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

BRIEF IN OPPOSITION

SHAUNA JOHNSON CLARK
JACLYN A. HERMES
FULBRIGHT & JAWORSKI L.L.P.
Fulbright Tower
1301 McKinney
Suite 5100
Houston, TX 77010

JONATHAN S. FRANKLIN*
MARK EMERY
FULBRIGHT & JAWORSKI L.L.P.
801 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-0466
jfranklin@fulbright.com

* Counsel of Record

Counsel for Respondent

QUESTION PRESENTED

Whether an employer is liable for co-worker retaliatory harassment under 42 U.S.C. § 2000e-3(a), where the court of appeals found, based on the record properly before the court, that the employer had no actual or constructive knowledge of any harassment against the plaintiff based on his association with minorities, and the plaintiff was found below to have waived the argument that the employer condoned any retaliatory acts of co-workers.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner, who was a plaintiff and appellant in the proceedings below, is John Ketterer.

Respondent, Yellow Transportation, Inc. ("Yellow") was the defendant and appellee below. Yellow has merged into YRC, Inc., and does business as YRC Freight. Pursuant to S. Ct. R. 29.6, respondent states that YRC, Inc. d/b/a YRC Freight is a wholly owned subsidiary of YRC Worldwide Inc. and that no other publicly held company owns 10% or more of the corporation's stock.

Other parties to the original complaint in the district court included plaintiffs Richard Arrieta, Freddie Brooks, Chris Calip, Benjamin Crommedy, Charles Denson, Charles Dotson, Kenneth Freeman, Rubin Hernandez, Roger Johnson, Randal Lee Jones, Kevin Levingston, Mark Nelson, Larry Reese, Donnell Smith, James Spears, Abram Trevino, George Williams, Willie Wilson, and Don Wesley. However, the only plaintiffs filing the operative pleading, the Third Amended Complaint, were Arrieta, Calip, Crommedy, Hernandez, Johnson, Ketterer, Trevino and Wesley. Hernandez and Trevino were also appellants below but do not seek a writ of certiorari.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page(s)

CASES:

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

No. 11-1361

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

BRIEF IN OPPOSITION

INTRODUCTION

Petitioner John Ketterer asserts that he has a valid retaliation claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. ("Title VII") based on harassment by his co-workers because his employer, respondent Yellow, purportedly "knew or should have known about the harassment yet tolerated it by failing to take action." Pet. i. But far from being an "excellent vehicle" to address that fact-bound issue, Pet. 35, this case does not properly present it.

The Fifth Circuit found that "there is no evidence that [Yellow] was aware of any of the incidents on which Ketterer sues," and that "insufficient facts

have been identified to show that [Yellow] should have known Ketterer was harassed because of his association with minorities." Pet. App. 19a-20a. Moreover, the district court held that Ketterer had waived any argument that Yellow had condoned the allegedly retaliatory actions of his co-workers because Ketterer failed to timely raise that argument below or support it with adequate record citations, R. 34:8349-51, and the Fifth Circuit endorsed that ruling, Pet. App. 6a. The petition challenges none of these findings, and there is no basis for this Court to employ its scarce resources to consider a claim that both lower courts found has no factual basis.

The claimed circuit split is likewise illusory. In holding that Yellow was not liable under Title VII, the Fifth Circuit properly relied on the absence of any actions on the part of management, either in directly undertaking the allegedly retaliatory harassment or in effectively condoning it. As other decisions illustrate, when a plaintiff timely and properly presents such a claim, the Fifth Circuit recognizes that an employer can be liable for retaliation in the exceptional circumstance where management affirmatively tolerates or condones retaliatory acts of co-workers. The Fifth Circuit is no different from other circuits in that regard. And the Fifth Circuit panel properly declined Ketterer's invitation to "abandon" a precedent that is identical to the law set forth by this Court. Pet. App. 23a.

COUNTERSTATEMENT

A. Facts Relevant To Ketterer's Retaliation Claim.

This is an employment discrimination lawsuit brought by several Yellow employees at a Dallas,

Texas loading dock facility. Seven plaintiffs alleged claims for disparate treatment racial discrimination, hostile work environment and retaliation under Title VII, 42 U.S.C. § 1981 and the Texas Commission on Human Rights Act, Tex. Lab. Code § 21.001 *et seq*. ("TCHRA"). R. 4:755. The district court granted summary judgment on all disparate treatment discrimination and retaliation claims for all plaintiffs. Pet. App. 60a. The district court also granted summary judgment on the hostile work environment claims of Ketterer and two other plaintiffs, and dismissed all of their claims by a final judgment. R. 33:8029. The remaining plaintiffs continued to pursue their hostile work environment claims, tried them to a jury, and recovered relatively modest awards. Dist. Ct. Dkt. 289 (jury verdict), 326 (amended judgment); Pet. 12-13.

