No. 08-

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an employer is vicariously liable under Title VII for sexual harassment where the employer has implemented a concededly adequate anti-harassment policy with complaint procedure pursuant to this Court's decisions in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and the plaintiff fails to take advantage of the policy because of an unsupported subjective belief that it would be futile or lead to retaliation.

CORPORATE DISCLOSURE STATEMENT

Petitioner Asociacion de Empleados del Estado Libre Asociado de Puerto Rico is a private non-profit entity composed of and owned by public employees. There is no parent or publicly-held company owning 10% or more of petitioner's stock.

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The Asociacion de Empleados del Estado Libre Asociado de Puerto Rico respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the First Circuit.

OPINIONS BELOW

The decision of the court of appeals is reported at 554 F.3d 164 and is reproduced in the Appendix herein at 1a-25a. The decision of the U.S. District Court for the District of Puerto Rico is not officially reported but is available at 2007 WL 2245944 and is reproduced in the Appendix at 26a-32a.

JURISDICTION

The judgment of the court of appeals was issued on January 26, 2009. Pet. App. 1a. Petitioner's timely petition for rehearing and rehearing en banc was denied on February 20, 2009. Pet. App. 33a. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-2(a)(1), provides:

> (a) Employer practices
>
> 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.

STATEMENT

This case concerns the continuing vitality of this Court's decisions in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). In those decisions, this Court struck a balance between imposing vicarious liability under Title VII and providing incentives for employers to avoid that liability by creating adequate internal anti-harassment and complaint policies. The Court first held that an employer is vicariously liable under Title VII for a supervisor's sexual harassment creating a hostile work environment. Where no tangible employment action is taken, however, the Court made clear that the employer has an affirmative defense if it shows (1) that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior," such as by implementing an anti-harassment policy with complaint procedure; and (2) that the "plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer," such as by unreasonably failing to use such a complaint procedure. *See Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807. The decision

below interprets the second prong of that analysis to make the employee's use of a valid complaint procedure essentially voluntary, which has the effect of fundamentally reworking the balance the Court struck in *Ellerth* and *Faragher*.

In the present case, respondent alleged, and the jury found, that she was sexually harassed for several months by a supervisor who created a hostile work environment. Petitioner had instituted an anti-harassment policy and complaint procedure of which respondent was aware. The jury found that petitioner carried its burden under *Ellerth* and *Faragher* of exercising reasonable care to attempt to prevent and correct sexual harassment by adopting and disseminating this anti-harassment policy. Respondent nonetheless did not report the harassment to petitioner at any time during her employment; instead, she resigned and then brought this suit.

1. Respondent Michelle Monteagudo worked in 1999 and 2000 as a temporary employee at petitioner Asociacion de Empleados del Estado Libre Asociado de Puerto Rico ("AEELA"). In October 2000, she became a permanent secretary in the Human Resources Department. At that time, she was provided a copy of petitioner's sexual harassment policy, for which she signed a receipt. Court of Appeals Appendix ("A") 938-39. Respondent acknowledged that she had a copy of the policy and knew "what the procedures that needed to be followed were." A-974. Petitioner's policy stated:

> An employee who feels he has been sexually harassed at work in any way, should present his complaint to the

> Human Resources Department. If the alleged harasser should be this person, or anyone related or close to him, then the complaint must be presented directly to the Association's Executive Director.

A-156.

Respondent's immediate supervisor in the Human Resources Department was Orlando Vargas, the Director of Human Resources. Juan Francisco Arce-Diaz ("Arce"), a payroll, fringe benefits, and compensation manager for whom respondent had worked as a temporary employee, also assigned her work. Respondent testified that Arce began harassing her in mid-2002. Arce would "stop by" her work station at least once a day and "touch [her] on the shoulder," and she would "throw his hand backwards so he'd leave [her] alone." A-962-63. He also invited her "constantly to go out together" with other co-workers. A-961. In November 2002, after several months of this behavior, respondent testified that Arce "pulled [her] towards him to try to kiss [her]" in the parking lot of a local bar and she pushed him away. A-956-57.[1] The next work day, "the attitude displayed towards [respondent] by Mr. Vargas and Mr. Arce" was "changed completely around." A-963-64. Respondent testified that she was given additional work and that when she complained to Vargas about the work, "he slammed the desk very hard and told me that if I filed a

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[1] Respondent testified that Vargas and a co-worker named Marilyn Del Valle Cruz witnessed the incident in the parking lot. They both testified that they never witnessed any inappropriate conduct. A-1034, 910.

complaint, the next day I would be dismissed." A-967. Respondent did not mention the alleged harassment in the parking lot (or any other harassment) in this complaint to Vargas.

The only witness besides respondent to testify to an incident of possible harassment was a fellow employee named Jose Francisco Figueroa-Cana ("Figueroa"). Figueroa testified that one time he saw Arce "place[] his hand on her . . . waist . . . [in] an undesirable action." Court of Appeals Supplemental Appendix ("SA") 10. Respondent told him "that was something that normally took place . . . that [Arce] would always try to seek a way so he could touch her." SA-12.

Figueroa also advised respondent on the procedures that she could follow to report Arce's alleged harassment. SA-15. Figueroa testified that "[he] told her to go through the channels as to the policies that AEELA refers to." SA-15. He later testified, however, that "[he] would tell her that [he] didn't know what [he] could recommend to her because of the type of person we were dealing with." SA-18. And he said the matter was "extremely difficult and quite delicate" because it involved Vargas and Arce. SA-19. Figueroa was a union delegate, but he did not alert the union to respondent's allegations of harassment for a variety of reasons: he did not represent her department, "for me it was extremely difficult to bring forth something like this dealing with who we dealt with," the union was "very weak," and the union president would not be helpful. SA-19-22. Notwithstanding Figueroa's equivocal advice to respondent, he testified that he had filed his own complaint with

Vargas relating to sexual harassment, and that petitioner had responded promptly and effectively. SA-23-28.

