No. 13-165

In the Supreme Court of the United States

CAMILLE GROSDIDIER, PETITIONER

v.

WALTER ISAACSON, CHAIRMAN, BROADCASTING BOARD OF GOVERNORS

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
STUART F. DELERY
Assistant Attorney General
MARLEIGH D. DOVER
DANA J. MARTIN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals erred in affirming the district court's dismissal of petitioner's Title VII retaliation claim when, at the time she complained about certain behavior in the workplace, petitioner did not have a reasonable basis for believing that a violation of Title VII had occurred, was in progress, or would occur if the same behavior had continued unabated.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-19) is reported at 709 F.3d 19. The memorandum opinion of the district court (Pet. App. 20-91) and its memorandum opinion denying reconsideration are both reported at 774 F. Supp. 2d 76.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 2013. A petition for rehearing was denied on May 3, 2013 (Pet. App. 93-94). The petition for a writ of certiorari was filed on July 31, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, contains separate provisions regulating employment practices by private- and federal-sector employers. In the private sector, it is an "unlawful employment practice" for an employer to "discriminate" against an individual with respect to compensation, terms, conditions, or privileges of employment "because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a)(1). It is also unlawful under Title VII for a private-sector employer to "discriminate" against an employee or applicant "because he has opposed any practice made an unlawful employment practice by [Title VII], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]." 42 U.S.C. 2000e-3(a). Title VII's federal-sector provision provides that "[a]ll personnel actions" affecting employees or applicants for employment with certain federal government employers "shall be made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. 2000e-16(a). Courts have construed Title VII as extending the private-sector ban on retaliation to federal employers. See, *e.g.*, *Taylor* v. *Solis*, 571 F.3d 1313, 1320 (D.C. Cir. 2009); cf. *Gomez-Perez* v. *Potter*, 553 U.S. 474, 488 n.4 (2008) (reserving question).

2. Petitioner, a white female of French national origin, has worked as an international broadcaster for the French to Africa Service of the Voice of America since 1987. Pet. App. 2, 21. The Voice of America is an entity within the Broadcasting Board of Governors

(Board), and respondent is the Chairman of the Board. *Id.* at 20.

Between 2004 and 2005, petitioner made several complaints to her supervisor, an African-American male from Senegal, about conduct at her workplace that she found offensive. Pet. App. 3, 23-25. Specifically, she complained that her supervisor and a subordinate female producer in the office called each other "Sexy Papa" and "Sexy Mama"; that another female employee called the male managing editor "maître" (the French word for "master"); and that one female co-worker's excessive physical contact with men had "sexualized" the office culture. *Id.* at 3, 23, 24. Petitioner also complained about an email, forwarded to her and others by a co-worker, containing a picture of a well-known musician straddling a canon, which she found sexually suggestive. *Id.* at 3, 24. And petitioner complained about other employees hugging and kissing each other in the workplace and about one male employee wearing "short shorts" to the office. *Id.* at 23-24. Petitioner's supervisor addressed her complaints by instructing employees to maintain professionalism and to avoid excessive physical contact. *Id.* at 25.

In early 2006, petitioner applied for a promotion to a senior international broadcaster position. Pet. App. 3. Petitioner's supervisor convened a panel of employees to interview and evaluate the applicants, including petitioner. *Id.* at 3-4, 30-31. Although petitioner was interviewed, she was not selected. *Id.* at 31. A black African male was chosen for the position. *Id.* at 4, 31.

On July 5, 2006, upon learning of the selection, petitioner filed a formal complaint with the Equal Em-

ployment Opportunity (EEO) office, alleging that the selection panel had discriminated against her based on gender, race, and national origin, as well as her "prior EEO activity." Pet. App. 4, 39. In 2007, she filed a second charge with the EEO office, alleging that she had been subjected to additional discriminatory and retaliatory treatment including, *inter alia*, a reduction in her editing responsibilities. *Id.* at 4, 43-45.[1]

3. In 2008, petitioner filed suit in district court against respondent alleging, *inter alia*, unlawful discrimination and retaliation in violation of Title VII, 42 U.S.C. 2000e-16(a). See Pet. App. 4-5, 39-45. The district court granted summary judgment in favor of respondent on all but one claim. *Id.* at 90-91. The remaining claim later settled. See Pet. 3 n.1.

With respect to the discrimination claim, the district court found no evidence from which a reasonable jury could conclude that respondent's decision to promote another candidate instead of petitioner was based on her race, sex, or national origin. Pet. App.

