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IS SILENCE FOR SALE? THE FIRST AMENDMENT IMPLICATIONS OF THE MICHIGAN STATE UNIVERSITY'S SETTLEMENT WITH LARRY NASSAR SURVIVORS

Emily O. Monnett*

Michigan State University (“MSU”) has been embroiled in one of the largest sports or academic scandals in history.¹ In 2016, reporters from the *IndyStar* began the process of uncovering years of sexual abuse at the hands of MSU faculty member Dr. Larry Nassar.² Over the course of the investigation, it was revealed that Nassar had sexually assaulted hundreds of girls and young women over the course of two decades.³ The majority of the assaults occurred at MSU.⁴

Nassar will be in jail for the rest of his life, serving sentences for criminal sexual conduct and child pornography.⁵ Additionally, MSU has been under investigation for its role in

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¹ See, e.g., Caroline Kitchener & Alia Wong, *The Moral Catastrophe at Michigan State*, THE ATLANTIC (Sept. 12, 2018), <https://www.theatlantic.com/education/archive/2018/09/the-moral-catastrophe-at-michigan-state/569776/>.

² Tim Evans, Mark Alesia & Marisa Kwiatkowski, *Former USA Gymnastics Doctor Accused of Abuse*, INDYSTAR (Sept. 12, 2016), <https://www.indystar.com/story/news/2016/09/12/former-usa-gymnastics-doctor-accused-abuse/89995734/>.

³ Kitchener, *supra* note 1.

⁴ *Id.*

⁵ Lauren Theisen, *Larry Nassar Sentenced to Additional 40 to 125 Years in Prison*, DEADSPIN (Feb. 5, 2018, 9:49 AM), <https://deadspin.com/larry-nassar-sentenced-to-additional-40-to-125-years-in-1822724375>.

Nassar's actions.⁶ Survivors⁷ of Nassar's abuse claim that the University was aware of the abuse and went to great lengths to cover it up.⁸ For example, one filed a lawsuit alleging that in 1992 Nassar filmed himself raping a student-athlete, and a member of MSU's board of trustees took steps to conceal the video.⁹ In May 2018, MSU settled with 332 survivors of Nassar's abuse for \$500 million, though the university's troubles remain.¹⁰

The settlement is historic, but the amount is unsurprising given the number of victims and the number of complaints that the University ignored over the course of almost two decades.¹¹ But the settlement came with a surprising provision: Survivors of the abuse agreed to stop advocating for two specific reform bills that the Michigan state legislature were debating and voting upon at the time of the settlement.¹² The bills were originally

⁶ Kitchener, *supra* note 1.

⁷ In this essay, I will use the term "survivor" and "victim" interchangeably. Both terms have value and can serve different purposes. The use of both terms also allows for exclusivity and recognizes a variety of responses to trauma. For more explanation on the use of the terms, see RTI International, *Victim or Survivor: Terminology from Investigation Through Prosecution*, SEXUAL ASSAULT KIT INITIATIVE 1, <https://sakitta.org/toolkit/docs/Victim-or-Survivor-Terminology-from-Investigation-Through-Prosecution.pdf>.

⁸ Kitchener, *supra* note 1.

⁹ *Id.*

¹⁰ Dvora Meyers, *Michigan State's Nassar Settlement Could Set a Troubling First Amendment Precedent*, DEADSPIN (May 18, 2018, 2:02 PM), <https://deadspin.com/michigan-states-nassar-settlement-could-set-a-troubling-1826139831>; Kitchener, *supra* note 1.

¹¹ *Id.*

¹² *Id.*

introduced in February 2018 through the combined efforts of survivors of Nassar's abuse and Michigan state legislators.¹³ The two bills at issue would have ended governmental immunity¹⁴ for cases of childhood sexual abuse.¹⁵ The governmental immunity provisions of the bills were only one piece of the bills' efforts to combat childhood sexual abuse; the bills also included provisions to expand the statute of limitations, allow victims of childhood sexual abuse to file lawsuits anonymously, and expand mandatory reporting laws.¹⁶

At the time the settlement was announced, state legislators declared they would continue to work on and advocate for the reform bills, even though the survivors of Nassar's abuse were required to pull their support.¹⁷ Several legislators committed their support specifically to the

¹³ Jonathan Oosting, *Nassar Victims Push Changes to Michigan Law*, THE DETROIT NEWS (Feb. 26, 2018, 7:17 PM), <https://www.detroitnews.com/story/news/politics/2018/02/26/nassar-victims-sexual-assault-legislation/110876874/>.

¹⁴ Governmental immunity shields a state government from liability. *Odom v. Wayne Cty.*, 760 N.W.2d 217, 227 (Mich. 2008). Under the doctrine, the state or state entity is only liable when the state has expressly permitted a suit against it. *Id.*

¹⁵ Meyers, *supra* note 10.

¹⁶ *Id.*

¹⁷ Beth LeBlanc & Jonathan Oosting, *Nassar Bills Expected to Change Regardless of MSU Deal*, THE DETROIT NEWS (May 17, 2018, 7:44 PM), <https://www.detroitnews.com/story/news/local/michigan/2018/05/17/nassar-legislation-changes-msu-agreement/35038653/> ("Sen. Margaret O'Brien, who sponsored some of the post-Nassar legislation, said she remains committed to the package as it passed out of the Senate in March, including the proposal related to governmental immunity.").

governmental immunity provisions.¹⁸ But the Michigan state legislature changed its tune in July 2018, a week after the settlement agreement was filed in the U.S. District Court in Grand Rapids.¹⁹ State legislators dropped the governmental immunity bills and modified another in accordance with the provisions in the settlement.²⁰ Bob Young, an attorney who helped negotiate the settlement on behalf of MSU, said the settlement's reference to the legislation indicates an agreed-upon outcome that would result from victims' pulling their support for the legislation.²¹ The settlement was entirely conditioned on the failure of the bills.²² The settlement agreement explicitly stated that the settlement itself was only valid once the bills failed.²³ Furthermore, Young confirmed that the failure of the bills was

¹⁸ *Id.* ("Sen. Curtis Hertel Jr., D-East Lansing, said he will immediately introduce new legislation if the House drops the governmental immunity bill or other provisions he deems critical.").

¹⁹ See Beth LeBlanc, *Filing Sheds New Light on Nassar Settlement*, THE DETROIT NEWS (July 18, 2018, 6:01 PM), <https://www.detroitnews.com/story/news/local/michigan/2018/07/18/filing-msu-nassar-victims-settlement/797632002/>.

²⁰ *Id.*

²¹ *Id.*

²² The necessary condition that "(1) Michigan Senate Bill 872 (2018) either shall (A) fail to be enacted into law because it is withdrawn, defeated by vote, or otherwise fails to pass, or (B) be amended to reduce the timeframe to bring otherwise time-barred Nassar-Related Claims to 90 days following enactment of Senate Bill 872 (2018); and (2) Michigan Senate Bills 875 (2018) and 877 (2018) shall fail to be enacted into law because they are withdrawn, defeated by vote, or otherwise fail to pass" is marked as satisfied in the settlement agreement. See Lauren Theisen, *Here's Michigan State's Settlement Agreement With Larry Nassar's Victims*, DEADSPIN (July 18, 2018, 9:42 PM), <https://deadspin.com/heres-michigan-states-settlement-agreement-with-larry-n-1827705229>.

