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 FOR PETITIONER

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QUESTION PRESENTED

In *Faragher* v. *City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742 (1998), this Court held that under Title VII, an employer is vicariously liable for severe or pervasive workplace harassment by a supervisor of the victim. If the harasser was the victim's co-employee, however, under the prevailing rule, the employer is not liable absent proof of negligence. In the decision below, the Seventh Circuit held that actionable harassment by a person who was held out as a supervisor and who had the authority to direct and oversee the victim's daily work could not give rise to vicarious liability because the harasser did not also have the power to take formal employment actions against her. The question presented is:

Whether, as the Second, Fourth, and Ninth Circuits have held, the *Faragher* and *Ellerth* "supervisor" liability rule (i) applies to harassment by those whom the employer vests with authority to direct and oversee their victim's daily work, or, as the First, Seventh, and Eighth Circuits have held (ii) is limited to those harassers who have the power to "hire, fire, demote, promote, transfer, or discipline" their victim.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Cases—Continued: **Page(s)**

Cases—Continued: **Page(s)**

Cases—Continued: **Page(s)**

Cases—Continued: **Page(s)**

Statutes:

Miscellaneous:

Miscellaneous--continued: **Page(s)**

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Seventh Circuit, Pet. App. 1a-24a, is reported at 646 F.3d 461. The district court's unreported memorandum and order granting the respondent's motion for summary judgment, Pet. App. 25a-80a, is available at 2008 WL 4247836.

JURISDICTION

The judgment of the court of appeals was entered on June 3, 2011. On August 16, Justice Kagan granted an extension of time to file a petition for a writ of certiorari until October 31 and the petition was filed on that date. This Court granted the petition on June 25, 2012. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964 provides in pertinent part:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

42 U.S.C. § 2000e-2(a).

The Equal Employment Opportunity Commission ("EEOC") guidelines provide in pertinent part:

> An individual qualifies as an employee's "supervisor" if:
>
> a. the individual has authority to undertake or recommend tangible employment decisions affecting the employee; or
>
> b. the individual has authority to direct the employee's daily work activities.

Equal Emp't Opportunity Comm'n, Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (1999), 1999 WL 33305874, at *3, Pet. App. 90a (EEOC Guidance).

STATEMENT

In *Faragher* v. *City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742 (1998), this Court held that Title VII imposes vicarious liability (subject to an affirmative defense) on employers for sex- (and race-)based workplace harassment of a subordinate employee by his or her supervisor. *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765. In the decision below, the Seventh Circuit, following circuit precedent, held that rule inapplicable to actionable harassment by personnel who direct, oversee, evaluate—and "supervise"—their victims, but do not have power to take formal tangible employment action against them. Pet. App. 12a-13a.

A. Legal Background

Title VII prohibits workplace discrimination on the basis of race, color, religion, sex, or national

origin. 42 U.S.C. § 2000e-2(a). In *Meritor Savings Bank, FSB* v. *Vinson*, 477 U.S. 57 (1986), this Court first recognized that sex-based harassment in the workplace is actionable under Title VII. *Id.* at 66. The Court explained, "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult." *Id.* at 65. In *Harris* v. *Forklift Systems, Inc.*, 510 U.S. 17 (1993), and *Oncale* v. *Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), the Court laid out the basic elements of a hostile work environment claim: that (1) the race- or gender-based harassment be "severe or pervasive"; (2) a reasonable person in the plaintiff's position would find the environment either hostile or abusive; and (3) the plaintiff perceived it as such. *Harris*, 510 U.S. at 21-22.

In *Faragher* and *Ellerth*, this Court indicated that three different standards govern employer liability in such cases. When the harasser is a *co-worker*, not a supervisor, of the victim, employer liability turns on the employer's negligence—its "combined knowledge [of the behavior] and inaction" in response. *Faragher,* 524 U.S. at 789; see also *Ellerth,* 524 U.S. at 760. When a "*supervisor* with immediate (or successively higher) authority over the [victim]" creates an "actionable hostile environment," on the other hand, vicarious liability applies to the employer. *Faragher,* 524 U.S. at 807 (emphasis added); *Ellerth,* 524 U.S. at 765 (emphasis added). When the supervisor took no tangible employment actions against the victim, however, the employer can raise an affirmative defense "compris[ing] two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee

unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer." *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

In *Parkins* v. *Civil Constructors of Illinois, Inc.*, 163 F.3d 1027 (7th Cir. 1998), the Seventh Circuit took a narrow view of who counts as a "supervisor." It held that vicarious liability applies only when the supervisor has the power to alter the victim's formal employment status, *i.e.*, to hire, fire, promote, or discipline her. *Id.* at 1034 ("[A]bsent an entrustment of at least some of this authority, an employee does not qualify as a supervisor for purposes imputing liability to the employer."). "[F]or purposes of Title VII," an individual who has the title of manager, functions as the victim's boss, oversees her work, and assigns her daily tasks is a mere "co-worker." *Id.* at 1033. As the Seventh Circuit later explained, "'[s]upervisor' is a legal term of art for Title VII purposes," *Rhodes* v. *Illinois Dept. of Transp.*, 359 F.3d 498, 506 (7th Cir. 2004), and, in particular, "a 'supervisor' for purposes of Title VII is not simply a person who possesses authority to oversee the plaintiff's job performance," *Andonissamy* v. *Hewlett-Packard Co.*, 547 F.3d 841, 848 (7th Cir. 2008).

A few months later, the EEOC issued an *Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors*, *available at* 1999 WL 33305874 (reproduced at Pet. App. 81a-93a) (EEOC Guidance), which rejected the Seventh Circuit's interpretation. Under the EEOC Guidance, an employee who has "authority to direct the [victim's] daily work activities" or the power "to recommend," though not personally effect, "tangible

employment decisions" against the victim counts as the victim's "supervisor," Pet. App. 90a, because the employee's ability to harass "is enhanced by his or her authority to increase the employee's workload or assign undesirable tasks," Pet. App. 91a.

That interpretation, which has been advanced by the EEOC as enforcer and as amicus curiae, has persuaded the Second and Fourth Circuits. *Whitten* v. *Fred's, Inc.*, 601 F.3d 231, 245 (4th Cir. 2010) (rejecting, in state law claim decided under federal Title VII principles, rule that absence of "authority to take tangible employment actions" forecloses vicarious liability); *Mack* v. *Otis Elevator Corp.*, 326 F.3d 116, 125 (2d. Cir. 2003); see also *McGinest* v. *GTE Serv. Corp.*, 360 F.3d 1103, 1119 n.13 (9th Cir. 2004) (holding that application of vicarious liability depends "upon whether a supervisor has the authority to demand [his target's] obedience"), cert. denied, 552 U.S. 1180 (2008).

B. Facts and Proceedings Below[1]

This case arises from a decision of the Seventh Circuit holding, as a matter of law, that the respondent employer, Ball State University (BSU), could not be liable for the racial harassment and intimidation to which petitioner, Maetta Vance, was subjected in her workplace.

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[1] Because this case was decided on motions for summary judgment, the courts below were required (as this Court would be) to "draw all reasonable inferences in favor of the nonmoving party," *Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000); to disregard any evidence supporting Ball State that the jury would not be required to credit; and to refrain from "mak[ing] credibility determinations or weigh[ing] the evidence." *Ibid.*

Ms. Vance began working for BSU in 1989 as a substitute server in the Banquet and Catering Department of the University Dining Services. Pet. App. 2a. She became a part-time Catering Assistant in 1991 and was promoted to full-time Catering Assistant in 2007. *Ibid*. For much of this time, Vance was the sole African-American employee in the division. *Id*. at 1a-2a.

In 2005, Saundra Davis, a Catering Specialist was given authority to direct Vance's and other employees' work. During a previous stint in the department, Davis had physically assaulted Vance, who had reported it to her supervisor at the time, but did not pursue a formal complaint when Davis was transferred out. Pet. App. 3a.

Davis and Connie McVicker, another white employee, created an environment of physical intimidation and racial harassment. Davis threatened Vance, cornering her on an elevator and telling her, "I'll do it again." Pet. App. 3a. She used epithets like "Buckwheat" and "Sambo" to refer to Vance and felt comfortable doing so in the presence of Vance and other employees. *Id.* at 6a. For her part, McVicker regularly used the term "nigger" to refer to both Vance and African-American students at the university and openly boasted of her family's connections to the Ku Klux Klan. *Id.* at 3a. Both Davis and McVicker stared menacingly at Vance, leaving her afraid to be alone with them in the kitchen. *Id.* at 37a n.8.

As this behavior persisted, Vance lived and worked in a constant state of fear. She sought psychiatric care for anxiety and sleeplessness. J.A. 41. The University's incident reports described

Vance as "sitting on the edge of her seat" and "shaking violently" as she recounted the abuse. *Id.* at 34-35.

