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

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

Title IX of the Education Amendments of 1972 provides, in relevant part, that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). A plaintiff may state a damages claim for sexual harassment by a school employee only if the school had actual knowledge of the harassment and was deliberately indifferent to it. *Gebser* v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 285, 290 (1998). The questions presented are:

1. In the unusual Title IX case in which plaintiffs do not know they have been sexually abused, and the defendant successfully conceals its role in causing the abuse, does the discovery rule delay accrual of the plaintiffs' claims until they discover their injuries and the defendant's causal role?

2. Does the term "person," as used in 20 U.S.C. § 1681(a), mean a person, or is the term instead limited to current or prospective students or employees?

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INTRODUCTION

For nearly twenty years, The Ohio State University allowed Dr. Richard Strauss to sexually abuse hundreds and hundreds of men and boys. Starting in 1979, Ohio State knew that Strauss was using his position as its official athletics doctor to access and assault student-athletes, among others, disguising his abuse as medical exams. Rather than take action to stop Strauss, the University covered up the abuse, destroying evidence and falsifying records. Strauss did not leave Ohio State until 1998, when the University permitted him to retire from its faculty with emeritus status.

In 2018, Ohio State announced an investigation into Strauss's abuse and its own complicity. It was only then that other survivors first learned that Ohio State had long known about Strauss's abuse and failed to protect them. Many victims also realized only then that Strauss's "exams"—his digital penetration of their anuses, his touching of their testicles—had not been medical exams at all.

After learning about the abuse and Ohio State's role, some of Strauss's victims, including the 107 respondents in this case, filed Title IX lawsuits against the University for its deliberate indifference. Although Ohio State sought to dismiss their claims as untimely, the Sixth Circuit properly held that the victims' claims did not accrue until they learned of both their injury and Ohio State's role in causing it—a role that the University had covered up for decades. The Sixth Circuit

also recognized that four victims who were not students or employees could bring claims because Title IX protects all "person[s]." 20 U.S.C. § 1681(a).

Unhappy with the Sixth Circuit's ruling, the University now urges this Court to take up the case. Neither of the questions presented by the University's petition warrants certiorari.

First, on the discovery rule's application to Title IX, there is no circuit split. Additionally, Ohio State's argument on this question is predicated on a factual dispute that should be resolved after discovery, not by this Court on a motion to dismiss. Prior to factfinding, resolution of the question presented may have no effect on the outcome of this case.

Moreover, the timeliness decision below is a straightforward application of the two-pronged discovery rule. By contrast, Ohio State's proposal to severely limit the discovery rule's application and scope would mark a significant departure from existing case law across the circuits. Ohio State's rule would also create perverse incentives, encouraging schools to run out the clock by covering up abuse and their complicity.

Second, Ohio State also questions whether Title IX protects individuals other than students and employees, including four of the 107 respondents here. Ohio State claims no conflict among the circuits because none exists. That is unsurprising because the Sixth Circuit's decision follows from the plain language of

the statute, which forbids sex discrimination against any "person." 20 U.S.C. § 1681(a).

STATEMENT OF THE CASE

I. Factual Background

Ohio State hired Strauss in 1978. Pet. App. 2a. He served as a doctor for the University's athletics teams, as well as for its general student body. *Id.* 2a-3a. Strauss's position brought him into "regular contact with male student-athletes" on "at least seventeen different sports" teams. *Ibid*. The doctor used that access to "commit[] at least 1,429 sexual assaults, and 47 rapes" in the course of medical exams. *Id*. 4a. This abuse included "digital[] penetrat[ion of] students' anuses" and "grop[ing] and fondl[ing of] students' genitalia." *Ibid.* (citations omitted).

In nearly every case, Strauss disguised his abuse as medical care. Compl. ¶¶ 3, 272.[1] When he digitally penetrated John Doe 62's anus, Strauss told the student he was conducting a "prostate exam." *Id.* ¶¶ 2211-13. Strauss told eighteen-year-old John Doe 24 he needed to do a "hernia check"—an exam the student had never experienced before—and then groped the freshman's penis and testicles. *Id.* ¶¶ 1458-63. Strauss told other students, including one who saw the doctor for a sore throat, that he needed to check for swollen

[1] Citations to the operative second amended complaint in *Snyder-Hill* v. *Ohio State University*, available at docket number 123 in the district court, are identified as "Compl."

lymph nodes—and then fondled their genitals. *Id.* ¶¶ 1428, 2045. The operative complaints include dozens of other examples.

As an Ohio State-commissioned report by Perkins Coie found, the University knew about Strauss's abuse starting as early as 1979. Compl. ¶ 5 (citing Caryn Trombino & Markus Funk, Perkins Coie LLP, *Report of the Independent Investigation: Sexual Abuse Committed by Dr. Richard Strauss at The Ohio State University* 1 (2019) [hereinafter "Perkins Coie Report"]). "[A]lthough Ohio State received 'persisten[t], serious[], and regular[]' complaints from students, it took 'no meaningful action . . . to investigate or address the concerns'" for nearly twenty years. Pet. App. 7a (quoting Perkins Coie Report at 3). To the contrary, the University continued for decades to "require[] students to be examined and treated by Strauss, often explicitly or implicitly making students feel that they risked their scholarship or athletic opportunities if they refused." *Ibid*. Strauss's supervisors gave the doctor sterling performance reviews. *Ibid.*

Ohio State also affirmatively concealed the abuse, as well as its complicity. When one plaintiff, Steve Snyder-Hill, reported an assault by Strauss, Ohio State insisted, falsely, that it had never received a complaint about Strauss before. Pet. App. 11a, 13a. Yet it had received "multiple complaints, including one just three days earlier." *Id.* 13a. "Even after Ohio State completed [a] perfunctory investigation in 1996, at which time it ultimately suspended and terminated Strauss [from some of his roles with the University], it 'hid the

reason why it was investigating Strauss and placing him on leave,' . . . [and it] 'concealed [the] abuse by destroying medical records, [and] shredd[ing] files related to Strauss's sexual abuse.'" *Id.* 8a (quoting Compl. ¶¶ 244, 247-48).[2] The University made no effort to identify the students Strauss had abused. *Ibid*.