2. It is undisputed that respondent never told anyone in petitioner's management that she was sexually harassed. Petitioner's policy offered two options to report the alleged harassment: the Human Resources Department or petitioner's Executive Director (Pablo Crespo-Claudio ("Crespo")). Respondent testified that she did not report Arce's harassment to Vargas, the director of Human Resources, because Vargas and Arce were friends and had been out together at the bar where Arce allegedly tried to kiss respondent in the parking lot.[2]

With respect to Executive Director Crespo, respondent conceded that she had no reason to doubt his integrity. A-978. And respondent conceded that she had no knowledge of any past failure by Crespo to respond adequately to a harassment complaint. Indeed, respondent did not suggest that she had any reason to believe that, whether the complaint was made to the Human Resources Department or directly to the Executive Director, petitioner ever had failed to respond adequately to a harassment complaint.

Nonetheless, respondent testified that she did not report the harassment to Crespo because she believed the managers were all friends and would stick together rather than help a junior employee like her:

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[2] Nor did respondent report the alleged harassment to Vargas's supervisor, Blanca Medina de Grau, even though respondent "had no problems with her," A-1000, and Medina was not a friend of Arce's.

> Because the person I needed to complain with were all friends. Either it be the executive director or the human resources director, they're all friends amongst themselves. We're talking about some managerials versus an employee who virtually had started working a few days before.

A-976; *cf.* A-1003 (respondent's counsel stating that respondent's "sole reason" for believing Medina would protect Vargas and Arce was that all three "were managerials").

3. A week or two after the alleged incident in the parking lot, on December 5, 2002, respondent submitted a letter of resignation to Executive Director Crespo. Respondent's resignation letter did not report the alleged harassment. Far from it: the letter stated that respondent was "very grateful for the opportunity that you gave me to work for [petitioner], getting to know and fraternizing with other colleagues and of belonging to such an excellent team." A-154. At trial, respondent claimed that a friend drafted the letter. She testified that the letter was false but that she signed it because "if I were to need something from the Association later, I wanted the doors to be open." A-988.

4. A year after resigning, on December 23, 2003, respondent filed suit against petitioner in the U.S. District Court for the District of Puerto Rico, alleging sexual harassment under Title VII and the laws of Puerto Rico. The district court had subject-matter jurisdiction pursuant to 28 U.S.C. 1331 and 1367(a). At the end of respondent's case, and again at the close of all the evidence, petitioner moved for

judgment as a matter of law under Fed. R. Civ. P. 50(a) on the ground that it had established the *Ellerth-Faragher* affirmative defense. The district court denied the motions and submitted the affirmative defense to the jury.

The jury found that respondent was subjected to sexual harassment in violation of Title VII and Puerto Rico's analogous laws. The jury found for petitioner on the first prong of the *Ellerth-Faragher* defense, but for respondent on the second prong. A-601. The jury awarded compensatory damages of $333,000 and punitive damages of $300,000. The court then apportioned $1 of the compensatory damages to the Title VII claim and $332,999 to the claim under Puerto Rico law, because the latter provides for doubling compensatory damages. The resulting award was $965,999 not including interest. A-621. Petitioner renewed its motion for judgment as a matter of law as to the second prong of *Ellerth* and *Faragher*, but the district court denied the motion. Pet. App. 26a-32a.[3]

5. The First Circuit affirmed. Since the "parties agree[d] that the sexual harassment policy AEELA had in place was sufficient for it to meet the first prong of the defense," the only issue was whether respondent's "reasons for failing to report Arce's conduct to her superiors was [*sic*] unreasonable." Pet. App. 12a-13a. The court stated that under circuit precedent, "'[t]here is no bright-line rule as to when a failure to file a complaint

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[3] The Puerto Rico Supreme Court subsequently imported the *Ellerth-Faragher* framework into local law. *See Albino Agosto v. Angel Martinez, Inc.*, 2007 WL 1828398, *8 & n.4 (P.R. June 4, 2007).

becomes unreasonable.'" Pet. App. at 12a (quoting *Reed v. MBNA*, 333 F.3d 27, 35 (1st Cir. 2003)). The court concluded that respondent was "understandably reluctant to report Arce's behavior to Vargas because of the closeness of Vargas's relationship with Arce." Pet. App. 13a.

The court below found "more difficult" the question whether respondent's failure to report Arce to Crespo on the basis of their alleged friendship was unreasonable. Pet. App. 13a. The court of appeals noted that the "only evidence that [respondent] proffers for this friendship are conversations she overheard by Vargas and Arce and the fact that Crespo testified that he may have gone out with Arce for drinks." Pet. App. 13a. Nonetheless, the court cited other factors that it believed the jury could have taken into account, including Figueroa's advice to respondent that "the matter was 'extremely difficult and quite delicate' given the people involved," and the fact that "witnesses to the alleged harassment failed to report the sexual harassment as well." Pet. App. 13a. Although respondent had not testified that her age had anything to do with her decision not to make a complaint, the court below stated that respondent's "relative youth compared to Arce" also supported the reasonableness of her failure to report. Pet. App. 13a.

Moreover, although there was no evidence that petitioner ever had responded improperly or ineffectively to a harassment complaint, the First Circuit held that that did not matter. "Unlike other circuits," it explained, "we have not required . . . evidence demonstrating '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)).[4] Nor did the court below point to any other objective basis to believe that a complaint would have been futile or provoked retaliation. Instead, the court simply invoked its prior caselaw stating that "juries are supposed to be good at detecting false claims and at evaluating reasonable behavior in human situations," Pet. App. 13a, and concluded that "[w]hile Monteagudo's evidence is not overwhelming, we believe that a reasonable jury could conclude that her failure to report was based on 'more than ordinary fear or embarrassment' and was therefore reasonable." Pet. App. 14a.[5]

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[4] The court below noted this disagreement with other circuits in rejecting petitioner's challenge to the exclusion of evidence that petitioner had successfully taken corrective measures in cases where its anti-harassment policy had been used. Pet. App. 18a. The First Circuit not only held that respondent need not point to past instances where petitioner's policy had failed, but also found it irrelevant that petitioner's policy in fact had succeeded in other cases. The court's holding that it could be reasonable for respondent to forgo reporting without regard to the actual efficacy of petitioner's policy underscores the court's acceptance of purely subjective and unsupported reasons for not reporting.

