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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Fifth Circuit was required to vacate and remand the District Court's summary judgment on the Petitioner's Title VII hostile-work-environment claim after determining that the District Court had applied the wrong standard to one element of the claim, or whether it was permissible for the Fifth Circuit to exercise its discretion to affirm on alternative grounds supported by the record.

2. Whether an employee may pursue a hostile-work-environment claim under Title VII when the employer worked swiftly to investigate and address allegations of harassment, and no plausible allegations of harassment occurred after the initial investigation.

3. Whether the district court committed reversible error in denying the Petitioner's proposed jury instruction on the Cat's Paw theory of liability where the instruction was legally inaccurate, internally inconsistent, confusing, and, regardless, the Petitioner was not prejudiced from the denial.

4. Whether the Petitioner waived the first two Questions by failing to address them at the Fifth Circuit.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent Wal-Mart Stores Texas, L.L.C., discloses the following: Wal-Mart Stores Texas, L.L.C., is a Delaware limited liability company whose sole member is Wal-Mart Real Estate Business Trust, which is a Delaware statutory trust. The sole beneficial owner of Wal-Mart Real Estate Business Trust is Wal-Mart Property Co., which is a Delaware corporation. The sole shareholder of Wal-Mart Property Co. is Wal-Mart Stores East, LP, which is a Delaware limited partnership. The general partner in Wal-Mart Stores East, LP is WSE Management, LLC, which is a Delaware limited liability company, and the limited partner is WSE Investment, LLC, which is also a Delaware limited liability company. The sole member of Wal-Mart Stores East, LLC, is Walmart, Inc., which is a publicly traded corporation that is incorporated under Delaware law. No publicly traded company owns 10% or more of the stock of Walmart, Inc.

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INTRODUCTION

The Court should deny Yves Wantou's Petition for a Writ of Certiorari because it identifies no "compelling reasons" justifying the writ. Sup. Ct. R. 10. The Petition does not identify any unresolved important questions of federal law, nor does it identify any real conflicts between the Fifth Circuit's decision below and the decisions of any other Court of Appeals. *See id.* At bottom, all of Wantou's arguments amount to mere disagreements over the Fifth Circuit's application of the law to the facts of his case. And even if one were to look past that, this case still makes a poor vehicle for deciding the issues raised in the Petition because Wantou either waived them by failing to raise them below, or else the record does not support his arguments.

STATEMENT OF THE CASE

Yves Wantou worked as a pharmacist at Defendant Wal-Mart's ("Walmart") store in Mount Pleasant, Texas. *See* D. Ct. Summ. J. Order, R.490, at #10707.[1] Almost from the day he began the job until the day he left—less than two years later—Wantou sowed discord within the pharmacy.

Part of the problem was that Wantou "ignored the female technicians and only talked to male employees." *Id.* at #10722. Within Wantou's first nine months of being on the job, for example, his manager "had received six complaints from six female associates of all different racial backgrounds against" Wantou. *Id.*

Wantou's disrespect for his female colleagues was not his only problem. He also generally refused to help

[1] Refers to record PageID#.

his colleagues. *See id.* Among those whom Wantou refused to help were the pharmacy technicians he worked with. *See id.* Wantou's refusal to help the technicians meant that, when they had questions, they always had to turn to the one other pharmacist who worked at the pharmacy. *See id.* That dynamic, in turn, caused tension between Wantou and the other pharmacist. *See id.*

Yet another, related, problem was Wantou's work ethic. His manager found it was good when the manager was at the store, but bad when the manager was out of the store. *See id.*

Wantou had a different view. He felt he did not get along with his colleagues because they were racist. Wantou would later testify that his colleagues directed several racist comments toward him, prompting him to complain informally about the statements. *Id.* at #10717–18.

Wantou eventually filed a formal complaint about the alleged harassment with Walmart's Market Health and Wellness Director. *Id.* at #10719. Shortly after that, Wantou took time off for vacation. *Id.* at #10720. After returning from vacation and exchanging a few emails with the Director, the Director forwarded Wantou's complaint to Walmart's Global Ethics Department. According to company policy, the Global Ethics Department is tasked with investigating such complaints. *See* Walmart Summ. J. Ex. V, R.209-9, PageID#4247–50.

During the investigation, Wantou's colleagues vigorously denied the allegations of racial harassment. D. Ct. Summ. J. Op., R.490, at #10722. They explained how Wantou's difficulties at the pharmacy were based

on his mistreatment of women and the staff that worked there. *Id.*

Reviewing all the evidence, the investigation "concluded that [Wantou's] work practices" were to blame for the pharmacy's internal strife. *Id.* at #10723. The investigation also found "there was no evidence that Plaintiff was treated unfavorably on the basis of race or color." *Id.*

Wantou later lodged seven more complaints with the Global Ethics Department alleging racial harassment. *Id.* at #10723–45. Each complaint triggered either another investigation or some other review process. *See id.* As the investigations and reviews found, however, Wantou's allegations of racial harassment were all rather conclusory. *See id.* The substance of Wantou's complaints revealed that his true grievances were over far less serious matters. *See id.*

In the later complaints, for example, Wantou expressed annoyance that Walmart did not approach hiring within the pharmacy by "consensus." *Id.* at #10725, 10745. Wantou also noted disappointment at being ranked at the same skill level as another pharmacist whom Wantou considered inferior. *Id.* at #10726.

