

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIAN GARRETT,

Plaintiff-Appellant,

and

EDWARD GONZALES; JOHN
ANTOGNOLI; KENT KILGORE; ROGER
BEEDON; ADAM PLOUSE; DANIEL
RITCHIE; MICHAEL SCHYCK; DOCTOR
MARK CHRYSTAL; JOEL DAVIS; JOHN
DOES, 1-2, 4-6, 8, 10-15, 17, 19, 21-25, 27,
29-33, 35-46, 48, 50-51, 53, 56-59, 61, 62, 64,
69, 75, 77, 85-86, and 88-91 individually and
on behalf of all others similarly situated

Plaintiffs-Appellants,

v.

THE OHIO STATE UNIVERSITY,

Defendant-Appellee.

On appeal from the
United States District Court
Southern District of Ohio
Eastern Division

Case No. 21-3972

**MOTION FOR LEAVE OF CHILD
USA TO APPEAR AS *AMICUS
CURIAE* AND FILE A BRIEF IN
SUPPORT OF PLAINTIFFS-
APPELLANTS URGING
REVERSAL OF THE DECISION
BELOW**

CHILD USA respectfully submits this Motion for Leave to Appear as *Amicus Curiae* and File a Brief in Support of Plaintiffs-Appellants' appeal from the Opinion & Order granting The Ohio State University's ("OSU") Motion to Dismiss and Urging Reversal of the Decision Below, pursuant to Fed. R. App. Pro. 29 & 32.

CHILD USA, as an organization dedicated to preventing child sexual abuse and ensuring access to justice for victims has a strong interest in the outcome of this case and offers its expertise to the Court regarding the proper application of accrual rules to Plaintiffs-Appellants' Title IX, 20 U.S.C. §1681, et seq., claims in view of the scientific and structural impediments to victims' discovery of OSU's deliberate indifference to widespread sexual assault, and the impact on victims and society when courts abdicate their enforcement responsibilities. The proposed *Amicus* brief is attached hereto.

INTEREST OF CHILD USA AS *AMICUS CURIAE*

CHILD USA is a national non-profit think tank fighting for the civil rights of children. CHILD USA engages in-depth legal analysis and cutting-edge social science research to protect children, prevent future abuse and neglect, and bring justice to survivors of all ages. It is the leading organization in 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 SOL reform and for the application of existing laws to reflect the science of trauma that can delay victims’ understanding and disclosure of sexual abuse.

CHILD USA’s interests in this case are directly correlated with its mission to increase child protection and public safety, to ensure that institutions are held

accountable for their wrongful conduct that endangers the young people in their care, and to eliminate barriers to justice for victims.

The District Court erred by erroneously concluding that, as a matter of law, Plaintiffs-Appellants' Title IX claims accrued, *at the latest*, upon the last date of attendance at the university. The Court's conflation of the accrual of perpetrator claims with that of institutional claims reflects the Court's fundamental misunderstanding of the law and of victims' ability to recognize their injury and to investigate its cause in the context of campus sexual assault. Failure to hold Defendant OSU accountable for their deliberate indifference to sexual assault perpetuates policies that will endanger future students while at the same time barring an entire class of victims from accessing justice. The decision below is wholly inconsistent with both the black-letter law and Title IX's remedial purpose and must not be permitted to stand.

**THE AMICUS CURIAE BRIEF WOULD AID THIS COURT IN
CONSIDERATION OF THE ISSUES ADDRESSED BY PLAINTIFFS-
APPELLANTS ON APPEAL**

The District Court erred in concluding, as a matter of law, that Plaintiffs-Appellants' Title IX claims were time-barred by Ohio's 2-year personal injury SOL before Plaintiffs-Appellants realized both that they had been abused and that Defendants created the conditions that put them at risk and concealed their wrongful actions thereby violating Plaintiffs-Appellants' rights to an educational environment

free from sex-based discrimination.

CHILD USA is concerned that the decision below—which disregards the black-letter law and precedent concerning application of the federal common law discovery rule to Title IX claims—rewards institutions that successfully conceal widespread sexual misconduct and that, if adopted, would effectively bar countless victims of sexual assault from asserting their rights.

CHILD USA is uniquely positioned to provide this Court with current research and analysis regarding the traumatic effects that can delay recognition and disclosure of abuse, the challenges victims face in trying to access justice as a result, and the compelling public interests in holding institutions accountable under Title IX when they fail to reasonably address reports of sexual assault.

CHILD USA's *Amicus* brief will be helpful to this Court's understanding of, (1) why it is effectively impossible for Plaintiffs-Appellants and countless other victims of sexual assault to file civil claims under Ohio's 2-year personal injury SOL based on the science of trauma that can delay victims' recognition and disclosure of abuse, (2) how application of the federal common law discovery rule gives effect to Title IX's remedial purpose, and (3) the important public interests in addressing institutional abuse and holding educational institutions accountable for their conduct that knowingly violates the rights of their students, faculty, and staff.

CONCLUSION

For the foregoing reasons, CHILD USA respectfully requests that this Court enter an Order granting this Motion for Leave to Appear as *Amicus Curiae* and accepting the *Amicus* brief attached hereto in consideration of Plaintiffs-Appellants' appeal and in support of reversal.

Respectfully submitted 2nd day of March 2022,

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56-59, 61, 62, 64, 69, 75, 77, 85-86, and 88-91 individually and on behalf of all others similarly
situated

Plaintiffs-Appellants,

v.

