No. 11-556

IN THE
Supreme Court of the United States

MAETTA VANCE,
Petitioner,
v.

BALL STATE UNIVERSITY,
Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Seventh Circuit

BRIEF OF NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, ET AL., AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*

Amici submit this brief, with the consent of the parties,[1] in support of Petitioner's argument that employers should be subject to vicarious liability when a supervisor engages in workplace harassment and the harassing supervisor has authority to direct and oversee his or her victim's daily tasks. Specifically, the *amici* submit this brief to highlight the realities of the workplace for employees who experience harassment from an immediate supervisor and to highlight social science research about the serious implications of supervisor harassment for workers and their employers.

Because several *amici* have joined this brief, more detailed descriptions of each appear in the Appendix. The *amici* are:

- 9to5, National Association of Working Women
- Asian American Justice Center
- Lawyers' Committee for Civil Rights Under Law
- Leadership Conference on Civil and Human Rights
- Legal Aid Society-Employment Law Center
- Legal Momentum
- National Partnership for Women & Families
- National Women's Law Center
- Service Employees International Union
- Women Employed

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[1] Counsel for *amici* authored this brief in its entirety. No person or entity other than *amici*, their staff, or their counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been filed with Clerk of the Court pursuant to Supreme Court Rule 37.3.

SUMMARY OF ARGUMENT

This case compels the Court to determine how the term "supervisor" should be understood to determine an employer's liability for harassment by a supervisor. When a supervisor engages in unlawful harassment, the employer should be subject to vicarious liability if the harassing supervisor has authority to direct and oversee his or her victim's work. Vicarious liability for supervisory harassment is appropriate because supervisors are aided in such misconduct by the authority that the employer delegates. The vicarious liability standard should apply when the harassing supervisor has authority to undertake or recommend tangible employment decisions or to direct and oversee the employee's work. The Seventh Circuit's overly restrictive standard that vicarious liability can only be imposed when the harassing supervisor has formal authority to hire, fire, promote, demote, or make other such tangible employment decisions fails to comport with the Court's precedent and the realities of the workplace.

Although Title VII has long prohibited discrimination, harassment remains a pervasive problem in the workplace. Over the past decade, the number of charges of harassment filed with federal, state, and local agencies has grown by twenty-five percent. In the face of the prevalent problem of workplace harassment, the Seventh Circuit's standard fails to advance Title VII's primary objectives to prevent and eliminate unlawful discrimination and harassment.

The Seventh Circuit's opinion should be reversed because it fails to comply with Supreme Court precedent, ignores EEOC guidance, and runs contrary to a common sense understanding of the term "supervisor."

Furthermore, by relieving employers of responsibility for the behavior of direct supervisors, the standard adopted by the Seventh Circuit fails to comport with the realities of the workplace because it ignores the crucial role of direct supervisors. Direct supervisors have the greatest practical ability to create a hostile work environment. Their positions of authority within their organizations enable them to set the tone for other employees. While co-worker harassment can create an egregious and unlawful hostile work environment, harassment by a supervisor is generally perceived differently by workers.

The Seventh Circuit's standard diminishes accountability for harassment by direct supervisors and contravenes the purposes of Title VII. The Seventh Circuit's rule also reduces employers' incentives to detect and prevent harassment.

For these reasons, the standard adopted by the Seventh Circuit should be rejected. Employers should be subject to vicarious liability for supervisor harassment if the supervisor has authority to direct and oversee the work of the target of the harassment. The Court need not determine whether the facts of the case prove the existence of a hostile work environment, or whether the plaintiff's

supervisor meets the standard for supervisory liability, but should instead direct the lower courts to resolve this question using the correct legal standard on remand.

ARGUMENT

I. WHILE TITLE VII HAS LONG PROHIBITED DISCRIMINATION, HARASSMENT REMAINS A PERVASIVE PROBLEM IN THE WORKPLACE.

Title VII has long prohibited workplace harassment on the basis of race, color, national origin, religion, or sex. In 1985, after courts began to recognize workplace harassment as a violation of anti-discrimination laws, one researcher predicted that "it is possible by the mid-1990s to eliminate sexual harassment, leaving a more productive and professional workplace for everyone." Barbara A. Guteck, *Sex and the Workplace: The Impact of Sexual Behavior and Harassment on Women, Men, and Organizations* (1985). Nearly thirty years later, this prediction has proven overly optimistic, and unlawful harassment remains prevalent in the workplace.

Thousands of harassment charges are filed with the Equal Employment Opportunity Commission ("EEOC") and state and local agencies each year, and the numbers are on the rise. Over the past decade, the number of charges filed with the EEOC and state and local fair employment practice

agencies alleging harassment has grown by 25%.[2] The number of charges filed with the EEOC each year alleging *racial* harassment is growing at an even faster pace, with an increase of over 31% in the last ten years.[3] Women continue to suffer the brunt of sexual harassment, with women filing 84% of sexual harassment charges filed with the EEOC and state and local agencies.[4]

Indeed, in case after case, workers challenge egregious harassment by supervisors. In *Williams v. New York City Housing Auth.*, a supervisor displayed a noose in his office. 154 F. Supp.2d 820, 821, 824-26 (S.D.N.Y. 2001). In *Curry v. SBC Communications, Inc.*, 669 F. Supp. 2d 805, 814 (E.D. Mich. 2009), a "service leader" hung a noose in the work space and the regional manager saw the noose, left it hanging in place, and joked about it. In *Fuller v. Fiber Glass Sys., LP*, a supervisor made "monkey or gorilla gestures" behind an African American employee. 618 F.3d 858 (8th Cir. 2010). In *Spriggs v. Diamond Auto Glass*, a supervisor repeatedly referred to an African American employee as a "monkey" and "nigger." 242 F. 3d 179 (4th Cir. 2001). In *Hoskins v. Howard University*, a

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[2] Equal Employment Opportunity Commission, Harassment Charges, FY 1997-FY 2011, http://www.eeoc.gov/eeoc/statistics/enforcement/harassment.cfm (last visited Aug. 22, 2012).

