No. 22-263

In The

Supreme Court of the United States

YVES WANTOU,

Petitioner,

v.

WAL-MART STORES, TEXAS, L.L.C.,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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Petitioner, Pro Se

QUESTIONS PRESENTED

Immediately after beginning his employment with Respondent as a pharmacist in March 2015, Petitioner became the direct object of his Caucasian coworkers' and supervisor's constant ridicule, insults, rumors, and innuendoes concerning his race and national origin, false allegations about his work product and reputation; all of which Respondent allowed to continue unabated, which led to exacerbation of the hostile work environment. The district court granted summary judgment using erroneous standards. On appeal to the Fifth Circuit, a divided panel acknowledged the district court's erroneous standards but refused to reverse and remand the case to the district court.

Furthermore, following this Court's decision in *Staub v. Proctor Hospital*, a majority of Courts of Appeals have held that a Title VII/§ 1981 plaintiff is entitled to use Cat's Paw Theory of liability if the facts of the case show that a jury could find the employer liable under Cat's Paw Theory. In this case, the Fifth Circuit's Panel, while admitting that issuing Cat's Paw Theory instructions to the jury as to Petitioner's Title VII retaliation claims would have been proper, refused to reverse judgment on the retaliation claims at issue, ratifying *post hoc* and non-substantive justifications cited by the District Court.

The questions presented are:

1. Whether an appellate court is required to remand the case to the district court when the appellate

QUESTIONS PRESENTED—Continued

court determines the district court used erroneous legal standards in granting summary judgment as to a hostile work environment claim under Title VII/ § 1981; particularly when the adjudicating panel is divided on the issue.

2. Whether a victim of hostile work environment, under 42 U.S.C. § 2000e and 42 U.S.C. § 1981, has the duty to perpetually make the employer aware of illegal harassment after the employer failed to remedy the hostile work environment despite being repeatedly put on notice, by the victim, of said hostile work environment.

3. Whether as part of the "inescapable duty of the trial judge to instruct the jurors, fully and correctly, on the applicable law of the case, and *to guide*, direct, and assist them toward an intelligent understanding of the legal and factual issues involved in their search of the truth,"[1] a district court is required to issue Cat's Paw Theory instructions to jury upon due request by a plaintiff in a case in which the facts support a Cat's Paw Theory of causation.

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[1] 9 C. Wright A. Miller, Federal Practice and Procedure: Civil § 2556 (1971).

RELATED CASES

Yves Wantou v. Wal-Mart Stores Texas, L.L.C., No. 5:17-cv-18, U.S. District Court for the Eastern District Texas. Judgment entered March 12, 2020.

Yves Wantou v. Wal-Mart Stores Texas, L.L.C., No. 20-40284, U.S. Court of Appeals for the Fifth Circuit. Judgment entered January 10, 2022.

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I. PETITION FOR WRIT OF CERTIORARI

Yves Wantou petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

II. OPINIONS BELOW

The Fifth Circuit panel's published opinion[2] is reported at 23 F.4th 422 (5th Cir. 2022). The Fifth Circuit's denial of panel rehearing and en banc review[3] is unreported. The district court's summary judgment[4] is unreported. The district court's judgment is unreported.

III. JURISDICTION

The Fifth Circuit entered judgment on 01/10/2022;[5] and denied panel rehearing and en banc review on 04/19/2022.[6] This Court extended this petition's filing date to 09/16/2022, No. 22A34. This petition is timely filed pursuant to this Court's Rule 13.5 and grant of extension of time. This Court has jurisdiction under 28 U.S.C. § 1254(1).

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[2] App.1-31.

[3] App.41-42.

[4] App.32-40 (excerpts only).

[5] App.1-31.

[6] App.41-42.

IV. STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions include 42 U.S.C. § 1981; 42 U.S.C. § 2000e; and 42 U.S.C. § 2000e-3(a).

42 U.S. Code § 1981—Equal rights under the law

(a) STATEMENT OF EQUAL RIGHTS

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "MAKE AND ENFORCE CONTRACTS" DEFINED

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) PROTECTION AGAINST IMPAIRMENT

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S. Code § 2000e—Definitions

For the purposes of this subchapter –

(a) The term "person" includes one or more individuals, governments, governmental agencies, political

subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee

representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) twenty-five or more during the first year after March 24, 1972, or (B) fifteen or more thereafter, and such labor organization –

> **(1)** is the certified representative of employees under the provisions of the National Labor Relations Act, as amended [29 U.S.C. 151 et seq.], or the Railway Labor Act, as amended [45 U.S.C. 151 et seq.];
>
> **(2)** although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 [29 U.S.C. 401 et seq.], and further includes any governmental industry, business, or activity.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act [43 U.S.C. 1331 et seq.].

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

(k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: Provided, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

(l) The term "complaining party" means the Commission, the Attorney General, or a person who may bring an action or proceeding under this subchapter.

(m) The term "demonstrates" means meets the burdens of production and persuasion.

(n) The term "respondent" means an employer, employment agency, labor organization, joint labor-management committee controlling apprenticeship or other training or retraining program, including an on-the-job training program, or Federal entity subject to section 2000e-16 of this title.

42 U.S. Code § 2000e-3—Other unlawful employment practices

(a) DISCRIMINATION FOR MAKING CHARGES, TESTIFYING, ASSISTING, OR PARTICIPATING IN ENFORCEMENT PROCEEDINGS

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

(b) PRINTING OR PUBLICATION OF NOTICES OR ADVERTISEMENTS INDICATING PROHIBITED PREFERENCE, LIMITATION, SPECIFICATION, OR DISCRIMINATION; OCCUPATIONAL QUALIFICATION EXCEPTION

It shall be an unlawful employment practice for an employer, labor organization, employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment

by such a labor organization, or relating to any classification or referral for employment by such an employment agency, or relating to admission to, or employment in, any program established to provide apprenticeship or other training by such a joint labor-management committee, indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.

V. STATEMENT OF THE CASE[7]

A. PROCEDURAL HISTORY

After exhaustion of remedies with the Equal Employment Opportunity Commission ("EEOC"), Petitioner brought claims of illegal discrimination, disparate treatment, Hostile Work Environment ("H.W.E.") and retaliation under Title VII/§1981; and Quantum Meruit ("Q.M."); against Respondent, Wal-Mart Stores Texas, L.L.C. ("Wal-Mart"), by filing his Original Complaint ("O.C.") in E.D. Tex. on 01/17/2017, and subsequently three amendments thereof.[8] Respondent filed

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[7] Hereafter, references to the attached Appendix, and both the appellate record (Record of Appeal ("ROA")) and Opening Brief ("OB") in the Fifth Circuit shall be cited.

[8] *See* App.91.

Motion for Summary Judgment ("MSJ") on 11/14/2018,[9] which the District Court ("D.C.") granted on all but retaliation and Q.M. claims (09/30/2019).[10] Between 10/28/2019 and 11/06/2019, trial took place as to surviving claims. Jury found for Wantou only on retaliation claim regarding 06/28/2016 Coaching ("Coaching_III"). D.C. entered judgment on 03/12/2020,[11] and denied all parties' post-judgment motions on 07/06/2020.[12]

Both parties appealed D.C.'s final judgment to the Fifth Circuit. The EEOC filed Amicus Brief urging reversal on H.W.E.[13] Wantou's contention on appeal were, *inter alia*, that: **(i)** in concluding that the illegal harassment suffered by Wantou during his employment was not "severe and pervasive" enough to establish *prima facie* claim for H.W.E and in granting MSJ on Wantou's H.W.E. claim, D.C. used manifestly erroneous standards; **(ii)** in denying Cat's Paw Theory instructions ("C.P.T.I.'s") as to Wantou's retaliation claims, D.C. not only ran counter to authorities from many Circuit Courts that stipulate that a Title VII plaintiff (with a viable and pertinent claim under Cat's Paw Theory ("C.P.T.")) is ***entitled*** to have his case adjudicated by the factfinder under C.P.T. ***analysis*** (and thus if such a plaintiff is entitled to examination of his case by the jury under C.P.T. ***analysis***, then the jury must be instructed on how to perform cat's paw ***analysis***,

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[9] ROA.3603.