All the while, Wantou was continuing to underperform at his job. Over time, Wantou's underperformance led Walmart to issue him three "coachings." *See id.* at #10727–10733, 10737–10745 A "coaching policy" is a "progressive discipline policy designed to inform an associate when he is not meeting the requirements and expectations of his position." *Id.* at #10715–16. Generally, the more coachings an employee has received, the more likely his or her employment is to be terminated the next time the employee is disciplined. *See id.* But Walmart's coaching policy also provides

"that certain unacceptable conduct," such as intentional failure to follow Walmart policy . . . "may result in immediate termination." *Id.* at #10716 (quotation omitted).

Walmart issued Wantou his first "coaching" because of several communication and workflow problems he was causing at the pharmacy. *See id.* at #10728. For example, Wantou "admitted" he had "held up the pharmacy for 45 minutes" by refusing to fill a prescription "based on an erroneous understanding of the policies and procedures surrounding" those types of prescriptions. *Id.* at #10729. And aside from the workflow issue, Wantou was still refusing to "help or talk to anyone." *Id.* at #10728.

Wantou's second "coaching" came after Walmart continued to hear of Wantou's ongoing disputes with his colleagues. *See id.* at #10737. The Director of Health and Welfare had requested that Wantou and the other pharmacist working at the store improve communication between each other. *Id*. But during a visit to the store, the Director "determined . . . there had been relatively no improvement in communication" between Wantou and the other pharmacist. *Id.* As a result, the Director issued "identical coachings" to both pharmacists for the poor communication. *Id.*

Wantou received his third and final coaching after Walmart "received a string of complaints from associates and customers concerning" Wantou "and his work practices." *Id.* at #10740. During that time, Wantou's manager learned that Wantou had "refused to sell insulin syringes to a customer, argued with the customer for an extended period of time[,] and subsequently violated HIPAA requirements while discussing the matter with the customer." *Id.* at #10740. That was not all. Around the same time, Wantou's manager

received an anonymous complaint, titled, "unhappy employees," from the pharmacy where Wantou worked. *Id.* Even Wantou's manager felt like Wantou was being "insubordinate" to her during this period. *Id.*

But the last straw was something else. During a monthly audit, Wantou's manager noticed Wantou "had administered immunizations to patients outside the age parameters of" the relevant Walmart policy called a "Standing Order." *Id.* at #10746. The Standing Order prohibited pharmacists from administering certain immunizations to patients under the age of 65. *Id.* Yet that is exactly what Wantou had done. *Id.*

Because of the violation, three people visited Wantou: the outgoing Health and Wellness Director, the incoming Health and Wellness Director, and a regional manager. *Id.* at #10748. During the meeting, the Directors reiterated that, absent specific circumstances, the Standing Order prohibited pharmacists from administering certain immunizations to anyone under 65. *Id.* Although nobody issued Wantou a coaching for this incident, Wantou was instructed to follow the Standing Order going forward. *Id.*

Wantou continued to violate the Standing Order anyway. During another routine audit, Wantou's manager noticed *once again* that Wantou had been providing the immunizations to patients under 65. *Id.* at #10750–51. That discovery led the new Health and Wellness Director to investigate. *Id.* at #10751. The investigation found that Wantou "had improperly administered at least 10 vaccinations outside of the Standing Order." *Id*. Because of Wantou's repeated violations of Walmart's Standing Order, Walmart terminated his employment. *Id.* at #10756.

A couple of months after Walmart terminated Wantou's employment, Wantou filed a discrimination charge against Walmart with the EEOC based on "race, color, national origin and retaliation." *Id.* at #10757. While that charge was pending, Wantou also filed a claim for unemployment benefits with the Texas Workforce Commission. *Id.* at #10758. The Commission approved Wantou's claim for benefits, but the Commission's Appeal Tribunal later reversed that decision. *Id.* at #10759. The Appeal Tribunal concluded Wantou had "violated Walmart's known policies and procedures when he administered vaccinations in opposition to [Walmart's] standing orders." *Id.*

After receiving a right-to-sue letter from the EEOC, Wantou filed suit against Walmart in federal court. Compl. R.1. He brought various state and federal claims alleging discrimination based on race, color, and national origin, illegal harassment, and hostile work environment. *See Wantou v. Wal-Mart Stores Texas, L.L.C.*, 23 F.4th 422, 429 (5th Cir. 2022). He also alleged that Walmart had retaliated against him for complaining about the alleged discrimination. *Id.* Based on those claims, Wantou sought back pay, front pay, compensatory damages, punitive damages, attorney's fees, and restitution. *Id.*

The District Court granted summary judgment to Walmart on all of Wantou's claims except Wantou's Title VII retaliation claims and his quantum meruit claim. *Id.* Those four claims went to a jury, which rejected all of them except for one retaliation claim based on Wantou's third coaching. *Id.* For that claim, Wantou received damages and attorneys' fees. *Id.*

Wantou and Walmart both filed appeals to the Fifth Circuit. *Id.* at 430. Walmart's appeal focused on the one retaliation claim the jury decided in Wantou's

favor. *Id.* Wantou, for his part, appealed many issues. *Id.* These issues included the jury's rejection of Wantou's other retaliation claims along with the jury's rejection of various damages and restitution claims. *Id.* Wantou also challenged the District Court's award of summary judgment to Walmart on his discrimination and hostile-work-environment claims. *Id.* Along with those issues, Wantou appealed several other District Court rulings on proposed jury instructions, the admission of evidence, and limitations on trial time. *Id.*

The Fifth Circuit affirmed the District Court on every issue. As relevant here, the panel majority disagreed with the District Court's conclusion that none of the alleged harassment underlying Wantou's hostile-work-environment claim rose to the level of a Title VII violation. *See id.* at 434. But the Fifth Circuit nevertheless affirmed the District Court's award of summary judgment to Walmart for a different reason. That reason was Wantou's inability to show that Walmart had failed to take "prompt remedial action" once it "knew or should have known" of the alleged harassment. *Id.* As the Fifth Circuit observed, Wantou's formal complaint prompted Walmart to investigate the allegations. *See id.* at 435. After the investigation, Walmart issued an instruction to both Wantou and another pharmacist to better communicate with each other. *See id.* And Wantou failed to show that any alleged harassment continued after Walmart's investigation and instruction. *See id.*

