No. 11-556

In the Supreme Court of the United States

MAETTA VANCE, PETITIONER

v.

BALL STATE UNIVERSITY

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

BRIEF OF THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT AND THE COLLEGE AND UNIVERSITY PROFESSIONAL ASSOCIATION FOR HUMAN RESOURCES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether an employer may be held vicariously liable under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*., when the agency relationship between the employer and the alleged harasser did not assist the alleged harasser in creating a hostile work environment.

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INTEREST OF *AMICI CURIAE*

Amicus curiae the Society for Human Resource Management (SHRM) is the world's largest association devoted to human resources management. SHRM represents over 250,000 human resources professionals who make up its membership. The purposes of SHRM, as set forth in its bylaws, are to promote the use of sound and ethical human resources management practices in the profession, and to (a) be a recognized world leader in human resources management; (b) provide high-quality, dynamic, and responsive programs and service to its customers with interests in human resources management; (c) be the voice of the profession on human resources management issues; (d) facilitate the development and guide the direction of the human resources profession; and (e) establish, monitor, and update standards for the profession. Founded in 1948, SHRM currently has more than 575 affiliated chapters within the United States and members in more than 140 countries.[1]

Amicus curiae the College and University Professional Association for Human Resources (CUPA-HR) serves as the voice of human resources in higher education, representing more than 15,000 human resources professionals at over 1,800 colleges and

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[1] No counsel for a party authored this brief in whole or in part. No person other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Petitioner and respondent have filed letters with the Clerk granting blanket consent to the filing of *amicus* briefs.

universities across the country, including 92 percent of all United States doctoral institutions, 75 percent of all master's institutions, 60 percent of all bachelor's institutions, and nearly 600 two-year and specialized institutions. Higher education employs over 3.7 million workers nationwide, with colleges and universities in all 50 States.

SHRM, CUPA-HR, and their respective members have a substantial interest in the outcome of this case. Human resources professionals perform a vital function in helping to ensure that employers comply with Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on race, color, religion, sex, and national origin. 42 U.S.C. § 2000e-2(a). Among other things, human resources professionals develop policies, conduct employee training, and administer effective reporting mechanisms to prevent workplace discrimination. If problems arise, human resources professionals are often responsible for conducting orderly investigations and, where appropriate, taking corrective action. In short, human resources professionals serve on the frontlines of combating workplace discrimination in all its forms.

The Court has held that an employee may establish a Title VII violation by proving that discrimination in the workplace created a hostile work environment. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66 (1986). In *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998), the Court found that "[a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor

with immediate (or successively higher) authority over the employee."

Although the Court did not define what qualifies an individual as a "supervisor" for purposes of imposing vicarious liability, a finding of supervisory status has significant consequences for employers. In cases of harassment by co-workers instead of supervisors, the plaintiff must prove that the employer was itself negligent in that it knew or reasonably should have known about the harassment and failed to stop it. *Ellerth*, 524 U.S. at 766. That requirement is not imposed on plaintiffs in cases involving supervisors. Instead, an employer may be held vicariously liable for the conduct of supervisors under certain circumstances.

Even if supervisory status is established, the legal standard for imposing vicarious liability varies depending on whether a "tangible employment action" was taken against the employee. *See id.* at 761 (defining a "tangible employment action" as a "significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits"). If no tangible employment action was taken, the employer may assert an affirmative defense with two elements: (1) "that the employer exercised reasonable care to prevent and correct promptly any harassing behavior," and (2) "that the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Id.* at 765. The affirmative defense is unavailable where a tangible employment action was taken against the employee. *Id.*

The power to identify supervisory status is also important to human resources professionals. For a variety of reasons, including possible vicarious liability for workplace harassment, human resources professionals apply stricter standards when screening candidates for supervisory positions. Human resources professionals often help ensure that supervisors receive additional training commensurate with their level of authority and ability to bind the organization.

