NO. _____

In the Supreme Court of the United States

DEANA POLLARD SACKS,

Petitioner,

v.

TEXAS SOUTHERN UNIVERSITY, ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

Erwin Chemerinsky
UNIVERSITY OF CALIFORNIA, BERKELEY SCHOOL OF LAW
215 Law Building
Berkley, CA 94720
(510) 642-6483
echemerinsky@law.berkeley.edu

David J. Sacks
Counsel of Record
SACKS LAW FIRM
2323 S. Shepherd Drive
Suite 825
Houston, TX 77019
(713) 863-8400
david@sackslawfirm.com

February 14, 2024 *Counsel for Petitioner*

SUPREME COURT PRESS ♦ (888) 958-5705 ♦ BOSTON, MASSACHUSETTS

QUESTIONS PRESENTED

Title VII, the Equal Pay Act (EPA) and the Equal Protection Clause, *inter alia*, prohibit 1) disparate treatment/wages based on gender and/or race; 2) hostile work environments that coerce employees to resign; and 3) retaliation for discrimination complaints. The Equal Pay Act and 42 U.S.C. § 1983 create individual liability for retaliatory harassment that forces an employee to resign. Employers are liable for constructive termination pursuant to Title VII and the Equal Pay Act.

Petitioner Deana Pollard Sacks was a tenured professor at the Thurgood Marshall School of Law at Texas Southern University (TSU) until 2020. She filed two lawsuits against TSU, *Sacks-I* in 2018 and *Sacks-II* in 2022. This petition concerns *Sacks-II* for constructive termination. The petition for certiorari for *Sacks-I* is due March 14, 2024.

In both lawsuits Sacks alleged violations of Title VII for sex discrimination, a hostile work environment, disparate treatment, and retaliation, *inter alia*. The gender-discrimination claims were dismissed in both cases at the pleading stage for failure to state a claim upon which relief can be granted. Both dismissals were affirmed by the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit's opinions conflict in multiple ways with decisions of this Court and most or all other Circuits and pose the following issues:

1. Whether the Fifth Circuit may disregard the doctrine of continuing violations and instead adopt a discrete-act factor test requiring subjective intent in a hostile-environment-constructive-termination case in conflict with this Court's and other Circuits' objective

negligence-based test, thereby effectively abolishing the negligence theory of liability for constructive termination.

2. Whether the Fifth Circuit may adopt a restrictive causation requirement for Equal Pay Act retaliation claims in direct conflict with the language of 29 U.S.C. § 215(a)(3), Supreme Court precedent, and other Circuits.

3. Whether This Court Overruled *Swierkiewicz* and changed the pleading standard for Title VII cases by its decisions in *Twombly* And *Iqbal*, and if so, whether *Iqbal* empowers trial courts to disregard factual allegations and/or make factual findings to determine "plausibility."

PARTIES TO THE PROCEEDINGS

Petitioner and Plaintiff-Appellant below

- Deana Pollard Sacks

Respondents and Defendants-Appellees below

- Texas Southern University
- Ahunanya Anga
- James Douglas
- Fernando Colon–Navarro
- Ana Otero
- April Walker
- Darnell Weeden

LIST OF PROCEEDINGS

CURRENT CASE (SACKS II)

U.S. Court of Appeals for the Fifth Court
Docket 22-20541
Deana Pollard Sacks v. Texas Southern University; Ahunanya Anga; James Douglas; Fernando Colon–Navarro; Ana Otero; April Walker; Darnell Weeden
Date of Judgment October 3, 2023

U.S. District Court for the Southern District of Texas
Docket Civil Action H-22-299
Deana Pollard Sacks v. Texas Southern University; Ahunanya Anga; James Douglas; Fernando Colon–Navarro; Ana Otero; April Walker; Darnell Weeden ("Sacks-II")
Date of Judgment September 13, 2022

RELATED CASE (SACKS I)

U.S. Court of Appeals for the Fifth Court
Docket 22-20474
Deana Pollard Sacks v. Texas Southern University; Ahunanya Anga; James Douglas; Fernando Colon–Navarro; Ana Otero; April Walker
Date of Judgment December 15, 2023

U.S. District Court for the Southern District of Texas
Docket Civil Action H-18-3563
Deana Pollard Sacks v. Texas Southern University; Ahunanya Anga; James Douglas; Fernando Colon–Navarro; Ana Otero; April Walker ("Sacks-I")
Date of Judgment April 8, 2022

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PETITION FOR A WRIT OF CERTIORARI

Deana Pollard Sacks petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The decision of the United States District Court for the Southern District of Texas is unreported, and is at App.17a. The Opinion of the United States Court of Appeals for the Fifth Circuit is published, 83 F.4th 340 (5th Cir. 2023), and is at App.1a.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit affirmed the District Court's judgment on October 3, 2023. App.1a. Petitioner timely filed a petition for panel rehearing and petition for rehearing en banc on October 31, 2023 after an extension of time was granted. The petitions for panel rehearing and rehearing en banc were denied on November 17, 2023. App.27a-28a.

Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1) as she filed her petition for writ of certiorari within 90 days from the denial of her petition for panel rehearing and petition for rehearing en banc. Rule 13.1 and 13.3.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. XIV sec. 1:

> The Fourteenth Amendment to the United States Constitution:
>
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

29 U.S.C. § 215(a)(3):

> (a) After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person—
>
> (3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee;

42 U.S.C. Section 1981:

> (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.C. Section 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the

Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. Section 2000e-2:

(a) Employer practices

It shall be an unlawful employment practice for an employer

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. Section 2000e-3:

> (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.

STATEMENT OF THE CASE

A. Factual Background

There has been no adjudication of the facts of this case. Because the case was resolved against the Petitioner on a motion to dismiss for failure to state a claim, the facts pled must be presumed true and construed in the light most favorable to the Petitioner.

Petitioner was a law professor at Texas Southern University (TSU) from 2000 to 2020 when she resigned along with numerous other tenured females as a result

of TSU's continuing discrimination, years-long failure to investigate, and harsh retaliation for discrimination complaints. *See* Petitioner's Second Amended Complaint App.37a¶9, 81a-82a¶¶109-111. TSU is so saturated with all forms of discrimination that "dozens or hundreds of EEOC complaints and lawsuits have been filed against TSU in the past several years." App.40a-41a¶20. The American Bar Association (ABA) investigated Petitioner's and other female law professors' discrimination complaints and determined in 2017 that TSU has a "persistent" pattern of "refusing to acknowledge or investigate dozens of sexual harassment, sexual assault, gender discrimination and harassment, and unequal pay complaints… ultimately the ABA assessed a public censure against the law school and a $15,000.00 fine for its 'persistent' refusal to follow the ABA standards." App.34a¶3(e), 52a-53a¶34, 57a-58a¶47.

TSU routinely and systemically treats women differently than men in terms of wages, workloads, and promotional opportunities, and routinely retaliates harshly against complainants. TSU "routinely denies white and female professors employment opportunities and benefits that non-white and male professors routinely enjoy such as dean and director positions," (App.44a¶24), and "has a long history of overworking women to the point of physical and mental exhaustion while providing men with light workloads and much higher compensation." App.31a-32a¶3(a).

