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 FOR RESPONDENT

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QUESTION PRESENTED

Whether the sole employee (Saundra Davis) whose status is at issue in this case possessed the supervisory authority necessary to trigger vicarious liability under Title VII on the part of Ball State University for the alleged employee-on-employee harassment.

RULE 29.6 STATEMENT

Ball State University is a State supported institution of higher education.

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INTRODUCTION

This case concerns what supervisory authority an employee must possess to trigger vicarious liability under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, on the part of an employer for alleged harassment by its employees. Or to put it somewhat differently, the question is when an employee is a "supervisor" for purposes of Title VII. This Court has held that, under agency law principles, employers are vicariously liable for harassment committed by supervisors against their subordinates. *See Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998). But the Court has not defined the amount of authority necessary for an employee to qualify as a supervisor under Title VII. Because the court of appeals reached the correct conclusion that the only employee (Saundra Davis) whose status is at issue lacked the necessary supervisory authority to trigger vicarious liability, the judgment should be affirmed.

The Seventh Circuit believed that, to be a supervisor for purposes of Title VII, an employee must have the authority "'to hire, fire, demote, promote, transfer, or discipline an employee.'" Pet. App. 12a (citation omitted). That test provides a reliable, bright-line rule for determining who is a supervisor. However, although a clear demarcation between supervisors and co-workers is important, Ball State University (Ball State) agrees with petitioner and the United States that the "hire, fire, demote" test does not necessarily capture all employees who may qualify as supervisors. Under the agency principles that this Court has held govern Title VII, vicarious liability also may be triggered when the harassing employee has the

authority to control the victim's daily work activities in a way that materially enables the harassment.

The judgment below should be affirmed because it is clear that Davis lacked the necessary supervisory authority under the proper inquiry. As the United States has explained, there is no evidence that Davis controlled petitioner's daily work activities at all. At most, the evidence could support an inference that she sometimes relayed instructions by others and occasionally took the lead in the kitchen where she worked. But that is not enough to trigger vicarious liability under Title VII. Indeed, when asked point blank whether Davis was her supervisor even "intermittently, once in a while," petitioner replied that she was "not sure." JA 198; *see* U.S. Br. 30-31 & n.4. If that showing were sufficient to make Davis a supervisor for purposes of Title VII, then the standard would be essentially meaningless in distinguishing between supervisors and co-workers. At a minimum, the test would convert that question into a triable issue virtually any time a plaintiff alleges that a harassing employee had *some* ability to oversee, lead, or direct them, even if only on an occasional basis.

Because it is clear on the well-developed record that Davis does not qualify as a supervisor under the correct standard for vicarious liability, there is no basis for this Court to remand the case for further proceedings. It is critical for the Court to provide clear guidance to employers and employees on who qualifies as a supervisor under Title VII. Applying the proper standard to the record facts is the best way to provide such guidance. Remanding the case for the lower courts to do so in the face of the overwhelming record evidence that Davis is *not* a supervisor would signal

that the threshold for establishing supervisory authority is largely indeterminate. That message would seriously undermine any effort by the Court to establish meaningful limits on vicarious liability. The judgment of the court of appeals should be affirmed.

STATEMENT OF THE CASE

A. Workplace At Issue

Ball State University (Ball State) is a state-funded institution of higher education founded in 1918 and located in Muncie, Indiana—in the east central part of the State. It enrolls roughly 22,000 undergraduate and graduate students each year. At all relevant times it has had a policy of not tolerating sexual harassment of employees or students, and of encouraging any employee who believes she has been subjected to sexual harassment to promptly report it. JA 436-50. In addition, despite petitioner's assertion to the contrary (at 7-8), Ball State has at all times had a policy stating that it "will not tolerate" harassment on the basis of race and many other factors as well. Ball State Anti-Harassment Policy at 1, Ex. FFF to Def.'s Evidence in Supp. of Mot. Summ. J., *Vance v. Ball State Univ.*, No. 06-1452 (S.D. Ind.), ECF No. 87-8.

Like most universities, Ball State has thousands of employees engaged in the manifold tasks necessary to run a large enterprise. Its Dining Services Division serves thousands of meals each day to students, faculty, and others. Pet. App. 27a; JA 407. It employs approximately 850 individuals across seven residence hall dining units and other restaurants on campus. Pet. App. 27a. Dining Services is led by Jon Lewis, the Director of Campus Dining Services, whose job it is to oversee the various divisions of Dining Services. JA

407, 451. Lewis is assisted by (among others) Karen Adkins, the Assistant Director of Personnel, Administration, and Marketing. JA 458. Adkins oversees the University Banquet and Catering (UBC) division of Dining Services and reports to Lewis. Pet. App. 27a. UBC—which has about 60 employees—is led by General Manager Bill Kimes, who in turn reports to both Adkins and Lewis. JA 262-63, 408.

Serving directly under Kimes is the UBC Sales and Service Supervisor, the Banquet and Catering Sales and Service Supervisor, and the Banquet and Catering Chef/Supervisor. JA 456, 261-62. This last position, the Banquet and Catering Chef/Supervisor (chef), directly supervises kitchen employees and works along with those employees in the kitchen. JA 427, 213, 302. Among the chef's duties is the creation of daily "prep sheets," which the chef prepares after reviewing the upcoming UBC-catered functions. JA 427-28. The prep sheets list the tasks that must be undertaken to complete orders. *Id.*; *see* Pet. App. 72a (discussing chef's role in preparing prep sheets); JA 277 ("prep lists identify … the[] duties for the day, and those duties can range anywhere from production of meat and vegetables to finishing an event"). Remarkably, petitioner does not mention the chef in her brief, save for a stray reference in a footnote. Pet. Br. 11 n.3.

The UBC kitchen is staffed with full-time and part-time employees. Positions include full-time catering specialists and full and part-time catering assistants, as well as student assistants. JA 12, 84, 85. The position description for "catering specialist" states that the duties are to "[o]rganize workload and prepare all types of catered foods" for various events. JA 12. The position lists "Kitchen Assistants and Substitutes"

after "Positions Supervised." *Id.* In setting forth more specific "Duties" and "Responsibilities," the description states that catering specialists "[l]ead and direct kitchen part-time, substitute, and student employee helpers via demonstrating, coaching, and overseeing their work to promote efficiency and excellence." JA 13. The job description for "catering assistant" similarly states that the duties are to "[o]rganize workload and prepare all types of catered food" for various events, and to "[l]ead and direct helpers as assigned to the work area." JA 84-85, 87.

Kimes testified that, although broken up into full-time, part-time, and substitute employees with varying levels of experience, the "kitchen staff" all essentially have "the same duties. They're just different levels." JA 277; *see also* JA 366 (catering specialist has only "a little bit more duty" than a catering assistant). For example, some people bake, some people cut vegetables, and some people clean. JA 277-78. But the kitchen staff are "all given prep lists that identify their duties for the day, and those duties can range anywhere from production of meat and vegetable[s] to finishing an event." JA 277. The tasks that employees do each day can change depending on the prep sheet, which the chef prepares (subject to Kimes's ultimate authority to reassign activities). JA 278-79.

Saundra Davis was employed by Ball State in UBC from 1987 until 2000, when she left catering to accept a full-time position elsewhere at Ball State. Davis returned in November 2001 as one of two catering specialists. Petitioner Maetta Vance began working for Ball State in 1989 as a substitute server in UBC. She was promoted to the part-time catering assistant position in 1991 and worked in that position until

January 2007. Petitioner has testified that Kimes was her "supervisor" during this period and completed her annual reviews. JA 109, 117, 120. In 2007, petitioner was promoted to a full-time catering assistant position—which led to a pay raise, a benefits package worth an additional $9,492, and membership in the Ball State bargaining unit, with the rights associated with collective bargaining. Pet. App. 2a, 21a, 71a; JA 407.

Ball State discharged petitioner in 2009 for violating the University's zero-tolerance policy for threats of violence, following an incident in which she told a co-worker "'that [petitioner] needed to get a .380 assault rifle and kill [Ball State's Director of Employee Relations, Melissa Rubrecht].'" *Vance v. Ball State Univ.*, No. 1:09-cv-01501, 2012 WL 28602-JMS-DML, at *1 (S.D. Ind. Jan. 5, 2012) (citation omitted). Petitioner filed a retaliatory discharge claim against Ball State, which was dismissed and not appealed. *Id.* at 4. Petitioner's termination is not at issue here.

B. Allegations Of Harassment

Over several years of her employment with Ball State, petitioner, who is African American, was involved in several confrontations with different Ball State employees in UBC. During this period, petitioner herself also was the subject of complaints by another employee. The only employee whose alleged misconduct is at issue in this Court is Davis. Petitioner did not seek review of the court of appeals' disposition as to any other employee (though her statement of the case suggests that she now wishes to relitigate the entire case). Nevertheless, to provide a full context for petitioner's claim, we discuss the allegations that she has made against other employees as well.

1. Saundra Davis

Petitioner and Davis were friends for about ten years and "got along well" before the alleged events at issue unfolded. JA 112, 151. During her deposition, petitioner described her relationship with Davis as that of "co-workers." JA 151-52. Sometime before 2001, according to petitioner, Davis slapped petitioner on the head after an argument. Pet. App. 3a, 18a, 30a n.5. Petitioner orally complained to Kimes but did not pursue the matter with Human Relations. Petitioner testified that Kimes was her supervisor at the time. JA 108-09. Shortly after petitioner complained, Davis—for reasons unrelated to the alleged slap in 2001—transferred out of UBC to another department to accept a full-time position. Pet. App. 3a.

Several years later, Davis returned to UBC. In November 2005, Davis and petitioner became involved in an altercation involving an elevator. Davis first reported the incident and said that, as petitioner exited the elevator they were both riding, petitioner said to her, "Move bitch … you are an evil f- - - - - bitch." *Id.* at 6a; *see also* JA 23. Petitioner then submitted a complaint about the same incident, alleging that Davis stood in petitioner's way as she tried to get off the elevator and said, "I'll do it again," which petitioner took as a reference to the alleged slap in 2001. Pet. App. 3a. Ball State immediately investigated the complaints and found—based in part on a third-party eyewitness account—that it was "more probable than not" that the events "did not transpire as [petitioner] perceived them to occur." JA 82. Nevertheless, Ball State counseled both employees about the appropriate treatment of co-workers. Pet. App. 18a.