When Vance reported particular instances of the harassment to the University's Compliance Office, that office repeatedly assigned Bill Kimes, the general manager of Vance's department, to investigate. Kimes had himself long mistreated Vance. The first time she had introduced herself to him, Kimes had refused to shake her hand. Pet. App. 3a. Kimes also regularly excluded Vance from workplace activities, waiting until she left to invite her white coworkers to lunch. *Ibid.* Indeed, respondents conceded that Kimes was abusive, telling the Seventh Circuit that he was "very, very rude" and "ruled by intimidation." Resp. C.A. Br. 6. They denied only that he singled out Ms. Vance for particularly harsh treatment. *Ibid.*[2]

Little was done as the result of Kimes's investigations. Kimes never disciplined Davis (who denied Vance's account of the elevator incident) and instead exhorted both Davis and Vance to "respect" each other in the workplace. Pet. App. 6a. After numerous white employees corroborated Vance's reports about McVicker's racist tirades, BSU issued McVicker, whom it concluded had misled investigators, a confidential letter of reprimand. *Id.* at 16a. Because BSU had no formal policy concerning

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[2] Petitioner presented evidence—sworn statements of fellow employees—that Kimes's abuse of Vance was in fact worse than his mistreatment of the nonminority employees the University identified. See J.A. 413 ("I regularly witnessed Bill Kimes screaming at Maetta Vance, and I never witnessed him talking to her in a normal tone of voice.").

racial harassment—unlike a lengthy and detailed "zero tolerance policy" addressing sex-based harassment, J.A. 438-445, which identified "[p]ossible sanctions * * * as includ[ing] but * * * not limited to * * *: an apology to the victim[,] loss of salary or benefit[,] demotion, suspension, probation, termination, dismissal or expulsion," *id.* at 444, McVicker's letter referenced a generic rule prohibiting "conduct * * * inconsistent with proper behavior," *id.* at 63. In contrast to the University's forceful responses to incidents of gender- and sexual-orientation harassment, *id.* at 18-20 (terminating employee for expressing homophobic attitudes), the University refused Vance's request that McVicker be assigned to another department and even continued to schedule them to work together although it later explained that Kimes had "tried" to avoid doing so, Pet. App. 36a.

Although the reprimand letter indicated that McVicker risked more serious sanctions if she continued to direct racist epithets at Vance, she called Vance a "monkey" the day the letter was issued. Pet. App. 5a. When Vance reported this to Kimes, he discouraged her from "proceeding further" with a complaint, explaining that a "she said-she said exchange * * * wouldn't result in anything positive." *Id.* at 35a; but see J.A. 252 ("In working with Connie McVicker, I heard Ms. McVicker refer to Meetta Vance as a 'porch monkey.'"). This concern for corroboration did not obtain when Vance was accused. When Davis alleged that Vance had splashed pots and pans in her presence, Kimes issued Vance a warning even though no witnesses corrobrated the story. *Id.* at 8a.

The harassment did not abate. Even after Vance complained to the EEOC and filed this action, Davis approached her, taunted her and said, in a Southern accent "you scared?" Pet. App. 7a. Nor did McVicker relent. She cornered Vance and said, "Payback." *Id.* at 37a. Still later (after motions had been filed), Davis and her daughter accosted Vance on the campus, and the daughter said: "You are a nigger, a fucking nigger. You are trying to get my mother fired. What are you gonna do about it? I'll kick your ass." *Id.* at 44a. When Vance and a co-worker told Kimes about this encounter with Davis and her daughter, he told Vance to "get out of [his] face," *id.* at 45a, and did nothing.

When the University's newspaper posted articles describing Vance's lawsuit on its website, numerous overtly racist and threatening comments appeared. One commenter wrote that Vance should go "back to the east side and sell some crack" and another publicly called for a co-worker in the kitchen to "[b]ait [M]s. [Vance] into a physical altercation, make sure others see her strike you first, then beat that loudmouth down, in self-defense." Pet. App. 46a n.13.

Vance sued, making hostile environment and retaliation claims under Title VII. BSU moved for summary judgment, arguing, among other things, that it could not be held vicariously liable under *Ellerth* and *Faragher* because Davis was not Vance's supervisor. Def. Summ. J. Br. 27. In response, Vance pointed to BSU's formal description of Davis's "Catering Specialist" position, which identified "[k]itchen [a]ssistants and [s]ubstitutes" as two "positions supervised" and defined "leadership of up

to 20 part-time, substitute, and student employees" as part of Davis's "position['s] function." J.A. 12

BSU's internal documents were consistent with this description. They (1) described Vance as upset that Davis was "now in a place to *lead at work and do things to [Vance] and get away with it*," J.A. 50 (emphasis added); (2) noted that "Vance said she is not comfortable with Davis leaving her notes and delegating jobs to her in the kitchen," Ball State Internal Documentation Form, Dkt. No. 59-16, at 2; (3) recorded Kimes as describing "[Davis as] responsible for getting [Vance] the prep list for the day," J.A. at 74; (4) noted that there had been much discussion about Davis's "role as a lead person in the kitchen * * * and ho[w] [Vance] feels [Kimes] has never done anything about [Davis] and how she treats [Vance] during the whole time [Davis] has been working back at UBC," *id.* at 66; and (5) admitted Kimes believed that Davis "*does* * * * give [Vance] prep sheets daily," *ibid.* (emphasis added), and that Kimes himself "report[ed] 'that he knows [Davis] has given direction to [Vance],'" *id.* at 67.

Vance's complaints likewise show that she understood both that Davis was her supervisor and that supervisors and co-workers are different. In her BSU complaint, Vance described Davis and McVicker, respectively, as "kitchen supervisor" and "truck driver." J.A. 45. Her contemporaneous handwritten complaint to the local NAACP chapter explained that "Davis * * * came back *as a supervisor* only to start the intimidation again." *Id.* at 28 (emphasis added). She also described Betty Skinner, a Catering Specialist, like Davis, as "the other supervisor," *id.* at 4, and identified McVicker (and

others) as "co-workers and [other] employees who work in the kitchen," *id.* at 29.

Nor was Vance alone in this understanding. Donn Knox, who for years worked in the same kitchen, testified repeatedly at deposition that, while he didn't know "what [BSU] [calls Davis] now," she was "some type of supervisor[]" and had been brought "back to UBC as a supervisor with Betty Skinner." J.A. 385. And when pressed by BSU's counsel as to what "caused [him] to believe she was a supervisor," Knox answered, "[BSU management] told her that she was—they told us she was a supervisor," naming Kimes, in particular, as one who had so identified her. *Id.* at 386. Kimes's deposition testimony also supports Vance's claim. Asked whether Davis was "part of management," he answered "that's complicated," conceding that she "direct[ed] and l[ed] * * * [a]t times." *Id.* at 367. Pressed by Vance's counsel about why he believed Davis did not supervise although she "direct[ed] and lea[d]," Kimes answered that without "authority to discipline" Davis's powers to direct and lead did not make her a "supervisor" under BSU's understanding of the Seventh Circuit rule.[3] *Ibid.*

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[3] BSU's internal documents thus confirm what Vance and other employees consistently maintained: that the Catering Specialists, Davis and Skinner (before she retired), the highest-ranking employees regularly in the kitchen, oversaw its daily operations, with Kimes, the general manager of the department, taking only intermittent supervisory responsibility. See J.A. 78 (noting need "to place a management person in the kitchen at all times so behaviors of employees can be monitored * * * [and that] Betty Skinner, Catering Specialist did oversee employees in the kitchen but she recently retired."); *id.* at 51 (noting that Kimes "reminded [Courtright] that he is also the chef and has a

Rather than denying that Davis oversaw and directed Vance's work, BSU argued that such power was irrelevant under Seventh Circuit law. Defts' Summ. J. Reply Br. 17. Indeed, evidence BSU pointed to in support of summary judgment, an affidavit of BSU's Employee Relations Director attesting that "Saundra Davis is not now, and never has been, a supervisor at Ball State," immediately explained, in language tracking the Seventh Circuit rule, that "*A 'supervisor' at Ball State is a person who has authority to exercise all, or substantially all, of the following powers: to hire, fire, demote, promote, transfer, or discipline an employee. Saundra Davis does not have, nor has she ever had, such authority*." J.A. 409 (emphasis added).[4]

The district court granted BSU's motion for summary judgment. It first concluded that, whether or not Davis "had authority to direct the work of [Vance and] other employees," Pet. App. 54a, she lacked what the Seventh Circuit centrally required under *Faragher* and *Ellerth*: "the power to hire, fire, demote, promote, transfer, or discipline an employee," *id.* at 53a. The court then held that as a matter of law Vance's claim could not succeed under the

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lot more work to do than just manage employees"); *id.* at 72 (recognizing need for "someone [in the kitchen] who is stronger * * * than the kitchen lead [and] more accessible to the workers").

[4] Gloria Courtright of BSU's Office of [EEO] Compliance, argued along the same lines. She insisted that Vance had erred in identifying Davis as a "supervisor," because "Saundra Davis * * * could not [effect] any of those adverse actions." J.A. __ RE at 26.

negligence standard applicable to co-employee harassment.[5]

The Seventh Circuit affirmed the district court. The court assumed that Vance had carried her burden with respect to three of the four elements of her hostile environment claim: "(1) that [the employee's] work environment was both objectively and subjectively offensive; (2) that the harassment was based on her race; and (3) that the conduct was either severe or pervasive." Pet. App. 11a. It then upheld the district court's holding that Davis was not Vance's supervisor because Davis lacked the "power to directly affect the terms and conditions of [Vance's] employment" by hiring, firing, demoting, promoting, transferring, or disciplining her. *Id.* at 12a (quoting *Rhodes* v. *Ill. Dept. of Transp.*, 359 F.3d 498, 506 (7th Cir. 2004)) (emphasis omitted). Noting that it "ha[d] not joined other circuits in holding that the authority to direct an employee's daily activities establishes supervisory status under Title VII," *id.* at 12a-13a, the Seventh Circuit concluded that Vance's evidence "that Davis had the authority to tell her what to do" failed to raise a triable issue concerning supervisor

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[5] In so holding, the court addressed a dispute between the parties as to whether evidence of post-filing incidents, such as the assault by the Davis family and the comments on the newspaper website, were properly before it. After expressly stating that "even if [the court] were to consider the allegations set forth by Ms. Vance in her supplemental submissions, they would have no effect on our ultimate determination that she is unable to survive summary judgment on her hostile environment claim," Pet. App. 51a, the court agreed with BSU that the submissions should be disregarded for failure to comply with Fed. R. Civ. P. 15(d), the rule governing supplemental pleadings, *id*. at 49a.

status, *id.* at 13a. Vicarious liability thus did not apply to BSU.

