No. 11-556

In the Supreme Court of the United States

MAETTA VANCE, *Petitioner*,

v.

BALL STATE UNIVERSITY, *Respondent*.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF *AMICI CURIAE* AMERICAN COUNCIL ON EDUCATION AND OTHER HIGHER EDUCATION ORGANIZATIONS IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST[1]

Amicus American Council on Education (ACE) represents all higher education sectors. Its approximately 1,800 members include a substantial majority of colleges and universities in the United States. ACE is the major coordinating body for all of the nation's higher education institutions, and seeks to provide leadership and a unifying voice on higher education issues in order to influence public policy through advocacy, research, and program initiatives.

Because Title VII covers virtually all employers with fifteen or more employees, all institutions of higher education are subject to Title VII. Higher education employers have a significant interest in this Court adopting a principled definition of "supervisor" to address the myriad of employment relationships existing on campuses.

The following additional *amici* have joined in this brief and are described in greater detail in the attached Appendix:

- American Association of Community Colleges;
- American Association of State Colleges and Universities;

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[1] Counsel for *amici* authored this brief in its entirety. Sup. Ct. R. 37.6. No party or counsel for a party authored this brief in whole or in part, or made a monetary contribution to fund the preparation or submission of this brief. *Id.* Petitioner and Respondent have filed blanket consents to the filing of *amicus* briefs in this case. Sup. Ct. R. 37.3.

- Association of Governing Boards of Universities and Colleges;
- Association of Public and Land-grant Universities; and
- Higher Education Council of the Employment Law Alliance.

SUMMARY OF ARGUMENT

Organizing and classifying employees – as supervisors, subordinates, and co-workers – is fundamental to any work environment. Many businesses use defined "chains of command" to direct employee activities. Employment in higher education, however, may involve any number of varying arrangements – often more collaborative and less hierarchical – to organize employee activity. Variability in organizational arrangements in higher education poses significant challenges when attempting to define appropriate limits of vicarious liability for employee intentional misconduct under Title VII.

In accordance with Title VII and this Court's decisions, employers may be held vicariously liable for intentional acts of harassment committed by employees "outside of the scope of employment" consistent with agency principles. Those principles provide that employers may only be held vicariously liable for such intentional misconduct when the harassment is "made possible or facilitated by the existence of the actual agency relationship" between

the employer and the harasser. *Faragher v. City of Boca Raton*, 524 U.S. 775, 802 (1998), *citing* Restatement (Second) of Agency § 219 (1957). Only when so empowered may a harasser appropriately be considered to be an "agent" and "supervisor" under Title VII.

The EEOC's Enforcement Guidance (hereafter "Guidance") on vicarious liability under Title VII correctly notes that a "supervisor" for the purpose of imposing vicarious liability need not have the power to take tangible employment actions, such as hiring, firing, promoting, and demoting. EEOC Guidance, Pet. App. 90a-92a. The Guidance is inappropriately elastic however, when it states that vicarious liability may be imposed absent the employer granting the harasser any "actual authority" where, for instance, a victim simply believes the harasser is a "supervisor" because the "chain of command" is "unclear." *Id.* at 92a-93a.

An appropriate test for determining whether an employee is a supervisor for purposes of imposing vicarious liability under Title VII, where the harassment does not result in a tangible employment action, requires a plaintiff to plead and prove that (1) the victim subjectively believes that the harasser has the authority to impact significant, rather than trivial, conditions of employment, (2) the harasser, in fact, possesses such authority, and (3) the existence of a sufficient nexus between the authority conferred and the harassment. That nexus is shown when, as Respondent notes, the authority

materially enables or facilitates the harassment. Res. Br. 24-39.

The primary goal of Title VII is – and should be – "not to provide redress but to avoid harm." *Faragher*, 524 U.S. at 805-06, *citing Albermarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975). Harassment prevention has been fully embraced by the higher education community. An appropriate agency-based test for determining who qualifies as a supervisor for purposes of vicarious liability furthers the important preventive goals of Title VII. Clarifying employees' roles and responsibilities in the workplace allows institutions to focus the expenditure of scarce resources on developing and implementing appropriate policies to screen, train and monitor those who have meaningful authority over other employees.

