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Against the Work-Study Boundary: Synthesizing Title VII and Title IX Protections for Student-Employees

ABSTRACT. This Note examines the hurdles faced by student-employees who encounter sex discrimination and proposes both strategic and doctrinal solutions. First, Title VII is preferable to Title IX for vindicating claims of sex discrimination. But courts have repeatedly—and, I argue, wrongly—failed to extend Title VII protections to student-employees who satisfy the doctrinal test for "employee," reasoning that they are either students or employees, but not both. Instead, courts should more rigorously apply the relevant doctrinal tests to ensure that student-employees receive the Title VII protections they are due. Second, student-employee plaintiffs often err by exclusively bringing Title VII claims, when in fact Title IX may offer a better path—especially for those whose employment relationships with their schools are not coterminous with their educational relationships. Student-employees should thus also bring Title IX claims to ensure that key evidence makes it into the record. Ideally, courts would evolve Title VII doctrine to factor in evidence of education-based discrimination and education-based protected activity, thereby synthesizing Title VII's protective benefits with Title IX's coverage benefits.

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INTRODUCTION

Meng Huang came to The Ohio State University (OSU) in 2014 eager to commence her Ph.D. studies in mechanical engineering. But soon after she arrived, Dr. Giorgio Rizzoni—who served as both her supervisor and her professor—commenced an aggressive campaign of sexual harassment against her. Consistent with her dual roles as both an employee and a student, Huang brought claims against OSU under both Title VII of the Civil Rights Act of 1964,[1] which prohibits sex discrimination in the workplace, and Title IX of the Education Amendments of 1972,[2] which prohibits sex discrimination in schools.[3]

The district court, however, wrongly assumed that Huang could not simultaneously be an employee *and* a student protected by both laws—at least not at the same time.[4] As a result, the district court sorted the adverse actions Huang experienced into two separate buckets with no overlap: those related to her role as a student and those related to her role as an employee.[5] On that basis, the district court granted summary judgment to OSU on Huang's Title VII quid pro quo claim, holding that the primary adverse action she experienced (revocation of her fellowship stipend) for turning down Dr. Rizzoni's advances was related only to her role as a student, whereas he had made advances upon her only in her capacity as an employee.[6] In other words, the district court divorced

1. 42 U.S.C. § 2000e (2018).

2. 20 U.S.C. §§ 1681-1688 (2018).

3. Huang v. Ohio State Univ., No. 19-cv-1976, 2022 WL 16715641, at *1-4 (S.D. Ohio Nov. 4, 2022), *rev'd*, 116 F.4th 541 (6th Cir. 2024).

4. *Id.* at *5 ("Courts have considered the dual role of graduate students as both students and university employees hired as teaching and research assistants, 'carefully delineated between graduate students' academic activities and employment activities, and deemed them to be employees only with respect to what they do in employment.'" (quoting Seaton v. Univ. of Pa., No. CIV. A. 01-2037, 2001 WL 1526282, at *8 (E.D. Pa. Nov. 30, 2001))).

5. *Id.* (describing her graduate-fellow position, which she held from 2014 to 2017, as one giving rise to "a purely academic relationship, not an employment relationship" with the university—preventing her from incorporating the relevant adverse actions that occurred during that 2014-2017 period into her Title VII claim regarding her employment position as a graduate research associate, which began in 2017).

6. *Id.* at *5-8. The district court also granted summary judgment to The Ohio State University (OSU) on Huang's Title VII hostile-work-environment claim, Title VII retaliation claim, and Title IX retaliation claim, but denied summary judgment as to her due-process claim against Rizzoni in his individual capacity. *Id.* at *23. The jury verdict at trial came down in favor of Rizzoni, for reasons unrelated to the problems discussed in this Note. *See Huang*, 116 F.4th at 555.

the quid from the quo—even though both corresponded to her relationship with OSU and likely would have established a prima facie case had she been only an employee. That she was a student as well was, apparently, the death knell for her quid pro quo claim in district court. It should not have been. Indeed, on appeal, the Sixth Circuit castigated the district court for "mishandl[ing] Huang's claims" because "[t]he two roles are not mutually exclusive, as the district court mistakenly held."[7]

Huang's experience, both as a survivor and as a plaintiff in the district court, is far from atypical. First, it is no secret that sex discrimination, including in the forms of sexual harassment and assault, runs rampant at colleges and universities. Over a quarter of undergraduate women have experienced sexual assault on campus,[8] and nearly half of all students have indicated that they have been the victim of sexual harassment, including 75.2% of undergraduate women and transgender, genderqueer, or gender nonconforming (TGQN) students and 69.4% of graduate and professional women and TGQN students.[9]

Second, and more broadly, Huang's case illustrates a fundamental problem with the current landscape of students' civil-rights litigation: the overlooking of student-employees. Students like Huang are not just students—nor are they just employees, for that matter. Rather, students in today's educational landscape typically wear multiple hats. Approximately eighty percent of college students hold some sort of paid employment while in school,[10] frequently working in on-campus positions as research assistants, at school-run businesses (such as student-run coffeeshops and laundry services), at library or dormitory front desks, and so on. These positions have structures that range well beyond receiving wages for hourly work. For instance, students may participate in fed-

7. *Huang*, 116 F.4th at 546. In the interest of full disclosure, I worked on an amicus brief submitted by several workers' and students' rights organizations arguing that she should be properly considered an employee in this case. *See* Brief of Amici Curiae Workers' and Students' Rights Organizations in Support of Plaintiff-Appellant Meng Huang and Reversal, *Huang*, 116 F.4th 541 (No. 23-3469).

8. *Campus Sexual Violence: Statistics*, RAINN, https://www.rainn.org/statistics/campus-sexual-violence [https://perma.cc/W5AB-ZYZC].

9. David Cantor, Bonnie Fisher, Susan Chibnall, Reanne Townsend, Hyunshik Lee, Carol Bruce & Gail Thomas, *Report of the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct*, WESTAT, at xvi (Oct. 20, 2017), https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/AAU-Campus-Climate-Survey-FINAL-10-20-17.pdf [https://perma.cc/SQN2-4SYQ].

10. Omari Burnside, Alexa Wesley, Alexis Wesaw & Amelia Parnell, *Employing Student Success: A Comprehensive Examination of On-Campus Student Employment*, NASPA 5 (2019), https://naspa.org/files/dmfile/NASPA_EmploymentStudentSuccess_FINAL_April1_LOWRES_REVISED.pdf [https://perma.cc/JV3T-PRR7].

eral work-study programs as part of their financial-aid packages[11] or receive living stipends as part of doctoral programs that require employment.[12] In fact, to be both an employee and a student is arguably most common for graduate students, many of whom balance academic obligations as students with significant job duties as employees of their schools, such as teaching undergraduate students, working in a laboratory, or conducting research for their dissertation advisors.

The recent upswing in graduate-student unions has brought public attention to these job duties, as graduate-student workers have increasingly sought—and won—the right to bargain collectively for living wages and crucial benefits.[13] Indeed, the labor they perform is mission critical to universities' continued operation: "Universities have increasingly relied on graduate teaching assistants and contingent faculty, with the growth in graduate assistant positions and non-tenure-track positions outpacing the increase in tenured and tenure-track positions," to the point where "tenured and tenure-track faculty now account for just over a quarter of the academic workforce."[14]

In addition to forming a supermajority of the teaching workforce, graduate students are an essential economic element of the research workforce, as they

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11. *See* Fed. Student Aid, *Federal Work-Study Jobs Help Students Earn Money to Pay for College or Career School*, U.S. Dep't Educ., https://studentaid.gov/understand-aid/types/work-study [https://perma.cc/962J-ZJTU].

12. *See, e.g.*, Graduate Sch. of Arts & Scis., *PhD Stipends*, Yale Univ., https://gsas.yale.edu/resources/graduate-financial-aid/phd-stipends [https://perma.cc/D3D7-Y5PD]; Graduate Sch. of Arts & Scis., *Graduate School of Arts and Sciences Programs and Policies 2024-2025*, Yale Univ., https://catalog.yale.edu/gsas/policies-regulations/degree-requirements [https://perma.cc/7SKF-X6MK] ("Learning to teach and to evaluate student work is fundamental to the education of graduate students. Teaching is required in many departments and is an expectation for all doctoral students.").

13. *See, e.g.*, Ryan Quinn, *Grad Worker Unionization Is Booming, Even Down South*, Inside Higher Educ. (Sept. 6, 2023), https://www.insidehighered.com/news/faculty-issues/labor-unionization/2023/09/06/grad-worker-unionization-booming-even-down-south [https://perma.cc/C5M3-3Q2M] (describing the massive increase in graduate-student-union recognition); Julian Roberts-Grmela, *'Enormous Surge' in Unions Reflects Disconnect Between Colleges and Graduate Employees*, Chron. Higher Educ. (May 18, 2023), https://www.chronicle.com/article/enormous-surge-in-unions-reflects-disconnect-between-colleges-and-graduate-employees [https://perma.cc/MW79-DCUJ]; Trs. of Colum. Univ. in the City of N.Y., 364 N.L.R.B. 1080, 1080-81 (2016) (concluding that "students who perform services at a university in connection with their studies" may be that university's employees).

14. Teresa Kroeger, Celine McNicholas, Marni von Wilpert & Julia Wolfe, *The State of Graduate Student Employee Unions*, Econ. Pol'y Inst. 3 (Jan. 11, 2018), https://files.epi.org/pdf/138028.pdf [https://perma.cc/WRM5-8HLK].

are instrumental to the achievement of faculty members' research agendas.[15] In other words, universities cannot achieve either of their core purposes—education and research—without the constant stream of labor of graduate students. Schools should not be able to exploit these students by treating their labor as subsidiary to and separate from the university's educational mission. Rather, their labor is arguably the foundation of university operations today.

But missing from the unionization conversation is the recognition of duality: yes, graduate students are workers who deserve workers' rights, but they are students as well. To misclassify them as exclusively one or the other is to replicate the very same error that the district court made in Huang's case. For instance, graduate students' academic and employment responsibilities frequently intermix, as when their paid research work also informs their studies. Graduate degrees in science, engineering, technology, or mathematics (STEM), such as Huang's, epitomize this intermixing. Accordingly, I argue that Huang, and students like her, should be entitled to the protections offered by *both* education and employment antidiscrimination laws.

It would be doing student-employees a disservice to force them to pick one or the other. As Kimberlé Crenshaw noted in her seminal recognition of intersectional experiences across race and sex, focusing exclusively on "single axes" of discrimination tends to illuminate only the most privileged subgroups within a given subordinated class.[16] If antidiscrimination education law is developed without an eye towards students who also work on campus—thus predominantly privileging students who receive no financial aid due to their family's ability to pay—the doctrine would not necessarily address the unique needs of a large swath of the student population with greater financial need. Education law must account for student-employees in order to deliver on its promise of federally funded educational environments free of discrimination.

Similarly, the development of antidiscrimination employment law that imagines only employees who have no other relationship with their employer would leave out the needs of those who have the most at stake regarding their connection to their employer. Unlike most workers, student-employees rely on their employers for a variety of needs beyond just their job: education, health

15. *See infra* note 116 and accompanying text.

16. Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140 ("[I]n race discrimination cases, discrimination tends to be viewed in terms of sex- or class-privileged Blacks; in sex discrimination cases, the focus is on race- and class-privileged women. This focus on the most privileged group members marginalizes those who are multiply-burdened and obscures claims that cannot be understood as resulting from discrete sources of discrimination.").

care, housing, dining halls, and other facilities. This makes their boundary between work and nonwork often fuzzy and sometimes nonexistent. And when the boundary between work and nonwork is difficult to identify, employers can reasonably claim that the alleged discrimination occurred outside of work, making discrimination-free workplaces difficult to achieve. Attention to this nuance is essential to recognizing student-employees' multiple statuses. Just as it is essential to vindicate women of color's rights as women, as people of color, and—arguably most importantly—as both,[17] it is similarly essential to vindicate student-employees' rights as students, as employees, and uniquely as student-employees.

This Note proceeds in four Parts. Part I provides an overview of Title VII and Title IX, as well as Title IX's sister statute, Title VI. Although several circuits have held that Title VII preempts Title IX, I focus on the circuits that have denied such preemption, in no small part because their approach is, in my view and as others have persuasively argued, the correct one.[18] When both are available, Title VII offers a host of comparative benefits over and above Title IX in terms of the substantive protections offered by the doctrine to plaintiffs under each statute.[19]

The second and third Parts of this Note address two kinds of underinclusivity currently plaguing student-employee antidiscrimination litigation. The first problem, examined in Part II, is the fault of judges: courts are counting too few students as employees who deserve Title VII protections. As in Huang's case, courts have routinely failed to extend to student-employees the employment-law protections that they are due by reasoning that because they are *primarily* students, they are necessarily *not* employees. But student-employees like Huang are not just students or employees; they are both. And when they are properly recognized as employees, they are entitled to significantly greater protections in terms of both liability standards and remedies,[20] thus vindicating the antidiscrimination promise of Title VII.

The second problem, examined in Part III, is the fault of plaintiffs rather than courts. Student-employees are bringing fewer Title IX (and Title VI) claims than they should, instead hoping to rely fully on Title VII to secure re-

17. *See, e.g.*, *id.* at 139-40 (arguing against the "single-axis framework that is dominant in antidiscrimination law" and emphasizing in particular the jointly racist and sexist experiences of Black women, who also experience a unique form of discrimination at the intersection of these identities).

18. *See infra* notes 62, 63 and accompanying text.

19. *See infra* Section II.C.

20. *See infra* Section II.C.

lief. But while Title VII sometimes applies to the entirety of a plaintiff's relationship with a school (for example, for graduate students like Huang), it often only applies to a subset of that relationship for other plaintiffs, excluding too much retaliation and discrimination from redressability. Title IX thus offers a benefit that Title VII cannot: allowing the entirety of this adverse treatment to be addressed in the same claim. Accordingly, student-employee plaintiffs must ensure that their complaints advance claims under Title IX, not just Title VII.

As these dual proposals suggest, this Note does not take a position on whether, holistically, Title VII is a strictly better vehicle than Title IX or vice versa for all student-employee claims of discrimination. Neither statute is a panacea. Rather, per current doctrine, each has strengths and weaknesses that, depending on the circumstances, may make one a better vehicle than the other in a given case: Title VII offers more expansive protections for covered discrimination, but Title IX covers more discrimination. Parts II and III simply illustrate that courts and plaintiffs are respectively failing to grasp these advantages, meaning that the first step towards fulsome recognition of student-employees' inherently cross-cutting rights is to remedy the underinclusivity currently undermining enforcement. These reforms are immediately actionable, including under current doctrine.

Part IV offers a more ideal long-term solution to the problems faced by student-employees by advocating a doctrinal expansion that synthesizes the greater protections of Title VII with the greater scope of Title IX. Specifically, I propose that courts adopt a Title VII doctrine that allows (1) evidence of education discrimination to inform a student-employee's Title VII claim of employment discrimination and (2) education-based protected activity to inform a student-employee's Title VII claim of retaliation. Such a doctrine would allow student-employee plaintiffs to access the full range of benefits provided by Title VII within the full scope of coverage currently offered only by Title IX.

In the immediate, courts and plaintiffs alike need to engage in greater uptake of current doctrine: courts must extend student-employees the Title VII rights to which they are entitled, and student-employee plaintiffs should plead Title IX claims if Title VII would not be enough to redress their discrimination. In the longer term, courts should evolve Title VII doctrine to be more attendant to the specific needs of student-employees and their intersecting roles.

I. THE RELEVANT STATUTES

Student-employees who face discrimination at the hands of their schools have several statutes at their disposal to redress this discrimination. Title VII of

the Civil Rights Act of 1964 addresses *employment* discrimination, including sex and race discrimination,[21] whereas Title IX of the Education Amendments of 1972 addresses *education* discrimination on the basis of sex. Title VI of the Civil Rights Act, as amended by the Education Amendments, proscribes education discrimination on the basis of race.

A. A Brief Introduction to Title VII and Title IX

As *employees*, student-employees are entitled to protections from their universities under Title VII of the Civil Rights Act of 1964, assuming that the university has at least fifteen employees.[22] Title VII prohibits employers from discriminating on the basis of race, color, religion, sex (including sexual orientation and gender identity),[23] or national origin.[24] Impermissible discriminatory acts include discharge, failure or refusal to hire, deprivation of equal employment opportunities, and other adverse employment actions taken on the basis of these protected characteristics.[25] Title VII also proscribes retaliation taken by the employer against an employee for raising a complaint of any of the preceding acts.[26]

Title VII squarely prohibits sexual harassment. The Supreme Court recognized "hostile work environment" claims under Title VII in *Meritor Savings Bank v. Vinson*, which found that "[t]he phrase 'terms, conditions, or privileges of employment' [in Title VII] evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women,'" including psychological injuries inflicted by discrimination.[27] In *Meritor*, the Court established that "to state a claim for 'hostile environment' sexual harassment," the conduct

21. This Note focuses predominantly on sex discrimination and secondarily on race discrimination. But, as described *infra* in this Section, Title VII also prohibits discrimination based on other protected characteristics, as do other employment laws, such as the Age Discrimination in Employment Act of 1967. *See* 29 U.S.C. §§ 621-634 (2018). Title VI also extends to color and national origin. *See* 42 U.S.C. § 2000d (2018).

22. 42 U.S.C. § 2000e(b) (2018).

23. Bostock v. Clayton Cnty., 590 U.S. 644, 683 (2020).

24. 42 U.S.C. § 2000e-2(a) (2018).

25. *Id.*

26. *Id.* § 2000e-3(a).

27. 477 U.S. 57, 64 (1986) (quoting L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)).

must be "sufficiently severe or pervasive 'to alter the conditions of [the plaintiff's] employment and create an abusive working environment.'"[28]

The Court provided further clarity on sexual harassment in a pair of 1998 opinions published simultaneously, which established the standard governing employers' vicarious liability for actionable discrimination caused by an employee's superior: *Burlington Industries, Inc. v. Ellerth*[29] and *Faragher v. City of Boca Raton*.[30] In *Ellerth*, the Court established the standard for quid pro quo harassment, which involves a supervisor carrying out "threats to retaliate . . . if . . . denied some sexual liberties."[31] In *Faragher*, it established the same standard for "hostile work environment" harassment,[32] which involves "bothersome attentions or sexual remarks that are sufficiently severe or pervasive."[33] The *Faragher-Ellerth* standard provides that when a supervisor "with immediate (or successively higher) authority over the employee" takes a "tangible employment action," the employer is vicariously liable for the sexual harassment that occurred, whether in the form of a hostile work environment or quid pro quo harassment.[34] If no tangible employment action has been taken, however, the employer may raise an affirmative defense that it "exercised reasonable care to prevent and correct promptly" the conduct and that the employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer."[35]

Title VII's protections are enforceable by both private individuals—who may sue under Title VII for damages, injunctive relief, and equitable relief—and the Equal Employment Opportunity Commission (EEOC), a federal agen-

28. *Id.* at 67 (quoting Henson v. Dundee, 682 F.2d 897, 904 (11th Cir. 1982)); *see also* Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-23 (1993) (clarifying the standard for the severe-or-pervasive test by requiring that the conduct be hostile under both an objective standard and a subjective standard, including by examining the totality of the circumstances); Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79-80 (1998) (holding that Title VII's prohibition of sexual harassment extends to same-sex sexual harassment).

