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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Cases—Continued: **Page(s)**

Cases—Continued: **Page(s)**

Miscellaneous:

REPLY BRIEF FOR PETITIONER

In its brief, Ball State University (BSU) recognizes that the rule of law it urged and prevailed on below, which limits vicarious liability under *Faragher* and *Ellerth* to those supervisors who can take tangible employment actions against those they harass, cannot stand. See Resp. Br. 1, 15, 16, 27, 28. It further concedes—repeatedly—that vicarious liability "may be triggered when the harassing employee has the authority to control the victim's daily work activities." *Id*. at 1-2; see also, *e.g.*, *id*. at 15, 19, 24, 26, 27, 28. And it recognizes that "[t]he test for supervisory authority is *always* met when an employee has the power to * * * *recommend* tangible employment actions against the victim," *id.* at 25 (emphasis added), in flat disagreement with Seventh and Eighth Circuit precedent, which hold that such power is never sufficient.

BSU's brief does not merely disavow the Seventh Circuit's rule, but affirmatively discredits it. That rule cannot stand, BSU explains, because it is unwarranted "[u]nder the agency principles that this Court has held govern Title VII vicarious liability," Resp. Br. 1, is "difficult to square" with *Faragher*, *ibid.*, and with "strong[] sugges[tions]" in this Court's other precedents, *id.* at 26; and is at odds with the "common sense meaning of 'supervisor,'" *ibid.*

Indeed, BSU not only recognizes the deficiencies of the Seventh Circuit's rule, but also announces its agreement with petitioner (and the United States) as to "the basic standard for supervisory status," Resp. Br. 31, which it describes as whether the harasser's

employer-given authority over the victim "materially enables the harassment," *e.g.*, *id.* at 2, 15, 16, 19, 24; cf. Pet. Br. 45-46 (urging adoption of Second Circuit's "enables or materially augments" standard). Given these developments, the course for this Court is well-marked: to answer the question presented by rejecting the Seventh Circuit's spurious rule and then to remand for the courts below to apply the correct standard.

But BSU proposes something quite different. Lest lower courts receive the wrong "signal," Resp. Br. 53, it would have this Court comb through the summary judgment record and itself attempt to apply the correct legal standard to the facts. BSU also qualifies its agreement on the governing standard by enumerating a list of "limiting principles" or "guideposts," *id.* at 31, that it insists the Court must announce to keep vicarious liability within "meaningful" bounds, provide necessary "clarity," and "vindicat[e]" the "fundamental" rules established in its prior precedents, *id.* at 38.

This Court should rebuff these requests. There is no need for this Court either to engage in extrajudicial signaling or to arbitrarily restrict the "enables or materially augments" standard for supervisory liability. The "limiting principles" BSU presses are hardly principled; they are certainly not supported (and in important respects are refuted) by precedent and agency law; and they are obviously reverse-engineered to ease the way for respondent's plea for a Supreme-Court-level summary judgment proceeding in this one case.

I. Respondent's Five Guideposts All Point In The Wrong Direction

BSU's "limiting principles" share two features. First, none is a limiting *principle* rooted in existing case law and necessary to clarify the correct legal standard. Some involve unexceptionally relevant *considerations*; some are logical inversions of valid propositions; and some would produce precisely the kind of uncertainty that BSU claims must be avoided. Second, each, like the gun that hangs on the wall in a play's first act, makes a suspiciously timely and useful reappearance in BSU's final summary judgment argument. The need they are said to serve, moreover, is illusory. The danger that employers will be held automatically liable for all employees' (or even all supervisors') actionable harassment was foreclosed by *Ellerth* and *Faragher*'s recognition of an affirmative defense. See pp. 13-14, *infra*.