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[1] Petitioner's 2006 EEO charge of retaliation was based on a prior "EEO complaint" from 2002. 774 F. Supp. 2d 76, 118 & n.1; see Pet. App. 22. Petitioner's 2007 EEO charge of retaliation was based on EEO activity in 2000, 2001, and 2006. *Id.* at 43. Petitioner did not identify the 2004 and 2005 informal complaints as "protected activity" in either EEO charge. 774 F. Supp. 2d at 118. The district court held that the 2002 EEO complaint was "too remote in time for a reasonable jury to infer a causal connect[ion] to her nonselection" in 2006. Pet. App. 75 n.6. The district court also noted that petitioner may not have "administratively exhausted her claim that her nonselection in 2006 was motivated by retaliation for 2004 and 2005 complaints about her workplace." 774 F. Supp. 2d at 118 n.1. The court nevertheless proceeded on the assumption that petitioner's 2006 retaliation claim was properly premised on the 2004 and 2005 informal complaints.

72-73. The court explained that the two other candidates (the one ultimately chosen for the position and another ranked above petitioner) were recommended "based on a comparison of the candidates' qualifications and performance during their interviews." *Id.* at 73. Petitioner, the court continued, has "not shown that she was significantly more qualified" than the other candidates or that respondent's explanations were a "pretext for discrimination." *Ibid.*

As for the retaliation claim, the district court found that petitioner's 2004 and 2005 informal complaints about a "hostile work environment" did not amount to protected activity. Pet. App. 75-77. The court explained that the incidents about which petitioner complained "were not directed at her, nor were most of them objectively offensive"; they were not particularly "frequent" or "severe"; and they had no "material impact on [petitioner's] job performance." *Id.* at 77. Accordingly, the court concluded that, "[a]lthough it appears that [petitioner] had a good faith basis for opposing what she perceived to be offensive conduct in the workplace, no reasonable employee could believe that the conduct about which she complained amounted to a hostile work environment under Title VII." *Id.* at 76.[2]

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[2] In a motion for reconsideration, petitioner filed an affidavit that "add[ed] very little" to what petitioner "presented in her opposition brief." 774 F. Supp. 2d at 118. The "new affidavit" added only "conclusory allegations" and a few "discrete incidents." *Id.* at 118-119. The district court "decline[d] to reconsider its ruling" on the basis of "these newly minted allegations" that petitioner "could have and should have presented * * * as part of her original opposition to [respondent's] motion for summary judgment on her retaliation claim." *Id.* at 119, 120. In the alternative, the court held that the additional evidence, which did not make clear wheth-

4. The court of appeals affirmed. Pet. App. 1-19. As relevant here, the court explained that "[a]n employee's opposition to an employment practice is protected under Title VII when the employee 'reasonably and in good faith *believed* [the practice] was unlawful under the statute.'" *Id.* at 7 (quoting *McGrath* v. *Clinton*, 666 F.3d 1377, 1380 (D.C. Cir. 2012)) (brackets in original). And the court held that petitioner's "informal" complaints were not "protected activity" because "no reasonable employee could believe that the conduct about which she complained amounted to a hostile work environment under Title VII." *Id.* at 7-8 (quoting *id.* at 76).[3] The court noted petitioner's "suggestion that these kinds of complaints should be protected so that an employer will take steps to ameliorate the conduct before it escalates and results in a hostile work environment," but it adhered to circuit precedent. *Id.* at 8-9.

ARGUMENT

Petitioner contends (Pet. 6-18) that her informal complaints about workplace conduct constituted protected activity actionable as retaliation under Title VII because she reasonably believed that such conduct would have led to a hostile work environment. Even if the court of appeals erred in articulating the legal test in this context, petitioner's opposition activi-

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er petitioner ever "opposed this conduct" by complaining "about these newly alleged incidents," could not support the claim that petitioner engaged in protected activity. *Id.* at 121.

[3] The court of appeals held that the district court had properly declined to consider new allegations on the motion for reconsideration and noted that, even considering the additional evidence, it "was not sufficient to show the requisite reasonable belief." Pet. App. 8.

ty was not protected. Any disagreement among the courts of appeals regarding the appropriate legal standard is not express and is not well developed; moreover, petitioner would not prevail in any circuit. Further review is not warranted.

1. Title VII prohibits discrimination against, *inter alia*, an employee who "oppose[s] any practice made an unlawful employment practice" by Title VII. 42 U.S.C. 2000e-3(a) (private-sector ban); see 42 U.S.C. 2000e-16(a) (federal-sector provision); *Taylor* v. *Solis*, 571 F.3d 1313, 1320 (D.C. Cir. 2009) (holding that private-sector ban on retaliation applies to federal employers); cf. *Gomez-Perez* v. *Potter*, 553 U.S. 474, 488 n.4 (2008) (reserving question).

