No. 11-556

In the Supreme Court of the United States

MAETTA VANCE, PETITIONER

v.

BALL STATE UNIVERSITY, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether an employee must have the power to carry out a tangible employment action, such as hiring, firing, promoting, demoting, transferring, or disciplining an employee, in order to qualify as a supervisor for purposes of vicarious employer liability under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq*.

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INTEREST OF THE UNITED STATES

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq*., prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. 42 U.S.C. 2000e-2(a). Actionable discrimination includes harassment that creates a hostile working environment. See, *e.g.*, *Meritor Sav. Bank, FSB* v. *Vinson*, 477 U.S. 57, 66 (1986); *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998).

The standard for determining an employer's liability for harassment depends on the harasser's status in the workplace. An employer is vicariously liable for a supervisor's harassment. *Faragher* v. *City of Boca Raton*, 524 U.S. 775, 807 (1998); *Burlington Indus., Inc*. v. *Ellerth*, 524 U.S. 742, 764-765 (1998). If the victim suffered no tangible employment action however, the employer may assert as an affirmative defense that it exercised reasonable care to prevent and correct harassment and that the employee unreasonably failed to take advantage of the corrective and preventive opportunities. *Faragher*, 524 U.S. at 789, 807; *Ellerth*, 524 U.S. at 760, 764-765. When the harasser is a co-worker rather than a supervisor, the employer is liable if the victim proves that the employer was negligent because it "knew or should have known about the conduct" but failed to take appropriate action. *Ellerth*, 524 U.S. at 759, 765; see also *Faragher*, 524 U.S. at 799.

The Court has stated that the rule of vicarious liability for a supervisor's harassment applies to a "supervisor with immediate (or successively higher) authority." *Faragher*, 524 U.S. at 807. The Court has not, however, defined with specificity which employees qualify as supervisors for the purposes of that rule.

2. Petitioner Maetta Vance, who is black, was hired by respondent Ball State University in 1989 as a substitute server in the University Banquet and Catering division of University Dining Services. She became a part-time catering assistant in 1991. Pet. App. 2a, 27a. Petitioner was involved in various altercations at work, including racially-charged incidents. *Id.* at 1a-2a. Most relevant here are her difficulties with Saundra Davis, a catering specialist who is white.

a. In 1999 or 2001, petitioner and Davis argued, and Davis slapped petitioner on the head. Pet. App. 3a, 18a, 30 n.5. Petitioner told her supervisors about the incident but did not pursue the matter, and Davis was soon transferred to another department. *Id.* at 3a, 30a n.5.

When Davis returned to the University Banquet and Catering division in 2005, the conflicts resumed. Pet. 6; Pet. App. 3a. On September 23, 2005, petitioner and Davis quarreled at the elevator. Davis blocked petitioner from exiting the elevator and said, "I'll do it again"—apparently referring to the slapping incident. *Id*. at 3a, 18a, 29a-30a. Petitioner filed an internal complaint describing the incident. *Id.* at 3a-4a. Around the same time, petitioner overheard Davis joking and using the terms "Sambo" and "Buckwheat" while looking at her, but petitioner apparently did not report those comments. *Id.* at 6a, 59a-61a. Petitioner told her supervisors that she was "not comfortable with Saundra Davis leaving her notes and delegating jobs to her in the kitchen." 1:06-cv-01452 Docket entry No. (Docket entry No.) 59-16, at 2 (S.D. Ind. Nov. 1, 2007); *id.* No. 59-19, at 3.

In May 2006, petitioner filed another internal complaint alleging that Davis blocked her way at the elevator, that she was left alone with Davis in the kitchen, and that Davis gave her "weird" looks. Pet. App. 6a-7a, 37a n.8. In response to petitioner's various complaints, managers attempted to separate her from Davis. Docket entry No. 56-6, at 3.

b. During this period, petitioner also had difficulties with others in the department. In September 2005, someone told petitioner that co-worker Connie McVicker had bragged about her family ties to the Ku Klux Klan and had called petitioner a "nigger." Pet. App. 3a,

31a-32a. Petitioner reported the incident, and Bill Kimes, general manager of the Banquet and Catering Division, gave McVicker a written warning, which was atypical for a first offense. Pet 7; Pet. App. 4a-5a, 33a n.6, 34a-35a. A few days later, another supervisor met with McVicker and suggested she consider a transfer. Pet. App. at 35a. Petitioner also reported that McVicker had called her a "monkey." *Id.* at 5a, 35a. In December 2005, petitioner filed a complaint with the Equal Employment Opportunity Commission (EEOC) alleging, *inter alia*, race discrimination. *Id.* at 6a, 36a.

