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

REPLY BRIEF FOR PETITIONER

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I. Wal-Mart's Alleged Facts of the Case

Wal-Mart's representation of the facts[1] epitomizes that Wal-Mart's purported investigation as to Wantou's hostile work environment ("H.W.E.") complaints was a sham investigation,[2] and that Wal-Mart did ***absolutely nothing*** in response to said complaints other than to use the machinery of Wal-Mart's management/chain of command to sabotage Wantou, fabricate false allegations on Wantou's work performance/work ethics/professional behavior; use said false allegations to justify illegal conduct by Wal-Mart's racist employees against Wantou; retaliate against Wantou via bogus coachings[3] and using said very coachings as alleged basis for terminating Wantou[4].

For instance, Wal-Mart alleges that "[p]art of the problem was that Wantou 'ignored the female technicians and only talked to male employees.'"[5] That allegation was concocted/fabricated by Edwards and Samples,[6] two of the very Caucasian employees Wantou complained constantly called Wantou "chimp", "monkey" and other utterly racist insults[7]. As EEOC stated, "[f]rom the outset of [Wantou's] employment, Wantou

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[1] Opp.1-8.

[2] Pet.31-34.

[3] Pet.13-15, 36-37.

[4] Pet.13-15.

[5] Opp.1.

[6] ROA.4076, ROA.4080, ROA.9383.

[7] Pet.App.115, ROA.7171, ROA.7174, ROA.7177.

testified, three of the white technicians—Ann Samples, Rayla Edwards, and Wendy Willoughby—'repeatedly' and 'continuously subjected Wantou to racist comments[. . .], they would often insult him by calling him 'chimp' or 'monkey'. 'All three of them would make those comments', [..] '**and they would act in concert . . . with each other**'".[8]

First, the very fact that in a pharmacy **of over thirty employees**—heavily predominantly women (of whom none (outside racist staff complained about) had ever complained about Wantou)—,[9] Wal-Mart would heed only allegations from the racist staff Wantou complained about, and not even attempt to corroborate said allegations through nonracist employees, reflects Wal-Mart's bad faith in conducting its so-called investigation. Second, even assuming, *arguendo*, that Wantou exhibited the sexist behavior alleged: **(i)** said behavior would not excuse Wantou being repeatedly called "chimp" or "monkey", and Wal-Mart's failure to end same; **(ii)** Wal-Mart's own frivolous accusation of Wantou being a sexist exemplifies that Wal-Mart does not take Title VII seriously because an employer who learns that one of its employees exhibits sexism has the obligation to investigate and end same; but Wal-Mart accepted and perpetuated the allegation, yet did nothing, further confirming that the investigation was simply a sham.

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[8] Pet.App.115 (Emphasis added).

[9] ROA.6092.

As dissenting Fifth Circuit Judge ["D.F.C.J."] J.C. Ho recognized: "for five of [Wantou's] co-workers [Leeves[10], Shannon, Samples, Willoughby, and Edwards] at Wal-Mart, **all they saw was the color of [Wantou's] skin**."[11] D.F.C.J. Ho also 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]."[12] D.F.C.J. Ho further noted: "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 of [H.W.E.] under Title VII".[13]

Yet, in interviewing Edwards in its purported investigation of Wantou's discrimination/harassment complaints, instead of addressing Edwards' repeatedly calling Wantou "monkey" and "chimp" and Edwards'

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[10] Leeves was actually Wantou's supervisor.

[11] Pet.App.29 (Emphasis added).

[12] App.29 (Emphasis added).

[13] App.29 (Emphasis added).

