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No. 06-341

IN THE

Supreme Court of the United States

BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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Amicus curiae respectfully submits this brief in support of Petitioner pursuant to Supreme Court Rule 37.3.[1] *Amicus* urges the Court to reverse in pertinent part the judgment of the United States Court of Appeals for the Tenth Circuit.

STATEMENT OF INTEREST

Amicus curiae, the Chamber of Commerce of the United States of America (the "Chamber"), is a nonprofit corporation organized and existing under the laws of the District of Columbia. The Chamber is the world's largest federation of business, trade and professional organizations in the United States. The Chamber represents over three million businesses and organizations. The Chamber has members of every size, in every sector and in every region of the United States.

A principal function of the Chamber is to represent the interests of its members by filing *amicus* briefs in cases involving issues of vital concern to the nation's business community. The Chamber has regularly participated as *amicus curiae* in cases before this Court addressing employment law issues, including, most recently, in *Ledbetter v. Goodyear Tire & Rubber Co.*, No. 05-1074, 126 S. Ct. 2965 (June 26, 2006) (cert. granted); *Burlington Northern & Santa Fe Railway Co. v. White*, 126 S. Ct. 2405 (2006), *Domino's Pizza, LLC v. McDonald*, 546 U.S. 470 (2006), as well as in cases directly relevant to the issues presented here, *see, e.g.*, *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Kolstad v. American Dental Association*, 527 U.S. 526 (1999).

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus* has made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief *amicus curiae*, and their consent letters are on file with the Clerk's Office.

The Chamber's members have a substantial interest in the issues that this case presents regarding the proper standards for imposing vicarious liability under Title VII of the Civil Rights Act of 1964. This case presents this Court with the opportunity to decide whether and when an employer is subject to vicarious liability for unapproved, biased acts of a renegade employee. The plaintiff in this case seeks to establish a strict liability regime that would penalize employers for any acts by employees in the workplace that arguably have a factual connection to an adverse employment action. But employers are not social insurers and should not be held liable for every frolic and detour of their employees. Rather, as the Chamber explains below, the Court should apply principles of causation law and agency law so that employers are held liable only for discriminatory exercises of delegated authority that factually cause an adverse employment action and that could have been prevented by reasonable anti-discrimination policies and procedures.

SUMMARY OF ARGUMENT

Section 703(a) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(a)(1), provides that "an employer" may not "discharge any individual . . . because of such individual's race, color, religion, sex, or national origin." Title VII further provides that an "employer" is "a person engaged in an industry affecting commerce . . . and any agent of such a person." *Id.* § 2000e(b). The question in this case is whether "any agent" of petitioner "discharge[d]" the plaintiff "because of such individual's race . . . ." The court below oversimplified the issues raised by this question and did not analyze them correctly.

I. This Court's jurisprudence establishes that, to hold an employer vicariously liable for an allegedly biased act of one of its employees, the plaintiff must show both (1) that the allegedly biased act caused the adverse employment action

and (2) that the employer is legally responsible for the act under agency law principles applicable in Title VII cases.

A. Consistent with common-law causation principles, to establish causation in a Title VII case, a plaintiff must show that the unlawful bias of the employee was both the but-for and proximate cause of the ultimate adverse employment decision. But-for cause is factual causation; proximate cause is legal causation. This Court has recognized the applicability of both of these causation concepts in a variety of statutory contexts. The Court has expressly recognized but-for causation in Title VII cases; and, while it has not as explicitly discussed proximate cause concepts in a Title VII case, it has implicitly recognized the concept and courts of appeals have explicitly required proximate causation in the Title VII context. In this regard, the courts of appeals have held that effective anti-discrimination policies and procedures, such as investigations, may negate proximate cause. The Court should so hold as well.

B. It is also well-established that causation alone is insufficient to impose vicarious liability on an employer. Employers are not liable for all frolics and detours of their employees. Rather, a legal rule allowing imposition of agency-based liability in a particular context is required. Thus, even where an adverse action is caused by race, the employer is only responsible if that action and the motivation that is said to have caused it may properly be imputed to the employer.

To properly impute vicarious liability, a plaintiff must show that the agency law principles contemplated by Title VII allow holding the employer liable for bias of an employee. At common law, an employer could be held vicariously liable for torts of an employee where the employee was "aided in accomplishing the tort by the existence of the agency relation." RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1958). But this Court has made clear that this "aided by the existence of the agency relation"

standard cannot be applied literally in the Title VII context, because it would subject employers to overly broad liability and would undermine employer incentives to promote compliance with Title VII. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 760 (1998), *Faragher v. City of Boca Raton*, 524 U.S. 775, 797 (1998); *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 544 (1999).

Rather, the Court's cases suggest that imposition of vicarious liability on an employer in the Title VII context is appropriate only where the plaintiff proves that the allegedly biased actions involved the exercise of official delegated authority and thus properly can be attributed to the employer as official or company acts. *See Burlington*, 524 U.S. at 762; *Faragher*, 524 U.S. at 805; *Kolstad*, 527 U.S. at 545. An official act is certainly committed by a biased employee when he effectively makes the final decision that constitutes the adverse action for which the plaintiff sues his employer. In such circumstances, the biased employee is acting on delegated decision-making authority, and the biased decision is effectively ratified and adopted by the final decision-maker and the employer as their own. Because the decision-maker possesses the official power of the enterprise, this adoption of the biased decision becomes the act of the employer.

