No.11-556

In the Supreme Court of the United States

MAETTA VANCE,

Petitioner,

v.

BALL STATE UNIVERSITY, *et al.*,

Respondents.

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

REPLY BRIEF FOR PETITIONER

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The decision below affirmed summary judgment on a single ground, Title VII "employer liability," App. 11a, reasoning that evidence that Saundra Davis was a manager and directed Maetta Vance's work did not create a material dispute, because of binding circuit precedent restricting *Faragher*/*Ellerth* vicarious liability to harassment by those supervisors with authority to take ultimate employment actions against their victims. *Id.* 12a. That rule of law, the decision expressly acknowledged, conflicts with the EEOC's longstanding, closely-reasoned interpretation and decisions of numerous "other circuits [which] hold[] that the authority to direct an employee's daily activities establishes supervisory status under Title VII," *Ibid*.

As the petition explained (Pet. 27-29), this conflict is practically important, both because of the frequency with which this issue arises in the lower courts and because the starkly divergent rules produce dramatically different results. Intervention by this Court is particularly warranted because the split is growing and because the Seventh Circuit has refused to reconsider its rule in the face not only of conflicting authority but also of credible arguments it is irreconcilable with the decisions of this Court it is meant to implement. *Id.* at 21.

The Brief in Opposition is as notable for what it does not say as for what it does. Despite its length, it omits any argument that the Seventh Circuit's restrictive rule is correct or even permissible under *Faragher*/*Ellerth*. Equally absent is any serious effort to deny the existence of the sharp, wide, and entrenched circuit conflict on the question presented.

Instead, respondent confines its Opposition to two principal points: (1) a series of arguments that seek to establish that the conflict is not important enough to warrant the Court's intervention and (2) a plea that the Court "wait" (Opp. 20) for a future case in which the same Seventh Circuit rule is applied. Petitioner's case, respondent suggests, is not an "[]attractive vehicle," *id.* at 29, because of "problem[s]," *id.* at 20, unrelated to the employer responsibility issue and because, it announces, "the facts in this case" would not "establish[] that Davis was a supervisor * * * under the EEOC Guidelines," *Id.* at 25.

Neither of these has merit. The issue the petition raises has divided nine courts of appeals and been addressed in hundreds of (likewise conflicting) district court decisions, including many where the choice of "supervisor" definition was decisive, as it was here.

As for the supposed "vehicle" concerns, none of the issues to which respondent seeks to direct attention would prevent or even complicate the Court's resolution of the question presented. And none was passed upon by the Seventh Circuit, which assumed petitioner had established the other elements of her Title VII hostile environment claim and rested affirmance of summary judgment squarely and unambiguously on its controversial "supervisor" rule.

Nor should respondent's emphatic declarations that "Davis would not qualify as a supervisor" under the competing (correct) legal standard, Opp. 23, distract the Court. These are based on nothing but respondent's say-so: neither court below considered the "facts in this case" "under the EEOC standard,"

id. at 25, let alone determined or even suggested that respondent could carry its summary judgment burden on that issue. Indeed, both opinions are fairly read as accepting (at least assuming) that, absent the Seventh Circuit's restrictive definition, the evidence raised a triable claim that Davis was a supervisor, *i.e.*, "authorized to direct [petitioner's] day-to-day work activities," App. 91a (EEOC standard), which she was. Ball State's attempts to persuade the Court otherwise entail simply omitting the record evidence supporting petitioner's contention, not least the official description of Davis's job responsibilities, which begins with "supervis[e]," and proceeds to "direct[ing]" and "oversee[ing]." Pet. Summ. J. Br. Exh. 2 (No. 1:06-cv-1452-SEB-JMS).

I. THE CONFLICT OVER THE QUESTION PRESENTED IS GENUINE, WIDESPREAD, ENTRENCHED, AND IMPORTANT

1. The Opposition takes care to insert adjectives like "asserted" and "alleged" each time the word "conflict" appears. *E.g.*, Opp. at 2, 20-23, 29. But that the courts of appeals have settled on starkly different rules for determining when harassment of a subordinate triggers vicarious liability under *Faragher*/*Ellerth* is a fact, not an allegation. The existence of this split was expressly recognized below, as it has been by commentators and a raft of other courts, many of which have rejected the Seventh Circuit's restriction (often after concluding that it is not merely an implausible reading of *Faragher* and *Ellerth*, but an impermissible one).

