No. 11-556

In The
Supreme Court of the United States

MAETTA VANCE,

Petitioner,

v.

BALL STATE UNIVERSITY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF *AMICUS CURIAE* NATIONAL RETAIL FEDERATION IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

The National Retail Federation ("NRF") is the world's largest retail trade association and the voice of retail worldwide. The NRF's membership includes retailers of all sizes, formats and channels of distribution, as well as restaurants and industry partners from the United States and more than 45 countries abroad. In the United States, the NRF represents the breadth and diversity of an industry with more than 25 million employees and generated 2009 sales of $2.3 trillion. As the industry umbrella group, the NRF periodically submits *amicus curiae* briefs in cases raising significant legal issues, including employment law issues, that are important to the retail industry.

In *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), this Court recognized vicarious liability (subject to an affirmative defense) for severe or pervasive workplace harassment committed by a supervisor, while an employer would only be liable for harassment committed by a co-worker if the employer was negligent. The question left unresolved by *Faragher* and *Ellerth* – and the question now being addressed by the Court in this case – is what standard to apply to determine which employees constitute "supervisors" (common law "agents") for Title VII purposes.

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[1] Pursuant to the disclosure requirements of Rule 37.6 of the Supreme Court of the United States, counsel of record for the NRF authored the brief in whole and neither counsel nor a party has made a monetary contribution intended to fund the preparation or submission of this brief. No other person has made a monetary contribution to fund the preparation or submission of this brief.

This question is of vital importance to NRF members. The test established in the Seventh Circuit's opinion in *Parkins v. Civil Constructors of Illinois, Inc.*, 163 F.3d 1027 (7th Cir. 1998), applies vicarious liability to "supervisors" who have the authority to make tangible employment decisions affecting a subordinate's employment. The *Parkins* test is easily applied, definite, and provides employers with the categorical clarity necessary to discern their supervisors from employees. Being able to definitively identify the universe of supervisors allows NRF members to specifically identify and train supervisors on harassment avoidance. This ability was specifically cited by this Court as justification for the imposition of vicarious liability for intentional supervisor harassment and is consistent with the stated purpose of Title VII: deterrence. *Faragher*, 524 U.S. at 805-06; *Ellerth*, 524 U.S. at 764.

The test applied by the Second Circuit in *Mack v. Otis Elevator Co.*, 326 F.3d 116 (2d Cir. 2003), and advocated by the enforcement guidelines of the United States Equal Employment Opportunity Commission, would apply vicarious liability to any employee who has the authority to direct another's daily work activities. The *Mack* test would exponentially expand vicarious liability to categories of employees who would not qualify as agents under traditional common law agency principles for purposes of Title VII. The increased risk of vicarious liability if the *Mack* test were applied across the Country would also have a significant and negative impact on NRF members. The *Mack* standard, with its subjective and results-driven focus on the harassment itself rather than the agency authority

actually invested in the alleged harasser, would significantly impede NRF members in their efforts to identify a greatly expanded universe of "supervisors" and provide harassment avoidance training.

Because this case involves important questions regarding the definition of "supervisor" for purposes of Title VII, it is a matter of vital interest to the NRF and its membership. NRF therefore submits the arguments herein as support for the adoption of the *Parkins* test and in support of Ball State University's opposition to Petitioner's appeal.

The NRF submits this Brief pursuant to Rule 38 of the Rules of the Supreme Court of the United States.

SUMMARY OF THE ARGUMENTS

The *Parkins* test is the appropriate standard for determining supervisor vicarious liability under Title VII. First, the *Parkins* test is the only test consistent with the underlying common law principles recognized in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), *Faragher*, and *Ellerth*, because it focuses on the proper analysis of agency authority applied in each of those cases. The unbridled *Mack* test, on the other hand, *exponentially* broadens the risk of employer vicarious liability beyond anything previously recognized by this Court's precedent. Second, allowing vicarious liability for the unlawful harassment of supervisors who have the authority to take tangible employment actions (while applying a negligence standard for employees who simply manage or oversee work assignments) is consistent with the common law of agency. Finally, the *Parkins* test provides the most

practical standard with the most "categorical clarity" for employers to follow *before* an incident of harassment occurs and is consistent with Title VII's primary deterrence purposes.

ARGUMENT

I. Introduction

Under Title VII, this Court's decisions consistently recognize that only supervisors who are invested with the authority necessary to qualify them as "agents" under the common law of agency will create vicarious liability for employers. *Meritor*, 477 U.S. 57; *Faragher*, 524 U.S. 775; *Ellerth*, 524 U.S. 742. Thus, this Court has consistently refused to apply vicarious liability to the acts of all "supervisors." Underlying this Court's analysis in *Meritor*, *Faragher*, and *Ellerth*, is the necessary goal of recognizing an important line delineating those supervisors with authority to render them common law agents with those employees who lack the requisite agency authority under Title VII.

Petitioner would have this Court ignore *stare decisis* and break with the principles undergirding *Meritor*, *Faragher*, and *Ellerth*, by avoiding any distinction between supervisors who are invested with agency authority and those who are not. Petitioner urges the Court to adopt an almost unbridled rule that goes well outside of this Court's precedent; specifically, Petitioner would have this Court impose vicarious liability on an employer for the acts of any employee who "has the authority to direct an employee's daily work activities." (Petitioner's Brief at 4.) Petitioner's proposed rule

would unquestionably include as "supervisor/agents" many employees who do not have the authority necessary to render them agents, and who thus would not be classified as "supervisors" under *Meritor*, *Faragher*, and *Ellerth*. Petitioner's suggested test would include employees such as lead employees, foremen, senior employees (in seniority-based hierarchies), and even temporary or "fill-in" supervisors.

Adoption of Petitioner's overly broad test would effectively reverse this Court's carefully constructed liability framework grounded in sound agency principles recognized in *Meritor*, *Faragher*, and *Ellerth*. The correct result would be to affirm the *Parkins* test by recognizing vicarious liability only for supervisors who have the "authority to affect the terms and conditions of the victim's employment." 163 F.3d at 1034. The *Parkins* test gives employers and employees the concrete predictability necessary to further Title VII's stated goal of deterring unlawful harassment.