SUMMARY OF ARGUMENT

In this case, petitioner Maetta Vance sued respondent Ball State University, claiming that she was subjected to a racially hostile work environment while working in Ball State's catering department. In affirming the district court's grant of summary judgment in favor of Ball State, the United States Court of Appeals for the Seventh Circuit held that no question of material fact existed that Saundra Davis, who Vance alleged was a "supervisor" responsible for creating a racially hostile work environment, was a co-worker of Vance and not a supervisor. Pet. App. 11a-14a. The Seventh Circuit based its decision on the fact that Vance failed to produce any evidence that Davis had the authority to hire, fire, demote, promote, transfer, or discipline any employee, let alone Vance. Pet. App. 12a-13a. Treating Davis under the negligence standard for co-worker harassment, the Seventh Circuit found that Ball State was not directly liable for Davis's alleged conduct because Ball State promptly investigated each of Vance's complaints and took disciplinary action when appropriate. Pet. App. 15a-16a.

The Seventh Circuit's judgment should be affirmed for two reasons in addition to those stated in Ball State's brief.

First, the logical foundation for imposing vicarious liability under Title VII is missing from this case. In crafting the vicarious liability rule of *Ellerth* and *Faragher*, the Court based its analysis on Restatement (Second) of Agency § 219(2)(d) (1958), which provides that an employer is subject to liability for the torts of an employee acting outside the scope of his or her employment if the employee "was aided in accomplishing the tort by the existence of the agency relation." No credible argument can be made that the agency relationship between Ball State and Davis aided Davis in harassing Vance. Ball State did not give Davis any meaningful authority *vis-à-vis* Vance, let alone authority that was abused by Davis to create a hostile work environment. Nor was there ever any threat (explicit or implicit) that any authority given to Davis by Ball State would be abused if Vance complained to her actual supervisors. Instead, the record demonstrates that Vance and Davis treated each other as co-workers, a conclusion bolstered by Vance's own willingness to complain to her actual supervisors regarding Davis's alleged conduct.

Second, the Equal Employment Opportunity Commission's Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors (EEOC Guidance), Pet. App. 81a-93a, is not entitled to judicial deference under the "power to persuade" standard of *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). In relevant part, the EEOC Guidance claims that merely having the intermittent authority to direct another employee's daily work

activities makes a person a "supervisor" sufficient to trigger the vicarious liability rule of *Ellerth* and *Faragher*. Importantly, however, the EEOC Guidance bases its assertion, not on an interpretation of Title VII's language, but on an interpretation of the Court's decision in *Faragher*. Agency interpretations of judicial precedent are not entitled to any level of deference, for the interpretation of judicial precedent is quintessentially a judicial function. Even if *Skidmore* deference applied, the EEOC Guidance does not have the power to persuade because it disregards essential facts from *Faragher*, including that the harasser in question had virtually unchecked authority over his victim, directly controlling and supervising all aspects of her day-to-day activities in a work environment completely isolated from higher management. Those facts are not present in this case.

ARGUMENT

I. THE LOGICAL FOUNDATION FOR IMPOSING VICARIOUS LIABILITY UNDER TITLE VII IS MISSING FROM THIS CASE

A. The Rule of Vicarious Liability Established by *Ellerth* and *Faragher* Is Based on the Restatement (Second) of Agency's "Aided in Accomplishing" Standard

Ellerth and *Faragher* were decided on the same day and repeat the same holding. *Compare Ellerth*, 524 U.S. at 765, *with Faragher*, 524 U.S. at 807. That holding is derived from Restatement (Second) of Agency § 219(2)(d). *Compare Ellerth*, 524 U.S. at 760-63, *with Faragher*, 524 U.S. at 801-03. In relevant part, § 219(2)(d) provides that an employer is

vicariously liable for the torts of an employee acting outside the scope of his or her employment if the employee "was aided in accomplishing the tort by the existence of the agency relation."

