No. 21-843

IN THE
Supreme Court of the United States

CATHY SELLARS, ET AL.
Petitioners,

v.

CRST EXPEDITED, INC.,
Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an employer is liable under Title VII for a hostile work environment where its remedial response stops the harassment the employer knew or should have known about.

2. Whether a long-haul trucking company's standard remedial response of separating the two drivers involved in a coworker harassment complaint by removing the complaining driver from the truck is "per se retaliatory" under Title VII such that a plaintiff need not prove that the employer's desire to retaliate was the but-for cause of the removal.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent CRST Expedited, Inc. states that it is a wholly owned subsidiary of its parent corporation, CRST International Holdings, LLC, which is a privately held corporation. No publicly held corporation owns any of CRST Expedited, Inc.'s stock.

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INTRODUCTION

CRST Expedited, Inc. is a leading long-haul freight transportation company. It operates one of the industry's largest fleets of team drivers. Those drivers work in pairs so that one may sleep in the truck cab while the other is driving. This model allows the truck to remain in motion longer so CRST can deliver goods faster and fulfill its vital role in the supply chain. This model also means that drivers spend days on the road living and working alongside their co-drivers. When conflicts arise between drivers, including complaints of harassment, CRST faces unique challenges addressing those conflicts, which often occur hundreds of miles from the nearest CRST terminal and without any witnesses to corroborate either driver's version of events.

To tackle these challenges in CRST's unusual work environment, the company makes a standard remedial response to sexual harassment complaints from over-the-road drivers. The company's highest priority is safety, and the first step in its remedial response is to separate the drivers, which typically means removing the complaining employee from the harassing situation in the truck cab at the first opportunity. The company also logs the complaint and launches an investigation led by its human resources personnel. The investigation includes gathering records, developing questioning, and speaking with both drivers involved. If the investigator finds corroboration for the complaint, then the accused driver faces discipline up to and including termination. Even if the investigator is unable to corroborate the complaint, however, CRST takes remedial measures by

barring the accused driver from ever driving in the future with a driver of the complainant's sex.

Fifteen years ago, the Equal Employment Opportunity Commission brought suit against CRST challenging this standard remedial response under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. The district court rejected the EEOC's claims, and the Eighth Circuit upheld CRST's standard remedial response as "the type of prompt and effective remedial action that our precedents prescribe." *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657, 693 (8th Cir. 2012). The case reached this Court in the context of a dispute over the "prevailing party" standard in Title VII's attorney's fees provision. This Court held that fees may be awarded to defendants if the plaintiff's claim is frivolous, unreasonable, or groundless. *CRST Van Expedited, Inc. v. EEOC*, 578 U.S. 419 (2016). On remand, the district court held that the EEOC's claims met that standard and ordered it to pay $3,317,289.67 in fees to CRST, which the Eighth Circuit upheld on appeal.

After the EEOC's lawsuit was resolved in CRST's favor, Petitioners brought this class action challenging the same standard remedial response. They alleged that CRST maintained a hostile work environment for its female employees by failing to address complaints of sexual harassment adequately, and they claimed that CRST retaliated against female employees who lodged complaints by removing them from the truck cabs where the harassment allegedly occurred. The district court granted summary judgment to CRST on all claims, concluding that CRST was not negligent in its response

to alleged coworker sexual harassment, and that Petitioners failed to demonstrate the causal connection required for retaliation.

In a unanimous opinion, the Eighth Circuit substantially affirmed the district court's decision. Applying established precedent for hostile work environment claims, the court considered whether Petitioners had adduced evidence of negligence on CRST's part and concluded they had not. The court rejected Petitioners' argument that CRST was required "to assume, on the basis of complaints about individual male drivers, that any and every CRST male driver would be a sexual harasser." Pet. App. 29a-30a. In addition, Petitioners failed to establish that CRST's standard remedial response was ineffective at stopping the harassment of which CRST did have notice.

With respect to the retaliation claim, the Eighth Circuit again applied established precedent requiring an employee to prove that an employer took adverse employment action in retaliation for protected activity. Petitioners argued that the adverse employment action was a policy of "unpaid suspension" because under CRST's "split-mileage" payment system, drivers are paid for the trips they complete, and drivers who were removed from trucks after complaining of harassment were unable to complete the trips for which they were scheduled (though they were immediately eligible to start another trip if they chose to do so). Equating the removal of employees who complained of harassment from the alleged harassing environment with a supposed policy of "unpaid suspension," Petitioners argued that

the policy was "per se retaliation" such that proof of causation was unnecessary.

The court disagreed, finding that Petitioners failed to adduce evidence that any such "unpaid suspension" policy actually existed. While the court found that employees might have *expected* a loss of pay following a complaint, because compensation is tied in part to miles driven, that loss did not necessarily come to fruition, and in any event CRST had legitimate reasons for its standard remedial response that were not pretext for illicit retaliation. However, because CRST changed its compensation policies during the class period to provide additional compensation for complainants of sexual harassment, the Eighth Circuit remanded for the district court to consider whether the analysis was any different following that change.

Petitioners now seek interlocutory review of the Eighth Circuit's fact-bound and splitless opinion, but there is no basis for this Court's intervention.

The first question presented challenges an alternative holding that does not affect the outcome of the hostile work environment claim. Petitioners ask this Court to hold that an employer can escape liability for coworker sexual harassment only when its response deters all future harassment, including of other victims by other employees in other locations. But even if this Court were to adopt that radical expansion of employer liability, Petitioners would still lose because they failed to adduce evidence of actual or constructive notice that triggers the employer's duty to respond in the first place.

This case would have come out the same way in any other circuit because the requirement of notice for employer liability is universal. In addition, even the Ninth Circuit that Petitioners principally rely on for their claimed split would have granted summary judgment to CRST in the circumstances presented here. True, the Ninth Circuit has noted that employer remedial responses should both stop the present harassment and deter future harassment. But none of the decisions that Petitioners cite actually imposes liability on employers for recurring harassment where the subsequent incident involved different employees in different locations. In fact, one of the circuits in this alleged split has expressly rejected such a standard because it would effectively impose strict liability on employers.