other illegal harassment of Wantou, Wal-Mart, in bad faith, shifted the focus to why Wantou **(the person who complained of illegal discrimination/harassment)** allegedly treated the perpetrators **(who had not complained of any discrimination/harassment from Wantou)** differently;[14] and Wal-Mart conveyed to Edwards that Wal-Mart was "investigating the way [Wantou] treated associates in the pharmacy"[15]. Thus, when asked by Wal-Mart "why do you think [Wantou] is treating you differently?"[16] Edwards, now made (by Wal-Mart) the victim rather than the perpetrator, responds: "I don't know if it has to do with [Wantou's] religion because some religions put men above women."[17] Remarkably, Edwards is allowed by Wal-Mart to unabatedly/unabashedly display her racism, by associating Wantou to negativity for the sole reason of his African origin, by overtly displaying racial bias in presuming from Wantou's race/nationality that Wantou (who, incidentally, is Roman Catholic), must be from some exotic religion associated with negativity, namely one that promotes sexism, thus attributing Wantou's purported negative actions to Wantou's race/African origin. This only supports D.F.C.J. Ho's finding that "**all [she] saw was the color of [Wantou's] skin**."[18] Wal-Mart acquiesced to Edwards' overt display of racism. A reasonable jury would say: "**no wonder illegal**

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[14] ROA.4076.

[15] *See* ROA.9383.

[16] ROA.4076.

[17] *Id.*

[18] Pet.App.29 (Emphasis added).

harassment by Edwards only worsened!" Ditto for Samples, who overtly confirmed existing racial bias against Wantou[19].

Further exemplifying Wal-Mart's malicious use of the machinery of Wal-Mart's management to fabricate false allegations regarding Wantou's work performance/work ethics/professional behavior; and Wal-Mart's use of said false allegations to justify illegal conduct by Wal-Mart's racist employees against Wantou; Wal-Mart alleges that "[Wantou's] manager 'had received six complaints from six female associates of all different racial backgrounds against' Wantou."[20] This is yet another allegation concocted by Wal-Mart to sabotage Wantou. Wal-Mart provided no evidence (let alone contemporaneous) whatsoever supporting this conclusory allegation.

As further example, Wal-Mart states: "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."[21] Wal-Mart purposefully misstates the record here, as Wantou's manager never made any such finding but only stated that the racist Caucasian staff Wantou complained about claimed such.[22] Crucially, this allegation is belied by Wal-Mart itself, as Wal-Mart's counsel herself told Wantou, during Wantou's

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[19] ROA.4081.

[20] Opp.1.

[21] Opp.2.

[22] *See* ROA.9383.

deposition: "**clearly you have a strong work ethic, I don't think that was ever challenged while you worked for Walmart, your work ethic.**"[23] This echoed statements made by Wantou's own managers regarding Wantou's work ethics.[24]

Finally, Wal-Mart relying, to deny illegal discrimination/harassment, on perpetrators' denial of same[25] further exemplifies that Wal-Mart does not take Title VII seriously. Substantially all workers know illegally discriminating/harassing is lawbreaking, and lawbreakers ***typically*** deny their wrongdoing!

II. The Questions at Issue Are of Exceptional Importance

Wal-Mart attempts to undermine the exceptional importance conferred to this case not only by EEOC's *Amicus Curiae* participation **but especially by the disagreements between EEOC and the Fifth Circuit** (thereafter "FCCA"); but Wal-Mart's attempts fail. First, as EEOC stated: "Congress charged [EEOC] with administering and enforcing Title VII"[26]. When Congress enacted Title VII, it simultaneously created EEOC to serve as Title VII's "guardian". Thus it is no surprise that EEOC stated it filed its *Amicus* Brief because it "has a substantial interest in the proper

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[23] ROA.6086.

[24] *Id.*

[25] Opp.2-3.

[26] Pet.App.113.

interpretation of the laws it enforces."[27] It is well settled that EEOC, as the administrator/enforcer of Title VII, has very limited resources and consequently only participates in cases that not only are of exceptional importance as to the statutes EEOC was charged by Congress to enforce, but would affect a very large number of individuals said statutes were designed to protect. If EEOC, as part of the executive branch (EEOC is under the Department of Labor) of our government, is to administer/enforce Title VII, as charged by Congress, there cannot be any cacophony between said executive branch and the judicial branch as to interpretation of Title VII; and any such cacophony should be resolved by this Court, the highest of the land.

Contrary to Wal-Mart's allegations[28], FCCA and EEOC disagreed. EEOC made it clear that the district court ("D.C."): **(i)** used erroneous standards in requiring Wantou to demonstrate "severe **and** pervasive" rather than "severe **or** pervasive" harassment;[29] **(ii)** "**erred in finding that Wantou endured neither severe nor pervasive harassment, when in fact a reasonable jury could find both**";[30] and **(iii)** "erred by treating the most egregious harassment cases as if they established a baseline for recovery under Title VII"[31]. FCCA agreed with EEOC only on EEOC's Point

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[27] Pet.App.113-14.

