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IN THE SUPREME COURT OF THE UNITED STATES

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MAETTA VANCE, :

Petitioner : No. 11-556

v. :

BALL STATE UNIVERSITY, ET AL. :

- - - - - x

Washington, D.C.

Monday, November 26, 2012

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:06 a.m.

APPEARANCES:

DANIEL R. ORTIZ, ESQ., Charlottesville, Virginia; on behalf of Petitioner.

SRI SRINIVASAN, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; for United States, as amicus curiae, in support of neither party.

GREGORY G. GARRE, ESQ., Washington, D.C.; on behalf of Respondents.

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P R O C E E D I N G S

(11:06 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next this morning in Case 11-556, Vance v. Ball State University.

Mr. Ortiz.

ORAL ARGUMENT OF DANIEL R. ORTIZ

ON BEHALF OF THE PETITIONER

MR. ORTIZ: Mr. Chief Justice, and may it please the Court:

This case concerns who counts and who does not count as a supervisor under Title VII. The parties and the United States agree that the Seventh Circuit rule violates the holding of Faragher, the reasoning of Faragher and this Court's other central Title VII precedents, including Burlington Northern and Staub, and the common-sense meaning of the word "supervisor."

The parties even agree as to the general legal standard, although they style it a little bit different -- differently, that those harassers whose employer-conferred authority over their victims enables or materially augments the harassment should count as supervisors.

This is not a standard, Your Honor, that

1 imposes automatic liability on employers. Victims must
2 still prove actionable harassment, and employers can
3 still take advantage of the Ellerth/Faragher affirmative
4 defense.

5 CHIEF JUSTICE ROBERTS: Let's say you have a
6 work room. There are five people who work there. And
7 the employer has a rule that the senior employee gets to
8 pick the music that's going to play all day long. And
9 the senior employee says to one of the other employees,
10 you know, if you don't date me -- I know you don't like
11 country music; if you don't date me, it's going to be
12 country music all day long.

13 Now, that affects the daily activities of
14 that other employee. I would have thought, under your
15 theory, that means that that senior employee is a
16 supervisor.

17 MR. ORTIZ: No, Your Honor, because in that
18 circumstance the adverse action would not amount to --
19 would not be severe. Or, perhaps it would be
20 pervasive --

21 CHIEF JUSTICE ROBERTS: Well, that could
22 be -- that could be far more severe than, for example --

23 JUSTICE SCALIA: Hard rock instead of --
24 (Laughter.)

25 CHIEF JUSTICE ROBERTS: It could be far more

1 severe than simply saying, all right, you know, you're
2 going to -- as in this case -- you're going to be
3 cutting the celery rather than, you know, baking the
4 bread, or whatever.

5 MR. ORTIZ: Well, no, Your Honor, this is
6 the -- the severity is an objective standard; it's not a
7 subjective. So in this case, someone's intense
8 dislike -- maybe it's debilitating, subjective --
9 dislike of rock music, some forms of country music --
10 might impair the performance of some in the workplace;
11 but, from an objective reasonable employee's standpoint,
12 I don't believe that that would be the case. Not all --

13 CHIEF JUSTICE ROBERTS: Well, but, I mean,
14 there are places where the environment -- you know, an
15 assembly line or something like that -- where the task
16 may not be that different, but how you -- the
17 environment in which you have to perform them may be far
18 more significant than whether or not you're attaching
19 the door handles or the front fenders.

20 MR. ORTIZ: Oh, for sure, Your Honor, but
21 they have to be judged on a case-by-case basis.

22 CHIEF JUSTICE ROBERTS: Well, exactly. And
23 I would have thought the benefit of the Seventh
24 Circuit's test was that you don't have to go through
25 those case-by-case basis. I think we can have a

1 reasonable debate about whether the music you have to
2 listen to for eight hours is objectively a significant
3 enough interference with the daily activities to qualify
4 under your test.

5 But the Seventh Circuit test makes clear --
6 it doesn't give any kind of immunity; it just makes
7 clear what type of analysis is going to be applied to
8 the allegation.

9 MR. ORTIZ: Well, Your Honor, the Respondent
10 actually exaggerates the determinativeness of the
11 Seventh Circuit rule, and the indeterminativeness --
12 both indeterminativeness and unpredictability of the
13 Second Circuit rule.

14 The Seventh Circuit itself has recognized --
15 the judges in the Seventh Circuit itself have recognized
16 that the rule does not really well fit the realities of
17 the workplace. It also just moves uncertainty from one
18 category to another.

19 The category of supervisor may be a little
20 bit tidier; but, under the Seventh Circuit's approach,
21 the category of co-worker is very unpredictable.

22 The Seventh Circuit itself, in
23 *Doe v. Oberweis Dairy*, recognized that once you move
24 people who can take -- have this kind of power over
25 their victims but can't actually take annual employment

1 actions against them into the category of co-workers,
2 all of a sudden you have to apply a sliding scale of
3 negligence. Not only that, but the jury is the one who
4 applies it.

5 So for those categories -- this exact
6 category of employee, Your Honor, the employer going
7 forward has very little idea of whether -- what standard
8 of care is that a particular jury would apply in that
9 case and whether the jury would decide it is met or not.

10 The Seventh Circuit rule, in the overall, is
11 no more determinative than the Second Circuit rule.

12 Also, Respondent points to no cases in the
13 Second Circuit or the other circuits that have adopted
14 this rule where courts have identified problems with its
15 application. And that --

16 JUSTICE ALITO: Well, could you point out
17 what the materially augments rule means? Could you
18 provide a definition of that? The authority to assign
19 daily tasks has to be sufficient to do what?

20 MR. ORTIZ: It has to be sufficient to
21 enable the harasser to instill either fear in the victim
22 that the victim should not turn the harasser in, or that
23 it may have to do with the harasser's ability to control
24 the physical location of the victim. That can augment
25 harassment.

1 If an harasser can steer a victim to a
2 location where the harasser has an opportunity to
3 harass, and, indeed, may have an opportunity to harass
4 without other employees or other people in the company
5 seeing in, that would materially augment --

6 JUSTICE ALITO: There are situations where
7 the assignment of responsibilities is extremely
8 unpleasant, and so it's easy to see how the testimony
9 would apply in that situation.

10 But there are also a lot of situations, like
11 the Chief Justice's example, where it's really very
12 unclear. I don't know how courts are going to -- how
13 courts can grapple with that.

14 MR. ORTIZ: Well, Your Honor, this --

15 JUSTICE ALITO: You said that being
16 subjected to country music or hard rock or Wagner, you
17 know, every single day in the workplace would not be
18 sufficient. I don't know. Some people might think that
19 it was -- that that is.

20 MR. ORTIZ: Justice Alito, this part of the
21 standard, particularly the materiality requirement, is
22 meant to track this Court's standard in Burlington
23 Northern, where it said that only actions that are
24 materially adverse to the employee would count.

25 And this Court identified the materiality

1 requirement there as actually working to make the
2 standard more objective, not --

3 JUSTICE GINSBURG: Mr. Ortiz, why isn't the
4 question that you're presenting academic in this case?
5 Because didn't the district judge say that there had
6 been no showing that Davis' conduct was sufficiently
7 severe or pervasive?

8 It wouldn't matter if the supervisor -- if
9 the conduct was not sufficiently severe or pervasive
10 harassment, and, equally, if the company responded every
11 time a complaint was lodged. The district court found
12 both of those things, that it wasn't severe and
13 pervasive, and that every time she complained an
14 investigation was made.

15 MR. ORTIZ: Justice Ginsburg, we actually
16 tried to bring those things up before the Seventh
17 Circuit, but the Seventh Circuit found it unnecessary to
18 reach them because of its holding as to supervisory
19 liability.

