THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

FLAVIA PICHIORRI, PH.D.	)	Case No. 2:23-CV-01442
	)	
Plaintiff,	)	Judge Edmund A. Sargus, Jr.
	)	
v.	)	Magistrate Judge Chelsey M. Vascura
	)	
THE OHIO STATE UNIVERSITY COLLEGE OF MEDICINE INVESTIGATION COMMITTEE ("COMIC"), et al.	)	
	)	
Defendants.	)	

MOTION TO DISMISS OF DEFENDANTS THE OHIO STATE UNIVERSITY COLLEGE OF MEDICINE INVESTIGATION COMMITTEE ("COMIC"), ARTHUR BURGHES, BRANDON BIESDADECKI, JONATHAN DAVIS, JILL A. RAFAEL-FORTNEY, YUTONG ZHAO, THOMAS HUND, LOREN WOLD, COLLEEN RUPP, THE OHIO STATE UNIVERSITY BOARD OF TRUSTEES, AND PETER MOHLER

Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), defendants The Ohio State University Board of Trustees, The Ohio State University College of Medicine Investigation Committee, Arthur Burghes, Brandon Biesdadecki, Jonathan Davis, Jill A. Rafael-Fortney, Yutong Zhao, Thomas Hund, Loren Wold, Colleen Rupp, and Peter Mohler, respectfully move this Court to dismiss plaintiff Flavia Pichiorri's Complaint (ECF No. 1) with prejudice. The grounds for this Motion are set forth in the accompanying Memorandum in Support.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION.

This case arises out of a report defendant The Ohio State University ("Ohio State") issued in 2020 following its investigation of allegations that plaintiff Flavia Pichiorri, Ph.D., engaged in research misconduct. As a recipient of federal research funds, Ohio State was obligated to investigate the allegations and report its findings and conclusions to the federal government. Three years later, plaintiff has belatedly sued Ohio State, The Ohio State University College of Medicine Investigation Committee ("COMIC") (the committee that reviewed the allegations and conducted the research misconduct proceedings), and the Ohio State faculty and staff members comprising COMIC (the "Faculty and Staff Defendants"). Plaintiff has alleged federal due process and state law claims.

As explained below, plaintiff's claims suffer from several discrete deficiencies and fail as a matter of law. ***First***, plaintiff's Section 1983 and state law claims are barred by the Eleventh Amendment to the United States Constitution. ***Second,*** the applicable statutes of limitations on plaintiff's claims have run. ***Third,*** plaintiffs' claims additionally and alternatively fail because her due process claims are without basis and federal law preempts her state law claims.

Accordingly, this Court should dismiss all of plaintiff's claims with prejudice.

II. BACKGROUND.

A. The Federal Scheme For Investigating And Reporting Research Misconduct.

The United States government is one of the largest research-funding partners in America. As part of its funding efforts, the federal government is interested in ensuring that recipients of federal funds do not waste or misuse taxpayer dollars. *See* 42 C.F.R. § 93.100(a). To that end, Congress, in 1993, established the Office of Research Integrity ("ORI") within the Department of

Health and Human Services ("HHS"), and tasked HHS/ORI with overseeing and monitoring research misconduct. *See* 42 U.S.C. § 289b. Specifically, Congress charged ORI with promulgating a comprehensive set of federal rules defining research misconduct (42 U.S.C. § 289b(a)(3)), establishing a set of policies and procedures for reviewing, investigating, and reporting research misconduct (42 U.S.C. § 289b(b)), and providing ORI with oversight powers (42 U.S.C. § 289b(c)-(e)).

Pursuant to its congressional mandate, ORI has promulgated a broad set of rules that carry out Congress's clearly expressed intentions and render research misconduct a highly-regulated field. *See* 42 C.F.R. § 93.100 *et seq*; *see also* Pl.'s Compl. at ¶ 23 (ECF No. 1 at PageID 8-9).

B. Ohio State's Responsibilities.

At the heart of the extensive federal scheme regulating research misconduct investigations are partner institutions like Ohio State, 42 C.F.R. § 93.213, which have the "primary responsibility for responding to and reporting allegations of research misconduct." 42 C.F.R. § 93.100(b). Specifically, as a partner institution under the federal scheme, Ohio State is required to: cooperate with the federal government during research misconduct proceedings (42 C.F.R. § 93.300(g)); establish policies and procedures consistent with the federal research misconduct rules (42 C.F.R. § 93.304); timely and thoroughly review and investigate credible allegations of research misconduct (42 C.F.R. §§ 93.307 and 93.310); report to ORI whenever it begins and ends a research misconduct investigation (42 C.F.R. §§ 93.309 and 93.315); and, maintain a complete record of all research misconduct proceedings, including maintaining copies of investigation reports (42 C.F.R. § 93.317).

C. The Research Misconduct Proceedings Involving Plaintiff.

Plaintiff is a former research scientist and assistant professor at Ohio State. Pl.'s Compl.

at ¶¶ 12-15 (ECF No. 1 at PageID 6). In August 2016, plaintiff ***voluntarily*** left Ohio State for a position at The City of Hope Medical Center in Duarte, California. *Id.* at ¶ 15 (ECF No. 1 at PageID 6).