A. This Court Has Chosen Common Law Agency Principles to Guide Employer Liability Under Title VII for the Acts of its Employees

In *Meritor*, this Court defined "employer" to include a common law "agent" of an employer, recognizing that Congress intended "courts to look to agency principles for guidance in this area." 477 U.S. at 72. This definition "surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible." *Id.* The Court thus rejected the

argument that "employers are always automatically liable for [] harassment by their supervisors." *Id.* (citing generally Restatement (Second) of Agency §§ 219–237 (1958)).

B. *Faragher* and *Ellerth* Further Relied Upon Common Law Agency Limitations for Limiting Employer Liability

In the companion cases of *Faragher* and *Ellerth*, the Court established a three-prong system of employer liability for workplace harassment. Relevant here, the Court recognized vicarious liability against an employer (subject to an affirmative defense) for workplace harassment committed by an agent-supervisor. *Faragher*, 524 U.S. at 792; *Ellerth*, 524 U.S. at 764-65.

In *Ellerth*, the Court noted the truism that a harassing employee would almost always be aided in his harassment by an agency relationship between the employer and employee. 524 U.S. at 760. Of course, allowing vicarious liability against employers for such a broad "aided in the agency" standard alone would result in vicarious liability for almost *any* act by almost *any* employee. The Court explicitly declined to define employers' vicarious liability so broadly. *Id.* Such a loose standard would also make judicial findings of vicarious liability self-fulfilling: an employee's capability to harass another employee could be used - in a reverse style of logic - to establish that s/he had the necessary agency authority to illegally harass others. To avoid such a result, the Court in *Ellerth* reasoned:

> When a supervisor makes a tangible employment decision, there is assurance the injury could not have been inflicted absent the agency relation.... **The supervisor has been empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control**.
>
> . . .
>
> For these reasons [among others], a tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer. **Whatever the exact contours of the aided in the agency relation standard, its requirements will always be met when a supervisor takes a tangible employment action against a subordinate**.

Id. at 761–63 (emphasis added). *Ellerth's* "distinct class of agent" logic recognizes that common law

principles narrow the parameters of Title VII "supervisors."

In both *Faragher* and *Ellerth*, the Court stressed the importance of a standard that employers could use in real-world application to further Title VII's purpose of deterring harassment. For example, in applying vicarious liability for acts of agents/supervisors, *Faragher's* majority justified the more stringent vicarious liability standard as reasonable because employers could "guard against [supervisor] misbehavior more easily because their numbers are by definition fewer than the numbers of regular employees." 524 U.S. at 800-01. Similarly, the *Faragher* Court declined to make liability dependent on a distinction between affirmative or implicit uses of power because there was no bright-line rule for determining when an action was affirmative and when it was implicit. *Id.* at 805. The Court cautioned against standards lacking bright-line rules in the context of Title VII because such standards invite "judgment calls," which "would often be close," causing results to "often seem disparate even if not demonstrably contradictory," and making the "temptation to litigate . . . hard to resist." *Id.* In tandem with *Faragher*, the Court in *Ellerth* reaffirmed that Title VII interpretation should be guided by the twin goals of uniformity and predictability. 524 U.S. at 754 (stating the Court's requirement to establish a "uniform and predictable standard" for interpretation of Title VII guided by common law agency principles).

Thus, *Faragher* and *Ellerth* both recognize how vitally important it is for employers to be able to identity with "the virtue of categorical clarity," *Faragher*, 524 U.S. at 801, who is a supervisor/agent

prior to the occurrence of harassment so that the employer can ensure its supervisors are trained in harassment avoidance. *Id.* at 805-06; *Ellerth*, 524 U.S. at 764. This policy consideration was recognized as consistent with Title VII's "'primary objective' . . . to avoid harm." *Faragher*, 524 U.S. at 806 (internal citation omitted). *See also Ellerth*, 524 U.S. at 764 ("Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms," and to "encourage[e] forethought by employers and saving action by objecting employees.").

C. Appeals Courts Define "Supervisor" under Title VII as Those Employees Who Have the Authority to Make Tangible Employment Decisions

Following *Faragher* and *Ellerth*, the Fifth Circuit was the first to address the question of supervisory authority, holding that an employee was the plaintiff's supervisor "because he was authorized to, and did, discharge" the plaintiff. *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581, 593 (5th Cir. 1998).[2] Similarly, in *Lissau v. Southern*

[2] Prior to *Faragher* and *Ellerth*, the vast majority of Circuits held that an employer is only vicariously liable for the harassment of employees who had the ability to affect another employee's tangible employment actions. *See*, *e.g.*, *Volk v. Coler*, 845 F.2d 1422, 1436 (7th Cir. 1988); *Pfau v. Reed*, 125 F.3d 927, 937 (5th Cir. 1997); *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 803 (6th Cir. 1994); *Haynes v. Williams*, 88 F.3d 898, 899 (10th Cir. 1996); *Sauers v. Salt Lake County*, 1 F.3d 1122, 1125 (10th Cir. 1993); *Swentek v. USAIR, Inc.*, 830

Food Service, Inc., 159 F.3d 177, 179 (4th Cir. 1998), the Fourth Circuit based its determination that an employee was the plaintiff's supervisor under Title VII because the harasser "could hire and fire sales representatives."

Relying on these early cases and *Faragher* and *Ellerth*, the Seventh Circuit, in *Parkins v. Civil Constructors of Illinois, Inc.*, 163 F.3d 1027 (7th Cir. 1998), crafted a standard for determining supervisor status under Title VII that employers could use to identify and train those "few numbers" of employees whose actions could trigger vicarious liability for unlawful harassment. The Seventh Circuit correctly recognized that "because liability is predicated on misuse of supervisory authority, the touchstone for determining supervisory status is the extent of authority possessed by the purported supervisor." *Parkins,* 163 F.3d at 1033 (citing *Wright-Simmons v. City of Oklahoma City*, 155 F.3d 1264, 1271 (10th Cir. 1998)). Avoiding reliance on mere job titles (which could result in a "low-level supervisor" creating liability for an employer even though that supervisor has no more true authority than ordinary co-workers), the court instead held that the key factor to determining supervisor/agent status was the employee's *authority* to affect the terms and conditions of the victim's employment:

> [I]t is manifest that the essence of supervisory status is the <u>authority to affect the terms and conditions of the victim's</u>

F.2d 552, 558 (4th Cir. 1987); *Yates v. Avco Corporation*, 819 F.2d 630, 636 (6th Cir. 1987).