This petition involves one claim (retaliation under Title VII) by one plaintiff (Ketterer), who is a white male. Evidence of alleged racially-based harassment may pertain to the claims of the other plaintiffs, all of whom are either Hispanic or African-American, and all of whom have had their claims either dismissed by the district court or decided by a jury. But that evidence is not directly germane to Ketterer's claims that Yellow retaliated against him by condoning alleged acts of retaliation by his co-workers. Ketterer's citation to such evidence, *see*, *e.g.*, Pet. 5-7, 10-11, serves no purpose other than to distract.

The relevant evidence for Ketterer's retaliation claim is necessarily confined to acts taken after he began engaging in protected picketing activity in November 2004. The petition claims that after Ketterer engaged in this activity, harassment by his

co-workers "continued and escalated." Pet. 9. But the petition identifies only a few properly-presented incidents that post-date this alleged protected activity, and *none* of this evidence shows that Yellow knew or should have known that such activity was retaliation for protected activity yet condoned it. Pet. 9-10.

Ketterer claims that one day when he was not picketing, an employee referred to him by a vulgar nickname over a company radio. Pet. 9 (citing R. 21:5243, 5247-48). But as the court of appeals found, "[t]he record contains an explanation as to how Ketterer 'earned' that name, and there is no Title VII component to the story." Pet. App. 19a. According to Ketterer, he received this nickname around 1992 after he himself first used it to reference his co-workers. R. 10:2449. Co-workers, whether Caucasian, African-American or Hispanic, then used it for Ketterer. R. 10:2447-48; 22:5367. The nickname stuck, and his fellow Teamsters even wrote it on his work anniversary plaque. R. 10:2477. Far from condoning the nickname, when Yellow management learned of the plaque it offered to give Ketterer a new one, but he declined. R. 10:2477-78.

Ketterer also alleges that after engaging in picketing, a white co-worker insulted him with racial slurs and threw a lit firecracker at him. Pet. 9. But as the Court of Appeals found, Ketterer himself testified he did not complain to anybody at Yellow about this incident. *See* Pet. App. 17a-18a; R. 10:2458-63, 2482-84; 12:2774-75.

During certain weeks in 2005, three white employees allegedly circled Ketterer in their trucks in a "menacing way." Pet. 9. The petition alleges that Ketterer complained to supervisors of this conduct

yet nothing was done. Pet. 10, 11 (citing R. 21:5247-48). However, as explained below, the district court declined to consider that argument because Ketterer's response to the summary judgment motion failed to identify this (or anything else) as evidence that Yellow condoned co-worker harassment in retaliation for protected activity. *See infra* at 8-9. In any event, Ketterer never testified that he told any supervisor that this activity was retaliation for protected activity. R. 21:5247-48.

Ketterer claims that after he picketed, he was falsely accused of fighting, and that some employees asked others to sign false statements against him. Pet. 10 n.5. But Ketterer cites no evidence that Yellow knew or should have known that such acts were retaliation for protected activity. In fact, Ketterer has a well-documented history of fighting in the workplace. He received a warning for creating a hostile work environment because of an altercation with a co-worker, R. 10:2379-80; 11:2501-02, and police charged him with assault. Ketterer was terminated as a result, R. 10:2380, but agreed to return to work after a five day suspension without pay. R. 10:2382; 11:2501-02. He was also charged with assault for a fight with another co-worker, R. 10:2380-82, and terminated for outrageous conduct. R. 11:2509. He was again reinstated after a voluntary suspension. R. 10:2397-98, 2464-65.[1]

---

[1] Ketterer's misconduct has not been limited to assaulting co-workers. He has also received warnings for having preventable accidents, failing to follow instructions and causing injuries to co-workers, abusing company time, failing to give fair day's work for fair day's pay, and sleeping on the job. R. 10:2383-88, 2400; 11:2503-06. Ketterer does not contend these warnings were discriminatory or retaliatory. To the contrary, Ketterer

B. Proceedings In The District Court.

Plaintiffs initially filed suit in November 2005, R. 1:31, and filed the operative Third Amended Complaint in July 2007, R. 4:755 On July 8, 2008, Yellow moved for summary judgment on plaintiffs' claims for hostile work environment, disparate treatment discrimination and retaliation. R. 6:1282-1370.

Plaintiffs' amended response brief was 83 pages long. But nowhere in the amended response did Ketterer raise the issue that he now asks this Court to decide. *See* R. 27:6509-25 (discussing retaliation claims). Ketterer did not contend that the alleged adverse employment action for his retaliation claim was Yellow's toleration of retaliatory acts by his co-workers about which it had actual or constructive knowledge, or identify what evidence would have permitted a jury to so conclude. *See* R. 27:6513-14, 6516-19, 6521, 6524 (regarding Ketterer's retaliation claim).[2] He cited none of the decisions that he now contends should have supplied the standard to govern his retaliation claim.

