No. 20-27

In The Supreme Court of the United States

JENNIFER PASKERT,

Petitioner,

v.

KEMNA-ASA AUTO PLAZA, INC., et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Petitioner failed to preserve error on the question presented in the Petition.

Under this Court's decision in *Meritor Savings Bank, FSB v. Vinson*, workplace sex harassment is not actionable unless it is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" 477 U.S. 57, 66 (1986) (citation omitted).

The question presented is whether the Court of Appeals correctly applied that standard in rejecting Petitioner's claim of hostile work environment sex harassment.

RULE 29.6 STATEMENT

No parent or publicly held corporation owns 10% or more of Auto$mart, Inc.'s stock. No parent or publicly held corporation owns 10% or more of Kemna Motor Company's stock.

TABLE OF CONTENTS

APPENDIX TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

OPINIONS BELOW

The United States Court of Appeals for the Eighth Circuit's opinion is reported at 950 F.3d 535. Pet. App. 1a. The United States District Court for the Northern District of Iowa's opinion is not reported but available at 2018 WL 5839092. Pet. App. 10a.

JURISDICTION

The Petition correctly states the basis for this Court's jurisdiction.

STATUTES AND PROVISIONS INVOLVED

Section 703(a)(1) of Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for any employer . . . 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." 42 U.S.C.A. § 2000e-2(a)(1).

STATEMENT

Respondents adopt and incorporate the Background of the Eighth Circuit's unanimous panel opinion. Pet. App. 2a–4a.

REASONS FOR DENYING THE PETITION

A. Petitioner Waived the Question Presented in Her Petition by Failing to Raise It Below.

The Petition raises a single issue, and the Court should not consider it. Petitioner failed to raise the issue in the Court of Appeals and the District Court, denying both courts the chance to address it. Nor does the Petition point to any "exceptional circumstances," *Lawn v. United States*, 355 U.S. 339, 362 n.16 (1958), justifying first-time consideration in this Court, *see Pennsylvania Dep't of Corrs. v. Yeskey*, 524 U.S. 206, 212–13 (1998) ("'Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.'" (citation omitted)); *McLane Co. v. E.E.O.C.*, 137 S. Ct. 1159, 1170 (2017) ("'[W]e are a court of review, not of first view. . . .'" (citation omitted)).

B. No Conflict Exists Between the Courts of Appeals on the Question Presented.

As a rule, this Court awaits division in the Courts of Appeals on important legal questions. *See* Sup. Ct. R. 10(a). No split of authority exists here.

As the Petition correctly observes, this Court has entrusted the Courts of Appeals to implement *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), "and its progeny." Pet. at 2. In claiming they have divided in doing so, however, Petitioner cherry-picks opinions from the First, Second, Third, Fourth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits. *Id.* at 16–20. The

reality is different. Petitioner ignores that each of those circuits, like the supposedly conflicting Eighth and Fifth, have rejected hostile environment claims applying some form of the so-called "precedent-comparison standard."[1] *See*, *e.g.*, *Lee-Crespo v. Schering-Plough Del Caribe Inc.*, 354 F.3d 34, 47 (1st Cir. 2003) ("This case is a far cry from cases in which this court has reinstated a harassment verdict for an employee. . . ."); *Raspardo v. Carlone*, 770 F.3d 97, 118 (2d Cir. 2014) ("While Carlone's comments in the MDT message may have been offensive, they appear to have been isolated and were not as substantial as events that we have found sufficient to create a hostile work environment in prior decisions."); *Swyear v. Fare Foods Corp.*, 911 F.3d 874, 882 (7th Cir. 2018) ("Scott's actions were not severe as compared with acts this Court has

[1] Three points bear emphasis. First, the same standards generally apply to both race-based and sex-based hostile environment claims. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 787 n.1 (1998) ("Courts of Appeals in sexual harassment cases have properly drawn on standards developed in cases involving racial harassment."); *Richardson v. New York State Dep't of Corr. Serv.*, 180 F.3d 426, 436 n.2 (2d Cir. 1999). Second, "[t]he standard for granting summary judgment 'mirrors' the standard for judgment as a matter of law," *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 150 (2000), so decisions on the latter are relevant to the former, *see*, *e.g.*, *Fisher v. Pharmacia & Upjohn*, 225 F.3d 915, 923 n.5 (8th Cir. 2000). And third, "[s]exual harassment claims under section 1983 are analyzed under the same standards developed in Title VII litigation." *Wright v. Rolette Cty.*, 417 F.3d 879, 884 (8th Cir. 2005).

