**No. 23-3469**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

MENG HUANG,
*Plaintiff-Appellant*,

v.

THE OHIO STATE UNIVERSITY, et al.
*Defendant-Appellees.*

On Appeal from the United States District Court
for the Southern District of Ohio
Case No. 2:19-cv-01976
The Honorable James L. Graham

# MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE

Proposed amici curiae move for leave to file a brief in support of Plaintiff-Appellant Meng Huang. Plaintiff-Appellant, through counsel, has informed amici that she "does not consent but will not oppose" the filing of the brief. Defendant-Appellee declined to consent to the filing. A true and correct copy of the proposed brief accompanies this motion.

Proposed amici are Public Justice, A Better Balance, the National Employment Lawyers Association, and the National Women's Law Center. These four organizations work to advance the rights of workers and students, including their rights to work and learn free from sexual

harassment. Amici routinely engage in litigation and advocacy concerning Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, and Title IX of the Education Amendments of 1972, 20 U.S.C. § 168 *et seq*. Further information about amici and their interests in this case is available in the proposed brief.

Amici's proposed brief addresses the question of when graduate students are employees protected by Title VII. That issue will determine whether Ms. Huang's quid pro quo claim can proceed. It may also have significant effects on the legal remedies available to other graduate students when they face sexual harassment and other forms of discrimination. Given their interest and expertise in this issue area, amici respectfully submit that the attached brief setting forth their views will be useful to the Court in its consideration of this important issue.

September 7, 2023

Respectfully submitted,

/s/ *Alexandra Z. Brodsky*
Alexandra Z. Brodsky
Adele P. Kimmel
PUBLIC JUSTICE
1620 L Street NW
Suite 630
Washington, DC 20036
(202) 797-8600
abrodsky@publicjustice.net

## CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 236 words. This motion complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this motion has been prepared in a proportionally spaced typeface using Microsoft Office 365 in 14-point Century Schoolbook font.

Dated: September 7, 2023

*/s/ Alexandra Z. Brodsky*
Alexandra Z. Brodsky
*Counsel for* Amici Curiae

## CERTIFICATE OF SERVICE

I hereby certify that on September 7, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: September 7, 2023

*/s/ Alexandra Z. Brodsky*
Alexandra Z. Brodsky
*Counsel for* Amici Curiae

**No. 23-3469**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

MENG HUANG,
*Plaintiff-Appellant*,

v.

THE OHIO STATE UNIVERSITY, et al.
*Defendant-Appellees.*

On Appeal from the United States District Court
for the Southern District of Ohio
Case No. 2:19-cv-01976
The Honorable James L. Graham

# BRIEF OF AMICI CURIAE WORKERS' AND STUDENTS' RIGHTS ORGANIZATIONS IN SUPPORT OF PLAINTIFF-APPELLANT MENG HUANG AND REVERSAL

Alexandra Z. Brodsky
Adele P. Kimmel
PUBLIC JUSTICE
1620 L Street NW, Suite 630
Washington, DC 20036
(202) 797-8600
abrodsky@publicjustice.net
akimmel@publicjustice.net

*Counsel for Amici Curiae*

## CORPORTATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, amici curiae state that no amicus has a parent corporation, is owned in whole or in part by any publicly held corporation, or is itself a publicly held company.

# TABLE OF CONTENTS

# TABLE OF AUTHORITES

**Page(s)**

**Cases**

**Statutes and Authorities**

**Other Authorities**

## STATEMENT OF AMICI CURIAE

**Public Justice** is a national public interest advocacy organization that fights against abusive corporate power and predatory practices, the assault on civil rights and liberties, and the destruction of the earth's sustainability. Public Justice has, for decades, litigated and advocated on behalf of workers and students who have experienced discrimination, including sexual harassment. From its significant experience, Public Justice recognizes that judicial enforcement of federal sex discrimination laws that is consistent with the statutes' full breadth and promise is crucial to ensuring student-employees who have endured discrimination receive the redress they deserve.

**A Better Balance** is a national legal services and advocacy organization that uses the power of the law to advance justice for workers and students so they can care for themselves and their loved ones without jeopardizing their economic security or education. In advocating for workers, students, and student-workers, A Better Balance relies on the robust enforcement of our nation's civil rights laws, Title VII and Title IX, to ensure that all people can work and learn free from discrimination.