The courts of appeals have generally applied Section 2000e-3(a) "to protect employee 'oppos[ition]' not just to practices that are actually 'made . . . unlawful' by Title VII, but also to practices that the employee could reasonably believe were unlawful." *Clark County Sch. Dist.* v. *Breeden*, 532 U.S. 268, 270 (2001) (*Clark County*) (per curiam) (citations omitted; brackets in original); see *Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167, 187 & n.1 (2005) (Thomas, J., dissenting) (citing cases). This Court has not yet "rule[d] on the propriety of [that] interpretation." *Clark County*, 532 U.S. at 270. But the courts of appeals have consistently held that, for opposition activity to be protected, the employee must at least "demonstrate a good faith, reasonable belief that the challenged practice violates Title VII." *George* v. *Leavitt*, 407 F.3d 405, 417 (D.C. Cir. 2005) (citation omitted); see also, *e.g.*, *Fantini* v. *Salem State Coll.*, 557 F.3d 22, 32 (1st Cir. 2009); *Little* v. *United Techs., Carrier Transicold Div.*, 103 F.3d 956,

960 (11th Cir. 1997); *Reed* v. *A.W. Lawrence & Co.*, 95 F.3d 1170, 1178 (2d Cir. 1996); *Griffiths* v. *CIGNA Corp.*, 988 F.2d 457, 468 (3d Cir.), cert. denied, 510 U.S. 865 (1993). The court of appeals here applied that well-accepted standard to the facts of this case. See Pet. App. 7-9.

2. Petitioner does not dispute that general approach. Nor does she suggest that the court of appeals misapplied that standard to the facts of this case. For the complained-of conduct to have violated Title VII, it must have been "severe or pervasive enough to" have "create[d] an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive." *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998). The court of appeals held that petitioner did not have a "reasonable" belief that the conduct complained of (*e.g.*, excessive hugging and kissing by other co-workers) created such a hostile work environment. Pet. App. 8-9. And petitioner does not suggest otherwise.

Petitioner instead contends (Pet. 6-11) that the court of appeals should have adopted a different standard in this context, *i.e.*, when an employee is opposing conduct that may one day culminate in a hostile work environment. Petitioner argues that, in those circumstances, this Court's decisions in *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742 (1998) and *Faragher* v. *City of Boca Raton*, 524 U.S. 775 (1988), counsel in favor of a more employee-protective standard. Because those decisions "encourage employees to report harassing conduct before it becomes severe or pervasive," *Ellerth*, 524 U.S. at 764, petitioner argues that employees should similarly be pro-

tected from retaliation when they report harassing conduct "*before* the environment" becomes "severe or pervasive." Pet. 8.

But that argument offers petitioner no help here. Even if petitioner were correct that *Ellerth* and *Faragher* inform the proper standard for retaliation claims in the context of an alleged hostile work environment, that does not mean that petitioner's opposition activity in this case is protected. The statutory text speaks of practices "made * * * unlawful" under Title VII. 42 U.S.C. 2000e-3(a). The courts of appeals have already relaxed that language by looking to whether the employee had a "reasonable belief" that the employment practice complained of was unlawful, as opposed to whether it in fact was unlawful. An employee must, at the very least, have a reasonable, good faith belief that a Title VII violation had occurred, was in progress, or would occur if the same conduct had continued unabated. Whatever the precise test, petitioner cannot satisfy even that more relaxed showing.

The conduct of which petitioner complained in 2004 and 2005 included other co-workers hugging and kissing each other (Pet. App. 23, 77); a supervisor and a co-worker calling each other "Sexy Mama" and "Sexy Papa" (*id.* at 23, 76-77); a female employee using a French word for "master" to refer to one of the male managing editors (*id.* at 23, 77); and an email image that petitioner found offensive but that was not overtly sexual in nature (*id.* at 24, 76).[4] Under this Court's

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[4] Petitioner suggests (without citation) that the complained-of conduct also included "regular service-wide exchange of misogynistic stories, emails, photographs and jokes." Pet. 4. Any such evidence is outside the summary judgment record. As noted (see notes 2 & 3, *supra*), petitioner submitted a new affidavit along with

precedents, that conduct was not objectively offensive or abusive. *Id.* at 77-78. It was not directed at petitioner and there was no evidence that any of the employees involved found the conduct unwelcome or offensive. *Ibid.* The incidents were not "frequent." *Id.* at 77. And they did not have a "material impact" on petitioner's "job performance." *Ibid.*