After plaintiff left Ohio State in 2016, beginning in March 2017 and continuing through November 2018, Ohio State received allegations that plaintiff committed research misconduct while she was an employee at Ohio State. *Id.* at ¶ 20 (ECF No. 1 at PageID 8). The allegations involved accusations related to images plaintiff used in academic articles published while she was working as a research scientist in the lab of Dr. Carlo Croce. *See id.* at ¶¶ 18, 21, 25, 36 (ECF No. 1 at PageID 7-9, 12).

Consistent with the requirements imposed by the applicable federal regulations, *see* 42 C.F.R. § 93.307, Ohio State initiated a review of the research misconduct allegations against plaintiff. Pl.'s Compl. at ¶ 21 (ECF No. 1 at PageID 8). During this initial inquiry phase, plaintiff was afforded notice of the allegations against her and had the opportunity to respond to those allegations. *See id.* at ¶ 21 (ECF No. 1 at PageID 8). She took advantage of those procedural protections and submitted information and responses to a Committee of Initial Inquiry (the "CII"). *Id.* (ECF No. 1 at PageID 8).

Following the CII's review and determination that an investigation was warranted, Ohio State convened an investigation committee, COMIC, to formally investigate the allegations against plaintiff. *See id.* at ¶ 22 (ECF No. 1 at PageID 8). COMIC was comprised of defendants Arthur Burghes, Brandon Biesdadecki, Jonathan Davis, Jill A. Rafael-Fortney, Yutong Zhao, Thomas Hund, Loren Wold, and Colleen Rupp, all of whom were faculty or staff at Ohio State. *Id.* at ¶ 7 (ECF No. 1 at PageID 5). Defendant Peter Mohler, Ohio State's current Vice President of Research, is responsible for supervising research misconduct proceedings at the university. *See id.*

at ¶ 9 (ECF No. 1 at PageID 5-6). Plaintiff sued these individuals in their official capacities as members of COMIC. *Id.* at ¶¶ 7, 9 (ECF No. 1 at PageID 5-6).

During the investigation phase of the proceedings, COMIC received and reviewed additional evidence related to plaintiff's alleged research misconduct, including submissions and responses from plaintiff herself. *Id.* at ¶ 25-26 (ECF No. 1 at PageID 9). Plaintiff was represented by counsel in these proceedings and contended the allegations against her were the result of "honest error." *Id.* at ¶ 26-28 (ECF No. 1 at PageID 9-10). Honest error is an affirmative defense to a charge of research misconduct set out in the regulations for which respondents, like plaintiff, bear the burden of proof by a preponderance of the evidence. *See* 42 C.F.R. § 93.106(b)(2).

At the conclusion of the investigation, COMIC found sufficient evidence to support certain of the allegations against plaintiff and that plaintiff's research misconduct was not the result of honest error. *See* Pl.'s Compl. at ¶¶ 7, 29, 34 (ECF No. 1 at PageID 5, 10, 11). In accordance with the requirements of 42 C.F.R. §§ 93.313 and 93.315, COMIC recorded these findings in a final report issued in 2020. *Id.* at ¶¶ 7, 34, 37 (ECF No. 1 as PageID 5, 11, 12). The final report recommended the retraction of two manuscripts and the correction of a third. *Id.* at ¶ 34 (ECF No. 1 as PageID 11). The final report additionally recommended that plaintiff, no longer an employee at Ohio State, be permanently ineligible for re-hire at the university. *Id.* (ECF No. 1 as PageID 11).

Per the procedural process provided, plaintiff appealed COMIC's findings and recommendations. *See id.* at ¶ 42 (ECF No. 1 at PageID 13).

D. The Scientific Journal, *Nature*, Publishes An Article On Research Misconduct.

In 2022, after obtaining the report via a public records request submitted to Ohio State, the journal, *Nature*, published an article summarizing the findings of the 2020 final report in plaintiff's

case. *See id.* at ¶ 37 (ECF No. 1 at PageID 13).[1]

E. Plaintiff's Claims.

More than three years after the conclusion of her investigation and the issuance of the final report in her case in 2020, plaintiff filed this suit against Ohio State, COMIC, and the individual Faculty and Staff Defendants comprising COMIC (collectively "the Ohio State Defendants"). *See* Pl.'s Compl. (ECF No. 1). She alleges the Ohio State Defendants deprived her of her due process rights (Counts 1 and 2). *Id.* (ECF No. 1). She also alleges state law claims related to the research misconduct proceedings and the issuance of the final report, including claims nominally labeled negligence (Count 3), defamation (Count 4), false light (Count 5), tortious interference (Count 6), breach of implied contract and promissory estoppel (Count 7), intentional infliction of emotional distress (Count 8), vicarious liability (Count 9), and intentional misrepresentation (Count 10). *Id.* (ECF No. 1).