In 2006, petitioner alleged that Karen Adkins, an assistant personnel director, was "mean mugging" and following petitioner at work. Pet. App. 7a, 37a n.8. Petitioner also filed an internal retaliation complaint against Kimes. *Id.* at 7a, 40a. Respondent investigated the complaints but found no basis for disciplinary action. *Id.* at 37a n.8, 40a-41a. In August 2006, petitioner filed a second complaint with the EEOC, claiming that respondent had retaliated against her by diminishing her duties, withholding her breaks, denying her overtime, and disciplining her unequally. *Id.* at 7a, 40a.

c. Petitioner filed this suit in October 2006, alleging that she was subjected to a hostile work environment and was retaliated against for complaining about discrimination, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq*. Pet. App. 7a, 51a.

In January 2007, respondent promoted petitioner to a full-time catering assistant. Pet. App. 27a, 41a. Petitioner's troubles with Davis and others continued. Petitioner claimed that she was consigned to "entry level duties" such as cutting up celery sticks. *Id.* at 43a, 71a. Petitioner further alleged that in August 2007, Davis encountered petitioner at an elevator and said, "Are you

scared?" in a southern accent. *Id.* at 38a. Petitioner complained, and Davis received a verbal warning. *Ibid.* Also that month, petitioner filed a grievance about an incident in which McVicker said "payback" as petitioner walked onto the service elevator. *Id.* at 37a, 63a.

d. On petitioner's various complaint forms, she listed Davis as a "supervisor." Docket entry No. 59-1; *id.* No. 60-12, at 1; *id.* No. 59-8, at 2. But when asked in a deposition if Davis was her supervisor, petitioner said, "[O]ne day she's a supervisor; one day she's not. * * * It's inconsistent." Pet. App. 54a. Petitioner believed Davis was "part of management because she doesn't clock in." *Ibid.* Another employee said he was unsure of Davis's status, but claimed that Kimes told him Davis was a supervisor. Docket entry No. 61-10, at 4. Kimes characterized Davis's status as "complicated" and said that Davis did "direct and lead" at times. Reply Br. 11; Docket entry No. 56-6, at 3. Davis's job description states that she supervises "[k]itchen [a]ssistants and [s]ubstitutes," and exercises "leadership of up to 20 part-time, substitute, and student employees." Reply Br. 10; Docket entry No. 62-17, at 1. Petitioner's day-to-day tasks were generally assigned by Kimes or the kitchen chef. Pet. App. 27a, 41a-42a; Br. in Opp. 25.

3. After extensive discovery, the district court granted summary judgment in favor of respondent. Pet. App. 25a-80a.

a. The court initially concluded that Davis did not qualify as petitioner's supervisor and that respondent therefore was not vicariously liable for Davis's conduct. Pet. App. 53a-55a. The court applied circuit precedent holding that "[a] supervisor is someone with the power to directly affect the terms and conditions of the plaintiff's employment," *id.* at 53a (citing *Rhodes* v. *Illinois*

Dep't of Transp., 359 F.3d 498, 506 (7th Cir. 2004)), which authority "primarily consists of the power to hire, fire, demote, promote, transfer, or discipline an employee," *ibid.* (quoting *Hall* v. *Bodine Elec. Co.*, 276 F.3d 345, 355 (7th Cir. 2002)). Accordingly, the court ruled, even assuming "Davis periodically had authority to direct the work of other employees, such power would still not be sufficient to establish a supervisory relationship for purposes of Title VII." *Id.* at 54a.

b. The court evaluated petitioner's mistreatment by Davis and McVicker under the standard for harassment by co-workers. Pet. App. 59a-68a. The court explained that most of the incidents involving Davis had "no racial character or purpose," and that Davis's arguably racial remarks were "not sufficiently severe or pervasive" to support a hostile work environment claim. *Id.* at 59a-60a. The court concluded that McVicker's racial statements did not "rise to the level of actionable harassment." *Id.* at 61a-63a.