Founded in 1985, the **National Employment Lawyers Association** (NELA) is the largest bar association in the country focused on empowering workers' rights attorneys. NELA and its sixty-nine circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to protecting the rights of workers in employment, wage and hour, labor, and civil rights disputes. NELA attorneys litigate daily in every circuit, giving NELA a unique perspective on how principles announced by courts in employment cases actually play out on the ground. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. NELA members across the country represent university employees and those experiencing sexual harassment and violence in the workplace, making NELA uniquely interested in the proper application of Title VII as it relates to graduate students.

**National Women's Law Center** (NWLC) is a non-profit legal advocacy organization that fights for gender justice—in the courts, in public policy, and in our society—working across the issues that are central to the lives of women and girls—especially women of color, LGBTQI+ people, and low-income women and families. Since its founding in 1972,

NWLC has worked to advance educational opportunities, workplace justice, health and reproductive rights, child care, and income security. NWLC has participated as counsel or amicus curiae in a range of cases before the Supreme Court, federal Courts of Appeals, and state courts to secure equal treatment and opportunity in all aspects of society through enforcement of the Constitution and other laws prohibiting sex discrimination.

Consistent with Federal Rule of Appellate Procedure 29(a)(4)(E), amici's counsel authored this brief, no party's counsel authored the brief in whole or in part, and no party beyond amici contributed any money toward the brief.

## INTRODUCTION

Graduate students wear multiple hats. Many balance academic obligations as students with significant job duties as employees of their schools. Often their academic and employment responsibilities overlap, as when the research they are paid to complete also informs their studies. Fortunately, when graduate students are both students and workers, they are protected by both education and workplace anti-discrimination laws.

Meng Huang seeks to avail herself of those protections. Ms. Huang's supervisor sexually harassed her while she was a mechanical engineering PhD student and employee of The Ohio State University. Consistent with her dual roles, Ms. Huang brought claims under both Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, which prohibits sex discrimination in the workplace, and Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, which prohibits sex discrimination in schools. The district court, however, wrongly assumed that Ms. Huang could not simultaneously be a student *and* an employee protected by both laws. As a result, the district court sorted the adverse actions Ms. Huang experienced into two buckets with no overlap: adverse

actions related to her role as a student and adverse actions related to her role as an employee. Then, on that basis, the district court granted summary judgment on Ms. Huang's Title VII quid pro quo claim, holding the primary adverse action she experienced for turning down her supervisor's advances—his revoking of her stipend—was related only to her student role.

This disposal of Ms. Huang's Title VII claims conflicts with well-established employment law principles and precedent, threatening the rights of other graduate students. Rather than accepting defendants' classifications of their workers, this Court uses the common-law agency test to determine whether a plaintiff is an employee. Nothing about that test turns on whether the parties have an additional relationship, including an educational one. Consistent with that rule, courts have rightly held that graduate students much like Ms. Huang were employees entitled to employment law protections, even when their job duties overlapped with their academic studies. Those employment law protections can be essential given meaningful differences in Title IX and Title VII's standards and remedies—differences that may provide schools incentives to misclassify graduate students as non-employees, as Ohio State did

here. Accordingly, this Court should permit Ms. Huang's quid pro quo claim to proceed to a jury.

## ARGUMENT

### I. Some Graduate Students Are Employees of Their Universities Protected by Title VII.

The law, not Ohio State, controls whether there is an employer-employee relationship between a school and a graduate student. This Court uses the common-law agency test to determine whether graduate students are entitled to employment law protections. As multiple courts have recognized, nothing about that test excludes graduate students from employment law protections, even if their job and academic responsibilities overlap.

#### A. The Common-Law Agency Test Determines Whether Employment Laws Apply, Irrespective of a Plaintiff's Other Relationships to the Defendant.

To determine whether a plaintiff is an employee protected by Title VII, this Court uses the common-law agency test. *Shah v. Deaconess Hosp.*, 355 F.3d 496, 499 (6th Cir. 2004). The crux of this test is the defendant's "right to control the manner and means by which the [objective] is accomplished." *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751 (1989); *see Vander Boegh v. EnergySolutions, Inc.*, 772 F.3d 1056,

1061 (6th Cir. 2014) (same); Restatement of Employment Law § 1.01 (2015) (same). Relevant factors include "the source of the instrumentalities and tools," the "location of the work," the "method of payment," the "provision of employee benefits," the "extent of the hired party's discretion over when and how long to work," and "[w]hether the work is part of the regular business of the hiring party." *Reid*, 490 U.S. at 751-52. "[T]his Court has repeatedly held that the employer's ability to control job performance and the employment opportunities of the aggrieved individual are the most important of the many factors to be considered." *Marie v. Am. Red Cross*, 771 F.3d 344, 356 (6th Cir. 2014) (internal quotation marks and citations omitted).