In contrast, where employment actions do not involve mere rubberstamping but rather reflect independent decisions of agents with delegated authority to take the acts in question, vicarious liability may be properly imposed for unlawfully motivated actions that cause those independent decisions only if, in addition to but-for and proximate causation rules being satisfied, the unlawfully motivated actions are themselves official exercises of delegated authority. Acts *not* involving the exercise of delegated authority are not acts of the employer, they do not carry with them an "imprimatur of the enterprise," and should not subject employers to vicarious liability.

For example, where an employer has not delegated the duty of reporting about plaintiff to fellow employees or independent contractors, but rather those individuals take upon themselves the initiative to bring some information to management's attention, there is no exercise of "official" act of delegated authority. Similarly, there is no exercise of official delegated authority—even by a direct supervisor of the plaintiff—where that supervisor's bias is manifested in acts not part of his delegated duties. Just as in the sexual harassment context, proximity and regular contact are not enough to satisfy the "aided in the agency relation" standard. *Burlington*, 524 U.S. at 760. Only the exercise of delegated authority suffices, as only such acts carry the "imprimatur" of the enterprise.

II. Accordingly, the Tenth Circuit's decision in this case should be reversed. That court, at most, performed only the factual causation part of the liability inquiry. It did not critically assess the proximate cause issue; and it largely assumed vicarious liability rather than analyze applicable agency law principles. The court's focus was on whether the bias of the intermediate supervisor had a causal connection to the firing of the discharged employee. By skipping over the proximate cause and agency law inquiries, the Tenth Circuit endorsed a legal analysis that effectively allows automatic imposition of vicarious liability on the employer once factual causation is established. Such a regime unduly narrows the "because of" race standard, and impermissibly expands the meaning of "agent" in 42 U.S.C. § 2000e(b). Contrary to the court below, this Court has already held that the term "agent" in Title VII has a significantly more narrow meaning than that term has at common law.

ARGUMENT

Section 703(a) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(a)(1), provides that "an employer" may not "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." Title VII further provides that an "employer" is "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person." *Id.* § 2000e(b). There is no issue here concerning whether petitioner is an "employer"; it plainly is. Rather, the question here is whether "any agent" of petitioner "discharge[d]" the plaintiff "because of such individual's race . . . ." The court below oversimplified the issues raised by that question and then did not analyze them correctly. Accordingly, the judgment of the court below should be reversed in pertinent part.

I. FOR AN EMPLOYER TO BE HELD LIABLE UNDER TITLE VII, A PLAINTIFF MUST ESTABLISH BOTH THAT UNLAWFUL MOTIVATION CAUSED AN ADVERSE EMPLOYMENT ACTION AND THAT THE EMPLOYER IS LEGALLY RESPONSIBLE FOR THAT DISCRIMINATORY MOTIVATION UNDER APPLICABLE AGENCY LAW PRINCIPLES

As explained in detail below, whether "any agent" of petitioner "discharge[d]" an employee "because of such individual's race" raises two distinct sub-issues—a causation issue and an agency issue. As to causation, the sub-question is whether an unlawful motivation was both a but-for and proximate cause of the adverse employment action at issue. As to agency, the sub-question is whether applicable agency-law principles make petitioner legally accountable for that allegedly unlawful motivation. As the statutory language makes plain, both causation and agency are necessary conditions for imposition of vicarious liability on an employer.

A. The Plaintiff Must Show That Unlawful Motivation Was Both A But-For And Proximate Cause Of The Adverse Employment Action

With regard to the causation question, this Court has indicated on other occasions that Title VII is informed by principles of common law causation. *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228, 263 (1989) (O'Connor, J., concurring in the judgment); *see also Malley v. Briggs*, 475 U.S. 335, 345 n.7 (1986) (common-law causation principles inform imposition of liability under section 1983). Those principles limit liability to acts that are both a but-for and proximate cause of the injury suffered.

At common-law, it has long been recognized that causation has both factual and legal components. "[C]ausation is binary, comprising causation in fact and proximate, or legal, causation; it must be shown both that the plaintiff's harm would not have occurred but for the defendants' breach of a legal duty and that the breach proximately caused the harm, that is, that the defendant should bear legal responsibility for the injury." 57A Am. Jur. 2d NEGLIGENCE § 435 (2006). *See also* RESTATEMENT (SECOND) OF TORTS §§ 430-431 (1965) (same). Thus, "determinations of proximate or legal cause involve not only an inquiry into whether there was an actual 'cause-in-fact' relation" between the act and the injury, but "also considerations of policy." 57A Am. Jur. 2d NEGLIGENCE § 466 (citing proximate-causation cases) (2006). *See also Palsgraf v. Long Island R. Co.*, 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting) ("What is a cause in a legal sense, still more what is a proximate cause, depend in each case upon many considerations. . . . What we do mean by the word 'proximate' is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point."). Indeed, it was these "considerations of policy" that led the common law to recognize the concept of a "superseding" cause—to wit, "an act of a third person or other force which

by its intervention prevents the actor from being liable for harm to another which his or her antecedent negligence is a substantial factor in bringing about." 57A Am. Jur. 2d NEGLIGENCE § 561 (2006).