In *Faragher*, for example, the victim of harassment argued that the agency relationship between her employer and her two male harassers aided the harassers in creating a sexually hostile work environment. 524 U.S. at 801. Supervisors, she asserted, "can abuse their authority to keep subordinates in their presence while they make offensive statements, and that they implicitly threaten to misuse their supervisory powers to deter any resistance or complaint." *Id.* That, in turn, enabled the two harassers to "act for so long without provoking defiance or complaint." *Id.*

The Court agreed, finding that the Restatement's "aided in accomplishing" standard provides an appropriate starting point to determine vicarious liability under Title VII. *Faragher*, 524 U.S. at 802. "In a sense," the Court explained, "most workplace tortfeasors are aided in accomplishing their tortious objective by the existence of the agency relation: Proximity and regular contact may afford a captive pool of potential victims." *Ellerth*, 524 U.S. at 760. However, proximity and regular contact were not enough to satisfy the "aided in accomplishing" standard. Instead, the Court found that the standard "requires the existence of something more than the employment relation itself." *Id.* As the Court explained in *Faragher*:

> When a person with supervisory authority discriminates in the terms and conditions of subordinates' employment, his actions necessarily draw

> upon his superior position over the people who report to him, or those under them, whereas an employee generally cannot check a supervisor's abusive conduct the same way that she might deal with abuse from a co-worker. When a fellow employee harasses, the victim can walk away or tell the offender where to go, but it may be difficult to offer such responses to a supervisor . . . .

Id. at 803.

The Court identified the class of cases in which the "aided in accomplishing" standard is always satisfied: "when a supervisor takes a tangible employment action against the subordinate." *Ellerth*, 524 U.S. at 760. In those cases, "there is assurance the injury could not have been inflicted absent the agency relation." *Id.* at 761-62. "Tangible employment actions fall within the special province of the supervisor. The supervisor has been empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control." *Id.* at 762. Therefore, a "tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer." *Id.*

The Court found it "less obvious" whether the "agency relation aids in commission of supervisor harassment which does not culminate in a tangible employment action . . . ." *Id.* at 763. "On the one hand, a supervisor's power and authority invests his or her harassing conduct with a particular threatening character, and in this sense, a supervisor always is aided by the agency relation. . . . On the other hand, there are acts of harassment a supervisor might commit which might be the same acts a coemployee would commit, and there may be some cir-

cumstances where the supervisor's status makes little difference." *Id.*[2]

B. No Credible Argument Can Be Made That the Agency Relationship Between Ball State and Davis Aided Davis in Allegedly Creating a Hostile Work Environment

As Vance recognizes, the "primary concerns that led to vicarious employer liability for harassment by supervisors" are that "such workplace misconduct is aided by the agency relation, which affords supervisors contact with their victims and makes it more difficult for targets to 'walk away' from or 'blow the whistle' on those who harass them . . . ." Pet. Br. 16. The record in this case, however, demonstrates that no aspect of the agency relationship between Ball State and Davis—other than the mere fact that Davis was employed by Ball State, which placed Davis in physical proximity to Vance—aided Davis in

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[2] The Restatement's authors omitted the "aided in accomplishing" standard eight years after *Ellerth* and *Faragher* were decided. *See* 2 Restatement (Third) of Agency § 7.08 cmt. b at 228 (2006) ("This Restatement does not include 'aided in accomplishing' as a distinct basis for an employer's (or principal's) vicarious liability. The purposes likely intended to be met by the 'aided in accomplishing' basis are satisfied by a more fully elaborated treatment of apparent authority and by the duty of reasonable care that a principal owes to third parties with whom it interacts through employees and other agents."). At the time, the Restatement's authors explained that an employer's liability for an employee's tortious conduct toward another employee was a topic being considered for inclusion in the Restatement (Third) of Employment Law, *see* 2 Restatement (Third) of Agency § 7.07 cmt. a at 199, a final version of which has not yet been published.

allegedly creating a hostile work environment. For example, the record contains no evidence that Davis threatened Vance, either explicitly or implicitly, with the abuse of any authority Ball State allegedly gave Davis. Nor is there any evidence that the conduct Vance alleges is "supervisory" is the type of conduct a human resources professional would be called upon to approve or disapprove on behalf of the employer.