[5] The finding that petitioner fulfilled its duty under the first prong of *Ellerth-Faragher* to act reasonably to prevent and correct harassment cannot be reconciled with the finding necessary to permit punitive damages, *i.e.*, that petitioner acted "with malicious or reckless indifference" to respondent's rights and did not make "good-faith efforts to comply with Title VII." *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 545-46 (1999). The court below held that petitioner had waived any challenge to the punitive damages and declined to set aside the award on plain-error review. Pet. App. 21a-25a.

6. On February 20, 2009, the First Circuit denied petitioner's petition for rehearing or rehearing *en banc*. Pet. App.33a.

REASONS FOR GRANTING THE WRIT

The decision below effectively eviscerates the careful balance this Court struck in *Ellerth* and *Faragher* and creates a clear circuit conflict on whether generalized fears of retaliation or futility without any objective support excuse a would-be plaintiff from the duty to report sexual harassment pursuant to an employer's adequate anti-harassment policy. Several courts of appeals have held, using various formulations that all conflict with the decision below, that a plaintiff must have concrete, objective reasons for not reporting.

The Second Circuit requires proof that "the employer has ignored or resisted similar complaints or has taken adverse action against employees in response to such complaints." *Leopold v. Baccarat, Inc.*, 239 F.3d 243, 246 (2001). While acknowledging that holding, the First Circuit expressly rejected it (going so far as to uphold the exclusion of evidence of past responsiveness). Pet. App. 18a. There is clearly no such objective evidence in this case.

The Fourth Circuit has held that an employee cannot assume that a complaint will be futile "merely because members of the management team happen to be friends." *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262, 268 (4th Cir. 2001). The court below, in contrast, held that respondent could forgo reporting because the person to whom the report should have been made (Executive Director

Crespo) may have socialized on occasion with the harasser along with other employees. *See* Pet. App. 13a.

The Eighth Circuit has held that fear of retaliation is not "generally a proper excuse for failing to report," because "[n]ormally bringing a retaliation claim, rather than failing to report sexual harassment, is the appropriate response to the possibility of retaliation." *Adams v. O'Reilly Automotive, Inc.*, 538 F.3d 926, 933 (8th Cir. 2008). The court below, in contrast, in the absence of any objective basis to believe that retaliation was likely, accepted respondent's generalized, subjective fear of retaliation as a justification for failing to report.

The Eleventh Circuit has held that reporting is required except "in extreme cases." *Baldwin v. Blue Cross/Blue Shield of Alabama*, 480 F.3d 1287, 1306 (11th Cir. 2007). The court below, in contrast, held that reporting was not required in what is at most a typical case, with no facts that remotely can be termed "extreme."

In all these respects, the decision below conflicts with decisions of other circuits. Moreover, although the Third and Fifth Circuits have not addressed the issue as explicitly as the First Circuit, those courts appear to be aligned with the court below in adopting a decidedly more permissive attitude in allowing employees who bypass valid complaint procedures to prevail despite this Court's holding in *Ellerth* and *Faragher*.

The net effect of the decision below is to eviscerate the careful balance that this Court struck in *Ellerth* and *Faragher*. The availability of an affirmative defense was critical to the Court's

recognition of vicarious liability and to providing employers with the proper incentives to establish anti-harassment and complaint procedures. But those incentives will be diminished if the affirmative defense can be vitiated based on the thin showing accepted by the court below. Enforcement of the affirmative defense is important not merely to employer-defendants, but more fundamentally to the Court's carefully-crafted scheme to further Title VII's goal "to promote conciliation rather than litigation." *Ellerth*, 524 U.S. at 764. It is "at odds with the statutory policy" to impose vicarious liability on employers without giving employers "credit" for making "reasonable efforts to discharge their duty" by implementing anti-harassment policies. *Faragher*, 524 U.S. at 806.

When this Court imposed the reasonable-reporting duty, the Court understood that "the victim may well be reluctant to accept the risks of blowing the whistle on a superior." *Id.* at 803. But because "the cooperation of the victims" is necessary to expose and eliminate sexual harassment, *Walton v. Johnson & Johnson Svcs., Inc.*, 347 F.3d 1272, 1290 (11th Cir. 2003), and because it would be contrary to Congress' intent to impose automatic vicarious liability on employers, the Court required plaintiffs to act reasonably to report harassment despite the obvious reasons why many will be reluctant to do so. Most courts of appeals have recognized that excusing a failure to report based on nothing more than "subjective, ungrounded fears" would "completely undermine" the *Ellerth-Faragher* framework, *Pinkerton v. Colorado Dept. of Trans.*, __ F.3d __, 2009 WL 1014589, *8 (10th Cir. Apr. 16,

2009), and accordingly have insisted on concrete, objective reasons before a failure to report is excused. This Court should review and correct the First Circuit's contrary holding to restore uniformity and to vindicate the careful balance that the Court struck in *Ellerth* and *Faragher*.

I. The Circuits Are Divided On What Constitutes A Reasonable Justification For An Employee To Bypass A Valid Complaint Procedure

A. In Conflict With The Decision Below, Most Circuits Require A Concrete, Objective Basis to Believe A Complaint Will Be Futile

1. Although their formulations of this rule have varied, a majority of the circuits require that there be concrete evidence of futility, beyond the victim's mere unsupported belief, to excuse a failure to follow the employer's complaint procedure. As the decision below acknowledges, the Second Circuit requires a showing that reporting has proved futile (or worse) in the past. Pet. App. 18a; *Leopold v. Baccarat, Inc.*, 239 F.3d 243, 246 (2d Cir. 2001) (plaintiff must demonstrate "that the employer has ignored or resisted similar complaints or has taken adverse action against employees in response to such complaints").