The Fifth Circuit likewise affirmed the District Court's refusal to adopt Wantou's proposed Cat's Paw instruction. *Id.* at 436. The Fifth Circuit held that the District Court had not abused its discretion in rejecting the proposed instruction. Wantou's "proposed

instructions, as written, [were] confusing if not . . . internally inconsistent." *Id.* The instruction, moreover, referred to "discriminatory bias" and "discriminatory animus" at various times, "despite the district court's grant of summary judgment on all claims of discrimination." *Id.* In any event, the Fifth Circuit explained that Wantou was not prejudiced by the District Court's ruling. *See id.* That was because Wantou presented evidence to the jury and made a closing argument consistent with a Cat's Paw theory even without the instruction. *See id.*

Judge Ho dissented in part for one reason. *See id.* at 441–42 (Ho, J., concurring in part and dissenting in part). Judge Ho said he would not have reached the alternative ground under which the panel majority affirmed the District Court's grant of summary judgment to Walmart on Wantou's hostile-work-environment claim. *See id.* at 442. Neither did Judge Ho say he disagreed with the panel majority's analysis of that claim. Judge Ho instead explained he would have remanded the case to the District Court to consider the alternative ground "in the first instance." *Id.*

After the Fifth Circuit affirmed the District Court, Wantou petitioned for rehearing en banc. App.41. No judge requested a poll on Wantou's petition, so the petition was denied. App.41–42. Wantou's Petition to this Court for a writ of ceritiorari followed.

REASONS FOR DENYING CERTIORARI

Wantou's Petition for a Writ of Ceritorari does not raise any federal questions of exceptional importance, nor does it identify any conflicts between Fifth Circuit's decision below and decisions from other circuits.

All the arguments in the Petition are directed at one of two overarching issues: (1) Wantou's belief that

Walmart should not have been granted summary judgment on his hostile-work-environment claim; and (2) his belief that the District Court should have instructed the jury on the Cat's Paw theory of liability. He asserts that the Fifth Circuit's handling of these issues created multiple conflicts with decisions from other circuits. But he is wrong. The Fifth Circuit's decision created no circuit conflicts.

Rather than identifying true circuit conflicts, his arguments are essentially objections over the Fifth Circuit's application of settled law to the facts of his case. In other words, he is merely seeking error correction, not the resolution of a circuit conflict or some exceptionally important federal issue. And even at that, his arguments are not well taken because the Fifth Circuit correctly applied the law.

In any event, this case is a poor vehicle for resolving Wantou's arguments. Most of his arguments have been waived because he did not raise them below. Others focus on discretionary matters that are not well suited for certiorari. And still others lack sufficient factual support in the record to justify a ruling in Wantou's favor even if he were correct as a matter of law.

I. THE PETITION DOES NOT RAISE ANY EXCEPTIONALLY IMPORTANT FEDERAL QUESTIONS.

Wantou first says this Court should grant his Petition because, according to Wantou, his Petition raises "exceptional[ly] important[t]" questions. Pet. at 15. Wantou contends that is so because of reportedly "strong disagree[ment]" among the panel and the fact that the EEOC "exceptionally filed an Amicus Brief at

the [Court of Appeals] stage." *Id.* (first alteration original).

This case does not involve issues of nationwide significance, like the constitutionality of landmark legislation or the validity of some assertion of federal power. And on top of that, Wantou's argument is based on two incorrect premises: (1) that there was "strong disagreement" among the Fifth Circuit panel; and (2) that EEOC's participation at the Fifth Circuit as amicus demonstrates that there are questions of exceptional importance here.

First, while there was a disagreement between Judge Ho and the panel majority, Judge Ho—contrary to Wantou's argument—did not express "strong" disagreement with panel majority. What Judge Ho actually said was that he "strongly disagree[d] with the respected *district judge*"—not the panel majority—on one particular point. *Wantou*, 23 F.4th at 441 (emphasis added) (Ho, J., concurring in part and dissenting in part). That point was the District Court's conclusion that certain statements did not amount to unlawful harassment under Title VII. *See id*. And on that point there was *no* disagreement between the panel majority and Judge Ho. The panel unanimously rejected that part of the District Court's opinion. *Wantou*, 23 F.4th at 434–35 (majority op.).

Judge Ho and the panel majority disagreed only about whether the Fifth Circuit should vacate part of the District Court's judgment and remand. The panel correctly thought that doing so was unnecessary, and it exercised its discretion to affirm the District Court's judgment on alternative grounds. *See id.* Judge Ho thought the issue should have been decided by the District Court "in the first instance." *Wantou*, 23 F.4th at 442 (Ho, J., concurring in part and dissenting in

part). That disagreement over a discretionary matter is not an exceptionally important federal question.

Likewise, it is by no means "exceptional" when the EEOC chooses to file an amicus brief in a case before the Courts of Appeals. Moreover, the EEOC's amicus brief was filed in support of *neither* party, and it was filed to make exactly the point on which the panel majority and panel dissent *unanimously agreed—i.e.*, that certain alleged statements qualified as unlawful harassment. *See* Corrected Br. of the Equal Employment Opportunity Comm'n as Amicus Curiae in Support of Neither Party, 5th Cir. No. 20-40284, at 12–25. But the EEOC did *not* opine on any of the grounds that Wantou raises in his Petition to this Court. Thus, the EEOC's participation as amicus on certain issues at the Fifth Circuit does not support Wantou's argument that the different issues he now raises in his Petition are exceptionally important federal questions.