20 If this Court were to reverse the Seventh
21 Circuit's affirmance of summary judgment of the district
22 court, the case would then be remanded to the Seventh
23 Circuit, where it could either look at these
24 alternative -- these other holdings, or the thing would
25 be -- it could be remanded at that point and sent back

1 to the district court for another look.

2 The district court's reasoning, the Seventh
3 Circuit noted, when it was talking about other incidents
4 of harassment was very unusual. What the district court
5 did was it divided all of the incidents into two
6 categories.

7 One category -- one category consisted of
8 events that by themselves were not overtly racial in
9 nature and the other category consisted of those events
10 that were overtly racial in nature, where a racial
11 epithet had been hurled at someone, for example, and
12 said with respect to the first category, the things --
13 the events that on their face did not announce racial
14 animosity, that there wasn't any racial nexus, so they
15 didn't count, and swept all those events out and then
16 looked at the remaining ones where the connection to
17 racial animus was overt. And it said, well, these,
18 there may be some, but they just don't count.

19 So the Seventh Circuit itself discredited
20 the reasoning of the district court in those very
21 holdings.

22 JUSTICE KAGAN: Mr. Ortiz, suppose I agree
23 with your standard, but I just can't find on the record
24 as it has been presented in this Court any evidence that
25 Davis actually served as Vance's supervisor. What -- I

1 mean, what's your best -- so if that's true, I would be
2 tempted to actually just decide the thing rather than to
3 remand it.

4 So as against that approach, what is your
5 best evidence that there was a supervisory relationship
6 under your standard here?

7 MR. ORTIZ: First, Justice Kagan, it is
8 important to keep in mind that the record was developed
9 under the wrong legal standard. But even considering
10 that --

11 JUSTICE KAGAN: Well, is that the case? Is
12 there evidence that you did not present because the
13 Seventh Circuit applied a different standard?

14 MR. ORTIZ: There was evidence that was
15 probably not developed below because the Seventh
16 Circuit's standard was so absolute. But there is
17 actually evidence in the record, we believe plenty of
18 evidence, sufficient certainly to overcome summary
19 judgment, although perhaps not enough for partial
20 summary judgment on this question in our favor.

21 JUSTICE GINSBURG: What other than the job
22 description? The job description says that the catering
23 specialist has authority to direct or lead the part-time
24 employees. But what concrete instances of Davis
25 exercising supervisory authority over Vance is there in

1 this record?

2 MR. ORTIZ: Well, Justice -- there is two
3 separate questions, Justice Ginsburg. One is instances
4 of it; others is whether she has the authority or not.
5 Because this Court has held in Faragher itself that it
6 is the authority that makes the difference, not the
7 actual exercising of it in a particular case.

8 But let me go through what is in the record
9 now, much of it which is in the Joint Appendix but not
10 all, because we were not aware that we would be opposing
11 a summary judgment motion before this Court.

12 First, William Kimes, who is the director of
13 the university banquet and catering division, thus the
14 head of this 60-some-person department. Two employees
15 testified that he told them that Davis was a supervisor.
16 One of them was Vance; that could be found on page 198
17 of the Joint Appendix. Another is an employee who was
18 in Vance's position named Dawn Knox, and that statement
19 can be found on page 386 of the Joint Appendix.

20 William Kimes himself testified in his
21 deposition that Davis, quote: "Directed and led other
22 employees in the kitchen." That can be found on page
23 367 of the Joint Appendix. In an internal investigation
24 by compliance officers at Ball State --

25 JUSTICE GINSBURG: What I mean is not the

1 statement, well, she's a supervisor. But comparable to
2 Faragher, where the lifeguard who didn't have authority
3 to hire her or fire her said, if you don't date me, you
4 are going to be cleaning the toilets. We don't have
5 anything like that in this record.

6 MR. ORTIZ: Well, there was no overt threat
7 like that in the record, but the person who was hurling
8 racial epithets at her was in a position of authority
9 over her, both according to the job description, also
10 according to her understanding, according --

11 JUSTICE GINSBURG: But that was also -- that
12 would be for a very confined period. It would only be
13 when the -- when Vance was a part-time employee. Once
14 she is a full-time employee there isn't that.

15 MR. ORTIZ: No, Your Honor. There is two
16 separate provisions in the job description which cover
17 the whole period of time here. The harassment started
18 around September 2005, went in through August -- went to
19 August 2007 with one incident, March 1st, I believe it
20 was, 2008. On January 1st, 2007, Ms. Vance received a
21 promotion from part-time to full-time.

22 Page 13 on the Joint Appendix has this item
23 that you pointed to, Justice, which specifically lists
24 among the duties and responsibilities of the catering
25 specialist leading and directing part-time employees.

1 However, page 12 of the Joint Appendix lists under
2 positions supervised by the catering specialist, exactly
3 Vance's position. So when she moved from full-time --
4 sorry, from part-time to full-time in January 2007, the
5 supervisory nexus in the job description merely jumped
6 from page 13 to page 12. But it was covered for that
7 whole period of time.

8 JUSTICE ALITO: What was the most unpleasant
9 thing that Davis could have assigned the Petitioner to
10 do? Could it be chopping onions all day, every day?

11 MR. ORTIZ: Certainly within the -- within
12 the job duties that she traditionally did, the kind of
13 things she had to work with, what she had to do, things
14 like this, working with onions, chopping onions all day
15 might be punishment. Unfortunately again, though, the
16 record wasn't developed under an understanding that all
17 of this would be irrelevant.

18 JUSTICE ALITO: But that would materially
19 augment? Chopping onions all day would be enough?

20 MR. ORTIZ: Yes, Your Honor.

21 JUSTICE ALITO: Chopping -- how about
22 chopping other things, just chopping? You are the
23 sous-chef, you are going to be chopping all day every
24 day. Would that be enough?

25 MR. ORTIZ: Possibly, Your Honor. It

1 depends, again, on questions which would depend upon how
2 you had to chop, how heavy the knives were, whether you
3 would get repetitive injuries.

4 JUSTICE GINSBURG: Mr. Ortiz, did she ever
5 have that authority, because the record as far as we
6 have it says that the work assignment, what Vance was
7 doing, came from the chef or from Kimes, and the most
8 that Davis did was transmit the chef's orders of where
9 people would be stationed.

10 MR. ORTIZ: Your Honor, it is not quite
11 clear at this point. Vance, in an internal
12 investigation at Ball State University, Ms. Vance told
13 the compliance officer who was conducting the
14 investigation that Davis delegated jobs to her in the
15 kitchen. That appears in Document 59-16 on page 2.

16 JUSTICE SOTOMAYOR: Counsel, may I interrupt
17 a moment on --

18 MR. ORTIZ: Yes, Your Honor.

19 JUSTICE SOTOMAYOR: -- following up on an
20 issue raised in part by the Chief and by Justice
21 Ginsburg. Assuming that Davis was a direct supervisor,
22 would there be an affirmative defense available to the
23 employer?

24 MR. ORTIZ: For sure, Your -- for sure, Your
25 Honor.

1 JUSTICE SOTOMAYOR: That would be your
2 position?

3 MR. ORTIZ: Yes.

4 JUSTICE SOTOMAYOR: That this could not be
5 grounds that someone who directs an employee's
6 day-to-day activity should be treated like someone who
7 hasn't actually undertaken the threat because the
8 situations are different.

9 MR. ORTIZ: Yes, Your Honor. This is --
10 this falls out of the structure of the affirmative
11 defense as laid out in Ellerth and Faragher.

12 JUSTICE SOTOMAYOR: Is that what this fight
13 is about? What if we were to say that the EEOC's test
14 governed or the Second Circuit test governed, but
15 because of the nature of the difference between formal
16 supervisors who take tangible work activities and
17 informal supervisors who the employer would have less
18 control over and less knowledge about their activities,
19 that we would require an employee to complain. Would
20 that be a crazy rule, and why?