As to negligence, the court of appeals upheld the district court, concluding that BSU "promptly investigat[ed] each of [petitioner's] complaints and t[ook] disciplinary action when appropriate." Pet. App. 15a-19a.[6]

Summary of Argument

The Seventh Circuit decision affirming summary judgment rests on that court's distinctive, restrictive—and fundamentally mistaken—view of the Title VII employer liability rules established by *Faragher* and *Ellerth*. Beginning with *Parkins* v. *Civil Constructors of Illinois, Inc.*, 163 F.3d 1027 (7th Cir. 1998), that court's first post-*Faragher/Ellerth* decision, the Seventh Circuit (since joined by the Eighth Circuit and others) has developed a rule rooted in the claimed need to distinguish between a "supervisor" in the ordinary sense of the word and "a true supervisor," *id.* at 1033. Holding that "'[s]upervisor' is a legal term of art for Title VII purposes," *Rhodes*, 359 F.3d at 506, the Seventh Circuit has enumerated a narrow set of personnel powers necessary "to make someone a supervisor under Title VII," *Andonissamy* v. *Hewlett-Packard Co.*, 547 F.3d 841, 848 (7th Cir. 2008). Specifically, a

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[6] The court of appeals held that the district court erred in treating petitioner's post-filing evidence as "a disguised Rule 15(d) submission," Pet. App. 9a, emphasizing that a hostile work environment claim is premised on the "cumulative effect of individual acts," *id.* at 10a (quoting *Nat'l R.R. Passenger Corp.* v. *Morgan*, 536 U.S. 101, 115 (2002)), but it declined to remand, noting the district court's discretion to exclude evidence "in the interest of keeping [the case] moving forward," *id.* at 10a-11a.

Title VII plaintiff seeking redress for actionable workplace harassment by a person her employer holds out as her "supervisor" and vests with authority to direct and oversee her daily work activities, to evaluate her performance, or to recommend adverse personnel actions against her is relegated to "co-employee" status unless the harasser "could hire, fire, promote, demote, discipline or transfer" her. *Ibid.*

I. This strange restriction that a person whom the employer, victim, and others in the workplace recognize as the victim's "supervisor" and whose job duties include directing, overseeing, and "supervising" his victim's daily work is not her "supervisor" for purposes of Title VII is nonsensical, arbitrary, and contrary to controlling precedent. Cf. *United States* v. *Bajakajian*, 524 U.S. 321, 346 (1998) (Kennedy, J., dissenting) (highlighting the "doctrinal difficulty" of "speak[ing] of nonpunitive penalties").

A. This Court's decisions conclusively foreclose the Seventh Circuit's restrictive Title VII rule and the premises on which it rests. The particular "supervisory relationship" *Faragher* itself held triggered vicarious employer liability as a matter of law lacked the personnel powers the Seventh Circuit holds necessary. A long line of prior and subsequent Supreme Court precedent refutes the notions (1) that for "purposes of Title VII" "supervisor" is a narrow "term of art," (2) that the most common supervisory powers—to direct a subordinate's daily work, to "demand obedience," *McGinest* v. *GTE Serv. Corp.*, 360 F.3d 1103, 1119 n.13 (9th Cir. 2004), and to evaluate her performance—are peripheral and insufficient to establish a supervisory relationship,

and (3) that only high-level personnel count as "supervisors."

B. Nor do the reasons this Court has given for Title VII's employer liability regime permit the Seventh Circuit's restriction. The primary concerns that led to vicarious employer liability for harassment by supervisors—that such workplace misconduct is aided by the agency relation, which affords supervisors contact with their victims and makes it more difficult for targets to "walk away" from or "blow the whistle" on those who harass them—apply with at least equal force to harassment by an employee's immediate supervisor.

C. The Title VII needs the Seventh Circuit claimed its rule responds to—predictability and certainty of application—do not begin to support the actual rule it imposes. The *Parkins* approach, like other arbitrary and restrictive rules this Court has rejected in a series of recent Title VII cases, purchases the simplicity of a bright line at the cost of undermining the statute and disregarding governing precedent.

But here even the claimed benefits turn out to be chimerical. There is no evidence, in fact, that litigation in jurisdictions rejecting the *Parkins* rule has become voluminous or complex. And unlike other areas of the law, in which the borderline determines the lawfulness of regulated parties' primary conduct, *Ellerth*, *Faragher* and Title VII direct employers to prevent and respond to actionable workplace harassment perpetrated by their agents on both sides of the "supervisor" rule. Indeed, while the Seventh Circuit's short checklist of supervisorial powers may sometimes quickly (though often erroneously) resolve

a harasser's supervisory status, it does not simplify or speed Title VII litigation. Indeed, it does not even speed resolution of the employer responsibility *element* of such claims and instead channels litigation to complex and fact-intensive disputes over negligence.

II. Because the Seventh Circuit applied the wrong legal rule, its judgment against Vance must be reversed. Vance introduced ample evidence that Davis was in fact her supervisor. The district court granted summary judgment, however, because of the Seventh Circuit's restrictive *Parkins* rule and the Seventh Circuit affirmed on that basis. BSU did not argue in either court below that Davis could not be a supervisor under the correct legal standard. As this Court has repeatedly held, once it has determined that a lower court decision is based upon an improper legal rule, it should remand to the lower courts for them to reconsider the case under the correct standard.

Although the Court can resolve the question presented by simply holding that the Seventh Circuit erred in excluding from the *Ellerth*/*Faragher* rule supervisors who direct and oversee the work of their victims, the Court should provide more precise guidance to lower courts by embracing the Second Circuit's standard. That test, which inquires whether authority granted the harasser "enabled or materially augmented" the harasser's ability to create a hostile work environment for his subordinates, closely resembles the standard crafted by this Court in a similar context in *Burlington Northern* and would provide similar benefits of objectivity, administrability, and tight fit with the core purposes

of Title VII. The Second Circuit's standard properly focuses the inquiry on those practical realities of the workplace that can, as highlighted in *Faragher*, enable harassment, and that standard has proven workable and nondisruptive over many years of application.

ARGUMENT

I. The Seventh Circuit's Restriction On The Vicarious Liability Rule Is Foreclosed By *Ellerth*, *Faragher*, And This Court's Other Decisions

Although the Seventh Circuit and its followers have repeatedly emphasized that "supervisor" is a "term of art" for purposes of Title VII, they have made no effort to square their restriction of its meaning with the holdings and reasoning of this Court's Title VII decisions. Nor could they. This Court has, in fact, ruled out each of the stated but unexplained premises of the Seventh Circuit's rule: (1) that there is a valid and important need to limit Title VII vicarious liability under *Faragher* to some subset of high-level supervisors; (2) that vicarious liability should not apply to actionable harassment by those who are "referred to colloquially," even by the employer itself, as their victim's "supervisor" and charged with overseeing and directing her daily work activities or evaluating her job performance; and (3) that vicarious liability applies only to harassment by those vested with a specific list of personnel powers.

A. "Supervisor" Is Not A Narrow "Term of Art" For Purposes of Title VII

1. While *Faragher* and *Ellerth* recognize reasons for not extending vicarious liability to the abusive workplace conduct of "co-employees," they nowhere suggest that harassment by those held out by the employer and understood to be the victim's "'supervisor' in the colloquial sense of the word," *Andonissamy* v. *Hewlitt-Packard Co.,* 547 F.3d 841, 848 (7th Cir. 2008), should be exempted or that personnel powers in addition to "*supervising*" the subordinate employee are required to "make [the harasser] a supervisor for purposes of Title VII," *ibid.*; see also *EEOC* v. *Ceisel Masonry, Inc.*, 594 F. Supp. 2d 1018, 1025 (N.D. Ill. 2009) ("The bulk of [the harasser's] job duties consisted of supervising the work of [those he abused.] * * * [He] did not have the authority to hire, fire, demote, promote or transfer employees. Nor does [his] ability merely to *recommend* discharge transform him into a supervisor, even if his recommendations usually were followed.").

To the contrary, *Faragher* recognized the dangers of harassment by front-line supervisors, *i.e.*, those with power to "control[] and supervis[e] all aspects of [their target's] day-to-day activities," *Faragher* v. *City of Boca Raton*, 524 U.S. 775, 808 (1998) (quoting *Burlington Indus.* v. *Ellerth*, 524 U.S. 742, 761 (1998), and the need to hold employers responsible for it, *id.* at 801-808. In fact, the Seventh Circuit's restriction fails the first and most basic test: consistency with the *holding* of the decision it is meant to implement. One of the two "supervisors," *id.* at 808, to whom the Court in *Faragher* applied the

vicarious liability rule, Marine Safety lieutenant (later captain) David Silverman, did not possess any of the personnel powers the Seventh Circuit rule has held indispensable, *id.* at 810. Rather, Silverman was "responsible for making [the plaintiff and other lifeguards'] daily assignments, and for supervising their work and fitness training." *Id.* at 781.

