No. 22-896

IN THE

Supreme Court of the United States

THE OHIO STATE UNIVERSITY,

Petitioner,

v.

STEVE SNYDER-HILL, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICI CURIAE* OF THE ASSOCIATION OF AMERICAN UNIVERSITIES AND TWENTY-THREE INSTITUTIONS OF HIGHER EDUCATION IN SUPPORT OF PETITIONER

BRYAN H. BEAUMAN
STURGILL, TURNER, BARKER & MOLONEY PLLC
333 West Vine St., Ste. 1500
Lexington, KY 40507

Counsel for Amici Curiae**

NOEL J. FRANCISCO
Counsel of Record
JONES DAY
51 Louisiana Ave., N.W.
Washington, D.C. 20001
(202) 879-3939
njfrancisco@jonesday.com

STEPHEN J. COWEN
AMANDA K. RICE
ANDREW J. CLOPTON
JONES DAY
150 W. Jefferson, Ste. 2100
Detroit, MI 48226

Counsel for Amici Curiae*

[*] The Association of American Universities; University of Dayton; Eastern Michigan University; Ferris State University; Grand Valley State University; Iowa State University; The Board of Regents of the University of Michigan; Michigan Technological University; Oakland University; and Saginaw Valley State University.

[**] The Board of Trustees of the University of Arkansas; Bowling Green State University; Cleveland State University; University of Florida; Indiana University; University of Iowa; University of Minnesota; University of Missouri System; Purdue University; The University of Texas System; The Texas A&M University System; The Texas Tech University System; University of Toledo; and Troy University.

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INTEREST OF *AMICI CURIAE*[1]

Amici Curiae represent public and private universities from across the country. They include the Association of American Universities, which counts sixty-three of America's leading research universities as members. *See Our Members*, Ass'n of Am. Univ., https://bit.ly/3mDMFlj (last visited Apr. 16, 2023). They also include twenty-three individual institutions of higher education that receive federal funding:

- The Board of Trustees of the University of Arkansas
- Bowling Green State University
- Cleveland State University
- University of Dayton
- Eastern Michigan University
- Ferris State University
- University of Florida
- Grand Valley State University
- Indiana University
- University of Iowa
- Iowa State University
- The Board of Regents of the University of Michigan
- Michigan Technological University
- University of Minnesota
- University of Missouri System
- Oakland University
- Purdue University
- Saginaw Valley State University

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[1] No counsel for a party authored any portion of this brief or made any monetary contribution intended to fund its preparation or submission. All parties received timely notice of this brief.

- The University of Texas System
- The Texas A&M University System
- The Texas Tech University System
- University of Toledo
- Troy University

The scope of the implied right of action under Title IX is an issue of immense importance to institutions of higher education like *Amici*. In the decision below, the Sixth Circuit dramatically expanded that implied right of action by eviscerating the statute of limitations for Title IX claims and by extending Title IX remedies to any member of the public who visits a college campus.

Let stand, the decision below will subject federal funding recipients to near-limitless liability that far exceeds what they agreed to under Title IX. It will disincentivize institutions from investigating past wrongdoing in an attempt to prevent future harms. And, ultimately, it will divert critically important resources Title IX recipients otherwise could dedicate to research, teaching, and student support.

Amici who are located within the Sixth Circuit will be subject to that court's radical approach to Title IX absent this Court's intervention. And *Amici* who are located in other circuits have a strong interest in ensuring that the Sixth Circuit's deeply problematic approach does not spread more broadly.

INTRODUCTION AND SUMMARY OF ARGUMENT

Title IX is a Spending Clause statute. *See Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 640 (1999). That means that institutions that accept federal funding thereby consent to the obligations—and potential liability—the statute imposes. But funding recipients "cannot 'knowingly accept' the deal with the Federal Government unless they . . . 'clearly understand . . . the obligations' that . . . come along with doing so." *Cummings v. Premier Rehab Keller, P.L.L.C.*, 142 S. Ct. 1562, 1570 (2022) (quoting *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006)). "Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). And while this Court has implied a private right of action under Title IX, *Cannon v. Univ. of Chi.*, 441 U.S. 677 (1979), the scope of that implied right "must [be] give[n] 'narrow dimensions,'" *Janus Cap. Grp., Inc. v. First Derivative Traders*, 564 U.S. 135, 142 (2011)—both because Title IX is Spending Clause legislation and because Congress did not expressly provide any right to sue at all.

