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 *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE* [1]

The Chamber of Commerce of the United States of America is the world's largest business federation, representing 300,000 direct members and indirectly representing the interests of more than three million U.S. companies and professional organizations of every size. The Chamber represents the interests of its members by filing *amicus curiae* briefs in cases involving issues of vital concern to the nation's business community, including the scope of Title VII of the Civil Rights Act of 1964. For example, the Chamber previously filed briefs before this Court in *Wal-Mart Stores, Inc. v. Dukes* and *Ledbetter v. Goodyear Tire & Rubber Co.*

The Chamber's members operate in nearly every industry and business sector in the United States, and many of its members are subject to Title VII—the statute at the heart of this case. The Chamber's members devote extensive resources to developing employment practices and programs designed to ensure compliance with Title VII and other civil-rights statutes.

The Chamber's members have a substantial interest in this case because the standard adopted by this Court to govern automatic "supervisor" liability for employers under Title VII directly impacts how they plan and execute their anti-harassment efforts.

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *amicus curiae*, its members, or *amicus*'s counsel made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of *amicus* briefs have been filed with the Clerk of the Court.

Approving the bright-line standard applied by the First, Seventh, and Eighth Circuits will make it far easier for employers to identify who among their employees qualifies as a "supervisor" and, consequently, where and how best to direct measures that effectively prevent workplace harassment—Title VII's primary objective.

SUMMARY OF ARGUMENT

This case will not decide what constitutes actionable workplace harassment. Nor will it decide whether an employer may be legally responsible for workplace harassment committed by its employees. Instead, this case will decide when an employer may be held *automatically* liable for harassment between employees. That question hinges on the definition of "supervisor."

Workplaces vary widely. So do workplace hierarchies. No legal definition of "supervisor" will ever perfectly capture the on-the-ground realities of any given workplace—let alone *every* workplace governed by Title VII. Thus, whatever definition of "supervisor" this Court approves will inevitably exclude some employees who may be in a position to harass other employees.

But Title VII's "primary objective" is to prevent workplace harassment. *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998) (internal quotation marks omitted). It follows that the best definition of "supervisor" is one that is most likely to encourage employers to prevent such abuse. The First, Seventh, and Eighth Circuits apply a bright-line definition of "supervisor" that covers the core facets of the role: "the power to hire, fire, demote, promote, transfer, or discipline an employee." *Parkins v. Civil Construc-*

tors of Ill., Inc., 163 F.3d 1027, 1034 (7th Cir. 1998). This bright-line definition serves the salutary purpose of providing employers with clear guidance as to who wields the power that, if abused, may subject employers to automatic liability. Employers that readily can identify the "supervisors" who might trigger automatic liability have more incentive to screen, train, and monitor those employees, and to do so effectively. This bright-line definition best promotes Title VII's primary objective. By contrast, the open-ended definitions of "supervisor" adopted by some circuits and the EEOC provide employers virtually no guidance and therefore little incentive to undertake effective prevention efforts.

Workplace abuse will not go unchecked simply because the harasser is not a "supervisor" under a bright-line definition. Rather, in cases at the margin, plaintiffs will have the burden of proving the employer's negligence in failing reasonably to detect and stop the harassment—which is plaintiffs' burden normally in hostile-work-environment cases. The substantial benefits of promoting more targeted, effective preventative efforts outweigh the modest cost of returning a trial burden to plaintiffs. In short, the ounce of prevention is worth more than the pound of cure.

The bright-line definition is not foreclosed by the Court's decision in *Faragher v. City of Boca Raton*. The question of how to define "supervisor" was not before the Court in that case—indeed, the parties did not dispute the "supervisor" status of the harassers in *Faragher*. Although this question may have "lurk[ed] in the record," the Court did not rule squarely upon it. *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004) (internal quotation

marks omitted). The Court accordingly should consider the matter fresh.

If the Court ultimately rejects the bright-line definition, it nevertheless should impose meaningful and workable limits on the threshold for automatic liability. These limits will help to offset the damage caused by the over-breadth of whatever otherwise open-ended definition of "supervisor" the Court adopts.

Finally, no matter what definition of "supervisor" the Court applies, Petitioner here fails to establish that her alleged harasser was a supervisor for purposes of automatic vicarious liability. The Court thus should affirm the judgment of the Seventh Circuit.