Not surprisingly, in construing all sorts of federal statutes, this Court has long resorted to and embraced both but-for and proximate causation principles. The Court has required "but-for" causation in order to limit liability to only injuries that an actor has factually produced. *See, e.g.*, *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 266 (1992) (observing that that but-for causation is necessary so that only "factually injured plaintiffs . . . recover"). And the Court has explained that "we use 'proximate cause' to label generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts. At bottom, the notion of proximate cause reflects 'ideas of what justice demands, or of what is administratively possible and convenient.'" *Id.* at 268 (citing WILLIAM L. KEETON, *ET AL.*, PROSSER & KEETON ON THE LAW OF TORTS § 41, at 264 (5th ed. 1984)) (using the proximate cause concept to limit recovery in RICO actions).

On this notion, the Court has held that concepts of but-for and "proximate causation" limit liability under a variety of statutory schemes, including RICO, the Clayton Act, and the FTCA. *See, e.g.*, *Anza v. Ideal Steel Supply Corp.*, 126 S. Ct. 1991, 1997 (2006) (plaintiff cannot maintain its claim on § 1962(c) of RICO in the absence of proximate cause); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 703 (2004) (liability under the FTCA requires "proximate causation," which is the "notion of cause . . . necessary to connect the domestic breach of duty (at headquarters) with the action in the foreign country . . . producing the foreign harm or injury. [Thus,] [i]t is necessary . . . to conclude that the act or omission at home headquarters was sufficiently close to the ultimate injury, and sufficiently important in producing it, to make it reasonable to follow liability back to the headquarters behavior"); *Associated Gen. Contractors of*

Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 536 (1983) (a plaintiff's right to sue under § 4 of the Clayton Act requires a showing that the defendant's violation not only was a but-for cause of his injury, but was the proximate cause as well). *See also Blue Shield v. McCready*, 457 U.S. 465, 477 n.13 (1982) (quoting Judge Andrews' dissent in *Palsgraf* defining proximate causation).

The Court's practice with regard to causation evidences itself in Title VII and other employment discrimination cases as well. The Court has repeatedly stated that, in such cases, liability "'depends on whether the protected trait . . . actually motivated the employer's decision.' That is, the plaintiff's age must have 'actually played a role in the [employer's decisionmaking] process and had a determinative influence on the outcome." *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 141 (2000) (quoting *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) (brackets in original)). *See also Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 595 (2004); *Price Waterhouse*, 490 U.S. at 241-42 (plurality opinion); *Reeves*, 530 U.S. at 151-52.

Although the Court has not always analyzed the but-for and proximate causation components separately, the federal courts of appeals have regularly done so. *See, e.g., Armstrong v. Turner Indus., Inc.*, 141 F.3d 554, 562 (5th Cir. 1998) (to recover under the ADA, "[t]here must be some cognizable injury in fact of which the violation is a legal and proximate cause for damages to arise from a single violation"); *Shick v. Ill. Dep't of Human Servs.*, 307 F.3d 605, 615 (7th Cir. 2002) (requiring showing of both but-for and proximate causation); *Hamilton v. Rodgers,* 791 F.2d 439, 444 (5th Cir. 1986) (plaintiff's burden in Title VII case is to prove that harassment proximately caused injury), *abrogated on other grounds by Harvey v. Blake,* 913 F.2d 226 (5th Cir. 1990).

Consistent with this approach, the federal courts of appeals have also long recognized that reasonable anti-

discrimination policies and procedures—such as reasonable investigations by a decision-maker—may negate proximate causation. *See, e.g.*, *Long v. Eastfield Coll.*, 88 F.3d 300, 307 (5th Cir. 1996) ("If [the President of Eastfield College] based his decisions on his own independent investigation, the causal link between [the supervisors'] allegedly retaliatory intent and Long and Reavis's terminations would be broken."); *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990) ("Lehnst did not fire Shager; the Career Path Committee did. If it did so for reasons untainted by any prejudice of Lehnst's against older workers, the causal link between that prejudice and Shager's discharge is broken."); *Willis v. Marion County Auditor's Office*, 118 F.3d 542, 547 (7th Cir. 1997) ("[I]t is clear that, when the causal relationship between the subordinate's illicit motive and the employer's ultimate decision is broken [by an investigation], and the ultimate decision is clearly made on an independent and a legally permissive basis, the bias of the subordinate is not relevant."); *Wilson v. Stroh Cos.*, 952 F.2d 942, 946 (6th Cir. 1992) (where a decision-maker conducted an independent investigation, the "causal nexus" between a biased supervisor's action and the discharge "is absent").

