No. 12-268

In the Supreme Court of the United States

JANET BRUSH,

Petitioner,

v.

SEARS HOLDINGS CORPORATION,
D/B/A SEARS, ROEBUCK & COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONSE TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court should review a portion of the Court of Appeal's opinion that follows every other Circuit to have considered the issue and approves a "managers rule."

2. Whether this Court should review a portion of the Court of Appeal's opinion that an employee responsible for investigating potentially unlawful employment practices does not engage in protected "opposition" to an "unlawful employment practice" under Title VII merely by voicing disagreements with other employees involved in the exercise of those job duties.

RULE 29(6) CORPORATE DISCLOSURE STATEMENT

Respondent, Sears Holdings Corporation is a publicly traded corporation. There is no parent or publicly traded company owning more than 10% of the stock of Sears Holdings Corp.

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STATUTES INVOLVED

This case involves the anti-retaliation provision of section 704(a) of Title VII of the Civil Rights Act of 1964, which provides in pertinent part:

> **(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings**
> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a) (emphasis added).

Respondent, Sears Holdings Corporation, respectfully requests that this Court deny the petition for a writ of *certiorari* filed by Petitioner, Janet Brush, seeking review of the decision of the United States Court of Appeals for the Eleventh Circuit entered in

this case on March 26, 2012.[1] The Court of Appeals' decision was principally based upon the application of clear and unambiguous statutory language governing the threshold for a retaliation claim under 42 U.S.C. § 2000e-3(a), to the undisputed facts of record.

Petitioner advances a lengthy set of arguments and sub-arguments that the Court should review a portion of the Court of Appeals' opinion that approved the so-called "managers rule," as originated in *McKenzie v. Renberg's Inc*., 94 F.3d 1478, 1486 (10th Cir. 1996), *cert. denied*, 520 U.S. 1186 (1997). In an attempt to meet the requirements of Supreme Court Rule 10, Petitioner argues that there is a "deep" and substantial divide among the precedents of several circuits in their acceptance of and approach to this issue.[2] In fact, there is no such conflict, and every circuit to squarely address *McKenzie*/"the managers rule" has adopted it.

In any event, even if a conflict existed, the principal rule of law stated and applied by the District Court and affirmed by the Court of Appeals in the instant case does not depend on *McKenzie*/"the managers rule." The Court of Appeals held that Sears was entitled to

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[1] The proceedings in the District Court and Eleventh Circuit Court of Appeals are styled to reflect Sears Holdings Corp. as the Defendant. However, because Petitioner Brush was formerly an employee of Kmart, a subsidiary of Sears Holdings Corp., the record at times inconsistently reflects both "Kmart" and "Sears" as the Defendant-employer. For purposes of clarity and consistency, Respondent Sears Holdings Corp., is referred to herein as "Sears."

[2] *See* Petitioner Brush's Petition for Writ of Certiorari (hereinafter "Pet. Cert.") at 9.

summary judgment as a matter of law because it was undisputed that Petitioner failed to offer evidence of an essential element of her claim of retaliatory discharge. That is, Petitioner failed to establish that she opposed an employment practice that she *reasonably believed to be a violation of federal law* (Title VII) and instead merely "opposed" Sears' alleged actions that were indisputably not "unlawful employment practices."

STATEMENT OF THE CASE

Petitioner, Brush commenced this action in 2009, in which she alleges retaliation in violation of Title VII, 42 U.S.C. §§ 2000e *et seq*. and the Florida Civil Rights Act, Fla. Stat. §§ 760.01 *et seq*. Brush alleged that Sears terminated her employment because she engaged in protected "opposition" to an "unlawful employment practice."

Brush claimed the "unlawful employment practice" she opposed was the alleged rape of another Sears employee by that employee's supervisor and Sears' handling of those sexual harassment allegations, specifically Sears' decision not to immediately report the rape allegation to police. Notably Brush's only involvement in the underlying claims of sexual harassment was as part of a Sears team tasked to investigate the employee's allegations and recommend corrective action. *See* Sears' Statement of Facts in Support of Motion for Summary Judgment, Docket Entry (D.E.) 35 at pp. 5-7. Simultaneous with Brush's assignment to investigate the allegations, Sears also immediately suspended, and later terminated, the alleged harasser. *Id*. at 8. Thus, Brush does not claim

she ever "opposed" Sears' prompt remedial action to prevent any further sexual harassment.