21 MR. ORTIZ: That this Court would require
22 under those circumstances?

23 JUSTICE SOTOMAYOR: Would require, would
24 permit the affirmative defense to be raised by an
25 employer.

1 MR. ORTIZ: It doesn't actually map on well
2 to the structure of the affirmative defenses laid out in
3 Ellerth and Faragher.

4 JUSTICE SOTOMAYOR: No, but there is a
5 difference between those supervisors who take direct
6 activity, tangible direct actions, who are in power to
7 do that, and supervisors who don't have that power,
8 because supervisors who don't have that power are
9 supervised -- their actions are supervised in a way that
10 non-tangible employment supervisors are not.

11 MR. ORTIZ: Under the existing
12 affirmative -- affirmative defense, as I understand it,
13 Your Honor, an employee who doesn't complain, unless
14 they are reasonable in not complaining, in most cases
15 would make the affirmative defense unavailable to the
16 employer. Is it the question concerning the difference
17 between unreasonably failing to complain --

18 JUSTICE SOTOMAYOR: No, it's whether,
19 whether or not this whole fight is over that issue.

20 MR. ORTIZ: That -- this whole -- the fight
21 is in -- in part about that issue. That is certainly
22 not the only --

23 JUSTICE SOTOMAYOR: No, because it's also
24 about the burden of proof.

25 MR. ORTIZ: Yes.

1 JUSTICE SOTOMAYOR: So if we keep the burden
2 of proof with respect to the employer raising the
3 affirmative defense, does that solve half your problem?

4 MR. ORTIZ: Yes, Your Honor. It makes it
5 better.

6 And this Court has recognized the
7 affirmative defense appropriately allocates the burdens
8 between the employee and the employer going forward.

9 Your Honor, the Seventh Circuit rule,
10 although unsupported by Respondent, is supported by
11 several of the Respondents' amici. As I said, they tend
12 to oversell the determinativeness of the Seventh Circuit
13 rule. They exaggerate the -- the uncertainties that
14 they predict will happen under the --

15 JUSTICE SOTOMAYOR: Would you tell me what
16 you see as the major difference between the EEOC and the
17 Second Circuit rule, and why one is compelled over the
18 other?

19 It's the regulatory agency charged with
20 oversight of -- of the implementation of the statute.
21 Why shouldn't we give deference to it on --

22 MR. ORTIZ: Your Honor --

23 JUSTICE SOTOMAYOR: -- the standard it sets
24 forth?

25 MR. ORTIZ: -- it is -- it is entitled to

1 deference under Skidmore, no more. And it is our
2 understanding, although the government --

3 JUSTICE SCALIA: Excuse me. Why -- why --
4 why no more? Why just Skidmore?

5 MR. ORTIZ: Because it's -- it's only
6 informal guidance, Your Honor. It hasn't gone through
7 rulemaking, formal adjudication and those processes
8 which elevate the amount of deference --

9 JUSTICE SCALIA: That's an absolute rule?

10 MR. ORTIZ: Well, Your Honor, it's a little
11 bit contentious on this Court. No, Your Honor, it's a
12 little bit contentious on this Court; but, following
13 Mead Products, for example, it wouldn't be entitled to
14 more than Skidmore deference.

15 JUSTICE GINSBURG: Have you answered the
16 argument it shouldn't get any deference because what --
17 what the EEOC guidance does is it is -- it is
18 interpreting two decisions of this Court, and this
19 Court, not the EEOC, is in the best position to
20 determine what those two cases mean?

21 MR. ORTIZ: Well, what it is, Your Honor, is
22 it represents an interpretation of the word "agent" in
23 Title VII.

24 Now, where -- where the statute -- the
25 statutory term gives off and this Court's interpretation

1 begins is, in some cases, a tough question.

2 But in this case, the EEOC -- the EEOC is
3 really giving definition to the word "agent" in Title
4 VII, not so much this Court's interpretations in
5 Faragher and Ellerth.

6 If there are no further questions, Your
7 Honor, I would like to reserve my remaining time for
8 rebuttal.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.
10 Mr. Srinivasan?

11 ORAL ARGUMENT OF SRI SRINIVASAN,
12 FOR UNITED STATES, AS AMICUS CURIAE,

13 IN SUPPORT OF NEITHER PARTY

14 MR. SRINIVASAN: Thank you,
15 Mr. Chief Justice, and may it please the Court:

16 When a person controls a subordinate's daily
17 work activities and subjects her to harassment, that
18 person qualifies as a supervisor for purposes of the
19 Faragher- Ellerth vicarious liability affirmative defense
20 framework.

21 When it controls daily work activities and,
22 therefore, for example, can compel the cleaning of
23 toilets for a year, the principle that the agency
24 relationship augments the ability to carry out the
25 harassment is implicated in that the victim will lack

1 the same ability to resist the harassment or to report
2 it as would be the case if the harassment were conducted
3 by a coworker that --

4 CHIEF JUSTICE ROBERTS: What about -- what
5 about the music hypothetical?

6 MR. SRINIVASAN: Well --

7 CHIEF JUSTICE ROBERTS: Where -- where do
8 you think your test comes out on that?

9 MR. SRINIVASAN: I think it comes out, most
10 likely, against concluding that the person is a
11 supervisor. And the reason is that, under the EEOC
12 enforcement guidance, that accounts for situations in
13 which the authority is exercised over a limited field, a
14 limited number of tasks or assignments. And this is at
15 page 92(a) of the petition appendix.

16 And I think that would qualify under that
17 provision because it's limited.

18 CHIEF JUSTICE ROBERTS: Why -- it doesn't
19 really have to do with the number of tasks. It isn't an
20 assignment of tasks. It's something that clearly
21 affects the daily activities of the employee in a way
22 that could be used to implement or facilitate
23 harassment.

24 MR. SRINIVASAN: It could, Your Honor. I
25 don't disagree with that, and I don't disagree that

1 there are going to be cases that raise issues at the
2 margins.

3 But one way to think about the spectrum of
4 options available to the Court today is to envision that
5 on one end, you have harassment that's perpetrated by a
6 coworker, and you consider the types of harassment that
7 that might entail. And on the other end, you have
8 harassment that's perpetrated by a supervisor with
9 authority over tangible employment actions.

10 CHIEF JUSTICE ROBERTS: And -- and your
11 tests sort of use that, just as you've posed it, as some
12 broad continuum in which we're going to have countless
13 cases trying to figure out whether music falls closer to
14 this end or, you know, what -- the senior employee
15 controls the thermostat, is that closer to this end or
16 that end? Or cutting onions?

17 It seems to me that every single case has
18 its own peculiar facts, and courts are going to be --
19 have to figure out where on the continuum it resides.

20 MR. SRINIVASAN: Well -- well, I guess, Your
21 Honor, as Your Honor put it to -- to Petitioner's
22 counsel, the competing approach would be the approach
23 adopted by the Seventh Circuit; but, that approach has
24 some serious flaws.

25 For example, it wouldn't cover the

1 supervisor's conduct that was at issue in Faragher
2 itself, where the supervisor threatened that he would
3 make the harassment victim clean the toilets for a year
4 if she didn't succumb to the harassment. And I think
5 that's a pretty significant cost.

6 JUSTICE ALITO: Well, isn't cleaning the
7 toilets a limited -- isn't the authority to decide who
8 cleans the toilets the same as the authority to decide
9 what the music is going to be? It's one thing.

10 I thought -- and your answer on the music
11 was, well, that probably wouldn't count because it's the
12 authority to decide just one thing.