The Eighth and Ninth Circuits similarly have rejected efforts to bypass valid procedures absent actual evidence of futility. *See Weger v. City of Ladue*, 500 F.3d 710, 725 (8th Cir. 2007) (unsupported belief in futility insufficient to excuse failure to report); *Holly D. v. Cal. Instit. of Tech.*, 339

F.3d 1158, 1179 n.24 (9th Cir. 2003) (same). The Sixth and Tenth Circuits have reached similar holdings in unpublished opinions. *See Anderson v. Wintco, Inc.*, __ Fed. Appx. __, 2009 WL 449169, *4 (10th Cir. Feb. 24, 2009); *Deters v. Rock-Tenn Co.*, 245 Fed. Appx. 516, 525-26 (6th Cir. 2007).

In short, the majority rule, as articulated by the Fourth Circuit, is that "[a]n employee's subjective belief in the futility of reporting a harasser's behavior is not a reasonable basis for failing to take advantage of any preventive or corrective opportunities provided by the employer." *Barrett*, 240 F.3d at 268. The decision below, in contrast, expressly holds that objective evidence of actual futility is not required (and it is clear that no such objective evidence exists in this case). By approving respondent's unsupported subjective belief in futility as a valid reason to forgo reporting, the First Circuit has departed sharply from the majority of the courts of appeals.

2. More specifically, other courts have held that alleged friendship between managers is not a sufficient basis to assume that reporting will be futile. If it were, the *Ellerth-Faragher* framework would essentially be unavailable whenever a supervisor contributed to the alleged harassment. In *Barrett*, the Fourth Circuit explained that excusing reporting because of management friendships would vitiate the affirmative defense:

> We cannot accept the argument that reporting sexual harassment is rendered futile merely because members of the management team happen to be friends. Crediting this

> view would impose an impermissible burden on any company, especially small businesses. . . . [Plaintiff] claims that these friendships should relieve an employee of her reporting obligation and effectively impose automatic liability on the employer. Automatic liability, however, is precisely what the Supreme Court sought to avoid in fashioning the *Faragher/Ellerth* affirmative defense.

240 F.3d at 268. The Sixth and Eighth Circuits likewise have held that friendship between managers is common and does not, as a matter of law, excuse a failure to report. *See Deters*, 245 Fed. Appx. at 525 (that managers are friends is insufficient reason not to complain); *Weger*, 500 F.3d at 724-25 (plaintiffs' belief that they would not receive fair investigation because of "close relationship" between harasser and investigator is "insufficient"); *see also Holly D.*, 339 F.3d at 1179 n.24 (allegation of "faculty bias" does not "support a reasonable belief that Caltech was so biased that resort to its procedures would have been futile").

This case does not involve any allegation of a close, personal relationship, but only a degree of "friendship" that is to be expected of management in all but the largest enterprises. While the court below relied primarily on respondent's testimony that Crespo and Arce were friends, Pet. App. 13a, there was no evidence that Crespo and Arce were close friends, or relatives, or otherwise had such a close personal relationship that respondent could presume that Crespo would protect Arce in violation

of petitioner's written policy (and of the law). To the contrary, the evidence of Crespo's "friendship" with Arce consisted solely of the assertion that Crespo may have gone out for drinks on occasion with Arce, as Crespo also did with others in the office. *See* A-800 ("Have you ever gone out for drinks with Mr. Arce? [Crespo:] Maybe so. I don't specifically recall that I have, but I might have done so."). This shows -- at most -- a run-of the-mill collegial relationship, and is patently insufficient to excuse a failure to report under the law of most circuits.

The court also suggested that Figueroa's advice that the matter was "extremely difficult and quite delicate" bolsters respondent's assumption of futility. Pet. App. 14a. But again, this conflicts with the law of other circuits. Vague notions that managers stick together and of friendship among managers do not become transformed into objective evidence of futility by being described by a co-worker. What Figueroa pointedly did *not* say was that he knew of any complaints that had been futile or had resulted in retaliation. And he did not tell respondent that making a report would be futile or advise her not to make a report. To the contrary, he first testified that he told her to follow petitioner's procedures, and then equivocated that he did not know what to recommend. *See* SA-15, 18. Even if a co-worker's advice could substitute for evidence of actual futility in some circumstances (for example, where a co-worker erroneously tells the plaintiff that past complaints have been futile and the plaintiff forgoes reporting because she reasonably and sincerely believes that erroneous advice), Figueroa's equivocal advice did not come close to justifying

respondent's assumption that reporting would be futile.[6]

B. In Conflict With The Decision Below, Most Circuits Require A Concrete, Objective Basis To Believe A Complaint Will Lead To Retaliation

1. A majority of the circuits hold that a generalized, unsupported fear of retaliation does not, as a matter of law, excuse a failure to report sexual harassment. As with an excuse based on futility, an excuse based on fear of retaliation must be founded on objective evidence, not subjective fears or skepticism. As the Eleventh Circuit has explained,

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[6] The court below also stated that the jury could consider "the fact that witnesses to the alleged harassment failed to report the sexual harassment as well." Pet. App. 14a. But the court did not explain how the alleged failure of Vargas and Del Valle to report the alleged parking lot incident bears upon respondent's reasonableness in failing to report to Executive Director Crespo, and it does not. First, whether other employees failed to report as required by petitioner's anti-harassment policy is beside the point, for the reasonable reporting duty imposed by this Court rests on the would-be plaintiff. Second, that Vargas (who allegedly was complicit in Arce's harassment) failed to report it cannot excuse respondent's failure to follow the other specific avenue provided by the policy -- *i.e.*, reporting the harassment to Crespo, who was not alleged to be in any way complicit in it and whose integrity respondent had no reason to question. *See supra* at 6; *see also Wyatt v. Hunt Plywood Co.*, 297 F.3d 405, 413 (5th Cir. 2002) (where supervisor to whom employee initially reported later joined in harassment, employee's "reasonable (not to mention obvious) course of action would have been to report [original harasser's] and [supervisor's] conduct to one of those individuals with authority higher than [supervisor's]").