found sufficient to create a hostile or abusive work environment.").[2]

The circuits' widespread and consistent application of precedent in hostile environment cases makes perfect sense. Resolving cases in this way "promotes

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[2] *Kokinchak v. Postmaster Gen. of the United States*, 677 F. App'x 764, 767 (3d Cir. 2017) ("[T]he behavior Kokinchak complains about falls short of the sort of conduct courts have said constitutes hostile work environment sexual harassment."); *Sherrod v. Philadelphia Gas Works*, 57 F. App'x 68, 77 (3d Cir. 2003) ("Appellant's showing falls short of the severe and pervasive conduct in [two previous cases]."); *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 754 (4th Cir. 1996) ("When presented in other Title VII cases with conduct of the type alleged by Hopkins in this case, we have consistently affirmed summary judgment dismissing the claims."); *Wade v. Automation Pers. Servs., Inc.*, 612 F. App'x 291, 300 (6th Cir. 2015) ("This case is unlike [a previous case] in which the court found that the pervasive, extremely offensive comments, physical contact, and threats towards the female plaintiff in a 'male-dominated trade[ ]' constitutes conduct that was frequent, severe, threatening, and humiliating." (citation omitted)); *Adusumilli v. City of Chicago*, 164 F.3d 353, 362 (7th Cir. 1998), *cert. denied*, 528 U.S. 988 (1999); *Weiss v. Coca-Cola Bottling Co. of Chicago*, 990 F.2d 333, 337 (7th Cir. 1993) ("[T]hese incidents were . . . no more serious than those in [a prior case]."); *Kortan v. California Youth Auth.*, 217 F.3d 1104, 1111 (9th Cir. 2000) ("However offensive his language, Altesalp's conduct is not so severe or pervasive as Nusbaum's in [a previous case]. . . . [O]ther cases in which a hostile work environment has been found to exist are also quite different."); *Nettle v. Cent. Okla. Am. Indian Health Council, Inc.*, 334 F. App'x 914, 926 (10th Cir. 2009) ("[W]e believe that the dissent's standard for pervasiveness and severity falls short of what this court and the Supreme Court have set forth."); *Latrece Lockett v. Choice Hotels Int'l, Inc.*, 315 F. App'x 862, 866 (11th Cir. 2009) ("This is far shorter than the three years of daily harassing conduct which we found to be frequent in [a previous case].").

the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). And that general teaching applies no less to hostile environment cases.

First, a circuit's body of hostile environment precedent promotes decisional consistency among its district courts. Fundamentally, "[l]ike cases should be decided alike." Bryan Garner et al., *The Law of Judicial Precedent* 21 (2016). To that end, a circuit-wide precedent establishing a minimum for actionable harassment against which to compare new cases as they arise enhances the likelihood that litigants in separate judicial districts within the same circuit receive similar outcomes. Second, an established actionable minimum conserves judicial resources by avoiding a jury trial in nearly every case. *See id.* at 10 (describing efficiency justifications for precedent). And third, it reduces litigation costs by allowing counsel, insurers, the parties in particular, and employers more generally to predict outcomes. *See* Richard A. Posner, *Economic Analysis of Law* 753 (8th ed. 2011) ("Decision according to precedent reduces the costs of litigation by enabling the parties to a case, and the tribunal also, to use information that has been generated (often at considerable expense) in previous cases. . . . [and] reduces uncertainty about one's legal rights and obligations."). If it's anybody's guess whether a particular set of facts counts as actionable harassment, the result is more hostile environment litigation. *See id.* at 745.

A circuit's hostile environment precedent importantly also constrains district judges. Each individual district judge must of course consider "all the circumstances" in an individual case. *Harris v. Forklift Sys.*, *Inc.*, 510 U.S. 17, 23 (1993). But in establishing what does not constitute actionable harassment, a circuit delimits the boundaries of acceptable trial court rulings. That in turn prevents each district judge from deciding for himself in each case what suffices as severe or pervasive harassment, steered only by a "wide variety" of factors, his own perhaps idiosyncratic sense of "social context," and what by his own lights he believes a reasonable person in the plaintiff's position would conclude. Pet. at 8. As it does generally, precedent in hostile environment cases thus decreases the likelihood of arbitrary, biased, or "unbounded" decisions. *The Law of Judicial Precedent* 21.

