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

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Respondent Yellow Transportation, Inc. (Yellow) cannot defend the court of appeals' aberrant requirement for employers' Title VII retaliation liability. It claims the entrenched 6-1-1 circuit split is "illusory" (Opp. 2, 18-22), though the Fifth Circuit expressly acknowledged that it was diverging from the "'majority of [its] sister circuits.'" Pet. App. 23a. When an employee alleges that his employer retaliated against him for engaging in activity protected by Title VII – by tolerating co-worker harassment that the employer knew or should have known about – no other circuit requires proof that the co-workers harassed him to further the employer's business. Conversely, Yellow cites no Fifth Circuit decisions affirming employer liability for Title VII retaliation or otherwise questioning that circuit's in-furtherance-of-the-employer's-business requirement. Nor does Yellow defend the merits of this requirement or dispute the issue's legal and practical importance.

Instead, Yellow invents two specious vehicle objections. First, it argues that the question presented was waived (Opp. 15-18), though the issue was not only pressed, but also expressly passed upon below. Pet. App. 22a-23a, 49a-50a, 103a-104a, 116a. It therefore satisfies each of the two alternative requirements for this Court's review.

Second, Yellow misconstrues the decision below as resting on a fact-bound determination that Yellow lacked actual or constructive knowledge of the

co-workers' harassment. Opp. 11-15. That finding, however, was contained in an entirely different section of the court of appeals' opinion, dealing with a different claim arising under a different section of Title VII (alleging a hostile work environment). Pet. 14 n.8. Moreover, even concerning that claim, the court below stated only that Yellow lacked knowledge of one of the reasons for the harassment (associating with minorities), not the harassment itself. Pet. App. 19a-20a. The court below resolved the question presented as a pure matter of law based on binding circuit precedent, not as a matter of fact. Pet. App. 22a-23a, 49a-50a. Further review is warranted.

I. IN CONFLICT WITH SEVEN OTHER CIRCUITS, THE FIFTH CIRCUIT ERRONEOUSLY REQUIRES PROOF THAT CO-WORKERS ACTED IN FURTHERANCE OF THE EMPLOYER'S BUSINESS

A. The Circuit Split Is Clear and Entrenched

Six circuits hold that an employer violates Title VII's antiretaliation provision by knowingly or negligently tolerating co-worker harassment of an employee who has engaged in protected activity. Pet. 15-19; *e.g.*, *Jensen* v. *Potter*, 435 F.3d 444, 452-53 (3d Cir. 2006) (Alito, J.), *abrogated in part on other grounds by Burlington N. & Santa Fe Ry. Co.* v. *White*, 548 U.S. 53, 67 (2006). Two more circuits and three state supreme courts agree. Pet. 20-21. The Tenth Circuit holds employers liable if they actually knew

of co-worker harassment, but not if they should have known of it. *Gunnell* v. *Utah Valley State Coll.*, 152 F.3d 1253, 1265 (10th Cir. 1998); Pet. 19-20. Not one of these courts also requires proof, as the Fifth Circuit did in this case, that "the alleged harassment [was] committed in furtherance of [the employer's] business." Pet. App. 23a.

Yellow does not dispute that no other circuit imposes the in-furtherance requirement. Nor can it deny that the Fifth Circuit squarely rejected, as a matter of law, "the approach taken by the 'majority of [its] sister circuits.'" Pet. App. 23a. Nor does Yellow dispute that the Fifth Circuit's denial of rehearing en banc in this case firmly entrenched its position. Pet. 24-25. Indeed, Yellow's discussion of the circuit split and merits entirely ignores the Fifth Circuit's aberrant in-furtherance requirement. Instead, Yellow argues, irrelevantly, that the Fifth Circuit does not entirely foreclose employer liability for tolerating harassment. Opp. 19-22.

None of the Fifth Circuit decisions cited by Yellow rejects the in-furtherance-of-the-employer's-business requirement or upholds an employer's liability for retaliation under Title VII. As Yellow concedes in a footnote, one of the cited cases was decided under the Energy Reorganization Act, not Title VII (Opp. 19 n.8), and never mentions the in-furtherance-of-the-employer's-business requirement. Another cited case, as Yellow concedes in another footnote, was decided under the First Amendment and 42 U.S.C. § 1983, not Title VII. Opp. 20 n.9. Three other cited cases

discuss whether conduct amounted to an adverse employment action, without mentioning any requirement that it further the employer's business. *Alvarado* v. *Texas Rangers*, 492 F.3d 605, 613 n.6 (5th Cir. 2007); *Garza* v. *Laredo Indep. Sch. Dist.*, 309 F. App'x 806, 811 (5th Cir. 2009) (unpublished per curiam); *Griffin* v. *Citgo Petroleum Corp.*, 344 F. App'x 866, 867 (5th Cir. 2009) (unpublished per curiam) (also discussing, in the alternative, employer's actual knowledge of harassment). *Griffin* and *Garza* are unpublished per curiam decisions affirming summary judgment for employers on all counts, and all of these cases predate the decision below, which is a published, precedential Title VII decision in which the Fifth Circuit entrenched its position by denying rehearing en banc. The Fifth Circuit thus stands alone in requiring not only knowledge, but also that the harassment further the employer's business as a prerequisite for an employer's own liability.

