No. 20-27

In The

Supreme Court of the United States

JENNIFER PASKERT,
Petitioner,

v.

KEMNA-ASA AUTO PLAZA, INC., etc., et al.

Respondents

On Petition for A Writ of Certiorari
To The United States Court of Appeals
For The Eighth Circuit

REPLY BRIEF FOR PETITIONER

ERIC SCHNAPPER
Counsel of Record
University of Washington
School of Law
Box 353020
Seattle, WA 98195
(206) 660-8845
schnapp@uw.edu

PAUL W. DECK, JR.
WILLIAM G. DECK
Deck & Deck, L.L.P.
505 5th Street
Suite 635
Sioux City, IA 51101
(712) 255-3573

Counsel for Petitioner

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I. PETITIONER DID NOT WAIVE THE QUESTION PRESENTED

Respondents devote the first section of their brief to asserting that petitioner failed to raise the question presented in the courts below. Br Opp. 2. Although that assertion is not explained in that section of the brief, respondents later object that in the court of appeals petitioner merely argued that the harassment in this case was actionable "within Eighth Circuit standards." Br. Opp. 18 (quoting Br. of Appellant at 15-16) (emphasis omitted). Respondents' argument appears to be that by failing to attack "accepted [Eighth Circuit] law" in her lower court briefs, plaintiff "den[ied] both [lower] court the chance to address" whether that circuit's legal standard was incorrect. Br. Opp. 2. But both the panel and the district court were bound by the longstanding Eighth Circuit precedents at issue. Litigants are not required to go through the pointless exercise of asking lower courts to disregard controlling circuit precedent.

II. THIS CASE PRESENTS A CLEAR AND IMPORTANT CIRCUIT CONFLICT

A. The parties largely agree as to the nature of the Eighth Circuit standard for deciding sexual harassment cases. That court of appeals has established "a circuit-wide precedent establishing a minimum for actionable harassment against which to compare new cases . . ." Br. Opp. 5. There is no dispute that the courts below were applying that precedent. The district court explained that "the issue here is whether the alleged conduct meets the 'severe and pervasive' standard applied by the Eighth Circuit Court of Appeals." App 37a. The court of appeals held that the harassment was legal "[i]n light of these precedents." App. 6a.

Respondents fairly characterize the effect of the Eighth Circuit's legal minimum. Br. Opp. 8. This Court holds that a work environment is objectively hostile if "a reasonable person would find [it] hostile or abusive." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21(1993). Respondents explain that the Eighth's Circuit's strict legal precedents serve to prevent a judge (or, presumably, a juror) from applying that standard based on "what by his own lights he believes a reasonable person in the plaintiff's

position would conclude." Br. Opp. 6. *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 82 (1998) holds that sexual harassment claims should be determined with "an appropriate sensitivity to social context." Respondents explain that the Eighth Circuit's strict legal standards serve to prevent a judge (or, presumably, a juror) from utilizing his or her "own perhaps idiosyncratic sense of 'social context.'" *Id.* According to respondents, precise legal standard can make clear in a large number of cases whether the harassment at issue was lawful or unlawful, thus "conserv[ing] judicial resources by avoiding a jury trial in nearly every case." Br. Opp. 5.

Respondents correctly state that the Eighth Circuit standard, although avowedly limiting sexual harassment claims to "only 'extreme' harassment" (Br. Opp. 8), does not restrict such claims to "the most extreme cases." Br. Opp. 9. On the other hand, the types of sexual harassment cases, cited as illustrative by respondents, that have survived the stringent standard established by *Duncan v. Gen. Motors Corp.*, 300 F.3d 928 (8th Cir. 2002), and *LeGrand v. Area Res. For Cmty. & Human Servs.*, 394 F.3d 1098 (8th Cir. 2005), can fairly be described as extreme indeed.[1]

Respondents point out that occasionally sexual harassment opinions in the Eighth Circuit do not cite *Duncan* or *LeGrand*. Br. Opp. 10. But that does not mean that *Duncan* and *LeGrand* are not controlling precedents; respondents themselves insist they are. Judicial opinions do not invariably cite every relevant precedential decision, especially when the standards those decisions establish are well