The Eighth and Fifth Circuits do not uniquely interpret and apply this Court's standards. It's true enough that both have invoked the metaphor of a "high bar," App. 5a, or a "high threshold," *Watson v. Kroger Texas, L.P.*, 576 F. App'x 392, 393 (5th Cir. 2014). As Petitioner all but concedes, however, Pet. at 19, other Courts of Appeals routinely summon that very imagery, *see*, *e.g.*, *Abuomar v. Dep't of Corr.*, 754 F. App'x 102, 107 (3d Cir. 2018) (noting "the high threshold for a hostile work environment claim"); *Whittaker v. N. Illinois Univ.*, 424 F.3d 640, 648 (7th Cir. 2005) (describing the "high" and "stringent" standard for hostile work environment); *Terry v. Ashcroft*, 336 F.3d 128, 148 (2d

Cir. 2003) ("[T]he standard for establishing a hostile work environment is high. . . .").

And that crucially includes the Fourth, Sixth, and Tenth Circuits, contradicting Petitioner's claim they allegedly "presum[e]" harassment is "for a jury to determine." Pet. at 19; *see Fassbender v. Correct Care Sols., LLC*, 890 F.3d 875, 891 (10th Cir. 2018) (noting "the high bar" for hostile work environment); *E.E.O.C. v. Xerxes Corp.*, 639 F.3d 658, 676 (4th Cir. 2011) ("[W]e have 'recognized that plaintiffs must clear a high bar in order to satisfy the severe or pervasive test. . . .'" (citation omitted)); *E.E.O.C. v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 315 (4th Cir. 2008); *Baugham v. Battered Women, Inc.*, 211 F. App'x 432, 438 (6th Cir. 2006) ("Plaintiffs must overcome a high threshold to demonstrate actionable harm. . . ."). This Court should not commit judicial resources to evaluating a widely used metaphor having little if anything to do with resolving individual cases. *See City of Canton, Ohio v. Harris*, 489 U.S. 378, 384 (1989) ("'[T]he decision to grant certiorari represents a commitment of scarce judicial resources with a view to deciding the merits . . . of the questions presented in the petition.'" (citation omitted)).

No "circuit-specific standard," Pet. at 9, controls hostile environment claims in the Fifth and Eighth Circuits. In resisting that truth, Petitioner overlooks that both courts routinely and properly invoke this Court's teaching that all the circumstances matter—including notably in the four cases she derides. *See LeGrand v. Area Res. for Cmty. & Human Servs.*, 394 F.3d 1098, 1102 (8th Cir. 2005) ("We consider the

'totality of the circumstances'. . . ." (citation omitted)); *Hockman v. Westward Commc'ns, LLC*, 407 F.3d 317, 325 (5th Cir. 2004) ("Whether an environment is objectively hostile or abusive is determined by considering the totality of the circumstances."); *Duncan v. Gen. Motors Corp.*, 300 F.3d 928, 934 (8th Cir. 2002) ("[W]e look to the totality of the circumstances."); *Shepherd v. Comptroller of Pub. Accounts of State of Texas*, 168 F.3d 871, 874 (5th Cir. 1999) ("Whether an environment is 'hostile' or 'abusive' is determined by looking at all the circumstances. . . ."). As the Eighth Circuit noted in *Duncan*, courts must consider the harassing "occurrences in the aggregate." 300 F.3d at 935. And they do. *See*, *e.g.*, *Stewart v. Rise, Inc.*, 791 F.3d 849, 862 (8th Cir. 2015); *Cherry v. Shaw Coastal, Inc.*, 668 F.3d 182, 188–89 (5th Cir. 2012).