III. DISCUSSION.

A complaint that fails to state a claim upon which relief can be granted is subject to dismissal under Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss under Rule 12(b)(6), a complaint must contain sufficient factual matter to "'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "[C]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss," *Mezibov v. Allen*, 411 F.3d 712, 716 (6th Cir. 2005), and this Court "need not accept conclusory allegations or indulge in unreasonable inferences" when reviewing plaintiff's Complaint and this Motion. *HMS Prop. Mgmt. Grp., Inc.*

[1] *See also* Pl.'s Compl. at Part V ("Prayer for Relief") (asking the Court to enjoin Ohio State from maintaining the report as a "record of the University" and "disseminating [it] and its findings to third parties") (ECF No. 1 at PageID 30).

v. Miller, Nos. 94-3668, 94, 3369, 1995 WL 641308, at *3 (6th Cir. Oct. 31 1995) (citing *Blackburn v. Fisk Univ.*, 443 F.2d 121, 124 (6th Cir. 1971)).

Under Rule 12(b)(1), a complaint is subject to dismissal if the court in which it is filed lacks subject matter jurisdiction over the cause. Fed. R. Civ. P. 12(b)(1). In considering a motion under 12(b)(1) that presents a facial challenge to a court's jurisdiction, a court should review the allegations in the plaintiff's complaint to determine whether the plaintiff has properly alleged a basis for jurisdiction. *Morgan v. United States Dep't of Educ.*, 596 F.Supp.3d 1023, 1026 (S.D. Ohio 2022) (citing *Ohio Nat'l Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990)). While a plaintiff facing a 12(b)(1) motion is entitled to have the facts in the complaint taken as true and construed in manner most favorable to her, *id.* (quoting *United States v. Ritchie*, 15 F.3d 592, 598 (6th Cir. 1994)), the plaintiff on a 12(b)(1) motion still "has the burden of proving jurisdiction." *Id.* (citing *Moir v. Greater Cleveland Regional Transit Auth.*, 895 F.2d 266, 269 (6th Cir. 1990)). A court lacking jurisdiction "'must dismiss the cause.'" *Id.* (quoting *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974)).

Applied here, these standards warrant the dismissal of plaintiff's claims.

A. <u>The Eleventh Amendment Bars Plaintiff's Section 1983 And State Law Claims</u>.

The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const., Amend. XI. As interpreted and applied, this immunity acts as a jurisdictional bar to civil suits (like this one) that are filed in federal court against states and their institutions. *See, e.g., Kaplan v. Univ. of Louisville*, 10 F.4th 569, 576-577 (6th Cir. 2021); *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 571 (6th Cir. 2000); *Doe v. Ohio State Univ.*, 219 F.Supp.3d 645, 653-

54 (S.D. Ohio 2016); *Gies v. Flack*, 495 F.Supp.2d 854, 860-61 (2007). This immunity also extends to claims filed against state officers or employees in their official capacities as well, since suits of that variety are "'no different from a suit against the State itself.'" *Doe* at 654 (quoting *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989)).

Here, the Eleventh Amendment bars plaintiff's Section 1983 and state law claims. As an arm of the state, Ohio State is immune from these claims. *See Doe* at 654; *see also*, Ohio Rev. Code § 3345.011 (defining the term "State institution of higher education" and listing Ohio State as a "State university"). As a committee operating within the university, COMIC – which does not have a separate legal or corporate existence apart from Ohio State – also is immune from plaintiff's claims. *See Dillion v. Univ. Hosp.*, 715 F.Supp. 1384, 1386-87 (S.D. Ohio 1989). Finally, because they were named in their official capacities, the Faculty and Staff Defendants likewise are entitled to immunity from plaintiff's claims. *Doe* at 654.

Generally speaking, there are only three exceptions to this immunity: "(1) when the state has waived immunity by consenting to the suit; (2) when Congress has expressly abrogated the states' sovereign immunity, and (3) when the doctrine set forth in *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), applies." *Boler v. Early*, 865 F.3d 391, 410 (6th Cir. 2017). None of these exceptions apply here.

First, this is not a case where the state has expressly consented to suit against it in federal court. *See Univ. of Louisville* at 577; *Gies* at 861 (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984)). To the contrary, Ohio has only waived its sovereign immunity with respect to suits filed against it in the Ohio Court of Claims. *See* Ohio Rev. Code. § 2743.02(A)(1); *see also* Ohio Rev. Code § 2743.02(F) (requiring suits against state employees to start in the Court of Claims).

Second, this additionally is not a case where Congress has abrogated the State of Ohio's sovereign immunity in furtherance of its powers under the Fourteenth Amendment. *Univ. of Louisville* at 577 (quoting *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670 (1999). Rather, it is well-established that states and their institutions are still immune from claims filed under 42 U.S.C. § 1983. *See, e.g., Quern v. Jordan*, 440 U.S. 332, 345 (1979) ("§ 1983 does not explicitly and by clear language indicate on its face an intent to sweep away the immunity of the States"); *see also Will*, 491 U.S. at 71 (holding that "neither a State nor its officials acting in their official capacities are 'persons' under § 1983").