1. BSU's first guidepost states that the "supervisory inquiry turns on a careful consideration of the facts and realities of the situation, not on titles, formal job descriptions, or labels." Resp. Br. 31. Petitioner agrees that "titles" and "labels" should not be determinative. A harassing "team leader" may have genuine authority over his victim in one workplace, but not in another, and a "supervisor" is not always his *victim's* supervisor. But it is notable that the EEOC Guidance says nothing disparaging about "job descriptions," as opposed to "titles" and "labels," Equal Emp't Opportunity Comm'n, Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (1999), 1999 WL 33305874, and it is hard not to see this "principle" as anything other than an attempt on

BSU's part to blunt the clear implication of its own job descriptions: that Davis supervised Vance. After all, BSU's description of Davis's position, "Catering Specialist," (1) lists under "[p]ositions [s]upervised" the roles of "Kitchen Assistants and Substitutes," which included Vance's job position from 2007 until 2009; (2) states that the "[p]osition [f]unction * * * requires leadership of * * * part-time, substitute, and student employees," which covers Vance's position before 2007; and (3) specifically lists "[l]ead[ing] and direct[ing these same] part-time, substitute, and student employee[s]" among Davis's "[d]uties/[r]esponsibilities." J.A. 12-13. The "[p]osition [d]escription" also notes, moreover, that it indicates only some examples of the position's supervisorial authority, not its full reach. J.A. 12 ("This description * * * indicate[s] the kinds of duties * * * required [and] is not intended to limit the right of any supervisor to assign, direct and control the work of an employee under his/her supervision.") (italics omitted).

Job descriptions, unlike labels or titles, are highly probative of one employee's actual authority over another. See, *e.g.*, Chamber of Commerce of the United States of America Amicus Br. 21 (Chamber Amicus Br.). They are written by employers to provide exactly "the kind of clarity" that BSU and its amici insist is "necessary to put employers and employees on notice of their legal rights and obligations." Resp. Br. 38; see also Chamber Amicus Br. 6-7.

2. BSU's second "limiting principle" would *require* that "an employee's authority to control the victim's daily work activities * * * include the power either to

materially increase the victim's workload, or to assign the victim truly undesirable tasks." Resp. Br. 32. Here too the "lower court case law" that BSU cites, Resp. Br. 16, recognizes these as relevant *considerations* in making supervisor determinations, but not criteria for exclusion. *Mack* v. *Otis Elevator Corp.*, 326 F.3d 116 (2d Cir. 2003), for example, did not, as BSU asserts, Resp. Br. 33, "require[]" these particular powers, but rather indicated that supervisory liability would apply (notwithstanding the lack of hiring or firing power) "*if*" they were present, *Mack*, 326 F.3d at 126-127 (emphasis added) (quoting *Dinkins* v. *Charoen Pokphand USA, Inc.*, 133 F. Supp. 2d 1254, 1266 (M.D. Ala. 2001)). Indeed, the very same sentence indicates that "authority to 'affect [the victim's] daily work activities'" would also suffice. *Ibid.* (quotation omitted).

Were this "guidepost" part of the rule, it would exclude many situations where one employee's authority over another enables or materially augments harassment. As the Fourth Circuit recognized in *Whitten* v. *Fred's, Inc.*, 601 F.3d 231, 246 (4th Cir. 2010), for example, the power to set a subordinate's schedule should weigh heavily in determining someone's supervisory status. "Unlike a mere co-worker," the court noted,

> [the harasser] could change [the victim's] schedule * * * on a whim. And he in fact did so, making her stay late * * * and directing her to work on a Sunday that was supposed to be her day off. [He] therefore had power and authority that made [her] vulnerable to his conduct in ways that comparable conduct by a mere co-worker would

> not. [His] authority over [her] thus aided his harassment and enabled him to create a hostile working environment.

Ibid. (internal quotation marks and citations omitted). This "guidepost" would also exclude situations where a supervisor has the power to control the physical location of another employee, enabling him to subject her to abuse without worry that others would notice or interfere, cf. *id.* at 236 (describing power of supervisor to "call[victim] into the storeroom in the back of the store"), or to humiliate her, see *EEOC* v. *CRST Van Expedited, Inc.*, 679 F.3d 657, 687-688 (8th Cir. 2012) (describing power of lead truck driver to determine that trainee must urinate in a public parking lot rather than in a bathroom at a truck rest stop).