> employment. This authority primarily consists of the power to hire, fire, demote, promote, transfer or discipline an employee. Absent an entrustment of at least some of this authority, an employee does not qualify as a supervisor for purposes imputing liability to the employer.

Id. at 1034 (emphasis added).

The "*Parkins* test" became the standard for determining a Title VII supervisor.[3] Courts adopting the *Parkins* test generally found the most predictable and practical factor for identifying an employee as a Title VII supervisor was the employee's authority to take tangible employment actions against subordinates.

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[3] *See*, *e.g.*, *Mikels v. City of Durham*, 183 F.3d 323, 333 (4th Cir. 1999) (recognizing that "[t]he most powerful indicator of [] a threat-induced vulnerability deriving from the supervisor's agency relation lies in his authority . . . to take tangible employment actions against the victim . . . ."); *Noviello v. City of Boston*, 398 F.3d 76 (1st Cir. 2005)(agreeing with *Parkins* rationale); *Joens v. John Morrell & Co.*, 354 F.3d 938, 940 (8th Cir. 2004) ("The majority [of courts of appeals] hold that, to be a supervisor, the alleged harasser must have had the power (not necessarily exercised) to take tangible employment action against the victim, such as the authority to hire, fire, promote or reassign to significantly different duties."); *Phillips v. Taco Bell Corporation*, 156 F.3d 884, 888 (8th Cir.1998) (the store manager was a supervisor for Title VII liability purposes due to the degree of authority he exercised over plaintiff).

D. The Second Circuit Rejects the *Parkins* Test and Expands Title VII Supervisors/Agents to Include Those Employees Who Merely Make or Oversee Daily Work Assignments

No appellate court rejected the *Parkins* test until *Mack v. Otis Elevator Co.*, 326 F.3d 116 (2d Cir. 2003). There, an African-American elevator mechanic's helper brought suit alleging sex and race-based Title VII harassment. 326 F.3d at 120-121. Plaintiff worked as an assistant to six elevator mechanics at a remote location: a client office building. *Id*. *There was no supervisor who worked at Mack's job site*; rather, mechanic James Connolly – the most senior employee present – was designated mechanic in charge. *Id*. at 120, 125. As such, Mr. Connolly assigned and scheduled work, directed the work force, assured the quality and efficiency of assignments, and enforced safety policies at the separate job site. *Id*. at 120.

Under *Faragher* and *Ellerth*, the Second Circuit was required to determine whether Connolly was a supervisor/agent under Title VII. The *Mack* court began its analysis by rejecting the *Parkins* test. *Id*. at 126. It decided that "*Ellerth* and *Faragher* hold than an employer may be vicariously liable even for the misbehavior of employees who do *not* take tangible employment actions against their subordinate victims." *Id*. (emphasis in original). The court explained:

> The question in such cases is not whether the employer gave the

> employee the authority to make economic decisions concerning his or her subordinates. It is, instead, whether the authority given by the employer to the employee enabled or materially augmented the ability of the latter to create a hostile work environment for his or her subordinates.

Id.

The court thus determined that the proper scope of supervisor authority under Title VII was far broader than allowed for by the *Parkins* test. The court therefore adopted the broadest definition of supervisor from the EEOC enforcement guidelines,[4]

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[4] The EEOC enforcement guidelines stated that an "individual qualifies as an employee's 'supervisor' if: (a) the individual has authority to undertake or recommend tangible employment decisions affecting the employee; *or* (b) [t]he individual has authority to direct the employee's daily work activities." EEOC Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors, 8 FEP Manual (BNA) 405:7654 (1999) (emphasis in original). This EEOC guidance is not an agency regulation; thus, no judicial deference is required under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). *See E.E.O.C. v. SunDance Rehabilitation Corporation*, 466 F.3d 490, 500 (6th Cir. 2006) ("As the EEOC acknowledges, its Enforcement Guidance is entitled to respect only to the extent of its persuasive power. The Enforcement Guidance does not receive *Chevron*-type deference . . .") (internal citations omitted). *See also National Railroad Passenger Corporation v. Morgan*, 536 U.S. 101, 110 n.6 (2002) ("[W]e have held that the EEOC's interpretive guidelines do not receive *Chevron*

which included not only supervisors who have the authority to make tangible employment actions (the *Parkins* test), but also those employees who merely have the "authority to direct the employee's daily work activities." *Id*. at 127.

Under that expansive test, the appeals court determined that Connolly was a supervisor because his "authority over Mack . . . enabled him, or materially augmented his ability, to impose a hostile work environment on her." *Id*. at 125. The court further emphasized that Connolly's authority was primarily due to the remoteness of the job site and the significant fact that there were no supervisors at the job site who could have "checked" Connolly's behavior:

> [Connolly] possessed a *special dominance* over other on-site employees . . . arising out of their remoteness from others with authority to exercise power on behalf of Otis. There was no one superior to Connolly at [the work site] whose continuing presence might have acted as a check on Connolly's coercive misbehavior

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deference.") (citations omitted); *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (stating that interpretations contained in enforcement guidances lack the force of law and do not warrant *Chevron*-style deference; they "are 'entitled to respect' under our decision in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), but only to the extent that those interpretations have the 'power to persuade,' *ibid*.").

> toward other Otis employees there.

Id. (emphasis added). These "twin factors" were essential for the court's decision, but appear nowhere in the Petitioner's proposed rule here.

Following *Mack*, a minority of other Circuits held that supervisors include those who direct work assignments. *Whitten v. Fred's, Incorporated*, 601 F.3d 231 (4th Cir. 2010); *McGinest v. GTE Service Corp.*, 360 F.3d 1103 (9th Cir. 2004).