THE OHIO STATE UNIVERSITY,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION
CASE NO. 21-3972

**BRIEF OF *AMICUS CURIAE* CHILD USA IN SUPPORT OF PLAINTIFFS-
APPELLANTS AND URGING REVERSAL OF THE DECISION BELOW**

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RULE 29 STATEMENTS

Pursuant to Fed. R. App. P. 29(a)(4)(E), *Amici* affirm that no party or party's counsel authored the brief in whole or in part or contributed money that was intended to fund preparing or submitting the brief. No person other than *Amici*, their members, or their counsel contributed money that was intended to fund preparing or submitting the brief.

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INTRODUCTION

Sexual assault is a public health crisis in our nation's schools and on college and university campuses. **The best research suggests that 1 in 5 female students and 1 in 16 male students are sexually assaulted while attending college.** Krebs, C. P., et. al., *The campus sexual assault (CSA) study: Final report* (2007) available at <http://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf> (hereinafter Krebs, 2007). **Nearly 1 in 10 students will experience sexual misconduct by a school employee by the time they graduate high school.** Shakeshaft, C., *Educator sexual misconduct: A synthesis of existing literature. US Department of Education, Policy and Programs Studies Service* (2004), available at <https://www2.ed.gov/rschstat/research/pubs/misconductreview/report.pdf>. The prevalence of school-based sexual assault is likely significantly higher given that such crimes are underreported. Often victims' ability to recognize that they have been abused and to disclose the abusive experience is functionally and structurally impaired. Indeed, many victims delay disclosure for years, if not decades, if they are able to disclose at all.¹ It follows that the District Court's decision rests on a false narrative about what victims can or should be able to do in the aftermath of a

¹ For example, the average age of disclosure of child sexual abuse in a study of 1,000 victims was 52 years-old. See CHILD USA, *Delayed Disclosure: A Factsheet Based on Cutting-Edge Research on Child Sex Abuse*, CHILDUSA.ORG, 3 (Mar. 2020) available at <https://childusa.org/wpcontent/uploads/2020/04/Delayed-Disclosure-Factsheet-2020.pdf>.

sexual assault especially in the context of an institutional coverup of widespread campus sexual violence.

Title IX, 20 U.S.C. §1681, et seq., is supposed to be the pathway to hold institutions accountable for violating victims' right to an educational environment free from sex-based discrimination by permitting sexual abuse to proliferate. The District Court's decision flouts the policy objectives of Title IX by arbitrarily blocking victims' access to justice and perpetuating the institutional policies and practices that endanger students, faculty, and staff alike.

CHILD USA urges this Court to reverse the decision below and find that the federal common law discovery rule applies to Plaintiffs-Appellants' Title IX claims and that, consistent with empirical research, a jury could find that their claims did accrue until 2018 at the earliest. In so doing, this Court will give effect to the remedial purpose of Title IX and send a strong message to our nation's educational institutions that they will be held accountable for their deliberate indifference that permits sexual assault to proliferate.

**IDENTITY AND INTEREST OF CHILD USA & ITS SOURCE OF
AUTHORITY FOR FILING AN AMICUS BRIEF**

Pursuant to Fed. R. App. P. 29 & 32, CHILD USA submits this brief in support of Plaintiffs-Appellants' Brief and urging reversal of the decision below.

CHILD USA is a national non-profit think tank fighting for the civil rights of children. CHILD USA engages in in-depth legal analysis and cutting-edge social science research to protect children, prevent future abuse and neglect, and bring justice to survivors of all ages. It leads the nation in studying and analyzing SOLs—including CHILD USA’s Sean P. McIlmail Statutes of Limitations Research Institute. CHILD USA advocates for SOL reform and for the application of existing laws to reflect the science of trauma that can delay recognition and disclosure of sexual abuse.

Distinct from an organization engaged in the direct delivery of services, 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, to ensure that individuals and institutions are held accountable for their conduct that harms the young people over whom they exercise control, and to eliminate barriers to justice for victims of sexual abuse.

The District Court’s failure to apply the federal common law discovery rule to Plaintiffs-Appellants’ claims reflects its fundamental misunderstanding of the law and of victims’ ability to recognize their injury and to investigate its cause in the context of campus sexual assault. The decision below creates a perverse incentive

for institutions to conceal allegations of sexual assault, thereby putting future students—from elementary through post-secondary school—at significant risk of harm. It also effectively bars countless victims from asserting their rights while shielding the institutions that knowingly harbor serial sexual predators. The District Court’s decision defies Title IX’s broad remedial purpose and demands reversal.

STATEMENT OF CASE AND FACTS

CHILD USA hereby adopts, in its entirety, and incorporates by reference, the statement of the case and facts contained within Plaintiffs-Appellants’ Opening Appellate Brief. ROA. 21-3972, 23 at 14-19.

Over two decades, OSU physician Richard Strauss sexually abused hundreds of OSU students, **committing an estimated 1,500 sexual assaults and 47 rapes**. Alanna Vagianos, *Ohio State Doctor Committed Nearly 1,500 Sexual Assaults, New Report Finds*, HUFFPOST, Oct. 2, 2019, available at https://www.huffpost.com/entry/ohio-state-richard-strauss-committed-nearly-1500-sexual-assaults-annual-crime-repor_n_5d94ddc7e4b0019647b27ec6. For years, Defendant OSU facilitated and covered up Strauss’s misconduct as well as its role in permitting his sexual assault to flourish. In 2018, decades after university officials received the first report of abuse, OSU announced it was launching an official investigation into Strauss’s misconduct. Through this announcement and subsequent

investigation Plaintiffs-Appellants came to learn that OSU had received and ignored numerous complaints related to Dr. Strauss's behavior and that OSU had engaged in a decades-long campaign to coverup these complaints and their role in perpetuating his abuse. Many of the Plaintiffs-Appellants also learned—for the first time—that Dr. Strauss's so-called "examinations," rather than medically necessary, were a guise under which he was able to commit sexual assault in plain sight. OSU itself legitimized Dr. Strauss's conduct leading student-victims to disbelieve their own experiences and continued to funnel vulnerable students and would-be victims to Dr. Strauss. Now Defendant seeks to evade liability claiming that the SOL has run on Plaintiffs-Appellants' claims.

