No. 22-896

# In the Supreme Court of the United States

THE OHIO STATE UNIVERSITY,
*Petitioner*,
v.
STEVE SNYDER-HILL, 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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## INTRODUCTION

This case, as much as any, demonstrates the importance of statutes of limitations to the rule of law. In one fell swoop, the Sixth Circuit majority resurrected over a hundred Title IX claims filed more than 20 to 40 years after the alleged abuse occurred. To achieve that stunning result, the majority invoked Title IX's "broad remedial purpose" (Pet. App. 22a) to adopt an extreme discovery rule of accrual for Title IX claims. That decision deepens a circuit split acknowledged by at least six different judges, contravenes multiple lines of this Court's precedent, and "effectively nullifies" any limitations period for Title IX claims. *Id.* at 43a (Guy, J., dissenting).

Respondents attempt to portray this case as presenting a "fact-specific" question for an "unusual" situation. BIO i, 21. That could not be further from the truth. The principal question presented—When does a Title IX claim accrue?—is purely legal, and the type of issue this Court frequently resolves. Pet. 17-18. Universities from across the country have detailed the "staggering" consequences of the decision below. Univ. Br. 19. Respondents do not even *attempt* to answer amici's concerns. And multiple Sixth Circuit judges have written powerful dissents urging this Court's review "before more jurisprudential damage is done." Pet. App. 86a (Readler, J., joined by Bush, J., dissenting); *see id.* at 52a (Guy, J., dissenting); *id.* at 83a (Thapar, J., dissenting).

Justice Scalia once described the practice of inferring discovery rules from congressional silence as "bad wine of recent vintage." *TRW, Inc. v. Andrews,* 534 U.S. 19, 35-37 (2001) (opinion concurring in the judgment) (joined by Thomas, J.). The Sixth Circuit

took this practice to new heights in this case. Absent this Court's intervention, countless schools will suffer the consequences. And the decision below effectively "binds [the court] to [follow the same course] in other statutory settings, all, it is no exaggeration to say, at justice's expense." Pet. App. 98a (Readler, J., dissenting). Certiorari is warranted.

## ARGUMENT

### I. THE SIXTH CIRCUIT'S CLAIM-ACCRUAL RULING WARRANTS REVIEW

#### A. The Circuit Split Is Real

At least six different judges have recognized that the decision below deepened a circuit split on the proper accrual rule for Title IX claims. Pet. 13-17; *see* Pet. App. 49a (Guy, J., dissenting); Pet. App. 97a (Readler, J., joined by Bush, J., dissenting); *Bannister v. Knox Cnty. Bd. of Educ.*, 49 F.4th 1000, 1014 (6th Cir. 2022) (Murphy, J., joined by Siler and Larsen, JJ.). Respondents' attempts (at 11-20) to paper over that widely acknowledged conflict fail.

1. The Sixth Circuit's rejection of the "occurrence rule" for Title IX claims, Pet. App. 20a-25a, squarely conflicts with the Tenth Circuit's adoption of the occurrence rule for Title IX claims in *Varnell v. Dora Consolidated School District*, 756 F.3d 1208, 1215-17 (10th Cir. 2014). Respondents suggest (at 11-13) that the Tenth Circuit in *Varnell* "declined to decide" the issue. But the Tenth Circuit could not have been clearer: For "a claim under Title IX," the "relevant federal law on accrual is set forth in *Wallace*," which applied the occurrence rule—i.e., "'the standard rule that accrual occurs when the plaintiff has a complete and present cause of action.'" *Varnell*, 756 F.3d at 1215 (quoting *Wallace v. Kato*, 549 U.S. 384, 388

(2007)); *see id.* at 1217 (reiterating that this "general rule" governed the plaintiff's "Title IX claim"); Pet. App. 24a (panel majority agreeing that *Wallace* "applied the occurrence rule"). Under that rule, the Tenth Circuit held, the plaintiff's claim accrued when the sexual abuse occurred. 756 F.3d at 1215-17.

Respondents remarkably dismiss this entire analysis as an "introductory remark," BIO 13, and focus instead on the Tenth Circuit's observation that the plaintiff's Section 1983 claim would have been untimely "even if the discovery rule applie[d]," *id.* at 12 (quoting *Varnell*, 756 F.3d at 1216). But that observation does not erase the Tenth Circuit's clear holding that the plaintiff's Title IX claim was governed by the "general [occurrence] rule." 756 F.3d at 1217 (citing *Wallace,* 549 U.S. 388).[1] *Varnell*'s holding thus squarely splits with other circuits (including the Sixth Circuit) that apply the discovery rule instead of the occurrence rule to Title IX claims.

2. Moreover, even among circuits that have applied a discovery rule to Title IX claims, the Sixth Circuit is still an outlier.