3. BSU's next "principle" holds that an "employer is not liable when the victim is unaware of a supervisor's authority to control her daily activities." Resp. Br. 35. This is less a response to any real-world need for "clarification" and more a ham-fisted attempt to set the scene for BSU's later use of Vance's statement, misleadingly wrenched from its context in the record, that she did not "know" when Davis was a "supervisor," see pp. 21-22, *infra*. But as an abstract proposition, it is almost surely wrong. First, agency law principles treat actual and apparent authority as *alternative* grounds for imputing responsibility. Either is sufficient and neither is necessary. See 2 Restatement (Third) of Agency § 703 (2006). And in the real world, a supervisor who knows he has employer-conferred authority over a subordinate may well be emboldened in his harassment whether or not the victim is aware (or certain) of his power. Indeed,

this "principle" would seem to apply equally to harassers with unknown or incompletely understood powers to take tangible employment actions and would thus license defendants to fish for evidence of a victim's subjective understandings even under the Seventh Circuit's rule, thereby destroying the ex ante clarity that respondent and amici protest is essential.

Respondent buries in the same section of its brief an unrelated argument that a victim's "willingness to resist can establish that the harasser's authority did not materially enable the harassment." Resp. Br. 36. Unlike its other "principles," this one *can* claim support in the one lower court decision cited, *Mikels* v. *City of Durham*, 183 F.3d 323, 333 (4th Cir. 1999), but it is an approach especially deserving of this Court's rejection. It would make the "supervisor" determination depend on the sturdiness and courage of the individual victim. It would not only sacrifice respondent and its amici's purportedly cardinal virtue of ex ante clarity but would also violate the principles of *Ellerth* and *Faragher* by placing victims in a Catch-22. Victims who resist by formally complaining would, under BSU's logic, undercut any argument that their harassers were their supervisors. Yet, if they did not officially complain, the employer could escape liability by asserting the *Ellerth*/*Faragher* affirmative defense.

4. BSU's next guidepost would make "the extent to which the victim has on-the-scene access to her chain-of-command or whether the alleged harasser is the highest-ranking employee on-site" a "key factor" in determining whether the harasser is her supervisor. Resp. Br. 37. Stated as a "factor," this is unexceptionable and, in fact, supports Vance's claim.

The division head's absence from the kitchen, see J.A. 51, 78, and prolonged vacancies in the Chef and Catering Specialist positions, see J.A. 78, made Davis more threatening. Cf. *Mack*, 326 F.3d at 125 (recognizing that the harasser's authority over his target was augmented by the absence of a more senior employee). Stated as a prerequisite, however, as BSU suggests it, this guidepost is surely wrong. In *Pennsylvania State Police* v. *Suders*, 542 U.S. 129 (2004), for example, this Court recognized that Title VII applied supervisory liability standards not only to the actions of the highest-ranking employee on-site, the "Station Commander," but also to those of two lower "supervisors." *Id*. at 134. The lack of on-site recourse may make harassment worse, but on-site availability of higher-ranking supervisors does not mean that lower-level supervisors' powers over their victims do not aid their harassment.

5. BSU's final proposed guidepost, one pressed expansively by its amici, holds that "if an employee is only temporarily authorized to direct the daily work activities of another, the employer is vicariously liable only for unlawful harassment that occurs during that temporary period." Resp. Br. 37 (quoting U.S. Br. 28). Respondent supports its argument in only a single sentence that it deems "obviously" correct: "Supervisory authority that the harasser does not possess when he commits the harassment obviously cannot materially enable that same harassment." *Ibid*.

Pace respondent, that claim is demonstrably false. Supervisory authority that the harasser will enjoy over his victim *in the future* can enable or materially augment his harassment of her in the present. If a

victim knows that another employee can assign her to "clean the toilets," *Faragher*, 524 U.S. at 780, tomorrow, she will fear that employee's power today.