At the close of discovery, Sears moved for summary judgment on the grounds, *inter alai*, that Brush had not shown she had a "reasonable belief" that Sears' handling of the sexual harassment investigation, and failure to report the rape allegations to police, constituted an "unlawful employment practice" governed by Title VII. *See generally* Sears' Statement of Facts and Memorandum of Law in Support of Motion for Summary Judgment, D.E. 33, 34. The trial court granted summary judgment on this ground, expressly holding that, as a matter of undisputed fact (Brush's own admissions) the only acts of Sears she "opposed" were not "unlawful employment practices" governed by title VII, but Sears' reluctance to immediately report the harassed employee's rape allegations to the police.[3] *See* Order Granting Defendant's Motion for Summary Judgment, Pet. Cert. App. B at 25a. As an alternative, Sears urged, and the district court held, that even if the record contained evidence that Brush disagreed with Sears' response to the sexual harassment allegations, her claims would be barred by the so-called "managers rule" originating in *McKenzie* because her

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[3] While finding dispositive the fact that 'failure to call police' is not an "employment practice" governed by Title VII, the District Court further found that Sears was under no other legal obligation to report the allegations to police and that the complaining employee had specifically requested that Sears not do so. *See* Pet. Cert. App. B, at 26a (discussing *Entrekin v. City of Panama City*, 376 Fed. Appx. 987, 994 (11th Cir. 2010), *Baldwin v. Blue Cross/Blue Shield of Alabama*, 480 F.3d 1287, 1304 (11th Cir. 2007), *cert. denied*, 552 U.S. 991 (2007)).

only involvement was in the discharge of her assigned job duties to assist Sears in investigating those allegations. *Id*. at 28a (discussing *McKenzie v. Renberg's Inc*., 94 F.3d 1478, 1486 (10th Cir. 1996), *cert. denied*, 520 U.S. 1186 (1997)).

The Eleventh Circuit Court of Appeals affirmed the trial court's grant of summary judgment. The Court of Appeals agreed that, as a matter of undisputed fact, Brush's "opposition" consisted of her disagreement with the manner in which Sears investigated the employee's sexual harassment allegations and Sears' decision not to immediately report the rape allegations to police. Pet. Cert. App. A, at 9a-10a. Accordingly, the Court of Appeals affirmed the trial court's principal holding that Brush lacked an objectively reasonable belief that Sears violated Title VII by committing an "unlawful employment practice":

> Brush's case rests upon her belief that her opposition to rape and Sears' handling of Mrs. Doe's allegations are actionable under Title VII.
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> * * *
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> Quite simply, Brush's disagreement with the way in which Sears conducted its internal investigation into Mrs. Doe's allegations does not constitute protected activity. As required by the explicit language of 42 U.S.C. § 2000e-3(a), to qualify as "protected activity," a plaintiff's opposition must be to a "practice made unlawful by [Title VII.]" Since there is no evidence of Brush's opposition to any unlawful practice here,

> it follows that Brush can support no claim under Title VII.

Pet. Cert. App. A, at 9a-10a.

In an attempt to avoid the application of this settled rule of law to the undisputed facts of her case, Brush argued on appeal that *Crawford v. Metropolitan Government of Nashville & Davidson County, Tenn.*, so broadened the scope of protected "opposition" that an investigative manager's role in reporting a Title VII violation necessarily qualifies as a 'protected activity' relating to a discriminatory practice. Pet. Cert. App. A, at 11a-12a (citing Brush's Reply Brief p. 5); *cf. Crawford*, 555 U.S. 271, 274 (2009). Thus, Brush argued, she was not required to point to any evidence that *she* opposed any specific and unlawful employment practice by Sears, her involvement in the investigation of an "unlawful employment practice" claimed by another employee purportedly being sufficient. *Id*. It is only in rejecting Brush's argument for an overly expansive view of *Crawford,* that the Court of Appeals even had occasion to consider the so-called "managers rule":

> Brush would have us extend *Crawford*'s reasoning not just to those directly impacted by workplace discrimination but to all individuals involved in the investigation of that discrimination, no matter how far distant. Although we have not yet passed on the transitive property of a Title VII claim, other circuits have by creating what is known as the "manager rule." In essence, the "manager rule" holds that a management employee that, in the

> course of her normal job performance, disagrees with or opposes the actions of an employer does not engage in "protected activity." *See McKenzie v. Renberg's Inc., 94 F.3d 1478 (10th Cir. 1996)*; *Hagan v. Echostar Satellite, L.L.C., 529 F.3d 617 (5th Cir. 2008)* (same). Instead, to qualify as "protected activity" an employee must cross the line from being an employee "performing her job . . . to an employee lodging a personal complaint." *McKenzie*, 94 F.3d at 1486. While Brush argues that *Crawford* has foreclosed the "manager rule," we cannot agree. *Crawford* pertained only to whether the reporting of a harassment claim was covered by Title VII where the reporting was solicited rather than volunteered. *Crawford, 555 U.S. at 277-78*. It did not address whether a disinterested party to a harassment claim could use that harassment claim as its own basis for a Title VII action. Accordingly, we find the "manager rule" persuasive and a viable prohibition against certain individuals recovering under Title VII.

Pet. Cert. App. A, at 11a-13a.

While "find[ing] the 'manager rule' persuasive," the Court of Appeals nevertheless returned to its original holding, that the undisputed evidence established that Brush merely opposed Sears' handling of the investigation and rape allegations and not the underlying sexual harassment that was the only alleged "unlawful employment practice" at issue:

> There is simply no evidence in the record that Brush was asserting any rights under Title VII

or that she took any action adverse to the company during the investigation. *Cf. id. at 1486-87*. Disagreement with internal procedures does not equate with "protected activity" opposing discriminatory practices.