Third, and finally, this is not a case where the exception in *Ex parte Young* for prospective injunctive relief against state officials applies. *See Boler*, 865 F.3d at 412 (explaining the mechanics of the *Ex parte Young* exception). With respect to Ohio State and COMIC, the university is not a ***state official*** and so the exception under *Ex parte Young* is plainly inapplicable. *Univ. Louisville* at 577 (declining to apply this exception to a state university). With respect to the individual Faculty and Staff Defendants, *Ex parte Young* does not apply because the relief plaintiff seeks is intended to remedy past wrongs and is, therefore, retroactive, not prospective, as required. *Boler*, 865 F.3d at 412 ("the doctrine does not extend to retroactive relief"); *see also Comm. to Impose Term Limits v. Ohio Ballot Bd.*, 275 F.Supp. 3d 849, 861-62 (S.D. Ohio 2017), *aff'd on other grounds* 885 F.3d 443 (6th Cir. 2018) (declining to apply the *Ex parte Young* exception to a challenge seeking injunctive relief against the Ohio Ballot Board and its individual members to remedy a claim of past violations).

Accordingly, the Eleventh Amendment bars plaintiff's Section 1983 and state law claims, and those claims should be dismissed for lack of jurisdiction.

B. The Applicable Statutes Of Limitations Bar Plaintiff's Claims.

Assuming this Court has jurisdiction over plaintiff's claims, which for the reasons discussed above it does not, dismissal is independently warranted because plaintiff's claims are untimely and barred by the applicable statutes of limitations. Specifically, plaintiff's claims, which all accrued at the latest in 2020 when Ohio State concluded its investigation and issued its final report, are barred by the 2-year and 1-year statutes of limitations applicable to plaintiff's claims.

1. Plaintiff's Constitutional Claims Are Time-Barred.

The limitations period for a Section 1983 action arising in Ohio is the same as the general or residual statute of limitations period for personal injury actions in the state. *See Owens v. Okure*, 488 U.S. 235, 249-250 (1989). In Ohio, the appropriate statute of limitations period for Section 1983 actions is therefore found in Ohio Rev. Code § 2305.10 and is ***two years*** from the date of accrual. *Browning v. Pendleton*, 869 F.2d 989, 992 (6th Cir. 1989) (en banc); *Nadra v. Mbah*, 893 N.E.2d 829, 835 (Ohio 2008). Under federal law, a cause of action accrues and begins to run when the plaintiff knew or should have known that his or her rights were violated. *Pintup v. Director of Ohio Dep't of J. & Family Servs.*, 654 Fed.App'x 781, 785 (6th Cir. 2016). In cases like this in which procedural due process is at issue, a plaintiff's injury accrues at the time process was denied because "the allegedly infirm process is an injury in itself." *See Nasierowski Bros. Inv. Co. v. City of Sterling Heights*, 949 F.2d 890, 894 (6th Cir. 1991).

Applied here, the latest plaintiff's constitutional claims accrued is in 2020, *i.e.*, when the Ohio State Defendants concluded their research misconduct investigation and issued the report. *See* Pl.'s Compl. at ¶¶ 29, 37 (ECF No. 1 as PageID 10, 12). By that point, plaintiff had notice of any injury or infirmity in the process she complains of here. Under the controlling 2 year limitations period, her Section 1983 claims ran well before the date she filed her complaint on

April 27, 2023, and are untimely.[2]

2. Plaintiff's State Law Claims Also Are Time-Barred.

Under Ohio law, claims for defamation are subject to a 1 year statute of limitations period. Ohio Rev. Code § 2305.11(A); *see also Stainbrook v. Ohio Sec'y of State*, 88 N.E.3d 1257, 1263 (Ohio Ct. App. 2017). Where a claim is in essence a claim for defamation, Ohio courts apply the 1-year limitation period in Ohio Rev. Code § 2305.11(A) regardless of the claim's nominal title. *See, e.g.*, *Stainbrook* at 1265-66 (applying 1-year limitations period to false light claim); *Clevenger v. B.O.*, 184 N.E. 3d 968, 976 (Ohio Ct. App. 2022) (applying the 1-year limitations period to intentional infliction of emotional distress claim); *Ra v. Ohio Atty. Gen.'s Office*, 153 N.E.3d 759, 766-69 (Ohio Ct. App. 2020) (applying the 1-year limitations period to "disguised defamation claims" pled as negligence, tortious interference, and intention infliction of emotional distress claims). Because Ohio follows the single publication rule, defamation claims accrue at the time of the first publication of the matter complained of. *T.S. v. Plain Dealer*, 954 N.E.2d 213, 214-16 (Ohio Ct. App. 2011) ("the initial date of publication triggers the statute of limitations for causes of action based on allegedly defamatory materials").

