Nos. 21-3981, 21-3991

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STEVE SNYDER-HILL, et al.
Plaintiffs-Appellants,

v.

THE OHIO STATE UNIVERSITY,
Defendant-Appellee.

TIMOTHY MOXLEY, et al.
Plaintiffs-Appellants,

v.

THE OHIO STATE UNIVERSITY,
Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of Ohio
Nos. 2:18-cv-736, 2:21-cv-03838 (Hon Michael. H. Watson)

BRIEF OF RAINN (RAPE, ABUSE AND INCEST NATIONAL NETWORK), NATIONAL CRIME VICTIM LAW INSTITUTE, CHILD USA, AND OHIO ALLIANCE TO END SEXUAL VIOLENCE AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS SEEKING REVERSAL

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DISCLOSURE STATEMENT

No amicus has a parent corporation, and no publicly held company has a ten percent or greater ownership interest in any amicus.

No party's counsel authored this brief in whole or in part. No party, party's counsel, or other person contributed money that was intended to fund preparation or submission of this brief.

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STATEMENT OF AMICI CURIAE

Rape, Abuse and Incest National Network (RAINN), National Crime Victims Law Institute (NCVLI), CHILD USA, and Ohio Alliance to End Sexual Violence (OAESV) respectfully submit this amicus brief in support of Plaintiffs-Appellants. The *amici curiae* are sexual violence and victim advocacy organizations with collective decades of experience studying sexual violence and working with survivors. They have a strong interest in the outcome of these cases and believe their expertise in this field may be of assistance to the Court. The complete statements of *amici curiae* are provided in Appendix A.

INTRODUCTION

No one disputes that the plaintiffs who sued Ohio State University (OSU) in the district court suffered "unspeakable abuse" at the hands of Richard Strauss, a doctor employed by OSU who sexually abused hundreds of students over the course of decades. *Garrett v. OSU,* No. 2:18 Civ. 692 (S.D. Ohio), Opinion and Order, R.197 at 1494.[1] Yet even as it agreed that their claims "cry out for a remedy," the district court dismissed those claims as barred by the statute of limitations. *Id.* at 1495.

The concededly unjust outcome the district court reached—spurning the very remedy it acknowledged is urgently required—resulted from its cramped and facile understanding of how sex discrimination claims involving sexual assault arise in educational settings. The erroneous accrual rule embraced below gives survivors of sexual abuse a Hobson's choice: instead of bringing a lawsuit that will be dismissed as time-barred, bring one that will be dismissed for failing to state a claim. Either file a complaint with no way of showing that your school was deliberately indifferent to your rights, or else beg your school to share information that would inculpate

[1] The district court granted OSU's motions to dismiss in these actions for the reasons set forth in its opinion in *Garrett*. *Snyder-Hill v. OSU*, No. 2:18 Civ. 736 (S.D. Ohio), Opinion and Order, R.158 at 2775; *Moxley v. OSU*, No. 2:21 Civ. 3838, (S.D. Ohio), Opinion and Order, R.26 at 511-12.

it—information to which you have no right, and which your school has every incentive to conceal until your claims are time-barred.

Too little or too late.

At the heart of this case is the right of survivors of sexual violence to access the justice system and to have their day in court. By placing survivors in an impossible vise, the district court's decision abdicates responsibility for the enforcement of Title IX. It conditions the vindication of survivors' rights on the good faith and transparency of schools that have repeatedly shown unwillingness to treat complaints of sexual violence with the seriousness they demand. The district court's accrual rule creates perverse incentives, encouraging universities to cover up abuse and to side with their worst perpetrators over the students in their care. And it fundamentally misunderstands the experiences of survivors, overlooking that the fiction of "inquiry notice" means nothing to survivors when their schools may mislead them.

An affirmance here would ensure that the worst enablers of campus sexual violence will remain those least likely to be held accountable. It would force courts to reward the schools for their effectiveness at sheltering predators and covering up their own wrongdoing. And it would all but

guarantee that school administrators continue to fail the very survivors they have already failed the most.

The decision below cries out for reversal.

ARGUMENT

I. THE DISTRICT COURT'S DECISION PLACES SURVIVORS IN AN IMPOSSIBLE BIND

Had plaintiffs attempted to sue OSU under Title IX based on the facts they knew at the time Dr. Strauss assaulted them, their cases would have been dismissed for failure to state a claim. Time and again, the Supreme Court has reiterated that there is no *respondeat superior* liability under Title IX. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 285 (1998); *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 641 (1999). The Court has repeatedly distinguished actionable sex discrimination—deliberate indifference by school officials to known sexual harassment—from the unactionable, independent misconduct of employees, emphasizing that "a recipient of federal funds may be liable in damages under Title IX *only for its own misconduct*." *Davis,* 526 U.S. at 641 (emphasis added).

Accordingly, plaintiffs could not have sued OSU until they learned of the *university's* wrongdoing: that OSU had known for years that Dr. Strauss was a threat, that he preyed on male student athletes, and that he regularly molested students during medically unnecessary examinations. That

moment was no earlier than April 2018, when the school publicly announced it would open an investigation into Dr. Strauss's sexual misconduct. Before then, none of the plaintiffs knew (or had reason to know) that the assaults they had suffered were caused by OSU's failure to take reasonable steps to protect its students from a known predator. They possessed none of the evidence required to demonstrate that OSU—as distinct from Dr. Strauss—had inflicted a distinct injury upon them by violating their right to an educational environment free from sex discrimination.