II. THE COURT SHOULD NOT REVIEW WANTOU'S ARGUMENTS REGARDING HIS HOSTILE-WORK-ENVIRONMENT CLAIM.

Wantou contends that this Court should review the summary judgment granted to Walmart on his hostile-work-environment claim because—in his view—the Fifth Circuit's handling of that claim created numerous circuit conflicts. He is wrong. The Fifth Circuit correctly affirmed the District Court's summary judgment, and it did not create any circuit conflicts in doing so. And just as importantly, Wantou waived nearly all his arguments pertaining to that claim by failing to raise them before the Fifth Circuit.

A. Wantou waived nearly all his arguments pertaining to his hostile-work-environment claim.

Wantou has waived nearly all his arguments on his hostile-work-environment claim. That is because most of his arguments relate to the fifth prong of that claim, and Wantou never made any arguments about that prong at the Fifth Circuit.

To establish a hostile-work-environment claim, the plaintiff generally must show: (1) the plaintiff is a member of a protected class; (2) the plaintiff suffered unwelcomed harassment; (3) the harassment was based on the plaintiff's membership in a protected class; (4) the harassment "affected a term, condition, or privilege of employment"; and (5) the employer "knew or should have known" about the harassment and "failed to take prompt remedial action." *See, e.g.*, *West v. City of Houston*, 960 F.3d 736, 741 (5th Cir. 2020); *accord Warmington v. Bd. of Regents of Univ. of Minn.*, 998 F.3d 789, 799 (8th Cir. 2021); *Bailey v. USF Holland, Inc.*, 526 F.3d 880, 885 (6th Cir. 2008).

The District Court granted summary judgment to Walmart on the fourth prong. *See* D. Ct. Summ. J. Op., R.490, at #10809. Essentially, the District Court held that the alleged harassment could not have "affect[ed] the terms or conditions of [Wantou's] employment" because the alleged harassment was not "severe *and* pervasive" enough. *Id.* at #10809–10 (emphasis added).

The Fifth Circuit disagreed. It held—consistent with other circuits—that the alleged harassment could satisfy the fourth prong if the harassment was *either* severe *or* pervasive. *Wantou*, 23 F.4th at 433 (noting that the "severe *or* pervasive" test for harassment is

"stated in the disjunctive") (emphasis added). And the Fifth Circuit found that some of the alleged harassment was severe enough to satisfy the fourth prong. *See id.* at 434.

The Fifth Circuit nonetheless *affirmed* the District Court's grant of summary judgment to Walmart. *See id.* at 435. The Fifth Circuit did so based on the *fifth* prong of Wantou's claim. In short, the Fifth Circuit held that Walmart was not liable because, through its initial investigation, it took "prompt remedial action" to end the harassment once it "knew or should have known" about the harassment. *Id.* at 434–35.

In its response brief below, Walmart asked the Fifth Circuit to affirm the District Court on this alternative basis. *See* Br. for Appellee/Cross-Appellant Walmart Stores Texas, L.L.C., 5th Cir. No. 20-40284, at 76–80. Of course, the Fifth Circuit remained free to affirm the District Court on any basis supported by the record. *See Murr v. Wisconsin*, 137 S. Ct. 1933, 1949 (2017); *accord Thigpen v. Roberts*, 468 U.S. 27, 30 (1984). But Wantou never addressed Walmart's argument in reply. *See* Response/Reply Br. of Plaintiff-Appellant/ Cross-Appellee, 5th Cir. No. 20-40284.

Wantou only ever addressed his hostile-work-environment claim in his opening brief. And even in that brief, the argument focused exclusively on the *fourth* prong and totaled no more than *three sentences*. *See* Opening Brief of Plaintiff-Appellant Cross-Appelee, 5th Cir. 20-40284, at 68–69. He never addressed the fifth prong in either of his briefs to the Fifth Circuit, nor did he contest Walmart's argument that the Fifth Circuit should rely on the fifth prong as an alternative ground for affirming the District Court.

So Wantou has waived any argument about how, in his view, Walmart failed to take prompt corrective action to cure any alleged harassment. That matters because *most* of the issues Wantou raises in his Petition relate to that argument.

To be more precise, the first two of the three questions presented in Wantou's Petition relate exclusively to Wantou's waived argument. *See* Pet. at i–ii. Those questions are thus waived. The same goes for any suggestion in Section VI.A. of Wantou's Petition that the Fifth Circuit's analysis of the fifth prong of his hostile-work-environment claim raises "questions . . . of exceptional importance." *Id.* at 15.

And the waiver extends to the *vast majority* of the arguments that Wantou makes in Section VI.B in the argument portion of his Petition. These include Wantou's (incorrect) arguments that: (1) the Fifth Circuit was required to remand the case so that the District Court could consider the fifth prong in the first instance; (2) the Fifth Circuit applied the wrong standard and created a circuit conflict with regard to evaluating whether an employer has promptly responded to harassment; (3) the Fifth Circuit erroneously, and in conflict with other circuits, created a continuing obligation on the employee to report continued harassment after already making an initial report; and (4) the Fifth Circuit factually and legally erred as to the fifth prong of Wantou's hostile-work-environment claim. Pet. at 17–22, 26–39.

Wantou's failure to raise these arguments below is more than enough reason for this Court to refuse to consider them. But, ultimately, Walmart need not rely solely on waiver. Wantou's waiver is just one of many reasons this Court should refuse to consider Wantou's arguments pertaining to his hostile-work-environment

claim. As explained below, his arguments identify no error in the Fifth Circuit's reasoning, much less an error that creates a circuit conflict.