Yet that evaluation turns on more than the collective circumstances alone. Applying this Court's guidance, both the Eighth and Fifth Circuits thus recognize that only "'extreme'" harassment ranks as actionable. *Bowen v. Missouri Dep't of Soc. Servs.*, 311 F.3d 878, 883 (8th Cir. 2002) (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998)); *Hernandez v. Sikorsky Support Servs., Inc.*, 495 F. App'x 435, 439 (5th Cir. 2012) (same). In considering the circumstances, both courts also insist that hostile work environment claimants meet "'demanding'" standards. *Scusa v. Nestle U.S.A. Co.*, 181 F.3d 958, 966 (8th Cir. 1999) (quoting *Faragher*, 524 U.S. at 788); *West v. City of Houston, Texas*, 960 F.3d 736, 742 (5th Cir. 2020) (same). After all, *Faragher* explained that the very point of those standards, "[p]roperly applied," is to "filter out

complaints attacking 'the ordinary tribulations of the workplace.'" 524 U.S. at 788 (citation omitted); *accord Scusa*, 181 F.3d at 966; *West*, 960 F.3d at 742. And though they consistently heed those limits "'to ensure that Title VII does not become a general civility code,'" *Scusa*, 181 F.3d at 966 (quoting *Faragher*, 524 U.S. at 788), neither court has ever "held" that a plaintiff can show actionable harassment "only in the most extreme cases," Pet. at 13.

The Fifth and Eighth Circuits' standards instead match those applied by others. Both consider the factors prescribed in *Harris*, account for social context, and evaluate the "harassing conduct from the perspective of a reasonable person." *Id.* at 8; *see*, *e.g.*, *Williams v. Herron*, 687 F.3d 971, 976 (8th Cir. 2012). In other words, all the analytical features Petitioner claims those circuits have shunned in supposedly pioneering a "different standard." Pet. at 8. Indeed, the reports teem with opinions in which those courts, applying this Court's directions, have found actionable sex harassment after deciding *Duncan* and *Shepherd*—often (though not always) without batting an eye at either case. *See*, *e.g.*, *Nichols v. Tri-Nat'l Logistics, Inc.*, 809 F.3d 981, 985 (8th Cir. 2016); *Aryain v. Wal-Mart Stores Texas LP*, 534 F.3d 473, 480 (5th Cir. 2008).[3]

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[3] *Jenkins v. Univ. of Minnesota*, 838 F.3d 938, 945 (8th Cir. 2016) (section 1983); *Royal v. CCC & R Tres Arboles, L.L.C.*, 736 F.3d 396, 403 (5th Cir. 2013); *Williams*, 687 F.3d at 976 (section 1983); *Fuller v. Fiber Glass Sys., LP*, 618 F.3d 858, 864 (8th Cir. 2010) (racial harassment); *Donaldson v. CDB Inc.*, 335 F. App'x 494, 504 (5th Cir. 2009); *Lauderdale v. Texas Dep't of Criminal Justice, Institutional Div.*, 512 F.3d 157, 164 (5th Cir. 2007);

To take just two examples, the Eighth Circuit in *Stewart* considered the circumstances, without citing *Duncan*, holding that an employee's evidence was enough to find an actionably hostile work environment. 791 F.3d at 862. Taking a similarly fact-specific view in *Cherry*, the Fifth Circuit omitted *Shepherd* from its opinion holding that the evidence at trial supported the jury's finding that sex harassment was sufficiently severe or pervasive. 668 F.3d at 188–89.[4] *Duncan* and *Shepherd* (and *LeGrand* and *Hockman*) just do not pack the precedential force Petitioner ascribes to them.[5]

McKinnis v. Crescent Guardian, Inc., 189 F. App'x 307, 310 (5th Cir. 2006); *Harvill v. Westward Commc'ns, L.L.C.*, 433 F.3d 428, 436 (5th Cir. 2005); *Wright v. Rolette Cty.*, 417 F.3d 879, 886 (8th Cir. 2005) (section 1983); *Baker v. John Morrell & Co.*, 382 F.3d 816, 829 (8th Cir. 2004); *Eich v. Bd. of Regents for Cent. Missouri State Univ.*, 350 F.3d 752, 761 (8th Cir. 2003); *Reedy v. Quebecor Printing Eagle, Inc.*, 333 F.3d 906, 908 (8th Cir. 2003) (racial harassment); *La Day v. Catalyst Tech., Inc.*, 302 F.3d 474, 483 (5th Cir. 2002).

[4] If these decisions may evidence intra-circuit conflict, that ordinarily does not justify granting certiorari. *See Joseph v. United States*, 135 S. Ct. 705, 707 (2014) (Kagan, J., respecting denial of certiorari) ("[W]e usually allow the courts of appeals to clean up intra-circuit divisions on their own, in part because their doing so may eliminate any conflict with other courts of appeals."). Petitioner notably declined to seek en banc review of the panel's decision below. *Cf. Neylon v. BNSF Ry. Co.*, 968 F.3d 724, 728 (8th Cir. 2020) (" '[I]t is a cardinal rule in our circuit that one panel is bound by the decision of a prior panel.' " (citation omitted)).