Several years later—when she was deposed in this litigation in 2007—petitioner for the first time alleged that, around the same time as the elevator incident, she heard Davis utter the words "Sambo" and "Buckwheat" speaking to another individual. *Id.* at 6a; JA 161. It is undisputed that petitioner did not contemporaneously report this alleged incident (despite filing multiple complaints about other alleged acts of harassment). Pet. App. 6a; JA 161. And petitioner testified in 2007 that she concluded that "[i]t was nothing," and noted her own decision not to report the comments. JA 158, 167-68; *see* JA 158 (calling the references "little words," "little things").

In December 2005, petitioner complained to Kimes that Davis was glaring at her and slamming pots and pans around her. Pet. App. 6a. A year later, in May 2006, petitioner complained that Davis allegedly "blocked" her on the elevator and "stood there with her cart smiling." *Id.* at 6a-7a. She also complained that Davis purportedly smiled at petitioner and gave her "weird" looks in the kitchen. *Id.* at 7a. Ball State promptly investigated each of these incidents but found no basis to take disciplinary action. *Id.*

In August 2007—after Ball State promoted petitioner to her full-time position—petitioner filed a complaint alleging that Davis had asked her in a Southern accent, "Are you scared?" *Id.* In response to this complaint, Ball State launched another investigation. *Id.* Despite Davis's denial of the allegations, Ball State formally warned her to refrain from such behavior. *Id.* A month later, Davis made another complaint against petitioner, alleging that petitioner splattered gravy on Davis and slammed pots and pans around her in the kitchen. *Id.* at 8a.

2. Karen Adkins and Bill Kimes

Petitioner also filed complaints against both Adkins (Assistant Director of Personnel Administration) and Kimes (General Manager of UBC)—her undisputed supervisors while she worked as a catering assistant. In 2006, petitioner complained that Adkins had "mean-mugged" her. *Id.* at 6a-7a, 56a-57a. Ball State investigated the incident but found no basis to take disciplinary action. *Id.* at 7a. The same year, petitioner filed a complaint against Kimes alleging that he was retaliating against her for filing her previous complaints by forcing her to work through breaks. *Id.* Again, Ball State investigated but found no factual basis for the allegation. *Id.* In August 2007, petitioner again complained about Kimes, alleging that he had aggressively approached her while repeatedly yelling a question at her. *Id.* at 7a-8a. BSU investigated the incident and the witness identified by petitioner corroborated Kimes's account of the event. *Id.* at 8a.

3. Connie McVicker

Petitioner also filed a complaint regarding Connie McVicker, a truck driver for UBC. In September 2005, petitioner reported that an employee had told her that McVicker had used the racial epithet "n- - - - -" (outside of petitioner's presence) and that McVicker had stated that her family had ties to the Ku Klux Klan (KKK). Pet. App. 3a. In response, Ball State immediately investigated and verified the allegations. *Id.* at 4a, 16a. After learning of petitioner's complaint, Melissa Rubrecht, Assistant Director of Employee Relations, sent an email to the Director of Employee Relations, stating: "we need to make a strong statement that we will NOT tolerate this kind of language or resulting

actions in the workplace." *Id.* at 4a. Accordingly, although Ball State's four-step disciplinary process called for only a "verbal warning" for first infractions, Rubrecht concluded that "we can justify going beyond our limited prior past history and issue a written warning," and that "we should also strongly advise [McVicker] verbally when we issue this that it must stop NOW and if the words/behavior are repeated, we will move on to more serious discipline up to an[d] including discharge." *Id.* at 4a-5a.

That is what Ball State did. On November 11, 2005, Kimes gave McVicker a written warning for "conduct inconsistent with proper behavior," in violation of University rules. JA 63. The warning further explained that McVicker was being disciplined for using offensive racial epithets, discussing her family's relationship with the KKK, and also "looking intently" and "staring for prolonged periods at co-workers." *Id.* at 63-64. It warned McVicker that racially offensive language would not be tolerated. *Id.* In addition to the written warning, both Kimes and Gloria Courtright (the Assistant Director of the Office of Compliance) met with McVicker separately to discuss her inappropriate and offensive conduct. Pet. App. 5a. Courtright counseled McVicker to avoid petitioner and consider transferring to another department. *Id.*

Shortly after Courtright spoke with McVicker, petitioner complained to Courtright that in November 2005, McVicker had also called petitioner a "porch monkey." *Id.* at 5a. After receiving this complaint, Ball State again immediately investigated it. *Id.* Although McVicker denied making the comment, Ball State "did not stop by accepting a simple denial." *Id.* at 17a. Kimes interviewed the witness petitioner

identified but that witness could not corroborate petitioner's account. *Id.* at 65a. Kimes then advised petitioner that there were no witnesses to substantiate her claim but nevertheless offered to continue to pursue the matter if she wanted him to do so. *Id.*

In December 2005, petitioner complained that McVicker was giving her a hard time at work by glaring at her and slamming pots and pans around her. *Id.* at 5a-6a. And, in April 2007, petitioner filed another complaint alleging that McVicker had said the word "payback" to petitioner. *Id.* at 7a.[1]

C. Procedural History

In October 2006, petitioner filed this action against Ball State and various individual employees, alleging a range of federal and state discrimination claims, including a hostile work environment claim under Title VII. Pet. App. 2a, 7a. After both sides had engaged in extensive discovery, Ball State moved for summary judgment on all of petitioner's claims, and petitioner cross-moved for partial summary judgment on her hostile-work-environment claim. Among other things, in opposing Ball State's motion, petitioner argued that Davis was a supervisor for purposes of Title VII, pointing to the formal job description for "catering specialist" and the fact that she did not "clock in" for work (which petitioner argued showed that "she is a

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[1] On March 12, 2008, petitioner filed a supplemental affidavit in which she complained for the first time about other alleged events occurring in 2008—after petitioner had filed suit and moved for summary judgment. Pet. App. 44a-45a. The court of appeals held that the district court did not abuse its discretion in excluding this evidence, Pet. App. 10a, and petitioner did not seek review of that evidentiary ruling in this Court. *See* Pet. i.

member of management"). Pl.'s Mot. for Partial Summ. J. at 17, *Vance v. Ball State Univ.*, No. 06-1452 (S.D. Ind. Nov. 30, 2007), ECF. No. 75 (Pet. Dist. Ct. Br.); Position Description, Ex. XX to Def.'s Evidence in Supp. of Mot. Summ. J., ECF No. 62-16.

The district court (Barker, J.) granted Ball State's motion for summary judgment, holding that petitioner could not sustain her hostile-work-environment claim against Ball State. Pet. App. 26a-27a. In considering whether Davis was a supervisor for purposes of triggering vicarious liability under Title VII, the court followed Seventh Circuit precedent holding that "'[a] supervisor is someone with the power to directly affect the terms and conditions of the plaintiff's employment,'" which authority "'primarily consists of the power to hire, fire, demote, promote, transfer, or discipline an employee.'" *Id.* at 53a (citation omitted). The court concluded that Davis was not a supervisor, even assuming that "Davis periodically had authority to direct the work of other employees." *Id.* at 54a.

In evaluating petitioner's claims based on Davis's conduct under the standard for harassment by co-workers, the court concluded that most of petitioner's confrontations with Davis had no "racial character or purpose," and that any racial remarks were not "sufficiently severe or pervasive" to support a hostile work environment claim. *Id.* at 55a. The court further concluded that, even assuming petitioner had suffered severe or pervasive harassment by McVicker, she could not demonstrate a basis for employer liability because Ball State had addressed each of petitioner's complaints in a way "reasonably calculated to foreclose subsequent harassment." *Id.* at 61a, 65a. As for the alleged harassment by Kimes and Adkins—who

concededly were petitioner's supervisors—the court found "no evidence allowing a jury to find that Ms. Adkin's [sic] and Mr. Kimes's alleged behavior was based on race or sufficiently severe and pervasive to be considered objectively hostile." *Id.* at 58a.

The Seventh Circuit affirmed. In challenging the district court's conclusion that Davis was not a supervisor for purposes of Title VII, petitioner argued that "Davis had the authority to tell her what to do" and that "she did not clock-in like other hourly employees." *Id.* at 13a; Reply Brief of Plaintiff-Appellant at 5, *Vance v. Ball State Univ.*, No. 08-3568 (7th Cir. Nov. 10, 2010), ECF No. 51. (Pet. CA7 Reply Br.). The court rejected that argument, explaining that Davis lacked the authority to "'hire, fire, demote, promote, transfer, or discipline'" employees. Pet. App. 12a (citation omitted). Applying the standard for co-worker harassment, the court assumed that McVicker and Davis had created a hostile work environment but concluded that Ball State was not negligent—and therefore not liable—because it "promptly" and thoroughly investigated each of petitioner's complaints and took "disciplinary action when appropriate." *Id.* at 15a. The court also agreed with the district court that the alleged conduct by Kimes and Adkins—who, the court recognized, were petitioner's supervisors—fell "short of the kind of conduct that might support a hostile work environment claim." *Id.* at 13a-14a.

In affirming the judgment for Ball State, the court of appeals stressed that from the point that petitioner filed her first complaint in November 2005, Ball State had taken the complaints seriously and taken disciplinary action where appropriate. The court elaborated that "Ball State did what it could and did

not stop by accepting a simple denial"; that "the record does not reflect a situation in which all ties went to the discriminator"; that Ball State "calibrated its responses depending on the situation"; that Ball State issued warnings and "counseled both employees" even when "it was unsure who was at fault"; and that "Ball State investigated [petitioner's] complaint against Davis in 2007 with the same vigor as it did her complaint in 2005." *Id.* at 17a, 19a.

In short, the court of appeals squarely—and unanimously—rejected the picture that petitioner tries to paint in this Court of an employer who did not take the allegations seriously, when she claims that "[l]ittle was done" in response to her complaints. Pet. Br. 7.[2]

SUMMARY OF ARGUMENT

The judgment of the court of appeals should be affirmed because Saundra Davis—the only employee at issue—was not a supervisor under any plausible inquiry for assessing vicarious liability under Title VII.