Viewing the evidence in the light most favorable to petitioner, the behavior about which she complained may have been personally offensive and even, as the court of appeals suggested, "inappropriate in a professional office environment." Pet. App. 8. But even if that conduct were to have continued unabated, it was many steps removed from the sort of conduct that this Court has found sufficient to constitute a hostile work environment. See, *e.g.*, *Faragher*, 524 U.S. at 782 (one supervisor "repeatedly touched the bodies of female employees without invitation," made "crudely demeaning references to women generally," and asked one female job applicant whether she would have sex with male counterparts; another supervisor "made frequent, vulgar references to women and sexual matters, commented on the bodies of female lifeguards and beachgoers, and at least twice told female lifeguards that he would like to engage in sex with them"); *Oncale*, 523 U.S. at 77 (plaintiff was "forcibly subjected to sex-related, humiliating actions" on several occasions, physical assault, and the threat of

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a motion for reconsideration, but the district court declined to consider the new allegations and the court of appeals agreed. See Pet. App. 8; 774 F. Supp. 2d at 119; see also 774 F. Supp. 2d at 121 (noting, in the alternative, that the evidence would be insufficient even if it were to consider the additional allegations); Pet. App. 8 (same).

rape); *Harris* v. *Forklift Sys., Inc.*, 510 U.S. 17, 19 (1993) (company president insulted plaintiff "because of her gender and often made her the target of unwanted sexual innuendos," suggested they "go to the Holiday Inn to negotiate [plaintiff's] raise," asked plaintiff and other female employees to get coins from his front pants pocket, and threw objects on the ground and asked female employees to pick them up); cf. *Clark County*, 532 U.S. at 271 ("single incident" in which co-workers "chuckl[ed]" at job applicant's sexual statement was "at worst an 'isolated inciden[t]' that cannot remotely be considered 'extremely serious'") (citations omitted; brackets in original). Accordingly, to the extent the court of appeals erred in articulating the legal standard, it had no impact on the outcome of this case.

3. Petitioner contends (Pet. 11-18) that "there is a circuit split over whether the employee must reasonably believe a violation of Title VII has occurred, or whether a belief that opposition is required to prevent a violation is sufficient." Pet. 11 (capitalization omitted). That is incorrect. As explained above (see pp. 7-8, *supra)*, the courts of appeals generally require an employee to demonstrate a reasonable, good faith belief that a violation of Title VII has in fact occurred. The only arguable disagreement relates to the narrower question whether a different standard should apply in the context of opposing an emerging hostile work environment. There is no express disagreement among the courts of appeals on that issue and the case law that does exist is largely underdeveloped. Review by this Court would be premature.

Most of the cases petitioner cites (Pet. 12) do not consider whether a different standard should apply

when retaliation is alleged in the context of a hostile work environment claim. That is likely because the issue was not raised, see, *e.g.*, *Clover* v. *Total Sys. Servs., Inc.*, 176 F.3d 1346, 1351 (11th Cir. 1999) (noting that the parties "agree[d]" to the traditional "good faith, reasonable belief" standard); or because the court ultimately concluded that the plaintiff *did* have the requisite good faith, reasonable belief that an unlawful employment practice had occurred, see, *e.g.*, *Reed*, 95 F.3d at 1179-1180; *Aman* v. *Cort Furniture Rental Corp.*, 85 F.3d 1074, 1085 (3d Cir. 1996). Whatever the reason, none of those cases actually decided the question presented here.

Petitioner cites (Pet. 14-15) two cases that (at least implicitly) address what constitutes protected activity in a retaliation claim premised on opposing harassing conduct. In *Jordan* v. *Alternative Resources Corp.*, 458 F.3d 332, 341-343 (4th Cir. 2006), cert. denied, 549 U.S. 1362 (2007), the plaintiff argued that a retaliation claim should not require a "reasonable belief" that a hostile work environment already exists because such a rule would be inconsistent with a policy favoring early reporting. A divided court rejected that argument. See *ibid.*; see also *id.* at 351-357 (King, J., dissenting). The majority held that "an employee seeking protection from retaliation must have an objectively reasonable belief in light of all the circumstances that a Title VII violation has happened or is in progress." *Id.* at 340-341 (citing *EEOC* v. *Navy Fed. Credit Union*, 424 F.3d 397 (4th Cir. 2005), cert. denied, 547 U.S. 1041 (2006)).[5] But the court explained

[5] *Navy Federal Credit Union* did not involve complaints of harassing conduct. The Fourth Circuit there articulated the appropriate inquiry as whether "an employee reasonably believes" the

that it would not "simply *assume*" that "the opposed conduct will continue or will be repeated unabated; rather, the employee must have an objectively reasonable belief that a violation is actually occurring based on circumstances that the employee observes and reasonably believes." *Id.* at 341. Accordingly, in the Fourth Circuit, the employee must reasonably believe that a Title VII violation is, at least, "in progress" or "actually occurring" at the time of any opposition activity.