13 MR. SRINIVASAN: Well, we don't -- I guess,
14 we don't know enough about the threat to force her to
15 clean the toilets for a year to know whether it's only
16 one thing. But it could be, for example, that if
17 there -- in the scope of a particular day, you have
18 three particular options as to what you might do,
19 monitor the beach, clean the facilities, including the
20 toilets, or prepare meals, then it's something that
21 covers the entire day.

22 JUSTICE ALITO: But your argument is if the
23 only authority was to decide who cleans the toilets,
24 then -- then that would not -- that wouldn't count,
25 because that's just one thing.

1 MR. SRINIVASAN: No, I think that -- I don't
2 think we have an answer to that until we know how much
3 of the day's work is encompassed by cleaning the
4 toilets.

5 JUSTICE GINSBURG: I thought in Faragher it
6 was that -- that the lifeguard gave her her daily work
7 assignments. He controlled what she would do on the
8 job.

9 MR. SRINIVASAN: He -- he controlled every
10 aspect of her -- of her day's work, and cleaning the
11 toilets was one aspect of it. So that was a
12 particularly poignant example that he visited on her as
13 a way to perpetuate the harassment.

14 JUSTICE ALITO: Well, that can't possibly be
15 what the case means. Suppose that it's -- it's the
16 assignment of offices, and all of the offices except one
17 have heating and air conditioning, but one has no
18 heating and no air conditioning.

19 And so -- and that's the only authority that
20 this person has is to assign desks. That person says,
21 if you don't do whatever it is that I want you to do,
22 I'm putting you in the office where there's no heating,
23 and there's no air conditioning. And you would say that
24 doesn't count because it's just one thing. It's not a
25 broad range of authorities -- of authorities.

1 MR. SRINIVASAN: It doesn't constitute
2 authority over daily work activities. And I guess
3 that's what the EEOC guidance authorities --

4 JUSTICE BREYER: Have you --

5 MR. SRINIVASAN: We haven't encountered it
6 in real cases.

7 JUSTICE BREYER: Well, you've looked this
8 up. And apparently, for about a dozen years, the EEOC
9 has had, as -- as an alternative basis for qualifying as
10 a supervisor, the individual has authority to direct the
11 employee's daily work activities.

12 And in addition, we have three circuits that
13 for some period of years have been following roughly the
14 same kind of rule.

15 Now, has this problem of the country music
16 or the other problems raised, have they turned out to be
17 a significant problem in those circuits or for the EEOC?

18 MR. SRINIVASAN: They haven't,
19 Justice Breyer.

20 JUSTICE BREYER: They have, or they have
21 not?

22 MR. SRINIVASAN: They have not. I'm sorry.
23 They have not turned out to be an issue, and
24 that's what --

25 CHIEF JUSTICE ROBERTS: How do you know

1 that? Are you just saying they have not generated
2 actual Federal -- Federal court reported cases?

3 Do you have any idea how this works on the
4 ground when people complain about the exercise of
5 authority by a coworker who has specific
6 responsibilities that might be reviewed as supervisory?

7 MR. SRINIVASAN: Well, they haven't -- I
8 guess that's two components to the answer,
9 Mr. Chief Justice -- they haven't generated reported or
10 underreported decisions, as far as we've seen. And this
11 is not scientific, and it's just based on our
12 conversations with the EEOC lawyers who are charged with
13 dealing with right to sue letters and the like. They
14 haven't encountered these sorts of situations.

15 CHIEF JUSTICE ROBERTS: The EEOC lawyers
16 think the EEOC plan is working just fine.

17 MR. SRINIVASAN: Well, that -- I -- I
18 understand that that's not entirely surprising, but --

19 JUSTICE BREYER: But I guess they'd tell
20 you. There are three who signed the brief, or four.
21 And I guess they'd tell you, wouldn't they --

22 MR. SRINIVASAN: Right.

23 JUSTICE BREYER: -- what the problems are,
24 if they have problems.

25 MR. SRINIVASAN: Right. In our

1 conversations with them about the way in which these
2 issues arise --

3 JUSTICE BREYER: I mean, we can ask the
4 other side the same question. They've seen the cases in
5 the circuits. Have they seen instances in the EEOC or
6 before the circuits where it's turned out to be a
7 serious problem, like the country music or any of the
8 other hypotheticals raised?

9 MR. SRINIVASAN: And I don't think it has,
10 Justice Breyer.

11 And I think it's important to bear in mind
12 that the nature of this inquiry is such that there's
13 going to be cases at the margins that raise difficult
14 questions; but, in Ellerth, the Court recognized that.

15 JUSTICE KAGAN: Could I ask you how the
16 Seventh Circuit test works in operation?

17 We're in a university setting here, so let
18 me give you a university hypo. There's a professor, and
19 the professor has a secretary. And the professor
20 subjects that secretary to living hell, complete hostile
21 work environment on the basis of sex, all right? But
22 the professor has absolutely no authority to fire the
23 secretary. What would the Seventh Circuit say about
24 that situation?

25 MR. SRINIVASAN: That if there's no

1 authority over -- to -- to direct annual
2 employment actions, then --

3 JUSTICE KAGAN: No, no, the secretary is
4 fired by the head of secretarial services. Professors
5 don't have the ability to fire secretaries; but,
6 professors do have the ability to make secretarial lives
7 living hells. So what does the Seventh Circuit say
8 about that?

9 MR. SRINIVASAN: The professor would not
10 qualify as a supervisor for purposes of Ellerth-Faragher
11 framework.

12 JUSTICE KAGAN: Under the Seventh Circuit
13 test.

14 MR. SRINIVASAN: And so you'd look at it as
15 a -- you'd look at the professor as a coworker, and
16 you'd apply the same standards that applied to
17 harassment conducted by the coworker.

18 JUSTICE KAGAN: Even though, of course, it's
19 actually more difficult for the secretary to complain
20 about the professor than it would be for the secretary
21 to complain about the head of secretarial services.

22 MR. SRINIVASAN: Yes. And I think that's a
23 useful frame of reference that I was trying to
24 articulate earlier, which is that we can envision the
25 cases as falling on a spectrum between ability to

1 complain when the harassment is perpetrated by a
2 coworker on the one hand, and ability to complain when
3 harassment is perpetrated by a supervisor with tangible
4 employment authority --

5 JUSTICE KAGAN: And Mr. Srinivasan, if I can
6 just continue on about this, because I just don't even
7 understand the Seventh Circuit test. Would the Seventh
8 Circuit test also say that -- that that person is not a
9 supervisor even if the professor evaluates the secretary
10 on a yearly basis?

11 MR. SRINIVASAN: The Seventh Circuit would
12 say that as far as we can tell. They don't appear to
13 have a proviso for circumstances in which the harasser
14 has a role in determining tangible employment actions,
15 because that is one thing that the EEOC guidance takes
16 account of.

17 It's that -- not just that somebody counts
18 as a supervisor when they themselves undertake tangible
19 employment action, but if they have a substantial role
20 in making recommendations that in turn trigger tangible
21 employment actions, the EEOC would take the position
22 that that qualifies. Now, that's not an issue in this
23 case, but that's --

24 CHIEF JUSTICE ROBERTS: You've -- you've
25 talked several times about this going along the

1 spectrum. Where -- where are we supposed to cut off
2 the -- where's the cutting line in the spectrum?

3 MR. SRINIVASAN: Well, I think that the --
4 control over daily work activities is where we would
5 draw the line. And that's what has come up the most in
6 the cases. The reported decisions have conflicts on --
7 have a conflict on that issue, and that is where the
8 EEOC guidance draws the line.

9 Now, I think it would be helpful, if the
10 Court were going to issue an opinion that adopts that
11 line, to elaborate on -- on that line a little bit in
12 the following sense: That relaying instructions that
13 are -- that are disseminated by one person wouldn't
14 count for those purposes. That's in the EEOC guidance.
15 And -- and it's the functions of a job that actually
16 matter, not the job title. That is also in the EEOC
17 guidance.