The atmosphere at TSU was extremely hostile, mired in "hostile office rants" and anti-female and racist attitudes and remarks. App.52a¶¶33, n.5, 53a¶36. Deans and professors used epithets such as "white bitch" and "fucking whites." App.40a¶18, 53a¶36.

A dean told a childless 50-year-old female complainant to "go have a baby" so that she would be less aggressive and the same dean physically jumped back and forth in front of a female law professor who had recently made a gender-discrimination complaint, blocking her from walking down the law school hallway. App.76a¶96.

TSU creates and allows this atmosphere. TSU repeatedly promoted black males "soon after" they were accused of discrimination or found liable for discrimination, a showing of male solidarity against female complainants. App.74a¶90, 76a¶¶95-96. "Female law professors… referred to the hostile work environment at the law school as 'constant,' 'persistent,' 'pervasive,' and/or 'intolerable' [and described] 'hostile office rants' occurring on a 'regular, almost daily basis' and that 'retaliation is beyond isolated.'" App.53a¶36. TSU's *modus operandi* in response to complaints was "to force white females to resign by means of 'exhaustion harassment.'" App.31a-32a¶3(a).

In 2016 Petitioner lodged with TSU and then-dean Respondent Douglas a detailed 173-page discrimination complaint with exhibits; it was ignored. App.58a¶48. Soon after, "TSU and the individual Respondents retaliated against the Petitioner by misusing official TMSL committee processes and/or using their administrative or official positions of power over the Petitioner to deprive the Petitioner of earned wages or benefits of employment to which she was entitled." App.58a-59a¶49. The individual Respondents are an insular group of administrators and professors who have known each other for decades, attended TSU law school themselves, and had personal/romantic relationships. App.30a-31a¶¶2, 38a¶11, 38a¶13, 39a¶15,

40a-41a¶20, 65a¶68. The individual Respondents acted "intentionally," "maliciously," "in concert," and for the purpose of forcing Petitioner to resign. App.31a-35a¶3, 62a¶59. Their various acts of physical aggression and other forms of harassment intimidated and threatened Petitioner and deprived her of monies owed and other employment benefits, for the purpose of forcing her to resign. *See, e.g.*, App.30a-31a¶2, 39a-40a¶¶17-18, 63a-64a¶¶62-63, 65a-66a¶69, 67a-68a¶74, 69a-70a¶¶78-81, 75a¶93, 83a-84a¶¶118-119, 84a¶123.

Subsequent to Petitioner's complaints the Respondents targeted Petitioner for multiple acts of aggression including approaching her and threatening her on and off campus, slandering her to students, telling students not to enroll in her classes, and reprimanding Petitioner's student researchers for working with Petitioner. They "shouted down" the Petitioner in faculty meetings. App.58a-59a¶¶48-49, 65a¶68, 66a¶71, 67a¶73, 71a-72a¶84, 72a-73a¶86.

"The individual defendants not only misused state power as deans and committee members with authority over Petitioner's wages, employment benefits, and job security, but also engaged in tortious or criminal behavior in the law school hallways, parking lot, and other places, to force Petitioner to resign" and did so "with intent and malice." App.64a¶64. Respondents' abuse of official authority – falsely accusing Petitioner of discrimination despite the dean's ultimate finding of "no evidence" – and acts of aggression came "on the heels" of Petitioner's 2016 complaint, and again "soon after" Petitioner filed her 2017 EEOC charge. App.32a-33a¶3(b), 71a¶83. These same Respondents used official state power to withhold wages from Petitioner 2017-2020 and repeatedly harassed Petitioner with physical

intimidation until Petitioner resigned in 2020. App.31a-32a¶3(a), 42a-43a¶23(a), 49a-50a¶28, 51a-52a¶32, 58a-59a¶49, 81a-82a¶109.

A "Gender Equity Committee" (GEC) was created in early 2017 to address the ABA's finding that TSU failed to meet gender-equity accreditation standards and Petitioner served on the GEC. App.55a¶40, 56a¶43. However, TSU "took no reasonable steps to equalize the salaries of the professors, despite the ABA's specific directive to take immediate steps to equalize salaries between males and females," (App.57a¶45), "ignored or failed to reasonably respond to female law professors' serious sexual assault and/or harassment complaints against male professors," (App.43a¶23(c)) and "thwarted the [GEC]'s attempts to obtain pay data and after nearly three years… produced grossly false pay data that underreported the men's compensation." App.52a¶34.

In 2018, after serving nearly two years on the GEC and suffering exacerbated harassment, having wages withheld without explanation, and being subjected to many acts of aggression by the same group of professors who harassed Petitioner for years, Petitioner filed a hostile-environment lawsuit which included claims for intentional Equal Pay Act violations and a continuing pattern of all forms of gender/race discrimination, harassment, and retaliation. In *Sacks-I*, Petitioner alleged disparate pay, workloads, and promotions in addition to an exceedingly hostile workplace environment and harsh retaliation for complaining.

In 2017-2020 TSU retaliated against Petitioner and other female complainants who worked on the GEC, assigned them excessive workloads, and continued to fail to investigate females' claims while refusing to

provide wage data to the GEC. App.34a¶3(e), 50a¶29, 52a-53a¶34, 60a-61a¶¶54-55, 73a¶88, 81a-82a¶109. Among the continuing harassment, a Respondent blocked Petitioner's reserved parking space as Petitioner was about to pull in to create a confrontation and "physically charged at the Petitioner" and "got within 10 inches of Petitioner's face and repeatedly shouted in an angry and physically agitated manner, 'What are you going to do about it!?'" App.71a-72a¶84. In 2019-2020 another Respondent "threw her hair into the Petitioner's face" in the law school lobby and "approached the Petitioner's car aggressively in a church parking lot yelling, 'You can't park here!'" in the presence of Petitioner's stepson. App.66a¶71. A TSU security guard informed Petitioner that other professors want to "kill" her. App.64a-65a¶66.

In the 2019-2020 academic year, a new dean "increased the workload substantially as to the white female professors in particular by adding time-consuming, unnecessary, and menial tasks and created extra time-consuming tasks [tasks never assigned in the prior 20 years]." App.60a-61a¶¶54-55, 79a-80a¶103. Females, but not males, were forced to spend "large quantities of time" to handle "more onerous workloads, causing exhaustion for the women." App.44a¶23(e), 79a-80a¶103. In 2020 Petitioner watched as her highly qualified female colleague was treated abusively by the new dean, who responded to her complaints that the males were "underutilized" while "females were horribly overworked" with a more onerous workload, compelling the colleague to resign due to "intolerable" conditions, upsetting the Petitioner. App.62a-63a¶¶59-60.

In 2020 the females learned through discovery in *Sacks-I* that TSU's official wage-compliance reports underreported the men's salaries by "up to $70,000 per year to hide the willful and ongoing gender-based unequal pay… [in violation of] the Texas Education Code." App.42a¶22. By 2020 TSU's continuing misc-onduct and refusal to abide by ABA standards exhibited an entrenched, belligerent take-it-or-leave-it attitude toward females and whites: "it was clear that… TSU had no intention of ever following the law." App.80a-81a¶105.