[5] Indeed, it's unclear whether *Shepherd* and *Hockman* are even good law. True to form, the Petition elides the Fifth Circuit's express recognition that both applied "the wrong legal standard" by requiring "severe *and* pervasive" conduct, which "can lead to

Nor do district courts understand *Duncan* and *Shepherd* to inevitably permit all harassment deemed less egregious than that in those cases. After those decisions, district courts in both circuits have repeatedly found jury questions on hostile work environment sex harassment claims. *See*, *e.g.*, *Mader v. Lowe's Home Centers, LLC*, No. 18-4066, 2019 WL 3858608, at *7 (D.S.D. Aug. 16, 2019); *Waters v. Mills*, No. EP-13-CV-00241-FM, 2014 WL 11342500, at *6 (W.D. Tex. Dec. 17, 2014); *Brenneman v. Famous Dave's of Am., Inc.*, 410 F. Supp. 2d 828, 840 (S.D. Iowa 2006), *aff'd*, 507 F.3d 1139 (8th Cir. 2007); *Gordon v. W. Telemarketing*, No. CV 04-466-C-M3, 2006 WL 8432208, at *7 (M.D. La. Aug. 4, 2006).[6] Contrary to Petitioner's contention, then, district courts decide cases with due respect for precedent in "a case-specific fact-bound manner." Pet. at 2.

In the end, all the lower courts Petitioner identifies take a similar approach: while they may discuss it in different ways, they all apply this Court's standards in *Meritor* and *Harris*, and in doing so they all look at

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the wrong outcome." *Royal*, 736 F.3d at 403; *see Hale v. Texas Dep't of Criminal Justice*, No. 7:18-CV-097-M-BQ, 2019 WL 7500593, at *7 (N.D. Tex. Dec. 3, 2019), report and recommendation adopted, No. 7:18-CV-097-M, 2020 WL 95653 (N.D. Tex. Jan. 8, 2020) ("The undersigned finds these [cited] cases unpersuasive because they rely, in varying degrees, upon *Shepherd* and/or *Hockman*.").

[6] A list of district court decisions is set out in the Appendix to the Opposition.

their own prior cases applying those same standards to various sets of facts. No circuit conflict exists.

C. Review Is Not Warranted, Because the Lower Courts Properly Stated the Rule of Law and Correctly Found that Petitioner Failed to Show an Actionably Hostile Environment.

Meritor held "that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment." 477 U.S. at 66. In doing so, the Court clarified that not all harassing conduct is actionable; "it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Id.* (citation omitted).

Elaborating *Meritor*'s standard, *Harris* explained an actionably hostile environment is both objectively and subjectively offensive. *See* 510 U.S. at 21. Subjective offensiveness, *Harris* taught, turns on the plaintiff's perceptions, objective offensiveness on what "a reasonable person would find hostile or abusive." *Id.* Acknowledging the test's imprecision, the Court instructed lower courts to consider "all the circumstances," among them "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id.* at 23.

Harris underscored that "a nervous breakdown" is not Title VII's trigger. *Id.* But neither does Title VII

aim to cleanse workplaces of the "'genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex.'" *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998). As this Court has emphasized, Title VII does not forbid "'simple teasing,' offhand comments, [or] isolated incidents (unless extremely serious)." *Faragher*, 524 U.S. at 788 (citation omitted). Nor does it banish "intersexual flirtation," *Oncale*, 523 U.S. at 81, "'the sporadic use of abusive language,'" or "'gender-related jokes,'" *Faragher*, 524 U.S. at 788 (citation omitted). Title VII does not outlaw "'the ordinary tribulations of the workplace.'" *Id.* It's not a "general civility code." *Oncale*, 523 U.S. at 80.