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[1] See Br. Opp. App. 1-App. 2 (*Nelson v. Anoka Cty. Comty. Action Program*, 2009 WL 2568573 (D. Minn. Aug. 18, 2009) (harasser repeatedly exposed herself to plaintiff); *Alvarez v. Des Moines Bolt Supply, Inc.*, 2009 WL 10698031 (S.D. Iowa Jan. 23, 2009) (harasser exposed plaintiff's breasts, slapped her buttocks, rubbed his genitals against her); *Sheriff v. Midwest Health Partners*, P.C., 2009 WL 2992513 (D. Neb. Sept. 16, 2009) (harasser repeatedly touched plaintiff's breasts); *Edwards v. Sanyo Mfg. Corp.*, 2007 WL 1381650 (E.D. Ark. May 10, 2007) (harasser exposed himself, repeatedly rubbed his genitals against plaintiff); *Henry v. Pemicot Mem'l Health Sys.*, 2006 WL 2850550 at *1 (E.D. Mo. Oct. 3, 2006) (harasser touched breasts and buttocks of plaintiff); *Stanina v. Blandin Paper Co.*, 2006 WL 2069203 (D. Minn. July 26, 2006) (harasser repeatedly grabbed breasts and buttocks of victim); *Van Horn v. Specialized Support Servs., Inc.* 269 F. Supp. 2d, 1064, 1068 (S.D. Iowa) ("physical assault of a sexual nature"; harasser repeatedly grabbed breasts of plaintiff).

known. That does not mean there is some sort of intra-circuit conflict. Respondents do not claim there are any Eighth Circuit decisions rejecting either the holding or the methodology of *Duncan* or *LeGrand*.

Respondents point out that "the same standards generally apply to both race-based and sex-based hostile environment claims." Br. Opp. 3 n. 1. That is correct, and it illustrates the stark consequences of the Eighth Circuit's comparison-precedent standard. At the same time that the Eighth Circuit severely limited sexual harassment claims in *Duncan* and *LeGrand*, it decided several racil harassment cases imposing similarly harsh limitations on racial harassment claims. Those racial harassment decisions remain the controlling precedents in that circuit.

In *Jackson v. Flint Ink No. Am. Corp.*, 370 F.3d 791, 792-93 (8th Cir. 2004), the Eighth Circuit held that a racially hostile environment could not be established by proof of racial invective such as "damn nigger," "damn black," "nigger," "nigger rigging," and "nigger shit," even when combined with KKK graffiti and a drawing of a burning cross. In *Bainbridge v. Loffredo Gardens*, 378 F.3d 756, 759 (8th Cir. 2004), the Eighth Circuit held that two dozen epithets such as "Jap," "nip," and "gook" were insufficient to support a hostile environment claim. In the wake of those extraordinarily restrictive standards, courts in the Eighth Circuit have rejected dozens of racial harassment cases, dismissing as insufficient proof of racial epithets of every kind. Those dismissals include twenty-one cases alleging that harassers used the epithet "nigger." A list of these decisions is set out in the appendix to this brief.

B. (1) It is not the case, as respondents contend, that all other circuits "apply[] some form of the so-called 'precedent-comparison standard'" Br. Opp. 3. To the contrary, many of those circuits quoted by respondents have expressly disapproved treating their prior decisions as establishing a precedential standard by which to decide later cases.

The Eighth and Fifth Circuits apply precedents based on earlier decisions which held that particular circumstances of harassment in those cases were *not* sufficiently serious to be unlawful; those circuits determine the legality of later cases by comparing their facts to those in the earlier precedents. However, as a close reading of the quotations relied on by respondents makes clear (Br. Opp. 3-4 and n. 2), most of them concern the opposite situation: prior decisions in circuits which had held that the

circumstances at issue *were* sufficiently serious to be unlawful. None of those decisions hold that harassment in those earlier decisions established a legal standard to be "appl[ied]" in later cases; to the contrary, in these cited cases the legality of the harassment was determined based on an assessment of the circumstances at issue, not on any standard created by prior caselaw. Those circuits have repeatedly insisted that their prior decisions upholding harassment claims do *not* establish a minimum standard to be applied in deciding whether to reject sexual harassment claims in subsequent cases.

For example, in *Whidbee v. Garzarelli Food Specialists, Inc.*, 223 F.3d 62, 70 (2d Cir. 2000), the Second Circuit noted that

> it may be true, as the District Court observed, that the harassment here was not as severe as that in many other [Second Circuit] cases. We have reminded district courts, however, that "the appalling conduct alleged in prior cases should not be taken to mark the boundary of what is actionable." *Richardson v. New York State Dep't of Correctional Serv.*, 180 F.3d 426, 439 (2d Cir.1999).

The Second Circuit expressly rejected the suggestion that its earlier decisions should be used (as they are in the Eight and Fifth Circuits) to establish some actionable minimum.

