No. 20-1305

In the
Supreme Court of the United States

DOUGLAS J. HOLDINGS, INC., ET AL.,
Petitioners,

v.

JOY EBERLINE, ET AL.,
Respondents.

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

MOTION FOR LEAVE TO FILE *AMICUS* BRIEF AND BRIEF OF *AMICUS CURIAE* AMERICAN ASSOCIATION OF COSMETOLOGY SCHOOLS IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE

Pursuant to Rule 37.2(b) of the Rules of this Court, the American Association of Cosmetology Schools (AACS) moves for leave to file the attached Brief *Amicus Curiae* in support of the Petition for Writ of Certiorari. AACS provided timely notice of its intention to file the attached brief under Sup. Ct. R. 37.2(a). Counsel for Petitioners consented to the filing of the attached brief, but counsel for Respondents stated that they do not consent. No person or entity other than AACS, its members, and its counsel have made a monetary contribution to the preparation or submission of the attached brief. In particular, although certain Petitioners are dues-paying members of AACS, no Petitioner has contributed directly to the financing of this brief.

AACS is a nearly 100-year-old nonprofit organization that is dedicated to educating and advancing millions of students into the beauty and wellness industry. AACS's membership includes cosmetology, skin, nail, barbering, and massage schools, and currently represents approximately 600 schools across the nation. AACS estimates that cosmetology programs—both AACS member schools and non-member institutions—educate nearly 200,000 students annually. The overwhelming majority of AACS members are small, single location schools owned by families.

AACS, its members, and cosmetology schools across the country have a strong interest in this case. The Sixth Circuit's decision has created a circuit split with the Second, Seventh, and Ninth Circuits on the

identical issue of how to determine whether a student practicing hands-on skills in a clinic classroom setting is an employee of a school pursuant to the Fair Labor Standards Act. That circuit split has thrown into doubt decades of jurisprudence on which AACS's members and other schools have relied in developing and implementing curricula that incorporates significant experiential learning. The practical, hands-on education that cosmetology and other vocational schools provide overwhelmingly benefits students, and is instrumental in preparing them to pass licensure examinations and gain/keep employment. Moreover, the curricula is the product of years of academic expertise developed by these schools in conjunction with employers, educators, and other experts, as well as the demands of extensive government regulation and accreditor oversight. By calling into question whether the curricula implemented by these schools create an employment relationship with students across the country, the Sixth Circuit's decision casts into doubt the continued viability of this invaluable educational model for students.

The test announced by the Sixth Circuit requires courts to analyze piecemeal aspects of an educational task and to weigh the educational value of that task against that of any tangential benefit gained by the school from that task. This approach will lead to unpredictable litigation results and dramatically increase the risk of inconsistent conclusions about what constitutes an employment relationship in the educational context. In response, cosmetology schools and other schools will be forced to limit experiential learning opportunities for students that schools and

regulators have determined is both valuable and necessary. Given the strong interest that the members of AACS have in the resolution of the issue raised by this case, AACS respectfully requests this Court grant leave to file the attached brief.

WHEREFORE this Court should grant AACS's motion for leave to file the attached Brief *Amicus Curiae* in Support of Petitioners.

Respectfully submitted,

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The American Association of Cosmetology Schools submits this brief in support of the Petition for a Writ of Certiorari.[1]

INTEREST OF AMICUS CURIAE

American Association of Cosmetology Schools (AACS) is a nearly 100-year-old nonprofit organization that has dedicated itself to educating and advancing millions of students into the beauty and wellness industry. AACS's membership includes cosmetology, skin, nail, barbering, and massage schools, and currently represents approximately 600 schools across the nation. AACS estimates that cosmetology programs—both AACS member schools and non-member institutions—educate nearly 200,000 students annually. The overwhelming majority of AACS members are small, single location schools owned by families.