II. This Court Should Adopt the *Parkins* Test as the Appropriate Standard Under *Faragher/Ellerth* for Defining a Supervisor/Agent under Title VII

The *Parkins* test is the only test consistent with *Meritor*, *Faragher*, *Ellerth*; the *Mack* test *exponentially* broadens the risk of employer vicarious liability beyond anything previously recognized by this Court's precedent. Limiting vicarious liability for supervisor harassment to those who have the authority to affect another employee's economic work conditions (while applying a negligence standard for employees who simply manage or oversee work assignments) is consistent with the recognized principles of the agency law. Also, the *Parkins* test provides the most practical standard with the most "categorical clarity" for employers to further Title VII's deterrence goals.

A. The *Parkins* Test, and Not the *Mack* Test, is Consistent with Common Law Agency Principles

In addition to the "aided in the agency" analysis of *Ellerth* discussed above, this Court has long recognized the "fellow servant" rule from the common law of agency. Traditionally, "one who enters the service of another takes upon himself the ordinary risks of the negligent acts of his fellow servants in the course of the employment." *New England Railroad Company v. Conroy*, 175 U.S. 323, 327 (1899). Thus, a bedrock principle of this Court's agency law is that employers are not liable to co-workers who are injured by the negligence of fellow co-workers. *See Jansen v. Packaging Corporation of America*, 123 F.3d 490, 508-09 (7th Cir. 1997) (Posner, J., concurring and dissenting).[5]

However, there was a recognized exception to the fellow servant rule. If the negligent employee was a "vice-principal," meaning an employee who has been invested with inherent, non-delegable duties by the employer, then his actions triggered strict liability. *See*, *e.g.*, *Baltimore & O.R. Co. v.*

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[5] *See also Northern Pacific Railroad Company v. Peterson*, 162 U.S. 346, 353 (1896) ("The general rule is that those entering into the service of a common master become thereby engaged in a common service, and are fellow servants; and, prima facie, the common master is not liable for the negligence of one of his servants which has resulted in an injury to a fellow servant."); *Conroy*, 175 U.S. at 327 ("There is a general rule of law, established by a great preponderance of judicial authority in the English and in the state and Federal courts, that one who enters the service of another takes upon himself the ordinary risks of the negligent acts of his fellow servants in the course of the employment.").

Baugh, 149 U.S. 368, 383 (1893); *Peterson*, 162 U.S. at 354. Under common law agency principles, vice-principals were: (1) employees who managed a department or division, *Baugh*, 149 U.S. at 383 ("[I]f the business of the master and employer becomes so vast and diversified that it naturally separates itself into departments of service, the individuals placed by him in charge of those separate branches and departments of service, and given entire and absolute control therein, are properly to be considered, with respect to employe[e]s under them, vice principals . . . "), or (2) employees in whom the master delegated responsibility for "a reasonably safe place at which to work, with reasonably safe machinery, tools, and implements to work with, with reasonably safe materials to work upon, and with suitable and competent fellow servants to work with him. . ." *Id.* at 387 (internal quotation and citation omitted).

Over time, plaintiffs attempted to expand the vice-principal exception to the fellow-servant doctrine by arguing that strict liability applied to the negligence of employees who control and direct another's work activities. *See*, *e.g.*, *Chicago, M. & St. P. Ry. Co. v. Ross*, 112 U.S. 377, 390 (1884), *rev'd Conroy*, 175 U.S. at 341. This Court rejected such expansion, however.[6] The Court in *Peterson*, summarizing relevant precedent, held as follows:

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[6] This rejection is best demonstrated in the *Case of Ross*. There, a locomotive engineer alleged injury when a train conductor's negligence caused an accident. 112 U.S. at 381-82. Plaintiff argued that because the conductor had the right to "command the movements of a train and control the persons employed upon it," represented "the company while performing those duties," and did not "bear the relation of fellow servant to the engineer and other employe[e]s on the train," he was a vice-

> [T]he master's responsibility for the negligence of a servant is not founded upon the fact that the servant guilty of the neglect had control over, and a superior position to that occupied by, the servant who was injured by his negligence. The rule is that, in order to form an exception to the general law of nonliability, the person whose neglect

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principal warranting strict liability for his negligence. *Baugh*, 149 U.S. at 379 (summarizing *Case of Ross*). This Court agreed, holding "that the conductor of a railway train, who commands its movements, directs when it shall start, at what stations it shall stop, at what speed it shall run, and has the general management of it, and control over the persons employed upon it, represents the company, and, therefore, that, for injuries resulting from his negligent acts, the company is responsible." *Case of Ross*, 112 U.S. at 394.

However, the *Case of Ross* was almost immediately overruled by *Baugh*, wherein this Court refused to apply strict liability to the negligence of an engineer who had control and gave orders to an engineer who was injured. *Baugh*, 149 U.S. at 387; *see also Conroy*, 175 U.S. at 346 (recognizing *Baug*h's implicit overruling of *Case of Ross*). The *Case of Ross* was then *explicitly* overruled in *Conroy*, in which this Court surveyed the common law and recognized that general principles of agency will *not* impose strict liability on the negligence of employees who simply manage or control other employees. 175 U.S. at 336 ("It may safely be said that this court has never recognized the proposition that the mere control of one servant over another in doing a particular piece of work destroys the relation of fellow servants, and puts an end to the master's liability.") (citing *Baugh*).

> caused the injury must be 'one who was clothed with the control and management of a distinct department, and not a mere separate piece of work in one of the branches of service in a department.' This distinction is a plain one, and not subject to any great embarrassment in determining the fact in any particular case.