This case is also a poor vehicle for reconsidering the standards for employer liability given the uncommon features of CRST's work environment. Because drivers work in teams of two on truck cabs crisscrossing the country, CRST's workforce is generally unaware of whether and when sexual harassment occurs and how the company responds to specific complaints. Even if this Court wanted to consider the extent to which an employer is responsible for deterring future harassment when it responds to present complaints, it should not make law in the context of this case, where the decentralized nature of CRST's work environment looks nothing like the work environments of most employers.

Moreover, this Court need not grant review because the Eighth Circuit reached the right result. This Court has properly limited the circumstances in which an

employer can be found negligent for its response to sexual harassment complaints, and the existing standard makes sense. Petitioners would dramatically expand liability in a manner that would require employers to stereotype all their male employees as potential harassers and that would allow employers to escape liability only through the sorts of extraordinary measures that Petitioners have urged in this case, like installing video cameras inside truck cabs for constant surveillance of drivers while they work, eat, and sleep. That cannot be what Title VII requires.

Petitioners fare no better with their second question presented. Without even acknowledging this Court's decision in *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338 (2013), which addressed the causation required for a Title VII retaliation claim, they ask this Court to excuse employees from proving causation in certain circumstances where the employer's policy is "per se retaliatory." But this case does not implicate that issue because the Eighth Circuit held that Petitioners failed to adduce evidence of the "unpaid suspension" policy that Petitioners claimed to be per se retaliatory. The court was crystal clear that it had no occasion to address such a standard because the "facts of this case do not call for us to do so here." Pet. App. 12a. The court's findings, which Petitioners fail to acknowledge, much less dispute, are fatal to the petition. They also distinguish this case from the handful of cases cited by Petitioners that applied a per se standard.

The decision below on Petitioners' retaliation claim is correct: it faithfully applies *Nassar* and its holding "that Title VII retaliation claims require proof that the desire

to retaliate was the but-for cause of the challenged employment action." 570 U.S. at 352. Petitioners offer no reason to depart from that causation standard and instead urge deference to the very same agency views this Court rejected in *Nassar*.

Finally, this request for review is premature. Petitioners seek certiorari in an interlocutory posture: because the Eighth Circuit remanded in part, proceedings are simultaneously underway in the district court over one part of the retaliation claim. The parties are presently litigating whether Petitioners even have an adequate class representative at this point, and Petitioners have asked the district court to reopen the factual record. As a result, even if there were a question worthy of review, it should be considered in the normal course after final judgment is entered.

The petition should be denied in its entirety.

STATEMENT

Long-haul trucking is a key link in the national supply chain, responsible for transporting everything from food to household goods to medicines across the country. A leading long-haul trucking company, CRST operates one of the industry's largest fleets of team drivers. Pet. App. 2a, 43a. When drivers join CRST, the company requires them to undergo training by working alongside experienced drivers—known as "lead drivers" or "Driver Mentors"—for a period of time. Pet. App. 43a. Once student drivers complete their training, they may team with partners ("co-drivers") of their choosing. Pet. App. 3a, 44a. CRST uses teams of two drivers so that one may rest in the sleeper berth while the other is driving.

Pet. App. 43a. CRST's team drivers thus spend the vast majority of every day in a semi-tractor with a single coworker. *Ibid.* Drivers are supervised by a driver manager based in Cedar Rapids, the company's headquarters. Pet. App. 45a. Driver managers are responsible for addressing conflicts between drivers. Pet. App. 45a-46a.

A. CRST's Policies Prohibiting Sexual Harassment And Retaliation

CRST has a written policy prohibiting sexual harassment. Pet. App. 3a-4a, 48a. The policy also bars other forms of unlawful employment discrimination and retaliation. Pet. App. 48a. CRST communicates this policy in the Handbooks and Statement of Policy distributed to drivers and driver managers. *Ibid.* CRST also emphasizes this policy in a dedicated session at driver orientation, where qualified trainers present the policy and provide each driver with a stand-alone copy. *Ibid.* The policy states that CRST "prohibits sexual harassment"; provides that those who report it "will NOT be subject to ANY form of retaliation"; sets forth a complaint procedure; and charges personnel with reporting responsibilities. *Ibid.* CRST also addresses sexual harassment in its Code of Business Ethics, which prohibits harassment based on sex and mandates immediate reporting "to the appropriate Supervisor or [the Human Resources Department]." *Ibid.*

The Handbook spells out how to report harassment. It instructs that "[i]f any employee believes he or she is being subjected to verbal or physical harassment, the employee should immediately contact his or her Driver Manager or [the Human Resources Department] to

inform them of the situation and to request a new lead driver." *Ibid.* The Handbook further provides that "[a]n employee has the right to request a new driver without fear of retaliation. Any employee who reports any act of harassment and/or discrimination will NOT be subject to ANY form of retaliation." *Ibid.*

All drivers—including Petitioners—sign an acknowledgement form indicating that they have received and reviewed the Handbook and Statement of Policy, including the prohibition on sexual harassment and retaliation. Pet. App. 3a-4a, 48a-49a. The acknowledgement states:

> I also understand and agree that if I believe I am being subjected to harassment or discrimination, no matter how severe or pervasive, I will immediately report it to my fleet manager or to the Human Resources Department directly so that I may be removed from the harassing situation and so that CRST may conduct a prompt investigation.

Pet. App. 49a. This acknowledgement expresses the employee's clear understanding and agreement with CRST's remedial practice of removing the complaining employee from "the harassing situation." Pet. App. 49a, 51a.