The court further concluded that, even if petitioner had suffered severe or pervasive racial harassment by Davis and McVicker, she could not demonstrate a basis for employer liability. Petitioner could not establish that respondent was negligent because respondent had addressed petitioner's complaints in a way "reasonably calculated to foreclose subsequent harassment." Pet. App. 60a-61a, 63a-66a.

c. The court also rejected petitioner's claims against other employees and her claim of unlawful retaliation. Pet. App. 55a-59a, 68a-80a.

4. The court of appeals affirmed. Pet. App. 1a-24a. Of particular salience, the court of appeals agreed with the district court that Davis was not petitioner's supervisor because Davis lacked the "power to directly affect

the terms and conditions of [petitioner's] employment" by hiring, firing, demoting, promoting, transferring, or disciplining her. *Id.* at 12a (quoting *Rhodes*, 359 F.3d at 506) (emphasis omitted). The court observed that it "ha[d] not joined other circuits in holding that the authority to direct an employee's daily activities establishes supervisory status under Title VII." *Id.* at 12a-13a. The court thus held that petitioner's assertion "that Davis had the authority to tell her what to do" failed to raise a triable issue concerning supervisor status. *Id.* at 13a.

Applying the standard for co-worker harassment, the court assumed that McVicker and Davis had created a hostile work environment. Pet. App. 15a. The court concluded, however, that respondent was not negligent because it "promptly investigat[ed] each of [petitioner's] complaints and t[ook] disciplinary action when appropriate." *Ibid.*; see *id.* at 15a-19a. The court also upheld the district court's rejection of petitioner's remaining claims. *Id.* at 13a-14a, 19a-24a.

DISCUSSION

The court of appeals' understanding of who qualifies as a supervisor for purposes of an employer's vicarious liability for harassment under Title VII is inconsistent with this Court's application of agency principles in *Faragher* v. *City of Boca Raton*, 524 U.S. 775, 807 (1998), and *Burlington Industries, Inc*. v. *Ellerth*, 524 U.S. 742, 764-765 (1998), and it ignores the practical realities of the workplace. It also conflicts with the EEOC's longstanding enforcement guidance defining who constitutes a supervisor. The issue is important, and the circuits disagree on the proper understanding of supervisor status.

This case, however, would be an unsuitable vehicle for resolving that disagreement. On the record before this Court, Davis would fail to qualify as petitioner's supervisor even under the broader interpretation of that term applied by certain courts of appeals and by the EEOC. This Court therefore would be called upon to decide the question presented by the petition in the abstract, without a concrete factual setting in which to test the merits of the competing approaches or understand their practical implications, and in a context in which the Court's resolution of the issue likely would not affect the disposition of petitioner's suit. The Court therefore should deny the petition.

A. The Court Of Appeals Erred In Holding That An Employee Must Have The Authority To Take Tangible Employment Actions To Qualify As A Supervisor For Purposes Of Vicarious Employer Liability Under Title VII

1. a. The term "supervisor" does not appear in Title VII. Title VII, however, imposes liability on employers for the actions of their "agents." 42 U.S.C. 2000e(b) (defining "employer" to include an agent of the employer); see also *Faragher*, 524 U.S. at 791. Accordingly, in *Faragher* and *Ellerth*, this Court relied on agency principles to determine the scope of vicarious employer liability under Title VII. The Court concluded that an employer could be vicariously liable for harassment by a supervisor, even if the supervisor is acting outside the scope of his employment, because agency principles support an employer's vicarious liability for torts committed by a servant in those circumstances if the servant "was aided in accomplishing the tort by the existence of the agency relation." *Faragher*, 524 U.S. at 801 (quoting Restatement (Second) of Agency § 219(2)(d) (1957)); see

also *Ellerth*, 524 U.S. at 759. The Court explained that a supervisor's harassment of a subordinate is aided by the agency relationship because "[t]he agency relationship affords contact with an employee subjected to a supervisor's * * * harassment, and the victim may * * * be reluctant to accept the risks of blowing the whistle on a superior." *Faragher*, 524 U.S. at 803. The Court thus held 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." *Id.* at 807.

b. The court of appeals held that a "supervisor" for purposes of vicarious employer liability under *Faragher* and *Ellerth* is a person who has the "power to *directly* affect the terms and conditions of [the victim's] employment," which the court understood as "primarily consist[ing] of the power to fire, hire, demote, promote, transfer, or discipline an employee." Pet. App. 12a (citation omitted). That understanding is unduly restrictive.