The District Court acknowledged that the SOL is determined by federal accrual rules but misapplied the law to Plaintiffs-Appellants' claims, concluding that their claims accrued, *at the latest*, on the date Plaintiffs-Appellants last attended OSU. Under federal accrual rules, however, the SOL begins to run only at such time that a "reasonable person knows, or in the exercise of reasonable diligence should have known" both of his injury *and* the Defendant's role in causing that injury. See, *Campbell v. Grand Trunk W. R.R. Co.*, 238 F.3d 772, 775 (6th Cir. 2001); see also, *Sevier v. Turner*, 742 F.2d 262, 273 (6th Cir. 1984) (reversing, in part, dismissal of plaintiff's §1983 damages claim, and holding that "[t]he statute of limitations commences to run when the plaintiff knows or has reason to know of the injury

which is the basis of his action. . . . A plaintiff has reason to know of his injury when he should have discovered it through the exercise of reasonable diligence.”). The decision below disregards the fact that Plaintiffs-Appellants could not have filed suit against OSU until they learned of the school’s role in facilitating the abuse that resulted in the deprivation of their civil rights. That triggering moment, a jury could reasonably conclude, occurred in 2018 when victims learned of the investigation into a potential coverup by OSU. Still the District Court summarily dismissed Plaintiffs-Appellants’ claims as-time barred under Ohio’s 2-year personal injury SOL thereby denying access to justice for countless victims who suffered because of the horrendous actions of OSU officials.

ARGUMENT

By its very language, Title IX provides individuals protection against sex-based discrimination in educational settings. 20 U.S.C. § 1681(a). Consistent with this premise, Congress, the United States Supreme Court, and the Department of Education’s Office for Civil Rights have all made clear that Title IX requires schools to take reasonable steps to prevent and remedy sexual assault to ensure a safe environment in which students can learn. See Tani, K.M., *An Administrative Right to Be Free from Sexual Violence: Title IX Enforcement in Historical and Institutional Perspective*, 66 DUKE L.J. 1847, 1861-62 (2017). Sexual assault in

schools has reached epidemic proportions, and its traumatic effects underscore the need for educational institutions to fulfil the law's promise.

Courts are responsible for the enforcement of Title IX when schools place their own financial and reputational interests above the safety and civil rights of its students, faculty, and staff by failing to address widespread sexual assault. The District Court abdicated its role by summarily concluding that Plaintiffs-Appellants' claims were time-barred by Ohio's 2-year personal injury SOL before the victims realized that they had been abused and that their school deliberately created the conditions that put them at risk.

The decision below, if adopted, will perpetuate the policies and procedures that endanger students, faculty, and staff, and will limit countless victims from accessing justice. This Court must prioritize the protection of students over the reputation and financial interests of institutions and reverse the decision below.

I. THE DISTRICT COURT DECISION IGNORES THE DELETERIOUS IMPACTS OF SEXUAL ASSAULT & PERPETUATES THE PRECISE HARMS TITLE IX SEEKS TO ADDRESS

Sexual assault is pervasive in educational institutions and can have significant, negative lifelong effects for victims. Schools can be a source of safety and justice for victims when they respond appropriately to allegations of sexual assault or they can be the source of additional trauma when they respond dismissively or, even

worse, fail to respond at all. History has proven that schools that have tolerated sexual assault cannot be trusted to self-police, particularly when there are strong financial, reputational, and other incentives to conceal widespread abuse. When institutions place their own self-interests ahead of safety concerns and fail to give reports of sexual assault the seriousness they deserve, it is the courts' duty to uphold the animating principles of Title IX by ensuring that institutions will be held suitably accountable. On the contrary, the District Court's decision signals to institutions that they will be insulated from punishment for their policies and practices that destroy lives and makes it less likely that victims will come forward in the future.

A. The Pervasiveness and Devastating Impact of Campus Sexual Assault Underscores the Federal Policy Objectives of Title IX

On American college and university campuses specifically, sexual assault has been recognized as a significant educational, public health, and safety issue. Rates of campus-based assaults have reached epidemic proportions with an estimated 1 in 5 female students and 1 in 16 male students sexually assaulted while attending college. Krebs, 2007. This is likely a significant underestimate given that campus sexual assault is an underreported crime. Kimble, C., *Sexual Assault Remains Dramatically Underreported*, Brennan Center for Justice, Oct. 4, 2018, available at

<https://www.brennancenter.org/our-work/analysis-opinion/sexual-assault-remains-dramatically-underreported>.