By 2020 multiple tenured female law professors who served on the GEC resigned, losing tenure, including Petitioner. App.79a-80a¶103. Petitioner and other females were "forced to resign to preserve their health" despite "terrible financial consequences." App.77a¶99, 80a-81a¶105. "Both the original chair of the GE Committee and the second chair of the GE Committee–both white women–resigned from the law school following their assignment as the chair… between 2019-2020." App.56a¶43. In 2020 Petitioner reasonably concluded that TSU would continue to exacerbate discrimination/harassment of her, would never follow the law, and that her only option was to resign. App.35a¶3(h), 80a-81a¶105. Petitioner sought to amend her *Sacks-I* complaint to add constructive termination but was denied.

The *Sacks-I* trial court dismissed all of Petitioner's gender discrimination claims (other than EPA) on August 29, 2019 and eventually dismissed all of the claims against the individual Respondents.

Petitioner sought interlocutory appeal, it was denied, and the Fifth Circuit affirmed summarily on

December 15, 2023 with no legal analysis in an opinion less than two full pages. *Sacks v. Texas Southern University, et al*, no. 22-20474, 2023 WL 8676250 (5th Cir. December 15, 2023)(unpublished). Petitioner's petition for certiorari in *Sacks-I* is due March 14, 2024.

Petitioner filed *Sacks-II* for constructive termination based on: 1) continuing violations including an intolerably hostile work environment, persistent gender- and race–based discrimination of all types, Equal Pay Act violations, and continuing failure to investigate/correct discrimination; 2) persistent, intentional violations of the Equal Pay Act (including retaliatory wage-withholding and falsifying wage data to hide the violations); 3) concerted retaliation among all Respondents in violation of Title VII, the Equal Pay Act (Fair Labor Standards Act 29 U.S.C. § 215(a)(3)), the U.S. Constitution, and other law; and 4) discriminatory and retaliatory misuse of state action in violation of Title VII, the Equal Pay Act, 42 U.S.C. §§ 1981, 1985, the Equal Protection Clause, and the Due Process Clause (42 U.S.C. § 1983 claim); and 5) breach of contract for TSU's failure to pay certain wages owed to Petitioner after Petitioner fully performed.

B. Trial Court and Fifth Circuit Opinions

Despite the lengthy, detailed complaint, the district court granted a 12(b)(6) motion against Petitioner, dismissing all her claims. App.16a. The trial court disregarded judicial review standards for 12(b)(6) motions and ignored nearly all of Petitioner's well-pled facts. The court's test and analysis conflict with entrenched Supreme Court and all Circuits' precedent concerning continuing violations, "death by a thousand cuts," and "totality-of-the-circumstances" jurisprudence. All of

these require consideration of the entire course of conduct, even pre-limitations conduct that provide context for the termination. In fact, instead of taking all facts pled as true and construing them in the light most favorable to the Petitioner, the district court disregarded the standards for 12(b)(6) motions and made findings of fact contrary to facts pled in Petitioner's complaint. *See infra*, Section III. The district court specifically excluded all fact-intensive harassment allegations from 2016 through August 29, 2019 based on "res judicata" relative to the (erroneous) *Sacks-I* dismissal. App.21a-25a.

The district court also improperly found that in a Title VII constructive termination case the Petitioner can rely only upon abuses directed at Petitioner, excluding all harassment of coworkers, epithets, and overall environment. App.23a-25a The district court further improperly found that the individual Respondents had 11th Amendment immunity. App.25a

The Fifth Circuit affirmed in a published 13-page opinion on October 3, 2023. App.1a-15a. Petitioner's petition for panel rehearing and rehearing en banc were denied on November 17, 2023. App.27a-28a.

The Fifth Circuit affirmed and specifically relied on res judicata to eliminate all evidence of continuing violations prior to August 29, 2019 for the Equal Pay Act and § 1983 claims: "res judicata bars Sacks from bringing an EPA retaliation claim based on conduct occurring before August 29, 2019," App.8a-9a, 12a-13a "only post-August 29, 2019 incidents" considered for the § 1983 claim, App.14a-15a. The claims were dismissed based on insufficient pleading of facts post-August 29, 2019.

Although the Fifth Circuit found that "res judicata does not bar Sacks's Title VII constructive discharge claim and that Sacks can look to conduct before and during *Sacks-I*," for her continuing violations claim, App.6a, the court in fact disregarded all allegations prior to August 29, 2019, focused only on the 2019-2020 increased workload, and completely ignored the wealth of facts supporting exacerbated harassment 2017-2020 that caused so many females to resign. App.10a-11a. The Fifth Circuit then applied its unique intent-based discrete-act "factor" test to Petitioner's hostile-environment-constructive-termination claim and found that Petitioner "fails to allege any other factor that would make a reasonable person feel compelled to resign …. She does not allege a demotion… " App.10a-11a.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT REVIEW TO RESOLVE A CONFLICT AMONG THE LOWER COURTS CONCERNING THE PROPER TEST FOR HOSTILE – ENVIRONMENT – CONSTRUCTIVE – TERMINATION CASES

"A hostile environment claim is composed of a series of separate acts that collectively constitute one 'unlawful employment practice.'" *National Railroad Passenger Corporation v. Morgan*, 536 U.S. 101, 117 (2002) (*citing* Title VII), *abrogated on unrelated grounds*.[1] The doctrine of continuing violations is

[1] The Lily Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 expanded admissible evidence to prove discrimination:

the bedrock of Petitioner's hostile-environment-constructive-termination claim under all statutes involved,[2] and is comprised of "bits and pieces" of evidence that must be admitted into evidence and viewed collectively. *Vega v. Hempstead Union Free School District*, 801 F.3d 72, 86 (2nd Cir. 2015).[3]

Circuit courts consistently find reversible error when evidence of continuing harassment over the years preceding termination is excluded, regardless of whether the prior acts were actionable or not, because collectively they establish one claim. Harassing and retaliatory acts must be viewed collectively to prove context, whether the prior acts are directed at Petitioner or coworkers (to show employer's actual or constructive knowledge/intent) and whether they are actionable independently or not (whether due to limitations or another reason).

"With regard to any charge of discrimination under any law, nothing in this Act is intended to preclude or limit an aggrieved person's right to introduce evidence of an unlawful employment practice that has occurred outside of the time for filing a charge of discrimination."

[2] Title VII and EPA share "remedial" purposes and are interpreted consistently. *County of Washington v. Gunther*, 452 U.S. 161, 178 (1981). Continuing violations doctrine applies to hostile environment and retaliation claims. *Morgan*, *supra*. *Bryant v. Jones*, 575 F.3d 1281, 1296–97 (11th Cir. 2009), *cert. denied*, 559 U.S. 940 (2010) (Title VII, EPA, §§ 1981-1983 claims are all subject to continuing violations and "cumulative effects" analysis).

[3] Superseded on unrelated state-statute-amendment grounds, as explained in *Syeed v. Bloomberg, L.P.*, 568 F.Supp.3d 314 (S.D.N.Y. 2021).