A. This Court has held that, in accordance with agency principles, employers may be held vicariously liable under Title VII for discrimination committed by

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[2] In the Seventh Circuit, Ball State did not question the correctness of the court of appeals' "hire, fire, demote" test, which of course was binding circuit precedent for the parties. Ball State explained, however, that Davis did not possess any supervisory authority—even under the considerations that petitioner pointed to (*e.g.*, the job description's reference to "lead and direct") that were not relevant under the Seventh Circuit test. Br. of Appellee at 32-33 & n.5, *Vance v. Ball State Univ.*, No-08-3568 (7th Cir. Oct. 20, 2010), ECF No. 47. In opposing certiorari, Ball State argued that Davis was not a supervisor under any test adopted by another court of appeals or the guidance issued by the Equal Employment Opportunity Commission. Opp. 23-30.

their employees. Ordinarily an employer is liable only for the torts of employees committed "while acting in the scope of their employment." Restatement (Second) of Agency § 219(1) (1958). However, the Court has recognized an exception in limited circumstances when the employee "'was aided in accomplishing the tort by the existence of the agency relation.'" *Id.* § 219(2)(d). Applying that exception, this Court has held that employers can be vicariously liable for harassment committed by supervisors against their subordinates. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 777-78 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 743-44 (1998). A victim of harassment, the Court has observed, may be reluctant to accept the risks of confronting the harasser who possesses supervisory authority. And, as this Court reasoned in *Faragher* and *Ellerth*, the agency relationship can thereby aid such a harasser in perpetrating the harassment.

B. The Seventh Circuit held that employers are vicariously liable under Title VII for harassment committed by employees who have the power to take tangible employment actions—*e.g.*, to hire, fire, or demote—against their victims. Such employees certainly qualify as supervisors for purposes of Title VII, and they may be the most prominent example of employees who may trigger vicarious liability. But the Seventh Circuit rule does not necessarily reach the entire set of employees who may qualify as supervisors under this Court's precedent. Instead, under the agency principles that the Court adopted in *Faragher* and *Ellerth*, vicarious liability also may be appropriate when the employee is authorized to control a victim's daily work activities in a way that materially enables the harassment. Such employees—like the lifeguard in

Faragher—have the ability to "implicitly threaten to misuse their supervisory powers to deter any resistance or complaint" by their victims. *Faragher*, 524 U.S. at 801. And although it may be unusual that an employee actually has that control and yet lacks the authority to take any tangible employment actions, employees who do may qualify as supervisors.

C. An admitted shortcoming of recognizing this broader definition of supervisor is that it could prove difficult for employers and employees alike to tell when an individual is a supervisor rather than a co-worker, or vice versa, for purposes of triggering vicarious liability under Title VII. That consideration, by itself, counsels in favor of the Seventh Circuit rule, which unquestionably provides a bright-line. But the agency principles this Court has adopted appear to foreclose the Seventh Circuit position as a complete answer to who is a supervisor. And, in any event, the broader definition of supervisor can supply a workable rule—when applied in light of several limiting principles that comport with agency principles and existing lower court case law. These principles sharpen the vicarious liability analysis and clarify the boundaries between supervisors and co-workers. The courts of appeals that have rejected the "hire, fire, demote" test have pointed to such considerations in distinguishing between supervisors and co-employees. The principles are also consistent with the enforcement guidance issued by the Equal Employment Opportunity Commission (EEOC) on the vicarious liability of employers.

Although the considerations that may be decisive in any given case may vary, agency principles and existing case law support the following principles in determining whether an employee is a supervisor:

- An employee's status turns on the facts and realities of the workplace, and not on titles, formal job descriptions, or labels.
- An employee's authority to control the victim's daily work activities must include the power either to increase the victim's workload, or to assign the victim undesirable tasks.
- An employer is not vicariously liable if the victim is unaware of authority that an employee does have to control her daily activities.
- The inquiry should consider the extent to which the victim has on-the-scene access to the chain-of-command or whether the alleged harasser is the highest-ranking employee on site.
- If an employee's authority over the victim's daily activities is temporary or intermittent, vicarious liability is triggered only for harassment that occurs when the employee actually possesses the relevant powers.

These principles establish meaningful boundaries on vicarious liability and provide the needed guidance to employers, victims, and courts for establishing when such liability is triggered by an employee's actions.

D. Davis does not remotely qualify as a supervisor under Title VII. It is undisputed that she lacked the authority to take tangible employment actions. In addition, there is no evidence that Davis had the authority to control petitioner's day-to-day activities, much less that she exercised authority to increase petitioner's workload or assign her undesirable tasks. And when pressed, petitioner herself testified that she did "not know" whether Davis was her supervisor—hardly what one would typically say of a person who actually *controlled her daily activities*. Moreover,

petitioner did not hesitate to confront Davis and tell her "where to go." Davis was never the highest authority on site because both Kimes and the chef worked on site. And while petitioner hinges her case on Davis's formal job description, that description does not trump the facts and practical realities of the situation. The bottom line is that Davis did not possess supervisory authority that materially enabled the alleged harassment, and Ball State is therefore not vicariously liable for Davis's alleged conduct.

E. Because it is clear on the well-developed record that Davis does not qualify as a supervisor under even the broader test for supervisor, the Court should affirm the judgment below. Although this Court often remands for application of a new standard, it by no means always does so. When, as here, it is evident that a party cannot meet the new standard in light of the existing record, or that application of the standard to the facts would provide valuable guidance in elucidating the standard, this Court often proceeds to resolve the issue on the record before it. That is the right path here. Indeed, petitioner herself argues that guidance is needed from this Court on the proper standard. Pet. Br. 17. The best way to provide that guidance is to apply the standard to the record facts, and to hold that Davis lacked supervisory status.

ARGUMENT

DAVIS DID NOT EXERCISE ANY SUPERVISORY AUTHORITY OVER PETITIONER THAT COULD TRIGGER VICARIOUS LIABILITY UNDER TITLE VII

The question in this case is when is an employee a supervisor for purposes of Title VII, such that his actions may trigger vicarious liability on the part of the employer. Although it provides a bright-line rule, the Seventh Circuit's "hire, fire, demote" test does not necessarily describe all employees who may count as supervisors for purposes of Title VII. Instead, under the agency principles this Court has adopted in construing Title VII, it is more accurate to say that vicarious liability is triggered when an employee's authority materially enables his harassment of the victim. That condition is always satisfied when the harasser has the power to take a tangible employment action against the victim, and an employee with such authority is the prototypical example of a supervisor. But the test may also be satisfied when a harasser has the authority to control the victim's daily work activities in a way that materially enables the harassment. The judgment below should be affirmed because Davis was not a supervisor under that test.

A. Title VII Invokes Agency Principles To Limit The Vicarious Liability Of Employers For Employee Misconduct

Title VII makes it unlawful for an "employer" to discriminate against any individual in the workplace on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a). This Court has rejected the notion that employers may be held strictly liable under

Title VII for discrimination committed by their employees. *See Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 72 (1986). Rather, drawing from the fact that Title VII defines "employers" to include "agents," 42 U.S.C. § 2000e-2(b), the Court has held that the vicarious liability of employers must be determined in accordance with principles of agency law. *Ellerth*, 524 U.S. at 742 (noting that Title VII defines "employer" to include "agents," and that Congress thereby "directed federal courts to interpret Title VII based on agency principles"); *Faragher*, 524 U.S. at 791-92 (instructing courts to "look to traditional principles of the law of agency in devising standards of employer liability"); *Meritor Sav. Bank*, 477 U.S. at 72 (same); *see also Staub v. Proctor Hosp.*, 131 S. Ct. 1186, 1190-91, 1194 n.3 (2011) (noting similarity between Title VII and the Uniformed Services Employment and Reemployment Rights Act and applying *Faragher* and agency principles to determine scope of employer liability).

A baseline rule of agency law is that an employer is only liable for the torts of employees committed "while acting in the scope of their employment." Restatement (Second) of Agency § 219(1), (2); *see Ellerth*, 524 U.S. at 756 (relying on Restatement (Second) of Agency § 219(1)). This rule applies to both intentional and negligent misconduct. It renders an employer liable for an employee's torts whenever "the employee's 'purpose, however misguided, is wholly or in part to further the master's business.'" *Ellerth*, 524 U.S. at 756 (quoting W. Page Keeton *et al.*, *Prosser and Keeton on the Law of Torts* § 70, 505 (5th ed. 1984)).[3]

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[3] *See also, e.g.*, Restatement (Second) of Agency § 219 cmt. a (noting assumption that "the master can exercise control over the

This Court has held that, as a "general rule," workplace harassment carried out for personal motives unrelated to the employer "is not conduct within the scope of employment." *Ellerth*, 524 U.S. at 757; *see also Faragher*, 524 U.S. at 798-800. Employers are therefore not automatically liable for such misconduct under Title VII. This Court has also recognized, however, that in certain "limited circumstances" agency law imposes employer liability even for misconduct committed outside the scope of employment. *Ellerth*, 524 U.S. at 758. Those circumstances are set forth in Restatement (Second) of Agency § 219(2). They generally involve situations in which the employer indirectly contributes to the commission of the tort and thus can fairly be held morally responsible and financially accountable under Title VII. *See Ellerth*, 524 U.S. at 758-60 (quoting Restatement (Second) of Agency § 219(2)(d)).

