No. 97-1751

In the Supreme Court of the United States

OCTOBER TERM, 1997

MARIE PFAU, PETITIONER

v.

WILLIAM REED, DIRECTOR,
DEFENSE CONTRACT AUDIT AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether Title VII of the Civil Rights Act of 1964 preempts petitioner's claims under the Federal Tort Claims Act and Texas state law for intentional infliction of emotional distress.

2. Whether the judgment affirming the dismissal of petitioner's claim under Title VII should be vacated and remanded for reconsideration in light of *Faragher* v. *City of Boca Raton*, 118 S. Ct. 2275 (1998), and *Burlington Industries, Inc.* v. *Ellerth*, 118 S. Ct. 2257 (1998).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 125 F.3d 927.

JURISDICTION

The judgment of the court of appeals was entered on October 27, 1997. A suggestion for rehearing en banc was treated by the court as a petition for panel rehearing and was denied on January 14, 1998. The petition for a writ of certiorari was filed on April 14, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a former employee of the Defense Contract Audit Agency (DCAA). Pet. App. 2a. Petitioner worked on an audit team where Pete Gonzales was her first-line supervisor. *Ibid.* Petitioner alleges that, when she first became a member of that team, Gonzales made lewd and suggestive comments to her and requested sexually provocative behavior from her. *Ibid.* Petitioner further alleges that Gonzales requested that she take him on a trip with her, made sexual advances she rejected, asked to go on vacation with her at her expense, and asked her for money on several occasions. *Id.* 3a. Petitioner also alleges that Gonzales called her, appeared at her home, and insisted that they become sexually involved. *Ibid.*

Petitioner alleges that, after she complained to management that Gonzales had sexually harassed her, Gonzales retaliated against her. Pet. App. 3a. Among other things, she alleges that Gonzales gave her inappropriate work assignments, denied her training, and denied her request for sick leave. *Ibid.* Petitioner was ultimately fired from her job. *Id.* at 2a.

2. Petitioner filed suit in the United States District Court for the Western District of Texas against the Director of the DCAA and Gonzales among others. Pet. App. 4a. Petitioner alleged that Gonzales had subjected her to sexual harassment for which the DCAA was liable under Title VII of the Civil Rights Act of 1991, 42 U.S.C. 1981A. *Ibid.* She also alleged against Gonzales a state law tort claim of intentional infliction of emotional distress. *Ibid.* The district court dismissed petitioner's claim of intentional infliction of emotional distress. Supp. App. 5sa-9sa. The court held that Title VII and the Civil Service Reform Act of 1978 (CSRA), Pub. L.

No. 95-454, 92 Stat. 1111 (1978), preempted that claim. *Id.* at 6sa-8sa. Petitioner amended her complaint to add the United States as defendant and to assert a claim of intentional infliction of emotional distress under the Federal Tort Claims Act (FTCA). *Id.* at 5a. Petitioner also reasserted her state law tort claim against Gonzales. *Ibid.* The district court dismissed both tort claims, once again relying on the preemptive force of Title VII and the CSRA. *Ibid.*

The district court then granted summary judgment in favor of the government on petitioner's Title VII claim. Supp. App. 10sa-32sa. The court held that petitioner's evidence failed to raise an inference that DCAA knew or should have known about Gonzales's alleged sexual harassment prior to petitioner's complaint, or that DCAA failed to take appropriate action in response to the complaint. *Id.* at 29sa-32sa. The court also found that Gonzales did not qualify as petitioner's "employer" for purposes of imputing liability to the DCAA under Title VII, because Gonzales's alleged actions did not fall within the scope of his authority and his authority did not include the power to hire, fire, reward, or discipline her. *Id.* at 30sa.

3. The court of appeals affirmed. Pet. App. 1a-27a. The court held that, under circuit precedent, "when the same set of facts supports a Title VII claim and a non-Title VII claim against a federal employer, Title VII preempts the non-Title VII claim." *Id.* 8a. Finding that the same set of facts supported petitioner's Title VII claim and her intentional infliction of emotional distress claims, the court concluded that Title VII preempted petitioner's intentional infliction of emotional distress claims. *Id.* at 7a-11a. The court rejected petitioner's contention that her tort claims were distinct from her Title VII claims, because some of the alleged conduct

occurred away from the office and after business hours. *Id.* at 8a-10a. The court explained that, under *Meritor Savings Bank, FSB* v. *Vinson*, 477 U.S. 57 (1986), those factual allegations support her Title VII claim. *Id.* at 9a.