For a long time, the cover-up worked. In sharp contrast to Ohio State's knowledge, many of Strauss's victims were in the dark. "[M]ost plaintiffs"—98 out of 107—"did not know they were abused" at the time because Strauss disguised his abuse as medical exams. Pet. App. 8a-11a. Nearly all the plaintiffs "were teenagers and young adults" at the time of the abuse "and did not know what was medically appropriate." *Id.* 9a. The victims also trusted their school: "[M]any believed that Ohio State would not have made Strauss the athletic team doctor unless his examinations were legitimate, and thus, that the conduct was medically appropriate even if it was uncomfortable." *Id.* 10a. Indeed, "Ohio State witnesses, including physicians, conceded in sworn testimony that the [plaintiffs] could not have known Strauss abused them," given, among other reasons, their lack of medical expertise and the fact that "it is normal for patients to be naked in front of doctors and for doctors to touch them." *Ibid.* (quoting Compl. ¶ 156). Even Perkins Coie determined that "it

[2] Ohio State did not "fire[ ]" Strauss in 1998. *See* Amicus Br. 15. Rather, it allowed him to retire with emeritus status that year. Pet. App. 3a. Two years earlier, Ohio State had placed him on administrative leave and ended his roles with Student Health Services and the Athletics Department, but allowed him to continue working as a tenured professor. *Ibid.*

was essential for [its] Investigative Team to consult with suitably qualified medical experts" to determine what of Strauss's conduct was "medically necessary," and what was abusive, given that "the abuse 'occurred in the context of a student's purported medical examination.'" *Id.* 11a (quoting Perkins Coie Report at 12).

In addition, none of the victims knew about Ohio State's role in causing their abuse. Pet. App. 12a. They did not know Ohio State knew about the abuse and had failed to address it. *Id.* 12a-13a. Indeed, "[t]wo Ohio State employees," including "Strauss's direct supervisor," "stated that they did not know of 'any way' that 'any Ohio State student' could have known that Ohio State knew about Strauss's abuse and nonetheless failed to 'get rid of' him." *Ibid.* (quoting Compl. ¶¶ 265-66).

II. Proceedings Below

1. In 2018, spurred by a recent report from a former student-athlete, Ohio State publicly announced an investigation into Strauss's sexual abuse and Ohio State's role in enabling it. Compl. ¶¶ 270-74. From these public developments, plaintiffs became aware of Ohio State's culpability and most plaintiffs realized for the first time that Strauss's medical exams were sexual abuse. *Id.* ¶ 272.

Plaintiffs then filed the two Title IX actions consolidated on appeal. Pet. App. 17a. Title IX does not permit vicarious liability for sexual harassment; liability is only available for a school's deliberate indifference.

Gebser, 524 U.S. at 285, 290. Therefore, to state claims under Title IX, the victims had to plead that senior Ohio State administrators had actual knowledge of Strauss's abuse and the University was deliberately indifferent to it. All plaintiffs alleged that they did not know about Ohio State's role in their abuse until 2018, at the earliest, and could not have discovered it earlier. Pet. App. 12a. Most plaintiffs also alleged that, until 2018, they did not understand that Strauss had abused them because he had disguised his abuse as medical exams. *Id.* 8a-11a.

Ohio State moved to dismiss the claims as untimely. *See* Pet. App. 17a-18a. The district court granted the motion. *Id.* 18a.

2. Plaintiffs appealed, and the Sixth Circuit reversed. Pet. App. 2a. To begin, the Sixth Circuit explained that, under well-established precedent, a federal claim accrues "when the reasonable person knows, or in the exercise of due diligence should have known, both [1] his injury and [2] the cause of that injury." *Id.* 20a (quoting *Bishop* v. *Child.'s Ctr. for Developmental Enrichment*, 618 F.3d 533, 536 (6th Cir. 2010)). The court noted that this two-pronged discovery rule is "the same as [the rule in] the seven other circuits to address this issue." *Id.* 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 Hous.*, 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)).

Furthermore, the court noted that it has "long held that the discovery rule applies in the § 1983 context." Pet. App. 20a. Because "Title IX should be treated like § 1983 for limitations purposes," *King-White* v. *Humble Indep. Sch. Dist.*, 803 F.3d 754, 759 (5th Cir. 2015), the Sixth Circuit applied the same rule to the Strauss victims' Title IX claims. Pet. App. 20a.

The Sixth Circuit then held that all the victims had plausibly alleged they did not know and could not have known about Ohio State's role in causing their abuse until 2018. Pet. App. 33a-35a. The court noted that the plaintiffs were, until recently, unaware of senior Ohio State administrators' knowledge of Strauss's abuse. *Id.* 33a-34a. Moreover, had a victim undertaken his own investigation into Ohio State's knowledge around the time of the abuse, his efforts would have been futile because the University engaged in a "decades-long cover up": It "concealed Strauss's abuse and Ohio State's knowledge of it, destroyed records, gave Strauss false performance reviews, and actively misled students by, for example, telling complainants that no one had ever previously complained about Strauss." *Id.* 35a.

The Sixth Circuit also held that the plaintiffs who alleged they did not know of their abuse until 2018 had done so plausibly. Pet. App. 36a. The court found particularly persuasive that "Strauss gave pretextual medical explanations for his abuse, such as conducting

a hernia check or doing an evaluation for sexually transmitted infections." *Ibid*. The court also noted that "the plaintiffs were young, untrained, and inexperienced." *Ibid*. It observed "the unique difficulties of recognizing whether a physician's conduct is abusive," as illustrated by this case as well as "[e]xample after example" provided by *amici*. *Id.* 37a. "[P]hysicians, unlike other professionals, are expected to touch a person's sexual organs, and laypeople lack the training to know whether an examination is medically appropriate." *Id.* 36a. Plus, "[m]edical procedures, including necessary ones such as colonoscopies, are often uncomfortable," so "discomfort does not mean that plaintiffs *should know* that they are being abused." *Id*. 37a.

Accordingly, the Court held, the plaintiffs' claims were timely "for three independent reasons." Pet. App. 38a. All plaintiffs plausibly alleged that, until 2018, "they did not know and lacked reason to know that Ohio State caused their injury." *Ibid.* All plausibly alleged that "even if they had investigated" Ohio State's role in Strauss's abuse, "they could not have learned of Ohio State's conduct." *Ibid.* Finally, "most plaintiffs plausibly allege that they did not know that they were abused." *Ibid.* The court emphasized that "each of these grounds is sufficient to delay accrual," and remanded for discovery. *Id.* 38a, 42a.

