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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 imposes automatic liability on employers. Victims must

1 still prove actionable harassment, and employers can
2 still take advantage of the Ellerth/Faragher affirmative
3 defense.

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

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

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

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

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

24 CHIEF JUSTICE ROBERTS: It could be far more
25 severe than simply saying, all right -- you know, you're

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

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

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

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

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

1 listen to for eight hours is objectively a significant
2 enough interference with the daily activities to qualify
3 under your test.

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

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

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

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

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

1 all of a sudden you have to apply a sliding scale of
2 negligence. Not only that, but the jury is the one who
3 applies it.

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

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

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

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

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

1 harassment.

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

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

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

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

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

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

1 And this Court identified the materiality
2 requirement there as actually working to make the
3 standard more objective, not --

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

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

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

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

1 be -- it could be remanded at that point and sent back
2 to the district court for another look.

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

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

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

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

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

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

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

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

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

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

1 exercising supervisory authority over Vance is there in
2 this record?

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

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

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

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

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

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

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

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

23 Page 13 on the Joint Appendix has this item
24 that you pointed to, Justice, which specifically lists
25 among the duties and responsibilities of the catering

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

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

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

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

21 MR. ORTIZ: Yes, Your Honor.

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

1 MR. ORTIZ: Possibly, Your Honor. It
2 depends, again, on questions which would depend upon how
3 you had to chop, how heavy the knives were, whether you
4 would get repetitive injuries.

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

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

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

19 MR. ORTIZ: Yes, Your Honor.

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

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

1 Honor.

2 JUSTICE SOTOMAYOR: That would be your
3 position?

4 MR. ORTIZ: Yes.

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

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

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

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

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

1 employer.

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

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

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

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

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

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

1 MR. ORTIZ: Yes.

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

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

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

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

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

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

23 MR. ORTIZ: Your Honor --

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

1 MR. ORTIZ: -- it is -- it is entitled to
2 deference under Skidmore, no more. And it is our
3 understanding, although the government --

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

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

10 JUSTICE SCALIA: That's an absolute rule?

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

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

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

25 Now, where -- where the statute -- the

1 statutory term gives off and this Court's interpretation
2 begins is, in some cases, a tough question.

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

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

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.

11 Mr. Srinivasan?

12 ORAL ARGUMENT OF SRI SRINIVASAN,
13 FOR UNITED STATES, AS AMICUS CURIAE,
14 IN SUPPORT OF NEITHER PARTY

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

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

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

1 harassment is implicated in that the victim will lack
2 the same ability to resist the harassment or to report
3 it as would be the case if the harassment were conducted
4 by a coworker that --

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

7 MR. SRINIVASAN: Well --

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

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

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

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

25 MR. SRINIVASAN: It could, Your Honor. I

1 don't disagree with that, and I don't disagree that
2 there are going to be cases that raise issues at the
3 margins.

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

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

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

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

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

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

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

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

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

1 because that's just one thing.

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

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

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

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

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

1 broad range of authorities -- of authorities.

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

5 JUSTICE BREYER: Have you --

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

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

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

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

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

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

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

1 CHIEF JUSTICE ROBERTS: How do you know
2 that? Are you just saying they have not generated
3 actual Federal -- Federal court reported cases?

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

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

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

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

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

23 MR. SRINIVASAN: Right.

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

1 MR. SRINIVASAN: Right. In our
2 conversations with them about the way in which these
3 issues arise --

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

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

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

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

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

1 MR. SRINIVASAN: That if there's no
2 authority over -- to -- to direct annual
3 employment actions, then --

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

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

13 JUSTICE KAGAN: Under the Seventh Circuit
14 test.

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

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

23 MR. SRINIVASAN: Yes. And I think that's a
24 useful frame of reference that I was trying to
25 articulate earlier, which is that we can envision the

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

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

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

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

25 CHIEF JUSTICE ROBERTS: You've -- you've

1 talked several times about this going along the
2 spectrum. Where -- where are we supposed to cut off
3 the -- where's the cutting line in the spectrum?

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

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

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

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

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

1 you.

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

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

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

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

1 should basically write an opinion on summary judgment.

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

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

12 ORAL ARGUMENT OF GREGORY G. GARRE

13 ON BEHALF OF THE RESPONDENTS

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

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

21 JUSTICE ALITO: We took this case to decide
22 whether the Faragher and Ellerth -- and Ellerth
23 supervisory liability rule is limited to those harassers
24 who have the power to hire, fire, demote, promote,
25 transfer, or discipline their victim. And your answer

1 to that is no; is that right?

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

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

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

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

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

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

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

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

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

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

23 MR. GARRE: But they -- they omit the -- the
24 clause that follows, which is critical, which is "via
25 demonstration, coaching, or overseeing to ensure

1 efficiency." That is on page Joint Appendix 13. And
2 that job description has to be read in light of the
3 record that makes crystal clear that it was the chef who
4 did the daily assignments for the prep sheets.

