No. 11-556

In the Supreme Court of the United States

MAETTA VANCE,

Petitioner,

v.

BALL STATE UNIVERSITY, *et al.*,

Respondents.

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

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF FOR PETITIONER

The Solicitor General's brief offers compelling confirmation why this Court needs to settle the question presented, but no convincing reason for withholding review in this case.

The brief affirms that "the question presented is important" and that "the circuits disagree." U.S. Br. 14. The Solicitor General cogently explains that the Seventh Circuit's statutory interpretation "cannot be squared with this Court's * * * specific [holding] in *Faragher*"; is "inconsistent with the EEOC's longstanding enforcement guidance"; and "ignores the practical realities of the workplace and disserves the core purposes of Title VII." *Id.* at 12. He does not deny that the "supervisor" definition supplied the rule of decision in petitioner's case, nor suggest any benefit in permitting this well-developed and much-litigated conflict to percolate further. On the contrary, he recognizes that "the Court's review of the question presented [is] warranted." *Id.* at 17.

The Solicitor General offers only one reason for recommending denial: that this case is not an "appropriate" or "suitable vehicle," *id.*, for addressing the issue, because, he suggests, Vance would likely not prevail on remand under the proper legal standard. This contention lacks merit.

It is not the Court's "normal practice," U.S. Br. 22, to withhold review of a case that satisfies the stringent standards for exercising its discretionary jurisdiction, based on contentions the petitioner ultimately will not prevail, particularly when, as here, the obstacle alleged is one not addressed (or even argued) below. The Court regularly grants

certiorari in such cases – frequently at the Solicitor General's urging.

Equally important, a fair-minded review of the record does not support the Solicitor General's claims about how this case would turn out on remand. Because the Solicitor General, unlike respondent, actually acknowledges the evidence supporting petitioner, his efforts to find a vehicle problem fare worse. He must struggle to deflect and minimize the substantial evidence that Davis directed Vance's daily activities and advance aggressive readings of the EEOC's Guidance and doubtful inferences from ambiguities and alleged gaps in the record. These efforts fail on their own terms, and the larger project is essentially self-defeating. The Solicitor General's granular and case-specific arguments only highlight the extent to which he asks this Court to sit as one of first instance (indeed as fact-finder) and refute claims that this litigation is overly abstract.

I. This Case Is an Entirely Suitable Vehicle for Resolving the Question Presented

The Solicitor General does not allege the type of "vehicle" concern that might actually warrant withholding review of a case. The question is squarely presented: both courts below rejected petitioner's claim that Davis was a supervisor under *Faragher*, relying on the Seventh Circuit's controversial rule, Pet. App. 12a-13a, 53a, and neither decision held or even intimated that petitioner's claim would not withstand summary judgment under the EEOC standard. Respondent did not argue that; in both courts, it rested on circuit precedent, maintaining that evidence of Davis's "duties to 'lead and direct'" were legally insufficient, because "[n]o part of [her job] description include[d]

the power to [take tangible employment actions]," Dkt. 86 (S.J. Reply) at 17; C.A. Br. 32-33 & n.5.

Indeed, this case is, in important respects, an especially *strong* vehicle for resolving the conflict. Unlike many other cases where the question is addressed, the Seventh Circuit's decision raises no other issues that could prevent the Court from reaching it. Compare, *e.g.*, *Joens* v. *John Morrell & Co.*, 354 F.3d 938, 941 (8th Cir. 2004) (affirming summary judgment on alternative ground).[1]

A. This Court's Normal Certiorari Practice Supports Review Here

1. The Solicitor General nonetheless follows respondent in arguing that the Court should not grant review – and settle the entrenched conflict – unless Vance would likely prevail on remand under the correct legal rule.

Although the Solicitor General strains to depict this mode of proceeding as orthodox, it is emphatically not the Court's usual practice to resolve questions not addressed below or to restrict its certiorari jurisdiction to cases where the petitioner would indisputably prevail on application of the correct legal standard.