3. In reversing, the Sixth Circuit also rejected an argument Ohio State pressed as an alternative ground for affirming the dismissal of four victims' claims: that they were not students or employees. *See* Pet. App. 38a-42a. Two of those plaintiffs were independent

contractors; one was a high school student participating in an athletics program run by Ohio State on its campus; the other was a high school student to whom Strauss gave a tour of the athletics facilities. *Id.* 41a-42a. Ohio State did not argue that those victims could not meet the substantive elements of a Title IX claim. Rather, it contended that these four victims lacked "standing" because, by its telling, Title IX categorically bars suits by any individuals who were not students or employees at the time of the underlying events. Appellee's C.A. Br. 51-52.[3]

The Sixth Circuit held that Title IX includes no such limitation. It noted that "Title IX provides that '[n]o *person* . . . shall, on the basis of sex, be excluded from participation in, denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.' " Pet. App. 38a (quoting 20 U.S.C. § 1681(a)). The Sixth Circuit reasoned that, if Congress had wanted to limit Title IX's protections only to students or employees, rather than to all "person[s]," it would have done so. *Id.* 38a-39a.

Ohio State petitioned for rehearing en banc. Pet. for Reh'g En Banc 6-7. The Sixth Circuit denied the petition. Pet. App. 70a.

[3] "C.A. Br." refers to the identified party's brief in the Sixth Circuit docket for *Snyder-Hill v. The Ohio State University*, No. 21-3981.

REASONS FOR DENYING THE PETITION

I. THE SIXTH CIRCUIT'S APPLICATION OF THE DISCOVERY RULE IS UNWORTHY OF THIS COURT'S REVIEW.

There is no reason for this Court to review the Sixth Circuit's interlocutory conclusion that the plaintiffs' claims are plausibly timely. The decision below does not implicate a circuit split. Moreover, Ohio State misrepresents the complaints, which explain that 98 plaintiffs did not know until recently that they had been abused. Ohio State can challenge those allegations in a post-discovery motion for summary judgment. But the Court should not take on that factual dispute, especially on a motion to dismiss. And, as alleged, nearly all plaintiffs' claims are timely under either a one- or two-pronged discovery rule, meaning disposition of the question presented may have no effect on the case. Finally, the decision below is correct.

A. There is No Circuit Split.

Ohio State manufactures a circuit split to no avail. Contrary to its contention, no court has refused to apply the discovery rule to a Title IX harassment claim. And no court has adopted a version of the rule inconsistent with the Sixth Circuit's.

1. Ohio State's claim of a conflict turns on *Varnell* v. *Dora Consolidated School District*, 756 F.3d 1208 (10th Cir. 2014), which it says rejected the application of the discovery rule to Title IX claims. But *Varnell* did no such thing. There, the Tenth Circuit

declined to decide whether the discovery rule applied, since the plaintiff's claim was time-barred either way. *Id*. at 1216-17; *see also* Pet. App. 22a (distinguishing *Varnell*).

In *Varnell*, the plaintiff argued that her claim accrued when, years after the abuse by her school coach, she "discovered the extent of the injury inflicted on her by the abuse." 756 F.3d at 1215. The record, however, showed that she "knew long before she filed suit all the facts necessary to sue and recover damages." *Id.* at 1216. Accordingly, the Tenth Circuit explained, "even if the discovery rule applie[d]," it would not aid the plaintiff. *Ibid.*; *see also id*. at 1217 (stating "we know of no reason why Plaintiff could not have brought a Title IX claim as soon as" 2007).

That is not a rejection of the discovery rule, which the Tenth Circuit applies to "civil rights action[s]." *Alexander* v. *Oklahoma*, 382 F.3d 1206, 1215 (10th Cir. 2004) (citation omitted). Rather, *Varnell* stands for the very different point that a plaintiff need not know all the long-term effects of her injury to know that she has been injured. *See Wallace* v. *Kato*, 549 U.S. 384, 391 (2007) (holding a cause of action does not wait to accrue until "the full extent of the injury is . . . known" (quoting 1 C. Corman, Limitation of Actions § 7.4.1 (1991))); *Vasquez* v. *Davis*, 882 F.3d 1270, 1276 (10th Cir. 2018) (explaining § 1983 claims accrued once plaintiff knew or should have known each defendant "acted with deliberate indifference" and "caused [him] substantial harm," as distinct from when "the full extent of injury is . . . known" (citation omitted)). The issue in *Varnell*

is not presented in this case, where the plaintiffs have never argued that their claims accrued only when they discovered the full effects of long-known abuse. Rather, they have consistently argued that, until 2018, they did not know they were abused at all and did not know of Ohio State's role in causing that abuse. *See supra* pp. 7-9.

Ohio State reads too much into the Tenth Circuit's introductory remark that "it is 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*, 549 U.S. at 388). That statement is fully consistent with the principle that "claim[s] normally accrue[] at the time of the injury" but that, "to the extent that the facts necessary to bring a claim are unknown, the discovery rule may delay accrual." *Jardin De Las Catalinas Ltd. P'ship* v. *Joyner*, 766 F.3d 127, 133 (1st Cir. 2014).

2. Ohio State concedes that other appeals courts have applied the discovery rule to Title IX claims. Pet. 14. But, pointing to cases from the Fifth, Second, and Ninth Circuits, it asserts that courts have adopted versions of the discovery rule inconsistent with the Sixth Circuit's formulation. Again, Ohio State is wrong. Each of these courts, like the Sixth Circuit, has adopted a two-pronged discovery rule. None has rejected it for Title IX harassment cases. The cases on which Ohio State focuses—two of which are unpublished—demonstrate only that application of the rule may produce different results in factually different cases.

Fifth Circuit. Like the Sixth Circuit, the Fifth Circuit uses a two-pronged discovery rule under which a plaintiff's claim accrues when he knows "(1) [t]he existence of the injury; and (2) causation, that is, the connection between the injury and the defendant's actions." *Piotrowski*, 237 F.3d at 576 (citation omitted). The Fifth Circuit has, for example, applied that rule to hold a § 1983 claim did not accrue until the plaintiff learned that the municipal defendant had allowed a third party to hurt her—information the defendant had suppressed. *Id.* at 576-77.