Nor, despite respondent's dust-kicking, see *infra*, is there any denying that the Seventh Circuit's decision in this case rested squarely on the

controversial rule. The opinion acknowledged Vance's contention that Davis was a manager, vested with authority to "tell her what to do," App. at 13a, but then explained that, without the evidence of power over hiring and firing the Seventh Circuit rule requires, *id.* at 12a-13a, she had not raised a triable issue of "supervisory status under Title VII." *Id.* at 13a (noting Judge Rovner's concurrence in *Rhodes* v. *Ill. Dep't of Transp.*, 359 F.3d 498, 509 (7th Cir. 2004), advocating "a broader standard of supervisor liability based on EEOC guidelines").

2. Unable to credibly deny the *existence* of the conflict, respondent ventures a series of odd arguments purporting to show its unimportance.

a. Ball State proffers the denial "[e]ight years ago" of a "petition for certiorari [in *Otis Elev. Co.* v. *Mack*, 540 U.S. 1016 (2003)] presenting the same * * * basic question presented here," Opp. 2, as proof of the issue's unimportance. But even apart from the rule against "according" such dispositions "precedential value," 16B Charles A. Wright, et al, Fed. Prac. & Proc. Juris. § 4004.1 (2d ed. 1996), the assertion that "the landscape in the circuits" has not "materially changed" since 2003, Opp. at 20, is mystifying. When the *Mack* petition was filed, the only conflict the employer-petitioner could allege was between the Second Circuit decision in that case and the Seventh Circuit's in *Parkins* v. *Civil Constructors of Illinois, Inc.*, 163 F.3d 1027 (7th Cir. 1998) – a case briefed before *Faragher* and *Ellerth* were handed down and decided before the EEOC Guidance that persuaded the *Mack* court had been issued. Indeed, opposing certiorari, the respondent in *Mack* highlighted language in the *Parkins* opinion seeming to suggest the Seventh Circuit approach

would be less stringent than the petitioner maintained. See Br. in Opp., No. 03-229 at 3.

The "landscape" now could hardly be more different. For its part, the Seventh Circuit has made clear that its rule is as rigid and restrictive as the *Mack* petitioner argued. See, *e.g., Rhodes*, 359 F.3d at 506 (only harassment by those with "authority to hire, fire, promote, demote, discipline or transfer" gives rise to vicarious liability); *id.* at 509-510 (Rovner, J., concurring) (criticizing "circuit's method of identifying supervisors," and urging that court "re-examine [it]"); *id.* at 510 (Cudahy, J., concurring) (agreeing that rule should be "reconsider[ed] and "broaden[ed]").

Moreover, courts across the Nation have now chosen sides. See Pet. 13-20. What was (at most) a 1-1 circuit split in 2003 is now a 5-4 division (3-3 among those which have addressed the question in published opinions), with district and state courts registering similar disagreement. While respondent quibbles over exactly which decisions "contribute[]to [the] * * * conflict," Opp. at 21 n.5, it does not – and could not – claim that there is any realistic prospect of nationwide uniformity without this Court's intervention.

b. Respondent's attempt to find meaning in the "the absence of * * * petitions" presenting the question since *Mack* (Opp. 22), *i.e.*, as "bel[ying]," *id.* at 23, the petition's description of this issue as recurring and important, is equally strange. The claim's factual premise is mistaken: a petition was filed in *Cheshewalla* v. *Rand & Son Constr. Co.,* 415 F.3d 847 (8th Cir. 2005). See Pet. for Cert., No. 05-494 at i; 546 U.S. 1091 (2006) (denying cert.). And the inference respondent invites from litigants'

decisions not to seek certiorari is implausible: several of the decisions giving rise to the split resulted in remands, see Eugene Gressman, et al., Supreme Court Practice § 2.3 (9th ed. 2009) at 81-82 (explaining Court's reluctance to review nonfinal judgments), and it is not uncommon for employers to settle, rather than litigate, cases, especially ones involving unflattering evidence of "severe or pervasive" sex- or race-based workplace harassment (and limited damage exposure, see 42 U.S.C. § 1981a(b)(3)). For modestly-paid workers with individual discrimination claims – those not represented by pro bono counsel – the practicalities of petitioning can be more daunting. The apparent "absence" is thus no more "telling" (Opp. 23) than the cat that didn't bark in the night.