[10] App.32-40 (excerpts only); ROA.9354.

[11] ROA.11504.

[12] ROA.12116.

[13] App.108-33.

and the trial judge has the inescapable duty to fully instruct and guide the jurors on applicable law); but most importantly, the instructions as given by the trial judge, were misleading and misguiding.

B. STATEMENT OF FACTS

Wantou, an African, Black man from the country of Cameroon, began his employment as a pharmacist at Wal-Mart in March 2015, at the pharmacy of Wal-Mart Store #131 ("Pharmacy_131") in Mt. Pleasant, TX.[14] Immediately upon beginning his employment with Wal-Mart, Wantou became subject to constant ridicule, insults, rumors, and innuendoes concerning Wantou's race and national origin, and false allegations about Wantou's work product and reputation, all of which emanating from Caucasian pharmacy staff and all of which Respondent allowed to continue unbated and to actually flourish, which led to the exacerbation of the illegal harassment and H.W.E.[15] Among other things, Wantou was repeatedly called "monkey" and "chimp" by Caucasian pharmacy technicians Ann Samples, Wendy Willoughby and Rayla Edwards; and whenever Wantou would ask said pharmacy technicians to perform tasks or point errors they had made in typing prescriptions, they would mimic, ridicule and mock Wantou's accent **in front of customers** and utter racist or xenophobic slur referring to Wantou's

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[14] App.51-52; ROA.6025; ROA.12442.

[15] App.73-76; App.92-95; App.104-07.

African ethnicity and national origin.[16] As an example of such racist and xenophobic harassment, Caucasian pharmacist Shawn Shannon would repeatedly call Wantou "African fart"; Caucasian pharmacy technician Ann Samples would repeatedly tell Wantou "You monkey like to work like a dog. Of course, you are a monkey from Africa."[17] As another example, in the summer of 2015, Pharmacy_131 was infested with flies; and Wantou has the personal trait of getting very annoyed by the presence of flies.[18] Upon noticing how annoyed Wantou was due to loads of flies constantly roaming around, Ann Samples, Caucasian pharmacy technician would repeatedly make the following comment to Wantou (in June 2015 and repeatedly thereafter), **in front of other associates and customers**: "I see pictures of dirty children from Africa with running nose and flies all over their face all the time. Being from Africa, there is no reason for you to be annoyed by flies. You come from a dirty and fly-infested country [. . .] You come from a dirty place, so just deal with it."[19] The fact that Ann Samples made the above comment in front of other associates and, most of all, **in front of customers**, made Wantou feel very humiliated, illegally harassed and discriminated against based on his national origin.[20]

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[16] App.73-76; App.81-90; App.92-95; App.104-07.

[17] App.73-76; App.92-95; App.104-07.

[18] App.73-76; App.92-95; App.104-07.

[19] App.73-76; App.81-90; App.92-95; App.104-07.

[20] App.73-76; App.92-95; App.104-07.

Wantou reported and complained about the above described acts of illegal harassment in June 2015 to Wal-Mart, through Pharmacy Manager Pascal Onyema ("Onyema"); however, said acts of illegal harassment continued unabated and actually got worse.[21] As Wantou's complaints to Onyema were to no avail, Wantou escalated his complaints by verbally reporting said acts of illegal harassment to Health and Wellness Market Director Steve Williams ("Williams") in June, July, August and September 2015.[22] Wantou initially wanted to keep his complaints informal, in the hope that the illegal discrimination and harassment complained about could be resolved informally.[23] However, as it became clear that Wal-Mart was ignoring Wantou's complaints and refusing to remedy the H.W.E. Wantou was subjected to, Wantou decided, in late September 2015, to start filing formal complaints.[24] Yet, the illegal harassment and H.W.E. only worsened and continued throughout Wantou's employment.[25]

Things got far worse when new Pharmacy Manager, Katy Leeves (Caucasian female) took over as Pharmacy Manager for Wantou's store in February 2016.[26] From the time Leeves took over as Pharmacy Manager, Leeves exhibited racism and disparate treatment (with respect to similarly situated Caucasian

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[21] App.81-83.

[22] App.83-87.

[23] App.83-84.

[24] *Id.*

[25] App.73-76.

[26] App.59-60; App.95-97.

staff, including Caucasian staff pharmacist Shawn Shannon) against Wantou; and Leeves sought to retaliate against Wantou due to Wantou's repeated complaints against racism and illegal harassment by Leeves and other Caucasian staff; and within less than four months of Leeves taking over as Pharmacy Manager, Wantou (who had worked under two prior successive Pharmacy Managers without any discipline whatsoever before Leeves' takeover) went from having immaculate/unblemished disciplinary record to being at maximum coaching level (Level III) before termination, after receiving an alleged coaching on 03/16/2016 ("Alleged_Coaching_I"), a coaching on 04/25/2016 ("Coaching_II") and a coaching on 06/28/2016 ("Coaching_III").[27]

All coachings/adverse actions against Wantou were bogus, issued on basis of false and fabricated allegations made by Leeves and/or false and fabricated allegations solicited by Leeves or Wal-Mart from retaliatory Caucasian pharmacy staff who bore retaliatory animus against Wantou due to Wantou having filed complaints of illegal discrimination/harassment by Wal-Mart's Caucasian pharmacy staff, including Leeves, staff pharmacist Shawn Shannon, and pharmacy technicians Ann Samples, Wendy Willoughby and Rayla Edwards.[28] As part of her retaliatory animus against Wantou, Leeves repeatedly wrote e-mails to Wal-Mart's higher management to make false allegations

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[27] App.52-54; App.59-60; ROA.18204-05; ROA.18227-28; ROA.18229-31; ROA.6026; ROA.12417-18.

[28] App.43-50; App.60-63; App.97-104; ROA.13254.

about Wantou's work product, and said retaliatory e-mails and allegations by Leeves eventually gave rise to Wantou's termination; as they were the proximate cause of Wantou's termination in November 2016.[29] Wal-Mart terminated Wantou on 11/09/2016 for alleged "misconduct with coachings,"[30] without specifying what said alleged "misconduct" was[31] (unlike for other terminations of pharmacists),[32] and using fabricated and fraudulent documents to support its decision to terminate Wantou.[33]

VI. REASONS FOR THE GRANTING THE PETITION

A. THE QUESTIONS AT ISSUE ARE OF EXCEPTIONAL IMPORTANCE

The exceptional importance of the issues involved in Wantou's H.W.E. claim is reflected not only by the fact that even amongst the Panel's members, there was "strong disagree[ment],"[34] but also by the fact that the EEOC, whom Congress charged with administering and enforcing Title VII, exceptionally filed an Amicus Brief[35] at the appeal stage in this case to point out the important errors committed in the adjudication of

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[29] App.43-50.

[30] ROA.13552.

[31] *Id.*

[32] *See* ROA.6894-6904.

[33] App.54-55; App.67-70; ROA.12420.

[34] App.30.

[35] App.108-33.

Wantou's H.W.E. claim. The EEOC has an indisputably unique position and unique expertise to identify important issues, as it did in the instant case, pertaining to Title VII of the Civil Rights Act. Moreover, the "strong disagreement" among the Panel's members, coupled with the EEOC's independent Amicus Brief, show that experts on the issues involved herein can reach different conclusions, making it all the more important that this Court provide guidance not only as to H.W.E. issues but also as to the C.P.T.I.'s issues, which are intricately linked to the H.W.E. issues. C.P.T.I.'s were designed precisely to prevent making moot an employer's obligation to promptly remedy H.W.E., by making the employer liable for harm that arises as a result of illegal animus that the employer neglects to halt or passively acquiesces to.