ARGUMENT

There are approximately 4,500 public and private colleges, universities, and community colleges in the United States. Department of Education, *National Center for Education Statistics Integrated Postsecondary Education Data System, Table 275* (2011). American colleges and universities employ nearly four million people in the widest possible array of positions. Department of Education, *National Center for Education Statistics Integrated Postsecondary Education Data System, Human Resources Survey* (2011). Colleges and universities employ not only professionals but also students,

often building work experiences into curricula. Institutions employ persons in a dizzying array of positions – including accountants, animal handlers, attorneys, custodians, deans, faculty members, maintenance personnel, mathematicians, musicians, physicians, scientists, and security guards. Higher education is unmatched in the breadth and diversity of its employees' backgrounds, duties, skills, and employment arrangements.

While employment relationships in many business enterprises are characterized by a "clear chain of command," *Faragher*, 524 U.S. at 781, employment relationships in higher education are often more collaborative and less hierarchical. "Although one might easily identify the 'supervisor' among factory workers . . . one might have more trouble among college professors." *Dutt v. Delaware State College*, 854 F. Supp. 276, 281 (D. Del. 1994) (discussing the meaning of "supervisor" and "agent" under Title VII in tenure and promotion dispute).[2] In the higher education context it can be particularly vexing to classify the relative powers of various employees.

For instance, faculty members often have the power to *recommend* that colleagues obtain or not obtain promotion or tenure but the ultimate decision to confer tenure may be reserved to the institution's curators or trustees. *Compare Dutt, supra, and*

[2] The word "supervisor" obviously has different meanings in different contexts. This brief focuses exclusively on the meaning and application of that term in the context of litigation commenced under Title VII.

Kumar v. Bd. of Trustees, 774 F.2d 1 (1st Cir. 1985) (ultimate decision to award tenure vested in Chancellor and Board of Trustees). A particular faculty member or administrator may wield significant influence at his or her institution by virtue of reputation and professional standing, but may have no authority over either tangible job actions or the day-to-day activities of particular employees. *See, e.g., Milligan v. Bd. of Trustees of S. Ill. Univ.*, 686 F.3d 378, 382 (7th Cir. 2012) (Title VII claims by student worker regarding alleged harassment by prominent *emeritus* faculty member). Department chairs may have the power to assign colleagues various daily teaching and administrative duties, but may lack authority to take tangible employment actions. Colleges and universities are thus regularly confronted with not only traditional "chain of command" work arrangements, *e.g., Gawley v. Ind. Univ.*, 276 F.3d 301, 310 (7th Cir. 2001) (university police quartermaster's rank in "chain of command" assumed to be supervisor of lower-ranking female officer), but also many non-hierarchical work relationships. *See also Okruhlik v. Univ. of Ark.*, 395 F.3d 872 (8th Cir. 2005) (no analysis conducted as to whether powers of department chair rendered him "supervisor"); *An v. Regents of the Univ. of Cal.*, 94 Fed. Appx. 667 (10th Cir. 2004) (director of research assumed to be supervisor of research assistant without analysis of powers of director).

An inappropriately elastic definition of "supervisor," which exposes institutions to vicarious

liability under Title VII for an employee's intentional misconduct simply because the "chain of command" is "unclear," and even though the employer has done nothing to empower the harasser with authority having a meaningful nexus to the harassment, exposes all employers – and particularly higher education institutions – to excessive potential vicarious liability for that intentional employee misconduct.

I. VICARIOUS LIABILITY UNDER TITLE VII, *ELLERTH*, *FARAGHER*, AND THE EEOC GUIDANCE.

A. Title VII defines "employer" – the party that may be held liable in an action for damages for unlawful discrimination – to include any "agent" of the employer. 42 U.S.C. 2000e(b). Congress has thus explicitly directed that determinations of liability under Title VII must be made in accordance with agency principles. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 754 (1998); *Faragher*, 524 U.S. at 791-92. The word "agent," however, is not defined in Title VII and the word most often used to describe an employer's agent in this context – "supervisor" – does not appear in the statute at all.