AACS and cosmetology schools across the country have a strong interest in this case. The Sixth Circuit's departure from this Court's jurisprudence creates a circuit split with the Second, Seventh, and Ninth Circuits on the identical issue of how to determine whether a student is an employee of a school pursuant

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[1] Pursuant to Sup. Ct. R. 37.2(a), amicus curiae provided timely notice of its intention to file this brief. Petitioners consented to the filing of this brief, but Respondents did not. Counsel for amicus curiae authored this brief in whole. No person or entity other than amicus curiae, its members or counsel, made a monetary contribution to the preparation or submission of this brief. In particular, although certain Petitioners are dues-paying members of AACS, no Petitioner has contributed directly to the financing of this brief.

to the Fair Labor Standards Act. In so departing, the Sixth Circuit announced a new test that requires courts to analyze piecemeal aspects of an educational task and weigh the educational value of that task against that of any tangential benefit gained by the school from that task. Such an analysis abandons this Court's directive to determine the economic reality of the situation by determining the primary beneficiary of the relationship as a whole. Moreover, the new rule fails to give due deference to academic decisions of schools. And it will lead to unpredictable and inconsistent conclusions as to what constitutes an employment relationship, including situations where the employment relationship may vacillate minute-by-minute or be based on subjective factors. Finally, this new rule subjects all schools (public, private, non-profit, for-profit, graduate, etc.), to uncertain legal risk with devastating class-action costs of defense and possible liability.

AACS respectfully requests this Court grant the Petition for Writ of Certiorari and direct the Sixth Circuit to follow its sister circuits in holding that the economic reality test requires analyzing the totality of the circumstances to determine which party is the primary beneficiary of the relationship as a whole, and not on a piecemeal basis analyzed in a vacuum.

SUMMARY OF ARGUMENT

Until this case, courts have recognized that the economic reality test used to determine whether a person is an employee under the FLSA requires analyzing the totality of the circumstances to ascertain whether the student or the school is the primary

beneficiary of the relationship. By looking at the totality of the circumstances, this test accounts for the overall educational nature of the relationship, including that some tasks may be redundant with what the students already know or are repetitive of lessons learned. It further recognizes that courts defer to schools—the experts on what students need to learn—about how they set and implement their curriculum. That test has worked since this Court's decision in *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947). Schools and students understood the boundaries of the academic relationship, and schools were able to implement curriculum to provide students with the invaluable experiential learning they need for licensure and employment without the schools running afoul of the FLSA.

The Sixth Circuit now seeks to overturn that system. In breaking from this Court, the Second, Seventh, and Ninth Circuit Courts of Appeal, and numerous district courts, the Sixth Circuit espouses a new test that disregards the totality of the circumstances as well as the economic realities of the relationship. Instead, its new rule analyzes piecemeal and in a vacuum only whether the student or the employee is the primary beneficiary of a *particular task*. As the Sixth Circuit held, "when a plaintiff asserts an entitlement to compensation based only on a portion of the work performed in the course of an educational relationship, courts should apply the primary-beneficiary test . . . only to that part of the relationship, not to the broader relationship as a whole." *Eberline v. Douglas J. Holdings, Inc.*, 982 F.3d 1006, 1014 (6th Cir. 2020).

The Sixth Circuit's new rule is unworkable in the academic context because it ignores the economic reality of the situation: these are students practicing required hands-on skills as part of a training program for a licensed profession. Analyzing tasks out of that context is meaningless—they are being done as part of the overall training, aimed at guiding students to graduation, licensure, and employment. The tasks would not exist *but for* the learning environment, and the two cannot be separated.

Relatedly, the Sixth Circuit's new approach substitutes its own opinion of curriculum over that of the schools' judgment. That result not only contravenes established case law, it also ignores that schools are best qualified to determine what needs to be taught to students. Schools are run by and employ individuals who know firsthand the demands and expectations of employers. They are guided by community, employer, and other stakeholder input. They understand the licensure examination topics, and the legal requirements that apply to their graduates and their chosen professions. It is impermissible and unwise to supplant the expert academic decisions of schools with that of the judiciary.