18 So I think there are some aspects of the
19 EEOC guidance that elaborate on that line about control
20 over daily activities that I think I would commend to
21 the Court, that it might well --

22 JUSTICE SOTOMAYOR: Do we have a developed
23 record enough to do that in this case?

24 MR. SRINIVASAN: I'm sorry? I didn't hear
25 you.

1 JUSTICE SOTOMAYOR: Do -- do we have a
2 developed record enough? Petitioner's counsel says we
3 don't, that the Seventh Circuit test didn't permit them
4 to develop the record sufficiently to clarify all of
5 these issues. We certainly have snippets or -- or lack
6 snippets, as the case may be. But is the record
7 sufficiently developed for the Court to even
8 pronounce -- make pronouncements of that nature?

9 MR. SRINIVASAN: I think -- I think the real
10 question, Justice Sotomayor, is whether the parties had
11 a sufficient opportunity to develop the record. Because
12 if you take the record in the case as a given, we think
13 that the record would support the grant of summary
14 judgment for Ball State University, because there isn't
15 a sufficient showing in the record if you take it as a
16 given that the relevant supervisory -- the relevant
17 putative supervisory employee, Davis, has control over
18 day-to-day work activities.

19 The question that remains is whether the
20 record should be allowed to be expanded.

21 JUSTICE ALITO: The conclusion in your brief
22 is that the judgment of the court of appeals should be
23 vacated and the case remanded for further proceedings,
24 and now -- now you are telling us that we should -- we
25 should basically write an opinion on summary judgment.

1 MR. SRINIVASAN: No. I think if you take
2 the record as a given, that a grant of summary judgment
3 in favor of the employer would be in order. But in the
4 normal course what this Court does when it announces a
5 new standard is it remands for the lower courts to deal
6 with the application of the standard to the facts. And
7 the conclusion in our brief is just, I think, a
8 parroting of that normal conclusion.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.
10 Mr. Garre.

11 ORAL ARGUMENT OF GREGORY G. GARRE
12 ON BEHALF OF THE RESPONDENTS

13 MR. GARRE: Thank you, Mr. Chief Justice,
14 and may it please the Court:

15 The judgment of the court of appeals should
16 be affirmed because the record establishes that the only
17 employees whose status is at issue lacked the
18 supervisory authority necessary to trigger vicarious
19 liability under Title VII.

20 JUSTICE ALITO: We took this case to decide
21 whether the Faragher and Ellerth -- and Ellerth
22 supervisory liability rule is limited to those harassers
23 who have the power to hire, fire, demote, promote,
24 transfer, or discipline their victim. And your answer
25 to that is no; is that right?

1 MR. GARRE: That's right. We don't think
2 the Seventh Circuit test is the complete answer to the
3 question of who may qualify as a supervisor. But we
4 think it's clear that the -- the person whose status is
5 at issue did not qualify and therefore, the judgment
6 should be affirmed. This Court --

7 JUSTICE ALITO: All right. Well, if we --
8 if we agree with that without having any party defending
9 the rule that was adopted by three circuits, then
10 surely -- well, then, why shouldn't we just remand this
11 case for the lower courts to decide this, this summary
12 judgment issue, and -- and permit further development of
13 the record if the record isn't fully developed?

14 MR. GARRE: Well, most importantly, Justice
15 Alito, because the courts need guidance on how to apply
16 the EEOC and the Second Circuit standard. The best way
17 to provide that guidance is to do what this Court often
18 does, which is to apply the facts to the standard.

19 In this case, applying the record facts to
20 the standard that we think applies, the "materially
21 enables the harassment" standard, it's clear that Ms.
22 Davis, the person who is at issue, does not qualify as a
23 supervisor. And the reason why it's clear is the record
24 is uncontradicted that either the chef or Mr. Kimes made
25 the daily assignments through the prep sheets. The prep

1 sheets are what every employee in the kitchen got each
2 day and they would tell you: Dice vegetables for 60
3 people; prepare boxed lunches for 20; prepare six
4 vegetable trays.

5 That's -- that was their daily assignments,
6 and the record is absolutely clear, JA 2 -- 277, 278, JA
7 424 -- that all the employees got the prep sheets from
8 the chef or Mr. Kimes.

9 It's also absolutely clear that Mr. Kimes
10 was the one who controlled the schedule in the kitchen.
11 He is the one that told employees what times of days
12 that they could work. He controlled the schedule.

13 JUSTICE ALITO: I understand Mr. Ortiz to
14 say that there's at least a dispute of fact about
15 whether Davis could have controlled what Petitioner did
16 on a daily basis.

17 MR. GARRE: There is -- there is neither a
18 material nor genuine dispute on that, Your Honor. It at
19 the very --

20 JUSTICE ALITO: Doesn't her job description
21 say that she can assign tasks in the kitchen?

22 MR. GARRE: But they -- they omit the -- the
23 clause that follows, which is critical, which is "via
24 demonstration, coaching, or overseeing to ensure
25 efficiency." That is on page Joint Appendix 13. And

1 that job description has to be read in light of the
2 record that makes crystal clear that it was the chef who
3 did the daily assignments for the prep sheets.

4 And there -- and there are examples of the
5 prep sheets as an exhibit to Ms. Fultz's affidavit, the
6 affidavits at 424 of the Joint Appendix. The -- the
7 exhibits are LLL and JJJ --

8 JUSTICE SCALIA: We didn't take this case
9 to -- to decide those factual questions.

10 MR. GARRE: Your Honor, you --

11 JUSTICE SCALIA: We really didn't. We took
12 it principally to decide whether the Seventh Circuit
13 rule was -- was right or not. And you don't even defend
14 that. So there is nobody here defending the Seventh
15 Circuit.

16 MR. GARRE: Well, Your Honor has excellent
17 briefing defending the Seventh Circuit. The Chamber of
18 Commerce and other amici have defended it. We certainly
19 think that it -- that -- that it's a superior --

20 JUSTICE SCALIA: They are not talking to us
21 here, are they?

22 MR. GARRE: No, Your Honor. We think it's a
23 superior bright line, but, as we say in our brief, we
24 think that ultimately this Court's precedents compel
25 that the Court reject that. And I think most -- most

1 squarely we look at the Faragher decision. We look at
2 lifeguard Silverman in Faragher, who had the authority
3 to control all aspects of the victim's schedule and
4 daily activities in a virtually unchecked manner.

5 So if the Court is looking for an example
6 that it wants to point to of someone who could qualify
7 under the non-Seventh Circuit category, we think that
8 lifeguard Silverman, from this Court's precedents, would
9 be the example that this Court would hold out.

10 JUSTICE GINSBURG: Was that -- that question
11 wasn't presented. It was -- it was just assumed that --
12 that Silverman would qualify as a -- as a supervisor.

13 MR. GARRE: That -- that's absolutely right,
14 Justice Ginsburg. And I think, for some of the reasons
15 that Justice Kagan brought up in her colloquy with --
16 with Mr. Srinivasan, I think the logic of the Court's
17 precedents, agency principles adopted, would lead to the
18 conclusion that someone who does control virtually all
19 aspects of one's schedule but yet lacks the authority to
20 hire, fire, or demote, nevertheless still would be
21 qualified as someone who --

22 CHIEF JUSTICE ROBERTS: Every -- every
23 time -- every time you adopt a rule rather than a
24 multifactor analysis, there are going to be particular
25 cases that fall outside the rule that look like a harsh

1 result. Now, here it simply affects the nature. It
2 doesn't give any immunity for harassment, it just
3 affects the nature of the showing that might be made.