"subjective fears of reprisal may exist in every case, but those fears, standing alone, do not excuse an employee's failure to report a supervisor's harassment." *Walton*, 347 F.3d at 1291. Similarly, the Eighth Circuit has admonished that "[w]e do not believe that a fear of retaliation is generally a proper excuse for failing to report sexual harassment." *Adams*, 538 F.3d at 932; *see also Weger*, 500 F.3d at 725 (fear of retaliation must be "truly credible"). Other circuits likewise have emphasized that a certain degree of concern over the potential for retaliation is inherent in the employer complaint process that the Court sanctioned, so undifferentiated and unsupported subjective fears "do not alleviate the employee's duty under *Ellerth* to alert the employer to the allegedly hostile environment." *Thornton v. Federal Express*, 530 F.3d 451, 457 (6th Cir. 2008) (internal quotation omitted); *accord Shaw v. Autozone*, 180 F.3d 806, 813 (7th Cir. 1999); *Pinkerton*, 2009 WL 1014589, *8.

The Fourth Circuit's decision in *Barrett* illustrates the majority rule requiring concrete, objective evidence that retaliation is likely before a failure to report is excused. The plaintiff there claimed that she feared retaliation because the company president and the harasser were "good friends." 240 F.3d at 267-68. But because there was no evidence that the company had "ever taken any adverse tangible employment action against complaining employees," the court held that the plaintiff's fear was merely "[a] generalized fear of retaliation" that could not excuse her failure to report. *Id.*

Similarly, in the decision that the court below expressly rejected, the Second Circuit held that evidence of actual retaliation against prior complainants was required:

> A credible fear [of retaliation] must be based on more than the employee's subjective belief. Evidence must be produced to the effect that the employer has ignored or resisted similar complaints or has taken adverse actions against employees in response to such complaints.

Leopold, 239 F.3d at 246.[7]

2. a. In conflict with these decisions, the First Circuit expressly acknowledged that it does not require concrete evidence to support an alleged fear of retaliation (or belief in futility):

> Unlike other circuits, we have not required that in order to overcome the second prong of the *Faragher-Ellerth* affirmative defense, plaintiffs must produce evidence demonstrating "that the employer has ignored or resisted similar complaints or has taken adverse action against employees in response to such complaints." *See, e.g., Leopold v. Baccarat, Inc.*, 239 F.3d 243, 246 (2d Cir. 2001).

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[7] *Cf. Distasio v. Perkin Elmer Corp.*, 157 F.3d 55, 59, 64-65 (2d Cir. 1998) (failure to report later harassment excused where plaintiff initially reported co-worker's harassment to supervisor and supervisor told her she was "crazy" and would lose her job if she complained).

Pet. App. 18a. Indeed, the First Circuit not only explicitly rejected the Second Circuit's holding in *Leopold*, but went so far as to uphold the exclusion of evidence concerning an instance in which the internal complaint procedures had proven successful. Pet. App. 18a. Accordingly, while in the Second Circuit evidence of past futility or retaliation is required, in the First Circuit evidence of success is not even relevant.

In approving a failure to report based on unsupported, subjective fear of retaliation, the decision below built on the foundation that the First Circuit had laid in *Reed v. MBNA Mrkg. Sys., Inc.*, 333 F.3d 27 (2003). *Reed* noted that other courts had "focused on whether the employee had concrete reason to apprehend that complaint would be useless or result in affirmative harm to the complainant." *Id.* at 35-36. But *Reed* did not adopt this standard. Instead of giving legal content to this Court's "reasonableness" requirement, *Reed* stated that "juries are supposed to be good at . . . evaluating reasonable behavior in human situations," and reversed summary judgment for the employer. *Id.* at 37. Indeed, *Reed* acknowledged that its holding "creates a loophole for false and overstated claims of threat by one hoping to reach a sympathetic jury." *Id.*[8]

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[8] Before the decision below, some courts had quoted other language in *Reed* in support of a standard similar to the majority rule requiring concrete, objective evidence. *See, e.g.*, *Weger*, 500 F.3d at 725. *Reed* suggested, for example, that "unless patently futile, concerns as to whether the complaint mechanism will fail can be tested by trying it out . . ." 333 F.3d at 36. Despite this language, *Reed*'s reversal of summary judgment for the employer meant that the plaintiff was *not*

b. The Third and Fifth Circuits appear to align with the First Circuit in declining to require objective evidence that a report of harassment would lead to retaliation. While these circuits have not addressed the issue as explicitly as the First Circuit, any requirement of an objective basis for a failure to report is conspicuous by its absence from their decisions, despite the substantial body of caselaw from other circuits adopting such a rule.

In *Cardenas v. Massey*, 269 F.3d 251, 267 (3d Cir. 2001), the Third Circuit held that whether an employee acted reasonably was a question for the jury where the employee waited four years to file a formal complaint "for fear of aggravating the situation or branding himself a troublemaker." There is no indication that the employer had retaliated against any prior complainants or of any other objective basis for the employee's fear that making a report would lead to adverse consequences. And rather than follow the Fourth and Seventh Circuits' decisions in *Barrett*, 240 F.3d at 267-68, and *Shaw*, 180 F.3d at 813, respectively, by requiring objective evidence, the Third Circuit focused on the employee's subjective belief.[9]

Similarly, in *Mota v. Univ. of Texas Houston Health Science Center*, 261 F.3d 512, 526 (5th Cir.

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required to test out the complaint mechanism or to present any objective support for her belief in futility or retaliation. *Id.* at 37. In any event, the decision below has resolved any ambiguity in *Reed*, and it now is plain that the First Circuit does not require the concrete, objective evidence required by most circuits.

[9] *Cardenas* involved national-origin harassment, but the court expressly adopted the *Faragher/Ellerth* framework in that analogous context. *See* 269 F.3d at 261 n.6.

2001), the Fifth Circuit held that a nine-month delay in reporting harassment was reasonable where the supervisor threatened retaliation and the plaintiff "may have believed [the complaint process] was "ineffectual, given [the supervisor's] influence at the University." As in *Cardenas*, there is no indication in *Mota* that the employee's fear of retaliation was objectively supported, and the court focused instead on the employee's subjective belief.[10]

C. In Conflict With The Decision Below, Other Circuits Do Not Excuse A Failure to Report Even When The Plaintiff Suffers Much More Severe Trauma

The decision below also creates a circuit split on the question whether a failure to report sexual harassment can be excused because the plaintiff is young or has been traumatized by the harassment.