In the hostile-work-environment context, the Court has invoked the Restatement (Second) of Agency's exception to the scope-of-employment requirement in situations when the employee "was aided in accomplishing the tort by the existence of the agency

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physical activities of the servant" during the time of service); *Faragher*, 524 U.S. at 797 (explaining that the "ultimate question" in deciding application of scope-of-employment rule is "'whether or not it is just that the loss resulting from the servant's acts should be considered as one of the normal risks to be borne by the business in which the servant is employed'" (quoting Restatement (Second) of Agency § 229 cmt. a)); *Taber v. Maine*, 67 F.3d 1029, 1037 (2d Cir. 1995) (citing leading treatise for proposition that "'the integrating principle' … is 'that the employer should be liable for those faults that may be fairly regarded as risks of his business'" (citation omitted)); Keeton *et al.*, *supra*, at 505 (observing that the "employer is to be held liable for those things which are fairly to be regarded as risks of his business").

relation." Restatement (Second) of Agency § 219(2)(d); *see Faragher*, 524 U.S. at 802 *Ellerth*, 524 U.S. at 759. The Court has interpreted this exception to authorize vicarious liability under Title VII when an employee's "tortious conduct is made possible or facilitated by the existence of the actual agency relationship." *Faragher*, 524 U.S. at 802. Applying the exception, this Court has held that employers can be vicariously liable for harassment committed by "a supervisor" against a subordinate, when "made possible by abuse of his supervisory authority." *Id.*; *Ellerth*, 524 U.S. at 760-66.

Vicarious liability for harassment committed by a supervisor comports with agency principles because supervisory authority can aid his commission of the tort. *See* Restatement (Second) of Agency § 219(2)(d). Indeed, "[w]hen 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." *Faragher*, 524 U.S. at 803. As this Court has explained, an employee who qualifies as a supervisor for Title VII purposes controls the work environment in which his subordinates operate. He wields the power to impose "sanctions"—formal or informal—for disfavored conduct, and subordinates thus typically have a strong desire to avoid displeasing him. *See id.* at 805 (recognizing that statements by supervisors, unlike those by co-workers, are implicitly backed by "threat[]" of "sanctions"). The classic example of an employee who possesses such authority is the lifeguard in *Faragher* (Silverman), who controlled "all aspects of [the victim's] day-to-day activities." *See id.* at 780-82, 808; *infra* at 26-27.

Because a supervisor can punish employees, his "power and authority" to exact reprisals can "invest[] his or her harassing conduct with a particular threatening character." *Ellerth*, 524 U.S. at 763. The potential threat to one's livelihood or working conditions will make the victim think twice before resisting harassment or fighting back. As this Court has noted, "'[i]t is precisely because the supervisor is understood to be clothed with the employer's authority that he is able to impose unwelcome [harassing] conduct on subordinates.'" *Id.* (quoting *Meritor Sav. Bank*, 477 U.S. at 77 (Marshall, J., concurring)). Ultimately, the supervisor's authority makes it difficult for the victim to "blow[] the whistle on a superior," to "walk away" from the harassment, or to "tell the offender where to go." *Faragher*, 524 U.S. at 803; *see* Pet. Br. 37 (noting that "central concern" of *Ellerth* and *Faragher* is to "protect[] victims reluctant to run the 'risk of blowing the whistle'" on their supervisors (citation omitted)); U.S. Br. 8 (same).

In short, under this Court's precedent, the supervisory authority that matters under Title VII is authority that enables harassment—and thus triggers vicarious liability under agency principles—by making it harder for the victim to resist the harassment.[4]

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[4] Title VII does not use or define the term "supervisor," though Congress has used that term in other statutes. In particular, the National Labor Relations Act (NLRA), 29 U.S.C. § 152(11), defines the term "supervisor." Ball State agrees with the EEOC (Pet. App. 88a) that, because of the different considerations underlying Title VII and the NLRA, the NLRA's definition does not answer the question presented here. To the extent that the NLRA definition has any bearing on the question presented here, it underscores that Congress appreciates that not

B. To Trigger Vicarious Liability, An Employee Must Exercise Supervisory Authority Over The Victim That Materially Enables The Harassment

Although this Court has held that employers can be vicariously liable for harassment committed by supervisors (*see Ellerth* and *Faragher*), the Court has never articulated the scope of supervisory authority necessary to trigger such liability, or demarcated the line between supervisor and co-employee for purposes of Title VII. Nevertheless, the agency principles discussed above lead to the conclusion that a harassing employee may qualify as a supervisor not only when he has the power to take tangible employment actions against his victim, but also when he exercises the power to control the victim's daily activities in a way that materially enables the harassment. The latter category is the focus of the dispute in this case.

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every employee with *some* kind of authority to direct, lead, or oversee other employees qualifies as a supervisor for all purposes. As this Court has recognized, in enacting the NLRA's definition of "supervisor," Congress sought to include employees "vested with … genuine management prerogatives," while excluding "employees with minor supervisory duties" (*e.g.*, "straw bosses," "leadmen," and "set-up men"). S. Rep. No. 80-105, at 4 (1947); *NLRB v. Health Care & Retirement Corp. of Am.*, 511 U.S. 571, 587-88 (1994) (Ginsburg, J., joined by Blackmun, Stevens, and Souter, JJ., dissenting); *see also*, *e.g.*, *Stop & Shop Cos. v. NLRB*, 548 F.2d 17, 19 (1st Cir. 1977) ("mere fact that an employee may give some instructions to others" does not make him a supervisor under NLRA).

1. Vicarious Liability Is Naturally Triggered When The Harassing Employee Has The Power To Take Tangible Employment Actions Against The Victim

The test for supervisory authority is always met when an employee has the power to undertake or recommend tangible employment actions against the victim, such as "hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Ellerth*, 524 U.S. at 761-63. As the EEOC has explained, a supervisor's power to undertake or recommend tangible employment decisions is necessarily "of a sufficient magnitude so as to assist the harasser explicitly or implicitly in carrying out the harassment." Pet. App. 89a (EEOC 1999 Enforcement Guidance); *see Mikels v. City of Durham*, 183 F.3d 323, 333 (4th Cir. 1999) (observing that authority to take "tangible employment actions" is the "most powerful indicator" of "vulnerability deriving from the supervisor's agency relation").

When an employee actually undertakes the tangible employment action as part of his harassment, the employer is automatically liable for the Title VII violation. *Ellerth*, 524 U.S. at 761, 762-63; *Faragher*, 524 U.S. at 807. In such cases, the action "becomes for Title VII purposes the act of the employer," and there is no question that the supervisory relationship directly aids the harassment. *Ellerth*, 524 U.S. at 762-63. By contrast, when an employee possesses the authority to take tangible employment actions—but does not exercise that power as part of the alleged harassment—the employer is vicariously liable subject to an affirmative defense that may negate liability. To

prevail on that defense, the employer must show (1) that it "exercised reasonable care to prevent and correct promptly any … harassing behavior," and (2) that the victim "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Id.* at 765; *see also Faragher*, 524 U.S. at 807.

2. Vicarious Liability May Be Triggered When The Harassing Employee Has The Power To Control The Victim's Daily Activities In A Manner That Materially Enables The Alleged Harassment

Although the Court did not squarely address the question, *Ellerth* and *Faragher* strongly suggest that vicarious liability is appropriate when the harassing employee's right to control the victim's daily activities materially enables the harassment. Such employees have the ability to "implicitly threaten to misuse their supervisory powers to deter any resistance or complaint" by their victims. *Faragher*, 524 U.S. at 801. The result may be to "intimidate" the victims and thereby facilitate the harassment. U.S. Br. 14. As the United States has explained, under *Ellerth* and *Faragher* "a victim of harassment may be reluctant to accept the risks of confronting a harasser who has supervisory authority," and so "the agency relationship between the employer and the supervisor thus aids the harasser in accomplishing the harassment." *Id.* at 8. Recognizing that an employee who possesses such authority over a victim is a supervisor for purposes of Title VII is consistent with agency principles as well as with a common-sense meaning of "supervisor."

Faragher illustrates when this test will be satisfied. The victim in that case (Beth Ann Faragher) was a

female lifeguard for the City of Boca Raton who was sexually harassed by her two immediate supervisors in a "clear chain of command"—Bill Terry and David Silverman. *Faragher*, 524 U.S. at 780-83. Terry had the power to take tangible employment actions against Faragher, but Silverman did not. *Id.* at 781. Rather, Silverman was "responsible for making the lifeguards' daily assignments, and for supervising their work and fitness training." *Id.* Faragher reported directly to Silverman, who had "'virtually unchecked authority'" over Faragher and her fellow lifeguards. *Id.* at 808. The record established that Silverman "'directly controll[ed] and supervis[ed] all aspects of [their] day-to-day activities,'" and designated her work and shift assignments as well. *Id.* at 781, 808. And Silverman used this supervisory authority to threaten Faragher, telling her, "'Date me or clean the toilets for a year.'" *Id.* at 781 (citation omitted). This Court concluded that the City was vicariously liable for Silverman's harassment as well as Terry's. *Id.* at 808 (citation omitted); *see also* Pet. App. 91a-92a (EEOC 1999 Enforcement Guidance) (discussing *Faragher*).[5]

The Seventh Circuit correctly recognized that vicarious liability exists when an employee has the power to take tangible actions against the victim. But under the agency principles adopted in *Faragher* and *Ellerth*, vicarious liability is not necessarily limited *only* to employees who possess such authority. *See*

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[5] Because Silverman's supervisor status was not at issue before this Court in *Faragher*, the Court's treatment of Silverman does not dispose of the question presented here. Nevertheless, it appears difficult to square *Faragher* with the conclusion that vicarious liability is triggered only when an employee has the authority to take tangible employment actions against a victim.

Pet. App. 12a-13a (citing *Hall v. Bodine Elec. Co.*, 276 F.3d 345, 355 (7th Cir. 2002); *Rhodes v. Illinois DOT*, 359 F.3d 498, 506 (7th Cir. 2004)). Although it may be unusual for an employee to control "all aspects" (*Faragher*, 524 U.S. at 781) of an employee's daily activities and *not* have the authority to take tangible employment actions against the employee as well, the agency principles this Court has adopted support the conclusion that an employee who does wield such power is a supervisor for purposes of Title VII as well.