Most to the point, there *is* potent "direct evidence," Opp. 23, that the issue is both "'important and recurring'" *id.* (quoting Pet. 28). The EEOC has filed amicus curiae briefs on the issue in multiple courts of appeals, see Pet. 19, and the relevant portions of the *Mack* and *Parkins* opinions (and their progeny) have been cited in hundreds of decisions at the district court level.[1]

3. Respondent further argues (Opp. 21) that the conflict is not important because the Seventh Circuit (and First and Eighth Circuit) rule is not an *insurmountable* barrier: "numerous plaintiffs" will be able to prevail (or reach a jury) under the negligence standard if these courts are permitted to adhere to their restrictive, erroneous "supervisor"

[1] A search of the Lexis "Allfeds/Allstates" database for "(mack parkins) /p (supervisor! manag!) & (faragher ellerth)" yields 362 results, 33 from the past year.

case law. If the only decisional conflicts that warranted review were ones that are outcome determinative in every case – or involved rules that prevented *every* deserving plaintiff from winning, the bar for certiorari would be high, indeed. And any claim that there is no "outcome-determinative conflict," Opp. 20, is refuted by decisions on both sides of the divide, such as *Rhodes* and *Mack* – and *Faragher* itself – where the choice between rules determined which party was entitled to judgment as a matter of law.

The contention (Opp. 21-22) that there is no important difference between the negligence and vicarious liability standards would presumably surprise the parties in *Faragher* and *Ellerth,* not to mention the Justices who granted certiorari – and divided – in those cases, see *Ellerth*, 524 U.S. at 769-770 (Thomas, J., dissenting). While the negligence standard *Faragher*/*Ellerth* rejected for supervisor harassment and the vicarious-liability/affirmative-defense it imposed are "akin," Opp. 6, in that both consider employers' "preventive [and] corrective" actions, *Ellerth*, 524 U.S. at 765, the latter requires defendants seeking to avoid liability to show that the victim "unreasonably failed to take advantage" of these, *ibid*. That showing is a difficult one, and Ball State does not claim it could be made here.

4. As noted, the Opposition does not make even a token effort to show that the Seventh Circuit's "supervisor" definition, which supplied the rule of decision below, is correct or preferable to its competitors or even to defend it against charges, leveled by other courts and the EEOC, that it is irreconcilable with both the specific holding of *Faragher* – which found employer responsibility, on

the "supervisor" standard, for harassment by a higher-ranking lifeguard who did not have authority to "hire, fire, demote, promote, transfer, or discipline" the plaintiff – and its underlying rationale.[2]

II. RESPONDENT ADVANCES NO VALID REASON FOR AWAITING ANOTHER CASE PRESENTING THIS SAME ISSUE

Unable to muster a convincing argument against the need for the Court to settle this sharp and clear split, respondent asks that it "wait for a [different] case" in which the same question is presented. Opp. at 20. Postponement is warranted, respondent offers, because petitioner's hostile environment claim was "carefully considered" and "correctly rejected" in the courts below, *ibid.*, and because, respondent says, other "problem[s] with petitioner's action," *ibid.*, unrelated to the disputed "supervisor" definition, make this an "unattractive vehicle," *ibid.*

1. To begin, this plea is in obvious, if unacknowledged, tension with respondent's

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[2] As those authorities explain, harassers like Davis (and those in *Mack* and *Rhodes*), who are vested with "immediate" *Faragher*, 524 U.S. at 807, supervisory authority are, as a matter of workplace reality, often better "able to impose unwelcome [conduct]," *Ellerth*, 524 U.S. at 763 (citation omitted), than those with personnel powers, whose jobs entail infrequent contact with lower-level employees, see *Rhodes*, 359 F.3d at 509 (Rovner, J., concurring); and the "risks of blowing the whistle," *Faragher*, 524 U.S. at 803, on harassers who have employer-conferred assignment and oversight authority are significant. See *ibid.* (noting threat to assign plaintiff toilet cleaning); *Burlington Northern & Santa Fe Ry. Co.* v. *White*, 548 U.S. 53, 70 (2006).

observation that cases in which the issue is addressed – involving individual claimants and modest monetary relief – seldom culminate in petitions. See p. 5, *supra*.

Moreover, the only "consider[ation]" Vance's Title VII claim received was under the disputed – incorrect – legal standard. See App. 12a-13a. None of the issues respondent largely devotes the Opposition would prevent or even complicate the Court's reaching and resolving the question presented; indeed, none was passed upon by the Seventh Circuit.[3]

2. Nor are respondent's *ipse dixit* assertions about what the "facts" or "undisputed facts" of this case (Opp. 2) establish, *e.g.*, "that Davis was [not] a supervisor * * * under the EEOC guidelines," *id*. at 25 – any basis for withholding review. None of the "four Judges" below (Opp. 30) so found, and both opinions are fairly read as assuming that petitioner's evidence *did* raise a triable issue, but for the strictures of the *Parkins* rule. See App. 12a-13a; accord *id.* at 54a.

