

No. 25-3310

In the
United States Court of Appeals
For the Third Circuit

SOPHIA O'NEILL,

Plaintiff-Appellant,

v.

TRUSTEES OF THE UNIVERSITY OF PENNSYLVANIA,

Defendant-Appellee.

On Appeal from United States District Court for the
Eastern District of Pennsylvania, Case No. 2:25-cv-001129
The Honorable Mark A. Kearney, U.S. District Judge

**BRIEF OF THE CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA AS AMICUS CURIAE
IN SUPPORT OF DEFENDANT-APPELLEE**

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/s/ Matthew A. Fitzgerald
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IDENTITY AND INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America (the “Chamber”) is the world’s largest business federation. The Chamber represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation’s business community.¹

¹ All parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2). No counsel for any party authored this brief in whole or in part and no entity or person, aside from amicus curiae, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION

The Chamber files this brief to address the proper standard for employer liability under Title VII for harassment committed by third parties (often a customer, but here a student), and to respond to the briefs filed the EEOC and NELA on this point.

Bivens v. Zep announces that employers are liable under Title VII for harassment by a third party only if the employer “intends” the harassment. The core rationale is very simple: Title VII sets up an intentional tort. And when the harasser is not an agent of the employer, that person’s intent cannot be attributed to the employer. Thus, to be liable for the acts of a third party, the employer must have its own discriminatory intent. The district court here correctly agreed, and predicted that this Court would, too. Appx15–16.²

The EEOC and NELA advocate for a negligence standard instead, but their arguments fail. Virtually all precedent supporting the EEOC’s view relies, directly or indirectly, on EEOC regulations announcing a negligence standard. Yet the EEOC admits its Title VII regulations lack the force of law. And neither the

² The district court also applied a negligence test, finding that Plaintiff’s case would fail under that test as well. Appx19. The Chamber takes no position about whether there are other ways that the defendant employer can prevail in this appeal beyond the scope of the issue addressed this amicus brief.

EEOC, nor NELA, nor O’Neill points to any court that has specifically entertained the possibility of an intent standard, weighed it, and then rejected it. The EEOC’s preferred policy views, written long ago into non-binding regulations, have created a long train of unreasoned and unpersuasive precedent. This Court should join the Sixth Circuit in applying an intent standard.

ARGUMENT

Bivens v. Zep, Inc. holds that an employer is only liable under Title VII for the actions of a non-employee (third-party) harasser if “the employer intends for the harassment to occur.” 147 F.4th 635, 646 (6th Cir. 2025), *cert. denied*, No. 25-932 (U.S. Apr. 20, 2026). Intent can be shown either by evidence that the employer “desired” the unlawful harassment, or evidence that the employer was “substantially certain” that harassment would result from its action or inaction. *Id.* at 645; *see also Staub v. Proctor Hosp.*, 562 U.S. 411, 422 n.3 (2011) (“Under traditional tort law, intent denotes that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it.”) (marks omitted).

Zep is a pathmarking decision. *Zep* openly disagrees with many other circuits (although not this one). *See* Penn Br. 41–42. A petition was filed at the U.S. Supreme Court in *Zep* and was promptly denied, with no opposition to certiorari

ever filed. *Bivens v. Zep, Inc.*, --- S. Ct. ---, No. 25-932, 2026 WL 1052175 (U.S. Apr. 20, 2026). The apparent message from the Supreme Court is that it will await the views of other circuits in response to *Zep*. This case presents just such an opportunity for this Court. *Zep* is correct, and this Court should join the Sixth Circuit’s interpretation of Title VII.

I. *Bivens v. Zep* is correctly decided and this Court should follow it.

The text of Title VII is straightforward. Title VII makes it an “unlawful employment practice for an employer . . . to discriminate . . . because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a)(1). The law then defines “employer” to include “any agent” of that entity. 42 U.S.C. § 2000e(b).