Under traditional agency principles, the acts of an agent may be imputed to the principal under the familiar doctrine of *respondeat superior*. *Faragher*, 524 U.S. at 796-797; *see, e.g., Jones v. Wittenberg Univ.*, 534 F.2d 1203 (6th Cir. 1976) (university held liable for wrongful death of student caused by

negligent acts of university's security guard under *respondeat superior*). Where an employer does not authorize its agent to engage in the alleged misconduct – or when it does not even have notice of the misconduct – the employer may nonetheless be held vicariously liable under traditional agency principles for such acts committed by agents "outside the scope of employment." *Faragher*, 524 U.S. at 796-797. But describing the outer limits of vicarious liability under such circumstances – particularly in the context of higher education – is difficult at best as courts have justified disparate outcomes based upon a variety of competing policies. *Id.* The application of agency law – which itself is "indefinite and malleable," *id.,* to Title VII is imperfect and has resulted in the use of inconsistent rules regarding vicarious liability.

The differences between the application of agency principles in the contexts of common law torts and Title VII are not insignificant. For instance, under common law rules, both principals and agents may generally be held jointly liable to the injured plaintiff for the agent's tortious conduct. *See, e.g., Wittenberg*, *supra*, 534 F.2d 1203 (university and police officer jointly liable for wrongful death of student caused by negligent acts of university security guard). Title VII only permits the imposition of entity liability and insulates harassing supervisors from personal liability for their own misconduct. *See, e.g., Greenlaw v. Garrett*, 59 F.3d 994, 1001 (9th Cir. 1995); *Williams v. Banning*, 72 F.3d 552, 554 (7th Cir. 1995). Principals may

initiate third party actions against their agents and others for contribution and an apportionment of liability or fault in common law actions – not so under Title VII. *Northwest Airlines, Inc. v. Transport Workers Union of America, AFL-CIO*, 451 U.S. 77 (1981) (no right of action for contribution under Title VII because not expressly included in statute). Limitations on the availability of common law doctrines to apportion liability or fault under Title VII counsel strongly against an overly broad rule of vicarious liability premised upon expansive definitions of "agent" and "supervisor."

B. Indeed, this Court recognized in *Ellerth* that the "general rule" is that harassment by a supervisor is not conduct "within the scope of employment," and, as a result, employers are not automatically liable for such intentional misconduct committed by those employees. *Ellerth*, 524 U.S. at 757. This Court also held, however, that employers may be held vicariously liable for the intentional misconduct of supervisory employees who act outside of the "scope of their employment" in a limited circumstance: where the harasser is aided in the harassment by the agency relationship. *Id.* at 759; *Faragher*, 524 U.S. at 802-04. Of course, if the harasser is merely a co-worker, then agency principles have no application and the employer may only be held liable if the victim demonstrates that the employer was negligent in either discovering or remedying the harassment. *Ellerth*, 524 U.S. at 759; *Milligan*, 686 F.3d at 383.

In *Faragher*, the Court emphasized that vicarious liability is justified in such circumstances because the harassment is "made possible or facilitated by" the agency relationship between the employer and the harasser. *Faragher*, 524 U.S. at 802. It is clear that vicarious liability may be imposed on employers where harassment culminates in tangible employment actions (such as hiring, firing, promoting, and demoting) – those supervisory acts are clearly made possible by the agency relationship. *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 762-63. But this Court's decisions also permit the imposition of vicarious liability committed by employees where the harassment does not culminate in tangible employment actions consistent with agency principles. *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765. Justice Kennedy acknowledged, however, that whether the agency relation aids in the commission of harassment not culminating in a tangible job action is "less obvious." *Ellerth*, 524 U.S. at 763. It is this "less obvious" milieu that concerns *amici*.

C. When and how does an agency relationship "make possible" or "facilitate" harassment in non-hierarchical employment relationships such as those found on college campuses? When a colleague has the authority to make recommendations about another's promotion, is he or she acting as a "supervisor" under Title VII? When a secretary has the authority to assign administrative tasks to a work study student, is the institution vicariously liable under Title VII for harassment committed by

the secretary unrelated to and disconnected from those tasks?