29. 524 U.S. 742, 765 (1998) (observing that the test for these claims is the same and that the distinction is merely a helpful way of classifying the conduct that occurred).

30. 524 U.S. 775, 780 (1998).

31. *Ellerth*, 524 U.S. at 751.

32. *Faragher*, 524 U.S. at 780. As the Court in *Ellerth* observed, the test for these claims is the same, and the distinction is merely a helpful way of classifying the conduct that occurred. *Ellerth*, 524 U.S. at 751-54.

33. *Ellerth*, 524 U.S. at 751.

34. *Id.* at 765 (articulating this test for quid pro quo); *Faragher*, 524 U.S. at 807 (articulating the same test for hostile work environment).

35. *Ellerth*, 524 U.S. at 765 (articulating these affirmative defenses for quid pro quo); *Faragher*, 524 U.S. at 807 (issuing the same affirmative defense for hostile work environment).

cy established by Title VII itself.[36] In order for a private individual to enforce her Title VII rights, she must first file an administrative charge with EEOC within 180 days of the unlawful employment practice.[37] If EEOC determines, after conducting an investigation, that there is reasonable cause to believe discrimination occurred, it will invite the parties to resolve the charge through conciliation, or it may elect to litigate the issue itself.[38] If conciliation fails and/or EEOC declines to litigate the charge itself, it will issue the charging party a right-to-sue letter, which empowers that individual to commence a lawsuit in federal court within ninety days.[39] On the other hand, if EEOC is unable to find reasonable cause, the charging individual will be issued a notice of dismissal and notice of rights, which also gives them ninety days to file a federal lawsuit.[40]

While Title VII protects student-employees in their role as employees, Title VI and Title IX protect them in their role as *students*. More specifically, student-employees are entitled to protections from race and sex discrimination under Title VI of the Civil Rights Act of 1964[41] and Title IX of the same, added by the Education Amendments of 1972. Both Title VI and Title IX address discrimination by recipients of federal financial assistance under Congress's Spending Clause power.[42] These recipients include the majority of colleges and universities in the United States, as well as all public elementary and secondary schools.[43] Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be

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36. *See* CHRISTINE J. BACK, CONG. RSCH. SERV., IF11705, THE CIVIL RIGHTS ACT OF 1964: ELEVEN TITLES AT A GLANCE 2 (2020); *see also* 42 U.S.C. §§ 2000e-4 to -5 (2018) (establishing and empowering the Equal Employment Opportunity Commission (EEOC)).

37. 42 U.S.C. § 2000e-5(e)(1) (2018).

38. *See What You Can Expect After a Charge Is Filed*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/employers/what-you-can-expect-after-charge-filed [https://perma.cc/35VG-W3RW].

39. *See id.*; 42 U.S.C. § 2000e-5(b), (f)(1) (2018); *Filing a Lawsuit*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/filing-lawsuit [https://perma.cc/Z4TN-HT3Z].

40. *See What You Can Expect After a Charge Is Filed*, *supra* note 38.

41. Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 601-605, 78 Stat. 241, 252-53 (codified as amended at 42 U.S.C §§ 2000d to 2000d-7).

42. CHRISTINE J. BACK & JARED P. COLE, CONG. RSCH. SERV., R47109, FEDERAL FINANCIAL ASSISTANCE AND CIVIL RIGHTS REQUIREMENTS 2 (2022).

43. *See* Education Amendments of 1972, Pub. L. No. 92-318, §§ 901-907, 86 Stat. 235, 373-75; *see also* JARED P. COLE, CONG. RSCH. SERV., LSB11087, TITLE VI AND PEER-TO-PEER RACIAL HARASSMENT AT SCHOOL: FEDERAL APPELLATE DECISIONS 1 (2023) ("All public and most private colleges and universities receive federal financial assistance, as do all K-12 public school districts.").

subjected to discrimination under any education program or activity receiving Federal financial assistance," with enumerated exemptions (for example, historically single-sex schools, schools with contrary religious tenets, and military service academies).[44] Title VI provides the same with respect to "race, color, or national origin," but without the enumerated exemptions.[45] A private right of action is available to redress both discrimination (disparate treatment) and retaliation[46] under Title VI and Title IX,[47] for which there is no administrative-exhaustion requirement.[48]

On sex discrimination specifically, the *Gebser-Davis* standard governs claims of sexual harassment under Title IX of students by teachers and by fellow students. First, in *Gebser v. Lago Vista Indiana School District*, the Court held that, for an educational institution to be liable for damages for *teacher*-on-student sexual harassment under Title IX, an appropriate school official must have had knowledge of and been deliberately indifferent to the harassment.[49] Second, in *Davis ex rel. LaShonda D. v. Monroe County Board of Education*, the Court held that the same liability arises for *student*-on-student sexual harassment when

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44. 20 U.S.C. § 1681(a)(1)-(4) (2018).

45. 42 U.S.C. § 2000d (2018).

46. Retaliation may also properly be considered a subset of discrimination, rather than a distinct category. However, this Note will treat the claims separately in order to follow the structure referenced by the Supreme Court in *Burlington Northern & Santa Fe Railway Co. v. White*, which focuses heavily on the distinction between Title VII's prohibition of disparate treatment (the "anti-discrimination provision") and retaliation (the "anti-retaliation provision"). *See* 548 U.S. 53, 61 (2006).

47. *See* C.R. Div., *Title IX Legal Manual*, U.S. DEP'T JUST. (Sept. 14, 2023) [hereinafter *Title IX Legal Manual*], https://www.justice.gov/crt/title-ix [https://perma.cc/RJE6-MP2Z]; Cannon v. Univ. of Chi., 441 U.S. 677, 709 (1979) ("Not only the words and history of Title IX, but also its subject matter and underlying purposes, counsel implication of a cause of action in favor of private victims of discrimination."); Barnes v. Gorman, 536 U.S. 181, 185 (2002) (finding "an implied right of action" under Title VI, such that it is "beyond dispute that private individuals may sue" to address allegations of intentional discrimination under the statute (quoting Alexander v. Sandoval, 532 U.S. 275, 280 (2001))). Note that while regulations promulgated under Title IX and Title VI may also proscribe disparate-impact discrimination, there is no private right of action available to address allegations of disparate-impact discrimination violating regulations implementing Title VI. *See Sandoval*, 532 U.S. at 284-85, 293.

48. *Cannon*, 441 U.S. at 706 n.41 (declining to impose an exhaustion requirement under Title IX); *see also Title IX Legal Manual*, *supra* note 47, at Section VIII.A (explaining that the *Cannon* Court decided that "exhaustion of administrative remedies was not required under Title IX").

49. 524 U.S. 274, 290-91 (1998).

"the behavior is so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect."[50]

This Note focuses predominantly on Title IX, especially in light of the aforementioned sexual-harassment culture that plagues college and university campuses. However, much, if not all, of its analysis is equally applicable to Title VI's ability to redress racial discrimination against student-employees of color, since Titles IX and VI are typically interpreted *in pari materia* with respect to the scope and requirements of the protections they provide.[51] "Congress consciously modeled Title IX on Title VI," such that "Title VI legal precedent provides some important guidance for the application of Title IX."[52] For instance, with respect to disparate treatment, "the applicable legal standards under Title VI and Title IX are generally identical and investigative officials can rely on case law decided under Title VI in establishing violations under Title IX."[53]

B. The Preemption Question

A key question regarding these statutes is whether their scopes overlap in addressing discrimination experienced by a student-employee at the hands of their school-employer, or whether the protections of Title VII and the Spending Clause statutes are siloed into separate arenas. Although courts have not unanimously landed on an answer—nor has the Supreme Court provided one[54]—the majority of circuits have found that the Spending Clause statutes reach employment discrimination.

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50. 526 U.S. 629, 652 (1999).

51. *See, e.g.*, *Cannon*, 441 U.S. at 694-96 (explaining that "Title IX was patterned after Title VI," that "[e]xcept for the substitution of the word 'sex' in Title IX to replace the words 'race, color, or national origin' in Title VI, the two statutes use identical language to describe the benefited class," and that the statutes employ "the same administrative mechanism for terminating federal financial support for institutions engaged in prohibited discrimination"); *Gebser*, 524 U.S at 286 (1998) ("Title VI . . . is parallel to Title IX . . . . The two statutes operate in the same manner . . . ."). Accordingly, the vast majority of the analysis in this Note extends as much to Title VI claims as it does to Title IX claims.

52. *Title IX Legal Manual*, *supra* note 47, at Part I ("[B]ecause Title IX, Section 504, and Title VI contain parallel language, the same analytic framework should generally apply in cases under all three statutes."); *see also* Alexander v. Choate, 469 U.S. 287, 294 (1985) ("Congress in 1973 adopted virtually the same language for § 504 that had been used in Title VI . . . .").

53. *Title IX Legal Manual*, *supra* note 47, at Section IV.A.1.

54. The Supreme Court has definitively held that "employment discrimination comes within the prohibition of Title IX," but did not expound upon the implications of this inclusion for the overlap between Title IX and Title VII. N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 530 (1982).

There is currently a circuit split on the question whether Title IX (and, by extension, Title VI[55]) provides a remedy for student-employees who experience employment discrimination, or whether Title VII comprises the exclusive remedy for this wrong. The question turns on whether Title IX contains an implied private right of action for employment discrimination, which intersects with the question whether Title VII preempts Title IX claims when both might be applicable. Some courts have held that Title VII preempts Title IX, such that Title IX contains no implied private right of action for employment discrimination in schools. In these cases, Title VII would be the only vehicle available to address a case of employment discrimination. By contrast, as the plurality of courts have held, Title VII does *not* preempt Title IX, and Title IX thus contains an implied private right of action for employment discrimination in schools—meaning it could capture *both* education and employment discrimination. This Note applies primarily to student-employees who study and work in these latter circuits—that is, in circuits where both Title IX and Title VII claims are available.

More specifically, the First, Second, and Fourth Circuits have held that Title IX does provide for this implied private right of action (as well as the Third Circuit by implication),[56] while the Fifth Circuit has held it does not.[57] Similar-

55. Title VI applies slightly more narrowly than Title IX for the purposes of redressing employment discrimination, but not so narrowly as to exempt it from the scope of this Note. Specifically, Title VI redresses employment discrimination only "where a primary objective of the Federal financial assistance is to provide employment." 42 U.S.C. § 2000d-3 (2018). But "[t]his is not to say that the employment practices of a recipient of non-employment related assistance will always be beyond the reach of Title VI"; rather, "[w]here such employment discrimination so infects the tone and tenor of a program or activity that it subjects beneficiaries to an oppressive discriminatory atmosphere, enforcement action under Title VI is authorized." *See Title IX Legal Manual*, *supra* note 47, at Section IV.B.1 n.74 (citing 28 C.F.R. § 42.104(c)(2) (2023); 15 C.F.R. § 8.4(c)(2) (2024); 34 C.F.R. § 100.3(c)(2) (2024); Ahern v. Bd. of Educ. of Chi., 133 F.3d 975, 977-78 (7th Cir. 1998); United States v. Jefferson Cnty. Bd. of Educ., 372 F.2d 836, 883 (5th Cir. 1966)).

56. Lipsett v. Univ. of P.R., 864 F.2d 881, 897 (1st Cir. 1988) (finding employment discrimination against a student-employee actionable under Title IX); Vengalattore v. Cornell Univ., 36 F.4th 87, 106 (2d Cir. 2022) (finding employment discrimination against a professor actionable under Title IX); Preston v. Virginia *ex rel.* New River Cmty. Coll., 31 F.3d 203, 205-06 (4th Cir. 1994) ("An implied private right of action exists for enforcement of Title IX. This implied right extends to employment discrimination on the basis of gender by educational institutions receiving federal funds." (citing *Cannon*, 441 U.S. at 717)); Doe v. Mercy Cath. Med. Ctr., 850 F.3d 545, 560 (3d Cir. 2017) ("Title VII's concurrent applicability does not bar [the plaintiff's] private causes of action for retaliation and *quid pro quo* harassment under Title IX.").

57. Lakoski v. James, 66 F.3d 751, 754 (5th Cir. 1995) ("Given the availability of a private remedy under Title VII for aggrieved employees, we are unwilling to . . . [find] an implied private

ly, while the Fifth and Seventh Circuits have found that Title VII preempts Title IX claims,[58] the First, Third, and Fourth Circuits have held it does not (as well as the Second Circuit by implication).[59] The Sixth Circuit—where Huang's case takes place—is less clear: a panel for the Sixth Circuit overruled a district-court holding that Title VII preempts Title IX,[60] but another district judge has observed that this antipreemption panel decision is not binding on future Sixth Circuit panels.[61] Meanwhile, the Department of Justice's position is that there is no preemption and thus that there is a private right of action under Title IX for employment discrimination in schools.[62] Many authors have also convincingly argued that Title VII should not be read to preempt Title IX.[63]

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right of action for damages under Title IX for employment discrimination."); Lowrey v. Tex. A&M Univ. Sys., 117 F.3d 242, 247 (5th Cir. 1997) ("[E]ven if we were inclined to disagree with *Lakoski*, we would deny Lowrey's invitation to reconsider *Lakoski*, which is the settled law of this circuit. Title IX does not afford a private right of action for employment discrimination on the basis of sex in federally funded educational institutions.").

58. Waid v. Merrill Area Pub. Sch., 91 F.3d 857, 862 (7th Cir. 1996) ("Title VII preempted any of Waid's claims for equitable relief under § 1983 or Title IX."), *abrogated in part on other grounds by* Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246 (2009); *Lakoski*, 66 F.3d at 753 ("We are not persuaded that Congress intended that Title IX offer a bypass of the remedial process of Title VII. We hold that Title VII provides the exclusive remedy for individuals alleging employment discrimination on the basis of sex in federally funded educational institutions.").

59. *Lipsett*, 864 F.2d at 897; *Mercy Cath. Med. Ctr.*, 850 F.3d at 560; *Preston*, 31 F.3d at 204-06; *Vengalattore*, 36 F.4th at 107.

60. Ivan v. Kent State Univ., 92 F.3d 1185, 1996 WL 422496, at *2 n.10 (6th Cir. 1996) (unpublished table decision).

61. Weaver v. Ohio State Univ., No. C2-96-1199, 1997 WL 1159680, at *7 (S.D. Ohio June 4, 1997).

62. *See Title IX Legal Manual*, *supra* note 47, at Section IV.B.2.b ("The Department takes the position that Title IX and Title VII are separate enforcement mechanisms. Individuals can use both statutes to attack the same violations. This view is consistent with the Supreme Court[']s decisions on Title IX[']s coverage of employment discrimination, as well as the different constitutional bases for Title IX and Title VII.").

63. *See, e.g.*, Lynn Ridgeway Zehrt, *Title IX and Title VII: Parallel Remedies in Combatting Sex Discrimination in Educational Employment*, 102 MARQ. L. REV. 701, 703-05 (2019) (arguing based on "legislative history and purpose" that Title VII must not be read to preempt Title IX and that Title IX must be read to provide an implied private right of action for employment discrimination); Brigid Burroughs, Comment, *Title VII Meets Title IX for Student Employees: Remedies for Discrimination Against Graduate Students*, 89 UMKC L. REV. 441, 452-59 (2020) (considering stare decisis, congressional intent, and the canons of statutory construction); McKenzie Miller, Comment, *Is VII > IX?: Does Title VII Preempt Title IX Sex Discrimination Claims in Higher Ed Employment?*, 68 CATH. U. L. REV. 401, 405 (2019); Kendyl L. Green, Note, *Title VII, Title IX, or Both?*, 14 SETON HALL CIR. REV. 1, 18 (2017).

There are additional splits on these questions among district courts in circuits that have not yet spoken on the matter.[64] For example, many employment-discrimination cases brought under Title IX are not brought by student-employees; rather, they are commonly brought by teachers, administrators, or professors (who are not also enrolled at the school). Accordingly, these plaintiffs are exclusively alleging employment discrimination, not a mix of education and employment discrimination—meaning that they would be pursuing the exact same claim under either Title VII or Title IX, rather than alleging anything specific to the educational nature of their employer. Indeed, in one case brought by a student-employee, *Nurradin v. Tuskegee University*, a judge for the Middle District of Alabama explained that the "litany of cases" cited by the defendant "in support of Title VII preemption" were "distinguishable" because they "all . . . involve plaintiffs who are employees of educational institutions but are not also students."[65] Quoting another Alabama district-court decision, the judge explained that "a Title IX sex discrimination claim filed by a plaintiff who is *both a student and an employee* of a federally funded educational program is materially different than a Title IX sex discrimination claim filed by a plaintiff who is *solely an employee* of the federally funded educational program."[66] As such, the judge in *Nurradin* found that the plaintiff's claims under Title IX for sex discrimination, sexual harassment, and retaliation were not preempted by Title VII.[67]

C. The Comparative Benefits of Title VII

As Fatima Goss Graves has catalogued, Title VII outperforms the Spending Clause statutes on a host of fronts when it comes to protecting plaintiffs.[68]

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64. Burroughs, *supra* note 63, at 443 & n.29.

65. No. 21-cv-00155, 2022 WL 808693, at *13-14 (M.D. Ala. Mar. 16, 2022) (collecting these cases).

66. *Id.* at *14 (quoting Sadeghian v. Univ. of S. Ala., No. CV 18-00009, 2018 WL 7106981, at *6 (S.D. Ala. Dec. 4, 2018), *report and recommendation adopted*, No. CV 18-00009, 2019 WL 289818 (S.D. Ala. Jan. 22, 2019)).

67. *Id.* at *15.

68. Fatima Goss Graves, *Restoring Effective Protections for Students Against Sexual Harassment in Schools: Moving Beyond the* Gebser *and* Davis *Standards*, 2 ADVANCE 135, 140-43 (2008); *see also* Shiwali Patel, Elizabeth X. Tang & Hunter F. Iannucci, *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) (arguing that under the *Gebser-Davis* standards, students have less access to remedies for sex-based harassment under Title IX than workers do under Title VII, even under identical forms of harassment and institutional mistreatment); Catherine Fisk & Erwin Chemerinsky, *Civil Rights Without Remedies: Vicarious Liability Under Title VII, Section*

First, under Title IX's *Gebser* standard for teacher-on-student sexual harassment,[69] "a plaintiff must show that the school has received '*actual* notice' of the harassment."[70] Under this standard, "the knowledge of the teacher/harasser does not constitute 'actual notice' [for teacher-on-student harassment]; instead, an 'appropriate official' of the school must receive notice."[71] By contrast, Title VII imposes no "actual notice" requirement: employers are strictly vicariously liable for supervisor-on-worker harassment if a tangible employment action occurs.[72]

Second, under *Gebser*, "Title IX harassment plaintiffs must also demonstrate that the required notice was given to an 'appropriate person' with authority to 'take corrective action.'"[73] But since there is no notice requirement for Title VII liability for supervisor-on-worker harassment, the question of to whom

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1983, and Title IX, 7 WM. & MARY BILL RTS. J. 755, 757-58 (1999) (stating that the Supreme Court in 1998 "approved vicarious liability for employers under Title VII for sexual harassment by supervisors," while in the same Term "[rejecting] vicarious liability for sexual harassment under Title IX").

69. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1998) (finding that a school is liable in private litigation under Title IX for teacher-on-student sexual harassment only if the school (1) had actual knowledge of the misconduct and (2) was deliberately indifferent).

70. Graves, *supra* note 68, at 140 (emphasis added).

71. *Id.* (footnote omitted).

72. *See* Vance v. Ball State Univ., 570 U.S. 421, 424 (2013) ("If the supervisor's harassment culminates in a tangible employment action, the employer is strictly liable. But if no tangible employment action is taken, the employer may escape liability by establishing, as an affirmative defense, that (1) the employer exercised reasonable care to prevent and correct any harassing behavior and (2) that the plaintiff unreasonably failed to take advantage of the preventive or corrective opportunities that the employer provided." (first citing Faragher v. Boca Raton, 524 U.S. 775, 807 (1998); and then citing Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998))). *Compare Faragher*, 524 U.S. at 807 ("An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee."), *and Ellerth*, 524 U.S. at 747 ("[A]n employee who refuses the unwelcome and threatening sexual advances of a supervisor, yet suffers no adverse, tangible job consequences, can recover against the employer without showing the employer is negligent or otherwise at fault for the supervisor's actions."), *with* Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 633 (1999) (concluding that a school board may be liable for private damages in cases of "student-on-student harassment . . . only where the funding recipient [here, the school board] acts with deliberate indifference to known acts of harassment."). Other scholars have similarly observed this difference between Title VII and Title IX liability standards. *See, e.g.*, Fisk & Chemerinsky, *supra* note 68, at 758 (describing the standard for sexual harassment cases under Title VII as "strict employer liability"); Patel et al., *supra* note 68, at 975-76 ("[U]nder Title IX, courts apply an 'actual notice' . . . standard to student plaintiffs—more stringent than Title VII's constructive 'should have known' standard.").

73. Graves, *supra* note 68, at 141.

notice must be given is not even a relevant one. For worker-on-worker harassment under Title VII, the threshold is still lower than for Title IX: under the constructive-notice standard, the employer is liable for worker-on-worker harassment if "*any* 'agent' of [the] employer" knew or should have known of the harassment.[74]

Third, under *Gebser*, "the school . . . response must amount to 'deliberate indifference to discrimination'" to prove a Title IX violation.[75] But there is no "deliberate indifference" requirement for any Title VII claim. Rather, the *Faragher-Ellerth* affirmative defense for supervisor-on-worker harassment makes it much harder for employers to avoid liability than schools.[76] Similarly, for worker-on-worker harassment, an employer need only be "negligent in controlling working conditions" to be held liable—again, a far lower standard than "deliberate indifference."[77]

Fourth, to be unlawful under Title IX, student-on-student harassment under the *Davis* standard[78] "must be 'so severe, pervasive, *and* objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.'"[79] Title VII requires only that worker-on-worker harassment must be severe *or* pervasive.[80]

A potential fifth hurdle to add to Graves's list is damages. There are entire categories of damages clearly available under Title VII that may no longer be available under Title IX, depending on courts' application of *Cummings v. Premier Rehab Keller, P.L.L.C.*[81] In *Cummings*, the Supreme Court held that plaintiffs cannot recover emotional-distress damages in private actions under

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74. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 72 (1986) (emphasis added) (quoting 42 U.S.C. § 2000e (2018)).

75. Graves, *supra* note 68, at 141 (quoting Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1998)).

76. *See Faragher*, 524 U.S. at 807 ("The defense comprises two necessary elements: (a) that the employer exercised *reasonable care* to *prevent* and *correct promptly any* sexually harassing behavior, and (b) that the plaintiff employee *unreasonably* failed to take advantage of *any* preventive or corrective opportunities provided by the employer or to avoid harm otherwise." (emphases added)); *see also Ellerth*, 524 U.S. at 765 (describing the same standard and decided alongside *Faragher*).

77. *Vance*, 570 U.S. at 424.

78. Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 652 (1999) (holding that a school is liable in private litigation for student-on-student sexual harassment only where "the behavior is so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect").

79. Graves, *supra* note 68, at 142 (emphasis added) (quoting *Davis*, 526 U.S. at 650).

80. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986).

81. 596 U.S. 212 (2022).

the antidiscrimination provisions of the Rehabilitation Act and the Patient Protection and Affordable Care Act.[82] Some courts have begun to apply *Cummings* to other Spending Clause statutes, such as Title IX and Title VI.[83] Meanwhile, Title VII's language *explicitly* provides for emotional-distress damages,[84] even though it imposes caps on this and other categories of damages.[85]

Accordingly, if a court considers a plaintiff to be a student and *only* a student during all or part of her time at a school, she will not be able to take advantage of these Title VII protections, leaving the relevant Spending Clause statute (Title IX or Title VI) as her only remedy. This is exactly what happened to Huang at the district-court level: the judge denied her Title VII protections for the first three years of her Ph.D., reasoning that she was only a student and not an employee during that time—even though OSU exercised the requisite control over her work and provided her the requisite remuneration to satisfy the doctrinal test for employment.[86] As a result, the judge ruled that Huang could not claim that OSU's removal of her stipend satisfied the "adverse action" requirement of her Title VII quid pro quo claim because it occurred during this period, allowing him to grant summary judgment to OSU on that claim.[87] This distorted analysis hammers home the importance of ensuring that Title VII protections are properly extended to graduate student-employees.

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82. *Id.* at 218-22.

83. *E.g.*, Party v. Ariz. Bd. of Regents, No. CV-18-01623, 2022 WL 17459745, at *3 (D. Ariz. Dec. 6, 2022) (applying *Cummings* to deny emotional-distress damages and damages for reputational harm under Title IX); M.R. v. Burlington Area Sch. Dist., No. 21-CV-1284, 2023 WL 4826471, at *4 (E.D. Wis. July 27, 2023) (applying *Cummings* to deny emotional-distress damages under Title VI).

84. *See* 42 U.S.C. § 1981a(b)(3) (2018) (counting "emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses" among the "compensatory damages" available for Title VII violations).

85. *See id.* As a result of Title VII's inclusion of emotional-distress damages, rightful recognition of a graduate student's employment relationship with her school can have significant ramifications for available remedies, which may in turn affect plaintiffs' lawyers' willingness to take up her case. For instance, many plaintiffs' lawyers work on a contingency-fee basis, meaning that, rather than billing by the hour, their payment comes in the form of a fixed percentage (for example, one-third) of a client's recovery. *See* David A. Hyman, Bernard Black & Charles Silver, *The Economics of Plaintiff-Side Personal Injury Practice*, 2015 U. Ill. L. Rev. 1563, 1566. If the potential recovery is insufficiently high for their percentage to be worth their time, the lawyer may decline to take the case. *See id.* at 1594.

86. *See* Brief of Amici Curiae Workers' and Students' Rights Organizations in Support of Plaintiff-Appellant Meng Huang and Reversal, *supra* note 7, at 4-5, 21-26.

87. Huang v. Ohio State Univ., No. 19-cv-1976, 2022 WL 16715641, at *7-8 (S.D. Ohio Nov. 4, 2022), *rev'd*, 116 F.4th 541 (6th Cir. 2024).

Of course, Title VII does not necessarily beat Title IX on every front. For instance, Title VII requires that affected parties take action quickly, as the incident must be reported to EEOC within 180 days for purposes of administrative exhaustion, or 300 days if a state or local agency prohibits employment discrimination on the same basis.[88] After a Title VII complainant receives a right-to-sue letter from EEOC, they only have ninety days to sue.[89] By contrast, Title IX has no such administrative-exhaustion requirement, meaning that the 180-day requirement to file a complaint with the Department of Education Office of Civil Rights is not mandatory in the same way it is for Title VII claims.[90] While Title IX's statutes of limitations vary by state, they range from one to six years[91]—allowing for a much more flexible timeline.

One complicating factor in the comparison between Title VII and Title IX is the respective development and underdevelopment of each statute's doctrine. For instance, while the vicarious liability under Title VII detailed in Graves's first prong is admittedly limited to a narrow category of supervisors who have the power to take tangible employment actions against the plaintiff,[92] the definition of "appropriate person" under Title IX is arguably even narrower and, perhaps worse, unclear.[93] Additionally, but-for causation is the standard for Ti-

88. 42 U.S.C. § 2000e-5(e)(1) (2018); *see also Time Limits for Filing a Charge*, U.S. Equal Emp. Opportunity Comm'n, https://www.eeoc.gov/time-limits-filing-charge [https://perma.cc/5UUH-CZDP] (outlining the 180- and 300-day deadlines for filing charges of discrimination).

89. 42 U.S.C. § 2000e-5(f)(1) (2018); *see also Filing a Lawsuit*, U.S. Equal Emp. Opportunity Comm'n, https://www.eeoc.gov/filing-lawsuit [https://perma.cc/Z4TN-HT3Z] ("Once you receive a Notice of Right to Sue, you must file your lawsuit within 90 days.").

90. Off. for C.R., *Complaint Processing Procedures*, U.S. Dep't of Educ. 1 (July 2022), https://www.ed.gov/media/document/complaints-howpdf [https://perma.cc/T3HP-RRCC].

91. *See* Nicole Wiitala, *Statute of Limitations Under Title IX*, Sanford Heisler Sharp McKnight (May 1, 2020), https://www.sanfordheisler.com/blog/2020/05/statute-of-limitations-under-title-ix [https://perma.cc/3J5L-V88J]; *see also Help for Students Facing Sex Discrimination or Harassment at School*, Nat'l Women's L. Ctr., https://nwlc.org/legal-assistance/help-for-students-facing-sex-discrimination-or-harassment-at-school [https://perma.cc/2LTY-JV7Z] ("In general, the deadline for filing a Title IX lawsuit ranges from 1 to 6 years, depending on your state.").

92. Vance v. Ball State Univ., 570 U.S. 421, 424 (2013) ("[A]n employee is a 'supervisor' for purposes of vicarious liability under Title VII [only] if he or she is empowered by the employer to take tangible employment actions against the victim.").

93. *See* Jared P. Cole & Christine J. Back, Cong. Rsch. Serv., R45685, Title IX and Sexual Harassment: Private Rights of Action, Administrative Enforcement, and Proposed Regulations 12-15 (2019) (detailing the complex and often-conflicting definitions of "appropriate person" and noting that "even when there arguably is such evidence" of an individual's "responsibilities" to receive allegations of harassment and "ability

tle VII claims of retaliation,[94] and motivating-factor causation is the standard for Title VII claims of discrimination[95]—but circuits are split on whether motivating-factor causation is available at all under Title IX. This circuit split preserves the possibility of a lower burden of proof for Title IX retaliation claims than for Title VII ones but does not guarantee it. For instance, the Fourth Circuit has held that motivating-factor causation is not available at all under Title IX,[96] but the Second and Third Circuits have reached the opposite conclusion.[97] Accordingly, even though Title VII is by no means a golden ticket for plaintiffs—given its administrative-exhaustion requirements, short statutes of limitations, and high standard for retaliation claims—it certainly edges out Title IX on a number of fronts, including, perhaps most prominently, the clarity of its doctrine.

II. GUARANTEEING TITLE VII PROTECTIONS: HOW COURTS MISAPPLY RELEVANT TESTS

Title VII provides a litany of benefits to plaintiffs that Title IX does not, such that relegating them only to Title IX claims may deprive them of more plaintiff-friendly burdens of proof and remedies that better vindicate civil-rights promises. Yet courts, such as the district court in Huang's case, have de-

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to correct or halt the misconduct," "it may not be sufficient to render that individual an 'appropriate person'").

94. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 360 (2013) ("Title VII retaliation claims must be proved according to traditional principles of but-for causation, not the lessened causation test stated in § 2000e–2(m). This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer.").

95. *Id.* at 343 ("An employee who alleges status-based discrimination under Title VII need not show that the causal link between injury and wrong is so close that the injury would not have occurred but for the act. So-called but-for causation is not the test. It suffices instead to show that the motive to discriminate was one of the employer's motives, even if the employer also had other, lawful motives that were causative in the employer's decision.").

96. Sheppard v. Visitors of Va. State Univ., 993 F.3d 230, 237 (4th Cir. 2021) ("'[O]n the basis of sex' requires 'but-for' causation in Title IX claims alleging discriminatory school disciplinary proceedings.").

97. Doe v. Columbia Univ., 831 F.3d 46, 53 (2d Cir. 2016) ("Because Title IX prohibits . . . subjecting a person to discrimination on account of sex, it is understood to 'bar[] the imposition of university discipline where gender is a motivating factor in the decision to discipline.'" (alteration in original) (quoting Yusuf v. Vassar Coll., 35 F.3d 709, 714 (2d Cir. 1994))); Doe v. Univ. of the Scis., 961 F.3d 203, 209 (3d Cir. 2020) (citing *Doe v. Columbia University* for the principle that universities cannot discipline students when sex "is a motivating factor in the decision to discipline" (quoting *Doe*, 831 F.3d at 53)).

nied student-employees the ability to access these benefits by presuming that graduate students are primarily students, not employees. This dichotomy is a false one. The well-established tests for whether a plaintiff is an "employee" for purposes of employment laws, such as Title VII, do not contemplate whether these plaintiffs have an additional relationship with the purported employer, such as an educational one. Similarly, they expressly refuse to defer to the purported employer's classification of these students as "students" and "students" only. A principle to the contrary would allow any actor to avoid legal liability through selective labeling. This Part thus introduces this Note's first prescriptive solution, which is an immediate remedy that courts can implement. Courts must be more rigorous about applying these standard doctrinal tests to determine whether an employment relationship exists—known as the common-law agency and economic-realities tests—to properly extend the protections of employment law to student-employee plaintiffs.

A. The Common-Law Agency and Economic-Realities Tests

To determine whether an alleged employee is an employee for purposes of Title VII, courts use either the common-law agency test or the economic-realities test. As the Sixth Circuit has observed, "The substantive differences between the two tests are minimal."[98]

First, the common-law agency test pertains to "the conventional master-servant relationship as understood by common-law agency doctrine."[99] This is the test purportedly applied by the district court in Huang's case: "The fundamental elements of a master-servant relationship under common-law agency doctrine are the rendering of service (work) for the employer, under the control of the employer, in exchange for compensation."[100] This test assesses several factors, including

> the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties;

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98. Shah v. Deaconess Hosp., 355 F.3d 496, 499 (6th Cir. 2004) (citing Johnson v. City of Saline, 151 F.3d 564, 568 (6th Cir. 1998); Simpson v. Ernst & Young, 100 F.3d 436, 442-43 (6th Cir. 1996)); *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).

99. Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 322-23 (1992) (quoting Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 740 (1989)) (describing Congress's intent for this test to apply for Title VII purposes).

100. Huang v. Ohio State Univ., No. 19-cv-1976, 2022 WL 16715641, at *6 (S.D. Ohio Nov. 4, 2022), *rev'd*, 116 F.4th 541 (6th Cir. 2024).

> whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.[101]

Second, the economic-realities test involves analysis of at least five factors:

> (1) [T]he extent of the employer's control and supervision over the worker, including directions on scheduling and performance of work, (2) the kind of occupation and nature of skill required, including whether skills are obtained in the workplace, (3) responsibility for the costs of operation, such as equipment, supplies, fees, licenses, workplace, and maintenance of operations, (4) method and form of payment and benefits, and (5) length of job commitment and/or expectations.[102]

Taken together, these tests generally examine the alleged employer's control over the worker, whether the worker's duties and skills pertain to the alleged employer's general business, whether the alleged worker utilizes the employer's materials and facilities, and the existence and method of payment to the worker by the alleged employer.

Of all these factors, "the employer's right to control is the most important when determining whether an individual is an employee or an independent

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101. *Cmty for Creative Non-Violence*, 490 U.S. at 751-52 (footnotes omitted).

102. *Knight*, 950 F.2d at 378-79 (quoting Knight v. United Farm Bureau Mut. Ins. Co., 742 F. Supp. 518, 521 (N.D. Ind. 1990)) (articulating the five-factor test upon which the district court relied). Some courts have preferred to use an eleven-factor test instead. *See, e.g.*, Spirides v. Reinhardt, 613 F.2d 826, 832 (D.C. Cir. 1979) (listing the factors as follows: "(1) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision; (2) the skill required in the particular occupation; (3) whether the 'employer' or the individual in question furnishes the equipment used and the place of work; (4) the length of time during which the individual has worked; (5) the method of payment, whether by time or by the job; (6) the manner in which the work relationship is terminated; i.e., by one or both parties, with or without notice and explanation; (7) whether annual leave is afforded; (8) whether the work is an integral part of the business of the 'employer'; (9) whether the worker accumulates retirement benefits; (10) whether the 'employer' pays social security taxes; and (11) the intention of the parties"); Broussard v. L.H. Bossier, Inc., 789 F.2d 1158, 1160 (5th Cir. 1986) (reiterating the eleven factors that *Spirides* set out).

contractor."[103] However, some circuits have also treated remuneration as a necessary condition to satisfy either test[104]:

> Where no financial benefit is obtained by the purported employee from the employer, no "plausible" employment relationship of any sort can be said to exist because although "compensation by the putative employer to the putative employee in exchange for his services is not a sufficient condition, . . . it is an essential condition to the existence of an employer-employee relationship."[105]

Others have taken the opposite approach.[106] In general, however, the alleged employer's control over the worker and the method and nature of compensation are often key indicators of whether an employment relationship exists for the purpose of employment laws' application.

B. Proper Application of the Relevant Tests

Just as important as properly analyzing the factors within each of these tests is properly excluding factors that have no place within this analysis. In order for courts to faithfully and rigorously apply these tests to student plaintiffs alleging an employment relationship with the school, they must be careful to avoid incorporating elements that are explicitly excluded: namely, deferring to the way schools classify these plaintiffs, and assuming—as the district court did in Huang's case, for instance[107]—that they can be only students or only employees, but not both. No matter the slight ways in which the common-law agency and economic-realities tests depart from each other (or the slight ways

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103. *Knight*, 950 F.2d at 378 (citing *Broussard*, 789 F.2d at 1160; *Spirides*, 613 F.2d at 831).