[3] Equal Employment Opportunity Commission, Race-Based Harassment Charges, FY 1997-FY 2011, http://www.eeoc.gov/eeoc/statistics/enforcement/race_harassment.cfm (last visited Aug. 22, 2012).

[4] Equal Employment Opportunity Commission, Sexual Harassment Charges http://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment.cfm (last visited Aug. 22, 2012).

supervisor told his employee that he had "considered sexually assaulting" her and made "moaning sounds" around her, told her that he was attracted to her, told her that he could not control his feelings around her, and made various sexual remarks to the plaintiff. 839 F. Supp.2d 268 (D.D.C. 2012).

Major cross-organizational studies have shown that large numbers of American women indicate they have been harassed on the job. Paula M. Popovich et al., *Assessing the Incidence and Perceptions of Sexual Harassment Behaviors Among American Undergraduates*, 120 Journal of Psychology 387 (2001). In one survey, a third of women reported that they had experienced sexual harassment in the workplace. Christopher Uggen, Amy Blackstone, *Sexual Harassment as a Gendered Expression of Power*, 69 American Sociological Review 73 (2004).

A cross-generational study of the harassment experiences of physician mothers and their physician daughters revealed that "sexual harassment and gender bias remain stubbornly entrenched in medical training and practice settings." Diane K. Shrier, et al., *Generation to Generation: Discrimination and Harassment Experiences of Physician Mothers and Their Physician Daughters*, 16 Journal of Women's Health 883 (2007). The study found that over a quarter of the female doctors surveyed had experienced harassment by a supervisor. *Id.* at 887.

In traditionally male-dominated fields with few women, sexual harassment occurs at much higher

rates. For example, in a survey of individuals in the armed services, sixty-eight percent of military women responded that they had experienced harassment during their military careers. Juanita M. Firestone, Richard J. Harris, *Perceptions of Effectiveness of Responses to Sexual Harassment in the US Military, 1988 and 1995*, 10 Gender, Work and Organization 51 (2003).

To prevent yet another generation of workers from enduring rampant harassment on the job, the standard of employer liability must advance Title VII's objectives to prevent and eliminate workplace harassment. The opinion below instead undermines Title VII's effectiveness. It should be reversed.

II. THE SEVENTH CIRCUIT'S RULING BELOW IS SQUARELY AT ODDS WITH SUPREME COURT PRECEDENT, THE ORDINARY MEANING OF THE TERM "SUPERVISOR," THE DECISIONS OF LOWER COURTS, AND EEOC GUIDANCE.

a. The Seventh Circuit's opinion misapplies the Court's holding in *Faragher*.

The Seventh Circuit's conclusion that the "authority to direct an employee's daily activities [does not] establish[] supervisory status under Title VII," *Vance v. Ball State University*, 646 F.3d 461, 470 (7th Cir. 2011), fundamentally misapplied the Supreme Court's decision in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). Nothing in the facts, holding, or analysis of the *Faragher* decision

supports the restrictive definition of "supervisor," adopted in the Seventh Circuit's prior decisions and applied in this case without further analysis. The decision should be reversed.

Beth Ann Faragher was a 19-year-old college student who worked part time as a lifeguard for the City of Boca Raton. Beth Ann Faragher, *Faragher v. City of Boca Raton: A Personal Account of an Employment Discrimination Plaintiff*, 22 Hofstra Labor & Employment Law Journal 417 (2005). She suffered physical and verbal harassment by two of her supervisors. *Id.* One of the harassers held the title of Chief of the Marine Safety Division and had the authority to hire and discipline lifeguards in addition to supervising their work; the other was a lieutenant who was responsible for directing and overseeing the lifeguards' daily assignments. *Faragher,* 524 U.S. at 781. Both supervisors repeatedly subjected Faragher and other female lifeguards to "uninvited and offensive touching" and lewd and offensive remarks. *Id.* at 781.

The Court ruled that Faragher's employer should be held liable for the hostile work environment created by the supervisors. *Faragher*, 524 U.S. at 810. The Court did not distinguish between the acts of the higher- and lower-ranking harassers, but explicitly 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 (emphasis added). Noting that unchecked application of this rule could lead to automatic liability for employers,

the Court further held that when no tangible employment action is taken, the employer may assert an affirmative defense that the employer provided a reasonable system for complaints and the employee unreasonably failed to use it. *Id.*

Nowhere in the *Faragher* decision did the Court evince an intent to exclude harassers with the authority to direct and control their victim's activities from the definition of a "supervisor." To the contrary, in the factual context of the case, the reference to "immediate . . . authority" in the Court's holding could only refer to the supervisor who directed the lifeguards' daily assignments. *Id.* The Court recognized that harassment can be facilitated by the authority delegated by the employer to a supervisor, whether the supervisor has formal authority to make a tangible employment decision or whether the supervisor has the authority to direct and oversee work.

In its discussion of supervisory authority, the Court repeatedly emphasized the importance of supervisors' power to direct and control employees' actions. In analyzing the reasons for holding employers vicariously liable for supervisory misconduct, the Court found persuasive the following rationale:

> [T]he supervisor is clearly charged with maintaining a productive, safe work environment. The supervisor *directs and controls* the conduct of the employees, and the manner of doing so may inure to the employer's benefit or

> detriment, including subjecting the employer to Title VII liability.