The particular employer-conferred authority Silverman threatened to abuse, his power to assign the plaintiff undesirable tasks, like "clean[ing] the toilets for a year," unless she agreed to "[d]ate [him]," *Faragher*. 524 U.S. at 780, appears nowhere on the Seventh Circuit's enumerated list of "true supervisor" powers, *Parkins* v. *Civil Constructors of Ill., Inc.*, 163 F.3d 1027, 1033 (7th Cir. 1998). Indeed, those courts adopting the Seventh Circuit's rule have held, as a matter of law, that such power over the victim's work life does not make a harasser a supervisor for purposes of the *Faragher* and *Ellerth* liability regime. See, *e.g.*, *Weyers* v. *Lear Operations Corp.*, 359 F.3d 1049, 1057 (8th Cir. 2004) (holding that the harasser was not a supervisor "[a]lthough [the harasser] had the authority * * * to assign [the plaintiff] to particular tasks"); cf. *Browne* v. *Signal Mountain Nursery, L.P.*, 286 F. Supp. 2d 904, 914 (E.D. Tenn. 2003) (professing confusion as to "how the authority to assign unpleasant work activities, as opposed to desirable ones, operates to enhance a supervisory employee's capacity to sexually harass subordinate"). The principal power this Court cited for characterizing Bill Terry, the other harasser in *Faragher*, as a "supervisor" was the power "to hire new lifeguards *(subject to the approval of higher management).*" 524 U.S. at 781 (emphasis added). This power too falls on the wrong side of the Seventh

Circuit's line. See *Weyers* 359 F.3d at 1057 (holding that a harasser whose evaluations led to his victim's firing was a co-worker because "[he] himself did not have the authority to take tangible employment action against [the plaintiff]"); accord *Ceisel Masonry*, 594 F. Supp. 2d at 1025 (holding that harassers are not supervisors when "ultimate [decisions] * * * are entrusted to a higher level manager"). This Court's careful formulation of the vicarious liability rule as applicable to "an actionable hostile environment created by a supervisor with *immediate* (or successivey higher) authority over the [victim]," *Faragher*, 524 U.S. at 807 (emphasis added); *Ellerth*, 524 U.S. at 765 (emphasis added), refutes the Seventh Circuit's premise that harassment by high-level management is the rule's primary or sole concern.

2. *Faragher* and *Ellerth did* identify a subset of high-ranking supervisors whose actions should be subject to a distinct Title VII liability rule. A "supervisor," the Court recognized, may "hold a sufficiently high position 'in the management hierarchy of the company'" that under ordinary agency principles "his actions [should] be imputed automatically to the employer." *Faragher*, 524 U.S. at 789-790 (quoting *Torres* v. *Pisano*, 116 F.3d 625, 634-635 & n.11 (2d Cir. 1997)). In these cases, the employer is directly, not vicariously, liable on the theory that these high-level managers are the employer's "proxy," *id*. at 789, or "alter ego," *Ellerth*, 524 U.S. at 758 (citing Restatement (Second) of Agency § 219(2)(a) (1957)).

Tellingly, the Seventh Circuit used this entirely distinct line of authority, addressing the "class of an

employer['s] * * * officials who may be treated as [its] organization's proxy," *Faragher*, 524 U.S. at 789, to derive the particular "essential attributes of a *supervisor* for purposes of a claim of hostile environment sexual harassment under Title VII," *Parkins*, 163 F.3d at 1033 & n.1. Thus *Parkins* cited *Sauers* v. *Salt Lake County*, 1 F.3d 1122 (10th Cir. 1993), which explained that an "'individual * * * [who] serves in a supervisory position and exercises significant control over the plaintiff's hiring, firing or conditions of employment' * * * operates as the alter ego of the employer," *id.* at 1125 (quoting *Paroline* v. *Unisys Corp.*, 879 F.2d 100, 104 (4th Cir. 1989), aff'd in pertinent part, 900 F.2d 27 (1990) (en banc)), and reasoned that since, "as county attorney, [the harasser] had the ultimate authority over [plaintiff's] employment and working conditions[,] * * * plaintiff's claim of a hostile work environment caused by [his] conduct is a claim *against Salt Lake County itself,*" *ibid.* (emphasis added). *Parkins* also cited two other cases, *Pierce* v. *Commonwealth Life Insurance Co.*, 40 F.3d 796, 803 (6th Cir. 1994), and *Haynes* v. *Williams*, 88 F.3d 898, 899 (10th Cir. 1996), that rest on the "alter ego" theory of direct employer liability.[7]

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[7] Another case relied on by *Parkins*, *Yates* v. *Avco Corp.*, 819 F.2d 630, 636 (6th Cir. 1987), addressed a distinct, but related issue: whether an individual ranks so high within a firm that his personal knowledge (that unlawful conduct is ongoing) should be imputed to the employer, thereby placing the employer itself "on notice." In such cases, courts have long concluded, consistently with agency law principles, only a subset of "supervisors"—those at the "management level"—qualify. As the Third Circuit recently explained:

> [W]e require that this knowledge have reached an employee in the governing body of the entity, as opposed

3. Nor was *Faragher* an outlier in its understanding of who counts as a supervisor "for purposes of Title VII." This Court has had no trouble identifying what it means to be a supervisor and has never searched for powers beyond "supervising the work" of a subordinate, *Ceisel Masonry, Inc.*, 594 F. Supp. 2d at 1025, to "transform," *ibid.*, someone into the subordinate's "true supervisor." Rather, this Court has repeatedly held consistent with ordinary usage, see, e.g., *United States* v. *Stratton*, 779 F.2d 820, 827 (2d Cir. 1985) ("In ordinary parlance, a relationship of supervision is created when one person gives orders or directions to another person who carries them out."), that someone who directs and oversees another's work is her supervisor.

In *Pennsylvania State Police* v. *Suders*, 542 U.S. 129 (2004), for example, this Court addressed "whether a constructive discharge brought about by supervisor harassment * * * precludes assertion of

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> to merely a supervisory employee in the labor force. * * * [M]ere supervisory authority over the performance of work assignments by other co-workers is not, by itself, sufficient to qualify an employee for management level status. * * * [T]o the extent that such a supervisor does not have a mandate generally to regulate the workplace environment, that supervisor does not qualify as management level.

Huston v. *Procter & Gamble Paper Prods. Corp.*, 568 F.3d 100, 108 (3d Cir. 2009); accord *Swinton* v. *Potomac Corp.*, 270 F.3d 794, 804-805 (9th Cir. 2001) (emphasizing differences between personnel whose managerial powers make imputation appropriate and those whose powers over the employee warrant vicarious liability under *Faragher*); cf. *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 286 (1974) (discussing NLRA's distinct exemptions for "managers" and "supervisors").

the affirmative defense articulated in *Ellerth* and *Faragher*." *Id.* at 140. The "three *supervisors*" found to have subjected the plaintiff to workplace abuse, *id.* at 134 (emphasis added), were a sergeant, whom the employer described as "formally the direct supervisor of respondent and [of] the other communications operators," and two corporals, who, it said, "supervised [operators] on a day-to-day basis [depending on] * * * the[] shift," Pet. Br. at 3, *Suders*, *supra* (No. 03-95). Although the Court reversed the court of appeals decision holding the employer liable and remanded to allow the employer to assert *Faragher* and *Ellerth*'s affirmative defense, it nowhere suggested that the employer's vicarious liability depended on these individuals possessing any of the powers on the Seventh Circuit's list.

In *Oncale* v. *Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), decided the same Term as *Faragher* and *Ellerth,* the Court similarly described two members of plaintiff's "eight-man [oil rig] crew" who had abused him, "Lyons, the crane operator, and Pippen, the driller," as having "*supervisory authority*," *id.* at 77 (emphasis added), based on plaintiff's representation that they "had *de facto* control over the conditions of his employment," Pet. Br. at 5, *Oncale*, *supra* (No. 96-568); but see Resp. Br. at 1, *Oncale*, *supra* (No. 96-568) (noting that "driller" had no authority over "roustabouts" like the plaintiff).

Likewise, in *Burlington Northern & Santa Fe Railway Co.* v. *White*, 548 U.S. 53 (2006), nothing suggests that Bill Joiner, the person who initially harassed the plaintiff, and Percy Sharkey, the person who falsely accused her of being insubordinate after

she complained to the EEOC, an action that led *his* supervisor to suspend the plaintiff without pay, had any of the powers the Seventh Circuit test requires. The Sixth Circuit, in fact, had characterized Joiner as "her foreman," *White* v. *Burlington N. & Santa Fe Ry. Co.*, 310 F.3d 443, 447 (6th Cir. 2002) (vacated panel opinion), and described her as "working under the supervision of * * * foreman Percy Sharkey" on the day he reported her, 364 F.3d 789, 793 (6th Cir. 2004) (en banc). This Court described both Joiner and Sharkey, however, as the plaintiff's "immediate supervisor[s]." 548 U.S. at 58.

In *Staub* v. *Proctor Hospital*, 131 S. Ct. 1186 (2011), a case arising under an employment discrimination statute "very similar to Title VII," *id.* at 1191, this Court characterized as a "supervisor," *id.* at 1189, someone who had not made and "was not charged with making [an] ultimate employment decision," *id.* at 1190, but had given a biased evaluation which she intended to lead to the plaintiff's termination. *Staub* described the lower court's rule that only the motives of those employees who make "ultimate employment decision[s]," *ibid.*, could give rise to employer liability as "implausible" because it would shield an employer "from [liability for] discriminatory acts and *recommendations of supervisors* that were designed * * * to produce [an] adverse action." *Id.* at 1193 (emphasis added).