In a 77-page opinion, Pet. App. 59a-138a, the district court granted in part and denied in part Yellow's motion for summary judgment. *Id*. at

---

testified that he likes the supervisor who warned him about sleeping on the job. R. 10:2387-88.

[2] The response listed several incidents of alleged harassment of Ketterer by co-workers. However, many of the incidents appear to pre-date Ketterer's 2004 picketing activity, and the response never alleged that Yellow knew or should have known about, much less tolerated, any of those acts of co-worker harassment in retaliation for Ketterer's engaging in activity protected by Title VII.

138a.[3] With respect to Ketterer, the court granted summary judgment to Yellow on his claims for race discrimination, retaliation and hostile work environment. *Id*. at 60a, 96a-99a, 116a-118a, 137a.

The court rejected Ketterer's argument that various actions by Ketterer's co-workers were imputable to the company, given that the actions were taken by ordinary employees and not in the furtherance of Yellow's business. *Id*. at 116a; *see also id*. at 97a ("coworkers calling Ketterer a vulgar nickname * * * [did not] constitute [an] adverse employment action[] taken *by YTI*") (emphasis in original). Allegations that Ketterer's supervisors stared at him and did not have casual conversations with him were not materially adverse because they "would not dissuade a reasonable employee from making a charge of discrimination." *Id*. at 116a-117a. And there was no evidence that Ketterer received "more and dirtier work." *Id*. Finally, the court rejected Ketterer's allegation that his discharge and reinstatement without backpay were retaliatory. *Id*. at 117a.

The plaintiffs moved for reconsideration of the summary judgment ruling. R. 33:8233-35. For the first time, Ketterer and the other plaintiffs argued that Yellow should be liable because it condoned coworker harassment that it knew or should have known about. R. 34:8266-76. The district court held

---

[3] Yellow moved to strike large portions of the accompanying appendix. R 27:6566-70. In granting summary judgment for Yellow, the court denied the motion to strike as moot. Pet. App. 138a. The court, however, noted that while it did not consider all of the evidence cited in the response brief to be admissible summary judgment evidence, it "base[d] its decision only on the admissible evidence that it discusses in the memorandum opinion and order." *Id*. at 127a n.35.

that the motion for reconsideration provided no grounds to disturb its summary judgment on Ketterer's claims. R. 34:8348.

The court expressly held that Ketterer had waived his new argument that the company condoned acts of harassment by failing to timely present and support that claim in opposition to the summary judgment motion:

> Although plaintiffs now make a *post hoc* attempt to bolster or refine several of their arguments, they do not point to any manifest errors that warrant reconsideration of the court's decision. For example, plaintiffs now argue at much greater length that Ketterer, who is Caucasian, has actionable discrimination claims under Title VII, § 1981, and the TCHRA because of his association with minority coworkers. *Plaintiffs also now contend that [Yellow] condoned many of the allegedly retaliatory acts of its employees. Plaintiffs give no reasons for why they could not have advanced or adequately developed these arguments when opposing [Yellow's] summary judgment motion.*

R. 34:8349-50 (second emphasis added, internal footnote omitted).

The district court explained that it did "not suggest that these arguments would have affected its decision had they been made, or that they are even supported by admissible summary judgment evidence," but cited them "as examples of refined and buttressed arguments that *it need not consider* for the first time on a motion for reconsideration." R. 34:8351 (emphasis added). The court made the same finding as to evidence not properly cited in support of

arguments made in the summary judgment response. *See id.* (although plaintiffs' reconsideration motion "now cite[s] evidence that they failed to cite (or to properly cite) in their summary judgment briefing, they have not explained why they could not have adequately cited it before, and the court *need not consider it now*") (emphasis added).

C. Proceedings In The Court Of Appeals.

A panel of the Fifth Circuit unanimously affirmed the district court's "thorough and well-reasoned" decision. Pet. App. 5a.[4] At the outset of its opinion, the panel noted its agreement with the district court's waiver finding in its order on the motion for reconsideration. *Id.* at 6a. The district court had denied reconsideration of its summary judgment ruling "in part because some of the evidence these plaintiffs were citing had not been pointed out at the time of the original decision." *Id.* Recognizing that a district court's decision is "largely controlled by what the parties presented," the Fifth Circuit confirmed that "[i]f somewhere in a record there is evidence that might show a dispute of material fact, the district court needs to be pointed to that evidence as opposed to having to engage in an extensive search." *Id.* (citations omitted).