Nothing in the common-law agency test considers—let alone treats as dispositive—whether a worker has another relationship with the employer. To the contrary, a plaintiff may be the defendant's "'employee' notwithstanding any other status the law may or may not have reposed on her (for example, a 'student')." *Doe v. Mercy Catholic Med. Ctr.*, 850 F.3d 545, 559 (3d Cir. 2017); *see Ivan v. Kent State Univ.*, 863 F. Supp. 581, 585 (N.D. Ohio 1994) (similar), *aff'd*, 92 F.3d 1185 (6th Cir. 1996); *see also, e.g.*, *Guy v. Casal Inst. of Nevada, LLC*, No. 213CV02263, 2016

WL 4479537, at *4 (D. Nev. Aug. 23, 2016) ("[T]he the Court does not find that Plaintiffs cannot as a matter of law, establish that they were employees [under FLSA] . . . merely because they were students enrolled at [the defendant]."); *cf. United States v. City of New York*, 359 F.3d 83, 86, 92 (2d Cir. 2004) (holding unpaid "welfare recipients obligated to participate in" welfare provider's "Work Experience Program . . . are employees within the meaning of Title VII"); *Trs. of Columbia Univ. in the City of New York*, 364 N.L.R.B. 1080, 1080 (Aug. 23, 2016) (holding that, under the National Labor Relations Act, "coverage is permitted by virtue of an employment relationship; it is not foreclosed by the existence of some other, additional relationship that the Act does not reach").

Any other rule would lead to absurd results. For example, under such a test, a person who worked for United HealthCare and was also insured by the company could not, legally, be an employee of United. A property manager who lived in a building managed by his employer could not, for purposes of Title VII, be its employee. Luckily, that is not how the law works.

### B. Courts and the NLRB Have Held That Graduate Students May Be Both Students and Employees.

Consistent with that rule, courts have recognized that graduate students may be both students *and* employees under the common-law agency test and a close out-of-circuit analog, the "economic realities" test. *See, e.g.*, *Cuddeback v. Fla. Bd. of Educ.*, 381 F.3d 1230, 1234-35 (11th Cir. 2004) (holding graduate student was employee under economic realities test); *Ivan,* 863 F. Supp. at 585-86 (same); *Ruiz v. Trs. of Purdue Univ.*, No. 4:06-CV-130-JVB-PRC, 2008 WL 833125, at *11 (N.D. Ind. Feb. 20, 2008) (same), *report and recommendation adopted,* No. CIV.A. 4:06-CV-130, 2008 WL 833130 (N.D. Ind. Mar. 26, 2008); *Consolmagno v. Hosp. of St. Raphael Sch. of Nurse Anesthesia*, 72 F. Supp. 3d 367, 379 (D. Conn. 2014) (same, applying common-law agency test); *see also Mercy Catholic*, 850 F.3d at 559 (holding medical resident, whom court analogized to a student, was an employee under common-law agency test).[1]

In one case similar to Ms. Huang's, "[t]he fact that [the plaintiff]," a "graduate assistant," "was [also] a student d[id] not negate her

[1] The out-of-circuit "economic realities" test "looks to the totality of the circumstances involved in a relationship, including 'whether the putative employee is economically dependent upon the principal or is instead in business for himself.'" *Shah*, 355 F.3d at 499 (citation omitted). This

employee status." *Ivan*, 863 F. Supp. at 585. Rather, "[t]he totality of the circumstances of [plaintiff's] graduate assistantship . . . demonstrated she was an employee under the terms of Title VII." *Id.* at 586. In another case, a court acknowledged "that in order of importance, [the plaintiff] is likely a student first and a worker second. Nevertheless, a worker is not confined to a single role." *Ruiz*, 2008 WL 833125, at *11.[2]

The National Labor Relations Board has also concluded that "students who perform services at a university in connection with their

---

Court has recognized that "the substantive differences between the" common-law agency and "economic realities" tests "are minimal." *Id.*; *see also Knight v. United Farm Bureau Mut. Ins. Co.*, 950 F.2d 377, 378-79 (7th Cir. 1991) (defining the economic realities test as aligned with many factors of the common-law agency test). Indeed, this Court occasionally applies the economic realities test. *See, e.g.*, *Acosta v. Off Duty Police Servs., Inc.*, 915 F.3d 1050, 1055-62 (6th Cir. 2019). Accordingly, case law using the economic realities test is instructive here.