In *King-White* v. *Humble Independent School District*, 803 F.3d 754 (5th Cir. 2015), the Fifth Circuit applied that discovery rule to a Title IX harassment claim that was nonetheless time barred because, unlike here, the plaintiffs knew or should have known of the abuse and the school's role years earlier. *See id.* at 762-63. In that case, a student-victim and her mother sued a school district after it failed to address a teacher's abuse, which the mother had "personally" reported "to [s]chool [o]fficials." *Id.* at 757, 762. The Fifth Circuit held that the claim had accrued back when officials ignored the mother's complaints, because that inaction provided notice of the school's causal role. *Id.* at 762-63. The plaintiffs' later discovery of the school's broader "policies or customs" related to sexual abuse did not delay accrual because that information was not necessary for them to know the factual predicate for their claim. *See id.* at 763.

"*King-White* . . . applied the same formulation of the discovery rule as the [Sixth Circuit] did [below].

The difference is that *King-White* dealt with" a different kind of Title IX harassment claim than those Ohio State faces. Pet. App. 78a (Moore, J., concurring in denial of petition for rehearing en banc). As *King-White* demonstrates, the discovery rule will rarely help plaintiffs who press what are known as "post-assault" Title IX claims, which seek to hold schools liable for their deliberate indifference after the plaintiff is abused and reports. After all, a "plaintiff will typically know or have reason to know that a school mishandles their own report of an assault close to the time of the school's inadequate response." *Id.* 32a. The Ohio State victims, by contrast, press "pre-assault" claims that seek to hold the University liable for its deliberate indifference to other victims' previous complaints, which permitted Strauss to go on to abuse the plaintiffs. *See id.* 31a-32a; Appellant's C.A. Br. 49-50. And they had no reason to know about those prior complaints, or that the school had mishandled them, until recently. Pet. App. 12a. *King-White*, then, is a factbound application of the same two-pronged discovery rule both the Fifth and Sixth Circuit have adopted.

Contrary to Ohio State's suggestion, the *King-White* plaintiffs' mere knowledge of the teacher's employment by the school was not and could not have been enough to establish that "the defendant's actions" caused the injury, *King-White*, 803 F.3d at 762 (citation omitted); *see also Piotrowski*, 237 F.3d at 576-77 & 577 n.12 (holding plaintiff's § 1983 claim against city did not accrue until she knew its causal role, even though she knew earlier about its employees' misconduct).

Title IX imposes no *respondeat superior* liability. *Gebser*, 524 U.S. at 285. Schools can only be sued for their *own* misconduct, such as deliberate indifference to sexual harassment known by an official with authority to take corrective action. *Id*. at 290. Accordingly, the *King-White* claims accrued outside the limitations period because "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," not because of the mere fact of the teacher's connection to the school. *King-White*, 803 F.3d at 763.

Second Circuit. Citing the unpublished decision in *Twersky* v. *Yeshiva University*, 579 F. App'x 7 (2d Cir. 2014), Ohio State also claims that the Second Circuit applies a different rule than the Sixth. Even putting aside that an unpublished decision has no precedential effect in the Second Circuit, *see* 2d Cir. R. 32.1.1(a), Ohio State is wrong. *Twersky* described the Second Circuit's two-pronged rule, under which "a cause of action accrues 'when, with reasonable diligence, the plaintiff has or should have discovered the critical facts of both his injury *and* its cause.'" 579 F. App'x at 9 (quoting *A.Q.C. ex rel. Castillo* v. *United States*, 656 F.3d 135, 140 (2d Cir. 2011)) (emphasis added); *see also Barrett* v. *United States*, 689 F.2d 324, 328-30 (2d Cir. 1982) (holding that two-pronged discovery rule delayed accrual when plaintiff knew he was injured but government defendant concealed its wrongdoing). As in the Sixth Circuit's decision below, *Twersky* explained that, assuming the discovery rule applies, a Title IX

deliberate indifference claim would not accrue until a plaintiff has "at least inquiry notice as to the school's awareness of and indifference to the abusive conduct." 579 F. App'x at 10 (citing *United States* v. *Kubrick*, 444 U.S. 111, 122 (1979)).

The panel declined, however, to decide whether the discovery rule applied to the plaintiffs' claims because, it determined, they were untimely either way. *Twersky*, 579 F. App'x at 9-10; *see also* Pet. App. 22a (characterizing *Twersky* as "declining to decide whether the discovery rule applies"). The plaintiffs had, years earlier, reported "their own abuse" to the school and knew the school had "rebuffed" them, allowing their abusers to "continue[]" teaching. *Twersky*, 579 F. App'x at 9-10. Accordingly, the plaintiffs had been "aware . . . years before filing this suit of a potential claim for deliberate indifference." *Id.* at 10.

This issue is not present in the respondents' appeal. Ohio State has not argued that any plaintiff was on notice of its deliberate indifference because he knew the University had mishandled a report of his own abuse decades before. *See generally* Appellee's C.A. Br. For good reason. The vast majority of the plaintiffs did not know they had been abused; next to none reported to senior Ohio State officials. *See supra* pp. 5-6, 8-9.[4]

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[4] Plus, as the Sixth Circuit held, it would not have mattered if plaintiffs had inquiry notice of the University's deliberate indifference to past reports "because the plaintiffs adequately allege that if they had investigated the abuse, they would not have discovered that Ohio State injured them." Pet. App. 35a. "This [futility] alone provides sufficient grounds to delay the accrual of their

Ninth Circuit. Finally, Ohio State is also wrong to look to Ninth Circuit case law. In several cases, the Ninth Circuit, like the Sixth Circuit, has applied a two-pronged discovery rule that turns on "when the plaintiff knows or has reason to know of the injury . . . and the cause of that injury." *Gregg* v. *Hawaii, Dep't of Pub. Safety*, 870 F.3d 883, 887 (9th Cir. 2017); *see also*, *e.g.*, *Bonneau* v. *Centennial Sch. Dist. No. 28J*, 666 F.3d 577, 581 (9th Cir. 2012) (same).