Several of respondent's amici take this nexus argument further still, insisting that vicarious liability should be limited to harassment that was *both* perpetrated by the victim's supervisor *and* "aided by his [supervisory] relationship." See, *e.g.*, Amicus Br. of American Council on Education 18 (arguing that plaintiffs should be required to show the "existence of a nexus between the harasser's authority and the resulting harassment"). Such a rule would have two effects. A company president who repeatedly scribbled a swastika on his Jewish employee's locker would be considered a "co-worker" because a common worker could do the same and a supervisor who had the power to make another employee "clean the toilets for a year," *Faragher*, 524 U.S. at 780, would be considered a "co-worker" so long as he did not make that threat explicit. But *Faragher* expressly rejected "requiring active or affirmative, as distinct from passive or implicit, misuse of supervisory authority," *id.* at 804, in large part because requiring it would destroy the clarity that BSU and its amici insist is so important and make "the temptation to litigate * * * hard to resist," *id.* at 805. "[P]laintiffs and defendants alike," the Court noted, "would be poorly served by an active-use [of authority] rule." *Ibid.* The proper way to accommodate the employer's interests, it held, was *Ellerth*'s affirmative defense. *Id.* at 805-808.

The Court should reject all of BSU's carefully gerrymandered "guideposts." They not only are unnecessary but, in fact, disserve the very interest in

predictability that BSU and its amici assert is "critical." Resp. Br. 38; see, *e.g.*, Chamber Amicus Br. 6.

II. The Seventh Circuit Rule Is, As Both Parties Recognize, Indefensible

While BSU now rejects the rule of law on which it prevailed below, some of its amici argue that the Seventh Circuit's rule is correct. These amici do not grapple with the many legal deficiencies identified in petitioner's opening brief, that of the United States, and, most notably, the brief of respondent. Indeed, their "arguments" are remarkably thin, consisting of (1) a purported demonstration that the Seventh Circuit rule is not "foreclosed" by the holding in *Faragher* and (2) many pages of often facially implausible ipse dixit about the benefits of the clarity the Seventh Circuit's rule would supposedly provide.

A. The Seventh Circuit's Rule Is Irreconcilable With *Faragher* And Other Governing Precedent

1. Rather than contend that this Court's decisions in *Faragher* and *Ellerth* actually *support* the Seventh Circuit's test, the most prominent amicus proponent of that rule, the U.S. Chamber of Commerce, argues a much smaller point: that this Court's disposition in *Faragher*, directing judgment under the newly-formulated supervisor rule for harassment by Silverman, who lacked any power to take tangible employment actions, "does not preclude" the Seventh Circuit rule because the employer in that case did not dispute that Silverman was a "supervisor." Chamber Amicus Br. 17.

That proposition is, on its own narrow terms, somewhat arresting. According to the Chamber, this Court would have granted judgment to the City of Boca Raton on the issue of its vicarious liability for Silverman's harassment if only it had claimed Silverman was not a "supervisor."

That argument has no merit. The question whether the actions of Silverman and Terry gave rise to employer liability, that is, whether they were "supervisors" under *Ellerth* and *Faragher*, did not "lurk" in the background of the case, as the chief amicus claims. Chamber Amicus Br. 19. It was full front and center. This Court did not answer the abstract legal question of how to treat harassment by "supervisors" and then assume its rule applied to whomever the parties or lower courts assumed met that description. On the contrary, the Court's opinion made clear that the particular facts of the case were "circumstances under which [the] employer may be held liable under Title VII." *Faragher*, 524 U.S. at 780. The Court set out in precise detail the authority over Ms. Faragher that the employer had given—and not given—each harasser; it developed, explained, and applied its rule with reference to the workplace authority both employees possessed; and it directed judgment against the employer based on these individuals' particular supervisory powers.

The Court's acceptance in *Faragher* that Terry and Silverman were "supervisors" indicates no casualness on its part, but rather confirms that it did not intend "supervisor" to be a narrow term of art. As the facts of that case vividly illustrate, a superior's power to direct a subordinate's daily work activities,

like the power to hire or fire her or set her wages, can enable or materially augment invidious harassment.