[2] This Court and others also appear to have implicitly recognized employment relationships between graduate students and their universities by assessing graduate students' Title VII claims on the merits. *See, e.g.*, *Ivan v. Kent State Univ.*, 92 F.3d 1185, 1185 (6th Cir. 1996) (assessing graduate students' Title VII claim on the merits); *Brewer v. Univ. of Ill.*, 407 F. Supp. 2d 946, 963-70 (C.D. Ill. 2005) (same); *see also Gollas v. Univ. of Tex. Health Sci. Ctr. at Houston*, 425 F. App'x 318, 321-30 (5th Cir. 2011) (same, for medical resident); *Latif v. Univ. of Tex. Sw. Med. Ctr.*, 834 F. Supp. 2d 518, 525 (N.D. Tex. 2011) (observing that, in assessing merits of graduate students' claims, these courts "necessarily implie[d] that, because [graduate students] are entitled to sue under Title VII, they must also be considered employees under Title VII").

studies" may be that university's employees. *Columbia Univ.*, 364 N.L.R.B. at 1080-81. It has specifically held that "student assistants . . . engaged in research funded by external grants" may have "a common-law employment relationship with the university," and so may be protected by employment law. *Id.* at 1081.

To be sure, sometimes a graduate student is just a student. But in the familiar scenario where a graduate student both learns from and works for his school, he may be both a student and employee.

### C. Overlap Between Graduate Students' Employment and Studies Does not Deprive Them of Title VII Protections.

Graduate students are typically employed by their school in their chosen field and may incorporate research they complete in their jobs into their academic work. For example, they may, like Ms. Huang, take a job conducting research for a lab and integrate their findings into their dissertation on the same topic. Contrary to the district court's assumption, then, there may not always be delineations "between graduate students' academic activities and employment activities." Summ. J. Op., R. 143, Page ID # 6669. By extension, the fact that a given task serves a student's education as well as their job duties does not foreclose a finding of an

employment relationship. Cases brought by graduate students in science, technology, engineering, and math ("STEM"), and by medical residents, illustrate this point.

For example, in *Cuddeback v. Florida Board of Education*, "much of [plaintiff's] work in [advisor's] lab was done for the purpose of satisfying the lab-work, publication, and dissertation requirements of her graduate program." 381 F.3d at 1234. The Eleventh Circuit still concluded that she "was an employee for Title VII purposes" because, among other factors, she received a stipend for her work "and the University provided the equipment and training." *Id.* at 1234-35. The nature of the *Cuddeback* plaintiff's responsibilities, and Ms. Huang's, is representative of many STEM graduate students': The work they perform for their advisors frequently aligns with both the school's preexisting research plans *and* their own dissertations or theses. That is by design.

In the biosciences, "[t]he members of a lab work to further the director's particular research agenda; the work they do will also contribute to their individual graduate theses (which may constitute focused subprojects, part of the larger research program), academic presentations and publications." Chris MacDonald & Bryn Williams-Jones, *Supervisor-*

*Student Relations: Examining the Spectrum of Conflicts of Interest in Bioscience Laboratories*, 16 Account Res. 106, 109 (2009). For "laboratory-based disciplines" in general, students select a faculty "principal investigator" who will serve both as their boss, directing their contributions to the lab's larger mission, and their academic advisor. *See* Michelle A. Maher et al., *Finding a Fit: Biological Science Doctoral Students' Selection of a Principal Investigator and Research Laboratory*, 19 CBE Life Sci. Educ. 1, 1 (2020). That work inures not only to the benefit of the graduate student's education but to the laboratory: "[T]he execution of research plans would be difficult without the graduate student . . . workforce." Christie L. Sampson et al., *A Graduate Student's Worth*, 28 Current Bio. Mag. 850, 850 (2018).

Cases brought by medical residents—who, like STEM graduate students, learn by working—are also instructive here. *See Columbia Univ.*, 364 N.L.R.B. at 1081-82, 1090 (looking to precedent concerning medical residents' status as employees to determine employment status of graduate students). Appellate courts have recognized that a medical residency program is a "mixed employment-training context" in which a participant is "both an employee *and* a student." *Lipsett v. Univ. of P.R.*, 864

F.2d 881, 897 (1st Cir. 1988); *see Ezekwo v. N.Y.C. Health & Hosps. Corp.*, 940 F.2d 775, 785 (2d Cir. 1991) (similar); *Mercy Catholic*, 850 F.3d at 556-57, 559 (3d Cir. 2017) (similar); *cf. Latif*, 834 F. Supp. 2d at 525-26 (rejecting defendant's contention that a resident was only a student and holding "[m]edical residents are employees for the purpose of suit under Title VII"). Courts have underscored that "[w]hile a medical residency program is largely an academic undertaking, it also is an employment relationship." *Ezekwo*, 940 F.2d at 785.