This Court should embrace this particular practice of the lower courts. Recognition that reasonable anti-discrimination policies and practices such as investigations break the chain necessary for legal causation promotes Title VII's "prophylactic" goal, *Kolstad*, 527 U.S. at 545, of providing incentives to employers to create mechanisms to "avoid harm" from discrimination. *Faragher*, 524 U.S. at 805-06; *see also Kolstad*, 527 U.S. at 544 (declining to adopt a rule that would "would reduce the incentive for employers to implement antidiscrimination programs"). Encouraging reasonable anti-discrimination practices and procedures, such as investigations by an independent decision-maker, promotes the salutary objective of ensuring that a discriminatory bias by an employee is not embraced by the company. Indeed, this Court has emphasized that it is

imperative to "recognize the employer's affirmative obligation to prevent violations and give credit . . . to employers who make reasonable efforts to discharge their duty." *Faragher*, 524 U.S. at 806.

B. The Plaintiff Must Show That, Under Applicable Agency Law Principles, The Employer Is Legally Responsible For The Discriminatory Motivation That Caused An Adverse Employment Action

In any event, it is also well-established that causation alone is insufficient to impose liability on an employer for a discriminatory motivation that results in an adverse employment action. The discriminatory motivation may have been held by a person or entity for whom the employer is not legally responsible. Thus, for liability to be imposed, a legal rule allowing imposition of agency-based liability is also required; and, for that reason, even where causation exists, liability does not always lie. The question is whether, in the particular context, applicable agency law principles allow an unlawfully motivated act to be attributed to the employer.

1. This Court's cases demonstrate that, even where a biased motivation caused an adverse employment action, liability for the employer does not always follow. For example, in the context of suits against municipalities under Sections 1981 and 1983 predicated upon allegedly biased actions of the municipality's employees, the Court has refused to impose *respondeat superior* liability for municipalities, with the narrow exception for actions taken pursuant to the official municipal policy. *See Monnell v. Dep't of Social Servs.*, 436 U.S. 658, 691 (1978) (section 1983 analysis); *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 736 (1989) (section 1981 analysis).

The Court has also similarly held that, in cases arising under Section 1981, employers may not be held vicariously liable for a union's discriminatory operation of a hiring hall. *See Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458

U.S. 375, 378 (1982). The Court reasoned that holding employers vicariously liable for a union's discriminatory actions would be "alien to the fundamental assumptions upon which the federal labor laws are structured." *Id.* at 393.

The Court's cases construing Title VII have similarly held that causation alone is not a sufficient basis for imposition of liability upon an employer. As the Court first explained in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), vicarious liability under Title VII requires reference to traditional agency law principles, as appropriately modified to reflect the policies and purposes of Title VII. In *Vinson*, the Court emphasized that "Congress's decision to define 'employer' to include any 'agent' of an employer, 42 U.S.C. § 2000e(b), surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible." 477 U.S. at 72. And the Court added that "common-law [agency] principles may not be transferable in all their particulars to Title VII." *Id.*

2. This Court's subsequent decisions have reiterated both that causation alone is not legally sufficient and that Title VII's vicarious liability rules find only their "*starting* point" in common law agency principles. *Faragher*, 524 U.S. at 803 n.3 (noting that "our obligation here is not to make a pronouncement of agency law in general or to transplant § 219(2)(d) into Title VII") (emphasis added). These principles are then "adapt[ed] . . . to the practical objectives of Title VII." *Id.*

As this Court has explained, the doctrine of "*respondeat superior*, as traditionally conceived . . . enables the imposition of liability on a principal for the tortious acts of his agent and, in the more common case, on the master for the wrongful acts of his servant." *Gen. Bldg. Contractors*, 458 U.S. at 392 (citing RESTATEMENT (SECOND) OF AGENCY §§ 215-216, 219). Under general principles of agency law, "[a]n employer may be liable for both negligent and intentional torts committed by an employee within the scope

of his or her employment." *Burlington*, 524 U.S. at 756; RESTATEMENT (SECOND) OF AGENCY § 229(1). Furthermore, in certain "limited circumstances," general principles of agency law, as reflected in the Restatement applicable at the time of Title VII's enactment, allow imposition of vicarious liability where an employee acts outside of the scope of the employment:

> (2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
>
> (a) the master intended the conduct or the consequences, or
> (b) the master was negligent or reckless, or
> (c) the conduct violated a non-delegable duty of the master, or
> (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he *was aided in accomplishing the tort by the existence of the agency relation.*

Burlington, 524 U.S. at 758 (quoting RESTATEMENT (SECOND) OF AGENCY § 219(2)) (emphasis added); *id.* (citing RESTATEMENT (SECOND) OF AGENCY § 219, cmt. *e* (Section 219(2), which "enumerates the situations in which a master may be liable for torts of servants acting solely for their own purposes and hence not in the scope of employment")).

As courts have recognized, however, there would be substantial danger in interpreting the "aided by the agency relation" standard too literally. It would unreasonably impose strict liability on employers for many a frolic and detour that the employer simply cannot reasonably control or prevent:

> Courts have criticized § 219(2)(d) primarily because the exception swallows the rule and amounts to an imposition of strict liability

> upon employers. Indeed, it is difficult to conceive of an instance when the exception would not apply because an employee, by virtue of his or her employment relationship with the employer is always "aided in accomplishing" the tort. Because the exception is not tied to the scope of employment but, rather, to the existence of the employment relation itself, the exception strays too far from the rule of *respondeat superior* employer nonliability.

