No. 06-

IN THE
SUPREME COURT OF THE UNITED STATES

LONNELL BREWER,
Petitioner,

v.

BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS,
Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Can an employer be held liable under Title VII of the 1964 Civil Rights Act when the discriminatory animus of an intermediate supervisor was a factor in the employer's ultimate decision to impose an adverse employment action, even when there is no evidence that the formal decision-maker personally harbored bias against the affected employee?

PARTIES TO THE PROCEEDINGS

All parties to this action are set forth in the caption.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Lonnell Brewer respectfully requests this Court to issue a writ of *certiorari* to review the decision of the United States Court of Appeals for the Seventh Circuit, entered in this case on March 21, 2007.

OPINIONS BELOW

The March 21, 2007, opinion of the United States Court of Appeals for the Seventh Circuit (App. 1a-37a) is published at 479 F.3d 908. The December 22, 2005, opinion and order of the United States District Court for the Central District of Illinois, Urbana Division, (App. 38a-104a) is published at 407 F. Supp. 2d 946.

STATEMENT OF JURISDICTION

The final judgment of the Court of Appeals was entered on March 21, 2007. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 703(a) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-(2)(a), provides:

> It shall be an unlawful employment practice for an employer –
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment,

> because of such individual's race, color, religion, sex or national origin[.]

Section 703(m) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(m), provides:

> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

STATEMENT OF THE CASE

This case raises a question of general and broad importance: What is the appropriate standard for imposing Title VII liability on an employer when an adverse employment decision is based on the racially motivated acts or omissions of a biased intermediate supervisor?[1] The answer to this question will significantly impact an ever-increasing number of American companies and the individuals they employ. In today's progressively complex and global labor market, it is common for final employment decisions to be made by higher-level supervisors or individuals in personnel departments who are insulated from the everyday activities of their employees. Those

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[1] This Court recently received a petition for a writ of *certiorari* in another case, Supreme Court Docket No. 06-1644, which presents a question similar to the one presented in this case. The lower court opinions in that case, however, do not directly address the issue as clearly as the Seventh Circuit opinion does here.

individuals necessarily must rely on the input of intermediate supervisors to make decisions about employees whom the higher-level supervisors neither directly supervise nor monitor.

The circuit courts of appeals are split on what standard should be applied for imposing Title VII liability on an employer when the acts or omissions of a biased intermediate supervisor are part of a decision-making process that leads to an adverse employment decision against a member of a protected class. This split among the circuit courts of appeals is such that employment discrimination cases nationwide are being decided under very different standards, which inevitably leads to irreconcilable outcomes among, and even within, the circuits.

The Court previously recognized the importance of resolving this confusion among the circuits. Indeed, the Court has taken steps to resolve the issue not just once, but twice, by issuing a writ of *certiorari* in *BCI Coca-Cola Bottling Company of Los Angeles v. EEOC*, 450 F.3d 476 (10th Cir. 2004), *cert. granted*, 127 S. Ct. 852 (U.S. Jan. 5, 2007) (No. 06-341), and by inviting the Solicitor General to file a brief expressing the views of the United States while the Court was deciding whether to issue a writ of *certiorari* in *Hill v. Lockheed Martin Logistics Management, Inc.*, 354 F.3d 277 (4th Cir. 2004), *petition for cert. filed*, 2004 WL 1243067 (June 1, 2004) (No. 03-1443). In both cases, however, the petitioners withdrew their petitions before the Court could consider and provide guidance on this important issue. This case presents an opportunity for the Court finally to resolve the split among the circuits, and thus both to clarify the appropriate legal standard and to

provide certainty to employees and businesses nationwide.

I. Background Facts and Issues

This case, which arises under Title VII of the 1964 Civil Rights Act, involves a university student-employee, Lonnell Brewer, who was terminated from his job based on information provided to a higher-level supervisor by a racially biased intermediate supervisor.[2] Specifically, during his two semesters working at the Personnel Services Office ("PSO") at the University of Illinois, Kerrin Thompson, Mr. Brewer's immediate supervisor, made false, disparaging, and racially motivated comments about him to his other supervisors, co-workers, and his professors.[3] These comments included, among other things, referring to

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[2] Mr. Brewer also alleged that he was terminated from his graduate master's program because of his race, in violation of Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000e, and that his employers said unfavorable things about him to his professors in retaliation for his complaints about the supervisor's racism, in violation of Title VII. Brewer's petition for writ of *certiorari* addresses only the Title VII discriminatory firing claim; however, the Seventh Circuit linked the analysis of the Title VI claim to the Title VII claim. (App. at 33a-34a ("As [the Title VI] argument is similar to his Title VII argument, however, it again fails for the same reason....[his supervisor] did not have the singular degree of influence required to make her functionally responsible for Brewer's grades.").) Accordingly, any clarification of the Title VII claim would affect the analysis of the Title VI claim.