In *Magyar* v. *Saint Joseph Regional Medical Center*, 544 F.3d 766 (2008), the Seventh Circuit considered an employee's complaint that, on two occasions, a male co-worker "old enough to be her father plop[ped] into her lap and put his lips to her ear to whisper 'you're beautiful.'" *Id.* at 772. The court concluded that her "grievance was objectively reasonable" because that "type of occurrence," *i.e.*, an occurrence involving "actual touching" and "unwanted physical contact," "could constitute sexual harassment" if it were to "happen[] often enough." *Id.* at 771-772. The court contrasted that behavior with "the occasional vulgar banter, tinged with sexual innuendo, of coarse or boorish workers" which, it noted, would lie on "the other side" of the "severity" line. *Id.* at 772 (citation omitted). Although the court did not expressly consider the appropriate standard, *Magyar* could be read to suggest that opposition activity is

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employment action "to be unlawful." 424 F.3d at 406-407. The court did not purport to modify that standard; it simply held that the employee reasonably believed the employer's conduct (which was part of a "larger plan" to terminate another employee) to be unlawful. *Id.* at 407; see *ibid.* (noting that the district court had taken "too narrow a view" of the relevant facts).

protected when the occurrence complained of is of the "type" that would constitute sexual harassment "if it happened often enough."[6]

The decision below does not squarely conflict with *Jordan* or *Magyar*. Petitioner did not cite either case in her appellate briefs and, in seeking rehearing en banc, she did not suggest any circuit conflict. Neither case, moreover, is mentioned in the court of appeals' decision.

Nor is it at all clear that the result in *Magyar* would have been different had it arisen in the Fourth Circuit, or that *Jordan* would have come out differently had it arisen in the Seventh Circuit. *Magyar* involved multiple instances of "unwanted physical contact," 544 F.3d at 771, while *Jordan* was understood by the Fourth Circuit (rightly or wrongly) to involve "an isolated racial slur," 458 F.3d at 342. That the Fourth Circuit would have precluded a claim involving multiple instances of "unwanted physical contact" or that the Seventh Circuit would have permitted a claim involving "an isolated racial slur" is by no means apparent.

In any event, petitioner could not prevail in the Fourth or Seventh Circuits. It was not objectively reasonable for petitioner to believe that a Title VII violation was "actually occurring" or "in progress" at

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[6] Petitioner also cites (Pet. 15-16) *Hamner* v. *St. Vincent Hospital & Health Care Center, Inc.*, 224 F.3d 701 (7th Cir. 2000). But the Seventh Circuit there explained that, although the practice need not actually violate Title VII to be "statutorily protected expression" under Title VII's retaliation provision, the employee must have "a sincere and reasonable belief that he is opposing an unlawful practice." *Id.* at 706-707. The court did not suggest a lesser standard for opposition claims based on an emerging hostile work environment.

the time of her informal complaints. *Jordan*, 458 F.3d at 341. And the sort of conduct complained of here is not of the "type" that would constitute sexual harassment if it continued unabated or "happened often enough." *Magyar*, 544 F.3d at 772. Indeed, it involved the "occasional vulgar banter, tinged with sexual innuendo, of coarse or boorish workers" that the Seventh Circuit identified as lying on "the other side" of the "severity" line. *Ibid.* (citation omitted). Because the outcome here would be the same in the Fourth and Seventh Circuits, and because there is no express or developed conflict, further review is not warranted.[7]

[7] Further review is also unwarranted in light of this Court's recent decision in *University of Texas Southwestern Medical Center* v. *Nassar*, 133 S. Ct. 2517 (2013). In *Nassar*, a private-sector retaliation case, the Court held that "Title VII retaliation claims must be proved according to traditional principles of but-for causation," which "require[] proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer." *Id.* at 2533. Here, the district court has already determined (and the court of appeals has affirmed) that respondent's reason for hiring a candidate other than petitioner was legitimate, nondiscriminatory, and not pretextual. See Pet. App. 9-19, 59-74. Petitioner will likely be unable to make the necessary causal showing on the facts of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
STUART F. DELERY
Assistant Attorney General
MARLEIGH D. DOVER
DANA J. MARTIN
Attorneys

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