The record also reflects that Vance had no trouble complaining to her actual supervisors regarding Davis's alleged conduct. *See, e.g.*, J.A. 21-26 (Ball State's internal investigation form related to incident in elevator where Davis allegedly threatened to strike Vance), 44-47 (formal written complaint filed by Vance with Ball State's compliance office regarding same). In other words, Davis's alleged supervisory status made little difference in their relationship, as Vance had no trouble telling Davis "where to go" and vice versa. *See, e.g.*, J.A. 23-26 (describing conflicting allegations that Vance and Davis exchanged insults); *see also Mikels v. City of Durham*, 183 F.3d 323, 334 (4th Cir. 1999) ("[W]here the level of authority had by a harasser over a victim—hence her special vulnerability to his harassment—is ambiguous, the tip-off may well be in her response to it. Does she feel free to 'walk away and tell the offender where to go,' or does she suffer the insufferable longer than she otherwise might?").

Vance's own equivocal answers as to whether she viewed Davis as a "supervisor" confirm that the authority Ball State allegedly gave Davis did not aid Davis in harassing Vance. *See* J.A. 197 (deposition testimony in which Vance stated "I don't know what she is" when asked whether Davis was a supervisor);

cf. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-22 (1993) (explaining that to be actionable under Title VII, a sexually objectionable work environment must be both objectively and subjectively offensive, i.e., one that a reasonable person would find hostile or abusive, and one that the victim in fact perceived to be so). At most, the agency relationship between Ball State and Davis placed Davis in physical proximity to Vance, which is insufficient to satisfy the Restatement's "aided in accomplishing" standard. *Ellerth*, 524 U.S. at 760. It should also be insufficient to put the employer at risk for conduct that, without an internal complaint by the alleged victim, would not come to the attention of human resources professionals for investigation and appropriate remedial action.

Accordingly, the Seventh Circuit's judgment should be affirmed because the authority Ball State supposedly delegated to Davis in no way aided Davis in creating a hostile work environment.

II. THE EEOC GUIDANCE IS NOT ENTITLED TO *SKIDMORE* DEFERENCE

Acting as an *amicus curiae* in support of neither party, the United States argues at length that the Court should defer to the EEOC Guidance's definition of "supervisor" under the "power to persuade" standard of *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *See* Br. of United States as *Amicus Curiae* 26-29 ("U.S. Br."); *see also* Br. of Nat'l Employment Lawyers Ass'n et al. as *Amici Curiae* 26-30 (repeating deference argument); Br. of Nat'l P'ship for Women & Families et al. as *Amici Curiae* 14 (same); Pet. Br. 47 n.12 (same). No deference is owed for two independent reasons. First, because the EEOC Guid-

ance's definition of "supervisor" is based on an interpretation of the Court's decision in *Faragher* and not on Title VII itself, the EEOC Guidance cannot qualify for *Skidmore* deference. Second, even if an agency interpretation of judicial precedent could qualify for *Skidmore* deference, the EEOC Guidance lacks the power to persuade because it misinterprets *Faragher*.

A. *Skidmore* Deference Does Not Apply to Agency Interpretations of Judicial Precedent

In relevant part, the EEOC Guidance asserts that a "supervisor" includes anyone who has the "authority to direct the employee's daily work activities." Pet. App. 90a. Importantly, however, that aspect of the EEOC Guidance is not based on an interpretation of statutory language. Title VII, after all, does not even use the word "supervisor," a fact expressly noted in the EEOC Guidance itself. *See* Pet. App. 88a ("The federal employment discrimination statutes do not contain or define the term 'supervisor.'").

Rather than being based on an interpretation of statutory language, the EEOC Guidance's "daily work activities" test is based on an interpretation of the Court's decision in *Faragher*. *See* Pet. App. 91a-92a. The EEOC admitted that fact when it rescinded certain regulations following the issuance of *Faragher* and *Ellerth*. *See* Final Rule, Sex Discrimination Guidelines and National Origin Discrimination Guidelines, 64 Fed. Reg. 58,333 (Oct. 29, 1999) (explaining, in the course of rescinding pre-*Faragher* and *Ellerth* regulations, that the EEOC Guidance "interpret[s] those decisions and explain[s] the circumstances under which employers are vicariously

liable for unlawful harassment by supervisors"); *see also* 29 C.F.R. § 1604.11 app. A (2012) (explaining that the EEOC Guidance "examines the *Faragher* and *Ellerth* decisions and provides detailed guidance on the issue of vicarious liability for harassment by supervisors"); U.S. Br. 10 (arguing that the EEOC "thoroughly considered the Court's decisions in *Faragher* and *Ellerth* in forming its position").[3]