B. The Fifth Circuit did not create a circuit conflict over whether certain statements can create a hostile work environment under Title VII.

The first of several circuit conflicts that Wantou tries—and fails—to identify in his Petition concerns the harassing statements his colleagues allegedly directed at him between June and September 2015. The District Court held that those statements could not be actionable because they were not severe *and* pervasive. As Wantou points out, that holding conflicts with decisions from several circuits, which hold that harassing statements need only be severe *or* pervasive. Pet. at 25. But it is the Fifth Circuit's decision—not the District Court's—that matters for identifying a circuit conflict. And the Fifth Circuit disagreed with the District Court and expressly *agreed* with the other circuits that statements can be actionable if they were severe *or* pervasive. *See Wantou*, 23 F.4th at 434.

The Fifth Circuit acknowledged that if the statements at issue had been "the only evidence" before the court, it "likely would [have] vacate[d] and remand[ed]" the District Court's award of summary judgment to Walmart on Wantou's hostile-work-environment claim. *Id.* But the statements from Wantou's colleagues were not the only evidence in the record. *See id.* at 434–35. Viewing the totality of the record, the Fifth Circuit correctly affirmed the District Court on the alternative ground that Walmart did not fail to take prompt remedial action once it learned about the harassment. *See id.* at 435. That makes this case different from the

ones that Wantou cites as proof of a circuit conflict. *See* Pet. at 25. And that distinction means that there is no circuit conflict here. *See Bernstein v. Bankert*, 733 F.3d 190, 213 (7th Cir. 2013); *see also Fla. Power Corp. v. Firstenergy Corp.*, 810 F.3d 996, 1007 (6th Cir. 2015).

Nevertheless, Wantou argues that because the Fifth Circuit affirmed the District Court's summary judgment—although on alternative grounds—the Fifth Circuit's decision necessarily "marked a split" with those other circuits. Pet. at 26. But that is not how genuine circuit conflicts arise. A circuit conflict does not exist simply because a circuit court affirms a District Court decision that relied on reasoning that is contrary to decisions from other circuits. Nor does a circuit conflict exist simply because cases that share a single factual similarity—like actionable harassment—reach different results. *See Bernstein v. Bankert*, 733 F.3d at 213 (noting the lack of a circuit conflict because of "obvious and dispositive differences in the facts" of another case); *accord Fla. Power Corp. v. Firstenergy Corp.*, 810 F.3d at 1007.

Wantou asserts that Judge Ho acknowledged a circuit split between the panel majority's decision and the Fourth Circuit's position in *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 182 (4th Cir. 2001), but that simply is not true. What Judge Ho actually did was remark that the *District Court's* analysis of the alleged statements was inconsistent with Fifth Circuit precedent and other circuits' precedent. *Wantou*, 23 F.4th at 441 (Ho, J., concurring in part and dissenting in part). In providing one out-of-circuit example of such precedent, Judge Ho cited a Fourth Circuit decision. *See id.* (citing *Spriggs*, 242 F.3d at 182). But at the risk of repetition, the panel majority *agreed* with Judge Ho

(and Wantou, and other circuits, and the EEOC) on this point. *See id.* at 434 (panel majority op.).

The only reason Judge Ho dissented was because he disagreed with the panel majority's decision to affirm the judgment on alternative grounds not reached by the District Court. *Wantou*, 23 F.4th at 442 (Ho, J., concurring in part and dissenting in part). In no part of his opinion did Judge Ho so much as hint that the panel majority created a circuit split or implicate an existing split.

Finally, Wantou also suggests that the Fifth Circuit created a circuit conflict by affirming on alternative grounds rather than vacating the summary judgment and remanding after finding that the District Court applied an incorrect standard. *See* Pet. at 17–22. But Wantou does not identify any conflicting decisions from other circuits. And, indeed, there are none. The Courts of Appeals have discretion to affirm judgments on alternative grounds when they believe it is appropriate to do so. *See Murr*, 137 S. Ct. at 1949; *accord Thigpen v. Roberts*, 468 U.S. at 30. Here, the Fifth Circuit found it appropriate to do so. That other courts under other circumstances might have concluded otherwise does not mean that the Fifth Circuit created a circuit conflict. Reasonable jurists like Judge Ho might be able to disagree about whether the panel majority should have exercised its discretion to decide the issue itself, but it is beyond dispute that the panel majority had the right to do so. *Id.* And the discretionary nature of the decision means that there cannot be a true circuit conflict on that point.

C. The Fifth Circuit did not create a circuit conflict over whether employers may be liable for failing to take prompt remedial action against harassment.

Wantou next claims that the Fifth Circuit's decision conflicts with the decisions of the Fourth, Ninth, and Eleventh Circuits in failing to recognize that an employer may be liable under a hostile-work-environment claim where the employer "knew or should have known of the harassing conduct but failed to take prompt remedial action." *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1278 (11th Cir. 2002); Pet. at 31. But the Fifth Circuit's decision does no such thing. To the contrary, the Fifth Circuit expressly recognized that rule and applied it. *Wantou*, 23 F.4th at 435. Indeed, it has long been the law of the Fifth Circuit that an employer may be liable under Title VII for failing to "take prompt remedial action" over harassment the employer "knew or should have known about." *Id.* at 433 (quoting *West v. City of Houston*, 960 F.3d 736, 741-42 (5th Cir. 2020)); *accord Ramsey v. Henderson*, 286 F.3d 264, 268 (5th Cir. 2002); *Celestine v. Petroleos de Venez. SA*, 266 F.3d 343, 353 (5th Cir. 2001); *Waltman v. Int'l Paper Co.*, 875 F.2d 468, 477 (5th Cir. 1989). And the irony here is that the Fifth Circuit rejected Wantou's hostile-work-environment claim *precisely because* Wantou failed to establish this element in opposing Walmart's motion for summary judgment. *See Wantou*, 23 F.4th at 434.