The court of appeals also held that petitioner's evidence was insufficient to raise an inference that Gonzales was the DCAA's agent within the meaning of Title VII's definition of "employer," such that his alleged harassment of petitioner could be imputed to the DCAA. Pet. App. 11a-18a. The court held that, under its precedent, a supervisor is treated as an employer's agent for purposes of liability when he has been delegated the employer's "traditional rights, such as hiring and firing." *Id.* at 17a, quoting *Garcia* v. *Elf Atochem N.Am.*, 28 F.3d 446 (5th Cir. 1994). Since Gonzales could only "recommend that employees receive awards or be subject to disciplinary action" and "issue assignments to auditors and determine the number of hours allocated to each assignment," he was not such an "agent." *Ibid.* The court noted that some courts had held that a supervisor qualifies as an "agent" when he has "'significant' control" over "hiring, firing or conditions of employment." *Id.* at 18a, quoting *Paroline* v. *Unisys Corp.*, 879 F.2d 100 (4th Cir. 1989). The court concluded that application of that standard would not assist petitioner, however, because the "minimal authority wielded by Gonzales falls short of such significant control." *Id.* at 18a.

Finally, the court of appeals held that petitioner's evidence did not raise an inference that DCAA was negligent with respect to the alleged harassment. Pet. App. 19a-27a. The court noted that (1) there was no evidence that DCAA management knew or should have known of Gonzales's conduct prior to the date of her

complaint, *id.* at 20a-23a; (2) DCAA "had a structured, accessible grievance procedure that [petitioner] could use to provide the DCAA with actual notice of her harassment," *id.* at 24a; (3) "upon receiving [petitioner's] formal complaint, the DCAA's EEO department began a prompt investigation," *id.* at 26a; and (4) petitioner "essentially admitted in deposition that Gonzales engaged in no more sexually harassing conduct after [petitioner] made her formal complaint," *id.* at 26a-27a.

ARGUMENT

1. Petitioner contends (Pet. 6-12) that the court of appeals erred in ruling that Title VII preempts her claims for intentional infliction of emotional distress under the Federal Torts Claims Act (FTCA) and Texas state law. That contention does not warrant review.

a. In *Brown* v. *GSA*, 425 U.S. 820, 835 (1976), this Court held that Title VII "provides the exclusive judicial remedy for claims of discrimination in federal employment." The court of appeals in this case interpreted that holding to mean that "[w]hen the same set of facts supports a Title VII claim and a non-Title VII claim against a federal employer, Title VII preempts the non-Title VII claim." Pet. App. 8a. Finding that the same set of facts supported petitioner's Title VII claim and her intentional infliction of emotional distress claims, the court concluded that Title VII preempted petitioner's intentional infliction of emotional distress claims. *Id.* at 7a-11a.

Petitioner contends (Pet. 7-8) that some of the factual allegations upon which she relies to support her intentional infliction claims do not support her Title VII claim. That fact-bound challenge to the decision below

does not raise any issue of general importance and therefore does not warrant review.

In any event, the court of appeals correctly concluded that all of petitioner's allegations would be relevant in establishing a Title VII claim. Petitioner contends (Pet. 7-8) that some of the factual allegations upon which she relied to support her intentional infliction of emotional distress claims are not relevant to her Title VII claim, because they do not involve "sexual" conduct. Those allegations are that Gonzales requested money from petitioner, sought joint vacations with her, and made phone calls to her house. See *ibid.* Title VII, however, does not require proof that harassing conduct is of a sexual nature. Rather, "any harassment or other unequal treatment of an employee or group of employees that would not occur but for the sex of the employee or employees may, if sufficiently patterned or pervasive, comprise an illegal condition of employment under Title VII." *McKinney* v. *Dole*, 765 F.2d 1129, 1138 (D.C. Cir. 1985); see also *Hicks* v. *Gates Rubber Co.*, 833 F.2d 1406, 1415 (10th Cir. 1987) ("evidence of threats of physical violence and incidents of verbal abuse" would be considered along with evidence of sexual harassment in determining hostile work environment claim); *Hall* v. *Gus Constr. Co.*, 842 F.2d 1010, 1013 (8th Cir. 1988) ("[i]ntimidation and hostility toward women because they are women can obviously result from conduct other than explicit sexual advances").