[3] Because this case arises in the posture of a motion for summary judgment, the Court is required to view all facts and draw all reasonable inferences in favor of the nonmoving party, Mr. Brewer. *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 150 (2000).

Mr. Brewer as a "nigger" (App. at 11a), and saying he "lacked urgency about his work" (App. at 5a). Shortly after Ms. Thompson's final confrontation of Mr. Brewer, Ms. Thompson's supervisor, Denise Hendricks, fired Mr. Brewer, allegedly over a misunderstanding involving a parking tag. Ms. Hendricks acknowledged that she received information relating to the parking tag incident directly from Ms. Thompson, and Ms. Hendricks testified that she engaged in only a cursory personal evaluation of the facts underlying the incident. (App. at 12a, 57a.)

Despite this and other evidence in the record that Mr. Brewer was racially targeted by his immediate supervisor, Ms. Thompson, and despite undisputed evidence that his higher-level supervisor, Ms. Hendricks, relied on information provided by Ms. Thompson in deciding whether to terminate Mr. Brewer, the district court nonetheless entered summary judgment in favor of the University and against Mr. Brewer on his Title VII claim. The Seventh Circuit Court of Appeals affirmed the judgment. According to the Seventh Circuit, imposition of liability under Title VII requires that the intermediate supervisor exercise "singular influence" over the firing decision; it is insufficient, according to the Seventh Circuit, that the racially biased actions of an intermediate supervisor motivated the higher-level supervisor's final adverse employment decision.

The standard employed by the Seventh Circuit has been expressly adopted by only one other circuit court of appeals and conflicts both with the express statutory language of Title VII and with the case law of the majority of other circuits. *See* discussion, *infra*, at 15-26. Additionally, the Seventh Circuit's standard

undermines the purposes of Title VII and creates substantial uncertainty for companies and individuals nationwide. *See* discussion, *infra*, at 26-27.

The pertinent facts underlying Mr. Brewer's appeal are set forth below.

A. Mr. Brewer's Employment at the University

Mr. Brewer, an African American, was a student at the University of Illinois at Urbana-Champaign, enrolled in the master's degree program at the University's Institute of Labor and Industrial Relations (ILIR). (App. at 2a.) In addition to receiving merit-based financial aid to help him pay for the academic program, Mr. Brewer was employed as an ILIR research assistant, which provided him a stipend for working at the Personnel Services Office. (App. at 2a-3a.)

Mr. Brewer began his research assistantship at the PSO in early September 1997. (*Id.*) On his first day of work, he met with his immediate supervisor, Kerrin Thompson, who was the assistant to the PSO Director Denise Hendricks. (*Id.*) Ms. Thompson told Mr. Brewer he could work flexible hours and wear jeans and other casual clothes to the office. (*Id.*) Ms. Thompson also gave Mr. Brewer a temporary University parking tag and told him he could park anywhere in the parking lots at the PSO (lot E7) or the ILIR (lot C8) as long as he had his tag on the mirror. (App. at 3a-4a.) The parking tag was handwritten and

purported to grant permission to park in either lot.[4] (App. at 10a.)

In early October 1997, Ms. Thompson's attitude and behavior toward Mr. Brewer grew increasingly hostile. (App. at 4a.) Mr. Brewer believes this change started when Ms. Thompson discovered that Mr. Brewer was engaged to marry a white woman. (*Id.*) Mr. Brewer's co-workers and professors told him that Ms. Thompson had made disparaging remarks about him, specifically that he lacked urgency about his work, that he was absent on days when he should be working, and that he should stop wearing jeans to the office. (App. at 4a-5a.) At one point, Ms. Thompson jeopardized Mr. Brewer's employment by trumpeting to Ms. Hendricks the fact that Mr. Brewer had missed an important deadline (he had, in fact, received a short extension from his project supervisor), and by falsely accusing Mr. Brewer of not working his full schedule. (App. at 7a-8a.)

One day in mid-April 1998, the temporary parking tag Ms. Thompson had given Mr. Brewer at the beginning of the year broke so that it would not hang from his rearview mirror. (App. at 54a.) When Mr. Brewer went to the University's parking service office to have the tag replaced, the clerk discovered that the PSO's application for the tag contained inaccurate information. Parking services informed Mr. Brewer that he should not have a tag to park in the

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[4] The Seventh Circuit concluded that Mr. Brewer "basically admits that he wrote the C8 lot permission on the tag," which Mr. Brewer stated he did because Ms. Thompson "neglected" to do so. (App. at 10a & n.4)

ILIR lot (lot C8).[5] (*Id.*) They issued Mr. Brewer a temporary parking tag pending further investigation. (App. at 10a.)

Parking services then called the PSO and spoke to Ms. Thompson about the parking tag, which they believed contained inaccurate information about where Mr. Brewer was authorized to park. (App. at 54a.) Ms. Thompson informed Ms. Hendricks about the call from parking services, explaining (according to Ms. Thompson's own deposition testimony) that she "had received a call from parking services that . . . one of [the PSO's] hang tags had been altered to allow Lonnie [Mr. Brewer] to park in another lot." (*Id.*) Ms. Thompson did *not* tell Ms. Hendricks that she had told Mr. Brewer that he was authorized to park anywhere in either the PSO lot (lot E7) or the ILIR lot (lot C8).