²³ Thiesen, *supra* note 25.

the only way that MSU could see any demonstrable result from the survivors' pulling their support of the reform bills.²⁴

Michigan State had a lot riding on these bills.²⁵ In addition to the complaints they already settled, the University faces a federal lawsuit from 257 of the survivors.²⁶ In a motion to dismiss that lawsuit, the University responded, "As much as MSU sympathizes with Plaintiffs, it would be contrary to the State's established public policy, as embodied in the laws and the decisions of its courts, to impose legal liability on the MSU Defendants," citing governmental immunity from these kinds of suits.²⁷ In August 2019, MSU sought to dismiss *another* wave of lawsuits on the grounds of governmental immunity.²⁸

Here, the damage is done and the governmental immunity bills are dead, but several First Amendment commentators have decried the provision of the settlement that

²⁴ Amy Rock, *Full Details of MSU Settlement with Nassar Victims Released*, CAMPUS SAFETY (July 20, 2018), <https://www.campussafetymagazine.com/clery/details-msu-settlement-nassar-victims> ("The only way we could assure ourselves that their support had been withdrawn was a demonstrable result. That's why it's worded that way.").

²⁵ See Nicholas Roumel, *Is Michigan State's Nassar Settlement Fake News for Some Survivors?*, NACHTLAW (May 23, 2018), <https://www.nachtlaw.com/blog/2018/05/is-michigan-states-nassar-settlement-fake-news-for-some-survivors/>.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Michigan State: We're Immune from Liability in Nassar Claims*, WTOP (Aug. 27, 2019, 2:33 PM), <https://wtop.com/national/2019/08/michigan-state-were-immune-to-liability-in-nassar-claims>.

limited survivors' ability to advocate for reform.²⁹ Commentators point out that state officials are working to silence the political speech of the survivors, and that these provisions are not enforceable.³⁰ They express concern about the precedent these kinds of settlements set for future litigation.³¹

Unfortunately, it is likely that a school, government official, or other state actor will be involved in a similar scandal.³² The MSU settlement is a roadmap for defeating unfriendly legislation. Going forward, whether provisions limiting a party's First Amendment rights can be successfully challenged will continue to be an important legal issue. And not just a sexual violence issue. Regardless of the issue, litigation and legislation are both powerful reform tools. If settlements can be used to kill legislation, they could hobble an important tool for social and political change.

²⁹ Meyers, *supra* note 10; LeBlanc & Oosting, *supra* note 18.

³⁰ Meyers, *supra* note 10; LeBlanc & Oosting, *supra* note 18.

³¹ Meyers, *supra* note 10.

³² In recent years, there have been sexual assault scandals at Pennsylvania State University, MSU, and the University of Southern California. Greg Toppo, *Why Do Colleges Keep Failing to Prevent Abuse?*, INSIDE HIGHER ED (June 5, 2018), <https://www.insidehighered.com/news/2018/06/05/why-do-campus-abuse-cases-keep-falling-through-cracks>. The recent scandals within the Catholic Church provide a good example of how widespread sexual abuse scandals are. *See, e.g.*, Emma Green, *Why Does the Catholic Church Keep Failing on Sexual Abuse?*, THE ATLANTIC (Feb. 14, 2019), <https://www.theatlantic.com/politics/archive/2019/02/sean-omalley-pope-francis-catholic-church-sex-abuse/582658> (providing some background on recent sexual abuse scandals within the Catholic Church).

This Note evaluates whether courts can and should enforce provisions of settlement agreements between private parties and state actors that limit one party's First Amendment rights. Section I of this Note looks at constitutional issues in determining the enforceability of this settlement. Section II of this Note evaluates the enforceability of this settlement under the *Rumery/Grossmont* framework. Section III looks at the traditional contract theory and the public policy exception as a means of challenging the settlement provision. Section IV concludes by summarizing how and why similar settlements can—and *must*—be challenged.

I. CONSTITUTIONAL ISSUES

Several outspoken critics of the MSU settlement have expressed concern about its implications for the First Amendment.³³ But it is important to first analyze whether the First Amendment is implicated at all. The First Amendment of the United States Constitution states, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or *abridging the freedom of speech*, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”³⁴ Of all the

³³ Meyers, *supra* note 10; LeBlanc & Oosting, *supra* note 18.

³⁴ U.S. CONST. amend. I (emphasis added).

rights protected by the First Amendment, the MSU settlement would most likely implicate the freedom of speech.

A. Freedom of Speech

The First Amendment has historically limited the legislative authority of the federal government.³⁵ However, the interaction between the First and Fourteenth Amendments³⁶ of the Constitution extends the reach of First Amendment protections.³⁷ Under the Fourteenth Amendment, states and state actors, including education officials at public institutions, must act within the confines of the Constitution and the Bill of Rights.³⁸ The First Amendment does not apply to private actors, and thus there can be no First Amendment violation without action by the state or federal government.³⁹ In this way, the protections of the Constitution and the First Amendment extend

³⁵ See U.S. CONST. amend. I (“*Congress shall make no law* respecting an establishment of religion”) (emphasis added).

³⁶ “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

³⁷ See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) (“The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures”).

³⁸ See *id.* (“[Boards of Education] have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights.”).

³⁹ See *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 295 (2001).

beyond laws passed by Congress and can apply to certain actions taken by state actors.⁴⁰ The courts have not established one singular test for determining what is or is not state action.⁴¹ Instead, it is a fact-specific inquiry.⁴² That said, state universities and public schools have traditionally been treated as government entities subject to constitutional limitations.⁴³ As a publicly funded university,⁴⁴ Michigan State University is bound by the Constitution, including the First Amendment.

The Supreme Court of the United States has been clear that “the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”⁴⁵ The government cannot proscribe speech merely because it disapproves of the ideas expressed.⁴⁶ Historically, this means that restrictions on First Amendment rights are only constitutional when the restrictions are “content neutral.”⁴⁷ “Content-based regulations are

⁴⁰ *See id.* at 293.

⁴¹ *Lee v. Katz*, 276 F.3d 550, 554 (9th Cir. 2002) (“Because of the fact-intensive nature of the inquiry, courts have developed a variety of approaches to the State actor issue.”).

⁴² *Id.*

⁴³ *See Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503 (1969); *Cooper v. Aaron*, 358 U.S. 1 (1958); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *McLaurin v. Okla. State Regents*, 339 U.S. 637 (1950).

⁴⁴ *See MICH. CONST.* art. VIII, § 4 (“The legislature shall appropriate moneys to maintain . . . Michigan State University . . .”).

⁴⁵ *Police Dept. of Chi. v. Mosley*, 408 U.S. 92, 95 (1972).

⁴⁶ *See R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 392 (1992).

⁴⁷ *See id.* at 382.

presumptively invalid.”⁴⁸ More specifically, “[l]aws designed or intended to suppress or restrict the expression of specific speakers contradict basic First Amendment principles.”⁴⁹ When challenged, content-based restrictions can only survive if they pass strict scrutiny, meaning the restriction is constitutional only if it is narrowly tailored to meet a compelling government interest.⁵⁰ Furthermore, speech on matters of public concern are historically given more rigorous First Amendment protection.⁵¹ Speech on matters of public concern is a fairly broad concept and includes speech that can “be fairly considered as relating to any matter of political, social, or other concern to the community.”⁵²

Here, a restriction on speech is targeted specifically at survivors of Nassar’s abuse and is focused on their advocacy on two specific reform bills. It should be noted that the settlement provision is technically an indirect restriction on the waiver of the survivors’ First Amendment rights, as it says the bills must

⁴⁸ *R.A.V.*, 505 U.S. at 382. Content-based restrictions are permitted for certain categories of “speech,” including: obscenity, defamation, and “fighting words.” *Id.* at 382-83.