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

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

11 MR. GARRE: Your Honor, you --

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

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

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

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

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

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

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

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

23 CHIEF JUSTICE ROBERTS: Every -- every
24 time -- every time you adopt a rule rather than a
25 multifactor analysis, there are going to be particular

1 cases that fall outside the rule that look like a harsh
2 result. Now, here it simply affects the nature. It
3 doesn't give any immunity for harassment, it just
4 affects the nature of the showing that might be made.

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

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

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

25 CHIEF JUSTICE ROBERTS: Well, I think -- I

1 think your friend on the other side was -- made a good
2 point in his reply brief, which is the variety of
3 circumstances you think courts should look at just
4 happen to correspond with the factual issues that you
5 would have resolved in your favor.

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

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

16 MR. GARRE: Well, Your Honor --

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

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

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

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

11 MR. GARRE: And RMA then --

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

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

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

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

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

25 JUSTICE SCALIA: If you are aided -- you

1 know, you're going to work in a cold room unless you --
2 you know, comply with my sexual advances, apply the
3 principle. What's so hard about that? That's a clear
4 line.

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

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

22 And so the Court, I think, struck a
23 reasonable balance. And taking the balance and what
24 this Court said, we think the proper way to resolve this
25 case is to adopt something like the EEOC rule or the

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

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

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

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

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

25 How much guidance is that?

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

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

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

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

1 But in one of the very first cases that we
2 had in this line, Harris v. Forklift, there was -- it
3 was the boss, so there was no question about supervisor,
4 and he was really making things hard for this employee;
5 but, she was very firm, and she talked back to him.

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

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

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

22 And I think that's what we take this piece
23 of evidence to assist the Court on the question
24 presented. I think -- but we think what was sufficient
25 to resolve the question presented is the clear and

1 unrefuted evidence that the prep sheets, the daily
2 activities were assigned by the chef or Mr. Kimes, that
3 Mr. Kimes had the authority to control the schedule.

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

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

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

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

23 JUSTICE ALITO: If you were willing to
24 concede that this would be a close case under the Second
25 Circuit standard or under the EEOC guidance, then there

1 might be an argument in favor of our applying those
2 tests -- or one of those tests to the facts of the case,
3 because then that might provide some guidance, even
4 though we are supposed to be a court of review, not a
5 court of first view.

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

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

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

24 JUSTICE SOTOMAYOR: Mr. Garre, there is one
25 BSU internal document that -- a note to the file by a

1 compliance officer, who apparently investigated one of
2 the complaints, that says that -- Kimes is recorded as
3 saying -- he's the avowed supervisor -- that he, quote,
4 "knows Davis has given direction to Vance, and that he
5 just doesn't know what else to do."

6 Doesn't that defeat summary judgment on its
7 face?

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

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

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

22 Ms. Davis was asked at her deposition on
23 page 135, quote, "Was there ever" -- "have you ever been
24 assigned to a less meaningful or fulfilling job
25 classification?" And her response was yes, and she

1 pointed to an example by Mr. Kimes, because it was
2 Mr. Kimes who had the authority to make those
3 assignments, not Ms. Davis.

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

13 Again --

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

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

22 MR. GARRE: Well, first, I would look at her
23 summary judgment briefs, Your Honor, and in those briefs
24 she argued that Davis was a supervisor because, one,
25 under the job description she had the authority to lead

1 and direct, the same sorts of things that we are talking
2 now and would be talking about under the EEOC and Second
3 Circuit tests. And, two, she points to the fact that
4 they didn't clock in, again something that is irrelevant
5 under the Seventh Circuit test.

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

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

25 So you would expect to see some indication

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

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

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

1 we've cited many more in our briefs.

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

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

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

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

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

12 MR. GARRE: Well, we disagree with that,
13 Your Honor. If you look on page JA 12, the job
14 description position function, the last sentence says,
15 "Requires leadership of up to 20 part-time substitute
16 and student employees." So we think it's clear.

17 We said -- this is in our red brief and
18 there wasn't any response to it in the yellow brief --
19 that any authority, any conceivable supervisory
20 authority, could have only existed when Ms. Vance was a
21 part-time employee.

22 But we don't think that that's relevant,
23 Your Honor, because putting -- putting aside whether she
24 had authority over catering assistants who were part
25 time or full time, the record is absolutely clear that

1 Ms. Davis just lacked the authority that would have been
2 sufficient to trigger vicarious liability. And again we
3 think the paradigm case where that authority is present
4 is something like the lifeguard in Silverman where they
5 control all aspects of the daily activities, one's
6 schedule, one's daily work assignments, and down the
7 line.