B. CIRCUIT COURTS OF APPEALS ARE IN DISARRAY AS TO THE STANDARDS FOR HOSTILE WORK ENVIRONMENT CLAIMS UNDER TITLE VII/§1981 AND THIS COURT'S PEREMPTORY GUIDANCE IS DIRELY NEEDED

1. This Court Has Stressed the Importance of Application, at the District Court Level, of Proper Standards as to Hostile Work Environment Claims; and the Fact that Circuit Courts of Appeals Cannot Substitute District Courts by Conducting First Instance Application of Said Standards

In *Harris v. Forklift Sys., Inc.*,[36] petitioner Harris sued her former employer, Forklift Systems ("Forklift"), claiming that during her employment with Forklift, Forklift's president had repeatedly harassed her because of her gender in violation of Title VII through sexist insults and comments fraught with unwanted sexual innuendoes.[37] The District Court held that the insults and comments in question did not create an abusive work environment under Title VII because they were not "so severe as to . . . seriously affect Harris' psychological wellbeing or lead her to suffer injury."[38] The Sixth Circuit Court affirmed. This Court granted certiorari "to resolve a conflict among the Circuits on whether conduct, to be actionable as abusive work environment harassment [. . .] must seriously

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[36] *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993).

[37] *Id.* at 17-19.

[38] *Id.* at 17, 20.

affect an employee's psychological wellbeing or lead the plaintiff to suffer injury."[39] This Court held that the District Court used erroneous standards in requiring harassment to "seriously affect plaintiff's psychological wellbeing" or lead plaintiff "to suffer injury" in order to be actionable under Title VII[40]; and this Court concluded that, in such a case, reversal and remand were necessary because the District Court's conclusions rested on the application of incorrect standards which "may well have influenced the [District Court's] ultimate conclusions."[41] Furthermore, this Court emphasized that "no single factor is required" in the adjudication of a H.W.E. claim.[42]

In the case at bar, D.C. used erroneous standards in requiring harassment to be "severe ***and*** pervasive"[43] rather than severe ***or*** pervasive; and in requiring harassment to involve" physical threat."[44] D.C. further used erroneous standards by holding, upon misstating various authorities or citing various authorities that were inapposite,[45] that use of the word "nigger" cannot be "not severe or pervasive enough to establish a prima

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[39] *Id.* at 20 (int. quot. marks om.).

[40] *Id.* at 17, 21.

[41] *Id.* at 17, 23 (int. quot. marks om.).

[42] *Id.* at 23.

[43] App.38; App.113-15, 119-23.

[44] App.38; App.129-30.

[45] D.C. cited cases in which the N-word was used *in the presence* of a plaintiff rather than directed at a plaintiff, when, in the instant case, the N-word was unequivocally ***directed at*** Wantou.

facie claim of [H.W.E.]."[46] Such a holding went against the facts that: (i) the Fifth Circuit itself has acknowledged that many courts of appeals "have found instances where the use of the N-word itself was ***sufficient*** to create hostile work environment"[47]; (ii) the Fourth Circuit has held that the N-word is "pure anathema to African-Americans"[48]; (iii) the Ninth Circuit has explained that the N-word is "highly offensive and demeaning, evoking a history of racial violence, brutality, and subordination," and "is perhaps the most offensive and inflammatory racial slur in English, a word expressive of racial hatred and bigotry"[49]; (iv) now-Justice Kavanaugh observed that the N-word "powerfully [and] instantly calls to mind our country's long and brutal struggle to overcome racism and discrimination again African-Americans."[50]

In the case at bar, the Fifth Circuit, on appeal, acknowledged that D.C. had used erroneous standards in adjudicating Wantou's H.W.E. claim by requiring that the harassment be severe ***and*** pervasive rather

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[46] App.38.

[47] *Collier v. Dallas Cnty. Hosp. Dist.*, 827 F. App'x 373, 377 (5th Cir. 2020) (citing *Ayissi-Etoh v. Fannie Mae*, 712 F.3d 572, 580 (D.C. Cir. 2013) and *Rodgers v. W.-S. Life Ins. Co.*, 12 F.3d 668, 675 (7th Cir. 1993)), cert. denied, 2021 WL 1952066 (May 17, 2021).

[48] *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 185 (4th Cir. 2011).

[49] *McGinest v. GTE Serv.*, 360 F.3d 1103, 1116 (9th Cir. 2004) (int. citations and quot. marks om.).

[50] *Ayissi-Etoh v. Fannie Mae*, 712 F.3d 572, 580 (D.C. Cir. 2013) (now-Justice Kavanaugh, concurring).

than severe ***or*** pervasive,[51] and by requiring that the harassment involve physical threat.[52] Yet, the Fifth Circuit, refused to reverse and remand Wantou's H.W.E. claim, in total contravention of the abovementioned tenets decreed by this Court in *Harris*. D.C. declined, in adjudicating Wantou's H.W.E. claim, to resolve the question as to whether Wal-Mart's alleged response was prompt and remedial, but properly held that "What constitutes prompt remedial action is a fact-specific inquiry and not every response by an employer will be sufficient to absolve the employer of liability."[53] The Fifth Circuit failed to explicitly resolve said question either but seemingly implied (wrongly) that Wal-Mart's response was prompt and remedial, and refused to reverse and remand on the alleged ***alternative*** ground that Wal-Mart was allegedly not liable because "it is not evident that a triable dispute exists relative to whether Wal-Mart remained aware [after Walmart's alleged initial response] that Wantou suffered continued harassment and 'failed to take prompt remedial action.'"[54] Thus, the Fifth Circuit not only refused to reverse and remand Wantou's H.W.E. claim in contravention of the tenets decreed by this Court in *Harris*, but imposed a requirement for a plaintiff to make the employer perpetually aware of illegal harassment after the employer's alleged initial response fails to remedy the H.W.E. Such a

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[51] App.11.

[52] App.12-13.

[53] App.35 (int. quot. marks om.).

[54] App.16.

requirement departs from the holdings of numerous Circuit Courts. As shown above, the Panel was divided on the issue, and dissenting Circuit Judge J.C. Ho "strongly disagreed"[55] with the affirmance of D.C.'s judgment and held, consistent with this Court's decision in *Harris*, that "I would vacate the judgment as to the hostile environment claim [. . .]. I would not affirm on ***alternative grounds*** not reached by the district court in the first instance [. . .]. [W]e are a court of review, not first view."[56] Recognizing that the Panel assumed an impermissible role regarding the determination of whether the actions allegedly taken by Wal-Mart were sufficient to avoid liability, Circuit Judge J.C. Ho, in his dissent, properly held that this question is "**an issue that should be decided in the first instance by the district court, if not by a jury**."[57]

Just like *Harris*, this case is certainly a "close case"[58] as reflected by the fact that there was disagreement even within the Panel itself on whether the case should be reversed and remanded. In *Harris*, this Court held that when a district court has used erroneous standards, especially in a "close case," the case should be reversed and remanded.[59] Moreover, the fact that there was disagreement even with the Panel itself means "reasonable minds could differ" on the case, and

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[55] App.30.

[56] App.30-31 (Emphasis added).

[57] App.31.

[58] *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 18 (1993).