The decision below holds that respondent's failure to report was reasonable in part because respondent may have been more traumatized by it given the "significant age differential" between respondent and Arce. Pet. App. 14a. In *Reed*, the First Circuit had held that trauma could be a

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[10] Some unpublished decisions arguably vary in their application of *Cardenas* and *Mota*, but as unpublished decisions they do not purport to change the law of the circuit. *See, e.g., Amati v. U.S. Steel Corp.*, 304 Fed. Appx. 131, 134 (3d Cir. 2008) (four-month delay in reporting unreasonable); *Harper v. City of Jackson Municipal School Dist.*, 149 Fed. Appx. 295, 302 (5th Cir. 2005) ("reasons for not complaining about harassment should be substantial and based upon objective evidence") (quotation omitted).

reasonable justification for failing to report where the plaintiff was a minor and had been sexually assaulted. *See* 333 F.3d at 37. By extending *Reed* to hold that respondent's "relative youth compared to Arce bears at least some relevance" even though respondent was not a minor (she was 22 and Arce 45) and did not suffer the kind of trauma associated with sexual assault, the decision below demonstrates the extent of the conflict among the circuits. Pet. App. 14a.

As to trauma, in contrast to the decision below, the Eleventh Circuit has rejected trauma as an excuse for failing to make a timely report despite the plaintiff's allegations that she was raped repeatedly and intimidated by being shown a gun. *See Walton*, 347 F.3d at 1290-91 & n.17. The court acknowledged that "severe harassment such as that which is alleged to have occurred here can be particularly traumatic," but it held that such trauma was insufficient as a matter of law to excuse the plaintiff's three-month delay in reporting. *Id.* at 1290. Without embracing this decision as correct, it does underscore the chasm between the approaches of the Eleventh and First Circuits.

As to age, there is similar tension between the decision below and a decision of the Seventh Circuit on the relevance of the plaintiff's "relative youth." In *Doe v. Oberweis Dairy*, 456 F.3d 704, 713 (7th Cir. 2006), the Seventh Circuit held that, in assessing whether sexual conduct constituted unwelcome harassment, courts should look to whether the plaintiff was below the local age of consent. That bright-line approach to the relevance of age makes sense. But the decision below -- by injecting age as a

mitigating factor in the case of someone well above the age of consent -- distracts attention from objective evidence that could justify a failure to use valid and available complaint mechanisms.[11]

II. The First Circuit's Approach Vitiates The Affirmative Defense That This Court Created In *Ellerth* and *Faragher*

As most circuits have recognized, subjective fears of retaliation or futility concerning the employer's internal complaint procedure can exist in every case. After all, in every case it is the employer that is allegedly responsible, at least at some remove, for the harassment, and the employer is certainly in a position to retaliate in that it will be overseeing the complaint procedure. If such fears, without more, rendered it "reasonable" not to report harassment, the affirmative defense that this Court created would be essentially useless -- not only in protecting employers from the automatic liability that this Court held improper, but more fundamentally in achieving the Court's goal of furthering Title VII's "primary objective" of "avoid[ing] harm." *Faragher*, 524 U.S. at 806. To be sure, the Court's "reasonableness" standard does not invariably require every victim to report harassment no matter what the circumstances. But by holding

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[11] Respondent did not testify that she failed to report because of youthful naivete or any alleged trauma. Any such suggestion would be contrary to respondent's testimony that she omitted any reference to the alleged harassment in her resignation letter because she wanted to keep her options open with petitioner. *See supra* at 7.

that a failure to report can be excused based on nothing more than the subjective, unsupported reasons offered by respondent, the First Circuit has vitiated the affirmative defense and the careful balance struck by this Court in *Ellerth* and *Faragher*.

A. Reporting Should Be Presumptively Required, And Failure To Report Should Be Excused Only For Objectively Supported Reasons

This Court fashioned the affirmative defense in order to avoid imposing automatic liability on employers -- which it held that Title VII could not support -- and because the affirmative defense would further Title VII's "basic policies of encouraging forethought by employers and saving action by objecting employees." *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 764. The Court also noted, that in crafting this scheme, it intended to provide an "incentive" or "credit" to employers who make reasonable efforts to discharge their duty. *Faragher*, 524 U.S. at 806. "To the extent limiting employer liability could encourage employees to report harassing conduct before it becomes severe or pervasive, it would also serve Title VII's deterrent purposes." *Ellerth*, 524 U.S. at 764. This Court recently reaffirmed that *Ellerth* and *Faragher* are intended to create "a strong inducement" for employers to implement anti-harassment policies "as a way to break the circuit of imputed liability." *Crawford v. Metropolitan Gov't of Nashville and Davidson County*, 129 S. Ct. 846, 852 (2009).

Because the obligations of the employer and employee function together to help prevent, discover, and remedy sexual harassment, enforcement of the employee's obligation to report sexual harassment is critical to the effective functioning of the entire scheme: "The genius of the *Faragher-Ellerth* plan is that the corresponding duties it places on employers and employees are designed to stop sexual harassment before it reaches the severe or pervasive stage . . . But that design works only if employees report harassment promptly." *Baldwin*, 480 F.3d at 1307. Just as it is important to provide robust protections against retaliation so employees are not deterred from reporting harassment, *See Crawford*, 129 S. Ct. at 852, it is equally important to ensure that employees have meaningful incentives to report harassment and are not lightly excused from utilizing valid employer procedures.

To give effect to the *Ellerth-Faragher* scheme, many circuits apply a strong presumption that a plaintiff must report harassment promptly (assuming that the employer has instituted an anti-harassment policy with complaint procedure). The Eleventh Circuit, for example, has held that the employee has the "obligation[] . . . to take full advantage of the employer's preventative measures" and that only "in extreme cases" could an employee's "reasons for not reporting harassment" be "good enough." *Baldwin*, 480 F.3d at 1306. The Eighth Circuit has stated that failure to complain "will *normally* suffice to satisfy the employer's burden under the second [prong]." *Adams*, 538 F.3d at 932 (emphasis added). And the Second Circuit has

expressed the inquiry in terms of a burden-shifting presumption:

> [O]nce an employer has satisfied its initial burden of demonstrating that an employee has completely failed to avail herself of the complaint procedure, the burden of production shifts to the employee to come forward with one or more reasons why the employee did not make use of the procedures. The employer may rely upon the absence or inadequacy of such a justification in carrying its ultimate burden of persuasion.