2. Regardless whether the *holding* in *Faragher* dooms the Seventh Circuit rule, the *reasoning* of that case, of *Ellerth*, and of subsequent decisions certainly does. As petitioner, respondent, and the United States agree, supervisory liability should extend equally to those who oversee their victims every day and to those who can hire or fire them. Both have employer-conferred power to coerce their subordinates' obedience and deter complaint. And as petitioner has explained, Pet. Br. 34-37, this Court's later decisions in *Burlington N. & Santa Fe Ry. Co.* v. *White*, 548 U.S. 53 (2006), and *Staub* v. *Proctor Hosp.*, 131 S. Ct. 1186 (2011), make that even plainer. Actionable harassment by a supervisor who has power to take actions that would "dissuade[his victim] * * * from making or supporting a charge of discrimination," *Burlington N.*, 548 U.S. at 68 (citations omitted), implicates the central concerns of the *Faragher*/*Ellerth* rule, as does harassment by one who can effectively recommend, but not personally effect, his subordinate's termination, see *Staub*, 131 S. Ct. at 1193.

B. Even "Considered Fresh," There Is No Valid Reason For Adopting The Seventh Circuit's Arbitrary Restriction

Even "consider[ed] fresh," Chamber Amicus Br. 4, there is no reason to adopt the Seventh Circuit's rule and many good reasons to reject it. Amici's attempts to support the rule consist largely of dramatic assertions about the consequences of adopting the Second Circuit's "enable or materially augment" standard. That standard, they argue, will expose

employers to "automatic liability" for "alleged harassment" and "provide employers virtually no guidance" and "little incentive to undertake prevention efforts." *Id.* at 3, 20. By contrast, the Seventh Circuit rule, they insist, will enable employers to "identify" precisely that subset of supervisors whose harassment would trigger vicarious liability and thus permit employers to direct scarce "screening, training, and monitoring" to "where they will do the most good." *Id.* at 5, 10.

1. Many of these claims are implausible and illogical on their face and none has any empirical support. Respondent's amici offer no evidence that what they insist *would* happen, were the Seventh Circuit rule rejected, actually *has* happened in the many years the EEOC Guidance and Second Circuit rule have been in place. They cite no evidence that Title VII hostile environment cases have flooded district courts in the Second Circuit; that litigation there has been more complex than in the Seventh Circuit; or that employers' prevention efforts are less effective there. And amici identify no actual Second Circuit decision that illustrates the many vices they claim attend the Second Circuit rule. No employer has, in fact, sought this Court's review of a Second Circuit decision since *Mack*, 326 F.3d 116, cert. denied, 540 U.S. 1016 (2003).

The reasons why respondent can offer no evidence or case support are many. First, because employer responsibility is only one element of a hostile environment claim, even adopting the most employee-friendly "supervisor" rule would not induce plaintiffs to file frivolous suits. Second, *Ellerth* and *Faragher*'s affirmative defense provides employers

great protection. To avoid liability for harassment by a supervisor who took no tangible employment actions against his victim, the employer need show only "(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 765; *Faragher*, 524 U.S. at 807. Third, the Seventh Circuit rule lacks many of the virtues respondent's amici attribute to it. In particular, it hardly streamlines litigation. As the Chamber itself recognizes, in cases where the harasser is deemed a "co-worker" rather than a "supervisor," courts must "proceed to determine whether the plaintiff has proven the employer's negligence." Chamber Amicus Br. 14. That inquiry is more, not less, complex than imputing vicarious liability.

2. The Chamber's only real argument in favor of the Seventh Circuit rule is that its "bright-line * * * provid[es] employers with clear guidance as to who wields the power that, if abused, may subject employers to automatic liability [and thereby gives employers] more incentive to screen, train, and monitor those employees, and to do so effectively." Chamber Amicus Br. 3. That argument, however, cannot withstand scrutiny. First, it defies common sense that a standard making it *harder* for victims to recover for actionable harassment by those who wield power over them would provide employers with a *greater* "incentive" to take care that those with employer-conferred power wield it appropriately.

Second, the Seventh Circuit rule does not provide the "bright-line" clarity that respondent's amici believe it does. The Seventh Circuit has noted that under its rule the negligence standard "implicitly impose[s] on the employer a higher duty of care to protect its employees against those employees whom the employer has armed with authority, *even if it is less than the authority that triggers the employer's strict liability*" for harassment by a "supervisor." *Doe* v. *Oberweis Dairy,* 456 F.3d 704, 717 (7th Cir. 2006) (emphasis added). "How much greater [care]," it added, "will normally be a jury question." *Ibid.* This ex post jury-determined sliding scale of duty hardly provides the ex ante clarity amici claim for the Seventh Circuit rule.