[59] *Id.*

this Court has held that if the evidence is such that "reasonable minds can differ," a summary judgment verdict is improper.[60]

2. The Circuit Courts of Appeals Apply very Disparate Standards and there is a Clear Circuit Split

Dissenting Circuit Judge J.C. Ho recognized that "for five of [Wantou's] co-workers at Wal-Mart, all they saw was the color of [Wantou's] skin."[61] Crucially, dissenting Circuit Judge J.C. Ho recognized that "[a]ccording to the summary judgment evidence, Wantou's co-workers repeatedly called him a 'monkey,' a 'chimp,' 'a little African,' and an 'African fart.' They constantly mocked his accent in front of co-workers and customers. And they made numerous comments disparaging Cameroon, Wantou's country of origin, as 'Ebola infested,' 'fly-infested,' and a 'dirty place.' As one co-worker told Wantou: 'I see pictures of dirty children from Africa with running nose and flies all over their face all the time. Being from Africa, there is no reason for you to be annoyed by flies. You come from a dirty and fly-infested country [so you should be used to flies].'"[62] Judge J.C. Ho stated: "This evidence establishes a troubling pattern of racial harassment—one that a jury could find sufficiently pervasive to alter the conditions of employment and thereby support a claim

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[60] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986).

[61] App.29.

[62] App.29.

of hostile work environment under Title VII of the Civil Rights Act of 1964."[63]

As Judge J.C. Ho recognized, in *Harris* this Court held that a H.W.E. is one that "is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment."[64] This very Court has held that, considering the totality of the circumstances, an isolated incident that is "extremely serious" may constitute a discriminatory alteration of the terms of employment in violation Title VII.[65] This has been echoed by various Circuit Courts of Appeals, *e.g.*, the Seventh Circuit has held that the requirement that the harassment be severe or pervasive "may be met by a single extremely serious act of harassment."[66] The Third, Fourth, Eleventh and D.C. Circuits have held the same rule.[67] The EEOC, whom Congress charged with administering and enforcing Title VII, has adopted the same principle in its guidance: "[A] single,

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[63] App.29.

[64] App.29 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)).

[65] *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1988).

[66] *Robinson v. Perales*, 894 F.3d 818, 828 (7th Cir. 2018) (citing *Hall v. City of Chicago*, 713 F.3d 325, 330 (7th Cir. 2013); *Haugerud v. Amery Sch. Dist.*, 259 F.3d 678, 693 (7th Cir. 2001)).

[67] *Castleberry v. STI Group*, 863 F.3d 259, 264-66 (3d Cir. 2017); *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 268 (4th Cir. 2015) (en banc); *Adams v. Austal, U.S.A., L.L.C.*, 754 F.3d 1240, 1254 (11th Cir. 2014); *Ayissi-Etoh v. Fannie Mae*, 712 F.3d 572, 577 (D.C. Cir. 2013).

extremely serious incident of harassment may be sufficient to constitute a Title VII violation."[68]

There is no question that insulting (let alone ***continuously***) Wantou through use of the terms "monkey," "chimp" constituted serious incidents. Dissenting Circuit Judge J.C. Ho further acknowledged, *inter alia*, that the Fifth Circuit Panel's decision in the instant case was contrary to decisions in other Circuit Courts such as, *e.g.*, *Spriggs v. Diamond Auto Glass*, where the Fourth Circuit held that reversal of summary judgment was warranted where plaintiff suffered "incessant racial slurs" including "dumb monkey."[69]

Indeed, the Panel itself recognized that Wantou testified that "three Caucasian pharmacy technicians (Ann Samples, Rayla Edwards, and Wendy Willoughby) ***continuously*** called him 'chimp' or 'monkey.'"[70] Wantou testified that the illegal harassment continued unabated and actually got worse after Wantou reported it.[71] Wantou also stated that the harassment was allowed, by Wal-Mart, to continue unbated and to actually flourish, which led to its exacerbation.[72] The Panel also recognized that the evidence included recurring records as to Wantou's Caucasian co-worker Ann Samples insulting Wantou by saying: "You like to work like

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[68] *EEOC Compliance Manual* § 15-VII.A.2 (2006).

[69] App.29-30 (citing/quoting *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 182 (4th Cir. 2001)).

[70] App.12.

[71] App.81-83.

[72] App.92-95, 104-07.

a dog, or a monkey rather."[73] The Fourth Circuit has held that the term "monkey" is "about as odious as the use of the word nigger,"[74] term which is "pure anathema to African-Americans,"[75] and which the Second, Third, Fourth and Ninth Circuits held one single use thereof can be enough to create a hostile work environment.[76] The Fourth Circuit further held: "To suggest that a human being's physical appearance is essentially a caricature of a jungle beast goes far beyond merely unflattering; it is **degrading and humiliating in the extreme**."[77] The Eighth Circuit has held that "Primate rhetoric has been used to intimidate African-Americans and monkey imagery has been significant in racial harassment in other contexts as well."[78] The Eleventh Circuit has held that Black people "certainly could find racist and demeaning" being compared to primates.[79]

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[73] App.15.

[74] *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 280 (4th Cir. 2015) (en banc).

[75] *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 185 (4th Cir. 2001).

[76] *Daniel v. T&M Protection Resources*, 689 F. App'x 1 (2d Cir. 2017); *Castleberry v. STI Group*, 863 F.3d 259, 265 (3d Cir. 2017); *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 185 (4th Cir. 2001); *McGinest v. GTE Serv.*, 360 F.3d 1103, 1116 (9th Cir. 2004).

[77] *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 185 (4th Cir. 2001).

[78] *Green v. Franklin Nat'l Bank of Minneapolis*, 459 F.3d 903, 911 (8th Cir. 2006).

[79] *Jones v. UPS Ground Freight*, 683 F.3d 1283, 1303 (11th Cir. 2012).

Thus, even setting aside the abovementioned erroneous standards used by the Fifth Circuit Panel in the instant case, erroneous standards which by themselves (as shown above and as emphasized by dissenting Circuit Judge J.C. Ho) warranted reversal and remand to D.C., the Panel's refusal to reverse and remand the case to D.C. despite Wantou being ***continuously*** called, *inter alia*, "chimp" and "monkey" by his co-workers (not to mention other acts such as, *inter alia*, mimicking, ridiculing and mocking Wantou's accent ***in front of customers*** or repeatedly calling Wantou "African fart," repeatedly telling Wantou that he should be used to flies because flies like dirt and Wantou "comes from a dirty country") not only marked a split from Fourth Circuit's position, as dissenting Circuit Judge J.C. Ho noted, but also marked a split from positions of the Second, Third, Seventh, Eighth, Ninth and Eleventh Circuits.

3. The Standards as to the Requirements for Employer "Prompt Remedial Response" and what Constitutes Same Remain Blurred and Inconsistent Between the Circuit Courts of Appeals, Making this Court's Guidance Imperative

This Court has held that the standard for summary judgment under Rule 56 requires that "the court must review ***all evidence in the record***, drawing all reasonable inferences in favor of the nonmoving party, but making no credibility determinations or weighing any evidence. ***The latter functions, along with the***

drawing of legitimate inferences from the facts, are for the jury, not the court."[80] This Court further held that under Rule 56, "summary judgment shall be rendered forthwith if ***the pleadings, depositions***, answers to interrogatories, and ***admissions on file***, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."[81] As stated above, in adjudicating Wantou's H.W.E. claim, D.C. declined to resolve the question as to whether Wal-Mart's alleged response was prompt and sufficiently remedial. On appeal, the Panel failed to explicitly resolve said question either, and simply "danced around" said question, but seemingly implied that Wal-Mart's response to Wantou's complaints of H.W.E. was sufficiently prompt and remedial. As stated above, Circuit Judge J.C. Ho "**strongly disagreed**" with the failure to reverse and remand,[82] and held that the Panel assumed an impermissible role regarding the determination of whether Wal-Mart took prompt remedial action sufficient to avoid liability, a question which Circuit Judge J.C. Ho properly held was "**an issue that should be decided in the first instance by the district court, if not by a jury.**"[83]

In seemingly implying that Wal-Mart's response to Wantou's complaints of H.W.E. was sufficiently prompt

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[80] *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 135 (2000) (Emphasis added) (int. ref. om.).

[81] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986).

[82] App.30.