Finally, the consequences of this new rule now threaten the viability of the experiential learning system for all schools (not just cosmetology or vocational schools). The FLSA applies to cosmetology schools, community colleges, traditional schools, and graduate programs. As such, any of those students could bring class action lawsuits against their schools, alleging that cherry-picked, piecemeal aspects of their

education benefited the school more than the student, and that they (and all others like them) should be paid for that benefit. The financial risk from litigation costs and damages exposure is potentially devastating. To minimize their litigation exposure, schools and externship/clinical sites will be forced to eliminate any task or feature of an experiential learning environment that could potentially be construed as employment. As such, students will be deprived of meaningful and otherwise unavailable practical skills and lessons demanded by employers and required to pass licensure examinations.

For the benefit of students and schools everywhere, AACS respectfully requests this Court grant the Petition for Writ of Certiorari and confirm that the economic reality test of the FLSA still requires analyzing the totality of the circumstances to determine the primary beneficiary of the entire relationship.

ARGUMENT

I. The Court Should Grant Certiorari to Confirm the Proper Analysis for Assessing Whether an Employment Relationship Exists in a Highly Regulated, Educational Environment.

The Sixth Circuit's decision permits students to claim they were employees based on performance of isolated and piecemeal aspects of their clinic classroom education. Such a rule ignores entirely the nature and purpose of clinic classrooms, in large part because it fails to understand the duty and expertise cosmetology

schools have in preparing their students for licensure and employment. This Court should grant the petition to reaffirm that an appropriate analysis of whether a student, intern, or trainee is an employee must be performed within the context of the broader educational relationship, especially given the regulatorily required instructional methods and content for vocational schools.

A. Governing regulations, accreditor requirements, and employer demands all require that cosmetology schools teach practical skills through clinic classrooms.

The analysis adopted by the Sixth Circuit overlooks a fundamental fact about how cosmetology schools operate: Everything these schools require their students to do is related to—if not expressly demanded by—numerous layers of regulatory, accreditor, and government oversight, as well as the demands and expectations of employers. The application of the "primary beneficiary analysis" must be performed within the context of clinic classroom work and the reason for those tasks—that is, it must be based on the totality of the circumstances.

1. Cosmetologists and cosmetology schools across the country operate in highly regulated environments that require significant "hands-on" education in, among other things, personal hygiene, salon management, and salon sanitation. The regulatory framework that applies in this case fairly represents the typical regulatory environment across the country.

Michigan prohibits the performance of "any form of cosmetology services, with or without compensation, on any individual other than a member of his or her immediate family without a license." Mich. Comp. Laws § 339.1203a(1). To be licensed by the Michigan Department of Licensing and Regulatory Affairs (LARA), a person must complete either a 1,500-hour course of study in a school of cosmetology or a two-year apprenticeship at a licensed cosmetology establishment, and pass a licensing examination. *Id.* at § 1207. LARA similarly licenses and oversees cosmetology schools. *Id.* at § 1203b.

Of the required 1,500 hours, state regulations require schools to provide 425 hours in a lecture setting ("theory hours"), 965 hours in a hands-on clinic classroom ("practical hours"), and 110 hours in either setting at the school's discretion. Mich. Admin. Code. R. 338.2161. These same regulations further delineate how many hours must be spent on particular topics of instruction. As relevant here, schools are required to provide 90 theory hours and 40 practical hours on sanitation/patron protection laws and rules, personal hygiene, salon management, and mechanical and electrical equipment safety. *Id.* Within those 130 hours, students must perform at least 585 practical applications of these skills (*e.g.*, sanitizing scissors, sanitizing workstation, disposing of dirty towels). *Id.* Repetition of sanitation skills is intended to make those skills automatic and habitual, thereby protecting the public and the cosmetologist from bloodborne and airborne contagions. Similarly, schools must provide 20 theory hours and 10 practical hours on occupational safety and health. *Id.*