> [A] rigid "calculate and compare" methodology ignores the proper role of courts which, at the summary judgment stage, is to construe all facts and draw all inferences in the light most favorable to the nonmovant. . . . Because of the fact-specific and circumstance-driven nature of hostile environment claims, courts must be mindful that " 'the appalling conduct alleged in prior cases should not be taken to mark the boundary of what is actionable.' " . . . . And courts should not, themselves, attempt to establish an absolute baseline for actionable behavior.

Haut v. State University of New York, 352 F.3d 733, 746 (2d Cir. 2003) (quoting *Whidbee*).

The Fourth Circuit has expressly rejected an attempt to invoke prior decisions upholding harassment claims as establishing a minimum standard.

> [T]he [defendant] . . . contends, "All of the [prior Fourth Circuit] cases which have determined conduct to be sexual harassment have involved much more serious harm than is present in this case."
>
> This may be so, but as the Supreme Court recently noted in *Harris v. Forklift Systems,* [510 U.S.at 22]:
>
> > The appalling conduct alleged in *Meritor* [*Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986)] , and the reference in that case to environments, " 'so heavily polluted with discrimination so as to destroy completely the emotional and psychological stability of minority group workers,' " merely present some especially egregious examples of harassment. They do not mark the boundary of what is actionable.
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> . . . . [N]o prior decisions of this court hold that the facts of this case fall outside the boundary of actionable cases.

Spicer v. Com. of Va., Dept. of Corrections, 44 F.3d 218, 225 (4th Cir. 1995).

The Tenth Circuit too has rejected attempts to create limiting precedents from earlier decisions upholding harassment claims.

> Although the incidents of harassment in [an earlier Tenth Circuit case] were greater in number than in the present case and were directed personally at the plaintiff, we are mindful that "appalling conduct alleged in prior cases" does not "mark the boundary of what is actionable."

Jones v. UPS Ground Freight, 683 F.3d 1283, 1304 n. 10 (11th Cir. 2012) (quoting *Whidbee*).

In *Billings v. Town of Grafton,* 515 F.3d 39, 49 (11th Cir. 2008), the Eleventh Circuit similarly explained that the circumstances of earlier decisions upholding harassment claims did not establish a minimum standard to be applied to later cases.

> Each of the[] [earlier Eleventh Circuit decisions relied on defendant] simply held that, based on the evidence presented, a reasonable jury could have found the harassment sufficiently severe or pervasive to constitute a hostile environment as a matter of law. . . . Thus, while they serve as instructive examples of actionable sexual harassment, they do not suggest that harassing conduct of a different kind or lesser degree will necessarily fall short of that standard. . . . As another court has cautioned about the use of its own precedent in this area, "[p]rior cases in which we have concluded that a reasonable juror could find that the work environment was objectively hostile do not establish a baseline that subsequent plaintiffs must reach in order to prevail."

(Quoting *Schiano v. Quality Payroll Sys., Inc.,* 445 F.3d 597, 606 (2d Cir.2006)).

In *Kokinchak v. Postmaster Gen. of the United States*, 677 F. App'x 764, 767 (3d Cir. 2017), quoted by respondents, the Third Circuit mentioned that "the behavior Kokinchak complains about falls short of the sort of conduct courts have said constitutes hostile work environment sexual harassment. *See, e.g.*, *Harris*, 510 U.S. at 19–20; *Meritor*, 477 U.S. at 60–61." But this Court in *Harris* had made crystal clear that the prohibition of Title VII is *not* limited to "the sort of conduct" at issue in the cases before it.

> The appalling conduct alleged in *Meritor,* and the reference in that case to environments " 'so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers,' " . . . merely present some especially egregious examples of harassment. They do not mark the boundary of what is actionable.

510 U.S. at 22 (citations omitted).

(2) The petition pointed out that seven courts of appeals hold that the existence vel non of an objectively hostile work environment is ordinarily a question of fact for the jury or other trier of fact, and

explained why that rule is inconsistent with the creation of precise legal precedents for deciding most cases as a matter of law. Pet. 19-20. Respondents acknowledge that the function of the Eighth and Fifth Circuit precedents is to "conserve judicial resources by avoiding a jury trial in nearly every case" (Br. Opp. 5), and does not dispute our characterization of the First, Second, Third and Ninth Circuits as treating the existence of a hostile environment as a jury issue. All that respondents do contend is that the use of a "high bar" standard in the Fourth, Sixth and Tenth Circuits somehow "contradict[s] Petitioner's claim they allegedly 'presum[e]' harassment is 'for a jury to determine.'" Br Opp. 7 (quoting Pet. 19). But what evidentiary standard a plaintiff must meet (e.g., predominance, clear and convincing evidence) is a separate question from whether a jury, or a judge, should apply that standard. And decisions in the Fourth, Sixth and Tenth Circuits make crystal clear that in those circuits—unlike in the Eighth and Fifth Circuits--this is indeed a jury issue.[2]