Zsigo v. Hurley Med. Ctr., 716 N.W.2d 220, 226 (Mich. 2006) (footnotes omitted). For this reason, state courts have frequently declined to extend agency principles as far as the "aided in the agency relation" standard would extend them. *See, e.g.*, *id.* at 234 n.11; *Groob v. Keybank*, 843 N.E.2d 1170, 1179 (Ohio 2006); *Salinas v. Genesys Health Sys.*, 688 N.W.2d 112, 113 (Mich. Ct. App. 2004).

This Court similarly made clear that agency law principles applicable in Title VII cases do *not* extend to acts merely because they were "aided" by "the existence of the agency relation." The Court reasoned that "most workplace tortfeasors are aided in accomplishing their tortious objective by the existence of the agency relation" as "[p]roximity and regular contact may afford a captive pool of potential victims." *Burlington*, 524 U.S. at 760; *see id.* at 763 (citing *Meritor,* 477 U.S. at 77 (Marshall, J., concurring in judgment) ("[I]t is precisely because the supervisor is understood to be clothed with the employer's authority that he is able to impose unwelcome sexual conduct on subordinates.")); *Faragher*, 524 U.S. at 797 ("mechanical application" of the RESTATEMENT's § 229 is unwarranted). Because a literal application of the "aided in the agency relation" test in the employment context would impose too broad a liability, the Court concluded that imposition of liability "requires the existence of something *more* than the

employment relation itself." *Burlington*, 524 U.S. at 760 (emphasis added).

For example, in the sexual harassment context, the Court has held that employers may be vicariously liable "when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment." *Faragher*, 524 U.S. at 808. Furthermore, the Court has held that vicarious liability may be imposed on an employer "for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee." *Faragher*, 524 U.S. at 807; *Burlington*, 524 U.S. at 765. However, the Court has also held that, even in cases involving supervisor misconduct, "[w]hen no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages," comprised of two necessary 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." *Burlington*, 524 U.S. at 765. The Court reached this result by "accommodat[ing] the agency principles . . . as well as Title VII's equally basic policies of encouraging forethought by employers and saving action by objecting employees." *Id.* at 764.

Relatedly, in the context of determining the availability of punitive damages under Title VII, the Court similarly declined to apply literally the "aided in the agency relation" standard. *See Kolstad*, 527 U.S. at 542-43. The Court noted that the Restatement of Agency itself restricts the imposition of punitive damages on the employer under *respondeat superior* principles. *Id.* at 543 (citing RESTATEMENT (SECOND) OF AGENCY § 217(C)). However, the Court deemed even the limited circumstances enumerated by the Restatement to impose too broad a standard for potential vicarious liability and concluded that Title VII further

curtails the availability of punitive damages against employers. *Id.* at 544. The Court explained that the "prophylactic goals" of Title VII would be disserved by the blanket adoption of the Restatement and held that it was necessary "to modify these principles to avoid undermining the objectives underlying Title VII." *Id.* at 545. Specifically, the Court held that "in the punitive damages context, an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's good faith efforts to comply with Title VII." *Id.*

3. This case raises the distinct question of whether and when employer liability exists under agency principles applicable in Title VII cases for employee acts that, while perhaps causally related to an adverse employment actions, are not themselves tangible employment actions of the kind referred to in *Faragher* and *Burlington.* The answer to that question is informed by general agency law principles, as well as by this Court's Title VII cases modifying those principles for appropriate application in the Title VII context. These authorities suggest that imposition of vicarious liability on an employer for its employee acts that are not themselves tangible adverse employment actions is appropriate only where the acts constitute the exercise of official delegated authority.

As a threshold matter, it is important to distinguish the actors from whom the employer may receive input in making an adverse employment decision and the wide variety of acts these actors perform. The employer acts through its managers who make the adverse decisions. Those managers may receive input regarding a plaintiff's performance from other managers, intermediate supervisors, shop floor employees, independent contractors, unions, and other individuals or entities that have a chance to observe the plaintiff. In deciding to terminate a plaintiff, the manager decision-maker may adopt the recommendation of another manager. The decision-maker may also receive a report on a

plaintiff's performance from an intermediate supervisor, who is not empowered to recommend a particular action or to take any official action. The decision-maker may also be made aware of an informal hallway discussion regarding plaintiff's performance or receive a message, whether from an identified source or an anonymous one, regarding plaintiff's performance. The actions of an employer's employees span a broad spectrum and, both because of their variety and their differing relationship to delegated authority (or lack thereof), should not all necessarily trigger vicarious liability under Title VII.

Rather, the Court's Title VII jurisprudence suggests that vicarious liability may be properly imposed on an employer only for "official acts" that "become[] . . . the act of the employer," "a company act." *Burlington*, 524 U.S. at 762. The most obvious class of such acts is "when a supervisor takes a tangible employment action against the subordinate"; "we think it reflects a correct application of the aided in the agency relation standard." *Id.* at 760-61. It is proper to impose vicarious liability for "tangible employment actions" because these "are the means by which the supervisor brings the official power of the enterprise to bear on subordinates." Such acts have "an imprimatur of the enterprise." *Id.* at 762.