* * *

The evidence in this record shows that Brush's opposition was to Sears' failure to immediately summon law enforcement and a more general "opposi[tion] to the grave forcible sex [alleged by Mrs. Doe]." Brush, however, has not demonstrated how these actions were criminally unlawful on the part of Sears. She has cited no state or federal law that would have mandated Sears take some action other that what it took. Sears fired the accused offender. Nor has Brush demonstrated that Mrs. Doe in this instance wanted her claims reported to the police. In fact, it is undisputed that Mrs. Doe informed Brush and Sears that she did not want either the police or her husband informed of what happened to her. Under these circumstances, then, it is impossible for Brush to have had a reasonable belief that Sears' actions were unlawful. *Cf. Little*, 103 F.3d 956 at 960. Therefore, Brush's deposition testimony that she was "opposed [to] the way that Sears Holding[s] took care of our associates, took care of the investigation" simply refutes any claim that she was engaged in protected activity.

* * *

> Therefore, we echo the words of *Entrekin*: "because [Brush's] complaint involved the adequacy of [Sears'] internal procedure for receiving sexual harassment complaints, rather than an employment practice that Title VII declares to be unlawful," *Entrekin*, 376 Fed. Appx. at 994, her criticisms do not relate to unlawful activity. And, since unlawful activity is the *sine qua non* of "protected activity" as defined by Title VII, Brush cannot satisfy the first requirement of a *prima facie* case for retaliation.

Pet. Cert. App. A, at 13a-15a. Accordingly, the Eleventh Circuit affirmed the summary judgment, and Brush now petitions the Court to grant certiorari.

REASONS FOR DENYING THE PETITION

I. There Is No Conflict Among Any Circuits Regarding the Managers Rule.

Petitioner contends that certiorari is appropriate because of a "deep" and "complex" conflict between the Court of Appeals' approval of *McKenzie*/the managers rule in the instant case, and decisions of several other circuits supposedly adopting rules of law seriously at odds with the Court of Appeals' position. Pet. Cert. at 9. There is *no* such conflict and the Circuits to have considered the issue have unanimously approved of the so-called managers rule. Indeed, Circuits which Petitioner identifies as having rejected the managers rule have, instead, adopted it in subsequent decisions overlooked by the Petition for Writ of Certiorari.

As Petitioner correctly recites, the managers rule originated in *McKenzie v. Renberg's Inc*., a decision involving an FLSA retaliation claim. *See* Pet. Cert. 15-16, citing *McKenzie*, 94 F.3d 1478, 1486 (10th Cir. 1996), *cert. denied*, 520 U.S. 1186 (1997). And, as Petitioner also acknowledges, *McKenzie* has been followed in Title VII cases, and applied to other employment retaliation cases, by the Fifth, Eighth and now Eleventh Circuits. Pet. Cert. at 14-16. Thus, Petitioner concedes that these four circuits have approved *McKenzie*/the managers rule and are in no conflict. *Id*.

A. The Cited Decisions of the Sixth and District of Columbia Circuits Do Not Create Conflict and, In Fact, Subsequent Decisions of Those Circuits Have Adopted the Managers Rule.

Petitioner's "conflict" argument misidentifies circuits that have supposedly rejected *McKenzie*/the managers rule. *See* Pet. Cert. pp. 17- 20. Petitioner claims that both the Sixth and District of Columbia Circuits have rejected *McKenzie's* managers rule, and, thus, stand in direct conflict with *McKenzie's* precedent and with the Eleventh Circuit's opinion in the instant case. *Id*. Petitioner is incorrect, as the two cases she cites are distinguishable, and subsequent decisions in both the Sixth and District of Columbia Circuits expressly adopt *McKenzie*'s managers rule.

Petitioner initially cites *Johnson v. University of Cincinnati*, 215 F.3d 561 (6th Cir. 2000), *cert. denied*, 531 U.S. 1052 (2000), for the principal that the Sixth Circuit has considered and rejected *McKenzie*/the

managers rule. In fact, the *Johnson* opinion never mentions a "managers rule" or similar doctrine, nor does it discuss *McKenzie* (which preceded it by four years) or any of the numerous intervening decisions around the country that address *McKenzie*/the managers rule. Instead, *Johnson* addresses only the applicability of the Sixth Circuit's own prior decision in *Holden v. Owens-Illinois, Inc.,* 793 F.2d 745, 748-49 (6th Cir. 1986), *cert. denied*, 479 U.S. 1008 (1986), a decision likewise decided without reference to any doctrine similar to the managers rule.