The Court has held that agencies are entitled to judicial deference when they interpret ambiguous statutes Congress has entrusted the agencies to administer. *See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984); *Skidmore*, 323 U.S. at 140. The same is true when agencies interpret their own ambiguous regulations. *See Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012); *Auer v. Robbins*, 519 U.S. 452, 461-62 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

At the same time, the Court has never condoned giving *any* level of deference to agency interpretations of judicial precedent. *See, e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706-07 (2012) (unanimously rejecting EEOC interpretation of Supreme Court precedent

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[3] At one point in its brief, the United States appears to suggest that the EEOC Guidance's "daily work activities" test constitutes an administrative interpretation of Title VII itself. *See* U.S. Br. 26 (citing *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986)). An examination of the Guidance's plain language demonstrates that any such suggestion is incorrect, as the EEOC expressly based its test on an interpretation of *Faragher*. *See* Pet. App. 91a-92a.

without any indication such interpretations could qualify for judicial deference). Federal appellate courts have consistently rejected agencies' claims for deference under those circumstances. *See, e.g.*, *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1085 (D.C. Cir. 2001) ("We, of course, owe no deference to an agency's reading of judicial orders or decisions."); *New York v. Shalala*, 119 F.3d 175, 180 (2d Cir. 1997) ("[U]nlike an administrative action that requires significant expertise and entails the exercise of judgment grounded in policy concerns, an agency has no special competence or role in interpreting a judicial decision. . . . And certainly an agency is no better suited to interpret a judicial decision than the court that rendered it.") (internal brackets, quotation marks, and citations omitted); *Akins v. FEC*, 101 F.3d 731, 740 (D.C. Cir. 1996) (en banc) ("We are not obliged to defer to an agency's interpretation of Supreme Court precedent . . . . There is therefore no reason for courts—the supposed experts in analyzing judicial decisions—to defer to agency interpretations of the Court's opinions."), *vacated on other grounds*, 524 U.S. 11 (1998); *Blackburn v. Reich*, 79 F.3d 1375, 1377 n.3 (4th Cir. 1996) ("Because the [agency] based [its] decision in the instant case on judicial precedent rather than [its] own interpretation of the statute, we owe 'no more deference than we would any lower court's analysis of the law.'") (quoting *Thomas Hodgson & Sons, Inc. v. FERC*, 49 F.3d 822, 826 (1st Cir. 1995)).

As explained by one federal district court, there is "no law that supports the [agency's] position that an Article III judge must defer to an agency or department of the Executive Branch or the head of such an

agency or department . . . on interpretations of decisions of the United States Supreme Court; for that is quintessentially a judicial function." *Mudd v. Caldera*, 134 F. Supp. 2d 138, 144 (D.D.C. 2001); *accord Piersall v. Winter*, 507 F. Supp. 2d 23, 38 (D.D.C. 2007) (rejecting agency's claim for deference because the "interpretation of judicial decisions . . . falls foursquare in the bailiwick of the judiciary"); 1 Richard L. Pierce Jr., *Administrative Law Treatise* § 3.5 at 200 (5th ed. 2010) ("[C]ourts are at least as good as agencies at interpreting judicial opinions.").[4]

Tellingly, none of the decisions cited by the United States support the notion that the Court should give *Skidmore* deference to what is, in fact, an agency interpretation of judicial precedent. Instead, the cases cited by the United States involved agency interpretations of statutes or regulations. *See Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1335 (2011) (giving *Skidmore* deference to agency's statutory interpretation); *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 399 (2008) (giving same to agency's statutory and regulatory interpretations); *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 156-57 (1991) (giving same to agency's regulatory interpretation); *Meritor*,

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[4] The Second Circuit's decision in *Mack v. Otis Elevator Co.*, 326 F.3d 116 (2003), is not to the contrary. In giving *Skidmore* deference to the EEOC Guidance's "daily work activities" test, the *Mack* court overlooked the fact that the test is based on the EEOC's interpretation of *Faragher*, not Title VII. *See id.* at 127. Had the *Mack* court considered that fact, circuit precedent would have dictated giving no deference to the EEOC Guidance. *See New York*, 119 F.3d at 180.