An employee's "reluctan[ce] to accept the risks of blowing the whistle on a superior," *Faragher*, 524 U.S. at 803, is not confined to situations where the harasser has the power to take tangible employment actions against the victim. See *Ellerth*, 524 U.S. at 761 (explaining that a "tangible employment action constitutes a significant change of employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits"). It may be equally difficult for a victim to "walk away or tell the offender where to go," *Faragher*, 524 U.S. at 803, when the harasser, while lacking authority to take tangible employment actions, directs the victim's daily work activities. See *id.*

at 780 (life guard captain told victim "date me or clean the toilets for a year"); *Whitten* v. *Fred's, Inc.*, 601 F.3d 231, 246 (4th Cir. 2010) (store manager "could change [victim's] work schedule and impose unpleasant duties on a whim") (internal quotation marks and citation omitted); *Weyers* v. *Lear Operations Corp.*, 359 F.3d 1049, 1057 (8th Cir. 2004) ("team leader" kept victim from training opportunities and signed performance evaluations); *Hall* v. *Bodine Elec. Co.*, 276 F.3d 345, 355 (7th Cir. 2002) ("set-up operator" directed tasks, trained victim, and contributed to performance evaluations).

This Court recognized as much in *Faragher*, observing that it may be difficult for a victim to respond "to a supervisor, whose 'power to supervise—[which may be] to hire and fire, *and to set work schedules* and pay rates—does not disappear . . . when he chooses to harass through insults and offensive gestures.'" *Faragher*, 524 U.S. at 803 (quoting Susan Estrich, *Sex at Work*, 43 Stan. L. Rev. 813, 854 (1991) (emphasis added)). *Faragher* and *Ellerth* hold that an employer is subject to vicarious liability for a hostile environment created by "a supervisor with immediate (or successively higher) authority over the employee," *id.* at 807, and an employee who controls work assignments and schedules certainly may possess "immediate," day-to-day authority over a victim notwithstanding a lack of power to take tangible employment actions.

The court of appeals' approach also cannot be squared with this Court's resolution of the specific claims in *Faragher*. The Court concluded that the employer was vicariously liable for harassment by two supervisors, one of whom had no authority to effect tangible employment actions. Lifeguard captain David Silverman was "responsible for making the [employees']

daily assignments, and for supervising their work and fitness training." 524 U.S. at 781, 810. In contrast, Bill Terry, Chief of the Marine Safety Division, had "authority to hire new [employees] (subject to the approval of higher management), to supervise all aspects of [their] work assignments, to engage in counseling, to deliver oral reprimands, and to make a record of any such discipline." *Id.* at 781. The Court upheld vicarious liability for both Silverman's and Terry's actions, explaining that "these supervisors were granted virtually unchecked authority over their subordinates, directly controll[ing] and supervis[ing] all aspects of [Faragher's] day-to-day activities." *Id.* at 808 (internal quotation marks and citation omitted). Under the court of appeals' restrictive approach, however, the employer in *Faragher* would not have been liable for Silverman's harassment because he lacked authority to take tangible employment actions.

c. The court of appeals' unduly restrictive understanding of supervisor status undermines Title VII's objectives. The primary object of Title VII is not "to provide redress but to avoid harm." *Faragher*, 524 U.S. at 806; see also *Ellerth*, 524 U.S. at 764. Properly applied, the affirmative defense provided in *Faragher* and *Ellerth*—through which an employer can avoid liability for supervisor harassment in certain circumstances by showing that it exercised reasonable care to prevent and correct harassment and that the employee unreasonably failed to take advantage of those corrective opportunities—encourages employers to screen supervisors, monitor them, and establish effective training and complaint programs. *Faragher*, 524 U.S. at 803; *Ellerth*, 524 U.S. at 764-765. But if employers face vicarious liability only for supervisors with power to take tangible employment actions, employers could insulate themselves from liabil-

ity simply by centralizing personnel decisions in a department that may have indirect or infrequent contact with the victim, leaving workers vulnerable to harassment by those with the greatest day-to-day ability to create intolerable working conditions.