4 You have no difficulty, as representing an
5 employer, by saying that in every case an allegation of
6 this sort is made you have to go through a case-by-case
7 description of the particular responsibilities, whether
8 it's the thermostat, whether it's the music, whether
9 it's the assignment of everything that the employee
10 does, and decide on that basis whether or not you should
11 compensate the victim, or -- or whether or not you
12 should go to court?

13 MR. GARRE: We do have great difficulty,
14 Your Honor. First of all, if we are wrong about what
15 this Court's precedents compel, then this Court should
16 adopt the Seventh Circuit principle, and we've -- we've
17 said that in our brief, if we're wrong in our
18 understanding of the Court's precedents.

19 Secondly, we think that the -- the Court can
20 and should establish meaningful limits on what this
21 broader category of supervisors would require, and I
22 think the case law illustrates that. If you look at the
23 leading circuits who apply the standard --

24 CHIEF JUSTICE ROBERTS: Well, I think -- I
25 think your friend on the other side was -- made a good

1 point in his reply brief, which is the variety of
2 circumstances you think courts should look at just
3 happen to correspond with the factual issues that you
4 would have resolved in your favor.

5 MR. GARRE: Well, I -- I would take issue
6 with that. We -- we tried to provide guideposts that
7 would be helpful. But if you look at, for example, the
8 principle that the EEOC agrees with, which -- which is
9 just that limited or marginal occasion authority to lead
10 or oversee by virtue of a paper title, its grade, or
11 seniority is not sufficient.

12 JUSTICE SCALIA: What does that have to do
13 with agency? That's what I don't understand. Why --
14 why do any of these tests have to do with agency?

15 MR. GARRE: Well, Your Honor --

16 JUSTICE SCALIA: I mean, I can understand
17 Congress writing a statute that says, you know, any --
18 any person given -- given authority by the employer,
19 which authority is used to make it more difficult for a
20 person to complain about racial or sexual harassment, is
21 bad. But the statute doesn't say that. It says apply
22 agency principles.

23 How does agency have anything to do with the
24 line you're arguing that we take here?

25 MR. GARRE: What this Court said in Faragher

1 and Ellerth -- and I appreciate that you dissented in
2 the case, but what this Court said was it adopted
3 section 219(2)(d) of the Restatement (Second) of Agency,
4 the notion that if -- if there was -- if the employee
5 was aided in the accomplishment of the harassment by
6 virtue of an agency relation, that that would be the
7 agency trigger for liability.

8 JUSTICE SCALIA: Then why not leave it
9 there? If that's what the agency is --

10 MR. GARRE: And RMA then --

11 JUSTICE SCALIA: -- then you don't need it
12 at all. So the music -- the music would -- the
13 thermostat would qualify. It would all qualify.

14 MR. GARRE: I don't think it would, Your
15 Honor, because we agree, certainly, with the EEOC that
16 there are material limits to how far that principle
17 could be stretched.

18 The Court in Ellerth made clear that there
19 were limits to the vicarious liability of employers in
20 this context.

21 JUSTICE SCALIA: Why? Why? I mean, if
22 that's your principle, apply the principle.

23 MR. GARRE: Well, for the very --

24 JUSTICE SCALIA: If you are aided, you know,
25 you're going to work in a cold room unless you, you

1 know, comply with my sexual advances, apply the
2 principle. What's so hard about that? That's a clear
3 line.

4 MR. GARRE: This is the balance I think that
5 the Court struck in Ellerth, Your Honor, which was -- it
6 took into account that the statute was passed against
7 the backdrop of agency principles; but, yet, Congress
8 also was cognizant that imposing vicarious liability on
9 the employer for acts that the Court recognized were not
10 themselves authorized by the employer, that that was a
11 punitive aspect of that, and the Court would establish
12 limits.

13 And I think our position takes into account
14 that there have to be limits in this area, on the extent
15 of vicarious liability, in order to give effect to
16 Congress's intent; but, also recognizes, in the
17 situation like you had with the lifeguard in Faragher,
18 that that person did have authority that would assist in
19 the harassment -- they made her clean the toilets, as
20 the lifeguard in Faragher said.

21 And so the Court, I think, struck a
22 reasonable balance. And taking the balance and what
23 this Court said, we think the proper way to resolve this
24 case is to adopt something like the EEOC rule or the
25 Second Circuit rule, but to make clear there are limits.

1 And the best way to make clear that there are limits is
2 to make clear that on the record in this case Ms. Davis
3 did not qualify as a supervisor.

4 Now, my friend said they didn't have the
5 opportunity to develop evidence to the contrary; but,
6 the fact is, from the outset, they litigated this case
7 as if the Seventh Circuit standard did not apply.

8 The reasons that they gave for why Ms. Davis
9 was a supervisor, in the lower court, was that, one,
10 they pointed to the job description, that she had this
11 other authority to "lead and direct," and they also
12 pointed to the fact that she didn't clock in.

13 Those are irrelevant under the Seventh
14 Circuit test. So all along, they had in their mind that
15 they wanted to try to show that Davis was different, and
16 it did have some marginal authority to lead --

17 JUSTICE ALITO: What guidance would your --
18 what guidance would the kind of opinion that you're
19 suggesting we write really provide? The -- the guidance
20 would be that if someone has no authority to assign
21 daily work, then that person isn't -- and also has no
22 authority to hire, fire, promote, et cetera, then that
23 person isn't a supervisor.

24 How much guidance is that?

25 MR. GARRE: I think it's a lot of guidance,

1 Justice Alito. I think that the flip side of that is
2 the Court would make clear that merely having some
3 occasional or marginal authority to lead or direct by
4 virtue of one's better paper title or seniority is not
5 sufficient to trigger vicarious liability. I think
6 that's going to resolve the mine-run of the cases in
7 which this question has come up and been litigated, at
8 least to the courts of appeals.

9 If you look, for example, at the difference
10 between something like the Mack case out of the Second
11 Circuit and the Mikels case out of the Fourth Circuit,
12 in Mikels, we had an example of two police officers, one
13 had a higher paper rank, corporal versus private, and it
14 was alleged that the corporal was a supervisor. And the
15 court said, no, no, no, he's not a supervisor, all there
16 is, is some marginal occasional authority. That's not
17 sufficient.

18 It was clear that the victim in that case
19 wasn't shy about telling the harasser where to go, to
20 tell him off. And that's the kind of --

21 JUSTICE GINSBURG: But why should that --
22 why should that matter? I know you said that in your
23 brief, Mr. Garre, if the alleged victim talked back.

24 But in one of the very first cases that we
25 had in this line, Harris v. Forklift, there was -- it

1 was the boss, so there was no question about supervisor,
2 and he was really making things hard for this employee;
3 but, she was very firm, and she talked back to him.

4 But, still, that's not what we said that
5 counted. We said, is she being subjected to terms and
6 conditions of employment that she would not be subjected
7 to but for her sex.

8 MR. GARRE: Right. And we -- we don't think
9 that that's a dispositive criterion. We recognize the
10 point that the person gets to establish superior ability
11 to stand up to despicable treatment. But I think what
12 our point is, is that it's part of the equation that you
13 would look at.

14 In essence, did the person treat the alleged
15 harasser like a co-employee, or did the person treat the
16 alleged harasser like a supervisor? And in this case,
17 the record is clear that she treated her like a
18 co-employee, someone who -- they obviously had
19 disagreements among them.

20 And I think that's what we take this piece
21 of evidence to assist the Court on the question
22 presented. I think -- but we think what was sufficient
23 to resolve the question presented is the clear and
24 unrefuted evidence that the prep sheets, the daily
25 activities were assigned by the chef or Mr. Kimes, that

1 Mr. Kimes had the authority to control the schedule.

2 And if you want to go further than that, the
3 record also shows that Mr. Kimes had the authority to
4 review -- to do annual reviews. Mr. Kimes had the
5 authority to evaluate. He had all the kind of authority
6 that one would expect in a supervisor.