This required curriculum prepares students for the licensure examination, which consists of a multiple-choice section and a hands-on section. Mich. Admin. Code R. 338.2139, .2161. At least 25% of the multiple-choice section focuses on topics including infection control, client protection, disinfectants, bacteria, virus, fungus, decontamination, as well as Michigan's cosmetology regulations, licensing requirements, and salon-management responsibilities. *See Eberline*, 982 F.3d at 1019 (Batchelder, J., concurring in part) (explaining testing process and citing to appellate record for same). Moreover, the hands-on portion of the exam scores students on whether they disinfected their workstations before and after servicing a client, and if they practiced proper safety criteria during every cosmetic service (including changing towels and cleaning spills). *Id.*

Sanitation is taught by cosmetology schools and heavily tested on the licensure examination to protect public health, and cosmetologists can be fined or have their license revoked for failing to follow prescribed practices. LARA requires licensed cosmetologists to adopt and follow standards necessary "to prevent the spreading of an infectious or contagious disease." Mich. Comp. Laws § 339.1203(1). LARA further demands cosmetologists follow state and local health regulations, and for salons to be "clean, safe, and sanitary at all times." Mich. Admin. Code R. 338.2171(2)(b) and 338.2173. Hair clippings must be disposed of after servicing every patron; fresh towels must be supplied for every service; and sinks, tubs, and shampoo bowls must be "thoroughly cleanse[d] and sanitize[d] . . . immediately after each use." *Id.* Student training in

these areas is purposefully repetitive in order to create the automatic habits required to protect public health and ensure compliance with LARA's regulations governing the same.

2. In addition to satisfying requirements under state law, cosmetology schools must also be accredited in order to participate in Title IV federal fund programs (*e.g.*, federal loans and grants for students). While schools are not required to participate in federal funding, the vast majority of schools choose to participate so their students can obtain federal financial aid. Every such school is under accrediting oversight by one of twenty-six institutional accreditors approved by the U.S. Department of Education. Each accreditor is an autonomous, independent entity that performs initial and then recurring evaluations of each school to ensure the school's facilities, faculty, curriculum, student support services, and student outcomes meet a set of minimum standards.

Accreditors require that schools teach students the skills they need to work as cosmetologists, including sanitation and business management skills. Like more than 1,300 schools nationwide, Petitioners' schools are accredited by the National Accrediting Commission of Career Arts and Sciences (NACCAS). To be accredited, NACCAS ensures that a school's curriculum "compl[ies] with the applicable regulatory agency curriculum requirements."[2] Each program must also provide "instruction on the regulations governing the scope of

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[2] NACCAS, Standard VI–Curriculum, *available at* http://naccas.org/Standards (last accessed April 14, 2021).

practice for which students are training." *Id.* And it must provide "supervised instruction in the applicable skills and competencies" required to work in the chosen profession. *Id.*

3. A school's survival depends on its graduates' ability to gain and keep employment after graduation. To achieve that outcome, schools must teach practical skills that will be required for employment, including all aspects of being a successful cosmetologist (*e.g.*, proficiency in all hair services, sanitation, product sales) and operating a business (*e.g.*, bookkeeping, reception, inventory).

In addition, the Higher Education Act limits eligibility to participate in federal funding programs to those institutions preparing students for "gainful employment in a recognized occupation." 20 U.S.C. § 1001. To determine if such an outcome is being achieved, the U.S. Department of Education requires schools to disclose enumerated debt-to-earnings rates for each program.[3] These rates include the annual earnings rate and the discretionary income rate, which measure "the ability of program completers to reasonably repay the educational debt incurred for their attendance in the program." *Id.* Moreover, schools must disclose this data to prospective students and it

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[3] *See* U.S. Dep't of Ed., Gainful Employment Information, available at https://studentaid.gov/data-center/school/ge (last accessed April 14, 2021).

is publicly available on the Department of Education's College Scorecard website.[4]

B. Before this case, every court to apply the "primary beneficiary test" has confirmed that clinic classroom experience is invaluable to students and imposes financial burdens on schools.