ARGUMENT

I. THE COURT SHOULD APPROVE THE BRIGHT-LINE DEFINITION OF "SUPERVISOR" USED BY THE FIRST, SEVENTH, AND EIGHTH CIRCUITS

A. A Bright-Line Definition Of "Supervisor" Best Promotes Title VII's Primary Objective Of Avoiding Harm

Title VII's "primary objective . . . is not to provide redress but to avoid harm." *Faragher*, 524 U.S. at 806 (citation and internal quotation marks omitted). The statute seeks to achieve this objective by "encourag[ing] the creation of antiharassment policies and effective grievance mechanisms." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764 (1998). The statute likewise threatens employers with liability if they are negligent in failing to detect and stop workplace harassment between employees. *See id.* at 759.

Title VII further seeks to "avoid harm" by holding employers vicariously liable for workplace harass-

ment committed by their supervisory employees. This threat of automatic vicarious liability encourages employers to focus their preventative efforts (and limited resources) where they will do the most good: on those employees most likely to wield, and potentially abuse, the "official power of the enterprise." *Id.* at 762. Because "employers have greater opportunity and incentive to screen [supervisors], train them, and monitor their performance," employers have "a greater opportunity to guard against misconduct by supervisors than by common workers." *Faragher*, 524 U.S. at 803.

The definition of "supervisor" directly affects how effectively Title VII's automatic-liability regime encourages employers to prevent harassment by supervisors—as opposed to compensates victims. Any definition of "supervisor" that turns on the scope of duties is inherently vague. Workplaces and workplace hierarchies in this country vary widely, and the trend in recent years has been away from traditional top-down hierarchies and toward "the use of autonomous or self-regulated teams" comprised of "'quasi-overseer' employees." *Miss. Power & Light Co. & Int'l Bhd. of Elec. Workers*, 328 N.L.R.B. 965, 971 (1999), *abrogated on other grounds by Entergy Gulf States, Inc. v. NLRB*, 253 F.3d 203 (5th Cir. 2001); *see also Dinkins v. Charoen Pokphand USA, Inc.*, 133 F. Supp. 2d 1254, 1267 (M.D. Ala. 2001) ("Radical economic changes are blurring the distinction between labor and management. The concept of the 'overseer,' who has the apparent authority to supervise, is not as uncommon as in the past."). Simply put, in many workplaces the distinction between "supervisor" and "common worker" is unclear.

Accordingly, to best promote Title VII's "primary objective" of preventing workplace harassment, the definition of "supervisor" used to impose automatic liability should be one that is clear and easy for employers to apply prophylactically to guide their compliance efforts, before the onset of litigation. The definition likewise should be the one most likely to include the core group of employees entrusted with the "official power of the enterprise." The realities of today's workplace call for a bright-line definition that captures "the essence of supervisory status." *Parkins*, 163 F.3d at 1034.

1. The First, Seventh, and Eighth Circuits have approved such a bright-line definition of "supervisor." These courts impose automatic liability only if the harassing employee has "the authority to affect the terms and conditions of the victim's employment," *i.e.*, "the power to hire, fire, demote, promote, transfer, or discipline an employee." *Id.*; *accord Noviello v. City of Boston*, 398 F.3d 76, 96 (1st Cir. 2005); *Joens v. John Morrell & Co.*, 354 F.3d 938, 940–41 (8th Cir. 2004).[2] The harassing employee must be empowered by the employer "'to make economic decisions affecting [the plaintiff].'" *Merritt v. Albemarle Corp.*, 496 F.3d 880, 884 (8th Cir. 2007) (quoting *Pa. State Police v. Suders*, 542 U.S. 129, 144 (2004)). The harassing

[2] *See also Griffin v. Harrisburg Prop. Servs., Inc.*, 421 F. App'x 204, 209 (3d Cir. 2011) (applying *Parkins*); *Johnson v. Shinseki*, 811 F. Supp. 2d 336, 347–48 (D.D.C. 2011) (applying *Parkins*); *Browne v. Signal Mountain Nursery, L.P.*, 286 F. Supp. 2d 904, 913, 918 (E.D. Tenn. 2003) (applying *Parkins* and concluding that "[t]he authority entrusted in a supervisory employee need not be plenary or absolute, but it must encompass, in some significant way, the power to initiate, recommend, or effect tangible employment actions affecting the economic livelihood of the supervisor's subordinates").

employee is not deemed a "supervisor" absent the power to make tangible employment decisions against the plaintiff. *See Ellerth*, 524 U.S. at 761–62 (defining "tangible employment decision").