It follows that an employer should also have vicarious liability for managerial actions that involve no independent assessment but merely rubberstamp discriminatory actions of subordinate employees who are in effect *de facto* decision makers. An "official" act is committed by a biased employee when he is effectively allowed to make the final decision that adversely affects the plaintiff. Thus, the employer is liable when it *acts* through a biased employee by virtue of delegating to him decision-making authority (and making him a *de facto* decision-maker) to "discharge" plaintiff "because of [plaintiff's] race." As this Court has explained, holding an employer vicariously liable is appropriate because, in these circumstances, "'the [employee] and the employer merge[d] into a single entity,'" *Id.* (quoting

Kotcher v. Rosa & Sullivan Appliance Ctr., Inc., 957 F.2d 59, 62 (2d Cir. 1992)), and the biased employee's act became the "official act." *See also* RESTATEMENT (SECOND) OF AGENCY § 219, cmt. a ("The assumption of *control* is a usual basis for imposing tort liability when the thing controlled causes harm.") (emphasis added).

In contrast, when employment actions do not involve mere rubberstamping but rather reflect independent decisions of agents with delegated authority, vicarious liability may properly be imposed (for unlawfully motivated actions that influence independent decisions) only where the unlawfully motivated influence involves an exercise of delegated authority (and factual and proximate causation are established). In elaborating on the scope of the "aided by the agency" standard, the Court in *Burlington* cited *Shager*, 913 F.2d at 405-06, a case where the plaintiff was formally fired by the Career Path Committee, but which allegedly acted on a report by a biased intermediate supervisor. *Burlington*, 524 U.S. at 762-63. The *Shager* court held that if the Committee "acted as the conduit of [the supervisor's] prejudice—his cat's paw—the innocence of its members would not spare the company from liability." 913 F.2d at 405. However, the court added that, if the committee "was not a mere rubber stamp, but made an independent decision to fire Shager, there would be no ground for finding willful misconduct by" the employer. *Id.* at 406. In such circumstances, the "official" responsibility for the adverse employment action would lie with, and would be exercised by, the committee—and not by the employee with the alleged bias.

This distinction between unauthorized employee actions and official actions has been repeatedly recognized by federal courts of appeals. *See, e.g.*, *Muegge v. Heritage Oaks Golf & Country Club, Inc.*, No. 06-12850, 2006 WL 3591957, at *4 (11th Cir. Dec. 12, 2006) (no vicarious liability for theft by employees because employees "were hired to paint the exterior of the Club Homes III residences and were not authorized by Cotton and Martin to enter any of

the residences"); *Booker v. GTE.net LLC*, 350 F.3d 515, 519 (6th Cir. 2003) (no vicarious liability for employer for unauthorized acts of its employee); *Jones v. Baisch*, 40 F.3d 252, 255 (8th Cir. 1994) (same). *See also Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 287-88 (4th Cir. 2004), *cert. dismissed*, 543 U.S. 1132 (2005) (discussing *Burlington* and *Shager* to support the "actual decision-maker" test for vicarious liability). It is also reflected in this Court's decisions, for example, regarding the necessary conditions for imposition of punitive damages in Title VII cases. *See, e.g.*, *Kolstad*, 527 U.S. at 542-43. These cases recognize that the key to proper imposition of vicarious liability must be the delegation of authority by an employer, as liability is properly imputed to an employer only for the discriminatory exercise of authority that it has delegated.

Correlatively, acts *not* involving delegated authority that do not carry with them an "imprimatur of the enterprise" should not subject an employer to vicarious liability. For example, the current employer may take an adverse employment action upon receiving a negative recommendation about the employee from his prior employer, who provides false negative information because of the racial bias. However, despite the existence of causation, the current employer would not be vicariously liable because he is not legally responsible for the prior employer. Or, where the plaintiff's fellow employee brings to the decision-maker's attention a conversation overheard in the hall involving the plaintiff, or where an independent contractor sends a note to the manager complaining about the plaintiff, these employees are not exercising delegated authority. The employer has not delegated the duty of reporting about plaintiff to fellow employees or independent contractors; rather, those individuals take upon themselves the initiative to bring some information to the management's attention. To be sure, they would not be able to observe plaintiff's behavior at the place of business had they not been also empowered to be there by the virtue of their agency

relationship with the employer. But, just as in the sexual harassment context, proximity and regular contact are not enough to impose vicarious liability because they "may afford a captive pool of potential victims" and would cover "most workplace tortfeasors," including "co-worker[s]." *Burlington*, 524 U.S. at 760. "Something more" than "proximity and regular contact" is required for imposing vicarious liability for alleged racial discrimination. *Id.*

Similarly, there is no exercise of official delegated authority even by a direct supervisor of the plaintiff where that supervisor's actions are not part of his official delegated duties. "[T]he ultimate focus must be on agency, not supervisory status. The [adjudicator] cannot . . . move straight from a finding of supervisory status to a finding of liability without considering evidence showing that the supervisor did not speak on behalf of management." *NLRB v. Schroeder*, 726 F.2d 967, 969 (3d Cir. 1984). It is not enough that the supervisor speaks, or that the supervisor complains, or that the supervisor influences; rather, the supervisor must be exercising delegated authority in taking the allegedly discriminatory acts, if the employer is to be held vicariously liable for them. *Cf. Price Waterhouse*, 490 U.S. at 277 (O'Connor, J., concurring in judgment) ("statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself" do not suffice to show that the employment decision was based on illegitimate criteria).