⁴⁹ *United States v. Playboy Entm’t Grp.*, 529 U.S. 803, 812 (2000).

⁵⁰ *Id.* at 813. (“If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest.”).

⁵¹ *See generally* *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (“[R]estricting speech on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest . . .”); *Connick v. Myers*, 461 U.S. 138, 145 (1983) (“[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.”) (internal quotations omitted).

⁵² *Connick v. Myers*, 461 U.S. 138, 146 (1983).

fail for the settlement to be valid rather than the survivors cannot advocate for the bills. However, this should not change the analysis because it was understood and intended as a waiver of the survivors' political speech.⁵³ Counsel for MSU made it clear that the provision of the settlement was related to the survivors' advocacy by saying, "The only way we could assure ourselves that their support had been withdrawn was a demonstrable result. That's why [the settlement is] worded that way."⁵⁴ The condition in the settlement was meant as a way to enforce and verify the withdrawal of support for the bills. It was meant to restrict the survivors' First Amendment rights. Based on the text and the statements made by MSU's counsel, it is hard to argue the provision was about anything other than forcing the survivors to withdraw their political support and silence their political advocacy.

As a state actor, MSU cannot place a content-based restriction on speech that is not narrowly tailored to a compelling government interest.⁵⁵ It is unclear what MSU would cite as a compelling governmental interest in restricting the speech of Nassar's victims. Realistically, MSU's strongest interest is in

⁵³ *See id.*

⁵⁴ Rock, *supra* note 26.

⁵⁵ *See R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 395 (1992).

maintaining governmental immunity to avoid liability in future lawsuits. As discussed previously, the two reform bills would work to limit the defense of governmental immunity in cases of child sexual abuse.⁵⁶ MSU has a strong interest in avoiding another \$500 million settlement, but it is unclear how this argument would stand up in court. It may be difficult to argue that there is a compelling government interest in preventing the public from weighing in on the reform bills, especially given that there were elected representatives pushing for the reform bills.⁵⁷

At the very least, there is a strong argument that creating a condition in their settlement is not narrowly tailored to this interest. Instead, MSU could have engaged in their own political advocacy around the bills or taken other steps to fight the bills at issue. Conversely, the settlement only restricts the survivor's ability to advocate for two specific reform bills rather than foreclosing all future political advocacy. State legislators could introduce a new bill with the exact same provisions, and victims of Nassar's abuse are free to support it. In that sense, the restriction may be narrowly tailored to achieve the government's interest.

⁵⁶ Meyers, *supra* note 10.

⁵⁷ LeBlanc & Oosting, *supra* note 18.

The survivors' ability to speak about their experiences in promoting reform measures is a matter of public concern and should be given robust First Amendment protections. The settlement concerns one of the largest sports and academic scandals in American history. The public has a strong interest in learning and hearing about it from all angles, not only because Michigan is still considering reform measures in the wake of the scandal but also because it was a historic and culturally significant event.

The provision of the settlement restricting the survivor's political speech violates their First Amendment rights and thus can additionally be challenged under the unconstitutional conditions doctrine.

1. Unconstitutional Conditions Doctrine

Under the unconstitutional conditions doctrine, the settlement agreement is likely unenforceable. The unconstitutional conditions doctrine stands for the idea that the government cannot grant a benefit on the condition that the beneficiary surrender a constitutional right.⁵⁸ For example, the government cannot require an organization to support or

⁵⁸ *E.g.*, *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013); *Rumsfeld v. Forum for Acad. and Inst'l Rights, Inc.*, 547 U.S. 47, 60 (2006). *See also* 16 AM. JUR. 2D *Constitutional Law* § 411 (2019).

promote a particular position in order to receive federal funds, thus infringing on the organization's right to free speech.⁵⁹

The unconstitutional conditions doctrine applies even when the government could have withheld the benefit altogether.⁶⁰ When the doctrine applies, courts must use strict scrutiny in assessing the condition at issue.⁶¹ In order for the condition to be constitutionally valid, the government interest must outweigh the particular right at issue.⁶² Furthermore, the government cannot require an individual to give up a right in exchange for a discretionary benefit when the benefit given has little relation to the issue at hand.⁶³ A state actor cannot constitutionally condition the receipt of a benefit on an agreement that the recipient will surrender a constitutional right.⁶⁴

Accordingly, the government cannot deny a benefit from an individual in a way that infringes on that person's First

⁵⁹ See, e.g., *U.S. Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 570 U.S. 205 (2013).

⁶⁰ See, e.g., *Perry v. Sinderman*, 408 U.S. 593, 597 (1972) (holding that the government cannot deny a discretionary benefit in a way that inhibits a person's constitutionally protecting rights). See also 16 AM. JUR. 2D *Constitutional Law* § 411 (2019).

⁶¹ See AM. JUR. 2D *Constitutional Law* § 411 (2019).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *R.S.W.W., Inc. v. City of Keego Harbor*, 397 F.3d 427, 434 (6th Cir. 2005); 16 AM. JUR. 2D *Constitutional Law* § 411 (2019).

Amendment rights.⁶⁵ The unconstitutional conditions doctrine protects “the Constitution's enumerated rights by preventing the government from coercing people into giving them up”⁶⁶ and “ensure[s] that the government may not indirectly accomplish a restriction on constitutional rights which it is powerless to decree directly.”⁶⁷ A condition is unconstitutional when the government could not directly impose it.⁶⁸ In essence, the unconstitutional conditions doctrine protects our constitutional rights by preventing the government from having a work-around for things it is already powerless to do. Because the government cannot pass a law saying its citizens cannot criticize the government, it also cannot make not criticizing the government a condition of receiving government benefits,⁶⁹ obtaining a permit,⁷⁰ receiving funding,⁷¹ etc.

Through the settlement provision, MSU is restricting the survivor's First Amendment rights, something that it is otherwise powerless to do. There is little debate that Michigan could have

⁶⁵ See *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013); *Rumsfield v. Forum for Acad. and Inst'l Rights, Inc.*, 547 U.S. 47, 60 (2006).

⁶⁶ *Koontz*, 570 U.S. at 604.

⁶⁷ 16 AM. JUR. 2D *Constitutional Law* § 411 (2019).

⁶⁸ See *Rumsfield*, 547 U.S. 47 at 60.

⁶⁹ See *Perry v. Sinderman*, 408 U.S. 593, 597 (1972).

⁷⁰ *Koontz*, 570 U.S. at 606.

⁷¹ *Rumsfield*, 547 U.S. 47 at 59 (“[We] recognize a limit on Congress' ability to place conditions on the receipt of funds.”).

constitutionally directly prohibited the survivors of Nassar's abuse from advocating for reform measures. First, this would be a content-based restriction on speech and subject to strict scrutiny.⁷² Second, because it is about proposed legislation in the wake of a massive government scandal, the speech at issue would be a matter of public concern.⁷³ Therefore, under the constitutional conditions doctrine, MSU cannot indirectly prohibit Nassar's survivors from advocating for reform measures.

As discussed previously, the settlement was wholly conditioned on the failure of the two bills.⁷⁴ Accordingly, the settlement provision is indirectly conditioned on the waiver of the survivors' First Amendment rights, as it says the bills must fail for the settlement to be enforced rather than that the survivors cannot advocate for the bills. But this should not change the

⁷² See *supra* Section. II A.