Id. at 798 (quoting *Faragher v. City of Boca Raton*, 111 F.3d 1530, 1542 (11th Cir. 1997) (Barkett, J., dissenting in part and concurring in part)) (emphasis added).

In concluding that the City of Boca Raton was liable for the hostile work environment created by Faragher's supervisors, the Court again focused on the supervisors' power over employees' daily activities. The Court noted that "[i]t is undisputed 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 (emphasis added). The Court never discussed the fact that only one of the harassing supervisors had formal authority over Faragher's employment status, and the use of the phrase "these supervisors" leaves no doubt that the Court was referring to both of them.

In the opinion below, the Seventh Circuit mechanically applied its prior precedents that cited the *Faragher* decision but declined to apply its reasoning or holding. The court instead relied on its prior rulings that supervisory authority "primarily consists of the power to hire, fire, demote, promote, transfer or discipline an employee," and the power "to direct an employee's daily activities" is therefore insufficient to confer supervisory status. *Vance*, 646 F.3d at 470 (quoting *Hall v. Bodine Elec. Co.*, 276 F.3d 345, 355 (7th Cir. 2002)); *see id.* (citing *Rhodes*

v. Illinois Dept. of Transp., 359 F. 3d 498, 506 (7th Cir. 2004); *Parkins v. Civil Constructors of Illinois, Inc.*, 163 F. 3d 1027, 1032-34 (7th Cir. 1998)). These authorities are plainly inconsistent with the *Faragher* decision.

Because the court below failed to apply this Court's rule in *Faragher*, the opinion should be reversed.

b. The Seventh Circuit's rule ignores the common sense meaning of "supervisor."

In the opinion below, the Seventh Circuit mechanically applied its prior precedents that not only misread *Faragher*, but also ignored the plain meaning of the word "supervisor." The ordinary meaning of "supervisor" encompasses the power to direct and control employees' daily activities. As used in common parlance, a "supervisor" is "a person who manages or supervises," and the verb "supervise" means "to direct or oversee the performance or operation of" or "to watch over so as to maintain order, etc." Collins Online English Dictionary, 2012, http://www.collinsdictionary.com/dictionary/english/supervisor.

This Court has stressed the importance of a "common sense" approach in applying Title VII's provisions to workplace situations. *See Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 70 (2006); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81-82 (1998). An employee would naturally understand the person who directs her

daily activities to be her "supervisor," and there is no reason to apply a definition in the Title VII context that departs from the common-sense understanding of the word in the workplace environment.

c. The Seventh Circuit decision is at odds with other courts, which have applied a common sense definition of supervisor to determine liability under Title VII.

Both before and after *Faragher*, courts have had little difficulty concluding that an individual with the power to direct and control subordinates' daily activities is a "supervisor" whose actions may render the employer vicariously liable for Title VII purposes. In *Bundy v. Jackson*, 641 F.2d 934, 943 (D.C. Cir. 1981), the court found it was "obvious" that the men who harassed the plaintiff were her supervisors even though only one had control over plaintiff's employment status. In *Johnson v. Booker T. Washington Broadcasting Serv.,* 234 F.3d 501, 511 (11th Cir. 2000), the Eleventh Circuit ruled that a radio program director "clearly" was the plaintiff's supervisor even though he did not have hiring and firing authority. *See also Katz v. Dole*, 709 F.2d 251, 256 n.6 (4th Cir. 1983) ("supervisor" directed day-to-day office management); *Mack v. Otis Elevator Co.,* 326 F.3d 116, 120-21, 125 (2d Cir. 2003) ("mechanic in charge" who oversaw daily assignments was supervisor); *Whitten v. Fred's Inc.,* 601 F.3d 231, 246 (4th Cir. 2010) (store manager who gave plaintiff assignments, set schedule and directed her activities qualified as a supervisor); *Dawson v. Entek Intern.*, 630 F.3d 928, 937 (9th Cir. 2011) ("trainer" who

directed plaintiff's activities on production line was supervisor). The pragmatic approach these courts adopted in determining supervisor status accords with this Court's guidance and the realities of the workplace.[5]

d. EEOC guidance also adopts a common sense understanding to determine liability for harassment by a supervisor.

The EEOC, which investigates tens of thousands of discrimination complaints each year, has also concluded that "supervisory" power extends to the authority to direct and control an employee's daily activities. According to the EEOC guidelines, an individual qualifies as a "supervisor" if "the individual has authority to undertake or recommend tangible employment decisions affecting the employee; *or* the individual has authority to direct the employee's daily work activities." EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, EEOC

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[5] In contrast, courts applying the Seventh Circuit's rule rely on an artificial and limited analysis of formal agency principles that both ignores the Court's analysis of agency principles in *Faragher* and has little to do with workers' understanding or experiences. *See*, *e.g.*, *Noviello v. City of Boston*, 398 F.3d 76 (1st Cir. 2005); *Joens v. John Morell & Co.*, 354 F.3d 938 (8th Cir. 2004); *Rhodes*, 359 F.3d at 509*; Parkins* 163 F.3d at 1034. While the *Faragher* Court recognized that these common-law principles are "an appropriate starting point" in the vicarious liability analysis, 524 U.S. at 802, it cautioned that they must be adapted to the "practical objectives of Title VII." *Id.* at 803 n.3; *see also Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986).

Notice No. 915.002 (Jun. 18, 1999) (emphasis in original). These guidelines regarding vicarious liability for supervisor harassment apply to harassment based on race, color, sex, religion, national origin, age, or disability. *Id.*

The Court has repeatedly recognized that EEOC interpretations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Meritor*, 477 U.S. at 65; *see also General Electric Co. v. Gilbert*, 429 U.S. 125, 142 (1976). Indeed, the Court has explained that EEOC interpretations are entitled to "great deference" when they are consistent with Title VII's statutory language and purpose. *See Griggs v. Duke Power Co.,* 401 U.S. 424, 433-44 (1971) (because "the Act and its legislative history support the Commission's construction, this affords good reason to treat the guidelines as expressing the will of Congress").