Under a hostile-environment theory, constructive termination is established where workplace discrimination and harassment became "intolerable" and an employee reasonably felt compelled to resign. In *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004), Justice Thomas noted the Circuit split concerning whether employer "intent" is an element of the claim and explained that the theory of employer liability is negligence, requiring employer fault but not intent. Post-*Suders*, most Circuits conformed their hostile-environment analysis to reflect the negligence-based theory of liability and eliminated the employer-intent element. Post-*Suders* all Circuits that retained an intent element (except the Fifth Circuit) define "intent" to mean the "reasonably foreseeable consequences" of the employer's actions, consistent with negligence liability. *See* Section I(B)(1) *infra*.

The Fifth Circuit's rejection of the continuing violations doctrine and its adoption of a discrete-act "factors" test requiring subjective employer intent conflicts with all other Circuits and *de facto* abolishes the negligence-based theory of liability recognized by this Court in *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004). The Fifth Circuit test confuses intent-based disparate-treatment-constructive-termination analysis with negligence-based hostile-environment-constructive-termination analysis and directly conflicts with Supreme Court precedent[4] and all other Circuits,

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[4] "Hostile environment claims are different in kind from discrete acts. Their very nature involves repeated conduct . . . The 'unlawful employment practice' therefore cannot be said to occur on any particular day. It occurs over a series of days or perhaps even

whose tests conform to this Court's negligence-based precedent for hostile-environment-constructive-termination claims.

Res judicata is irrelevant because the validity of the discrimination complaints that triggered retaliation is irrelevant. *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 69 (2006) (the retaliation claim "standard is tied to the challenged retaliatory act, not the underlying [alleged discriminatory] conduct"). The *Sacks-I* gender-discrimination dismissal is irrelevant because even if the *Sacks-I* claims were not actionable prior to August 29, 2019, the prior acts that form the years-long continuing violations are relevant and admissible to prove the claim that arose in 2020. That is, finding that res judicata bars a prior claim does not affect the admissibility of prior acts that comprise the continuing violations upon which the current claim is based. *See infra* Section I(B)(1)&(2).

The Fifth Circuit also rejected the "take-it-or-leave-it" theory of constructive termination, where employers fail to respond to discrimination complaints for so long that employees have no option to remain employed under lawful conditions and therefore resign. This conflicts with numerous Circuits.

Issues of exceptional importance are involved. Tens of millions of women work in Louisiana, Mississippi, and Texas. Social facts show that harassment of females is rising and causes devastating

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years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own.*" National Railroad Passenger Corporation v. Morgan*, 536 U.S. 101, 115 (2002).

health and employment effects. The type of discrimination involved in this case – bullying – disproportionately harms females.[5] The Fifth Circuit essentially abolished the negligence theory of liability that evolved to address this form of discrimination which causes involuntary resignation. The Court should grant review to settle the various Circuit conflicts concerning this form of discrimination so critically important to women.

A. Supreme Court Precedent

Where discriminatory conduct "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment," Title VII has been violated. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986), *quoting* 29 C.F.R. ¶1604.11(a)(3) (EEOC Guidelines). A hostile environment is one that is "so heavily polluted with discrimination" as to "discourage employees from remaining on the job, or keep them from advancing in their careers." *Harris v. Forklift*, 510 U.S. 17, 21-22 (1993)

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[5] *See, e.g., Chai Feldblum & Victoria Lipnic, Select Task Force on the Study of Harassment in the Workplace*, EEOC (June 2016); Purdue University, *Workplace Bullying takes an emotional, physical toll; support is in place to help*, PURDUE TODAY (January 12, 2022). The EEOC and experts explain that ongoing workplace harassment is "repeated, health-harming mistreatment of one or more persons (the targets) by one or more perpetrators. It is abusive conduct that is threatening, humiliating, or intimidating, work interference–sabotage–which prevents work from getting done, verbal abuse" and females are the usual targets. PURDUE TODAY, *supra*. The EEOC determined that workplace harassment "Starts at the Top . . . Workplace culture has the greatest impact on allowing harassment to flourish …. " The EEOC reports retaliation as the most common complaint.

(citations omitted, emphasis added). "[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances." *Id.* at 23 (emphasis added).

"Hostile environment claims are different in kind from discrete acts. Their very nature involves repeated conduct… The 'unlawful employment practice' therefore cannot be said to occur on any particular day. It occurs over a series of days or perhaps even years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own …. Such claims are based on the cumulative effects of individual acts." *Morgan*, 536 U.S. at 115 (emphasis added, internal citations and quotations omitted). "[T]he entire hostile work environment encompasses a single unlawful employment practice." *Morgan*, 536 U.S. at 117.

> The statute [Title VII] does not separate individual acts that are part of the hostile environment claim from the whole… the employer may be liable for all acts that are part of this single claim… the employee need only file a charge within 180 or 300 days of any act that is part of the hostile work environment… the statute in no way bars a Petitioner from recovering damages for that portion of the hostile environment that falls outside the period for filing a timely charge.

Morgan, 536 U.S. at 118. Although liability for "discrete acts" is time-barred based on the act's date, discrete acts may still be used "as background evidence to support a timely claim." *Id.* at 113. *Morgan* made clear that years of continuing violations are admissible regardless of significant time gaps concerning prior

acts. 536 U.S. at 118 ("it does not matter whether nothing occurred within the intervening 301 days so long as each act is part of the whole… all incidents are still part of the same claim.").

Constructive termination is an "aggravated case" of a hostile work environment where "harassment [is] ratcheted up to the breaking point… harassment so intolerable as to cause a resignation may be effected through co-worker conduct, unofficial supervisory conduct, or official company acts." *Pennsylvania State Police v. Suders*, 542 U.S. 129, 146, 147-148 (2004) (emphasis added). "The inquiry is objective: Did working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign?" *Suders*, 542 U.S. at 141 (citation omitted; emphasis added). Although this Court adopted objective negligence standards (reasonableness) for employer liability in hostile environment cases, not a subjective intent standard, the Circuits have been split on the employer-intent issue for twenty years. *See infra* Section I(B)(1).

> We phrase the [objective reasonable employee] standard in general terms because the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters. The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships that are not fully captured by a simple recitation of the words used or the physical acts performed. A schedule change in an employee's work schedule may make little difference to

> many workers, but may matter enormously to a young mother with school-age children.

Burlington, 548 U.S. at 69 (emphasis added; internal quotations, citations omitted).

"We directed courts to determine whether an environment is sufficiently hostile or abusive by 'looking at all the circumstances,' including the 'frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Faragher v. City of Boca Raton*, 524 U.S. 775, 787-788 (1998), *quoting Harris* at 23 (emphasis added) (harassment of coworkers constitutes "circumstances.").

Retaliation claims may arise from continuing violations and are given even broader evidentiary latitude because the conduct prohibited protects an entirely different interest: encouraging the reporting of discrimination. "The scope of the antiretaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm." *Burlington*, 548 U.S. at 67 (emphasis added). "An employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing a harm outside the workplace," (*Id.* at 63, emphasis in original), because "effective retaliation" can take "many forms." *Id*. at 64. "The EEOC has consistently found '[r]etaliatory work assignments' to be a classic and 'widely recognized' example of 'forbidden retaliation.'" *Burlington* at 71 (citations omitted).

