No. 08-1454

In the Supreme Court of the United States

ASOCIACION DE EMPLEADOS DEL ESTADO LIBRE ASOCIADO DE PUERTO RICO,
Petitioner,

v.

MICHELLE MONTEAGUDO,
Respondent.

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

REPLY FOR PETITIONER

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August 5, 2009

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The petition set forth a circuit split on an important and recurring question of law, namely, whether the affirmative defense to employer liability for sexual harassment that this Court fashioned in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), can be defeated based on subjective fears where there is no objective basis for the plaintiff's failure to report the harassment. Respondent does not dispute that other circuits have held that reporting is required absent objective evidence that it will be futile or provoke retaliation (and have done so to prevent the affirmative defense from being rendered a dead letter). Nor can respondent dispute that the decision below expressly acknowledged that it was in conflict with the Second Circuit's approach.

Respondent attempts to paper over the conflict by arguing that she had an objective basis for her failure to report, but the "factors" that respondent cites focus on Vargas (the human resources director, whom respondent alleged was complicit in Arce's harassment) and barely mention Executive Director Crespo. Petitioner's anti-harassment policy was reasonable precisely because it gave respondent the option to bypass Vargas and report directly to Crespo, whose integrity respondent did not question. That Vargas had allegedly retaliated against respondent for refusing Arce's advances was all the more reason for respondent to report the harassment—and the retaliation—to Crespo.

On the central question of why respondent was excused from reporting the harassment to Crespo,

respondent—like the court below—can point only to two "factors." Neither remotely rises to the level of objective evidence of futility or likely retaliation, and both underscore the direct conflict between the First Circuit and other courts of appeals. First, respondent relies on what she characterizes as the "friendship" among Arce, Vargas, and Crespo. On the undisputed evidence, Crespo's "friendship" was nothing more than run-of-the-mill office camaraderie. The Fourth, Sixth, and Eighth Circuits, in contrast, have expressly held that friendship among managers does not entitle a harassment victim to assume that reporting will be futile or will provoke retaliation. Second, respondent embraces the First Circuit's reliance on the "age differential" between respondent and Arce, but neither the First Circuit nor respondent explains why someone who has reached the age of majority is less able to report harassment by a 50-year-old as opposed to a 30-year-old. The Seventh Circuit, in contrast, has held (on a related issue under Title VII) that a sexual harassment victim's age is relevant only if she is a minor.

Finally, respondent argues that no conflict exists because whether a report is required depends on the totality of the circumstances. But that the legal standard is reasonableness does not mean that the standard has no legal content. Indeed, the imprecision of the "reasonableness" standard adopted in *Ellerth-Faragher* is all the more reason why this Court's guidance is needed now. As other circuits have recognized, subjective fears that reporting sexual harassment will be futile or provoke retaliation are likely to be the rule not the exception.

See, e.g., Walton v. Johnson & Johnson Svcs., Inc., 347 F.3d 1272, 1291 (11th Cir. 2003). This Court surely understood as much, but it nonetheless adopted the *Ellerth-Faragher* test as a generally-applicable affirmative defense. By allowing "subjective, ungrounded fears" of futility or retaliation to defeat the affirmative defense, the First Circuit has created an exception that swallows this Court's rule and "completely undermine[s]" the *Ellerth-Faragher* framework. *Pinkerton v. Colorado Dept. of Transportation*, 563 F.3d 1052, 1063 (10th Cir. 2009) (quotation omitted). This Court's review is needed to restore and clarify the careful balance that it struck in *Ellerth-Faragher*.

RESPONDENT CANNOT AVOID THE CLEAR CONFLICT CREATED BY THE DECISION BELOW OR THE NEED FOR THIS COURT'S REVIEW

1. Respondent criticizes the petition's discussion of the "friendship" between Executive Director Crespo and Arce and asserts that their friendship cannot be questioned given the jury's verdict. *See* Opp. 7 & n.4, 20 n.13. Construing the evidence in respondent's favor, however, cannot change the evidence itself. As the First Circuit noted, the only evidence of "friendship" between Crespo and Arce was respondent's testimony that she overheard conversations between Vargas and Arce and the fact that Crespo "may have gone out with Arce for drinks." *See* Pet. App. 13a. Petitioner does not dispute either the First Circuit's description of that evidence or its existence. The dispute, rather, is whether the type and degree of "friendship" shown