B. CRST's Standard Remedial Response To Harassment Complaints

When CRST receives a complaint of sexual harassment, its first priority is the safety of the complaining driver. Pet. App. 49a. CRST takes steps to separate the drivers quickly and safely. Pet. App. 4a,

50a. CRST equips the dispatchers who receive complaints of sexual harassment to provide immediate and effective responses to these complaints—including authority to separate the employees, arrange necessary accommodations for the complainant, and pay or reimburse for those accommodations. Pet. App. 50a. Thus, when a complaint is received, the dispatcher or driver manager speaks with the complainant, makes a plan for the complainant's safety, including transportation and lodging, and then relays the complaint to CRST Human Resources (HR).

Upon receiving the complaint, HR logs it and immediately commences an investigation—including gathering pertinent records, developing a line of questioning, and speaking with the complainant and the accused. Pet. App. 55a. After considering all the available evidence, the investigator determines whether the complaint can be corroborated. Pet. App. 55a-56a. Even if the investigator cannot corroborate the complaint, CRST nonetheless takes remedial measures. Pet. App. 56a. An accused male driver will be changed to a "male-only" team designation and never reassigned to drive with the complainant or any other female driver. *Ibid.* The "male only" designation lasts indefinitely, can only be removed by HR, and produces an error message in the driver database if anyone attempts an impermissible pairing. Pet. App. 57a. Furthermore, the accused driver receives a copy of CRST's policy prohibiting harassment via certified mail. *Ibid.* If the HR investigator can corroborate the complaint, the accused driver will face disciplinary action up to and including termination. *Ibid.*

C. CRST's Policies On Driver Pay

CRST's drivers are paid on a per-mile basis using a "split-mileage system." Pet. App. 3a, 46a. Under this system, each driver is paid at his or her individual rate for half of the total miles for each delivery trip (regardless of the distance the driver personally drives). Pet. App. 46a. Although the split-mileage system is the standard payment method at CRST (and throughout the long-haul transportation industry), the company provides other compensation in certain circumstances. Pet. App. 3a, 47a. A driver may receive "layover pay" if a truck is "available from empty time to dispatched pickup time" for specified lengths of time, and may receive compensation related to breakdowns or impassable highway conditions. Pet. App. 47a.

On July 1, 2015, CRST promulgated a new Layover Pay Policy specific to individuals who lodge complaints of harassment or discrimination. Pet. App. 3a, 53a. As that Policy states:

> Upon a report of harassment or discrimination, CRST staff actively engages with each driver to ensure their safety. Normally, the driver making the complaint (Complainant/Accuser) is removed from the truck expeditiously and routed to a safe haven. The objective here is safety first. If the situation warrants, police will be called to ensure that no incidents transpire while the driver is packing up and exiting the truck. CRST exemplifies a culture that is fair and consistent with regard to pay and lodging to employees who report Title VII concerns. A team driver will not be

> penalized, financially, for reporting a bonafide concern. In addition, CRST enforces zero tolerance for retaliation.

Pet. App. 135a. CRST pays the driver removed from the truck a daily amount equal to ten times the highest hourly minimum wage in the country until CRST can pair that driver with a new co-driver. Pet. App. 54a. Prior to July 2015, where there was a delay in the pairing and continuation of driving that exceeded 48 hours, a driver complaining of harassment was eligible to receive the standard layover pay of $40 per day. *Ibid.*

CRST does not have and has never had a policy that drivers who lodge complaints of discrimination are subject to "unpaid removal." *Contra* Pet. 9. Rather, both before and after July 2015, removed drivers are eligible to begin driving and earning pay immediately on a different truck after being removed from the trucks where they complained of harassment, and CRST assists with driver pairings in such circumstances. Complaining drivers (including Petitioner Fortune) regularly continued work on different trucks the very same day they lodged harassment complaints. *See, e.g.*, A2521, 2532, 2542, 2546, 2581.[1] CRST does not bar the driver from getting on another truck, nor does CRST impose any "pay cut" following a complaint.

D. Prior Litigation Resolved In CRST's Favor

Petitioners filed this action after a prior lawsuit brought by the Equal Employment Opportunity Commission (EEOC) was resolved in CRST's favor. The

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[1] "A__" refers to the Appellants' Appendix in the Eighth Circuit.

EEOC alleged that female drivers were subjected to a pattern or practice of severe and pervasive sexual harassment perpetrated by their male co-drivers, and that it was CRST's "standard operating procedure" to tolerate that sexual harassment.

The district court rejected those allegations and granted summary judgment to CRST. *EEOC v. CRST Van Expedited, Inc.*, 611 F. Supp. 2d 918, 941-46 (N.D. Iowa 2009). The district court held that "a reasonable jury could not find that it is CRST's 'standard operating procedure' to tolerate sexual harassment." *Id.* at 952 (citation omitted). Moreover, "[t]he incidence of [alleged] sexual harassment against CRST's female drivers—no more than 5.4% of the total 2,701 female drivers employed by CRST who were teamed with at least one male driver during the relevant period, 2.7% of all female/male teams, 0.8% of the trips taken, 0.9% of all days driven or 0.8% of all the miles driven"—was plainly insufficient to support any "reasonable inference that CRST's anti-sexual harassment policies and practices are a ruse to hide a pattern or practice of tolerating sexual harassment." *Id.* at 953. The Eighth Circuit affirmed, holding that, "as a matter of law, CRST promptly and effectively remedied the sexual harassment once it became aware of it." *CRST Van Expedited*, 679 F.3d at 692.

That litigation reached this Court in the context of a dispute over attorney's fees under 42 U.S.C. § 2000e-5(k). This Court held that an award of such fees is proper in circumstances where a plaintiff's claims are frivolous, unreasonable, and/or groundless. *CRST Van Expedited*, 578 U.S. at 434-35. The Eighth Circuit determined on

remand that many of the EEOC's claims against CRST met that standard. As a result, the EEOC was ordered to pay $3,317,289.67 in fees to CRST. *EEOC v. CRST Van Expedited, Inc.*, 944 F.3d 750 (8th Cir. 2019).