This Court explicitly declined to announce a hard and fast rule of vicarious liability in *Faragher* and *Ellerth* and left it to litigants and subordinate courts to flesh out the meaning of "agent" and "supervisor" in this context. *Ellerth*, 524 U.S. at 763. The EEOC's Guidance drew its inspiration from these two seminal decisions and attempted to bring a measure of clarity to the outer limits of vicarious liability. The Guidance classifies "supervisors" as either being "in [a] supervisory chain of command" or "outside [a] supervisory chain of command." Guidance, Pet. App. 88a-93a. To be a supervisor within a chain of command, the Guidance states that the employee must have "authority . . . of a sufficient magnitude so as to assist the harasser explicitly or implicitly in carrying out the harassment." *Id.* at 89a. The Guidance provides that authority is of "sufficient magnitude" when either (1) the employee has the authority to "undertake or recommend" tangible employment actions, or (2) the employee has the authority to "direct [an] employee's daily work activities." *Id.*

The Guidance also states that an employer may be vicariously liable even where the harasser is "outside [the] supervisory chain of command" and lacks "actual authority" over the victim if the victim "reasonably believes the harasser had such power." *Id.* at 92a-93a. The Guidance thus supports the imposition of vicarious liability where the employer

does nothing to empower the harasser with meaningful "authority" that assists the harasser in carrying out the harassment, and apparently where there is no meaningful nexus between the authority granted by the employer and the harassment.

Amici believe that the EEOC Guidance appropriately concludes, consistent with *Faragher* and *Ellerth* but contrary to the test described by the Seventh Circuit in this and other cases,[3] that a harasser need not have the power to make tangible employment actions – such as hiring, firing, promoting, and demoting – in order to meet the definition of a supervisor under Title VII. Petitioner and Respondent agree on this point as well. Pet. Br. 18-42; Res. Br. 26-28. The Guidance is unnecessarily elastic, however, to the extent it includes in the definition of "supervisor" persons who lack any "actual authority" over the victim where, for instance, the victim merely believes that the "chain of command" is "unclear" – a condition that may arise with frequency in collaborative settings like higher education. Guidance, Pet. App. at 93a. Vicarious liability should not be imposed in such circumstances because to do so would elevate subjective beliefs of employees over the foundational requirement of agency law, as applied by the Court in this context, that the authority vested by the

[3] *See Parkins v. Civil Constructors of Ill., Inc.*, 163 F.3d 1027, 1034 (7th Cir. 1998) (supervisory authority "*primarily* consists of the power to hire, fire, demote, promote, transfer, or discipline an employee) and *Rhodes v. Ill. DOT*, 359 F.3d 498, 506 (7th Cir. 2004) (applying *Parkins* narrowly).

employer in the harasser actually makes possible or facilitates the harassment.

II. RESPONDENT PROPOSES AN APPROPRIATE TEST TO DETERMINE WHO QUALIFIES AS A SUPERVISOR FOR PURPOSES OF THE IMPOSITION OF VICARIOUS LIABILITY UNDER TITLE VII.

A. Courts have obviously struggled to apply agency principles in a consistent way when harassment does not culminate in tangible job actions. Decisions emanating from the higher education context reflect the varying tests and rules. *See, e.g.,* cases*, supra,* at pp. 5-6.

Respondent's proposed test, focusing on whether the authority conferred on the harasser "materially enables" the harassment, appropriately requires claimants to establish a legally meaningful relationship between the authority conferred and the harassment before permitting the imposition of vicarious liability. Res. Br. 24-39. *Amici* thus join Respondent in supporting the adoption of a test for determining when vicarious liability may be imposed absent a tangible employment action that focuses on the nature of the power given by the employer to the harasser, the perception of that power by the victim, and whether that power enables or facilitates the harassment.

Any inquiry concerning the roles of a harasser and a victim should begin by examining the specific tasks or conditions a harasser has the power to impact. Some work tasks are so trivial that authority over them is largely irrelevant to the meaningful terms and conditions of an employee's work experience. While the Guidance correctly notes that "someone who directs only a limited number of tasks or assignments would not qualify as a 'supervisor,'" Guidance, Pet. App. 92a, the number of tasks is only one factor to consider, and is likely less important than the relative burdensomeness of the tasks and whether burdens are shared with other employees. It is unlikely that the power to tell an employee where to park his car on campus, or to require an employee to appear at a department picnic, is meaningful in this context. The authority to require employees to perform tasks routinely undertaken or shared by other employees, where, for instance, all department members serve as marshals at commencement, is also likely not significant here.