Under the Court's "demanding" standards, *Faragher*, 524 U.S. at 788, both lower courts correctly rejected Petitioner's claim. In a long and detailed opinion, the District Court found that Petitioner alleged that, over five months, she suffered just one instance of unwelcome physical contact, Burns at most twice said he could "have Paskert" if the two weren't married to others, had tried to make Petitioner cry, and "several" times said he should not have hired a female. Pet. App. 37a. Although Burns uttered the words "cunts" and "bitches," he undisputedly did so referring not to Petitioner, but to customers. *See id.* at 37a; *Hocevar v. Purdue Frederick Co.*, 223 F.3d 721, 741 (8th Cir. 2000) ("Abuse directed at a third party is part of the picture, but it is less significant than abuse

directed at the plaintiff.").[7] Invoking *Harris*' statement that a hostile work environment occurs when "'the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,'" the court rejected her claim. Pet. App. 35a, 37a (quoting *Harris*, 510 U.S. at 21).

On de novo review, a panel of the Eighth Circuit unanimously affirmed. *Id.* at 6a. Reciting *Meritor*'s standard, the Eighth Circuit correctly observed that the question was whether the alleged harassment was "'sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Id.* at 5a (quoting *Meritor*, 477 U.S. at 67).[8] And on the record evidence, it held that Petitioner fell short. *Id.* at 6a.

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[7] *See also Warf v. U.S. Dep't of Veterans Affairs*, 713 F.3d 874, 878 (6th Cir. 2013); *Ladd v. Grand Trunk W. R.R.*, 552 F.3d 495, 501 (6th Cir. 2009); *McPhaul v. Bd. of Comm'rs of Madison Cty.*, 226 F.3d 558, 567 (7th Cir. 2000); *Gleason v. Mesirow Fin., Inc.*, 118 F.3d 1134, 1144 (7th Cir. 1997); *Black v. Zaring Homes, Inc.*, 104 F.3d 822, 826 (6th Cir. 1997), *cert. denied*, 522 U.S. 865 (1997); *Yuknis v. First Student, Inc.*, 481 F.3d 552, 556 (7th Cir. 2007) (Posner, J.) ("The American workplace would be a seething cauldron if workers could with impunity pepper their employer and eventually the EEOC and the courts with complaints of being offended by remarks and behaviors unrelated to the complainant except for his having overheard, or heard of, them.").

[8] Petitioner quibbles with the opinion's failure to use the words "reasonable person [or] reasonable jury." Pet. at 7. But it quoted *Meritor*'s standard, Pet. App. 5a, and so Petitioner is plainly incorrect that the Eighth Circuit "did not purport" to

Little or no evidence in the record supported the factors *Harris* clarified suggest actionable harassment. As in many cases in which the Courts of Appeals have rejected harassment claims, Petitioner presented no evidence of "sever[e]" or "physically threatening or humiliating" conduct by Respondents. *Harris*, 510 U.S. at 23; *see*, *e.g.*, *Callanan v. Runyun*, 75 F.3d 1293, 1296 (8th Cir. 1996) ("We agree with the district court that the conduct to which Callanan was subjected was not 'frequent, severe, physically threatening, or humiliating.'" (citation omitted)); *Wade v. Automation Pers. Servs., Inc.*, 612 F. App'x 291, 300 (6th Cir. 2015) ("[T]hese inappropriate comments were neither pervasive nor physically threatening, and therefore did not create an actionable hostile working environment."); *Brooks v. CBS Radio, Inc.*, 342 F. App'x 771, 777 (3d Cir. 2009) ("The harassment Brooks alleges he faced in his workplace was not particularly frequent and was certainly not physically threatening or humiliating. . . ."); *Nettle v. Cent. Okla. Am. Indian Health Council, Inc.*, 334 F. App'x 914, 923 (10th Cir. 2009) ("Certainly none of the comments directed at (or around) Ms. Nettle rose to the level of being physically threatening or humiliating."); *Hensman v. City of Riverview*, 316 F. App'x 412, 417 (6th Cir. 2009) ("[T]he unwanted physical contact from Batchelder was inappropriate, but it does not rise to the level of 'physically threatening or humiliating.'"); *Lockett*, 315 F. App'x at 866 ("[T]he alleged sexual remarks and two incidents

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consider whether her work environment was objectively hostile or abusive, Pet. at 7.

of brief touching fall below the minimum level of severity or humiliation needed to establish sexual harassment.").