Applying that standard, Gonzales's alleged money requests, vacation demands, and phone calls are relevant to petitioner's Title VII claim. Those incidents allegedly occurred during the same time period that Gonzales engaged in repeated sexual advances, made lewd and suggestive comments, and demanded sexual relations. Pet. App. 2a-3a. Whether or not the inci-

dents were non-sexual, they could help to establish that petitioner was subjected to a pattern of harassment that would not have occurred but for her gender and that was sufficiently severe and pervasive as to affect the terms and conditions of her employment. The court of appeals, therefore, correctly concluded that those incidents are relevant to petitioner's Title VII claim.

Petitioner also contends (Pet. 8) that some of the conduct upon which she relies for her intentional infliction of emotional distress claims is not relevant to her Title VII claim, because it occurred after work hours and outside of work premises. When a supervisor harasses a subordinate after work hours and outside of work premises, however, it can have a substantial effect on the way that employee experiences her work environment. Such evidence is therefore relevant in establishing a Title VII hostile work environment claim. See *Meritor Savings Bank* v. *Vinson*, 477 U.S. 57, 60 (1986) (plaintiff's allegation that her supervisor invited her to dinner, suggested at dinner that they go to a motel for sexual relations, and made repeated demands for sexual favors both during and after business hours, formed part of the basis for a Title VII sexual harassment claim).

In sum, all of the evidence upon which petitioner relies for her intentional infliction of emotional distress claims is also relevant to her Title VII claim. Petitioner's contention to the contrary is without merit.

b. Petitioner also contends (Pet. 6, 10-12) that the court of appeals' "same facts" test is not the correct standard for judging the preemptive force of Title VII, and that it conflicts with Ninth Circuit decisions holding that Title VII does not preempt FTCA and state law causes of action that involve a "highly personal violation beyond the meaning of discrimination." *Brock* v.

United States, 64 F.3d 1421, 1423 (9th Cir. 1995); see also *Arnold* v. *United States*, 816 F.2d 1306, 1311-1312 (9th Cir. 1987); *Otto* v. *Heckler*, 781 F.2d 754, 756-758 (9th Cir. 1986). For several reasons, that contention does not warrant review in this case.

First, only the Fifth and Ninth Circuits have addressed the extent to which Title VII preempts FTCA and state law tort claims. That issue would benefit from further ventilation in the regional courts of appeals.

Second, the Ninth Circuit's decisions have all involved particularly aggravated forms of conduct; in no case has the sole claim been one of intentional infliction of emotional distress. *Brock*, 64 F.3d at 1421 (rape and assault); *Arnold*, 816 F.2d at 1312 (assault, battery, and false imprisonment); *Otto*, 781 F.2d at 755, 757-758 (stalking and placing in fear of sexual assault resulting in a miscarriage). It is unclear whether the Ninth Circuit would conclude that intentional infliction of emotional distress without more is the kind of "highly personal violation beyond the meaning of discrimination" that is not preempted by Title VII. *Brock*, 64 F.3d at 1423.

Third, all of the Ninth Circuit cases involved claims based on conduct that predated the 1991 amendment to Title VII, which provides that victims of intentional discrimination may seek compensatory relief. The 1991 amendment was intended to afford the victims of sexual harassment compensation for injuries to "their mental, physical, and emotional health, to their self-respect and dignity, and for other consequential harms." 137 Cong. Rec. 30,661 (1991) (discussion of "Section 102 Damages," by Representative Edwards in his "Section by Section Analysis"). As a result of that amendment, Title VII now provides compensation for the same

kinds of injuries that are alleged as a basis for claims of intentional infliction of emotional distress. The Ninth Circuit has previously held that Title VII preempted a state law tort suit for defamation when the plaintiff sought compensation for "precisely the injuries cognizable and remediable under Title VII." *Otto*, 781 F.2d at 757. In light of the 1991 amendment, the Ninth Circuit may reach a similar conclusion with respect to Title VII's effect on the tort of intentional infliction of emotional distress.