After all, "work-related activities are the foundation of resident learning." P.W. Teunissen et al., *How Residents Learn: Qualitative Evidence for the Pivotal Role of Clinical Activities*, 41 Med. Educ. 763, 768 (2007). "[P]articipants learn both by treating patients and by observing other physicians do so." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 507 (1994); *see also McKeesport Hosp. v. ACGME*, 24 F.3d 519, 525 (3d Cir. 1994) ("Medical residencies are a vital component of medical education . . . ."). There is no tension, then, between a resident's simultaneous roles as student and worker.

## II. Courts Should Not Defer to Schools' Classifications of Their Graduate Students.

Courts assess for themselves whether a plaintiff is an employee rather than deferring to a defendant's classification. This principle is well established in employment law and the law of agency more generally. "The underlying economic realities of the employment relationship, rather than any designation or characterization of the relationship in an agreement or employer policy statement, determine whether a particular individual is an employee." Restatement of Employment Law § 1.01 cmt. g (2015); *see also* Restatement (Third) of Agency § 1.02 cmt. a (2006) ("[H]ow the parties to any given relationship label it is not dispositive. Nor does party characterization or nonlegal usage control whether an agent has an agency relationship with a particular person as principal."); *cf.* 26 C.F.R. § 31.3121(d)-1(a)(3) (2023) ("If the relationship of employer and employee exists, . . . it is of no consequence that the employee is designated as a partner, coadventurer, agent, independent contractor, or the like.").

Employers cannot avoid liability by, for instance, simply labeling their employees "independent contractors" when the common-law agency test reveals employment relationships instead. *See Myths About*

*Misclassification*, U.S. Dep't of Labor, https://www.dol.gov/agencies/whd/flsa/misclassification/myths/detail/#8 ("Your employer cannot classify you as an independent contractor just because it wants you to be an independent contractor. You are an employee if your work falls within a law's definition of employment."). A prominent contemporary example of independent-contractor misclassification is employers' attempts to deny employment law protections to members of "gig economy." In these cases, an employer's insistence that a worker is an independent contractor does not make it so. *See, e.g.*, *Acosta*, 915 F.3d at 1062 (6th Cir. 2019) (holding that self-scheduled security officers were employees entitled to overtime pay, not independent contractors as defendant claimed); *People v. Uber Techs., Inc.*, 270 Cal. Rptr. 3d 290, 296 (2020), *as modified on denial of reh'g* (Nov. 20, 2020) (restraining Uber and Lyft from misclassifying their drivers as independent contractors and thus depriving them of employment law protections). Similarly, "labeling as a partnership an enterprise that does not have the structure, the character, of the traditional partnership"—but instead that of an employer-employee relationship—"will not immunize it from" Title VII. *EEOC v. Sidley Austin Brown & Wood*, 315 F.3d 696, 706 (7th Cir. 2002).

Deference to the way schools choose to refer to their graduate students, like that exhibited by the district court below, contravenes these well-established principles of both employment and agency law. Such deference risks robbing graduate students of the employment law protections to which they are entitled. For instance, if labels ruled, a university could evade liability for employment law violations simply by labeling all its graduate students "students." Indeed, schools have no incentive to label their graduate students in perfect accordance with relevant employment law. And given that Title VII offers more protections than Title IX, they likely have incentives to the contrary. *See infra* Part III.

## III. The Availability of Title VII Claims Has Significant Implications for Graduate Students.

Proper recognition of graduate students' employment relationships is crucial because Title VII offers more expansive protections and remedies than Title IX. A graduate student wrongly classified as only a student may, as a result, be deprived of any legal recourse.[3]

First, Title VII's liability standard is easier for plaintiffs to satisfy than Title IX's. Under Title VII, if an employee is harassed by a coworker,

[3] The same would be true of a graduate student who brought a race discrimination claim under Title VI of the Civil Rights Act of 1964, 42 U.S.C.

the employer is liable if it knew or should have known about the harassment and failed to take reasonable steps to address the harassment; if an employee is sexually harassed by their supervisor, the employer is ordinarily strictly liable, regardless of whether it had any notice of the harassment. *Faragher v. City of Boca Raton,* 524 U.S. 775, 807 (1998); *Burlington Indus., Inc. v. Ellerth,* 524 U.S. 742, 764-65 (1998). The Supreme Court has defined actionable sexual harassment as "unwelcome" sexual conduct that is "severe or pervasive." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67-68 (1986).