The EEOC's well-reasoned guidance furthers the legislative intent of the statute, comports with a common-sense understanding of the various forms of authority that employers grant to their supervisors, and avoids the arbitrary distinctions between different classes of supervisors created by the Seventh Circuit rule.

III. THE SEVENTH CIRCUIT'S DISTINCTION BETWEEN DIFFERENT CLASSES OF SUPERVISORS IS INCONSISTENT WITH THE REALITIES OF WORKPLACE HARASSMENT.

a. The Seventh Circuit rule excludes those supervisors who have the greatest practical ability to create a hostile work environment.

While high-level supervisors are undoubtedly responsible for maintaining a workplace free from discrimination, it is the supervisors who direct and control workers' daily activities who have the most immediate control over their subordinates' working conditions and the greatest opportunity to inflict harm on employees. Employers should be vicariously liable when a supervisor engages in harassment, regardless of whether the employer has delegated authority in the form of the power to direct and oversee workers or the power to make tangible employment decisions.

A victimized employee need not show economic harm or any tangible employment action such as termination, transfer, or demotion in order to state a hostile work environment claim. *Meritor*, 477 U.S. at 64. Rather, the harm lies in the experience of the work environment itself, as the worker is subjected to harassment so pervasive or severe as to make working conditions demeaning and intolerable. *Id.* at 65-66. *See also Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993) ("When the workplace is permeated with discriminatory

intimidation, ridicule and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, Title VII is violated.") (citations and internal quotation marks omitted).

For most employees, the direct supervisor who oversees their work is the most significant supervisor in their day-to-day work life, and the supervisor with whom they have the most frequent contact. *See Faragher*, 524 U.S. at 808. Because of this close interaction, the direct supervisor has greater opportunity to engage in "severe or pervasive" harassment than more senior managers who tend to have limited contact with low-level employees.

The abuse of supervisory authority can take many forms, ranging from discriminatory work assignments to physical assault. For example, in *McGinest v. GTE Service Corp.,* 360 F.3d 1103, 1107 (9th Cir. 2004), the plaintiff's direct supervisor assigned him more dangerous duties because of his race. In *Williams v. New York City Housing Auth.*, a white supervisor displayed a noose in his office. 154 F. Supp.2d 820 (S.D.N.Y. 2001). As the court in that case noted, "the effect of such violence on the psyche of African-Americans cannot be exaggerated." *Id.* at 824. In *Dinkins v. Charoen Pokphand USA, Inc.,* 133 F. Supp. 2d 1254, 1258-61 (M.D. Al. 2001), male supervisors at a chicken processing plant subjected female employees to a litany of outrageous conduct, including following female employees into the restroom; touching female employees' buttocks, genitals, and breasts; making constant sexual

comments and gestures; conditioning favorable work assignments on compliance with sexual demands; and victimizing one employee with "a barrage of psychological warfare, stalking and sexual assault." *Id.*

In *Faragher*, the plaintiff suffered egregious harassment by her direct supervisor, who

> [t]ackled Faragher and remarked that but for a physical characteristic he found unattractive, he would readily have had sexual relations with her. Another time he pantomimed an act of oral sex. Within earshot of the female lifeguards, [her direct supervisor] made frequent, vulgar reference to women and sexual matters, commented on the bodies of female lifeguards and beachgoers, and at least twice told female lifeguards that he would like to engage in sex with them.

Faragher, 524 U.S. at 782 (internal citations omitted).

As the *Faragher* Court observed, isolation from more senior supervisors can itself facilitate a hostile work environment, because there may be no immediate check on the direct supervisor's behavior. The harassing supervisors in *Faragher* worked at a remote worksite where Faragher and her colleagues were "completely isolated from the City's higher management." *Id.* at 808-09.

In *Mack v. Otis Elevator,* the "mechanic in charge" at an elevator repair work site sexually harassed and "explicitly questioned [plaintiff's] place in the elevator business as a woman and an African-American." 326 F.3d at 127. In concluding the employer should be vicariously liable for the supervisor's conduct, the Second Circuit reasoned that because the "mechanic in charge" was the most senior employee at the work site, he "possessed a special dominance over other on-site employees . . . arising out of their remoteness from others with authority to exercise power on behalf of [the employer]." *See also Whitten,* 601 F.3d at 245, 247 (store manager who harassed plaintiff was the only supervisor on site).

The supervisors in *Mack, McGinest, Dinkins* and *Whitten*, as well as one of the supervisors at issue in *Faragher*, would not be considered "supervisors" under the Seventh Circuit rule because none had formal authority over their victims' employment status, even though they used the power and authority delegated by their employers to create hostile work environments. In contrast, many supervisors who fall within the Seventh Circuit rule have little practical ability to create a hostile work environment because of their limited contact with employees. *See, e.g., Dawson*, 630 F.3d at 933 (employee "never . . . dealt with" supervisors other than the immediate supervisors who participated in harassment).

The Seventh Circuit rule is out of step with the reality of today's workplace, in which supervisory relationships are often informal,

reflecting a trend toward a flattening of organizational hierarchies in the modern American workplace. *See* Susan A. Sturm, *Race, Gender & the Law in the Twenty-first Century Workplace: Some Preliminary Observations*, 1:2 U. Pa. Journal of Labor and Employment Law, 639, 659-63 (1998). As a result, "[l]egal analysis that focuses on questions of formal status or position may bear no relation to the actual process of decision making or the capacity or predisposition to abuse power in ways that implicate discrimination." *Id.* at 663.