The facts in *Johnson* are as follows. Johnson was employed as the University's Affirmative Action Officer, and after his termination, Johnson claimed, *inter alia*, retaliation for his "opposition" to unlawful employment practices under Title VII. The trial court rejected Johnson's "opposition" claim on the grounds that his advocacy efforts *in implementing an affirmative action program* were not opposition to an unlawful employment practice governed by Title VII:

> In conjunction with his allegations that his termination was discrimination for his advocacy on behalf of women and minorities, Plaintiff similarly contends that the University retaliated against him for his advocacy efforts in opposition to Defendants' alleged unlawful employment practices. The district court found that Plaintiff's claim failed at the inception because, as an affirmative action official, Plaintiff could not have reasonably believed that the conduct he was opposing was protected activity. Relying upon ***Holden v. Owens-Illinois,*** 793 F.2d 745, 748-49 (6th Cir. 1986), the district court

> reasoned that because attempts to implement an affirmative action program that complies with Executive Order 11246 are not protected by Title VII, and because Plaintiff is presumed to know the state of the law, it follows that Plaintiff could not have reasonably believed that he was opposing conduct that is protected under Title VII, and that his claim brought under this clause therefore failed.

Johnson, 215 F.3d at 579 (emphasis added).[4]

The Sixth Circuit reversed based upon substantial record evidence that Johnson not only advocated for an affirmative action program – conduct beyond the ambit of Title VII's proscriptions – but also repeatedly and expressly opposed certain of his employer's *specific* hiring decisions.

> In addition, the actions taken by Plaintiff in response to hiring decisions which he felt were discriminatory and not in line with the A-900 process were sufficient to constitute opposition under Title VII. For example, Plaintiff sent letters to Dr. Steger voicing his objections to the hiring of Mr. Cohen and the Vice-Chairman of the Department of Surgery on the grounds that these individuals were hired in a discriminatory manner.

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[4] This is precisely the same grounds upon which the District Court and Court of Appeals in this case based their primary holding, rejecting Brush's opposition claim. To wit: she could not have reasonably believed that "her opposition to rape and Sears' handling of Mrs. Doe's allegations are actionable under Title VII."

Johnson, 215 F.3d at 580. Thus, the Sixth Circuit simply concluded the lower court failed to consider or grasp the significance of record evidence of Johnson's opposition to specific "unlawful employment practices":

> We find the district court's application and extension of *Holden* to the facts of this case contrary to Title VII's intent.
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> As accurately argued by Plaintiff, the scope of *Holden* extends only to an employee who protests the implementation of the affirmative action program; ***because Plaintiff protested discrimination that occurred in the hiring process, which was contrary to law as well as the affirmative action program, his case falls beyond Holden's reach.*** To hold otherwise would improperly expand the scope of *Holden* to include not only the employee who protests an employer's failure to implement an affirmative action program under Title VII, but also the employee who opposes discrimination that occurs in the hiring process the likes of which the affirmative action program was designed to correct and prevent.

Johnson, 215 F.3d at 579 (emphasis added).[5]

To be sure, in its discussion and limitation of *Holden*, the *Johnson* court vigorously rejects the notion

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[5] Thus, *Johnson* differs primarily and dispositively from the instant decision based upon the record evidence that Johnson engaged in specific acts of opposition to indisputably "unlawful employment practices" and, here, Petitioner did not.

that Johnson was without *any* protection from retaliation simply because his job entailed advocacy against discriminatory – and thus unlawful – employment practices. However, even this language does not conflict with *McKenzie*/the managers rule. This language from the *Johnson* opinion does not even suggest there are *no* limitations on such an EEO employee's ability to claim "opposition" for the performance of his/her ordinary job duties; it simply rejects the notion such an employee is barred from asserting *any* "opposition" claim under *any* circumstances. Neither *Johnson* nor *McKenzie* and its progeny suggest that *all* actions of management employee are protected, or that *no* actions are protected. Thus, those decisions are not in conflict.

In any event, any argument that the Sixth Circuit rejected *McKenzie*/the managers rule in *Johnson* should have been put to rest by *Pettit v. Steppingstone, Center For The Potentially Gifted*, et al., 429 Fed. Appx. 524 (6th Cir. 2011). In that FLSA retaliation case, the Sixth Circuit acknowledged it had <u>not</u> previously addressed the issue, but that district courts in the Sixth Circuit, as well as other circuit court of appeals that had addressed the issue, consistently followed *McKenzie*/the managers rule:

> While the Sixth Circuit has not addressed the issue of distinguishing job performance from protected activity, district courts within the Circuit have come to the conclusion that complaints within the scope of one's job duties cannot be protected activity. *See, e.g., Pettit v. Steppingstone Ctr. for the Potentially Gifted,* No. 08-12205, 2009 U.S. Dist. LEXIS 78262 (E.D.