The one published Ninth Circuit case Ohio State cites, *Stanley* v. *Trustees of California State University*, 433 F.3d 1129 (9th Cir. 2006), concerned the application of the continuing violation doctrine, not the discovery rule, to a Title IX claim. *See id.* at 1136-37. The University emphasizes *Stanley*'s passing observation that "a cause of action generally accrues when a plaintiff knows or has reason to know of the injury which is the basis of his action." *Id.* at 1136 (citation omitted). That is not at odds with the decision below. As the Ninth Circuit has explained, the question of when a plaintiff discovers an "injury" encompasses "when the plaintiff knew or in the exercise of reasonable diligence should have known of the injury *and* the cause of that injury." *Bonneau*, 666 F.3d at 581 (quoting *Lukovsky* v. *City & Cnty. of S.F.*, 535 F.3d 1044, 1050 (9th Cir. 2008))

Title IX claims." *Id*. 36a; *see also New Eng. Health Care Emps. Pension Fund* v. *Ernst & Young, LLP*, 336 F.3d 495, 501 (6th Cir. 2003) (explaining "the limitation period begins to run only when a reasonably diligent investigation would have discovered" the defendant's wrongdoing, not upon inquiry notice).

(emphasis added). The Sixth Circuit's rule is the same. Pet. App. 27a-28a.

Ohio State also points to *Samuelson* v. *Oregon State University*, 725 F. App'x 598 (9th Cir. 2018). There, in sharp contrast to this case, the plaintiff "expressly disclaimed . . . any claim that [the school] was responsible for her sexual assault." *Id.* at 599. Instead, she argued that her school caused her to drop out after she was raped. *Ibid.*[5] In an unpublished memorandum, which did not engage with discovery rule case law, the Ninth Circuit determined the plaintiff's claim was untimely. *See ibid.* That very brief decision assessing a different kind of Title IX claim presents no conflict here, even putting aside that it is nonprecedential, *see* 9th Cir. R. 36-3(a). Post-*Samuelson*, district courts within the circuit continue to apply the Ninth Circuit's established two-pronged discovery rule to pre-assault Title IX cases, consistent with the Sixth Circuit's decision below. *E.g.*, *Karasek* v. *Regents of Univ. of Cal.*, 500 F. Supp. 3d 967, 978-79 (N.D. Cal. 2020); *Dutchuk* v. *Yesner*, No. 3:19-CV-0136, 2020 WL 5752848, at *5 (D. Alaska Sept. 25, 2020); *Jameson* v. *Univ. of Idaho*, No. 3:18-CV-00451, 2019 WL 5606828, at *3-4 (D. Idaho Oct. 30, 2019).

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[5] The plaintiff pressed a unique theory that her school's "deliberate indifference to [her] report of rape is . . . a consequence of [its] deliberate indifference to [a previous victim's] report of rape." Reply Br. at 3, *Samuelson* v. *Oregon State Univ.*, 725 F. App'x 598 (9th Cir. 2018) (No. 16-35216), ECF No. 24. Whatever that means, it is not the same kind of claim at issue in this case.

In sum, none of the cases on which Ohio State relies is inconsistent with the decision below. A difference in outcome based on the application of the same law to different facts does not create a conflict.

B. This Case is an Unsuitable Vehicle for Review.

Even if there were a circuit split, this case would be a bad vehicle for the Court to resolve it. Ohio State's argument is predicated on a version of the facts flatly contradicted by the complaints. And, without fact discovery contradicting plaintiffs' allegations, the legal question in its petition may be academic.

Although Ohio State insists "the relevant facts are uncontested," Pet. 29, it contests the facts. In its petition, the University represents that "each respondent knew of their injury between 1978 and 1998, when the injury occurred." *Id.* 23 (cleaned up). But, as described above, the vast majority of plaintiffs allege that they did *not* know they were injured at the time because Strauss disguised his abuse as medical care. *See supra* pp. 5-6, 8-9. The Sixth Circuit explained why those allegations are plausible, given the unique dynamics of physician-patient abuse. Pet. App. 36a-38a.[6]

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[6] Splicing the Sixth Circuit's words, Ohio State inaccurately claims that the court held "respondents may not have realized that Strauss's . . . conduct 'medically' constituted 'abuse,'" Pet. 10-11 (citing Pet. App. 35a-38a), as though the issue was that the plaintiffs did not realize the conduct met some technical medical definition of abuse. That is not what the Sixth Circuit said. Instead, it held that the plaintiffs plausibly alleged they did not

Ohio State, apparently, does not believe the plaintiffs. But courts must accept a complaint's allegations as true on a motion to dismiss. *Ashcroft* v. *al-Kidd*, 563 U.S. 731, 734 (2011); Pet. App. 19a, 35a. And, most important at this juncture, the fact-specific plausibility of the plaintiffs' allegations is not a matter for this Court to resolve. The Court should not take up this case to decide whether it is plausible that John Doe 62 did not know, and should not have been expected to know, that Strauss digitally penetrated his anus for sexual purposes rather than to conduct a prostate exam. Compl. ¶¶ 2212-13. Nor should it take up this case to decide versions of that question for 97 other men.

Instead, questions about the plaintiffs' knowledge are appropriate for a factfinder after proper development of the record. In discovery, Ohio State will have the chance to explore when the victims knew or should have known they had been sexually abused. If the evidence does not support the allegations in the complaint, Ohio State can move for summary judgment on that basis.

Until then, it is impossible to know whether resolution of the question presented will have any effect on the case. *See* Stephen M. Shapiro et al., *Supreme Court Practice* § 4-18 (11th ed. 2019) (explaining this Court is disinclined to grant certiorari in cases where "resolution of [the question presented] is irrelevant to the ultimate outcome of the case"). Under Ohio State's

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know they were abused—not just "medically," but at all. Pet. App. 36a-37a.

version of the discovery rule, a claim should accrue when the plaintiff knows he has been injured, even if he does not know the defendant's role in causing his injury. Pet. 23-25. Because the vast majority of respondents pleaded they did not know they had been injured until recently, their claims, as alleged, would be timely even if the discovery rule were only single pronged in the manner Ohio State proposes.[7]

If Ohio State is able to convince a factfinder that all the victims did, in fact, know they were abused at the time, then the distinction between a one- and two-pronged discovery rule would matter. And the interlocutory posture of the case means that Ohio State will have an opportunity to seek review on a developed record if it does not prevail on remand. But the University's petition is premature given the complaints' factual allegations.