The Second, Fifth, and Ninth Circuits have held that a Title IX claim accrues under the discovery rule when the plaintiff is "aware of (1) their injuries, (2) their abusers' identities, and (3) their abusers' prior and continued employment at [the educational institution]." *Twersky v. Yeshiva Univ.*, 579 F. App'x

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[1] Even if *Varnell*'s observation that the Section 1983 claim was *also* untimely under the discovery rule provided an alternative basis for dismissing the Title IX claim, the court's holding that the occurrence rule applies to Title IX claims would still be binding precedent. *See, e.g.*, *Anderson Living Tr. v. Energen Res. Corp.*, 886 F.3d 826, 835 (10th Cir. 2018).

7, 9-10 (2d Cir. 2014), *cert. denied*, 575 U.S. 935 (2015); *see King-White v. Humble Indep. Sch. Dist.*, 803 F.3d 754, 762-63 (5th Cir. 2015); *Stanley v. Trustees of the Cal. State Univ.*, 433 F.3d 1129, 1136 (9th Cir. 2006). "This information [is] sufficient" to trigger the limitations period because it "put[s] [the plaintiffs] on at least inquiry notice as to the school's awareness of and indifference to the abusive conduct," *Twersky*, 579 F. App'x at 10, such that it would "prompt[] a reasonable person to investigate [the school's] conduct further" during the limitations period, *King-White*, 803 F.3d at 762. In the Sixth Circuit, by contrast, "[a] plaintiff's knowledge that he was abused" and "that [the school] employed [the abuser] is not enough" to "start the clock," even if that knowledge would prompt a reasonable person to "investigat[e] further." Pet. App. 34a-35a.

Respondents try to gloss over this critical distinction by claiming (at 13) that these circuits also employ a "two-pronged discovery rule." That argument is purely semantic; it fails to engage with the actual substance of the discovery rule outside the Sixth Circuit. For example, respondents cannot deny that the decision below adopted the same version of the discovery rule the Fifth Circuit explicitly "decline[d]" to adopt, which would have "delayed accrual" until the plaintiff became aware of the school's "'policies' that ostensibly allowed [the] abuse to continue." *King-White*, 803 F.3d at 757, 763. Respondents try to confuse matters (at 15) by splicing deliberate indifference into "pre-assault" and "post-assault" theories. But the Fifth Circuit did not suggest that its rejection of that extreme discovery rule had anything to do with the plaintiff's particular deliberate-indifference theory; rather, it rejected that

rule because it was so starkly at odds with "the ordinary accrual rule." *King-White*, 803 F.3d at 763.

Moreover, respondents concede (at 17 n.4) that, under the Sixth Circuit's rule, "it would not have mattered if plaintiffs had inquiry notice of the University's deliberate indifference as to past reports" of alleged abuse. That confirms the conflict with *Twersky*, 579 F. App'x at 10. And while respondents point out (at 17) that some of the plaintiffs in *Twersky* reported the abuse, respondents themselves argue that students—including lead respondent Snyder-Hill—lodged "persistent, serious, and regular complaints" about Strauss's conduct. BIO 4 (citation and internal alterations omitted). Yet, under the Sixth Circuit's rule, no Title IX claim accrued until decades later.[2]

The Sixth Circuit's reliance on *Ouellette v. Beaupre*, 977 F.3d 127 (1st Cir. 2020)—a case delaying accrual of a Section 1983 claim against a municipality until the plaintiff discovered "the existence of an official municipal policy or custom," *id.* at 139-40—also confirms the conflict. As the Fifth Circuit explained in *King-White*, that reasoning has been criticized for Section 1983 claims, and the court explicitly "decline[d]" to adopt it for purposes of Title IX claims. 803 F.3d at 763; *see* Pet. App. 65a (Guy, J., dissenting) ("*Ouellette* stands alone"). Yet the Sixth Circuit majority "fully" "adopt[ed]" *Ouellette*'s discredited rule. Pet. App. 30a; *see id.* at 34a.

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[2] Respondents note (at 16) that *Twersky* is an "unpublished decision," but panels of the Second Circuit still follow such decisions in "similar cases." *United States v. Montague*, 67 F.4th 520, 535 n.4 (2d Cir. 2023) (citation omitted).

In all events, the discovery rule cases all conflict with the Tenth Circuit's adoption of the occurrence rule for Title IX claims. No matter whether the split is 4-1 or 1-3-1, the division in the circuits on this critical question of federal law warrants certiorari.

### B. The Sixth Circuit's Extreme Accrual Rule Is Wrong

Respondents' merits arguments are unpersuasive and only underscore the need for review.