⁷³ See *supra* Section. II A.

⁷⁴ The necessary condition that "(1) Michigan Senate Bill 872 (2018) either shall (A) fail to be enacted into law because it is withdrawn, defeated by vote, or otherwise fails to pass, or (B) be amended to reduce the timeframe to bring otherwise time-barred Nassar-Related Claims to 90 days following enactment of Senate Bill 872 (2018); and (2) Michigan Senate Bills 875 (2018) and 877 (2018) shall fail to be enacted into law because they are withdrawn, defeated by vote, or otherwise fail to pass" is marked as satisfied in the settlement agreement. See Lauren Theisen, *Here's Michigan State's Settlement Agreement With Larry Nassar's Victims*, DEADSPIN (July 18, 2018), <https://deadspin.com/heres-michigan-states-settlement-agreement-with-larry-n-1827705229>; see also Nick Roumel, *Is Michigan State's Nassar Settlement Fake News for Some Survivors?*, NACHTLAW (May 23, 2018), <https://www.nachtlaw.com/blog/2018/05/is-michigan-states-nassar-settlement-fake-news-for-some-survivors>.

analysis because, as outlined above, it was understood and intended as a waiver of the survivors' political advocacy.⁷⁵ As the settlement was conditioned on the survivors' waiver of First Amendment rights, the settlement is unconstitutional under the unconstitutional conditions doctrine.

The Ninth Circuit decision in *Davies v. Grossmont Union High School Dist.*⁷⁶ also supports the conclusion that the settlement is unenforceable. *Grossmont* dealt with a situation that is most similar to the MSU settlement at issue. In understanding *Grossmont*, it is also important to understand the Supreme Court's decision in *Town of Newton v. Rumery*.⁷⁷

2. *Rumery* and *Grossmont*

In *Rumery*, the Supreme Court was asked to decide, "whether a release of individual rights in a private settlement agreement with a public official violated public policy."⁷⁸ The Supreme Court held that "a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement."⁷⁹

⁷⁵ *See id.*

⁷⁶ *Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1396 (9th Cir. 1991).

⁷⁷ 480 U.S. 386 (1987).

⁷⁸ *Grossmont*, 930 F.2d 1390, 1396; *see Rumery*, 480 U.S. at 392.

⁷⁹ *Rumery*, 480 U.S. at 392 (plurality opinion).

Bernard Rumery was arrested for witness tampering in connection with a felony sexual assault.⁸⁰ Rumery eventually negotiated a release-dismissal agreement with the local prosecutor, where the prosecutor agreed to drop all charges against Rumery if he “would agree not to sue the town, its officials, or [the victim] for any harm caused by [his] arrest.”⁸¹ Almost a year later, Rumery brought suit against the town of Newton alleging that the town and its officers had violated his constitutional rights.⁸² The suit was dismissed in Federal District Court on the grounds that Rumery had agreed to release all claims against the city.⁸³

The Supreme Court held that such agreements were not *per se* unenforceable⁸⁴ and instead relied on a balancing test weighing the public interest in enforcement versus non-enforcement.⁸⁵ The Court concluded that release-dismissal agreements are not any more coercive than plea-bargaining.⁸⁶ They also relied on the fact that Rumery was a “sophisticated

⁸⁰ *Id.* at 389-90.

⁸¹ *Id.* at 389-90.

⁸² *Rumery*, 480 U.S. at 391.

⁸³ *Id.*

⁸⁴ *Id.* at 392 (“Thus, although we agree that in some cases these agreements may infringe important interests of the criminal defendant and of society as a whole, we do not believe that the mere possibility of harm to these interests calls for a *per se* rule.”).

⁸⁵ *Id.*

⁸⁶ *Id.* at 393.

businessman,” who was competent to weigh the benefits and drawbacks of gaining immunity from criminal prosecution in exchange for abandoning a civil suit.⁸⁷ The Court concluded that there is a strong public interest in support of release-dismissal agreements.⁸⁸ Section 1983 suits, like the one Rumery filed, are expensive and lengthy to defend. Release-dismissal agreements “protect officials from the burdens of defending unjust claims . . . [and] further this important public interest.”⁸⁹

Four Justices disagreed with the Court’s analysis.⁹⁰ Justice Stevens, writing for the dissent, argued that it was improper to analogize release-dismissal agreements with plea-bargaining.⁹¹ They concluded that an “agreement to forgo a civil remedy for the violation of the defendant’s constitutional rights in exchange for complete abandonment of a criminal charge” was not at all like a plea bargain.⁹² The dissent relied on two main points to suggest such agreements are unenforceable: first, the agreements are inherently coercive, and second, the agreements “exact[] a price unrelated to the character of the defendant’s own

⁸⁷ *Id.* at 394.

⁸⁸ *Id.* at 395 (plurality opinion).

⁸⁹ *Id.* at 396.

⁹⁰ *Id.* at 403 (Stevens, J., dissenting).

⁹¹ *Id.* at 409.

⁹² *Id.*

conduct.”⁹³ The dissent did not go so far as to say that all release-dismissal agreements are unenforceable, but instead stated that “the federal policies reflected in the enactment and enforcement of § 1983 mandate a strong presumption against the enforceability of such agreements and that the presumption is not overcome in this case by the facts or by any of the policy concerns discussed by the plurality.”⁹⁴

In *Davies v. Grossmont Union High School Dist.*,⁹⁵ the Ninth Circuit applied *Rumery* and refused to enforce a contract provision that prohibited an individual from running for office. The appellant, Dr. Davies, and his wife had originally sued Grossmont Union High School District under § 1983 in connection with his wife’s employment with the district.⁹⁶ Dr. Davies and his wife eventually settled with the District, and the settlement included a provision that he would not “ever seek, apply for, or accept future employment, position, or office with [Grossmont Union High School District.]”⁹⁷ A year later, Dr. Davies ran for the Governing Board of the District and was elected.⁹⁸ The District then sought to enforce the contract and

⁹³ *Id.* at 411.

⁹⁴ *Id.* at 417-18.

⁹⁵ 930 F.2d 1390 (9th Cir. 1991).

⁹⁶ *Id.* at 1392.

⁹⁷ *Id.*

⁹⁸ *Id.*

force Dr. Davies to resign.⁹⁹ Dr. Davies challenged the enforceability of the order upholding the settlement agreement.¹⁰⁰

The Ninth Circuit addressed a number of arguments from Dr. Davies.¹⁰¹ They affirmed the idea that constitutional rights may be waived “if it can be established by clear and convincing evidence that the waiver is voluntary, knowing and intelligent.”¹⁰² They concluded that Dr. Davies had in fact waived his constitutional right to seek office.¹⁰³ However, the Ninth Circuit refused to enforce the settlement agreement on public policy grounds.¹⁰⁴ The court agreed that enforcing the contract “would violate [Dr. Davies’] constitutional right to run for elective office and the constitutional right of the voters to elect him.”¹⁰⁵ In so deciding, the Ninth Circuit looked to *Rumery*¹⁰⁶ and compared the two cases.

In differentiating the case from *Rumery*, the Ninth Circuit focused primarily on the fact that the rights released by Rumery were private rights,¹⁰⁷ and “thus the Court believed that the

⁹⁹ *Id.* at 1393.

¹⁰⁰ *Id.* at 1394.

