No. 11-1361

In The Supreme Court of the United States

JOHN KETTERER,

Petitioner,

v.

YELLOW TRANSPORTATION, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

AMICUS CURIAE BRIEF OF EMPLOYMENT LAW PROFESSORS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF THE AMICI CURIAE[1]

Amici are law professors at American law schools[2] who regularly write and teach in the area of employment law and employment discrimination. In particular, Amici have studied and written about the problems of employment discrimination and retaliation. Amici seek to provide this Court with information that will assist it in interpreting the circumstances under which an employer may be held liable for retaliation directed at an employee by the coworkers of that employee. Amici agree that this Court should reverse the judgment below and that this Court should do so for reasons substantially similar to the reasons set forth in Petitioner's brief.

SUMMARY OF ARGUMENT

Amici curiae submit this brief to highlight the importance of the issues raised by Petitioner. This

[1] Pursuant to Rule 37.6 of the Rules of the Supreme Court, counsel of record for all parties received notice at least 10 days prior to the due date of the Amici curiae's intention to file this brief. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici curiae, or their counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

[2] A full list of Amici, who joined this brief as individuals and not representatives of any institutions with which they are affiliated, is set forth in the Appendix to this brief.

case provides the Court the opportunity to address when employers will be liable for retaliation committed by coworkers under Title VII of the Civil Rights Act of 1964, as amended.

The decision of the United States Court of Appeals for the Fifth Circuit contradicts this Court's prior holding in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006). In *Burlington*, this Court held that Title VII prohibits *any* retaliatory act that a reasonable employee would find materially adverse. *Id.* at 68. In contrast, the Fifth Circuit's decision provides that a plaintiff may not establish that serious coworker retaliation is materially adverse unless the coworker's actions are "conducted 'in furtherance of the employer's business.'" *Hernandez v. Yellow Transp., Inc.*, 670 F.3d 644, 657 (5th Cir. 2012) (citations omitted). The Fifth Circuit standard fundamentally alters this Court's holding in *Burlington*. The decision also creates two standards for material adversity – one that applies in cases of coworker retaliation and another for retaliation committed by supervisors.

In altering the materially adverse standard, the Fifth Circuit conflates two separate issues – whether retaliation is serious enough to result in potential liability and when the employer is liable for that serious retaliatory conduct. The Fifth Circuit's reasoning highlights an unresolved issue in retaliation law – how the concept of material adversity intersects with concepts of employer responsibility. In *Burlington*, this Court addressed whether the actions taken

against the employee were serious enough to be deemed actionable. Given the types of actions at issue in *Burlington*, the Court did not consider the full contours of when an employer will be held liable for retaliatory acts taken by employees. Left without guidance, lower courts have been unable to consistently resolve this question. A circuit split currently exists regarding when the employer should be held liable for retaliatory conduct.

Importantly, the Fifth Circuit's standard is also contrary to this Court's reasoning in both *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). Those cases recognized that employers could be liable for discriminatory actions taken by coworkers. The standard enunciated by the Fifth Circuit in the instant case makes it especially unlikely that employers will face liability for coworker retaliation. The petitioner raises issues that are as important to retaliation law as *Faragher* and *Ellerth* are to discrimination law.

The Fifth Circuit's standard is particularly distressing in light of the strong deterrent effect coworker retaliation can have on the willingness of employees to engage in protected activity. As discussed in greater detail *infra*, social science literature and common sense suggest strongly that the threat of retaliation by one's coworkers is likely to have a particularly strong deterrent effect on the willingness of employees to engage in protected activity. The fact that the threat of coworker retaliation may deter an

employee from seeking redress for the discrimination he or she has faced personally is disturbing enough. But, as in the present case, there is also the related concern that coworker retaliation may deter one employee from coming forward in support of *another* employee who has been the victim of unlawful discrimination. These twin problems pose significant obstacles to the effective enforcement of Title VII's anti-discrimination goals.

