is the accrual yardstick for Title IX claims. In fact, *none* of the cases Ohio State cites even arise under Title IX. *See Wallace v. Kato*, 549 U.S. 384, 388, 397 (2007) (affirming dismissal of § 1983 claim as untimely, no discussion of discovery rule); *Bay Area Laundry & Dry Cleaning Pension Tr. Fund v. Ferbar Corp. of Cal., Inc.*, 522 U.S. 192, 201, 210 (1997) (reversing in part dismissal of claim under Multiemployer Pension Plan Amendments Act, no discussion of discovery rule); *Rotkiske v. Klemm*, 140 S. Ct. 355, 360–62 (2019) (reversing application of discovery rule in FDCPA case because statute set accrual on "date on which the violation occurs," not its discovery); *McDonough v. Smith*, 139 S. Ct. 2149, 2155 (2019) (addressing § 1983, due process, and malicious prosecution claims, no discussion of discovery rule but noting a claim presumptively accrues "when the plaintiff has 'a complete and present cause of action' "); *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 580 U.S. 328, 331–32, 337 (2017) (Patent Act case, no discussion of discovery rule); *Green v. Brennan*, 578 U.S. 547, 554 (2016) (addressing timely exhaustion of administrative remedy in Title VII case, holding 45-day clock for notice to EEOC of constructive discharge claim begins running upon employee's resignation); *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 670 (2014) (holding equitable doctrine of

laches cannot bar a claim under Copyright Act that is otherwise timely under the Act's three-year statute of limitations); *Gabelli v. S.E.C.*, 568 U.S. 442, 450–51, 454 (2013) (holding discovery rule did not apply to save government's untimely enforcement action under Investment Advisers Act's five-year statute of limitations for civil penalties in securities fraud case); *Merck & Co., Inc. v. Reynolds*, 559 U.S. 633, 644–45 (2010) (applying discovery rule based on text of Securities Exchange Act's statute of limitations as accruing from date of discovery of injury); *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 418 (2005) (False Claims Act claims and retaliation claims, no discussion of discovery accrual rule; rejecting defendant's argument that statute of limitation for retaliation claim began running on the date the FCA violation occurred, which would start the clock before retaliation occurred, and could result in retaliation claim being time-barred before it accrues); *Kubrick*, 444 U.S. at 122–23 (following judgment for veteran under Federal Tort Claims Act, applying discovery rule but rejecting plaintiffs' proposed accrual date); *Clark v. Iowa City*, 87 U.S. 583, 589–90 (1874) (concluding that breach of contract claim for non-payment on bond coupons brought fourteen years after payment was due was barred by ten-year statute of limitations; rejecting argument that claim accrued when bonds matured rather than when the interest payment was due and unpaid).

Ohio State relies heavily on *Wallace v. Kato* for its claim that the occurrence rule "governs the accrual" of federal causes of action unless Congress provides otherwise. *Snyder-Hill* Pet. 18; *Gonzales* Pet. 8. In *Wallace*, unlike here, there was "no dispute that petitioner could have filed suit as soon as the allegedly wrongful arrest occurred." *See* 549 U.S. at 388. *Wallace* focused on divining whether the injury resulting from false arrest occurs, for purposes of a § 1983 claim, at the time of the arrest, the arraignment, or upon dismissal of the charges and release. *Id.* at 384, 391–92 (holding, on appeal from summary judgment, that statute of limitations for § 1983 claim for unlawful arrest accrued when plaintiff was bound over for trial, not when he was later released). *Wallace* simply did not implicate the discovery rule on its facts. Nor does *Wallace* or its progeny foreclose the discovery rule's application.[13] *See McDonough*, 139 S. Ct. at 2155 (holding that when "a § 1983 claim accrues 'is a question of federal law,' 'conforming in general to common-law tort principles.' That time is presumptively when the plaintiff has 'a complete and present cause of action,' *though the answer is not always so simple*") (internal quotation marks