A few days before April 21, 1998, Mr. Brewer approached Ms. Thompson to discuss the parking tag issue. (App. at 54a-55a.) On seeing Mr. Brewer, Ms. Thompson exclaimed, "I know what you did." (App. at 11a.) Ms. Thompson explained that Mr. Brewer was not supposed to have a parking tag, that she had lied on the application to get him one, and that he should not have gone to parking services. (*Id.*) She told Mr. Brewer that Ms. Hendricks had already talked to the ILIR about the incident, and that his indiscretion could cost him his job. (*Id.*)

When Mr. Brewer reminded Ms. Thompson that she had told him he was authorized to park anywhere in either the PSO lot (lot E7) or the ILIR lot (lot C8), Ms.

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[5] The Seventh Circuit concluded, without explanation or citation to the record, that "[p]arking services suspected that [Mr.] Brewer was not entitled to park anywhere at all." (App. at 10a.)

Thompson said she was "through with you people" and that Mr. Brewer was "a smart one." (*Id.*) Ms. Thompson told Mr. Brewer to go retrieve the temporary parking tag he had been given by parking services, yelling, "I have had it with you nigger, get my tag!" (*Id.*)

Sometime later that day, Ms. Hendricks fired Mr. Brewer from his job at the PSO. (App. at 11a, 56a.) At her deposition, Ms. Hendricks said that she fired Mr. Brewer for "adulterating" the parking tag. (App. at 12a.) Ms. Hendricks also stated that Ms. Thompson had told her that parking services was upset because Mr. Brewer had apparently handwritten "C8" on the tag. (App. at 12a.) Ms. Hendricks admitted that the parking tag issue did not merit termination, but said she feared the PSO would lose "parking flexibility" unless she fired someone. (App. at 11a.)

Ms. Hendricks further testified at her deposition that, prior to deciding to fire Mr. Brewer, she did not contact him to get his side of the story and she did not engage in any independent verification of the facts. (App. at 57a.) To the extent Ms. Hendricks sought independently to investigate the parking tag incident at all, she simply visually inspected the parking tag and verified that it had been altered. (App. at 12a, 57a.) Ms. Hendricks acknowledged that, if she had known about Ms. Thompson's racist comments to and about Mr. Brewer, or that Ms. Thompson had given Mr. Brewer permission to park in the C8 lot, she might have reconsidered firing Mr. Brewer.[6] (App. at 12a-13a.)

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[6] At his deposition, Mr. Brewer testified that he told Ms. Hendricks that Ms. Thompson had given him permission to

Mr. Brewer was fired from the PSO effective April 21, 1998. (App. at 13a.) Subsequently, the ILIR terminated his research assistantship and accompanying financial aid.[7] (*Id.*)

B. Decision of the District Court

The district court granted the University's motion for summary judgment, finding that Mr. Brewer had failed to establish a genuine issue of material fact as to whether Ms. Thompson's racism caused her to withhold exculpatory information about the parking permit incident from Ms. Hendricks.

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park in the "C8" lot. (App. at 12a.) Mr. Brewer also testified that he informed Ms. Hendricks of Ms. Thompson's racist remarks, including her use of the word "nigger." (*Id.*) Mr. Brewer said that Ms. Hendricks replied that she didn't know if Ms. Thompson had said those things but that, either way, it was an issue solely between Ms. Thompson and Mr. Brewer. (*Id.*)

[7] Mr. Brewer was also terminated from his master's program at the end of the Spring 1998 term. He had narrowly missed the required cumulative grade point average for two semesters in a row. (App. at 13a.) The first semester he took five courses instead of the usual four. Although his grades may have suffered from the excessive workload, two of his professors also admitted to penalizing him after learning about his troubles at the PSO. Mr. Brewer's second semester grades showed improvement but were insufficient to raise his cumulative average to the required level. Following Mr. Brewer's receipt of his second semester grades, a committee of professors recommended to the ILIR Director that Mr. Brewer be retained because his poor grades were a reflection of his heavy workload rather than a reflection of poor ability. (*Id.*) The Director rejected the recommendation "based on the incident at the PSO." (*Id.*) These facts form the basis of Mr. Brewer's Title VI claim that he brought against the University. That claim, like the Title VII claim, was dismissed at the summary judgment stage on the same analysis that was applied to the Title VII claim.

(App. at 77a.) Mr. Brewer appealed to the Seventh Circuit.