104. *See, e.g.*, O'Connor v. Davis, 126 F.3d 112, 116 (2d Cir. 1997) ("[T]he preliminary question of remuneration is dispositive in this case."); McGuinness v. Univ. of N.M. Sch. of Med., 170 F.3d 974, 979 (10th Cir. 1998) (finding that a former medical-school student was not an employee for purposes of the Americans with Disabilities Act because he did not receive remuneration (citing *O'Connor*, 126 F.3d at 116)); Jacob-Mua v. Veneman, 289 F.3d 517, 521 (8th Cir. 2002) (finding that a volunteer graduate-student researcher was not an employee because "the research she obtained for her dissertation was [not sufficient] compensation").

105. *O'Connor*, 126 F.3d at 115-16 (alteration in original) (quoting Graves v. Women's Pro. Rodeo Ass'n, 907 F.2d 71, 73 (8th Cir. 1990)).

106. *See, e.g.*, Stewart v. Morgan State Univ., 46 F. Supp. 3d 590, 595 (D. Md. 2014) ("The Fourth Circuit has held that receiving a paycheck is not a condition precedent to being deemed an employee under Title VII." (citing Haavistola v. Cmty. Fire Co. of Rising Sun, 6 F.3d 211, 221-22 (4th Cir. 1993))), *aff'd*, 606 F. App'x 48 (4th Cir. 2015).

107. Huang v. Ohio State Univ., No. 19-cv-1976, 2022 WL 16715641, at *5-6 (S.D. Ohio Nov. 4, 2022), *rev'd*, 116 F.4th 541 (6th Cir. 2024).

in which versions of each depart from each other), no formulation of either test demands deference to labels or false dichotomies.

1. Resisting Deference to Schools

Notably, these tests are not governed by the *name* used by the alleged employer to refer to the alleged employee's position. Because courts must apply these doctrinal tests on a case-by-case basis to determine whether a worker is an employee, they have soundly rejected deference to an employer's own classifications. This principle is well established in employment law and, more generally, in the law of agency: "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."[108] In broader terms, "how 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."[109]

For instance, employers cannot avoid liability simply by labeling their employees as "independent contractors" or "partners" when the above-described tests reveal employment relationships instead.[110] In fact, courts have repeatedly rejected employers' attempts to deny employment-law protections to members of "gig econom[ies]" through independent-contractor misclassifications.[111] Similarly, "labeling as a partnership an enterprise that does not have the structure, the character, of the traditional partnership will not immunize it from" Ti-

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108. RESTATEMENT OF EMP. L. § 1.01 cmt. g (AM. L. INST. 2015); *cf.* 26 C.F.R. § 31.3121(d)-1(a)(3) (2024) ("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.").

109. RESTATEMENT (THIRD) OF AGENCY § 1.02 cmt. a (AM. L. INST. 2006).

110. *See* Wage & Hour Div., *Myths About Misclassification*, U.S. DEP'T LABOR, https://www.dol.gov/agencies/whd/flsa/misclassification/myths/detail [https://perma.cc/63VG-A2Q3] ("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.").

111. *See, e.g.*, Acosta v. Off Duty Police Servs., 915 F.3d 1050, 1062 (6th Cir. 2019) (holding that part-time, self-scheduled security officers were employees entitled to overtime pay under the economic-realities test, not independent contractors as the defendant claimed); Vizcaino v. Microsoft Corp., 120 F.3d 1006, 1015 (9th Cir. 1997) (overturning a company's decision to exclude from its benefit plans certain temporary workers whom it labeled "independent contractors"); People v. Uber Techs., Inc., 270 Cal. Rptr. 3d 290, 299-300 (Ct. App. 2020) (restraining Uber and Lyft from misclassifying their drivers as independent contractors and thus depriving them of legal protections for employees).

tle VII.[112] Any other position would be logically untenable: a publicly traded corporation could not escape its fiduciary duties to shareholders by referring to them instead as "friends," just as a lawyer could not violate attorney-client privilege with impunity by referring to his client as a "stranger."

Deference to the way schools choose to label their graduate students (namely, as "students"), like that exhibited by the district court in Huang's case,[113] runs afoul of these well-established principles. Such deference serves as an end run around the tests that courts must apply and thus risks robbing student-employees of the employment-law protections they deserve. Schools have no incentive to refer to their graduate students in exact accordance with relevant employment law; in fact, they likely have incentives to the contrary, since Title VII offers more protections than Title IX.[114] Accordingly, it is essential that courts faithfully apply these tests, rather than allowing schools to avoid Title VII liability through selective labeling.

2. *Resisting the False Dichotomy*

Courts must also resist the urge to believe that a given plaintiff can be *either* a student or an employee at a particular time, but not both. Graduate student-employees often carry a workload that necessarily intermixes their academic responsibilities with their job duties. As a result, their obligations can be plausibly framed as exclusively educational by their schools when they in fact pertain to employment as well—underscoring the importance of thorough application of these tests rather than eyes-wide-shut deference. As the National Labor Relations Board has recognized, graduate students frequently undertake roles, such as research and teaching assistantships, that give rise to employment rela-

112. *See* Equal Emp. Opportunity Comm'n v. Sidley Austin Brown & Wood, 315 F.3d 696, 706 (7th Cir. 2002) ("[A] firm could not, by affixing the label of 'partner' to someone who was functionally an employee, avoid federal antidiscrimination law." (citing Wells v. Clackamas Gastroenterology Assocs., P.C., 271 F.3d 903, 905 (9th Cir. 2001))); *cf.* RESTATEMENT (THIRD) OF THE L. GOVERNING L. § 9 cmt. e (AM. L. INST. 2000) ("[C]ertain classifications of 'partner' (sometimes referred to as nonequity partners) may have no managerial power or participation in firm profits and thus be similar . . . to senior employees.").

113. *See* Huang v. Ohio State Univ., No. 19-cv-1976, 2022 WL 16715641, at *7 n.2 (S.D. Ohio Nov. 4, 2022) (deferring to OSU's classification of the plaintiff's fellowship stipend as akin to a scholarship based on the university's graduate handbook), *rev'd*, 116 F.4th 541 (6th Cir. 2024).

114. *See supra* Section I.C.

tionships.[115] Naturally, graduate students are typically employed by the school in their chosen field, such as by conducting research for a professor who also serves as their dissertation advisor on the same topic. Faithful application of the common-law agency and economic-realities tests thus requires courts not to dismiss something as non-employment-related simply because it is also plausibly academic, but instead to assess each factor of the test on its own terms.

This overlap between academic and professional obligations is particularly pronounced for graduate students in STEM—meaning it is especially important that courts resist the urge to artificially bifurcate these students' obligations into academic or job-related categories. As in Huang's case, the work that STEM graduate students perform for their advisors frequently aligns with both the school's preexisting research plans *and* their own dissertations or theses. For instance, 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 sub-projects, part of the larger research program), academic presentations and publications."[116] For "laboratory-based disciplines" in general, "doctoral education is shaped by faculty principal investigators (PIs), the research laboratories (labs) they lead, and the students who learn under the PIs' tutelage within their labs," since "a student cannot select a PI without selecting that PI's lab" and "the PI must agree to [both] become the student's doctoral advisor and accept the student as a lab member."[117]

Accordingly, that a given task is in service of a student's education as well as their job duties does not foreclose a finding of an employment relationship. For instance, in one Eleventh Circuit case regarding a graduate student advancing sex-discrimination claims, although "much of [the plaintiff's] work in [the advisor's] lab was done for the purpose of satisfying the lab-work, publication, and dissertation requirements of her graduate program," the court still concluded that she "was an employee for Title VII purposes" based on the eco-

115. *See* Trs. of Colum. Univ. in the City of N.Y., 364 N.L.R.B. 1080, 1085 (2016) ("[T]he payment of compensation, in conjunction with the employer's control, suffices to establish an employment relationship . . . .").

116. Chris MacDonald & Bryn Williams-Jones, *Supervisor-Student Relations: Examining the Spectrum of Conflicts of Interest in Bioscience Laboratories*, 16 Acct. Res. 106, 109 (2009).

117. Michelle A. Maher, Annie M. Wofford, Josipa Roska & David F. Feldon, *Finding a Fit: Biological Science Doctoral Students' Selection of a Principal Investigator and Research Laboratory*, 19 CBE—Life Scis. Educ. art. no. 31, at 1 (2020); *see also* Christie L. Sampson, Brett M. Frye & Michael A. Carlo, *A Graduate Student's Worth*, 28 Current Bio. Mag. R850, R850 (2018) ("[T]he execution of research plans would be difficult without the graduate student . . . workforce.").

nomic-realities test.[118] The nature of this plaintiff's responsibilities, like Huang's, is representative of many STEM graduate students' responsibilities: 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. Similarly, the First, Second, and Third Circuits have "ha[d] no difficulty extending the Title VII standard to discriminatory treatment by a supervisor in th[e] mixed employment-training context" of a medical residency program.[119]

On a similar note, these tests also do not consider whether the alleged employee and employer have a separate, additional relationship. Nothing in these tests 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')."[120] As the National Labor Relations Board has explained, "[C]overage [of workers' rights laws] is permitted by virtue of an employment relationship; it is not foreclosed by the existence of some other, additional relationship that the [law] does not reach."[121] Any other rule would lead to absurd results. 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. That is not how the law works.

Of course, sometimes a graduate student is just a student. But in the familiar scenario where a graduate student both learns from and works for her school, she may be both a student and an employee. Graduate students should not be deprived of their rightful employment-law protections under Title VII simply because schools layer their job duties onto their existing academic

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118. Cuddeback v. Fla. Bd. of Educ., 381 F.3d 1230, 1234-35 (11th Cir. 2004).

119. Lipsett v. Univ. of P.R., 864 F.2d 881, 897 (1st Cir. 1988); *see also* Ezekwo v. N.Y.C. Health & Hosps. Corp., 940 F.2d 775, 785 (2d Cir. 1991) ("While a medical residency program is largely an academic undertaking, it also is an employment relationship."); Doe v. Mercy Cath. Med. Ctr., 850 F.3d 545, 559-60 (3d Cir. 2017) ("Doe was [defendant's] 'employee' notwithstanding any other status the law may or may not have reposed on her (for example, a 'student').").

120. *Mercy Cath. Med. Ctr.*, 850 F.3d at 559; *see* Ivan v. Kent State Univ., 863 F. Supp. 581, 585 (N.D. Ohio 1994) ("The fact that Ivan was a student does not negate her employee status."), *aff'd per curiam*, 92 F.3d 1185 (6th Cir. 1996); *see also, e.g.*, Guy v. Casal Inst. of Nev., LLC, No. 13-CV-02263, 2016 WL 4479537, at *4 (D. Nev. Aug. 23, 2016) ("[T]he Court does not find that Plaintiffs cannot as a matter of law, establish that they were employees under the FLSA merely because they were students enrolled at [the defendant institution].").

121. Trs. of Colum. Univ. in the City of N.Y., 364 N.L.R.B. 1080, 1080 (2016).

commitments. Failure to apply these tests rigorously thus leaves room for schools to argue that any educational benefit operates to the exclusion of an employer-employee relationship, when the reality is that education and employment relationships can, and often do, coexist.

C. Misapplication of the Relevant Tests

Courts have routinely failed to apply these tests properly, both factually—that is, by failing to properly apply these tests to the facts—and legally—that is, by failing to apply the right tests in the first place. Of course, application of these tests is necessarily fact-intensive and case-specific, meaning that not all cases denying Title VII claims advanced by student-employees have necessarily come out the wrong way. Sometimes, the facts are just not there. But when courts have found student-employees not to be entitled to Title VII protections, they have overwhelmingly ignored the legal implications of key facts, considered facts outside the realm of what is proper under these tests, or—even more concerningly—failed to recognize that the tests are applicable at all.

1. Errors in Factual Determinations

Huang's case epitomizes the harms that accrue when courts fail to apply these tests properly and thoroughly to the facts at hand. Although OSU exerted significant control over Huang's work from 2014 to 2017 and provided her with remuneration for her work,[122] the district court ignored key evidence by misapplying the common-law agency test. For instance, the court insisted that Huang "was in complete control of how to conduct her academic studies" and was "not obligated to perform any work or service for OSU,"[123] in contravention of myriad evidence of the opposite conclusion: OSU specified her dissertation and research topic, assigned her specific projects and tasks, and managed her work down to requiring attendance at specific meetings.[124] Additionally, the court simply accepted OSU's characterization of Huang's 2014-2017 posi-

122. *See* Brief of Amici Curiae Workers' and Students' Rights Organizations in Support of Plaintiff-Appellant Meng Huang and Reversal, *supra* note 7, at 22-26.

123. Huang v. Ohio State Univ., No. 19-cv-1976, 2022 WL 16715641, at *6 (S.D. Ohio Nov. 4, 2022), *rev'd*, 116 F.4th 541 (6th Cir. 2024); *see also* Brief of Amici Curiae Workers' and Students' Rights Organizations in Support of Plaintiff-Appellant Meng Huang and Reversal, *supra* note 7, at 27-28 (describing how the district court's conclusion on this front was based solely on OSU's characterization of Huang's stipend and an affidavit from an OSU official).

124. *See* Brief of Amici Curiae Workers' and Students' Rights Organizations in Support of Plaintiff-Appellant Meng Huang and Reversal, *supra* note 7, at 22-27.

tion as that of a student (and *only* a student), rather than both a student and employee—including by deferring to OSU's characterization of her remuneration as "in the same category as an academic scholarship."[125] This flies in the face of not only the wealth of precedent discussing how to assess payment in the context of these tests, but also OSU's own admission that her stipend was *exactly the same* as the stipend she would have received in a role OSU admitted was that of an employee.[126] Relying solely on out-of-circuit district-court cases, the district court concluded that "education, not money, was at the core of th[e] relationship" between Huang and OSU.[127] But this conclusion was premised on a false dichotomy: Huang was both a student *and* an employee, which the court would have found had it properly applied the common-law agency test it claimed to use.

Huang's district-court judge is not alone in committing this error. For instance, a 2013 decision from the Southern District of Ohio is replete with many of the same false assumptions, despite its purported application of the economic-realities test. First, the judge there—like the judge in Huang's case—framed the remuneration the plaintiff received as "a scholarship[] that all Program students received" such that he "was not an employee of the University."[128] In making this determination, the judge also deferred to phrasing from the university's "Program Handbook"[129] rather than systematically applying the economic-realities test's analysis of "method and form of payment," which pays no heed to the terms used by the alleged discriminator to classify the remuneration. Second, and again like Huang's judge, this judge held that "the dominant purpose of Plaintiff's relationship with the University was educational," such that "Plaintiff should not be considered an employee under Title VII and therefore, his claims under Title VII against the University should fail as a matter of law."[130] Just like the judge in Huang's case, this judge failed to consider that graduate students can be *both* employees *and* students. To consider them only

125. *Huang*, 2022 WL 16715641, at *5.

126. *See* Brief of Amici Curiae Workers' and Students' Rights Organizations in Support of Plaintiff-Appellant Meng Huang and Reversal, *supra* note 7, at 27.

127. *Huang*, 2022 WL 16715641, at *5.

128. Al-Maqablh v. Univ. of Cincinnati Coll. of Med., No. 11-cv-531, 2013 WL 5944073, at *9 (S.D. Ohio Nov. 5, 2013), *report and recommendation adopted*, No. 11-cv-531, 2014 WL 2048126 (S.D. Ohio May 19, 2014), *aff'd*, No. 14-4113, 2015 WL 13928995 (6th Cir. Dec. 10, 2015); *see also id.* at *10 ("Plaintiff has failed to show that [what] this pay stub was based upon is employment with the University and not a portion of his stipend award.").

129. *Id.* at *9.

130. *Id.* at *9-10.

the latter is to lock them out entirely from Title VII despite their satisfaction of the relevant tests.

Other analysis on this front is frequently thin and lacking. In a recent decision from the Middle District of Tennessee, the court purported to apply the economic-realities test, but instead considered evidence entirely outside the scope of the test. The court pointed out that "the mass emails Plaintiff received were addressing recipients as 'graduate students,' 'VUSE Students,' and 'Students,'" and that the adverse action alleged in the plaintiff's retaliation claim—the cancellation of her ability to register in the spring—was solely educational.[131] In doing so, the court improperly deferred to the university's characterization of the group to which the plaintiff belonged based on mass emails, contravening the longstanding principles of employment law and the law of agency described above. And the court ran afoul of Supreme Court precedent holding that an adverse educational action may give rise to retaliation under employment law.[132] The court also did not look to the university's control over the plaintiff's work, the nature of the plaintiff's occupation and skills, whether the university bore responsibility for costs of the plaintiff's work, remuneration for the plaintiff's work, or the length of the plaintiff's commitment and the extent of her expectations—all elements enumerated under even the less stringent version of the economic-realities test.[133]

2. *Errors in Legal Determinations*

These failures of courts to identify the crucial facts are worrisome, but their failures to identify the relevant *law* are downright dangerous. Indeed, some courts have even gone so far as to decline to invoke either of these tests at all,[134]

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131. Taylor v. Vanderbilt Univ., No. 22-cv-00465, 2023 WL 2398761, at *7 (M.D. Tenn. Jan. 23, 2023), *report and recommendation adopted*, No. 22-cv-00465, 2023 WL 2390678 (M.D. Tenn. Mar. 7, 2023).

132. *See* Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 57 (2006) (holding that retaliation outside the workplace is still actionable under Title VII if the protected activity pertained to the employment relationship).

133. *See supra* Section II.A.

134. *See, e.g.*, Bakhtiari v. Lutz, 507 F.3d 1132, 1137 (8th Cir. 2007) (failing to invoke either the common-law agency test or the economic-realities test before determining the alleged discrimination was not related to employment); Seaton v. Univ. of Pa., No. CIV. A. 01-2037, 2001 WL 1526282, at *8-9 (E.D. Pa. Nov. 30, 2001) (same); Pollack v. Rice Univ., No. H-79-1539, 1982 WL 296, at *1 (S.D. Tex. Mar. 29, 1982) (same); Stilley v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ., 968 F. Supp. 252, 260-61 (W.D. Pa. 1996) (same); Diaz v. City Univ. of N.Y., No. 13 Cv 2038, 2014 WL 10417871, at *16-17 (S.D.N.Y.

seemingly on the backward assumption that the allegations at hand could only ever correspond to education discrimination. Of course, such an assumption can only be true if the court has categorically ruled out the existence and applicability of the alleged employment relationship—which can only be done through application of the common-law agency and economic-realities tests. These decisions thus represent perhaps the worst version of this failure: rather than failing to apply the tests correctly, they failed to apply them at all.

However, courts properly applying these tests have repeatedly found graduate students to be employees and have properly extended them Title VII coverage.[135] These findings demonstrate that cases like Huang's at the district-court level represent doctrinal failures rather than doctrinal rules.[136] When courts faithfully apply these tests, they extend to student-employees the Title VII protections that they are due.