Under this definition, merely "directing work activities and recommending disciplinary action are not in and of themselves sufficient to make a supervisor under Title VII." *Andonissamy v. Hewlett-Packard Co.*, 547 F.3d 841, 848 (7th Cir. 2008); *accord Bryant v. Jones*, 575 F.3d 1281, 1300 (11th Cir. 2009); *Merritt*, 496 F.3d at 883. Nor is it enough that the harassing employee has the power to decide which of the plaintiff's normal work duties he or she must perform on a given day. *See EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657, 684 (8th Cir. 2012); *Merritt*, 496 F.3d at 884; *Rhodes v. Ill. Dep't of Transp.*, 359 F.3d 498, 506 (7th Cir. 2004). And the harasser's mere apparent authority does not transform him or her into a "supervisor." *See CRST Van Expedited, Inc.*, 679 F.3d at 685; *Weyers v. Lear Operations Corp.*, 359 F.3d 1049, 1057 n.7 (8th Cir. 2004).

The definition applied by the First, Seventh, and Eighth Circuits appropriately gives employers clear notice of which employees may subject them to automatic liability for workplace harassment—and, therefore, which employees the employers should be particularly careful to screen, train, and monitor. This definition also effectively captures the "essence of supervisory status." "[E]mployers do not entrust mere co-employees with any significant authority with which they might harass a victim . . . ." *Parkins*, 163 F.3d at 1032. By encouraging focused and deliberate preventative efforts on a discrete group of employees, this definition promotes the

avoidance of workplace harassment. *See* Jodi R. Mandell, Note, Mack v. Otis Elevator*: Creating More Supervisors and More Vicarious Liability for Workplace Harassment*, 79 St. John's L. Rev. 521, 549 (2005).

2. By contrast, some courts have adopted much broader, highly fact-driven definitions of "supervisor." Unlike the bright-line definition applied by the First, Seventh, and Eighth Circuits, the broad definitions adopted by these courts provide insufficient notice to employers and therefore hamper employers' ability to "avoid harm."

The Second Circuit, for example, defines "supervisor" to include employees with the power to "direct the particulars of . . . [the plaintiff's] work days, including . . . work assignments." *Mack v. Otis Elevator Co.*, 326 F.3d 116, 125 (2d Cir. 2003). The Fourth Circuit considers "'whether as a practical matter [the harasser's] employment relation to the victim was such as to constitute a continuing threat to her employment conditions that made her vulnerable to and defenseless against the particular conduct in ways that comparable conduct by a mere co-worker would not.'" *Whitten v. Fred's, Inc.*, 601 F.3d 231, 244 (4th Cir. 2010) (quoting *Mikels v. City of Durham*, 183 F.3d 323, 333 (4th Cir. 1999)). The Ninth Circuit uses an even murkier standard that defines "supervisor" to include any employee who "has the authority to demand obedience from [the plaintiff]." *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1119 n.13 (9th Cir. 2004).

In an effort to give context to these formless and elastic definitions, courts also have considered the harasser's on-the-job seniority vis-à-vis the plaintiff to determine the harasser's "supervisor" status. *See,*

e.g., *Whitten*, 601 F.3d at 245–46; *Mack*, 326 F.3d at 125. Courts likewise have looked to the presence or absence at the work site of employees more senior than the harasser. *See, e.g.*, *Whitten*, 601 F.3d at 246; *Mack*, 326 F.3d at 125. And some courts consider whether the plaintiff *subjectively* believed that the harassing co-worker was a supervisor. *See, e.g.*, *Whitten*, 601 F.3d at 246. The uncertainty inherent in these open-ended definitions undermines Title VII's "primary objective" of harassment prevention in two critical ways.

First, the nebulous threshold for "supervisor" status advanced by these definitions makes it *more* difficult for employers to engage in preventive "forethought." *Ellerth*, 524 U.S. at 764; *Faragher*, 524 U.S. at 807; *see also Browne*, 286 F. Supp. 2d at 914. Vague, fact-specific, or "totality of the circumstances" definitions provide employers no practical basis to distinguish between indisputable supervisors, whom employers deliberately entrust with the power to take tangible employment actions against the plaintiff, and otherwise "common workers" who have some limited oversight of the plaintiff merely by virtue of the idiosyncrasies of their unique workplaces. The unique workplace factors that courts have considered in applying these definitions are equally unhelpful. These factors—the harasser's relative seniority, the on-site presence of even more senior supervisors, and the plaintiff's subjective beliefs—can change on a daily basis, without notice, and often are beyond the employer's knowledge or control. Indeed, these definitions sweep so broadly that they could anoint many of an employer's employees as "supervisors" for purposes of automatic liability under Title VII at one time or another. *See Browne*, 286 F. Supp. 2d at 914 (rejecting *Mack* because "[t]he sheer numerosity of

potential supervisors" it creates is antithetical to the spirit of *Ellerth* and *Faragher*). "[I]f an employer cannot determine who qualifies as a supervisor, there may simply be too many employees for the company to carefully select, train, and monitor." Mandell, *supra*, at 549.