1. The Sixth Circuit's rejection of the standard occurrence rule for Title IX claims flouts this Court's precedent. Pet. 17-23. Respondents do not dispute that their claims are untimely under the occurrence rule. Nor do they defend the Sixth Circuit's primary rationale for rejecting that rule for Title IX claims—Title IX's "broad remedial purpose." Pet. App. 21a-22a. Instead, respondents argue (at 25-27) that the "discovery rule" is the general "common-law" rule that provides the "backdrop" against which Congress legislates. That is plainly wrong.

This Court has repeatedly held that the "'standard,'" "common-law" rule of accrual for federal claims is the *occurrence* rule, under which the statute of limitations begins to run when "the plaintiff has 'a complete and present cause of action.'" *Wallace*, 549 U.S. at 388 (citation omitted); *see* Pet. 17-18 (collecting a dozen cases); *Reed v. Goertz*, 598 U.S. 230, 235 (2023) (reiterating this "general" rule). Thus, as Justice Scalia (joined by Justice Thomas) explained in a case respondents tellingly ignore, the *occurrence* rule provides the "background rule" that "Congress has been operating against . . . for a very long time," and "[w]hen it has wanted [courts] to apply a different rule, such as the injury-discovery rule, it

has said so" explicitly. *TRW*, 534 U.S. at 38 (concurring in the judgment). Because Congress did not express any "different rule" in Title IX, the standard occurrence rule governs.[3]

Respondents also suggest (at 27-28) that adopting a discovery rule in the Title IX context "makes sense" due to the particular facts here. But those fact-specific arguments have no bearing on determining the proper accrual rule for Title IX claims. That is a purely legal question, and its answer does not change based on the facts in any particular case.

2. 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 even further afield. Pet. 23-26; *see* Pet. App. 55a-65a (Guy, J., dissenting); *id.* at 98a-100a (Readler, J., dissenting). The Sixth Circuit's rule flouts this Court's "emphatic" admonition that, even when a discovery rule applies, it "does not extend beyond" the plaintiff's "discovery of the *injury*." *Rotella v. Wood*, 528 U.S. 549, 555 (2000) (emphasis added). By ignoring that admonition, the Sixth Circuit's rule "renders meaningless any limitations provision for Title IX claims." Pet. App. 47a (Guy, J., dissenting).

Respondents try (at 29) to square the Sixth Circuit's rule with *Rotella* by claiming that, in referring to discovery of the "injury," the Court actually "mean[t]" discovery of all of "the acts that constitute 'the [legal] violation.'" BIO 29 (citation and

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[3] None of the fraud and latent injury cases cited by respondents (at 23-24) suggests that the discovery rule is the common-law rule. *See TRW*, 534 U.S. at 37-39 (Scalia, J., concurring in the judgment) (refuting respondents' theory).

internal alterations omitted). This unusual understanding of "injury" tries to get through the back door what *Rotella* prohibited through the front. *Rotella* held that accrual occurs upon "discovery of the injury, *not discovery of the other elements of a claim*." 528 U.S. at 555 (emphasis added). Respondents cannot avoid that holding by simply redefining the word "injury" to encompass those "other elements."

Respondents note (at 29) that *Rotella* quoted *Kubrick*'s reference to a "discovery rule," applicable "[i]n the circumstance of medical malpractice," that is tethered to a plaintiff's discovery of "'his injury [and] its cause.'" *Rotella*, 528 U.S. at 555-56 (quoting *United States v. Kubrick*, 444 U.S. 111, 122 (1979)). But this is not a medical malpractice case, so a statement consciously limited—in both *Rotella* and *Kubrick*—to the medical malpractice context does not apply here. Moreover, that line from *Kubrick* could not support the extreme "injury-and-deliberate-indifference discovery rule" for Title IX claims adopted by the Sixth Circuit, Pet. App. 60a (Guy, J., dissenting), which delays accrual "until the plaintiffs discover all aspects of the institution's intentional misconduct," *id.* at 100a (Readler, J., dissenting).

Respondents suggest (at 20-21, 29-30) that some plaintiffs did not "know they had been abused" because they believed Strauss's conduct constituted "medical care." But as Judge Guy explained, "abuse" is just a "label for conduct," and "[t]he 'accrual of a claim' does not 'await awareness'" by the plaintiff that such a label applies. Pet. App. 58a-59a (Guy, J., dissenting) (quoting *Kubrick*, 444 U.S. at 123). All respondents undisputedly knew of Strauss's conduct towards them when it occurred; some are simply claiming that they lacked the "medical expertise" to

realize at the time that this conduct constituted abuse. BIO 5. But even accepting the premise, a delayed realization that Strauss's conduct was "improper" or "blameworthy" does not delay accrual of a claim. *Kubrick*, 444 U.S. at 120-23.[4]

In short, the decision below brazenly bulldozed "multiple lines of Supreme Court authority." Pet. App. 92a (Readler, J., dissenting).