477 U.S. at 65 (giving same to agency's statutory interpretation); *Skidmore*, 323 U.S. at 140 (same). The other decisions cited by Vance's *amici* are to the same effect. *Compare Crawford v. Metro. Gov't of Nashville & Davidson Cnty., Tenn.*, 555 U.S. 271, 276 (2009) (giving deference to agency's statutory interpretation); *Penn. State Police v. Suders*, 542 U.S. 129, 142 (2004) (same); *Griggs v. Duke Power Co.*, 401 U.S. 424, 433 (1971) (same), *with Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 141-43 (1976) (refusing to give deference to agency's statutory interpretation).

It stands to reason that if the Court owes no deference to a lower court's interpretation of the Court's decisions, no deference is owed to an agency's interpretation of the Court's decisions. This is especially true in the Title VII context, where "Congress has left it *to the courts* to determine controlling agency law principles . . . ." *Ellerth*, 524 U.S. at 751 (emphasis added); *see also Gilbert*, 429 U.S. at 141 (explaining that Congress "did not confer upon the EEOC authority to promulgate [substantive] rules or regulations pursuant to" Title VII). It is the province of the Court and the Court alone to interpret its decisions, unfettered by whatever gloss an agency might give them.

B. The EEOC Guidance Lacks the Power to Persuade

Under *Skidmore*, an agency's interpretation is only given that "measure of deference proportional to the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." *SmithKline*, 132 S.

Ct. at 2169 (internal quotation marks and citations omitted). Even if one assumed for the sake of argument that agency interpretations of judicial precedent could qualify for *Skidmore* deference, the EEOC Guidance should be rejected because it lacks the power to persuade.

Of particular relevance to this case, the EEOC Guidance asserts that a "supervisor" includes anyone who has the "authority to direct the employee's daily work activities." Pet. App. 90a. The EEOC Guidance reaches this conclusion by first observing that one of the two harassers in *Faragher* (David Silverman) was "responsible for making the [employees'] daily work assignments and supervising their work and fitness training." Pet. App. 91a. The EEOC Guidance then posits that there was "no question that the Court viewed [Silverman as a supervisor] even though [he] apparently lacked authority regarding tangible job decisions." Pet. App. 91a-92a. The EEOC Guidance therefore concludes that any employee who merely has the authority to direct another employee's daily work activities is that person's "supervisor" because having the authority to take or recommend tangible employment action is unnecessary. *See* Pet. App. 91a-92a.

The conclusion drawn by the EEOC's syllogism is flawed because it elevates to controlling status one characteristic from *Faragher*'s facts—that Silverman had the authority to direct employees' daily work activities—and disregards the case's remaining facts, including that Silverman was granted "virtually unchecked authority" over his subordinates, "directly controlling and supervising *all aspects* of [the plaintiff's] day-to-day activities." *Faragher*, 524 U.S. at

808 (internal quotation marks and citation omitted) (emphasis added). The Court also found it "clear" that the plaintiff in *Faragher* and her colleagues were "completely isolated from the [employer's] higher management," *id.* (internal quotation marks and citation omitted), which facilitated Silverman's ability to create a hostile work environment by abusing his near-total authority over the plaintiff, *see id.* at 780 (quoting Silverman as having told the plaintiff: "Date me or clean the toilets for a year.").

The EEOC Guidance's "daily work activities" test ignores these essential facts from *Faragher*, rendering the Guidance unpersuasive as an interpretation of judicial precedent. That the EEOC has been persistent in advocating its flawed interpretation of *Faragher*, *see* U.S. Br. 28 (citing EEOC *amicus* briefs filed in other cases), does not make the flawed interpretation any more valid.