Second, by leaving unclear who qualifies as a "supervisor," these definitions encourage employers to diffuse their limited resources, thereby resulting in less effective screening, training, and monitoring of so-called "supervisors." Comprehensive screening, training, and monitoring of a larger, more diversified group of purported "supervisors" is more difficult to develop and properly administer than targeted efforts. And scattershot compliance measures inevitably are less effective than (and could displace) more thorough compliance measures aimed at those most likely to abuse the official power of the enterprise—traditional supervisors. *See id.* at 549–50.

Ultimately, these definitions force employers to confront an untenable catch-22. On the one hand, employers could broaden their preventative efforts to cover more so-called "supervisors," yet still run the substantial risk of automatic liability because these efforts would be less effective at preventing workplace harassment. On the other hand, employers could continue to focus their compliance efforts on traditional supervisors, but risk being potentially unable to disprove their negligence as an affirmative defense to automatic liability for harassment by those purported "supervisors" who received no additional screening, training, and monitoring. Because neither of these choices gives employers incentives to prevent harm, the open-ended definitions of "supervisor" that

spawn these choices are fundamentally "at odds with [Title VII's] statutory policy." *Faragher*, 524 U.S. at 806.

B. The EEOC's Open-Ended Definition Of "Supervisor" Provides Employers With Inadequate Guidance And Is Not Entitled To Deference

The EEOC, like the Second, Fourth, and Ninth Circuits, also endorses an open-ended, fact-specific definition of "supervisor" that would include employees who "ha[ve] authority to direct the [plaintiff's] daily work activities." EEOC, Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, 8 FEP Manual (BNA) 405:7654 (1999), *available at* 1999 WL 33305874 (reproduced at Pet. App. 81a–93a) (EEOC Guidance). The EEOC's definition generally considers whether the "ability to commit harassment is *enhanced* by [the harasser's] authority to increase the employee's workload or assign undesirable tasks." Pet. App. 91a (emphasis added).

But like the open-ended definitions of "supervisor" applied by the Second, Fourth, and Ninth Circuits, the EEOC's definition only obfuscates the line between "supervisor" and "common worker." The EEOC's definition does not explain what it means for the ability to harass to be "enhanced," as opposed to simply "aided." *Faragher*, 524 U.S. at 804. Nor does the EEOC definition meaningfully clarify the minimum duration and scope of the harasser's authority over the plaintiff's work activities necessary to render the harasser a "supervisor." Although the EEOC says that employees who are "temporarily authorized to direct [the plaintiff's] daily work activities" are supervisors "during that time period," Pet. App. 92a,

the EEOC neither defines nor qualifies the meaning of "temporarily." The EEOC further states that "supervisors" do not include employees who "merely relay[] other officials' instructions regarding work assignments and report[] back to those officials," nor employees "who direct[] only a limited number of tasks or assignments," such as "coordinating a work project of limited scope." Pet. App. 92a. Yet the EEOC does not qualify the meaning of either "limited number" or "limited scope."

Consequently, employers cannot in advance readily apply the EEOC's definition of "supervisor" to decide where and how best to deploy their limited resources to both prevent workplace harassment and avoid automatic liability for the misconduct of so-called "supervisors." Indeed, the weakness of the EEOC's definition as a guidepost for employers' preventative measures is evident from the fact that the parties (and the United States) seemingly agree that the EEOC's definition is correct yet continue to reach starkly different conclusions about the status of Petitioner's alleged harasser at this advanced stage of the litigation. Like the Second, Fourth, and Ninth Circuits' unhelpful definitions, the EEOC's definition fails to provide employers with the proper incentives and guidance needed to achieve Title VII's "primary objective" of "avoid[ing] harm." *Faragher*, 524 U.S. at 806 (internal quotation marks omitted).