[83] App.30-31.

and remedial, the Panel made both factual and legal errors; and reinforced a circuit split which this Court should address. As an initial matter, the Panel made the fatal factual error of making the erroneous allegation that "According to Wantou, he first informed Wal-Mart in late October 2015 about his hostile work environment."[84] This is a gross factual error by the Panel which should clearly negate and nullify the Panel's opinion. This is because the time at which Wantou informed Wal-Mart about his H.W.E. is imperatively crucial, as "[Wal-Mart had an obligation to remedy [Wantou's] harassment once it learned of it."[85] "Title VII does not permit employers to stand idly by once they learn that [illegal] harassment has occurred."[86] "Once an employer knows or should know of harassment, a remedial obligation kicks in."[87] "Once an employer has notice, then it must respond with remedial action reasonably calculated to end the harassment."[88] "Our precedents have long defined the basis for imposing liability under element (4) as being that after acquired actual or constructive knowledge of the alleged harassing conduct, the employer had taken '*no*

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[84] App.31 (Footnote #1).

[85] *Fuller v. City of Oakland*, 47 F.3d 1522, 1529 (9th Cir. 1995).

[86] *Id.*

[87] *Id.* at 1528.

[88] *EEOC v. Xerxes Corp.*, 639 F.3d 658, 669 (4th Cir. 2011) (quoting *EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 319 (4th Cir. 2008)).

prompt and adequate remedial action to correct it.'"[89] "[T]he employer will be held directly liable only if it knew or should have known of the harassing conduct and failed to take prompt remedial action."[90]

Evidence indisputably shows Wantou complained, **as far back as June 2015 (*and not in late October 2015 as the Panel alleged*)** to Wal-Mart, through Pharmacy Manager Pascal Onyema, about being subject to illegal harassment; however, said harassment continued unabated and actually got worse.[91] There is no ***contemporaneous*** evidence whatsoever that Wal-Mart ever responded (let alone ***promptly***) to Wantou's June 2015 complaint to Wal-Mart through Pascal Onyema, and certainly no evidence whatsoever that a jury or factfinder would be required to believe. As Petitioner's complaints to Oneyma were to no avail, Wantou escalated his complaints by verbally complaining about said illegal harassment to Health and Wellness Market Director Steve Williams in June 2015, July 2015, August 2015 and September 2015.[92] Wantou initially wanted to keep his complaints informal, in the hope that the illegal harassment complained about could be resolved informally.[93] However, as it became

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[89] *Id.* (emphasis in original, int. br. om.) (quoting *Spicer v. Commonwealth of Va., Dep't of Corr.*, 66 F.3d 705, 710 (4th Cir. 1995) (en banc)).

[90] *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1278 (11th Cir. 2002).

[91] App.81-83.

[92] App.83-87.

[93] App.83-84.

clear that Wal-Mart was ignoring Wantou's complaints and refusing to remedy the H.W.E. Wantou was subjected to, Wantou decided, in late September 2015, to start filing formal complaints.[94] Again, there is no ***contemporaneous*** evidence whatsoever that Wal-Mart ever responded (let alone ***promptly***) to Wantou's June 2015, July 2015, August 2015 and September 2015 verbal complaints and late September/early October 2015 formal complaints to Wal-Mart through Steve Williams, and certainly no evidence whatsoever that a jury or factfinder would be required to believe.

Even after Wantou filed formal complaints in late September/early October 2015, Wal-Mart still failed to investigate and/or respond to said formal complaints; continuing to find ***excuses*** to delay and avoid responding to Wantou's complaints. **Over a month** after filing said formal complaints of H.W.E. in late September/early October 2015 to Wal-Mart via Steve Williams, complaints which were still unresponded to, Wantou, again, filed, in early November 2015, written complaints to Wal-Mart via Steve Williams, complaining that his formal complaints of late September/early October 2015 had not been addressed.[95] It was only after these November 2015 complaints that Wal-Mart began to conduct a purported investigation as to Wantou's complaints of H.W.E., therefore ***nearly half a year*** after Wantou's initial complaints of H.W.E. to

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[94] *Id.*; ROA.6374-75.

[95] ROA.6376-77.

Wal-Mart, and therefore "**too little too late.**"[96] By the time Wal-Mart began to conduct a purported investigation, Wantou had been subjected to H.W.E. for at ***over half a year***, H.W.E. which Wal-Mart knew or should have known about for said entire duration. Wantou had to make repeated complaints to Wal-Mart before Wal-Mart even began to conduct what was a ***semblance*** of an investigation; and therefore Wal-Mart's response cannot be said to constitute a prompt remedial response.[97]

As shown above, the Fourth, Ninth and Eleventh Circuits (among other Circuits) have peremptorily held that an employer has the obligation to remedy harassment once it knows or should know of same; and that an employer cannot escape liability if it fails said obligation. Thus the Panel implying, in the instant case, that Wal-Mart effected a prompt remedial response runs counter to said peremptory holding by (among other Circuits) the Fourth, Ninth and Eleventh Circuits, and therefore creates a circuit split which this Court ought to address. To make matters worse, in implying that Wal-Mart effected a prompt remedial response, the Panel took Wal-Mart's conclusory allegations as fact. In Wantou's Response to Wal-Mart's MSJ, Wantou clearly showed that Wal-Mart's purported investigation (which, in any event, was "too little too

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[96] *Christian v. Umpqua Bank*, 984 F.3d 801, 813 (9th Cir. 2020) (citing *Fuller v. City of Oakland*, 47 F.3d 1522, 1528 (9th Cir. 1995); *Freitag v. Ayers*, 468 F.3d 528, 540 (9th Cir. 2006)).

[97] *Christian v. Umpqua Bank*, 984 F.3d 801, 813 (9th Cir. 2020).

late," as shown above) was a sham investigation "whose primary mission was to exculpate the offending Caucasian pharmacy technicians and Caucasian pharmacist Shawn Shannon and reach a bogus and sham conclusion after a sham investigation, that there was no discrimination."[98] Indeed, Wal-Mart conclusorily espoused the allegations and justifications made, during what was a sham investigation, by the very people Wantou was complaining about (in an attempt to justify their harassment and illegal behavior toward Wantou) even when said allegations and justifications were contradicted by objective evidence.[99] Many Circuit Courts of Appeals have been clear on the fact that such a perfunctory investigation cannot satisfy the requirement of a "remedial response"; *e.g.*, the Ninth Circuit in *Fuller*: "When Romero's version of events differed from plaintiff's, **the employer often accepted Romero's version without taking reasonable and easy steps to corroborate that version** [. . .] **An employer whose sole action is to conclude that no harassment occurred cannot in any meaningful sense be said to have 'remedied' what happened**. Nor does the fact of an investigation alone suffice."[100]

As further examples regarding the fact that Wal-Mart's purported November 2015 investigation was a sham investigation whose primary purpose was to

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[98] App.74-77.

[99] App.76-77.

[100] *Fuller v. City of Oakland*, 47 F.3d 1522, 1529 (9th Cir. 1995) (Emphasis added).

"exculpate"* racist offenders,**[101] during Steven Williams' **11/4/2015** interview of Pharmacy Manager Onyema, Onyema admits Wantou complained about Samples' racist/xenophobic comments, including racist harassment through the statement "I see pictures of dirty children from African with running nose and flies all over their face all the time. Being from Africa, there is no reason for you to be annoyed by flies. You come from a dirty and fly-infested country [. . .] You come from a dirty place, so just deal with it."), and that people were bullying Wantou; Williams ***doesn't (as one would expect) contemporaneously inquire further, nor even ask ***(as one would expect, given the requirement of a prompt remedial response)*** Onyema ***what actions Onyema took following Wantou's complaint!***[102] ***Three days later***, Onyema writes a statement ***alleging*** he had verbally reprimanded Samples five months earlier as to her racist/xenophobic harassment against Wantou, when there is no contemporaneous evidence of any reprimand of Samples in June 2015 or for that matter at any other time![103] A factfinder would be entitled to suspect sham, and that Wal-Mart took the ***three days*** (following Onyema's interview) in question to fabricate evidence purporting it had taken prior action when there is no contemporaneous evidence as to such! Yet, the Panel took as fact Wal-Mart's mere allegations as to

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[101] App.74-77.