### C. The Accrual Question Is Exceptionally Important And Warrants Review Here

On importance, respondents have no response—none—to the grave concerns spelled out by the two dozen university amici, one of whose members include an additional 63 institutions of higher education. As those amici explain, the decision below will have "far-ranging and potentially devastating" impacts for both institutions and students. Univ. Br. 4-5.

Respondents do not seriously deny that, if left to stand, the Sixth Circuit's decision will have the perverse effect of discouraging institutions from investigating allegations of historical misconduct, as Ohio State did here, to eliminate such misconduct. *Id.* at 16-18; Pet. 26-27.[5] Nor do respondents address the concern that, by "nullif[ying] [the] statute of limitations for Title IX claims based on sexual harassment," Pet. App. 43a (Guy, J., dissenting), the decision below will "exponentially increase the number of these lawsuits," ultimately diverting

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[4] This theory is also belied by respondents' own assertion that students "'persisten[tly]'" complained about Strauss's "abuse," BIO 4, not to mention the graphic allegations of abuse in their complaints, *see* Pet. App. 45a-47a, 56a-57a (Guy, J., dissenting).

[5] Conversely, a meaningful accrual rule will encourage prompt claims—and *stop* improper conduct.

resources and attention from institutions' core instructional missions. Univ. Br. 13-14. And these concerns extend to *every* school receiving federal aid.

Respondents also ignore the fundamental unworkability of the Sixth Circuit's extreme discovery rule, which hinges the statute-of-limitations defense on an institution's ability to somehow prove—in this case, *decades* after the fact—when each individual plaintiff had knowledge of "what appropriate persons within [the institution] knew." Pet. App. 34a. This will divert finite resources from education to litigation and put universities in a difficult if not impossible position of defending themselves long after witnesses have left (or died), documents have been lost, and memories have faded. Univ. Br. 15-16. Statutes of limitations are designed to prevent such unfairness.

Ultimately, respondents cannot deny what respondents themselves insisted below: Determining the proper accrual rule for Title IX claims is an "immense[ly]" "important question[] of federal law." Resp. C.A. Br. 1 (Feb. 2, 2022). They were right then: "[F]irmly defined, easily applied [accrual] rules" are vital to the proper functioning of statutes of limitations. *Rotella*, 528 U.S. at 559. This Court thus frequently grants review to resolve conflicts in the lower courts over accrual issues. *See* Pet. 17-18.

Grasping at straws, respondents try (at 20-22) to manufacture a "vehicle" problem, contending that the Court will have to "resolve" the "fact-specific plausibility of the plaintiffs' allegations." Not so. The question presented asks the Court to determine the proper accrual rule for Title IX claims—a legal question that does not depend at all on any factual issues. Nor does the interlocutory posture of this case cut against certiorari. As the district court's decisions

underscore, the question presented is outcome-determinative. And there is no basis to consign Ohio State—and the district court—to the extremely burdensome discovery and fact-finding that would be necessary for the *hundreds* of claims at issue under the Sixth Circuit's fundamentally misguided rule.

## II. THE SIXTH CIRCUIT'S EXPANSION OF TITLE IX'S SCOPE WARRANTS REVIEW

The Sixth Circuit's expansion of the scope of Title IX's implied right of action to anyone who visits campus also warrants review. Pet. 29-33.

Like the Sixth Circuit, respondents defend (at 31-32) that expansion based on one word—"person." But "construing statutory language is not merely an exercise in ascertaining 'the outer limits of a word's definitional possibilities'"; the word must be read in context to ensure "compatib[ility] with the rest of the law." *Sackett v. EPA*, No. 21-454, 2023 WL 3632751, at *13 (U.S. May 25, 2023) (citations omitted). Respondents ignore the statutory context here, which confirms that "Title IX extends only to those persons participating in an education program or activity, not to anyone who has ever stepped foot on school grounds." Pet. App. 107a (Readler, J., dissenting).

Respondents also dismiss applicable "background principles of construction," *Sackett*, 2023 WL 3632751, at *14 (citation omitted), restraining a court's expansion of Spending Clause legislation and implied causes of action. Pet. 30-32; Univ. Br. 5-11. Congress has not clearly authorized, and this Court has never recognized, Title IX claims by individuals who are not prospective or current students or employees. The Sixth Circuit's decision thus "drastically expand[s] Title IX's reach" in a "classic

example of legislating by non-legislators." Pet. App. 101a, 107a (Readler, J., dissenting).

Such a sea change should come only at the hand of Congress, not a court repurposing a cause of action that was implied to begin with.

## CONCLUSION

The petition should be granted.

Respectfully submitted,

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