Yet the district court held that survivors of Dr. Strauss's abuse forfeited their civil claims by waiting to bring suit until they possessed a factual basis to assign blame to OSU. *See* Opinion and Order (*Garrett*), R.197 at 1503-05 (applying occurrence rule); *id.* at 1505-09 (applying discovery rule in the alternative). The district court disposed of the plaintiffs' claim accrual arguments with an unsupported conclusory finding that the bare fact of Dr. Strauss's employment relationship with OSU sufficed to place plaintiffs on notice of OSU's role in perpetuating the abuse and start the limitations clock running.[2] This rationale upends the Supreme

[2] To the extent the district court's notice analysis relied on stray references to rumors and jokes about Strauss's conduct that are not particularized to any plaintiff, *see* Opinion and Order (*Garrett*), R.197 at

Court's repeated admonitions that Title IX does not confer vicarious liability.

The district court's rule places survivors between a rock and a hard place, dictating that knowledge of facts that fail to plausibly state a Title IX claim can nonetheless trigger accrual of that very claim and start the running of the limitations period. Given the realities of campus sexual assault, such a rule would gut the protections of Title IX.

II. THE DISTRICT COURT'S DECISION IGNORES THE CONTEXT OF SEXUAL ASSAULT ON CAMPUSES

The district court's decision overlooks two crucial realities.

First, it ignores the fundamental misalignment between a school's incentives and those of its student-survivors in cases of sexual abuse. The bigger the underlying problem and the school's prior failures to address it, the greater its incentive to hide the information a survivor requires to state an actionable Title IX claim. As a result, the decision below perversely incentivizes schools to conceal their worst wrongdoing and forces courts to reward them when they do.

1511-12 nn. 7-8, some courts have held that even facts similar to those the district court baselessly imputed to every single plaintiff are insufficient to plead a Title IX claim. *See, e.g.*, *Bernard v. E. Stroudsburg Univ.*, 700 F. App'x 159, 165 (3d Cir. 2017); *Shrum ex rel. Kelly v. Kluck*, 249 F.3d 773, 780 (8th Cir. 2001).

Second, in stressing what survivors *should* do, the district court failed to grasp what they *can* do. Many survivors do not realize they have been sexually abused. For those who do, it is difficult, if not impossible, for survivors navigating the aftermath of trauma to pursue information about school officials' prior knowledge of their abuser's predatory propensities. Meanwhile, the few survivors capable of pursuing this information have no right to obtain the evidence that their schools are most strongly incentivized to conceal. The district court's decision ignores that survivors are structurally impeded from discovering their schools' causal role in their abuse, no matter how diligent they may be.

A. Schools' Incentives Are Often Misaligned with Those of Student-Survivors

1. Schools Have Historically Obstructed Survivors' Timely Access to Evidence in Cases of Widespread Abuse

Like universities across the nation, OSU promises to protect its students to the best of its ability and to foster a safe and secure educational environment.[3] This case illustrates the tragedy that can result when such promises are broken.

[3] Ohio State University, *Student Conduct: What We Do* (2021), https://studentconduct.osu.edu/ (last visited Jan. 5, 2021).

Title IX is an expression of Congress's acknowledgment that self-regulation is not always enough to ensure that schools invariably act in their students' best interests. Sadly, universities are perhaps nowhere more likely to fail their students than in the context of sexual assault and abuse. Fears of reputational damage, the cost and administrative burden of complying with Title IX's mandates, and concerns about potential civil and criminal liability all conspire to undermine schools' prosocial interests and incentivize concealment. Universities are not alone in succumbing to these pressures; as the Pennsylvania grand jury report on child sexual abuse in the Catholic Church succinctly observed: "The main thing was not to help children, but to avoid 'scandal.'"[4] Recent cases involving far-reaching coverups on campuses nationwide demonstrate how pernicious these incentives can prove in the educational context.

In June 2012, Jerry Sandusky, an assistant coach for the Penn State University football team, was convicted of 45 counts of child sexual abuse related to the molestation of ten young boys over a fifteen-year period.[5]

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[4] *See* Mary Anne Case, *Institutional Responses to #MeToo Claims: #VaticanToo, #KavanaughToo, and the Stumbling Block of Scandal*, 2019 U. CHI. LEGAL F. 1, 12 (2019).

[5] Freeh Sporkin & Sullivan, LLP, *Report of the Special Investigative Counsel Regarding the Actions of The Pennsylvania State University Related to The Child Sexual Abuse Committed by Gerald A. Sandusky*, 13 (July 12, 2012) (hereinafter "Freeh Report"), https://web.archive.org/web

Following the public revelation of Sandusky's conduct, Penn State enlisted the law firm Freeh Sporkin & Sullivan to investigate the failure of Penn State personnel to respond to and report Sandusky's misconduct to appropriate authorities.[6] The paper trail uncovered by the Freeh Report demonstrated that high-ranking officials acutely understood what the revelation of a scandal of this magnitude would do to the university, and that their desire to maintain the high status of the university—and in particular its football program—entirely eclipsed their concern for Sandusky's past and future victims.[7] As a result, they allowed him to continue preying on students for years.

Emails exchanged between three of the most powerful officials at the university–President Graham Spanier, Senior Vice President Gary Schultz, and Athletic Director Timothy Curley–paint a depressing portrait of the calculus high-level officials apply in cases of sexual abuse. After receiving a report that Sandusky had anally raped a young boy in the locker room

/20120713173804/http://www.thefreehreportonpsu.com/report_final_071212.pdf.

[6] *Id.* at 8.