In contrast, the U.S. Supreme Court has adopted a much less protective standard for sexual harassment claims brought under Title IX of the Education Amendments of 1972, which prohibits sex discrimination in education. 20 U.S.C. § 1681(a). In two cases from the late 1990s, *Gebser* and *Davis*, the Court designed a test for establishing schools' liability for sexual harassment of students by teachers or classmates. *See Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629,

---

§ 2000d *et seq*, which courts interpret as analogous to Title IX. *See, e.g.*, *Sewell v. Monroe City Sch. Bd.*, 974 F.3d 577, 584 (5th Cir. 2020) (applying Title IX precedent to Title VI harassment claim); *Maislin v. Tenn. State Univ.*, 665 F. Supp. 2d 922, 931 (M.D. Tenn. 2009) (same).

650 (1999) (student-on-student sexual harassment); *Gebser v. Lago Vista Ind. Sch. Dist.*, 524 U.S. 274, 277 (1998) (teacher-on-student sexual harassment). This standard requires a student to establish that her school was deliberately indifferent to sexual harassment of which the school had actual knowledge and, at least in cases of peer sexual harassment, that the harassment was severe *and* pervasive. *Davis*, 526 U.S. at 650; *Gebser*, 523 U.S. at 277.

Collectively, these requirements make it far harder for students to establish sexual harassment claims under Title IX than for employees to establish sexual harassment claims under Title VII. *See* Shiwali Patel et al., *A Sweep As Broad As Its Promise: 50 Years Later, We Must Amend Title IX to End Sex-Based Harassment in Schools*, 83 La. L. Rev. 939, 973 (2023); Fatima Goss Graves, *Restoring Effective Protections for Students against Sexual Harassment in Schools: Moving Beyond the* Gebser *and* Davis *Standards*, 2 Advance 135, 139-43 (2008); Catherine Fisk & Erwin Chemerinksy, *Civil Rights Without Remedies: Vicarious Liability Under Title VII, Section 1983, and Title IX*, 7 Wm. & Mary Bill Rts. J. 755, 757-58 (1999). Whether a graduate student is an employee, then, is not a

merely academic question. For a plaintiff who can satisfy Title VII's requirements, but not Title IX's, this classification may be case dispositive.

Second, some damages available under Title VII may no longer be available under Title IX after *Cummings v. Premier Rehab Keller, P.L.L.C.*, 142 S. Ct. 1562 (2022). In *Cummings*, the Supreme Court held that emotional distress damages are not recoverable in private actions enforcing the anti-discrimination provisions of the Rehabilitation Act and the Patient Protection and Affordable Care Act. *Id.* at 1571-76. Some courts have applied *Cummings* to other Spending Clause statutes, including Title IX. *E.g.*, *Party v. Ariz. Bd. of Regents*, No. CV-18-01623, 2022 WL 17459745, at *2-3 (D. Ariz. Dec. 6, 2022); *Doe v. Town of N. Andover*, No. 1:20-CV-10310, 2023 WL 3481494, at *11 (D. Mass. May 16, 2023). That limitation threatens to reduce Title IX plaintiffs' damages significantly, since "[o]ften, emotional injury is the primary (sometimes the only) harm caused by discrimination." *Cummings*, 142 S. Ct. at 1579 (Breyer, J., dissenting). But Title VII's language explicitly provides for emotional distress damages. *See* 42 U.S.C. § 1981a(b)(3). A court's rightful recognition of a graduate student's employment relationship with her school, then, can have significant ramifications for available remedies.

## IV. A Jury Could Find Ms. Huang Was an Employee When She Was a Graduate Fellow.

Ms. Huang has established a dispute of material fact as to whether she was an Ohio State employee when she was a Graduate Fellow—and, accordingly, whether the revocation of her Graduate Fellow stipend was an adverse action cognizable under Title VII.

The timeline here, and Ohio State's system of classifying graduate students, is complicated. In short: Ohio State originally offered Ms. Huang the position of Graduate Research Associate in 2014, but that offer was replaced, prior to her enrollment, by an offer for the position of Graduate Fellow. Exs. 38-40 to Rizzoni Dep., R. 98-3, Page ID # 3784 (Fellow offer letter). She served as a Graduate Fellow from 2014 to late August 2017. Defs.' Mot. Summ. J., R. 105, Page ID ## 5418-5419. During that time, Ms. Huang worked on a research project sponsored by Ford Motor Company and also her dissertation on a related topic, both of which Ohio State had assigned her. Anderson Dep., R. 76, Page ID ## 660, 665, 672-675; Rizzoni Dep. Vol. 1, R. 98, Page ID # 3942. Then, in 2017, Ms. Huang became a Graduate Research Associate. Defs.' Mot. Summ. J., R. 105, Page ID # 6189 (Ex. S, Bons Aff.). In that position, she finished her

Ford-focused dissertation and conducted research for another professor. Weimer Dep., R. 87, Page ID ## 2161, 2164.