Ultimately, Wantou's argument is not really that the Fifth Circuit applies a different standard from the Fourth, Ninth, or Eleventh Circuits in evaluating the fifth element of a plaintiff's hostile-work-environment claim. Rather, Wantou's disagreement is over the Fifth Circuit's *application* of that settled legal standard to

the unique facts of his case. In other words, Wantou is disputing the Fifth Circuit's conclusion that Walmart took prompt remedial action in *his* case. Pet. at 27–28. By definition, the Courts of Appeals cannot be split on that issue.

In any event, the Fifth Circuit properly applied the fifth element of Wantou's claim based on its thorough "review of the record." *Wantou*, 23 F.4th at 434. As the Fifth Circuit explained, soon after Wantou's first formal complaint to Walmart management in October 2015, Walmart conducted an investigation. *See id.* at 435. In fact, within *two hours* of Wantou submitting his formal complaint, Steven Williams—Walmart's Market Health and Welfare Director—responded. Walmart Summ. J. Ex. F., R.209-6, #4223. Williams told Wantou that Williams knew that day was Wantou's day off from work, so Williams would wait until Friday to call Wantou. *Id.* Williams also reassured Wantou that, in "the meantime," if he wanted to talk to Williams that day, he should "feel free to call" Williams. *Id.* Williams then thanked Wantou for sending the email and said he "look[ed] forward to speaking with" Wantou. *Id.* It so happened, however, that Wantou was taking off for vacation in the next day or two, so Williams's call with Wantou was postponed. D. Ct. Summ. J. Op., R.490, #10720.

After Wantou returned from vacation, he followed up with Williams in a second email that Wantou sent on November 3, 2015. Walmart Summ. J. Mot. Ex. G, R.209-7, #4226–27. That same day, Williams "forwarded [Wantou's] follow-up email to Walmart's Global Ethics Department ("Global Ethics") for investigation." D. Ct. Summ. J. Op., R.490, #10721. And the very next

day, Walmart initiated "a formal ethics investigation . . . in which" it interviewed "all key witnesses." *Id.*

To the extent that Wantou suffered any harassment before that investigation, it was "not apparent that offensive racist comments and conduct of the sort highlighted in . . . Wantou's deposition testimony continued after [that] investigation." *Wantou*, 23 F.4th at 435. After the initial investigation, Wantou never relayed another plausible allegation of racial harassment to Walmart again.

That is not to say Wantou did not have complaints. Wantou would lodge seven other formal complaints with Walmart, triggering additional investigations and review processes. But as the investigations and reviews found, Wantou's allegations of racial harassment were all rather conclusory. As explained above, in the Statement of the Case, the substance of his complaints revealed that his true grievances were over much less serious matters. But even though the substance of his complaints addressed more trivial issues, Walmart still took remedial actions in response to them. On April 25, 2016, both Wantou and another pharmacist received a written coaching by Walmart's Health and Welfare Director for not maintaining communication "as they had previously been instructed to do." *Id.* The next day, Walmart pharmacy manager Katie Leeves also met with Wantou and other pharmacy staff "to restate the requirement that all personnel act professionally in the pharmacy." *Id.*

The important point here is that the record does not support Wantou's assertion that Walmart remained aware of racial harassment and failed to take prompt remedial action after the initial investigation. As a result, the Fifth Circuit properly affirmed the District

Court's summary judgment based on the fifth prong of the hostile-work-environment claim.

In arguing to the contrary, Wantou begins by insisting "the Panel made the fatal factual error of [concluding] that . . . '[Wantou] first informed Wal-Mart in late October 2015 about his hostile work environment.'" Pet. at 28. Wantou claims he informed Walmart (through various individuals) as early as June 2015 and that Walmart failed to act until formally commencing an investigation in November 2015. Pet. at 29-30.

This argument must fail because, at the Fifth Circuit, Wantou himself argued that he "complained multiple times to Walmart, starting 10/01/2015." Opening Br. of Plaintiff-Appellant/Cross-Appellee, 5th Cir. 20-40284, at 39 (emphasis added). The Fifth Circuit was entitled to accept that concession as true, *see United States v. Stiger*, 371 F.3d 732, 736 n.1 (10th Cir. 2004); *see also Witkowski v. Welch*, 173 F.3d 192, 200 n.10 (3d Cir. 1999), and it did, *see Wantou*, 23 F.4th at 435. Indeed, even Judge Ho—the sole judge to vote for a remand in Wantou's case—concluded that Wantou "first informed Walmart in … October 2015 about his hostile work environment" claim. *Id.* at 442 n.1 (Ho, J., concurring in part and dissenting in part).

Along with Wantou's concession, the record independently shows that October 2015 was the date Walmart was on notice of Wantou's claims. Wantou admitted—and the District Court found—that before October 2015, Wantou had only complained "informally" about harassment he says he experienced. D. Ct. Summ. J. Op., R.490, at #10717–18. It was only starting in October 2015 that Wantou submitted a "formal" complaint that set the matter in motion with Walmart's Global Ethics Office. *Id.* at #10719.