[7] *See id.* at 14 ("The most saddening finding by the Special Investigative Counsel is the total consistent disregard by the most senior leaders at Penn State for the safety and welfare of Sandusky's child victims.").

showers more than a decade before it was revealed to the public, Director Curley and Vice President Schultz took no action other than to send Sandusky a warning not to be seen with young children while on campus "in order to avoid publicity issues."[8] Their decision was fully supported by President Spanier. In a recovered e-mail, Spanier provided a glimpse into the university's cynical approach to reputational management: "[T]he only downside for us [of not escalating the matter] is if the message isn't heard and acted upon, and we then become vulnerable for not having reported it. But that can be assessed down the road."[9]

As the cases of both OSU and Penn State demonstrate, schools' interest in protecting the reputation of their athletic programs has long stood at odds with their duty to enforce Title IX and protect their students. Investigations have shown that University of Michigan officials suppressed information that athletics doctor Robert Anderson routinely molested more than 950 students during medical examinations;[10] that Michigan State was long aware that Larry Nassar, a doctor with the school's athletics

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[8] *Id.* at 78.

[9] *Id.* at 75.

[10] WilmerHale, *Report of Independent Investigation: Allegations of Sexual Misconduct Against Robert E. Anderson*, 3-7 (May 11, 2021) (hereinafter "Michigan Report"), https://regents.umich.edu/files/meetings/01-01/WH_Anderson_Report.pdf.

department, sexually assaulted hundreds of individuals under the guise of medical treatment;[11] and that officials at the University of Minnesota conspired to cover up the fact that its men's hockey coach, Thomas Adrahtas, horrifically sexually assaulted numerous student athletes.[12] Still other investigations have corroborated allegations that Baylor University and Louisiana State University each concealed numerous allegations of sexual assault committed by high-profile student athletes.[13] A report by the law firm Husch Blackwell—commissioned by Louisiana State following revelations that officials suppressed rape allegations relating to the school's star running back—could apply equally to all these institutions: "The 'work

[11] Letter from Fed. Student Aid, U.S. Dep't of Educ., to John Engler, President, Mich. State Univ. 5-7 (Dec. 14, 2018) (hereinafter "Michigan State Review"), https://www2.ed.gov/documents/press-releases/20190905-michigan-state-letter.pdf.

[12] Katie Strang, *Former players say Chicago area hockey coach sexually abused them,* THE ATHLETIC (Feb. 2, 2021), https://theathletic.com/1591547/2020/02/21/former-players-say-chicago-area-hockey-coach-sexually-abused-them/.

[13] *See* Baylor University Board of Regents, *Findings of Fact*, 1-2 (May 26, 2016) (hereinafter "Baylor Report"), https://www.baylor.edu/thefacts/doc.php/266596.pdf; Husch Blackwell, *Louisiana State University Title IX Review*, 47-53 (March 3, 2021) (hereinafter "LSU Report"), https://www.lsu.edu/titleix-review/docs/4828-6651-7216_1_lsu_report-final.pdf.

arounds' employed by the University to try to control narratives or 'protect the brand' have served the University community poorly."[14]

Recent history also demonstrates that the specters of civil and/or criminal liability are insufficient to dissuade officials from engaging in coverups. In a number of these cases, school officials were found to have violated the Clery Act, 20 U.S.C. § 1092(f), which requires institutions to disclose information about security policies and crime on campus and imposes civil penalties of up to $25,000 per violation, 20 U.S.C. § 1094(c)(3)(B)(f).[15] It made no difference. Nor did the threat of criminal liability. For instance, the Commonwealth of Pennsylvania charged multiple Penn State officials with violating state law relating to the mandatory reporting of child abuse in 2002, while the same officials also committed perjury in their effort to conceal their complicity in Sandusky's abuse.[16] Other examples are legion.[17]

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[14] LSU Report at 147.

[15] *See, e.g.*, Michigan State Review at 10, 14-16 (documenting at least 21 instances in which Michigan State neglected to comply with its Clery Act obligations over a five-year period).

[16] Freeh Report at 13.

[17] *See, e.g.*, Jennifer Medina, *'Just the Grossest Thing': Women Recall Interactions With U.S.C. Doctor,* N.Y. TIMES (May 17, 2018), https://www.nytimes.com/2018/05/17/us/USC-gynecologist-young-women.html (noting University of Southern California officials neglected to

As these cases amply demonstrate, colleges and universities have powerful incentives to conceal information about sexual assault on their campuses and their own failures to address it. The district court's rule punishes survivors who are unable to pierce this wall of silence.

2. The District Court's Rule Perversely Incentivizes Schools to Conceal Information Until Survivors' Claims Are Time-Barred, and Rewards Particularly Effective Coverups

Title IX's key legislative purpose is to "provide individual citizens effective protection against" sex discrimination in educational settings. *Gebser*, 524 U.S. at 286 (internal quotation marks omitted). In *Gebser*, the Supreme Court explained its rejection of vicarious liability in favor of a deliberate indifference standard as an effort to align the scope of the private right of action with that legislative purpose. The statute thus imposes liability where officials fail to respond despite actual notice of sexual misconduct on campus, while insulating federal fund recipients from indiscriminate liability so long as they act reasonably to address concerns about sex discrimination when they learn of them. *Id.* at 286-89.