E. District Court Proceedings In This Case

Petitioners subsequently brought this action alleging that CRST subjected them to a hostile work environment, retaliated against them for complaining, and constructively discharged them. Pet. App. 8a, 122a. While discovery was ongoing, the district court certified nationwide classes for the hostile work environment and retaliation claims. *Ibid.* At the close of discovery, CRST moved for decertification of the hostile work environment class and for summary judgment on the class retaliation claim. Pet. App. 121a. The district court granted both motions. Pet. App. 216a-217a.

In its summary judgment motion on the class retaliation claim, CRST argued that removing employees who complain of harassment from the allegedly harassing situation is not a materially adverse employment action. Pet. App. 149a. Petitioners responded by changing their theory. Rather than continue to argue that the materially adverse employment action was the removal of the complainant from the truck, as defined in the district court's certification order, Petitioners recast their claims as based on a supposed CRST policy of suspending female truck drivers without pay when they complain of sexual harassment. *See* Pet. App. 149a-150a. Petitioners did not offer any statistical or anecdotal evidence of this alleged policy, nor did they offer fact or expert witnesses to substantiate it. They instead relied upon evidence that

their counsel created: a so-called "compilation" of CRST's business records, containing counsel's assumptions and guesses about what female drivers would have earned had they remained on the truck. Pet. App. 155a-159a. In response, CRST argued that the compilation ignored the natural fluctuations in driver pay based on CRST's split-mileage compensation system and the basic realities of long-haul trucking, such as mandatory off-duty time under Department of Transportation regulations. *See* Pet. App. 163a-164a. Even accepting the compilation at face value, though, it showed that many female drivers who complained did not experience any effect on their pay, and that some even benefited financially. *Ibid.*

The district court granted summary judgment in CRST's favor. It rejected class counsel's compilation as failing to evince any standard policy of suspending women without pay because it ignored how drivers are paid and how "drastically" their compensation varies over time. Pet. App. 163a. Ultimately, the district court found, the evidence did "not demonstrate that this pay was consistently less than a driver would have made had she stayed on the truck." Pet. App. 164a. The district court also held that Petitioners failed to adduce evidence that CRST acted with a retaliatory motive. Pet. App. 167a-176a.

CRST then sought summary judgment on the remaining individual claims, including the hostile work environment claims. Pet. App. 38a-40a. The district court granted CRST's motion. Pet. App. 118a. After carefully reviewing the record evidence regarding each harassment complaint lodged by Sellars, Lopez, and

Fortune, the district court held it was "undisputed that in response to plaintiffs' complaints, they were separated from the harassing driver and were never paired with him again." Pet. App. 103a. The district court found no "evidence that after they made a complaint of harassment by a co-driver and CRST responded to their complaint, they continued to be harassed by the same co-driver." Pet. App. 111a. Likewise, there was "no evidence that any of the alleged harassers in this case had previously harassed another female driver, which would be relevant as to CRST's knowledge and the reasonableness of its previous response." *Ibid.* The district court held that CRST was not required to "foresee misconduct by employees who have no history of misconduct." Pet. App. 110a.

F. Decision Below

On appeal, the Eighth Circuit issued a unanimous opinion affirming in part and vacating in part the district court's decisions. Pet. App. 1a-36a.

As to the individual and class retaliation claims, the Eighth Circuit confirmed "that CRST's practice during the entire class period was to remove drivers who complained of co-driver sexual harassment from the truck as soon as practicable." Pet. App. 11a. While that meant the complainant ceased earning her split-mileage rate for the existing trip, she "remained eligible to earn the other types of pay" under the company's standard compensation structure—including layover pay or split-mileage pay for a new trip. Pet. App. 11a & n.3, 13a. The record evidence showed that "the net effect of removal on a driver's pay was dependent on a variety of factors," and that "some removed drivers did not experience a net

decrease in pay" at all. Pet. App. 13a n.4. The court therefore rejected any claim that CRST had an "unpaid suspension" policy for drivers complaining of sexual harassment, and held that the company's actual policy of removing complaining drivers did not constitute per se retaliation. Pet. App. 12a-13a.

The court next considered whether Petitioners demonstrated a triable issue under the traditional standards governing retaliation claims, which require proof of an adverse employment action and an impermissible retaliatory motive. Pet. App. 14a. The court analyzed those questions separately for class members who lodged complaints before the July 2015 Layover Pay policy change versus after.

For the first group, the court agreed with Petitioners that a reasonable employee could have been deterred from complaining because she may have anticipated a decrease in expected pay following removal. Pet. App. 16a. The court nonetheless affirmed summary judgment for CRST because Petitioners failed to show that "this adverse employment action was in retaliation for their Title VII protected activity." Pet. App. 17a. While Petitioners attempted to show "direct evidence of retaliation" through internal HR documents questioning whether complaining drivers were punished for their complaints, the court explained that this question was not a "comment by a decisionmaker," and in any event "d[id] not reflect any motivative discriminatory bias." Pet. App. 18a-19a. The court also concluded that Petitioners failed to raise an inference of retaliation under the *McDonnell Douglas* framework. CRST offered legitimate and neutral reasons for the removal

policy—*i.e.*, "protecting the complainant's safety and responding properly to complaints of sexual harassment as required by our hostile work environment precedent"—and Petitioners failed to show pretext. Pet. App. 19a-21a.

The court's analysis for post-July 2015 was similar. The court concluded that because CRST had not publicized the policy change that made additional compensation available for sexual harassment complainants, women who complained after July 2015 could have expected the same result as women who complained before—even if "the anticipated net decrease did not come to fruition." Pet. App. 22a. The court thus held that the district court erred by concluding that Petitioners failed to raise a triable issue as to the existence of an adverse employment action. Moreover, because the district court had not specifically considered retaliatory intent as to this second group, the court remanded for the lower court to do so in the first instance. Pet. App. 23a.