Moreover, the EEOC Guidance's "daily work activities" test is extremely vague and unworkable in practice. For example, the EEOC Guidance asserts that "[a]n individual who is temporarily authorized to direct another employee's daily work activities qualifies as his or her supervisor during that time period." Pet. App. 92a. "On the other hand," the EEOC Guidance explains, "someone who merely relays other officials' instructions regarding work assignments and reports back to those officials does not have *true supervisory authority*." *Id.* (emphasis added). "Furthermore, someone who directs only a *limited number of tasks or assignments* would not qualify as a 'supervisor.' For example, an individual whose delegated authority is confined to coordinating a *work project of limited scope* is not a 'supervisor.'"

Id. (emphasis added); *see also* U.S. Br. 31 ("Nor would it be enough for [Vance] to show that Davis occasionally took the lead in the kitchen.").

The EEOC Guidance never explains what constitutes "true supervisory authority," a "limited number of tasks," and a "work project of limited scope." Thus, employers and their human resources professionals can only guess as to whether the authority given a particular employee qualifies him or her as a "supervisor" for purposes of vicarious liability under Title VII. However, because "[r]ecognition of employer liability when discriminatory misuse of supervisory authority alters the terms and conditions of a victim's employment is underscored by the fact that *the employer has a greater opportunity to guard against misconduct by supervisors than by common workers*," *Faragher*, 524 U.S. at 803 (emphasis added), employers and their human resources professionals should be able to identify supervisors with reasonable certainty. The "daily work activities" construct frustrates their ability to do so—especially when, in the real world, a co-worker without the power to take or effectively recommend a tangible employment action is not considered someone's "boss."

Many workplaces today bear no resemblance to the hierarchical structure at issue in *Faragher*. With increased focus on workplace flexibility, many organizations now assign "lead" employees on rotating projects. While these employees may oversee the work of others for a limited period of time, their ultimate status as co-workers has not changed. The "daily work activities" test, however, is so open-ended that only the lowest level of employees would be considered co-workers, rendering nearly everyone

in the workplace a "supervisor" whose conduct subjects the employer to potential vicarious liability. That, in turn, is contrary to *Faragher*, which found that imposing a heightened duty on employers to guard against supervisor misbehavior was reasonable because the number of supervisors is "by definition *fewer* than the numbers of regular employees." 524 U.S. at 801 (emphasis added).

More fundamentally, the EEOC Guidance focuses on the definition of "supervisor" as if the conduct of an employee who qualifies as a "supervisor" automatically triggers the vicarious liability rule of *Ellerth* and *Faragher*. That is incorrect. Regardless of whether an alleged "supervisor" has the authority to take tangible employment actions or the virtually unchecked authority to direct all daily work activities in an environment isolated from higher management, a plaintiff must still prove that the authority delegated by the employer to the alleged harasser actually aided the harasser in creating a hostile work environment. In other words, not all harassment by supervisory personnel renders an employer vicariously liable for the harassment. *See, e.g.*, *Mikels v. City of Durham*, 183 F.3d 323, 331 (4th Cir. 1999).

Accordingly, even if one assumed for the sake of argument that agency interpretations of judicial precedent could qualify for *Skidmore* deference, the EEOC Guidance's interpretation of *Faragher* and the resulting "daily work activities" test lacks the power to persuade and should be rejected.[5]

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[5] The United States recognizes that, despite substantial factual discovery, the record contains no evidence that Davis (continued)

CONCLUSION

For the reasons stated above and in Ball State's brief, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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satisfies the "daily work activities" test. U.S. Br. 30. Vance nonetheless argues that the Court should remand this case "for application of the correct legal standard to facts as developed with an eye to that standard." Pet. Br. 44. Even if the Court were to accept the "daily work activities" test, because there is no serious prospect that the test could be satisfied on remand, Ball State should not be subjected to the burden and expense of further litigation. *See Faragher*, 524 U.S. at 808 (declining to remand case for application of new legal standard because there was no "serious prospect" the new standard could be satisfied); *Mikels*, 183 F.3d at 334 (applying *Faragher*'s "no serious prospect" standard in refusing to remand action for application of correct legal standard because the record developed through substantial discovery demonstrated that the agency relationship between the employer and the alleged harasser did not aid the creation of a hostile work environment).