The Sixth Circuit's decision below flouts these foundational principles and deepens a circuit split. Instead of narrowly interpreting Title IX's private right of action, the Sixth Circuit dramatically expanded that right of action in two different ways. *First*, it held that the statute of limitations for Title IX claims does not begin running until a plaintiff discovers *not only* his injury *but also* the funding recipient's deliberate indifference to that injury. Pet.App.32a–35a. *Second*,

it held that the implied right of action under Title IX extends to "virtually anyone who sets foot on campus, no matter the reason." Pet.App.85a (Readler, J., dissenting from denial of rehearing en banc).

The Petition and dissenting opinions below well explain why these holdings bear all the marks of certworthiness. *Amici* write separately to underscore the profound importance of these issues to federal funding recipients and to further explain the harms that will transpire if the decision below takes root.

Amici are deeply committed to the ideals of Title IX and embrace the substantive obligations that come with accepting federal funding. And they unequivocally condemn the conduct that caused devastating harm in the case below. *Amici* acknowledge, moreover, that under *Cannon*, funding recipients are subject to suit by injured students for a term of years (set by state law) after those injuries occur. That, after all, is the bargain this Court has held they struck in accepting federal funds. What funding recipients did not agree to, however, is near-limitless liability to any member of the public who happens to set foot on campus. The Sixth Circuit's endorsement of that broad rule turns this Court's Spending Clause and implied-rights-of-action jurisprudence on its head.

It will also have far-ranging and potentially devastating financial impacts. Even as funding recipients continually improve their policies and make meaningful strides toward sex equality in education, they face a growing number of Title IX lawsuits. The Sixth Circuit's decision will exponentially increase that number, as decades-old allegations and non-student theories of liability inevitably proliferate. And the costs of

that litigation threatens to put funding recipients—most of which are State institutions funded by taxpayer dollars—in a serious fiscal bind. Even more troubling, the Sixth Circuit's statute-of-limitations ruling creates perverse incentives for institutions to avoid internal investigations to uncover misconduct. And its extension of Title IX's substantive obligations to all members of the public will overwhelm Title IX offices and redirect resources away from those whom the statute was designed to protect.

This Court's intervention is badly needed. It should grant the petition, reverse the Sixth Circuit's judgment, and restore Title IX's implied right of action to its proper scope.

ARGUMENT

I. THE SIXTH CIRCUIT'S RADICAL EXPANSION OF TITLE IX'S IMPLIED RIGHT OF ACTION VITIATES IMPORTANT PROTECTIONS FOR FUNDING RECIPIENTS.

This Court has at least "twice … told courts what to do when there is no federal statute of limitations at all": "appl[y] the occurrence rule." Pet.App.52a (Guy, J., dissenting) (citing *Wallace v. Kato*, 549 U.S. 384, 388–91 (2007)); *McDonough v. Smith*, 139 S. Ct. 2149, 2155–56 (2019)). The Sixth Circuit's refusal to abide that instruction would be problematic in any context. But it is especially so in this one, where the statute in question is Spending Clause legislation and the right of action in question is judicially implied. The decision below ignores that Spending Clause statutes can support liability only where they provide funding recipients clear notice. *See Cummings*, 142 S. Ct. at 1570. And it construes Title IX's implied right of action

"broad[ly]," Pet.App.25a, rather than "narrow[ly]," *Janus Cap. Grp.*, 564 U.S. at 142. In both respects, the Sixth Circuit vitiated important protections for funding recipients.