[28] Opp.11.

[29] Pet.App.113, 122-24.

[30] Pet.App.124-28.

[31] Pet.App.129-31.

of Error ("P.E.") **(i)**[32] and partially agreed on P.E. **(iii) but diverged on crucial P.E. (ii)**. Indeed, FCCA ***danced around*** P.E.(ii), only qualifying the comments complained about by Wantou as "unquestionably reprehensible"[33] and Wantou's workplace as "hardly copacetic"[34]; then concluding that no triable dispute existed because Wal-Mart allegedly did not "*remain aware*" of H.W.E. after purported response[35].

Thus FCCA effectively disagreed with EEOC regarding the "severe or pervasive" test, including the standards for assessing evidence, at summary judgment ("S.J."), for said test; belying Wal-Mart's allegation that EEOC did not opine on any grounds raised by Wantou in his Petition[36]. EEOC made clear that because of D.C.'s use of erroneous legal standards and because reasonable minds could find Wantou's evidence met requisite Title VII standards, D.C.'s judgment must be reversed[37]. This goes to the heart of Wantou's first question presented[38] in his Petition ("Q.P.P."). EEOC also made clear that under proper Title VII standards, Wal-Mart was sufficiently made aware, consistent with Wal-Mart's own policies, of Wantou's H.W.E., such that there was no need for Wal-Mart to

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[32] Pet.App.11.

[33] Pet.App.13.

[34] Pet.App.15.

[35] Pet.App.16.

[36] Opp.11.

[37] Pet.App.131-32.

[38] Pet.i-ii.

be continuously made aware of same,[39] which goes to the heart of Wantou's second Q.P.P.[40] The importance of Wantou's third Q.P.P. is intricately linked to that of the first two.[41]

Wal-Mart's attempt to lessen the importance of EEOC's *Amicus* brief because it was filed in support of neither party[42] equally fails. The primary purpose of EEOC's intervention in a case is not to support a party but to highlight the importance of the causes therein as to Title VII and protect the masses that would be affected by said causes down the line. This further attests that EEOC's intervention in a case reflects the high importance of the issues therein. When, as here, FCCA disagreed with EEOC, issues disagreed upon are of even greater importance before this Court.

Unquestionably, the ***strong*** disagreement within the Panel itself further highlights the importance of Wantou's Q.P.P.'s. Wal-Mart's parsing of words/semantics to suggest that D.F.C.J. Ho "strongly disagree[d]" only with D.C. and not Panel majority ("P.M.") is simply unavailing[43]. D.F.C.J. Ho could not have made it clearer that he ***strongly*** disagreed with P.M. First, unlike P.M., D.F.C.J. Ho did not *dance around* EEOC's P.E. (ii), fully addressed it and, like EEOC, found that the "evidence establishes a troubling pattern of racial

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[39] Pet.App.116-18.

[40] Pet.ii.

[41] Pet.16.

[42] Opp.11.

[43] Opp.10.

harassment—one that a jury could find sufficiently pervasive to alter the conditions of employment and thereby support a claim of [H.W.E.] under Title VII."[44] Second, D.F.C.J. Ho radically disagreed with P.M.'s refusal to vacate judgment despite clearly erroneous standards used by D.C., and categorically chastised P.M. for affirming judgment on alternative grounds adjudicated by FCCA at first instance, chiding P.M. for violating the principle that FCCA is "a court of review, not first view."[45]

III. The Circuit Split

The circuit split here could not be more entrenched. Wal-Mart attempts to deny/undermine it through inaccurate facts as to: **Point (i):** the date on which Wal-Mart became/should have become aware of Wantou's H.W.E.[46]; **Point (ii):** whether Wantou's verbal H.W.E. complaints complied with Wal-Mart's policies[47]; **Point (iii):** whether H.W.E.'s "fifth element" was required in the first place[48]; **Point (iv):** whether even after Wantou's 10/01/2015 formal complaint, Wal-Mart's response was prompt/remedial[49].