Huang's case itself is an instructive example. On appeal, the Sixth Circuit reversed the district court, explaining that "Huang raised a material dispute of fact as to whether she was an 'employee' of OSU for Title VII purposes, even though she was also a student," because "[t]he two roles are not mutually exclusive, as the district court mistakenly held."[137] Accordingly, it held that "Huang's sexual harassment claim under Title VII must go to a jury"[138]—finally allowing her to receive the analysis on the merits.

The Sixth Circuit executed its correction of the district court through a much more rigorous and faithful application of the common-law agency test.[139] In examining "the nature of Huang's work, the degree of control that OSU exerted in those endeavors, and Huang's compensation," it found that Huang's recruitment for and performance of a "preexisting research

Nov. 10, 2014) (same), *report and recommendation adopted in part*, No. 13 Civ.2038, 2015 WL 5577905 (S.D.N.Y. Sept. 22, 2015).

135. *See, e.g.*, Ruiz v. Trs. of Purdue Univ., No. 06-CV-130, 2008 WL 833125, at *8, *11 (N.D. Ind. Feb. 20, 2008) (holding that a graduate student was an employee under the economic-realities test), *report and recommendation adopted*, Civil Action No. 06-CV-130, 2008 WL 833130 (N.D. Ind. Mar. 26, 2008); Consolmagno v. Hosp. of Saint Raphael Sch. of Nurse Anesthesia, 72 F. Supp. 3d 367, 379 (D. Conn. 2014) (applying the common-law agency test and holding the same); *see also* Trs. of Colum. Univ. in the City of N.Y., 364 N.L.R.B. 1080, 1080-81 (2016) (explaining that "students who perform services at a university in connection with their studies" may be that university's employees, including as "student assistants . . . engaged in research funded by external grants").

136. *See* Brief of Amici Curiae Workers' and Students' Rights Organizations in Support of Plaintiff-Appellant Meng Huang and Reversal, *supra* note 7, at 9-11.

137. Huang v. Ohio State Univ., 116 F.4th 541, 546 (6th Cir. 2024).

138. *Id.*

139. *Id.* at 555-60.

workstream[]" was "part of . . . OSU's 'regular business'" and redounded to "significant economic benefits [for OSU]."[140] It further concluded that a reasonable jury could conclude that her supervisor-professor "controlled her work along various dimensions," including "her dissertation topic," "when and where she worked," "her vacation schedule," and "where they met."[141] Finally, in terms of her compensation, the Sixth Circuit held that the fact that "Huang's funding was tied to her research . . . , not just her enrollment in the Ph.D. program at OSU, suggest[ed] an employment relationship."[142] Rather than accepting OSU's unsupported assertions that her compensation was not employment-related, the court emphasized that her supervisor-professor "used his control over Huang's tuition, stipend, bonus, visa, and career success to de facto set the terms and conditions of her work," including by threatening termination if she did not comply.[143] "Having determined that Huang could be considered an employee under Title VII," the Sixth Circuit proceeded to "evaluate whether her sexual harassment claim should survive [defendant's motion for] summary judgment" and concluded that it should.[144]

Similarly, in *Cuddeback v. Florida Board of Education*, the Eleventh Circuit held that the plaintiff, a STEM graduate student, was an employee under the economic-realities test based on the facts that

> (1) she received a stipend and benefits for her work; (2) she received sick and annual leave; (3) a comprehensive collective bargaining agreement governed her employment relationship with the University; (4) the University provided the equipment and training; and (5) the decision not to renew her appointment was based on employment reasons, such as attendance and communication problems, rather than academic reasons.[145]

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140. *Id.* at 558 (quoting Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 324 (1992)).

141. *Id.* at 558-59; *see also id.* at 559 ("Because Rizzoni dictated Huang's research topic based on the university's needs and set the times and location of her work, a jury could conclude that Rizzoni exercised the type of control over Huang that made her an OSU employee.").

142. *Id.* at 559.

143. *Id.* (noting that the Sixth Circuit had previously held "that the 'ability to terminate a non-compliant employee' and thus cut off 'the source of income upon which [an employee] depends' is an employer's 'greatest source of control'" and finding that "Rizzoni—and by extension OSU—had that power over Huang" (alteration in original) (citation omitted) (quoting Marie v. Am. Red Cross, 771 F.3d 344, 357-58 (6th Cir. 2014))).

144. *Id.* at 560.

145. 381 F.3d 1230, 1234 (11th Cir. 2004).

The Eleventh Circuit explicitly rejected the argument that the academic benefits of her work rendered her solely a student.[146] The Sixth Circuit had previously affirmed a similar holding based upon similar reasoning, where the district court stated: "The fact that [the plaintiff] was a student does not negate her employee status."[147] Rather, as the district court explained, "[t]he totality of the circumstances of [the plaintiff's] graduate assistantship" may "demonstrate[] she was an employee under the terms of Title VII."[148] In addition to *explicitly* recognizing employment relationships between graduate students and their universities, courts have also *implicitly* done so by allowing their employment-law claims to proceed.[149] This approach "necessarily implies that, because [graduate students] are entitled to sue under Title VII, they must also be considered employees under Title VII."[150]

Medical residents are the paradigmatic example here, given their coterminous education and employment relationships with their educational institutions.[151] But courts have not categorized medical residents as *solely* employees. Rather, after applying the tests above, courts have recognized that a medical

146. *Id.* at 1234-35 (noting that while "much of [the plaintiff's] work in Dr. Wang's lab was done for the purpose of satisfying the lab-work, publication, and dissertation requirements of her graduate program," "the economic realities of this particular situation lead us to conclude that . . . [the plaintiff] was an employee for Title VII purposes").

147. Ivan v. Kent State Univ., 863 F. Supp. 581, 585 (N.D. Ohio 1994), *aff'd per curiam*, 92 F.3d 1185, 1996 WL 422496 (6th Cir. 1996) (unpublished table decision). The appellate decision itself contained no additional language on this point.

148. *Id.* at 586; *see also id.* (finding the plaintiff was an employee for the purposes of Title VII under the economic-realities test).

149. *See, e.g.*, Gollas v. Univ. of Tex. Health Sci. Ctr. at Hous., 425 F. App'x 318, 320 (5th Cir. 2011) (analyzing a medical resident's Title VII claim as if she were an employee); Zaklama v. Mount Sinai Med. Ctr., 842 F.2d 291, 293 (11th Cir. 1988) (same); Brewer v. Bd. of Trs. of the Univ. of Ill., 407 F. Supp. 2d 946, 963-70 (C.D. Ill. 2005) (analyzing a graduate-student research assistant's Title VII claim as if he were an employee); *Ivan*, 92 F.3d 1185, 1996 WL 422496, at *3 (affirming a district-court Title VII decision on the merits where the district court recognized that a graduate student was an employee). For why medical residents are both students and employees, see *infra* notes 151-153 and accompanying text.

150. Latif v. Univ. of Tex. Sw. Med. Ctr., 834 F. Supp. 2d 518, 525 (N.D. Tex. 2011) (referring to *Gollas*).

151. *See, e.g.*, Doe v. Mercy Cath. Med. Ctr., 850 F.3d 545, 559 (3d Cir. 2017) (finding that a medical resident enrolled in graduate medical education was an employee under the common-law agency test); *Latif*, 834 F. Supp. 2d at 526 ("[M]edical residents are employees for the purpose of suit under Title VII."); Mayo Found. for Med. Educ. & Rsch. v. United States, 562 U.S. 44, 60 (2011) (finding that medical residents are employees for purposes of a Treasury Department tax regulation); *cf.* Trs. of Colum. Univ. in the City of N.Y., 364 N.L.R.B. 1080, 1081-82, 1090 (2016) (looking to precedent concerning medical residents' status as employees to determine the employment status of graduate students).

residency program is a "mixed employment-training context" in which a medical resident is "both an employee *and* a student"—not one or the other.[152] After all, "work-related activities are the foundation of resident learning."[153] There is no tension, then, between a resident's simultaneous roles as student and worker, just as there is no doctrinal tension between a plaintiff's simultaneous roles as student and employee. A court must do its job to determine whether the latter role exists in addition to the former.

III. GUARANTEEING TITLE IX PROTECTIONS: ADDRESSING THE CLEAVING PROBLEM

The previous Part presented the argument for why courts must methodically and faithfully apply the common-law agency and economic-realities tests to determine if student-employees are employees for purposes of Title VII protections, including and especially because Title VII provides greater protections than Title IX. But that prescriptive solution is not this Note's only one, since Title VII, as it currently stands, cannot address the full range of discrimination and harassment to which student-employees are subjected. Title VII, and the host of benefits it provides above and beyond Title IX, is most helpful for student-employees if their employment relationship with their school includes the entirety of the discriminatory actions they wish to challenge. This is often the case for graduate students (especially medical residents and STEM graduate students) like Huang, whose studies and job duties have so much overlap that they are often functionally coterminous,[154] but it is unlikely to be the case for many other student-employees. Consider the undergraduate who works part-time for the university's bartending service, or the law student who serves as a professor's research assistant without taking that professor's classes (both posi-

152. 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) ("While a medical residency program is largely an academic undertaking, it also is an employment relationship."); Castrillon v. Saint Vincent Hosp. & Health Care Ctr., Inc., 51 F. Supp. 3d 828, 843 (S.D. Ind. 2014) ("[A] medical resident is both an employee and a student."); *Mercy Cath. Med. Ctr.*, 850 F.3d at 556-57 (explaining that the residential program was educational in nature, but the plaintiff was still an employee).

153. P.W. Teunissen, F. Scheele, A.J.J.A. Scherpbier, C.P.M. van der Vleuten, S.J. van Luijk & J.A.A.M. van Diemen-Steenvoorde, *How Residents Learn: Qualitative Evidence for the Pivotal Role of Clinical Activities*, 41 MED. EDUC. 763, 768 (2007); *see also* Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 507 (1994) ("[P]articipants learn both by treating patients and by observing other physicians [that] do so . . . ."); McKeesport Hosp. v. ACGME, 24 F.3d 519, 525 (3d Cir. 1994) ("Medical residencies are a vital component of medical education . . . .").

154. *See supra* Part II.

tions I have held). In these situations, Title VII would only cover adverse actions experienced by these students within the narrow scope of these employment relationships, even though their interactions with the college or university—indeed, even with the same bad actors—are much broader.

The interactions between Title VII and Title IX claims thus give rise to what I term the "cleaving" problem. Unfortunately, some of what the district court said in Huang's case is right: courts have to "carefully delineate[] between . . . students' academic activities and employment activities, and deem[] them to be employees only with respect to what they do in employment."[155] The wrong version of this approach is to assume that an activity cannot be simultaneously related to both a student's academics and employment, which is the error committed in Huang's case. The right version of this approach, I argue, is to acknowledge that Title VII simply does not cover the full slate of discrimination experienced by student-employees, because sometimes at least part of it occurs outside of their employment relationship with their school.

Despite its higher liability standard and more limited remedies, Title IX remains an essential tool in the student-employee plaintiff's toolbox. Title VII is crucial for ensuring that students are *also* envisioned as employees; Title IX allows them to be seen as *both at once*. A student's experiences of discrimination *qua* student can be intimately related to their experiences of discrimination *qua* employee. Because Title IX is more expansively phrased than Title VII (which, naturally, focuses only on employment relationships), Title IX can uniquely encompass *both* employment and education discrimination in a way that Title VII, as currently construed, cannot—indeed, as evidenced by the circuit split described above.[156] If courts are prevented from connecting education discrimination to employment discrimination, and vice versa, they will miss the opportunity to provide these plaintiffs with the protections and remedies that comprise the raison d'etre for Title IX.

This Part thus presents a second immediately actionable prescriptive solution: student-employee plaintiffs must advance Title IX claims in addition to Title VII claims, rather than holding out for the pot of gold at the end of the Title VII rainbow. Arguing under Title VII alone might simply leave too much discrimination and retaliation on the table.

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155. Huang v. Ohio State Univ., No. 19-cv-1976, 2022 WL 16715641, at *5 (S.D. Ohio Nov. 4, 2022) (quoting Seaton v. Univ. of Pa., No. CIV. A. 01-2037, 2001 WL 1526282, at *8 (E.D. Pa. Nov. 30, 2001)), *rev'd*, 116 F.4th 541 (6th Cir. 2024).

156. *See supra* Section I.B.

A. The Cleaving Problem: A Thought Experiment

Take the example of a hypothetical classmate of mine, John, who works as a teaching assistant for Professor Smith's Civil Procedure class and, separately, is enrolled in Professor Smith's Antitrust class. During a meeting to discuss his final paper for Antitrust, Professor Smith makes sexual advances towards John, which John rejects. Such sexual harassment would amount to sex discrimination against John solely in his capacity as Professor Smith's student. Imagine, then, the following scenarios:

> *Scenario A*: The next day, Professor Smith fires John from his position as her teaching assistant for Civil Procedure.

> *Scenario B*: John reports Professor Smith to his university's Title IX office immediately after leaving the meeting. The next day, Professor Smith fires John from his position as her teaching assistant for Civil Procedure.

In Scenario A, John may want to raise a quid pro quo claim under Title VII against his law school's university, similar to the one Huang brought against OSU. On its face, such a claim might seem simple: the "quid" is John's acquiescence to Professor Smith's advances in that meeting to discuss his paper, and the "quo" is his job as her teaching assistant. But even if a court legitimately recognized that John's role as a teaching assistant to Professor Smith constituted an employment relationship, it may find that the "quid"—by virtue of pertaining solely to his *educational* relationship—would not apply to his Title VII claim. Under current doctrine, only Title IX, if understood to contain implied private rights of action against both education and employment discrimination, would allow him to challenge Professor Smith's conduct as unlawful sex discrimination.

In Scenario B, John may want to raise a retaliation claim under Title VII against his law school's university. Again, on its face, such a claim may seem simple, as Professor Smith took immediate adverse action against him following his reporting of her advances. But again, a court may cleave his protected activity from the adverse action that followed since he reported the incident as a *student*—rendering irrelevant his experience of retaliation as an employee.

John may be tempted to cite *Burlington Northern & Santa Fe Railway Co. v. White*, in which the Supreme Court held that Title VII's antiretaliation provision extends to retaliatory action taken outside of the employment context.[157]

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157. 548 U.S. 53, 61-63 (2006).

For instance, if an employee complains of discrimination at work and the employer retaliates by totaling the employee's car, *White* provides that she would still have a retaliation claim under Title VII. But *White* alone would be of no help to John here. *White* may have provided a direct solution if contexts were flipped—that is, if the discriminatory conduct took place in John's employment capacity and the retaliatory conduct took place in his educational capacity. For instance, if Professor Smith had made these sexual advances in a meeting to discuss John's duties as her teaching assistant, and she had retaliated against his reporting these advances by giving him a poor grade in Antitrust, John could bring a Title VII retaliation claim. Indeed, several district courts have found *White* to provide a retaliation remedy to student-employees in analogous situations.[158] Yet with the fact pattern laid out in Scenario B—where the adverse action and not the retaliation occurred outside his employment relationship—*White* by itself offers John no help. Again, under current doctrine, only Title IX—with its ability to capture both education and employment discrimination—would provide John a way forward.

Finally, consider a slightly different scenario involving peer-to-peer harassment:

> *Scenario C*: Sarah is John's fellow teaching assistant for Professor Smith's Civil Procedure class, as well as his classmate in Professor Smith's Antitrust class. On Monday, Sarah makes sexual advances toward John during a meeting with Professor Smith and all her teaching assistants, specifically by propositioning him verbally. On Tuesday, she does so again during Professor Smith's Antitrust class, this time by grabbing his crotch.

John may seek to prove that he has been subject to an unlawful hostile environment, which again may seem like a feasible claim on its face, especially giv-

158. *See* Jenkins v. Univ. of Minn., 131 F. Supp. 3d 860, 868, 883-84 (D. Minn. 2015) (suggesting that retaliation in the form of an accelerated dissertation timeline is eligible for consideration as actionable retaliation for the plaintiff's reporting of her supervisor's sexual harassment); Kovacevich v. Vanderbilt Univ., No. 09-0068, 2010 WL 1492581, at *1, *3, *16 (M.D. Tenn. Apr. 12, 2010) (finding that the plaintiff had established a prima facie case of retaliation under *White* based on (1) sex discrimination and sexual harassment she reported when she was a student-employee and (2) a retaliatory critique of her thesis and threats against her career after her graduation); Consolmagno v. Hosp. of Saint Raphael Sch. of Nurse Anesthesia, 72 F. Supp. 3d 367, 376-78 (D. Conn. 2014) (finding that a school's dismissal of the plaintiff from an educational nursing program based on a manipulated exam after she complained of sexual harassment could constitute adverse action for a Title VII retaliation claim, as participation in the program was both educational and professional since "'student' and 'employee' are not . . . mutually exclusive categories under Title VII").

en Title VII's comparatively lower standard for sexual harassment. Title VII adopts a severe-*or*-pervasive standard for worker-on-worker sexual harassment to constitute a hostile workplace environment, which—unlike Title IX's severe-*and*-pervasive requirement for classmate-on-classmate sexual harassment to constitute a hostile educational environment[159]—may be satisfied by a single incident if it is severe enough, such as Sarah's offensive touching of John's crotch.[160] But in this scenario, John would not be able to satisfy even Title VII's lower standard, since the sexual harassment he experienced in his *employment* capacity (in the teaching-assistant meeting) was neither severe (solely verbal) nor pervasive (only one incident). The only way for him to bring a hostile-environment claim would be to do so under Title IX—and only if his Title IX claim encompassed both the educational (classroom) and employment (meeting) instances of harassment, as just the former incident would be insufficient under Title IX's "severe and pervasive" standard.

Therein lie the dangers of the cleaving approach and the importance of Title IX for student-employees. That a student-employee plaintiff can prove *an* employment relationship with his school does not automatically grant him full access to the promises of Title VII if the discrimination that he wants to challenge falls outside that relationship. Instead, when Title VII does not preempt Title IX, these plaintiffs should also seek relief under Title IX, which, unlike Ti-

159. *See, e.g.*, Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 652-53 (1999) (finding it "unlikely that Congress would have thought" that "a single instance of sufficiently severe one-on-one peer harassment could" be severe and pervasive); Kollaritsch v. Mich. State Univ. Bd. of Trs., 944 F.3d 613, 621 (6th Cir. 2019) (observing that "a single incident is insufficient on its own to state a claim" of peer-on-peer sexual harassment under Title IX).