The Seventh Circuit rule has the salutary effect of providing employers, employees, and courts with a bright-line test for determining when an employee is a supervisor. And a clear rule for distinguishing between supervisors and co-workers promotes the objectives of Title VII—*e.g.*, by ensuring that employers can identify and train supervisors. But, at least as long as the Court recognizes meaningful and workable limits on the broader definition of supervisor, those considerations—while undoubtedly important—are insufficient to deviate from the agency law principles that this Court has already adopted in this context. As discussed next, agency principles and existing lower court case law supply such limits.[6]

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[6] The Seventh Circuit appears to have initially started down the right path. As petitioner notes, the Seventh Circuit standard originated in *Parkins v. Civil Constructors of Ill., Inc.*, 163 F.3d 1027 (7th Cir. 1998). Pet. Br. 4. In that case, the court observed that the requisite supervisory authority "*primarily* consists of the power to hire, fire, demote, promote, transfer, or discipline an employee." *Parkins*, 163 F.3d at 1034 (emphasis added). As the EEOC has recognized, *Parkins* did not explicitly rule out the possibility that supervisory authority could exist in other circumstances. U.S. Br. 29. To the contrary, in determining whether vicarious liability was triggered on the facts before it in

C. The EEOC's Enforcement Guidance And Lower Court Case Law Provide Important Limits On The Scope Of Vicarious Liability In This Context

1. Drawing from *Faragher*, the EEOC and the Second Circuit and the Fourth Circuit have concluded that vicarious liability may be triggered in two sets of circumstances: (1) when an employee is authorized to take tangible employment actions against the victim; and (2) when the employee controls the victim's daily work activities. Although these circuits and the EEOC have used slightly different formulations to describe the requisite level of supervisory authority, they have agreed that vicarious liability ultimately turns on whether the authority enabled the harassment.

The EEOC's 1999 Enforcement Guidance recognizes the core principle established by *Ellerth* and *Faragher* that "vicarious liability for supervisor harassment is appropriate because supervisors are aided in [their] misconduct by the authority that the employers delegated to them." Pet. App. 89a. It then notes that liability is appropriate when the authority is "of sufficient magnitude so as to assist the harasser

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Parkins, the court looked to more than simply whether the employee was empowered to take tangible employment actions against the victim. *See id.*; *Parkins*, 163 F.3d at 1034-35 (summarizing evidence); *id.* at 1035 (concluding that, because the harassing employees "exercised almost no control over truck drivers [like the plaintiff], they clearly were not supervisors"). Nevertheless, in *Rhodes*, 359 F.3d at 506, the Seventh Circuit read *Parkins* to hold that an employee *must* be authorized to take tangible employment actions against the victim to be a supervisor under Title VII. That is where the Seventh Circuit veered off the path marked by the Court's precedent.

explicitly or implicitly in carrying out the harassment," such as when a supervisor "is authorized to direct another employee's day-to-day work activities." *Id.* at 89a, 91a. As the United States has explained, the EEOC Guidance also recognizes definite "limits on who should qualify as a supervisor by virtue of authority to direct another employee's daily activities." U.S. Br. 27. These limits are "directly tied to whether harassment would be 'aided by the agency relation' in specific circumstances." *Id.* (citation omitted).

The Second Circuit has embraced the EEOC's reasoning that—for an employer to be vicariously liable based on a supervisor's authority to direct the victim's daily work activities—that authority must actually enable the harassment. As the court has explained, "[v]icarious liability … depends on whether the power—economic or otherwise, of the harassing employee over the subordinate victim given by the employer to the harasser—enabled the harasser, or materially augmented his or her ability, to create or maintain the hostile work environment." *Mack v. Otis Elevator Co.*, 326 F.3d 116, 125 (2d Cir. 2003).

In defining the level of supervisory authority that triggers vicarious liability under Title VII, the Fourth Circuit likewise has focused on "'whether the particular [harassing] conduct [i]s aided by the agency relation.'" *Whitten v. Fred's, Inc.*, 601 F.3d 231, 244-45 (4th Cir. 2010) (citation omitted). As that court has put it, the "determinant" for vicarious liability is "whether as a practical matter [the supervisor's] employment relation to the victim was such as to constitute a continuing threat to her employment conditions that made her vulnerable to and defenseless against the

particular conduct in ways that comparable conduct … would not." *Mikels*, 183 F.3d at 332-33.

Petitioner recognizes that the EEOC Enforcement Guidance and the Second and Fourth Circuit standards for imposing vicarious liability all reflect the same core agency principles, and has urged the Court to adopt those principles. Pet. Br. 5, 45-51. But although the parties appear to agree on the basic standard for supervisory status, we disagree over whether Davis is a supervisor under that standard. That disagreement suggests that—while petitioner has ostensibly embraced the EEOC Enforcement Guidance and the Second Circuit and Fourth Circuit tests—she is not willing to embrace the doctrinal implications of that position. And that in turn suggests that the parties still disagree in important ways about the standard. The resolution of that disagreement is critical to answering the question presented and ensuring that there are meaningful limits on vicarious liability.

2. The EEOC Enforcement Guidance and case law from the Second Circuit and Fourth Circuit supply several important limiting principles that govern when an employee possesses supervisory authority capable of triggering vicarious liability, notwithstanding that the employee lacks the authority to take tangible employment actions. Although the importance of any given principle listed below may vary based on the circumstances, together the principles supply workable guideposts grounded in agency law for identifying when vicarious liability is appropriate.

First, the supervisory inquiry turns on a careful consideration of the facts and realities of the situation, not on titles, formal job descriptions, or labels. As the EEOC has explained, the determination "is based on

[the supervisor's] job function rather than job title (*e.g.*, "'team leader'") and must be based on the specific facts" of each particular case. Pet. App. 89a-90a; *see also* U.S. Br. 21, 27-28 (same); Pet. Br. 51 & n.13 (noting that the proper focus is on "the realities of the particular workplace relationship," that "'nomenclature' matters little," and that "direct evidence of workplace realities … control" the analysis (citation omitted)). It is therefore not enough that an employee or position is labeled "supervisor." Rather, courts must look beyond labels, consider the underlying situation, and determine whether a supervisory relationship existed and helped make the harassment possible in each individual case.

Second, to trigger vicarious liability, an employee's authority to control the victim's daily work activities must include the power either to materially increase the victim's workload, or to assign the victim truly undesirable tasks. That is consistent with the threat of "sanction" that this Court referred to in *Faragher*. 524 U.S. at 805. That requirement properly ensures that the supervisor's authority is "of a sufficient magnitude so as to assist the harasser explicitly or implicitly in carrying out the harassment." Pet. App. 89a (EEOC Enforcement Guidance). The power to inflict undesirable consequences—like the power of the lifeguards in *Faragher* to force the victim to "clean the toilets for a year," 524 U.S. at 780—inhibits a victim's will to resist and thus enables the harassment.[7]

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[7] *See*, *e.g.*, *Faragher*, 524 U.S. at 808 (supervisor had "'virtually unchecked authority'" over victim (citation omitted)); *Whitten*, 601 F.3d at 236 (supervisor had power to order victim to stay late to clean and work all night if necessary; to assign her to work on previously-scheduled days off; and to make her life "a

Both the EEOC and the Second Circuit have embraced this requirement. The EEOC Enforcement Guidance explains that it is appropriate to impose vicarious liability when a supervisor "is authorized to direct another employee's day-to-day work activities," because "[s]uch an individual's ability to commit harassment is enhanced by his or her authority to increase the employee's workload or assign undesirable tasks." Pet. App. 90a. The Second Circuit also has held that vicarious liability requires a supervisor to have "actual authority to … direct another employee's day-to-day work activities in a manner that may increase the employee's workload or assign additional or undesirable tasks." *Mack*, 326 F.3d at 126-27 (adopting holding of *Dinkins v. Charoen Pokphand USA, Inc.*, 133 F. Supp. 2d 1254, 1266 (M.D. Ala. 2001)). And both the United States and petitioner appear to agree with this requirement as well.[8]

'living hell'"); *Mack*, 326 F.3d at 120, 127 (supervisor had power to assign, schedule, and direct work); *see also Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 70-71 (2006) (discussing the coercive power that comes with being able to "insist that [an employee] spend more time performing more arduous duties and less time performing those that are easier or more agreeable").

[8] *See* U.S. Br. 27 (imposing vicarious liability "when an employee has authority to direct another employee's day-to-day work activities" and can therefore "'increase the employee's workload or assign undesirable tasks'" (citation omitted)); Pet. Br. 4-5 (arguing that Title VII imposes liability for supervisors who direct daily work activities "because the employee's ability to harass 'is enhanced by his or her authority to increase the employee's workload or assign undesirable tasks'"); *see also Noviello v. City of Bos.*, 398 F.3d 76, 96 n.5 (1st Cir. 2005) (noting that the Second Circuit "considers a supervisor to be someone who has actual authority to direct an employee's work-related tasks in a way that could increase her workload or saddle her with

Ostensible supervisory power falling short of this authority does not trigger vicarious liability. For example, the EEOC Enforcement Guidance states that an employee "who merely relays other officials' instructions regarding work assignments and reports back to those officials"—or "who directs only a limited number of tasks or assignments"—is not a supervisor for purposes of Title VII. Pet. App. 92a; U.S. Br. 27-28 (emphasis added). Without the potential to intimidate the victim and dissuade her from resisting the harassment, such responsibilities do not facilitate the supervisor's misconduct. Petitioner appears to agree, observing that "not all powers of oversight or direction … give rise to vicarious liability—only those that make a difference to the harasser's ability to inflict harm on his victim." Pet. Br. 49; *see id.* (noting that "[o]ccasional oversight authority … that added little to a worker's ability to harass others" does not trigger employer liability); *id.* at 48 (same for "incidental power to direct or oversee … work").[9]

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less desirable tasks"); *Wiercinski v. Mangia 57, Inc.*, No. 09 Civ. 4413 (ILG) (JO), 2012 U.S. Dist. LEXIS 85043, at *31 n.12 (E.D.N.Y. June 18, 2012) (citing *Mack* for proposition that supervisor must have authority to increase workload or assign undesirable tasks); U.S. Br. 21, *Mack v. Otis Elevator Co.*, 326 F.3d 116 (2d Cir. 2003) (supporting vicarious liability because supervisor "had the authority to give [the victim] the least desirable maintenance tasks or withhold training opportunities if she rejected or complained about his advances"); U.S. Br. 22, *Weyers v. Lear Operations Corp.*, 359 F.3d 1049 (8th Cir. 2004) (supporting vicarious liability because supervisor "had the authority to give [the victim] the least desirable production tasks or withhold training opportunities").