¹⁰¹ *See id.* at 1394-96.

¹⁰² *Id.* at 1394.

¹⁰³ *Id.* at 1395.

¹⁰⁴ *Id.* at 1396.

¹⁰⁵ *Id.*

¹⁰⁶ *Town of Newton v. Rumery*, 480 U.S. 386 (1987).

¹⁰⁷ *Grossmont*, 930 F.2d 1390, 1397 (9th Cir. 1991).

surrender of these rights did not have a significant impact upon the public at large.”¹⁰⁸ The Ninth Circuit noted a clear distinction between the surrender of a statutory remedy with the waiver of a constitutional right.¹⁰⁹ This distinction created two important propositions.¹¹⁰ First, a stricter rule is more appropriate in cases where a constitutional right is waived because constitutional rights are “generally more fundamental than statutory rights.”¹¹¹ Second, “foregoing a remedy of money damages for a past injury that cannot be undone may not implicate the public interest to the same extent as does the surrender of the right itself.”¹¹² The *Davies* court declined to follow that line of analysis, and instead held that the case did not even meet the *Rumery* standard.¹¹³

The Ninth Circuit examined whether the public interest is better served by enforcement of the agreement rather than non-enforcement.¹¹⁴ In terms of public policy in favor of non-enforcement, the settlement involved the waiver of the “the most important political right in a democratic system of government: the right of the people to elect representatives of their own

¹⁰⁸ *Id.* at 1400.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 1397.

¹¹⁴ *Id.*

choosing to public office.”¹¹⁵ Unlike in *Rumery*, the waiver of the right to run for office implicates the public interest and has an effect on the public at large.¹¹⁶

In favor of enforcement is “a policy favoring enforcement of private agreements and the encouragement of settling litigation.”¹¹⁷ This interest is important but is present in every settlement agreement.¹¹⁸ The court thus concluded that “where a substantial public interest favoring nonenforcement is present, the interest in settlement is insufficient.”¹¹⁹ The Ninth Circuit then looked for an additional interest beyond the interest in settlement.¹²⁰ The court found that the school district’s other interest in preventing Dr. Davies from being on the board was malicious.¹²¹ Whether or not a person is fit to be on the school board is an issue for the voters to decide during the election—not members of the board during a settlement agreement.¹²² The Ninth Circuit also took issue with commodification of political rights and said it “corrupts the political process.”¹²³

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 1398.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* (“Otherwise, there would be no point to the *Rumery* balancing test: since the interest in settlement is present in every case, every settlement agreement would be enforced.”).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *See id.*

¹²³ *Id.*

The *Davies* court went on to invalidate the agreement on additional grounds.¹²⁴

Before the government can require a citizen to surrender a constitutional right as part of a settlement or other contract, it must have a legitimate reason for including the waiver in the particular agreement. A legitimate reason will almost always include a close nexus—a tight fit—between the specific interest the government seeks to advance in the dispute underlying the litigation involved and the specific right waived.¹²⁵

In *Rumery*, there was a “tight fit” between the interests advanced in the underlying litigation and interest waived.¹²⁶ The criminal charges against the defendant in *Rumery* and the civil suit filed by the defendant arose from the same incident.¹²⁷ In resolving the dispute between the defendant and the prosecutor, both matters needed to be resolved.¹²⁸ In contrast, “the nexus between the individual right waived and the dispute that was resolved by the settlement agreement is not a close one” for Dr. Davies and the school district.¹²⁹ The underlying dispute between Dr. Davies and the school district had “little connection” with the potential of Dr. Davies running for election.¹³⁰ The Ninth

¹²⁴ *Id.* at 1399.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

Circuit concluded that “[t]he absence of a close nexus will ordinarily show that the government is seeking the waiver of important rights without a legitimate governmental interest that justifies doing so.”¹³¹ The Ninth Circuit did not go so far as to say the absence of a “close nexus” was enough to make a contract provision unenforceable.¹³² But without a strong public policy in favor of enforcement, a contract provision will be unenforceable.¹³³ The Ninth Circuit found the provision unenforceable because in their view there was no strong public policy in favor of enforcement on the facts.¹³⁴

Relying solely on *Grossmont*, the provision in the settlement between MSU and the survivors of Larry Nassar’s abuse could be deemed unenforceable, as well as any similar provisions in future settlements. The Ninth Circuit relied on a number of distinctions between *Rumery* and the case at hand, and similar distinctions exist here. First, the right that was waived was one of fundamental importance. The survivors of Nassar’s abuse waived their right to political advocacy regarding specific

¹³¹ *Id.*

¹³² See *id.* (“Although there may be circumstances in which the public interest that would be served by enforcement of a settlement agreement is so strong that it outweighs the absence of a close nexus, such cases are the exception rather than the rule.”).

¹³³ See *id.*

¹³⁴ *Id.*

reform bills.¹³⁵ This is, at its core, political speech, which has traditionally been afforded the most protection.¹³⁶ Like the right to vote and run for office at issue in *Grossmont*,¹³⁷ the right to political speech can only be restricted as necessary to achieve a compelling government interest.¹³⁸

Second, like the right at issue in *Grossmont*, the right to political speech here affects the public at large. Whether the two reform bills mentioned in the settlement became law directly impacts the citizens of Michigan. The bills had the potential to open other government actors up to liability and affect the rights of any Michigander to sue.¹³⁹ Furthermore, it had a direct effect on the plaintiffs in pending litigation against MSU.¹⁴⁰ The reform bills had the potential to open up MSU to liability in future cases.¹⁴¹ The *Grossmont* court stressed that the voters should have the right to choose their elected officials.¹⁴² Just as the citizens of Michigan have the right to choose through their representatives what bills are enacted. As in *Grossmont*,¹⁴³ there are fundamental

¹³⁵ See Meyers, *supra* note 10.

¹³⁶ See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 339-40 (2010).

¹³⁷ *Grossmont*, 930 F.2d at 1397.

¹³⁸ *Citizens United*, 558 U.S. at 340.

¹³⁹ See *Leblanc & Oosting*, *supra* note 18.

¹⁴⁰ See *supra* note 24.

¹⁴¹ See *supra* note 24.

¹⁴² *Grossmont*, 930 F.2d at 1398.

¹⁴³ *Id.* (“[D]emocratic government is premised on the proposition that the people are the best judges of their own interests, and that in the long run it is

constitutional rights at issue that affect the public at large, and thus there is a public interest in favor of nonenforcement.

A sticking point for the Ninth Circuit was that the school board was using the settlement to silence a political rival outside the democratic process.¹⁴⁴ MSU is not a political rival of the survivors of the abuse; however, MSU has directly opposed the reform bills advocated by the survivors and has benefitted politically from the survivors' silence.¹⁴⁵ In some ways, this does make them political rivals.

In *Grossmont*, the Ninth Circuit balanced the public interest in non-enforcement with the interests in enforcement.¹⁴⁶ Similarly, there is a public interest here in encouraging settling and favoring enforcement of private agreements. But the Ninth Circuit concluded that when there is a strong interest in favor of nonenforcement, the interest in settling is not enough. MSU's interest in supporting policies limiting their liability is also likely

better to permit them to make their own mistakes than to permit their "rulers" to make all their decisions for them.")

¹⁴⁴ *Id.* ("As harmful as such agreements are in general, they are particularly offensive where, as here, the parties authorizing the payment are elected officials and the recipient is a potential political opponent.").