In discussing Ketterer's hostile work environment claim, the panel held that Ketterer "needed to point to specific facts in the record to demonstrate that the company knew or should have known that Ketterer was harassed because of a reason that could be remedied under Title VII, namely, his association

---

[4] The panel issued an original opinion, *id.* at 32a-58a, and later substituted an amended opinion upon denial of a petition for rehearing, *id.* at 1a-31a.

with minorities." *Id.* at 15a-16a (citation omitted). The panel found that evidence existed that Ketterer was "harassed, at least in part, for reasons unrelated to his association with his minorities." *Id.* at 16a. The allegations that Ketterer's coworkers harassed him in connection with his association with minorities were "not accompanied by any facts to show that the company knew of the comments," and "[f]ar from presenting evidence that the company knew or should have known of the harassment, [Ketterer] specifically denied that he told management." *Id.* The panel thus concluded that "there is no evidence that [Yellow] was aware of *any* of the incidents on which Ketterer sues." *Id.* at 19a (emphasis added). It further held that "insufficient facts have been identified to show that [Yellow] should have known Ketterer was harassed because of his association with minorities." *Id.* at 20a.

Having determined that Yellow had neither actual nor constructive knowledge of the harassment against Ketterer, *id.* at 19a-20a, the panel then considered the only theory of retaliation which the district court had found was properly presented: that Yellow was vicariously liable for acts of non-management employees. Relying on *Long* v. *Eastfield Coll.*, 88 F.3d 300, 306 (5th Cir. 1996), the panel noted that decisions by such ordinary employees are not normally imputable to their employer unless they are in furtherance of the employer's business. *Id.* The panel concluded that none of the incidents of co-worker harassment identified by Ketterer met that standard. Pet. App. 22a-23a.

In *Long*, the Fifth Circuit held that an employer can be liable under Title VII if a supervisor takes an adverse employment action in retaliation for

protected conduct or if management, acting as a so-called "cat's paw," effectively endorses retaliatory acts of other employees. *See Long*, 88 F.3d at 304-08. In seeking rehearing, Ketterer argued that the Fifth Circuit should have found Yellow directly liable for condoning retaliatory co-worker acts under precedents from other circuits. Without discussing those cases, the Fifth Circuit panel "decline[d] [the plaintiffs'] invitation" to "abandon our framework for coworker retaliation as articulated in *Long*," on the ground that one panel cannot overrule an earlier panel's decision. Pet. App. 23a.

REASONS FOR DENYING THE PETITION

I. PETITIONER FAILED TO PROPERLY PRESERVE HIS FACT-BOUND ISSUE.

Ketterer contends that his retaliation claim was improperly dismissed because Yellow purportedly knew or should have known of the co-worker harassment and yet condoned it. But the Fifth Circuit has already found that Yellow lacked actual or constructive knowledge that Ketterer's co-workers harassed him because of his association with minorities, and Ketterer does not challenge that finding. *Id*. 19a-20a. The Fifth Circuit also approved the district court's ruling that Ketterer's post-hoc attempts to redefine his harassment allegations under the retaliation cause of action failed because Ketterer did not timely raise the argument, or identify the evidence supporting it, when responding to the summary judgment motion. This Court's scarce resources are not well spent on a fact-bound issue that the lower courts have held is not supported by the properly-presented evidence of record.

A. The Fifth Circuit Has Determined That Yellow Had No Actual Or Constructive Knowledge Of The Allegedly Retaliatory Co-Worker Harassment.

Affirming the district court's denial of Ketterer's hostile work environment claim, the Fifth Circuit found that Yellow had no actual knowledge of "*any* of the incidents on which Ketterer sues," *id.* at 19a (emphasis added), and that "insufficient facts have been identified to show that [Yellow] should have known Ketterer was harassed because of his association with minorities," *id.* at 20a.

Ketterer's failure to challenge these factual findings obviates the entire basis for the petition. Indeed, even if Ketterer had disputed those findings made by both lower courts, there would be no cause for this Court to disturb them. *See*, *e.g.*, *Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982) ("this Court has frequently noted its reluctance to disturb findings of fact concurred in by two lower courts"); *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987) (where court of appeals did not set aside any of district court's findings of fact relevant to issue, "we are not inclined to examine the record for ourselves absent some extraordinary reason for undertaking this task"); *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."); S. Ct. R. 10 ("[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings").

Rather than challenge the Fifth Circuit's findings that Yellow had no actual or constructive knowledge of the alleged co-worker retaliatory harassment, Ketterer suggests that they do not apply to his

retaliation claim. Ketterer argues, in a footnote buried in the petition, that the Fifth Circuit made its findings regarding Yellow's lack of actual or constructive knowledge in the section of its opinion that discussed Ketterer's hostile work environment claim, rather than in the following section that discussed whatever remained of his retaliation claim. Pet. 14 n.8 (citing Pet. App. 22a-23a).