B. The Fifth Circuit's Erroneous Test Undermines Enforcement of Title VII

On the merits, Yellow confuses the issue by focusing on vicarious liability in a case that is about the employer's own wrongdoing in tolerating harassment. Yellow argues that "the vicarious liability principles applied in *Long* [v. *Eastfield Coll.*, 88 F.3d 300 (5th Cir. 1996)] and other cases remain an important part of Title VII law." Opp. 24. It claims that "the standard endorsed in *Long expands* [Title VII retaliation liability] by making employers liable even for

discrimination of which the decision-maker had no knowledge." *Id.* (emphasis added). *Long*, however, was about vicarious liability under "respondeat superior," 88 F.3d at 306, not an employer's liability for its own wrongdoing in tolerating co-worker harassment. Pet. 29-31. *Long* was willing to impute *supervisors'* discriminatory motives to their employer without requiring proof of the employer's knowledge. But it imposed the in-furtherance requirement and refused to impute ordinary co-workers' "wrongful intent" to their employer. 88 F.3d at 306-07. In extending *Long* to an employer's own liability for co-worker harassment, the initial panel opinion "*decline[d]* [Mr. Ketterer's] invitation" to "*expand*[] Title VII's retaliation provision to protect against broader forms of coworker harassment" that do not further an employer's business. Pet. App. 50a (emphases added). The court of appeals understood that it had constricted, not expanded, liability by requiring that harassment further the employer's business. This unduly narrow construction undermines Title VII's broad anti-retaliation provision and frustrates its role in ensuring enforcement of Title VII's core anti-discrimination provisions. Pet. 27-32; Amicus Br. 10-17. It grafts a vicarious-liability requirement onto an employer's liability for its own wrongdoing, conflating the two theories of liability.

Moreover, Yellow's claim that employer liability for tolerating harassment is not foreclosed by the Fifth Circuit's position (Opp. 19-20) is misleading. As this Court has recognized, racial (or any other) harassment will rarely, if ever, further the employer's business.

Faragher v. *City of Boca Raton*, 524 U.S. 775, 799-800 (1998); *see* Pet. 27. The Fifth Circuit has effectively closed the door on co-worker retaliation claims that other circuits would entertain.

II. THE ISSUE WAS NOT ONLY PRESSED, BUT ALSO EXPRESSLY PASSED UPON BELOW

1. Mr. Ketterer timely pressed the issue below. His third amended complaint (¶¶ 19, 29(Z, AA)) alleged retaliation – that Yellow knew or should have known that co-workers harassed him after he picketed to protest discrimination against minority employees, but tolerated the harassment. *See* Pet. 12; R. 746-47, 751, 754. Mr. Ketterer's opposition to summary judgment did not discuss vicarious liability or acts in furtherance of the employer's business because Yellow did not make these arguments. Neither party considered them relevant. Instead, Yellow's amended motion for summary judgment (at 63-64) raised only fact-specific objections, arguing that any harassment did not rise to the level of "a materially adverse employment action" and that Mr. Ketterer failed to follow grievance procedures. R. 1360-61. In response (at 69, 74), Mr. Ketterer identified the specific incidents of co-worker harassment following his picketing on which his claim before this Court is based. R. 6519, 6524. Neither party's brief suggested that the co-worker harassment did or did not further the employer's business, much less that furthering the employer's

business was a prerequisite to an employer's liability for retaliation.