(3) The petition emphasized that, although Fifth and Eighth Circuit apply a "high bar," or "high threshold" in determining whether sexual harassment is unlawful, there is no such demanding legal standard in the First, Ninth and District of Columbia Circuits. Pet. 18-19. Respondents do not dispute that characterization of the law in the First, Ninth and District of Columbia Circuits or deny the existence of that circuit conflict. Respondents argue only that the Fifth and Eighth Circuit position is not "unique[]", and that several other circuits side with the Eighth nd Fifth Circuits and also apply a "high bar" or "high threshold." Br. Opp. 6-7. But a circuit conflict is no less real merely because there is a

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[2] *Paroline v. Unisys Corp.*, 879 F.2d 100, 105 (4th Cir. 1989) ("To determine whether the harassment was sufficiently severe or pervasive, the fact finder must examine the evidence both from an objective perspective and from the point of view of the victim. . . . "); *Smith v. Rock-Tenn Services, Inc.*, 813 F.3d 298, 310-11 (6th Cir. 2016) ("Like several of our fellow circuits, we consider whether harassment was so severe and pervasive as to constitute a hostile work environment to be "quintessentially a question of fact." . . . . "); *O'Shea v. Yellow Technology Services, Inc.* 185 F.3d 1093, 1096-1101 (10th Cir. 1999) ("[T]he critical issue is whether, examining all of the evidence and reasonable inferences therefrom in a light most favorable to Plaintiff, a jury reasonably could infer that a hostile work environment existed and that it had a reasonable nexus to the sexual and gender-based harassment Plaintiff suffered. . . . [T]he severity and pervasiveness evaluation is particularly unsuited for summary judgment because it is 'quintessentially a question of fact.' ")

majority and minority view. In the alternative, respondents argue that the Fifth and Eighth Circuit requirement of a "high" bar or threshold is only a "metaphor having little if anything to do with resolving individual cases." Br. Opp. 7. But on the very next page of their brief, respondents describe the Fifth and Eighth Circuits standard in even more stringent terms, as limited to "only 'extreme' harassment," and insist that standard is of dispositive importance.

> [T]h[e] evaluation [of a case] turns on more than the collective circumstances alone. . . . [T]he Eighth and Fifth Circuits . . . recognize that only 'extreme' harassment ranks as actionable. . . . In considering the circumstances, both courts . . . insist that hostile work environment claims meet 'demanding' standards.

Br. Opp. at 8.

III. THIS CASE PRESENTS AN EXCELLENT VEHICLE FOR DECIDING THE QUESTION PRESENTED

This case is an excellent vehicle for resolving the question presented. The decision of the court of appeals was based on the *Duncan* standard and methodology, and did not rest on any alternative ground. Respondents contend that they would be entitled to prevail even if this case were decided under the different standard applied by the other circuits. But that is a question that can be addressed on remand. The issue before this Court is only the correctness of the legal standard that both parties agree was applied—at the urging of respondents--by the Eighth Circuit.[3]

[3] Respondents assert that there were only "sporadic instances of 'inappropriate' comments." Br. Opp. 17. Both courts below correctly noted testimony from two witnesses that the harassment was frequent. Pet. 3-4. Respondents insist that plaintiff "presented no evidence of ' . . . humiliating' conduct by Respondents." Br. Opp. 15. But a reasonable jury could conclude that the harassment at issue, such as constantly hearing women referred to as "bitch[es]" and "cunt[s]," would be humiliating to a reasonable woman. Respondents insist there was "no evidence of 'sever[e]' . . . conduct . . . ." Br. Opp. 15. But a reasonable jury assuredly could conclude that the conduct at issue was severe.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

ERIC SCHNAPPER
Counsel of Record
University of Washington
School of Law
P.O. Box 353020
Seattle, WA 98195
(206) 660-8845
schnapp@uw.edu

PAUL W. DECK, JR.
WILLIAM G. DECK
Deck & Deck, L.L.P.
505 5th Street
Suite 635
Sioux City, IA 51101
(712) 255-3573

Counsel for Petitioner