All of these issues take on greater importance when one considers that nearly every state has its own laws prohibiting employer retaliation. Alex B. Long, *Viva State Employment Law! State Law Retaliation Claims in a Post-Crawford/Burlington Northern World*, 77 TENN. L. REV. 253, 254-55 (2010). Although not all of these state statutes use language identical to that of § 704(a), most use language that is similar. *Id.* at 257. In many jurisdictions, courts have an announced policy of construing the language of these statutes in a manner identical to the federal courts' interpretation of § 704(a) when feasible. *Id.* at 256-57. This is consistent with state courts' treatment of the interpretations of parallel federal employment discrimination statutes more generally. *See* Sandra F. Sperino, *Diminishing Deference: Learning Lessons from Recent Congressional Rejection of the Supreme Court's Interpretation of Discrimination Statutes*, 33 RUTGERS L. REC. 40, 40 (2009) ("Both state and federal courts routinely apply the Supreme Court's interpretations of the federal employment discrimination statutes in their analysis of discrimination claims

brought pursuant to state law."); Alex B. Long, "*If the Train Should Jump the Track . . . ": Divergent Interpretations of State and Federal Employment Discrimination Statutes*, 40 GA. L. REV. 469, 477 (2006) (discussing the tendency of state courts to interpret state statutes in a manner consistent with prevailing federal interpretations of parallel federal statutes). The issue of employer liability for coworker retaliation has already arisen under parallel state statutes, *see, e.g.*, *Janssen v. Rockville Ctr.*, 869 N.Y.S.2d 572, 575 (N.Y. App. Div. 2008); *Madeja v. MPB Corp.*, 821 A.2d 1034 (N.H. 2003), and, given the prevalence of such cases at the federal level, one must assume that more cases will be forthcoming.

This case, therefore, raises important issues regarding the proper interpretation and application of Title VII's antiretaliation provision. Amici believe that the standard adopted by the Fifth Circuit Court of Appeals is in conflict with the standards adopted by this Court and undermine the goals of the antiretaliation provision. Therefore, Amici urge the Court to grant the petition for a Writ of Certiorari and review the judgment of the United States Court of Appeals for the Fifth Circuit.

ARGUMENT

I. The Fifth Circuit's Standard is Contrary to the Standard Established by this Court in *Burlington Northern & Santa Fe Railway Co. v. White*.

Title VII's antiretaliation provision prohibits actions that "discriminate against" an employee because he has "opposed" a practice that Title VII forbids or has "made a charge, testified, assisted, or participated in" a Title VII "investigation, proceeding, or hearing." 42 U.S.C. § 2000e-3(a). Prior to *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), lower courts reached different conclusions about how serious conduct needed to be to trigger employer liability for retaliation. In *Burlington*, this Court held that retaliation is serious enough to create potential liability when the action is materially adverse. *Id.* at 67. A challenged action is "materially adverse" when "it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Id.* at 68 (quoting *Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir. 2006)).

As noted in *Burlington*, the Fifth Circuit previously employed a "restrictive approach" in retaliation cases. *Id.* at 60. This approach limited actionable retaliatory conduct to acts "'such as hiring, granting leave, discharging, promoting, and compensating.'" *Id.* (quoting *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997)). By holding that Title VII's antiretaliation provision "extends beyond workplace-related or employment-related retaliatory acts and

harm," *id.* at 67, this Court in *Burlington* expressly rejected the Fifth Circuit's prior restrictive standard. Despite this, the Fifth Circuit's rejected approach continues to taint its retaliation decisions. In the decision below, for example, the court purported to apply this Court's "materially adverse" standard from *Burlington*. *Hernandez*, 670 F.3d at 657. Yet, part of the court's justification for affirming summary judgment in the employer's favor was that none of the verbal threats, physical intimidation, or other retaliatory acts "were perpetrated by anyone other than ordinary employees," *id.*, who lack the authority to make ultimate employment decisions. Moreover, the lower court's statement that there must be "a direct relationship between the allegedly discriminatory conduct and the employer's business," *id.*, is directly contrary to this Court's holding in *Burlington*.

Applying the standard developed in *Burlington*, there can be little doubt that coworker retaliation may, depending upon the circumstances, amount to actionable retaliation in circumstances beyond those allowed by the Fifth Circuit's standard. The applicable standard is simply whether "a reasonable employee would have found the challenged action materially adverse, 'which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Id.* at 68 (quoting *Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir. 2006)). Although "petty slights, minor annoyances, and simple lack of good manners" may not qualify, *id.*, a reasonable jury could easily

conclude that the retaliatory acts in the present case – including physical intimidation, verbal threats, and vandalization of personal belongings – satisfy the standard.