B. The Circuits Are Split Concerning the Proper Test/Analysis For Hostile-Environment-Constructive-Termination Claims

1. The Fifth Circuit's Discrete-Act "Factors" Test Conflicts with Other Circuits' Totality-of-the-Circumstances Test and Injects a Subjective Employer-Intent Element into a Negligence-Based Claim

The Fifth Circuit's discrete-act factor-based test for environmental constructive termination conflicts with all other Circuits and with this Court's decisions because it conflicts with the theory of liability. The test confuses the elements of an intentional disparate-treatment-constructive-termination claim (requiring discrete acts) with the negligence-based hostile-environment-constructive-termination claim. The latter requires no discrete acts and no employer intent. It imposes employer liability for fault as in any negligence claim, including negligent failure to investigate and correct a hostile environment.

Justice Thomas analyzed the Circuit split concerning employer "intent" twenty years ago:

> [U]nder this hostile environment plus framework, the proper standard for determining employer liability is the same standard for hostile work environment claims that I articulated in *Burlington*. An employer should be liable if, and only if, the Petitioner proves that the employer was negligent in permitting the supervisor's conduct to occur… an employer is liable if negligent.

Suders, *supra*, at 154 (Thomas, J, dissenting; internal quotations and citations omitted). The minority view requiring subjective employer intent in hostile-environment-constructive-termination cases has been recognized as overruled by *Suders*. *See Cecala v. Newman*, 532 F.Supp.2d 1118, 1168 (D.Az. 2007) ("The Supreme Court overruled the deliberateness requirement in 2004.")

Other Circuits follow Supreme Court precedent and adopt a negligence-based "totality-of-the-circumstances" test that requires consideration of years of harassment/continuing violations to determine whether the employee reasonably felt compelled to resign. *See Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1081, 1083 (3rd Cir. 1996) (the "totality of the circumstances" and six years of "suspicious" remarks cannot be excluded from a hostile-environment-constructive-termination claim because whether an "abusive environment severe enough to affect the psychological stability of a minority employee" compelled the employee's resignation can be determined only by reviewing the "overall scenario" and all prior acts in the years preceding resignation).

Even subsequent to Justice Thomas's clarification that intent is not an element of the claim, the Fifth and Eighth Circuits retain an employer-intent element. Opinion at 11 (requiring that employer "calculated" to force resignation); *Rester v. Stephens Media, LLC*, 739 F.3d 1127, 1132 (8th Cir. 2014) ("To establish a case of constructive discharge, [Petitioner] must show that (1) a reasonable person in her situation would find the working conditions intolerable, and (2) the employer intended to force her to quit.")

Sometimes Circuits analyze the employer's "intent" in hostile-environment-constructive-termination cases because, as in this case, Petitioner states claims under both intentional and negligence theories of liability. But Circuits other than the Fifth Circuit recognize that the claim sounds in negligence and construe "intent" as the "reasonably foreseeable consequences" of employer action or inaction. *See, e.g., Phillips v. Taco Bell*, 156 F.3d. 884, 890 (8th Cir. 1998) (intent "mean[s] the employee's resignation must be a reasonably foreseeable consequence of the employer's discriminatory actions."); *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343, 1355 (4th Cir. 1995) ("intent" means the "reasonably foreseeable consequences" of ongoing harassment, even where the employer did not want the employee to quit because he wanted to "continue to perpetrate and execute his lascivious acts on her.").

The Fifth Circuit's subjective intent element conflicts with multiple Circuits and fails to recognize that negligence is a theory of discrimination liability with elements and policies distinct from intentional torts. This Court should grant review and settle the Circuit conflict identified by Justice Thomas in *Suders*.

2. The Fifth Circuit's Rejection of The Doctrine of Continuing Violations Conflicts With All Other Circuits and This Court's Precedent

Other Circuits routinely find reversible error where years of harassment evidence is excluded because the prior acts collectively show: 1) defendant's motive/intent/knowledge; 2) overall workplace

environment or "corporate state-of-mind";[6] 3) cumulative effects of the "thousand cuts" of harassment; and 4) why Plaintiff reasonably felt compelled to resign. All other Circuits allow circumstantial evidence of a hostile environment whether the prior acts were directed at the plaintiff or coworkers, whether they were within or outside of the statute of limitations, and whether they were work-related or not, because the acts of harassment collectively constitute one claim, as *Morgan* made clear.

"[I]f… hostility pervades a workplace, a plaintiff may establish a violation of Title VII, even if such hostility [over a five-year period] was not directly targeted at the plaintiff." *Dominguez-Curry v. Nevada Transportation Dept*., 424 F.3d 1027, 1036 (9th Cir. 2005)(internal quotations and citation omitted).

Other Circuits require consideration of coworker harassment. Nearly 40 years ago the D.C. Circuit explained that female-coworker harassment must be considered in sex discrimination cases. In *Vinson v. Taylor*, 753 F.2d 141 (D.C. Cir. 1985), *aff'd, Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), *supra*, excluding coworker harassment was reversible error because, "evidence tending to show [defendant's] harassment of other women working alongside [plaintiff] is directly relevant to the question whether [defendant] created an environment violative of Title VII" and "[e]ven a woman who was never herself the object of harassment might have a Title VII claim if she were forced to work in an atmosphere in which such harassment was pervasive." *Id*. at 146.

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[6] *Conway v. Electro Switch Corp.*, 825 F.2d 593, 596 (1st Cir. 1987).

"[I]t is not possible to determine whether the environment was 'hostile or abusive' without considering the cumulative effects of the conduct at issue to determine whether it was sufficiently 'severe or pervasive' to alter the conditions of the workplace." *Zetwick v. County of Yolo*, 850 F.3d 436, 444 (9th Cir. 2017)(emphasis in original, citation omitted). A hostile environment is "ambient and persistent,… it continues to exist between overt manifestations." *Id*. at 444 (citation omitted). "A play cannot be understood on the basis of some of its scenes but only on its entire performance, and similarly, a discrimination analysis must concentrate not on individual incidents, but on the overall scenario." *Aman v. Cort Furniture Rental Corp*., 85 F.3d 1074, 1083 (3rd Cir. 1996)("totality-of-the-circumstances" test determines whether a "reasonable" employee would resign).

Coworker harassment is "critical to a plaintiff's case, for a claim of harassment cannot be established without a showing of more than isolated indicia of a discriminatory environment." *Vinson*, at 146 & n. 9 (citation omitted). *See also, e.g., Ercegovish v. Goodyear Tire & Rubber Co*., 154 F.3d 344, 356 (6th Cir. 1998) (ageist remarks revealed a "corporate state-of-mind" and "cumulative managerial attitude… [and] may serve as circumstantial evidence of individualized discrimination directed at the plaintiff.").