On the contrary, the Court routinely reviews cases where the "ultimate outcome," *id.* at 21, is uncertain and where it is not "plain[]," *id.* at 22, that

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[1] Because the Title VII hostile environment cause of action includes numerous distinct elements and because unsuccessful "supervisor" claims proceed under the "co-worker" standard, appellate decisions rejecting "supervisor" claims often address, and resolve in employers' favor, other fact-bound issues, making them genuinely unsuitable candidates for review.

the petitioner would prevail once an erroneous legal standard is rejected. See, *e.g.*, *Malat* v. *Riddell*, 383 U.S. 569, 572 (1966); see also *Zivotofsky* v. *Clinton*, 132 S. Ct. 1421, 1430-1431, (2012); *Bond* v. *United States,* 131 S. Ct. 2355, 2367 (2011); *Johnson* v. *California*, 543 U.S. 499, 515 (2005); *Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 431 (2001) cf. *Hertz Corp.* v. *Friend*, 130 S. Ct. 1181, 1195 (2010) (expressing doubt respondents could prevail, but remanding "[b]ecause [they] should have a fair opportunity to litigate their case in light of our holding").

2. In reaching back a half century for case support for his claim of "normal practice," see U.S. Br. 22 (citing dismissal in *The Monrosa* v. *Carbon Black Exp., Inc.*, 359 U.S. 180 (1959)), the Solicitor General overleaps much more relevant, contemporary materials. Several times this Term, the United States petitioned (successfully) for certiorari, arguing that the prospect a respondent would ultimately prevail did not counsel against review. In *Match-E-Be-Nash-She-Wish Band* v. *Patchak*, the Solicitor General maintained:

> Whatever the ultimate outcome of the litigation over the particular land acquisition at issue here, [respondent] does not deny that this case would provide a vehicle for the Court to consider important questions concerning the interpretation of [two federal statutes.] * * * The possibility that [respondent] might ultimately be able to [prevail on other grounds] * * * would not prevent the Court from addressing the questions presented in the petition. Indeed, the Court frequently considers cases that have been decided on

> one ground by a court of appeals, leaving other issues to be decided on remand, if necessary.

Cert. Reply, Nos. 11-246, 11-247 at 10; accord Cert. Reply, *Astrue* v. *Capato*, No. 11-159, at 8 (similar).

Similarly, in recommending review in *Freeman* v. *Quicken Loans, Inc.*, No. 10-1042, the Solicitor General urged that the Court reject respondent's contention that review be denied "because the court of appeals could have granted summary judgment to respondent on other grounds," *id.* at 17.

What the Solicitor General explained in *Freeman* applies here: the "alternative argument[]" advanced "would [not] prevent the Court from reaching the question presented," *ibid.*; "neither the court of appeals nor the district court passed upon" whether Ball State should prevail under the EEOC test, *id.* at 19; and that issue is "not logically antecedent to the question presented." *Ibid.* The dissimilarity between this case and *The Monrosa* is also manifest. In that case, there was no dispute that the question before the Court was "not of great importance" *in the parties' litigation*, 359 U.S. at 185 (Harlan, J., dissenting), because "the [plaintiff would] be able to try its claim in the District Court" however the Court ruled. *Id.* at 183. Ms. Vance's interest here is anything but "academic," *id.* at 185; she seeks only to obtain relief in this suit, and that depends on the Court's taking jurisdiction and settling correctly the question presented.

3. The customary reasons for not considering new issues apply with heightened force when they would require this Court to predict findings of fact from a summary judgment record developed under a different and incorrect legal standard. See *Jefferson*

v. *Upton*, 130 S. Ct. 2217, 2223 (2010) (remand is "especially [appropriate] given that the facts * * * are undeveloped"); U.S. Br. at 12, *Sprint/United Mgmt. Co.* v. *Mendelsohn*, 552 U.S. 379 (2008) (No. 06-1221) (proposing that "[r]ather than engaging in a record-intensive de novo review," the Court "should answer the question presented * * * provide some general guidance * * * and [remand] to the district court for a determination * * * under the correct legal standards").

4. The Solicitor General's overwrought concerns that the "Court * * * would be called upon to decide the question presented in the abstract" and be deprived of a "context" in which to "test the merits of the competing standards" are makeweights. U.S. Br. 8. This issue arose in the "[c]ontext of meaningful litigation," and, whatever the ambiguities in the summary judgment record, in a "concrete factual setting." *Ibid.*

Hyperbole aside, as the Solicitor General's brief (and the EEOC Guidance before that) illustrate, the deficiencies in the Seventh Circuit rule – its incompatibility with the holdings and rationales of *Faragher* and *Ellerth* and its thwarting of Title VII's "core purposes" – do not depend on the particular facts in which it is invoked. More generally, when the Court seeks to "understand the[] practical implications" of competing rules of law, U.S. Br. 8, it need not confine itself to the single case before it. Hundreds of lower courts have considered this issue, and the implications and merits of their two starkly different legal rules are well-developed.