A. Title IX was "enacted pursuant to Congress' authority under the Spending Clause." *Davis*, 526 U.S. at 640; *see also Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287 (1998). "When Congress acts pursuant to its spending power, it generates legislation 'much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions.'" *Davis*, 526 U.S. at 640 (quoting *Pennhurst*, 451 U.S. at 17). The statute, in other words, "operates based on consent." *Cummings*, 142 S. Ct. at 1570. As a result, Title IX suits are permissible "only if the funding recipient is *on notice* that, by accepting federal funding, it exposes itself to liability of that nature." *Id.* (quoting *Barnes v. Gorman*, 536 U.S. 181, 187 (2002)). Courts interpreting Title IX "thus insist that Congress speak with a clear voice, recognizing that there can, of course, be no knowing acceptance of the terms of the putative contract if a [funding recipient] is unaware of the conditions imposed by the legislation or is unable to ascertain what is expected of it." *Davis*, 526 U.S. at 640 (quotation marks and alterations omitted); *id.* at 686 (Kennedy, J., dissenting) ("[A] watered-down version of the Spending Clause clear-statement rule is no substitute for the real protections of state and local autonomy that our constitutional system requires.").

Those Spending Clause principles extend not only to a statute's substantive reach but also to the remedies available thereunder. *See Barnes*, 536 U.S. at 187 (explaining that Title IX's "contractual nature"

must inform "the scope of available remedies"). "When Congress attaches conditions to the award of federal funds under its spending power," this Court "examine[s] closely the propriety of private actions holding the recipient liable in monetary damages for noncompliance with the condition." *Gebser*, 524 U.S. at 287. As a result, a remedy under a Spending Clause statute "is 'appropriate relief' only if the funding recipient is *on notice* that, by accepting federal funding, it exposes itself to liability of that nature." *Barnes*, 536 U.S. at 187 (citation omitted).

These principles apply with additional force in the Title IX context because Congress did not expressly provide private remedies in Title IX at all. This Court has all but abandoned its old practice of implying private rights of action under statutes that contain no express right of action. *See Alexander v. Sandoval*, 532 U.S. 275, 287 (2001) ("Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals."); *id.* ("Having sworn off the habit of venturing beyond Congress's intent, we will not accept respondents' invitation to have one last drink."); *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1402 (2018) ("The Court's recent precedents cast doubt on the authority of courts to extend or create private causes of action even in the realm of domestic law[.]"). But it has adhered to older precedents implying rights of action more freely. One such precedent is *Cannon*, which implied a private right of action under Title IX. 441 U.S. 677.

The origin of that right in judicial implication, however, necessarily constrains its reach. *See Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 78 (1992)

(Scalia, J., concurring in the judgment) (Because Title IX's implied right "came into existence under the *ancien regime*," it must be "limited by the same logic that gave [it] birth."); *accord Gebser*, 524 U.S. at 284–85. Courts must proceed with "caution" when construing an implied right of action, *Hernández v. Mesa*, 140 S. Ct. 735, 742 (2020), and they must be especially careful when "delimit[ing] the circumstances in which a damages remedy should lie." *Gebser*, 524 U.S. at 284–85 (declining to imply *respondeat superior* liability or constructive notice principles); *cf., e.g.*, *Barnes*, 536 U.S. at 188 (declining to imply a punitive damages remedy under Title VI).

B. The Sixth Circuit did the opposite. Instead of construing Title IX's implied right of action narrowly, it purported to interpret the statute in light of its "broad remedial purpose." Pet.App.25a. The panel majority did not even mention the Spending Clause or acknowledge that it was construing an implied right of action. And it did not even pretend to claim that funding recipients were somehow "*on notice*" of the radical new rules the panel majority created. *Barnes*, 536 U.S. at 187.

Amici can attest from personal experience that they were not. *Amici* and their peer institutions are fully committed to preventing sexual assault and harassment on campus. And since *Cannon*, they have been "*on notice*" that they might be subject to timely lawsuits by students injured by a violation of Title IX's substantive requirements. But they were certainly not "*on notice* that, by accepting federal funding, [they would] expose[] [themselves] to liability" for decades-old claims, *see id.*, let alone for claims brought by anyone who happens to walk onto a college campus, *cf.,*

e.g., 34 C.F.R. subpt. B, ch. I, pt. 106 (regulating student admissions, recruitment, housing, facilities, classes, benefits, athletics, and employment). Indeed, sexual assault and harassment claims were not widely accepted as cognizable under Title IX before the early 1990s. *See Franklin*, 503 U.S. at 75 (holding, for the first time, that sexual harassment and sexual abuse constitute sex discrimination under Title IX); Emmalena K. Quesada, *Innocent Kiss or Potential Legal Nightmare: Peer Sexual Harassment and the Standard for School Liability Under Title IX*, 83 CORNELL L. REV. 1014, 1023–26 (1998) (discussing *Franklin* as the first "[r]ecogni[tion of] [s]exual [h]arassment as [s]ex [d]iscrimination [u]nder Title IX").