Here, each of plaintiff's state law claims is based on the Ohio State Defendants' allegedly defamatory conduct. Namely, each of plaintiff's claims is predicated on allegations related to the issuance or dissemination of the final report in 2020 finding plaintiff committed research misconduct and plaintiff's claim that those findings were false:

- **Count Three (Negligence)** - ***"[A]s a direct and proximate result of Defendants'*** negligent review, erroneous, findings and other negligence, and the ***dissemination*** of

[2] To the extent plaintiff has tried to plead her procedural due process claim directly under the United States Constitution, the same limitations period and analysis should apply here. *See Smith v. Kentucky*, 36 F.4th 671, 674-76 (6th Cir. 2022); *Accord v. Anderson Cty. Tenn.*, No. 22-5206, 2022 WL 16825411, at *4 (6th Cir. Nov. 8 2022).

the same, Plaintiff may lose awards and grants, important to her career and research because of COMIC's gross errors and ***false conclusions***." Pl.'s Compl. at ¶ 76 (ECF No. 1 at PageID 19) (Emphasis added.);

- **Count Four (Defamation)** – "Defendants' ***false publications*** have directly and proximately caused Plaintiff to suffer public humiliation, embarrassment, and psychological injury by casting her as unethical and one who has committed research misconduct among readers of the publications to which ***Defendants disseminated its erroneous findings of research misconduct***, as well as members of the OSU research community and the general community. Additionally, Plaintiff may suffer the loss of grants and benefits, as well as research opportunities." *Id.* at ¶ 82 (ECF No. 1 at PageID 20) (Emphasis added.);

- **Count Five (False Light)** – "Defendants knowingly ***acted with reckless disregard as to the falsity of the publicized matter and the false light in which Plaintiff was placed*** because Defendants knew or should have reasonably known that Plaintiff had not committed research misconduct and had not falsified research data as it alleged." *Id.* at ¶ 87 (ECF No. 1 at PageID 21) (Emphasis added.);

- **Count Six (Tortious Interference)** – "Defendants intentionally and improperly…***published false and misleading statements***…and created negative sentiment…against Plaintiff based upon skewed findings of research misconduct…interfering with Plaintiff's employment business relationship and prospective business relationships" *Id.* at ¶ 93 (ECF No. 1 at PageID 22) (Emphasis added.);

- **Count Seven (Breach of Implied Contract and Promissory Estoppel)** – "Defendants made promises and assertions and committed acts and followed certain customs and practices upon which Plaintiff relied to her detriment and which led Plaintiff to believe that she…would not be ***falsely accused*** or improperly investigated for research misconduct" *Id.* at ¶ 100 (ECF No. 1 at PageID 24) (Emphasis added.);

- **Count Eight (Intentional Infliction of Emotional Distress)** – "Defendants' COMIC ***report has caused Plaintiff significant emotional distress*** because the COMIC report being ***disseminated*** to scientific journals, the media, and members of the scientific community and even presently, wherein the damage to Dr. Pichiorri is continuing as this ***false information*** has been used in highly circulated Italian national newspapers in 2023." *Id.* at ¶ 108 (ECF No. 1 at PageID 26) (Emphasis added.); and

- **Count Ten (Intentional Misrepresentation) –** "***The misrepresentations in the COMIC report has resulted in injury to Dr. Pichiorri's reputation***, jeopardized current research funding, and harmed her opportunity to obtain future research grants and funding." *Id.* at ¶ 135 (ECF No. 1 at PageID 29) (Emphasis added.).[3]

[3] Count Nine (Vicarious Liability) is derivative of plaintiffs' other claims based on allegedly defamatory conduct, and is subject to the same 1-year statute of limitations as those other claims.

As alleged in the Complaint, and illustrated in the allegations specifically quoted above, each of plaintiff's state law claims is really just a claim that Ohio State made false statements about plaintiff in the report and published it. The true nature of plaintiff's state law claims is further confirmed when one looks at the nature of the retroactive equitable relief requested in connection with these claims. Specifically, for each of these claims, plaintiff asks the Court to:

- "Enjoin Defendants from engaging in [the complained of] conduct";
- "Enjoin Defendants from allowing the COMIC report, with its erroneous findings, to be maintained as a record of the University and published in online journals"; and
- "Enjoin Defendants from disseminating the COMIC report and its findings to third parties."

Pl.'s Compl. at Part V ("Prayer for Relief") (ECF No. 1 at PageID 30). Notwithstanding the lack of a basis for such relief, this is the type of relief plaintiffs seek in defamation suits. *See, e.g.*, *Sky v. Van Der Westhuizen*, 136 N.E.3d 820, 836 (Ohio Ct. App. 2019) (reviewing injunctive relief ordering the defendant-appellee to remove defamatory posts and prevent any further such acts).

Because the allegedly defamatory conduct complained of here (*i.e.*, the final report) was first published in 2020, *see* Pl.'s Compl. at ¶ ¶ 29, 37 (ECF No. 1 as PageID 10, 12), the statute of limitations on plaintiff's state law claims expired no later than the end of 2021. Accordingly, plaintiff's state law claims, to the extent they are not barred by the Eleventh Amendment, are time-barred.