In 1986 Judge Posner explained why it is "essential" to admit prior acts to show employer negligence. In *Hunter v. Allis-Chalmers Corp*., 797 F.2d 1417, 1422 (7th Cir. 1986), *overruled on other grounds, Price-Waterhouse v. Hopkins*, 490 U.S. 228 (1989), Judge Posner found that a supervisor's racial epithet was "direct evidence" of his "racial attitudes" and a key to

the plaintiff's case, as was evidence of other racial comments/graffiti on the bathroom walls. *Id*. at 1423. "The evidence disclosed a strong and persistent pattern of racial hostility that management could hardly have been unaware [and] the evidence of discrimination against [a coworker] was pertinent, perhaps essential, to [plaintiff's] case." *Id*. at 1423-1424 (emphasis added).

> In a hostile work environment claim, evidence concerning all circumstances of the complainant's employment must be considered.... Incidents which occurred outside the filing period also may be admissible as relevant background to later discriminatory acts.... The [prior acts] were relevant... to illustrate a pattern of sex discrimination and... whether a hostile work environment existed.

Kimzey v. Wal-Mart Stores, 107 F.3d 568, 572-573 (8th Cir. 1997). *In accord*, *Glass v. Philadelphia Electric Co.,* 34 F.3d 188, 192-194 (3rd Cir. 1994) (finding reversible error to exclude evidence of years of harassment outside the limitations period, including the employer's failure to take corrective action).

It is reversible error to exclude evidence of prior acts directed at the plaintiff, coworkers, and students: "an atmosphere of condoned sexual harassment in a workplace increases the likelihood of retaliation for complaints in individual cases. Hawkins is entitled to present evidence of such an atmosphere... some detail about the alleged harassment is necessary context for the complaints made to administrative personnel." *Hawkins v. Hennepin Technical Center*, 900 F.2d 153, 156 (8th Cir. 1990), *cert. denied*, 498 U.S. 854 (1990)(citations omitted, emphasis added). *See also, Becker v. ARCO Chemical Company*, 207 F.3d 176,

194, n. 8 (3rd Cir. 2000), *citing United States Postal Serv. Bd of Governors v. Aikens*, 460 U.S. 711, 713, n. 2 (1983)("evidence of a defendant's prior discriminatory treatment of a plaintiff or other employees is relevant and admissible… to establish whether a defendant's employment action against an employee was motivated by invidious discrimination.") (emphasis added) (listing Circuit cases); *Demers v. Adams Homes of Northwest Florida, Inc.*, 321 Fed. Appx. 847, 853-854 (11th Cir. 2014)("Me too evidence" must be considered as evidence of "employer's mental processes"), *citing Postal Service v. Aikens*, 460 U.S. at 714-716; *Ansell v. Green Acres Contracting Co, Inc.*, 347 F.3d 515, 523 (3rd Cir. 2003) ("evidence regarding an employer's treatment of other members of a protected class is especially relevant to the issue of an employer's discriminatory intent.").

Because liability arises from the employers' negligent failure reasonably to investigate and correct discrimination, "Evidence of other acts of harassment is extremely probative as to whether the harassment was sexually discriminatory and whether the [employer] knew or should have known that sexual harassment was occurring."). *Hurley v. Atlantic City Police Dept.*, 174 F.3d 95, 111 (3rd Cir. 1999), *cert. denied*, 528 U.S. 1074 (2000)(emphasis added). "The plaintiff can prove that the employer knew of the harassment by showing either that she complained to higher management or that the harassment was pervasive enough to charge the employer with constructive knowledge." *Vance v. Southern Bell and Tel. Co.*, 863 F.2d 1503, 1512 (11th Cir. 1989), *cert. denied*, 513 U.S. 1155 (1995), *reversed on other grounds*, *Harris v. Forklift*, 510 U.S. 17, 20 (1993). *See also Heyne v.*

Caruso, 69 F.3d 1475, 1479-1480 (9th Cir. 1995)("It is clear that an employer's conduct tending to demonstrate hostility toward a certain group is both relevant and admissible.")

It is irrelevant whether the plaintiff knew of prior discriminatory acts until after she filed a lawsuit because the prior acts do not "depend[] on the plaintiff's knowledge of the incidents; instead they go to the motive behind the harassment.… " *Hurley*, at 111. "Systemic" discrimination affects all females: "it is implausible in the extreme that [plaintiff] was somehow immune from the pervasive sexism." *Id.* at 111.

The Fifth Circuit ignored all of the epithets revealing discriminatory animus. This is in conflict with other Circuits that routinely admit such evidence. Even a few isolated epithets by supervisors revealing a discriminatory attitude–and even where the plaintiff himself used the same epithets–help to prove constructive termination in conjunction with "additional workload on top of the work-related stress." *Rodgers v. Western-Southern Life Insurance Co.*, 12 F.3d 668, 672 (7th Cir. 1993).

Remarks by a university president that a department had become a "damn matriarchy" despite a small percentage of female professors and calling female professors' husbands financial "parachutes" showed discriminatory animus toward females as a class. *Brown v. Trustees of Boston University*, 891 F.2d 337, 349-350 (1st Cir. 1990), *cert. denied*, 496 U.S. 937 (1990). It did not matter that the remarks were subsequent to the alleged discrimination because a factfinder can infer that "any discriminatory animus toward women manifested in 1982 and 1983 would have existed in 1980 and 1981." *Id.* at 350. *See also*

Conway v. Electro Switch Corp., 825 F.2d 593, 596-597 (1st Cir. 1987)("For a woman supervisor, you do very well" reflects a gender-biased "corporate state-of-mind"); *Wilson v. City of Aliceville*, 779 F.2d 631, 633, 634, 635 (11th Cir. 1986) (reversible error to exclude a witness statement that the mayor made a racial slur months after the alleged discrimination); *Hardin v. Dadlani*, 221 F.Supp.3d 87, 103 (D.D.C. 2016) (discrimination toward black patrons is "relevant and admissible" evidence of discrimination toward black employees); *Miles v. M.N.C. Corporation*, 750 F2d 867, 873-76 (11th Cir. 1985)(racial slur made by a manager must be considered despite the manager not being directly responsible for the adverse employment action); *Robinson v. Runyon*, 149 F.3d 507, 512-513 (2nd Cir. 1998) (reversible error to exclude "circumstantial evidence" showing "attitudes" of supervisors).

The Fifth Circuit's rejection of the doctrine of continuing violations conflicts with this Court's and Circuits' jurisprudence. This Court should grant review to settle the issue of whether a Circuit may disregard the doctrine of continuing violations in a hostile-environment-constructive-termination case.

3. The Fifth Circuit's Rejection of Failure-To-Investigate "Take-It-Or-Leave-It" Constructive Termination Conflicts With Multiple Circuits

Numerous circuits recognize that where an employer manifests a "take-it-or-leave-it" attitude and the employee has no option to "keep working under *lawful* conditions," resignation is constructive termination. *Herbert v. Mohawk Rubber Co.*, 872 F.2d 1104, 1112-1113 (1st Cir. 1989) (emphasis added). *See*

also, Moore v. Kuka Welding Systems, 171 F.3d 1073, 1079 (6th Cir. 1999) (employer knew of discriminatory jokes/slurs and "did little to correct this problem," supporting constructive termination).