In framing Title IX, then, Congress intended to incentivize effective antidiscrimination policies by linking a school's reasonable efforts to root

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inform appropriate authorities that George Tyndall, a campus gynecologist, sexually preyed on hundreds of patients over a 25-year period).

out sexual assault on campus with avoidance of liability. The district court's rule turns that principle on its head. Instead of going to the trouble and expense of implementing effective measures to curb sexual assault, schools can choose instead to simply conceal their complicity in sexual misconduct from survivors until the applicable limitations period has elapsed. Experience shows that, particularly in high-profile cases, schools will almost always choose that option if it is available to them, finding it cheaper, simpler, and a better public relations strategy.

If adopted here, the district court's rule will also force courts to reward concealment that is particularly effective—for, as the district court's decision itself demonstrates, the fraudulent concealment doctrine does not provide a means to hold schools accountable. To toll a statute of limitations based on fraudulent concealment, a plaintiff must demonstrate, among other things, detrimental reliance on the defendant's factual misrepresentation. *Lutz v. Chesapeake Appalachia*, LLC, 807 F. App'x 528, 530 (6th Cir. 2020). Plaintiffs cannot make this showing where they "knew or should have known all of the elements of potential causes of action." *Doe v. Archdiocese of Cin.*, 849 N. E.2d 268, 278-79 (Ohio 2006). But according to the district court's decision, "kn[owing] of the injury, the identity of the perpetrator, and the perpetrator's employer" is sufficient to place survivors

on inquiry notice of their Title IX claims. Opinion and Order (*Garrett*), R.197 at 1513. If the bare fact of an assault by a school employee satisfies this requirement, it follows that any concealment occurring after the assault itself cannot possibly have prejudiced the survivor. The decision below thus slams the door on the prospect of equitable tolling.

If schools—particularly in cases of large-scale abuse—are already poised to betray the student-survivors in their care, the district court's decision guarantees courts will have no means to stop them. Student-survivors will be left powerless, and those responsible for harboring their assailants will escape accountability forever.

B. The District Court's Rule Fails to Acknowledge that Inquiry Notice Means Nothing to Survivors When Their Schools Can Mislead Them

The district court baselessly found that plaintiffs were contemporaneously aware of the educational deprivations Strauss's abuse caused them, and that this awareness "was sufficient to put them at least on inquiry notice to determine whether the injury would have occurred but for OSU's deliberate indifference." *Id.* at 1510. That assertion is wrong as a matter of both law and empirical reality.

Inquiry notice is a fact-bound concept that seeks to balance "the staunch federal interest in requiring plaintiffs to bring suit promptly and

the equally strong interest in not driving plaintiffs to bring suit before they are able, in the exercise of reasonable diligence, to discover the facts necessary to support their claims." *New England Health Care Emps. Pension Fund v. Ernst & Young, LLP*, 336 F.3d 495, 501 (6th Cir. 2003) (cleaned up). As this Court has repeatedly made clear, the inquiry notice rule does *not* mean that a statute of limitations begins to run as soon as the plaintiff learns facts that would prompt a reasonable person to investigate. *Id.* Rather, "the limitation period begins to run only when a reasonably diligent investigation *would have discovered"* the defendant's wrongdoing. *Id.* (emphasis added).

Accordingly, it is largely irrelevant whether survivors who possess the kind of knowledge the district court imputed to plaintiffs—that their abuser worked for their school and that his abuse deprived them of educational benefits—*should* understand the need to investigate potential Title IX violations by their school. Unless such an investigation *reasonably could* have led to the discovery of information that would allow them to file suit, the limitation period does not begin to run.

The district court's overly demanding conception of inquiry notice is particularly inapt in the context of campus sexual assault. Even student survivors who recognize they have been sexually abused typically lack both

the practical means and the emotional wherewithal to gather the information they would need to file suit, much less make use of it to present legal claims. This Court must consider those realities in fashioning accrual rules for Title IX claims.

1. Student-Survivors Have No Right to the Evidence They Need to Allege Title IX Claims in Court

The district court's implicit portrait of students as amateur sleuths, able to unearth school officials' wrongdoing based only on their assailant's employment status, is a fantasy. Survivors seeking the evidence they require to state a plausible claim for relief will quickly learn that they have virtually no weapons in their arsenal that would permit them to penetrate a cover-up and expose high-level wrongdoing by their school's administration.

Instead, survivors are left to hope that the very institution they may wish to sue will gratuitously share information they require to sue it. They have no pre-suit compulsory process available to obtain the evidence they need to pursue Title IX deliberate indifference claims, such as information concerning past complaints about the same perpetrator or what their schools did or did not do in response to those complaints.[18] Even under the

[18] Even the most recent federal Title IX regulations, adopted in 2020 in an effort to formalize university grievance procedures and strengthen

best of circumstances, strict confidentiality rules governing personnel and disciplinary records may prevent even the most intrepid survivor from gathering enough evidence to state a Title IX claim, absent extraordinary luck.

Given these limitations, the remedial purpose of Title IX demands that survivors not be locked out of court on timeliness grounds unless they have knowingly squandered a meaningful opportunity to discover evidence of their school's wrongdoing. The district court's failure to consider the practical constraints survivors face was error.

2. The District Court's Flawed Conception of a "Reasonable Inquiry" Is an Inappropriate Diligence Standard for Student-Survivors

Given the traumatizing nature of sexual assault, a stringent "reasonable inquiry" requirement for delaying accrual of Title IX claims is unrealistic. The power imbalance that is often inherent in relationships

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due process requirements, entitle complainants to receive evidence compiled during the school's investigation only if it is "directly related to the allegations raised" in his or her own complaint—a determination that is left to school officials and their designees. 34 C.F.R. § 106.45(b)(5)(iv). Because "neither [a Title IX complainant or respondent] may issue a subpoena to gather information from each other or the recipient for purposes of the grievance process," survivors have no means of compulsory process to obtain evidence that their school may deem only "indirectly" related to their own experience. U.S. Dep't of Educ., *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30026-01.

between students and adults on college campuses renders the district court's exacting diligence standard even more inapt here.