[13] The *Rotkiske* decision did not change this tradition. *Snyder-Hill* Pet. 3; *Gonzales* Pet. 8 (citing *Rotkiske*, 140 S. Ct. at 360). *Rotkiske* interpreted a provision enacted by Congress—under the Fair Debt Collections Practices Act (FDCPA)—which expressly required claims to be brought "within one year from the date on which the violation occurs." 140 S. Ct. at 358 (quoting 15 U.S.C. § 1692k(d)). In *Rotkiske*, the Court declined to apply the discovery rule to enlarge the timeframe expressly set by Congress in the Act. *Id.* at 360.

omitted/modified for clarity) (internal citations omitted) (emphasis added); *see also id*. at 2160 (recognizing that "[t]he Court has never suggested that the date on which a constitutional injury first occurs is the only date from which a limitations period may run").

Ohio State's reliance on an out-of-context quote from the Court's decision in *Rotella* that "discovery of the injury, not discovery of the other elements of a claim, is what starts the clock" is also unavailing. *See Gonzales* Pet. 8; *Snyder-Hill* Pet. 3, 23 (quoting *Rotella*, 528 U.S. at 555). As the *Snyder-Hill* decision correctly noted, *see Snyder-Hill* Pet. App. 27a, the rest of the passage in *Rotella*, in context, makes clear that "'a plaintiff's ignorance of his legal rights'" is distinct from "'his ignorance of the fact of his injury or its cause,'" and that the discovery rule does not extend to excuse the former. 528 U.S. at 555–56 (quoting *Kubrick*, 444 U.S. at 122).

Ohio State nevertheless proffers the occurrence rule here on the basis that it "sets a fixed date" for claim accrual that "advance[es] the policies" behind limitations provisions. *Snyder-Hill* Pet. 19. But, as the Sixth Circuit correctly pointed out, to apply such a rule here "leaves the plaintiff 'at the mercy of' the defendant and unable to file suit." *Snyder-Hill* Pet. App. 21a (quoting *Kubrick*, 444 U.S. at 122); *see id*. ("To say to one who has been wronged, 'You had a remedy, but before the wrong was ascertainable to you, the law stripped you of your remedy,' makes a mockery of the law.") (quoting *City of Aurora v. Bechtel Corp*., 599 F.2d

382, 387–88 (10th Cir. 1979) (internal citation and emphasis omitted)). Therefore, although a claim typically accrues when it arises, *Snyder-Hill* Pet. 21, federal common law accommodates delayed accrual where a victim has no knowledge of—and could not reasonably be expected to discover—the factual predicate of his or her claim, particularly where that lack of knowledge is attributable to the defendant's own misconduct. *See*, *e.g.*, *Kubrick*, 444 U.S. at 113, 122 (explaining that the statute of limitations does not "accrue[]" where "the facts about causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain").

Ohio State's inflexible insistence on the occurrence rule's application to Plaintiffs' allegations is anathema to the very cases it cites. Rather, the discovery rule's "centuries-old roots" in this Court's precedent find fertile soil in the factual allegations here. *See Gabelli*, 568 U.S. at 449; *see also id*. at 451 (reinforcing that the discovery rule remains appropriate for "the defrauded victim the discovery rule evolved to protect"); *McDonough*, 139 S. Ct. at 2155 (recognizing "[w]here, for example, a particular claim may not realistically be brought while a violation is ongoing, such a claim may accrue at a later date"); *Merck*, 559 U.S. at 645–46 (quoting 2 C. Corman, Limitation of Actions § 11.1.1 (1991)) (citing *Kubrick* as an application of the discovery rule, under which a claim accrues "when the litigant first knows or with due diligence should know facts that will form the basis for an action") (emphasis omitted).