In granting summary judgment, the district court *sua sponte* raised this in-furtherance requirement and based its ruling on the absence of allegations that Mr. Ketterer's co-workers acted in furtherance of Yellow's business. Pet. App. 104a. Mr. Ketterer moved to reconsider this *sua sponte* ruling, objecting (at 31-35) to the district court's reliance on *Long*, which predated and conflicted with this Court's decision in *Burlington Northern*. R. 8312-16.[1]

Mr. Ketterer raised the retaliation issue again on appeal in his opening brief (at 38-44), reply brief (at 29-31), petition for rehearing en banc (at 9-11), and en banc reply (at 4-5). Although Yellow argued that Mr. Ketterer had waived this claim (at 28), neither the word "waive" nor the word "waiver" appears anywhere in the Fifth Circuit's opinion. The court below did not treat the issue as waived but rather decided it on its merits.[2]

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[1] Mr. Ketterer did not attempt to bring in additional evidence; in fact (at 39-40), he cited a subset of the retaliation incidents cited in his initial brief. R. 8320-21. Thus, the district court's suggestion that some plaintiffs might not initially have cited some evidence later presented with the motion for reconsideration could not have referred to Mr. Ketterer's retaliation claim. R. 8355-56.

[2] The opinion referred only to the possibility that certain "facts" and "evidence" were not adduced until the motion for reconsideration. Pet. App. 6a. Those statements cannot apply to Mr. Ketterer's retaliation claim because the facts supporting

(Continued on following page)

2. In any event, the issue was expressly passed upon below. The district court *sua sponte* based its decision on this ground (Pet. App. 103a-104a, 116a), as did both the original and amended Fifth Circuit opinions, *id.* at 22a-23a, 49a-50a. Had the Fifth Circuit considered the issue waived, it would not have reached the merits or would at least have phrased its holding in the alternative.

The pressed-or-passed-upon rule "operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon." *United States* v. *Williams*, 504 U.S. 36, 41 (1992); *accord*, *e.g.*, *Verizon Communications, Inc.* v. *FCC*, 535 U.S. 467, 530-31 (2002); *Lebron* v. *Nat'l RR Passenger Corp.*, 513 U.S. 374, 379 (1995); *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1099 n.8 (1991); *Stevens* v. *Dep't of Treasury*, 500 U.S. 1, 8 (1991). "[T]he Court has never adhered" to a rule "limiting review to questions pressed by the litigants below." *Williams*, 504 U.S. at 42 n.2. Thus, this Court will grant certiorari even on questions not pressed by a litigant below, so long as the court of appeals passed upon the issue. *E.g.*, *Verizon Communications*, 535 U.S. at 530-31; *Stevens*, 500 U.S. at 8.

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that claim were presented in the initial opposition to summary judgment, but must instead refer to other plaintiffs and claims. *See supra* n.1.

That rule is not contradicted by the four waiver cases cited by Yellow (Opp. 16-18), which are inapposite. In two of them, this Court declined to consider issues that had *neither* been timely pressed *nor* passed upon by either the trial court or the court of appeals. *United States* v. *Alvarez-Sanchez*, 511 U.S. 350, 365 n.5 (1994); *U.S. Dep't of State* v. *Ray*, 502 U.S. 164, 171-72 (1991). A third case acknowledged that lower courts have discretion to consider forfeited issues, as opposed to those expressly waived. *Wood* v. *Milyard*, 132 S. Ct. 1826, 1834 (2012).[3] Yellow identifies no such waiver here, which distinguishes the situation from the repeated express waivers in *Wood*. The final case cited likewise preserved the courts of appeals' traditional discretion to decide issues not passed upon below. *Exxon Shipping Co.* v. *Baker*, 554 U.S. 471, 487 (2008).

Yellow cannot show even a forfeiture, let alone an affirmative waiver, of the issue presented. As it was not only pressed but also expressly passed upon below, it is properly presented for this Court's review.

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[3] Waiver requires "intentional relinquishment or abandonment of a known right," as opposed to mere forfeiture by failure to assert a right promptly. *United States* v. *Olano*, 507 U.S. 725, 733 (1993) (quoted in *Wood*, 132 S. Ct. at 1835).

III. THE COURTS BELOW DID NOT DETERMINE THAT RESPONDENT LACKED ACTUAL OR CONSTRUCTIVE KNOWLEDGE OF THE CO-WORKER HARASSMENT

The courts below did not rule, as Yellow asserts (Opp. 12), that Yellow lacked actual or constructive knowledge of Mr. Ketterer's harassment by co-workers, which Yellow tolerated in retaliation for Mr. Ketterer's protected activity. Mr. Ketterer's retaliation claim should be litigated on remand.

1. The courts below found that Mr. Ketterer failed to identify for the district court sufficient evidence of Yellow's knowledge only with respect to Mr. Ketterer's hostile-work-environment discrimination claim, not his retaliation claim. Pet. App. 19a-20a; Pet. 14 n.8. In the discrimination section of his amended initial brief opposing summary judgment (at 33), Mr. Ketterer failed to point the court to evidence that Yellow was aware of the harassment. R. 6483. By contrast, his retaliation argument (at 63 n.36) listed multiple specific incidents of co-worker harassment about which Mr. Ketterer had complained to supervisors. R. 6513 n.36. The district court granted summary judgment on the retaliation claim not because of any factual deficiency in Mr. Ketterer's submission, but rather as a matter of law, holding that the acts of harassment were not "imputable" to Yellow "because they were made by ordinary employees and were not made in furtherance of [Yellow's] business." Pet. App. 116a.