162 U.S. at 355. *See also Jansen*, 123 F.3d at 508-09.[7]

Under *Meritor, Faragher* and *Ellerth*, this Court has established that Title VII should be guided by the common law of agency. The *Parkins* test is consistent with the long-recognized common law fellow servant rule and its vice-principal exception. The Second Circuit's *Mack* analysis is not compatible with common law principles, as best

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[7] *See also Cooper v. Penn Bridge Co.*, 47 App. D.C. 467, 472 (D.C. Ct. 1918) (holding a superintendent a vice-principal because he had "complete charge of the men," including the ability to hire, pay and discharge them.). Texas continues to recognize the vice-principal exception to the fellow servant rule in workplace torts and continues to adhere to the rule that a vice-principal must have the ability to affect tangible employment decisions such as hiring and firing. *See Garrett v. Great Western Distributing Company of Amarrillo*, 129 S.W.3d 797, 802 ("Having some supervisory authority over others without the ability to hire and fire is not enough" to constitute a vice principal.).

evidenced by this Court's decision in *Peterson*. For this reason alone, this Court should reject Petitioner's proposal to expand vicarious liability to classes of employees who would never have been found to warrant such liability under common law principles.

B. The Second Circuit's *Mack* Test is Impractical, Unpredictable, and Unworkable

The Seventh Circuit's *Parkins* standard is not only consistent with this Court's agency principles, it is also the only practical approach for employers and lower courts. The Seventh Circuit's approach allows employers and courts to determine – without question or ambiguity – which employees can trigger strict liability. *See*, *e.g.*, *Browne v. Signal Mountain Nursery, L.P.*, 286 F. Supp. 2d 904, 914 (E.D. Tenn. 2003).[8] Under this Court's recognized purpose of Title VII, the ability to definitively identify supervisory employees allows employers to target those supervisors with appropriate harassment training to deter future Title VII violations.

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[8] To demonstrate the amorphous and overly broad nature of the *Mack* test, the court in *Browne* pointed to a prior district court that struggled to apply the *Mack* test. 286 F. Supp. 2d at 914 (citing *Dinkins v. Charoen Pokphand USA, Inc.*, 133 F. Supp. 2d 1254 (M.D. Ala. 2001)). As the *Browne* court noted, the court in *Dinkins* engaged in "hair-splitting" when it was forced to narrow the *Mack* test so that it could be applied to the facts. 286 F. Supp. 2d at 914 (citing *Dinkins*, 133 F. Supp. 2d at 1266). Even using a narrowed *Mack* test, however, "[t]he more nebulous the standard for determining which employees are supervisors" led "the court in *Dinkins* [to] identif[y] eleven individuals who were potentially supervisors." *Id.* (citing *Dinkins*, 133 F. Supp. 2d at 1267, n.17).

Application of the *Mack* test, on the other hand, would too often rely upon subjective judgments. This reliance invites circular or results-driven reasoning, and would produce unpredictable, and even contradictory results. *See Browne*, 286 F. Supp. 2d at 914; *Dinkins*, 133 F. Supp. 2d at 1267. For example, under the *Mack* test, courts would need to examine how each separate employee's authority was communicated, the victim's understanding of such authority, and any other factors which prevent the victim from resisting or stopping the harassing employee. *See*, *e.g.*, *Mikels*, 183 F.3d at 333–34 (assuming, without deciding, employers could be held vicariously liable for actions of employees with lesser forms of supervisory authority, "the victim's response in context may be highly probative on the issue"). Courts would also be forced into circular, results-driven analysis by focusing first on the circumstances surrounding the harassment and the victim's response before even determining whether the harasser had the *authority* to qualify as a supervisor. *See Mack*, 326 F.3d at 126 (the proper focus is "whether the authority given by the employer to the employee enabled or materially augmented the ability of the latter to create a hostile work environment for his or her subordinates.").

With the exaggerated, unpredictable *Mack* standard, many more employees will fall into the category of Title VII supervisor[9]; a result which would be incompatible with this Court's principles in its Title VII precedent. In fact, the logic of the *Mack* approach would result in a dramatic increase of vicarious liability to cover any employee with even a modicum of superiority over another employee.

[9] *See*, *e.g.*, *Dinkins*, 133 F. Supp. 2d at 1267 n.17.

Factors that could trigger supervisory status under the elastic *Mack* approach include such everyday workplace factors as seniority, performance history, perceived management favor, temporary direction of work, and personal relationships with superiors. *Browne*, 286 F. Supp. 2d at 914. Many non-supervisory positions would be held "supervisors" under the *Mack* test, including forepersons, temporary "fill-in" supervisors, lead employees, and senior employees in hierarchical organizations. Allowing vicarious liability for the actions of these lower-level employees is contrary to this Court's already recognized application of common law agency principles under Title VII, *Meritor*, *Faragher* and *Ellerth*. The *Mack* test, if applied across the country, will have a devastating impact on employers' ability to predict, train, and control supervisors in the workplace.

C. The *Parkins* Test is Consistent with Supreme Court Precedent Interpreting Title VII

Petitioner erroneously argues that the *Parkins* test is wrong because it is inconsistent with an isolated factual statement in *Faragher*. Petitioner reads *Faragher* as applying vicarious liability to the conduct of any employee "with power to 'control[] and supervis[e] all aspects of [their target's] day-to-day activities.'" (Petitioner's Brief at 19) (quoting *Faragher*, 524 U.S. at 808.) Petitioner's argument oversimplifies *Faragher* and selectively identifies findings of fact that were not reviewed by the Supreme Court.

1. Lower Courts' Findings in *Faragher* Demonstrate the Supreme Court Did Not View Employee Silverman in Isolation

The unique factual circumstances in *Faragher* do not require the rejection of the *Parkins* test. Instead, when viewed in the totality of circumstances of *Faragher* and the Court's rationale in *Ellerth*, it is clear that the *Parkins* test - not the *Mack* test - is the most consistent with the rationale of both cases, and thus *stare decisis* supports this Court's adoption of the *Parkins* test.[10]

An objective review of the factual and procedural review of the record in *Faragher* demonstrates Petitioner's erroneous analysis. After a bench trial on Faragher's Title VII sex harassment claim, the district court made certain findings of fact. *Faragher*, 864 F. Supp. 1552 (S.D. Fla. 1994); *Faragher v. City of Boca Raton*, 111 F.3d 1530, 1534 (11th Cir. 1997) *rev'd*, 524 U.S. 775 (1998). Relevant here, the district court found that Faragher was a

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[10] The doctrine of *stare decisis* is "the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion," and permitting "society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact." *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986). "While *stare decisis* is not an inexorable command," this Court has repeatedly stated that it will diverge from "the straight path of *stare decisis*" only "when the Court [feels] obliged 'to bring its opinions into agreement with experience and with facts newly ascertained.'" *Id.* (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting)).

lifeguard working in the Marine Safety Section of the City's Parks and Recreation Department, *Faragher*, 864 F. Supp. at 1555, and that the Marine Safety Section was organized in a "paramilitary configuration," with a "clear chain of command," wherein lifeguards reported *directly* to lieutenants and captains who in turn reported to Chief Bill Terry, the head of the Section. *Faragher*, 864 F. Supp. at 1564.