C. The Sixth Circuit's Decision is Correct.

1. Below, the Sixth Circuit correctly applied the well-established two-pronged discovery rule embraced by this Court and the unanimous courts of appeals. And the victims' claims are precisely the type that call for it.

a. "[A]ll statutes of limitation must proceed on the idea that the party has full opportunity afforded

[7] Five plaintiffs have also alleged fraudulent concealment, which would toll the statute of limitations under Ohio state law for their claims even absent the discovery rule. Appellant's C.A. Reply Br. 20-23.

him to try his right in the courts." *Wilson* v. *Iseminger*, 185 U.S. 55, 62 (1902). Thus, though a claim "normally" accrues when it arises, Pet. 21, common-law rules often delay accrual until the victim has a reasonable chance to file suit and obtain relief. *See*, *e.g.*, *McDonough* v. *Smith*, 139 S. Ct. 2149, 2155 (2019) ("Where, for example, a particular claim may not realistically be brought while a violation is ongoing, such a claim may accrue at a later date."); *cf. Lozano* v. *Montoya Alvarez*, 572 U.S. 1, 11 (2014) (holding that "background" common-law tolling rules may extend the time to sue if the statute does not say otherwise).

A plaintiff lacks such a chance when he does not know he has been injured or the defendant's causal role. *See Kubrick*, 444 U.S. at 122. "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." *City of Aurora* v. *Bechtel Corp.*, 599 F.2d 382, 387-88 (10th Cir. 1979) (citation and emphasis omitted). The discovery rule offers a solution with "centuries-old roots." *Gabelli* v. *S.E.C.*, 568 U.S. 442, 449 (2013).

b. This Court has long applied the discovery rule to delay accrual of claims where plaintiffs could not immediately discover their injury or its cause. *See Urie* v. *Thompson*, 337 U.S. 163, 170 (1949); *Holmberg* v. *Armbrecht*, 327 U.S. 392, 397 (1946); *Expl. Co.* v. *United States*, 247 U.S. 435, 446-47 (1918); *Bailey* v. *Glover*, 88 U.S. 342, 349-50 (1874). The rule first took hold in fraud cases. *See Bailey*, 88 U.S. at 349. But this Court has recognized its application to other claims that are

undiscoverable when they first arise. In *Urie*, for example, a worker's claim based on an occupational illness did not accrue until his symptoms emerged years later. 337 U.S. at 170. To hold that the clock ran while the plaintiff remained in "blameless ignorance" of his condition, the Court held, would create a "delusive remedy." *Id.* at 169-70. It would also frustrate "the traditional purposes of statutes of limitations, which conventionally require the assertion of claims within a specified period of time after notice of the invasion of legal rights." *Id.* at 170.

Later, in *Kubrick*, the Court acknowledged the rule again and clarified the circumstances that call for it. In the ordinary case, the injured plaintiff knows "the critical facts that he has been hurt and who has inflicted the injury," and "need only ask" experts "if he has been wronged." 444 U.S. at 122. In other cases, however, the injury is "unknowable" until it reveals itself "and the facts about causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain." *Ibid.* *Kubrick* indicated that although a plaintiff's ignorance of the law will not delay accrual, his blameless ignorance of the claim's "factual predicate"—his injury and its cause—will. *Id.* at 118, 122; *see also Merck & Co.* v. *Reynolds*, 559 U.S. 633, 645-46 (2010) (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)); Pet. App. 26a (discussing *Kubrick*).

Following *Kubrick*, the courts of appeals have understood that the discovery rule delays accrual when a plaintiff is "blamelessly ignorant of the existence or cause of his injury." *Barrett*, 689 F.2d at 327; *see also*, *e.g.*, *Simmons* v. *United States*, 805 F.2d 1363, 1366 (9th Cir. 1986) (applying *Kubrick* to hold claim for sexual abuse by doctor did not accrue until plaintiff discovered "both the existence and cause of [her] injury"); *Arvayo* v. *United States*, 766 F.2d 1416, 1419 (10th Cir. 1985) (applying *Kubrick* to hold that a claim accrues when "the plaintiff has discovered both his injury and its cause"); *Dubose* v. *Kansas City S. Ry. Co.*, 729 F.2d 1026, 1030 (5th Cir. 1984) ("The *Kubrick* rule . . . should be applied in federal cases whenever a plaintiff is not aware of and has no reasonable opportunity to discover the critical facts of his injury and its cause."); *Stoleson* v. *United States*, 629 F.2d 1265, 1269-71 (7th Cir. 1980) (citing *Kubrick* to hold that a claim accrues when the plaintiff "discovers" or with "reasonable diligence should discover his injury and its cause").

c. Congress legislated against the backdrop of these common-law principles when it ratified Title IX's private cause of action in 1986. *See Franklin* v. *Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 72 (1992) (holding that the 1986 amendment to Title IX "cannot be read except as a validation" of the private cause of action); *id*. at 78 (Scalia, J., concurring) (same); *see also*, *e.g.*, *Lozano*, 572 U.S. at 11 (noting that Congress intends courts to apply background common-law principles to

statutes of limitation when it leaves a statutory gap). And this case proves the need for the discovery rule in the unusual Title IX deliberate indifference case, like this one, where victims had no reason to know they were abused and that the defendant caused the abuse. *See* Pet. App. 30a, 33a-37a. Without delayed accrual, universities would have every reason to run out the clock by covering up their facilitation of sexual predators like Strauss. *See id.* 35a.

2. Ohio State wishes the law were otherwise. But its counterarguments do not hold up.

a. Ohio State contends the occurrence rule—that a claim accrues when "the plaintiff has a complete and present cause of action"—*always* applies to *every* claim under *every* statute that does not "unambiguous[ly]" adopt another rule. Pet. 3, 21-22 (citation omitted). But neither this Court nor any circuit has adopted that extreme position, which conflicts with *Kubrick*, *Urie*, and other Supreme Court cases that all applied the discovery rule without an explicit statutory command. *See supra* pp. 23-24 (collecting cases). And none of Ohio State's cases support its proposed rule. *See* Pet. App. 23a (explaining *Rotkiske* v. *Klemm*, 140 S. Ct. 355 (2019), does not "affect 'the continuing propriety of the discovery rule'" (quoting *Sohm* v. *Scholastic, Inc.*, 959 F.3d 39, 50 (2d Cir. 2020)); *see also Martinelli* v. *Hearst Newspapers, L.L.C.*, 65 F.4th 231, 241 (5th Cir. 2023) (same). Some undermine it. *See Gabelli*, 568 U.S. 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 (citing

Wallace, 549 U.S. at 388-91 & 390 n.3) (explaining, in a case where the discovery rule was not at issue, that a § 1983 claim may not accrue until it could "realistically be brought," well after a "complete and present cause of action" arose).[8]