II. The Fifth Circuit's Standard Improperly Conflates Questions of Seriousness with Those of Employer Responsibility.

The Fifth Circuit held that the actions taken against petitioner were not materially adverse because those actions were not taken by a final decisionmaker or were not taken by employees acting in the furtherance of the employer's business. *Hernandez*, 670 F.3d at 657. This standard confuses two issues – whether actions are serious enough to result in potential liability and whether the employer is responsible for those serious actions. To date, this Court has not addressed the intersection of these concepts in the retaliation context.

It is clear, however, that the Fifth Circuit's approach is wrong in two respects. First, it is incorrect for courts to conflate seriousness and employer responsibility under the materially adverse prong of retaliation analysis. Second, the Fifth Circuit's standard for determining when an employer will be liable for employee misconduct contradicts this Court's reasoning about employer liability in the discrimination context.

While this Court has not considered how employer liability concerns should be resolved in the retaliation

context, the Fifth Circuit's standard conflicts with this Court's resolution of employer liability issues in the discrimination context. In the present case, the Fifth Circuit held that the actions of ordinary employees are not imputable to their employer unless they are "in furtherance of the employer's business." *Hernandez*, 670 F.3d at 657 (citations omitted). In *Faragher*, this Court rejected a similar standard in the context of sexual harassment committed by supervisors. 524 U.S. at 795-97 (finding scope of employment analysis unhelpful). In that same case, the Court recognized the nearly uniform application of a negligence analysis to coworker harassment claims. *Id.* at 799. In *Ellerth*, this Court held that "[n]egligence sets a minimum standard for employer liability under Title VII." 524 U.S. at 749.

The Fifth Circuit is not the only federal court confused about how employer liability concerns affect retaliation claims. *See, e.g.*, *Cross v. Cleaver*, 142 F.3d 1059, 1071 (8th Cir. 1998) (noting confusion and citing cases); *Bozeman v. Per-Se Tech., Inc.*, 465 F. Supp. 2d 1282, 1345 (N.D. Ga. 2006). A circuit split now exists regarding the proper standard. The Sixth Circuit has held that an employer is liable for retaliatory acts of coworkers when "supervisors or members of management have actual or constructive knowledge of the coworker's retaliatory behavior" and "have condoned, tolerated, or encouraged the acts of retaliation, or have responded to the plaintiff's complaints so inadequately that the response manifests indifference or unreasonableness under the circumstances."

Hawkins v. Anheuser-Busch, Inc., 517 F.3d 321, 347 (6th Cir. 2008); *see also Moore v. City of Philadelphia*, 461 F.3d 331, 349 (3d Cir. 2006).

This circuit split exists because the question of employer liability for coworker retaliatory harassment requires courts to anticipate how this Court's holdings in retaliation cases intersect with its holdings regarding employer liability in the discrimination context. In *Burlington*, this Court held that actions taken against Ms. White were serious enough to create potential liability under Title VII's retaliation provisions. The Court did not address the separate question of whether employers would always be liable for such conduct. *See* Sandra F. Sperino, *The "Disappearing" Dilemma: Why Agency Principles Should Now Take Center Stage in Retaliation Cases*, 57 KAN. L. REV. 157 (2008). Therefore, this case presents the Court the opportunity to clarify how its prior holdings in the discrimination context affect employer liability for coworker retaliatory harassment.

III. The Fifth Circuit's Standard Frustrates the Policies Underlying Title VII's Retaliation Provisions and this Court's Decisions.

The Fifth Circuit has announced a standard that is far more difficult for plaintiffs to satisfy than any of the standards accepted in *Faragher* and *Ellerth*. Importantly, few plaintiffs will be able to prevail on a coworker retaliatory harassment claim using the

Fifth Circuit's standard. As a result, the Fifth Circuit's standard frustrates the policies underlying Title VII's retaliation provisions.

Employees are frequently the best source of information regarding whether discrimination is occurring in the workplace. Their willingness to complain about discriminatory actions and to participate in formal proceedings and in-house investigations into alleged discrimination is essential. *See Crawford v. Metropolitan Government of Nashville and Davidson County*, 555 U.S. 271, 278-79 (2009) (discussing the role coworkers play in helping to "ferret out" discriminatory activity in the workplace).