In the United States, someone is sexually assaulted every 68 seconds.[19] Despite its prevalence, sexual violence is drastically underreported to law enforcement.[20] Some studies report that, even among the subset of survivors who contemporaneously recognize they have been sexually abused, 90 percent of adult victims on college campuses never report the sexual violence they experience.[21] The reasons for this underreporting are manifold. Victims worry they will not be taken seriously by police officers and they are frequently afraid of the consequences of reporting, "unsure of whom to tell, fearful of retaliation from the rapist, and wary of exposing themselves to a system that they do not trust and that may further invade their privacy and cause additional trauma."[22] They fear being

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[19] *Victims of Sexual Violence: Statistics,* Rape, Abuse & Incest Nat'l Network (hereinafter "RAINN Sexual Violence Statistics"), https://www.rainn.org/statistics/victims-sexual-violence (last visited Jan. 5, 2021).

[20] *The Criminal Justice System: Statistics,* Rape, Abuse & Incest Nat'l Network, https://www.rainn.org/statistics/criminal-justice-system (last visited Jan. 5, 2021) (noting more than two of three sexual assaults go unreported).

[21] *See, e.g.*, A. H. Conley et al., *Prevalence and Predictors of Sexual Assault Among a College Sample*, 65 J. AM. COLL. HEALTH 41, 41 (2017).

[22] Carol E. Tracy et al., *Rape and Sexual Assault in the Legal System*, Women's Law Project, 8-9 (2012), https://www.womenslawproject.

blamed and shamed, that their families and friends will find out and treat them differently and that they will face retribution for reporting.[23]

Anxieties about being forced to endure re-traumatizing fact-finding processes are only compounded when the survivor in question is a student. As the U.S. Department of Education has observed, "the grievance process is stressful, difficult to navigate, and distressing for both parties, many of whom in the postsecondary institution context are young adults 'on their own' for the first time." 85 Fed. Reg. 30026-01. Similarly, fears of retaliation are heightened in educational settings: universities and their employees exercise enormous control over students' lives and futures, with perpetrators and administrators uniquely positioned to penalize and influence students.

The case of the University of Michigan's Dr. Robert Anderson is especially instructive and bears striking resemblance to the present case—

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org/wp-content/uploads/2016/04/Rape-and-Sexual-Assault-in-the-Legal-System-FINAL.pdf.

[23] Eliza Gray, *Why Victims of Rape in College Don't Report to the Police*, TIME (June 23, 2014), http://time.com/2905637/campus-rape-assault-prosecution/; Michael Planty et al., *Female Victims of Sexual Violence, 1994-2010*, NCJ 240655, The Bureau of Justice Statistics of the U.S. Dep't of Justice (Mar. 2013), https://www.bjs.gov/content/pub/pdf/fvsv9410.pdf (noting twenty percent of victims cited fears of retaliation as their reason for not reporting).

not least because, like Strauss, Anderson "refrained from engaging in sexual misconduct with patients who were more likely to recognize and report it."[24] More than 950 people have accused Anderson of sexually abusing them while he worked as an athletic doctor for the university between 1966 and 2003. An independent investigation found that "many of the student athletes Dr. Anderson examined were on scholarship, and some of them told us they feared that complaining about Dr. Anderson's examinations would put their financial aid, and hence their ability to remain at the University, at risk."[25] Numerous student athletes reported that they worried that complaining about Dr. Anderson's examinations would be perceived as "rocking the boat" or "making waves" and could cause them to "lose playing time."[26] Their concerns mirror those of other survivors, who frequently cite fears that accusing their professors of sexual misconduct will result in poor grades or academic discipline as reasons for not originally reporting the abuse they suffered.[27]

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[24] Michigan Report at 62.

[25] *Id.*

[26] *Id.*

[27] *Campus Sexual Violence: Statistics*, Rape, Abuse & Incest Nat'l Network (hereinafter "RAINN Campus Sexual Violence Statistics"), https://www.rainn.org/statistics/campus-sexual-violence (last visited Jan. 5, 2021).

These anxieties are reinforced when university officials express reluctance to assist students with pursuing their complaints, particularly when the perpetrator is a celebrated member of the campus community. The highly traumatic nature of sexual assault—precisely what denies survivors the equal access to the benefits of their education that Title IX exists to protect—all but guarantees that survivors frequently find themselves in a tailspin in the aftermath of an assault. Many student-survivors suffer from depression, post-traumatic stress disorder, eating disorders, anxiety attacks, flashbacks, nightmares, and suicidal ideation.[28]

Sexual assault also has a neurobiological effect on a survivor's brain and nervous system.[29] When the brain perceives a threat, its defense circuitry activates, releasing a flood of stress chemicals that prevent the body from doing anything unnecessary, including higher cognitive processing, to focus on the threat at hand.[30] This defense circuitry impairs functioning of the prefrontal cortex, which is responsible for executive function.[31] In the aftermath of a sexual assault, a survivor's neurobiological

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[28] RAINN Sexual Violence Statistics.

[29] Lori Haskell et al., *The Impact of Trauma on Adult Sexual Assault Victims,* Justice Canada, 5 (2019), https://www.justice.gc.ca/eng/rp-pr/jr/trauma/trauma_eng.pdf.