That is a distinction without a difference. All of the allegedly retaliatory co-worker harassment that Ketterer now asserts to support his retaliation claim also allegedly contributed to his hostile environment claim. *Compare* Pet. 9-10 (detailing allegedly retaliatory co-worker harassment) *with* Br. of Plaintiffs-Appellants at 31-33, No. 09-10183 (5th Cir. filed Feb. 22, 2010) and Reply Br. of Appellant at 16-20, No. 09-10183 (5th Cir. filed Apr. 21, 2010) (detailing co-worker harassment allegedly causing hostile work environment). Indeed, Ketterer's hostile work environment claim was even broader than his co-worker retaliation claim, because it encompassed acts that did not occur because of his alleged protected activity (the 2004 picketing). Thus, the Fifth Circuit's holding that Yellow had no knowledge of "any of the incidents on which Ketterer sues," Pet. App. 19a, included every incident alleged to constitute retaliation.

Contrary to Ketterer's assertion, Pet. 14 n.8, the same is true of the court's finding that there was "insufficient evidence to show that [Yellow] should have known Ketterer was harassed because of his association with minorities." *Id*. at 20a. This finding encompasses Ketterer's retaliation claim. His alleged protected activity was picketing against the treatment of his minority coworkers, in association

with those coworkers. Pet. App. 21a; Pet. 9. Thus, in Ketterer's own words, he was retaliated against because of this "association" with minorities.[5]

Thus, the Fifth Circuit has made unchallenged factual findings that obviate the central premise of the petition. Yellow could not have "tolerated," Pet. i, retaliatory harassment about which it knew nothing. And in making those findings, the Fifth Circuit applied the precise legal standard that Ketterer contends this Court should apply. *See* Pet. App. 19a ("despite any lack of actual knowledge, an employer may have constructive knowledge when the harassment is pervasive") (citing *Sharp* v. *City of Houston*, 164 F.3d 923, 930 (5th Cir. 1999)); Pet. 16-19 (arguing that same standard applies to both hostile work environment and retaliation claims); *Richardson* v. *N.Y. State Dep't of Corr. Servs.*, 180 F.3d 426, 446 (2d Cir. 1999), *abrogated in part on other grounds by Burlington N. & Santa Fe Ry. Co.* v. *White*, 548 U.S. 53 (2006); *Sharp*, 164 F.3d at 930 ("The city also may be liable if it had constructive knowledge, *i.e.*, if through the exercise of reasonable care it should have known what was going on but failed to address it.").

None of Ketterer's claims "remain alive to be litigated upon remand." Pet. 14 n.8. In light of the

---

[5] In his EEOC charge, Ketterer alleged that Yellow discriminated against him "based on retaliation through intimidation, harassment and the creation of a retaliatory hostile work environment." R. 18:4350. He alleged that many of his work friends were minorities and "because of [his] association with these friends and work associates [he has] been continually shunned, harassed and intimidated by [his] White coworkers, supervisors and managers," and that such discriminatory conduct "escalated" because of his complaints. *Id.*; Pet. 9, 11.

unchallenged factual findings made by both lower courts, the sole question presented by the petition for certiorari is not presented at all. Because the Court's function "is judicial, not simply administrative or managerial," it decides questions only "in the context of meaningful litigation." *The Monrosa* v. *Carbon Black Exp., Inc.*, 359 U.S. 180, 184 (1959). The Court thus normally denies review—even of a genuine circuit split, when one is presented—if the resolution of a clear conflict is "irrelevant to the ultimate outcome of the case before the Court." Eugene Gressman et al., *Supreme Court Practice* 248 (9th ed. 2007) (citing *Sommerville* v. *United States*, 376 U.S. 909 (1964) (denying certiorari, despite concession of live conflict, where outcome would not change the result below)). Because the lower courts have concurred in concluding that Yellow had no actual or constructive knowledge of any harassment against Ketterer, the petition presents no meaningful issue for the Court to decide.

B. Ketterer Waived The Application Of The Evidence To His Direct Liability Claim.

The district court expressly found Ketterer waived any argument that Yellow was directly liable for tolerating retaliatory acts of his co-workers because that argument was raised for the first time on a motion for reconsideration, after the district court had issued a lengthy ruling based on its review of a voluminous record. As the court held, "Plaintiffs also now contend that [Yellow] condoned many of the allegedly retaliatory acts of its employees. Plaintiffs give no reasons for why they could not have advanced or adequately developed these arguments when opposing [Yellow's] summary judgment motion." R. 34:8349-50 (emphasis added). *See also*

Dos Santos v. *Bell Helicopter Textron, Inc.*, 651 F. Supp. 2d 550, 553 (N.D. Tex. 2009) (citing district court's ruling in this case for proposition that "a motion to reconsider is not the proper vehicle for rehashing old arguments or raising arguments that could have been presented earlier"); *Valles* v. *Frazier*, No. SA-08-CA-501-XR, 2009 WL 4639679, *2 (W.D. Tex. Nov. 30, 2009) (same).