Although between World War I and 1970 the structure of the American workplace was "largely hierarchical and bureaucratic," changing economic trends have led to a significant reorganization in the workplace since then. Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 Harv. Civ. Rights-Civ. Lib. L. Rev. 91, 99-100 (2003). "As part of the attempt to increase flexibility and institutional receptivity to consumer demand, companies have been flattening hierarchies and pushing management and decisionmaking authority lower. . . . Lower-level employees in these organizations are often given substantial responsibility and decisionmaking authority." *Id.* at 101. These lower-level supervisors frequently direct other employees' day-to-day activities with complete authority.

A consequence of the structure of the modern American workplace is that while many of today's employees have little to no interaction with those supervisors who have the ability to hire, fire,

promote, demote, transfer or discipline them, these same employees interact on a daily basis with lower-level supervisors who direct their work. As this trend toward flattening of organizational hierarchies continues, the Seventh Circuit rule would enable companies to escape liability for the discriminatory acts of lower-level supervisors.

Application of the Seventh Circuit's rule thus leads to the anomalous result of insulating employers from vicarious liability based on the harassing conduct of those very supervisors who are best positioned to "create . . . an actionable hostile work environment," *Faragher*, 524 U.S. at 807.

b. **Harassment by a direct supervisor can have a detrimental effect not only for the target of the harassment, but also for the culture of the workplace and the productivity of the organization more broadly.**

Research into workplace harassment confirms that abusive behavior by supervisors has far-reaching implications for the work environment. As authority figures, supervisors communicate through their words and actions the standards of conduct that are allowed at the workplace. They set the tone for workplace behaviors and their actions can have particularly grave implications for individual employees and for the organization as a whole. And supervisors who direct employees' daily activities and have frequent contact with subordinates are best-positioned to set the code of accepted conduct in

a workplace. Thus, harassment by direct supervisors can set harmful precedents for employees.

i. Because of their positions of authority within their organizations, supervisors set the tone for other employees.

Individuals with a proclivity toward engaging in abusive behaviors are more likely to harass when they see a role model do so. J. Pryor, C. La Vite, and L. Stoller, *A social psychological analysis of sexual harassment: The person/situation interaction*, 42 Journal of Vocational Behavior 68-83 (1993). For better or worse, authority figures often serve as role models; thus, to the extent that supervisors engage in harassing behaviors and reinforce others' tendencies to do the same, the damage is compounded. *Id.* Another study came to the same conclusion, noting that as role models, supervisors should be cognizant of signals they send to subordinates about the permissibility of harassing behavior in the workplace. Rebecca A. Thacker, Stephan F. Gohmann, *Emotional and Psychological Consequences of Sexual Harassment: A Descriptive Study*, 130 Journal of Psychology 442 (1996).

A study of female lawyers in private practice documented this phenomenon. The study concluded that actions by supervisors influenced the behavior of colleagues by implicitly or explicitly permitting other employees to harass workers. David N. Laband, Bernard F. Lentz, *The Effects of Sexual Harassment on Job Satisfaction, Earnings, and*

Turnover among Female Lawyers, 51 Industrial and Labor Relations Review 596 (1998).

Ultimately, when supervisors model and reinforce abusive behavior by employees, a culture is created in which acceptance of harassing behavior is the norm—a paradigmatic example of a hostile work environment. *See* J. Pryor, C. La Vite, and L. Stoller, *A social psychological analysis of sexual harassment: The person/situation interaction*, 42 Journal of Vocational Behavior 68-83 (1993); *Dawson*, 630 F.3d at 933 (after employee complained about taunts and offensive remarks from co-workers, supervisor joined in); *Dinkin*s, 133 F. Supp. 2d at 1254 (supervisor told plaintiff daily verbal and physical harassment by co-supervisor was "just playing").

Supervisors who direct employees' daily activities may be the most powerful role models for the organization because of their frequent contact with subordinates. As even the Seventh Circuit has recognized, "Perhaps no single act can more quickly alter the conditions of employment and create an abusive working environment than [a supervisor's] use of an unambiguously racial epithet such as 'nigger' in the presence of his subordinates." *Rodgers v. Western-Southern Life Ins. Co.*, 12 F.3d 668, 675 (7th Cir. 1993) (citations and internal quotation marks omitted). *See also Swinton v. Potomac Corp.*, 270 F.3d 794, 799-800 (9th Cir. 2001) (plaintiff's immediate supervisor laughed along with racist jokes and never told any employees to stop); *EEOC v. Whirlpool Corp.*, 2009 U.S. Dist. LEXIS 118624, *1-7 (M.D. Tenn. 2009) (rather than

condemning and disciplining workers who racially and sexually harassed a coworker, the supervisor encouraged the harassed African American worker to "give [another worker] what he wants and get it over with").

When direct supervisors harass their subordinates they send powerful messages to both the target of the harassment and other workers about the employer's tolerance for workplace discrimination. Because of their key roles in setting standards in the work environment, their actions should be attributed to their employers.

ii. Harassment from a supervisor often carries different implications than harassment from a co-worker.

Workplace harassment is fundamentally about power,[6] and all supervisors exercise power

[6] Rebecca A. Thacker, Stephan F. Gohmann, *Emotional and Psychological Consequences of Sexual Harassment: A Descriptive Study*, 130 Journal of Psychology 442 (1996). Accordingly, workers who occupy high-status positions are less likely to be harassed than those in low-status positions, and low-status workers (such as trainees and clerical workers) are more vulnerable than those in professional, managerial, and administrative positions. Robert A. Jackson, Meredith A. Newman, *Sexual Harassment in the Federal Workplace Revisited: Influences on Sexual Harassment by Gender*, 64 Public Administration Review 707 (2004). "Workers who are poorly paid may be easy targets for disrespect and bullying by supervisors--supervisors who are often accorded significant discretion within workplace contexts, and who sometimes activate that discretion in informal and abusive ways." Vincent J. Roscigno, Steven H. Lopez, and Randy Hodson,

over their subordinates in one form or another. For this reason, harassment by supervisors is categorically different than harassment by co-workers.