Had Ohio State done its duty to promptly and transparently investigate and respond to the first report—or to any others for that matter—the trigger date for accrual might be different. And many hundreds of young people might have been spared from abuse. Ohio State's complete failure to respond to any report, its complicity in the abuse disguised as medical treatment, and its active concealment of its failures and Strauss's predation over the course of decades, kept victims in "'blameless ignorance'" of Ohio State's role in their abuse: it is this kind of deceit that the discovery rule is designed to address. *Snyder-Hill* Brief in Opp. at 21–26 (citing *Bailey v. Glover*, 88 U.S. 342, 349 (1874); quoting *Urie v. Thompson*, 337 U.S. 163, 169 (1949)). Unsatisfied with the result, Ohio State and the *Snyder-Hill* amici fearmonger about "near-limitless liability" flowing from the decision. *See Snyder-Hill Amici Brief*, at 4. But this exaggerates the impact of the decision, which is circumscribed to the extraordinary fact of Ohio State's successful, decades-long cover-up—an atypical scenario that is (hopefully) unlikely to arise again.

Because the decision's application of the federal discovery rule on the facts alleged is consistent with Supreme Court precedent and the purposes and policies underlying this Court's statutes of limitations and accrual jurisprudence, the petition should be denied.

II. The Decision Below Does Not Create Or Deepen A Circuit Split.

Ohio State's argument that review of the Sixth Circuit's decision is necessary to resolve a "'circuit split'" is, at best, misleading, if not outright false. *See Gonzales* Pet. 7 (quoting *Snyder-Hill v. Ohio State Univ.*, 48 F.4th 686, 709, 712 (6th Cir. 2022) (Guy, J., dissenting)). Circuit courts *are not* divided on the issue of whether the federal discovery rule applies to Title IX claims. On the contrary, all circuits courts to rule on this issue directly have applied the federal discovery rule to evaluate accrual of Title IX claims.

a. There is no contrary decision.

Ohio State's circuit-split argument rests solely on *Varnell v. Dora Consol. Sch. Dist.*, which, contrary to Ohio State's assertion, did not reject the discovery rule. *See Gonzales* Pet. 7. In fact, in *Varnell* the Tenth Circuit suggested the discovery rule (and other equitable tolling) could have applied but concluded plaintiff had not satisfied this burden on the undisputed facts of that case and/or had forfeited such arguments by not raising them below. 756 F.3d 1208, 1215–16 (10th Cir. 2014).

The plaintiff in *Varnell* raised § 1983 and Title IX post-assault claims in 2012 based on abuse by her coach that occurred between 2005-07, asserting that the superintendent had been alerted to the abuse at the time but had failed to report it, had instead allowed the coach to resign, and had dissuaded plaintiff's

mother from reporting to authorities. *Id.* at 1210–11, 1215. Plaintiff admitted that she had filed suit well past the applicable three-year statute of limitation, but argued that although she knew at the time that she was injured by defendants, she did not discover how *much* she was injured until psychological analysis years later. *Id.* at 1216–17.

Writing for a three-judge panel, Judge Hartz acknowledged that the discovery rule delays accrual of a claim until the plaintiff knew or should have known the facts necessary to establish their cause of action, but declined to apply the rule on the particular facts and granted summary judgment for defendant. *Id.* at 1216–18. In contrast to the allegations here, the plaintiff in *Varnell* did *not* allege that the school actively covered up its knowledge of the abuse, let alone that the school's deliberate indifference was unknowable until many years later, like all the Plaintiffs in this case. She also did not allege that, even if she had investigated, she could not have known of defendant's role in her abuse until much later. And no defendant witness had admitted, as they have here, *see supra* notes 3, 6, 8, that a plaintiff could not have known about defendant's egregious failings and active cover-up, or that defendant itself did not know of its causal role.

Rather, the plaintiff in *Varnell* argued only that her claim accrued when years later, through therapy as an adult, she began to "appreciate the consequences" of her abuse, *Varnell*, 756 F.3d at 1211, and "discovered the *extent* of the injury inflicted on her by the abuse."