Fourth, in deciding the preemption question, neither the Ninth Circuit nor the court below had the benefit of this Court's recent decisions in *Faragher* v. *City of Boca Raton*, 118 S. Ct. 2275 (1998), and *Burlington Industries, Inc.* v. *Ellerth*, 118 S. Ct. 2257 (1998). Those decisions establish the principles that govern the extent to which an employer is liable under Title VII for harassment committed by a supervisor. Because those decisions help to define the reach of Title VII, they may also affect the scope of Title VII's preemptive effect. That issue should be explored by the lower courts in the first instance.

Finally, the employer liability decisions may reduce the practical importance of the preemption question, particularly in conjunction with the 1991 amendment. Since plaintiff employees can more readily establish employer liability for supervisory harassment and can now obtain compensatory relief for a violation, they have less incentive than before to pursue FTCA and state law tort claims. Experience under the new rules for determining employer liability for supervisory harassment is necessary before an assessment can be made concerning the continuing importance of the preemption issue. For those reasons, the question concerning the correct legal standard for determining Title VII's

preemptive effect on FTCA and state tort law does not warrant review in this case.

2. Petitioner also seeks review (Pet. 13-19) of the court of appeals' conclusion that the government could not be held liable under Title VII for Gonzales's alleged harassment of petitioner. The court of appeals applied its own precedent in resolving that issue. Under that precedent, an employer is automatically liable for the conduct of a supervisor who has been delegated power to hire or fire employees. Pet. App. 17a-18a. Since Gonzales did not have such power, the court concluded that his conduct could not be imputed to the government. *Ibid.* The court of appeals went on to note that some circuits have imposed automatic liability for supervisory conduct when the supervisor has a significant role in hiring or firing an employee or in determining an employee's conditions of employment. *Id.* at 18a. It concluded that those decisions would not benefit petitioner, however, because Gonzales's role in recommending awards and discipline and in assigning work and determining the amount of time allocated to each assignment falls short of such significant control. *Ibid.*

After the court of appeals' decision in this case, this Court issued its decisions in *Faragher* and *Burlington*. In those decisions, the Court held that "[a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile [work] environment created by a supervisor with immediate (or successively higher) authority over the employee." *Faragher*, 118 S. Ct. at 2292-2293; *Burlington*, 118 S. Ct. at 2270. Under *Faragher* and *Burlington*, an employer is automatically liable and has no affirmative defense when a supervisor takes "a tangible employment action" against a subordinate. *Faragher*, 118 S. Ct. at 2293; *Burlington*, 118 S. Ct. at 2270. A tangible employment action "constitutes

a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Burlington*, 118 S. Ct. at 2268. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages. *Faragher*, 118 S. Ct. at 2293; *Burlington*, 118 S. Ct. at 2270. The defense has two elements: "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Ibid.*

The court below issued its decision without the benefit of this Court's decisions in *Faragher* and *Burlington*, and it applied a different legal standard of employer liability from the one set forth in those decisions. The court did not consider whether the summary judgment evidence shows a genuine issue of fact as to whether Gonzales was a supervisor under the appropriate legal standard, see Pet. App. 15a-17a & n.5, whether he took any tangible employment action against the petitioner, whether he otherwise created an actionable work environment, and whether the evidence establishes the elements of an affirmative defense. The court of appeals' judgment affirming the dismissal of petitioner's Title VII claim should therefore be vacated and the case should be remanded for reconsideration in light of *Faragher* and *Burlington*.

CONCLUSION

With respect to the question whether Title VII preempts petitioner's claims for intentional infliction of emotional distress, the petition for a writ of certiorari should be denied. With respect to the question whether the government may be held liable for the harassment allegedly committed by petitioner's supervisor, the petition for a writ of certiorari should be granted, the judgment should be vacated, and the case should be remanded for reconsideration in light of *Faragher* and *Burlington*.

Respectfully submitted.

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