On the other hand, employers can clearly confer powers other than hiring, firing, promoting, and demoting that are significant enough to meaningfully impact important conditions of employees' work environments. The authority to assign burdensome and demeaning tasks not shared by other employees, or to single out a victim by scheduling work in an exhausting way, may meaningfully change important aspects of an employee's work environment, particularly when the

burdensome assignments or scheduling is frequent rather than occasional.

The authority to recommend, but not take, tangible employment actions may also be significant but only if the harasser's "recommendation is given substantial weight by the final decision maker." Guidance, Pet. App. 91a. However, if colleagues are routinely asked for input on raises or promotions of other colleagues, but the decisions are, in fact, reserved to administrators or faculty other than the harasser, then the power to merely recommend is insufficient to warrant the imposition of vicarious liability in this context. *Id.* Similarly, if all university employees have the power to report misconduct by other employees but the administration is tasked with investigating and ultimately deciding whether or not to discipline, then the power to report, in and of itself, is insufficient to impose vicarious liability. When the power to recommend or report is given generally to employees, it is indistinguishable from any number of other powers conferred to co-workers and cannot reasonably support vicarious liability.

Even if a harasser is, in fact, conferred authority over the victim's significant tasks or conditions of employment, vicarious liability should not be imposed if the victim does not subjectively perceive the harasser's powers to be significant. *Ellerth,* 524 U.S. at 763; *Faragher,* 524 U.S. at 803. As Justice Marshall emphasized in *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986), it is "precisely because

the supervisor is understood to be clothed with the employer's authority" that he or she is able to harass his or her subordinate victim. *Id.* at 77. If the victim does not "understand" that the harasser has the power to alter significant aspects of his or her employment, then the victim is happy to tell the harasser "where to go." *Faragher,* 524 U.S. at 803; Res. Br. pp. 23, 35-37. In such circumstances, the harasser's authority, not perceived by the victim, cannot reasonably push the harasser over the line separating co-workers from supervisors to warrant the imposition of vicarious liability.

Moreover, it should not be enough to impose vicarious liability that the particular authority conferred upon the harasser is both objectively and subjectively significant. To be consistent with this Court's aided-in-agency analysis, the power given to the harasser must materially enable or facilitate the harassment – and thus have a meaningful nexus to the intentional misconduct about which the victim complains. Res. Br. 24-28; *Mack v. Otis Elevator Co.*, 326 F.3d 116, 125 (2d Cir. 2003). If, for instance, an employer gives a harasser the power to assign menial duties but there is no nexus between that authority and the harassment (the record is devoid of proof of actual assignment or threats of assignment), then vicarious liability should not be imposed. If an employer vests a harasser with the power to change another employee's work schedule in a material way, but the harassment does not include changes or real threats of schedule alteration, then no meaningful connection exists

between that authority and the harassment. In this regard, the harasser and victim are no different than any other co-workers because whatever power the harasser possesses is irrelevant to the harassment.

Thus, in order to establish a claim of vicarious liability where the harassment does not culminate in a tangible employment action, a plaintiff should be required to plead[4] and prove that (1) he or she subjectively believes that the harasser possesses powers to alter significant[5] rather than trivial conditions of the victim's employment; (2) the harasser, in fact, possesses the authority to alter the

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[4] *See Hoskins v. Howard Univ.*, 839 F. Supp.2d 268 (D.D.C. 2012) (alleged harasser, a Director of Finance, considered to be co-worker where plaintiff, an Assistant Director for Training, did not plead facts demonstrating Director had supervisory powers in Title VII hostile environment case).