These decisions are consistent with the definitions of "supervisor" and related terms commonly found in dictionaries. See *Webster's New International Dictionary* 2533 (2d ed. 1960) (defining "supervise" in second definition as "[t]o oversee for direction; to superintend"); *Webster's New World Dictionary* 1430

(2d college ed. 1980) (defining "supervise" as "to oversee or direct (work, workers, a project, etc.); superintend"); *New Oxford American Dictionary* 1698 (2d ed. 2005) (defining "supervise" as to "observe and direct the work of (someone): nurses were supervised by a consulting psychiatrist.");[8] *Oxford English Dictionary* (3rd ed. online June 2012), http://www.oed.com/view/Entry/194560 (defining "supervisor" in first definition as "a person who directs or oversees a task or activity and in third definition as "[a] person who oversees the work or conduct of another or others"). And this Court itself, in cases extending across a broad range of subject matters, commonly uses the term in this ordinary way. See, e.g., *Messerschmidt* v. *Millender*, 132 S. Ct. 1235, 1243 (2012) ("The police officer] submitted the warrants to his supervisors—Sergeant Lawrence and Lieutenant Ornales—for review."); *Bullcoming* v. *New Mexico*, 131 S. Ct. 2705, 2722 (2011) ("It would be a different case if, for example, a supervisor who observed an analyst * * * testified."); *Sheridan* v. *United States*, 487 U.S. 392, 407 (1988) (noting danger that litigants could circumvent the FTCA

[8] Notably, under the Seventh Circuit's rule, doctors who are given (and unlawfully abuse) authority to direct nurses' work activities are their victims' "co-workers," because they lack power to take personnel actions against the nurses whose activities they control and direct. See *Kirkland* v. *State Univ. of Iowa*, No. 3-99-CV-30105, 2001 WL 737548, at *6 (S.D. Iowa May 1, 2001) (finding that the fact that doctor had "the ability to persuasively recommend to her supervisors that [an "EKG extern"] be fired or disciplined [and had] * * * threatened to report a mistake she had committed unless she submitted to his sexual advances" was "beside the point" because he "had no supervisory authority to make [firing and discipline] decisions").

intentional tort exclusion by "ascrib[ing injuries] to the negligence of the tortfeasor's supervisors").

4. "Supervisor" also has an assigned meaning under the National Labor Relations Act, one that casts further doubt on the Seventh Circuit's restriction. That law's definition of "supervisor[y]" employees includes not only personnel with power "to hire, * * * promote, discharge, * * * or discipline," but also those with "responsib[ilit]y to direct" other employees or with authority "effectively to recommend [personnel] actions," 29 U.S.C. § 152(11), the two types of authority the Seventh Circuit repeatedly has said are not "actual supervisory powers," *Parkins*, 163 F.3d at 1033; see *Iowa Elec. Light & Power Co.* v. *NLRB*, 717 F.2d 433, 434-435 (8th Cir. 1983) (explaining that "[a]uthority to do only one of these listed acts is enough to make an employee a supervisor").

Indeed, the rules this Court forcefully rejected in its recent cases addressing that provision, *NLRB* v. *Health Care & Ret. Corp. of Am.*, 511 U.S. 571 (1994) (*HCRCA*), and *NLRB* v. *Kentucky River Cmty. Care, Inc.*, 532 U.S. 706 (2001), rested on premises strikingly similar to the Seventh Circuit's. In *HCRCA*, the NLRB maintained that the licensed practical nurses whose status was disputed were "supervisors [only] when, '*in addition to* performing their professional duties and responsibilities, they also possess the authority to affect the job status or pay of [nurses' aides] working under them." 511 U.S. at 578 (quoting Reply Br. at 4, *HCRCA*, *supra* (No. 92-1964)) (emphasis added). The NLRB argued, in other words, that "a nurse who * * * engage[s] in responsible direction of other employees is not a

supervisor. Only a nurse who * * * engage[s] in one of the activities related to another employee's job status or pay can qualify." *Id.* at 579. The *HCRCA* Court answered that it could "perceive" "no plausible justification" for treating "responsible direction" authority as lesser than ones involving hiring and firing. *Ibid.*; accord *Kentucky River*, 532 U.S. at 719 (noting that Congress had forbidden the NLRB from limiting supervisor status to those who "direct the work of other employees *and* perform another listed function" and had provided that "direction alone [would] suffice"). Indeed, "responsib[ility] to direct" had been added to the original NLRA list because, its sponsor explained, without it, Section 152(11)'s definition risked "cover[ing] * * * everything except the basic act of supervising," 93 Cong. Rec. 4677 (1947) (Statement of Sen. Flanders), reprinted in 2 NLRB, *Legislative History of the Labor Management Relations Act, 1947*, at 1303 (1948).

B. The Seventh Circuit's Rule Violates The Reasoning of *Ellerth* and *Faragher* And The Purposes Of Title VII

The Seventh Circuit rule fails a second important test: consistency with the *reasoning* of the decisions and with the purposes of the statute it ostensibly implements. Although the Seventh Circuit rule stands on the premise that "for purposes of Title VII" the term "supervisor" means something narrower than it does "colloquial[ly]" and in other statutes, *Andonissamy* v. *Hewlett-Packard Co.,* 547 F.3d 841 848 (7th Cir. 2008), that premise violates the Title VII concerns *Ellerth* and *Faragher* found justified vicarious liability. The consistent reasoning of this

Court's subsequent Title VII decisions also rules this premise out.

1. In *Ellerth* and *Faragher*, this Court held that (subject to the affirmative defense) employers are liable under Title VII for supervisors' actionable harassment. Grounding its reasoning in the "aided by agency" principle of the Restatement (Second) of Agency § 219 (1957), this Court identified three different ways in which supervisory authority aids harassers: (1) their supervisory authority "affords contact with [the] employee subject[] to [their] harassment," *Faragher*, 524 U.S. at 803; (2) those harassed "generally cannot check a supervisor's abusive conduct the same way that [they] might deal with abuse from a co-worker," *ibid.*; and (3) the "acts of supervisors have greater power to alter the environment than acts of coemployees generally," *id.* at 805. In all these ways, a supervisor's abusive behavior "necessarily draw[s] upon his superior position." *Id.* at 803.

All three of these reasons for adopting vicarious liability are directly implicated when the harasser has the authority to direct his victim's daily work activities, whether or not he also has the authority to make formal employment decisions. First, those who direct others' daily work activities can often arrange or count on contact—often away from others—with those they would harass. Indeed, this is illustrated by the facts of *Ellerth* itself.

In *Ellerth*, the Court cited three incidents of particular concern. In two of them the harassing supervisor had control over the location of the meeting with the subordinate and in one of those he was able to ensure that others were not present.

(Although the harasser had *Parkins* powers over the victim, the Court's analysis did not rest on that fact. It turned instead largely on his non-*Parkins* power to manage and control his victim's presence.) In the first incident, during "a business trip, [the supervisor] invited Ellerth to the hotel lounge, an invitation Ellerth felt compelled to accept because [the supervisor] was her boss." 524 U.S. at 748. At the meeting, after "Ellerth gave no encouragement to remarks [her supervisor] made about her breasts, he told her to 'loosen up' and warned, 'you know, Kim, I could make your life very hard or easy at Burlington.'" *Ibid.* (citations omitted). In the second incident, during a promotion interview, the supervisor "expressed reservations * * * because [Ellerth] was not 'loose enough' [and] reach[ed] over and rub[bed] her knee." *Ibid.* (citation omitted). In both cases, the supervisor used his authority to determine the location and character of the meeting to make sexual overtures that he could not easily make in an ordinary, public work environment. His power to manage his victim's presence—often away from the knowing observance of others—augmented his power to injure and coerce.

A recent Eighth Circuit case well illustrates how control over another employee's physical presence and absence of others from the particular workplace environment can augment one's ability to harass and increase the harassment's severity. In *EEOC* v. *CRST Van Expedited, Inc.*, 679 F.3d 657 (8th Cir. 2012), the Eighth Circuit held that so-called "Lead Drivers" who drove with trainee drivers during their 28-day training trip were not "supervisors" subject to the *Ellerth*/*Faragher* rule because they did not have "the power (not necessarily exercised) to take tangible

employment action against the victim," *id.* at 684. The Lead Drivers, it found, "could only (1) dictate minor aspects of the trainees' work experience, such as scheduling rest stops during the team drive and (2) issu[e] a non-binding recommendation * * * concerning whether CRST should upgrade the trainee to full-driver status." *Ibid.* The court cited evidence, however, that the Lead Drivers employed these limited authorities to subject trainees to serious harassment. One plaintiff, Jones,

> testified that, on three or four occasions over the course of a two-week training trip, her Lead Driver, James Simmons, entered the cab wearing only his underwear and rubbed the back of her head, despite repeated requests by Jones that he stop. Jones also testified that, "everyday," Simmons entered the cab in his underwear while she was driving. Additionally, according to Jones, Simmons called her "his bitch" five or six times, including on one occasion when, in response to Jones's complaints about his slovenly habits, he ordered Jones to clean up the truck, declaring "that's what you're on the truck for, you're my bitch. I ain't your bitch. Shut up and clean it up." Finally, Jones testified that, like many of CRST's Lead Drivers, Simmons routinely urinated in plastic bottles and ziplock bags while in transit. However, Jones testified that Simmons would leave his urine receptacles about the truck's cab and that when Jones implored Simmons to gather them, Simmons ordered her to "shut up and clean it up."

Id. at 688. Other testimony indicated that another employee used the power to direct rest stops to

devastating effect. In addition to asking his female co-driver to "drive naked" and "grabb[ing her] face while she was driving and beg[inning] screaming that 'all he wanted was a girlfriend,'" this employee "refused [his female co-driver's] repeated requests to exit at a truck stop so she could go to the bathroom, ordering her to urinate in a parking lot instead." *Id.* at 687-688. This power to "dictate minor aspects of the * * * work experience," *id.* at 684, enabled the directing employee to make "a patent attempt at humiliation," *id.* at 688.

Immediate supervisors who direct their targets' daily work are, in fact, typically aided by their agency relationship more powerfully than are higher-level managers who have the sort of personnel powers *Parkins* and its progeny insist upon.[9] Indeed, immediate supervisors typically are "afforded" far more "contact" with those whom they subject to workplace abuse than are successively higher supervisors. As the decided cases illustrate, the employer-conferred power to direct a subordinate where to be and what to do on a daily basis can enable especially grave forms of workplace abuse. See *Whitten* v. *Fred's, Inc.*, 601 F.3d 231, 236 (4th Cir. 2010) (store manager used his authority to order the plaintiff into a storeroom, where he could sexually assault her).