The question posed in this appeal applies only to one narrow application of Title VII: When is an employer liable for claims based on harassment of an employee by a third party? No one asserts that the Supreme Court has ever addressed this question. It has not. Two points, however, should be common ground based on what the Supreme Court *has* said about Title VII.

First, harassment/hostile workplace claims under Title VII target *intentional* conduct. “Sexual harassment under Title VII presupposes intentional conduct.” *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 756 (1998). That is, as relevant here,

Title VII sets up an intentional tort that is “distinguished from negligent or reckless torts, [and] generally require[s] that the actor intend the *consequences* of the act.” *Staub*, 562 U.S. at 417 (addressing a parallel statute to Title VII). Hostile workplace claims are disparate treatment claims, and in those cases “the plaintiff is required to prove that the defendant had a discriminatory intent or motive.” *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 986 (1988); *Bostock v. Clayton Cnty.*, 590 U.S. 644, 657–58 (2020) (“this Court has also held that the difference in treatment based on sex must be intentional”).

Second, where the Court has allowed an employer to be held liable for the intentional acts of others, it has done so only where agency law imputes an agent tortfeasor’s action to his principal. By defining “employer” to include its “agents,” Title VII imports “principles of agency law.” *Ellerth*, 524 U.S. at 754 (“In express terms, Congress has directed federal courts to interpret Title VII based on agency principles.”). Complex agency principles have driven much of the intricacy in modern case law about when an employer can be liable for different categories of employees’ actions.

In fact, the Supreme Court has spent decades hammering out when the employer can be liable for the actions of various sorts of the employer’s agents: supervisors and co-workers. *E.g.*, *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 72

(1986) (“Congress wanted courts to look to agency principles for guidance in this area Congress’ [text] surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible.”); *Ellerth*, 524 U.S. at 756–57 (addressing when employers are liable for actions of supervisors); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807–08 (1998) (same); *Vance v. Ball State Univ.*, 570 U.S. 421, 430 (2013) (narrowing the scope of who is considered a “supervisor” to individuals with control over tangible employment decisions). The chart below reflects the current general state of the law for harassment-type Title VII claims:

Harasser	When is Employer Liable	Why
Supervisor with control over tangible employment decisions who has made one against plaintiff	Employer is liable. <i>Vance</i> , 570 U.S. at 429.	Agency principles impute the tangible decision of a supervisor to the employer itself. <i>Vance</i> , 570 U.S. at 429.
Supervisor with control over tangible employment decisions who has <i>not</i> made one against plaintiff	Employer is generally liable but can prove an affirmative defense if employer shows that it acted reasonably to prevent and correct misbehavior and the plaintiff acted unreasonably by failing to use corrective opportunities. <i>Vance</i> , 570 U.S. at 429–30.	Agency principles hold that “a supervisor always is aided by the agency relation” but at the same time this rule “accommodates the agency principles of vicarious liability for harm caused by misuse of supervisory authority” and the general policy of encouraging employers to act against this sort of harassment. <i>Vance</i> , 570 U.S. at 430; <i>Faragher</i> , 524 U.S. at 802.

Co-worker	Employer is liable only if the employer is negligent. <i>Ellerth</i> , 524 U.S. at 758–59.	Agency principles hold employer responsible for harassment of agents acting outside scope of employment if “the master was negligent or reckless” in allowing the co-worker harassment to occur. <i>Ellerth</i> , 524 U.S. at 758–59.
Third party	The Supreme Court has not addressed this scenario.	No agency connection between a harassing third party and the employer.

A. *Zep* is right about agency principles.

In confronting employers’ liability for third-party harassment, *Bivens v. Zep* departs from the path other circuits have taken. Yet *Zep* turns on a simple point: agency law draws a fundamental difference between actions of an employer’s agents (supervisors and co-workers), on one hand, and third parties on the other.