Moreover, contrary to the position advanced by the United States, U.S. Br. 26–29, the EEOC's enforcement guidance is not entitled to any deference because it amounts to little more than the agency's interpretation of this Court's decisions in *Faragher* and *Ellerth*. *See* Pet. App. 91a–92a & nn.23–24. "Agencies have no special claim to deference in their

interpretation of [the Court's] decisions." *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 642 n.11 (2007) (citing *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 336 n.5 (2000)).

C. Approving The Bright-Line Definition Will Not Absolve Employers Of Liability But Instead Merely Adjust Litigation Burdens

Critically, no matter how "supervisor" is defined, victims of workplace harassment can still pursue and potentially recover on their claims even if the harasser ultimately is not deemed a "supervisor." Thus, approving the bright-line definition of "supervisor" used by the First, Seventh, and Eighth Circuits will not insulate employers from liability for actionable harassment by employees who fail to meet this definition. To the contrary, approving the bright-line definition will simply return to plaintiffs the burden of proving their employer's negligence, and only in cases where no tangible employment action has resulted.

1. An employer's alleged negligence plays a central role in most workplace harassment cases because "[n]egligence sets a minimum standard for employer liability under Title VII." *Ellerth*, 524 U.S. at 759. An employer is negligent when it "knew or should have known about the [harassing] conduct and failed to stop it." *Id.*

When the harasser is a mere co-worker, the plaintiff bears the burden of proving affirmatively that the employer was negligent. *Id.* When the harasser is a "supervisor with immediate (or successively higher) authority over the [plaintiff]," *id.* at 765—and if no tangible employment action results—the employer is

automatically liable for the harassment unless it proves that it was not negligent in "prevent[ing] and correct[ing] promptly any . . . harassing behavior" and that the plaintiff was negligent in avoiding the harm. *Id.* at 765. If the harasser-supervisor "takes a tangible employment action against the [plaintiff]," the employer is strictly liable. *Id.* at 760.

Thus, the harasser's status effectively determines who bears the burden of proving the employer's negligence when no tangible employment action occurs. The harasser's status is not dispositive of a plaintiff's claims nor an employer's affirmative defense to automatic liability. Even when a plaintiff fails to establish that the harasser was a "supervisor"—which would shift the burden to the employer to prove that it was not negligent—courts regularly proceed to determine whether the plaintiff has proven the employer's negligence. *See, e.g.*, *Ryan v. Capital Contractors, Inc.*, 679 F.3d 772, 779 (8th Cir. 2012); *Andonissamy*, 547 F.3d at 849; *Merritt*, 496 F.3d at 885; *Cheshewalla v. Rand & Son Constr. Co.*, 415 F.3d 847, 851 (8th Cir. 2005); *Noviello*, 398 F.3d at 97; *Rhodes*, 359 F.3d at 506; *Hall v. Bodine Elec. Co.*, 276 F.3d 345, 356 (7th Cir. 2000); *Parkins*, 163 F.3d at 1035. That is what the lower courts did in this case. *See Vance v. Ball State Univ.*, 646 F.3d 461, 470–71 (7th Cir. 2011) (Pet. App. 13a); *Vance v. Ball State Univ.*, No. 1:06-cv-1452, 2008 WL 4247836, at *12 (S.D. Ind. Sept. 10, 2008) (Pet. App. 55a).

2. If the facts support a violation of Title VII, plaintiffs can readily meet their burden of establishing the employer's negligence—and often reach a jury on the issue—even in those circuits that apply the bright-line definition of "supervisor."

In *Noviello*, for example, after finding that the harasser was not a "supervisor" under the bright-line definition, the First Circuit concluded that the plaintiff nevertheless was entitled to a jury trial on her co-worker harassment claim because there was sufficient evidence that the employer had actual notice of the hostile work environment yet "did nothing to dispel it." 398 F.3d at 97. Similarly, in *Phelan v. Cook County*, the Seventh Circuit held that the plaintiff's co-worker claim should have gone to a jury because there was evidence that the plaintiff "continually complained of physical and verbal abuse in both of her work stations" and that the plaintiff's transfer to another location was inadequate to remedy the harassment. 463 F.3d 773, 785–86 (7th Cir. 2006). And in *Engel v. Rapid City School District*, the Eighth Circuit concluded that summary judgment should not have been granted as to the plaintiff's co-worker claim because there was evidence both that the hostile work environment continued after the employer's attempted remedial actions and that the employer failed to sufficiently respond further. 506 F.3d 1118, 1127 (8th Cir. 2007); *see also Hoyle v. Freightliner, LLC*, 650 F.3d 321, 335–36 (4th Cir. 2011) (genuine issue of material fact remained as to the employer's negligence); *Hawkins v. Anheuser-Busch, Inc.*, 517 F.3d 321, 341–44 (6th Cir. 2008) (same); *Andreoli v. Gates*, 482 F.3d 641, 648–49 (3d Cir. 2007) (same); *cf. Whitten*, 601 F.3d at 251 (holding that the employer was not entitled to summary judgment on its affirmative defense because "there [was] a question of fact as to whether [it] acted reasonably" in response to the plaintiff's complaints of sexual harassment).