7 So you would ask the question, what's left?
8 Essentially nothing. And whatever is left, we agree
9 with the EEOC, is not, as a matter of law, sufficient to
10 trigger vicarious liability.

11 That doesn't mean she can't present her
12 claim. It -- it means that it's just simply analyzed
13 under the framework for co-workers, in which she bears
14 the burden of establishing that the employer was
15 negligent in not responding to it.

16 And as Judge Wood, for the court of appeals,
17 and Judge Barker made clear in their detailed opinions,
18 this was not a situation where the employer stuck its
19 head in the sand and ignored incidents of unpleasantries
20 or, in some cases, despicable racial epithets --

21 JUSTICE ALITO: If you were willing to
22 concede that this would be a close case under the Second
23 Circuit standard or under the EEOC guidance, then there
24 might be an argument in favor of our applying those
25 tests -- or one of those tests to the facts of the case,

1 because then that might provide some guidance, even
2 though we are supposed to be a court of review, not a
3 court of first view.

4 But you're saying this is an extremely weak
5 case under those standards; and, therefore, what is --
6 what benefit is there in our applying this? Just send
7 it back and have it done in the normal course by the
8 court of appeals or by the district court.

9 MR. GARRE: Well, Your Honor, we don't think
10 it's a close case, but my friend does, and his amici do.
11 And I think the damaging signal that this Court would
12 send by remanding on this record would be that, whatever
13 it might say in its opinion, that would have virtually
14 no force in terms of establishing a standard that made
15 clear that this -- whatever else may be true about what
16 would qualify, something like this does not qualify.

17 And, again, like this Court did in the
18 Global Tech case, when the Court establishes a standard,
19 oftentimes, it applies the standard to the facts and
20 appreciates that that's the best way, the most judicial
21 way of providing guidance on what that standard means.

22 JUSTICE SOTOMAYOR: Mr. Garre, there is one
23 BSU internal document that -- a note to the file by a
24 compliance officer, who apparently investigated one of
25 the complaints, that says that -- Kimes is recorded as

1 saying -- he's the avowed supervisor -- that he, quote,
2 "knows Davis has given direction to Vance, and that he
3 just doesn't know what else to do."

4 Doesn't that defeat summary judgment on its
5 face?

6 MR. GARRE: It doesn't, Your Honor, if you
7 agree with our principle, that the EEOC also agrees
8 with, that having some limited or marginal authority to
9 lead or direct as a matter of law is not sufficient.

10 So that that piece of evidence, even in its
11 reasonable inference, would not be sufficient to create
12 a material issue. It also wouldn't be sufficient
13 creating -- looking at the body of the evidence, which
14 makes crystal clear that the prep sheets are really what
15 was driving the daily activities in this workplace. And
16 it was Kimes or the chef that did the prep sheets, not
17 Ms. Davis at all.

18 And it -- and it was also not material in
19 light of the evidence that Mr. Kimes did the schedule.

20 Ms. Davis was asked at her deposition on
21 page 135, quote, "Was there ever" -- "have you ever been
22 assigned to a less meaningful or fulfilling job
23 classification?" And her response was yes, and she
24 pointed to an example by Mr. Kimes, because it was
25 Mr. Kimes who had the authority to make those

1 assignments, not Ms. Davis.

2 So the mere fact that you've got some
3 marginal evidence drawn from snippets, giving it a
4 reasonable inference that she at times had some ability
5 to lead or direct, as the job description says, "by
6 coaching, demonstration or overseeing," is not
7 sufficient as a matter of law to entitle her to summary
8 judgment, nor do we think that this Court should take
9 the unusual step of remanding so that she can dig into
10 events six years old through new discovery.

11 Again --

12 JUSTICE KAGAN: Mr. Garre, could I ask you
13 about that? You said before that there is no -- nothing
14 to suggest that she left anything on the table because
15 of the nature of the Seventh Circuit standard.

16 So what's the best place in the record for
17 us to look to decide that question as to whether she at
18 all didn't present or didn't develop evidence because of
19 the nature of the Seventh Circuit standard?

20 MR. GARRE: Well, first, I would look at her
21 summary judgment briefs, Your Honor, and in those briefs
22 she argued that Davis was a supervisor because, one,
23 under the job description she had the authority to lead
24 and direct, the same sorts of things that we are talking
25 now and would be talking about under the EEOC and Second

1 Circuit tests. And, two, she points to the fact that
2 they didn't clock in, again something that is irrelevant
3 under the Seventh Circuit test.

4 So this wasn't a case where the litigant
5 felt themselves bound by the legal standard and one
6 could surmise that they would have pursued it
7 differently. I think I would look at that first. And
8 then I would look at her deposition transcript which is
9 in the Joint Appendix and the three affidavits that she
10 put in, in this case, which are in the Joint Appendix.

11 At some point you would expect her to come
12 along and try to rebut the notion that Mr. Kimes and
13 Ms. Fultz assigned the daily activities through the prep
14 sheets. In fact, it's just the contrary. If anything,
15 in her own affidavit she seems to accept that the prep
16 sheets were done by Kimes and the chef. That's at JA
17 430. You would expect her to contest the notion that
18 Mr. Kimes was the one who did the scheduling, who did
19 her annual reviews, who disciplined her on occasion.
20 After all, she was claiming that Davis was the
21 supervisor, and she didn't feel bound by the Seventh
22 Circuit tests.

23 So you would expect to see some indication
24 of how Ms. Davis actually assigned her something to do,
25 changed her schedule, the like. Instead what you find

1 is all those sorts of allegations, she made them, but
2 all those sorts of allegations were directed to Mr.
3 Kimes. That was the basis for her retaliation claim,
4 which isn't before the Court. But there are all the
5 sorts of things that you might expect one to complain
6 about against a supervisor in this sort of vein: She
7 made me cut vegetables instead of doing the baking like
8 I like to do; she didn't assign me enough overtime so I
9 could make more money; she changed my hours.

10 Those allegations were made. They were directed
11 at Mr. Kimes and that's perfectly consistent with the
12 record evidence. There was Kimes and the chef who had
13 the authority to do her daily activities, and Kimes had
14 the authority to do the schedule.

15 It's not enough for her to come here today,
16 I don't think, and just speculate that having an
17 opportunity to go through greater discovery, which in
18 essence would amount to a fishing expedition, the Court
19 should take the unusual step of remanding to give her an
20 opportunity for discovery. This Court -- although we
21 acknowledge oftentimes this Court does remand for the
22 lower courts to undertake that inquiry, it certainly
23 doesn't always do so. So Global-Tech is one example;
24 we've cited many more in our briefs.

25 And here, I think, again, the parties --

1 there is broad agreement on what the standard should be.
2 Something like the EEOC or Second Circuit test is, we
3 think, the best way to frame it. But given the debate
4 among the parties about what that test means and how it
5 applies to Davis here, I think it's absolutely critical
6 for the Court to apply the legal test to the record
7 facts and hold that Ms. Davis is not a supervisor and to
8 affirm the judgment below.

9 Although it's not before this Court, if one
10 wants to go to the next step and think about the
11 affirmative defenses and the like, this isn't a case
12 where the Court would be putting to rest a valid Title
13 VII claim.

14 But the claim was extensively looked at
15 below by Judge Barker in the district court, Judge Wood
16 and her colleagues on the court of appeals, and they
17 found an environment in which Ball State reacted
18 responsibly to the allegations that were made,
19 investigated them and took prompt action where the
20 investigation warranted it, particularly with respect to
21 the most despicable things that were uncovered, racial
22 epithets that were used by another employee,
23 Ms. McVicker, not Ms. Davis.