Likewise, the Fifth Circuit resolved the question presented on purely legal grounds. Pet. App. 21a-23a. The court's statements concerning evidence of Yellow's awareness of the co-worker harassment are found in its discussion of "Ketterer's Claim of a Hostile Work Environment," *not* "Ketterer's Retaliation Claim." *Id.* at 14a, 19a-21a; Pet. 14 n.8. They are based on Mr. Ketterer's failure to cite record evidence in the section of his brief opposing summary judgment devoted to the discrimination claim. The Fifth Circuit merely recognized that "the district court [had not] be[en] pointed to that evidence" in the briefing on his discrimination claim. Pet. App. 6a; *see id*. at 20a ("*insufficient facts have been identified* to show that Yellow Transportation should have known Ketterer was harassed because of his association with minorities" (emphasis added)).[4]

Yellow errs in claiming that all of the retaliation evidence stands or falls with the discrimination evidence. Opp. 13-14. The deficiency in the discrimination claim was one of briefing, not proof. Moreover, the district court expressly opined that some of the incidents Mr. Ketterer cites were relevant to one claim but not the other. "To the extent Ketterer asserts that

[4] Additionally, in response to the petition for rehearing en banc, which flagged large, lopsided circuit splits on both issues (at 6-7, 9-11), the court of appeals recast its discrimination ruling as one based on a lack of evidence rather than a pure question of law, but it reaffirmed its retaliation ruling as a matter of law. *Compare* Pet. App. 47a, *with id.* at 15a-20a, *and id.* at 49a-50a, *with id.* at 22a-23a.

his association with minorities consisted of opposing racial discrimination at [Yellow], this allegation supports his *retaliation* claim, not his *race discrimination* claim." Pet. App. 97a (emphases in original); *contra* Opp. 13-14. Because the court found that some evidence supported Mr. Ketterer's retaliation claim but not his discrimination claim, its adverse factual ruling on the latter claim cannot be extended to the former one.

2. Regardless, the courts below held only that Yellow was unaware of the *co-workers' racist motivation* for harassing Mr. Ketterer, not of the harassment itself. The Fifth Circuit immediately qualified its initial denial of actual knowledge by acknowledging that Yellow may have had constructive knowledge of the harassment. Pet. App. 19a. The court expressly recognized "evidence that management listened to the radio" and heard abusive language (which in fact referred to Mr. Ketterer's picketing, Pet. 9). Pet. App. 19a. Thus, "it may well be that Yellow Transportation at least should have been aware" of the verbal abuse. *Id.* The court nevertheless dismissed Mr. Ketterer's discrimination claim, but did so only for lack of evidence "that management would have known that these insults were *based on his association with minorities*." Pet. App. 19a (emphasis added); *accord id.* at 20a ("in response to his association with minorities"), 20a ("because of his association with minorities"). Likewise, Yellow does not dispute that Mr. Ketterer told his supervisor that co-workers harassed

him by circling him with their buggies, but objects only that he failed to inform supervisors "that the conduct was in retaliation for protected activity." Opp. 17 n.6; *see* Pet. 9-10. In short, the Fifth Circuit limited its knowledge ruling to the co-workers' motivations for harassing Mr. Ketterer because of his association with minority employees. Yellow greatly exaggerates the ruling by claiming that it also rejected Yellow's knowledge of the harassment itself that underlay the retaliation claim.

When an employee engages in protected conduct and then is harassed by co-workers, the employee states a valid retaliation claim by alleging that the employer knew or should have known of the harassment itself and failed to take action to stop it. Employers need not know co-workers' reasons for harassing the plaintiff or even that they intended to retaliate. "[M]anagement's acquiescence [may be] retaliatory, even if the [co-worker] harassment was not." *Moore* v. *City of Philadelphia*, 461 F.3d 331, 350 (3d Cir. 2006). It is the employer's toleration of harassment that serves to discourage employees from opposing discrimination and thus constitutes retaliation. Such passive retaliation can be as effective as other forms of retaliation, and is certainly easier to hide.

Yellow's actual or constructive knowledge about Mr. Ketterer's harassment by co-workers, and retaliatory toleration of it, are factual issues that remain to be litigated on remand. They are not foreclosed by the

decision below, which rests exclusively on an erroneous legal ruling.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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