[5] To be sure, a trial court may consider whether, as a matter of law, an alleged harasser has authority over sufficiently significant duties in the same way that courts decide whether harassment is sufficiently "severe" or "pervasive" to warrant a trial. *See, e.g., Stewart v. Miss. Transp. Comm'n*, 586 F.3d 321 (5th Cir. 2009) (affirming summary judgment because harassment was neither severe nor pervasive as a matter of law); *Russell v. Bd. of Trustees of Univ. of Ill. at Chicago,* 243 F.3d 336 (7th Cir. 2001) (same); *Devin v. Schwan's Home Serv.*, 491 F.3d 778 (8th Cir. 2007) (same); *Vasquez v. County of Los Angeles*, 349 F.3d 634 (9th Cir. 2003) (same); *Gupta v. Florida Bd. of Regents*, 212 F.3d 571 (11th Cir. 2001) (reversing jury verdict for professor on Title VII hostile environment claim because harassment was not sufficiently severe or pervasive).

victim's significant work conditions; and (3) the existence of a nexus between the harasser's authority and the resulting harassment so that the authority actually conferred to the harasser materially enabled or facilitated the harassment.

B. This formulation of the appropriate inquiry is consistent with this Court's decisions and other relevant cases. In *Faragher*, the harassers – from both a subjective and an objective point of view – had power over significant aspects of Faragher's work experience. *Faragher*, 524 U.S. at 808 (harassers had power to directly control "all aspects" of Faragher's "daily activities"). Moreover, there was a clear nexus between the powers conferred upon the harassers and the resulting harassment. *Id.* at 780 ("date me or clean toilets for a year"). The same is true in *Ellerth* where the harasser's power to "make hiring and promotion decisions" subject to another supervisor simply "sign[ing] the paperwork" and Ellerth's perception of that power, was directly connected to the harassment. *Ellerth,* 524 U.S. at 747-48 (threats that the harasser could make Ellerth's life "very hard or very easy" in context of overt sexual comments).

Other cases decided both before and after *Faragher* and *Ellerth* support this formulation. For instance, in *Torres v. Pisano*, 116 F.3d 625, 633-34, (2d Cir. 1997), *cert. denied*, 522 U.S. 997 (1997), the Second Circuit carefully applied agency principles and held that in order to establish vicarious liability absent a tangible employment action a plaintiff must

"establish a nexus between the supervisory authority" and the harassment. *Id.*, 116 F.3d at 635. From both a subjective and an objective point of view, the harasser in *Torres* had the authority to affect significant conditions of employment, but the Court concluded that under the facts presented in the summary judgment record, the plaintiff's claim that the harasser's powers "facilitated the harassment" was "too attenuated." *Id.*

In *Mack v. Otis Elevator Co.*, 326 F.3d 116 (2d Cir. 2003), a case relied upon heavily by both Petitioner and Respondent, the Court cited *Torres* and noted that vicarious liability may be imposed where the agency relationship "facilitates" the harassment – apparently drawing on language used in both *Torres* (116 F.3d at 635) and *Faragher* (524 U.S. at 802). *Mack*, 326 F.3d at 124. The Court held that vicarious liability, absent a tangible employment action, "depends on whether the power – economic or otherwise" of the harasser who is alleged to be a supervisor "enabled the harasser or materially augmented" his or her ability to harass the victim. *Id.* at 125. *See also Stayner v. Ohio Dep't of Rehab. & Corr.*, 2011 U.S. Dist. LEXIS 100099 (S.D. Ohio Sept. 6, 2011) (using "materially augmented" standard and holding it consistent with Sixth Circuit's "control over conditions of employment" test). Thus, under *Torres* and *Mack*, the authority conferred on the harasser must actually "facilitate" or "enable" or "augment" the harassment and therefore have a real nexus to the harm suffered by the victim.

C. The proposed test is, in most respects, in harmony with the EEOC's Guidance. The Guidance describes the authority giving rise to vicarious liability as "of sufficient magnitude so as to assist the harasser explicitly or implicitly in carrying out the harassment." Guidance, Pet. App. 89a. Power that is of "sufficient magnitude" is the power to impact significant conditions of employment. The Guidance also recognizes that the subjective perception of meaningful authority by victims of harassment is important in this context, noting that "if the employee reasonably believed that the harasser had such power" then vicarious liability may be imposed. *Id.* at 93a.