The Eighth Circuit then turned to the individual hostile work environment claims. It explained that the sole question was "whether CRST was negligent" in responding to harassment it knew or should have known about. Pet. App. 25a. On the question of notice, the court rejected Petitioners' argument that CRST had constructive notice of "a serious risk of sexual harassment in the workplace" based on the prior EEOC litigation and the ongoing complaints of female drivers. "The record shows," the court explained, "that the actual incidents of harassment took place away from management's oversight and were perpetrated by

employees with no known history of harassment." Pet. App. 29a. Even if these circumstances provided "notice of a generalized risk of harassment," that was "insufficient to establish the constructive notice of ongoing harassment necessary to trigger an employer's obligation to take preventative remedial action." *Ibid.* Indeed, the standard urged by Petitioners—which "would require CRST to assume, on the basis of complaints about individual male drivers, that any and every CRST male driver would be a sexual harasser"—amounted to strict liability for coworker sexual harassment, contrary to Supreme Court precedent. Pet. App. 29a-30a (citing *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998)).

The Eighth Circuit also disagreed with Petitioners that CRST was required to escalate its responsive measures in these circumstances, such as by installing video surveillance in the truck cabs where CRST drivers work and live. Pet. App. 30a-31a & n.8. The court declined to hold "that an employer's remedial response to harassment must deter future harassment by any offender in order to be reasonable." Pet. App. 31a. Rather, it confirmed that none of the Petitioners established harassment by a driver with a known history of harassment that CRST should have prevented, and that CRST's standard response to complaints of sexual harassment was adequate. Pet. App. 31a-32a.

REASONS FOR DENYING THE PETITION

I. The First Question Presented Does Not Warrant Review.

A. Petitioners Challenge An Alternative Holding That, Even If Reversed, Would Not Change The Outcome Of The Hostile Work Environment Claim.

The question presented concerns an alternative holding that had no impact on the Eighth Circuit's result. Petitioners ask this Court to decide whether an employer's remedial response to coworker sexual harassment must deter future harassment by other harassers for the employer to escape liability under Title VII. Even if this Court decided that question in favor of Petitioners, their sexual harassment claims would still fail because Petitioners did not establish the actual or constructive notice required for employer liability.

An employer is liable for coworker sexual harassment "only if the employer's own negligence caused the harassment." Pet. App. 24a-25a. To prove negligence, a plaintiff must show that the employer "knew or should have known about the conduct and failed to stop it." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 759 (1998). Negligence thus "involves a two-step inquiry." Pet. App. 25a. At the first step, the court asks whether the employer had notice (either actual or constructive) of the conduct at issue. If so, then at the second step the court asks whether the employer took appropriate remedial action in response. *Ibid.*

Consistent with that framework, the decision below started with the question of notice. Pet. App. 26a-30a.

After finding no actual notice as a matter of fact, the court addressed constructive notice and rejected Petitioners' theory that "even prior to their actual complaints of sexual harassment, CRST had constructive notice of a serious risk of sexual harassment in the workplace that was not being effectively addressed by its current policies." Pet. App. 28a. That theory, the court explained, would essentially impose strict liability on CRST, requiring it "to assume, on the basis of complaints about individual male drivers, that any and every CRST male driver would be a sexual harasser." Pet. App. 30a. Petitioners do not challenge the Eighth Circuit's holding with respect to notice, yet that holding dooms their claims.

The Eighth Circuit went on to provide an alternative basis to affirm summary judgment: even assuming CRST had constructive notice (and it did not), its remedial action was reasonably calculated to stop the harassment. Pet. App. 30a-33a. The petition relates exclusively to that alternative holding, arguing that it was not enough for CRST to stop the harassment if its actions failed to deter other harassment perpetrated by other employees in the future. But the Eighth Circuit's result did not rest on that alternative holding, and so the question presented makes no difference to the outcome of this case.

B. The Circuits On The Other Side Of The "Split" Would Have Reached The Same Result.

While Petitioners claim a circuit split, this case would have come out the same way in the Ninth Circuit. *Contra* Pet. 11, 21. That court requires the type of notice that the Eighth Circuit found absent here.

Petitioners trumpet the unpublished memorandum decision in *Anderson v. CRST International, Inc.* as demonstrating a split between the Eighth and Ninth Circuits and underscoring the need for clarity for employers like CRST that operate in multiple circuits. Pet. 21. According to Petitioners, there is a direct conflict between *Anderson*, which denied summary judgment on a hostile work environment claim, and the decision below. But *Anderson* is readily distinguishable. There was no dispute in *Anderson* that CRST had actual notice of the alleged harassment because the plaintiff in that case lodged a complaint. 685 F. App'x 524, 526-27 (9th Cir. 2017). The Ninth Circuit did not excuse the employee from establishing CRST's notice, nor did the court hold (as Petitioners urge in this case) that CRST could be charged with constructive notice of pervasive harassment *before* the particular complaint at issue was even lodged. The same is true for each of the Ninth Circuit decisions discussed in the petition.[2] Indeed, the Model Jury Instructions cited by Petitioners confirm that an employee must prove "management knew or should have known of the harassment" to establish

[2] *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103 (9th Cir. 2004) (actual notice from repeated employee complaints); *Nichols v. Azteca Rest. Enterprises, Inc.*, 256 F.3d 864 (9th Cir. 2001) (actual notice from repeated employee complaints); *Mockler v. Multnomah Cnty.*, 140 F.3d 808, 811 (9th Cir. 1998) (actual notice from employee complaint); *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991) (actual notice from repeated employee complaints); *Fuller v. City of Oakland*, 47 F.3d 1522 (9th Cir. 1995) (actual notice from reports by coworkers to supervisor).

employer liability. Ninth Circuit Model Civil Jury Instructions 10.7.

It is also far from clear that the Eighth and Ninth Circuits diverge in how they apply the requirement of an adequate remedial response. None of the cases discussed in the petition faults an employer for failing to deter future harassment of different victims by different harassers. For example, *Anderson* found a triable issue because the record permitted a jury to conclude that CRST's response was ineffective as to the plaintiff herself based on specific facts presented in that case. 685 F. App'x at 527. That conclusion was consistent with the arguments advanced by the EEOC as amicus in that case, which pointed to case-specific circumstances rather than claiming (as Petitioners suggest, *see* Pet. 21-22 & n.13) that the company's standard remedial response contributed to an environment of pervasive harassment. Amicus Br. of EEOC at 29, *Anderson v. CRST Int'l, Inc.*, No. 15-55556 (9th Cir. Dec. 22, 2015), 2015 WL 9449421.