The Court recently addressed a similar problem in *Staub* v. *Proctor Hospital*, 131 S. Ct. 1186 (2011), a case arising under the Uniformed Services Employment and Reemployment Rights Act of 1994, Pub. L. No. 103-353, 108 Stat. 3149, a statute that the Court has recognized "is very similar to Title VII." *Staub*, 131 S. Ct. at 1191. In *Staub*, the employer fired the plaintiffs based in part on reports from biased supervisors. The Court concluded that the employer could be liable for the discharge even though an unbiased vice president of human resources took the challenged tangible employment action. Otherwise, the Court explained, an employer could "be effectively shielded from discriminatory acts and recommendations of supervisors" by vesting ultimate authority for personnel decisions in an independent official. *Id.* at 1193. By providing for vicarious employer liability only if a harasser possesses authority to take tangible employment actions against the victim, the court of appeals' approach ignores the practical realities of the workplace and disserves the core purposes of Title VII.

2. The court of appeals' decision is inconsistent with the EEOC's longstanding enforcement guidance defining supervisor status. Shortly after the Court decided *Faragher* and *Ellerth*, the EEOC issued enforcement guidance defining who constitutes a supervisor for purposes of vicarious employer liability under Title VII. EEOC, *Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors*, 8

FEP Manual (BNA) 405:7654 (1999), *available at* 1999 WL 33305874 (reproduced at Pet. App. 81a-93a) (EEOC Guidance). The guidance provides that an individual qualifies as an employee's supervisor if:

> a. the individual has authority to undertake or recommend tangible employment decisions affecting the employee; *or*
>
> b. the individual has authority to direct the employee's daily work activities.

Pet. App. 90a (emphasis added). That guidance is "an administrative interpretation of [Title VII] by the enforcing agency," and "constitute[s] a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Meritor Sav. Bank, FSB* v. *Vinson*, 477 U.S. 57, 65 (1986) (quotation marks and citations omitted).

The EEOC explained that, because vicarious liability for supervisor harassment under *Ellerth* and *Faragher* is justified by the harasser's misuse of delegated authority, "that authority must be of sufficient magnitude so as to assist the harasser explicitly or implicitly in carrying out the harassment." Pet. App. 89a. The EEOC further explained that, when an employee has authority to direct another's day-to-day work activities, that person's ability to harass "is enhanced by his or her authority to increase the employee's workload or assign undesirable tasks." *Id.* at 91a.

The EEOC's guidance has governed the agency's enforcement actions since 1999, and the EEOC has filed numerous briefs in the courts of appeals setting forth its understanding. See EEOC Br. as Amicus Curiae, *Dulaney* v. *Packaging Corp. of Am.*, 673 F.3d 323 (4th Cir. 2012) (No. 10-2316); EEOC Br., *EEOC* v. *CRST Van*

Expedited, Inc., 2012 WL 1583026 (8th Cir. May 8, 2012) (Nos. 09-3764, 09-3765, 10-1682); EEOC Pet. for Reh'g and Suggestion for Reh'g En Banc, *CRST*, *supra*; EEOC Br. as Amicus Curiae, *Whitten*, *supra* (No. 09-1265); EEOC Br. as Amicus Curiae, *Weyers*, *supra* (No. 02-3732); EEOC Br. as Amicus Curiae, *Mack* v. *Otis Elevator Corp.*, 326 F.3d 116 (2d. Cir.) (No. 02-7056), cert. denied, 540 U.S. 1016 (2003). The EEOC's consistent position warrants a measure of deference. See *Kasten* v. *Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1335 (2011) (giving weight to EEOC's consistent position set forth in compliance manual and court of appeals briefs).

B. The Circuits Disagree On The Proper Understanding Of Supervisor Status Under *Faragher* And *Ellerth*

As the court of appeals recognized (Pet. App. 12a-13a), the circuits disagree on whether an employee with authority to direct an employee's daily work activities, but without power to take tangible employment actions, qualifies as a supervisor for purposes of vicarious employer liability under Title VII.

1. In its decision below, the court of appeals reiterated its prior holding that an employee qualifies as a supervisor only if he has authority to take tangible employment actions against the victim. Shortly after this Court decided *Faragher* and *Ellerth*, the court of appeals held in *Parkins* v. *Civil Constructors of Illinois, Inc.*, 163 F.3d 1027 (7th Cir. 1998), that supervisory authority under those cases "primarily consists of the power to hire, fire, demote, promote, transfer, or discipline an employee." *Id.* at 1034. The *Parkins* court explained that "[a]bsent an entrustment of at least some of this authority, an employee does not qualify as a super-

visor for purposes imputing liability to the employer." *Ibid.*

The EEOC issued its enforcement guidance shortly thereafter, and certain judges then called for the court of appeals to reconsider its holding in *Parkins*. See *Rhodes* v. *Illinois Dep't of Transp.*, 359 F.3d 498, 509 (2004), (Rovner, J., concurring in part and concurring in the judgment); *id.* at 510 (Cudahy, J., concurring). The court, however, has continued to hold that employees who assign tasks and recommend discipline fail to qualify as supervisors. *Id.* at 506; see also *Hall*, 276 F.3d at 355 (finding no supervisory status where harasser directed work, contributed to evaluations, and trained victim).