What respondent effectively asks – that the Court sit, at the petition stage, as a court of "first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 719 n.7 (2005), applying a fact-dependent legal standard to a large

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[3] The appeals court assumed that each of the other elements of the hostile environment claim was established, see App. 15a; and far from pronouncing the district court's resolution "well-reasoned," Opp. 13, the court was critical of the lower court's analysis, see App. 14a-15a – and pointedly admonished district courts and future litigants against misreading this Court's Title VII law as Ball State had. *Ibid.*

and disputed summary judgment record – would be an extraordinary use of "its scarce resources," Opp. at 20. Even after a merits ruling, when "courts below applied an incorrect legal standard," the Court usually will "not consider whether the result would be supportable * * * had the correct one been applied." *Malat* v. *Riddell*, 383 U.S. 569, 572 (1966).

If the Court were to take up that invitation, however, it would find a more basic problem with respondent's attention-getting assertions. Although "evidence" supporting a finding that "Davis had [supervisory] authority," Opp. at 2, is "absen[t]" from *respondent's discussion of the facts*, it is readily found in the summary judgment record.

For example, respondent depicts as devastating that Davis's job title, "Catering Specialist," did not include the word "supervisor" – and even reproduces as an appendix a directory attesting to that, see Opp. at 3-4 n.2; Add. 1a-6a. But the University's official description of that position begins "***Positions Supervised:*** **Kitchen Assistants and Substitutes**," Pet. Summ. J. Br. Exh. 2 (No. 1:06-cv-1452-SEB-JMS) (emphasis added), and prominent among the "responsibilities/duties" enumerated there are "[l]ead[ing,] direct[ing,] * * * and overseeing the[] work" of substitute and part-time employees, *id.* See Opp. at 7 (Vance was a "substitute" and then "part-time" employee from 1989 to 2007).[4]

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[4] While respondent insists that "those employees who were supervisors are referred to * * * as 'supervisors,'" Opp. 3-4 n.2, Kimes, who respondent stresses was one of Vance's supervisors, is "referred to," *ibid*, as "manager," as are numerous other high-ranking officers who, like

And though the district court noted "BSU's *position*," that Davis had "[n]ever been a supervisor," Opp. 3 (citing App. 54a n.17), the *evidence* was that Kimes, when asked at deposition whether Davis was "part of management," answered, "that's complicated," Resp't Summ. J. Br. Exh. B at 3 (No. 1:06-cv-1452-SEB-JMS), and admitted (as documentary evidence confirmed) that Davis assigned work to and "direct[ed]" Vance and other employees. *Ibid*.[5]

* * * * *

The "problems" Ball State purports to find with petitioner's case are of its own devising. The entrenched and important conflict on the question

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Davis, are listed above employees whose titles include "supervisor." See Add. 1a-5a.

[5] This reticence to present the evidence in a reasonably neutral light, let alone the one favorable to petitioner the law requires, necessarily compromises respondent's proffered "comparison" of the "circumstances" here and those in other cases. See Opp. 26-28. Indeed, the Opposition's efforts to show dissimilarity lead it to neglect facts supporting *defendants* in those cases. For example, *Smith* v. *Oklahoma City*, 64 Fed. App'x 122, 126-127 (10th Cir. 2003) (cited Opp. 27), vacated judgment for the employer on the issue, despite evidence the harasser was not designated a supervisor and lacked input in the plaintiff's leave, evaluations, or discipline, *ibid.*; and even in *Mack*, where the issue was resolved for the *employee* as a matter of law, the "supervisor" and victim were members of the same collective bargaining unit. See 326 F.3d at 125-126.

presented should be settled by this Court, and the Seventh Circuit's decision here, which rested squarely on its controversial and consequential misreading of this Court's applicable precedents, is a suitable, "[]attractive vehicle" for doing so.[6]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[6] Respondent's claims of "problem[s]" with other elements of petitioner's cause of action have nothing to do with the question presented. But the impression conveyed, that petitioner's hostile environment claim is somehow marginal or synthetic, merits response. The evidence showed not only that Davis casually referred to Vance, the lone African American in an 140-employee department, as "Sambo" and "Buckwheat" (as others were boasting of "Klan" connections and glaring menacingly at her), but that Davis's conduct went beyond abusive language to acts and threats of physical violence, which left petitioner fearful to be alone in the workplace with her. See Pet. 5-6.