[9] *See also Howard v. Winter*, 446 F.3d 559, 566 (4th Cir. 2006) (rejecting vicarious liability when supervisor had only "occasional authority … to direct [the victim's] operational duties"); *Joens v.*

Third, the employer is not liable when the victim is unaware of a supervisor's authority to control her daily activities. The very premise of vicarious liability is that the supervisor's power aids his harassment of the victim by implicitly threatening retribution. *See Ellerth*, 524 U.S. at 763 (noting that supervisor is aided by agency relation because his "power and authority invests his or her harassing conduct with a particular threatening character" and "'[i]t is precisely because the supervisor is understood to be clothed with the employer's authority that he is able to impose unwelcome [harassment] on subordinates'" (quoting *Meritor Sav. Bank*, 477 U.S. at 77 (Marshall, J., concurring in judgment))). Accordingly, when a victim is unaware that the harasser has the requisite supervisory authority, that authority carries no such

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John Morrell & Co., 354 F.3d 938, 939-40 (8th Cir. 2004) (fact that alleged harasser was a "shift foreman" in a "box shop" who could demand that the victim "make more boxes" was not in itself sufficient to trigger vicarious liability); *Mikels*, 183 F.3d at 333 (explicitly recognizing that "not all harassment even by 'supervisory' employees necessarily" is aided by agency relationship and triggers vicarious liability, and that test is "whether as a practical matter [the supervisory authority over the victim] was such as to constitute a continuing threat to her employment conditions that made her vulnerable to and defenseless against the particular conduct in ways that comparable conduct by a mere co-worker would not"); *Martinsky v. City of Bridgeport*, 814 F. Supp. 2d 130, 151 (D. Conn. 2011) (rejecting automatic vicarious liability when harasser is "'a low-level supervisor who does not rely on his supervisory authority in carrying out the harassment'" (quoting *Murray v. New York Univ. Coll. of Dentistry*, 57 F.3d 243, 249 (2d Cir. 1995)); U.S. Br. 27 (recognizing "limits"—flowing from aided-by-agency-relationship principle—on "who should qualify as a supervisor by virtue of authority to direct another employee's daily activities").

threat, it does not materially enable the misconduct, and it cannot be the basis of vicarious liability.[10]

Relatedly, a victim's willingness to resist can establish that the harasser's authority did not materially enable the harassment. As the Fourth Circuit has explained, "where the level of authority had by a harasser over a victim—hence her special vulnerability to his harassment—is ambiguous, the tip-off may well be in her response to it. Does she feel free to 'walk away and tell the offender where to go,' or does she suffer the insufferable longer than she otherwise might?" *Mikels*, 183 F.3d at 334. In such circumstances, the victim's refusal to tolerate the misconduct can be "highly probative" of the fact that the supervisory authority did not "increas[e] [the victim's] sense of vulnerability and defenselessness" or thereby enable the harassment. *Id.* at 333; *see also id.* at 334 (concluding that victim's profanity-laced outburst against the harasser, and filing of formal grievance, demonstrated that harasser's authority did

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[10] *See generally, e.g.*, *Browne v. Signal Mountain Nursery, L.P.*, 286 F. Supp. 2d 904, 914 (E.D. Tenn. 2003) (explaining that Second Circuit and EEOC tests require analysis of "the victim-employee's understanding of and appreciation for" the supervisory authority, and her response to the harassment, to determine whether vicarious liability is appropriate); *Entrot v. BASF Corp.*, 819 A.2d 447, 459 (N.J. Super. Ct. App. Div. 2003) (relying on Title VII case law to hold that supervisor liability under New Jersey anti-discrimination law applies when "the power the offending employee possessed *was reasonably perceived by the victim* … as giving that employee the power to adversely affect the victim's working life" (emphasis added)); *cf.* U.S. Br. 30-31 & n.4 (relying on evidence demonstrating that petitioner lacked a reasonable belief that Davis was her supervisor in arguing that vicarious liability was not triggered).

not facilitate harassment by making her more vulnerable or defenseless). The victim's refusal to tolerate the harassment can signal that the supervisory authority at issue was insufficient to trigger vicarious liability under Title VII.

Fourth, a key factor in evaluating whether a supervisor's authority to direct daily work activities enabled the alleged harassment is the extent to which the victim has on-the-scene access to her chain-of-command or whether the alleged harasser is the highest-ranking employee on-site. When the victim is "completely isolated from the [employer's] higher management," it will be harder for the victim to report any harassment up the chain of command—and, accordingly, her supervisor's day-to-day control of her work life will facilitate that harassment. *See*, *e.g.*, *Faragher*, 524 U.S. at 808 (highlighting victim's isolation from employer's "higher management" in imposing vicarious liability on the basis of the authority possessed by her on-site supervisors); *Mikels*, 183 F.3d at 334 (rejecting vicarious liability in part because victim "was not isolated from the continuing protective power of higher management" and had "immediate access" to more senior supervisors to whom she could report misconduct).

Finally, as the United States explains, "if an employee is only temporarily authorized to direct the daily work activities of another, the employer is vicariously liable only for unlawful harassment that occurs during that temporary period." U.S. Br. 28; *see* Pet. App. 92a (EEOC Enforcement Guidance) (same). Supervisory authority that the harasser does not possess when he commits the harassment obviously cannot materially enable that same harassment.

3. These principles place meaningful and workable limits on when vicarious liability may be triggered based on the exercise of supervisory authority. The adoption of such principles is critical to vindicating the fundamental rule—embraced by Congress, announced in *Meritor Savings Bank*, and reaffirmed in *Faragher* and *Ellerth*—that employers are not strictly liable for all unlawful Title VII harassment committed by their employees. *Meritor Sav. Bank*, 477 U.S. at 72; *Ellerth*, 524 U.S. at 763-64; *Faragher*, 524 U.S. at 792. An indeterminate and manipulable standard also would undermine the objective of ensuring that employers can identify employees who are supervisors for purposes of Title VII and train them to avoid, detect, and prevent harassment. Moreover, failing to adopt meaningful limits on supervisory status would upset the carefully calibrated scheme established by this Court for proving a hostile-work-environment claim. That scheme imposes vicarious liability—subject to an affirmative defense—when the harasser is the victim's supervisor, but not when he is the victim's co-employee (where the plaintiff bears the burden of proving negligence to establish employer liability). *See Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 759.

If this Court disagrees with these limiting principles—or, more fundamentally, rejects the notion that *Ellerth* and *Faragher* incorporate agency-law restrictions on vicarious liability—then the Court should adopt the Seventh Circuit's bright-line standard. That standard undeniably provides the kind of clarity necessary to put employers and employees on notice of their legal rights and obligations. And to the extent that this approach might limit employer liability in some cases, it would still allow for recovery by any

victim capable of showing that her employer was responsible for the harassment through negligence or intentional misconduct. *See Faragher*, 524 U.S. at 789. In other words, the cost of such a rule to the employee likely would be marginal, though the gain to all in clarity and workability would be significant.

D. Davis Did Not Exercise Any Supervisory Authority Over Petitioner That Could Trigger Vicarious Liability

If this Court adopts the Seventh Circuit's "hire, fire, demote" test, then Davis undeniably was not petitioner's supervisor (since all agree that Davis lacked the authority to take tangible employments actions against petitioner). But the record also establishes beyond doubt that Davis was not a supervisor under the broader definition as well.

1. Under the principles set forth above—and as the United States correctly recognizes—Davis lacked any supervisory authority over petitioner that could trigger vicarious liability on the part of Ball State under Title VII for the alleged harassment. U.S. Br. 5-6; 30-32. At the outset, the only timeframe that is conceivably relevant is between 2005 and January 2007, when Davis and petitioner worked together and petitioner's position was part-time. *Supra* at 5-7. That is because petitioner has never argued that—as a catering specialist—Davis had the authority to supervise *full-time* employees. Instead, petitioner's argument is that Davis had the authority to supervise part-time employees. Petitioner was a part-time employee from 2005 through January 2007 (when she was promoted to a full-time position), but the record makes clear that Davis lacked the requisite authority

to control petitioner's daily work activities in a way that materially enabled the alleged harassment.

a. Petitioner bases her argument that Davis is a supervisor for purposes of Title VII on the formal job description for "catering specialist" and the fact that she was occasionally referred to as a "supervisor" by other employees (without elaboration on how they defined that term). A generic job description, however, is not sufficient to establish that Davis actually possessed—much less exercised—supervisory authority that could trigger vicarious liability under Title VII. As the EEOC has explained, supervisory status "is based on … job function rather than job title" and "must be based on the specific facts." Pet. App. 89a-90a (Enforcement Guidance); *see supra* at 31-32. Petitioner herself concedes that "'nomenclature' matters little" in the face of the "realities of the particular workplace relationship." Pet. Br. 51.

Petitioner attaches particular significance to the fact that the formal "Position Description" for "Catering Specialist" includes within the list of various "Duties" and "Responsibilities": "[l]ead and direct kitchen part-time, substitute, and student employees." JA 12-13. But petitioner overlooks the clause that immediately follows, and thus modifies, "[l]ead and direct"—*viz.*, "via demonstration, coaching, and overseeing their work to promote efficiency and excellence." JA 13. Likewise, the job description's reference to "Positions Supervised" must be read in light of the foregoing reference to "[l]ead[ing] and direct[ing]" part-time employees and substitutes, since that is as close as the job description comes to identifying anything approaching supervisory-type

authority in listing the "Duties" and "Responsibilities" of catering specialists. JA 12, 13.