Against this regulatory, accreditation, and outcome-oriented backdrop, every court has recognized that clinic classrooms at cosmetology schools exist for the primary benefit of students—until the Sixth Circuit in this case.

Clinic classrooms instill in students the habits required for success, including sanitation skills. Students learn the repetitive and unceasing nature of properly sweeping and sanitizing the entire workstation before each hair service. Students asked to wash used towels, refill product dispensers, sweep, and clean around the stations so "you could eat off" of the surfaces are performing tasks that will be required by employers. Moreover, all of these skills flow from the students practicing cosmetology on guests. The tasks would not exist *but for* the students practicing those skills.

Similarly, in the clinic classroom, students learn critical business skills, such as how to discuss particular products with guests and how to sell those products. Those skills are important because many

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[4] *See* U.S. Dep't of Edu., College Scorecard, *available at* https://collegescorecard.ed.gov/ (last accessed April 14, 2021).

practicing cosmetologists rely on commissions from product sales as a supplement to their wages. Many students become self-employed or start small businesses as independent salon owners. The clinic classroom also teaches students how to run a business by greeting guests, hosting guests with beverage and food, booking follow-up appointments, tracking and stocking inventory, and bookkeeping. Again, employers will not hire graduates unable to do these tasks.

The clinic classroom provides students with a safe environment in which to practice necessary skills. No matter how poorly they perform a treatment, how awkward they are at discussing and selling product, or how angry a guest gets at them, students cannot be fired or terminated in the clinic classroom. And instructors are there to help students learn from and correct their mistakes, including ensuring the students do not endanger the public (or themselves) by failing to properly sanitize a workstation. These conditions are the opposite of a working salon, where cosmetologists work with no supervision and can be terminated for any of those performance problems.

Given these non-employment conditions, clinic classrooms are not set up to be profitable. *See, e.g., Ortega v. Denver Inst. LLC*, 14-cv-1351, 2015 WL 4576976, at *4 (D. Colo. July 30, 2015) ("[T]he profit and loss statement 'associated only with the service revenue on the clinic floor' indicates a net operating loss of nearly $450,000."); *Gerard v. John Paul Mitchell Systems*, 14-cv-4999, 2016 WL 4479987, at *4, 7 (C.D. Cal. Aug. 22, 2016) ("The fees generated from clinic classroom services and product sales added to

Defendants' revenue totals, and the schools were profitable. But the bulk of revenue came from tuition and fees. . . . The clinic classrooms exist solely for the students . . . ."); *see also Jochim v. Jean Madeline Educ. Ctr. of Cosmetology, Inc.*, 98 F.Supp.3d 750, 758 (E.D. PA. 2015) ("Jean Madeline asserts that its main business is the School itself and that the clinic does not generate revenue."). The reason is self-evident: a professional salon could not stay in business under the conditions of the clinic classrooms. No business could operate where employees cannot be terminated for taking too long for a service or performing a skill badly, while charging *de minimis* prices, paying exorbitant rents on very large buildings in high-traffic, easily accessible areas to attract students, and displaying signs and advertisements that its "employees" were not licensed nor qualified. And the meager prices charged to guests are meant to replicate the demands and pressures of working on paying members of the public (as opposed to volunteers or family/friends, who are typically more forgiving and patient). *See, e.g.*, *Benjamin v. B&H Educ., Inc.*, 13-cv-4993, 2015 WL 6164891, at *3 (N.D. Cal. Oct. 16, 2015) ("Working on paying customers has obvious educational value in preparing students for careers in which they will, in fact, be working on other paying customers."); *Ortega*, 2015 WL 4576976 at *16 (school charged guests "to ensure that the guests attach a level of reasonable value to the services provided").