B. The Specific Premises Underlying The Solicitor General's Vehicle Argument Are Faulty

There is a more basic problem with the vehicle argument: although the record, developed under the Seventh Circuit rule, is not without ambiguities, it does not support the Solicitor General's confident assertions about what a court of first instance would or should decide here once the erroneous rule is repudiated. The evidence that Davis was a supervisor under the EEOC's test is substantial, not "scant." U.S. Br. 18. Indeed, the evidence the Solicitor General acknowledges – but attempts to quarantine with a "to be sure," Br. 19 – would be sufficient in itself to defeat summary judgment and surely to quell any concern that the proper supervisor rule is "irrelevant" to petitioner's case.

1. First, respondent's official description of Davis's "Catering Specialist" position (Dkt. 75-4) states that she "supervises * * * Kitchen Assistants" and "lead[s] and direct[s]" and "oversee[s] the[] work" of "part-time, substitute, and student employees." *Ibid*.

Second, petitioner consistently identified Davis as her supervisor – before she was represented by counsel or had any appreciation of the legal significance of that characterization. See Dkt. 59-1. (describing Davis as "kitchen supervisor"). In her handwritten complaint to the local NAACP chapter (Dkt. 59-8), Vance explained that "Saundra Davis * * * came back as a supervisor only to start the intimidation again." *Ibid*. She there described Betty Skinner – like Davis, a "Catering Specialist" – as "the other supervisor," while identifying McVicker, another harasser, and others as "co-workers." *Ibid.*

Vance was not alone in this understanding. Donn Knox, who for years worked in the same kitchen, testified that Davis was "some type of supervisor[]" and had been brought "back * * * as a supervisor with Betty Skinner." Dkt. 61-10. When pressed by respondent's counsel what "caused [him] to believe [Davis] was a supervisor," Knox answered, that "Bill Kimes" "told her that she was – [and] told us she was a supervisor," *ibid.*; see also Dkt. 62-3 (testimony of employee Julie Murphy) (describing Davis and Skinner as "[the] supervisors in the kitchen" and testifying that Davis "would give orders").

The Solicitor General's efforts to minimize and deflect this evidence are unavailing – especially given the case's summary judgment posture. He first says it is "unclear," U.S. Br. 19, that Davis's express authority over "*Kitchen* Assistants" and "part-time employees" extended to Vance, a part-time employee, because her title was "*Catering* Assistant." But Ball State made no such semantic argument when Vance pointed to the job description in opposing summary judgment, Dkt. 75-1 at 26 – and whether this is the only possible understanding, it is surely a permissible inference to which a nonmovant is entitled.

The Solicitor General similarly suggests that the Court (or a court adjudicating an actual summary judgment motion) should disregard the evidence that Vance, other employees, and even Kimes described Davis as a "supervisor," pointing to the EEOC's Guidance providing that "job function," rather than "job title," is central. U.S. Br. 20 (citing Pet. App. 89-90a). But Davis's job description uses "supervise[]"– and "oversee," "direct[,] and lead" – as verbs, and the witnesses were not referring to Davis's *title*. The

contention that such evidence "does [not] matter," *id.* at 19, is contrary to the EEOC's expressed understanding. In its recent amicus brief in *Dulaney* v. *Packaging Corp. of Am.,* 673 F.3d 323 (4th Cir. 2012), the EEOC argued that the harasser's "title as 'Lead Person' suggests a level of authority over Dulaney" and emphasized that "[the plaintiff] and her co-workers viewed [him] as a 'supervisor,'" noting that "they all referred to him this way in their depositions." EEOC Br. at 22 (4th Cir. No. 10-2316).

2. It is simply incorrect that "[p]etitioner identifie[d] no specific facts suggesting that Davis directed her day-to-day work." U.S. Br. 20. Internal Ball State documents submitted on summary judgment described Vance ["MV"] as upset that Davis ["SD"] was "now in a place to *lead at work and do things to MV and get away with it*," Dkt. 75-19 (emphasis added), and recorded that Vance was "not comfortable with SD leaving her notes and delegating jobs to her in the kitchen," Dkt 59-16 ("Internal Documentation Form"). Respondent's EEO Compliance officer Gloria Courtright's summary of her meeting with Kimes and Vance recorded that there had been much discussion "about SD's role as a lead person in the kitchen," *ibid.*, and noted that Kimes "reported 'that he knows SD has given direction to MV.'" *Ibid.*

3. The Solicitor General endeavors to deflect this evidence by mining the EEOC Guidance for subprinciples that might be invoked to defeat or disparage petitioner's claim. See, *e.g.*, Br. 18 ("someone who directs only a limited number of tasks or assignments" is not a supervisor); *id.* at 19 (suggesting evidence of Davis's "direction" of Vance "at some unspecified time" would not make her a

"temporary supervisor"). But this effort fails on all fronts.