Because of the paramilitary structure of the Section, the district court further decided that Chief Terry had significant formal authority over Section employees; namely, the authority to "hire new lifeguards (subject to the approval of higher management), to supervise all aspects of the lifeguards' work assignments, to engage in counseling, to deliver oral reprimands, and to make a record of any such discipline." *Id.* at 1563-64. Further, Lieutenant (and later Captain) Silverman was "responsible for making the lifeguards' daily assignments, and supervising their work and fitness training." *Id*. at 1555. Faragher reported directly to Silverman, and in turn to Terry. *Id*.

Contrary to Petitioner's argument, the district court decided that Terry and Silverman's combined authority over City lifeguards did not end with their formal responsibilities. Instead, because of the unique circumstances of the Marine Safety Section's paramilitary structure and the City's abdication of responsibility over it, the trial court concluded that the City had effectively given Terry and Silverman special and near-absolute authority over Section employees. For example, the trial court decided that lifeguards and supervisors were stationed at the city beach and worked out of the Marine Safety

Headquarters, *Id.* at 1555-56, which "was thus physically remote from City Hall." *Faragher*, 111 F.3d at 1544 (emphasis added). Due to this remoteness, "the lifeguards' contacts with higher city officials ... were almost non-existent." *Id.* Like all lifeguards at the Marine Safety Headquarters, Faragher was "completely isolated from the City's higher management, and Terry and Silverman directly controlled and supervised *all* aspects of her day-to-day activities." *Id.* (emphasis added). The combined authority invested in Terry and Silverman was "virtually unchecked," *Faragher*, 524 U.S. at 808, because the City "divested itself of all responsibility for the social climate of the lifeguards' work environment." *Faragher*, 111 F.3d at 1544. As a result, the appeals court had also concluded that "Terry and Silverman essentially were given unfettered responsibility for and control over that environment, and that the lifeguards had no effective avenue of redress with the City." *Id.* (emphasis added).

Based on the district court's findings, among other things, the appeals court decided that this near-absolute authority over Faragher's employment collectively rendered Terry and Silverman agents of the City; thus, the City was "directly liable for Terry's and Silverman's conduct under agency principles based on Terry's and Silverman's supervisory authority and the overall workplace structure," and ". . . because the conduct was severe and pervasive and supported 'an inference of knowledge, or constructive knowledge, on the part of

the City regarding Terry's and Silverman's sexual harassment.'" *Faragher*, 111 F.3d at 1534.[11]

2. The Supreme Court Did Not Review Lower Courts' Facts Regarding Superiors' Authority

This Court granted certiorari review of the *en banc* Eleventh Circuit's decision in *Faragher* to address one issue: the "identification of the circumstances under which an employer may be held liable under Title VII . . . for the acts of a supervisory employee whose sexual harassment of subordinates has created a hostile work environment amounting to employment discrimination." *Faragher*, 524 U.S. at 780. This Court held that "an employer is vicariously liable for actionable discrimination caused by a supervisor, but subject to an affirmative

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[11] After judgment was entered for Faragher on her Title VII claim in the amount of $1 in nominal damages, both Faragher and the City cross-appealed, presenting six narrow issues for review. *See Faragher*, 76 F.3d 1155, 1159-60 (11th Cir. 1996). Significant to this Court's later analysis, the City did not appeal the trial court's findings (1) that Terry and Silverman had been "granted virtually unchecked authority" over lifeguards, including the authority described above; or (2) the fact that Faragher and the other lifeguards were "completely isolated from the City's higher management." *Faragher*, 524 U.S. at 808 (noting that these facts were "undisputed" because "[t]he City did not seek review of these findings."). On appeal, a panel of the Eleventh Circuit reversed the district court's judgment for Faragher on her Title VII sexual harassment claim against the City, but affirmed the district court's judgment in all other respects. *Faragher*, 76 F.3d 1155. After vacating the panel opinion, the Eleventh Circuit reheard the appeal *en banc*, and reversed the district court's judgment as to Faragher's Title VII claim.

defense looking to the reasonableness of the employer's conduct as well as that of a plaintiff victim." *Id*.

The Court accepted the district court's factual findings concerning the unique paramilitary structure of the Marine Safety Section *and* Terry *and* Silverman's near-total authority over lifeguards because "[t]he City did not seek review of these findings." *Id*. at 808. Because of the lower court's findings regarding the unique paramilitary structure of the Marine Safety Section, the remoteness of the lifeguard's workplace, and the "virtually unchecked" authority Terry and Silverman together had over Faragher, this Court concluded that Terry and Silverman together had sufficient authority over the lifeguards to qualify as common law agents, thus warranting the imposition of vicarious liability on the City for their misconduct. *Id*.

3. A Complete Review of the Unique Facts in Faragher Refutes Petitioner's Claim that Faragher Requires Application of the Mack Test

An objective review of the *Faragher* record exposes several false bases in Petitioner's argument for adopting the *Mack* test. First, *Faragher* did not resolve the proper standard for determining whether an employee is vested with the necessary authority to warrant the application of vicarious liability for his actions. Petitioner, thus, incorrectly asserts that *Faragher held* that vicarious liability will *always* be applied to any employee who assigns or oversees another employee's daily work. The Court simply

did not define the parameters of the authority that must be invested in an employee before vicarious liability will be applied.