Ohio State called Ms. Huang an employee when she was a Graduate Research Associate and classified her Graduate Fellowship as a strictly academic position. Summ. J. Op., R. 143, Page ID ## 6670, 6673 n.2. And the district court accepted Ohio State's classifications at face value: While it rightly recognized that Ms. Huang's Graduate Research Associate position gave rise to an employment relationship, *id.* at 6671, the court treated her Graduate Fellow position as "a purely academic relationship, not an employment relationship," with Ohio State, *id.* at 6670.

That was incorrect. Under the common-law agency test, Ms. Huang was also an employee during her time as a Graduate Fellow because Ohio State exercised significant control over her work. *See* Opening Br. at 37-45. The district court's conclusion to the contrary was based on a misreading of the record, coupled with deference to Ohio State's classifications.

### A. Ohio State Exerted Significant Control Over Ms. Huang as a Graduate Fellow.

As explained above, *see supra* p. 7, the "most important" factors for assessing a defendant's control over a plaintiff's work are its "ability to

control job performance and employment opportunities for the aggrieved individual." *Marie*, 771 F.3d at 356. Here, Ohio State exerted control over the subject, scope, and execution of Ms. Huang's job duties while she was a Graduate Fellow.

Ms. Huang's Graduate Fellow offer letter set forth the topic she would research for Ohio State as part of the Ford-sponsored University Research Project. Exs. 38-40 to Rizzoni Dep., R. 98, Page ID # 3784. It also specified that Ms. Huang would "work within a group," have "regular meetings with the group and with" her supervisor, George Rizzoni," have "individual meetings with" Rizzoni, and "participate in the meeting of [Rizzoni's] electrochemical energy storage systems research group." *Id.*[4] Consistent with the offer letter, as soon as she arrived on campus, Rizzoni assigned Huang a specific portion of the University Research Project for her doctoral research *and* made it her dissertation topic. Summ. J. Op., R. 143, Page ID ## 6662-6663. As part of this work, Rizzoni directed her

[4] In doing so, the Graduate Fellow offer letter was more proscriptive than Ms. Huang's offer letter for the Graduate Research Assistantship—a position Ohio State later characterized as an employee—indicating Ohio State exercised a greater degree of control over the putatively academic role. *Compare* Exs. 38-40 to Rizzoni Dep., R. 98, Page ID # 3784 (Fellow offer letter) *with* Pl.'s Resp. Opp'n Mot. Summ. J., R. 114, Page ID # 6302 (Ex. 4, 2014 Associate offer letter).

to participate in biweekly WebEx meetings with Ohio State and Ford staff. *Id.* at 6663; Anderson Dep., R. 76, Page ID ## 707-708.

As other courts have concluded, this kind of control demonstrates an employment relationship between a graduate student and her school. *See Cuddeback*, 381 F.3d at 1234 (explaining, in deciding graduate student was employee, that relevant factor included "whether the defendant directed the plaintiff's work"); *see also Mercy Catholic*, 850 F.3d at 559 (explaining common-law agency test "factors indeed suggest [plaintiff] was an employee under Title VII," in part because defendant "assigned [plaintiff] projects and tasks"); *Okeke v. Admins. of Tulane Educ. Fund*, No. 20-450, 2021 WL 2042213, at *4 (E.D. La. May 21, 2021) (holding medical resident was employee of defendant because resident agreement "set the terms and conditions of the residency by stipulating a period and outlining expectations").

Other factors, too, demonstrate an employment relationship. Ohio State furnished the instrumentalities, tools, and location for the University Research Project during Ms. Huang's Graduate Fellowship, in coordination with Ford. Exs. 38-40 to Rizzoni Dep., R. 98, Page ID # 3784 (specifying in Huang's Fellow offer letter that, "[a]s part of this work, you

will have access to the facilities of our electrochemical energy storage laboratory and of its staff . . . ."); *see Cuddeback*, 381 F.3d at 1234 (finding that the university's provision of "equipment and training" was a factor "weigh[ing] in favor of treating [plaintiff] as an employee for Title VII purposes"); *Mercy Catholic*, 850 F.3d at 559 (holding medical resident was employee in part because "[Defendant] was the source of the instrumentalities and tools of Doe's work as a resident, the location of Doe's work was at [Defendant], and [Defendant] assigned Doe projects and tasks.").