Third, respondent's amici's argument rests on an unfounded assumption: that the Seventh Circuit rule identifies "those employees most likely to wield, and potentially abuse, the 'official power of the enterprise.'" Chamber Amicus Br. 5 (quoting *Faragher*, 524 U.S. at 762). The reverse is true, in fact. The Seventh Circuit rule identifies only employees who have the power to take tangible employment actions against others. They may work in distant human resources departments and have no day-to-day contact with or even know those below them in the field. On the other hand, the rule excludes those superiors who do have daily contact with their subordinates and can command their presence and retaliate against them through unpleasant assignments or scheduling. Surely the latter, not the former, represent the greater concern. They, after all, have much more opportunity and effective power to harass and are thus "mo[re] likely

to abuse the official power of the enterprise." *Id*. at 10.

Fourth, amici's argument rests on a further unfounded assumption: that the Second Circuit rule would lead to "scattershot compliance measures inevitably * * * less effective than * * * more thorough compliance measures aimed at * * * traditional supervisors." Chamber Amicus Br. 10. They offer no evidence that employer compliance measures in the Seventh Circuit are "more thorough" and less "scattershot" than in the Second. And there is no reason why they should be. Supervisors of any stripe require no extensive, highly specialized training to refrain from harassing their subordinates.

Furthermore, the clarity amici seek would come at some cost. It would lead employers to take action not necessarily to prevent *harassment*, but to prevent *liability*. By reserving the power to take tangible employment actions to individuals in central headquarters, employers could easily insulate themselves from liability for harassment by supervisors in the field. As several Seventh Circuit judges have noted,

> to the extent that employers with multiple worksites vest the managers of such sites with substantial authority and discretion to run them but reserve formal employment authority to a few individuals at central headquarters, our standard may have the practical, if unintended, effect of insulating employers from liability for harassment perpetrated by their managers.

Rhodes v. *Ill. Dept. of Transp.*, 359 F.3d 498, 510 (7th Cir. 2004) (Rovner, J., specially concurring); see

Phelan v. *Cook Cnty.*, 463 F.3d 77, 784 (7th Cir. 2006) (criticizing as "an odd result [that] an employer could escape the possibility of strict liability for supervisor harassment simply by scattering supervisory responsibilities amongst a number of individuals, creating a Title VII supervisory Hydra").

3. It is hard to know what to make of amici's bold claim that the Seventh Circuit rule better reflects "[t]he realities of today's workplace." Chamber Amicus Br. 6. Although judges on the Seventh Circuit itself have applied the rule as a matter of stare decisis, they have criticized it, in fact, for "not comport[ing] with the realities of the workplace." *Rhodes*, 359 F.3d at 510 (Rovner, J., concurring in part and concurring in judgment). And surely any increasing diversity of workplace arrangements, Chamber Amicus Br. 5, would favor a rule that looks to the amount, not the formal type, of power the employer has given the harasser over his victim.

III. This Court Should Remand For Proper Application Of The *Ellerth*/*Faragher* Rule

Despite conceding that the courts below applied the wrong legal standard, BSU implores this Court to send a "signal" by itself applying the new legal standard to the record developed under the erroneous one. Resp. Br. 53. This Court does not, however, ordinarily apply new legal rules to uncertain facts, scour records, and consider summary judgment motions in the first instance, let alone send "signal[s]." It decides the law, see *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), and should reject BSU's request for extrajudicial succor.