Many victims take years, if not decades, just to realize that what they've experienced is sexual abuse. Victims' ability to process the abusive experience is often challenged by the significant short-term and long-term effects of sexual assault on victims' physical and mental health. While each victim is unique in their experience, many struggle with intense feelings of shame, guilt, and denial following a sexual assault. See Rothman, K., et. al., *Sexual Assault Among Women in College: Immediate and Long-Term Associations with Mental Health, Psychosocial Functioning, and Romantic Relationships*, 36(19-20) J. OF INTERPERSONAL VIOLENCE 9600 (2021); see also BESSEL VAN DER KOLK, *THE BODY KEEPS THE SCORE: BRAIN, MIND, AND BODY IN THE HEALING OF TRAUMA* (Viking 2014) (hereinafter VAN DER KOLK). Many victims also find that their sense of safety and ability to trust others has been profoundly impacted because of their experience. VAN DER KOLK (2014). Sexual assault often takes a significant, long-term toll on victims' overall health as well, increasing the risk not only for depression, anxiety, substance abuse, post-traumatic stress disorder (PTSD), and suicidal ideation, but also physical ailments such as high blood pressure and chronic illness. See McGregor, K.M., *Raped a Second Time: The Mental Health Impact of Campus Sexual Assault Investigation and Adjudication*, 18 QUINNIPIAC HEALTH L. J. 401, 414 (2016)

(finding that victims are three times more likely to suffer from depression; six times more likely to suffer from PTSD; and four times more likely to contemplate suicide); CENTERS FOR DISEASE CONTROL AND PREVENTION, NATIONAL CENTER FOR INJURY PREVENTION AND CONTROL, DIVISION OF VIOLENCE PREVENTION, PREVENTING SEXUAL VIOLENCE (last reviewed by the CDC on Jan. 17, 2020), available at https://www.cdc.gov/violenceprevention/sexualviolence/fastfact.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fviolenceprevention%2Fsexualviolence%2Fconsequences.html. Male victims are at exceptionally great risk of developing psychological and relational problems due to the stigmas surrounding same sex abuse. Stemple, L., *The Sexual Victimization of Men in America: New Data Challenge Old Assumptions*, 104 AM. J. OF PUB. HEALTH 6 (2014).

The highly traumatic nature of sexual assault and its profound physical and psychological effects often interfere with students' ability to participate in and access the benefits of their education. See Bolger, D., *Gender Violence Costs: Schools' Financial Obligations Under Title IX*, 125 Yale L.J. 2106, 2111 (May 2016) (hereinafter Bolger); Jordan, C.E., et al., *An Exploration of Sexual Victimization and Academic Performance Among College Women*, 38 UNIV. OF KY. OFFICE FOR POLICY STUDIES ON VIOLENCE AGAINST WOMEN PUB'NS 1, 3 (2014) (hereinafter Jordan). Research shows that student-victims are more likely to have lowered academic achievement, including declines in overall GPA, increased

absenteeism, as well as to transfer institutions, or drop out of school altogether following a sexual assault. See Jordan, at 18-19; see also, Mengo, C. & Black, B.M., *Violence Victimization on a College Campus: Impact on GPA & School Dropout*, 18 J. OF C. STUDENT RETENTION RES. THEORY & PRAC. 234, 249 (2016) (finding 34% of sexual assault victims dropout of college).

The traumatic effects of sexual assault also exacerbate monetary harms as student-victims are not only left to bear the medical and psychological treatment costs, but also the costs associated with decreased academic performance such as loss of scholarships and financial aid or additional tuition necessary to retake a course. Bolger at 2109-10; Jordan at 5-6. The loss of educational opportunities may also limit future career prospects and result in lower lifetime earnings. *Id.*

The costs associated with sexual abuse are substantial for the individual victim but also staggering for society. For example, studies estimate that the lifetime cost of rape is \$122,461 per victim, resulting in an annual national economic burden of \$263 billion. See Peterson, C., et al., *Lifetime Economic Burden of Rape Among U.S. Adults*, 52 AM.J. PREVENTATIVE MED. 6 (2017); see also, Miller, T.R., et al., *Victim Costs of Violent Crime and Resulting Injuries*, 12 HEALTH AFFAIRS 4 (1993). The greatest portion of these costs flow from lost productivity and through criminal justice and medical costs. The lifetime economic cost of rape across all victims

carries a total economic burden of almost \$3.1 trillion. *Id.* (\$1.2 trillion in medical costs, \$1.6 trillion in lost productivity, and \$234 billion in criminal justice costs).

B. The Omission of Protective, Preventative, or Responsive Institutional Action Is an Injury Distinct from The Underlying Abuse That Exacerbates the Precise Harms Title IX Seeks to Address

Schools across the country tout policies wherein student safety is paramount; yet a historical pattern of institutional inaction in response to sexual violence has emerged which suggests a different set of priorities is controlling institutional behavior. This deliberate indifference to widespread sexual assault harms victims in a manner that is wholly distinguishable from the initial abusive experience. “Institutional betrayal” describes a distinct traumatic experience in response to the omission of protective, preventative, or responsive institutional actions. See Smith, C.P., & Freyd, J.J., *Dangerous Safe Havens: Institutional Betrayal Exacerbates Sexual Trauma*, 26 J. OF TRAUMATIC STRESS 1 (2013). Roughly 40% of students who are victims of campus sexual assault report experiencing institutional trauma or betrayal trauma. See Smith, C.P., & Freyd, J.J., *Dangerous Safe Havens: Institutional Betrayal Exacerbates Sexual Trauma*, 26 J. OF TRAUMATIC STRESS 1 (2013). The negative effects of institutional betrayal exacerbate and often exceed those associated with victims’ primary abusive experience. Campbell, R. et al., *An Ecological Model of the Impact of Sexual Assault on Women’s Mental Health*, 10 TRAUMA, VIOLENCE, & ABUSE 225, 234 (2009); see also, Smith, C.P. & Freyd, J.J.,

Institutional Betrayal, 69 AM. PSYCHOLOGIST 575, 577-78 (2014) (hereinafter “Smith & Freyd, 2014”) (explaining that institutional betrayal directly causes an increase in post-traumatic symptoms such as difficulty recalling the abuse, physical health problems, delays in reporting, and disengagement from formerly valued institutions.).