by that evidence, even when viewed in the light most favorable to respondent, is sufficient to allow respondent to assume that reporting Arce's harassment to Crespo would be futile or lead to retaliation. Even if a close, personal friendship with the harasser could justify a failure to report, neither item relied upon by the First Circuit remotely suggests a close relationship between Arce and Crespo, nor did the First Circuit suggest that its holding was based on a finding of such a close relationship. As to the "overheard conversations," respondent never testified about their contents. *See* A-976. As to the evidence that Arce and Crespo "may have gone out . . . for drinks," the First Circuit's use of this tentative and minimalist formulation is no accident—it was the sum total of the evidence.

Respondent cites six pages of the trial transcript for the assertion that "Arce, Vargas and [Crespo] were friends and would go out for drinks together." Opp. 4 (citing A-798-800, A-954-55, A-976). That citation merits close scrutiny and demonstrates the minimal nature of any "friendship." Pages 798 and 799 relate exclusively to Crespo and Vargas.[1] Pages 954 and 955 relate exclusively to Vargas and Arce; they contain respondent's testimony that Vargas and Arce were at a bar called La Terraza de Julio one evening, "together as usual," along with "some others of their co-workers." A-955. Page 976 relates to

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[1] A-798 ("Q. And after he came to the Association, did you become friends with Mr. Vargas? A [Crespo]. We went on to become co-workers. Q. Do you ever go out for drinks? A. Maybe so. Could be.").

Crespo, but only because respondent there *denied* ever having seen Crespo with Vargas and Arce at La Terraza de Julio. Accordingly, the sole basis for the notion that Crespo was so close to Arce that respondent could bypass the *Ellerth-Faragher* reporting requirement was Crespo's testimony on page 800. That testimony suggested only the most run-of-the-mill collegial office relationship, and nothing approaching a close, personal friendship:

> Q. And do you have a friendship with Mr. Arce?
>
> A. We're also co-workers.
>
> Q. Have you ever gone out for drinks with Mr. Arce?
>
> A. Maybe so. I don't specifically recall that I have, but I might have done so.

If this degree of "friendship" between the alleged harasser and the individual designated to receive internal complaints—co-workers and the possibility of a shared beverage—entitles a would-be plaintiff to forgo reporting, then the affirmative defense is useless. For that very reason, the Fourth, Sixth, and Eighth Circuits have held, contrary to the decision below, that friendship among managers does not render reporting harassment unnecessary. Pet. 15-17 (discussing *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262 (4th Cir. 2001), *Deters v. Rock-Tenn Co.*, 245 Fed. Appx. 516 (6th Cir. 2007), and *Weger v. City of Ladue*, 500 F.3d 710 (8th Cir. 2007)). The conflict is even sharper given that the First Circuit excused respondent's failure to report not merely based on a routine and insignificant degree of "friendship," but even where respondent

conceded that she had no reason to question Crespo's integrity. *See* A-978.

2. Respondent also tries to escape the conflict over whether objective evidence is required by deflecting attention to why a report to *Vargas* was not required. Respondent thus emphasizes that Vargas and Arce were friends and that Vargas retaliated against her after she refused Arce's advances. *See* Opp. 9, 12, 19, 25-26, 32-33. But that is irrelevant given the policy's option of reporting to Crespo, instead of Vargas. No one disputes the reasonableness of petitioner's anti-harassment policy and reporting procedure, a fact that makes this case an attractive vehicle for review. *See* Pet. 35. That policy was reasonable in part because it allowed victims to bypass the human resources director "[i]f the alleged harasser should be this person, or anyone related or close to him." A-156; Pet. 4. If Arce was "close" to Vargas, the policy instructed that "the complaint must be presented directly to the Association's Executive Director." *Id.* Accordingly, Vargas' alleged retaliation was a reason to report the harassment *and* the retaliation to Crespo, not an excuse for failing to do so.[2] *Cf. Matvia v. Bald Head Island Mgt., Inc.*, 259 F.3d 261, 270 (4th Cir. 2001) (bringing a retaliation claim, "rather than failing to