Far from disturbing that finding, the Fifth Circuit endorsed it at the outset of its opinion. Specifically referring to the district court's order on the motion for reconsideration, the panel agreed with the district court that its decision is "largely controlled by what the parties presented," and confirmed that "[i]f somewhere in a record there is evidence that might show a dispute of material fact, the district court needs to be pointed to that evidence as opposed to having to engage in an extensive search." Pet. App. 6a. The petition does not, and cannot, challenge those waiver findings. Instead, it proceeds as if they had never occurred. *Cf. S. Power Co.* v. *N. Carolina Pub. Serv. Co.*, 263 U.S. 508, 509 (1924) (pointing out "the necessity for clear, definite, and complete disclosures concerning the controversy when applying for certiorari").

Thus, the Fifth Circuit, in an unchallenged ruling, agreed with the district court that its decision was properly limited to the arguments and supporting evidence made by plaintiffs in response to the summary judgment motion rather than belatedly in a motion for reconsideration. *Cf. Wood* v. *Milyard*, 132 S. Ct. 1826, 1834 (2012) ("For good reason, appellate courts ordinarily abstain from entertaining issues that have not been raised and preserved in the court of first instance."). Given that holding, it is not

surprising that the panel then evaluated (and rejected) Ketterer's co-worker retaliation claim on the only basis the district court had found was properly presented—that the acts of the co-workers could somehow be imputed to the company under principles of vicarious liability. Pet. App. 21a-22a.

In any event, Ketterer's adjudicated waiver of the question would preclude this Court's review. As an initial matter, the lower courts' waiver findings dispose of Ketterer's attempt to rely on evidence not properly presented in his summary judgment response. In a back-door attempt to challenge factual findings made by both lower courts, the petition cites cursory testimony that Ketterer allegedly told one supervisor about one incident (the "circling" of trucks) but nothing was done. *See*, *e.g.*, Pet. 9-10. But as just noted, the district court, with the Fifth Circuit's agreement, rejected Ketterer's belated reliance on that evidence (and any other evidence of Yellow's toleration of the co-worker harassment) because it had not been properly cited in support of such an argument in Ketterer's summary judgment response. It is not this Court's role to correct allegedly erroneous factfinding. *See supra* at 12.[6]

---

[6] Nor would that snippet of testimony have been probative even if it had been properly raised because, among other reasons, Ketterer never testified that he informed his supervisor that the conduct was in retaliation for protected activity. Thus, the testimony cannot be evidence that Yellow tolerated or condoned retaliation when management was never informed of the alleged reason for the action. *See Gunnell* v. *Utah Valley State Coll.*, 152 F.3d 1253, 1265 (10th Cir. 1998) (no employer liability for intentional retaliatory harassment where "co-workers, without the knowledge of supervisory or management personnel, independently take it upon themselves to harass the plaintiff in retaliation for engaging in protected activity").

More fundamentally, the waiver would prevent this Court from even considering the question that the petition attempts to present.[7] Like the lower courts, this Court does not consider questions not properly presented and preserved below. *See United States* v. *Alvarez-Sanchez*, 511 U.S. 350, 360 n.5 (1994) ("Finding no exceptional circumstances that would warrant reviewing a claim that was waived below, we adhere to our general practice and decline to address respondent's * * * argument."). The district court's express finding that Ketterer waived any argument that Yellow "condoned many of the allegedly retaliatory acts of its employees," R. 34:8349-50, was undisturbed by the Fifth Circuit and cannot be overturned absent an abuse of discretion. *Exxon Shipping Co.* v. *Baker*, 554 U.S. 471, 487 (2008); *Dep't of State* v. *Ray*, 502 U.S. 164, 171-72 (1991). There was no such abuse of discretion, given that Ketterer never advanced that argument in responding to summary judgment and did so for the first time only in his motion for reconsideration. Accordingly, there is no basis for this Court to grant certiorari only to agree that the question presented has been waived.

II. THE JUDGMENT BELOW IS CORRECT AND IMPLICATES NO CIRCUIT SPLIT.

There is no circuit split for the Court to resolve in this case. Although Ketterer waived application of the standard, the Fifth Circuit already recognizes a "toleration" standard for retaliation. And, far from

[7] In the Fifth Circuit, Yellow expressly noted that "[s]ince the argument was not properly presented to the District Court in his summary judgment briefing, it is not before this Court." Br. for Defendant-Appellee Yellow Transportation, Inc. at 27, No. 09-10183 (filed Mar. 31, 2010).

constituting reversible error, the Fifth Circuit was unquestionably correct in declining to abandon its earlier decision in *Long*, 88 F.3d 300, which is the only holding of the court challenged in the petition.