The First Circuit has followed the same approach, holding that a "shift supervisor"—the victim's immediate supervisor—lacked the requisite supervisory authority to trigger vicarious employer liability. *Noviello* v. *City of Boston*, 398 F.3d 76, 95-96 (2005) (applying Title VII standards to parallel provisions in state law and quoting *Parkins*). The court stated that, without authority "to hire, fire, demote, promote, transfer, or discipline an employee," a harasser "should be regarded as an ordinary coworker." *Ibid.* (internal quotation marks and citation omitted).

The Eighth Circuit has also adopted that restrictive understanding. In *Weyers* v. *Lear Operations Corp.*, *supra*, the court held that an alleged harasser failed to qualify as a supervisor even though he assigned the victim's tasks, barred her from training, and signed her performance evaluations. 359 F.3d at 1057. The court explained that it had adopted "the narrower standard of supervisor liability," under which the harasser must have the "power (not necessarily exercised) to take tan-

gible employment action against the victim, such as the authority to hire, fire, promote, or reassign to significantly different duties." *Ibid.*; see also *Joens* v. *John Morrell & Co.*, 354 F.3d 938, 940 (8th Cir. 2004); *CRST Van Expedited*, Nos. 09-3764, 09-3765, 10-1682, 2012 WL 1583026, pet. for reh'g pending (filed May 9, 2012).

2. Other circuits, by contrast, have adopted a broader understanding of supervisor liability. Citing the EEOC guidance, the Second Circuit held in *Mack* v. *Otis Elevator Corp.*, *supra*, that a "mechanic in charge" qualified as a supervisor because he assigned the victim's daily tasks, oversaw her work, assigned overtime, and was typically the senior employee on site. 326 F.3d at 127. The court stated that the relevant question is "whether the authority given by the employer to the employee enabled or materially augmented the ability of the [employee] to create a hostile work environment." *Id.* at 126.

Similarly, the Fourth Circuit held in *Whitten* v. *Fred's, Inc.*, *supra*, that a store manager was an assistant manager's supervisor because he assigned tasks, controlled scheduling, and was usually the senior employee on site. 601 F.3d at 246 (applying *Faragher* and *Ellerth* standard to state law claims). The court observed that the manager used his supervisory authority to order the victim into a storeroom (where she would be alone with him), to revoke her day off after she objected to his touching, and to give her undesirable assignments as punishment. *Ibid.* Such power, "as a practical matter," left the victim "vulnerable to and defenseless" to harassment "in ways that comparable conduct by a mere co-worker would not." *Id.* at 244 (citation and quotation marks omitted).

The Ninth Circuit has not fully defined a test for supervisor status, but has concluded that a victim's "trainer and immediate manager" could be a supervisor if he "engaged in supervision of or had authority over [plaintiff]." *Dawson* v. *Entek Int'l*, 630 F.3d 928, 937, 940 (2011) (construing state law analogous to Title VII); see also *McGinest* v. *GTE Serv. Corp.*, 360 F.3d 1103, 1119 n.13 (2004) (holding supervisory status depends "upon whether a supervisor has the authority to demand obedience from an employee"), cert. denied, 552 U.S. 1180 (2008).[1]

C. This Case Is Not A Suitable Vehicle For Resolving The Disagreement

The question presented is important, and the courts of appeals have adopted divergent approaches. Accordingly, this Court's review of the question presented would be warranted in an appropriate case. This case, however, would not be a suitable vehicle for addressing the issue. The only employee whose supervisory status is in issue is Davis, see Pet. 29, and she would fail to qualify as petitioner's supervisor under the record before the Court under any of the competing approaches. The Court should not address this important question in