Second, Petitioner's out-of-context focus on an isolated statement in *Faragher* concerning only Silverman's formal authority to "control[] and supervis[e] all aspects of [Faragher's] day-to-day activities" ignores the other unique and important facts that together were relied upon for the Court's analysis: namely, that Silverman and Terry, *together*, had "virtually unchecked authority," *Faragher*, 524 U.S. at 808, and "unfettered responsibility for and control over [the employees'] environment." *Faragher*, 111 F.3d at 1544.[12] Most importantly, the "virtually unchecked authority" the City afforded to the two supervisors in a paramilitary organization in *Faragher* is

[12] The *Faragher* decision is silent as to whether Silverman would have been considered a supervisor for purposes of Title VII in the absence of Terry, if he was employed in a non-paramilitary employment structure, or if Silverman had been working in a facility with higher management present to check his "unfettered" and "virtually unchecked" authority. Because of this silence, and because it was not the issue to be decided in *Faragher*, the sentence primarily relied on by Petitioner is, at best, dicta and not controlling on this Court's review of the specific standard for determining who is a supervisor/agent for purposes of Title VII. *See Central Virginia Community College v. Katz*, 546 U.S. 356, 363 (2006) ("[W]e are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated.") (citing *Cohens v. State of Virginia*, 19 U.S. 264, 6 Wheat. 264, 399-400, 5 L. Ed. 257 (1821) ("It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.").

significantly greater than the *Mack* test advocated by Petitioner here: the mere ability to "direct daily work activities." One common hypothetical clearly demonstrates why the *Mack* standard is contrary to this Court's *Faragher* analysis: under the *Mack* test, a lead employee in a manufacturing facility (where higher managers also work) who has only the authority to tell other employees which machines to operate during a shift would qualify as a "supervisor" for purposes of Title VII. To argue that such a result is *required* by *Faragher* is absurd: one simply cannot equate this hypothetical lead employee's meager duty with the "virtually unchecked authority" of the two supervisors in *Faragher*.

4. Petitioner's Argument Conspicuously Ignores *Ellerth's* Significant Holding That Undermines Petitioner's Argument

Petitioner's constricted focus on out-of-context statements in *Faragher* while ignoring contrary language in *Ellerth* further undermines her argument. The *Ellerth* Court noted that a supervisor is someone who "has been empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control." 524 U.S. at 761 (emphasis added). The *Ellerth* Court's analysis demonstrates why this Court has highlighted the difference between a supervisor and a co-employee - a distinction Petitioner asks this Court to reject:

As a general proposition, only a supervisor, or other person acting with the authority of the company, can cause this sort of injury [i.e., a tangible employment action]. A co-worker can break a co-worker's arm as easily as a supervisor, and anyone who has regular contact with an employee can inflict psychological injuries by his or her offensive conduct. . . . But one co-worker (absent some elaborate scheme) cannot dock another's pay, nor can one co-worker demote another. **Tangible employment actions fall within the special province of the supervisor. The supervisor has been empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control.**

Id. at 762 (emphasis added) (internal citations omitted).[13] *Ellerth* is thus squarely at odds with the *Mack* standard advocated by Petitioner.

While Petitioner ignores the above-quoted language of *Ellerth*, she does argue that *Ellerth*'s reference to "'an actionable hostile environment created by a supervisor with *immediate* (or successively higher) authority over the [victim]'" . . . "refutes the Seventh Circuit's premise that harassment by highlevel (sic) management is the rule's primary or sole concern." (Petitioner's Brief at 21) (quoting *Ellerth*, 524 U.S. at 765 (emphasis in original)). However, Petitioner's argument is inapposite.[14] First, the quoted language is dicta, as the Court in *Ellerth* did not decide the minimum authority necessary for a supervisor to be considered an agent for Title VII purposes.[15] Second, Petitioner misstates the Seventh Circuit's premise in *Parkins*. Nowhere in *Parkins* did the Seventh Circuit hold

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[13] When *Faragher* is read in context with *Ellerth*, it becomes clear that the combined supervisory authority of Terry and Silverman – "unfettered" and "virtually unchecked authority" – is actually a *higher* standard than the description of "supervisor" in *Ellerth* or the *Parkins* test. Even a supervisor who has the ability to make tangible employment decisions will rarely have "virtually unchecked authority," *Faragher*, 524 U.S. at 808, and "unfettered responsibility for and control over [a work] environment." *Faragher*, 111 F.3d at 1544.

[14] Significantly, not even the Second Circuit, when deciding *Mack*, relied on the language from *Ellerth* quoted by Petitioner to justify its reasoning or holding.

[15] Petitioner admits as much in her Petition for a Writ of Certiorari. (Petition for Writ at 3-4.) Moreover, this Court would likely not have accepted review of the question had it been already decided in *Ellerth*.

that *only* high-level supervisors, and not direct supervisors, are agents warranting vicarious liability. To the contrary, the *Parkins* test is as applicable to direct supervisors as it is to higher-level management. Third, in actuality, *Ellerth*'s reference to "direct (or successively higher) authority" undercuts Petitioner's argument. The *Mack* test applies "supervisor" status to any employee who oversees another's daily activities, irrespective of whether the subordinate employee "immediately reports" to the assigning employee. As a result, there is no question that the *Mack* test *exponentially* broadens the definition of supervisor beyond even the language from *Ellerth* relied upon by Petitioner.

Thus, when *Faragher* is read in conjunction with *Ellerth*, these two companion cases support the adoption of a standard which imposes vicarious liability on an employer for the acts of supervisors only if that supervisor has, *at a minimum*, the authority to "make economic decisions affecting other employees." *Ellerth*, 524 U.S. at 762. This standard would include those supervisors with "virtually unchecked authority" over other employees. The *Parkins* test is therefore far and away more consistent with underlying common law principles relied upon in *Faragher* and *Ellerth.*

The overly broad *Mack* test, on the other hand, unnecessarily goes far beyond the agency principles undergirding *Ellerth* and *Faragher*. In *Mack*, the plaintiff, like the plaintiff in *Faragher*, worked at a remote location where only one mechanic – Connelly – was in charge of her employment. The *Mack* court, like the lower courts in *Faragher*, decided that Connolly was invested

with a particularly "special dominance" primarily due to the remoteness of the job site and the fact that there were no supervisors at the job site who could have "checked" his behavior. *Mack*, 326 F.3d at 125.