Third parties—particularly customers, clients, members of the public, or in this case, a student—are *not agents of the employer at all*. The EEOC does not dispute this. In fact, no one argues that third parties are actually *agents* of the employer, and they are not. *See* Restatement (Second) of Agency § 1(1) (A.L.I. 1958) (an agency relationship requires “manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act”). As *Zep* correctly recognized, the law of agency creates no basis for holding an employer liable for the actions of a third party like a customer,

client, member of the public, or in this case, a student. *Zep*, 147 F.4th at 647 (“In the end, there is no legal mechanism for imputing unlawful intent of a customer to a business he frequents.”).

Without any agency connection to an intentional harasser, the employer can be liable only if the employer itself *intends* the harassment to occur. “[W]ith no legal bridge between the client’s intent and [the employer]’s responsibility, [the employer] can be held liable only for its *own* intentional actions.” 147 F.4th at 645. As the *Zep* court held, that intent can be proven by a showing that the employer knew of the harassment and chose to do nothing despite being “substantially certain” it will recur. *Id.*

Plaintiff and her amici hardly argue that the law of agency somehow connects employers to third party harassers. The EEOC (alone) suggests that *Zep* overlooks Section 213(d) of the Restatement of Agency (A.L.I. 1958). EEOC Br. 7, 13–14.

That section states:

A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless:

...

(d) in permitting, or failing to prevent, negligent or other tortious conduct by persons, whether or not his servants or agents, upon premises or with instrumentalities under his control.

Restatement (Second) of Agency § 213(d). There are several fatal problems with any reliance on § 213(d).

First, the Restatement itself says that “the rule stated in this Section is not based upon any rule of the law of principal and agent or of master and servant.” Restatement (Second) of Agency § 213, cmt. a.; *id.* (adding that “It is a special application of the general rules stated in the Restatement of Torts.”). In other words, as a matter of general tort law, a negligent person can unsurprisingly be liable for what happens on his premises or with his tools. As the Restatement admits, this has nothing to do with agency. After all, § 213(d) treats “servants and agents” the same as any other “persons.” Because the Supreme Court has made clear that the law of agency, not general tort law, determines what wrongs can be imputed to an employer under Title VII, this expressly not-agency-based principle of tort law is irrelevant to what standard should apply for employer liability for third-party harassment. Even the EEOC quickly pivots to the Restatement of *Torts* when it raises § 213(d). EEOC Br. 14–15.³ Meanwhile, *agency* principles confirm

³ Even as a matter of the common law of torts, liability based on a failure to protect an employee from the intentional acts of a third party is an uncertain and complex area of the law. Generally, there is no “duty to protect” a person from third-party criminal acts or other intentional harm, although there are exceptions, some of which sometimes may apply to employers. *E.g., Varone v. Publix Super Mkts., Inc.*, ___ So. 3d ___, 2026 WL 758711, at *8 (Fla. Dist. Ct. App. Mar. 18, 2026) (finding a

that “the master’s duty as to working conditions does not extend to . . . the conduct of third persons with whom the servants are to be brought into contact during the course of the work.” Restatement (Second) of Agency § 504 (A.L.I 1958) (making an exception only for disclosing “dangerous conditions” that the employer should know of).

Second, nor does § 213(d) address *intentional* torts like Title VII. That is, the intent of an employee can be attributed to an employer when the employer acts negligently in failing to control that employee. But it makes no sense to attribute the intent of a third party like a customer or a student to the employer through simple negligence. Allowing that would erase the “intent” aspect of harassment cases under Title VII.

Third, even if § 213(d) were a principle of agency law, it would not support the EEOC’s blanket negligence rule, because § 213(d) requires either “premises” or “instrumentalities” under the employer’s control. Thus, even if a court were to (wrongly) apply § 213(d) as agency law in a Title VII case, the court would need to conduct a confusing analysis of the premises and instrumentalities at issue in a given case. For instance, in *Zep* itself the harassment occurred in a customer’s

grocery store had no tort duty to protect shoppers from a random act of violence in the store).

motel, miles away from any employer’s premises or control. 147 F.4th at 648. And even in this case, much of the alleged harassment was by text messages sent in the middle of the night and found by the plaintiff days later. Penn Br. 6; O’Neill Br. 7. Sorting out separate standards for the different locations and instrumentalities involved in alleged harassment would create its own needless complexity in these cases.