¹⁴⁵ See Jonathan Oosting & Kim Kozlowski, *Engler: Lawmakers 'Interfered' in Settlement Talks*, THE DETROIT NEWS (March 15, 2018), <https://www.detroitnews.com/story/news/politics/2018/03/15/msu-nassar-lawsuit-talks-divisions/32961185/> ("Lawmakers scaled back broader retroactive and immunity elimination provisions this week amid intense lobbying from [MSU]...").

¹⁴⁶ *Id.*

an insufficient additional interest. The issue of whether or not certain reform bills are good policy is a matter for the legislators and their constituents to decide, rather than MSU.

MSU has an additional interest in enforcing the provision as it shields MSU from liability. In *Rumery*, the plurality gave weight to the government wanting to shield itself from frivolous § 1983 claims.¹⁴⁷ In her concurrence, Justice O'Connor agreed, saying “[s]paring the local community the expense of litigation associated with some minor crimes for which there is little or no public interest in prosecution may be a legitimate objective of a release-dismissal agreement.”¹⁴⁸

However, the MSU settlement is distinct from the release-dismissal agreement at issue in *Rumery*. First, the link between MSU shielding itself from frivolous claims and the settlement is more attenuated. The settlement deals with advocacy for specific reform bills, not specifically with any particular claims or settlement.¹⁴⁹ And second, MSU is not merely shielding itself from “minor crimes for which there is little or no public interest.” MSU is working to shield itself from liability from one of the largest sports and sex abuse scandals in history. Given these

¹⁴⁷ *Town of Newton v. Rumery*, 480 U.S. 386, 396 (1987).

¹⁴⁸ *Id.* at 399-400 (O'Connor, J., concurring).

¹⁴⁹ Theisen, *supra* note 24.

distinctions, it is unlikely that MSU's interest in shielding itself from liability would be given the same weight as in *Rumery*.

Balancing the public policy interests in enforcement and nonenforcement according to *Grossmont*, it is likely that the provision in the MSU settlement would be unenforceable. Given the respect afforded to political speech, it also seems likely that similar provisions relating to political advocacy in settlement agreements would be unenforceable when applying the *Grossmont* standard.

The Ninth Circuit also invalidated the provision of the settlement in *Grossmont* on constitutional grounds.¹⁵⁰ The MSU settlement also involves a state actor¹⁵¹, MSU, so it was worth analyzing this as well. Following the Ninth Circuit's rationale in *Grossmont*, the MSU settlement provision would likely fail because there is no "close nexus" between the government interest in the dispute underlying the litigation and the specific right waived. Here, the underlying dispute is over MSU's involvement in Nassar's sexual abuse. The right waived is the survivor's political speech related to the reform bills. The survivor's advocacy for reform has little to do with the dispute

¹⁵⁰ *Grossmont*, 930 F.2d at 1399.

¹⁵¹ *See supra* Section I.

over MSU's liability for the abuse. According to *Grossmont*,¹⁵² this gives rise to the presumption that there is no legitimate government interest. Without a well-articulated and legitimate government interest, MSU would likely fail at enforcing the provision under this analysis as well.

The petition for writ of certiorari for *Grossmont* was denied,¹⁵³ and as it stands *Grossmont* is still good law in the Ninth Circuit. Although no other circuits have taken up the analysis in *Grossmont*, it has been distinguished on a few occasions.¹⁵⁴ But those cases have been distinguished only on the grounds that there was no state actor¹⁵⁵ or that there was no public interest at issue.¹⁵⁶

What would the Supreme Court do with a case like *Grossmont* or a challenge to the MSU settlement? Did the Ninth Circuit in *Grossmont* go beyond where the Supreme Court would

¹⁵² 930 F.2d at 1399 (“The absence of a close nexus will ordinarily show that the government is seeking the waiver of important rights without a legitimate governmental interest that justifies doing so.”).

¹⁵³ *Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390 (9th Cir. 1991), *cert denied*, 501 U.S. 1252 (June 28, 1991).

¹⁵⁴ *See* *Harcourt Brace Jovanovich Legal & Prof'l Publ'ns v. Multistate Legal Studies, Inc.*, 26 F.3d 948 (9th Cir. 1994); *Wilkicki v. Brady*, 882 F. Supp. 1227 (D.R.I. 1995); *State v. Noah*, 9 P.3d 858 (Wash. Ct. App. 2000).

¹⁵⁵ *Noah*, 9 P.3d at 871 (Wash. Ct. App. 2000) (“[*Grossmont*] is not applicable here because it was a case of state action where the school district was a party.”).

¹⁵⁶ *See* *Wilkicki v. Brady*, 882 F.Supp 1227 (D.R.I. 1995)

(“In [*Grossmont*], the enforcement of plaintiff's waiver compromises a fundamental right of the public; in this case, the enforcement of the waiver does not.”).

go? The Supreme Court in recent years has placed significant weight on the value of political speech.¹⁵⁷ The Court has also given strong protection to speech on matters of public concern.¹⁵⁸ Furthermore, the MSU case involves not only political speech but also state action to silence political advocacy. It is therefore possible that the Supreme Court would move to protect political speech. Looking at traditional constitutional doctrines and recent case law, the survivors of Nassar's abuse could likely succeed in challenging the settlement provision silencing their political advocacy. The survivors also likely have a successful challenge under traditional contract theory.

II. TRADITIONAL CONTRACT THEORY

The settlement agreement between MSU and the survivors of Nassar's abuse is a contract between the two parties and is thus subject to the traditional rules of contracting.¹⁵⁹ As such, it is important to analyze whether the settlement can be challenged under traditional contract principles. The settlement agreement is unique in that, in part, it is a contract to buy the

¹⁵⁷ See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 339-40 (2010).

¹⁵⁸ See, e.g., *Snyder v. Phelps*, 562 U.S. 443, 552 (2011).

¹⁵⁹ See *Knudsen v. C.I.R.*, 793 F.3d 1030, 1035 (9th Cir. 2015)

("A settlement is a contract, and its enforceability is governed by familiar principles of contract law.").

survivors' silence related to their political advocacy. Given that the settlement is a unique form of contract, it can be challenged under public policy doctrine.

Generally, great weight and recognition is given to the “freedom of contract.”¹⁶⁰ However, there is significant debate about “contracts of silence”¹⁶¹ and whether they should be treated differently because they suppress speech.¹⁶² Contracts of silence are exactly what they sound like; contracts where one or both parties agree to remain silent about a subject. Contracts of silence have exploded in the last forty years with the rise of the non-disclosure agreement (“NDA”), one form of the contract of silence.¹⁶³ Contracts of silence are used to conceal a range of information, including trade secrets, sexual harassment allegations, and environmental hazards.¹⁶⁴ The freedom of speech is critical, yet not all contracts of silence are harmful.¹⁶⁵ Companies are and should be allowed to protect their trade secrets from contractors and former employees¹⁶⁶ and celebrities can and should be able to keep their address and location

¹⁶⁰ Alan E. Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 CORNELL L. REV. 261, 264 (1998).

¹⁶¹ *See id.* at 268.

¹⁶² *Id.* at 266.

¹⁶³ Michelle Dean, *Contracts of Silence*, COLUM. JOURNALISM REV. (Winter 2018), https://www.cjr.org/special_report/nda-agreement.php/.

¹⁶⁴ *Id.*

¹⁶⁵ *See* Garfield, *supra* note 166, at 275.