[102] ROA.4072-73.

[103] ROA.185011-12.

purported "admonition" of Samples,[104] when there is no contemporaneous evidence of such, or for that matter, no evidence whatsoever, and certainly no evidence of any ***prompt*** action by Wal-Mart. Thus, this is yet another example regarding the fact that the Panel ran counter to the holdings of other Circuit Courts of Appeals, including the Ninth Circuit' holdings in *Fuller*, as shown above[105]; further showing the Circuits Courts are divided on said issues.

4. The Fifth Circuit Imposed Standards Departing from those of other Circuits by Requiring that Wantou Perpetually Make Wal-Mart Aware of Illegal Harassment after Wal-Mart's Alleged Initial Response

As shown above, many Circuit Courts of Appeals have held that the employer bears the burden and responsibility of ending illegal harassment (and preventing future harassment) immediately upon being made aware of such harassment, and that this burden may not be transferred in whole or in part to the plaintiff. Yet, the Panel held that "it is not evident that a triable dispute exists relative to whether Wal-Mart remained aware that Wantou suffered continued harassment and 'failed to prompt remedial action.'"[106] Thus the Panel impermissibly shifted the matter at issue to

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[104] App.13-15.

[105] *Fuller v. City of Oakland*, 47 F.3d 1522, 1529 (9th Cir. 1995).

[106] App.16.

whether Wal-Mart was made aware of further illegal harassment ***after*** its alleged initial response, when the only question should be whether Wal-Mart's initial response was prompt, remedial and designed to prevent further harassment. "Effectiveness [of employer's response] is measured not only by ending the current harassment but also by deterring future harassment—by the same offender or others. If 1) no remedy is undertaken, or 2) the remedy attempted is ineffectual, ***liability will attach***."[107] Thus liability attaches if harassment continues after ineffective employer response, **whether or not the employee continues to report harassment**. An employer may not condition its response to H.W.E. on whether a victimized employee repeatedly complains, nor is an employee required to continuously make the employer aware of further harassment when the employer fails to end the harassment: "By conditioning its response on [Plaintiff's] reports of further harassment, [Defendant] placed virtually all its remedial burden on the victimized employee . . . [T]his response was not sufficient."[108]

In the same vein, the Panel held that "it is not apparent that offensive racist comments and conduct of the sort highlighted in the EEOC's brief and Wantou's

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[107] *Christian v. Umpqua Bank*, 984 F.3d 801, 812 (9th Cir. 2020) (quoting *Fuller v. City of Oakland*, 47 F.3d 1522, 1528-29 (9th Cir. 1995)).

[108] *Christian v. Umpqua Bank*, 984 F.3d 801, 813 (9th Cir. 2020) (quoting *Nichols v. Azteca Rest. Enters, Inc.*, 256 F.3d 864, 876 (9th Cir. 2001)).

deposition testimony continued after the investigation and instruction provided by Wal-Mart managerial personnel, in late 2015, in response to Wantou's complaint to management."[109] First, there is no contemporaneous evidence of any instructions being given by Wal-Mart managerial personnel. At best, there is an ***allegation*** made in late December 2015 by Human Resource Manager Kendra Buford (***after Wantou complained yet again for the umpteenth time***) that Steve Williams "***will need***" to discuss with pharmacy manager to ensure policy adherence,[110] but there is no evidence ***whatsoever*** such ever happened. In evaluating a H.W.E. claim, promises by the employer may not be equated to implementation of said promises.[111]

Furthermore, by virtue of the actions the Panel itself listed as constituting Wal-Mart's response to Wantou's complaints of H.W.E., Wal-Mart's response did not meet the criteria of a permissible response under Title VII; *e.g.*, the Panel cites the fact that Wal-Mart issued a coaching to both Wantou and Caucasian pharmacist Shawn Shannon as forming part of Wal-Mart's response. Not only does issuing a coaching to Wantou ***as a response to Wantou's H.W.E. complaint*** constitutes retaliation under Title VII (as such coaching would tend to dissuade Wantou from making further complaints) and therefore is an impermissible

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[109] App.15.

[110] ROA.4116.

[111] *Christian v. Umpqua Bank*, 984 F.3d 801, 806-07 (9th Cir. 2020).

response to a H.W.E. complaint,[112] but "[h]arassment is to be remedied through actions targeted at the ***harasser***, not the victim."[113]

Crucially, the Panel was wrong in stating that it is not evident that racist comments continued after what the Panel held was Wal-Mart's response, as Wantou testified that Steven Williams failed to put an end to same[114]; and that the illegal harassment continued unabated and actually got worse after Wantou reported it.[115] In any event, as shown above, the inescapable question is whether Wal-Mart took prompt remedial action. In this case where Wal-Mart did not conduct a ***sham*** investigation until half a year after Wantou's initial complaint of H.W.E., Wal-Mart's purported response was neither prompt nor remedial. Even assuming, *arguendo*, that the harassers had eventually stopped their behavior (which they did not) in the absence of Wal-Mart's prompt remedial action, Wal-Mart would still be liable: "Title VII does not permit employers to stand idly by once they learn [. . .] harassment has occurred. To do so amounts to a ratification of the prior harassment. We refuse to make liability for past harassment turn on the fortuity of whether the harasser, as he did here, voluntarily elects to cease his

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[112] *Burlington N. & S.F.R. Co. v. White*, 548 U.S. 53, 57 (2006).

[113] *Fuller v. City of Oakland*, 47 F.3d 1522, 1529 (9th Cir. 1995) (Emphasis in original; int. br. om.) (quoting *Intlekofer v. Turnage*, 973 F.2d 773, 780 (9th Cir. 1992)).

[114] App.76-77.

[115] App.81-83.

activities, for the damage done by the employer's ratification will be the same regardless."[116]

In any event, the Panel was wrong to consider the issue as to whether there were further "offensive racist comments and conduct" after Wal-Mart's alleged actions[117] (which there undoubtedly were) as being consequential. The Panel "failed to consider the totality of the harassers' [(Leeves', Shannon's, Samples', Edwards', Willoughby's)] conduct, separating [. . .] retaliation instead of including it as part of the harassment."[118] "[A]ll instances of harassment need not be stamped with signs of overt discrimination if they are part of a course of conduct which is tied to evidence of discriminatory animus."[119]

5. The Fifth Circuit Factually and Legally Erred as to Fifth Prong for Hostile Work Environment Claim

The Panel averred that both Wantou and the EEOC failed to make arguments as to the fifth prong for H.W.E. claims; and stated that its conclusion in failing to reverse and remand to D.C. was based on this alleged failure by both Wantou and the EEOC.[120] First,

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[116] *Fuller v. City of Oakland*, 47 F.3d 1522, 1529 (9th Cir. 1995).

[117] App.15.

[118] *Robinson v. Perales*, 894 F.3d 818, 829 (7th Cir. 2018).

[119] *Watson v. CEVA Logistics U.S., Inc.*, 619 F.3d 936, 944 (8th Cir. 2010).

[120] App.13-14.

the Panel was factually wrong in stating that both the EEOC and Wantou failed to argue the fifth prong for H.W.E. Wantou properly made arguments as to said fifth prong in Wantou's Response as to MSJ,[121] which was part of the record on appeal. On appeal, Wantou was only required to present arguments points of error and the fifth prong for H.W.E. was a point of error nor identified as deficient in D.C. summary judgment.[122] In the same vein, the EEOC properly identified all the five prongs in its Amicus Brief,[123] but specified that it would only present arguments as to matters that were at issue in D.C.,[124] which the fifth prong was not one of them. Regardless, the fifth prong is only required for co-worker harassment but Wantou's H.W.E. involved both supervisor and co-worker harassment, and Wantou's claims allege that supervisors (including Leeves) were full actors as to H.W.E.[125]

C. IN DENYING CAT'S PAW THEORY INSTRUCTIONS IN THIS CASE, THE FIFTH CIRCUIT SET A PRECEDENT THAT PUT A WEDGE BETWEEN ITSELF AND THE MAJORITY OF ITS SISTER CIRCUIT COURTS

In *Staub*, this Court held that "if a supervisor performs an act motivated by [illegal] animus that is

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[121] App.71-80.