First, these granular arguments take an improperly grudging – and, in places, inaccurate – view of the evidence and a notably stingier view of the substantive law than when EEOC appears as enforcer or amicus.[2] For example, the Solicitor General offers that Davis "may have handed Vance her prep lists on occasion," U.S. Br. 20, when record evidence indicates she did so "daily," Dkt. 59-16; that Davis "[o]ccasionally took the lead" – despite evidence it was her duty and "role" "to lead," Dkt. 75-4; and that Davis only "relayed instructions" when evidence indicates she "g[a]ve orders." Dkt. 59-16.

And the Solicitor General posits that petitioner could not raise a *triable issue* that she "'reasonably believed' Davis was her supervisor," U.S. Br. 18 (quoting Pet. App. 93a), "even if Davis's * * * job description characterized her as supervising petitioner," *id.* at 19, because Vance testified that "[o]ne day [Davis] told people what to do, and one day she[did] not," *id.* at 18. But the Guidance's

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[2] The adverse inferences the Solicitor General proposes, based, *e.g.*, on what "one would expect petitioner to have recounted" in her deposition, U.S. Br. 18, are neither justified nor fair. Davis's status as a supervisor was hardly a central focus of the district court litigation. Respondent aggressively contested every element of Vance's hostile environment and retaliation claims. Indeed, it principally argued that Vance's harassment claim failed *assuming* Davis was her supervisor, Dkt. 55 at 24, 26, 30, 31; and, rather than disputing the sufficiency of evidence that Davis directed petitioner's work, respondent submitted that such evidence failed under circuit law. Dkt. 86 at 17.

"reasonable belief" principle is meant to apply exactly when "chains of command are unclear." Pet. App. 93a.[3]

These particular shortcomings aside, the Solicitor General's resort to fact-specific contentions about the meaning of sentences in the Guidance or individual documents itself refutes his claims of adherence to "normal" petition-stage practice – and is fatal to the "vehicle" argument in which it appears. That the Solicitor General argues over whether (or not) the "number of tasks" Davis supervised was too "limited," U.S. Br. 18 (quoting Pet. App. 92a), quiets any suggestion that this litigation is insufficiently "concrete" or "meaningful." *Id.* at 8, 21.

II. The Considerations Favoring Review Are Decisive, In Any Event

Even if these questionable "vehicle" reservations had any force, however, the Solicitor General offers no explanation why they deserve controlling weight, as against the considerations strongly supporting review here.

The Solicitor General's brief persuasively documents – but fails to reckon with – the truly

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[3] There is ample evidence that Davis was – because of turnover (a chef was fired, and another Catering Specialist retired) and Kimes's competing responsibilities – frequently the most senior Ball State employee in Vance's workplace. See Dkt. 75-20 (noting need "to place a management person in the kitchen" and that "Betty Skinner, Catering Specialist, did oversee employees in the kitchen but she recently retired"); Dkt. 75-21 (recognizing need for "someone [in the kitchen] who is stronger * * * than the kitchen lead"); cf. *Mack* v. *Otis Elevator Corp.*, 326 F.3d 116, 120 (2d Cir. 2003) (holding that "mechanic in charge" was supervisor because higher-ranking employee "was seldom there").

significant costs of the disposition it recommends. Denying review would perpetuate widespread disuniformity on an important and recurring question of federal law. It would saddle employees (and EEOC as enforcer) in many circuits with a legal rule that, the Solicitor General recognizes, is contrary to this Court's controlling precedents and Title VII's core purposes; frustrates statutory incentives meant "to avoid harm," U.S. Br. 12; and leaves "workers vulnerable to harassment by those with the greatest day-to-day ability to create intolerable working conditions." *Ibid.*

And these costs would persist. As explained in our reply, despite the issue's importance, there is no assurance that other opportunities to correct the Seventh Court's error will soon present themselves, let alone in vehicles as suitable as this one. See Reply Br. 5-6; p. 3, *supra*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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