C. Decision of the Seventh Circuit Court of Appeals

The Seventh Circuit affirmed the district court's ruling. In contrast to the district court, the appellate court found that a jury could reasonably conclude that Ms. Thompson's behavior toward Mr. Brewer was motivated by discriminatory animus. (App. at 19a.) The Seventh Circuit also noted that Ms. Thompson's failure to reveal exculpatory information relating to the parking pass may have influenced Ms. Hendricks' decision to fire Mr. Brewer. (App. at 20a-21a.[8]) The court nonetheless held that "it is not enough just [for a supervisor] to have some minimal amount of influence . . . ." (App. at 21a-22a.) Rather, before an employer may be found liable under Title VII, "an employee without formal authority to materially alter the terms and conditions of a plaintiff's employment" must, for discriminatory reasons, exert her "*singular influence* over an employee who does have such power to harm the plaintiff . . . ." (App. at 20a (emphasis added).)

The Seventh Circuit defined "singular influence" as those situations where the "nominal decision-maker [is] nothing more than the functional decision-maker's cat's paw.'"[9] (App. at 22a (*citing*

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[8] Ms. Hendricks stated that she might not have fired Mr. Brewer had she known that Ms. Thompson had told Mr. Brewer he could park anywhere and that Mr. Brewer's alteration of the tag was an honest mistake.

[9] The term "cat's paw" comes from a fable in which a monkey convinced a cat to pull cashews from a hot fire. Once the cat

Shager v. Upjohn Co., 913 F.2d 398, 403 (7th Cir. 1990).) It held that, if the nominal decision-maker receives all of her information from a biased employee and makes a decision based solely on that information, then the employer may be found liable under Title VII. (App. at 22a.) The Seventh Circuit held, however, that an employer is *never* liable when the nominal decision-maker consults *any other source* before making the adverse employment decision. The Seventh Circuit reasoned that this is true even when the decision-maker's investigation of the matter is functionally inadequate to uncover the bias. (App. at 23a ("It does not matter that in a particular situation much of the information has come from a single, potentially biased source, so long as the decisionmaker does not artificially or by virtue of her role in the company limit her investigation to information from that source.").)

The Seventh Circuit concluded that Ms. Hendricks' mere act of examining the altered parking tag before deciding whether to fire Mr. Brewer was sufficient to absolve the University of liability for race discrimination. (App. at 29a.) In so holding, the

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did so, burning his paws in the process, the monkey ate all the cashews, leaving none for the cat. As one court has explained:

> In the employment discrimination context, "cat's paw" refers to a situation in which a biased subordinate, who lacks decisionmaking power, uses the formal decisionmaker as a dupe in a deliberate scheme to trigger a discriminatory employment action. The "rubber stamp" doctrine . . . refers to a situation in which a decisionmaker gives perfunctory approval for an adverse employment action explicitly recommended by a biased subordinate.

BCI Coca-Cola, 450 F.3d at 484.

Seventh Circuit rejected prior Seventh Circuit precedent and the decisional authority of the majority of other circuit courts of appeals.

REASONS FOR GRANTING THE WRIT

This case raises an important issue of federal law that the Court has twice recognized as significant and in need of clarification. It presents an opportunity for the Court to resolve the growing split of opinion among the circuit courts of appeals (and, indeed, within the individual circuit courts) as to the proper standard for holding an employer liable under Title VII when an intermediate supervisor's bias is a factor in an adverse employment action.

I. The Court Has Twice Recognized the Need to Resolve the Question Presented in This Petition.

Twice in the last three years, the Court has taken steps to clarify the very issue raised in this petition. In both prior instances, however, the petitioners chose to withdraw their petitions before the Court was able to analyze and resolve the increasingly divergent case law percolating up through the lower courts. *See BCI Coca-Cola Bottling Co. of Los Angeles v. EEOC*, 450 F.3d 476 (10th Cir. 2004), *cert. granted*, 127 S. Ct. 852 (U.S. Jan. 5, 2007) (No. 06-341), *cert. dismissed*, 127 S. Ct. 1931 (U.S. Apr. 12, 2007); *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277 (4th Cir. 2004) (en banc), *petition for cert. dismissed*, 543 U.S. 1132 (U.S. Jan. 25, 2005) (No. 03-1443).

In 2005, the Court was confronted with the same question presented in this case in a petition for writ of *certiorari* filed in *Hill v. Lockheed Martin Logistics*

Management, Inc., 354 F.3d 277 (4th Cir. 2004) (en banc), *petition for cert. dismissed*, 543 U.S. 1132 (U.S. Jan. 25, 2005) (No. 03-1443). The plaintiff petitioner in *Hill* eventually moved to dismiss the petition. Before receiving the motion to withdraw in *Hill*, however, the Court acknowledged the importance of the issue by inviting the Solicitor General to file a brief expressing the views of the United States. *See* 542 U.S. 935 (U.S. June 28, 2004).