[122] App.33-39.

[123] App.121-22.

[124] App.122.

[125] App.107 (¶81).

intended by the supervisor to cause adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable."[126] The cat's paw metaphor "refers to a situation in which an employee is fired or subjected to some other adverse employment by a supervisor who himself has no discriminatory/[retaliatory] motive, but who has been manipulated by a subordinate who does have such a motive and intended to bring about the adverse employment action."[127] Since *Staub*, a majority of Circuits, including the Fifth Circuit, have adopted C.P.T. in Title VII retaliation.[128] In heralding the advent of both coworker and supervisor C.P.T. for retaliation in the Second Circuit, said Circuit made it clear, citing this Court's decisions in *Ellerth*,[129] that retaliation in the context of H.W.E. makes C.P.T. all the more warranted: "We see no reason why *Ellerth*, though written in the context of hostile work environment, should not also be read to hold an employer liable under Title VII when, through its own negligence, the employer gives

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[126] *Staub v. Proctor Hospital*, 562 U.S. 411 (2011).

[127] *Cook v. IPC Intern Corp.*, 673 F.3d 625, 628 (7th Cir. 2012).

[128] *McKenna v. City of Philadelphia*, 649 F.3d 171, 180 (3d Cir. 2011); *Hicks v. Forest Preserve Dist. of Cook Cty., Ill.*, 677 F.3d 781, 789-90 (7th Cir. 2012); *Bennett v. Riceland Foods, Inc.*, 721 F.3d 546, 551-52 (8th Cir. 2013); *Velazquez-Perez v. Developers Diversified Realty Corp.*, 753 F.3d 265, 273 (1st Cir. 2014); *Zamora v. City of Houston*, 798 F.3d 326, 332-33 (5th Cir. 2015); *EEOC v. New Breed Logistics*, 783 F.3d 1057, 1069-70 (6th Cir. 2015); *Vasquez v. Empress Ambulance Serv., Inc.*, 835 F.3d 267, 274 (2d Cir. 2016).

[129] *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 754-58 (1998).

effect to the retaliatory intent of one of its—even low-level—employees."[130]

In the case at bar, Wantou amply showed, in both D.C. and on appeal, that the facts of the case supported C.P.T.[131] The Panel itself did not dispute the fact that the facts of the case supported C.P.T. The Panel simply stated: "Here, the district court concluded that Wantou did not come forward with sufficient evidence to support a 'Cat's Paw" causation instruction."[132] The Panel did, however, effectively admit a reasonable mind would find that the facts in Wantou's case supported C.P.T., by holding: "If we were to consider the question in the first instance, we might find no harm in providing a Cat's Paw instruction."[133] If "reasonable minds could differ," then there was, at least, a genuine issue of material fact ("G.I.M.F."),[134] making C.P.T. warranted. Hence the Panel should have reversed and remanded, as Wantou did not have to convince D.C. (which was not the ultimate factfinder) on the underlying issues but only to show G.I.M.F. Crucially, D.C. did not provide any substantive explanation whatsoever on the standards or reasoning it used in concluding that Wantou did not "come forward with sufficient evidence" to support C.P.T., making reversal all the more warranted. Other Circuit Courts to have examined

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[130] *Vasquez v. Empress Ambulance Serv., Inc.*, 835 F.3d 267, 273-74 (2d Cir. 2016).

[131] OB.40-56.

[132] App.17.

[133] *Id.*

[134] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986).

objection to refusal of C.P.T.I.'s have delved into the substantive reasoning of D.C. in denying C.P.T.I.'s. In *Radnor*, the Third Circuit affirmed D.C.'s denial of C.P.T.I.'s only after examination of D.C.'s thorough reasoning on the substantive grounds and evidence supporting said denial.[135] Ditto for the Sixth Circuit in *Bose*,[136] Eighth Circuit in *Singer*,[137] and State courts of appeals (relying on this Court's dicta in *Staub*), *e.g.*, in *Cipolla*.[138] Here, D.C. provided no explanation whatsoever on the merits, let alone standards used, to support its denial and conclusory allegation that Wantou did not "come forward with sufficient evidence"; yet, unlike in other Circuits, the Panel affirmed in the absence of any information whatsoever on the standards (or lack thereof) used by D.C. What's more, after Wantou complained, in post trial motions, about the erroneous denial of C.P.T.I.'s, D.C. shifted its explanation, now alleging differing *post hoc* non-substantive reasons not alleged at trial.[139] Despite all the above, the Panel refused to reverse and remand. Moreover, high courts across the land, such as the Oregon Supreme Court (relying on this Court's dicta in *Staub*) have reversed and remanded judgment due to denial of C.P.T.I.'s because C.P.T.I.'s were "a correct and applicable

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[135] *Murphy v. Radnor Twp.*, 604 F. App'x 175 (3d Cir. 2015).

[136] *Bose v. Bea*, 947 F.3d 983 (6th Cir. 2020).

[137] *Singer v. Harris*, 897 F.3d 970 (8th Cir. 2018).

[138] *Cipolla v. Vill. of Oak Lawn*, 26 N.E.3d 432, 444 (1st Dist. 2015).

[139] OB.53-55.

statement of the law, and that the instructional error prejudiced plaintiff."[140]

The Panel failed to address Wantou's contention that D.C. used erroneous standards in denying C.P.T.I.'s; and failed to address highly pertinent issues as to denial of C.P.T.I.'s. First, the primary question as to denial of C.P.T.I.'s is whether the jury was properly equipped to analyze the facts of Wantou's case. The answer to this question is simply "no." The Fifth Circuit itself has held that the "[i]t is the ***inescapable duty*** of the trial judge to instruct the jurors, ***fully*** and correctly, on the applicable law of the case, and ***to guide***, ***direct***, and ***assist them*** toward an intelligent understanding of the legal and factual issues involved in their search of the truth."[141] The Panel misapprehended the issue on appeal regarding C.P.T.I.'s. Wantou's complaint is not that D.C. "erred in failing to include ***[Wantou's]*** 'Cat's Paw' instructions," as the Panel alleged,[142] but that the jury was misled/misguided by not being "instructed in any manner on C.P.T.I.'s/attending theory" despite: **(i)** the fact that Wantou met, on the merits, the requirements for inclusion of C.P.T.I.'s (which the Panel did not dispute, as shown above), **(ii)** a majority of Circuit Courts, including the Fifth Circuit, have held that a plaintiff meeting

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[140] *Ossanna v. Nike, Inc.*, 365 Or. 196 (Or. 2019).

[141] 9 C. Wright A. Miller, Federal Practice and Procedure: Civil § 2556 (1971) (Emphasis added). *See also Pierce v. Ramsey Winch Co.*, 753 F.2d 416, 425-26 (5th Cir. 1985); *EEOC v. Manville Sales Corp.*, 27 F.3d 1089, 1096 (5th Cir. 1994) (quoting *Bender v. Brumley*, 1 F.3d 271, 276 (5th Cir. 1993)).

[142] App.16.

said requirements is "***entitled***" to supervisor/coworker cat's paw ***analysis*** by the factfinder—in this case the jury—(***and not simply entitled to present his case to jury under C.P.T.***).[143] However, if such a plaintiff is entitled to cat's paw ***analysis***, then the factfinder (jury) **must be instructed on how to perform said cat's paw analysis**. Thus, in denying C.P.T.I.'s in this case, the Fifth Circuit created a precedent that puts a wedge between itself and the majority of its sister Circuit Courts.