Leopold, 239 F.3d at 246.

Faragher and *Ellerth* did not specify particular circumstances that would or would not excuse a plaintiff's failure to report harassment. But several circuits have recognized that to excuse such a failure on the basis of speculative, unsupported reasons would eviscerate the affirmative defense that this Court took pains to fashion. As these courts have recognized, because "the problem of workplace discrimination . . . cannot be [corrected] without the cooperation of the victims," *Madray v. Publix Supermarkets, Inc.*, 208 F.3d 1290, 1302 (11th Cir. 2000) (citation omitted), plaintiffs should be excused from their obligation to report sexual harassment only for reasons that are objectively supported and that transcend the run of the mill.[12]

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[12] In the analogous context of exhaustion of union grievance procedures, it is well-settled that objective evidence is required before exhaustion is excused on grounds of futility. *See, e.g., Johnson v. District of Columbia*, 552 F.3d 806, 813 (D.C. Cir.

In particular, as the Eleventh Circuit has explained, subjective fears of retaliation may exist in every case, but this Court surely understood as much and did not go to the trouble of creating the affirmative defense intending that it be routinely defeated by unsupported speculation:

> Every employee could say . . . that she did not report the harassment earlier for fear of losing her job or damaging her career prospects. . . . [T]he Supreme Court undoubtedly realized as much when it designed the *Faragher-Ellerth* defense, but it nonetheless decided to require an employee to make the choice in favor of ending harassment if she wanted to impose vicarious liability on her employer. . . Were it otherwise, the *Faragher-Ellerth* defense would be largely optional with plaintiffs, and it would be essentially useless in furthering the important public policy of preventing sexual harassment.

Baldwin, 480 F.3d at 1307; *accord Pinkerton*, 2009 WL 1014589, *8 (excusing plaintiff's failure to report based on "subjective, ungrounded fears" would "completely undermine" *Faragher-Ellerth* framework). The Fourth Circuit similarly has explained that accepting "a speculative 'fear of

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2008) (requiring "a clear and positive showing of futility") (quotation omitted); *Terwilliger v. Greyhound Lines, Inc.*, 882 F.2d 1033, 1039 (6th Cir. 1989) (same; "[t]hat [plaintiff] subjectively may have thought such procedures were futile is insufficient").

retaliation' excuse for remaining silent . . . would undermine the primary objective of Title VII and could result in more, not less, sexual harassment going undetected." *Barrett*, 240 F.3d at 267. Insisting on concrete, objective evidence does not mean assuming that retaliation never occurs, but rather that "[n]ormally bringing a retaliation claim, rather than failing to report sexual harassment, is the appropriate response to the possibility of retaliation." *Adams*, 538 F.3d at 932-33 (citations omitted).

B. It Is Particularly Important For Plaintiffs To Fulfill Their Duty To Report Where, As Here, The Employer Has Fulfilled Its Duty Of Instituting A Proper Policy

This Court made clear that the duties of the employer and employee are complementary, operating together to achieve Title VII's goals. *See Faragher*, 524 U.S. at 764-65; *Ellerth*, 524 U.S. at 807. Where the employer has done its part, it is especially important for the employee to report harassment. That is true not only because the affirmative defense was designed to avoid automatic employer liability, but also because employers often will have no ability to "avoid[] harm" (*Faragher*, 524 U.S. at 806) caused by sexual harassment if the victim does not report it.

Moreover, the two prongs of the affirmative defense are related. Where an employer has put in place an adequate anti-harassment policy with complaint procedure, there should be less reason for the employee to believe that complaining will be

futile or lead to retaliation. The employer's fulfillment of its duty under the first prong thus heightens the employee's duty under the second prong: the more reasonably an employer has behaved in implementing an anti-harassment policy, the less reasonable it is for an employee to fail to take advantage of that policy. *Cf. McPherson v. City of Waukegan*, 379 F.3d 430, 442 (7th Cir. 2004) ("Since [plaintiff] does not dispute that the [employer] acted reasonably [under the first prong], the burden *was* on [plaintiff] to avail herself of these policies and procedures that she well knew were available to her.") (emphasis in original).

C. The First Circuit's Acceptance of Subjective, Unsupported Reasons For Failing To Report Vitiates The Affirmative Defense

Even before the decision below, the First Circuit had acknowledged that its interpretation of *Ellerth* and *Faragher* "creates a loophole for false and overstated claims of threat by one hoping to reach a sympathetic jury." *Reed*, 333 F.3d at 37. The decision below expands that loophole, essentially vitiates the careful balance struck by the Court in *Ellerth* and *Faragher*, and makes it crystal clear that the court below is in conflict with the circuits that have read *Ellerth* and *Faragher* to require that a plaintiff report sexual harassment absent a concrete, objective reason to forgo reporting. Those circuits have recognized that for the affirmative defense to play the important role for which this Court created it, the plaintiff's duty to report must be enforced, at least in ordinary cases.

The First Circuit, in contrast, has held that run-of-the-mill office camaraderie among managers entitles an employee to assume that reporting will be futile or provoke retaliation, even where there is no history of either and the employee concedes that she has no basis to question the integrity of the person to whom the report is supposed to be made.

If the view of the court below prevails, the affirmative defense will be "largely optional with plaintiffs, and . . . essentially useless in furthering the important public policy of preventing sexual harassment." *Baldwin*, 480 F.3d at 1307. Petitioner put in place a concededly adequate anti-harassment policy; petitioner was deprived of the opportunity to remedy the harassment of respondent because respondent chose for unsupported, subjective reasons not to report it; and petitioner nonetheless owes a very large judgment. An affirmative defense that is so easily evaded does not properly incentivize employers to put in place effective anti-harassment policies. *Cf. Crawford*, 129 S. Ct. at 852.