A. The Fifth Circuit Recognizes Claims That An Employer Can Be Liable For Tolerating Co-Worker Retaliation.

As the Eleventh Circuit recently held—after the Fifth Circuit's decision in this case—a claim for retaliatory hostile work environment is cognizable in "every other circuit." *Gowski* v. *Peake*, --- F.3d ----, No. 09-16371, 2012 WL 1986446, *8 (11th Cir. June 4, 2012) (citing cases, including *Williams* v. *Admin. Review Bd.*, 376 F.3d 471 (5th Cir. 2004)).[8]

Contrary to petitioner's contention, Pet. 15, the Fifth Circuit has long recognized that an employer can be liable for retaliation based on its toleration of retaliatory acts carried out by co-workers. In *Sharp*, 164 F.3d 923, the plaintiff police officer, Sharp, was "subjected to retaliation by fellow officers" for complaining about other officers' misconduct. *Id.* at 927. Sharp argued that the city was liable for its negligent failure to remedy the harassment. *Id.* at 929. The Fifth Circuit affirmed a judgment of retaliation, holding that "Sharp presented evidence that the retaliatory acts * * * were not merely those of her co-workers. Her immediate supervisors, as well as their supervisors * * * were aware of the

[8] In *Williams*, the Fifth Circuit held that a retaliatory hostile work environment not involving adverse employment action is actionable under the Energy Reorganization Act's whistleblower provision, and in doing so recognized that the Title VII standard governs such claims. *Id.* at 476-478.

retaliation and failed to stop the retaliatory acts." *Id.* at 934-35.[9]

Sharp's standard is not materially different than the standard now espoused by Ketterer. Pet. 15-21. *See*, *e.g.*, *Knox* v. *Indiana*, 93 F.3d 1327, 1334 (7th Cir. 1996) ("employers can be liable for coworker actions when they know about and fail to correct the offensive conduct"); *Jensen* v. *Potter*, 435 F.3d 444, 448 (3d Cir. 2006) (employer liable for co-worker harassment where "management knew or should have known about the harassment," but failed to take prompt and adequate remedial action), *abrogated in part on other grounds by Burlington N.*, 548 U.S. 53. And the Fifth Circuit panel in this case specifically cited and relied on *Sharp* for its constructive knowledge standard. *See* Pet. App. 19a.

Recent Fifth Circuit decisions likewise confirm that the Fifth Circuit does not automatically "refus[e]," Pet. 14, to recognize claims that employers are liable for retaliation based on toleration of co-worker harassment. *See Griffin* v. *Citgo Petroleum Corp.*, 344 Fed. App'x 866 (5th Cir. 2009); *Garza* v. *Laredo Indep. Sch. Dist.*, 309 Fed. App'x 806 (5th Cir. 2009). In *Griffin*, the Fifth Circuit affirmed summary judgment in favor of an employer on a claim of co-worker retaliation, but the court did not do so by categorically refusing to recognize such a claim. Instead, the court indicated that it considers evidence of an employer's knowledge in the same manner outlined by other circuits, noting that "even if CITGO could be

[9] Although the retaliation claim in *Sharp* was evaluated under the First Amendment and 42 U.S.C. § 1983, the Fifth Circuit has recognized that its holding applies as well to Title VII retaliation cases. *See Alvarado* v. *Texas Rangers*, 492 F.3d 605, 613 n.6 (5th Cir. 2007).

liable for Griffin's coworkers' retaliation, Griffin has not established that CITGO's management knew of the conduct before she reported it or that CITGO failed to respond appropriately." 344 Fed. App'x at 867-68 (citing *Hawkins* v. *Anheuser-Busch, Inc.*, 517 F.3d 321, 347 (6th Cir. 2008)).

Similarly, in *Garza*, a teacher alleged that his employer, the school district, was liable for retaliation under Title VII based on incidents that occurred after he made his EEOC claim. Citing the general rule that "[a]n adverse employment action is any action that might have dissuaded a reasonable worker from making or supporting a charge of discrimination," 309 Fed. App'x at 810-11, the court considered a number of allegedly retaliatory acts (assuming that they occurred after the filing of the EEOC claim), including acts allegedly perpetrated by co-workers. *Id.* at 811.[10] Again, the Fifth Circuit did not dismiss such evidence as a matter of law as incapable of supporting a retaliation claim. Instead, it concluded that such incidents of retaliation "[did] not reach the level of an adverse employment action." *Id.*

Thus, the claimed circuit split is wholly illusory. In the Fifth Circuit—no differently than in other circuits—a plaintiff can legitimately claim that an employer is liable if management tolerates retaliation by co-workers. The claim is difficult to

[10] For example, the plaintiff alleged that most of the staff stopped talking to him, acknowledging his presence, or displaying greetings; that school staff would scorn his students; that janitors neglected to clean his classroom; that staff members attempted to persuade the principal to cancel a festival because he was the co-coordinator and master of ceremonies; and that staff addressed him with sarcasm. *Id.* at 811.

prove, however, since the plaintiff must show that management affirmatively tolerated or condoned harassing activity that it not only knew was occurring but also knew was occurring as retaliation for protected conduct. *See*, *e.g.*, *Gunnell*, 152 F.3d at 1265 ("An employer may not be held liable for the retaliatory acts of co-workers if none of its supervisory or management-level personnel orchestrated, condoned, or encouraged the co-workers' actions, and no such management participation could occur if the supervisory or management-level personnel did not actually know of the co-workers' retaliation."). But contrary to Ketterer's allegations in his petition, the Fifth Circuit has not foreclosed the possibility of such a claim when, unlike here, it is properly presented and proved.