The Guidance inappropriately concludes, however, that vicarious liability may be imposed even though the harasser lacks "actual authority over the employee" where the "chain of command" is "unclear." *Id.* at 92a-93a. Here, in abandoning the requirement of proof of actual authority over significant conditions of employment, it appears that the Guidance inappropriately adopts a broad rule of apparent authority and elevates the importance of the form of harassers' titles or designations over the substance of harassers' actual authority and use of that power. This is not only inconsistent with the EEOC's directive to focus on the "job function rather than job title," *id.* at 89a-90a, but also with various courts' holdings. *Compare Wilson v. Moulison North Corp.*, 639 F.3d 1, 10 (1st Cir. 2011) (title such as foreman "does not transmogrify a line employee into a supervisor for Title VII purposes") *and EEOC v.*

CRST Van Expedited, Inc., 679 F.3d 657, 685 (8th Cir. 2012) (rejecting application of apparent authority altogether in this context); *but see Rubidoux v. Col. Mental Health Institute,* 173 F.3d 1291 (10th Cir. 1999) (recognizing availability of "apparent authority" to establish harasser was "supervisor" for purposes of imposing vicarious liability). *Amici*, Petitioner, and Respondent agree that a principled test should not be tied to nomenclature but rather grounded in an examination of actual power conferred to harassers and the way that power is used in the workplace. Pet. Br. 51; Res. Br. 31-32. Analysis that is not shackled to titles and designations is particularly important in the realm of higher education where titles are often at odds with the decidedly non-hierarchical work arrangements.

The Guidance also references temporary or intermittent abuse of authority as potentially supporting the imposition of vicarious liability absent tangible employment actions. Guidance, Pet. App. 92a. It is certainly relevant for a court to consider whether the intermittent nature of the use of power renders it insufficient to support a meaningful nexus between authority and harassment. As Respondent appropriately notes, "[s]upervisory authority that the harasser does not possess when he commits the harassment obviously cannot enable that same harassment." Res. Br. 37. Moreover, the intermittent nature of the use of authority may be relevant to the inquiry as to

whether a victim subjectively perceives the harasser to be his or her supervisor.

Finally, although the Guidance does not mention the relevance of a victim's relative isolation from persons with supervisory powers other than the harasser, *amici* agree with Respondent's suggestion that a victim's access to or separation from supervisors who may intercede to prevent harassment may well be relevant to a court's inquiry. Res. Br. 37. For instance, a university employee who has other supervisory personnel on site may not perceive the harasser to have meaningful authority over significant conditions of his or her work. The presence of other on-site supervisors may also be relevant to show that the harasser did or did not, in fact, have such authority.

III. THE PRIMARY GOAL OF TITLE VII IS TO PREVENT HARASSMENT.

The "primary objective" of Title VII is not to "make persons whole for injuries" but rather to "avoid harm" in the first place. *Faragher*, 524 U.S. at 806. The Court in *Faragher* noted that employers must have an "incentive" to avoid harm and the imposition of vicarious liability may provide such an incentive. *Id.* But the Court also recognized that an appropriately balanced standard for the imposition of vicarious liability should "give credit" to employers who "make reasonable efforts" to prevent harassment. *Id.* The primary means that this Court employed to achieve an appropriate balance was the

adoption of the affirmative defense to vicarious liability where the harassment does not culminate in a tangible employment action. This defense, of course, is premised upon employers' development and use of measures (such as policies) to prevent and correct harassment and a concomitant failure of the victim to avail himself or herself of such measures. *Id.* at 806-808; *Ellerth,* 524 U.S. at 765.

The Court's strategy clearly had its intended effect in the area of higher education as a perusal of anti-harassment policies, training programs, and other preventive measures demonstrates. *See, e.g.,* College and University Personnel Association, *Sexual Harassment: A Sourcebook of Policies in Colleges and Universities*, CUPA (1999); Euben, *Sexual Harassment in the Academy: Some Suggestions for Faculty Policies and Procedures*, AAUP (2002). The implementation of anti-harassment policies and training programs in the higher education community is ubiquitous.

The adoption of the proposed practical test for determining who qualifies as a "supervisor" under Title VII in this context also supports the important goal of harassment prevention. Justice Souter referenced the obvious "virtue of categorical clarity" when discussing the challenges related to determining the contours of vicarious liability under Title VII for intentional misconduct of employees. *Faragher*, 524 U.S. at 800-01. Brighter lines provide employees and employers alike with the opportunity

for clearer understanding of their respective rights and obligations regarding workplace harassment.