Point (i): Wal-Mart states "Wantou's insist[s] 'the Panel made the **fatal** factual error of [stating] that

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[44] Pet.App.29.

[45] Pet.App.30.

[46] Opp.21.

[47] Opp.21-22.

[48] Opp.19.

[49] Opp.19.

Wantou first informed Wal-Mart in **late** October 2015 about his [H.W.E.].'"[50] Wal-Mart alleges (purposefully misquoting/misciting Wantou's FCCA Opening Brief) that "Wantou himself argued that he 'complained multiple times to Walmart starting 10/01/2015.'"[51]. What Wantou stated (as EEOC noted[52]) was that starting 10/01/2015, Wantou repeatedly complained to Wal-Mart **about Shawn Shannon not speaking to him at all except to make racist insults**;[53] and that this impaired Wantou's ability to do his job[54].

EEOC properly noted that prior to 10/01/2015, Wantou had duly, consistent with Wal-Mart's policy, repeatedly complained about H.W.E. for many months.[55] Regardless, Wal-Mart cannot, in good faith, claim that even said statement by Wantou which Wal-Mart purposefully misquoted/miscited would give ground to FCCA to make the **fatally** erroneous conclusion that Wantou first complained about H.W.E. "in **late** October 2015" when said very statement mentions 10/**01**/2015.

Point (ii): Contrary to Wal-Mart's allegations, Wantou's repeated verbal complaints prior to Wantou's 10/01/2015 formal complaint, were proper under Wal-Mart's policies. EEOC properly found so.[56] Wal-Mart's

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[50] Opp.21 (Emphasis added); Pet.28.

[51] Opp.21.

[52] Pet.App.116-17.

[53] Opening Brief, FCCA 20-40284, at 39; ROA.13163.

[54] Pet.App.116-17.

[55] Pet.App.116.

[56] Pet.App.116.

policies do not require that illegal harassment complaints be made formally or through Global Ethics, but simply to "*any salaried member of management*"[57]; and Wantou's informal/verbal complaints complied with this[58].

Point (iii): Wal-Mart itself admitted that where supervisor harassment is present, H.W.E.'s "fifth element" is not required.[59] In this case, as both supervisor harassment (by Leeves, as noted by EEOC[60]) and coworker harassment were present and occurred in concert with one another; "fifth element" was not required.

Point (iv): Wal-Mart asserts that Wantou's verbal complaints,[61] over months, prior to his 10/01/2015 formal complaint should be discarded because they allegedly did not comply with Wal-Mart's policy. As shown above, this is plainly false. However, even discarding said verbal complaints prior to 10/01/2015, Wal-Mart's response to Wantou's 10/01/2015 formal complaint was neither prompt nor remedial. Wal-Mart simply used dilatory tactics: Wantou went on vacation for just a ***couple days*** and Wal-Mart pretextually used said vacation to delay (by ***over a month***!) investigation.[62]

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[57] ROA.13493.

[58] Pet.App.116,ROA.7170-78.

[59] ROA.3642.

[60] Pet.App.118, 128; ROA.722-27.

[61] Pet.App.116, Pet.13, Pet.App.83-87.

[62] Opp.2, ROA.13166-68.

Moreover, Wantou's "vacation" or "day[s] off"[63] should have had no impact on the initiation of an investigation. What's more, Wantou had to repeatedly send e-mails to his manager before Wal-Mart started conducting a purported (sham) investigation[64].

Hence, Wal-Mart relies on plainly erroneous factual grounds to deny/undermine circuit splits, thus its arguments fail. Furthermore, outside the *Umpqua* case, Wal-Mart fails to make any substantial responsive argument as to cases (from the Third, Fourth, Ninth, Eleventh and D.C. Circuits) pointed by Wantou as to circuit split. Wal-Mart attempts to manufacture differences between *Umpqua* and Wantou's case,[65] but the two cases could not be more parallel: both involve an employer dismissing H.W.E. complaints, impermissibly delaying addressing same and eventually only effectuating sham response.[66] In *Umpqua*, while D.C. (just as FCCA in instant case) took employer's purported response as adequate and refused to look past the sham of said response, the Ninth Circuit looked past the sham and held that what the employer alleged to be its response could not be considered prompt/remedial under Title VII.[67]

Regarding Cat's Paw Theory Instructions ("C.P.T.I.'s"), Wal-Mart completely misses the issues on circuit

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[63] Opp.2, 19.