These facts matter because Walmart's policies make clear that Wantou should have contacted the Global Ethics Office directly if he was dissatisfied with the response his "informal" complaints were receiving. Walmart Summ. J. Mot. Ex. V, R.209-9, #4244–45. It would have been easy for him to do so. The "Global Ethics Helpline . . . is available to associates around the world 24 hours a day, seven days a week." *Id.* at #4250. That Wantou did not notify Walmart of his grievances through proper channels until October 2015 informs when Walmart "'knew or should have known' about the harassment." *Wantou*, 23 F.4th at 433 (quoting *West v. City of Houston*, 960 F.3d 73, 741-42 (5th Cir. 2020); *see also Minix v. Jeld-Wen*, 237 F. App'x 578, 586 (11th Cir. 2007).

Finally, aside from contesting the Fifth Circuit's view about when he first notified Walmart of harassment, Wantou also disputes the Fifth Circuit's conclusion that Walmart's remedial actions were appropriate. As explained above, the Fifth Circuit properly evaluated this issue. It made no error. More importantly, it did not create any circuit conflicts in applying settled law to the facts of this case. Wantou makes little effort to identify any true circuit conflicts. Instead, he simply argues that the Fifth Circuit incorrectly applied the law to the facts of his case. Despite his best efforts to couch his argument in terms of a circuit conflict, he is really just seeking error correction. And that is not the purpose of certiorari.

D. The Fifth Circuit did not hold that employees have a continuing obligation to report ongoing harassment.

Wantou next tries to manufacture a circuit conflict out of the Fifth Circuit's observation that it was "not evident that a triable dispute exists relative to

whether Walmart remained aware that Wantou suffered continued harassment and failed to prompt remedial action." Pet. at 34 (quotation omitted). Wantou contends—incorrectly—that the Fifth Circuit deviated from other circuits by imposing a continuing obligation on the employee to report ongoing harassment. But the Fifth Circuit did not so hold.

Wantou's argument to the contrary fails because it depends on a mischaracterization of both the Fifth Circuit's decision in this case, as well as the law outside the Fifth Circuit. Wantou suggests that the Fifth Circuit's decision contravenes the decisions of "many Circuit Courts of Appeals," Wantou's Pet. at 32, but Wantou only cites one supposedly conflicting case: *Christian v. Umpqua Bank*, 984 F.3d 801, 812 (9th Cir. 2020). As Wantou points out, *Christian* states that an employer may not "condition[] its response on [the employee's] reports of further harassment." *Id.* at 813. (*quoting Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 876 (9th Cir. 2001)). Doing so "place[s] virtually all of [the employer's] remedial burden on the victimized employee." *Id.* (quoting *Nichols*, 256 F.3d at 876). Pet. at 35.

Wantou takes *Christian* out of context. *Christian* simply explained that an employer's "response" to "ongoing harassment" cannot solely be to tell the employee to let the employer know if "further harassment" continues and nothing more. *Id.* at 813. It makes sense that *Christian* said as much. In that case, there was evidence the employer took no action to end "ongoing harassment" that the employee was continuing to experience. *See id.* at 813.

Nichols—the case *Christian* relied on—illustrates the point even more clearly. In that case, the employer took no meaningful action to address an employee's

allegations of sexual harassment that the employee had experienced at the workplace. *Nichols*, 256 F.3d at 876. For example, "[t]he company made no effort to investigate [the employee's] complaint." *Id.* Nor did the company "discuss [the employee's] allegations with the perpetrators." *Id.* Instead, the employer told the employee to inform the employer "if the offensive conduct recurred." *Id.* That "solution" did not "remedy the harassment that had already occurred, and was not adequate to deter future harassment." *Id.*

The facts in Wantou's case could not be more different. Here, Walmart took prompt remedial action by investigating Wantou's complaint and interviewing the alleged wrongdoers. *Wantou*, 23 F.4th at 435. Unlike in *Christian* and *Nichols*—where the employers took no remedial action in response to the complaints—Walmart had no reason to believe that the harassment was ongoing after it took remedial action in response to Wantou's complaints. *See id.* The only way Walmart would have had reason to have such a belief would have been if Wantou had made further plausible reports of racial harassment, which he did not do. *See id.*

The upshot is this: when the Fifth Circuit noted in Wantou's case that it was "not evident that . . . Wal-Mart remained aware that Wantou suffered continuous harassment," the court was talking about a very different situation than the one presented in *Christian* or *Nichols*. The court was referring to a period in which Walmart had already appropriately dealt with any harassment that Wantou had experienced. *See Wantou*, 23 F.4th at 435. So it was proper for the Fifth Circuit to observe that, barring any further reports of racial harassment, Walmart had no reason to take further remedial action. *See id.*; *Christian*, 984 F.3d

at 812–13; *Nichols*, 256 F.3d at 876. After all, the law (in the Fifth Circuit and elsewhere) only holds an employer liable for a hostile work environment where the employer "*knew or should have known* of the harassment in question and failed to take prompt remedial action." *Hernandez v. Yellow Transp., Inc.*, 670 F.3d 644, 651 (5th Cir. 2012) (emphasis added).

Thus, contrary to Wantou's strained reading of the decision below, the Fifth Circuit did not establish a new rule requiring employees to bear the burden of continually reporting ongoing harassment. Instead, it merely concluded that—on these facts—there was no evidence that Walmart had any reason to believe there was ongoing racial harassment after its initial investigation.

But even if the Fifth Circuit *had* created a circuit conflict by announcing such a rule, this case would *still* be a poor vehicle for resolving the conflict because the Fifth Circuit *also* held that no ongoing harassment occurred here. *See Wantou*, 23 F.4th at 435. These facts would therefore produce the *same* outcome even under the Ninth Circuit's rule.