3. There Is No Continuing Violation That Tolls Or Saves Plaintiff's Claims.

In her Complaint, plaintiff attempts to plead around the applicable statutes of limitations by claiming they "are tolled because the wrongful conduct pleaded…were a continuous series of

See Clawson v. Heights Chiropractic Phys., LLC, Slip Op. No. 2022-Ohio-4154, 2022 WL 17169411, * 4 (Ohio 2022).

acts and conduct through November 2022." *See* Pl.'s Compl. at ¶¶ 52-54 (ECF No. 1 as PageID 15-16). Plaintiff is wrong and her claims are time barred.

In *O'Gorman v. City of Chicago*, the Seventh Circuit rejected a similar tolling argument and granted dismissal on Section 1983 claims arising under similar facts. 777 F.3d 885 (7th Cir. 2015). There, the plaintiff-appellant was a civil servant who had trouble with the law. *Id.* at 887. When he resigned in lieu of termination in 2007, his name was placed on a "do-not-hire" list. *Id.* at 888. Four years later, in 2011, the do-not-hire list and the criteria for appearing on that list were subject to a public record request. *Id.* As here, the plaintiff-appellant in *Gorman* filed suit after the list was made public under Section 1983, claiming that his former employer, the City of Chicago, had violated his Fourteenth Amendment due process rights related to his employment. *Id.* at 889. As here, the plaintiff-appellant in that case tried to overcome the applicable two year statute of limitations for Section 1983 claims in Illinois by arguing that his claims were tolled as a result of a "continuing violation." *Id.* at 890. While finding the plaintiff-appellant had waived the argument, the Seventh Circuit also rejected it as "meritless," *id.*, and found each of the Section 1983 claims were time-barred. *Id.* at 890-92.

Gorman reached the correct result and this Court should reject plaintiff's "continuous violation" tolling arguments too. *See Printup*, 654 Fed.App'x at 789 (explaining that "continual ill effects from an original violation" do not result in a continuous violation, and declining to apply this tolling rule to Section 1983 claims); *Cooper v. City of W. Carrollton*, 112 N.E.3d 477, 485-86 (Ohio Ct. App. 2018) (declining to apply the "continuous violations" rule in Ohio). As such, plaintiffs' claims were untimely, and dismissal is proper on statute of limitations grounds as a matter of law.

C. Plaintiff's Claims Fail As A Matter Of Law For Independent Reasons.

Independent of the bases above, plaintiff's claims fail for the additional reasons that (1) her due process claims fail as a matter of law, and (2) federal law preempts the prosecution of her state law claims.

1. Plaintiff's Due Process Claims Fail As A Matter Of Law.

The Fourteenth Amendment forbids state actors from depriving individuals of "life, liberty or property without due process of law." U.S. Const. amend. XIV, § 1. "The clause has both a substantive and a procedural component." *EJS Properties, LLC v. City of Toledo*, 698 F.3d 845, 855 (6th Cir. 2012). Here, plaintiff has brought both substantive and procedural due process claims against the Ohio State Defendants. Each of those claims lacks merit and each fails.

a. Plaintiff's Substantive Due Process Claims Fail.

The Sixth Circuit generally recognizes two types of substantive-due-process claims: (1) where an official act has resulted in the denial of a fundamental right secured by the United States Constitution; and (2) where the acts of a government official toward the plaintiff "shocks the conscious." *See Mertik v. Blalock*, 983 F.2d 1353, 1367 (6th Cir. 1993). Plaintiff has not stated either type of substantive due process claim.

Plaintiff's substantive due process claims are devoid of any allegations that the Ohio State Defendants' conduct "shocks the conscious." *See* Pl.'s Compl. at ¶¶ 55-62 (ECF No. 1 at PageID 16-17). Instead, plaintiff's substantive due process claims focus exclusively on the first type of claim—*i.e.*, those involving an alleged depravation of a fundamental right. *Id.* (ECF No. 1 at PageID 16-17). Plaintiff's substantive due process claim distills down to conclusory allegations that the investigation and final report harmed her reputation and career prospects. *See id.* at ¶¶ 59-60 (ECF No. 1 at PageID 16-17). This fails to state a claim for which relief can be granted,

however, because the ***right to one's reputation or career is not a fundamental right*** and cannot serve as the basis for a substantive due process claim. *See Lambert v. Hartman*, 517 F.3d 433, 444 (6th Cir.2008); *Singleton v. Cecil*, 176 F.3d 419, 428 (8th Cir. 1999) (en banc). Rather, such a right is typically safeguarded via procedural due process protections, which, as explained below, plaintiff was afforded. *See Lambert*, 517 F.3d at 544; *see also Quinn v. Shirey*, 293 F.3d 315, 319 (6th Cir. 2002).

As such, plaintiff has not stated, and cannot state, a proper substantive due process claim.

b. Plaintiff's Procedural Due Process Claims Likewise Fail.

To establish a procedural due process violation, a plaintiff must establish (1) that a state actor deprived her of a life, liberty, or property interest, and (2) that this depravation occurred without adequate procedural protections beforehand. *EJS Properties, LLC*, 698 F.3d at 855; *University of Louisville*, 10 F.4th at 577.