Institutional betrayal may arise in the context of reporting when victims discover that they must overcome significant structural barriers to accessing the protections meant to keep campuses safe imposed by the very institution charged with their safety. KNOW YOUR TITLE IX, WHY SCHOOLS HANDLE SEXUAL VIOLENCE REPORTS, available at <https://www.knowyourix.org/issues/schools-handle-sexual-violence-reports/> (last visited Jan. 03, 2022). It is also linked to the covering-up of abuse, which suggests prioritizing institutional reputation over its obligation to protect the safety and trust of its members. Smith & Freyd, 2014 (noting institutional self-protection is key predictor of institutional betrayal).

By enacting Title IX, Congress acknowledged the financial and reputational limitations to institutional self-policing. The significant impacts of sexual assault on victims’ ability to access the benefits of their education underscores the importance that schools take effective action to address it—not merely to prevent its reoccurrence but also to remediate its discriminatory effects. A school’s role in preventing sexual assault is critical when it has knowledge that an individual poses

a substantial risk to the students that they serve; this is especially true where, as here, that knowledge is exclusively controlled by school officials.

Accountability to victims by educational institutions is critical to effectuate Title IX's principles. Yet the District Court's decision vitiates Title IX's promise of equal access to the benefits of an education without sex-based discrimination by denying victims access to a system through which they can seek such accountability. If the District Court's decision is adopted, institutions may continue to perpetuate abuse undeterred. Shutting the courthouse doors will also have broader implications—it will chill reports of sexual assault as many victims will choose not to come forward if they see no avenue to justice.

II. THE COURT'S ACCRUAL ANALYSIS MUST BE UNDERTAKEN FROM THE PERSPECTIVE OF A REASONABLE VICTIM OF SEXUAL ASSAULT & CONSISTENT WITH THE SCIENCE OF TRAUMA THAT CAN DELAY RECOGNITION AND DISCLOSURE OF ABUSE

For federal civil rights claims such as Title IX, the limitations period begins to run only once a person knows, or in the exercise of reasonable diligence should have known, both of his injury *and* the defendant's role in causing that injury. *Campell*, 238 F.3d at 775. Despite widely held misconceptions, it is common for victims of sexual assault—particularly young people and particularly those abused by doctors they have been taught to trust—not only to have difficulty understanding

that they have been abused but also connecting both the traumatic effects to the abusive experience and a third-party's role in the same.

Courts across the country recognize a continuum against which to evaluate the reasonableness of a plaintiff's conduct depending upon the obviousness of the connection between the plaintiff's injury and the defendant's conduct, and where science and circumstance has indicated it necessary to access justice, that analysis has been undertaken from the perspective of a reasonable victim of sexual assault. *See, e.g., Doe 1 v. Baylor Univ.*, 240 F. Supp. 3d 646, 661 (W.D. Tex. 2017) (holding that the discovery rule delayed accrual of claims because it was plausible the plaintiffs "did not have reason to further investigate th[eir] claims" after being discouraged from naming their assailants and coming forward); *see also, Osland v. Osland*, 442 N.W.2d 907, 909 (N.D. 1989) (holding that the discovery rule could toll the statute of limitations where plaintiff had suffered "severe emotional trauma" from the sexual abuse but "was not able to fully understand or discover her cause of action during the applicable statutory time period..."); *Phinney v. Morgan*, 39 Mass. App. Ct. 202, 205 (1995) (invoking the discovery rule to toll the statute of limitations out of "fundamental fairness" where, "because of the nature of the injury and the relationship of the parties, a child may repress all memory of the abuse, lack understanding of the wrongfulness of the conduct, or be unaware of any harm or its cause until years after the abuse."); *R.L. v. Voytac*, 99 N.J. 285, 299-304 (2009)

(While plaintiff had a conscious memory of the sexual abuse, plaintiff's statutory cause of action for sexual abuse, did not accrue, until plaintiff should have reasonably discovered that the serious psychological and mental illness injuries from which he allegedly suffered were caused by that sexual abuse.); *B.R. v. Horsley*, 345 P.3d 836, 839 (Wash. Ct. App. 2015) (explaining that the SOL for claims of childhood sexual abuse specifically focuses on when a victim of sexual abuse discovers causal link between abuse and injury for which suit is brought because legislature specifically anticipated that victims may know they are suffering emotional harm or damage but not be able to understand connection between those symptoms and abuse).²

The District Court's accrual analysis is antithetical to the above approach. The Court demanded that Plaintiffs-Appellants, as victims of sexual assault, do that which the science and circumstances dictate is effectively impossible in order to access legal protection. The District Court's misapplication of the law significantly undercuts Title IX's remedial purpose and leaves countless victims in the lurch. This Court must affirm that the limitations period on Plaintiffs-Appellants' Title IX claims did not begin to run until they knew both that they had been abused, learned

² Legislatures across the country have also considered the scientific realities of sexual violence and eliminated or extended the SOL for victims of childhood sexual abuse. For a complete history of the SOL reform movement in the United States since 2002 see CHILD USA's *2020 SOL Report* available at <https://childusa.org/wp-content/uploads/2021/02/2021-02-26-2020-SOL-Report-2.16.21-v2-1.pdf>

of OSU's deliberate indifference to sexual assault, *and* connected those facts to the resultant deprivation of their civil rights.