B. The Panel's Opinion Identifies A Correct Rule That Accords With This Court's Precedents.

The Fifth Circuit's actual holding in this case was correct and accords fully with this Court's precedents. In assessing Ketterer's retaliation claim, the panel recognized that "[a]n adverse employment action is one that 'a reasonable employee would have found * * * [to be] materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'" Pet. App. 22a (citation omitted). That holding faithfully follows the law as announced by this Court. *See Burlington N.*, 548 U.S. at 57 (antiretaliation provision covers materially adverse actions, which "means that the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination").

Nor did the panel err when it "decline[d] [the] invitation" to "abandon our framework for coworker retaliation as articulated in *Long*" on the ground that "'one panel of the court cannot overturn another.'" Pet. App. 23a (quoting *Macktal* v. *U.S. Dep't. of Labor*, 171 F.3d 323, 328 (5th Cir. 1999)). Although the petition repeatedly characterizes this passage as categorically rejecting all employer liability for co-worker retaliation, that is not what the panel actually held. The only holding in this language was that the court would not abandon its prior decision in *Long* because one panel cannot overrule another.

That holding was plainly correct. Nowhere do Ketterer or his amici take issue with the Fifth Circuit's decision in *Long*, which the panel adhered to in this case. And for good reason. In *Long*, the court considered the question of wrongful termination decisions based on the complaints or recommendations of other employees. 88 F.3d at 306. The court noted that the actions of non-supervisory employees are not ordinarily imputable to the company if not undertaken in furtherance of the employer's business. *Id*. at 306-07. But where a supervisor making a termination decision has "rubber stamped" another employee's discriminatory recommendation, the company can be liable as a "cat's paw." *Id*. at 307. Far from misstating the law, *Long* got it exactly right. More than a decade later, this Court announced a nearly identical rule in *Staub* v. *Proctor Hosp.*, 131 S. Ct. 1186 (2011), which endorsed the cat's paw theory of discrimination.

Contrary to Ketterer's argument, the framework employed in *Long* is not "irrelevant to employer liability in a Title VII case." Pet. 32 (capitalization removed). Nor does it impose any improper

"limitation" on retaliation claims. To the contrary, the vicarious liability principles applied in *Long* and other cases remain an important part of Title VII law. *See Faragher* v. *City of Boca Raton*, 524 U.S. 775, 807 (1998) (employer is vicariously liable for actionable discrimination caused by a supervisor); *Burlington Indus., Inc.* v. *Ellerth*, 524 U.S. 742, 764-765 (1998) (same); *Vance* v. *Ball State Univ.*, No. 11-556 (cert. granted June 2, 2012) (involving question of who is a supervisor). And far from being a "limitation" on Title VII liability, the standard endorsed in *Long* expands it by making employers liable even for discrimination of which the decision-maker had no knowledge. Thus, the *Long* standard is more generous to many plaintiffs than the one Ketterer would replace it with, since employer knowledge need not be proven.

The Fifth Circuit thus correctly refused to abandon its framework in *Long* in favor of a standard that imposes liability *only* when management affirmatively tolerates or condones retaliatory actions. Having already found that Ketterer presented no evidence that Yellow knew or should have known of any co-worker harassment, it is not surprising that the Fifth Circuit evaluated the remaining retaliation claim under a liability standard that did not require such proof. And it committed no error by declining Ketterer's invitation to "abandon" that standard in all co-worker retaliation cases. By considering the question of vicarious liability, the panel *broadened* its consideration of Ketterer's retaliation claim by examining whether there was a basis to impute the alleged retaliation to Yellow notwithstanding the company's lack of knowledge.

In the short one-paragraph passage of its opinion that forms the crux of Ketterer's entire petition, the Fifth Circuit did nothing more than decline to overrule the holding of an earlier decision that comports fully with this Court's precedents, and replace it with a more restrictive liability standard that the court already found was not implicated on the facts of this case. Nothing about that correct, fact-specific ruling warrants this Court's extraordinary intervention.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

JONATHAN S. FRANKLIN*
MARK EMERY
FULBRIGHT & JAWORSKI L.L.P.
801 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-0466

SHAUNA JOHNSON CLARK
JACLYN A. HERMES
FULBRIGHT & JAWORSKI L.L.P.
Fulbright Tower
1301 McKinney
Suite 5100
Houston, TX 77010

* Counsel of Record *Counsel for Respondent*