> Mich. Sept.1, 2009); *Samons v. Cardington Yutaka Techs, Inc.,* No. 2:08-cv-988, 2009 U.S. Dist. LEXIS 30398, *15-16 (S.D. Ohio April 7, 2009); *Robinson v. Wal-Mart Stores, Inc.,* 341 F. Supp. 2d 759 (W.D. Mich. 2004). The other Circuits that have addressed the issue have reached the same conclusion. *See, e.g., Hagan v. Echostar Satellite, L.L.C.,* 529 F.3d 617, 627-28 (5th Cir. 2008); *Claudio-Gotay v. Becton Dickinson Caribe, Ltd.,* 375 F.3d 99, 102 (1st Cir. 2004); *EEOC v. HBE Corp*., 135 F.3d 543, 554 (8th Cir. 1998); *McKenzie v. Renberg's Inc.,* 94 F.3d 1478, 1486-87 (10th Cir. 1996).

Pettit, 429 Fed. Appx. at 530 n. 2. Thus, Petitioner's argument that there is an existing conflict between the law of the Sixth Circuit and the adoption of *McKenzie*/the managers rule in the instant case is, at best, no longer good law.

Petitioner next cites *Smith v. Secretary of the Navy*, 659 F.2d 1113 (D.C. Cir. 1981), as evidence of a second circuit in direct and "deep" conflict with the Court of Appeals decision in the instant case. *See* Pet. Cert. at 18-19. However, as with *Johnson*, this thirty year-old, 2-1 decision does not address the managers rule or present any conflict. In fact, the only issue in *Smith v. Secretary of the Navy* was whether the plaintiff was a "prevailing party," and thus entitled to attorney's fees, when he obtained equitable but not monetary relief. *Smith v. Secretary of the Navy*, 659 F.2d at 1114. And, as with the Sixth Circuit, the District of Columbia Circuit perceives no such conflict as it expressly

approved the managers rule in a decision **also citing *Smith v. Secretary of the Navy***.[6]

Smith was employed in a dual role, having both engineering duties and EEO duties. *Smith v. Sec'y of the Navy*, 659 F.2d at 1115. When the supervisor overseeing his engineering duties negatively evaluated Smith for spending too much time on his other, EEO duties, Smith claimed retaliation. *Id*. at 1116-1117. The district court held the negative evaluations should be removed from Smith's file but that Smith had not suffered any adverse consequence as a result of those evaluations so he was not entitled to any further relief. *Id*. at 1118. On this basis the district court further concluded that Smith was not a "prevailing party" entitled to attorney's fees. *Id*.

The D.C. Circuit Court of Appeals addressed and reversed only the issue of "prevailing party" attorney's fees, finding that even though Smith obtained only non-monetary relief, he was the prevailing party under Title VII.

> Although much of the argument in this court focused on whether the plaintiff-appellant in this case was a "prevailing party" entitled to consideration for attorney's fees, resolution of that issue ultimately depends on a deeper question: whether Title VII creates a cause of action for a person who is the victim of a discriminatory job-performance evaluation, but

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[6] *See infra* discussion of *Smith v. Office of the Architect of the Capitol*, 56 Fed. Appx. 517 (D.C. Cir. 2003).

> who cannot demonstrate that the evaluation constituted the cause of his being denied a specific job or promotion. We hold that Title VII does provide a cause of action in this case . . .

Id. at 1114.

Smith v. Secretary of the Navy only addressed an issue similar to the managers rule in response to the dissent, and then merely distinguished its holding as subject to the *per se* rule of the participation clause. That is, Smith's underlying claim was based exclusively upon his "participation" in Title VII proceedings in the course of performing his EEO duties; there was no apparent claim of any "opposition." While the dissent challenged the lack of evidence of any retaliatory motive,[7] the *Smith v. Secretary of the Navy* majority opinion expressly distinguished Smith's *per se* protection for "participation" from the absence of any evidence of "opposition":

> In view of the plain language of the statute, we are unable to understand the view, implicit in the dissent, that a reprisal based on an employee's ***participation in Title VII enforcement activities*** is not condemned per se by the statute. The statute does not, as the

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[7] As the Dissent stated: "The complaints examiner found that the supervisor displayed no "antipathy" toward EEO in general and there is no taint whatsoever that [supervisor] Bednar was motivated by any anti-EEO animus. Moreover, there is no finding that Bednar retaliated against Smith for any particular exercise of protected activity." *Smith v. Sec'y of the Navy*, 659 F.2d at 1124 (MacKinnon, J., dissenting).

> dissent suggests, condemn only those reprisals that are motivated by racial hatred or abstract hostility to EEO. It specifically forbids penalization of ***participation in protected activities***.

Id. at 1121 n. 63 (emphasis added). Thus, even this isolated language in *Smith v. Secretary of the Navy* has no application to "opposition" clause cases, such as the instant case.