Then, earlier this year in *BCI Coca-Cola*, the Court issued a writ of *certiorari* on the same question presented in this petition. After all briefs were filed, and only six days before the Court was scheduled to hear oral argument in the case, the defendant petitioner BCI Coca-Cola moved for dismissal. On April 12, 2007, the Court dismissed BCI Coca-Cola's petition. Thus, the Court was again denied the opportunity to clarify the appropriate standard for employer liability in cases where the discriminatory animus of an intermediate supervisor was a factor in the employer's ultimate decision to impose an adverse employment action.

This petition raises precisely the same question presented in *BCI Coca-Cola* and in *Hill*. The Court should decide—as it has in the past—that the question is ripe (if not long overdue) for resolution. The need for resolution is even stronger now that the Seventh Circuit's reversal of its own precedent on this issue has further exacerbated the circuit split discussed by the Tenth Circuit Court of Appeals in *BCI Coca-Cola*.

II. Supreme Court Clarification is Necessary to Resolve Inter- and Intra-Circuit Confusion.

A. There is a Distinct and Growing Split of Opinion in the Circuit Courts of Appeals as to the Proper Standard for Holding an Employer Liable For an Intermediate Supervisor's Bias.

This Court issued a writ of *certiorari* earlier this year to review *BCI Coca-Cola,* a Tenth Circuit opinion that expressly acknowledged confusion in the circuit courts as to the proper standard for holding an employer liable for an intermediate supervisor's bias. As the Tenth Circuit noted, "[d]espite broad support for some theory of subordinate bias liability, our sister circuits have divided as to the level of control a biased subordinate must exert over the employment decision." *BCI Coca-Cola,* 450 F. 3d at 486. This division is even more pronounced today.

The various circuit courts of appeals have called it by different names—including "cat's paw," "rubber stamp," or the "subordinate liability doctrine"—but all have recognized that Title VII provides that an employer can be liable under *some circumstances* for the bias of a supervisory employee who is not formally imbued with the authority to fire a subordinate. *See Santiago-Ramos v. Centennial P.R. Wireless Corp.,* 217 F.3d 46, 55 (1st Cir. 2000); *Rose v. New York City Bd. of Educ.,* 257 F.3d 156, 161-62 (2d Cir. 2001); *Abramson v. William Paterson Coll. of New Jersey,* 260 F.3d 265, 286 (3rd Cir. 2001); *Hill,* 354 F.3d at 288; *Russell v. McKinney Hosp. Venture,* 235 F.3d 219, 227 (5th Cir. 2000); *Ercegovich v. Goodyear Tire & Rubber Co.,* 154 F.3d 344, 354-55 (6th Cir. 1998); *Lust v. Sealy,* 383 F.3d 580, 584

(7th Cir. 2004); *Stacks v. Southwestern Bell Yellow Pages, Inc.*, 27 F.3d 1316, 1322-23 (8th Cir. 1994); *Bergene v. Salt River Project Agr. Imp. & Power Dist.*, 272 F.3d 1136, 1141-42 (9th Cir. 2001); *BCI Coca-Cola*, 450 F.3d at 483-86; *Stimpson v. City of Tuscaloosa*, 186 F.3d 1328, 1332 (11th Cir. 1999); *Griffin v. Wash. Convention Ctr.*, 142 F.3d 1308, 1311-12 (D.C. Cir. 1998).

The circuit courts of appeal, however, lack clarity as to *which circumstances* are sufficient to trigger liability in this context. Specifically, decisions between and among the circuit courts differ as to the degree to which a biased intermediate supervisor must contribute to an adverse employment decision before an employer may be held liable. Further aggravating the problem, the various circuit courts have used ambiguous and inconsistent language to describe the appropriate legal standard under which this question should be answered.

The Seventh Circuit's decision in this case further exacerbated the division of opinion among the circuit courts of appeals on this issue. The Seventh Circuit's articulation of a "singular influence" test differs from the standards expressed by the majority of courts because it rejects liability even when a biased intermediate supervisor directly influenced or effectively caused an adverse employment decision. (App. at 22a.) Instead, to hold an employer liable for the acts of even its supervisory employees,[10] the

[10] This case does not involve the thornier issues of whether and to what extent an employer may be held liable for the discriminatory acts of its non-supervisory employees. Because the intermediate supervisor in this case, Ms. Thompson, was acting within the scope of her actual authority when she withheld exculpatory information about the parking pass

Seventh Circuit requires the "[supervisor to] possess so much influence as to basically be herself the true 'functional[] ...decisionmaker.'" (App. at 22a (citing *Little v. Ill. Dep't of Revenue*, 369 F.3d 1007, 1015 (7th Cir. 2004)).) Only the Fourth Circuit Court of Appeals has adopted a liability standard as strict as that articulated by the Seventh Circuit here; in the Fourth Circuit, the biased intermediate supervisor must take on the persona of the "functional" or "actual" decision-maker before Title VII liability may be imposed in a "cat's paw" case.[11] *See Hill*, 354 F.3d at 291.