To be sure, co-worker harassment can lead to employer liability if the employer knew or should have known of the misconduct, unless the employer can show that it took immediate and appropriate corrective action. But because supervisors are aided in such misconduct by the authority that the employers delegate to them, it is appropriate that a different standard of vicarious liability should apply to supervisory harassment.

Regardless of whether the supervisor exercises direct control over employees' tasks or formal control over their work status, abuse of the supervisory position can have devastating consequences for employees and the enterprise itself.

Supervisors are delegated legitimate organizational power over their subordinates, and the structural hierarchy of positions in the organization provides legitimacy—that is, the organization has bestowed legitimacy on the position holder through a managerial, executive, or supervisory title. *See, e.g.,* R. A. Thacker, G. R. Ferris, *Understanding sexual harassment in the workplace: The influence of power and politics within*

Supervisory Bullying, Status Inequalities and Organizational Context, 87 Social Forces 1575, 1564 (2009). Similarly, workers with insecure jobs are common targets for workplace harassment and women in blue-collar jobs are at a unique risk of receiving unwanted sexual attention. *Id.*

the dyadic interaction of harasser and target, 1 Human Resource Management Review 23-37 (1991); M. Weber, *The theory of social and economic organization* (1947).

Due to the "importance of status-based power differentials and organizational context," harassment from a supervisor often carries different implications than harassment from a co-worker. Vincent J. Roscigno, Steven H. Lopez, and Randy Hodson, *Supervisory Bullying, Status Inequalities and Organizational Context,* 87 Social Forces 1561 (2009). *See also* Rebecca A. Thacker, Stephan F. Gohmann, *Emotional and Psychological Consequences of Sexual Harassment: A Descriptive Study*, 130 Journal of Psychology at 439 (1996). Inappropriate behavior by a supervisor is more likely to be perceived as harassment, to be experienced more acutely than it would be if perpetrated by a coworker, and to cause greater psychological trauma and discomfort at work. *Id.*

The very nature of the work relationship between the target and the harasser may determine whether the behavior is perceived as harassment. K. M. York, *Defining sexual harassment in workplaces: A policy-capturing approach*, 32 Academy of Management Journal, 830-50 (1989). In a study of perceptions about harassing behavior on the job, the same behavior was considered by the participants to be more definitely sexual harassment if it was exhibited by a supervisor than by a co-worker. Paula M. Popovich et al., *Assessing the Incidence and Perceptions of Sexual Harassment Behaviors Among American Undergraduates*, 120 Journal of

Psychology 392-93 (2001); *see also* 130 Journal of Psychology at 429-30 (1996) (harassment from a supervisor is more likely to lead to a worsening of the employee's physical and emotional condition, as compared to harassment from a co-worker). *See, e.g., Nichols v. Frank*, 42 F.3d 503, 507, 513 (9th Cir. 1994) (repeated sexual harassment of a postal worker by her immediate supervisor led to suicidal ideations and other severe psychological trauma). "The position of the supervisor or manager has a certain degree of power associated with it that can turn what appears to be an innocuous behavior (e.g., a refusal of a date) into something leading the employee to feel threatened in his or her job." Paula M. Popovich et al., *Assessing the Incidence and Perceptions of Sexual Harassment Behaviors Among American Undergraduates*, 120 Journal of Psychology 395 (2001). As such, employees "may recognize that the power of the supervisor's position makes such behaviors more serious." *Id.*

Harassment from a supervisor or from someone who is higher in the organizational hierarchy is not only more likely to be perceived as harassment, but is likely to cause greater suffering than harassment from a peer or co-worker. *See, e.g.,* E. G. C. Collins, T. B. Blodgett, *Sexual harassment: Some see it. . . Some don't*, Harvard Business Review 77-95 (1981); Kevin Stainback, Thomas N. Ratliff, and Vincent J. Roscigno, *The Context of Workplace Sex Discrimination: Sex Composition, Workplace Culture and Relative Power*, 89 Social Forces 1165 (2011).

Because of the authoritative position of the

supervisor harasser, workers who are targeted for harassment by a supervisor are more likely to suffer psychological trauma because they lack control over their ability to remove the unwelcome harassment. C. Diener, C. Dweck, *An analysis of learned helplessness: II. The processing of success*, 29 Journal of Personality and Social Psychology 940-52 (1980); M. Seligman, *Depression and learned helplessness*. In R. Friedman & M. Katz (Eds.), *The psychology of depression: Contemporary theory and research*, 83-113 (1974).

Harassment from an immediate supervisor as well as other higher level supervisors is also more likely than co-worker harassment to lead to a worsening of an employee's feelings about work. Rebecca A. Thacker, Stephan F. Gohmann, *Emotional and Psychological Consequences of Sexual Harassment: A Descriptive Study*, 130 Journal of Psychology 436 (1996). Because of their positions of authority, there is a greater propensity for supervisor harassers to affect an employee's psychological state in a detrimental way. *Id.* at 439. "Discomfort, anger, guilt, and even fear can affect individuals' emotional/physical condition as well as feelings about their work, and these feelings can, in turn, lead to turnover, absenteeism, and reduced productivity." *Id.* at 430.