Id. at 1216 (emphasis added); *see also generally Wallace*, 549 U.S. at 391 (holding a cause of action does not wait to accrue until "the full extent of the injury is . . . known"). On this basis, the Tenth Circuit concluded that the *Varnell* victim knew "long before she filed suit all the facts necessary to sue and recover damages," even if the full ramifications of the abuse were not yet apparent. 756 F.3d at 1216. Contrary to Ohio State's claim, *Varnell* did not reject the discovery rule, nor did it hold that the occurrence rule applies to all Title IX claims. *See Snyder-Hill* Pet. 13.

In other civil rights actions, the Tenth Circuit has consistently applied the discovery rule. *See*, *e.g.*, *Alexander v. Okla.*, 382 F.3d 1206, 1215 (10th Cir. 2004) (citation omitted) (applying two-prong discovery rule to federal race discrimination claims); *Fogle v. Pierson*, 435 F.3d 1252, 1258 (10th Cir. 2006) ("A § 1983 action 'accrues when facts that would support a cause of action are or should be apparent.' "); *Fratus v. DeLand*, 49 F.3d 673, 675–76 (10th Cir. 1995) (holding civil rights action accrued when "facts that would support a cause of action are or should be apparent"; reversing district court's dismissal of § 1983 claims where there was factual uncertainty about the accrual date, i.e., whether accrual was implicated by receipt of restitution order or at later date when plaintiff learned or should have learned that prison arbitrarily charged him more than other prisoners for similar item).

There is not even abstract tension between *Varnell* and the decision here, let alone "conflict" over whether the discovery rule can be an appropriate measure for

accrual of a Title IX claim when the circumstances call for it. Ohio State does not and cannot show that the Tenth Circuit—or *any* court in *any* circuit—has reached a different result on similar facts or would reach a different result here.

b. All circuit courts to consider the issue have applied the federal discovery rule to evaluate accrual of Title IX claims.

Indeed, Ohio State concedes that "other circuits have held that the 'discovery rule' governs the accrual of claims under Title IX." *See Snyder-Hill* Pet. 14–15 (citing *King-White v. Humble Indep. Sch. Dist.*, 803 F.3d 754, 762 (5th Cir. 2015); *Stanley v. Tr. of the Cal. State Univ.*, 433 F.3d 1129, 1136 (9th Cir. 2006); *Samuelson v. Oregon State Univ.*, 725 F. App'x 598, 599 (9th Cir. 2018); *Twersky v. Yeshiva Univ.*, 579 F. App'x 7, 9–10 (2d Cir. 2014), *cert. denied*, 575 U.S. 935 (2015)); *see also Moore v. Temple Univ.*, 674 F. App'x 239, 241 (3d Cir. 2017). The fact is, as the Sixth Circuit noted, its two-prong discovery rule is "the same as the seven other circuits to address this issue" in similar contexts. *Snyder-Hill* Pet. App. 26a (citing *Ouellette v. Beaupre*, 977 F.3d 127, 136 (1st Cir. 2020); *Kronisch v. United States*, 150 F.3d 112, 121 (2d Cir. 1998); *Miller v. United States*, 932 F.2d 301, 303 (4th Cir. 1991); *Piotrowski v. City of Houston*, 237 F.3d 567, 576 (5th Cir. 2001); *In re Copper Antitrust Litig.*, 436 F.3d 782, 789 (7th Cir. 2006); *Bibeau v. Pac. Nw. Rsch. Found. Inc.*, 188 F.3d 1105, 1108 (9th Cir. 1999); *Chappell v. Rich*, 340 F.3d 1279, 1283 (11th Cir. 2003)). The circuits having

addressed it are unanimous on the federal accrual issue.

c. The decision below did not create a new rule, but Ohio State seeks one.

The rule applied here is the mainstream position. But Ohio State argues via conclusory labels that the Sixth Circuit decision "staked out a new position" (*Gonzales* Pet. 7), was "extreme" (*Gonzales* Pet. 16), "egregiously wrong" (*Snyder-Hill* Pet. 23), "profoundly mistaken" (*Snyder-Hill* Pet. 3), and "fundamentally misguided" (*Snyder-Hill* Pet. 8). But it is Ohio State, like the *Snyder-Hill* dissent and amici, that urge a "new" and "extreme" version of the accrual rule—one supported by no court.