Congress itself never could have anticipated the expansive liability the Sixth Circuit endorsed, either. To the extent Congress contemplated private rights of action under Title IX at all, it surely would have expected that the default "occurrence" rule would govern claim accrual for such suits. After all, that "standard rule" applies absent unambiguous statutory text to the contrary. *Wallace*, 549 U.S. at 388; *see also, e.g.*, *Rotkiske v. Klemm*, 140 S. Ct. 355, 360 (2019). And there is zero text to the contrary here. In fact, statutory context confirms that the occurrence rule should apply, because Congress used "occurrence" language when it later abrogated certain immunities for claims under Title IX. 42 U.S.C. § 2000d-7(b) (providing that the abrogation would "take effect with respect to violations that *occur* in whole or in part after October 21, 1986" (emphasis added)).

If there were any doubt about what Congress would have intended with respect to the accrual of claims under Title IX, its use of the accrual rule for charges

brought under Title VII should eliminate it. Title VII, unlike Title IX, includes an administrative exhaustion requirement and a private right of action. And Congress could hardly have been clearer that the "occurrence" rule applies to EEOC charges brought under that Act. *See id.* § 2000e-5(e)(1) ("A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice *occurred*." (emphasis added)); *see also, e.g.*, *Abels v. Braithwaite*, 832 F. App'x 335, 336 (5th Cir. 2020) ("The discovery rule is inapplicable to [a] discrimination claim" under Title VII."). This Court has refused to read Title IX ("where Congress has *not* spoken on the subject of either the right or the remedy") more broadly than Title VII (where Congress *has* spoken on that subject). *Gebser*, 524 U.S. at 286 (emphasis added) (looking to Title VII to determine whether Title IX supports respondeat superior liability). And if the discovery rule cannot be read into a statute like Title VII that supplies remedies, it surely cannot be read into a statute like Title IX that merely implies them. *Cf., e.g.*, *Rotkiske*, 140 S. Ct. at 361 (no discovery rule under the FDCPA); *Wallace*, 549 U.S. at 388–91 (no discovery rule under § 1983).

Nor could Congress have ever contemplated extending Title IX remedies to any "member[] of the public" who happens to visit a college campus. Pet.App.40a. The statute covers "discrimination *under* an[] education program or activity," not discrimination full-stop. 20 U.S.C. § 1681(a) (emphasis added). And here again, Title VII is instructive. Just as only employees or their equivalents can sue to enforce Title VII's anti-discrimination provision, *see, e.g.*, *Gulino v. N.Y. State*

Educ. Dep't, 460 F.3d 361, 370 (2d Cir. 2006) (requiring an "employer-employee relationship"), only those who "participat[e] in an education program or activity" can sue to enforce Title IX's anti-discrimination provision, Pet. App. 107a (Readler, J., dissenting); *see, e.g.*, *Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007) (requiring a plaintiff to allege that "she was a student at an educational institution receiving federal funds").

* * *

In construing Title IX's implied right of action, the panel's "watchword" should have been "caution." *Hernández*, 140 S. Ct. at 742. Instead, the panel threw caution to the wind in a purported attempt to promote Title IX's "broad remedial purpose." Pet.App.25a. But the idea that "remedial statutes should be liberally construed" has long been considered a "false notion." Antonin Scalia & Bryan A. Garner, *Reading Law* 364 (2012); *see, e.g.*, *CTS Corp. v. Waldburger*, 573 U.S. 1, 12 (2014) (explaining that "[t]he Court of Appeals was in error" when it relied on the principle "that remedial statutes should be interpreted in a liberal manner"). "[A]lmost every statute might be described as remedial in the sense that all statutes are designed to remedy some problem." *CTS*, 573 U.S. at 12. But "no legislation pursues its purposes at all costs." *Id.* (quoting *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987) (per curiam)). And a broad, purpose-based construction is a particularly poor fit for Spending Clause legislation with no express right of action at all. *See Gebser*, 524 U.S. at 285–87 (finding that broad liability under Title IX would "frustrate" the statute's purposes).