When this Court determines that a case was litigated and decided under an incorrect legal standard, it nearly always remands for the lower courts to apply the newly adopted legal standard. See generally *Malat* v. *Riddell*, 383 U.S. 569, 572 (1966) ("Since the courts below applied 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. * * * [T]he 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."); see also, *e.g.*, *Allison Engine Co., Inc.* v. *United States*, 553 U.S. 662, 673 (2008); *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 329 (2007); *Rapanos* v. *United States*, 547 U.S. 715, 757 (2006) (opinion of Scalia, J.); *Johnson* v. *California*, 543 U.S. 499, 515 (2005); *Consol. Rail Corp.* v. *Gottshall*, 512 U.S. 532, 557-558 (1994); *Lucas* v. *S.C. Coastal Council*, 505 U.S. 1003, 1032 (1992); *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986); accord U.S. Br. 32 (collecting cases) ("The Court's usual practice * * * is to remand to the lower courts to apply the correct standard as announced by this Court.").

Remanding after adopting a new legal standard is the customary practice for two good reasons: it serves "the ends of justice," *Kelley* v. *S. Pac. Co.*, 419 U.S. 318, 333 (1974) (Stewart, J., concurring in judgment), by ensuring that the parties have a fair opportunity to litigate their case under the correct legal framework, see *Hertz Corp.* v. *Friend*, 130 S. Ct. 1181, 1195 (2010), and it promotes "the efficient allocation of judicial resources," *Kelley*, 419 U.S. at 333. This Court "is a court of final review and not first view," *Zivotofsky* v. *Clinton*, 132 S. Ct. 1421,

1430 (2012) (citation omitted), and "factfinding is the basic responsibility of district courts, rather than appellate courts," *DeMarco* v. *United States*, 415 U.S. 449, 450 n.* (1974) (per curiam). "As a practical matter," moreover, "it is impossible for any member of this Court to make the kind of conscientious and detailed examination of the record that" a district court would. *United States* v. *Hasting*, 461 U.S. 499, 517 (1983) (Stevens, J., concurring in judgment). And, practical considerations aside, it can "insult * * * the Court of Appeals to imply * * * that it cannot be trusted with a task that would normally be conducted on remand." *Ibid.*

Remand is especially appropriate when, as here, the record was developed under an "erroneous view of the law." *Pullman-Standard* v. *Swint*, 456 U.S. 273, 291 (1982); see also *id.* at 300 (Marshall, J., dissenting) ("Having found that the District Court's findings * * * were made under an erroneous view of controlling legal principles, the Court of Appeals was *compelled* to set aside those findings."). Indeed, that rule exists because it is impossible for the reviewing court to be confident that legal error did *not* affect the record in any given case. Remanding leaves such determinations to the courts best positioned to make them and preserves their discretion to permit parties to supplement the record. See *Ellerth*, 524 U.S. at 766 ("On remand, the District Court will have the opportunity to decide whether it would be appropriate to allow Ellerth to amend her pleading or supplement her discovery.").

To be sure, this Court does not lack the *power* to affirm a judgment after rejecting the legal standard on which it was based—or even to do so on a ground

that was not argued or considered below. But instances of it exercising that power are rare and reserved for exceptional circumstances. Respondent's paucity of supporting authority is unsurprising. Fed. R. Civ. P. 56(f) forbids *district courts* from "grant[ing summary judgment] on grounds not raised by a party" without first giving the non-moving party "notice and a reasonable time to respond." Respondent asks this Court, however, to do exactly what the district court itself could not do—to grant summary judgment under a new legal rule when the facts are highly disputed and were not developed under that standard. This Court should not accept its invitation.

Because BSU's original summary judgment brief offered scant argument that Davis was not Vance's supervisor *under even the incorrect legal standard*, remand is particularly appropriate. BSU's opening brief in support of summary judgment is thirty-five pages long. Of those pages, BSU's whole argument that Davis did not supervise Vance consists of a single textual sentence stating that "Saundra Davis is not a supervisor," Defs.' Br. Supp. Summ. J. 30, and a footnote that references the Seventh Circuit's standard, *id*. at 30 n.12. Its reply brief, addressing evidence Vance raised in opposition that Davis did indeed supervise her, concedes that Davis "le[]d and direct[ed] by * * * [o]versight," Defs.' Opp. to Pltf.'s Cross-Mot. for Summ. J. and Reply Br. in Supp. of Mot. for Summ. J. 17 (internal quotation marks omitted) (Defs.' Summ. J. Reply), but argues that "[n]o 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," *ibid.*

(citation omitted). The sum total of BSU's argument for summary judgment on this point, in other words, was that Seventh Circuit precedent foreclosed Davis from being considered Vance's supervisor no matter how much day-to-day leading and direction through oversight Davis performed.