III. THE COURT SHOULD NOT REVIEW WANTOU'S ARGUMENTS ABOUT HIS PROPOSED CAT'S PAW THEORY JURY INSTRUCTION.

Wantou also tries—with no avail—to find a circuit split in the Fifth Circuit's analysis of his proposed jury instruction on the Cat's Paw theory of liability. *See* Pet. at 39–48. The key point here is that the Fifth Circuit agreed with other circuits that a Cat's Paw instruction *could* have been given here. *Wantou*, 23 F.4th at 436. But the Fifth Circuit concluded that—under these facts—the District Court did not abuse its

discretion in refusing to give the particular instruction that Wantou requested. *Id.*

Even Wantou seems to acknowledge there is no circuit conflict. At no point in his Petition does he outright say that the Fifth Circuit's decision created one. Instead, he uses more equivocal language, arguing that the Fifth Circuit "put a wedge between itself and . . . its sister circuit courts" in denying Wantou "cat's paw theory instruction." Pet. at 39.

One of the "wedge[s]" Wantou identifies is the fact that the Fifth Circuit affirmed the rejection of the proposed Cat's Paw jury instruction even though—in Wantou's view—the District Court provided no explanation for doing so. Pet. at 42. Wantou argues that the Fifth Circuit's decision in that regard runs counter to decisions where other circuits upheld the denial of Cat's Paw instructions "only after examination of [the district courts'] thorough reasoning." *Id.*

This is not a real circuit conflict. Even so, the argument completely overlooks the fact that the District Court *did* explain the standards and reasons underlying its refusal to provide a Cat's Paw instruction. The District Court did so when denying Wantou's Rule 59 motion in which Wantou requested a new trial because of the District Court's rejection of Wantou's proposed instruction. *See* D. Ct. March 12, 2020 Order, R.631 at #13977-79. In that order, the District Court carefully explained why, under the relevant standards, it rejected Wantou's proposed instruction. The District Court described how "Wantou did not come forward with sufficient evidence for a Cat's Paw instruction." *Id.* at #13978. The District Court also explained how its ruling in any event did not "seriously impair" Wantou's "ability to present" his Title VII claims. *Id.* The District Court also reasoned that "Wantou's

proposed instruction was not legally accurate because it was both "internally inconsistent" and "reintroduced foreclosed arguments." *Id.* at #13979

Wantou nonetheless faults the District Court for providing these reasons in a post-trial order rather than contemporaneously when rejecting Wantou's proposed instruction. But Wantou does not cite a single circuit decision holding that a District Court may not adequately state its reasons for denying a jury instruction in a post-trial order. And no such decision exists.

Wantou points to one other issue that he suggests the Fifth Circuit decided differently from other circuits. He notes how, following this Court's decision in *Staub v. Proctor Hosp.*, 562 U.S. 411 (2011), the Courts of Appeals have allowed plaintiffs to prove causation in Title VII under a Cat's Paw theory. *See* Pet. at 44 n.143. The irony is that Wantou also (correctly) acknowledges that this is the law in the Fifth Circuit, too. *See id.*; *see also Fisher v. Lufkin Indus., Inc.*, 847 F.3d 752, 758 (5th Cir. 2017) ("[A] Title VII retaliation plaintiff is entitled to use the Cat's Paw theory of liability if he can demonstrate that a person with a retaliatory motive used the decisionmaker to bring about the intended retaliatory action.") (quotation omitted).

What Wantou misses is that the issue on appeal at the Fifth Circuit was not whether Wantou was entitled to prove his Title VII retaliation claim under a Cat's Paw theory of causation, but whether the District Court abused its discretion in refusing to give the specific jury instruction about the Cat's Paw theory that Wantou had proposed to the court. *See* Dist. Ct. March 12, 2020 Order, R.631 at #13977-79; *Wantou*, 23 F.4th at 435. And *that* issue is governed by a different analysis; namely, whether "the district court's

refusal to give a requested jury instruction . . . (1) was a substantially correct statement of law, (2) was not substantially covered in the charge as a whole, and (3) concerned an important point in the trial such that the failure to instruct the jury on the issue seriously impaired the party's ability to present a given claim." *Kanida v. Gulf Coast Med. Pers. LP*, 363 F.3d 568, 578 (5th Cir. 2004). When addressing whether a District Court committed reversible error in denying a proposed jury instruction, the Fifth Circuit's sister circuits look to substantially similar factors. *See, e.g.*, *Kozlov v. Associated Wholesale Grocers, Inc.*, 818 F.3d 380, 389 (8th Cir. 2016); *United States v. Bobb*, 471 F.3d 491, 499 (3d Cir. 2006). As with other parts of his Petition, the rest of Wantou's brief does not raise a single, genuine issue for this Court to resolve. It is as an unsuccessful attempt to explain why the Fifth Circuit erred in applying settled factors to the particular facts of his case. *See* Pet. 44–48. And certiorari does not exist for error correction.

Further, even if the Fifth Circuit had held that Wantou could not rely on a Cat's Paw theory, this case would be a poor vehicle for resolving any circuit conflict on that point. Wantou's proposed instruction was confusing and internally inconsistent. D. Ct. March 12, 2020 Order, R.631 at #13977-79. Thus, even if the District Court and the Fifth Circuit had interpreted the law incorrectly, Wantou still would not have been entitled to the jury instruction he proposed. The Fifth Circuit also found that the instruction that was given to the jury allowed Wantou to argue the Cat's Paw theory of liability, and he in fact did so. *Wantou*, 23 F.4th at 436. Thus, Wantou was not prejudiced by the District Court's rejection of his proposed jury instruction. *See id.*

CONCLUSION

For the foregoing reasons, this Court should deny the Petition.

Respectfully submitted,

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