II. THE SIXTH CIRCUIT'S RULING WILL HAVE PROFOUND, NEGATIVE EFFECTS.

These issues are of the utmost importance to federal funding recipients like *Amici*, as well as to the students they serve. The Sixth Circuit's evisceration of Title IX's statute of limitations and its extension of Title IX's remedies to the broader public will multiply Title IX lawsuits, requiring massive expenditures of resources by funding recipients and disrupting the federal-state balance. Its decision to tie claim accrual to the "discovery" of a funding recipient's deliberate indifference will discourage internal investigation and reform efforts. And its endorsement of non-student claims will increase compliance costs and divert resources from student support, research, and teaching—the very priorities embraced by Title IX and other regulations governing institutions of higher education.

A. Title IX was "[o]ne of the great achievements of the women's movement." Barbara Winslow, *The Impact of Title IX*, Gilder Lehrman Inst. of Am. History, https://bit.ly/3lqK0uB (last visited Apr. 7, 2023). "The landmark law has helped improve equity, safety, and wellness on college campuses since its passage in 1972[.]" Zara Abrams, *Title IX: 50 Years Later*, Am. Psych. Ass'n (June 28, 2022), https://bit.ly/42kTJDB. And while there is still much work to be done to ensure sex equality on college campuses, the statute "has improved access to educational opportunities for millions of students, helping to ensure that no educational opportunity is denied to women on the basis of sex and that women are granted equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities."

Equal Access to Education: Forty Years of Title IX, U.S. Dep't of Just. (June 23, 2012), https://bit.ly/3FpnfOI (quotation marks omitted).

Despite that progress, universities have over time faced a growing number of Title IX lawsuits. *See, e.g.*, Samantha Harris & KC Johnson, *Campus Courts in Court: The Rise in Judicial Involvement in Campus Sexual Misconduct Adjudications*, 22 N.Y.U. J. LEGIS. & PUB. POL'Y 49, 50 (2019); *see generally Title IX Lawsuits Database*, Title IX for All, https://bit.ly/3TpfIVF (last visited Apr. 7, 2023); *OCR Investigations Database*, Title IX for All, https://bit.ly/3yFnLUW (last visited Apr. 7, 2023); Anemona Hartocollis, *Colleges Spending Millions to Deal with Sexual Misconduct Complaints*, N.Y. TIMES (Mar. 29, 2016), https://nyti.ms/3FsUh08. This Court's decisions in *Davis*, 526 U.S. 629, and *Gebser*, 524 U.S. 274, recognized new theories of liability based on a funding recipient's "deliberate indifference" to harassment. And the Department of Education's subsequent guidance has imposed new and ever-changing obligations on funding recipients to investigate and combat harassment. *See, e.g.*, Russlynn Ali, *Dear Colleague Letter*, U.S. Dep't of Educ. (Apr. 4, 2011), https://bit.ly/3YXpfEC; Candice Jackson, *Dear Colleague Letter*, U.S. Dep't of Educ. (Sept. 22, 2017), https://bit.ly/40aqVM7; Press Release, *The U.S. Department of Education Releases Proposed Changes to Title IX Regulations, Invites Public Comment*, U.S. Dep't of Educ. (June 23, 2022), https://bit.ly/3FuAKMN; *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 87 Fed. Reg. 41,390 (July 12, 2022) (to be codi-

fied at 34 C.F.R. pt. 106). In the wake of these developments, funding recipients have faced an ever-increasing avalanche of Title IX litigation.

The Sixth Circuit's ruling will exponentially increase the number of these lawsuits, as decades-old allegations and "any member of the public" theories of liability inevitably proliferate. *Amici* and other funding recipients are already struggling to bear the costs—both in dollars and in institutional resources—of the current wave of Title IX litigation. And "[t]he cost of defending against" these additional lawsuits "alone could overwhelm many school[s]"—to say nothing of the "limitless liability" that could result where suits are successful. *Davis*, 526 U.S. at 680–81 (Kennedy, J., dissenting); *id.* at 686 (recognizing that the "suits . . . [that] follow" an expansion of Title IX will, "in cost and number, will impose serious financial burdens on local school districts"). Indeed, "school liability in [just] one … sexual harassment suit could approach, or even exceed, the total federal funding of many school districts." *Id.* at 680.