[30] *Id.*

[31] *Id.* at 14.

trauma response may make it more difficult for them to return to everyday life, let alone to navigate the byzantine administrative processes their schools have established or the vagaries of litigation.

These realities must inform what courts see when they imagine the "reasonably diligent" response of a young adult who has been sexually assaulted at college after moving away from home for the first time. This Court has held that a sophisticated corporate litigant's access to "superior personnel and equipment" upon which it can rely to uncover tortious conduct by its commercial counterparties justifies applying a more stringent inquiry notice standard under such circumstances. *Med. Mut. of Ohio v. K. Amalia Enters.*, 548 F.3d 383, 391 (6th Cir. 2008). It follows that the many obstacles faced by survivors in reporting sexual assault—much less pursuing complex civil claims against powerful institutions that hold influence over so many aspects of their lives—requires a more forgiving approach in cases like this.

III. THE DISTRICT COURT'S DECISION CONDITIONS SURVIVORS' RIGHTS ON THE GOOD FAITH OF SCHOOLS THAT HAVE FREQUENTLY FAILED TO PLACE STUDENTS' INTERESTS ABOVE THEIR OWN

The district court's decision means courts will step back when they should be stepping in. It leaves schools—the very institutions that federal law holds accountable for failing to protect students from sexual violence—

to fill the gap courts leave. But available evidence suggests they are poorly equipped to shoulder this massive responsibility alone.

A number of recent Title IX instigations by DOE's Office for Civil Rights (OCR) have catalogued the kaleidoscopic variety of obstacles survivors are forced to navigate to see their Title IX complaints through. These findings underscore the reality that expecting schools to consistently place survivors' interests above their own is no more than wishful thinking. With respect *solely to universities in this Circuit*, OCR found a troubling pattern of violations.

Schools in this Circuit routinely failed to inform survivors of their Title IX rights.[32] When survivors were apprised of their rights, they were only told of a subset. For instance, guidance provided to students neglected to outline what instances of sex discrimination were actually proscribed, or else failed to note that sexual misconduct constitutes actionable

[32] *See, e.g.*, Letter from Office for Civil Rights, U.S. Dep't of Educ., to Gloria A. Hague, Gen. Counsel, E. Mich. Univ. 5-7 (Nov. 22, 2010). (hereinafter "Eastern Michigan Letter"), http://www2.ed.gov/about/offices/list/ocr/docs/investigations/15096002-a.pdf; Letter from Office for Civil Rights, U.S. Dep't of Educ., to Dave L. Armstrong, Vice President & Legal Counsel, Notre Dame Coll. 4 (Sept. 24, 2010) ("hereinafter Notre Dame Letter"), http://www2.ed.gov/about/offices/list/ocr/docs/investigations/15096001-a.pdf.

discrimination or harassment.[33] Still other policies stated that serious sexual misconduct can be addressed solely as a criminal matter,[34] or neglected to clarify that non-discrimination provisions ran against employees in addition to students (or vice versa).[35] The guidance that did exist was often published in multiple handbooks or on multiple websites—none of which was independently sufficient to explain survivors' options—and was routinely contradictory and internally inconsistent.[36]

Even when survivors were adequately apprised of their rights, they frequently had no idea how to go about vindicating them or the remedies

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[33] *See, e.g.,* Eastern Michigan Letter at 4; Letter from Office for Civil Rights, U.S. Dep't of Educ. to Elizabeth L. Peters, General Counsel, Northwood Univ. 7 (July 20, 2014) (hereinafter "Northwood Letter", https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/15132147-a.pdf; Letter from Office for Civil Rights, U.S. Dep't of Educ. to David A. Campbell, General Counsel, Wittenberg Univ. 5 (Mar. 24, 2017) (hereinafter "Wittenberg Letter"), https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/15132141-a.pdf.

[34] *See, e.g.,* Notre Dame Letter at 4.

[35] *See, e.g.,* Eastern Michigan Letter at 4; Notre Dame Letter at 5; Letter from Office for Civil Rights, U.S. Dep't of Educ. to Mary Ann Poirier, General Counsel, Univ. of Dayton 4 (July 11, 2014) (hereinafter "Dayton Letter"), https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/15132199-a.pdf.

[36] *See, e.g.*, Dayton Letter at 5; Eastern Michigan Letter at 6; Notre Dame Letter at 3; Letter from Office for Civil Rights, U.S. Dep't of Educ., to Matthew J. Wilson, President, Univ. of Akron 9, 13-14 (Mar. 24, 2017 (hereinafter "Akron Letter"), https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/15142157-a.pdf.

available. Schools routinely failed to appoint a Title IX coordinator or responsible party to handle Title IX complaints.[37] When they did appoint coordinators, they often failed to make their identity known to survivors or other students who might need them,[38] or to provide survivors any means of contacting them.[39] The coordinators that did exist were frequently under-trained and unsupervised,[40] or else lacked the independence or resources necessary to carry out Title IX's mandates.[41]

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[37] *See, e.g.,* Akron Letter at 9, 13; Eastern Michigan Letter at 6; Letter from Office for Civil Rights, U.S. Dep't of Educ., to Michael V. Drake, President, Ohio State Univ. 10 (Sept. 11, 2014) (hereinafter "OSU Letter"), http://www2.ed.gov/documents/press-releases/ohio-state-letter.pdf.