Ohio State's underlying-injury-only test, tying Title IX claim accrual to the date of the underlying sexual abuse as a matter of law, would essentially require the Court to repudiate its own precedent that there is not *respondeat superior* liability for Title IX, *see Davis*, 526 U.S. at 640; *Gebser*, 524 U.S. at 285, which would open the floodgates to Title IX—a result that Ohio State claims to fear. *See Snyder-Hill* Pet. 12. But in the post-assault context, the underlying-injury-only test that Ohio State seeks would also have the absurd result of "starting the clock" running on a plaintiff's Title IX claim against a federal fund recipient before the institution had even engaged in a violation. At the same time, Ohio State's proposal would reward federal fund recipients with immunity

under a borrowed state statute of limitations for covering up and destroying evidence of the abuse, as well as for failing to promptly investigate and respond to reports of sexual discrimination, harassment, and abuse.[14]

III. To the Extent the Question of Title IX Claim-Accrual Is Important, This Case Presents a Poor Vehicle for Addressing the Issues.

Any distinction worth addressing regarding accrual of Title IX claims is best done in the context of a different case, at a different stage: the fact-centered nature of the inquiry on limitations and accrual is uniquely unsuited for disposition on a motion to dismiss the pleadings, and the allegations here all create fact questions that must be resolved in favor of the Plaintiffs at this stage. *See Ashcroft v. al-Kidd*, 563 U.S. 731, 734 (2011). Thus, the egregious facts of these cases and the early stage of litigation renders the decisions below poor vehicles for review, or for yielding any nuance in judicial approach. Ohio State's proposed

[14] The borrowed limitations period for Title IX claims is two years in Ohio, Ohio Revised Code § 2305.10, and is even shorter in some other states. *See*, *e.g.*, *Haley v. Clarksville-Montgomery Cnty. Sch. Sys.*, 353 F. Supp. 3d 724, 731 (M.D. Tenn. 2018) (holding one-year statute of limitations in Tenn. Code Ann. § 28-3-104 applies in analogous § 1983 context, evaluating accrual under discovery rule); *Doe v. Howard Univ.*, 594 F. Supp. 3d 52, 62 (D.D.C. 2022), *appeal dismissed*, No. 22-7056, 2023 WL 3395921 (D.C. Cir. May 8, 2023) (holding the one-year statute of limitations in D.C. Code § 2-1403.16 applies to Title IX, evaluating claim under discovery rule).

underlying-injury-only accrual rule would compound the accrual-related fact questions for every plaintiff, none of which are properly resolved on a Rule 12(b)(6) motion.

The underlying facts of these cases are in dispute despite Ohio State's assertion to the contrary. *Snyder-Hill* Pet. 29. Moreover, the issues related to Ohio State's affirmative statute of limitations defense are not *over* just because the district court's decision was reversed and remanded. The Sixth Circuit's decision is unremarkable in that it concludes the Plaintiffs alleged enough to proceed to discovery, after which Ohio State can raise its arguments again, to challenge what a reasonable plaintiff knew or should have known and when. The reasonable person standard attached to the federal discovery rule measures whether a plaintiff knew or should have known that they were injured by Ohio State. Ohio State cannot ask for more. What Ohio State seeks is a statute of repose, which is outside the realm of remedy this Court can provide.

Rather than "discouraging" educational institutions from conducting investigations, *Snyder-Hill* Pet. 26, the decision's straightforward application of the discovery rule provides clarity and certainty for educational institutions. All that a federal fund recipient needs to do in order to ensure that the statute of limitations is triggered is to promptly endeavor to comply with its Title IX obligations. A claim cannot accrue before a plaintiff discovers that the defendant injured him. It cannot accrue while the defendant

actively prevents a plaintiff from making that discovery. No court holds otherwise. The Sixth Circuit's decision is the result justice requires under the facts and is correct under the law.

CONCLUSION

The Court should deny the petition for writ of certiorari.

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