The proliferation of these lawsuits will have federalism costs, too. *See id.* at 684 (explaining that Title IX cases are fundamentally "about federalism," and that "[p]reserving our federal system is [both] a legitimate end in itself" and "the means to other ends"). That is because most federal funding recipients are state institutions funded at least in part by taxpayer dollars. Properly applied, the interpretive principles that govern Spending Clause legislation preserve the delicate federal-state balance by ensuring that those funding recipients are on notice of—and voluntarily assume—the substantive obligations and potential liability imposed by Title IX. *See supra* Part I.A. But

the barrage of litigation presaged by the decision below threatens to disrupt that delicate balance and leaves taxpayers footing the bill.

B. The Sixth Circuit's ruling also puts funding recipients in the difficult position of having to defend against claims involving decades-old allegations. Statutes of limitation are fundamental to the operation of courts, "vital to the welfare of society," and provide "security and stability to human affairs." *Wood v. Carpenter*, 101 U.S. 135, 139 (1879); *accord Gabelli v. SEC*, 568 U.S. 442, 448–49 (2013). They "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Order of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 348–49 (1944). After all, "time is constantly destroying the evidence" necessary to present an effective defense. *Wood*, 101 U.S. at 139. And "there comes a point at which the delay of a plaintiff in asserting a claim is sufficiently likely either to impair the accuracy of the fact-finding process or to upset settled expectations that a substantive claim will be barred without respect to whether it is meritorious." *Bd. of Regents of Univ. of State of N.Y. v. Tomanio*, 446 U.S. 478, 487 (1980).

The practical difficulties of litigating decades after the fact are on full display in this case. Plaintiffs allege that they were abused in the 1970s, 1980s, and 1990s. *See* Pet.App.2a–5a. By the time they filed suit in 2018 and 2021, the passage of time had taken its toll. The perpetrator, Dr. Strauss, was fired in 1998 and died in 2005. *See* Pet.6; Pet.App.43a (Guy, J., dissenting). Staffmembers who may have been able to testify about what happened have also passed away.

Cf. Pet.App.2a. And medical records from decades ago no longer exist in light of standard record retention schedules. *See* Pet.App.8a n.30. The intervening delay has thus profoundly compromised OSU's ability to understand what happened and defend itself from liability. That is particularly true given that, under the Sixth Circuit's rule, OSU must litigate in each case not only the facts of the incidents at issue but also the time at which each individual plaintiff discovered those facts.

C. To be clear, allegations of sexual misconduct must be taken with the utmost seriousness—even when they surface many years after the fact. And Plaintiffs' allegations were certainly not taken lightly here. OSU swiftly launched an independent investigation after a former student reported abuse. *See* Caryn Trombino & Markus Funk, *Report of the Independent Investigation: Sexual Abuse Committed by Dr. Richard Strauss at The Ohio State University*, Perkins Coie LLP (May 15, 2019), https://bit.ly/3yIhwj5. It publicly released not only the results of that investigation but also 17,500 pages of relevant records. *See Strauss Investigation*, The Ohio State Univ., https://bit.ly/3YWWO9T (last visited Apr. 7, 2023). And it even compensated some claimants notwithstanding its strong limitations defense. *See Ohio State announces new settlement program for survivors in remaining Strauss cases*, Ohio State News (May 7, 2021), https://bit.ly/3zkuWlO; *Additional settlements reached in cases involving Strauss*, Ohio State News (July 22, 2022), https://bit.ly/3lgOnIN.

According to the Sixth Circuit, however, it was OSU's responsible decision to investigate allegations of historical misconduct and share the results publicly

that exposed it to massive new liability. *See* Pet.App.32a–34a. That ruling creates perverse incentives for institutions to refrain from sharing the results of internal investigations and, indeed, from undertaking them in the first place.