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[1] Other circuits have addressed the issue in unpublished opinions. *Griffin* v. *Harrisburg Prop. Servs., Inc.*, 421 Fed. Appx. 204, 208-209 (3d Cir. 2011) (citing the Seventh Circuit's standard and noting the alleged harasser's lack of authority to direct plaintiff); *Smith* v. *Oklahoma City*, 64 Fed. Appx. 122, 127 (10th Cir.) (holding alleged harasser could be a supervisor where he provided daily training, testing, and evaluation), cert. denied, 540 U.S. 948 (2003); *Stevens* v. *United States Postal Serv.*, 21 Fed. Appx. 261, 263-264 (6th Cir. 2001) (accepting district court's reasoning that the alleged harasser was not a supervisor, where he "had informal supervisory duties," but no "formal title" and no "power to hire or fire").

a case where it would not affect the outcome and is presented only in the abstract.

1. At the summary judgment phase, the parties engaged in extensive discovery of the facts pertaining to petitioner's claims. There is scant evidence that Davis exercised any authority over petitioner's daily work activities. Insofar as Davis possessed day-to-day authority over petitioner's work, petitioner was the best person to explain that authority, but her 128-page deposition describes no instances in which Davis actually directed her work. Docket entry Nos. 58-2 to 58-7. If Davis had that authority, one would expect petitioner to have recounted various tasks Davis assigned her, identified specific orders or instructions Davis gave her, or related any occasions in which Davis altered her work assignments or schedule. And to meet the EEOC's standard, petitioner would be required to do more than demonstrate that Davis possessed some minimal level of authority over petitioner, because "someone who directs only a limited number of tasks or assignments would not qualify as a 'supervisor.'" Pet. App. 92a (EEOC Guidance).

Petitioner has not even shown that she "reasonably believed" Davis was her supervisor. See Pet. App. 93a (EEOC Guidance) (noting that an employer may be vicariously liable "if the employee reasonably believed that the harasser had [supervisory] power," even if that belief is false). When asked whether she considered Davis her supervisor at the time of their confrontation at the elevator in April 2006, petitioner replied: "I don't know what she is." Docket entry No. 58-5, at 3; see also Pet. App. 54a. Petitioner explained that, "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." *Id.* at 54a. Asked whether Davis was her supervisor even "inter-

mittently, once in a while," petitioner answered that she was "not sure." Docket entry No. 58-5, at 3.[2]

To be sure, petitioner referred to Davis as a "supervisor" or "kitchen supervisor" in various complaint forms. Docket entry No. 59-1; *id.* No. 60-12, at 1; *id.* No. 59-8, at 2. And other employees stated that Kimes had told them Davis was a supervisor. *Id.* No. 61-10, at 4; *id.* No. 62-3, at 1. Davis's job description states she "lead[s] and direct[s]" "kitchen part-time, substitute, and student employee helpers" and supervises "[k]itchen [a]ssistants and [s]ubstitutes." Docket entry No. 62-17, at 1; see also Reply Br. 3, 10. It is unclear whether this included petitioner, who was a part-time "catering assistant" from 1991 to 2007. *Id.* at 10, Pet. App. 2a, 70a.[3] Kimes acknowledged that Davis directed employees "[a]t times." Docket entry No. 56-6, at 3; see also Reply Br. 11; Br. in Opp. 25. But even if Davis was labeled a "supervisor" and her job description characterized her as supervising petitioner, that would not satisfy the EEOC's standard. Nor, similarly, does it matter whether Davis is listed as a "supervisor" on respondent's "Staff List" or other documents. Br. in Opp. 3-4 & n.2; Br. in Opp. Addendum 1a, 5a.

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[2] Petitioner's observation that Davis "d[id not] clock in" may indicate that Davis outranked petitioner in the organizational hierarchy, but it does not show that she had authority to direct petitioner's day-to-day activities. Pet. App. 54a; see also *Mikels* v. *City of Durham*, 183 F.3d 323, 334 (4th Cir. 1999) (finding no supervisory status where harasser outranked victim but had "minimal" authority over her).

[3] Petitioner does not allege harassment between 1989 and 1991, when she was a "substitute." After her promotion to a full-time catering assistant in 2007, she would not fall under the document's description of Davis's subordinates. Reply Br. 10; Pet. App. 2a, 27a-28a.