Presented with these facts, every court that has previously conducted the primary beneficiary analysis in this context has agreed students benefit immensely from the experiential learning in clinic classrooms. *See,*

e.g., Jochim, 98 F.Supp.3d at 758 (school provides "realistic clinic in which students can practice treatments and hone customer service skills, retail skills, and sanitary practices as [state] law requires"); *Ortega*, 2015 WL 4576976 at *14–15 (students benefitted from practicing services, sanitation skills, and retail recommendations); *Hollins v. Regency Corp.*, 144 F.Supp.3d 990, 999–100 (N.D. Ill. 2015) (similar); *Benjamin*, 2015 WL 6164891 at *3 (similar); *Atkins v. Capri Training Ctr., Inc.*, 2:13-cv-6820, 2014 WL 4930906, at *9 (D.N.J. Oct. 1, 2014) ("[C]linical program . . . afford[ed] students the chance to gain the experience and skills they need[] to succeed after graduation."). These decisions have uniformly recognized that clinic classrooms permit students to practice their skills and learn from their mistakes before those mistakes could cost them a job or endanger the health of a customer. The clinic classrooms are not a business model for profiting on unpaid labor. Rather, the clinic classrooms are run at a financial loss for the benefit of the students as part of their education.

The Sixth Circuit's decision breaks from this consistent line of cases and takes a different tact that makes no sense in the academic context. The Sixth Circuit's application of its own rule highlights the problems in trying to separate a challenged task from its broader educational context. While the Sixth Circuit instructed that the employment analysis should not "consider benefits that come from a different part of the broader relationship that is not connected to the work at issue," 982 F.3d at 1017, the Sixth Circuit did precisely that when it concluded that "Douglas J does make a profit from the salons [because of] tuition paid

by students," *id.* at 1010. The Sixth Circuit looked at the entire economic relationship to determine the clinic classroom was "profitable," but had a far narrower focus when determining the educational benefit of the task in question. That problem does not exist under the primary beneficiary test espoused by the Second, Seventh, and Ninth Circuits, which looks to the economic reality of the relationship as a whole to determine who is the primary beneficiary of the relationship. *See Velarde v. GW GJ, Inc.*, 914 F.3d 779, 788 (2d Cir. 2019) ("Once again evaluating the totality of the circumstances, then we reiterate our conclusion that [plaintiff] was the primary beneficiary of his relationship with the [school]."); *Hollins v. Regency Corp.*, 867 F.3d 830, 836–37 (7th Cir. 2017) (analyzing curriculum requirements to conclude "incidental tasks to which Hollins points are not enough to tip the balance over to the 'employee' side of the line"); *Benjamin v. B&H Educ., Inc.*, 877 F.3d 1139, 1147–48 (9th Cir. 2017) (similar); *accord Nesbitt v. FCNH, Inc.*, 908 F.3d 643, 646–47 (10th Cir. 2018) (to determine if massage therapy students were employees, court examined "totality of the circumstances" to determine "the economic reality of the situation"). The Court should grant the petition to confirm the proper analysis for assessing whether an employment relationship exists in this highly regulated, educational environment.

II. The Sixth Circuit Departed from this Court's Longstanding Mandate that Courts Should Defer to a School's Academic Decisions.

The Court should grant certiorari in this case to address the Sixth Circuit's mistaken choice to substitute the judgment of the judiciary for the judgment of educators on purely academic issues. This Court has long instructed that courts are unsuited to "evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions—decisions that require 'an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decisionmaking.'" *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 (1985) (quoting *Board of Curators, Univ. of Mo. v. Horowitz*, 435 U.S. 78, 89–90 (1978)). Courts should only overturn academic decisions if they are "such a substantial departure from accepted academic norms as to demonstrate that the faculty did not exercise professional judgment." *Id.* at 227.