Likewise, an employee's opposition to unlawful discrimination – whether it takes the form of refusing to participate in another's discriminatory treatment of a coworker or calling attention to discriminatory treatment of a coworker – is an important component of Title VII's remedial framework. By opposing what the employee believes to be unlawful discrimination, an employee may help to put the employer on notice about the possibility of a violation of the law, thus enabling the employer to investigate and address the problem before it escalates. *See id.* (concluding that providing information in the course of an employer's internal investigation about a supervisor's alleged discriminatory conduct is protected opposition conduct). Similarly, an employee's decision to stand up for his or her own rights or the rights of coworkers may have its own salutary effect. Discrimination is often "a product of an organization's existing climate

and structures." Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 41 (2005). Therefore, "discrimination is even more likely to flourish where rank-and-file employees remain silent in the face of mistreatment and marginalization of coworkers." Alex B. Long, *The Troublemaker's Friend*, 59 FLA. L. REV. 931, 967 (2007).

There are, however, numerous disincentives that employees face when deciding whether to oppose or otherwise report unlawful practices. As this Court noted in *Crawford*, "'Fear of retaliation is the leading reason why people stay silent instead of voicing their concerns about bias and discrimination.'" *Crawford*, 555 U.S. at 279 (quoting Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 20 (2005)). These fears are often well-founded. Studies indicate that losing one's job or suffering some other type of tangible employment action is not uncommon for employees who report or oppose unlawful behavior. *See* Geoffrey Christopher Rapp, *Mutiny by the Bounties? The Attempt to Reform Wall Street By the New Whistleblower Provisions of the Dodd-Frank Act*, 2012 B.Y.U. L. Rev. 73, 113 (citing studies); Joyce Rothschild & Terance D. Miethe, *Whistle-Blower Disclosures and Management Retaliation: The Battle to Control Information About Organization Corruption*, 26 WORK AND OCCUPATIONS 107, 120 (1999) (reporting results of study finding that approximately 69% of employees who made internal reports of illegal conduct lost their jobs or were forced to retire).

Beyond the fears an employee may have concerning job security, there are other disincentives to engaging in protected conduct. Opposing unlawful workplace conduct is frequently viewed by employers and coworkers alike as an act of disloyalty. Indeed, studies indicate that employees who report illegal behavior tend first to attempt to resolve matters internally rather than externally, because internal reporting is more consistent with the employees' *own* sense of loyalty to the organization and colleagues. *See* MARCIA P. MICELI & JANET P. NEAR, BLOWING THE WHISTLE 26 (1992) (noting that internal opposition implicates notions of organizational loyalty and that "nearly all whistle-blowers who use external channels also reported problems internally"); Orly Lobel, *Citizenship, Organizational Citizenship, and the Laws of Overlapping Obligations*, 97 CAL. L. REV. 433, 463 (2009) ("Recent empirical research confirms that whistleblowers indeed prefer internal speech to immediate outside reporting."); Richard E. Moberly, *Sarbanes-Oxley's Structural Model To Encourage Corporate Whistleblowers*, 2006 BYU L. REV. 1107, 1143 (stating that an employee's sense of loyalty may discourage external reporting); Janet P. Near & Marcia P. Miceli, *Organizational Dissidence: The Case of Whistle-Blowing*, 4 JOURNAL OF BUSINESS ETHICS 1, 10 (1985) (noting that "the great majority" of whistleblowers "consider themselves to be very loyal employees"). Thus, employees who engage in protected activity may experience their own internal moral conflict when it comes to reporting or opposing unlawful conduct. *See* Wim Vandekerckhove & Eva E.

Tsahuridu, *Risky Rescues and the Duty to Blow the Whistle*, 97 J. BUS. ETHICS 365, 370 (2010) (noting the "moral conflict" brought about by internal reporting, given "the realities of collegiate loyalty and team spirit").

Coworkers often respond negatively toward another employee's opposition to unlawful conduct, perhaps because the individual accused of discrimination is a popular figure within the group, *see Noviello v. City of Boston*, 398 F.3d 76, 82 (1st Cir. 2005), because the employee is viewed as being "'out of touch' with the values of the organization." Janet P. Near et al., *Explaining the Whistle-Blowing Process: Suggestions from Power Theory and Justice Theory*, 4 ORG. SCI. 393, 403 (1993), or because coworkers fear that the employee's actions will have adverse consequences for them. Not surprisingly, research suggests that coworker retaliation is fairly common. *See* Geoffrey Christopher Rapp, *Beyond Protection: Invigorating Incentives for Sarbanes-Oxley Corporate and Securities Fraud Whistleblowers*, 87 B.U. L. REV. 91, 121 (2007) ([R]esearchers have found that social ostracism of whistleblowers is a more common retaliatory technique than adverse employment actions."); Joyce Rothschild & Terance D. Miethe, *Whistle-Blower Disclosures and Management Retaliation: The Battle to Control Information About Organization Corruption*, 26 WORK AND OCCUPATIONS 107, 120 (1999) (reporting results of study finding that 69% of employees who made internal reports of illegal conduct were criticized or avoided by coworkers).