Properly viewed, agency law provides no path for employer liability for harassment by third parties.

B. “Ability to control” is a poor fit for the intentional acts required by Title VII.

The EEOC’s broader challenge to *Zep* boils down to this assertion: “employer liability for third-party harassment flows entirely from the employer’s ability to control the workplace or working conditions—and not from the existence of an agency relationship between the employer and the harasser.” EEOC Br. 19. This theory fails.

First, and most importantly, it ignores the text of Title VII. The EEOC does not assert that an employer that is unaware of customer harassment (even unreasonably) has “discriminated because of sex” under Title VII, nor does it identify the “intentional” act by or attributable to the employer that the Supreme Court has said is necessary. *See Watson*, 487 U.S. at 986.

As *Zep* held, the intentional act requires at least that the employer be aware of the harassment and intentionally put the employee back into the situation where it is “substantially certain” to recur. 147 F.4th at 645. The EEOC’s attempt to hold employers liable for simple ignorance based on the assertion that they should have known better lacks any connection to the text of Title VII and should fail.

Second, the famous “macaw” example from the Seventh Circuit does not support the EEOC either. In essence, the EEOC argues that if a pet parrot owned by a hospital patient harassed female nurses but not male nurses, the hospital should be liable for the parrot’s actions, even though the parrot is not an agent of the hospital. EEOC Br. 16-17. (quoting *Dunn v. Washington Cnty. Hosp.*, 429 F.3d 689, 691 (7th Cir. 2005)). But the “macaw” example presupposes the hospital has knowledge of the parrot’s behavior, and the EEOC ignores that the employer still can be held liable under an intent standard for the substantially certain consequences of its own intentional inaction. *Contra id.* Under *Zep*, if the hospital *knows* the parrot will harass female nurses yet continues to send female nurses into the room without remedying the situation, the hospital can be liable. *See Zep*, 147 F.4th at 645. By contrast, if the hospital does not know that the parrot will harass female nurses, it would not be liable. Title VII harassment requires intentional discrimination, and holding liable a hospital that is unaware of a parrot’s bizarre

sexist proclivities—as the EEOC seems to suggest—would be far afield of Title VII.

II. Authority contrary to *Zep* is overstated.

All agree that *Bivens v. Zep* is the first federal court of appeals to hold that employer liability for third-party harassment under Title VII requires *intent* by the employer. And all agree that at least most of the circuits have stated that a negligence standard applies. *Zep*, 147 F.4th at 647; O’Neill Br. 26–27; EEOC Br. 10–13; NELA Br. 8–10.

But the authority contrary to *Zep* is not persuasive. The cases do not consider and reject the “intent” standard that *Zep* adopts. Instead, tracing the precedent back shows that it originates with the EEOC’s own policy-based regulation, with courts simply adopting without analysis the EEOC’s view, and with subsequent courts summarily adopting that adoption. Rather than a long line of jurists providing reasoned analyses, the precedent is a line of dominoes set into motion by EEOC regulations that lack the force of law and are justified not by textual analysis of Title VII but only by the EEOC’s (unpersuasive) view of good policy.

A. EEOC’s regulations lack the force of law or persuasive power.

The EEOC is the foundation of all precedent applying a negligence standard. But the EEOC’s regulation lacks the force of law, and the regulation lacks any rationale explaining it or supporting it in a way that a court could find persuasive.

For decades, the EEOC has taken the position that under Title VII, “an employer may also be responsible for the acts of non-employees . . . where the employer . . . knows or should have known of the conduct and fails to take immediate and appropriate corrective action.” 29 C.F.R. § 1604.11(e) (dating to November 1980).