160. "[A] single, unusually severe incident of harassment may be sufficient to constitute a Title VII violation; the more severe[] the harassment, the less need to show a repetitive series of incidents. This is particularly true when the harassment is physical." U.S. Equal Emp. Opportunity Comm'n, EEOC-CVG-1990-8, Policy Guidance on Current Issues of Sexual Harassment (Mar. 19, 1990), https://www.eeoc.gov/laws/guidance/policy-guidance-current-issues-sexual-harassment, [https://perma.cc/B3GL-MJNM]; *see also* U.S. Equal Emp. Opportunity Comm'n, EEOC-CVG-2024-1, Enforcement Guidance on Harassment in the Workplace (Apr. 29, 2024), https://www.eeoc.gov/laws/guidance/enforcement-guidance-harassment-workplace [https://perma.cc/QEQ6-26ZJ] (explaining that "[i]n limited circumstances, a single incident of harassment can result in a hostile work environment," such as "[s]exual assault," "[s]exual touching of an intimate body part," or "physical violence or the threat of physical violence"); Barrett v. Omaha Nat'l Bank, 726 F.2d 424, 426-28 (8th Cir. 1984) (finding that one incident of offensive touching constituted actionable sexual harassment under Title VII); Turner v. Saloon, Ltd., 595 F.3d 679, 686 (7th Cir. 2010) (finding that the plaintiff's claim that a female supervisor grabbed his penis through his pockets was likely sufficiently severe to create a genuine issue of material fact on his sexual-harassment claim).

tle VII, allows them to circumvent the need for cleaving and submit pleadings relating to both education and employment discrimination.

B. Pleading the Relevant Claims

The problems with the cleaving approach are evident in how student-employees have been routinely locked out of making Title VII claims when the impacts of a school's discrimination on their employment flow directly from the impacts of the same discrimination on their education. For instance, a graduate student discriminatorily expelled by a university for allegedly insufficient academic performance would also be foreclosed from working as a teaching assistant at the university—but that effect on her employment would be incidental to the academic decision made, not an employment decision in itself. Thus, under the cleaving approach, a court would be prohibited from extending Title VII protections to this graduate student simply because there is no standalone adverse employment action to recognize. Once again, under current doctrine, Title IX would remain the only path available to address such sex discrimination. Student-employee plaintiffs in such fact patterns should ensure their complaints harness the unique ability of Title IX to encompass both the education and employment discrimination they experience.

Several appellate decisions are instructive here regarding the risks of pleading only Title VII claims. Other than the Eleventh Circuit in *Cuddeback*, only two other federal appellate courts have confronted this situation, both of which held that the student-employee plaintiff could not avail himself of Title VII protections because any adverse employment actions only incidentally flowed from adverse educational actions. For instance, in *Stewart v. Morgan State University*, the Fourth Circuit affirmed a lower-court decision which held that the "Plaintiff's argument that he received two 'Cs' from Dr. Welsh [his professor and internship supervisor] based on racial discrimination is unavailing [for his Title VII claim] considering that the grades he received in those two classes concerned his role as a student, *not* as an employee in the internship."[161] As such, the district-court judge explained that receiving two Cs was "not connected to any adverse *employment* action."[162] Since Stewart's alleged adverse employment action—dismissal from his internship—derived from his failure "to maintain the required academic standing,"[163] the Fourth Circuit affirmed

161. 46 F. Supp. 3d 590, 596 (D. Md. 2014), *aff'd*, 606 F. App'x 48 (4th Cir. 2015).

162. *Id.* The Fourth Circuit opinion affirming this decision contains no relevant language on this particular issue. *See* Stewart v. Morgan State Univ., 606 F. App'x 48, 49 (4th Cir. 2015).

163. *Stewart*, 46 F. Supp. 3d at 596.

the lower court's grant of summary judgment to the defendant on his Title VII discrimination and retaliation claims.[164]

Similarly, in *Bakhtiari v. Lutz*, the Eighth Circuit held that Bakhtiari could not establish a prima facie case of retaliation based on termination from his teaching-assistant position because his allegedly protected activities—threatening to file a grade appeal with the Department of Education, complaining to the school's international-affairs office about how the school handled his student immigration status, and complaining that an employee in the school's student-affairs office "spoke to him in a discriminatory manner during a student conduct investigation"—were solely related to his student status.[165] The Eighth Circuit held that these did not count as "'protected' actions as an *employee* of [the school]" because "[a]ll of these activities pertain to [the plaintiff's] status as a *student*, and not as a TA employed by" the school.[166] The court characterized his complaints as "about [the school] as a university, not about [the school] as an employer," relying on a 1995 Eighth Circuit case foreclosing retaliation claims where a teacher's alleged protected activity stemmed from opposition to the school's desegregation plan, rather than their employment with the school.[167]

It is notable that both Stewart and Bakhtiari brought discrimination claims *only* under Title VII—not Title VI, which prohibits race and national-origin discrimination in recipients of federal funding such as universities, just as Title IX does for sex discrimination. Because these student-employee plaintiffs advanced *no* education-discrimination claims and sought to avail themselves solely of Title VII, they missed out on the potential of securing any liability for the discriminatory and retaliatory treatment they experienced, or at the very least consideration of their claims as matters of fact rather than matters of law. Claims under Title VI would have been significantly more likely to capture the reality of their experiences *and* ensure that the adverse employment actions they experienced as a result of their education discrimination were considered relevant. By extension, Title IX would be a better vehicle for similarly situated plaintiffs combating sex discrimination rather than race discrimination.

A multitude of district-court decisions reflect the same unfortunate results of student-employees alleging exclusively employment discrimination, with

164. *Stewart*, 606 F. App'x at 49-50.

165. 507 F.3d 1132, 1137 (8th Cir. 2007).

166. *Id.* (emphasis added).

167. *Id.* at 1137-38 (citing Evans v. Kan. City, Mo. Sch. Dist., 65 F.3d 98, 100-02 (8th Cir. 1995)).

only two exceptions.[168] These cases include plaintiffs who were denied admission to a graduate program (and thus denied the opportunity to be employed as a graduate-student research assistant or instructor),[169] were denied approval of a dissertation topic (and thus denied the opportunity to be employed in a teaching position as an adjunct lecturer),[170] were subjected to COVID-testing requirements (which the plaintiff alleged amounted to disability discrimination against her as an employee, even though the testing requirements were mandated only for students),[171] and received a letter from a professor disclaiming discriminatory conduct after the plaintiff filed a lawsuit against an off-campus business (where the plaintiff pleaded that he had only an academic relationship with the professor, even if he was otherwise employed by the university).[172] In all of these cases, plaintiffs' discrimination claims were *only* advanced under employment-discrimination laws, *not* education-discrimination laws. And, as a result, their claims all failed as a matter of law, rather than as a matter of fact.

In contrast, when plaintiffs have alleged Title VI or Title IX claims *in addition* to Title VII claims, judges at least got to consider the merits of their positions—rather than dismissing them for failure to qualify for the claimed statutory protections. For instance, in a 1996 Western District of Pennsylvania decision, the plaintiff was repeatedly sexually harassed by her academic advisor, who also served as her professor, dissertation-committee chair, and employment supervisor.[173] After reporting this pattern of discrimination, she was subjected to both academic retaliation (unfair requirements for and sabotage of her

168. Contee v. Univ. of Pa., No. 21-1398, 2021 WL 2661459, at *1, *4 (E.D. Pa. June 29, 2021) (finding that employment-discrimination claims were available after the school denied the plaintiff's request for short-term medical leave and the professor threatened to cut off his departmental funding if he took leave, since these acts "plausibly relate[d] to the conditions of [plaintiff's] employment" as a teaching assistant); Consolmagno v. Hosp. of Saint Raphael Sch. of Nurse Anesthesia, 72 F. Supp. 3d 367, 376-78 (D. Conn. 2014) (relying on the student handbook's promise of renumeration to establish employment for a Title VII retaliation claim against a supervisor in the clinical nursing program, in part because "'student' and 'employee' are not . . . mutually exclusive categories under Title VII," since "Title VII can encompass . . . mixed educational and employment relationships, including postgraduate medical training . . . and graduate student education" (quoting Consolmagno v. Hosp. of Saint Raphael, No. 11cv109, 2011 WL 4804774, at *5 (D. Conn. Oct. 11, 2011))).

169. Pollack v. Rice Univ., No. H-79-1539, 1982 WL 296, at *1 (S.D. Tex. Mar. 29, 1982).

170. Diaz v. City Univ. of N.Y., 2014 WL 10417871, at *2, *16 (S.D.N.Y. Nov. 10, 2014).

171. Taylor v. Vanderbilt Univ., No. 22-cv-00465, 2023 WL 2398761, at *7 (M.D. Tenn. Jan. 23, 2023).

172. Seaton v. Univ. of Pa., No. CIV. A. 01-2037, 2001 WL 1526282, at *8 (E.D. Pa. Nov. 30, 2001).

173. Stilley v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ., 968 F. Supp. 252, 257 (W.D. Pa. 1996).

dissertation overview) *and* professional retaliation (exclusion from a textbook based on the project on which she was employed).[174] On her claims of academic retaliation under Title VII, the judge granted summary judgment to the university.[175] Although he "recogniz[ed] that plaintiff's work on her dissertations is closely related to her work on the [textbook] Project," he held that "the Title VII inquiry must focus only on the employer-employee relationship" such that "any allegations of 'quid pro quo retaliation' regarding plaintiff's dissertation are not proper for a Title VII claim and will not be considered by the Court in its Title VII analysis."[176] By contrast, on her Title IX claims—which encompassed *both* the academic and professional retaliation she alleged—the judge declined to grant summary judgment to the university, thus allowing her to proceed.[177]

Similarly, in a 2021 Western District of Virginia case, the student-employee plaintiff alleged under both Title VII and Title VI that he was discriminatorily dismissed from his graduate program—and thus terminated from his graduate research position—as a result of national-origin discrimination and retaliation.[178] While the district court did not reach the merits of his Title VII claims because he had "not alleged that [the school] took any adverse action against him with respect to his status as an employee rather than as a student,"[179] it *did* reach the merits of his Title VI claims.[180] Another district court similarly dismissed a student-employee's Title VII claims on the grounds that his claim (that he was removed from his teaching-assistant position) "necessarily only applies to his role as a student" because the removal flowed from his removal from the university overall[181]—but, again, reached his Title VI claims on the merits.[182]

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174. *Id.*

175. *Id.* at 261.

176. *Id.*

177. *Id.* at 267.

178. Alberti v. Rector & Visitors of Univ. of Va., No. 21-cv-14, 2021 WL 5853598, at *4 (W.D. Va. Dec. 9, 2021).

179. *Id.*

180. *Id.* at *6-7 (disposing of the Title VI claims by respectively finding no "sufficient temporal nexus" between the alleged discriminatory conduct and the plaintiff's "dismissal from the graduate program" and "too much time between" the plaintiff's protected conduct "and any alleged adverse action").

181. Muthukumar v. Univ. of Tex. at Dall., No. 10-cv-115, 2011 WL 1771806, at *4 (N.D. Tex. May 10, 2011).

182. *Id.* at *6 (dismissing his claims because "fully absent from his Complaint is a single factual allegation that could demonstrate discriminatory or retaliatory *intent*" (emphasis added)).

Most notably, in *Bucklen v. Rensselaer Polytechnic Institute*, a judge for the Northern District of New York dismissed the plaintiff's Title VII claim

> since that claim [that he was discriminated against] based on his national origin and gender in conjunction with his taking of the preliminary examination for his doctoral degree . . . does not allege discrimination in terms or conditions of his employment but rather discrimination against him in his role as a student.[183]

However, the judge noted that "[s]ince the alleged discriminatory action involved the provision of educational services, the Court will consider Plaintiff's Title IX claim" and *denied* defendant's motion to dismiss this claim.[184] Notably, the plaintiff's claims about his employment relationship were directly germane to his education-discrimination claims. The judge observed:

> Plaintiff alleges in his complaint that he was even asked to serve as a TA in a course covering the very subject matter which he was told he had failed on the examination. The professor of the course allegedly told Plaintiff that he wanted him to serve as the TA because he was the graduate student with the best grasp of the subject matter. Plaintiff contends that this is inconsistent with the committee's claim that he did not know the material.[185]

The judge held that, based in part on these allegations, "Plaintiff has 'allege[d] events that, if proven, would support an inference of discrimination.'"[186]

Bucklen is proof of concept. Title IX allows judges to avoid the cleaving approach required when Title VII does not cover the entirety of a school's sex discrimination by ensuring that evidence pertaining to a student-employee's employment relationship maintains relevance to the school's liability for education discrimination.

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183. 166 F. Supp. 2d 721, 722, 726 (N.D.N.Y. 2001).

184. *Id.* at 726.

185. *Id.* at 723 n.4.

186. *Id.* at 726 (alteration in original) (quoting Yusuf v. Vassar Coll., 35 F.3d 709, 715-16 (2d Cir. 1994)).

IV. MERGING TITLE VII PROTECTIONS WITH TITLE IX COVERAGE: A PROPOSAL FOR DOCTRINAL REFORM

As Parts II and III explain, both of these problems of underinclusivity—courts counting too few student-employees as employees, and student-employees filing too few Title IX claims—could be remedied under current doctrine through, respectively, better judging[187] and more strategic and thorough pleading.[188] But the core doctrinal problems with Title IX's lesser protections and Title VII's limited coverage would be ideally resolved by a doctrinal solution: a reformed Title VII doctrine that incorporates the best of both statutes and frees courts from the burden of cleaving.

Building upon the principle established by the Supreme Court in *White*, this Note offers a third and final prescriptive solution, this time on a longer time horizon and at a higher doctrinal level: courts should (1) expressly incorporate education-based discrimination into a student-employee's Title VII claims of discrimination when reasonably related to her formal relationship with the school-employer and (2) count education-based complaints as protected activity for purposes of Title VII retaliation claims for student-employees when the adverse action occurs within the employment context. A doctrine to this effect would allow student-employees to harness the range of benefits that Title VII provides over and above Title IX, while ensuring that they are not forced to leave out key aspects of their discriminatory experiences—solving both the application problems described in Part II and the cleaving problem described in Part III in one fell swoop.

In *White*, the Court held that Title VII's antiretaliation provision also prohibits retaliatory action taken outside the employment context.[189] For instance, an employer could be liable for reporting an employee to Child Protective Services after she complained of discrimination, even if the call were made outside of work and had nothing to do with her performance at work.[190] *White* thus underscores the principle that action taken outside of the employment context can—and should—maintain relevance to the employee's antidiscrimination rights at work.

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187. *See supra* Part II.

188. *See supra* Part III.

189. Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 57 (2006).

190. *Cf. id.* at 63-64. The Court cited *Berry v. Stevinson Chevrolet* as an example in this vein, wherein an employer filed false criminal charges against an employee in retaliation for a complaint of discrimination and the court found that this was actionable under Title VII's retaliation provision. 74 F.3d 980, 984, 986 (10th Cir. 1996).

Of course, *White* by itself is not enough. It exclusively provides a claim for retaliation when the complaint was made regarding employment and the retaliatory act was taken outside of work; it does not provide a cause of action for the reverse scenario, where the complaint was made outside of work and the retaliatory act was taken at work.[191] Nor does its holding pertain to Title VII's antidiscrimination provision. Indeed, the *White* opinion is expressly based on the linguistic differences between Title VII's antidiscrimination and antiretaliation provisions.[192]

Yet the larger principle for which *White* stands provides at least a foundation for both the antidiscrimination and antiretaliation doctrinal expansions urged by this Part. Just as "[a]n employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm *outside* the workplace,"[193] so too can an employer effectively discriminate against an employee by taking actions outside his employment that cause him harm in the workplace.[194] This is especially true when, as is the case for student-employees, the school-employer has another ongoing relationship with the student-employee (namely, an educational relationship) through which they can channel discrimination that poisons the overall relationship between them. A better doctrine would reflect the porosity of the boundaries between a student-employee's student life and work life and err on the side of incorporating, rather than artificially excluding, evidence of discrimination and protected activity.

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191. *See infra* note 244 (discussing a case in which a judge categorically ruled that complaints made about sex discrimination to the Title IX office about discrimination proscribed by Title IX could never be considered protected activity for the purpose of Title VII).

192. *White*, 548 U.S. at 61-64; *see also id.* at 63 ("There is strong reason to believe that Congress intended the differences that its language suggests, for the [antidiscrimination and antiretaliation] provisions differ not only in language but in purpose as well.").

193. *Id.* at 63 (citing Rochon v. Gonzales, 438 F.3d 1211, 1213 (D.C. Cir. 2006); *Berry*, 74 F.3d at 984, 986).

194. The proposal contained in this Part is limited solely to an expansion of Title VII doctrine as it applies to student-employees. This Note does not reach the question of whether this expansion should also apply to employee-plaintiffs who have other interactions with or bear other relationships to their employer-defendants.

A. Incorporating Education Discrimination into Title VII Discrimination Claims

Evidence of education-based discrimination should be factored into assessments of plaintiffs' discrimination claims under Title VII, including both quid pro quo claims and hostile-work-environment claims.

1. Quid Pro Quo Claims

Consider Scenario A from Section III.A, where John would fail to make out a quid pro quo claim under current doctrine because his "quid" was education-based, not employment-based.[195] On the flip side, in Huang's case, the district court determined that her "quid" was employment-based, but her "quo" was solely education-based.[196] Sometimes, as for Huang, showing that the contested "quid" or "quo" was actually employment-based—contrary to the assertions of schools like OSU—allows the plaintiff to make out a Title VII claim.[197] But sometimes, as for John in Scenario A, the contested "quid" or "quo" cannot be said to be strictly employment-based, foreclosing any path to Title VII liability under current doctrine. In these situations, Title VII should require that only one of the "quid" and the "quo" be employment-based, so long as the other still pertains to the student-employee's formal relationship with the school.[198] This move would ensure that the student-employee's entire relationship with their employer remains free from discrimination, drawing on both *White* and a rising consensus in the federal appellate courts that outside-of-work discrimination can and often does bear on workplace-discrimination claims.

First, this approach parallels the logic of *White*, which makes sense because the structure of quid pro quo claims is nearly isomorphic to that of retaliation claims. In the paradigmatic retaliation claim, an employee engages in protected activity (for example, by making a complaint of discrimination to human resources), and, in response, the employer retaliates against her through some kind of adverse action (for example, by firing her). Similarly, in the paradigmatic quid pro quo claim, the employee refuses to submit to the advances of

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195. *See supra* Section III.A.

196. Huang v. Ohio State Univ., No. 19-cv-1976, 2022 WL 16715641, at *5 (S.D. Ohio Nov. 4, 2022), *rev'd*, 116 F.4th 541 (6th Cir. 2024).

197. *See supra* Part II.