In any event, in a subsequent decision citing *Smith v. Secretary of the Navy,* the District of Columbia Circuit made it clear that that case does ***not*** conflict with the managers rule. *Smith v. Office of the Architect of the Capitol*, 56 Fed. Appx. 517 (D.C. Cir. 2003). Indeed, the Circuit Court expressly followed the managers rule:

> On Count 2 concerning the alleged denial of sick leave and worker's compensation after Smith investigated the second cafeteria incident, Smith's conclusory assertions never demonstrated that his actions constituted "participation . . . in a hearing or other proceeding" under the formal OSHA enforcement procedures established in 2 U.S.C. § 1341(c). *Cf. Smith v. Sec'y of the Navy*, 659 F.2d 1113, 1121-22 (D.C. Cir. 1981) (involving an equal employment opportunity counselor whose job duties by definition involved assisting in investigating Title VII grievances). Nor did he show that his actions that day involved "stepping outside" his normal job duties to "oppose any practice made unlawful" by the

> Congressional Accountability Act and the Occupational Safety and Health Act. *Cf. EEOC v. HBE Corp*., 135 F.3d 543, 554 (8th Cir. 1998) (distinguishing the mere reporting of potential compliance problems when such a report is within the scope of an employee's duties from opposition activities such as refusing to carry out unlawful policies).

Smith v. Office of the Architect of the Capitol, 56 Fed. Appx. at 517.

In the 30 years since *Smith v. Secretary of the Navy,* no decision of the District of Columbia Circuit has cited it as authority bearing on the managers rule or conflicting with *McKenzie* and its progeny. Instead, numerous decisions of district courts in the District of Columbia Circuit have consistently followed *McKenzie* and the managers rule. *See, e.g*., *Miller v. Health Servs. for Children Found.*, 630 F. Supp. 2d 44, 49-50 (D.C. Cir. 2009) (". . . an 'employee must [still] step outside his or her role of representing the company and . . . threaten to file an action adverse to the employer, actively assist other employees in asserting FLSA rights, or otherwise engage in activities that reasonably could be perceived as directed towards the assertion of rights protected by the FLSA") (citing *Hicks v. Ass'n of Am. Med. Coll.*, 503 F. Supp. 2d 48, 52-53 (D.D.C. 2007) (quoting *McKenzie* and *Cooke v. Rosenker*, 601 F. Supp. 2d 64 (D.D.C. 2009). Thus, there is simply no basis to continue to suggest *Smith v. Secretary of the Navy* evidences conflict with *McKenzie*/the managers rule, when the court of appeals and lower courts consistently find *Smith v. Secretary of*

the Navy no hindrance to application of the mangers rule in the District of Columbia Circuit.

B. The Ninth Circuit Is Not in Conflict With the Instant Case or the Managers Rule.

In addition to her claims that two circuits have expressly rejected the managers rule, Petitioner asserts that the Ninth Circuit has adopted a rule that is directly contrary to the rule applied by the majority. Pet. Cert. at 22-23. As with her other assertions of a circuit conflict, Petitioner relies upon a distinguishable, thirty year-old decision of the Ninth Circuit and fails to even attempt to account for numerous subsequent decisions in the Ninth Circuit approving the managers rule.

Petitioner claims *Smith v. Singer*, 650 F.2d 214 (9th Cir. 1981), applied the "managers rule" to preclude an employee/manager's opposition claim *because* the manager stepped outside his role as an employee/manager. Pet. Cert. at 22-23. In fact, the decision does not involve an "opposition" claim and did not even address the *prima facie* case requirements at issue under the managers rule. Instead, without addressing whether the employee's conduct was "protected activity" under the managers rule, *Singer* addressed the separate issue of whether the employer had a "legitimate non-retaliatory reason" for the termination. On this distinct issue, *Singer* found the manager stepped so far outside of his role as employee/manager – including deliberately deceiving his employer—that he placed himself in a serious conflict of interest with his responsibilities to his

employer. *Singer*, 650 F.2d at 217. Thus, *Singer* concluded,

> The district court granted summary judgment for Singer, ruling that appellant had not been fired in retaliation for exercise of protected activity, but for failure to perform tasks fundamental to his position.
>
> * * *
>
> We agree with the district court.

Id. at 216. *Singer* does not involve an "opposition" claim, makes no mention of a "managers rule" or similar doctrine, and it assumes that that the employee/manager engaged in *prima facie* "protected activity" but was nevertheless terminated for a legitimate and non-retaliatory reason. Accordingly, *Singer* does not even address the managers rule issue much less mis-apply it as petitioner contends.

Unlike the Sixth and District of Columbia Circuits, the Ninth Circuit does not yet appear to have expressly adopted the "managers rule." But neither has it ever suggested, as Petitioner contends, that *Smith v. Singer* governs the application of the managers rule. Thus, district courts in the Ninth Circuit considering the issue have expressly predicted that, as with every other circuit to actually address the issue, the Ninth Circuit would follow *McKenzie*/the managers rule. *See, e.g*., *Stein v. Rousseau*, No. CV-05-264-FVS, 2006 U.S. Dist. LEXIS 54939 (E.D. Wash. Aug. 8, 2006) (concluding the

Ninth Circuit would follow the lead of the First[8] and Tenth[9] Circuits, both of which have adopted the managers rule); *Lukov v. Schindler Elevator Corp*., No. 5:11-cv-00201-EJD, 2012 U.S. Dist. LEXIS 160653 *14-15 (N.D. Cal. Nov. 8, 2012) ("The court finds that Plaintiff did not 'step outside' of his role, and therefore Plaintiff did not engage in protected activity under Section 6310 [Cal. Labor Code prohibition on retaliation]"), *Muniz v. UPS, Inc*., 731 F. Supp. 2d 961, 969 (N.D. Cal. 2010) (finding *McKenzie* to be "persuasive" as to defining "protected activity" under Cal. Labor Code).