¹⁶⁶ *Id.* at 269.

private.¹⁶⁷ Contracts of silence can still be used in dangerous ways.¹⁶⁸ For example, non-disclosure agreements are frequently cited as an explanation for why sexual predators can continue to harm new victims.¹⁶⁹ In essence, not all contracts of silence are created equal. The legal system should be equipped to handle these differences.¹⁷⁰

Though the law places great weight on the freedom to contract, it is not an absolute right.¹⁷¹ Under traditional contract theory, the courts have a variety of tools for dealing with the disparities in value among contracts of silence.¹⁷² Courts regularly refuse to enforce contracts for a wide variety of reasons.¹⁷³ Some contracts of silence can be found unenforceable under traditional contract principals such as unconscionability¹⁷⁴ or duress.¹⁷⁵ In determining the enforceability of contracts of silence, the most relevant contract doctrine is public policy.¹⁷⁶

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 331-32. *See Dean, supra* note 169.

¹⁶⁹ *See Dean, supra* note 169.

¹⁷⁰ *See Garfield, supra* note 166, at 269.

¹⁷¹ *See id.* at 294.

¹⁷² *See id.* at 276.

¹⁷³ *See id.* at 276-92.

¹⁷⁴ *See, e.g., Disher v. Fulgoni*, 464 N.E.2d 639, 644 (Ill. App. Ct. 1984) (invalidating overbroad employee confidentiality agreement on public policy grounds, but also noting the “unconscionable nature” of the agreement); *see also id.* at 285.

¹⁷⁵ *Id.* at 286.

¹⁷⁶ *See id.*

“Under the Restatement (Second) of Contracts, a contract or term will be unenforceable when public policy considerations against enforcement clearly outweigh the interests in favor of enforcement.”¹⁷⁷ Courts are given wide discretion to consider both laws and their own sense of what should be enforceable in deciding what violates public policy.¹⁷⁸

Under Section 178 of the Restatement, a contract provision is unenforceable under public policy “if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.”¹⁷⁹ This means that courts may find a contract provision unenforceable when (1) there is legislation specifically stating such or (2) when the “public policy against enforcement clearly outweighs the interests in favor of enforcing the term.”¹⁸⁰ Generally courts consider legislation, case law, and their own judgment to decide what is good for public

¹⁷⁷ *Id.* at 294-95. See RESTATEMENT (SECOND) OF CONTRACTS § 178 (AM. LAW INST. 1981); *see, e.g.*, *Town of Newton v. Rumery*, 480 U.S. 386, 403 (1987).

¹⁷⁸ See RESTATEMENT (SECOND) OF CONTRACTS § 179 cmt. a (AM. LAW INST. 1981); *see also* *Twin City Pipe Line Co. v. Harding Glass Co.*, 283 U.S. 353, 356 (1931) (“The meaning of the phrase ‘public policy’ is vague and variable; courts have not defined it, and there is no fixed rule by which to determine what contracts are repugnant to it.”).

¹⁷⁹ RESTATEMENT (SECOND) OF CONTRACTS § 178 (AM. LAW INST. 1981).

¹⁸⁰ Garfield, *supra* note 166, at 296-97.

welfare in determining what violates public policy.¹⁸¹ Given the weight and importance of the private right to contract, courts have historically limited their use of the public policy exception.¹⁸² While courts should remain restrained in their use of the public policy exception, there are times when society would benefit more from not enforcing a contract or a contract provision.¹⁸³

No bright line rule exists for determining whether contracts of silence are unenforceable on public policy grounds.¹⁸⁴ Courts will almost always enforce contracts requiring silence related to trade secrets;¹⁸⁵ however, courts will almost always refuse to enforce a contract on public policy grounds that requires a party to remain silent about the commission of a crime.¹⁸⁶ Most contracts of silence exist somewhere in between

¹⁸¹ *Id.* at 297; *see also* Pittsburgh, C., C. & St. L. Ry. Co. v. Kinney, 115 N.E. 505, 507 (Ohio 1916) (“Sometimes such public policy is declared by Constitution; sometimes by statute; sometimes by judicial decision. More often, however, it abides only in the customs and conventions of the people . . .”).

¹⁸² Garfield, *supra* note 166, at 298-99; *see also* Twin City Pipe Line Co. v. Harding Glass Co., 283 U.S. 353, 356 (1931) (“The principle that contracts in contravention of public policy are not enforceable should be applied with caution and only in cases plainly within the reasons on which that doctrine rests.”).

¹⁸³ Garfield, *supra* note 166, at 299.

¹⁸⁴ *Id.*

¹⁸⁵ *See id.* at 300-306; *see, e.g.*, Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974) (discussing the role and importance of trade secret law).

¹⁸⁶ Garfield, *supra* note 166, at 302-03; *see, e.g.*, Branzburg v. Hayes, 408 U.S. 665, 696 (1972) (“ . . . it is obvious that agreements to conceal information relevant to commission of crime have very little to recommend them from the standpoint of public policy.”).

these two examples.¹⁸⁷ How should courts deal with these contracts? How should courts determine public policy when there are no relevant laws on point? The broad text of the Restatement¹⁸⁸ has given courts little guidance in formulating a test for determining public policy.¹⁸⁹

Comparing the two extremes of contracts of silence, Alan Garfield proposes that “[a] court must compare the strength of the public and private interests in enforcing a contract that suppresses speech”¹⁹⁰ (the “confidentiality interest”) “with the competing public interest in not having the threat of contractual liability inhibit speech”¹⁹¹ (the “disclosure interest”). When the disclosure interest clearly outweighs the confidentiality interest, the contract is not enforceable.¹⁹² In determining whether the public interest in speech overrides the interest in contract enforcement, Garfield suggests looking at other areas of the law.¹⁹³ For example, trade secret law suggests, “that a person’s interest in protecting trade secrets is sufficient to override the

¹⁸⁷ Garfield, *supra* note 166, at 312.

¹⁸⁸ “A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.” RESTATEMENT (SECOND) OF CONTRACTS § 178 (AM. LAW INST. 1981).

¹⁸⁹ *See* Garfield, *supra* note 166, at 314.

¹⁹⁰ *Id.* at 315.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.* at 316.

public interest in access to such information.”¹⁹⁴ Garfield argues that determining the balance of interests in any given case depends greatly on the facts.¹⁹⁵

Under traditional contract theory, the settlement agreement provision at issue in the MSU case is likely unenforceable on public policy grounds. There are quite a few interests in favor of “confidentiality.” First, the settlement was freely entered into by the plaintiffs. Second, the historic settlement amount was likely due in part to the survivors being compensated for their silence. MSU agreed to settle at such a great expense, in part, because the university wanted to buy their silence. In MSU’s view, the survivors were justly compensated for their rights. Third, the parties entered into the agreement with the expectation that the settlement would be enforced. Contracts function because both parties operate under the assumption the contract will be enforced.¹⁹⁶ If parties have reason to doubt the enforceability of their contract, they have less reason to abide by it.

In terms of “disclosure interests,” the citizens of Michigan had an interest in hearing from those directly affected

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 318.

¹⁹⁶ See Chunlin Leonhard, *Illegal Agreements and the Lesser Evil Principle*, 64 CATH. UNIV. L. REV. 833, 846-47 (2015).

by Nassar's abuse in forming their opinions about reform measures. The reform measures were designed to protect past and future victims of abuse, and the voices of survivors could help the general public better understand the strengths and weaknesses of these provisions as well as the differences that reform could make. There is also a strong interest in not allowing government actors to circumvent the political process in their favor. It is possible that the reform bills would have failed on their own, but that is for the legislators and their constituents to decide. Michigan State University should not be able to decide its own future liability. The sheer importance of the political process and allowing political actors full knowledge in making decisions outweighs any confidentiality interest.