A. Victims Face Many Barriers That Prevent or Delay Recognition and Disclosure of Abuse

One of the most significant barriers that victims face is recognizing that what they experienced was in fact abuse—a process that can years, even decades. The District Court's decision rests on a false narrative that once victims are abused, they can come forward. But disclosure, rather than a discrete event, is a process and it is a medical fact that victims of sexual assault often need decades to come forward, if they disclose at all.³

Rates of disclosure of campus sexual assault may be even lower than among the general victim population. It is estimated that fewer than 30 percent of victims report to an organization or agency like a university's Title IX office or law enforcement. THE ASSOCIATION OF AMERICAN UNIVERSITIES, REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT at 43 (Westat 2017), available at <https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/AAU-Campus-Climate-Survey-FINAL-10-20-17.pdf>.

Notably, this case involves male victims and studies indicate that their rates of

³ For example, the average age of disclosure of child sexual abuse in a study of 1,000 victims was 52 years-old. See CHILD USA, *Delayed Disclosure: A Factsheet Based on Cutting-Edge Research on Child Sex Abuse*, CHILDUSA.ORG, 3 (Mar. 2020) available at <https://childusa.org/wpcontent/uploads/2020/04/Delayed-Disclosure-Factsheet-2020.pdf>.

disclosure are significantly lower than those of female victims. See, e.g., Walsh, W., et al., *Disclosure and service use on a college campus after an unwanted sexual experience*, 11(2) J. OF TRAUMA & DISSOCIATION 134, 143 (2010) (in a study of victims of campus sexual assault 79% of females disclosed their abuse while only 44% of male victims disclosed); Bullock, C.M., & Beckson, M., *Male victims of sexual assault: phenomenology, psychology, physiology*, 39(2) J. OF THE AM. ACADEMY OF PSYCHIATRY AND THE LAW 197 (2011).

Victims face significant barriers to disclosure including challenges at the social, cognitive, individual, and interpersonal levels as well as on a wider sociocultural level. Liang, B., et. al., *A theoretical framework for understanding help-seeking processes among survivors of intimate partner violence*, 36(1-2) AM. J. OF COMM. PSYCH. 71 (2005). Since disclosure is often the first step in forging the connection between their injuries and their cause, victims of sexual assault often remain blamelessly ignorant of their right to bring a lawsuit until years after the abuse has ended.

Decades of trauma research and advances in the neurosciences has dramatically increased our understanding of the difficulties faced by victims of sexual assault in realizing both that they have been abused and that they have suffered harm. See generally, VAN DER KOLK; Trickett, P. et al., *The Impact of Sexual Abuse on Female Development: Lessons from a Multigenerational*,

Longitudinal Research Study, 23 DEV. & PSYCHOPATHOLOGY 453 (2011) (hereinafter Trickett); Hoskell, L. & Randall, M., *The Impact of Trauma on Adult Sexual Assault Victims*, JUSTICE CANADA 30 (2019), available at https://www.justice.gc.ca/eng/rp-pr/jr/trauma/trauma_eng.pdf. Experts in neurobiology now know that the prefrontal cortex—the portion of the brain responsible for decision-making, executive functioning skills such as organization and planning, and impulse control—develops over time and does not fully mature until at least age 25. Arain, et al., *Maturation of the adolescent brain*, 9 NEUROPSYCHIATR. DIS. TREAT. 449-461 (2013), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3621648/#:~:text=The%20development%20and%20maturation%20of%20the%20prefrontal%20cortex%20occurs%20primarily,helps%20accomplish%20executive%20brain%20functions.>⁴ This biological immaturity of the pre-frontal cortex inhibits victims’ reasoning capacities and functionally impairs victims’ abilities to make emotionally charged decisions such as whether or not to disclose abuse (or to whom, how much, etc.). De Bellis, M. D., Spratt, E. G., & Hooper, S. R., *Neurodevelopmental biology associated with*

⁴ Courts have also recognized these unique biological challenges in contexts other than Title IX to justify greater protective treatment for children and young adults. See, e.g., *Matter of Monschke*, 482 P.3d 276, 283 (Wash. 2021) (noting that turning 18 does not transform a person into “an adult” and stating “[t]he Concept of An ‘Age of Majority’ Is Inherently And Necessarily Flexible.”); *Miller v. Alabama*, 567 U.S. 460, 472 (2012) (quoting *Graham v. Florida*, 560 U.S. 48, 68 (2010)) (“parts of the brain involved in behavior control’ continue to develop well into a person’s 20s”); *Helfman v. Northeastern Univ.*, 485 Mass. 308, 320 (2020) (“the brain’s maturation process ... continues into young adulthood, at least through the early twenties”).

childhood sexual abuse, 20(5) J. OF CHILD SEXUAL ABUSE 548 (2011); see also, B. McEwen, *Physiology and neurobiology of stress and adaptation: central role of the brain*, 87(3) PHYSIOL. REV. 873 (2007), available at <https://pubmed.ncbi.nlm.nih.gov/17615391/> (explaining that these neurobiological challenges are compounded in the face of acute and chronic stress which, alone, decreases the activity of the prefrontal cortex and increase activity in the limbic system, the emotion-center of the brain).