24 The only allegations against Ms. Davis that
25 we think are relevant here during the time period that

1 Ms. Davis was a part-time employee were: One, the
2 so-called elevator incident where Ms. Davis allegedly
3 blocked Ms. Vance as she got out of the elevator, which
4 isn't race-based at all, we don't think; and two, the
5 alleged use of words like "Sambo" or
6 "Buckwheat" to refer --

7 JUSTICE GINSBURG: Mr. Ortiz said it wasn't
8 just part-time. He called my attention to the page
9 before that says she also -- that Davis also directed --

10 MR. GARRE: Well, we disagree with that,
11 Your Honor. If you look on page JA 12, the job
12 description position function, the last sentence says
13 "Requires leadership of up to 20 part-time substitute
14 and student employees." So we think it's clear. We
15 said this is in our red brief and there wasn't any
16 response to it in the yellow brief, that any authority,
17 any conceivable supervisory authority, could have only
18 existed when Ms. Vance was a part-time employee.

19 But we don't think that that's relevant,
20 Your Honor, because putting aside whether she had
21 authority over catering assistants who were part time or
22 full time, the record is absolutely clear that Ms. Davis
23 just lacked the authority that would have been
24 sufficient to trigger vicarious liability. And again we
25 think the paradigm case where that authority is present

1 is something like the lifeguard in Silverman where they
2 control all aspects of the daily activities, one's
3 schedule, one's daily work assignments, and down the
4 line.

5 Here there is no evidence that any of that
6 authority that was possessed, and the record makes clear
7 beyond doubt that all that authority was possessed by
8 others, Ms. -- the chef and Mr. Kimes. And I think, as
9 the amicus brief makes clear, this is consistent with
10 workplaces across America today, where jobs are less
11 hierarchical, more collaborative, and so where you have
12 got more senior employees by virtue of their experience
13 or job title, just a paper title, are in a broad sense
14 team leaders of the like in the workplace.

15 That doesn't mean they are supervisors in
16 any traditional sense, and it certainly doesn't mean
17 they are supervisors for purposes of triggering
18 vicarious liability under Title VII.

19 So for those reasons, we would urge this
20 Court to affirm the judgment below, to make clear in
21 order to provide the needed guidance to the courts of
22 appeals and the assumption that something like the EEOC
23 or Second Circuit standard does apply to determine who
24 is a supervisor triggering vicarious liability. Ms.
25 Davis, the only employee who is at issue, does not meet

1 that standard.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 MR. GARRE: If you have no more questions,

4 thank you.

5 CHIEF JUSTICE ROBERTS: Mr. Ortiz, you have

6 4 more minutes remaining.

7 REBUTTAL ARGUMENT OF DANIEL R. ORTIZ

8 ON BEHALF OF THE PETITIONER

9 MR. ORTIZ: Thank you, Your Honor.

10 The Seventh Circuit rule is not one that can
11 be justified in terms of its superior judicial
12 manageability, administrability, despite producing a few
13 odd results. As Justice Kagan's question revealed, it
14 produces truly perverse results. Someone who can tell
15 you what to do in your job day-to-day, manage you during
16 the whole job period, what kind of tasks you have to do,
17 was not necessarily considered a supervisor, while the
18 person upstairs in human resources that you may never
19 see or even know would be considered your supervisor.

20 JUSTICE KENNEDY: Well, if you adopted that
21 rule I suppose you could couple it with an increased
22 duty of care on the part of the employer to take
23 necessary steps to prevent forbidden harassment. In
24 other words, you up the duty of care on the part of the
25 employer generally.

1 MR. ORTIZ: Well, Justice Kennedy, that in
2 fact is one thing the Seventh Circuit has tried to do,
3 but it dispels any kind of certainty and predictability
4 in the rule, because the duty of care of course would be
5 determined by a jury only after hearing a particular
6 case.

7 Second, my friend tries to get out from
8 under the clear import of the job description here by
9 saying directing and leading somehow don't count because
10 that is accomplished through oversight. Oversight,
11 however, is a common synonym for supervision itself.
12 It's merely a dog chasing its own tail.

13 Third, it's no surprise that many of the
14 things that Ms. Vance referred to, the particular
15 instance she referred to went back to William Kimes. Of
16 course, that related to the retaliation part of her
17 claim, which is not before this Court.

18 Also, Your Honor, Faragher in the end is not
19 a toilet cleaning case. The district court did not
20 find -- made no finding on that. The court of appeals
21 didn't mention it. This Court in its Faragher opinion
22 mentioned only that it was an allegation in the
23 complaint. It is not clear -- the allegation of the
24 complainant was that he said that, not that Silverman
25 actually had that authority. And it was clear from the

1 case that he actually wasn't interested in even dating
2 Faragher, it was just a way of humiliating her in the
3 workplace. So just as Faragher's expressed, it was not
4 clear that was even something that Silverman had
5 authority to do.

6 And finally, if this Court is worried about
7 sending signals, think about what kind of signal it will
8 be sending to litigants in the future if it were to
9 affirm, simply affirm here. In the future, whenever
10 anyone is thinking that they may want to challenge a
11 rule, no matter how well-settled it is in a particular
12 circuit, they would have an incentive to, through
13 discovery, to produce information that might be relevant
14 to any future twist.

15 JUSTICE BREYER: Well, is there any? You
16 said he went through, you weren't preceding on the --
17 your client, originally in district court, not preceding
18 on the basis of the straight Seventh Circuit test. He
19 had the EEOC look into it; the Government itself says
20 that we should affirm and they have EEOC lawyers on it.
21 And so is there any piece of information that would be
22 relevant that you know of that you would introduce, were
23 it sent back, say to the district court, that you have
24 not already introduced?

25 MR. ORTIZ: Well, Your Honor, first, the

1 Solicitor General's office does not now take the
2 position that affirmance is proper.

3 JUSTICE BREYER: I read what they said in
4 the last page of their brief. They said either affirm,
5 that was their first thing, or send it back. Okay. Now
6 my question remains the same.

7 MR. ORTIZ: Yes.

8 JUSTICE BREYER: Is there --

9 MR. ORTIZ: There is.

10 JUSTICE BREYER: What is it?

11 MR. ORTIZ: On page 197 of the Joint
12 Appendix, in the deposition testimony of Ms. Vance, she
13 says that Davis told her what to do, what not to do. In
14 the internal memo to the file that Justice Sotomayor
15 pointed to, William Kimes, who had the authority --

16 JUSTICE SOTOMAYOR: I think Justice Breyer's
17 question was what's not in the record?

18 MR. ORTIZ: Oh, what's not -- I'm sorry,
19 Your Honor.

20 JUSTICE SOTOMAYOR: Do you have something
21 that's not in the record that will materially add to
22 this discourse?

23 MR. ORTIZ: Yes, Your Honor. Thank you.

24 In document number 62-3, which concerns the
25 deposition testimony of another employee -- is not in

1 the Joint Appendix, which -- which -- which is the
2 deposition testimony of another employee named Julie
3 Murphy. Ms. Murphy testified that Davis, quote unquote,
4 gave orders in the kitchen. That's on page 24, I
5 believe.

6 On page 38, she testifies that Davis was
7 understood as a supervisor.

8 And on page 37, she indicates that she
9 received particular orders from Davis to do different
10 things, like clean a particular piece of kitchen
11 equipment, at different times.

12 CHIEF JUSTICE ROBERTS: That's all in the
13 record in this Court.

14 MR. ORTIZ: Yes.

15 CHIEF JUSTICE ROBERTS: Just not in the
16 Joint Appendix.

17 MR. ORTIZ: Just not in the Joint Appendix,
18 Your Honor.

19 Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.
21 The case is submitted.

22 (Whereupon, at 12:06 p.m., the case in the
23 above-entitled matter was submitted.)

24

25

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