This approach to vicarious liability is necessary to properly achieve Title VII's goals. As this Court has recognized, Title VII does not intend to make employers liable for every frolic and detour of their employees. *See, e.g.*, *Faragher*, 524 U.S. at 798 ("[T]here is no reason to suppose that Congress wished courts to ignore the traditional distinction between acts falling within the scope and acts amounting to what the older law called frolics or detours from the course of employment."). Rather, Title VII intends to make employers liable only for discriminatory actions that

an employer has empowered an employee to take and that the employer could reasonably have controlled and, if necessary, prevented. *Id.* at 798-99. Moreover, imposing vicarious liability for acts that do not entail exercise of official delegated authority, such as where a renegade low-level employee's bias somehow caused a discriminatory action, is not "just." *Faragher*, 524 U.S. at 797 (quoting RESTATEMENT (SECOND) OF AGENCY and explaining that "'the ultimate question'" in imposing vicarious liability is whether "'it is just that the loss resulting from the servant's acts should be considered as one of the normal risks to be borne by the business in which the servant is employed'"). The employer's "exercise of reasonable care" through the official and formal promulgation and enforcement of anti-discrimination policies, as expected where the employer has a large work force, should be rewarded; and, even where factual and proximate causation exist, liability should be imposed only for the discriminatory exercise of delegated authority that the employer officially ceded to the allegedly abusive employee. *Id.* at 808.

II. THE TENTH CIRCUIT'S DECISION IS INCORRECT BECAUSE IT ATTEMPTED ONLY THE FACTUAL CAUSATION PART OF THE INQUIRY AND DISREGARDED THE AGENCY LAW INQUIRY

The Tenth Circuit's decision below should be reversed. The court performed only the factual causation part of the liability inquiry. It did not seriously conduct either the proximate causation or the agency law inquiry.

First, the Tenth Circuit did not conduct a proper proximate causation inquiry. The court seriously considered only whether a factual "causal" connected existed between Mr. Grado's alleged bias and the termination action in issue. Appendix to Petitioner BCI Coca-Cola's Petition for Certiorari (hereinafter "Pet. App.") 26a-30a. The court did not seriously consider the proximate causation issue: While

the court suggested that pulling a personnel file is not a legally sufficient investigation, Pet. App. 31a, in doing so, it ignored that Ms. Edgar did much more—including "h[olding] a series of phone calls with Ms. Pederson ["[t]he highest-ranking human resources official in the Albuquerque office"] . . . and Mr. Grado concerning Mr. Peters' conduct." Pet. App. 3a, 6a. Moreover, in suggesting that an investigation is necessarily flawed if the decision-maker does not ask the employee for "his side of the story," Pet. App. 28a, the court proposed a wholly unworkable and impracticable standard, as geography, timing, workplace needs and other such circumstances may make such an individual interview inappropriate and infeasible. Indeed, the court failed directly to confront either the district court's finding that the investigation was reasonable in the circumstances, *see* Pet. App. 63a, 67a, or the decisions of other courts that have found proximate cause lacking where the decision-maker herself indisputably was not biased and made reasonable business judgments about the investigation to conduct in the circumstances, *see, e.g.*, *Long*, 88 F.3d at 307; *Shager*, 913 F.2d at 405; *Willis*, 118 F.3d at 547; *Wilson*, 952 F.2d at 946. A proper proximate cause inquiry would take account of all of the facts of record and make a legal judgment about proximate cause based on the relevant case law and with appropriate deference to the business judgment that employers must exercise in response to conflicting demands and pressures of the particular circumstances.

Second, the court did not undertake a proper vicarious liability analysis under agency principles applicable in Title VII cases. The Tenth Circuit largely assumed vicarious liability and instead focused almost entirely on whether the bias of the employee had a causal connection to the firing. The court did not critically analyze whether applicable agency principles properly made petitioner liable for any such bias.

The predominant feature of Part II(A) of the opinion, "Subordinate Bias Liability," Pet. App. 14a, which purports to lay out the legal rules, is explaining and taking a position on the causation debate—the "level of control a biased subordinate must exert over the employment decision." Pet. App. 18a. The Tenth Circuit rejected the Fifth Circuit's "any influence" standard because it "improperly eliminates a requirement of *causation*." Pet. App. 19a (emphasis added). The Tenth Circuit also rejected the Fourth Circuit's "actual decision-maker" standard, because the Tenth Circuit agreed with the Seventh Circuit that the Fourth Circuit's analysis is "inconsistent with the normal analysis of *causal* issues in tort litigation." Pet. App. 20a (emphasis added; internal quotation marks omitted).