Continuing violations and an employer's failure to investigate over the years wears down employees, causing constructive termination. *Amirmokri v. Baltimore Gas and Electric Co.*, 60 F.3d 1126, 1131-1132 (4th Cir. 1995), (employer's "superficial response" to harassment complaints created a hostile atmosphere, and "[t]he constant stress created by this atmosphere caused [plaintiff] to get an ulcer and eventually resign."). *See also, Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1084 (3rd Cir. 1996) ("The fact that [plaintiff] had been subject to continuous discrimination during her employment could support a conclusion that she simply had had enough.").

In *Kimzey v. Wal-Mart Stores*, 107 F.3d 568, 574-575 (8th Cir. 1997), women, but not men, were subjected to various forms of verbal abuse including being screamed at but "management generally ignored [females'] complaints… [which was] increasingly upsetting to Kimzey. A reasonable jury could find that the continuing harassment and management's indifference rendered Kimzey's working conditions intolerable and forced her to quit." *See also, Van Steenburgh v. Rival Co.*, 171 F.3d 1155, 1160 (8th Cir. 1999) (constructive termination based on five years of harassment the employer failed to investigate, showing a "lack of recourse against the harassment."); *Ogden v. Wax Works, Inc.*, 214 F.3d 999, 1008 (8th Cir. 2000) ("[I]f an employee quits because she reasonably believes there is no chance for fair treatment, there has been a constructive discharge."), *citing Kimzey*;

Clark v. Marsh, 665 F.2d 1168, 1174, 1176 (D.C. Cir. 1981)(plaintiff's "informal efforts to obtain relief were largely ignored," over "a period of several years" and became "intolerable and drove [plaintiff] to an involuntary quit.") (internal quotations and citation omitted); *Nolan v. Cleland*, 686 F.2d 806, 814 (9th Cir. 1982) (a "history of unlawful discrimination… may have made [plaintiff's] position intolerable… [such] that a reasonable person would have felt compelled to resign.")

Petitioner and other females worked for several years to resolve their discrimination complaints but their efforts were thwarted as TSU continued in its long pattern of violations. Other Circuits find that such facts state a claim but the Fifth Circuit came to the opposite conclusion. This Court should offer guidance on proper elements, tests, and analysis in this important area of civil rights law. What must be alleged to state a hostile-environment-constructive-termination claim?

II. THIS COURT SHOULD GRANT REVIEW TO RESOLVE A CONFLICT CONCERNING CAUSATION FOR RETALIATION CLAIMS UNDER THE EQUAL PAY ACT

The Fifth Circuit required Petitioner to show a "causal link" between *Sacks-I* and post-August 29, 2019 harassment for the Equal Pay Act claim then focused on the lack of "causal link" repeatedly to justify dismissal. *See* App.13a. The Fifth Circuit found that Petitioner "does not show a causal link between her filing *Sacks-I* and her resignation" and relied on the lack of causation to dismiss the lawsuit. App.13a.

This conflicts directly with Supreme Court precedent and all Circuits because for an Equal Pay Act retaliation claim Petitioner can rely on causation between any of her complaints and subsequent harassment and need not show causation between *Sacks-I* and subsequent harassment. This Court made this clear in *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1 (2011).

In *Kasten*, this Court resolved a Circuit split concerning whether oral complaints trigger retaliation protection pursuant to 29 U.S.C. § 215(a)(3) and found that they did. Resolving the "conflict among the Circuits as to whether an oral complaint is protected," *Kasten*, 563 U.S. at 6, the Court found affirmatively: "To fall within the scope of the antiretaliation provision, a complaint must be sufficiently clear and detailed for a reasonable employer to understand it.… This standard can be met, however, by oral complaints, as well as by written ones." *Kasten*, 563 U.S. at 14 (internal quotations and citation omitted), *citing* 29 U.S.C. § 215(a)(3).

Other than the Fifth Circuit, Circuits have followed *Kasten* and allow liability where causation is found between informal complaints and subsequent harassment. *See, Greathouse v. JHS Sec. Inc.*, 784 F.3d 105, 106-107 (2nd Cir. 2015) (*citing Kasten*); *Minor v. Bostwick Laboratories, Inc.*, 669 F.3d 428, 432-433 (4th Cir. 2012)(*citing Kasten*); *Kasten v. Saint – Gobain Performance Plastics Corp.*, 703 F.3d 966, 968 (7th Cir. 2012), *vacated and remanded*, 563 U.S. 1 (2011) (*citing Kasten*); *Shrable v. Eaton Corp.*, 695 F.3d 768, 771 (8th Cir. 2012) (*citing Kasten*); *Moore v. Freeman*, 355 F.3d 558, 562 (6th Cir. 2004) (pre-*Kasten*).

In addition to its inappropriate restrictive causation requirement, the Fifth Circuit conflicts even further with other Circuits who find that harassment subsequent to oral, informal, or formal complaints establishes causation. That is, the chronology of events sufficiently pleads retaliation without more direct evidence. "A retaliatory purpose can be shown indirectly by timing: protected activity followed closely in time by adverse employment action." *Vega*, 801 F.3d at 90.

Petitioner described in factual detail extreme harassment "soon after" her 2016-2017 complaints and alleged that in 2020 (post-*Sacks-I*) the harassment toward female complainants became intolerable such that several tenured female professors resigned. *See* Statement of the Case, *supra*. The Fifth Circuit's rejection of chronology-based causation conflicts with multiple Circuits.

In 2015 the Second Circuit reversed a judgment on the pleadings and explained the different analyses between disparate-treatment discrimination and five years of retaliation. In 2008 Vega complained that he was assigned too many students, causing "twice as much work" without additional compensation. *Id*. at 77. Vega was then assigned a more onerous teaching load, forced "to teach in an 'excessively noisy' media center,'" and his computer password was "deactivated." *Id*. at 77. Over the next five years he was subjected to wage-withholding and exclusion from faculty-wide notices. In 2013 he received his first negative performance review in 16 years of teaching. *Id*. at 77. Only the "disproportionately heavy workload" constituted a discrete-act "adverse employment action" supporting disparate treatment, but the other (independently non-actionable) acts of harassment must be

considered as "relevant background evidence by shedding light on Defendant's motivation" for disparate treatment. *Id*. at 85, 88 (internal quotations and citations omitted). The other acts established retaliation, "any action that could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Vega*, 801 F.3d at 90*, quoting Burlington*, *supra.* "Some of these actions, considered individually, might not amount to much. Taken together, however, they plausibly paint a mosaic of retaliation and an intent to punish Vega for complaining of discrimination." *Id*. at 92. *See also Moore*, 171 F.3d at 1080 ("proximity in time [between an EEOC complaint and harassment].... allows for an inference… [of] retaliation for undertaking the protected activity.")

The Fifth Circuit conflicts with the Second and Sixth Circuits because the Fifth Circuit fails to accept as true the chronology of the facts pled and construe them in Petitioner's favor to find causation between Petitioner's various discrimination complaints and harsh retaliation that allegedly occurred "soon after."