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[9] Of course, as *Faragher* noted, instances of harassment by very high-ranking company actors are not unknown. See 524 U.S. at 789 (noting that harasser in *Harris* "was the president of the corporate employer") (citing *Harris* v. *Forklift Sys., Inc.*, 510 U.S. 17, 19 (1993)); see also *Crawford* v. *Metro. Gov't*, 555 U.S. 271, 273 (2009) (harasser was defendant's "employee relations director"); *Patterson* v. *McLean Credit Union*, 491 U.S. 164 (1989).

Second, victims of harassment "generally cannot check a [directing employee's] abusive conduct the same way that [they] might deal with abuse from a co-worker." *Faragher*, 524 U.S. at 803. In *Faragher*, this Court expressly noted in reaching its decision that "[w]hen a fellow employee harasses, the victim can walk away or tell the offender where to go, but it may be difficult to offer such responses to a supervisor." *Ibid.* It further held Boca Raton vicariously liable for one employee's (Silverman's) harassment because, although he had no authority to take tangible employment actions, he was "responsible for making the lifeguards' daily assignments[] and supervising their work and fitness training." *Id.* at 781. As the Court noted, this power to set daily work assignments gave Silverman the ability to retaliate against his victims, as illustrated by his proposition to the plaintiff: "Date me or clean toilets for a year." *Id.* at 780.

Similarly, in *CRST*, testimony indicated that the threat of retaliation by Lead Trainers gave them power to harass trainees even though they had no power to take tangible employment actions against them. One testified that her Lead Trainer

> began to make sexual remarks to me whenever he gave me instructions. He told me that the gear stick is not the penis of my husband, I don't have to touch the gear stick so often. 'You got big tits for your size, etc. . [.]' I informed [him] that I was not interested in a sexual relationship with him. [Over a period of two weeks, he] forced me to have unwanted sex with him on several occasions while we were traveling in order [for me] to get a [recommendatory] passing grade.

679 F.3d at 666.

Third, those who direct the activities of others necessarily "have greater power to alter the environment than acts of coemployees generally." *Faragher*, 524 U.S. at 805. Unlike co-employees, those who oversee and direct can punish those who resist, more effectively enlist others to their ends, and more directly set the tone and values of an organization. Because they lead others, their actions send a strong signal of appropriate organizational behavior and have more power to shape other employees' views and actions. Those who oversee and direct, like those who hire, fire, and set pay, also have a greater ability to pressure and deter witnesses, who can report on their misbehavior.

2. Even if *Ellerth* and *Faragher* did not themselves refute it, this Court's later decisions in *Burlington Northern* and *Staub* certainly foreclose the notion that only those supervisors with *Parkins* powers can use their supervisory relationship to intimidate and injure their victims. In *Burlington Northern*, the Court relied on "common sense" to hold that Title VII's retaliation clause, 42 U.S.C. § 2000e-3(a), prohibited "discrimination" beyond "adverse employment action[s]," 548 U.S. 53, 64 (2006). It made actionable, in other words, not just retaliation in "hiring, granting leave, discharging, promoting, and compensating," *id.* at 60 (quoting *Mattern* v. *Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997)), but more generally through any action that "might well have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.* at 68 (quoting *Rochon* v. *Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir. 2006)). The Court recognized that

"[a]lmost every job category involves some responsibilities and duties that are less desirable than others" and that "one good way to discourage an employee * * * from bringing discrimination charges would be to insist that she spend more time performing the more arduous duties and less time performing those that are * * * more agreeable." *Id.* at 70-71. Limiting actionable retaliation to tangible employment actions, the Court explained, would fail to "deter [this and] the many [other] forms that effective retaliation can take." *Id.* at 64.

Similarly, *Whitten* v. *Fred's, Inc.*, 601 F.3d 231, illustrates how a supervisor who does not have the power to take tangible employment actions against his victim can nonetheless use his other powers over her to facilitate harassment. There the harasser "told [his supervised victim] that if she wanted long weekends off from work, she needed to 'be good to [him] and give [him] what [he] want[ed' and that] he would make her life a 'living hell' if she ever took work matters 'over [his] head.'" *Id.* at 236. He then carried out his threats by "order[ing] her to stay late to clean the store [even] if it took her all night" and later ordering her to work on Superbowl Sunday, a day she had scheduled off. *Ibid.*

The *Parkins* rule, by contrast, treats a harassing supervisor who has employer-conferred authority to take (and threaten) many kinds of "effective retaliation," indeed the very power to assign undesirable tasks that this Court highlighted in *Burlington Northern*, as a "mere co-worker." Thus, in *CRST*, one harasser whom the *Parkins* rule did not count as a supervisor "ordered [a trainee truck driver plaintiff] to clean up the truck," including discarding

plastic bottles and ziplock bags containing the harassers' urine. 679 F.3d at 688. He told her "that's what you're on the truck for, you're my bitch. I ain't your bitch. Shut up and clean it up." *Ibid.* Lower courts applying the *Parkins* rule fail to understand how powers other than taking tangible employment actions can enable harassment. See *Browne* v. *Signal Mountain Nursery, L.P.*, 286 F. Supp. 2d 904, 914 (E.D. Tenn. 2003) (defending *Parkins* rule and professing confusion as to "how the authority to assign unpleasant work activities, as opposed to desirable ones, operates to enhance a supervisory employee's capacity to sexually harass subordinates").

Staub also forecloses the *Parkins* rule. It characterized as "supervisors" agents who could not "*directly* affect" their victim's employment in the ways the Seventh Circuit demands, see p. 25, *supra*, and further recognized that such personnel can nonetheless "cause an adverse employment action," 131 S. Ct. at 1194, by providing the ultimate decision-maker with biased and untruthful "performance assessments" of their subordinates, *id.* at 1192; see *ibid.* (highlighting the "implausib[ility]" of shielding "employer from [liability for] discriminatory * * * *recommendations of supervisors* that were designed and intended to produce [an] adverse action") (emphasis added and original emphasis omitted). But the Seventh and Eighth Circuits have repeatedly rejected exactly this power as insufficient to establish supervisory status. In *CRST*, for example, the latter court held that evidence that a "Lead Trainer[] forced [his subordinate] to have unwanted sex * * * in order to get a passing grade [from him]," 679 F.3d at 666, could not trigger vicarious liability because the

harasser's evaluation, rendered after a twenty-eight-day trip and "virtually always followed," was "non-binding," *id.* at 684; accord *Ceisel Masonry*, 594 F. Supp. 2d at 1025 (harasser's "ability merely to *recommend* discharge" does not "transform him into a supervisor, even if his recommendations usually were followed").

As both *Staub* and *Burlington Northern* make clear, the central concern of the *Ellerth*/*Faragher* rule, protecting victims reluctant to run the "risk of blowing the whistle," is present whenever a harassing supervisor has power over the subordinate sufficient to "dissuade[] a reasonable worker from making * * * a charge of discrimination." *Burlington Northern*, 548 U.S. at 68. And, as these cases specifically hold, consistently with common sense, many powers beyond taking tangible employment actions, particularly the power to assign job duties, plainly qualify.

3. Considering employees who possess these powers over their victims "supervisors" also promotes the important Title VII purpose of "avoid[ing] harm" on which *Faragher* and *Ellerth* ultimately rest. *Faragher*, 524 U.S. at 806; see also *Ellerth*, 524 U.S. at 764. Both the rule of vicarious liability and the affirmative defense provide employers the incentive to screen supervisors properly, monitor them, and establish effective training and complaint programs. *Faragher*, 524 U.S. at 803; *Ellerth*, 524 U.S. at 764-765. The Seventh Circuit's rule, by contrast, encourages employers to resort to formalities to defeat liability. Thus, in language anticipating this Court's reasoning in *Staub*, one lower court explained:

> [Accepting the Seventh Circuit's rule] would facilitate an employer to effectively insulate itself from the application of *Faragher*, and *Ellerth*, simply by directing all critical personnel decisions to be effected by a personnel department, which may have no direct, and only infrequent contact with the employee subject to the harassment.

Grozdanich v. *Leisure Hills Health Ctr., Inc.*, 25 F. Supp. 2d 953, 973 (D. Minn. 1998); see *Staub*, 131 S. Ct. at 1193 (rejecting rule that would enable employer to be "effectively shielded from [liability for] discriminatory acts and recommendations of supervisors" by vesting ultimate authority for personnel decisions in a different company official); see also 93 Cong. Rec. 4677-4678 (1947) (Statememt of Sen. Flanders) (explaining that "responsibility to direct" should be added to the list of NLRA "supervisor" powers because "[m]any of the [other] activities * * * are transferred in modern practice to a personnel manager or department").

The Seventh Circuit rule obviously disserves another recognized purpose of Title VII, especially as amended in 1991: to provide a remedy for those harmed by unlawful discrimination, see *Burlington Northern*, 548 U.S. at 72; *West* v. *Gibson*, 527 U.S. 212, 217-220 (1999), and for victims of sexual harassment in particular, see H.R. Rep. No. 40 (II), 102d Cong., 1st Sess. 25 (1991). The 1991 amendments not only rejected the holding of *Patterson* v. *McLean Credit Union*, 491 U.S. 164 (1989), that racial harassment was not actionable under 42 U.S.C. § 1981, see 42 U.S.C. § 1981(b), (c) (as amended); *id.* § 2000e-2(m), but they enacted a Title VII damages remedy, see *id.* § 1981a(a)(1), (b),

responsive to "disturbing" evidence in the legislative record concerning "the severe consequences * * * the lack of [such a remedy]" caused workers "who suffered severe sexual harassment on the job." H.R. Rep. No. 40 (II), at 25. The Seventh Circuit rule, by requiring those unlawfully harassed by supervisors enjoying no *Parkins* powers to make the showing of employer negligence that *Faragher* rejected, ill-serves that purpose.