This is true whether the supervisor exercises formal control over the employee's employment or direct control over the employee's tasks. In both cases, "[i]t is the authority vested in the supervisor by the employer that enables him to commit the wrong: it is precisely because the supervisor is

understood to be clothed with the employer's authority that he is able to impose unwelcome sexual conduct on subordinates." *Meritor*, 477 U.S. at 76-77 (Marshall, J., concurring). *See also Faragher,* 524 U.S. at 803 ("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.").

iii. **Harassment can have detrimental effects not only for the target of the harassment, but on the organization more broadly.**

Preventing and rooting out discrimination is critical to both individual workers and organizational productivity. Rebecca A. Thacker, Stephan F. Gohmann, *Emotional and Psychological Consequences of Sexual Harassment: A Descriptive Study*, 130 Journal of Psychology 429-30 (1996). The costs of harassment are estimated to be extremely high, due in part to turnover among those who leave their jobs because of the harassment, payment of leave to those who miss work in an attempt to avoid further harassment, and reduced individual and work-group productivity. Stefan Thau, Rebecca J. Bennett, Marie S. Mitchell, Mary Beth Marrs, *How management style moderates the relationship between abusive supervision and workplace deviance: An uncertainty management theory,* 108 Organizational Behavior and Human Decision Processes 79 (2009).

Women who experience or observe sexual harassment report lower overall job satisfaction and a greater intention to quit their jobs. David N. Laband, Bernard F. Lentz, *The Effects of Sexual Harassment on Job Satisfaction, Earnings, and Turnover among Female Lawyers,* 51 Industrial and Labor Relations Review 596, 594 (1998). In fact, experienced or observed sexual harassment increased the expressed intentions of female lawyers to quit their current workplace within two years by over twenty-five percent. *Id.* at 604. And only sexual harassment *by supervisors* demonstrated a significantly negative impact on the reported job satisfaction. *Id.* at 600.

When employers delegate the authority to direct and oversee subordinates to direct supervisors, those supervisors often have as much, if not greater, capacity to harass subordinates as supervisors with formal control. Because the Seventh Circuit's rule should be rejected because it draws arbitrary distinctions among supervisors that are inconsistent with the realities of workplace harassment.

IV. ADOPTING THE SEVENTH CIRCUIT'S STANDARD AND DIMINISHING ACCOUNTABILITY FOR HARASSMENT BY DIRECT SUPERVISORS WOULD CONTRAVENE THE PURPOSES OF TITLE VII.

Title VII's primary goal is to prevent discrimination in the workplace. "Although Title VII seeks 'to make persons whole for injuries suffered on

account of unlawful employment discrimination, its 'primary objective,' like that of any statute meant to influence primary conduct, is not to provide redress but to avoid harm." *Faragher*, 524 U.S. at 807-08 (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975)). The EEOC urges that because "[p]revention is the best tool for the elimination of sexual harassment . . . an employer should take all steps necessary to prevent sexual harassment from occurring." 29 C.F.R. § 1604.11(f) (1996). By diminishing employer accountability for harassment by supervisors, the Seventh Circuit's rule works against these objectives.

Without vicarious liability for harassment by direct supervisors, employers have less incentive to communicate harassment policies, to provide training, and to monitor the actions of all supervisors. Without appropriate training, monitoring, and accountability, supervisors may be more likely to engage in harassment. In *Faragher*, the Court observed that "an employer has a greater opportunity to guard against misconduct by supervisors than by common workers; employers have greater opportunity and incentive to screen them, train them, and monitor their performance." 524 U.S. at 803. The Court took note in that case that the employer "made no attempt to keep track of the conduct of supervisors," including those who harassed Beth Ann Faragher. *Id.* at 808.

Such preventive measures are essential to combating workplace harassment. Because supervisor harassment derives power from ingrained authority structures in the workplace, "recognition of

the problem must be coupled with a willingness to identify and implement more effective structural changes and to expose and correct discrimination and harassment." Diane K. Shrier, et al., *Generation to Generation: Discrimination and Harassment Experiences of Physician Mothers and Their Physician Daughters*, 16 Journal of Women's Health 894 (2007). Experts recommend training and education for supervisors to increase awareness of the effect of their harassment on their targets and the unique effect of their power positions on the psychological and physical well-being of their subordinates. *See, e.g.,* Rebecca A. Thacker, Stephan F. Gohmann, *Emotional and Psychological Consequences of Sexual Harassment: A Descriptive Study*, 130 Journal of Psychology 442 (1996).

By reducing employers' accountability for the conduct of direct supervisors who are uniquely positioned to create hostile work environments, the Seventh Circuit rule discourages employers from taking these measures. Worse, the Seventh's Circuit's focus on formal, rather than practical, supervisory authority encourages employers to limit formal authority to high-level managers and other supervisors who have minimal contact with employees – thus minimizing exposure to lawsuits while doing nothing to protect employees from unlawful harassment by their immediate supervisors.

CONCLUSION

For the above reasons, the Seventh Circuit's decision should be reversed and remanded.

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APPENDIX

APPENDIX

Descriptions of the Amici Curiae

The Asian American Justice Center ("AAJC"), a member of the Asian American Center for Advancing Justice, is a national non-profit, non-partisan organization whose mission is to advance the civil and human rights of Asian Americans and build and promote a fair and equitable society for all. Founded in 1991, AAJC advances its mission through litigation, public policy, advocacy, and community education and outreach on a range of issues. AAJC has a long-standing commitment to protecting the rights of Asian American workers by challenging unlawful discrimination and harassment in employment. This interest has resulted in AAJC's participation in a number of amicus briefs before the courts.