Indeed, in *Faragher* itself, the plaintiff still would have prevailed on her claims even if her harassers had not been deemed supervisors, thus requiring the plaintiff to prove the city's negligence. As this Court concluded, "as a matter of law . . . [,] the [defendant] City could not be found to have exercised reasonable care to prevent the supervisors' harassing conduct." 524 U.S. at 808.

3. To be sure, the burden of proving the employer's negligence is not insignificant in comparison to the plaintiff's burden in an automatic-liability regime. Instead of showing that the harasser was a "supervisor" and that actionable harassment occurred, the plaintiff must show that the employer failed reasonably to detect and stop the harassment.

But whatever the cost of returning to plaintiffs the burden of proving negligence in cases at the margin, that cost ultimately is outweighed by the prophylactic benefits of using the First, Seventh, and Eighth Circuits' bright-line definition of "supervisor." Again, adopting this definition will not let negligent employers off the hook for workplace harassment by employees who are not technically "supervisors." Moreover, adopting this definition will not, as the United States warns, "leav[e] workers vulnerable to harassment" by giving employers incentive to "attempt to insulate themselves from vicarious liability by confining the authority to effect tangible employment actions to a decentralized personnel department" that "might be off site, and might have indirect or infrequent contact with potential victims." U.S. Br. 24. An employer arguably would fail to meet the minimum negligence standard if it intentionally structured its business in a way that kept it willfully blind of workplace harassment or made it more difficult for employees to

file grievances. *See, e.g.*, *EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 320 (4th Cir. 2008) (concluding that a jury reasonably could conclude the employer was negligent in preventing the harassment because it "was practicing something akin to willful blindness").

And, it makes sense that a plaintiff should have to meet a more rigorous definition of "supervisor" before triggering "the more stringent standard of vicarious liability," *Ellerth*, 524 U.S. at 759—particularly when all the plaintiff needs to prove to trigger this tougher standard is the harassment itself and the harasser's status.

D. The Court's Decision In *Faragher* Does Not Foreclose The Bright-Line Definition

Petitioner and her *amici* contend that the Seventh Circuit's definition of "supervisor" is foreclosed by the Court's decision in *Faragher*. *See* Pet. Br. 19–21; Br. of *Amici Curiae* Nat'l P'ship for Women & Families, et al., 9–10; Br. of *Amici Curiae* Nat'l Emp't Lawyers Ass'n & AARP 12. Petitioner relies on the fact that the *Faragher* Court approved automatic liability for misconduct by one of Faragher's "supervisors," David Silverman, who Petitioner claims lacked "any of the personnel powers the Seventh Circuit rule has held indispensable." Pet. Br. 20.[3] Petitioner is incorrect. *Faragher* does not preclude approval of the bright-line definition of "supervisor" simply because one narrow reading of that decision supports a definition of "supervisor" that includes employees with authority over the plaintiff's daily work activities.

[3] The United States espouses a similar view. U.S. Br. 14 ("The court of appeals' restrictive approach cannot be squared with this Court's resolution of the specific claims in *Faragher*.").

As a factual matter, Silverman was "responsible for making lifeguards' daily assignments, and for supervising their work and fitness training." *Faragher*, 524 U.S. at 781. To be sure, the Court referred to Silverman at least once as Faragher's "supervisor[]." *Id.* at 808. And the Court observed that Silverman "directly controll[ed] and supervis[ed] all aspects of Faragher's day-to-day activities"—albeit in the context of its determination that Silverman had contributed to an "actionable" hostile work environment. *Id.* (internal quotation marks omitted).