The fact that more experienced or senior employees in a workplace, or employees with a higher paper rank, may "demonstrate[e]" how to do a task, "coach[]" other employees in accomplishing tasks, or even "oversee[]" work to promote efficiency does not transform them into *supervisors* for purposes of Title VII. Nor would it make a difference if such an employee occasionally asked a fellow co-worker to help with, undertake, or do a task. That sort of a collaborative working arrangement is common in workplaces across America. The fact that more senior employees may interact with co-workers in that way does not mean that they are authorized to *control* the day-to-day activities of their co-workers in a way that could materially enhance any harassment. Likewise, the fact that an employee—whether by virtue of her seniority, title, or skill—may be a "lead person" (JA 66) in a workplace does not mean that she is a *supervisor* for purposes of Title VII. *See* U.S. Br. 30-31 (even if petitioner "occasionally took the lead in the kitchen" or had a "lead role . . . of some sort," that is not enough to trigger vicarious liability).

b. The practical reality of the workplace in which petitioner and Davis worked is that there is no evidence that Davis possessed the requisite supervisory authority over petitioner. Petitioner herself testified that "Kimes has the overall supervision in the kitchen as he often reassigns people to perform different tasks." JA 431. There is no evidence that Davis was authorized to control petitioner's daily activities, no evidence that she had the power to increase petitioner's workload or assign her undesirable tasks, and no evidence that she in fact

purported to do either. *See* U.S. Br. 30 (noting that there is "scant evidence … that Davis exercised the requisite authority over petitioner's daily work activities"). Despite being deposed and having submitted three sworn affidavits, petitioner has failed to describe a single concrete instance in which Davis actually directed her work. JA 102-248, 415-20, 430-35. And the few details she did give actually cut against the notion that *Davis* controlled her daily activities. *See*, *e.g.*, JA 431 (stating that "Kimes," not Davis, "controls the schedule" in the kitchen and "reassigns people to perform different tasks").[11]

The record establishes that "daily 'prep sheets'" generally were used to assign the tasks in the kitchen, and that it was the responsibility of the chef (subject to Kimes's oversight) to prepare those lists. Pet. App. 41a-42a, 72a; *see* JA 427, 277-79.[12] Petitioner has never disputed that. Petitioner argues that Davis occasionally *relayed* the prep sheets to her. Pet. Br. 10 (citing JA 74). This contradicts what she told Ball State officials investigating her complaint in November 2005. JA 66 (noting petitioner's insistence that Davis did *not* give her prep sheets). In any event,

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[11] With respect to her retaliation claim (which petitioner has not pressed here), petitioner *did* assert that she was assigned "tasks in the kitchen that were menial and less significant compared to her prior duties" (*e.g.*, "cutting vegetables" instead of "baking"). Pet. App. 70a-72a. But, tellingly, those assignments were made by the chef or Kimes—not Davis. *Id.* at 72a-73a; *see also* Pet. Dist. Ct. Br. 7 (alleging that Kimes provided "better job assignments" to another employee than petitioner).

[12] The chef was responsible for filling out prep sheets. JA 427-28; Pet. App. 72a. But Kimes testified that, during the period that UBC was without a chef, he prepared them. JA 293.

as the United States has explained, "someone 'who merely relays other officials' instructions regarding work assignments' does not qualify as a supervisor." U.S. Br. 31 (quoting EEOC Enforcement Guidance).

Even if Davis had sometimes filled out a prep sheet herself (and the record does not identify a single instance in which that occurred), or otherwise directed petitioner's activities in some occasional way, that would not be sufficient to trigger vicarious liability. Indeed, petitioner herself recognizes that under the proper standard "not all powers of oversight or direction … give rise to vicarious liability—only those that make a difference to the harasser's ability to inflict harm on his victim." Pet. Br. 49; *see also id.* (noting that "[o]ccasional oversight authority … that added little to a worker's ability to harass others" does not trigger employer liability); *id.* at 48 (same for "incidental power to direct or oversee … work"). Petitioner had ample opportunity and incentive to *try* to develop evidence that Davis in fact exercised supervisory authority over her, but she failed to do so.

Nor is there any evidence that Davis had any other authority that could have materially enabled the alleged harassment. Davis had no authority to punish or discipline petitioner, no authority to evaluate petitioner, no authority to assign petitioner overtime, no authority to set petitioner's schedule, no authority to require her presence in any given location, no authority to control her work space, and so on. Kimes had that authority. *See* JA 115 (authority to "put [petitioner] in the baking area"), 117 (annual performance reviews), 120 (discipline), 431 (schedule). And petitioner has another problem. She repeatedly claimed (JA 29, 45, 50, 66, 156, 210, 405)—and another

witness confirmed (JA 405)—that Davis and petitioner did not even *speak* to each other during the relevant time period. It is difficult if not impossible to see how Davis could have realistically exercised the requisite authority—much less controlled petitioner's day-to-day activities—without speaking to her directly.

c. Petitioner's own statements about Davis's role bolster the conclusion that Davis lacked the requisite authority to trigger vicarious liability. Although petitioner referred to Davis as a "supervisor" in some complaint forms (JA 28-29, 45), when asked under oath whether Davis was her supervisor, petitioner said "I don't know what she is," JA 197. Petitioner elaborated that "one day she's a supervisor; one day she's not. … It's inconsistent." *Id.* And when pressed as to whether Davis was her supervisor even "intermittently, once in a while," petitioner said that she was "not sure." JA 198. "Not sure" is hardly how one would respond if an employee in fact had the authority to control her daily activities. Petitioner's uncertainty about whether Davis was a supervisor is even more telling in light of the fact that she listed Kimes—not Davis—as her "Immediate Supervisor" on the complaint that she filled out for the elevator incident, JA 44, and swore in her deposition that Kimes had "overall supervision in the kitchen," JA 431.

These statements are significant because petitioner was in an ideal position to describe the type of authority that Davis exercised. And yet she not only failed to identify any instance in which Davis had increased her workload or assigned her any undesirable tasks, she said that she was "not sure" if Davis was even her supervisor. JA 198. An employee's testimony that a co-worker is a supervisor

is not sufficient in isolation to establish that the co-worker was a supervisor for Title VII purposes because the test focuses on the practical realities of the workplace, and not labels used to refer to positions. Nevertheless, the fact that petitioner failed to identify any supervisory authority actually exercised by Davis means that she could not have been bullied or intimidated by such authority—and that Davis's alleged supervisory status did not play any role in facilitating or enabling the alleged harassment.

That conclusion is bolstered by the fact that petitioner obviously did not hesitate to confront Davis—and tell her "'where to go.'" *Mikels*, 183 F.3d at 334 (quoting *Faragher*, 524 U.S. at 803). The fact that the alleged victim does not exhibit "any sense of special vulnerability or defenselessness deriving from whatever authority" the coworker possessed is a "clincher" in showing that the employee lacked the requisite authority to trigger vicarious liability. *Id.* Petitioner not only was not shy about confronting Davis, her conduct towards Davis caused Davis to complain to Kimes about petitioner. Indeed, Davis was the first to report the elevator incident to Ball State (JA 22-23), in which—according to Davis—petitioner said, "Move bitch … you are an evil f - - - - - - bitch." Pet. App. 6a. Petitioner's unabashed willingness to confront Davis bolsters the conclusion that Davis did not possess the requisite supervisory authority to hold Ball State vicariously liable for her conduct.

d. This case also does not remotely present the *Faragher* situation, where the victim lacked on-the-scene access to higher management in the chain-of-command or where the alleged supervisor was the highest authority on-site. *See Faragher*, 524 U.S. at

781-82; *see also Mack*, 326 F.3d at 125 (noting that the harassing employees' status as the senior employee on the work site gave him "a special dominance over other on-site employees, including [the plaintiff], arising out of their remoteness from others with authority to exercise power on behalf of" other supervisors). Kimes—who petitioner herself testified had "overall supervision in the kitchen," JA 431—was on-site and available to petitioner. Petitioner had direct access to Kimes and reported the alleged harassment to him, and Kimes promptly initiated investigations. *See supra* at 7-10. The chef also was present in the kitchen. Petitioner had direct access to both. JA 302-03.[13]

In short, Davis did not possess the supervisory authority necessary to trigger vicarious liability under any agency-law construction of Title VII. That conclusion should not come as a surprise. No circuit court of which we are aware—no matter what test it applied—has held that an employee had supervisory authority in circumstances like those here.[14]

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[13] Earlier in the case (but not in this Court), petitioner pointed to the fact that Davis did not "clock in" as proof that she had supervisory authority. Pet. App. 54a. As the United States has explained, that fact has no bearing on whether Davis was a supervisor. U.S. Br. 32 n.5. And although Davis did not "clock in" (for reasons that had to do with the collective bargaining arrangement), she was still an "hourly employee." JA 368.

[14] Petitioner has overstated Davis's responsibilities and relied on snippets of documents taken out of context in arguing that summary judgment is not appropriate. *See, e.g.*, Pet. Br. 42-43. But it bears mention that a defendant cannot defeat summary judgment simply by denying or mischaracterizing record evidence, or by relying on conclusory allegations unsupported by

2. The leading cases in the circuits that have followed the EEOC's Enforcement Guidance illustrate the sort of circumstances—simply absent here—that can justify a finding of supervisory authority. They underscore that Davis lacked the necessary supervisory authority to trigger vicarious liability.

a. The seminal Second Circuit case is *Mack v. Otis Elevator Company*. The plaintiff there (Mack) alleged that the "mechanic in charge" (Connolly) had harassed her from the day she started on the job. *Mack*, 326 F.3d at 120. The evidence showed that "the mechanic in charge ha[d] 'the right to assign and schedule work,'" and that Connolly "direct[ed] the particulars of each of Mack's work days, including her work assignments." *Id.* at 120, 125. In addition, Connolly "was the senior employee on the work site"; "[t]here was no one superior to Connolly [at the work site] whose continuing presence might have acted as a check on Connolly's coercive misbehavior toward" Mack. *Id.* at 125. In these circumstances, Connolly plainly "possessed a special dominance over the other on-site employees." *Id.* Thus, the Second Circuit concluded that the harassing employee was a "supervisor for purposes of Title VII analysis." *Id.* at 125, 126.