Here, plaintiff's procedural due process claim alleges, in conclusory fashion, that the Ohio State Defendants failed to conduct a fair research misconduct investigation and that this failure deprived her of the opportunity to defend the allegations against her. *See* Pl.'s Compl. At ¶¶ 65-66 (ECF No. 1 at PageID 17-18). At the heart of her claims is plaintiff's real grievance: her displeasure with the outcome of these proceedings. That is, plaintiff's procedural due process claims essentially allege that the Ohio State Defendants should have concluded that the research misconduct allegations against her were the result of "honest error," and that the outcome of these proceedings should have been different. *See id.* at ¶¶ 27-29, 65 (ECF No. 1 at PageID 9-10, 17). That is not how procedural due process works and those claims should be dismissed.

Initially, dismissal of plaintiff's procedural due process claims is warranted because she cannot demonstrate that the Ohio State Defendants deprived her of a constitutionally protected

liberty interest given that her Complaint alleges the interest implicated was the right to her reputation and career. *See* Pl.'s Compl. At ¶¶ 67 (ECF No. 1 at PageID 17-18). It is black letter law that a reputational harm at the hands of a government entity alone cannot give rise to a procedural due process claim. *See, e.g.*, *Paul v. Davis*, 424 U.S. 693, 711 (1976); *Quinn v. Shirey*, 293 F.3d 315, 319 (6th Cir. 2002). Instead, the law requires something more (*e.g.*, reputational harm ***plus*** termination from a position) before such a claim can move forward under the Fourteenth Amendment. *Quinn* at 319; *Gies*, 495 F.Supp.2d at 867. Crucially, plaintiff voluntarily resigned her position at Ohio State well before the proceedings at issue, and was not fired or discharged because of them. Pl.'s Compl. at ¶ 15 (ECF No. 1 at PageID 6). As a result, her claim under the Fourteenth Amendment alleging entitlement to greater procedural protections fails. *See Gies*, 495 F.Supp.2d at 867 ("because Plaintiff was not terminated from his employment, he has no claim to a depravation of his liberty interest").[4]

Next, and more importantly, plaintiff's procedural due process rights were not violated in that she was given all the process she was due. While due process is a somewhat flexible concept, the fundamental question in any procedural due process cases is simple: Was the plaintiff provided with notice and a meaningful opportunity to respond before the alleged depravation occurred. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985); *Doe*, 219 F.Supp.3d 656-57. Here, plaintiff's own Complaint allegations establish she was afforded all that and more.

[4] At best, what plaintiff has pled is a claim based upon her personal interest in her career or occupation. *See* Pl.'s Compl. (ECF No. 1). Such allegations (without more) do not state a proper procedural due process claim. *See Fei Wang v. Bd. of Trustees of Univ. of Ill.*, 612 F.Supp.3d 739, 751-52 (N.D.Ill. 2020) (rejecting an overbroad and vague liberty interest in an academic career at a particular institution); *Univ. of Louisville*, 10 F.4th at 585-86 (same); *see also Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 575 (1972) ("It stretches the concept [of occupational liberty] too far to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another").

First, the Ohio State Defendants provided plaintiff with notice of the allegations against her before any formal proceedings occurred, and further gave her the opportunity to respond to those allegations during the CII stage. Pl.'s Compl. at ¶ 21 (ECF No. 1 at PageID 8). Second, once the investigation before COMIC began, plaintiff was given additional opportunities to respond and present additional evidence. *Id.* at ¶¶ 25-26 (ECF No. 1 at PageID 9). Notably, she was aided by counsel in doing so. *Id.* at ¶ 28 (ECF No. 1 at PageID 10). Finally, at the conclusion of these proceedings, plaintiff was apprised of the findings against her and afforded an opportunity to appeal, which she did. *Id.* at ¶¶ 29, 42 PageID 10, 13). Thus, in this case, "all the process that [was] due [was] provided." *Loudermill*, 470 U.S. at 547; *see also Univ. of Louisville*, 10 F.4th at 583 (affirming dismissal of a similar procedural due process challenge and finding additional procedural protections were unwarranted where, as here, the plaintiff sat for an interview, filed written responses, and received a hearing).

The fact that the Ohio State Defendants did not agree that plaintiff's actions were the result of "honest error" does not change this conclusion or save her procedural due process claims from dismissal. *See* Pl.'s Compl. at ¶ 65 (ECF No. 1 at PageID 17). In *Fei Wang v. Bd. of Trustees of Univ. of Ill.*, for instance, the Northern District of Illinois rejected a similar argument from a professor who was terminated following a research misconduct investigation, explaining in the course of its decision dismissing the professor's complaint that, "[a]lthough [the plaintiff] insists that his actions were merely 'honest mistakes'… '[d]ue process does not require decisionmakers to adopt the charged party's explanation.'" 612 F.Supp.3d 739, 748 (N.D.Ill. 2020) (quoting *Pugel v. Bd. of Trs. of Univ. Ill.*, 378 F.3d 659, 666 (7th Cir. 2004)). The conclusion in *Fei Wang* was sound and this Court should reach the same result here given it is indisputable that a state does not violate the Due Process Clause by requiring that a defendant/respondent prove an affirmative

defense. *See Leland v. Oregon*, 343 U.S. 790, 798-800, (1952) (statute requiring accused to establish defense did not violate the federal Due Process Clause); *Patterson v. New York*, 432 U.S. 197, 210, (1977) (same); *Martin v. Ohio*, 480 U.S. 228, 233 (1987) (same).