In Part II(B) of the opinion, "The Subordinate Bias Claim in this Case," Pet. App. 22a-31a, the decision below continues its predominant focus on the factual causation issue and disregards the vicarious liability inquiry. After discussing Mr. Grado's alleged racial bias in Subpart II(B)(1), Pet. App. 23a-26a, the court moves on to the final portion of the opinion, Subpart II(B)(2), entitled "Pretext and *Causation*," Pet. App. 26a-31a (emphasis added). After discussing whether the firing was pretextual, Pet. App. 26a-30a, the court addresses whether Ms. Edgar conducted an independent investigation and holds that "directing Ms. Pederson to pull Mr. Peters' personnel file," which did not contain information about the recent incident, constitutes inadequate investigation as a matter of law. Pet. App. 30a. Therefore, the court concludes, "a jury could conclude that Mr. Grado's factually disputed report—the sole source of information on which Ms. Edgar relied—*caused* the termination." Pet. App. 31a (emphasis added). Thus, yet again, the court's predominant focus is on the factual causation of the termination.

To be sure, two paragraphs of Part II(A) of the opinion discuss concepts of vicarious liability, but, crucially, they do so without performing any serious analysis and without

recognizing the import of this Court's caselaw on the "aided by the agency relation" standard. The court first spent a paragraph reciting the application of the "aided . . . by the existence of the agency relation" standard by this Court in *Meritor*, *Burlington* and *Faragher*. Pet. App. 16a-17a. The court then added another paragraph to express its endorsement of "[h]olding employers accountable for the actions of biased subordinates," because it "advances the goals of Title VII," such as "deterren[c]e" and "creation of "employer procedures that prevent discriminatory actions." Pet. App. 17a-18a. In that same paragraph, the opinion notes that, because "a company's organizational chart does not always accurately reflect its decisionmaking process," Pet. App. 17a (citing *Reeves*, 530 U.S. at 151-52), "[r]ecognition of subordinate bias claims forecloses a strategic option for employers who might seek to evade liability, even in the face of rampant race discrimination among subordinates, through willful blindness." Pet. App. 18a. But, at the end of these two paragraphs, which recognize that this Court has modified Restatement 219(d)(2)'s "aided . . . by the existence of the agency relation" standard to conform to Title VII's goals, the court never proceeded to examine the reach of that standard in this particular context.

The court below omitted this crucial analysis even though it had stated, at the outset, that, "[f]or the EEOC to prevail, it must make not only a factual showing that Mr. Grado harbored racial animus toward black employees, but also a convincing legal claim that his racial animus *should be imputed to BCI* despite the fact that Mr. Grado had no power to terminate anyone." Pet. App. 14a (emphasis added). Rather than follow through on this acknowledgment of the distinct role that agency principles play in the proper analysis, however, the court below instead switched to the discussion of factual causation, as explained above, and never answered the difficult agency law question.

By not completing the agency law inquiry, the Tenth Circuit has effectively inaugurated a regime that

automatically imposes vicarious liability on an employer once causation is established. Such automatic imposition of liability impermissibly expands the meaning of "agent" in 42 U.S.C. § 2000e(b), which this Court has already held to have a significantly more narrow meaning that the Restatement gives that term. The Tenth Circuit's approach is contrary to this Court's explicit rejection of such an approach in Title VII cases, because it would impose too broad of a liability:

> [The] employer is not "*automatically*" liable for harassment by a supervisor who creates the *requisite* degree of discrimination, and there is obviously some tension between that holding and the position that a supervisor's misconduct aided by supervisory authority subjects the employer to liability vicariously; if the "aid" may be the unspoken suggestion of retaliation by misuse of supervisory authority, the risk of *automatic* liability is high.

Faragher, 524 U.S. at 804 (emphases added; footnote omitted).

Accordingly, because the decision below did not apply the correct proximate cause and agency law tests, it should be reversed. Those tests require inquiry into (1) whether Mr. Grado's bias in his reporting to Ms. Edgar was the proximate cause of the firing, and (2) whether Mr. Grado was officially exercising delegated authority in the specific discriminatory actions he is alleged to have taken.

In the causation inquiry, the question will be whether Mr. Grado's alleged bias was both the but-for and proximate cause of the termination. In this regard, proper weight must be given to the investigation undertaken by Ms. Edgar, in light of this Court's admonition to provide employers with incentive to create mechanisms to "avoid harm" of discrimination. *Faragher*, 524 U.S. at 805-06.

In the agency inquiry, the question will be whether petitioner delegated to Mr. Grado the authority to take the actions that respondent claims are discriminatory. The inquiry should look at the nature of Mr. Grado's duties; whether he was delegated authority to report on plaintiff's conduct; and whether Ms. Edgar, in terminating the plaintiff, then ratified and adopted as her own the allegedly biased acts.

With regard to both the proximate cause and agency law inquiries, due account should be taken of BCI Coca-Cola's non-discrimination policies, as well as its prevention and complaint procedures. Courts should "give credit" to an employer's "reasonable efforts to discharge" its "duty" to comply with Title VII. Such analysis would "implement clear statutory policy and complement the Government's Title VII enforcement efforts." *Id.* at 806.

CONCLUSION

For the foregoing reasons, the decision below should be reversed in pertinent part.

Respectfully submitted,

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