The other Ninth Circuit decisions that Petitioners discuss likewise fail to demonstrate a circuit split. *McGinest v. GTE Service Corp.* found that the employer failed to take any action in response to various racist acts that the employer knew or should have known about. 360 F.3d 1103, 1120 (9th Cir. 2004). *Nichols v. Azteca Restaurant Enterprises, Inc.* condemned the employer's response because the employer "did nothing" in the face of multiple complaints and, when it finally responded, that response was so inadequate that it did not even include an investigation of the complaint. 256 F.3d 864, 876 (9th Cir. 2001). *Mockler v. Multnomah County* found the employer liable where its response did not even

prevent the same harasser from targeting the same victim again. 140 F.3d 808, 814 (9th Cir. 1998). *Ellison v. Brady* held that the employer's response was insufficient insofar as it "only told [the harasser] to stop harassing [the victim]" and nothing more. 924 F.2d 872, 882-83 (9th Cir. 1991). And *Fuller v. City of Oakland* involved circumstances where the employer "failed to take *any* appropriate remedial steps once it learned of the harassment." 47 F.3d 1522, 1529 (9th Cir. 1995). Thus, while it is true that the Ninth Circuit articulates "the twin purposes of ending the current harassment and deterring future harassment," *id.* at 1528, Petitioners have not identified any case applying those principles to find an employer's response inadequate in circumstances like these.

Petitioners cannot show a split with the Tenth Circuit either. *See* Pet. 16-17. *Kramer v. Wasatch County Sheriff's Office*, 743 F.3d 726 (10th Cir. 2014), and *Tilghman v. Kirby*, 662 F. App'x 598 (10th Cir. 2016), both involved alleged harassment by a supervisor and so addressed vicarious liability rather than the negligence standard at issue here. *See Vance v. Ball State Univ.*, 570 U.S. 421, 424 (2013) (explaining distinct standards). As to the negligence standard, the Tenth Circuit's view accords with the decision below. The court has rejected any standard that "would make employers insurers against future sexual harassment by coworkers after an initial employer response, regardless of the nature of the response taken," which the court denounced as "liability without end." *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 679 (10th Cir. 1998); *cf.* Pet. App. 29a-30a (expressing concern that Petitioners'

standard would subject CRST to strict liability). Thus, in the Tenth Circuit, evidence of later harassment is irrelevant to the adequacy of the employer's response unless the employee shows that a later harasser "knew of, or was at all motivated by," the employer's response. *Adler*, 144 F.3d at 678. Petitioners adduced no such evidence here, and so the Tenth Circuit would have reached the same result as the Eighth Circuit below.

Petitioners fare no better in their effort to demonstrate a split based on other antidiscrimination laws with different texts, purposes, and standards. Pet. 17-19. Their analogy to Title IX is inapt because, as Petitioners acknowledge, a school's liability under that statute requires deliberate indifference rather than the negligence standard applied here. Even setting that difference aside, however, there is no split. Petitioners rely on *Patterson v. Hudson Area Schools*, 551 F.3d 438 (6th Cir. 2009), neglecting to mention that it was abrogated by the Sixth Circuit in an en banc decision repudiating exactly the type of standard Petitioners urge here—*i.e.*, that "whenever harassment continues after a school receives notice, a reasonable jury can find that the school remained deliberately indifferent." *Foster v. Bd. of Regents of Univ. of Mich.*, 982 F.3d 960, 968 (6th Cir. 2020) (en banc). The Sixth Circuit explained: "That can't be. Foster's proposed rule calls to mind strict liability, not deliberate indifference." *Ibid.* Title VI also uses a deliberate indifference standard, and *Zeno v. Pine Plains Central School District* merely holds that inaction or half-measures in response to an escalating campaign of harassment against the same student over a period of years can rise to the level of

deliberate indifference. 702 F.3d 655, 668-69 (2d Cir. 2012).

In sum, Petitioners are wrong that this case would have come out differently in another circuit, both because their claims would still fail for lack of notice, and because other courts have not applied the standard Petitioners are seeking here.

C. CRST's Uncommon Work Environment Makes This Case A Poor Vehicle.

This case is anything but "an excellent vehicle" for addressing standards governing employer liability for coworker sexual harassment. *Contra* Pet. 22. CRST's work environment is unusual in several respects that are potentially relevant to the general deterrence standard that Petitioners urge this Court to adopt.

"CRST's drivers share more in common with astronauts, submariners or lighthouse watchmen than they do with the average office worker." *CRST Van Expedited*, 611 F. Supp. 2d at 940. They work in teams of two in truck cabs, not among colleagues at offices. Any harassment on those trucks takes place outside the view of other drivers and in many cases is addressed without the involvement or knowledge of other employees in CRST's workforce. The Eighth Circuit emphasized the "decentralized nature of CRST's work environment" when it addressed constructive notice, explaining that "[r]eports made by nonplaintiff victims about different harassers at separate worksites were not probative of whether the employer had constructive notice that sexual harassment was pervasive and open in an individual plaintiff's work environment." Pet. App. 29a.

By the same token, an appropriate remedial response in this decentralized environment may differ from an appropriate remedial response in a more traditional workplace setting. For example, what it means to "deter future harassment" under the standard that Petitioners urge could look very different in CRST's workplace than in the majority of workplaces nationwide, where coworkers are more likely to witness the harassment and observe the employer's response (or inaction). The unusual factual circumstances presented here make this case a poor vehicle for making law about employer liability for coworker harassment that would affect millions of workplaces around the country when those workplaces look nothing like CRST's. And it is a poorer vehicle still for announcing a rule that would extend to other antidiscrimination laws like Title VI and Title IX, thereby affecting a wide range of institutions receiving federal funds, including schools and universities, that operate in environments that bear no resemblance to the work environment here.