8 Here there is no evidence that any of that
9 authority that was possessed, and the record makes clear
10 beyond doubt that all that authority was possessed by
11 others, Ms. -- the chef and Mr. Kimes.

12 And I think, as the amicus brief makes
13 clear, this is consistent with workplaces across America
14 today, where jobs are less hierarchical, more
15 collaborative, and so where you have got more senior
16 employees by virtue of their experience or job title,
17 just a paper title, are in a broad sense team leaders of
18 the like in the workplace.

19 That doesn't mean they are supervisors in
20 any traditional sense, and it certainly doesn't mean
21 they are supervisors for purposes of triggering
22 vicarious liability under Title VII.

23 So for those reasons, we would urge this
24 Court to affirm the judgment below, to make clear in
25 order to provide the needed guidance to the courts of

1 appeals and the assumption that something like the EEOC
2 or Second Circuit standard does apply to determine who
3 is a supervisor triggering vicarious liability. Ms.
4 Davis, the only employee who is at issue, does not meet
5 that standard.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.

7 MR. GARRE: If you have no more questions,
8 thank you.

9 CHIEF JUSTICE ROBERTS: Mr. Ortiz, you have
10 4 more minutes remaining.

11 REBUTTAL ARGUMENT OF DANIEL R. ORTIZ

12 ON BEHALF OF THE PETITIONER

13 MR. ORTIZ: Thank you, Your Honor.

14 The Seventh Circuit rule is not one that can
15 be justified in terms of its superior judicial
16 manageability, administrability, despite producing a few
17 odd results.

18 As Justice Kagan's question revealed, it
19 produces truly perverse results. Someone who can tell
20 you what to do in your job day-to-day, manage you during
21 the whole job period, what kind of tasks you have to do,
22 was not necessarily considered a supervisor, while the
23 person upstairs in human resources that you may never
24 see or even know would be considered your supervisor.

25 JUSTICE KENNEDY: Well, if you adopted that

1 rule I suppose you could couple it with an increased
2 duty of care on the part of the employer to take
3 necessary steps to prevent forbidden harassment. In
4 other words, you up the duty of care on the part of the
5 employer generally.

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

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

18 Third, it's no surprise that many of the
19 things that Ms. Vance referred to, the particular
20 instance she referred to went back to William Kimes. Of
21 course, that related to the retaliation part of her
22 claim, which is not before this Court.

23 Also, Your Honor, Faragher in the end is not
24 a toilet cleaning case. The district court did not
25 find -- made no finding on that. The court of appeals

1 didn't mention it. This Court in its Faragher opinion
2 mentioned only that it was an allegation in the
3 complaint.

4 It is not clear -- the allegation of the
5 complainant was that he said that, not that Silverman
6 actually had that authority. And it was clear from the
7 case that he actually wasn't interested in even dating
8 Faragher, it was just a way of humiliating her in the
9 workplace. So just as Faragher's expressed, it was not
10 clear that was even something that Silverman had
11 authority to do.

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

21 JUSTICE BREYER: Well, is there any? You
22 said he went through, you weren't preceding on the --
23 your client, originally in district court, not preceding
24 on the basis of the straight Seventh Circuit test. He
25 had the EEOC look into it; the Government itself says

1 that we should affirm and they have EEOC lawyers on it.

2 And so is there any piece of information
3 that would be relevant that you know of that you would
4 introduce, were it sent back, say to the district court,
5 that you have not already introduced?

6 MR. ORTIZ: Well, Your Honor, first, the
7 Solicitor General's office does not now take the
8 position that affirmance is proper.

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

13 MR. ORTIZ: Yes.

14 JUSTICE BREYER: Is there --

15 MR. ORTIZ: There is.

16 JUSTICE BREYER: What is it?

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

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

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

1 JUSTICE SOTOMAYOR: Do you have something
2 that's not in the record that will materially add to
3 this discourse?

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

5 In document number 62-3, which concerns the
6 deposition testimony of another employee -- is not in
7 the Joint Appendix, which -- which -- which is the
8 deposition testimony of another employee named Julie
9 Murphy. Ms. Murphy testified that Davis, quote unquote,
10 gave orders in the kitchen. That's on page 24, I
11 believe.

12 On page 38, she testifies that Davis was
13 understood as a supervisor.

14 And on page 37, she indicates that she
15 received particular orders from Davis to do different
16 things, like clean a particular piece of kitchen
17 equipment, at different times.

18 CHIEF JUSTICE ROBERTS: That's all in the
19 record in this Court.

20 MR. ORTIZ: Yes.

21 CHIEF JUSTICE ROBERTS: Just not in the
22 Joint Appendix.

23 MR. ORTIZ: Just not in the Joint Appendix,
24 Your Honor.

25 Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.

2 The case is submitted.

3 (Whereupon, at 12:06 p.m., he case in the

4 above-entitled matter was submitted.)

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