Nor did Petitioner's evidence suggest that the alleged harassment "unreasonably interfere[d]" with her work performance. *Harris*, 510 U.S. at 23; *see*, *e.g.*, *Lee-Crespo v. Schering-Plough Del Caribe Inc.*, 354 F.3d 34, 46 (1st Cir. 2003) ("Here, the complained of conduct was episodic, but not so frequent as to become pervasive; was never severe; was never physically threatening (though occasionally discomforting or mildly humiliating); and significantly, was never, according to the record, an impediment to Lee-Crespo's work performance."); *Kosereis v. Rhode Island*, 331 F.3d 207, 216–17 (1st Cir. 2003) ("Kosereis has not produced any evidence that the comments about which he complains . . . were physically threatening or interfered with his work performance."); *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1248 (11th Cir. 1999) ("First and most importantly, Mendoza did not present evidence that Page's conduct was 'physically threatening or humiliating' or that the cumulative effect of this conduct 'unreasonably interfered' with Mendoza's job performance.").

Finally, Petitioner misses the mark in insisting that Burns' "epithets simply did not matter" to the lower courts. Pet. at 18. To start, the Eighth Circuit observed last century—in cases Petitioner fails to acknowledge here and failed to cite below—that "gender-based insults, including the term 'bitch,' may give rise to an inference of discrimination based on sex."

Carter v. Chrysler Corp., 173 F.3d 693, 700 (8th Cir. 1999); *see Burns v. McGregor Elec. Indus., Inc.*, 989 F.2d 959, 965 (8th Cir. 1993) ("Vulgar and offensive [gender-based] epithets . . . are 'widely recognized as not only improper but as intensely degrading, deriving their power to wound not only from their meaning but also from the disgust and violence they express phonetically.'" (citation omitted)).

The problem below thus was not the courts' indifference. It was the evidence. Far from showing "tirades," Pet. at 22, or a "barrage" of harassment, *id.* at 3, the record revealed no more than sporadic instances of "inappropriate" comments spread over five months. Pet. App. 6a, 37a. As Courts of Appeals have repeatedly held, such infrequent comments, even those more offensive than here, "spread over months [are] unlikely to have so great an emotional impact as a concentrated or incessant barrage." *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 431 (7th Cir. 1995); *see*, *e.g.*, *Corbett v. Beseler*, 635 F. App'x 809, 816–17 (11th Cir. 2015) (holding that "isolated and sporadic" name calling, including "bossy," "bitchy," "abrasive," "dumb," and "stupid fucking bitch," were not "daily occurrences" and thus "not sufficiently pervasive to constitute a hostile work environment"); *Lockett*, 315 F. App'x at 866; *Hopkins*, 77 F.3d at 753; *see also Harris*, 510 U.S. at 21 ("'[M]ere utterance of an . . . epithet which engenders offensive feelings in a employee,' does not sufficiently affect the conditions of employment to implicate Title VII." (citation omitted)).

As all that shows, this case would make an exceedingly poor vehicle with which to resolve any illusory

conflict claimed in the Petition. Highlighting her forfeiture of the issue she now asks this Court to review, Petitioner "[a]dmitted[]" below that Eighth Circuit "precedent requires a strong showing of severe or pervasive conduct over a period of time." Reply Br. of Appellant at 4, 2019 WL 3222291, at *4. She asserted merely that "the District Court set[] the bar too high in determining a hostile work environment *within the Eighth Circuit standards*." Br. of Appellant at 15–16, 2019 WL 1458867, at *15–16 (emphasis added). She did *not* assert that the Eighth Circuit improperly interpreted the law.

Instead, Petitioner merely challenged how the accepted law applied to her case. But as all four Article III judges who considered this case below found, her scant evidence of actionable harassment simply failed to show an environment "permeated with 'discriminatory intimidation, ridicule, and insult that [was] sufficiently severe or pervasive to alter the conditions of [her] employment and create an abusive working environment.'" *Harris*, 510 U.S. at 21 (citations omitted). The Petition should be denied. *Cf.* Sup. Ct. R. 10 ("A petition . . . is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.").

CONCLUSION

The Petition in truth seems to want not the resolution of supposed division in the circuits, but for this Court to rethink its own well-established decisions

elaborating *Meritor*. Petitioner, apparently clairvoyant, insists that those decisions have "fallen short" of what past Justices and the public at large had "hoped." Pet. at 20. Even if that were true—and many cases above suggest it is not—any reevaluation of this thoroughly developed and repeatedly relied-on body of law should await real division in the circuits, a record containing evidence of actionable harassment, and a petition where the issue was preserved. That is not the case here.

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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