Undoubtedly, the instructions, as given by D.C., misled/confused jury, *inter alia*, into thinking that the only way for Wantou to prove retaliation was by proving "by a preponderance of the evidence that [. . .] Third, ***Defendant Wal-Mart's decision to take*** an adverse employment action against plaintiff Wantou was on account of his protected activity. You need not find that ***the only reason*** for defendant Walmart's decision was plaintiff Wantou's protected activity [. . .]."[144] This instruction, **in a C.P.T. case**, is misleading/confusing to jury, as it not only misleads/confuses jury to believe that at least one of the reasons for adverse

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[143] *Fisher v. Lufkin Indus., Inc.*, 847 F.3d 752, 758 (5th Cir. 2017) (citing *Zamora v. City of Houston*, 798 F.3d 326, 332-33 (5th Cir. 2015)). *See also McKenna v. City of Philadelphia*, 649 F.3d 171, 180 (3d Cir. 2011); *Hicks v. Forest Preserve Dist. of Cook Cty., Ill.*, 677 F.3d 781, 789-90 (7th Cir. 2012); *Bennett v. Riceland Foods, Inc.*, 721 F.3d 546, 551-52 (8th Cir. 2013); *Velazquez-Perez v. Developers Diversified Realty Corp.*, 753 F.3d 265, 273 (1st Cir. 2014); *EEOC v. New Breed Logistics*, 783 F.3d 1057, 1069-70 (6th Cir. 2015); *Vasquez v. Empress Ambulance Serv., Inc.*, 835 F.3d 267, 274 (2d Cir. 2016).

[144] ROA.13079 (Emphasis added).

action has to be Wantou's protected activity ***known to the decision-maker*** or that the decision-maker took the adverse action in question against Wantou ***because of*** Wantou's protected activity,[145] when under C.P.T., jury need not find that any of Wantou's protected activity ***known to the decision-maker*** was ***a reason for*** or ***proximately played any part whatsoever*** in Wal-Mart's ***adverse decision***. Instead, jury may properly find that even if the adverse decision was not directly connected to Wantou's protected activity, a retaliatory supervisor or coworker of Wantou's provided negative information, relied on by decision-maker, with the intent to harm Wantou.[146] Hence, instructions given by D.C. misleadingly/insidiously ignored, failed to ***guide*** jury on the critical aspect of C.P.T. that even if Wantou's protected activity did not ***proximately cause*** the adverse ***decisions*** in question, Wantou can prove retaliation if supervisor/coworker with retaliatory animus induced decision-maker into making said decision. Thus D.C.'s instructions enabled Wal-Mart to "insulate itself from liability by isolating the decisionmaker[s] from employee's supervisor's[and/or coworkers' retaliatory animus],"[147] which the Fifth Circuit itself has unequivocally stated "undercut[s] a law designed to prevent employment discrimination[/retaliation]."[148] Thus

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[145] *Id.*

[146] *See, e.g., Vasquez v. Empress Ambulance Serv., Inc.*, 835 F.3d 267, 274 (2d Cir. 2016).

[147] *Zamora v. City of Houston*, 798 F.3d 326, 332 (5th Cir. 2015).

[148] *Id.*

the Fifth Circuit itself has effectively admitted that failure to equip the factfinder with the tools necessary to perform C.P.T. analysis, when said analysis is warranted, significantly impairs a plaintiff, which is contrary to the Panel's allegation that Wantou was not "significantly impaired.[149]

The misleading instructions mentioned above, per the Fifth Circuit's own precedents**, constitute *reversible error*.**[150] In addition, D.C's jury instructions "at no place gave an[y] [. . .] statement [whatsoever] of the kind of conduct that the jury would have to find in order to conclude that [Wantou had proven his claims ***under C.P.T.***]."[151] Such failure, along with misleading/confusing/insidious/misguiding instructions, must leave Court with "substantial doubt whether the jury was properly guided in its deliberations [. . .] [and] therefore compel [Court] to vacate verdict against [Wantou for Alleged_Coaching_I, Coaching_II, and Termination]."[152]

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[149] App.18.

[150] *See, e.g., Manville Sales Corp.*, 27 F.3d 1089, 1096-97 (5th Cir. 1994) (vacating judgment, in a case where plaintiff was terminated upon realignment of sales territory, because instruction was semantically misleading/misdirecting in instructing jury to find for plaintiff only if it found discrimination in "decision to realign the territory" rather than in "decision to terminate," as the latter would properly put focus on ***harm*** (action of terminating employee) when the former would misdirect inquiry to investigating purported business decision).

[151] *Skidmore v. Precision Printing*, 188 F.3d 606, 614 (5th Cir. 1999).

[152] *Id.* (vacating verdict when instruction was misleading, ignored significant aspect of theory of claim and at no place provided a statement reflecting totality of law pertinent to case, and

As stated above, the Panel was wrong in stating that "Wantou's ability to present and argue his retaliation claim to the jury was not seriously impaired by the district court's [denial of C.P.T.I.'s]." The purpose of C.P.T.I.'s is to instruct the factfinder (jury) on the law it should use to ***analyze*** the facts of the case; therefore, C.P.T.I.'s bear little to no relationship to a plaintiff's ability to ***present*** his case, but instead, are determinant as to the factfinder's (jury's) ability to ***analyze*** said case. Moreover, the Panel erroneously focused on denial of the C.P.T.I.'s ***proposed*** by Wantou rather than denial of C.P.T.I.'s ***altogether***. D.C. did not have to grant C.P.T.I.'s as proposed by Wantou but had the obligation to fully instruct the jury on applicable law, as shown above. The Panel adopted *post hoc* justifications (differing from those given by D.C. at trial[153]) of D.C., even though said *post hoc* justifications are impertinent given the fact D.C. has the obligation to adequately instruct the jury as to the full law applicable to the case. Yet, adopting ***post hoc*** reasons alleged by D.C. (reasons different from those alleged at trial[154]), the Panel embraced D.C.'s ***post hoc*** justification that one of Wantou's proposed instruction referred to "discriminatory bias"/"discriminatory animus,"[155] when it is well settled that use of words "discrimination"/"discriminatory" is common within the context of

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of the kind of conduct jury would have to find to conclude plaintiff proved her claim).

[153] *See* App.43-50.

[154] *Id.*

[155] App.17-18.

retaliation, as a retaliatory act is necessarily discriminatory; *e.g.,* the Fifth Circuit itself has said, *e.g.*, "The ***anti-retaliation*** provision, unlike the substantive provision, is not limited to ***discriminatory*** actions that affect the terms and conditions of employment."[156] The Panel further embraced/rubber-stamped D.C.'s ***post hoc*** justification that Wantou's proposed C.P.T.I.'s were "confusing," "internally inconsistent," without giving any single example.[157]

As shown above, the Panel's statements were largely impertinent and the bottom line is reversal was warranted because C.P.T.I.'s were "a correct and applicable statement of the law, and that the instructional error prejudiced plaintiff."[158] C.P.T.'s standards/requirements are treated/applied very disparately among Circuit Courts, and high courts across the land, including State Supreme Courts relying on this Court's dicta. For that matter, even within individual Circuits, there are great inconsistencies; inconsistencies which are magnified from one Circuit to another. The Seventh Circuit once noted: "'cat's paw' doctrine . . . has received inconsistent treatment in this Circuit." This continues to be the case within individual Circuits and, worse, across the different Circuits and high courts across the land. This Court should resolve such conflicts among the Circuit Courts and high courts across the land.

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[156] *McCoy v. Shreveport*, 492 F.3d 551, 559-60 (5th Cir. 2007).

[157] App.18.

[158] *Ossanna v. Nike, Inc.*, 365 Or. 196 (Or. 2019).

VII. CONCLUSION

The Court should grant this petition for writ of certiorari.

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