In contrast, no decision in the Ninth Circuit has suggested that *Singer* even involved the managers rule, much less adopted a rule at odds with all other Circuits to have considered it. There simply is no such conflict.

II. The Managers Rule Is Not an Obstacle to Enforcement of Title VII and, Instead, Encourages Voluntary Compliance

As an alternative to Petitioner's claims of a "deep" conflict among the circuits, she argues that the managers rule "creates a major obstacle to the implementation of Title VII and other federal employment statutes." Pet. Cert. at 23-30. The flaw in

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[8] The First Circuit expressly adopted the managers rule in *Claudio-Gotay v. Becton Dickinson Caribe, Ltd*., 375 F.3d 99 (1st Cir.2004), *cert. denied*, 543 U.S. 1120 (2005).

[9] *McKenzie v. Renberg's Inc*., 94 F.3d 1478, 1486 (10th Cir. 1996), *cert. denied*, 520 U.S. 1186 (1997).

Petitioner's reasoning is apparent from the very outset of her argument:

> The manager rule strikes at the very heart of the voluntary compliance mechanisms on which Title VII depends and which section 704(a) was enacted to protect.

Pet. Cert. at 23. Petitioner's "*voluntary* compliance mechanisms" are, by definition, measures *not* governed by Title VII. Neither § 704(a) nor any other provision of Title VII compels, governs or was designed to protect an employer's "voluntary compliance mechanisms."

The Court's seminal decision in *Faragher* laid the formal groundwork for assessing "voluntary compliance mechanisms" in the context of this case: investigating and taking prompt corrective action in response to sexual harassment complaints. *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). Yet *Faragher* made equally clear that investigations/corrective action were not mandates upon employers, dictated by Title VII, but a potential affirmative defense to exonerate the employer in the case of a *prima facie* violation of Title VII. Even in the context of this employer defense, the Court expressly held that no particular voluntary compliance mechanisms were dictated by Title VII:

> In order to accommodate the principle of vicarious liability for harm caused by misuse of supervisory authority, as well as Title VII's equally basic policies of encouraging forethought by employers and saving action by objecting employees, we adopt the following holding in this case and in *Burlington Industries, Inc*. v.

Ellerth, *ante*, p. __, also decided today. An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer ***may raise an affirmative defense*** to liability or damages, subject to proof by a preponderance of the evidence, *see* Fed. Rule. Civ. Proc. 8(c). The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. ***While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense***. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense. No affirmative defense is available, however, when

> the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment. See *Burlington*, *ante*, at 17.

Faragher, 524 U.S. at 807-808 (emphasis added). Thus, if in response to a sexual harassment complaint an employer chose to refrain from *any* investigation/corrective action, they would simply lose the opportunity to assert the *Faragher* defense to avoid vicarious liability; they would not be engaged in a new and separate "unlawful employment practice." Accordingly, an employee challenging some failure in the investigation/corrective action is not challenging an "unlawful employment practice" and the managers rule is not implicated.[10]

The instant case further demonstrates that the managers rule does not somehow insulate employers from Title VII violations, it merely protects their right to choose their own "voluntary compliance

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[10] *See Baldwin v. Blue Cross/Blue Shield of Alabama*, 480 F.3d 1287, 1304 (11th Cir. 2007) (noting that an employer need not "conduct a full-blown due process, trial-type proceeding in response to complaints of sexual harassment. All that is required of an investigation is reasonableness in all of the circumstances, and the permissible circumstances may include conducting the inquiry informally in a manner that will not unnecessarily disrupt the company's business, and in an effort to arrive at a reasonably fair estimate of truth"), *Entrekin v. City of Panama City*, 376 Fed. Appx. 987, 994 (11th Cir. 2010) (holding that plaintiff did not engage in protected activity because plaintiff's complaint involved adequacy of defendant's internal procedure for receiving sexual harassment complaints, rather than an employment practice that Title VII declares to be unlawful).

mechanisms" without being subject to retaliation claims from employees who disagree with those choices (or do not comply with them to the employer's satisfaction). Here, a Title VII violation, prohibited sexual harassment, was alleged. Thereafter, in an effort to limit and remedy this alleged violation of Title VII, Sears assigned employees to investigate (and suspended, then terminated, the alleged harasser).[11] Title VII neither required Sears to take such action nor prohibited it from doing so. Yet, Petitioner contends that, having voluntarily undertaken efforts to investigate and take corrective action, Sears should be subject to new and additional Title VII liability based upon its handling of the investigation and her alleged "opposition" to the scope thereof.