In insisting the discovery rule cannot apply absent a statutory directive, Ohio State handwaves about Title IX's implied cause of action. Pet. 22. But, as explained above, Congress expressly "validat[ed]" Title IX's private right of action in 1986, *Franklin*, 503 U.S. at 78 (Scalia, J., concurring) (citation omitted), and did so against the backdrop of the discovery rule. *See supra* p. 25. And the University offers no principled reason why a claim under an implied right of action should accrue differently than a claim under an express cause of action if the statutes are otherwise identical and both silent on accrual.

b. Ohio State also appears to suggest that the discovery rule should be limited to cases of fraud, Pet. 19, latent disease, *ibid.*, and medical malpractice, *id.* 25. But neither this Court nor any other has limited the discovery rule to those contexts. *See*, *e.g.*, *Barrett*, 689 F.2d at 327 (2d Cir.) (rejecting similar argument); *Stoleson*, 629 F.2d at 1269 (7th Cir.) (same); *Alexander*,

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[8] The other cases Ohio State cites have nothing to do with the discovery rule. *See*, *e.g.*, *Petrella* v. *Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 677-78 (2014) (holding that laches defense did not apply to Copyright Act); *Graham Cnty. Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 545 U.S. 409, 418 (2005) (holding that limitations period on False Claims Act retaliation claim did not begin running before the claim accrued).

382 F.3d at 1215 (10th Cir.) (holding two-pronged discovery rule applies to civil rights actions); *Piotrowski*, 237 F.3d at 576-77 (5th Cir.) (applying two-pronged discovery rule to § 1983 state-created danger case); *Bibeau*, 188 F.3d at 1108 (9th Cir.) (applying two-pronged discovery rule to § 1983 physical abuse claim); *Ouellette*, 977 F.3d at 136 & n.7 (1st Cir.) (applying two-pronged discovery rule to § 1983 sexual abuse claim); *Mullinax* v. *McElhenney*, 817 F.2d 711, 716 (11th Cir. 1987) (applying two-pronged discovery rule to § 1983 entrapment claim). The courts' consistent view makes sense because plaintiffs with other types of claims may blamelessly "face comparable problems in discerning the fact and cause of their injuries." *Barrett*, 689 F.2d at 327; *see also Stoleson*, 629 F.2d at 1269 (same).

This case illustrates the point. Through "a decades-long cover up," Ohio State "actively concealed" its complicity in a pattern of anal and genital molestation that Dr. Strauss fraudulently disguised as legitimate medical exams. Pet. App. 8a-9a, 35a. The reasons the discovery rule is often so necessary in medical malpractice and fraud cases—including patients' reliance on doctors' explanations and fraud's self-concealing nature—are equally pressing here. *See*, *e.g.*, *Kubrick*, 444 U.S. at 120 n.7 (noting the discovery rule is important for medical malpractice claims because "the nature of the tort . . . will frequently prevent knowledge of what is wrong, so that the plaintiff is forced to rely upon what he is told by the physician" (quoting Restatement (Second) of Torts § 899 cmt. e (1979))); *Bailey*, 88 U.S. at 349-50 (explaining the

discovery rule is necessary in fraud actions "when the fraud has been concealed, or is of such character as to conceal itself").

c. Ohio State argues that, if there is a discovery rule, it requires only that the plaintiff know he is harmed, not that he knows the defendant's causal role. Pet. 23. The University focuses on a line from *Rotella* v. *Wood*, echoed in *Gabelli*, that "discovery of the injury, not discovery of the other elements of a claim, is what starts the clock." 528 U.S. 549, 555 (2000). But as the Sixth Circuit explained, and the rest of that passage makes clear, *Rotella* used "injury" to mean what it usually does "in the context of the discovery rule": not just "harm" but also the acts that constitute "[t]he violation of another's legal right." Pet. App. 29a n.81 (alteration in original) (quoting *Injury*, Black's Law Dictionary (11th ed. 2019)). Indeed, "*Rotella*'s very next sentence points to *Kubrick*'s explanation that 'the justification for a discovery rule does not extend beyond the injury' because 'a plaintiff's ignorance of his legal rights' is different from 'his ignorance of *the fact* of his *injury or its cause*.'" Pet. App. 27a (quoting *Rotella*, 528 U.S. at 555-56 (quoting *Kubrick*, 444 U.S. at 122)). *Rotella* only reinforces that the discovery rule is two-pronged.

The Sixth Circuit, then, did not "adopt[] an extreme version of [the discovery] rule," as Ohio State asserts. Pet. 16. It used the same rule this Court and the other courts of appeals have endorsed. Pet. App. 26a-28a. Moreover, as explained, at least 98 of the respondents' claims would be timely even under a

single-pronged discovery rule, since they did not know they had been abused. *See supra* pp. 21-22.

d. Finally, Ohio State fearmongers that the Sixth Circuit's holding will have bad policy consequences. In doing so, it overstates the impact of the case: Most Title IX claims are quickly discoverable because most schools don't engage in "decades-long cover-up[s]." Pet. App. 35a. And Ohio State is wrong that the discovery rule discourages institutional transparency. It has the opposite effect, ensuring schools are not rewarded for covering up abuse and institutional complicity until the clock runs out. *See supra* p. 26. Plus, this case provides good evidence that the discovery rule does not inhibit internal investigations. After all, the well-established two-pronged discovery rule long embraced by the Sixth Circuit did not dissuade Ohio State from retaining Perkins Coie to investigate Strauss's conduct and the University's own failures. Pet. App. 5a, 26a.

For these reasons, the Court should deny certiorari on this first question presented.

II. THE SIXTH CIRCUIT'S HOLDING THAT TITLE IX PROTECTS "PERSONS," NOT ONLY STUDENTS AND EMPLOYEES, IS UNWORTHY OF REVIEW.

Ohio State also asks this Court to take up a second question: Whether Title IX's protections extend only to "current or prospective students or employees." Pet. i. The statute answers that question directly, and the

answer is no. On this, too, the courts agree. There is no reason for this Court to take up the question.