198. For instance, if the alleged "quo" is that Professor Smith refuses to give John a discount at a local restaurant that she owns, that would be insufficient to give rise to a quid pro quo claim under this proposed standard even if the "quid" was employment-related, since the "quo" would be entirely divorced from John's relationship to his school-employer.

the employer,[199] and, in response, the employer strips a benefit from the employee, demonstrating that acquiescence to the advances (the quid) was a condition precedent to said benefit (the quo). Both retaliation and quid pro quo claims, then, challenge an adverse action by an employer (retaliation or benefit stripping) that punishes an employee for concretely availing herself of her antidiscrimination rights (reporting discrimination or resisting advances). *White* allows this adverse action to be actionable in a retaliation claim if it occurs outside of work,[200] but current Title VII doctrine does not do the same for "quos" that occur outside of work for discrimination claims. Instead, as Huang's case illustrates, it maintains that the "quo" be strictly employment-related.[201]

The logic of *White*—and the reality of student-employees' lives—counsels in favor of construing "employment-related" more broadly. If the universe of prohibited adverse actions may extend outside of the workplace for retaliation claims, as it does per *White*, it naturally follows that the universe of prohibited "quos" should as well. Without such a protection, there would be insufficient deterrence of the employment-based discrimination against which Title VII is supposed to protect.[202] For instance, Title VII squarely prohibits sexual har-

199. Note that there is also a different kind of viable quid pro quo claim wherein the employee does submit to the advances of the employer—that is, where the "quid" is exchanged for the "quo." (In the scenario described above the line where the employee does not submit, the exchange does not occur: the employer removes the "quo" because the "quid" was not provided.) That said, the analysis in this Section applies equally to this kind of claim where the "quid" and "quo" are exchanged. If an employer conditions a non-work-related "quo" on provision of sexual favors at work ("quid"), the workplace environment is still poisoned by workplace discrimination that Title VII may not reach under current doctrine. *See infra* note 213 and accompanying text (discussing the difficulty of establishing how many incidents of harassment are required to successfully make out a hostile-work-environment claim); *see also supra* Section III.A (discussing Scenario C of student-on-student harassment, first verbally in a workplace setting and then physically in a classroom setting). Accordingly, Title VII should be reformed to redress this harm.

200. Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 61 (2006).

201. *Huang*, 2022 WL 16715641, at *7 (dismissing her quid pro quo claim based on the termination of her supplemental stipend on the grounds that the stipend termination (the "quo") was "not employment related"); *see also* Stilley v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ., 968 F. Supp. 252, 261 (W.D. Pa. 1996) (holding that "any allegations of 'quid pro quo retaliation' regarding plaintiff's dissertation are not proper for a Title VII claim and will not be considered by the Court in its Title VII analysis" regarding education- and employment-based sexual harassment from her dissertation advisor and employment supervisor).

202. *See White*, 548 U.S. at 64 ("A provision limited to employment-related actions would not deter the many forms that effective retaliation can take.").

assment in the workplace.[203] But if a student-employee rejects her advisor-supervisor's advances in the laboratory on Monday, and on Tuesday the advisor-supervisor issues her a failing grade on her dissertation, she may have no Title VII claim under current doctrine. Depending on the severity of the advances, she may not have enough to make out a Title VII hostile-work-environment claim based exclusively on Monday's events.[204] She also could not bring a Title VII quid pro quo claim based on both days' events, given the education-based nature of the "quo." Letting her harasser off the Title VII hook in this case would thus serve to implicitly *license*, rather than *deter*, his workplace-based sexual harassment—contravening Title VII's raison d'être.

Accordingly, if a student-employee's "quid" is clearly employment-related, the "quo" taken from her should include *all* benefits pertaining to her formal relationship to the school for purposes of her Title VII claim. In other words, "employment-related" should extend to the entirety of the formal relationship between the school-employer and the student-employee, in recognition of the fact that strict line-drawing around the specific job duties that she performs proves arbitrary rather than clarifying.[205]

As noted previously, the *White* Court largely hung its hat on the differences between Title VII's antidiscrimination and antiretaliation provisions, stressing that the former is strictly concerned with "employment-related discrimination."[206] But this Section does not advocate that *all* outside-of-work "quos" should count for purposes of quid pro quo claims under the statute.[207] Rather, by limiting its proposal solely to benefits that pertain to the student-employee's formal relationship to the school, this Section maintains fidelity to the *White* Court's framing of the antidiscrimination provision by simply reframing what should be considered "employment-related," thus requiring no departure from the *White* precedent. The *White* Court reasoned that the "provision's basic objective of 'equality of employment opportunities' and the elimination of prac-

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203. *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986) ("Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." (alteration in original)).

204. *See infra* note 213 and accompanying text (discussing the unpredictability of the severe-or-pervasive standard for Title VII hostile-work-environment claims); *see also supra* Section III.A (discussing Scenario C).

205. *See supra* Section II.B.2 (discussing the difficulties with identifying where a student-employee's job ends and her studies begin when her work product informs both concurrently).

206. *White*, 548 U.S. at 63; *see also supra* text accompanying notes 189-192 (discussing this aspect of the *White* Court's reasoning).

207. *See supra* note 198.

tices that tend to bring about 'stratified job environments,' would be achieved were all employment-related discrimination miraculously eliminated," such that "Congress did not need to prohibit anything other than employment-related discrimination."[208] This Section merely argues for expanding the definition of "employment-related discrimination" to include all discrimination that pertains to the employer's formal relationship with the employee—including their educational relationship. A student-employee's work environment becomes "stratified" when she must show up to the laboratory knowing that failure to subject herself to her advisor-supervisor's predatory advances in that space (and thus in that employment role) will be swiftly followed by academic punishment just a few doors down in his office. Such knowledge necessarily "affect[s her] employment" by turning it into an environment of fear, not professionalism, and "alter[s] the conditions of the workplace" by making clear she is expected to perform duties (sexual favors) well outside of her job description.[209]

Student-employees facing the reverse version of this scenario, with education-based "quids" rather than "quos," should also be able to make out a quid pro quo claim. That is, if an employer strips a *work-related benefit* from an employee because she did not accede to his *advances outside of work*, she should also be protected by Title VII. Otherwise, employers would be free to engage in sexual harassment the second they stepped outside the office—and to pressure employees into acquiescence through abuse of their work-related powers. For instance, if a student-employee rejects the advances made in a one-on-one meeting to discuss her dissertation, and her advisor-supervisor promptly terminates her teaching assistantship, her work environment has been irrevocably "alter[ed]"—indeed, completely eliminated—by the sexual harassment, in plain contravention of the principles espoused by Title VII.[210] The clear message conveyed by this fact pattern is that the maintenance of the teaching assistantship was contingent upon the provision of sexual favors, constituting the very essence of a quid pro quo in violation of Title VII.[211]

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208. *White*, 548 U.S. at 63 (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973)).

209. *Id.* at 62.

210. *Id.*

211. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 752 (1998) ("[I]f an employer demanded sexual favors from an employee in return for a job benefit, discrimination with respect to terms or conditions of employment was explicit."); MODEL CIV. JURY INSTRUCTIONS FOR THE DIST. CTS. OF THE 3D CIR. ch. 5.1.3 (COMM. ON MODEL CIV. JURY INSTRUCTIONS FOR THE 3D CIR. 2024) (providing that a required element of a quid pro quo claim under Title VII is that "[Plaintiff's] submission to [supervisor's] conduct was an express or im-

Particularly in the case of student-employees, the timing and context of the "quid" may be artificial. John should not be prevented from bringing a Title VII quid pro quo claim simply because Professor Smith decided to harass him in a meeting about his Antitrust paper rather than in a meeting about grading first-year Civil Procedure memos. The fickle nature of when an employer's urge to harass strikes ought not to exempt them from Title VII liability when the effect is still that the employee's overall relationship with the employer is now fraught with discrimination. If only the "quo" is employment-based, the "quid" should apply to all advances made in the context of the student-employee's formal relationship to the school-employer. In short, the entirety of that relationship ought to be considered "employment-related."

2. Hostile-Work-Environment Claims

Evidence of education discrimination should also count toward Title VII's severe-or-pervasive standard for hostile-work-environment claims. While, of course, Title VII's severe-*or*-pervasive standard is less demanding than Title IX's severe-*and*-pervasive standard,[212] additional evidence is always welcome and sometimes necessary to prove claims under this lower standard, given its elusive nature. "[T]here is neither a threshold 'magic number' of harassing incidents that gives rise, without more, to liability [under Title VII] as a matter of law nor a number of incidents below which a plaintiff fails as a matter of law to state a claim."[213] The previous discussion of Scenario C illustrates the difficult nature of this standard in certain cases: a single incident of nonsevere harassment in the employment context would be insufficient to prove Title VII liability, but if John could incorporate into his claim another incident of harassment (especially a severe one) from the same harasser in the *educational* context, he could make out a prima facie Title VII claim of a hostile work environment.[214]

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plied condition for receiving a job benefit or avoiding a job detriment" (alterations in original)).

212. *See supra* Section I.C.

213. Rodgers v. W.-S. Life Ins. Co., 12 F.3d 668, 674 (7th Cir. 1993); *see also* Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993) (explaining that the determination of whether harassment creates a hostile work environment under Title VII "is not, and by its nature cannot be, a mathematically precise test"); Blair Druhan, *Severe or Pervasive: An Analysis of Who, What, and Where Matters When Determining Sexual Harassment*, 66 VAND. L. REV. 355, 356-57 (2013) (explaining that a hostile-work-environment claim "is incredibly difficult for most courts to define, as they must determine what actions meet the vague standard of 'severe or pervasive'").

214. *See supra* Section III.A.

There is already support from several federal appellate courts for an expanded understanding of what it takes to meet this standard, meaning that the foundation for this approach has already been laid. The First, Sixth, and Seventh Circuits have recognized that "harassment does not have to take place within the physical confines of the workplace to be actionable; it need only have consequences in the workplace,"[215] and the Eighth and Ninth Circuits have similarly indicated that outside-of-workplace conduct can and should inform hostile-work-environment claims.[216]

For instance, in *Lapka v. Chertoff*, the Seventh Circuit called for a broad construal of what "*workplace* harassment" means.[217] In *Lapka*, the plaintiff, an employee of the Department of Homeland Security (DHS), alleged she was raped by a coworker during training sessions that took place at a Federal Law Enforcement Training Center (FLETC) and that DHS failed to both investigate the assault and "take reasonable steps to protect her from further harm," instead retaliating against her.[218] In detailing why the sessions at the FLETC constituted part of "the workplace environment," the Seventh Circuit described circumstances that sound suspiciously like a school: "The FLETC bar [where the

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215. Lapka v. Chertoff, 517 F.3d 974, 983 (7th Cir. 2008) (citing Doe v. Oberweis Dairy, 456 F.3d 704, 715-16 (7th Cir. 2006)); *accord* Duggins *ex rel.* Duggins v. Steak 'N Shake, Inc., 3 F. App'x 302, 311 (6th Cir. 2001) ("[W]hen an employee is forced to work for, or in close proximity to, someone who is harassing her outside the workplace, the employee may reasonably perceive the work environment to be hostile."); Crowley v. L.L. Bean, Inc., 303 F.3d 387, 409 (1st Cir. 2002); Roy v. Correct Care Sols., LLC, 914 F.3d 52, 63 n.4 (1st Cir. 2019) (quoting *Crowley*, 303 F.3d at 409). *But see* Sprague v. Thorn Ams., Inc., 129 F.3d 1355, 1366 (10th Cir. 1997) (holding the defendant's comments did not meet Title VII's severe-or-pervasive standard because the conduct "occurred at a private club, not in the workplace"); Gowesky v. Singing River Hosp. Sys., 321 F.3d 503, 510 (5th Cir. 2003) (dismissing the plaintiff's claim regarding out-of-office harassment on the basis that the cases she cited referred to "harassment *in the workplace*"). The reform urged in this Part would reverse the conclusions reached by the Fifth and Tenth Circuits.

216. Dowd v. United Steelworkers of Am., Loc. No. 286, 253 F.3d 1093, 1102 (8th Cir. 2001) ("The offensive conduct does not necessarily have to transpire at the workplace in order for a juror reasonably to conclude that it created a hostile working environment."); Ellison v. Brady, 924 F.2d 872, 883 (9th Cir. 1991) (explaining, in a case where a male coworker sent a female coworker harassing "love letters" outside of work, that "in some cases the mere presence of an employee who has engaged in particularly severe or pervasive harassment can create a hostile working environment"); *see also* Fuller v. Idaho Dep't of Corr., 865 F.3d 1154, 1167 (9th Cir. 2017) ("[I]f an employer, acting in the workplace, discriminates against a female rape victim in the conditions of her employment by condoning her rape and its effects, that employer should not escape Title VII liability for its discrimination merely because a rapist employee conducted his assault off the premises.").

217. *Lapka*, 517 F.3d at 983.

218. *Id.* at 978.

rape occurred] was a part of the FLETC facility, and [the plaintiff] first encountered [the rapist] on the FLETC campus, so the event could be said to have grown out of the workplace environment."[219] Furthermore, the "FLETC facility is different from a typical workplace" because "[t]rainees at this facility attend employment-related training sessions, eat in the FLETC cafeteria, drink at the FLETC bar and return to dormitories and hotel rooms provided by the DHS."[220]

In other words, because the plaintiff relied on the campus provided by her employer for essential needs for which there was no alternative (for example, for food and housing) and because the plaintiff only encountered her sexual harasser as a result of her job, the fact that the adverse employment action did not necessarily take place within some place defined so narrowly as her office did not prevent her from making out a prima facie claim under Title VII.

The First Circuit has called for a similar approach. In *Crowley v. L.L. Bean, Inc.*, the First Circuit proclaimed that "[c]ourts . . . do permit evidence of non-workplace conduct to help determine the severity and pervasiveness of the hostility in the workplace as well as to establish that the conduct was motivated by gender."[221] The *Crowley* plaintiff had been harassed by her supervisor both in the workplace and outside the workplace, such as in a bar and at her home.[222] The court reasoned that the harasser's "intimidating behavior and hostile interactions with [the plaintiff] outside of work help explain why she was so frightened of [him] and why his constant presence around her at work created a hostile work environment"[223]—a logic that naturally extends to student-employees who experience harassment when fulfilling employment duties that is worsened by harassment experienced when working on academic projects.

Even if discriminatory interactions between a student-employee and her supervisor-teacher (or coworker-classmate) take place outside any context related at all to their employment relationships to the school, multiple circuits have still recognized that such discrimination should be actionable if it bleeds into the workplace. In *Duggins ex rel. Duggins v. Steak 'N Shake, Inc.*, the Sixth Circuit cited with approval a district-court case recognizing that "an employee who is forced to work . . . in proximity to someone who is harassing her outside the workplace may reasonably perceive the work environment to be hostile

219. *Id.* at 983.

220. *Id.* (citing Ferris v. Delta Air Lines, Inc., 277 F.3d 128, 135 (2d Cir. 2001)).

221. Crowley v. L.L. Bean, Inc., 303 F.3d 387, 409 (1st Cir. 2002) (citing O'Rourke v. City of Providence, 235 F.3d 713, 724 (1st Cir. 2001)).

222. *See id.*

223. *Id.* at 409-10.

as a result."[224] While neither the plaintiff in the cited district-court case nor the plaintiff in *Duggins* met this standard,[225] the reasons why they did not meet the standard point all the more to counting education-based discrimination as employment-based when it pervades the employment relationship. In *Duggins*, the harasser "did not even work at the same restaurant as Plaintiff," and "she had contact with [the harasser] on only three occasions, all of which occurred outside the workplace."[226] But in a situation like Huang's, for instance, a student-employee would be in contact with her supervisor-teacher nearly every weekday, including in what should be properly considered the workplace (for example, the laboratory). It is the repeated, incessant, forced contact with a potential harasser that makes the student-employee's relationship with the school so important to protect—because she relies on the school for nearly everything.

In addition to these appellate opinions, a multitude of district courts outside of these circuits have also called for inclusion of outside-of-work harassment when evaluating claims of workplace harassment, which necessarily includes a call for inclusion of education-based harassment—further laying the groundwork for development of this doctrine.[227] For instance, in perhaps the

224. 3 F. App'x 302, 311 (6th Cir. 2001) (citing Temparali v. Rubin, No. CIV. A. 96-5382, 1997 WL 361019, at *2 (E.D. Pa. June 20, 1997)).

225. *Id.* at 311; *Temparali*, 1997 WL 361019, at *3.

226. *Duggins*, 3 F. App'x at 311.

227. *See, e.g.*, Arredondo v. Schlumberger Ltd., 583 F. Supp. 3d 783, 810 (W.D. Tex. 2022) (finding that the plaintiff established a prima facie case of sexual harassment under Title VII based partially on outside-of-work harassment (citing Lapka v. Chertoff, 517 F.3d 974, 983 (7th Cir. 2008); Crowley v. L.L. Bean, Inc., 303 F.3d 387, 409 (1st Cir. 2002); Roy v. Correct Care Sols., LLC, 914 F.3d 52, 63 n.4 (1st Cir. 2019); *Duggins*, 3 F. App'x at 311)), *aff'd sub nom.* Arredondo v. Elwood Staffing Servs., Inc., 81 F.4th 419 (5th Cir. 2023); D.C. v. Hasratian, 304 F. Supp. 3d 1132, 1143 (D. Utah 2016) ("[The defendant's] rather limited view of the scope of the evidence of a hostile working environment appears to be premised upon an assumption that any actions that [the plaintiff] took towards her subordinate outside of work could not contribute to a hostile working environment. 'But harassment does not have to take place within the physical confines of the workplace to be actionable; it need only have consequences in the workplace.'" (quoting *Lapka*, 517 F.3d at 983) (citing Ellison v. Brady, 924 F.2d 872, 883 (9th Cir. 1991))); Savage v. Dennis Dillon Auto Park & Truck Ctr., Inc., No. 14-CV-00123, 2016 WL 310418, at *7 (D. Idaho Jan. 25, 2016) ("[H]arassment does not have to take place within the physical confines of the workplace to be actionable under Title VII, it need only have consequences in the workplace." (citing *Lapka*, 517 F.3d at 983)); Brown v. N.Y. State Dep't of Corr. Servs., 583 F. Supp. 2d 404, 418 (W.D.N.Y. 2008) ("In addition, the fact that some of the incidents may have occurred outside of plaintiff's workplace does not mean that they are irrelevant to plaintiff's claim or that they could not have contributed to the hostile atmosphere of plaintiff's working environment. At the very least, they provide context for the incidents that did occur at work, and they tend to show the mo-

most elegant account of why harassment outside of work can and does have consequences in the workplace under Title VII, a judge for the District Court for the Southern District of New York denied the defendant's motion for summary judgment where a plaintiff's supervisor had harassed her both at work and at his father's funeral and then proceeded to retaliate against her for reporting it.[228] As the court explained, "The court is *aware of no settled law* that, in gauging the severity or pervasiveness and effects of sexual harassment, *allows the offender to compartmentalize his misconduct*."[229] Much like I argue, this would "allow a harasser to *pick and choose the venue for his assaults* so as to not account for those that occur physically outside the workplace."[230] As is true for student-employees, "[t]he employment relationship cannot be so finely and facilely parsed," since "[i]t comprises multiple dimensions of time and place that cannot be mechanically confined within the precise clockwork and four walls of the office."[231] Accordingly, "[t]he proper focus of sexual harassment jurisprudence is not on any particular point in time or coordinate location that rigidly affixes the employment relationship, but on the manifest conduct associated with it."[232]

The judge continued by emphasizing the reverberating effects that outside-the-workplace conduct, such as harassment in the classroom or in a discussion about a dissertation, has within the workplace: "[O]ften such outside misbehavior rebounds and transposes its consequences inside the actual workplace itself. However much the transgressor chooses to minimize or dismiss an act of harassment because it allegedly happened beyond the workplace, the victim may not have the equal aplomb to leave the matter behind . . . ."[233] As such, "the effects of an offensive sexual encounter that occurs outside the office may continue to manifest internally, within the actual working environment, and

tivation for the harassing behavior of plaintiff's coworkers." (citing *Crowley*, 303 F.3d at 409; Dowd v. United Steelworkers of Am., Loc. No. 286, 253 F.3d 1093, 1102 (8th Cir. 2001)).