III. THIS COURT SHOULD GRANT REVIEW TO RESOLVE A CIRCUIT SPLIT CONCERNING WHETHER *TWOMBLY-IQBAL* OVERRULED *SWIERKIEWICZ*

The Circuits are split concerning the pleading and dismissal standards for Title VII discrimination claims. The split concerns two issues: 1) Whether *Swierkiewicz*'s Fed. R. Civ. P. 8 notice-pleading rule was overruled by *Twombly* and *Iqbal*; and 2) whether *Iqbal* empowers trial courts to construe pleadings against plaintiffs and engage in "fact-finding" to decide "plausibility."

> The Second Circuit recognized the conflict:
>
> [U]ncertainty lingered as to whether *Twombly* and *Iqbal* overruled *Swierkiewicz* entirely, or whether *Swierkiewicz* survives only to the extent it bars the application of a pleading standard to discrimination claims that is heightened beyond *Twombly's* and *Iqbal's* demand for facial plausibility.

Vega, *supra* at 83-84, *quoting EEOC v. Port Authority of New York & New Jersey*, 768 F.3d 247, 254 (2nd Cir. 2014).

Swierkiewicz v. Sorema N.A., 534 U.S. 506, 513 (2002) held that Title VII pleadings are governed by Fed. R. Civ. P. 8's notice-pleading rule with "limited exceptions" concerning "all averments of fraud or mistake." This Court "rejected the argument that a Title VII complaint requires greater 'particularity,' because this would 'too narrowly constric[t] the role of the pleadings.'" *Swierkiewicz*, 534 U.S. at 511.

Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 569-570 (2007) held that although "detailed factual allegations" are unnecessary, "a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. The antitrust case involved fraudulent, concerted conduct but plaintiffs failed to allege any facts showing an "agreement" as required to state a claim. *Id.* at 568. In sum, failure to allege facts concerning an element of a fraud-based claim constitutes insufficient pleading. *Twombly* reiterated, "a judge ruling on a defendant's motion to dismiss a complaint must accept as true all of the factual allegations contained in the complaint," *Id.* at 572, even if

"doubtful in fact." *Id*. at 555, *citing Swierkiewicz*, 534 U.S. at 508, n.1.

Ashcroft v. Iqbal, 556 U.S. 662 (2009) involved a convicted felon's alleged discriminatory detainment and treatment after he entered the U.S. fraudulently and shared national-origin characteristics of terrorists who entered the U.S. fraudulently in the same time-frame. The Court found a national-security-based "obvious alternative explanation" for Iqbal's treatment following the September 11, 2001 terrorist attacks, concluding, "discrimination is not a plausible conclusion." *Id*. at 682.

The Second Circuit determined, "*Twombly's* endorsement of *Swierkiewicz* mandates, at a minimum, that *Swierkiewicz's* rejection of a heightened pleading standard in discrimination cases remains valid." *Vega*, 801 F.3d at 254. The Fourth Circuit disagrees: *Twombly* "announced a new pleading standard" that "superseded" the notice-pleading standard of *Swierkiewicz*. *Woods v. City of Greensboro*, 855 F.3d 639, 648 (4th Cir. 2017), *cert. denied*, 583 U.S. 1044 (2017). The Fifth Circuit Opinion indicates its agreement with the Fourth Circuit that *Swierkiewicz's* notice-pleading standard in Title VII cases has been overruled.

Some federal courts, such as the trial court in *Woods*, the trial court in this case, and the Fifth Circuit in this case, interpreted *Iqbal* "plausibility" to empower them to engage in "fact-finding" concerning discriminatory intent but the Fourth Circuit firmly rejected this interpretation. *See Woods*, 855 F.3d at 650.

The trial court and Fifth Circuit in this case engaged fact-finding and disregarded nearly all pled facts then relied on *Iqbal* to dismiss the case. For

example, the trial court found as a fact that Petitioner's "learning about general transgressions of the university… does not make her own position less tolerable… [and that] [i]t is implausible that any broad changes in school procedures and policies, or non-particularized changes to faculty workload, were designed to retaliate against Sacks." App.23a-25a. The trial court also found that Petitioner failed to plead that Walker is "any more than a peer (as opposed to a superior) [and the harassment by Walker] does not amount to more than 'petty slights, minor' annoyances.'" App.25a.

The Fifth Circuit made factual findings concerning Respondents' intent and the effects of the workplace environment on Petitioner, such as that "systemic" gender discrimination does "not personally implicate Sacks." App.11a. The Fifth Circuit further implied that Walker's targeted and aggressive harassment of Petitioner arose from "personal disputes" as opposed to intentional, retaliatory harassment as alleged. App.11a. The Fifth Circuit found that no facts alleged that Walker's harassment of Petitioner was "motivated" by *Sacks-I*, despite detailed factual allegations concerning how Petitioner and other GEC members were targeted for harassment and forced to resign in 2019-2020, after *Sacks-I* was filed. App.13a.

The Fifth Circuit's apparent view that *Iqbal* empowers federal courts to find facts to determine "plausibility" at the pleading stage is in conflict with the Second and Fourth Circuits which reject "fact-finding" post-*Iqbal* regardless of whether *Iqbal* overruled *Swierkiewicz*. *See Woods*, 855 F.3d at 650 (finding that the trial court improperly engaged in "fact-finding."). The Second Circuit interprets *Iqbal* to require "only plausible support to a minimal inference

of discriminatory motivation." *Vega*, 801 F.3d at 84 (citations omitted).

> In making the plausibility determination, the court must be mindful of the elusive nature of intentional discrimination… [because] clever men may easily conceal their motivations… rarely is there direct, smoking gun evidence of discrimination.… Instead, plaintiffs usually must rely on bits and pieces of information to support an inference of discrimination, *i.e.*, a mosaic of intentional discrimination.

Vega, 801 F.3d at 84-86 (internal quotations and citations omitted). "Courts must remember that the plausibility standard is not akin to a probability requirement." *Id.* at 87 (internal quotations and citations omitted). The Fourth Circuit's view is fairly consistent despite its conflict with the Second Circuit about the continued validity of *Swierkiewicz*: "A well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable and that a recovery is very remote and unlikely." *Woods*, 855 F.3d at 651 (internal quotations and citations omitted).

The Fifth Circuit departs radically from both Circuits. Its decision reveals that it interprets *Iqbal* as empowering trial courts to pick out a few of a "thousand cuts" pled, find "implausibility," and dismiss lawsuits while disregarding the vast majority of factual allegations and without construing the complaint in the light most favorable to the plaintiff.

This Court should grant review to settle whether *Swierkiewicz* was overruled and to clarify whether

Iqbal "plausibility" allows trial courts the type of discretion to find facts and dismiss lawsuits as exercised by the trial court and Fifth Circuit in this case.

CONCLUSION

Petitioner respectfully requests that her Petition for Certiorari be granted.

Respectfully submitted,

David J. Sacks
Counsel of Record
SACKS LAW FIRM
2323 S. Shepherd Drive
Suite 825
Houston, TX 77019
(713) 863-8400
david@sackslawfirm.com

Erwin Chemerinsky
UNIVERSITY OF CALIFORNIA,
BERKELEY SCHOOL OF LAW
215 Law Building
Berkley, CA 94720
(510) 642-6483
echemerinsky@law.berkeley.edu

Counsel for Petitioner

February 14, 2024