Nor does undermining the affirmative defense hurt employers alone. To the contrary, the Court fashioned the affirmative defense precisely because it recognized that all would benefit if the law encouraged "saving action" to prevent and stop sexual harassment, as opposed to litigation after it is too late. *See Faragher*, 524 U.S. at 807. All would agree that reporting sexual harassment may be difficult and unpleasant, *see, e.g.*, *Shaw*, 180 F.3d at 813, but that is why the Court created the affirmative defense in order to give victims the incentive to report and allow employers acting in good faith to address problems before they become

intractable. That is also why this Court in *Crawford* ensured that retaliation will not be excused based on technicalities. But neither should participation in valid complaint procedures be excused based on subjective fears. In neither case should the law encourage "prudent employees . . . to keep quiet about Title VII offenses." *Crawford*, 129 S. Ct. at 852.

Virtually all plaintiffs will be able to allege generalized concerns with futility or retaliation when it comes to reporting harassment by a supervisor to their employer. Moreover, it hardly can be exceptional for an anti-harassment policy to instruct that reports be made, as here, to someone in management, and it hardly is exceptional for the alleged harasser to be a supervisor rather than a low-level employee. Accordingly, if a victim could simply assume without evidence, as here, that management will stick together, then reports would be rare indeed. For these reasons, the decision below essentially vitiates the Court's work in *Ellerth* and *Faragher*. Apart from the need to resolve the circuit conflict, the Court should grant certiorari to ensure that the lower courts do not deprive its handiwork of meaning and effect. In order for the *Ellerth-Faragher* framework to accomplish its purpose, employees must be presumptively required to take advantage of reasonable employer policies, and reasons for failing to do so must be objectively supported and specific.

III. This Court's Guidance Is Needed, And This Case Is An Ideal Vehicle

A. Certiorari is warranted because the proper application of the *Ellerth-Faragher* affirmative defense is important both as a practical and policy matter. From a practical perspective, the issue is very frequently litigated. Employment discrimination cases represent more than 5% of all federal cases filed -- 13,375 cases in 2007 alone.[13] And the courts of appeals frequently address the *Ellerth-Faragher* defense: a Westlaw search for "(Ellerth Faragher) and 'affirmative defense'" returns 362 results for the courts of appeals. Moreover, the affirmative defense has been extended into contexts other than sexual harassment. *See, e.g., Williams v. Administrative Review Board*, 376 F.3d 471, 478 (5th Cir. 2004) (holding that *Ellerth-Faragher* is the appropriate standard for Energy Reorganization Act hostile-environment claim based on retaliation for whistleblowing, and noting that numerous other circuits have applied *Ellerth-Faragher* to racial harassment cases (citing cases from the 4th, 6th, 7th, 8th, and 10th circuits)); *Cardenas*, 269 F.3d at 261 n.6 (extending *Ellerth-Faragher* to national-origin harassment). And from a policy perspective, the goal that the Court sought to achieve in creating the defense -- preventing and stopping harassment -- remains vitally important, and undermining the defense imperils that goal. Title VII's "primary objective" remains "not to

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[13] *See* AOUSC Table 4.4 (U.S. District Courts: civil cases filed, by nature of suit) (2000-2007) ("Civil Rights: Employment").

provide redress but to avoid harm." *Faragher*, 524 U.S. at 805.

B. This Court adopted the reasonableness standard for the duties of employers and employees at a high level of generality, even while recognizing that clarity and predictability are important. *See Faragher*, 524 U.S. at 805. It is understandable that this Court announced the rule in general terms in the first instance. Now, however, the lower courts have been applying and refining the affirmative defense for 11 years in dozens, if not hundreds, of cases, and an explicit, acknowledged split has developed. This Court emphasized in *Faragher* itself the importance of avoiding "disparate" results and the resulting "temptation to litigate." 524 U.S. at 805. This Court has reaffirmed the importance of the *Ellerth-Faragher* framework, *see Crawford*, 129 S. Ct. at 852, but the Court has not provided substantive guidance about how that framework should be applied. The decision below highlights the need for this Court's intervention to provide clarity for the application of the affirmative defense that the Court crafted.

C. This case presents an ideal vehicle to consider the question presented and to clarify the proper interpretation of *Ellerth* and *Faragher*. A significant advantage of this case is that it cleanly presents the question of the proper standard for the second prong of the affirmative defense, because petitioner concededly satisfied the first prong. Moreover, the factual record is clear and straightforward in important respects. First, it is undisputed that respondent failed to report the alleged harassment in any manner at any time

during her employment, rather than (as in some of the reported cases) merely delaying a report or making a report in an ambiguous or ineffective manner.[14] Second, it is undisputed that there was no history of reports pursuant to petitioner's policy proving futile or provoking retaliation.[15] Third, the record is devoid of any other objective basis for respondent to believe that reporting Arce's harassment to Executive Director Crespo would be futile or lead to retaliation.

In short, this case is an ideal vehicle for the Court to ensure the effective functioning of the *Ellerth-Faragher* framework by clarifying the contours of an employee's "reasonable" obligation to report sexual harassment pursuant to an adequate anti-harassment policy. The Court should grant certiorari and hold that failing to report sexual harassment based on nothing more than a generalized fear of retaliation or belief in futility, without objective support, is unreasonable.

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[14] *See, e.g., Hardage v. CBS Broadcasting, Inc.*, 427 F.3d 1177, 1188 (9th Cir. 2005) ("when Hardage finally made his complaint he specifically asked the company not to investigate it"); *Madray*, 208 F.3d at 1302. Respondent's complete failure to report is "precisely the manner" in which "a victim of sexual harassment should *not* act in order to win recovery under [*Ellerth-Faragher*]." *Shaw*, 180 F.3d at 813 (emphasis in original).

[15] To the contrary, the only evidence admitted on the policy's application in other cases was Figueroa's testimony that he had used the complaint process and petitioner had responded promptly and effectively. SA-23-28.

CONCLUSION

The petition for a writ of certiorari should be granted.

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