228. Parrish v. Sollecito, 249 F. Supp. 2d 342, 350 (S.D.N.Y. 2003).

229. *Id.* (emphases added).

230. *Id.* at 350-51 (emphasis added).

231. *Id.* at 351.

232. *Id.*; *see also id.* (finding that "the working environment that characterizes the enterprise's home base . . . may project its effect outside" such that "the precise geographic locus of the offending act should not distract from the real focus of the misconduct: the degree to which, wherever a sexual assault occurs, its consequences may be felt in the victim's 'workplace' or 'work environment' and be brought to bear on her terms and conditions of employment").

233. *Id.* at 352.

reflect in the terms and conditions of employment that the victim may have to cope with day-by-day."[234]

Consider, for instance, a student-employee who refuses to submit to her coworker's advances in the classroom, is threatened with violence in the school hallways as a result, and then decides, out of fear, to accede to the coworker's next set of advances while working in the laboratory. There, the previous set of advances and adverse action produced "consequences in the workplace" (the laboratory) and would thus give rise to a Title VII claim under this expanded standard even though they took place in the context of her role as a student. Other potential examples of how this doctrine would allow student-employee plaintiffs to incorporate crucial evidence of discrimination abound. For instance, a student-employee who is sexually assaulted once in the classroom and then again in the laboratory may experience greater levels of emotional distress because of the repeated nature of the assault.[235]

Such a rule would be particularly effective for student-employees who experience suspension, dismissal, or expulsion as a part—in fact, likely as the apex—of the discrimination they experience, because it would allow them to challenge these actions as Title VII violations. For instance, if this rule were expanded to the Fourth Circuit, plaintiffs like Stewart could prevail on their Title VII claims[236] even though their alleged adverse employment action (in Stewart's case, termination from his internship) flowed only from the adverse educational action they experienced (expulsion from the school). Under current doctrine, of course, Stewart's claims failed as a matter of law. But under an expanded doctrine requiring only that the discrimination have "consequences in the workplace," the fact that he lost his job by virtue of losing his student status would still be enough to make out a Title VII claim if he lost his student status as a result of discrimination. Discriminatorily interfering with the conditions

234. *Id.*; *see also id.* (further finding that the funeral-based incident of sexual harassment ought to be considered because it "comprised an aspect of the . . . common adjuncts of various events and interactions associated with the normal course of business").

235. *See* Jason N. Houle, Jeremy Staff, Jeylan T. Mortimer, Christopher Uggen & Amy Blackstone, *The Impact of Sexual Harassment on Depressive Symptoms During the Early Occupational Career*, 1 SOC'Y & MENTAL HEALTH 89, 92 (2011) ("[T]hose who were harassed before may react more negatively to harassment than first-time targets because past experience diminishes one's ability to cope.").

236. *See supra* Section III.B (discussing Stewart v. Morgan State Univ., 46 F. Supp. 3d 590 (D. Md. 2014), *aff'd*, 606 F. App'x 48 (4th Cir. 2015)).

precedent to employment should be understood as the employment discrimination that it is.[237]

B. Incorporating Education-Based Protected Activity into Title VII Retaliation Claims

Evidence of education discrimination should also be factored in to address situations like Scenario B from Section III.A—namely, situations in which a student-employee complains of education-based discrimination and is retaliated against in their capacity as an employee. The combination of education-based protected activity with employment-based retaliation represents the inverse of, and thus complements, the combination already covered in *White* (prohibiting non-employment-based retaliation following employment-based protected activity).

This expansion would be particularly appropriate given the channel through which student-employees, like John in Scenario B, are most likely to engage in protected activity: Title IX offices. This reporting channel, unlike a human-resources office for student-employees, is mandatory on all college and university campuses that accept federal funding. The Department of Education requires that every school covered by Title IX create and distribute a sex-discrimination policy, appoint a Title IX coordinator, and have and publicize the procedures for making a complaint of sex discrimination.[238] By contrast, Title VII makes no such requirements of schools.[239] Schools even explicitly recommend reporting to the Title IX office in the event of sex discrimination without nary a mention of employment-based complaint procedures. The only

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237. This logic mirrors that of the Immigration Reform and Control Act of 1986, which prohibits employment discrimination based on an individual's citizenship or immigration status—including, for instance, rejection of documents establishing verification to work that meet specified standards or requesting additional standards. *See* 8 U.S.C. § 1324b(a)(6) (2018); *see also* Prac. L. Lab. & Emp., *Discrimination Under IRCA: Basics* (Westlaw Practical Law, Practice Note W-023-0012) (describing various impermissible "immigration-related employment practices"). This prohibited conduct reflects an understanding that interference with the threshold conditions for employment amounts to employment discrimination. While of course this statute specifically concerns employment discrimination based on protected characteristics outside of Title VII, it is nonetheless illustrative of how employment discrimination should be expansively understood.

238. *See Title IX Legal Manual*, *supra* note 47, at Sections V.C-E.

239. Title IX is a Spending Clause statute, unlike Title VII, which means Title IX empowers the federal government to impose conditions attached to the acceptance of federal funds. *See supra* Section I.A. Title VII, meanwhile, applies point blank to all employers with fifteen or more employees. *See* 42 U.S.C. § 2000e(b) (2018).

path Yale recommends other than the Title IX office, for instance, is reporting to law enforcement.[240]

Accordingly, the path most available to and most likely to be taken by student-employees experiencing sex discrimination is to report through the Title IX office. Recognition of this reality in the doctrine would protect student-employees who (1) may have no other designated reporting channel, forcing them to resort to ad hoc procedures, and (2) have been told time and time again that the Title IX office is their best bet for relief. Under current doctrine, reporting to the Title IX office would prevent them from making out a Title VII retaliation claim even if they are retaliated against in their employment capacity because the Title IX office is not considered to be strictly employment-based.[241] Courts should thus adapt Title VII retaliation doctrine to count complaints made to Title IX offices, as well as other education-based complaint procedures, as protected activity if they are followed by adverse employment-based actions.

One potential way to rework the doctrine in this manner would be to take seriously the fact that, as the *White* Court noted, Title VII's antiretaliation doctrine prohibits "employer's actions . . . that . . . could well *dissuade* a reasonable worker from making or supporting a charge of discrimination."[242] An explicit extension of the doctrine based on this principle would specifically take employment-based retaliation as sufficient dissuasion in and of itself. In other words, in Scenario B, where John filed an education-related complaint and received employment-based retaliation,[243] such employment-based retaliation can and should be considered an employer action that dissuades him from ad-

240. *See, e.g.*, Title IX at Yale, *Reporting Options*, YALE UNIV., https://titleix.yale.edu/reporting-options [https://perma.cc/NY9V-C4LQ] ("There are several options for reporting a concern of sex- or gender-based discrimination, including sexual misconduct. You may wish to disclose a concern to a Deputy Title IX Coordinator or make an online report to the Title IX Office."); *see also id.* (listing reporting to law enforcement as the only path to relief outside the Title IX office).

241. *Cf.* Huang v. Ohio State Univ., No. 19-cv-1976, 2022 WL 16715641, at *3, *16 (S.D. Ohio Nov. 4, 2022) (counting only Huang's reports to OSU's human-resources employee and her department chair as protected activity for purposes of her Title VII claim, even though she also reported to OSU's Title IX office), *rev'd*, 116 F.4th 541 (6th Cir. 2024). Notably, given that Title IX has been understood by a plurality of federal courts of appeals to encompass a private right of action for employment discrimination, Title IX offices can and should be considered forums for employment-based protected activity. *See supra* text accompanying note 56.

242. Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 57 (2006) (emphasis added).

243. *See supra* Section III.A.

vancing further complaints of discrimination.[244] This framing would require no departure from precedent—instead, it would simply build upon it.

At least one district judge has already connected these dots. In a 2010 Middle District of Tennessee case, *Kovacevich v. Vanderbilt University*, the judge found that the plaintiff had established a prima facie case of retaliation under Title VII based on an *education-based* complaint of primarily educational discrimination that led to *employment-based* retaliation (as well as additional retaliation, including education-based retaliation)[245]—essentially paralleling Scenario B. In this case, the plaintiff accompanied her doctoral-thesis advisor, for whom she also worked as a teaching assistant, in archaeological excavations solely in her capacity as a student, during which he sexually harassed her.[246] After she reported to the university-designated Title IX office,[247] the advisor-

244. *Contra, e.g.*, Lashley v. Spartanburg Methodist Coll., No. 18-CV-2957, 2021 WL 8014689, at *16 (D.S.C. Dec. 20, 2021) (finding that the plaintiff's report to a Title IX coordinator was not sufficient protected activity for the purposes of Title VII, even where the plaintiff was not a student in addition to an employee, because "no reasonable jury could find that the plaintiff engaged in protected activity under Title VII by opposing alleged discrimination that is covered by Title IX"), *report and recommendation adopted*, No. 18-CV-02957, 2022 WL 872604 (D.S.C. Mar. 24, 2022), *aff'd*, 66 F.4th 168 (4th Cir. 2023).

245. No. 09-0068, 2010 WL 1492581, at *3, *16 (M.D. Tenn. Apr. 12, 2010).

246. *Id.* at *1–2. The court noted that "graduate students who do field work in connection with archaeological excavation are not considered as performing TA duties during their field work"; rather, "[s]uch work is performed only as part of the student's graduate education." *Id.* at *1. While of course this language represents the deferential approach to schools excoriated earlier in this Note, *see supra* Section II.B.1, this Section takes at face value the district court's understanding of the nature of this determination without further interrogation for purposes of teasing out the subsequent analysis.

247. The plaintiff, a Vanderbilt graduate student, first reported to the Vanderbilt Opportunity Development Center (ODC), which, for relevant intents and purposes, served as the school's Title IX office. *Kovacevich*, 2010 WL 1492581, at *3.

ODC was "Vanderbilt's equal opportunity, affirmative action and disability services office, charged with the interpretation, understanding and application of federal and state laws which impose special obligations in the areas of equal opportunity and affirmative action." *Jenious Named Director of Opportunity Development Center at Vanderbilt*, VANDERBILT UNIV. (Dec. 2, 2009, 11:18 AM), https://news.vanderbilt.edu/2009/12/02/jenious-named-director-of-opportunity-development-center-at-vanderbilt [https://perma.cc/MB9Q-NVYV]; *see also id.* (explaining that "ODC assists anyone who has any concerns about equal opportunity, affirmative action or disability issues," including students). The director of the ODC "also serves as Vanderbilt's Title VI, Title IX and ADA Coordinator." *Id.* Although ODC appears to have been since dissolved, Vanderbilt instructed students to direct its Title IX claims to ODC when it existed, including during the time period of this case. *See Student Handbook*, VANDERBILT UNIV. [4] (2005/2006), https://dfkpq46c1l907.cloudfront.net/pdfs/23947e7f71b0ee626cf04cb9a7f81b0e.pdf [https://perma.cc/M3RR-CE7Q]; *see also id.* ("The Office of Civil Rights of the U.S. Department of Education defines sexual harassment

supervisor retaliated against her in her capacity as an employee: he withdrew her teaching assistantship with him (employment-based), as well as gave her biased feedback on her thesis (education-based), publicly lambasted her thesis when she was on the job market searching for a tenure-track position, and threatened to ruin her career, among even more adverse actions.[248]

Relying largely on *White*, the judge rejected the university's argument that her Title VII claims were foreclosed by her primarily educational relationship with the university.[249] Instead, in denying the school's motion for summary judgment, the judge held that

> [t]here are numerous genuine issues of material fact in this record as to whether [the advisor-supervisor], acting as an agent of [the school] . . . engaged in conduct that could well dissuade a reasonable . . . graduate student, TA, or research assistant from making or supporting a charge of discrimination, such that the conduct would qualify as material adverse action under *White*.[250]

Based on this reasoning, the judge concluded that the plaintiff had "established her *prima facie* case of retaliation" under Title VII.[251]

That the judge here found a prima facie case of Title VII retaliation—and made specific reference to the "dissuade" path to that liability in doing so—shows that choosing a Title IX office as the site of protected activity should not foreclose Title VII's application. Admittedly, in this relatively short opinion, the judge did not expound upon his understanding of how exactly the school's actions against the plaintiff dissuaded her from filing further complaints. But it is not difficult to draw an inference to this effect: if you were punished for complaining, why would you complain more, or even follow up to substantiate your first complaint further? Specifically, if your advisor-supervisor withdrew your employment—not to mention interfered with your future employment in myriad ways—it would be reasonable for you to desist from further com-

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under Title IX of the Education Amendments of 1972 as consisting of 'verbal or physical conduct of a sexual nature, imposed on the basis of sex, by an employee or agent of a recipient that denies, limits, provides different, or conditions the provision of aid, benefits, services, or treatment protected under Title IX.' Any person who has a complaint regarding sexual or other harassment should call the Opportunity Development Center as soon as possible."). *Id.*

248. *Kovacevich*, 2010 WL 1492581, at *3, *5-6.

249. *Id.* at *15-16.

250. *Id.* at *16. The judge also referred to other forms of protected activity in which the plaintiff had engaged, such as filing an earlier Title VII and Title IX lawsuit. *Id.* at *3, *16.

251. *Id.* at *16 (holding she had done so under both Title VII and Title IX).

plaints, fearful of what else might follow. This dissuasion is exactly the kind that Title VII's antiretaliation provision is meant to cover.[252]

Moreover, and perhaps more straightforwardly, the analysis provided above in Section IV.A on how education-based discrimination bleeds into the workplace and thus may constitute employment-based discrimination should also establish that complaints thereof count as protected activity for the purposes of Title VII's antiretaliation provision. To establish a claim for retaliation under Title VII, "a plaintiff must show, as an initial matter, that she engaged in 'protected activity,' such as reporting discriminatory conduct to a manager or human-resources office—often categorized as protected *opposition*—and/or filing an EEOC charge or participating in a Title VII proceeding, often categorized as protected *participation*."[253]

While the prototypical examples of opposition are reporting to human resources, reporting to a supervisor, or filing an EEOC charge, protected opposition may take a wide range of other forms, as Title VII specifies no particular methods. Indeed, in the absence of specific statutory language on what constitutes protected opposition, the Supreme Court ascribes to the term "oppose" its "ordinary meaning": to give an "ostensibly disapproving account" of the complained-of conduct to the employer.[254] As the Fourth Circuit has observed:

> This broad definition led the Court to conclude that the threshold for oppositional conduct is not onerous. Instead, "[w]hen an employee communicates to her employer a belief that the employer has engaged in . . . a form of employment discrimination, that communication virtually always constitutes the employee's *opposition* to the activity."[255]

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252. *See* Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 57 (2006) ("[T]he employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination.").

253. Christine J. Back, Cong. Rsch. Serv., R45155, Sexual Harassment and Title VII: Selected Legal Issues 31 (2018) (footnotes omitted).

254. Crawford v. Nashville & Davidson Cnty., 555 U.S. 271, 276 (2009).

255. DeMasters v. Carilion Clinic, 796 F.3d 409, 417 (4th Cir. 2015) (alterations in original) (quoting *Crawford*, 555 U.S. at 276); *see also* Back, *supra* note 253, at 36 ("The Court explained that the term means to 'resist or antagonize,' among other meanings, and that opposition can also entail taking a stand against a practice in other ways besides 'instigating' action. In light of the various definitions of 'oppose,' the Court concluded that the plaintiff's report of harassing behavior was opposition 'if for no other reason than the point argued by the Government and explained by an EEOC guideline . . . .'" (footnotes omitted) (quoting *Crawford*, 555 U.S. at 276-77)).

Based on this capacious definition, the crucial consideration for Title VII retaliation claims is *what* is reported—not *how* it is reported. So long as the report puts the school-employer on notice of an unlawful employment practice, complaints about it amount to protected activity.[256] Accordingly, education discrimination should be considered employment discrimination when "its consequences may be felt in the victim's 'workplace' or 'work environment' and be brought to bear on her terms and conditions of employment."[257] And when a student-employee communicates as much to her school—*however she chooses to do so*—that communication should count as protected opposition. Title VII retaliation doctrine must incorporate complaints made to Title IX offices and other education-based fora in order to thoroughly detect and protect against discouragement of reporting employment-based discrimination.

CONCLUSION

Fulsome vindication of student-employees' antidiscrimination rights requires careful analysis of how the legal tools designed to vindicate those rights—Title VII, Title IX, and Title VI—are failing in those missions. Review of the current landscape of litigation over student-employees' claims of discrimination illuminates that these statutes are being underutilized by different parties in redressing the harm that student-employees face. Starting now, to ensure that those entitled to Title VII protections actually receive them, courts must rigorously apply the common-law agency and economic-realities tests to student-employees, without regard for their other relationships with their schools or the exclusively educational labels schools slap upon them. To aid courts in this pursuit, student-employee plaintiffs should, to the extent practicable, thoroughly plead satisfaction of each element of these tests. Similarly, a student-employee plaintiff should not put all her eggs in the Title VII basket where her employment relationship with the school is not perfectly coterminous with her educational one. Instead, where not preempted, she should also plead Title IX claims to ensure that the full slate of discrimination and retaliation she experienced, across the entirety of her relationship with the school, can be properly considered by the court.

Looking ahead, courts should build upon the principle established by *White* to expand Title VII doctrine for student-employee plaintiffs, specifically by al-

256. *See* 42 U.S.C. § 2000e-3(a) (2018) (prohibiting an employer from discriminating against an employee "because he has opposed any practice made an unlawful employment practice by this subchapter").

257. Parrish v. Sollecito, 249 F. Supp. 2d 342, 351 (S.D.N.Y. 2003).

lowing them to incorporate evidence of education-based discrimination and education-based protected activity into their Title VII claims. Such a doctrine would integrate the protective benefits of Title VII with the coverage benefits of Title IX, allowing plaintiffs to introduce the entirety of their discriminatory and retaliatory experiences into the record under significantly more protective standards. A reform to this effect would be more faithful to and understanding of the complex, overlapping lives that student-employees lead.

Student-employees do not live in a cleavable world. A student-employee's relationship with their university should be entirely free from discrimination—and the doctrine should reflect that.