The unique workplace circumstances in the factual context of the seniority-driven remote job site location in *Mack* are very similar to the unique facts of the paramilitary organization and remote job site in *Faragher*. The Second Circuit, then, needed only to hold that the mechanic's special dominance over Mack's work due to the remoteness of the job site and the lack of any supervisory "check" on her harasser's conduct or authority was analogous to the "virtually unchecked authority" found in *Faragher*. Thus, there was no need for the Second Circuit to exponentially expand the definition of a common law supervisor/agent to employees never recognized as such. Instead, the Second Circuit needed only to hold that the unchecked "special dominance" of a single senior employee at a remote job site (without a manager present) was the very rare type of "virtually unchecked authority" that *Faragher* made clear rose to the level of supervisor/agent.

5. Petitioner's Misplaced Reliance on Non-*Faragher/Ellerth* Precedents of The Court Undermines Her Argument For the Second Circuit's Mack Test

Twice in Petitioner's Brief, she relies upon this Court's decision in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006);

both times her reliance totally misses the mark for the present supervisor/agent standard before the Court. In *Burlington Northern*, this Court addressed a totally separate provision of Title VII – the retaliation provision in Section 704 – which the Court distinguished from Section 703's substantive discrimination provision. Significantly, nowhere in *Burlington Northern* did the Court address *any* matters related to who was a supervisor for harassment liability. Indeed, Justice Souter, writing for the majority, rejected one parties' attempted reliance upon *Ellerth*, aptly noting that *Ellerth* had not "mention[ed] Title VII's antiretaliation provision at all." *Id*. at 65. That same observation distinguishes, in this case, any coincidental, generic use of "supervisor" in the Court's later decision. Likewise, Petitioner's attempted analysis of what was not included about Joiner's or Sharkey's employment "powers" provides no logical comparison in the present case because in *Burlington Northern* there was no issue involving those employee's supervisor status under *Meritor* or *Faragher*/*Ellerth*.

Petitioner also relies on *Staub v. Proctor Hospital*, 131 S. Ct 1186 (2011), where the question before the Court was unrelated to any analysis of a supervisor's status under Title VII. Indeed, in *Staub*, the challenged employment action was a discharge, a decision made by a Human Resource Vice President, but influenced by a subordinate supervisor. *Id*. at 1189-90. More importantly, this Court's analysis in *Staub* focused on "causation" for an adverse employment action, not upon any agency analysis under *Meritor* or *Faragher*/*Ellerth*.

Petitioner next attempts to compare the distinct statutory definition of supervisor under the

National Labor Relations Act ("NLRA") to the court's common law principles it separately applies to Title VII under *Meritor* and *Faragher*/*Ellerth*. (Petitioner's Brief at 26.) These different analyses are not surprising to observers of this Court. It bears noting that, if definitions of supervisor under the NLRA – a statute which has existed since far into the prior century – had any meaningful interpretive value for Title VII's underlying agency principles, it seems likely that this Court would have long ago drawn such comparisons in prior precedent, including, for example, *Meritor* and/or *Faragher*/*Ellerth*. Indeed, Petitioner's Brief notes a major difference between these dissimilar statutes; i.e., that "Congress had forbidden the NLRB from limiting supervisor status . . ." (Petitioner's Brief at 28) (citing *NLRB v. Kentucky River Cmty. Care., Inc.*, 532 U.S. 706, 719 (2001)). Since there has been no comparable Congressional action involving this Court's treatment of "supervisor" under Title VII's definition of an "employer's agent," it seems likely that this Court's different analysis of supervisor status under Title VII is fully compatible with Congress' different purposes for the NLRA.

Finally, in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), the issue before the Court was whether Title VII's prohibition of sex discrimination in the workplace applied to same-sex harassment. The Court's decision focused on the statutory interpretation of Title VII's "because of . . . sex" requirement, *id.* at 78; it did not attempt to analyze any employee's supervisor authority under *Faragher* or *Ellerth*. Again, Petitioner proffers a decision of this Court that does not address the question in this case.

In sum, Petitioner's attempted reliance on these Supreme Court decisions provides no support for what she needs to accomplish in this case; i.e., convince this Court that *Mack*'s unbridled standard for vicarious employer liability is supported by this Court's earlier common law principles in *Faragher* and *Ellerth*. For the reasons noted above, Petitioner cannot do so.

D. Alternatively, this Court Should Create a Narrow Exception to the *Parkins* Test by Recognizing that a Harassing Employee in a Remote Worksite with Unchecked Authority over Employees is a Supervisor/Agent Under Title VII

For the reasons set forth above, this Court should adopt the *Parkins* test as the appropriate standard for determining who is a supervisor/agent for purposes of Title VII. If, however, this Court decides to add to its *Faragher*/*Ellerth* decisions, the better approach is to simply recognize a very narrow, limited exception to this Court's *Faragher*/*Ellerth* decisions. This exception, based on the unique facts common to both *Faragher* and *Mack*, would apply in situations where an employee who lacks the formal authority to make tangible employment actions nevertheless exercises "virtually unchecked authority" over employees in a remote worksite where higher supervisors are absent. This limited exception would remain consistent with *Meritor*, *Faragher*, and *Ellerth* because it focuses on whether the supervisor possessed special authority over subordinate employees because of the employer's

abdication of supervision; special authority which may create an agency relationship warranting vicarious liability.

Such an exception would not affirm the Second Circuit's decision in *Mack*, because it would not expand the application of vicarious liability on those employees who merely oversee another's daily activities; a class of employees who have never been recognized as agents under the common law of agency or this Court's prior precedent. Instead, it would simply explain that while the standard adopted by the Second Circuit in *Mack* was incorrect, the result on the unique facts in that case can be found compatible with *Faragher*/*Ellerth*.

CONCLUSION

For the foregoing reasons, NRF respectfully requests that this Court adopt the reasoning of the *Parkins* test and hold that vicarious liability will only be applied to the actions of those supervisors who have the ability to make tangible employment decisions.

Respectfully submitted on October 26, 2012.

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