But the EEOC does not have the power to interpret the substance of Title VII in a binding way. *See Meritor*, 477 U.S. at 65 (noting that EEOC guidelines are “not controlling upon the courts by reason of their authority”); *Edelman v. Lynchburg Coll.*, 535 U.S. 106, 113 (2002) (“EEOC has no rulemaking power” under Title VII); 42 U.S.C. § 2000e-12(a). In the EEOC’s own words, its interpretive “guidelines do not have the force of law.” EEOC Br. 13.

Thus, the question just becomes whether the EEOC’s position is persuasive. *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 395 (2024) (holding that the courts are obligated to “independently interpret the statute”).

Yet when the EEOC created the regulation in 1980, it offered no theory of statutory interpretation to support it. *See* 45 Fed. Reg. 74676 (Nov. 10, 1980). In fact, the EEOC’s two-page rule offered no explanation at all as to how Title VII justified holding employers equally liable for the actions of strangers as for their own employees. At best, the EEOC’s current position is simply what the EEOC thinks would be good policy, nothing more.

B. Precedent from other circuits relies on the EEOC and does not consider and reject the *Zep* “intent” standard.

The EEOC argues that there is a wall of case law supporting its view that negligence is the proper standard for employer liability for third-party harassment. EEOC Br. 21–24 (asserting the proper circuit count is “eleven-to-zero” even after *Zep*). But the supposed wall of precedent is a house of cards. *See Zep*, 147 F.4th at 646–47. Circuits that have applied a negligence standard relied on the EEOC’s own advocacy for that position. *Id.* And none of them seem to have considered and rejected an “intent” standard or the rationale in *Zep* supporting it.

Though many cases state a negligence standard for third-party harassment, those cases circle back to just a couple of key precedents. *Lockard v. Pizza Hut, Inc.* is the leading one. 162 F.3d 1062 (10th Cir. 1998). *Lockard* holds that an employer is liable for third-party harassment if the employer is negligent. *Id.* at 1074–75 (holding that a local pizza franchise could be liable for sexual harassment of a

waitress by customers when she had complained to her manager but was still required to wait on them).

Yet *Lockard* contains no reasoning—zero—comparing negligence to an intent standard. *Lockard*'s reasoning has just three pieces: (1) it prominently quotes the EEOC regulation; (2) it cites three other cases that in turn rely without analysis on the EEOC regulation and on various state laws; and (3) it reasons that “harassment by customers is more analogous to harassment by co-workers than by supervisors [and so] we hold the same standard of liability applies to both co-worker and customer harassment.” 162 F.3d at 1074.

This rationale relies heavily on the EEOC. And its only separate reason—that third parties are more like co-workers than supervisors—cannot withstand scrutiny. Co-workers and supervisors are far more like each other than third parties are like either of them. Third parties might be more similar to co-workers than to supervisors, but that is not a reason to treat them alike. A baby bird is more similar to a human toddler than to a human adult, but that is a poor reason to treat baby birds and human toddlers the same.

In sum, *Lockard* and *Zep* agree that an employer can be liable for third-party harassment. The real question is—when? Negligence or intent? *Lockard* never seems to have even considered an intent standard.

Since 1998, however, *Lockard* has been cited for its holding that employer negligence is the standard for customer harassment by at least six other circuits and thirty-two different federal district courts. It is a “leading case on third-party harassment.” *Gardner v. CLC of Pascagoula, LLC*, 915 F.3d 320, 322 (5th Cir. 2019).

As one example of the many courts simply riding the *Lockard* train, consider the Eleventh Circuit. The EEOC and NELA cite two Eleventh Circuit cases—*Beckford* and *Blue Circle*—in seeking to show how widespread and entrenched the negligence standard is. But neither case—nor the ones they rely on—offers reasoning meaningfully contrary to *Zep*. Instead, these cases demonstrate how the negligence standard proliferated through deference to the EEOC and through the failure of parties and the courts to press and pass upon the correct standard.