[38] *See, e.g.,* Akron Letter at 9; Wittenberg Letter at 2; Letter from Office for Civil Rights, U.S. Dep't of Educ., to Kristine Zayko, General Counsel, Mich. State Univ. 2 (Sep. 1, 2015) (hereinafter "Michigan State Letter"), https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/151 42113-a.pdf; Letter from Office for Civil Rights, U.S. Dep't of Educ., to Thomas J. Laginess, General Counsel, Mid Mich. Cmty. Coll. 3 (July 24, 2013), (hereinafter "Mid Michigan Letter"), https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/15132031-a.pdf.

[39] *See, e.g.,* Eastern Michigan Letter at 4; Notre Dame Letter at 3; Letter from Office for Civil Rights, U.S. Dep't of Educ., to Burton J. Webb, President, Univ. of Pikeville. 4 (Aug. 9, 2016) (hereinafter "Pikeville Letter"), https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/03152014-a.pdf.

[40] *See, e.g.,* OSU Letter at 10; Eastern Michigan Letter at 6; Wittenberg Letter at 5.

[41] *See, e.g.,* Akron Letter at 13; Eastern Michigan Letter at 6; Michigan State Letter at 11; *see also* LSU Report at 4, 10.

Even where survivors understood they may have been discriminated against and knew to whom they should report, they were often dissuaded from reporting by an array of stumbling blocks. Schools failed to implement basic interim measures to protect survivors from additional trauma or retaliation, such as no-contact orders or campus escorts.[42] Where they did implement those measures, they didn't tell survivors about them.[43] Schools didn't make the reporting process confidential, or, if they did, didn't tell survivors it was.[44] They didn't provide survivors with basic support services.[45] They forced survivors to attend mediations with their harassers or permitted the harasser to be present for all stages of any hearings.[46]

When survivors did report, universities often ignored them,[47] or they discouraged them from pursuing the matter further.[48] At OSU itself, OCR found that survivors may even have been turned away for not attempting to

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[42] *See, e.g.*, OSU Letter at 14; Dayton Letter at 4; Wittenberg Letter at 18.

[43] *See, e.g.*, Mid Michigan Letter at 3; Northwood Letter at 7; Pikeville Letter at 5.

[44] *See, e.g.*, Michigan State Letter at 17; Notre Dame Letter at 5.

[45] *See, e.g.*, Wittenberg Letter at 18.

[46] *See, e.g.*, Notre Dame at 5; Wittenberg at 3.

[47] *See, e.g.*, Eastern Michigan Letter at 6; Notre Dame Letter at 4; Wittenberg Letter at 22.

[48] *See, e.g.*, Michigan State Letter at 24; *see also* Board of Regents Report at 2.

resolve the matter with the perpetrator before complaining.[49] Schools delayed opening investigations.[50] They stalled the investigations they did open, undercutting Title IX's promise of a "prompt and equitable resolution."[51] As investigations dragged on, schools did not tell the complainant what to expect or keep the complainant apprised of the investigation.[52]

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[49] OSU Letter at 25.

[50] *See, e.g.,* Michigan State Letter at 23; Wittenberg Letter at 18; Letter from Office for Civil Rights, U.S. Dep't of Educ., to Paul W. Coughenour, General Counsel, Macomb Cmty. Coll. 2 (Dec. 24, 2015), https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/15142244-a.pdf; *see also* Letter from Civil Rights Div., U.S. Dep't of Justice, and Office for Civil Rights, U.S. Dep't of Educ., to Royce Engstrom, President, Univ. of Mont. 15 (May 9, 2013), http://www.justice.gov/sites/default/files/opa/legacy/2013/05/09/um-ltr-findings.pdf (finding the school waited almost a year to initiate proceedings against three football players accused of sexual assault).

[51] *See, e.g.,* Eastern Michigan Letter at 4-5; Michigan State Letter at 3; Notre Dame Letter at 5; *see also* Letter from Office for Civil Rights, U.S. Dep't of Educ., to Anthony P. Monaco, President, Tufts Univ. 14 (Apr. 28, 2014), http://www2.ed.gov/documents/press-releases/tufts-university-letter.doc (finding school administrators took eighteen months after a claim was filed to determine that there was insufficient evidence to support the student's allegation of sexual assault).

[52] *See, e.g.,* OSU Letter at 9; Akron Letter at 14; Northwood Letter at 7.

The complaints that did receive attention were investigated half-heartedly.[53] Complainants were not provided the opportunity to offer evidence.[54] Schools did not permit them to view even the slim amount of evidence to which they were entitled.[55] Schools failed to document or refer to past investigations into the same perpetrator.[56] They sanitized records and failed to document crucial steps in their investigations, making it impossible for OCR to determine just how bad their investigations really were.[57] They failed to coordinate their investigations with law enforcement.[58] They abandoned their investigations if law enforcement became involved, or if a criminal or civil proceeding was instituted.[59] They abandoned their investigations where the complainant declined to pursue

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[53] *See, e.g.*, Eastern Michigan Letter at 6; Michigan State Letter at 23; Wittenberg Letter at 12-21.

[54] *See, e.g.*, OSU Letter at 7; Northwood Letter at 7.

[55] *See, e.g.*, Akron Letter at 15; *see also supra*, Section II.B.1.

[56] *See, e.g.*, Michigan State Letter at 3.

[57] *See, e.g.*, OSU Letter at 19; Michigan State Letter at 3, 6; Wittenberg Letter at 22.

[58] *See, e.g.*, Michigan State Letter at 16-17; Notre Dame Letter at 4.