[64] Opp.19.

[65] Opp.23-25.

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

[67] *Id.* at 811-14.

split, including that other reviewing courts upholding C.P.T.I.'s denial relied on substantive grounds, *i.e.*, merits, based on totality of trial record[68]; and that said courts, relying on *Staub*[69], interpreted/implemented same differently, including notably, the Oregon Supreme Court which held that denial of warranted C.P.T.I.'s **necessitates** reversal[70]. Wal-Mart devotes its arguments to defending D.C.'s denial of C.P.T.I.'s; and not to FCCA's review of said denial, which is what is at issue. The pivotal issue here was whether a reasonable factfinder would find Wantou's case supported C.P.T.I's, not whether D.C. was correct in denying Wantou's ***proposed*** C.P.T.I.'s.

IV. Fifth Circuit's Ruling Is Plainly Irretrievably Wrong

FCCA's opinion is plainly wrong. First, FCCA **fatally** based its opinion on a completely erroneous date as to when Wantou first duly complained about H.W.E. to Wal-Mart. This alone makes FCCA's opinion **irretrievably** erroneous.

Regarding C.P.T.I's, FCCA reviewed the wrong issue by reviewing denial of Wantou's ***proposed*** C.P.T.I.'s rather than C.P.T.I.'s denial altogether.[71]

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[68] Pet.41-42.

[69] *Staub v. P.H.*, 562 U.S. 411 (2011).

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

[71] Pet.47.

Wal-Mart's allegation that Wantou waived H.W.E. arguments by not raising them in FCCA[72] fails. In FCCA, S.J. is appropriate only if "***pleadings***, ***depositions***, [. . .] show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law."[73] Because Wantou's S.J. pleadings and depositions statements cited therein sufficiently refuted Wal-Mart's first-instance alternative ground allegations in FCCA, and because FCCA was required to review said pleadings *de novo*, Wantou did not have to rehash them in FCCA; hence, Wantou did not waive them.[74] Moreover, because FCCA was required to "review *de novo* [D.C.'s] grant of [S.J.], ***applying the same standards as [D.C.]***"[75], Wantou did not have to respond to Wal-Mart's arguments that required departure from D.C.'s standards such as those pertaining to whether Wal-Mart's response was prompt/remedial, question which, under D.C.'s conveyed standards, was for jury, not the court[76]. Similarly, FCCA alleging that Wantou and EEOC did not address H.W.E.'s "fifth requirement"[77] was wrong, as Wantou addressed it in S.J. pleadings[78] FCCA was required to review, and

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[72] Opp.9, 11-14.

[73] *Haire v. LSU*, 719 F.3d 356, 362 (5th Cir. 2013) (Emphasis added).

[74] Reply Brief, FCCA 20-40284, at 19.

[75] *Le v. Exeter*, 990 F.3d 410, 414 (5th Cir. 2021) (Emphasis added).

[76] App.35.

[77] Pet.App.13.

[78] ROA.6080-85.

EEOC sufficiently addressed it[79]. Regardless, since harassment involved Wantou's supervisor (Leeves), Wal-Mart liability attached regardless of "fifth requirement"[80].

Furthermore, to reach its conclusions, FCCA violated (*e.g.*, by comparing Wantou's deposition testimony to Wal-Mart's documentation/Wantou's written statements[81]) requirement that at S.J., a court shall ***draw all reasonable inferences in favor of non-moving party, and make no credibility determinations or weigh evidence***;[82] and only by violating said edicts could FCCA's conclusions be reached. EEOC emphasized said requirements in its *Amicus* Brief[83] but FCCA ignored them.

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[79] *E.g.*, Pet.App.116-17.

[80] *Staub*, *supra*, at 421.

[81] Pet.App.13.

[82] *Reeves v. S.P.P.*, 530 U.S. 133, 135 (2000); *Anderson v. L.L.*, 477 U.S. 242, 255 (1986).

[83] Pet.App.114.

CONCLUSION

The petition for certiorari should be granted.

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