Only three years ago, however, the Seventh Circuit had explicitly *rejected* the Fourth Circuit's "actual decision-maker" standard. *See Lust v. Sealy*, 383 F.3d 580, 584 (7th Cir. 2004) ("We are mindful that *Hill v. Lockheed Martin Logistics Management* . . . holds that a subordinate's influence, even substantial influence, over the supervisor's decision is not enough to impute the discriminatory motives of the subordinate to the supervisor . . . . *That is not the view of this court.*" (emphasis added)). In *Lust*, the Seventh Circuit opted instead for a "causation" approach, and held that an employer may be found liable under Title VII where

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incident from Ms. Hendricks, the Court need not consider when, if ever, an employer may be held liable for a non-supervisor's bias.

[11] In the Fourth Circuit, an employer can be found liable under Title VII only when the biased intermediate supervisor "possessed such authority as to be viewed as the one principally responsible for the decision or the actual decision-maker for the employer." *Hill*, 354 F.3d at 291. Thus, like the Seventh Circuit below, the Fourth Circuit has determined that an employer may not be held liable for the discriminatory acts of an intermediate supervisor who lacks such paramount authority, *even "when [discriminatory] acts or motivations lead to or influence a tangible employment action."* *Hill*, 354 F.3d at 287 (emphasis added).

the intermediate supervisor's bias was "a cause of [the plaintiff's] injury." *Id.*

The Seventh Circuit's departure below from its own precedent is emblematic of the confusion and inconsistency pervasive in the circuit courts on this issue. Expressly dismissing *Lust* as "doubtful . . . dicta," the Seventh Circuit admitted:

> [O]ur approach to Title VII cases involving an employee's influence over a decision maker has not always been completely clear. Our opinions have sometimes suggested that not only significant influence, but any influence over an employment decision is sufficient to impose Title VII liability on an employer. Many such instances simply involve imprecise language . . . .

(App. at 26a.)

The Seventh Circuit apparently sought to clarify its previous decisions by establishing the new "singular influence/functional decision-maker" standard. In the same opinion, however, the Seventh Circuit left the door wide open to further intra-circuit confusion by implying that this standard might not apply in every circumstance of subordinate bias:

> Even if we were to assume that a lesser degree of influence over an employment decision might trigger Title VII liability in other contexts, such as the context of regularized, formal performance evaluation, we do not think that such an approach can affect the outcome in a case

> like this that concerns an employee's discipline for particular misconduct.

(App. at 27a.)

This kind of confusion is not confined to the Seventh Circuit. Lacking guidance from this Court, lower courts nationwide have used a variety of different theories to describe the appropriate circumstances for holding an employer liable for the bias of an intermediate supervisor. In the Third Circuit, for example, an employer can be found liable if "those exhibiting discriminatory animus influenced or participated in the decision to terminate." *Abramson*, 260 F.3d at 286; *see also Griffin*, 142 F.3d at 1312 ("[E]vidence of a subordinate's bias is relevant where the ultimate decision maker is not insulated from the subordinate's influence."); *Stacks*, 27 F.3d at 1323 (holding that an employer may be liable where a biased intermediate supervisor was "closely involved in the decision making process at each step . . . ."). For purposes of this petition, we label this approach the "influence standard."

Other lower courts have applied something akin to the "influence standard" but have used the language of "but-for" causation to describe it. The Sixth Circuit, for example, has held that an employer may be liable when "the supervisor's racial animus was the *cause* of the termination or *somehow influenced* the ultimate decisionmaker." *Christian v. Wal-mart*, 252 F.3d 862, 877 (6th Cir. 2001) (emphasis added). And, although the Fifth Circuit has examined whether the intermediate supervisor "possessed leverage, or exerted influence, over the titular decisionmaker," the court also indicated that the liability analysis hinged on "who actually made the decision, or caused the

decision to be made." *Russell*, 235 F.3d at 227. While there is an obvious intersection between influence and causation, the implications of the overlap are unclear, and courts have reached divergent interpretations of the "influence standard."

Recently, in *BCI Coca-Cola*, the Tenth Circuit compared and contrasted the Fourth Circuit's "actual decision-maker" standard and the Fifth Circuit's "influence standard," and ultimately rejected *both* in favor of a third standard focusing on causation.[12] *BCI Coca-Cola*, 450 F.3d at 487. Under the Tenth Circuit's formulation, an employer may be liable only when a plaintiff can "establish more than mere 'influence' or 'input' in the decision-making process. Rather, the issue is whether the biased subordinate's discriminatory reports, recommendation[s], or other actions *caused* the adverse employment action." *Id.* (emphasis added). For the purposes of this petition, we label this approach the "causal standard."[13]

The Tenth Circuit in *BCI Coca-Cola* did not believe it was formulating a new standard for liability under Title VII. In fact, the court stated that it was aligning itself with what it perceived to be the rule of the Seventh Circuit. *Id.* ("We find ourselves in agreement with the Seventh Circuit . . . ."). Relying on *Lust*, the Tenth Circuit was not unreasonable in that assessment. In light of the Seventh Circuit's opinion in

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[12] The Fifth Circuit's analysis of "influence" led the Tenth Circuit to believe the Fifth Circuit had eliminated the requirement of causation. *See BCI Coca-Cola*, 450 F.3d at 487.