Additionally, the University Research Project comprised "part of the regular business of the hiring party," *Reid*, 490 U.S. at 752; *see also Mercy Catholic*, 850 F.3d at 559 (holding graduate student was employee in part because "her work was part of [Defendant's] regular business of providing healthcare to patients"): Ohio State has, for decades, conducted research for Ford at significant economic benefit to the University. *Center for Automotive Research Annual Report FY2016*, Ohio State Univ. (Oct. 10, 2016), https://issuu.com/osucar/docs/car_annualreport_2016_vfinal_single.

Finally, Ohio State provided Ms. Huang with a stipend and benefits in exchange for her work as a Graduate Fellow. Other courts have found the presence of similar stipends and benefits to point towards an employment relationship—not an exclusively educational one. For instance, the Eleventh Circuit in *Cuddeback* found the plaintiff's receipt of "a stipend and benefits for her work" to "weigh in favor of treating [her] as an employee for Title VII purposes." *Cuddeback*, 381 F.3d at 1234; *see also Ivan*, 863 F. Supp. at 585-86 (same); *see Consolmagno*, 72 F. Supp. 3d at 378 (same); *Okeke*, 2021 WL 2042213, at *4 (same).

**B. The District Court Overlooked Key Evidence.**

In reaching the opposite conclusion, the district court failed to view the facts in the light most favorable to Ms. Huang, as required on summary judgment. *See Scott v. Harris*, 550 U.S. 372, 380 (2007) (citing Fed. R. Civ. P. 56(c)). The court wrote, for example, that Ms. Huang "was in complete control of how to conduct her academic studies" and was "not obligated to perform any work or service for" Ohio State. Summ. J. Op., R. 143, Page ID # 6671. Far from it. As described, Ohio State required her to conduct research on a specific topic for Ford, instructed her to write

her dissertation on that topic, and managed her work down to requiring her to attend specific meetings. *See supra* Part IV.A.

The district court was also quick to accept Ohio State's characterization of Ms. Huang's Graduate Fellow stipend. Summ. J. Op., R. 143, Page ID ## 6672-6673. The district court never considered that Ohio State's payment to Ms. Huang for her research indicated an employment relationship. *See supra* p. 26. Instead, having already concluded Graduate Fellows were not employees, it asserted Huang received the renumeration "in her capacity as a student." Summ. J. Op., R. 143, Page ID # 6672. But the stipend was the exact same compensation Ohio State had offered Ms. Huang to serve as a Graduate Research Associate, an employee role. *See* Exs. 38-40 to Rizzoni Dep., R. 98, Page ID # 3784 (specifying in Huang's Fellow offer letter that the position comes "with the same stipend and benefits outlined in your original offer letter"). And, in analogizing the stipend to a student scholarship, the district court cited only an affidavit from a University official. Summ. J. Op., R. 143, Page ID # 6673 (citing Bons Aff., R. 143, Page ID ## 6188-6189). To the district court, the stipend was provided to Ms. Huang in her capacity as a student

rather than an employee—the question on which her quid pro quo claim hinged—because Ohio State said it was.

In short, the district court overlooked significant evidence that Ms. Huang, as a Graduate Fellow, was an Ohio State employee and that her stipend was related to her employment. In doing so, it doomed her Title VII quid pro quo claim. Given the disputes of material fact on this issue, Ms. Huang should have the chance to present her evidence to a jury.

## CONCLUSION

This Court should reverse the district court's grant of summary judgment on Ms. Huang's Title VII quid pro quo claim and remand for trial.

September 7, 2023

Respectfully submitted,

/s/ *Alexandra Z. Brodsky*

Alexandra Z. Brodsky
Adele P. Kimmel
PUBLIC JUSTICE
1620 L Street NW
Suite 630
Washington, DC 20036
(202) 797-8600
abrodsky@publicjustice.net

## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and 29(a)(5) because it contains 5,557 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office 365 in 14-point Century Schoolbook font.

Dated: September 7, 2023

*/s/ Alexandra Z. Brodsky*
Alexandra Z. Brodsky
*Counsel for* Amici Curiae

## CERTIFICATE OF SERVICE

I hereby certify that on September 7, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: September 7, 2023

*/s/ Alexandra Z. Brodsky*
Alexandra Z. Brodsky
*Counsel for* Amici Curiae