Indeed, the Sixth Circuit has itself instructed that "in an academic context[,] . . . judicial intervention in any form should be undertaken only with the greatest reluctance." *Doherty v. S. Coll. of Optometry*, 862 F.2d 570, 576–77 (6th Cir. 1988). "[J]udicial deference to educators in their curriculum decisions is no less applicable in a clinical setting because evaluation in a clinical course is no less an 'academic' judgment . . . ." *Id.* (internal quotation marks and citation omitted). Courts have followed that guidance closely. *See, e.g.,*

Ward v. Members of Bd. Control of E. Mich. Univ., 700 F.Supp.2d 803, 814 (E.D. Mich. 2010) ("[C]ourts have traditionally given public colleges and graduate schools wide latitude 'to create curricula that fit schools' understandings of their educational missions.'") (quoting *Kissinger v. Bd. of Trustees of Ohio State Univ., Coll. of Vet. Med.*, 5 F.3d 177, 181 (6th Cir. 1993)); *Mootoor v. E. Ky. Univ.*, 5:18-cv-645, 2020 WL 5633847, at *8 (E.D. Ky. Sept. 20, 2020), *appeal docketed*, No. 20-6166 (6th Cir. Oct. 13, 2020) ("As the Sixth Circuit has held, 'the federal judiciary is ill equipped to evaluate the proper emphasis and content of a school's curriculum.'") (quoting *Kaltenberger v. Ohio Coll. of Podiatric Med.*, 162 F.3d 432, 435 (6th Cir. 1998)).

Inexplicably, the Sixth Circuit's new test rejects this deference without analysis. Under that test, courts must now analyze on a task-by-task basis whether each task "provide[s] a benefit to students that exceeds the benefit of free labor received by the school." *Eberline*, 982 F.3d at 1017. Thus, courts are now required to wade into a school's curriculum choices to determine whether every aspect of the course—taken in relative isolation—provides educational value to the student. This is precisely the situation that courts should avoid.

Contrary to the Sixth Circuit's approach, courts should defer to cosmetology schools about how best to teach the required subjects within the regulatory framework. Cosmetology schools are experts in the subject matter. They are run by cosmetologists with firsthand knowledge of the practice. Instructors have an in-depth understanding of their state's regulations

and topics tested on the licensure examination, and prepare students accordingly. And cosmetology schools are guided by advisory boards consisting of local salon owners, licensed cosmetologists, and the school's own graduates to receive valuable feedback on the success and failures of recent graduates, as well as guidance on ways to improve teaching methods/practices (*e.g.*, focusing on new hair trends, developments in methodology, and economic challenges to salons). As a result, they actively adapt their instruction methodology to meet the demands and expectations of local employers. Lawyers and judges have no such insight into the cosmetology profession.

The Court should accept this appeal to correct the Sixth Circuit's departure from longstanding jurisprudence requiring deference to the academic decision-making by educators.

III. The Sixth Circuit's Unworkable Standard Will Impact All Schools, Not Just Cosmetology Schools.

By splitting from the Second, Seventh, and Ninth Circuits, the Sixth Circuit has made all schools prime targets for class-action lawsuits that isolate cherry-picked tasks to allege a per-event employment relationship. This unpredictable and unworkable employment analysis has never been the law. If permitted to take hold, the decision will significantly impact schools.

The Sixth Circuit's analysis is unworkable within the higher education context. A clinic classroom cannot (does not) exist outside of the education setting. It is a

practical impossibility to separate discrete tasks out of this broader educational relationship. Thus, attempts to parse out these tasks are necessarily based on subjective factors, such as whether the student knew how to do the task beforehand and how many times it takes each individual student to develop mastery of a subject. The results are necessarily inconsistent. Sweeping up in the clinic classroom may be employment for one student or at one time, but not for the next student or the same student at a different time.

The consequences of litigation risks from similar lawsuits are already significant. Such cases are being brought against cosmetology schools as federal and state class-actions, seeking damages for many years back for thousands of former students. Accordingly, the financial risk for litigation costs and possible damages exposure could easily reach into the tens of millions of dollars. Some schools may be forced to close from the cost of defense alone.