[13] In substance, the influence and causal standards may ultimately encompass the same fundamental approach; however, linguistic differences have confused the analysis to such an extent that there is no judicial consistency.

this case, however, the *Lust* analysis may no longer be the prevailing law of the Seventh Circuit.

The Ninth Circuit has arguably taken a different approach altogether, finding that an employer may be liable under Title VII whenever a biased intermediate supervisor was involved in the decision to take an adverse employment action. *See Bergene*, 272 F.3d at 1141. Yet, a mere two years later, the Ninth Circuit issued another opinion that appeared to require a causal link between a protected activity and an adverse employment action in order to make out a prima facie case of retaliation under Title VII. *See Stegall v. Citadel Broad. Co.*, 350 F.3d 1061, 1066 (9th Cir. 2003). This discrepancy in approach further highlights the need for Supreme Court guidance.

Further confusing the landscape, the Eleventh Circuit, while stopping short of explicitly requiring the "actual or functional decision maker" designation, nevertheless requires something more than "influence" or "causation." The Eleventh Circuit has noted the need for "a causal link between the [supervisor's] discriminatory animus and the decision to terminate . . . ," *Llampallas v. Mini-Circuits Lab Inc.*, 163 F.3d 1236, 1248-1249 (11th Cir. 1998), but has also found that causation is not always enough, *see McShane v. Gonzales*, 144 Fed. Appx. 779, 791 (11th Cir. 2005) ("[A]lthough causation may be established . . . the actual decision-maker must have acted in accordance with th[e biased] person's decision, without the actual decision-maker himself evaluating the employee's situation."); *see also Roberts v. Randstad N. Am., Inc.*, 2007 U.S. App. LEXIS 11568 (11th Cir. 2007).

Federal district courts have also noted this confusion. Recognizing the split in the circuits, a

district court in Pennsylvania recently confirmed that "the Third Circuit has adopted a standard toward the more lenient end of the spectrum." *Foroozesh v. Lockheed Martin Operations Support, Inc.*, 2006 U.S. Dist. LEXIS 77179, at *9 (D. Pa. Oct. 10, 2006) (citing *Abramson*, 260 F.3d 265). The district court in *Foroozesh*, however, acknowledged an unpublished Third Circuit opinion in 2004 that appeared to endorse the "actual decision-maker" standard set forth by the Fourth Circuit in *Hill*. *See Foroozesh*, 2006 U.S. Dist. LEXIS 77179, at *9 (referring to *Foster v. New Castle Area Sch. Dist.*, 98 Fed. Appx. 85, 88 (3d Cir. 2004)). Because *Foster* was non-precedential, the district court found that it was bound to follow *Abramson*, but recognized "the conflict between *Foster* and *Abramson*." *Foroozesh*, 2006 U.S. Dist. LEXIS 77179, at *10-*11.

B. Since Dismissal of the BCI Petition, the Issue Has Caused Further Confusion in the Lower Courts.

The issue presented by this petition arises frequently, and the recent dismissal of the *BCI Coca-Cola* petition has sparked continued debate in the lower courts. For example, the First Circuit traditionally has examined whether "discriminatory comments were made by the key decision-maker or those in a position to *influence* the decision-maker." *Santiago-Ramos*, 217 F.3d at 55 (emphasis added) (citations omitted). Since *BCI Coca-Cola*, however, at least one district court in the First Circuit has defined this approach as more akin to the Tenth Circuit's "causal standard" than the Third Circuit's "influence standard." Finding that the circuit courts have applied at least three standards—one that considers "input," one that considers "the actual decisionmaker," and one that reflects a "middle

ground, expressed in *BCI*" that focuses on causation—a district court in Maine concluded that "[t]he First Circuit currently holds with those in the middle ground." *Harding v. Cianbro Corp.*, 2007 U.S. Dist. LEXIS 32850, at *18-*20 (D. Me. May 2, 2007).

While it may be possible to reconcile the varying formulations of the "influence" and "causation" standards employed in a majority of the courts, it is impossible to reconcile either of these approaches with the stringent "actual decision-maker" standard now employed in two of the twelve circuits. The Seventh and Fourth Circuits require that the intermediate supervisor be transformed into the "functional" or "actual" decision-maker in order to establish employer liability. Thus, the circuit split is even more pronounced today than it was a year ago when this Court granted the petition for a writ of *certiorari* in *BCI Coca-Cola*.

C. The Applicable Standard Has Real Life Consequences for Parties, Because Different Standards Lead to Different Results for Similarly-Situated Parties in Different Federal Courts.