Independent internal investigations are the gold standard for institutions grappling with allegations of past wrongdoing. *Cf., e.g.*, Rebecca Files & Michelle Liu, *The Importance of Independent Internal Investigations*, Colum. L. Sch. Blue Sky Blog (Apr. 20, 2022), https://bit.ly/3yHAJkN (explaining that "[i]nternal investigations have become a necessity in today's increasingly complex legal environment" and are "considered standard practice for businesses responding to serious allegations" of misconduct). For good reason: Internal investigations can help institutions identify perpetrators, understand systemic shortcomings that may have facilitated misconduct, and make policy changes to prevent future tragedies. *See* Hervé Gouriage & Elisabeth Riedmueller, *Conducting Internal Investigations and Preserving the Attorney-Client Privilege*, 47-1 PRAC. LAW. 23, 24 (2001) ("If properly conducted, internal investigations can . . . shape organizational policy for the future[.]"). And sharing the results of those investigations with the public punishes wrongdoers, fosters healing, and facilitates participation in reform efforts by community stakeholders.

Indeed, "[w]ith the intense public interest that can surround higher education investigations, it is often not an option to conclude the investigation without a public report." Kenneth L. Wainstain & A. Joseph Jay III, *The Unique Aspects of Independent Investigations in Higher Education*, 39 AM. J. TRIAL ADVOC. 587, 594

(2016). "Though it may well be within a university's rights to withhold the investigative findings, it is practically impossible to do so in light of the intense pressure that would come from the press and [many] constituencies." *Id.* And in most contexts, that is a good thing. Publicly releasing the results of an independent investigation can provide "the objective and authoritative final word on the underlying controversy and give the university the opportunity to address the misconduct allegations, move beyond the controversy, and look forward to the future." *Id.*

But if the cost of these investigations is near-limitless liability, funding recipients will have to think twice before undertaking them in the future. Title IX should not be read to put funding recipients to that kind of choice. And it certainly should not be read to disincentivize responsible reform efforts.

D. Finally, the extension of Title IX obligations to all "members of the public" who "access[] university libraries or other resources, or attend[] campus tours, sporting members, or other activities," Pet.App.41a, threatens to overwhelm Title IX offices and divert attention and resources away from the students Title IX was designed to protect. Title IX and associated regulations impose numerous reporting, investigative, procedural, and remedial obligations on funding recipients. *See, e.g.*, 34 C.F.R. § 106.8. As an initial matter, it is difficult to imagine how a funding recipient could possibly fulfill those obligations with respect to virtually "anyone who has ever stepped foot on school grounds." Pet.App.107a (Readler, J., dissenting from denial of rehearing en banc). But even assuming that were theoretically possible, funding recipients do not have limitless resources. And the up-front compliance

costs of an "any member of the public" Title IX regime would necessarily divert resources from the students Title IX was designed to protect. *See, e.g.*, 34 C.F.R. § 106.31(b) (prohibiting discrimination "in providing any aid, benefit, or service *to a student*" (emphasis added)); *id.* § 106.21(b) (prohibiting discrimination with respect to applications).

* * *

The potential consequences of the decision below for funding recipients and their students are staggering. With a new school year approaching and funding recipients already grappling with the implications of the Sixth Circuit's new rule, this Court's review is urgently needed.

CONCLUSION

The Court should grant the petition for certiorari and reverse the decision below.

April 17, 2023

Respectfully submitted,

BRYAN H. BEAUMAN
STURGILL, TURNER,
BARKER & MOLONEY PLLC
333 West Vine St., Ste. 1500
Lexington, KY 40507

Counsel for Amici Curiae**

NOEL J. FRANCISCO
Counsel of Record
JONES DAY
51 Louisiana Ave., N.W.
Washington, D.C. 20001
(202) 879-3939
njfrancisco@jonesday.com

STEPHEN J. COWEN
AMANDA K. RICE
ANDREW J. CLOPTON
JONES DAY
150 W. Jefferson, Ste. 2100
Detroit, MI 48226

Counsel for Amici Curiae*

* The Association of American Universities; University of Dayton; Eastern Michigan University; Ferris State University; Grand Valley State University; Iowa State University; The Board of Regents of the University of Michigan; Michigan Technological University; Oakland University; and Saginaw Valley State University.

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