Undoubtedly, many instances of coworker retaliation fall into the category of "petty slights" that this Court has recognized as not being actionable and that the lower courts have had little difficulty identifying and excluding from coverage. However, the case law in the area is also replete with examples of more severe forms of coworker retaliation. *See, e.g., Hawkins v. Anheuser-Busch, Inc.*, 517 F.3d 321 (6th Cir. 2008) (setting plaintiff's car on fire and threatening to "kill the bitch"); *Noviello*, 398 F.3d at 82-83 (describing a systematic and sustained effort on the part of coworkers to ostracize plaintiff, resulting in a hostile work environment).

The threat of coworker retaliation is especially salient given the sense of interconnectedness and loyalty that often results from working as part of a group. As Professor Cynthia L. Estlund has explained,

> A good deal of the workday is spent interacting with coworkers. Employees tend to see the same people day after day over a significant period of time, and often work closely with them in carrying out their jobs. Coworkers interact not only in doing the job itself but also at the beginning and end of the workday, during breaks, in locker rooms and restrooms, and at the proverbial water cooler. Opportunities for this sort of interchange vary, but are commonplace on the assembly line as well as at the office. For those who work full-time, most discussions of current issues and events, movies, sports,

> popular culture, and personal relationships outside the family are with coworkers. Through these repeated and frequent interactions, coworkers often learn about each others' lives and develop feelings of affection, mutual understanding, empathy, and loyalty.

Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1, 9 (2000).

To the employee considering whether to oppose unlawful workplace conduct, the risk of being ostracized and subjected to scorn and abuse poses a considerable disincentive. In light of these realities, the studies that indicate employees who oppose unlawful conduct suffer much greater instances of depression and other psychological problems should hardly be surprising. *See* Joyce Rothschild & Terance D. Miethe, *Whistle-Blower Disclosures and Management Retaliation: The Battle to Control Information About Organization Corruption*, 26 WORK AND OCCUPATIONS 107, 121 (1999) (reporting findings of study that 84% of respondents reported suffering severe depression or anxiety and 69% reported declining physical health); Miriam A. Cherry, *Whistling in the Dark? Corporate Fraud, Whistleblowers, and the Implications of the Sarbanes-Oxley Act for Employment Law*, 79 WASH. L. REV. 1029, 1053 (2004) (noting similar statistics).

Ultimately, an employer's response (or lack thereof) to coworker discrimination and retaliation

plays a large role in the willingness of employees to engage in protected activity. As stated by one author,

> institutions retain a great degree of control over the extent to which fears of retaliation silence potential claims of discrimination. The organizational climate, including institutional norms and the organization's tolerance for discrimination and retaliation, has a profound influence on how persons choose to respond to perceived discrimination. If a target believes, based on past observations, that confronting or reporting discrimination is likely to trigger retaliation, she will be much less inclined to engage in such a response.

Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 38-39 (2005); *see also* Janet P. Near et al., *Explaining the Whistle-Blowing Process: Suggestions from Power Theory and Justice Theory*, 4 ORG. SCI. 393, 399 (1993) (explaining that research evidence suggests that retaliation "is more likely to occur when whistle-blowers lack support from top and middle management").

The Fifth Circuit's standard fails to give due weight to these realities. As a result, it undermines the policies underlying Title VII as explained by this Court.

CONCLUSION

Through its decisions in the discrimination and retaliation contexts, this Court has consistently sought to further the anti-discrimination goals of

Title VII and related laws by preserving the right of employees to be free from retaliation for engaging in protected activity. In the present case, the Fifth Circuit has created a higher standard for material adversity for coworker retaliation claims than the standard this Court articulated in *Burlington*. The Fifth Circuit has also created a higher standard for employer responsibility in retaliation cases than that discussed for discrimination cases in *Ellerth* and *Faragher*. These standards undermine the goals of Title VII. The Fifth Circuit's current approach gives employers less incentive to address coworker retaliation, thereby leaving employees more vulnerable to such retaliation and reducing the overall effectiveness of Title VII. For these reasons, Amici support Petitioner's request for a writ of certiorari and believe a writ should issue.

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