First, *Beckford* never addressed whether an intent standard should apply, and the defendant there conceded that negligence should govern. *Beckford v. Dep’t of Corr.*, 605 F.3d 951, 957 (11th Cir. 2010). In *Beckford*, which was about a prison’s potential liability for sexual harassment of employees by inmates, the prison never argued that it should be held to an “intent” standard. Instead, the prison “acknowledge[d] that ordinarily employers can be held liable for unreasonably failing to remedy harassment of employees by third parties.” *Id.* at 957. Rather

than addressing or challenging that standard, the prison “argue[d] that prison officials should be treated different from other employers” and that prisons should be categorically exempt from liability unless their own employees “participate in or encourage the harassment.” *Id.* The *Beckford* court then explained for several pages why prisons should be treated the same as other employers are and concluded that there is no “blanket exemption” from Title VII for prisons. *Id.* at 960. Nothing in *Beckford* addresses the possibility of an “intent” standard, much less weighs it against a negligence standard.

Beckford, in turn, relies on *Blue Circle* for the general rule that employers can be liable for third-party harassment if the employer is negligent. *Beckford*, 605 F.3d at 957–58. And *Blue Circle* does say that: in a footnote. *Watson v. Blue Circle*, 324 F.3d 1252, 1258 n.2 (11th Cir. 2003). That footnote, in turn, offers no rationale; rather, it simply cites *Lockard* and *Folkerson v. Circus Circus Enterprises, Inc.*, 107 F.3d 754 (9th Cir. 1997). Nor do the other cases cited in *Blue Circle* offer any on-point rationale. See *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269 (11th Cir. 2002) (addressing harassment only by a co-worker); *Fleming v. Boeing Co.*, 120 F.3d 242 (11th Cir. 1997) (same); *Breda v. Wolf Camera & Video*, 222 F.3d 886 (11th Cir. 2000) (same).

According to the EEOC and NELA, the Eleventh Circuit is firmly in the “negligence” camp. And the case law does say that. Yet no Eleventh Circuit case has ever *considered* holding employers to an “intent” standard for harassment by third parties as a possible standard versus negligence. There does not appear to be any Eleventh Circuit case in which any party has argued for an “intent” standard. And in fact, nearly all of the Eleventh Circuit cases involve allegations against co-workers (sometimes along with third parties), raising whether the Eleventh Circuit has ever applied the negligence standard in a case that would come out differently under *Zep*. It does not appear so.

The Eleventh Circuit is just one example. But it demonstrates the unpersuasiveness and vulnerability of the precedent in this field.

C. *Zep* controls in the Sixth Circuit.

The EEOC argues that the *Zep* panel even got its own Sixth-Circuit precedent wrong. EEOC Br. 21–22, 24 (asserting that the Sixth Circuit had adopted a negligence standard in *Slayton v. Ohio Dep’t of Youth Servs.*, 206 F.3d 669, 677 (6th Cir. 2000)). The EEOC is wrong for at least two reasons.

First, this Court need not investigate whether *Zep* correctly applied Sixth Circuit precedent. The *Zep* plaintiff filed for en banc review, no judge requested a vote, and en banc review was denied. Order, *Bivens v. Zep, Inc.*, No. 24-2109, (6th

Cir. Nov. 5, 2025), Dkt. 41-1. If any of the 16 active judges on the Sixth Circuit believed that *Zep* overlooked controlling contrary in-circuit precedent, they should have voted to take the case en banc. Absent that, this Court can safely consider *Zep* to be Sixth-Circuit law.

Second, *Slayton* is not on point. In *Slayton*, the harassment at issue came not only from third-party prison inmates, but also from the plaintiff's co-worker. As the court noted, "it is clear that [a co-worker] encouraged, endorsed, and even instigated the inmates' harassing conduct." 206 F.3d at 678. In other words, the plaintiff's co-worker, "with the tacit approval of the [employer], engaged in conduct that created a hostile environment." *Id.*

Slayton did not present a case of pure third-party harassment like the one at issue here. Accordingly, its holding—that the prison employer could be liable for negligently allowing a harassing environment created in significant part by its own employees—does not address purely third-party harassment and certainly does not foreclose an "intent" standard under those circumstances.