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the record. *See, e.g.*, *Bellard v. Gautreaux*, 675 F.3d 454, 460 (5th Cir. 2012) ("Conclusory allegations and unsubstantiated assertions will not satisfy the plaintiff's burden [at summary judgment]."); *Scotto v. Almenas*, 143 F.3d 105, 114 (2d Cir. 1998) (same); *Taylor v. Gallagher*, 737 F.2d 134, 137 (1st Cir. 1984) (a party's "conclusory mischaracterizations" do "not suffice to raise genuine issues of material fact"). If the record in this case is sufficient to create a triable issue on whether Davis was a supervisor, then it will be virtually impossible for courts to resolve the status of contested employees at summary judgment.

b. *Whitten v. Fred's, Inc.*—a leading Fourth Circuit decision—is to the same effect. In that case, the harassing employee (Green) was the "store manager" and the plaintiff (Whitten) was an "assistant manager." *Whitten*, 601 F.3d at 236. The evidence showed that Green "directed Whitten's activities, giving her a list of tasks he expected her to accomplish"; that he "controlled Whitten's schedule"; and that he "possessed and actually exercised the authority to discipline Whitten by giving her undesirable assignments and work schedules." *Id.* at 246; *see id.* ("Unlike a mere co-worker, Green could change Whitten's schedule and impose unpleasant duties on a whim," and "he in fact did so, making her stay late to clean the store and directing her to work on a Sunday that was supposed to be her day off"). Green, in other words, clearly had the authority to control—and coerce—Whitten's daily activities. It is not surprising, then, that the Fourth Circuit concluded that the fact that Green lacked "the authority to take tangible employment action" against Whitten did not mean that "Green was merely her co-worker." *Id.* at 244-45.

The Fourth Circuit's decision in *Mikels v. City of Durham* is also instructive. There, a police officer (Mikels) alleged that a fellow squad member (Acker) harassed her. *Mikels*, 183 F.3d at 326. The court rejected the argument that Acker possessed the supervisory authority needed to trigger vicarious liability. As the court explained, although Acker was "superior" to Mikels in rank—he was a "corporal" and she was a "private"—"any authority possessed by Acker over Mikels was at best minimal." *Id.* at 334. "At most," Acker's rank gave him "occasional authority to direct her operational conduct while on

duty." *Id.* Moreover, Mikels had "immediate access" to her "direct 'supervisor'" (Sergeant Cox) and therefore "was not isolated from the continuing protective power of higher management." *Id.* In short, Mikels did not experience any "special vulnerability or defenselessness deriving from whatever authority" Acker possessed over her. *Id.* And the "clincher" in that regard, the court held, was the fact that Mikels responded to Acker's "unwelcome conduct" by "rebuff[ing] him in an obscenity and profanity-laced outburst." *Id.*

c. Petitioner holds out *Joens v. John Morrell & Co.*, 354 F.3d 938 (8th Cir. 2004), as her lead example of a case where a harassing employee *lacked* sufficient authority to trigger vicarious liability, in an effort to suggest that her proposed test is not limitless. Pet. Br. 50-51. We agree that the *Joens* decision is instructive. But that case only further bolsters the conclusion that Davis was not a "supervisor," because the alleged harasser in *Joens* if anything had more authority over the plaintiff than Davis had over petitioner here.

The plaintiff in *Joens* was employed during the day shift in the "box shop" at a meat packing plant. 354 F.3d at 939. The harassing employee (Johnson) was the "day shift foreman." *Id.* The record established that Johnson could—and did—demand that the victim (Joens) "make more boxes" and that he was authorized to "write her up for … failing to perform her work." *Id.* at 940-41; *see* Br. for Appellant at 22-23, 27, *Joens v. John Morrell & Co.*, No. 03-1573 (8th Cir. May 12, 2003) (discussing evidence showing that Johnson "had the ability to direct Joens['] day-to-day work activities," "could increase Joens['] workload by increasing the work performed on the box shift," and

had authority to "write-up[]" Joens "for violating company polices or failing to work appropriately"). Yet the Eighth Circuit held that Johnson lacked the requisite "supervisory authority" to trigger vicarious liability. *Joens*, 354 F.3d at 941.

Petitioner argues that the Eighth Circuit was correct to find—on summary judgment—that there was "no implicit threat" based on the circumstances in *Joens*, and that the "workplace contact" in that case was "on terms indistinguishable from that with a co-worker." Pet. Br. 51. As discussed, unlike in *Joens*, here there is no evidence that Davis could increase petitioner's work load or that Davis could write-up petitioner for anything. In short, Davis lacked the authority exercised by the harasser in *Joens*—who petitioner apparently agrees was *not* a supervisor.

E. The Judgment Of The Court Of Appeals Should Be Affirmed

Because it is clear that Davis lacked the supervisory authority needed to trigger vicarious liability, the judgment below should be affirmed—and a remand is neither necessary nor advisable.

Petitioner points out that when this Court concludes that a lower court applied the wrong legal standard, it often remands for application of the correct standard. Pet. Br. 44-45. But this is by no means the only course this Court follows. To the contrary, the Court frequently announces and goes on to apply new legal standards in cases—like this one—where the record is developed and applying the standard would provide needed guidance or dispose of a case that obviously should not proceed any further. Indeed, the Court did just that in *Faragher*, when it

announced the affirmative defense to supervisor liability, yet concluded—based on its own independent analysis of the factual record—that the City of Boca Raton could not prevail on that defense as a matter of law. *See Faragher*, 524 U.S. at 808-09.[15]

Petitioner had ample opportunity to develop the record in this case to support her argument that Davis was her supervisor. *See* U.S. Br. 30. The parties engaged in extensive discovery, and petitioner attempted to make the case that Davis was a supervisor—despite lacking the authority to take tangible employment actions. *See, e.g.*, Pet. Dist. Ct. Br. 17 (arguing Davis was supervisor based on her alleged authority over part-time employees, her job description, and fact that she did not "clock in"); Pet. CA7 Reply Br. 5 (relying on Kimes's testimony, Davis's alleged "supervisory privileges," and Ball State's staff directory). Her briefs below never even acknowledged the Seventh Circuit standard. Instead, she argued that Davis was her supervisor based on the

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[15] *See also, e.g., Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2071 (2011) (announcing new standard and directly applying standard to affirm jury verdict); *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2722 (2010) (announcing and directly applying new interpretation of statute to facts of case); *Ricci v. DeStefano*, 557 U.S. 557, 585-86 (2009) (announcing and directly applying new standard of review to facts of case); *Yates v. Evatt*, 500 U.S. 391, 407 (1991) (announcing and applying new constitutional test on grounds of "judicial economy"), *overruled on other grounds by Estelle v. McGuire*, 502 U.S. 62 (1991); *McClesky v. Zant*, 499 U.S. 467, 497 (1991) (announcing and directly applying new standard governing "abuse of the writ" doctrine); *Thornburg v. Gingles*, 478 U.S. 30, 78 (1986) (announcing and directly applying new legal standard); *Rhode Island v. Innis*, 446 U.S. 291, 315-16 (1980) (announcing and directly applying new definition of statutory term).

same sort of evidence she would use to satisfy the standards for supervisory liability endorsed by the EEOC Guidance and the Second and Fourth Circuits. Petitioner is not now entitled to a second bite at the apple so that she can relitigate this case afresh.

That is particularly true because the ample record that does exist affirmatively forecloses petitioner's ability to establish that Davis was a supervisor under the proper standard. After all, petitioner has already testified that she "d[id] not know" and was "not sure" whether Davis was her supervisor. JA 197-98. She recognized that Kimes was her supervisor (JA 108-109) and was the one who "reassign[ed] people to perform different tasks" and who "control[led] the schedule" (JA 431). There is no question that Kimes was readily accessible at the UBC worksite. And the record makes clear that petitioner had no qualms about telling Davis "where to go." *See supra* at 45. In light of these facts, petitioner could not show that Davis had the requisite authority to control her daily activities—still less prove that such authority actually made her more vulnerable to the alleged harassment.

Moreover, applying the test that the Court adopts to the record facts would provide highly beneficial guidance to the lower courts. A decision illustrating *how* the proper standard should be applied in this case—and definitively holding that Davis is *not* a supervisor for purposes of Title VII—would provide important clarity to employers, employees, and lower courts. A remand on the existing record would suggest that the standard is more indeterminate than determinate. And uncertainty on drawing the line between supervisors and co-workers would defeat the purpose of limiting vicarious liability by heightening

litigation risks, promoting unjust settlements, and generating expensive trial litigation that would waste both public and private resources. *See generally Ellerth*, 524 U.S. at 773-74 (Thomas, J., dissenting) (highlighting consequences associated with unclear and overly broad standard of vicarious liability).

It is also important for this Court not only to establish meaningful limits on supervisory liability, but to demonstrate that those limits have teeth. As discussed above, the facts of this case—and the absence of virtually any evidence that Davis possessed supervisory authority over petitioner under any test—make it an outlier. *See supra* at 39-46. Even if this Court attempts to lay down meaningful limits on who is a supervisor, a remand on the record here almost certainly would send the opposite signal—that the test is virtually limitless. There undoubtedly will be close calls in deciding whether an employee is a supervisor for purposes of Title VII on the spectrum between the lifeguards in *Faragher* and an employee who exercises no supervisory authority at all. But this case is at the latter extreme—and far beyond the realm of close calls. Remanding on these facts could not help but signal to the lower courts that this Court has set an extremely low bar for triggering vicarious liability based on employee harassment, or that the Court's standard is so subtle and amorphous that it does not lend itself to straightforward application to the facts.

Finally, a decision not only announcing a clear standard but applying it to affirm the judgment below would provide welcome notice to employees and employers about their respective rights and responsibilities under Title VII. Such notice would

directly further the framework established by this Court for hostile-work-environment cases.[16]

* * * * *

Judge Wood, in her opinion for the court of appeals, aptly summarized why the Title VII claim in this case fails: although UBC was "undoubtedly an unpleasant place for [petitioner] between 2005 and 2007," the record shows that "Ball State promptly investigated each complaint that she filed, calibrating its response to the results of the investigation and the severity of the alleged conduct." Pet. App. 19a. The only issue before this Court is whether the Seventh Circuit properly concluded that Davis was not a supervisor for purposes of Title VII. It did. There is, accordingly, no basis to allow this lawsuit to proceed any further.

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[16] Petitioner suggests that Federal Rule of Civil Procedure 56(f) prevents this Court from affirming the judgment below. Pet. Br. 45 n.10 That is incorrect. Rule 56(f) authorizes a district court to grant summary judgment "on grounds *not* raised by a party." Fed. R. Civ. P. 56(f)(2) (emphasis added). But in any event, Ball State has always argued that Davis is not a supervisor. And there is nothing that prevents this Court from applying the proper legal test to the record facts and affirming the judgment below.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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