[59] *See, e.g.*, Akron Letter at 3; Notre Dame Letter at 4.

charges even when the accused could be identified.[60] They abandoned their investigations for no reason at all.[61]

When schools did complete their investigations, they concluded them without making findings about whether rights violations actually occurred.[62] They closed investigations without telling complainants or providing any opportunity for appeal.[63] They terminated disciplinary cases without documenting the results anywhere, ensuring their findings could not be referenced in future investigations.[64] They failed to conclude that they themselves were at fault when the evidence was clearly sufficient to show they were.[65] They failed to discipline perpetrators.[66] They failed to take or document basic remedial measures to ensure sexual abuse would not continue.[67] They failed to enforce the remedial measures they did take.[68]

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[60] *See, e.g.*, OSU Letter at 19.

[61] *See, e.g.*, Eastern Michigan Letter at 6; Wittenberg Letter at 18-19.

[62] *See, e.g.*, Notre Dame Letter at 5; Wittenberg Letter at 21.

[63] *See, e.g.*, Akron Letter at 14; Notre Dame Letter at 5; Wittenberg Letter at 22.

[64] *See, e.g.*, Eastern Michigan Letter at 4-7, 14.

[65] *See, e.g.*, Michigan State Letter at 3.

[66] *See, e.g.*, Michigan State Letter at 10.

[67] *See, e.g.*, OSU Letter at 19; Wittenberg Letter at 22.

[68] *See, e.g.*, Wittenberg Letter at 21-22.

None of this history provides survivors—or courts—with the assurance that schools can be trusted to respond determinedly to their Title IX obligations without the check of civil remedies. By closing the courthouse doors on student-survivors, the district court's accrual rule strips courts of this vital oversight function, rewarding schools that most effectively hide information about their dysfunctional Title IX practices from survivors with permanent civil amnesty.

If this Court affirms, the practical consequences of the district court's decision will be devastating. The survivors who sued OSU in the district court represent a fraction of the students Dr. Strauss molested during his decades-long tenure at OSU. And they represent only a fraction of a fraction of the survivors who will find the courthouse doors locked if this Court accepts the arguments advanced by OSU and endorsed below.

Studies suggest that thirteen percent of the twenty million students who cycle through this nation's colleges will experience rape or sexual assault through physical force, violence, or incapacitation.[69] The vast majority of these survivors will never have any hope of satisfying a stringent inquiry notice requirement. Even those survivors who recognize they have been sexually abused will not be able to investigate their own schools' past

[69] RAINN Campus Sexual Violence Statistics.

conduct and policies with no compulsory process at hand, while trying to heal and move on from the trauma of sexual violence—let alone develop and file a Title IX lawsuit within two years. The district court's decision therefore slams the courthouse doors on thousands of survivors.

This Court should not countenance such a flagrant subversion of Title IX's remedial purpose.

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that the decision below should be reversed.

Dated: February 9, 2022
New York, New York

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/s/ David A. Lebowitz
David A. Lebowitz

Counsel for Amici Curiae

APPENDIX A: STATEMENTS OF INTEREST OF AMICUS CURIAE

The Rape, Abuse & Incest National Network (RAINN)

RAINN is the nation's largest anti-sexual violence organization, whose purpose is to provide services to victims of sexual violence and advocate for improvements to the criminal justice system's response to sexual violence. RAINN founded and operates the National Sexual Assault Hotline, and in its more than 25 years of operation has helped more than three-and-a-half million survivors of sexual assault and their loved ones. RAINN is a leader in public education on sexual violence, provides consulting services to various industries on best practices for prevention and response to sexual assault/harassment, and advocates on the state and federal levels to improve legislation on sexual violence.

The National Crime Victim Law Institute (NCVLI)

NCVLI is a nonprofit educational and advocacy organization located at Lewis and Clark Law School in Portland, Oregon. NCVLI's mission is to actively promote victims' rights and victims' voices in justice systems through crime victim-centered legal advocacy, education and resource sharing. NCVLI accomplishes its mission through training and education; providing legal technical assistance on cases nationwide; researching and analyzing developments in crime victim law; promoting the National

Alliance of Victims' Rights Attorneys & Advocates; and participating as amicus curiae in select state, federal and military cases that present victims' rights issues of broad importance.

CHILD USA

CHILD USA is the leading national non-profit think tank working to end child abuse and neglect in the United States. CHILD USA engages in high-level legal and social science research and analysis to derive the best public policies to end child abuse and neglect in America and enhance access to justice for victims, including adults who were victimized as children and young adults. It leads the United States in studying and analyzing statutes of limitations ("SOLs")—including CHILD USA's Sean P. McIlmail Statutes of Limitations Research Institute. CHILD USA advocates for applicable SOLs to reflect the science of traumatology and delayed disclosure of sexual abuse.

CHILD USA produces evidence-based solutions and information needed by policymakers, organizations, courts, media, and society as a whole to increase child protection and the common good. CHILD USA's interests in this case are directly correlated with its mission to increase child protection and public safety and to eliminate barriers to justice for sexual abuse and sexual assault victims.

Ohio Alliance to End Sexual Violence (OAESV)

OAESV is a statewide coalition in Ohio that advocates for comprehensive responses to and rape crisis services for survivors and empowers communities to prevent sexual violence. OAESV aims to improve services and responses to survivors, increase public awareness about sexual violence, and inform and shape public policy with the ultimate goal of ending sexual violence.

CERTIFICATE OF SERVICE

I hereby certify that on February 9, 2022, I caused the foregoing papers to be filed via the Court's CM/ECF system, and all counsel of record were thereby served through that system.

/s/ David A. Lebowitz
David A. Lebowitz

Counsel for Amici Curiae