Nevertheless, in neither *Faragher* nor *Ellerth* did the Court directly "answer the question, 'who is a supervisor?'" *Joens*, 354 F.3d at 940. The definition of "supervisor" was not among the questions presented in those cases.[4] More importantly, the parties in *Faragher* never disputed Silverman's "supervisor" status before this Court. *See* Brief for Respondent City of Boca Raton at 5, *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) (No. 97-282), 1998 WL 32487 ("As lieutenant and later as captain, Silverman supervised the lifeguards' daily duties, including designating work assignments and supervising physical fitness routines."); *id.* at 19 ("Neither Terry nor Silverman made any use of his supervisory authority to assist or facilitate his wrongful conduct."); *id.* at 34 ("[P]etitioner seeks to impose liabil-

[4] *See generally* Petition for Writ of Certiorari at i, *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) (No. 97-282), 1997 WL 33485651 (listing the two questions presented); Petition for Writ of Certiorari at i, *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998) (No. 97-569), 1997 WL 33485655 (similar).

ity on the City solely on the ground that Terry and Silverman were supervisors.").[5]

At bottom, whether Silverman qualified as a "supervisor," and the true meaning of that term, were "'[q]uestions which merely lurk[ed] in the record, neither brought to the attention of the court nor ruled upon.'" *Cooper Indus.*, 543 U.S. at 170 (quoting *Webster v. Fall*, 266 U.S. 507, 511 (1925)). These questions should not now "'be considered as having been so decided as to constitute precedents.'" *Id.*

The Court is thus free to decide the issue in this case. It should take the opportunity to approve a definition of "supervisor" that truly promotes Title VII's "primary objective" of "avoid[ing] harm"—the bright-line definition adopted by the First, Seventh, and Eighth Circuits.

II. IF THE COURT REJECTS THE BRIGHT-LINE DEFINITION OF "SUPERVISOR," IT SHOULD IMPOSE MEANINGFUL AND WORKABLE LIMITS ON THE THRESHOLD FOR AUTOMATIC LIABILITY

If the Court rejects the bright-line definition of "supervisor" in favor of one that includes employees who oversee the plaintiff's daily work activities, it should, as Respondent argues, Resp. Br. 31–37,

[5] Nor did the defendant City contest the district court's finding that Silverman was Faragher's "supervisor," *see Faragher v. City of Boca Raton*, 864 F. Supp. 1552, 1558, 1565 (S.D. Fla. 1994), when on appeal before the Eleventh Circuit. *See generally Faragher v. City of Boca Raton*, 111 F.3d 1530, 1534 (11th Cir. 1997) (en banc), *rev'd*, 524 U.S. 775 (1998); *Faragher v. City of Boca Raton*, 76 F.3d 1155, 1164 & n.9 (11th Cir. 1996).

impose meaningful and workable limits on the extent to which harassment by so-called "supervisors" can trigger automatic liability.

For example, the harasser's mere oversight of the plaintiff's daily work activities should still be insufficient to transform him or her into a "supervisor" for purposes of automatic liability under Title VII. Instead, the harasser should be required to wield the power to increase the plaintiff's workload beyond normal limits, or to assign duties that the employer knows or should know are undesirable to the plaintiff. *Cf.* Resp. Br. 29; *CRST Van Expedited, Inc.*, 679 F.3d at 684 (harasser not a supervisor absent evidence that he or she had "the power to do anything more than assign a[n] [employee] to specific tasks already within that [employee's] normal, day-to-day duties"). An employer who deliberately entrusts an employee with the power objectively to worsen the workload of subordinates can reasonably anticipate that an employee might abuse that power. Thus, an employer that gives an employee this power in effect assumes the risk of automatic liability—and, *knowing* that risk, can take affirmative steps to prevent any harassment from happening.

Relatedly, plaintiffs should be required to prove more than just that actionable harassment occurred and that the harasser was a "supervisor" before saddling employers with automatic liability. Consistent with traditional notions of proximate causation, plaintiffs should be required to show a substantial nexus between the supervisor's power to worsen the plaintiffs' workload and the actionable harassment. For example, plaintiffs should have to show that they at least were subjectively aware of their supervisor's authority at the time the alleged harassment

occurred. Resp. Br. 35–36. If a plaintiff does not "underst[and]" the supervisor to be "clothed with the employer's authority," the supervisor's allegedly harassing conduct cannot possibly have the "threatening character" necessary to "aid[]" actionable harassment. *Ellerth*, 524 U.S. at 763 (citation and internal quotation marks omitted). Similarly, harassment that occurs at a time when the harasser does not have authority over the plaintiff's daily work activities definitively cannot "aid" the harassment. Resp. Br. 37; *see also* U.S. Br. 28. There ultimately must be "something more" between the "supervisor" and the plaintiff than just "[p]roximity and regular contact," otherwise "an employer would be subject to vicarious liability . . . for all co-worker harassment" simply because of "the employment relation itself." *Ellerth*, 524 U.S. at 760.