In addition, the litigation risk is likely to force some cosmetology schools to severely limit experiential learning opportunities for students. Schools will be forced to eliminate any task that could potentially be construed as employment, such as all of the tasks alleged in the lawsuit here (even though the schools disagree any of them constitute employment). As such, students will not have the practical skills demanded by employers. They will be far less prepared for the hands-on portions of the licensure examination, particularly as it relates to sanitation. And their lack of practice will be more of a health risk to the public. In short, the

clinic classrooms will lose their ability to mimic a salon and prepare students for licensure and employment.

The impact of the Sixth Circuit's analysis is not limited to cosmetology schools, vocational schools, or for-profit schools. Its potential application is much broader. Regardless of tax status, ownership structure, or subject expertise, *all* schools, colleges, and universities operate as businesses within the context of the FLSA.[5] *Accord* 29 C.F.R. Part 541; *Alexander v. Univ. of Mich.-Flint*, 509 F.Supp. 627, 628 (E.D. Mich. 1980) (applying FLSA to public university). The Sixth Circuit's new rule threatens to subject all institutions of higher education offering training for licensed professions—community colleges, private trade schools, vocational training programs, non-profit traditional colleges, graduate schools—to unpredictable litigation, conflicting results, and devastating class-action liability.

In Michigan, for example, LARA implements and enforces regulations governing approximately 50 different licensed professions. *See, e.g.*, Mich. Comp. Laws §§ 333.16101–.18838 (regulations governing training and licensure for 25 healthcare professions); *id.* at §§ 339.101–.2677 (regulations governing training and licensure for occupations). LARA's oversight includes setting curriculum requirements for educators preparing students for those professions. The vast majority of these licensure programs require schools to

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[5] *See, e.g.*, Dep't of Labor, Fact Sheet #17S: Higher Education Institutions and Overtime Pay Under the FLSA, *available at* https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs17s.pdf (last accessed April 14, 2021).

provide students with experiential learning in their chosen profession (just like cosmetology).[6]

In light of the circuit split created by the Sixth Circuit, the quality and nature of these experiential learning environments—both from the school and the volunteer clinics working with the schools—are now in jeopardy.

The danger is real for non-professional programs as well. Traditional four-year liberal arts degree programs often include job-shadowing or other career/networking opportunities. The Sixth Circuit's new ruling exposes companies offering experiential opportunities to students to substantial liability based on tasks that may or may not qualify as employment. Worse yet, these tasks may change from being employment to not being employment and back again based on unknowable factors, such as the student's prior experience or unforeseen disruptions to the learning environment.

Consider a pre-law undergraduate student who shadows a state court trial judge for several weeks. The judge regularly asks the student to make two copies of

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[6] *Accord* Mich. Admin. Code. R. 339.15202 (architecture requires internship); *id.* at R. 338.5 (audiologist required supervised clinical experience); *id.* at R. 339.6047 (barber requires practical hours); *id.* at R. 338.1753 (counseling requires internship hours); *id.* at R. 338.722 (massage therapy requires clinical hours); *id.* at R. 338.10306–.10309 (nursing [LPN, RN] requires clinical hours and simulation hours); *id.* at R. 338.1222 (occupational therapy requires practice education hours via reference to WFOT standards); *id.* at R. 338.4978 (veterinary technician requires practical experience hours via reference to AVMA standards).

briefs using the photocopier—one copy for the judge and one for the student. The judge intends to discuss the briefs with the student. Under the Sixth Circuit's analysis, the student is potentially an employee when she photocopies a brief. But that result could change based on innumerable factors, such as if the student just photocopies a brief for her own use, if the student has no prior knowledge of how to use a photocopier and the judge teaches her, if the student is asked to photocopy and never discusses the case with the judge, or if photocopying is part of a judicial administrative assistant's job description. Under the Sixth Circuit's analysis, the analysis changes with each shift in facts, because each of those facts affects the educational value to the student and the benefit to the alleged "employer."

The outcome of this type of piece-by-piece analysis of each action requested of a student potentially forecloses necessary and valuable experiential learning. Businesses will simply avoid the risk by not taking interns, externs, or clinical sites. That is not a viable outcome for anyone.

CONCLUSION

For the reasons set forth above, the Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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