Research also shows that the psychological impact of sexual assault may cause victims to develop a variety of coping strategies that impede their ability to recognize or understand the abuse they suffered. Goodman, G.S., et. al., *A prospective study of memory for child sexual abuse: New findings relevant to the repressed-memory controversy*, 14(2) PSYCHOL. SCI. 11 (2003); Littleton, H., Horsley, S., John, S., & Nelson, D. V., *Trauma coping strategies and psychological distress: a meta-analysis*, 20(6) J. OF TRAUMATIC STRESS 977 (2007). For example, victims may deny or repress memories of the abuse thereby delaying conscious discovery of the same. *Id.* These mechanisms, which may persist well into victims' adulthood, often challenge victims' memories surrounding the abusive experience, leading many to doubt the reality or abusive nature of the contact. *Id.* Often it is not until years or decades after the sexual abuse that the most severe symptoms manifest, and victims experience the debilitating effects associated with the abuse. See Von

Bargen, D.P., *Nittany Lions, Clergy, and Scouts, Oh My! Harmonizing the Interplay Between Memory Repression and Statutes of Limitations in Child Sexual Abuse Litigation*, 18 MICH. ST. U. J. MED. & L. 51, 61 (2014). This delayed onset of symptoms makes it difficult, if not impossible, for a victim to recognize the full extent of their harm or to connect their current problems to the abuse suffered decades before.

Social and environmental factors similarly impact reporting and disclosure behaviors. Of significance, student-victims may be more reluctant to report due to fears that their allegations will not be taken seriously, worry about social and professional retaliation, and doubts about the confidentiality of their report. See Holland, K.J. & Cortina, L.M., “*It happens to girls all the time*”: *Examining sexual assault survivors’ reasons for not using campus supports*, 59 AM. J. OF COMMUNITY PSCYH. 1-2 (2017). Male victims in particular may resist reporting due to contemporary social narratives surrounding masculinity. See Stemple, L., *The Sexual Victimization of Men in America: New Data Challenge Old Assumptions*, 104 AM. J. OF PUB. HEALTH 6 (2014). These challenges are compounded for intersectional students—especially students of color, LGBTQ students, and students with disabilities. See, e.g., BELKNAP, J., *THE INVISIBLE WOMAN: GENDER, CRIME, AND JUSTICE* (Cengage Learning, 2014); Davies, M., & McCartney, S., *Effects of gender and sexuality on judgements of victim blame and rape myth acceptance in a*

depicted male rape, 13(5) J. OF COMM. & APPLIED SOC. PSYCH. 391 (2003). Simply put, victims in the school setting view reporting sexual assault as the least desirable response available to them and will only seek institutional relief as a “last resort.” Fitzgerald, L.F., et al., *Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment*, 51 J. OF SOC. ISSUES 117, 121 (1995).

The idea that a victim always knows immediately when they are injured also ignores the fact that perpetrators of sexual abuse often stand in a position of trust in relation to their victim, and that the very nature of the relationship itself may preclude discovery of the injury. As the Larry Nassar scandal illustrates, discerning abuse is especially complicated in the context of physician-patient relationships. See, DUBOIS, ET AL., *SEXUAL VIOLATION OF PATIENTS BY PHYSICIANS, SEXUAL ABUSE: A JOURNAL OF RESEARCH AND TREATMENT* 2 (2017) (explaining that patients may be “confused as to whether abuse occurred”—like “not realizing that an ungloved vaginal exam was unnecessary”) (hereinafter DUBOIS); see also, Carrie Teegardin, et al., *License to Betray*, THE ATLANTA JOURNAL-CONSTITUTION (2016), available at http://doctors.ajc.com/part_1_license_to_betray/ (analyzing 100,000 disciplinary reports of physicians' sexual misconduct and finding some patients had not recognized that they had been abused because the assaultive behavior occurred under the guise of a legitimate medical exam). Sexual abuse by a physician is particularly

sinister because physicians are expected to have physical contact with their patients during medical procedures and examinations. Therefore, it may not be evident to the patient what behavior falls within the scope of a legitimate medical treatment and what behavior violates the standard of care. *Id.* This places would-be physician-perpetrators at an advantage where they can blur the lines between medical treatment and assault. Larry Nassar exploited this power imbalance to sexually assault thousands of gymnasts and like Nassar, Dr. Strauss also abused student-athletes under the guise of legitimate medical treatment. Dr. Strauss's clinical explanations succeeded in convincing young athletes that his examinations and treatments were well-within the standards of medical care. Student-victims who questioned his behaviors were dismissed by OSU officials who legitimized his abuse by confirming that Strauss's behavior was medically appropriate. As a result, many Plaintiffs-Appellants overlooked their own discomfort and continued to trust that Dr. Strauss's examinations were legitimate.