And, the harasser's job title or job description should not be determinative (even if it is probative) of the harasser's legal status as a "supervisor." Resp. Br. 31–32; *see also Noviello*, 398 F.3d at 95 ("[C]ourts must distinguish employees who are supervisors merely as a function of nomenclature from those who are entrusted with actual supervisory powers." (internal quotation marks omitted)); *Parkins*, 163 F.3d at 1038 ("[N]omenclature is not dispositive of the issue.").

At bottom, by rejecting the bright-line definition adopted by the First, Seventh, and Eighth Circuits, the Court would forfeit the substantial preventative benefits afforded by that definition, while simultaneously increasing the likelihood of "supervisor" false positives. Embracing the limitations discussed above, as well as the others raised by Respondent,

would help to curb employers' exposure to the inequitable imposition of automatic liability.

III. PETITIONER'S CLAIMS FAIL UNDER ANY DEFINITION OF "SUPERVISOR"

No matter which definition of "supervisor" the Court ultimately adopts, Petitioner cannot prevail on her supervisor liability claim here because her alleged harasser, Saundra Davis, does not qualify as a "supervisor" under any standard.

First, Petitioner fails to satisfy the bright-line definition of "supervisor"—and indeed makes no effort to do so. *See generally* Pet. Br. 42–45. Petitioner does not challenge the Seventh Circuit's conclusion, based on the summary-judgment record, that she did not "reveal[] a factual dispute regarding Davis's status by asserting that Davis had the authority to tell her what to do or that she [Davis] did not clock-in like other hourly employees." *Vance*, 646 F.3d at 470 (Pet. App. 13a).

Second, as Respondent and the United States both amply explain, Petitioner also fails to satisfy the open-ended definitions of "supervisor," applied by the EEOC and some circuit courts, because she has not shown that Davis had any authority over her daily work activities that could materially have aided the alleged harassment. Resp. Br. 39–46; U.S. Br. 30–32.

Petitioner highlights several purported indicia of Davis's "supervisor" status that, neither alone nor collectively, establish that Davis had anything more than some minimal level of authority over her. Although Petitioner never testified that Davis actually exercised authority over her daily work activities, J.A. 102–248, she vaguely claims that Davis, a "Catering Specialist," "was given authority to direct

[her] and other employees' work." Pet. Br. 6. Petitioner further marshals Davis's "formal [job] description," which briefly referenced "leadership" of certain employees; complaint forms Petitioner filed with the University, in which she herself referred to Davis as a "supervisor" who had "delegat[ed] jobs to her in the kitchen"; and generic statements by other employees characterizing Davis as a "supervisor" who had the authority to "direct[] and l[ead] *** [*a*]*t times*." Pet. Br. 9–11 (emphasis added); *see also id.* at 42–43. Petitioner also points to some evidence that Davis gave her daily "prep sheets," yet not to any evidence that *Davis* created those sheets. Pet. Br. 10.

Beyond simply invoking these indicia, Petitioner does not connect the oblique references to "supervision," "delegation," "direction," and "leadership" to instances when Davis ever actually had, let alone exercised, the power to dictate Petitioner's day-to-day work activities. More importantly, Petitioner fails to show how, if at all, these general dimensions of Davis's job somehow *materially aided* her alleged harassment of Petitioner. *See* EEOC Guidance, Pet. App. 91a (supervisor status appropriate when the harasser's "ability to commit harassment is enhanced by his or her authority to increase the employee's workload or assign undesirable tasks"); *Mack*, 326 F.3d at 125 (the harasser's authority must "enable[] . . . or materially augment[] his or her ability[] to create or maintain the hostile work environment"). Simply put, Petitioner fails to establish the very essence of the "aided-by-agency-relation principle" that justifies imposing automatic liability on employers. *Faragher*, 524 U.S. at 802.

For this reason, even if the Court adopts something other than the bright-line definition advanced herein, the Court can decide this case without remanding for further proceedings. Resp. Br. 50–54. Indeed, the Court should decide this case now, on the current record, because doing so would provide ascertainable limits applicable to future cases—a result beneficial not only to courts and litigants, but also to employers seeking to comply with Title VII.

CONCLUSION

The judgment of the Seventh Circuit should be affirmed.

Respectfully submitted,

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