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[2] For these reasons, the only relevant thing about respondent's testimony that she was afraid that "they would take reprisals like they had done before" is that, whomever "they" may have referred to apart from Vargas, Crespo had never taken any "reprisals" and this testimony did not relate to him. *See* Pet. 7, 25 (citing A-1002-03).

report sexual harassment," is proper response to retaliation).[3]

3. Respondent's extensive reliance on the finding that she was constructively discharged is entirely beside the point. *See* Opp. 17-18, 30-32. This Court has squarely held that the *Ellerth-Faragher* framework applies to claims that sexual harassment caused a constructive discharge, where (as here) no tangible employment action is taken. *Pennsylvania State Police v. Suders*, 542 U.S. 129, 148-49 (2004). That harassment results in a constructive discharge therefore cannot mean that the victim's failure to report is reasonable.

4. The court below held that the "significant age differential" between respondent and Arce supported the reasonableness of her failure to report, apparently on the rationale that respondent was especially traumatized because of her "relative youth." Pet. App. 14a. The First Circuit had opened the door narrowly to this rationale in *Reed v. MBNA*

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[3] Respondent's assertion that the facts of *Robinson v. Sappington*, 351 F.3d 317 (7th Cir. 2003), are "almost identical to this case," Opp. 26, is fanciful. Robinson, a clerk being harassed by the judge for whom she worked, reported the harassment to her administrative supervisor and to the presiding judge, in contrast to respondent's failure to report the harassment to anyone. *See* 351 F.3d at 322-24, 337 n.13. And Robinson's employer had not disseminated an anti-harassment policy, and "[t]he record [did] not suggest that [she] was informed of any further avenues of recourse or complaint" beyond the two that she pursued, *id.* at 337 n.13, in contrast to petitioner's promulgation of a reasonable anti-harassment policy and respondent's awareness that she should report to Crespo.

Marketing Systems, Inc., 333 F.3d 27, 37 (1st Cir. 2003), where the plaintiff was a minor and the trauma was extreme (sexual assault). The decision below drove a truck through that narrow opening, extending *Reed* to an adult plaintiff who had not been subjected to sexual assault.[4] Neither respondent nor the First Circuit explains why an age differential, as opposed to not having reached the age of majority, justifies a failure to report. Moreover, this aspect of the decision conflicts with decisions of the Eleventh and Seventh Circuits. *See* Pet. 24-25 (discussing tension between decision below and *Doe v. Oberweis Dairy*, 456 F.3d 704, 713 (7th Cir. 2006) (age), and *Walton*, 347 F.3d at 1290-91 & n.17 (trauma)).

5. Despite the First Circuit's express rejection of the Second Circuit's holding that a failure to report must be justified by evidence "that the employer has ignored or resisted similar complaints or has taken adverse action against employees in response to such complaints," Pet. App. 18a (quoting *Leopold v. Baccarat, Inc.*, 239 F.3d 243, 246 (2d Cir. 2001)), respondent contends that there is no conflict because

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[4] Respondent accuses petitioner of "substitut[ing] its interpretation" of *Reed* for the interpretation given by the First Circuit sitting *en banc* in that case. Opp. 14-15 & n.9. First, the First Circuit did not convene *en banc* in *Reed*. The order quoted by respondent is the *panel*'s explanation of its denial of panel rehearing; rehearing *en banc* was denied without explanation. *See* 337 F.3d 1, 1 (1st Cir. 2003). More fundamentally, as the petition explained (Pet. 21 n.8), regardless of how other courts previously had interpreted ambiguous passages in *Reed*, the First Circuit in the decision below has now clarified the law of that circuit.

Leopold did not mean what it said. *See* Opp. 21-22. According to respondent, reading *Leopold* literally would mean that an employee "who reasonably failed to report harassment *before the procedure had ever been tested"* would be "automatically deprived" of Title VII's protections. Opp. 22 (emphasis in original). But respondent's implicit criticism of *Leopold* does nothing to lessen the split between the First and Second Circuits. Indeed, the split is especially stark in that while the Second Circuit requires demonstrated prior futility or retaliation, the First Circuit appears to treat reporting harassment as optional in the absence of demonstrated prior success.[5]

Respondent next contends (Opp. 25-27 & n.18) that *Leopold* and other cases are distinguishable because they did not involve "actual retaliation" while this case does. This supposed distinction fails because—as already explained, *see supra* at 6—all of respondent's evidence relating to retaliation is exclusive to *Vargas* and does not address her failure