B. The District Court Ignored the Practical Constraints on Plaintiffs-Appellants' Ability to Discover the Facts of OSU's Wrongdoing

The absurdity of the District Court's inquiry standard is compounded in the context of a cover-up where—as the term implies—the evidence is under the exclusive control of the institution and victims' ability to access evidence is limited. Courts recognize that a perpetrator's role may be immediately ascertainable, but the truth

of the institution's complicity will be suppressed as long as it successfully covers up its role. See, e.g., *Sowers v. Bradford Area Sch. Dist.*, 694 F. Supp. 125, 132 (W.D. Pa. 1988), *aff'd*, 869 F.2d 591 (3d Cir. 1989) (vacated on other grounds) (denying motion to dismiss on statute of limitations grounds because factual questions remained as to whether student knew or should have known school district caused student's injury); *T.R. v. Boy Scouts of America*, 181 P.3d 758, 763 (Or. 2008) (“[T]he limitations period begins to run as to each defendant when the plaintiff discovers, or a reasonable person should have discovered, that defendant's causal role.”) (emphasis added); see also, *Browning v. Burt*, 613 N.E.2d 993, 1005 (Ohio 1993) (holding under state accrual rule that SOL for medical malpractice claim against hospital—as opposed to doctor—didn't start running until plaintiffs saw TV program and learned that their doctor “may have committed a number of harmful . . . surgeries upon a number of unsuspecting patients” such that the hospital's credentialing practices “could reasonably be brought into question”).

Instead, the District Court's decision equates Plaintiffs-Appellants' abuse with that of the actual injury inflicted by OSU—the deprivation of their civil rights—and erroneously concludes that once Plaintiffs-Appellants were on notice of the facts that would give rise to a claim against Dr. Strauss, they were also under a duty to investigate and discover potential claims against OSU. Yet it was not until they learned of the 2018 investigation at OSU that most Plaintiffs-Appellants even

realized that what they had experienced was sexual abuse rather than legitimate medical treatment let alone that OSU had known about Dr. Strauss's predations and actively concealed such knowledge for decades.

Even if we assume that Plaintiffs-Appellants had reason to investigate OSU's role in their abuse at the time it occurred, their efforts would have been futile. OSU maintained exclusive control over the confidential information related to prior complaints and, as history makes abundantly clear, when and if Plaintiffs-Appellants asked directly about Strauss, the university would simply lie. See, *Boy Scouts of America*, 181 P.3d 758 at 763-64 (While evaluating a § 1983 claim, "when a duty to investigate exists, the statute of limitations only begins to run if the investigation would have disclosed the necessary facts"); see also, *Piotrowski v. City of Houston*, 51 F.3d 512, 517 (5th Cir. 1995) (finding the cause of action accrued, but the SOL tolled "[w]hen a defendant controls the facts surrounding causation such that a reasonable person could not obtain the information even with a diligent investigation"). Courts that have considered these practical limitations in similar circumstances have held that the SOL does not accrue until such time that the plaintiff becomes aware of a school's role in perpetuating their sexual abuse. See, e.g., *Baylor Univ.*, 240 F. Supp. 3d at 661; *Doe v. Bd. of Educ of Hononegah Cmty. High Sch. Dist. No. 207*, 833 F. Supp. 1366 (N.D. Ill. 1993) (denying motion to dismiss based on SOL in § 1983 claim because student could not reasonably be

expected to discover school's role in allowing sexual abuse to flourish, when student alleged school concealed teacher's prior sexual misconduct); *Sowers*, 694 F. Supp. at 133 (denying motion to dismiss based on SOL in § 1983 claim where there were factual questions about whether student knew or should have known that school district caused student's injury by fostering environment of deliberate indifference to sexual abuse of female students).

Unfortunately, Plaintiffs-Appellants were at the mercy of their school who gave them no reason to believe that they were facilitating the predatory actions of Dr. Strauss as part of a decade's long effort to coverup their role in perpetuating widespread sexual assault; that is, until 2018 when Plaintiffs-Appellants learned of an official investigation into OSU's potential wrongdoing. Thus, even if the Plaintiffs-Appellants were aware that they had been abused, they were not—and could not possibly have been—aware of OSU's role in their sexual assault that resulted in the violation of their civil rights.

CONCLUSION

The District Court's accrual analysis is inconsistent with the black-letter law and precedent on the appropriate application of the federal common law discovery rule to Title IX claims. The decision below incentivizes schools to coverup sexual abuse thereby threatening the safety of future students, faculty, and staff. Schools

that violate students' civil rights should not escape liability and victims should not be denied redress for these harms simply because the realities of delayed recognition and disclosure of abuse and the practical limitations of discovering an institution's role in causing the same mean that most cannot find justice through an arbitrarily short SOL. If permitted to stand, this ruling will prejudice the weakest and most vulnerable members of our society who are compelled to rely on our justice system to do the right thing. Therefore, *Amicus*, CHILD USA, requests this Court reverse the District Court's Order and find that, pursuant to the federal common law discovery rule, the SOL did not begin to run until 2018 at the earliest.

Respectfully submitted 2nd day of March 2022,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing MOTION FOR LEAVE TO APPEAR AS AMICUS CURIAE AND FILE A BRIEF IN SUPPORT OF PLAINTIFFS-APPELLANTS APPEAL AND URGING REVERSAL OF THE DECISION BELOW and the proposed Amicus brief attached thereto have been filed with the Court's CM/ECF system this 2nd day of March 2022 and will be served upon all counsel of record through that system.

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CERTIFICATE OF COMPLIANCE UNDER RULE 32(g)(1)

This brief complies with type-volume requirement of Rule 29(5) of the Federal Rules of Appellate Procedure because it contains 6081 words, not including the items excluded under by Rule 32(f) of the Federal Rules of Appellate Procedure, which is not more than one-half the maximum word count (13,000) authorized by Rule 32(a)(7)(B)(i) of the Federal Rules of Appellate Procedure for the party's principal brief. This brief complies with the typeface and type-style requirements of Rules 32(a)(5) and 32(a)(6) of the Federal Rules of Appellate Procedure because the brief was prepared using Microsoft Word in 14-point Times New Roman font, which is a proportionately spaced serif typeface.

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