Moreover, this Court supported its decision to impose vicarious liability in the context of supervisory harassment not culminating in tangible employment actions by noting that "the employer has a greater opportunity to guard against misconduct by supervisors than by common workers; employers have greater opportunity and incentive to screen them, to train them, and to monitor their performance." *Faragher*, 524 U.S. at 803. Using a test that appropriately limits the definition of "supervisor" to those conferred the authority to impact significant conditions of employment enhances the ability of institutions to screen, train and monitor such persons; an unbounded and expansive definition has the opposite effect.

In the context of higher education in particular, the careful allocation of scarce resources to preventive measures, such as targeted supervisor training, is surely better than devoting resources to litigation. While the test employed by the Seventh Circuit is salutary in its definitiveness, it falls short of adhering to the foundational agency principles adopted in *Faragher* and *Ellerth*. Respondent's formulation, as restated here, meets both the requirements of precedent and furthers the compelling goal of preventing harassment in all contexts, including on campus.

CONCLUSION

Amici respectfully request that this Court adopt Respondent's formulation of an agency-based test for determining who qualifies as an "agent" or "supervisor" for purposes of imposing vicarious liability for harassment violating Title VII, as restated here, where that harassment does not culminate in a tangible employment action. Additionally, *amici* join in Respondent's request that the judgment of the court of appeals in favor of Respondent be affirmed. Most importantly, *amici* remain committed to the eradication of unlawful harassment and discrimination on campus.

October 25, 2012

Respectfully submitted,

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APPENDIX

APPENDIX

Descriptions of the Additional *Amici Curiae*

The American Association of Community Colleges (AACC) is the primary advocacy organization for the nation's community colleges. It represents nearly 1,200 two-year, associate degree-granting institutions.

The American Association of State Colleges and Universities (AASCU) is a Washington-based higher education association of more than 400 public colleges, universities and systems whose members share a learning- and teaching-centered culture, a historic commitment to underserved student populations and a dedication to research and creativity that advances their regions' economic progress and cultural development. AASCU members enroll nearly 4 million students.

The Association of Governing Boards of Universities and Colleges (AGB) is the only national association that serves the interests of academic governing boards, boards of institutionally related foundations and campus chief executive officers and other senior-level governance and leadership. AGB includes 1,900 institutions of higher learning and serves nearly 1,300 boards, both publicly supported and independent. The Association also serves more than 36,000 individuals, including trustees and

regents, campus and public college and university foundation chief executive officers, board professionals and staff members and senior level administrators. AGB's mission is to strengthen, protect and advocate on behalf of citizen trusteeship in ways that support and advance higher education.

The Association of Public and Land-grant Universities (A·P·L·U), founded in 1887, is a research and advocacy organization of public research universities, land-grant institutions, and state university systems. As the nation's oldest higher education association, A·P·L·U is dedicated to excellence in learning, discovery and engagement. Member campuses enroll more than 3.5 million undergraduate and 1.1 million graduate students, employ more than 645,000 faculty members, and conduct nearly two-thirds of all university-based research, totaling more than $34 billion annually. For more information, visit www.aplu.org

The Higher Education Council of the Employment Law Alliance (ELA)[6] collectively represents hundreds of institutions of higher education throughout the United States. The Council includes the following United States law firms with labor and

[6] The ELA is an integrated, global practice network comprised of independent law firms that are distinguished for their practice in employment and labor law. With more than 3,000 experienced attorneys located in more than 130 countries, it is the world's largest network of labor and employment lawyers.

employment practices and significant expertise in the field of higher education:[7]

- Bond, Schoeneck & King, PLLC
- Dinse, Knapp & McAndrew, P.C.
- Dinsmore & Shohl LLP
- Edwards Wildman Palmer LLP
- Gray Plant Mooty
- Hirschfeld Kraemer LLP
- Lathrop & Gage LLP
- Miller Nash LLP
- Parker Poe Adams & Bernstein LLP
- Pierce Atwood LLP
- Reed Smith LLP
- Shawe Rosenthal LLP
- Tueth Keeney Cooper Mohan & Jackstadt, P.C.
- Sturgill, Turner, Barker & Moloney, PLLC

[7]A full list of firms in the Higher Education Council includes international members Anjarwalla & Khanna; Fromont-Briens; and Rajah & Tann, LLP.