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a tax-exempt, nonprofit civil rights organization that was founded in 1963 by the leaders of the American bar, at the request of President John F. Kennedy, in order to help defend the civil rights of minorities and the poor. Its Board of Trustees presently includes several past Presidents of the American Bar Association, law school deans and professors, and many of the nation's leading lawyers. The Lawyers' Committee is dedicated, among other goals, to eradicating all forms of workplace discrimination affecting racial and ethnic minorities, women, individuals with disabilities, and other

disadvantaged populations. The Lawyers' Committee, through its Employment Discrimination Project, has been continually involved in cases before the Court involving the proper construction afforded to federal civil rights laws prohibiting employment discrimination.

The Leadership Conference on Civil and Human Rights is a diverse coalition of more than 200 national organizations charged with promoting and protecting the civil and human rights of all persons in the United States. The Leadership Conference was founded in 1950 by A. Philip Randolph, head of the Brotherhood of Sleeping Car Porters; Roy Wilkins of the NAACP; and Arnold Aronson, a leader of the National Jewish Community Relations Advisory Council. Its member organizations represent people of all races, ethnicities, religions and socio-economic backgrounds. The Leadership Conference works to build an America that's as good as its ideals, and towards this end, works to combat discrimination in all forms, including discrimination in the workplace. The Leadership Conference recognizes that racial and sexual harassment is a persistent problem in the workplace and urges the Court to follow its own precedent, as well as the intent of Title VII, EEOC guidance, and the commonplace understanding of the role of the supervisor, to reverse the narrow standard adopted by the Seventh Circuit.

Legal Aid Society – Employment Law Center (Legal Aid) is a non-profit public interest law firm whose mission is to protect the workplace rights of individuals from traditionally under-represented

communities. Since 1970, Legal Aid has represented clients in cases involving a broad range of employment-related issues, including discrimination and harassment on the basis of race, gender, age, disability, sexual orientation, national origin, and pregnancy. Legal Aid has appeared before this Court on numerous occasions, both as counsel for plaintiffs and in an *amicus curiae* capacity. Legal Aid's interest in preserving the protections afforded employees by this country's antidiscrimination laws is longstanding.

Legal Momentum (formerly the NOW Legal Defense and Education Fund) has worked to advance women's rights for more than forty years. Legal Momentum advocates in the courts, with federal, state, and local policymakers, and with unions and private business to combating gender discrimination and harassment in employment in order to ensure a just society and women's economic security. Legal Momentum has litigated cases to secure full enforcement of laws prohibiting gender discrimination and harassment, including *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and has participated as *amicus curiae* in leading cases in this area. Unfortunately, gender discrimination and harassment in the workplace remain far too pervasive. Therefore, Legal Momentum remains deeply concerned with ensuring that women effectively may use the law to address unlawful employment practices. This case, addressing who is a "supervisor" under Title VII, raises important issues for the effective enforcement of Title VII.

The National Partnership for Women &

Families is a nonprofit, nonpartisan organization that uses public education and advocacy to promote fairness in the workplace, quality health care for all, and policies that help women and men meet the dual demands of work and family. Founded in 1971 as the Women's Legal Defense Fund, the National Partnership has been instrumental in many of the major legal changes that have improved the lives of working women, including advancements in sexual harassment law. The National Partnership has devoted significant resources to combating sex, race, and other forms of invidious workplace discrimination and has filed numerous briefs amicus curiae in the United States Supreme Court and in the federal circuit courts of appeal to protect and the constitutional and legal rights of women and people of color in employment.

The National Women's Law Center (NWLC) is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and opportunities and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, NWLC has worked to secure equal opportunity in the workplace. This includes not only the right to a workplace that is free from all forms of discrimination and harassment, but also access to effective means of enforcing that right and remedying such conduct. NWLC has played a leading role in the passage and enforcement of federal civil rights laws, including through class action and pattern or practice litigation and in numerous amicus briefs involving sex and race discrimination in employment before the United States Supreme Court, federal courts of appeals and

state courts. NWLC has prepared or participated in several amicus briefs in Title VII cases, including *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006).

The Service Employees International Union (SEIU) represents 2.1 million women and men working in health care, property services, and public services, including schools and universities. The majority of the workers SEIU represents are women, and many are racial minorities or are foreign-born. SEIU is deeply committed to protecting the rights of all workers to be free from sexual and racial harassment in the workplace. This commitment is reflected in SEIU's Constitution, which affirms that it is an essential part of the union's mission to act as an "advocacy organization for working people" and to oppose "discrimination based on gender, race, ethnicity, religion, age, physical ability, sexual orientation or immigration status."

Women Employed's mission is to improve the economic status of women and remove barriers to economic equity. Women Employed promotes fair employment practices, helps increase access to training and education, and provides women with information and tools to plan their careers. Since 1973, the organization has assisted thousands of working women with problems of discrimination and harassment, monitored the performance of equal opportunity enforcement agencies, and developed specific, detailed proposals for improving enforcement efforts. Women Employed strongly

believes that sexual harassment is one of the main barriers to achieving equal opportunity and economic equity for women in the workplace, and when supervisors have the authority to direct and oversee the work of the target of their harassment, vicarious liability should apply.

9to5, National Association of Working Women is a national membership-based organization of women in low-wage jobs working to end discrimination and achieve economic justice. 9to5's members and constituents are directly affected by sex and other forms of workplace discrimination, sexual and other forms of harassment, and retaliation, as well as the difficulties of seeking and achieving redress for all these issues. Our toll-free Job Survival Helpline fields thousands of phone calls annually from women facing these and related problems in the workplace. 9to5 has worked for almost four decades at the federal level and in the states to strengthen protections against workplace discrimination and harassment. The issues of this case are directly related to 9to5's work to protect women's rights in the workplace and end workplace discrimination. The outcome of this case will directly affect our members' and constituents' rights in the workplace and their ability to achieve redress for workplace discrimination, harassment and retaliation.