C. No Valid Reason Supports The Seventh Circuit's Restriction

Courts imposing the *Parkins* restriction have offered little justification—and no valid justification—for doing so. *Parkins* itself argued that the rule was necessary to distinguish "employees who are supervisors merely as a function of nomenclature from those who are entrusted with actual supervisory powers." 163 F.3d at 1033. But no court of appeals applying the more flexible rule has held that "nomenclature" is determinative. See *Whitten*, 601 F.3d at 245-246 (explaining that "[w]hile the parties' titles may not be dispositive, 'the harasser's formal rank vis-à-vis that of the victim in the particular employment hierarchy . . . is of critical and sometimes decisive evidentiary importance'") (quoting *Mikels* v. *City of Durham*, 183 F.3d 323, 331-332 (4th Cir. 1999)). These courts look to the actual working relationship of the employees to determine whether one is a supervisor of the other. In *Whitten*, for example, the Fourth Circuit found that the following facts "point clearly to the conclusion that Green was Whitten's [, the plaintiff's,] supervisor":

> Except for the days when district manager Eunice was present in the store, Green was the highest

> ranking employee in the Belton store, and Green was in fact the highest ranking employee in the store on the two days that Whitten worked there. Moreover, the evidence establishes that Green directed Whitten's activities, giving her a list of tasks he expected her to accomplish; that Green controlled Whitten's schedule; and that Green possessed and actually exercised the authority to discipline Whitten by giving her undesirable assignments and work schedules. Finally, while it is not dispositive, it is worth noting that both Green and Whitten believed that Green was Whitten's supervisor.

Id. at 246 (footnote omitted). The Fourth Circuit's careful analysis eschewed the empty formalism of the *Parkins* test and instead looked to see whether Green "had power and authority that made Whitten vulnerable to his conduct 'in ways that comparable conduct by a mere co-worker would not.'" *Ibid.* (quoting *Mikels*, 183 F.3d at 333). Even though Green possessed no power to take tangible employment actions, the Fourth Circuit held that "Green's authority over Whitten * * * aided his harassment of her and enabled him to create a hostile working environment." *Ibid.*

To be sure, the Seventh Circuit test might be expected by dint of being so formalistic and restrictive to be somewhat more determinate. But even if that were true, which it is not, see pp. 41-42, *infra*, this Court has made clear that rules that purchase simplicity by sacrificing fidelity to governing precedent and statutory purposes cannot be upheld. Cf. *Gen. Motors Corp.* v. *Ruckelshaus*, 742 F.2d 1561, 1572-1573 (D.C. Cir. 1984) (Bazelon, C.J.,

dissenting) (describing rule as "enjoy[ing] the virtues of simplicity [and] administerability" but "suffer[ing] from the vices of * * * marked *in*congruence with the language and history of the statute it purports to interpret").

The Seventh Circuit rule, moreover, actually adds little certainty and predictability to litigation. The most salient difference between the EEOC's Guidance and *Parkins*, for example, is that the former adds two powers to the latter's list of powers that make one a supervisor: the power to direct daily activities and the power to recommend adverse action. Thus, for large numbers of cases, the two rules not only produce equally determinate results, but the *same* results. Harassment by personnel who possess *Parkins* powers over their victims gives rise to vicarious liability in both the Second and the Seventh Circuits and harassment by those who plainly are *not* the victim's supervisor in the commonly understood meaning of that word does not. Indeed, jettisoning the Seventh Circuit's restriction would largely replace one rule with another no less determinate.

In a larger sense, in fact, the Seventh Circuit rule actually complicates and extends litigation. Unlike other Title VII rules purchasing simplicity that this Court has rejected, see *Crawford* v. *Metro. Gov't*, 555 U.S. 271 (2009) (rejecting rule that dismissed cases involving employees who speak out about discrimination not on their own initiative, but in answering questions during an employer's internal investigation); *Burlington Northern*, *supra* (rejecting rule that dismissed cases involving retaliation only in assignment of work duties); *Oncale*, *supra* (rejecting rule that dismissed cases involving same-sex

harassment); *Robinson* v. *Shell Oil Co.*, 519 U.S. 337 (1997) (rejecting rule that dismissed cases involving former employees), the *Parkins* restriction does not end litigation or even settle the element of employer responsibility. In cases where it finds no supervisory relationship, that determination becomes more complex. In those cases, the jury must determine the employer's negligence, a notoriously difficult issue that turns in part on close analysis of the workers' relationship, the very inquiry the *Parkins* test purports to avoid. See *Doe* v. *Oberweis Dairy*, 456 F.3d 704, 717 (7th Cir. 2006) ("Even if not strictly liable for harassment by a shift supervisor, still the employer must exercise greater care than is required in a case of routine harassment by a coworker. How much greater will normally be a jury question.").

II. The Seventh Circuit's Judgment Must Be Reversed And The Case Remanded For Proper Application Of The *Ellerth*/*Faragher* Rule

In the courts below, petitioner developed abundant evidence that Davis was in fact her supervisor. That evidence included Davis's job description, which identified her duties as directing and overseeing, J.A. 12, and the testimony of other employees that Davis was a supervisor and that Kimes, the manager, identified her as such, *id.* at 386. It also included BSU internal documents (1) describing Davis as "in a place to *lead at work and do things to [Vance] and get away with it*," *id.* at 5 (emphasis added), (2) describing her as "delegating jobs to [Vance] in the kitchen," *id.* at 66, (3) noting "[Davis's] role as a lead person in the kitchen," *ibid.*, and (4) stating that Davis "*does* * * * give prep sheets

daily," *ibid.* (emphasis added), and "give[s] direction to [Vance]," *id.* at 67.

The courts below granted judgment to BSU on the ground that Davis was not Vance's supervisor under the Seventh Circuit's *Parkins* rule. Neither the district court nor the court of appeals intimated that Vance's evidence would have been insufficient under a standard, like the Second Circuit's, that properly considers directing or overseeing another's work activities a form of "supervision." See, e.g., *Mack* v. *Otis Elevator Co.*, 326 F.3d 116, 125 (2d Cir. 2003); see also *Whitten*, 601 F.3d at 245-246; *McGinest* v. *GTE Serv. Corp.*, 360 F.3d 1103, 1119 n.13 (9th Cir. 2004). Indeed, they are fairly read as assuming the opposite. See Pet. App. 12a-13a, 54a.

Nor did BSU seek summary judgment (or urge affirmance) on this basis. It never disputed that Davis directed Vance's work activities. It understandably rested on the Seventh Circuit rule and argued that "no part of [Davis's job] description includes the power to hire, fire, demote, promote, transfer, or discipline an employee, which are the essential functions of a supervisor as a matter of law." Defts' Summ. J. Reply 17; accord J.A. 409 ("A 'supervisor' at Ball State is a person who has *all, or substantially all, of the following powers*: to hire, fire, demote, transfer, or discipline an employee. Saundra Davis does not have, nor has she ever had, such authority.") (emphasis added). Indeed, respondent's principal summary judgment argument was that Vance's Title VII claim failed for other reasons, "even construing Davis's position as supervisory," Defts' Summ. J. Br. 27; see *id.* at 24, 30, 31 (likewise "assuming" supervisory relationship); cf. Fed. R. Civ.

P. 56(f) (stating judgment on grounds not raised by the moving party is impermissible, absent notice and opportunity for nonmovant to be heard). BSU also did not claim it was entitled to *Ellerth* and *Faragher*'s affirmative defense. In light of its deficient racial harassment policy and Vance's diligent efforts to obtain relief through BSU's internal processes, see pp. 7-9, *supra*, the defense was unavailable.

But as explained, pp. 39-42, *supra*, the Seventh Circuit restriction is spurious. There is no reason or need for excluding supervisors who cannot take tangible employment actions against their victims from the coverage of the *Ellerth*/*Faragher* rule. Because this case was litigated and decided under an incorrect legal standard, the Court should follow its normal practice of reversing the judgment and remanding for application of the correct legal standard to facts as developed with an eye to that standard. As this Court has held, when the

> courts below appl[y] an incorrect legal standard, we do not consider whether the result would be supportable on the facts of this case had the correct one been applied. We believe * * * that the appropriate disposition is to remand the case to the District Court, for fresh fact-findings, addressed to the statute as we have now construed it.