Consequently, plaintiff's procedural due process claims—which ignore the process she was afforded, and rest entirely on non-actionable harms to her reputation and lack of success in asserting an affirmative defense—should be dismissed.

2. Plaintiff's State Law Claims Fail As A Matter of Law.

Under the Supremacy Clause of the United States Constitution, state-law causes of action are preempted whenever Congress enacts a regulatory scheme so pervasive that it occupies an entire field of law, leaving no room for supplementation (known as "field preemption"), or, whenever there is an actual conflict between the requirements or objectives of the federal scheme and the state-law cause of action (known as "conflict preemption"). *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230-31 (1947). In this case, both doctrines apply to preclude plaintiff's state law claims.

First, as discussed above, Congress has manifested a clear intent to occupy the field of research misconduct and left no room for plaintiff's state-law claims. Congress created ORI and specifically tasked it with regulating entities like Ohio State that receive federal research funds. 42 U.S.C. § 289b. Congress also gave the agency oversight powers to "monitor administrative processes and investigations that have been established or carried out under [§ 289b]." 42 U.S.C. § 289b(d). Consistent with its mandate, ORI promulgated a sweeping set of federal rules that now govern research misconduct investigations and cover the required steps that institutions like Ohio State must take to review, investigate, and report allegations of research misconduct. *See* 42 C.F.R. § 93.100, *et seq.*

In similar cases involving other federally dominated fields, both the United States Supreme Court and Ohio courts have not hesitated to find claims like these field preempted. *See e.g., Penn. R.R. Co. v. Pub. Serv. Comm. of Penn.*, 250 U.S. 566 (1919) (regulating railcars); *Hines v. Davidowitz*, 312 U.S. 52 (1941) (regulating alien registration); *Rice*, 331 U.S. 218 (regulating federally licensed warehouses); *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624 (1973) (regulating flight times); *Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344, (2000) (regulating federally funded railroad crossings); *Buckman v. Plaintiffs' Legal Committee*, 531 U.S. 341, (2001); (regulating fraud on federal agencies); *PNH, Inc. v. Alfa Laval Flow, Inc.*, 958 N.E.2d 120 (Ohio 2011) (regulating bankruptcy proceedings). Significantly, in a recent decision directly on point, the Ohio Court of Claims held that state law claims related to a research misconduct investigation were field preempted. *See Croce v. The Ohio State Univ. Bd. of Trs.*, Ohio Ct. Claims No. 2022-00187JD (June 09, 2023) (Attached hereto as Ex. A). This Court should do the same and dismiss plaintiff's claims as field preempted.

Second, plaintiff's claims in this case also are conflict preempted. Conflict preemption occurs whenever compliance with both state and federal law is impossible, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963), or the state law (or state-law claim, as is the case here) " 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Hines* at 312 U.S. at 67. In short, conflict preemption exists whenever there is an "***actual conflict***" between the requirements imposed by state versus federal law. *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 884 (2000) (Emphasis added).

By seeking to hold the Ohio State Defendants liable for doing nothing more than complying with their obligations under the applicable federal rules, plaintiff's claims in this case ***actually conflict*** with the federal scheme and stand as "an obstacle to the accomplishment and execution

of the full purposes and objectives of Congress." *Hines* at 67. Specifically, plaintiff's Compliant improperly seeks to undermine Congress's objectives for ORI by subjecting diligent partner institutions like Ohio State to the specter of state-law liability for following ORI's rules, conducting its investigation, and issuing a final report *See* Pl.'s Compl at ¶¶ 69-70, 80, 87-88, 93, 96, 99-103, 108-109, 112, 117, 132, 135 (ECF No. 1). Additionally, plaintiff's requested relief (an injunction prohibiting Ohio State from maintaining the research misconduct report) further conflicts with the requirements in 42 C.F.R. § 93.317 that Ohio State maintain a complete record of all research misconduct proceedings, ***including copies of investigation reports***. None of these are constitutionally permissible results, and conflict preemption applies to cut off these claims. *See e.g., Buckman*, 531 U.S. at 350-51, 53; *Geier*, 529 U.S. at 881, 86.

Thus, plaintiff's state law claims, which would intrude on ORI's exclusive domain and create a direct conflict between state and federal law in the context of research misconduct proceedings, are preempted and should be dismissed for this reason too.

IV. CONCLUSION.

For the reasons stated above, this Court should dismiss plaintiff's Complaint (ECF No. 1) in its entirety with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was filed electronically on June 26, 2023. Notice was sent by operation of the Court's electronic filing system to all other counsel who have entered an appearance and any parties who have entered an appearance through counsel. The parties may access this filing through the Court's ECF system.

s/ Michael H. Carpenter
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