D. The Decision Below Is Correct.

This Court has properly limited the circumstances when an employer is liable under Title VII for coworker sexual harassment. An employer is liable only when its own negligence is a cause of the harassment, which means that "it knew or should have known about the conduct and failed to stop it." *Ellerth*, 524 U.S. at 759. This standard makes sense: an employer's duty arises when it knows or should know about harassment, and its duty extends as far as ending that harassment. The Eighth Circuit correctly applied this standard when it held that CRST was entitled to summary judgment.

Petitioners seek a radical change that would dramatically expand employer liability. Under their proposed standard, an employer would be liable anytime harassment occurs more than once at the same business, even if the employer's response to the first incident stopped the harassment, and even if the subsequent incident involved a different harasser and a different victim at a different location. It would not matter if the harasser involved in the subsequent incident had no known history of harassment, which was the case here, or even if that harasser was aware of the prior incident or the employer's action (or inaction) in response to it. Following a single instance of harassment of a female employee by a male employee, this standard would require the employer to treat *every male employee* as another potential harasser. Employers would be compelled to take extraordinary measures to avoid liability, like the proposal Petitioners made in this case to install video cameras inside truck cabs for constant surveillance of drivers where they both work and sleep, eliminating their privacy during weeks-long trips. Pet. App. 31a & n.8.

Holding an employer liable in such circumstances is "liability without end," *Adler*, 144 F.3d at 679, and requiring extraordinary measures like video surveillance—which the EEOC has not endorsed—"would revolutionize the workplace in a manner incompatible with a free society," *Ellerth*, 524 U.S. at 770 (Thomas, J., dissenting). The record is clear that when CRST had notice of harassment allegations, it took action reasonably calculated to end the harassment. The fact that CRST had previously received notice of other

allegations (not corroborated and proven harassment, as Petitioners suggest) did not render CRST strictly liable for alleged harassment in the future. When employers confront allegations of harassment, they have obligations to both the accuser and the accused. They cannot stereotype all male employees as harassers, nor can they dispense with the careful and impartial investigation that both parties deserve and simply assume the allegations are true. CRST's standard remedial response balances these important considerations and stops any harassment that is taking place. That is precisely what Title VII requires.

II. The Second Question Presented Does Not Warrant Review.

A. This Case Does Not Implicate Any Circuit Split Over "Per Se Retaliation."

The Eighth Circuit had no occasion to consider whether and when a per se retaliation standard should apply under Title VII. The decision below clearly stated: "We have not previously applied the Seventh Circuit's 'retaliatory per se' standard to find an employer's policy retaliatory on its face, and the facts of this case do not call for us to do so here." Pet. App. 12a. That was so, the court explained, because Petitioners failed to prove that CRST maintained any policy of imposing "unpaid suspension" whenever a female driver complained of sexual harassment. The only policy supported by the record was a policy "to remove the complainant from a truck and conduct an investigation." Pet. App. 13a & n.4. Upon removal, each class member received "whatever pay … she [wa]s entitled to under CRST's standard pay policy." Pet. App. 13a. While some class members

experienced a decrease in pay, others did not. Pet. App. 13a n.4. "[T]he net effect of removal on a driver's pay was dependent on a variety of factors, such as the length of the resulting layover, the driver's choice of action upon removal, and the availability of another load." *Ibid.*

The petition ignores these findings and continues to refer to a supposed CRST policy of "unpaid removal" even though the court below unequivocally held that no such policy exists. *See* Pet. 7, 9, 30, 36, 37. Even the question presented reflects this error: it characterizes the decision below as holding that "complaining of sexual harassment would directly lead to a net decrease in pay" under CRST's policy. Pet. i. That is wrong. The Eighth Circuit (like the district court) held that Petitioners failed to demonstrate the existence of such a policy. Pet. App. 13 & n.4. Instead, the Eighth Circuit determined that an employee might "*expect* that complaining of sexual harassment would directly lead to a net decrease in pay," Pet. App. 16a (emphasis supplied)—even though "the anticipated net decrease did not come to fruition" for many class members, Pet. App. 22a. The Eighth Circuit considered reasonable employee expectations when it analyzed the adverse employment action element, per *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 67-70 (2006). But those expectations do not change the policy CRST actually maintained, nor do they render that policy per se retaliatory.

The facts here stand in stark contrast to the leading case in the supposed split, *EEOC v. Board of Governors of State Colleges and Universities*, 957 F.2d 424 (7th Cir. 1992). There, the Seventh Circuit considered whether an

employer violated the antiretaliation provision in the Age Discrimination in Employment Act, 29 U.S.C. § 623(d), which forbids discrimination against employees who have filed a charge under the statute. The EEOC challenged "a collective bargaining agreement provision that denies employees their contractual right to a grievance proceeding whenever the employee initiates a claim, including a claim of age-based discrimination." *Board of Governors*, 957 F.2d at 425. In that context, the Seventh Circuit held that "[w]hen an employee's participation in statutorily protected activity is the determining factor in an employer's decision to take adverse employment action, that action is invalid regardless of the employer's intent." *Id.* at 428.

Board of Governors has no bearing here because participation in statutorily protected activity was *not* the determining factor in the adverse employment action claimed in this case. Petitioners arrive at the contrary conclusion only by substituting the policy that CRST actually maintains with an "unpaid-removal policy" that the Eighth Circuit flatly rejected as unsupported by the record evidence. Simply put, this case would not have come out differently if filed within the Seventh Circuit, because *Board of Governors* would not have supplied the appropriate standard for these circumstances.