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[5] Respondent criticizes petitioner for asserting that the First Circuit upheld the exclusion of "evidence of past responsiveness" in referring to that court's holding with respect to the policy's conceded effectiveness when it was invoked in 2005. Opp. 22 n.14 (quoting Pet. 11). To be sure, the 2005 complaint occurred after respondent's resignation, albeit before trial. As the petition explained, however, the important point is that the First Circuit not only held that evidence of past futility or retaliation was not required, *contra Leopold*, but went so far as to hold that the only evidence offered at trial bearing on the policy's actual effectiveness was irrelevant. *See* Pet. 10 n.4.

to report to *Crespo*, whom she does not allege to have engaged in any actual or threatened retaliation.[6]

6. Finally, respondent argues against certiorari on the ground that the reasonableness of a failure to report depends on the "totality of the circumstances." Opp. 11, 13 n.8, 18 n.12, 19, 28. But respondent's repetition of this phrase cannot make the divergent legal approaches of the circuits disappear or transform the evidence in this case into the objective evidence demanded by other circuits. That the applicable standard is one of "reasonableness" does not mean the standard has no legal content or that a split cannot emerge, as this Court's routine review of Fourth Amendment issues amply demonstrates.

Certainly *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75 (1998), despite its prominence in the brief in opposition, does not suggest that the *Ellerth-Faragher* inquiry is hopelessly factbound. Indeed, as one might expect from an opinion authored by Justice Scalia, *Oncale* is not a paean to the superiority of the totality-of-the-circumstances

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[6] Respondent's accusation that the petition misstated the evidence relating to Vargas (and his alleged mistress Del Valle) is beside the point for the same reason. Respondent's accusation also is incorrect. Respondent attacks the "statement in the Petition that the 'only witness besides respondent to an incident of possible harassment was a fellow employee named Jose Francisco Figueroa-Cana.'" Opp. 31-32 n.22 (purporting to quote Pet. 5). The quoted statement, however, does not appear in the petition. Rather, petitioner stated: "The only witness besides respondent *to testify* to an incident of possible harassment was a fellow employee named [Figueroa]." Pet. 5 (emphasis added). Petitioner's statement was correct. *See also* Pet. 4 n.1.

test, and predating *Ellerth* and *Faragher* and addressing the distinct question of how to judge the "objective severity of harassment," *see* 523 U.S. at 81, *Oncale* hardly could hold the key to how the Court should refine the affirmative defense that it fashioned in *Ellerth* and *Faragher*. Moreover, in giving content to the reasonableness of a plaintiff's failure to report under *Ellerth-Faragher*, it surely cannot be reasonable to adopt a standard that excuses reporting so often that the entire careful balance struck by the Court is undermined. Employers will not have incentives to create internal reporting systems and those systems will not stop harassment before it escalates, if there is no incentive to report and no reward for employers who adopt reasonable systems.

Respondent concludes that she was justified in not reporting the harassment because "[i]t was reasonably foreseeable for Crespo to protect Arce and Vargas." Opp. 33. The question on which this Court's guidance is needed is whether it is reasonable for an employee simply to assume that managers are likely to stick together and that reporting harassment will be useless or worse, *see* A-976, A-1003, or whether there must be an objective foundation for such a belief. Such an objective foundation could take multiple forms, and this Court of course could leave it to the lower courts to apply an objective-evidence requirement in the myriad factual scenarios that may arise. But if there is no requirement for an objective basis to excuse a failure to report, then reporting will be the exception rather than the rule and this Court's carefully-crafted scheme will be vitiated. *Cf. Crawford v. Metro. Gov't*

of Nashville and Davidson County, 129 S.Ct. 846, 852 (2009) (rejecting an interpretation that would "largely undermine the *Ellerth-Faragher* scheme" and Title VII's primary purpose of avoiding harm by encouraging employees to "keep quiet"). Every *Ellerth-Faragher* case will have some degree of factual content, and this case presents the issue in a uniquely clean manner: petitioner's satisfaction of the first prong, respondent's failure to report the harassment to anyone, and the lack of any objective evidence that reporting to Crespo would be futile or provoke retaliation are all undisputed. *See* Pet. 35-36.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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