Supervisor status instead "is based on * * * job function rather than job title" and "must be based on the specific facts." Pet. App. 89a-90a (EEOC Guidance). Discovery in this case was extensive, with depositions or affidavits taken from more than a dozen employees. The record also includes numerous memoranda, e-mails, minutes, and other documents. Nevertheless, petitioner identifies no specific facts suggesting that Davis directed her day-to-day work.

In fact, the record indicates that others, not Davis, directed petitioner's day-to-day work. Either Kimes or the chef outlined petitioner's daily tasks on "prep lists." Pet. App. 41a-42a, 72a; Br. in Opp. 25. Davis may have handed petitioner her prep lists on occasion, but the record does not show that Davis prepared them. See Docket entry No. 75-17, at 8. Even under the EEOC's view, someone "who merely relays other officials' instructions regarding work assignments" does not qualify as a supervisor. Pet. App. 92a (EEOC Guidance).

Furthermore, it would not be enough for petitioner to show that Davis occasionally took the lead in the kitchen. An employer may be liable where a temporary supervisor "commits unlawful harassment of a subordinate while serving as his or her supervisor." Pet. App. 92a (EEOC Guidance). But here, the record contains only oblique references to any exercise of authority by Davis, such as Kimes's statement in 2005 that Davis had "given direction to [petitioner]" at some unspecified time. Docket entry No. 59-19, at 4; see also Reply Br. 11; Br. in Opp. 25; Docket entry No. 56-6, at 3. Moreover, Kimes also testified that he "c[ould]n't have [Davis] directing [petitioner]" because of problems between them and that he tried to separate them after petitioner complained. Docket entry No. 56-6, at 3; see also Reply

Br. 11; Br. in Opp. 25. Petitioner does not allege that Davis misused authority to "increase [petitioner's] workload," "assign [petitioner] undesirable tasks," or otherwise mistreat petitioner. Pet. App. 91a (EEOC Guidance). Accordingly, petitioner could not meet the EEOC's standard even if one were to assume, as did the district court, that Davis had "periodic[] * * * authority." *Id.* at 54a; see also *Mikels* v. *City of Durham*, 183 F.3d 323, 334 (4th Cir. 1999) (holding "occasional authority to direct [victim's] operational conduct" does not amount to supervisor status).

2. Because this Court's "function in resolving [circuit] conflicts * * * is judicial, not simply administrative or managerial," it normally decides questions of public importance "in the context of meaningful litigation." *The Monrosa* v. *Carbon Black Exp.*, 359 U.S. 180, 184 (1959). The Court will normally deny review "[i]f the resolution of a clear conflict is irrelevant to the ultimate outcome of the case before the Court." Eugene Gressman et al., *Supreme Court Practice* 248 (9th ed. 2007). In *The Monrosa*, for example, the Court granted certiorari to decide whether a contract provision barring an in personam action was enforceable, but dismissed the writ as improvidently granted after it became clear that "in any event the [plaintiff] will be able to try its claim in the District Court" in rem. 359 U.S. at 183-184. The court stated that it would "await a day when the issue is posed less abstractly." *Id.* at 184; see also *Belcher* v. *Stengel*, 429 U.S. 118 (1976).

Those considerations counsel strongly against granting review here. If the Court were to attempt to resolve the disagreement among the courts of appeals in this case, it would be required to consider in the abstract whether an employer should be held vicariously liable

for the actions of a supervisor who has authority to direct petitioner's daily work activities. That issue would have little practical salience here, because the record fails to demonstrate that Davis in fact directed petitioner's daily work activities or how she did so. The Court thus would be in the position of considering the question presented without the benefit of concrete facts to test the strength or implications of the parties' competing positions.

The Court would better be able to assess the relative merits of the competing definitions of "supervisor" in a case where the harasser plainly had actual or apparent authority to direct the victim's daily activities (and thus where a victim likely would not have felt free to "walk away or tell the offender where to go," *Faragher*, 524 U.S. at 803). Here, however, there is no factual development of the authority ostensibly wielded by Davis over petitioner, and petitioner in fact expressed uncertainty concerning whether Davis was her supervisor at all. Compare *id.* at 801 ("Faragher points to several ways in which the agency relationship aided Terry and Silverman in carrying out their harassment."). The Court should adhere to its normal practice of addressing the question presented in a case in which the facts squarely and plainly implicate the disagreement among the circuits, so that it could consider the merits of the competing standards in a context affording an informed understanding of the practical and legal implications of adopting one or the other approach.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2012