Malat v. *Riddell*, 383 U.S. 569, 572 (1966) (per curiam); accord *Hertz Corp.* v. *Friend*, 130 S. Ct. 1181, 1195 (2010) (recognizing that parties "should have a fair opportunity to litigate their case in light of our holding" on remand); *Ellerth*, 524 U.S. at 766 (observing that the case had not been litigated with the affirmative defense in view and giving "the

District Court * * * the opportunity to decide" appropriate course on remand); cf. *Zivotofsky* v. *Clinton*, 132 S. Ct. 1421, 1430 (2012) (noting Court practice of "typically remand[ing] for resolution of * * * claims the lower courts' error prevented them from addressing").[10]

This Court can reverse by two means. First, it could simply hold that the Seventh Circuit incorrectly excluded from the coverage of *Ellerth* and *Faragher* those supervisors who direct and oversee the activities of their victims but have no power to take tangible employment actions against them. Second, it could adopt the Second Circuit's rule, that who counts as a "supervisor" depends on "whether the authority given by the employer to the [harassing] employee enabled or materially augmented the ability of the latter to create a hostile work environment for his or her subordinates." *Mack*, 326 F.3d at 126; cf. *Intel* v. *Advanced Micro Devices, Inc.*, 542 U.S. 241, 247 (2004) ("suggest[ing] considerations relevant to the disposition" to "guide * * * on remand"); compare *Thompson* v. *N. Am. Stainless, LP.*, 131 S. Ct. 863, 868 (2011) (declining to "identify

[10] At the certiorari stage, BSU urged this Court to depart from its ordinary practice of "not consider[ing] whether the result would be supportable on the facts of th[e] case had the correct [legal rule] been applied," *Malat*, 383 U.S. at 572, claiming that it might be entitled to summary judgment under a correct legal standard, see Br. in Opp. 25-29. But this Court should not decide summary judgment under a new legal standard in the first instance, especially since the facts were developed under an incorrect standard. Since the district court itself could not have granted summary judgment on this ground, Fed. R. Civ. P. 56(f) (limiting district courts' authority to grant summary judgment "on grounds not raised by a party"), it would be strange for this Court to entertain affirming on that basis.

a fixed class of relationships for which third-party reprisals are unlawful"), with, e.g., *Burlington Northern*, 548 U.S. at 67 (after rejecting Sixth Circuit rule, selecting two circuits' "formulation" of the proper standard from among competing versions). Although petitioner believes the latter represents the better approach, the choice is for the Court to decide.

The principal effect of either choice would be to expand the vicarious liability rule to actionable harassment by a somewhat larger, but still well-defined, class of individuals: those held out and recognized as supervisors in common parlance with authority to direct and oversee their victim's work activities, but who lack the managerial powers *Parkins* requires. Employer liability would hardly be automatic. The employer could still assert the affirmative defense "(a) that [it] exercised reasonable care to prevent and correct promptly any sexually harassing behavior and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Ellerth*, 524 U.S. at 766; *Faragher*, 524 U.S. at 807.[11] The employer liability rules for the vast majority of other cases, most notably those where the harasser possessed *Parkins* powers and those where he was not, in any real sense, the victim's supervisor, *e.g.*, an employee of equal or lower rank than the plaintiff or

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[11] Significant numbers of employers succeed under this defense, not infrequently on summary judgment. David Sherwyn, Michael Heise & Zev J. Eigen, *Don't Train Your Employees and Cancel Your "1-800" Harassment Hotline: an Empirical Examination and Correction of the Flaws in the Affirmative Defense to Sexual Harassment Charges*, 69 Fordham L. Rev. 1265, 1288 (2001).

a higher-ranking person outside her chain of command, would be governed, as they already are in all the circuits, by the "supervisor" and "co-worker" standards, respectively.

The Second Circuit's standard offers many benefits. For one thing, it would align the law with both the holdings and underlying reasoning of *Ellerth* and *Faragher*, which the Seventh Circuit rule fails to do, see pp. 28-39, *supra*, and with the EEOC's Guidance.[12] It would also align the law with the holding and reasoning of *Burlington Northern*.

In *Burlington Northern*, this Court held that although actionable retaliation under Title VII is not confined to "tangible employment actions" it does have to be "materially adverse, which in this context means it might well have dissuaded a reasonable worker from making or supporting a charge of discrimination." 548 U.S. at 68 (internal quotation marks and citations omitted). This standard, the Court explained, had three virtues. *Id.* at 68-69. Its materiality requirement "separate[s out] significant from trivial harms" because "petty slights, minor annoyances, and simple lack of good manners will not" deter victims from seeking redress. *Ibid.* Furthermore, it represents "[a]n objective standard [that] is judicially administrable. It avoids the uncertainties and unfair discrepancies that can

[12] Although the Guidance was issued 14 years ago and does not reflect intervening decisions such as *Suders*, *Burlington Northern*, and *Staub,* the Commission's judgment, experience, and its congressionally assigned role make the Guidance an important, though not controlling, body of expertise from which to draw. Cf. *Kasten* v. *Saint-Gobain Performance Plastics Corp*., 131 S. Ct. 1325, 1335 (2011).

plague a judicial effort to determine a plaintiff's unusual subjective feelings." *Id.* at 68-69. And finally, its "general terms" acknowledge that "the significance of any given act * * * will often depend upon the particular circumstances." *Id.* at 68.

The Second Circuit's "enable or materially augment" standard not only closely tracks the substance of the *Burlington Northern* standard but also shares these three particular virtues. Its materiality requirement separates out incidental power to direct or oversee another's daily work, like downstream quality monitoring on a production line or the power to direct an employee to one of several identical production lines, from more substantial power that implicates the core concerns of *Ellerth* and *Faragher*. Like the *Burlington Northern* standard, moreover, the Second Circuit standard is "objective" and "judicially administrable." 548 U.S. at 68. Most importantly, the Second Circuit rule, unlike the Seventh Circuit's, is responsive to the realities of the workplace. The rule would recognize, for example, that the power to determine restroom breaks could enable and materially augment harassment when it means one employee can force another to urinate in a public parking lot rather than a private restroom, see *CRST*, 679 F.3d at 687-689, but not when it means only that one employee must clear a restroom break with another to ensure that someone is on duty at all times.

Like the *Burlington Northern* rule, moreover, the Second Circuit standard focuses inquiry on the correct concern. It recognizes that the *fact* of power, not the *type* of power, a supervisor wields over his victims makes supervisor harassment a special

worry. As the Second Circuit held in *Mack*, vicarious liability should turn "on whether the power—economic *or otherwise*, of the harassing employee over the subordinate victim given by the employer to the harasser—enabled the harasser, or materially augmented his or her ability, to create or maintain the hostile work environment." 326 F.3d at 125. Whether that power is economic or not matters little. Both types of power directly implicate the central concerns this Court identified in *Faragher*. See pp. 29-39, *supra*. Under this standard, of course, not all powers of oversight or direction would give rise to vicarious liability—only those that make a difference to the harasser's ability to inflict harm on his victim. Occasional oversight authority, especially if mutual, that added little to a worker's ability to harass others, for example, would clearly not do so; routine oversight and direction, especially if it entailed the power to assign an employee to much less attractive work duties, see *Faragher*, 524 U.S. at 780 ("Date me or clean the toilets for a year."), certainly would.

The Second Circuit rule shares yet another virtue with the *Burlington Northern* standard: it has been tested. And that experience dispels the fears raised by courts following the *Parkins* rule, particularly that the Second Circuit's approach would appreciably increase the extent and complexity of litigation. After a decade, no court applying the Second Circuit rule has complained of this effect. The reason is simple. Employees considering litigation and the attorneys they need to persuade to sue are unlikely to be induced to file suit by the prospect that the Second Circuit standard might govern one "prong" of their multi-element Title VII claim. Even in *Parkins* jurisdictions, moreover, employees who have been

subject to severe workplace harassment by others who direct their daily work activities but have no *Parkins* powers over them regularly seek Title VII redress even though the negligence standard improperly applies. See, e.g., *EEOC* v. *Ceisel Masonry, Inc.*, 594 F. Supp. 2d 1018, 1026 (N.D. Ill. 2009) (permitting case to proceed on negligence standard and noting evidence "establish[ing] * * * notice of widespread use of racial epithets").

The Second Circuit rule also has many other virtues. For starters, it focuses inquiry where it properly belongs: on the particular supervisory relationship, not on general supervisor status. The question is not whether the harasser "was employed in a supervisory capacity," *Swinton*, 270 F.3d at 805, but whether "he is [*the victim's*] supervisor," *id.* at 803. Focusing on whether the supervisor's power over his victim enabled or materially augmented his ability to harass her addresses exactly this.

Thus, in cases where the harasser outranks his victim and even has an impressive title, but his job responsibilities do not entail directing her work, vicarious liability would not ordinarily apply. The facts of *Joens* v. *John Morrell & Co.*, 354 F.3d 938 (8th Cir. 2004), illustrate this. While the harasser was a foreman who outranked the plaintiff, who worked in "the box shop," "[w]ithin the plant, he was a customer of the box shop with no direct authority to control the work of its employees." *Id.* at 940. "Like any irate customer, Johnson could demand that Joens make more boxes for his cut floor line, and he did. But Joens * * * had discretion to decide which boxes to make." *Id.* at 940-941. In such cases, the concerns that animate the vicarious liability regime are

unlikely present. There is no implicit threat and workplace contact is on terms indistinguishable from that with a co-worker. Such an individual may be somebody's supervisor, but not the plaintiff's.

Because the Second Circuit standard focuses on the realities of the particular workplace relationship, "nomenclature" matters little. Someone with a minor title, like the "mechanic in charge" in *Mack*, 326 F.3d at 120, can meaningfully supervise another, just as someone with a grand title may supervise many but not the plaintiff.[13] In analyzing the particular supervisory relationship, the Second Circuit standard focuses attention where it belongs: on the employer-conferred power the harasser has over the victim, not on how much power that he has generally. A law firm associate's religiously based abuse of an administrative assistant assigned to him, whose work he directs and whose performance he evaluates, could give rise to vicarious liability. She would not be his mere "co-worker" in any sense *Ellerth* and *Faragher* recognized—nor in ordinary parlance. Cf. *Dawson* v. *Entek Int'l*, 630 F.3d 928, 937, 940 (9th Cir. 2011) (highlighting that alleged harasser was "trainer and immediate manager" of victim); *Whitten*, 601 F.3d at 245-246 (highlighting importance of the harasser's "rank vis-à-vis that of the victim" in holding employer liable for store manager's harassment) (internal citation omitted).

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[13] On the other hand, an employer's description of the individual's workplace *duties* and *responsibilities*, particularly those relating to the work activities of the victim, would be highly relevant, but, as in *Mack*, direct evidence of workplace realities would control. See 326 F.3d at 120 (noting that higher-ranking "supervisor" "was seldom" on-site).

Conclusion

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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