Thus, what Petitioner contends, in reality, is that having chosen to voluntarily investigate and take corrective action, Sears forfeited the right to choose how to investigate and what action to take, and that a "wrong" choice is an "unlawful employment practice" under Title VII. That is, though Sears could have lawfully refrained from engaging in any such investigation/corrective action in the first instance, it could "violate" Title VII by its voluntary choice to investigate and take corrective action in accordance with *Faragher*. In fact, the managers rule encourages employers to engage voluntary compliance mechanisms

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[11] The Record evidence is clear that Mrs. Doe never contacted the police herself regarding the alleged harassment, and she expressly stated that she did *not* want police involvement. *See* D.E. 32-25, at 22-23 (Deposition of Mrs. Doe, filed as an exhibit in support of Sears' Motion for Summary Judgment). Notwithstanding, Sears promptly terminated the alleged harasser.

to assure the employer is in compliance with Title VII and other employment laws by assuring that those compliance efforts will not be subject to an additional layer of scrutiny as potentially "unlawful employment practices."

III. The Managers Rule Defines *Actions* That Amount to Protected Opposition, It Does Not Exclude "*Any*" Employees from Title VII.

Petitioner's final argument is that the managers rule conflicts with the plain language of Title VII because it operates to entirely exclude certain classes of employees from protection under Section 704(a). Pet. Cert. at 30-33. Relying on a few words from the Court of Appeals' decision, Petitioner argues that the managers rule effectively excludes her, and similar employees, from Title VII's coverage of "*any* employee." Petitioner's argument is disingenuous, as there is no genuine suggestion in the Court of Appeals' decision, or any of the numerous other decisions approving the managers rule, that employees implementing an employer's "voluntary compliance mechanisms" are somehow *per se* excluded from the "any employee" coverage of Title VII. Instead, each of those decisions turns on the *actions* of the employee to determine whether the employee has "stepped outside" of his/her ordinary job duties and responsibilities to actually "oppose" an unlawful practice of the employer. The Court of Appeals' decision in the instant case expressly stated that whether a management employee was subject to the mangers rule turned on the nature of the allegedly "protected activity," not the employee's job title:

> Instead, to qualify as "protected activity" an employee must cross the line from being an employee "performing her job . . . to an employee lodging a personal complaint."

Pet. Cert. App. A, at 12a, *citing McKenzie v. Renberg's Inc*., 94 F.3d 1478 (10th Cir. 1996) (judgment against personnel director because she "never crossed the line from being an employee merely performing her job as personnel director to an employee lodging a complaint about the wage and hour practices of her employer and asserting a right adverse to the company"), *Hagan v. Echostar Satellite, L.L.C.,* 529 F.3d at 628 ("an employee must do something outside of his or her job in order to signal to the employer that he or she is engaging in protected activity.").

The courts addressing the managers rule consistently hold that if "any" employees step outside of their assigned job duties in opposition to an unlawful employment practice, then they will be covered by Section 704(a). If, on the other hand, an employee is simply engaged in the performance of the duties assigned by the employer, then the employee is not engaging in "opposition" to the employer, and is within the ambit of § 704(a). *See Hagan,* 529 F.3d at 628 ("voicing each side's concerns is not only *not adverse* to the employer's interests, it is exactly what the company *expects* of a manager").

In reality, Petitioner does not actually seek *equal* status for employees potentially subject to the managers rule. Instead, she seeks heightened protection for certain classes of employees whose jobs entail implementing the employer's voluntary

compliance mechanisms. That is, pursuant to Petitioner's argument, employees in certain positions would potentially be protected from any adverse employment action (including legitimate actions, such as those based upon their job performance) simply because the nature of their job duties involved Title VII compliance or the like. Indeed, in her zeal to extend the scope of § 704(a), Petitioner argues that government attorneys, advocating more expansive views of Title VII in this Court, are engaged in "protected opposition." This sort of unbridled view of "protected opposition" is exactly what the lower courts have unanimously rejected. *See, e.g.*, *Hagan,* 529 F.3d at 628 ("[a]n otherwise typical at-will relationship would quickly degrade into a litigation minefield, with whole groups of employees – management employees, human resources employees, and legal employees, to name a few – being difficult to discharge without fear of a lawsuit.") Yet, despite this *limitation* on "protected opposition" claims, neither *Hagan* nor any other iteration of the managers rule genuinely suggest that such employees should be *per se* excluded from Title VII coverage of "any" employee, as Petitioner incorrectly suggests in her Petition. Thus, there is no conflict between the Court of Appeals' approval of the managers rule and Title VII's broad coverage of "any" employee.

CONCLUSION

Brush's Petition identifies no genuine conflict among the decisions of any of the Circuit Courts of Appeals, with any decision of the Court, nor with the language and purpose of Title VII. Accordingly, for all

of the reasons set forth above, the petition for certiorari should be denied.

Respectfully submitted,

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