Widely varying legal standards for assigning Title VII liability have resulted in similarly-situated parties receiving different treatment in different courts. Mr. Brewer's case is an obvious example. Under the Seventh Circuit's new standard, Mr. Brewer was denied the opportunity to present his case to a jury, despite the court finding legally sufficient evidence that the intermediate supervisor's bias influenced the firing. (App. at 20a-21a.) If the court had applied an "influence" standard to Mr. Brewer's case, it would

have denied the University's summary judgment motion and allowed the case to proceed to trial. Instead, however, the court decided that "it is not enough just to have some minimal amount of influence," and thus dismissed the claim, extinguishing Mr. Brewer's chance to obtain relief. (App. at 21a-22a.) In another court, the Third Circuit, for example, Mr. Brewer would have had at least the *opportunity* to convince a jury that his case had merit.

It is inappropriate that similarly-situated parties are unable to vindicate their federal statutory rights equally across the federal courts. As the Court has previously recognized, there is a significant inter- and intra-circuit split on the appropriate standard for holding an employer liable for a intermediate supervisor's bias. That split has created confusion and inconsistencies of both policies and practice and situates this matter directly in the domain of this Court's discretionary jurisdiction.

D. The Court Should Correct the Seventh Circuit's Failure to Follow the Express Statutory Language of Title VII.

By disregarding its own precedent and adopting the "singular influence" standard for determining whether an intermediate supervisor's discriminatory acts or omissions caused an adverse employment action, the Seventh Circuit also ignored the unambiguous language of the governing statute.

Section 2000e-2(a) prohibits employers from discriminating against employees "because of . . . race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a). This language requires a plaintiff alleging race discrimination in the workplace to demonstrate a

causal link between race and an unlawful employment practice.[14] In 1991, Congress amended Title VII to clarify the causation standard required by Title VII. The 1991 amendment makes it explicit that an employer may be found liable when it or its agents use race as a *factor* in making an employment decision.

Section 42 U.S.C. § 2000e-2(m)(1994) provides (emphasis added):

> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was *a motivating factor* for any employment practice, even though other factors also motivated the practice.

Thus, under Title VII, if a plaintiff proves that the defendant acted "because of" discrimination by showing that unlawful bias was "a motivating factor" in the employment practice at issue, the employer may be held liable.

Where the statutory language is plain and unambiguous, the judicial inquiry must end. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). The Seventh Circuit's decision in this case disregarded the statutory directive by requiring that the decision-maker be "wholly dependent on a single source of information" in order to impose liability on the employer. (App. at

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[14] *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 272 (2001) (requiring a "causal connection" between the plaintiff's protected activities and the adverse employment action in a Title VII retaliation claim).

23a.) Similarly, the Fourth Circuit in *Hill v. Lockheed Martin* held that the supervisory employee must be the "actual decision-maker" to create liability for the employer. *Hill*, 354 F.3d at 291. These decisions conflict with the explicit language of Title VII, ignoring the language of "motivating factor" and avoiding any discussion of causation.

III. A Consistent Legal Theory Would Aid In Enforcement of Title VII and Guide Employers in Designing Anti-Discrimination Policies.

The question presented in this petition implicates the very core of Title VII—the text and the principles underlying the enactment of the 1964 statute and its 1991 Amendment—namely, to forbid consideration of race, sex, religion, color, or national origin as a factor in employment decisions. A decision in this case will determine the future scope and effectiveness of Title VII.

The existence of multiple standards, even within a circuit, prompts confusion not only in the courts, but for employers seeking to design policies to combat discrimination in the workplace and for employees seeking to understand and vindicate their rights.

Many, if not most, employers use multi-layered personnel processes that involve several different supervisors or officials making decisions about disciplinary actions or dismissals. In these complex structures, employers frequently separate the decision-making function from the investigation and reporting functions. Today, a national company with offices in Illinois, New Jersey, and Colorado, for example, has no uniform guiding principle to help it design anti-discrimination policies for its various offices. What is

considered consistent with Title VII in one jurisdiction may violate the statute in another. These employers need a consistent theory to guide them in protecting employees, training supervisors, designing anti-discrimination policies, conducting investigations, and complying with federal law.

Similarly, employees need this important clarification so they may understand their basic rights. As discussed above, today an employee in New Jersey is much more likely to get to a jury trial than an employee in Illinois on significantly similar facts. And the fact that several federal circuit courts of appeal apply inconsistent standards within their own borders makes the need for Supreme Court resolution of the issue even more critical.

This Court has already recognized the need to intervene by twice taking steps to resolve cases that presented the same issue. Yet, unfortunately, as evidenced by the Seventh Circuit's opinion in this very case, the circuit courts are becoming more split on this key issue. Petitioner respectfully requests that the Court seize the opportunity presented by this petition to decide once and for all the appropriate standard for holding an employer liable when an intermediate supervisor's bias contributes to an adverse employment action.

CONCLUSION

For the above reasons, Petitioner respectfully requests that his petition for a writ of *certiorari* be granted.

Respectfully submitted this 19th day of June, 2007.

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