A. There is No Circuit Split.

Ohio State does not claim there is any circuit split on this question. There is not. The few appellate courts that have addressed the issue agree that "Title IX does not limit its coverage at all, outlawing discrimination against any 'person.'" *Elwell* v. *Oklahoma ex rel. Bd. of Regents of Univ. of Okla.*, 693 F.3d 1303, 1311 (10th Cir. 2012) (Gorsuch, J.) (quoting 20 U.S.C. § 1681(a)); *see also*, *e.g.*, *Doe* v. *Brown Univ.*, 896 F.3d 127, 132 n.6 (1st Cir. 2018) (holding Title IX protects, among others, "[m]embers of the public [who] . . . attend campus tours [and] . . . sporting events" because they "are either taking part or trying to take part of a funding recipient"); *Doe* v. *Univ. of Ky.*, 971 F.3d 553, 558 (6th Cir. 2020) (recognizing Title IX protects persons beyond students and employees).

B. The Sixth Circuit's Decision is Correct.

The decision below is required by the statute's plain text and Supreme Court precedent. Again, Title IX provides that "[n]o *person* in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a) (emphasis added). The Dictionary Act defines a "person" to encompass all "individuals." 1 U.S.C. § 1.

Unsurprisingly, it does not define "person" to mean only "a student or employee." *See ibid.*

Accordingly, in using the term "person," the statute's text does not limit plaintiffs to those with a particular relationship to the institution. *Elwell*, 693 F.3d at 1311; *see also Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167, 179 n.3 (2005) ("Title IX's beneficiaries plainly include all those who are subjected to 'discrimination' 'on the basis of sex.' "). As this Court reasoned in *North Haven*—in which it held Title IX protects employees, not just students—"Congress easily could have substituted 'student' or 'beneficiary' for the word 'person' if it had wished to restrict [Title IX's] scope." *N. Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 521 (1982). Congress "did not limit the statute in this way and thus, Title IX's plain language sweeps more broadly." Pet. App. 39a; *see also Conviser* v. *DePaul Univ.*, No. 20-CV-03094, 2023 WL 130483, at *9-10 (N.D. Ill. Jan. 9, 2023) (holding, based on similar reasoning, that Title IX protects independent contractors).

The Civil Rights Restoration Act of 1987 (CRRA) confirms Title IX's broad reach. *See* 20 U.S.C. § 1687. The CRRA "amended Title IX to require the *entire* entity receiving federal funds to abide by the statute's substantive rules." *United States* v. *Grossi*, 143 F.3d 348, 350 (7th Cir. 1998) (emphasis added); *see also Doe* v. *Claiborne Cnty.*, 103 F.3d 495, 513 (6th Cir. 1996) (noting the CRRA requires "broad, institution-wide application" of Title IX (quoting 20 U.S.C. § 1687)). To accomplish this goal, Congress defined "program or activity," as used in Title IX, to "mean all the operations

of . . . a . . . college, university, or other postsecondary institution." 20 U.S.C. § 1687. A university, then, is a single "program or activity." *Ibid.* And because a university is an educational institution, the whole school is an "education program or activity" subject to Title IX. 20 U.S.C. § 1681(a); *see also Conviser*, 2023 WL 130483, at *10-11 (explaining why "'all the operations of' . . . a college . . . constitute an 'education program or activity' under Title IX," and the function of the word "education").

As the Senate report accompanying the CRRA explained, that means Title IX extends to parts of a university beyond their "traditional educational operations," including, for example, "campus restaurants" and "the bookstore." S. Rep. No. 100-64, at 17 (1998); *see also Conviser*, 2023 WL 130483, at *12 (discussing Title IX's reach to non-academic programs); *Fox* v. *Pittsburg State Univ.*, 257 F. Supp. 3d 1112, 1124 (D. Kan. 2017) (same); *Brown Univ.*, 896 F.3d at 132 n.6 (same). Potential plaintiffs are not excluded from Title IX's protections just because they engage with parts of a university outside its core academic programming "offered to students," Pet. 32.[9]

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[9] Ohio State's rule would also categorically bar potential claims by non-student, non-employees engaged with a school's core programming. For example, adjunct professors are independent contractors, just like John Doe 30 and John Doe 42 were. And Ohio State would be hard pressed to argue that Title IX—a statute well known for its role in promoting gender equality in sports—does not extend to its athletic programming and facilities, the context in which all four plaintiffs at issue were abused.

In sum, the Sixth Circuit's recognition that "person[s]" other than students and employees may bring claims under Title IX is not, as Ohio State newly contends, an expansion of the statute's private right of action. It is, instead, an application of Title IX's plain text. That Title IX is a Spending Clause statute does not change the answer here. The statute's use of "person" provides full notice to recipients that they may be liable for their intentional sex discrimination against "person[s]" other than students and employees.[10]

Finally, Ohio State overstates the effects of the decision below. It contends that the Sixth Circuit's refusal to place atextual limits on the universe of Title IX plaintiffs permits "virtually anyone who sets foot on campus" to bring a Title IX claim. Pet. 33 (citation omitted). But that would only be true if Ohio State engaged in intentional sex discrimination against everyone who visits the University. And this Court has established demanding liability standards that few plaintiffs are able to meet. *See*, *e.g.*, *Stiles ex rel. D.S.* v. *Grainger Cnty.*, 819 F.3d 834, 848 (6th Cir. 2016) (discussing the "high bar" for Title IX liability).

For example, in addition to establishing a recipient's actual knowledge and deliberate indifference, a plaintiff alleging peer harassment must also show the harassment was severe, pervasive, and objectively

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[10] On this question, Ohio State centers its argument on Title IX's implied private right of action and its status as a Spending Clause statute. Pet. 29-32. But the University did not raise either of these points before the Sixth Circuit. *See* Pet. for Reh'g En Banc 15-16; Appellee's C.A. Br. 51-52.

offensive, that the recipient exercised control over both the harasser and the context of the harassment, and that the recipient's deliberate indifference resulted in the plaintiff being deprived of its opportunities and benefits. *Davis ex rel. LaShonda D.* v. *Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 643-52 (1999). So, the University should be reassured that Ohio State sports fans will not "go home with a Title IX claim against the University for being indifferent to crude spectators," Pet. 33 (citation omitted), because that conduct would not give rise to a Title IX claim regardless of the identity of the victim.

To be sure, Ohio State might like to replace "person" with "student[] or employee[]" to limit the anti-discrimination obligations it accepts as a condition of federal funding. Pet. i. Rewriting Title IX, though, is Congress's job, not the Court's, and certainly not Ohio State's.

CONCLUSION

The Court should deny the petition for a writ for certiorari.

Respectfully submitted,

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