No. 22-897

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

REPLY BRIEF FOR PETITIONER

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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,
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As respondents acknowledge (at 2), the petition in this case presents the same question that is presented in *Ohio State University v. Snyder-Hill*, No. 22-896: When does a Title IX claim accrue? Respondents also agree (at 5 n.2) that "the underlying facts relevant" to that question "are generally the similar across all of Respondents' cases." This confirms that the petition in this case should be held pending the disposition of *Snyder-Hill* and then disposed of accordingly.

In opposing certiorari in this case, respondents largely piggyback on the arguments raised in the *Snyder-Hill* respondents' brief in opposition. As Ohio State has explained in its *Snyder-Hill* reply, those arguments fail and do not diminish the need for certiorari. None of the arguments raised by respondents in this case alters that conclusion.

1. The circuits are split over the proper rule of accrual for Title IX claims. The Tenth Circuit has adopted the occurrence rule for Title IX claims. By contrast, other circuits (including the Sixth Circuit) have applied the discovery rule to Title IX claims. But even among the circuits that adopt the discovery rule, the Sixth Circuit's is an outlier given the extreme nature of its discovery rule. That conflict, which has been acknowledged by at least six different judges, warrants this Court's review. *See* Pet. 7-8; *Snyder-Hill* Pet. 13-17; *Snyder-Hill* Cert. Reply 2-6.

As in *Snyder-Hill*, respondents here try (at 22-26) to paper over the acknowledged circuit split, largely duplicating the arguments raised by the *Snyder-Hill* respondents. These arguments are meritless.

First, respondents suggest (at 24) that the Tenth Circuit did not "hold that the occurrence rule applies

to all Title IX claims." But the Tenth Circuit was clear: For "a claim under Title IX," the "relevant federal law on accrual" is the occurrence rule—i.e., "'the standard rule that accrual occurs when the plaintiff has a complete and present cause of action.'" *Varnell v. Dora Consolidated Sch. Dist.*, 756 F.3d 1208, 1215 (10th Cir. 2014) (citation omitted); *see id.* at 1217 (reiterating that this "general rule" governed the plaintiff's "Title IX claim"). Like the *Snyder-Hill* respondents, respondents here just ignore this holding and focus instead (at 22-25) on the court's observation that the plaintiff's Section 1983 claim would have been untimely "even if" the discovery rule applied to that claim. *Varnell*, 756 F.3d at 1216. But that observation does not erase *Varnell*'s clear holding that the occurrence rule applies to Title IX claims. *Snyder-Hill* Cert. Reply 2-3 & n.1.

Second, respondents briefly suggest (at 25-26) that, among the circuits that have applied the discovery rule to Title IX claims, the Sixth Circuit's version of the discovery rule is "the mainstream position." That is simply not true. The Sixth Circuit's extreme version of the discovery rule—which delays accrual until the plaintiff discovers the injury *and* the educational institution's deliberate indifference—is an outlier. *Snyder-Hill* Cert. Reply 3-5.

2. The Sixth Circuit's rule is also profoundly wrong on the merits. It contravenes multiple lines of this Court's precedent holding (1) that the occurrence rule is the standard rule of accrual that applies absent statutory language to the contrary, *Wallace v. Kato*, 549 U.S. 384, 388 (2007); and (2) that even if the discovery rule applies, it does not extend beyond discovery of the injury, *Rotella v. Wood*, 528 U.S. 549, 555 (2000). The *Snyder-Hill* respondents attempt to

sidestep this precedent, largely by either rewriting it or ignoring it. *See Snyder-Hill* Cert. Reply 6-9. Respondents in this case add little to the analysis.

First, respondents dismiss the numerous cases from this Court establishing that the occurrence rule "is the default rule governing accrual of federal causes of action" by claiming that "none of the cases" "holds that the occurrence rule is the accrual yardstick for Title IX claims." BIO 16 (emphasis omitted). That is, of course, the question Ohio State is asking the Court to resolve in these cases.

Second, respondents assert that this Court's decision in *Wallace* is irrelevant because it "did not implicate the discovery rule on its facts." BIO 18. This argument misses the point—in *Wallace*, the Court recognized, as it has in many other cases, that the occurrence rule is the "'standard,'" "'traditional,'" "common-law" rule of accrual. 549 U.S. at 388, 390 (citations omitted); *see also TRW, Inc. v. Andrews,* 534 U.S. 19, 35-39 (2001) (Scalia, J., concurring in the judgment). The Sixth Circuit fundamentally disregarded that principle here.

Third, respondents dismiss (at 19) *Rotella*'s "emphatic" holding that the discovery rule is limited to "discovery of the injury," 528 U.S. at 555, by pointing to *Rotella*'s quotation of a line from *United States v. Kubrick*, 444 U.S. 111 (1979). But that line from *Kubrick* is specifically tethered to the medical malpractice context and provides no support for the Sixth Circuit's extreme discovery rule. *Snyder-Hill* Cert. Reply. 8.

Fourth, respondents repeatedly point to the specific "factual allegations" in this case. BIO 20; *see id.* at 27, 28. But those fact-specific arguments have

no bearing on determining the proper accrual rule for Title IX claims, which is the question presented. That is a purely legal question, and the facts in a particular case do not "control the decision about the basic limitations rule" itself. *Rotella*, 528 U.S. at 560.[1]

3. Respondents do very little to dispute the exceptional importance of the question presented and the need for this Court to resolve it in this case. Indeed, respondents' claim (at 28) that the Sixth Circuit's decision "provides clarity and certainty for educational institutions" simply blinks reality: As confirmed by two dozen university amici and multiple judges in *Snyder-Hill*, if left to stand, the Sixth Circuit's decision will produce staggering uncertainty for educational institutions going forward. *See Snyder-Hill* Univ. Br. 15-18; *Snyder-Hill* Pet. App. 60a-61a (Guy, J., dissenting); *Snyder-Hill* Pet. App. 85a-86a (Readler, J., dissenting). Respondents in this case and *Snyder-Hill* do not even attempt to address amici's concerns about the real-world implications of the Sixth Circuit's decision in this case.

The question presented is thus undeniably certworthy. Because the Sixth Circuit decisions underlying the petition in this case all relied on its decision in *Snyder-Hill*, the Court should grant the petition in *Snyder-Hill* and hold this petition pending a decision in *Snyder-Hill*. That will allow the Court to fully consider and decide all aspects of the issue

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[1] Moreover, respondents themselves stress that students—"'many'" of them plaintiffs—"report[ed] sexual abuse" by Strauss. BIO 10 (quoting Pet. App. 31a); *see id.* at 7-8; *see also* Resp. C.A. Reply Br. 5 n.9 (6th Cir. Nos. 21-3972, 21-4070) (Apr. 29, 2022) ("Class Plaintiffs do not dispute their 'awareness of Strauss's abuse' when it occurred.").

while minimizing duplicative briefing. Alternatively, the Court can grant the petition in this case as well and consolidate it with *Snyder-Hill* for argument.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's disposition of *Ohio State University v. Snyder-Hill*, No. 22-896. 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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