III. The *Zep* rule promotes Title VII's objectives.

Turning to policy, the EEOC and NELA argue that the intent standard "incentiviz[es] employer ignorance and inaction" while a "negligence standard

promotes Title VII's objectives." NELA Br. 3; EEOC Br. 19, 7–8. But even as a matter of policy, EEOC and NELA are wrong.

First, the *Zep* rule does not undermine employers' incentive to object to and address harassment in the workplace. Most obviously, *Zep* does not change employers' liability for the acts of their employees and other agents, and so *Zep* will not change an employer's incentives to combat harassment.

Further, even under *Zep*, there is still every incentive for a prudent employer to take appropriate action in response to third-party harassment, because an employer can still be liable for an inadequate response to harassment. 147 F.4th at 645. If an employee reports third-party harassment and the employer sends the employee back into "substantially certain" further harassment, then liability arises. Thus, under *Zep* employers still have substantial incentive to maintain working conditions free of harassment. And because of those incentives for employers to act, employees still have an incentive to promptly and thoroughly *report* harassment up the chain to their employer so that something can be done about it. Under *Zep*, employers simply are freer to react as they see fit to the inherently challenging scenario of third-party harassment.

Second, an employer's "arsenal of incentives and sanctions" are not the same for its employees and third parties. *Contra* NELA Br. 10–11 (asserting that

third parties and co-workers are “effectively equivalent”). To impose a liability rule on employers that assumes an equivalent level of control is nonsensical. An “employee” is at core a servant in a master-servant relationship, and the foundational feature of that relationship is the master’s control over the servant. *Clackamas Gastroenterology Assocs., P. C. v. Wells*, 538 U.S. 440, 445–48 (2003) (“At common law the relevant factors defining the master-servant relationship focus on the master’s control over the servant.”). An employer has the authority to control an employee and direct their actions, with a range of supervisory and disciplinary actions available to respond to misconduct, and an established relationship in which the employee presumably wants to retain their job and their favor.

In contrast, third parties may have no established relationship with an employer, and the employer may have few tools for addressing potential harassment. Businesses generally interact with vastly more third parties than employees. It is one thing to expect a business to keep reasonable tabs on its employees—who have actual authority to act on the company’s behalf, typically work there many hours every week, and have set supervisors and structure. It is another thing to expect a similar level of control over every one of thousands of customers, clients, and countless other third parties who interact with employees.

Imposing a rule that assumes employers have as much control over third parties as over employees will punish employers simply because the assumption is false. Employers can perhaps avoid negligence liability by counseling an alleged co-worker harasser about appropriate workplace conduct, but if the alleged harasser is a third party, they have no way to question the anonymous alleged harasser and impose tailored discipline.

This case itself is a good example of the different limitations that employers can face when dealing with alleged harassers who are not employees. Here, the plaintiff was a teaching assistant and the alleged harasser was a student.

Universities like the defendant here have balancing legal obligations toward both “complainants” and “respondents” on sexual harassment. Penn Br. 8–9; 34 C.F.R. § 106.44 (May 19, 2020) (requiring “equitable” treatment of “complainants and respondents”). They cannot treat students as they could treat at-will employees or as a retailer could treat random customers off the street. The Court should not adopt a rule that pretends otherwise.

CONCLUSION

Bivens v. Zep announces the correct rule for Title VII liability for employers based on third-party harassment. The district court correctly applied Title VII here, and it should be affirmed.

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Respectfully submitted,

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2. This brief complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it has been prepared in a proportionally spaced Equity A typeface using Microsoft Word, in 14-point size.
3. The text of this brief is identical to the text in any paper copies.
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I hereby certify that on April 20, 2026, the foregoing was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Third Circuit using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the system.

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