State laws can give an indication of a state's public policy interest in determining whether a contract should be enforceable.¹⁹⁷ For example, if a state has a statute protecting trade secrets, this suggests that public policy in that state supports enforcing a contract over a trade secret. Michigan does not have any relevant laws here, and this does not affect the above balance between disclosure and confidentiality interests; however the

¹⁹⁷ Garfield, *supra* note 166, at 297.

area of law surrounding contracts of silence is evolving.¹⁹⁸ Several states have debated passing laws forbidding non-disclosure agreements (one form of contracts of silence) in cases of sexual harassment.¹⁹⁹ If settlements like the one in the MSU case become more common, it would be important to monitor how states are regulating non-disclosure agreements in sexual harassment cases. It is possible that states will change their laws in the wake of the #MeToo²⁰⁰ movement.²⁰¹ If a state were to pass a law forbidding non-disclosure agreements in sexual harassment cases, a settlement like the one between MSU and the survivors of Nassar's abuse would likely be outright unenforceable under that law, or at least unenforceable under the public policy doctrine.

¹⁹⁸ See Stephanie Russell-Kraft, *How to End the Silence Around Sexual-Harassment Settlements*, THE NATION (Jan. 12, 2018), <https://www.thenation.com/article/how-to-end-the-silence-around-sexual-harassment-settlements/>.

¹⁹⁹ *Id.*

²⁰⁰ The #MeToo movement refers generally to the anti-sexual harassment movement. The movement has grown tremendously over the last few years and has been a public reckoning for powerful men in the entertainment business and politics. See Christen A. Johnson & KT Hawbaker, *#MeToo: A Timeline of Events*, CHICAGO TRIBUNE (July 17, 2019, 7:12 PM), <https://www.chicagotribune.com/lifestyles/ct-me-too-timeline-20171208-htmlstory.html>.

²⁰¹ See Russell-Kraft, *supra* note 203, at 3 (“To address the harms that confidentiality requirements impose, lawmakers in a handful of states, including New York, New Jersey, and Pennsylvania, have floated bills to bar nondisclosure provisions in . . . settlements relating to claims of discrimination, retaliation, and harassment.”).

Non-disclosure agreements are slightly different from what is at stake in the MSU settlement, but they are similar enough to suggest a state's public policy would not allow a similar settlement to be enforced. Under a non-disclosure agreement, a party would still be allowed to engage in political advocacy; however, they would not be able to discuss the specifics of their case. Sexual harassment can, in many cases, be a matter of public concern.²⁰² Political speech of the kind at issue in the MSU settlement is a significant matter of public concern because the reform bills would have affected the rights and responsibilities of all Michigan citizens. There is even greater public interest and effect in a similar settlement than a non-disclosure agreement, which suggests they would be given equal—or even greater—protection.

III. CONCLUSION

So far, Nassar's victims have not challenged the terms of their settlement agreement with MSU. The day the settlement was certified, the Michigan state legislature dropped the two reform bills at issue.²⁰³ The Michigan legislature is free to continue to work on and pass reform bills in the future and could

²⁰² See, e.g., *Webb v. Bd. of Trs. of Ball St. Univ.*, 167 F.3d 1146, 1150 (1999) (finding that speaking out about sexual harassment could be speech on matter of public concern).

²⁰³ LeBlanc, *supra* note 18.

even go so far as to introduce identical bill text under a new name. So why does it matter that the settlement provision was likely unconstitutional and unenforceable on public policy grounds? And as a society, are we comfortable with the way the scenario played out?

The survivors got what they wanted out of the settlement. That matters. On some level, they were given power over their story and their narrative. Many survivors of sexual abuse prefer to stay quiet about what happened and move on with their lives.²⁰⁴ Arguably, the survivors of Nassar's abuse were appropriately compensated for the rights that they gave up. The average payout survivors received for the settlement is \$1.2 million.²⁰⁵ That is ten to fourteen times more than what survivors of sexual abuse typically receive in settlements in Michigan.²⁰⁶ Furthermore, the settlement did not foreclose any future opportunities to become advocates for social or political change or for survivors to speak about their experience.

²⁰⁴ See *Speaking Out from Within: Speaking Publicly About Sexual Assault*, PENN. COAL. AGAINST RAPE 1-2 (2018), https://pcar.org/sites/default/files/resource-pdfs/speaking_out_from_within_speaking_publicly_about_sexual_assault.pdf.

²⁰⁵ Theisen, *supra* note 24.

²⁰⁶ *Id.*

Still, there is something inherently disturbing about MSU essentially buying survivors' silence. While the survivors were compensated, there is no way to calculate the benefit that their advocacy could have given the public at large. The idea that political speech has a value and can essentially be sold to the government is a difficult pill to swallow. Moreover, the Michigan legislators and their constituents should have the power to decide how to address the problem of child sexual abuse and whether government entities could be liable in those situations. This settlement took that power away from the legislature and their constituents.

Because the settlement involved over three hundred plaintiffs, it is possible that not every plaintiff got a fair deal.²⁰⁷ The reform bills were introduced with the help of a few of Nassar's victims.²⁰⁸ With such a large group of plaintiffs engaged in the settlement negotiations, it is easy to imagine that some parties had to make concessions for the benefit of the group that they might not have made if negotiating alone.²⁰⁹ For some, the

²⁰⁷ *Id.*

²⁰⁸ Leblanc & Oosting, *supra* note 18.

²⁰⁹ For example, large groups may be more risk-averse than individuals. Samid Hussain & Dina Older Aguilar, *An Economic Approach to Assessing the Reasonableness of Class-Action Settlement*, 9 ANTITRUST LITIGATOR 4-5 (2010), <https://www.cornerstone.com/Publications/Articles/An-Economic-Approach-to-Assessing-Settlements>. This means that large groups may settle for less than they would as individuals. *See id.* at 5.

rights they gave up may have meant little, and for others they may have meant much more. The few survivors that helped introduce the bill may not have wanted to impede the settlement for the rest of the group. And while the settlement may have only effectively silenced a few voices, but even one political voice silenced, in this case, is too many.

Unfortunately, what happened with Larry Nassar is likely not the last of these kinds of scandals. Currently, over one hundred students at Ohio State University have spoken up about misconduct by a team doctor and a professor at the school.²¹⁰ Additionally, more than fifty women at the University of Southern California have come forward with allegations against a campus gynecologist.²¹¹ As states and universities grapple with what to do in the wake of #MeToo, settlements with similar provisions are not out of the question. In making legislative decisions, states and their citizens should be able to hear from all interested and affected parties.

Finally, the use of this strategy has implications beyond sexual violence and into different areas of the law. What if a local

²¹⁰ Catie Edmondson, *More Than 100 Former Ohio State Students Allege Sexual Misconduct*, N.Y. TIMES (July 20, 2018), <https://www.nytimes.com/2018/07/20/us/politics/sexual-misconduct-ohio-state.html>.

²¹¹ *Id.*

government settles over an environmental disaster but requires the plaintiffs to end their advocacy efforts? Or a police department settles a claim related to misconduct that requires the victim to stop pursuing criminal justice reform? Silence on these issues technically has a price—\$1.2 million, but can we live with that?