Nor would this case have come out differently in the Third or Sixth Circuits, which Petitioners place alongside *Board of Governors* on the opposing side of this supposed split. *See* Pet. 25-26. Neither *Fasold v. Justice*, 409 F.3d 178 (3d Cir. 2005), nor *DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719 (3d Cir. 1995),

applied *Board of Governors'* standard to circumstances like these. *Fasold* analyzed the "evidentiary basis from which an inference of retaliation can be drawn," 409 F.3d at 190, which is precisely the analysis that Petitioners claim was unnecessary here, and *DiBiase* did not involve a retaliation claim at all, 48 F.3d at 724. Petitioners fare no better in the Sixth Circuit. That court has not applied *Board of Governors* beyond the narrow circumstances it presented: a collective bargaining agreement that prevented an employee from obtaining relief through a grievance process because that employee filed a charge of discrimination. *See Watford v. Jefferson Cnty. Pub. Schs.*, 870 F.3d 448, 454 (6th Cir. 2017). And while Petitioners also cite *EEOC v. SunDance Rehabilitation Corp.*, that case hurts rather than helps them. There, the Sixth Circuit "d[id] not find the Seventh Circuit's *Board of Governors* opinion to be compelling precedent" and declined to apply it in circumstances where the employer's policy was not "facially retaliatory" because it did not actually impose an adverse employment action. 466 F.3d 490, 498 (6th Cir. 2006). The same is true of CRST's removal policy.

No other circuit has adopted the "retaliation per se" standard. And in this case, the Eighth Circuit did not opine on whether and when a plaintiff can establish retaliation under a per se standard because it expressly found that "the facts of this case [did] not call for [it] to do so here." Pet. App. 12a. Just as in *Franklin v. Local 2 of the Sheet Metal Workers International Association*, 565 F.3d 508, 521 (8th Cir. 2009), the court had no occasion to address per se retaliation because the employer action at issue was factually distinguishable

from *Board of Governors*. Thus, even to the extent Petitioners could show that a circuit split exists with respect to the Seventh Circuit's decision on "retaliation per se" in *Board of Governors* (and they cannot), that split is not implicated by this case.

B. The Decision Below Is Correct.

The decision below is correct. The Eighth Circuit faithfully followed this Court's holding in *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338 (2013). *See* Pet. 14a. *Nassar* confirms "that Title VII retaliation claims require proof that the desire to retaliate was the but-for cause of the challenged employment action." 570 U.S. at 352. Applying that standard, the Eighth Circuit found that the record did not present a triable issue as to the required causal connection. Petitioners lacked any direct evidence that CRST had any retaliatory motive with respect to its policy of removing complainants from allegedly harassing environment after they lodged sexual harassment complaints. Pet. App. 16a-19a. Moreover, they failed to raise an inference of retaliation under the *McDonnell Douglas* burden-shifting framework: CRST offered legitimate and non-discriminatory reasons for its removal policy, and Petitioners neither disputed those reasons nor demonstrated that the real reason was retaliation. Pet. App. 19a-21a.

The petition ignores *Nassar* and its controlling standard for proving retaliation under Title VII. It does not even acknowledge this precedent, and it relies overwhelmingly on decisions that predate *Nassar*'s clarification of the causation required to state a claim. *See* Pet. 23-36. Consequently, Petitioners fail to grapple

with the Court's reasons for requiring "proof that the desire to retaliate was the but-for cause of the challenged employment action," which were grounded in the text of the antiretaliation provision, the structural choices reflected in the statute and its amendments, and the policy concern that "lessening the causation standard could also contribute to the filing of frivolous claims, which would siphon resources from efforts by employer, administrative agencies, and courts to combat workplace harassment." *Nassar*, 570 U.S. at 352, 358.

Rather than grappling with those reasons, Petitioners urge deference to agency guidance. They claim that the EEOC has advanced this retaliation per se theory in the actions it has filed and the guidance it has published. *See* Pet. 23-24 & n.16, 35. Notably, all of those actions were filed years before *Nassar*, *see* Pet. 23 n.14, and the EEOC Compliance Manual that Petitioners cite as supporting their theory is no longer in effect, *see* Pet. 24 n.16. The current version of that Manual says only that the employer conduct in *Board of Governors*—"[s]uspending or limiting access to an internal grievance procedure"—constitutes an adverse action, not that it relieves the employee of proving retaliatory motive. EEOC Compliance Manual § 8-II(D)(1). In fact, the Compliance Manual goes on to state the common-sense proposition that in order to make out a claim of retaliation, proof of "retaliatory motive" is required, *id.* § 8-II(E), just as the Eighth Circuit held.

Even if Petitioners were right that the EEOC supports their retaliation per se theory, that would not move the needle. As this Court held in *Nassar*, the Compliance Manual's views about causation "lack the

persuasive force that is a necessary precondition to deference under *Skidmore [v. Swift & Co.*, 323 U.S. 134 (1944)]." *Nassar*, 570 U.S. at 361. Petitioners do not address that holding nor explain why the Court should reach a different conclusion here.

C. Review Is Premature Given The Proceedings Underway In The District Court On Remand.

At a minimum, this Petition is premature because it seeks review on an interlocutory basis. Although the Eighth Circuit largely affirmed the district court's decision, it vacated one aspect of the decision with respect to the grant of summary judgment to CRST for retaliation claims arising after the July 2015 policy change. Pet. App. 23a. Those claims were remanded to the district court, and proceedings are underway to address a threshold problem that the Eighth Circuit identified: whether Petitioners have an adequate class representative for those claims because they all lodged their complaints before the July 2015 policy change. Pet. App. 23a n.6. In the course of those proceedings, Petitioners have argued that the district court should reopen fact and expert discovery and accept additional briefing on summary judgment. *See* Joint Status Report at 5, *Sellars v. CRST Expedited, Inc.*, No. 1:15-cv-117 (N.D. Iowa Nov. 15, 2021), ECF No. 260; Pls.' Mot. to File Am. Compl. at 11, *Sellars v. CRST Expedited, Inc.*, No. 1:15-cv-117 (N.D. Iowa Dec. 23, 2021), ECF No. 263-1.

There is no need for this Court to wade into this case now, while the parties are simultaneously litigating whether Petitioners have an adequate class representative for this remanded claim and whether the

record should be reopened. To the extent the decision below presents any question warranting his Court's review (and it does not), this Court can and should review it in the normal course after final judgment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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