BSU's primary argument against remand in this Court rests on five words plucked from petitioner's approximately 23,000-word deposition. See Resp. Br. 52 (arguing that "petitioner has already testified that she '*d[id] not know*' and was '*not sure*' whether Davis was her supervisor") (quoting J.A. 197-198) (emphasis added). When asked during her deposition whether "Saundra Davis is your supervisor," Vance replied "one day she's a supervisor; one day she's not. One day she's to tell people what to do, and one day she's not. It's inconsistent. So I don't know what she is." J.A. 197. When asked further "are you telling me that at times, intermittently, once in a while, she was your supervisor, or she was the supervisor of others or -- I'm not sure what your answer is," she responded "[the employees a]re not sure either." *Id*. at 198. And when asked "You don't know if she was or wasn't your supervisor," she explained "No. Because Bill [Kimes, the division head,] said one day she is and one day she's not." *Ibid*. The context from which BSU wrenches Vance's words reveals that she was trying to respond as carefully and accurately as possible and, in particular, trying to understand what BSU's lawyer meant by the question. She was unsure of what technical nomenclature to apply to Davis for two reasons: (1) because some days Davis would "tell people what to do" and some days she would not (Vance never indicated, moreover, that on those latter occasions Davis did not have *authority* to

"tell people what to do"), and (2) because Kimes, the head of the division, told all employees that Davis was their supervisor on some occasions and not others. Far from indicating uncertainty over whether Davis could and did supervise her, her full testimony indicates that Davis could and often did.

BSU's reliance on this excerpt is not only surprising, but also newfound. It never argued that Vance "'d[id] not know' and was 'not sure' whether Davis was her supervisor," Resp. Br. 52, before either the district court, see Defs.' Br. Supp. Summ. J. 30; Defs.' Summ. J. Reply 17, or the court of appeals, see Resp. C.A. Br. 33.

While it is improper for BSU to ask this Court for summary judgment on a ground not argued below and for petitioner to exhaustively marshal record evidence to oppose it, petitioner would point out that even a cursory examination of the record reveals a "genuine dispute as to * * * material fact," Fed. R. Civ. P. 56(a), that would preclude summary judgment. Consider evidence from just three of the many sources in the present record. First, BSU's own description of Davis's position clearly gave her the power to oversee and direct Vance during the time both served in the kitchen, see p. 4, *supra*, as BSU conceded in the district court, see *id.* at 20; Defs.' Summ. J. Reply 17 (conceding Davis "le[]d and direct[ed Vance] by * * * oversight"). Second, Kimes, the head of Vance and Davis's division, stated (1) that Davis "ha[d] given direction" to Vance, J.A. 67, (2) that he knew that "Davis * * * delegat[ed] jobs to [Vance] in the kitchen," Ball State Internal Documentation Form, Dkt. No. 59-16, at 2, (3) that Davis "direct[ed] and le[]d" other employees in the

kitchen, J.A. 367, and (4) that Davis's status as kitchen management was "complicated" because after Vance filed her complaint he could no longer "have [Davis] directing certain people. I mean, I can't have her directing Maetta [Vance]," *ibid.* In his deposition, Kimes resisted characterizing Davis as a "supervisor" only because he carefully parsed "the difference between directing, leading and supervising," *ibid.*, and believed that Davis did not meet the Seventh Circuit's standard for the last term, *ibid.* ("Supervising is * * * an authority to discipline."). Third, Vance repeatedly described Davis as her supervisor even before she filed her suit. See J.A. 28 (stating that "Davis * * * came back as a supervisor only to start the intimidation again"); *id.* at 45 (listing Davis as a "Kitchen Supervisor"). Such evidence is non-exhaustive but sufficient to preclude summary judgment.

Conclusion

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

Respectfully submitted.

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