Private Amici Curaie and the Supreme Court's 1997-1998 Term Employment Law Jurisprudence

Andrew P. Morriss

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PRIVATE AMICI CURIAE AND THE SUPREME COURT'S
1997-1998 TERM EMPLOYMENT LAW JURISPRUDENCE

Andrew P. Morriss*

The amicus curiae brief has become a common occurrence in today's legal arena, especially with the proliferation of private interest groups that specialize in numerous topics of political and social interest. The substantial increase in the use of amici briefs, however, has sparked criticism concerning both the costs (in effort and resources) associated with filing these briefs and the persuasive effect (or lack thereof) the briefs have on the Court. Much of this criticism arises from the failure of many interest groups to posit "legal" arguments that apply the facts of a given case to the law. Instead, the amici briefs often present policy arguments or unusual factual theories, which ultimately renders them ineffective as useful legal tools.

In this Article, Professor Morriss explores the role of the amici and the influence of the amicus curiae brief upon the Court in three recent Supreme Court Title VII cases: Oncale v. Sundowner Offshore Services, Inc., Burlington Industries, Inc. v. Ellerth, and Faragher v. City of Boca Raton. Morriss concludes that as more and more private interest groups endeavor to emphasize their own importance by filing amici briefs, the Court, rather than being enlightened, will be burdened by information which lacks legal substance.

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I. COURTS AND AMICI ....................................... 829
   A. Courts ........................................... 829
   B. The Development of the Role of Amici ................. 831

II. THE AMICI ........................................... 835
   A. Pro-Employer Amici ................................ 835
      1. The Chamber of Commerce of the United States .... 836
      2. The Equal Employment Advisory Council ............ 836
      3. The National Association of Manufacturers/The Manufacturers Alliance for Productivity and Innovation . 837
      4. The Society for Human Resource Management ......... 838
      5. The Texas Association of Business & Chambers of Commerce . 839
   B. Pro-Employee Amici ................................ 839
      1. Feminist Groups ................................. 840

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Most people believe that the independence of the judiciary makes courts in general, and federal courts in particular, relatively immune to political pressures. As Richard Epstein sums it up "[t]he set of institutional structures that has been introduced at the federal level has done its job."1 Despite this immunity, however, private interest groups2 increasingly are filing amici briefs in many cases.3 Indeed,

2 I examine only private groups because the government’s participation as amicus raises different issues. For example, regulatory agencies regularly participate as amici to provide
one prominent law firm partner argued that “[i]n today’s world, effective representation of your client requires that you at least seriously explore the possibility of enlisting persuasive amicus support on your client’s behalf.” Some groups even publicly solicit opportunities to participate as amici.

the courts with their perspective on how the legal issues in a case relate to their regulatory mission. As Professor David Ruder noted in his survey of Securities Exchange Commission (“SEC”) amicus activity, this often brings the weight and prestige of the federal agency into a private lawsuit on the side of one party. See David S. Ruder, The Development of Legal Doctrine Through Amicus Participation: The SEC Experience, 1989 WIS. L. REV. 1167, 1169 (1989).

See TIMOTHY J. O’NEILL, BAKKE & THE POLITICS OF EQUALITY: FRIENDS AND FOES IN THE CLASSROOM OF LITIGATION 221 (1985) (stating that over 80% of the 1986-1991 term full opinion cases have at least one amicus brief and, of those cases, the average number of amicus briefs filed for each is four); Robert C. Bradley & Paul Gardner, Underdogs, Upperdogs, and the Use of the Amicus Brief: Trends and Explanations, 10 JUST. SYS. J. 78, 78-80 (1985) (noting that the filing rate of amicus briefs by interest groups has increased substantially); Gregory A. Caldeira & John R. Wright, Organized Interests and Agenda Setting in the U.S. Supreme Court, 82 AM. POL. SCI. REV. 1109, 1111 (1988) (“At least since the 1960s evidence of the participation of interest groups as amici curiae or sponsors has virtually leaped from the pages of the United States Reports even on the most cursory inspection.”); Stephen Calkins, Supreme Court Antitrust 1991-92: The Revenge of the Amici, 61 ANTITRUST L.J. 269, 269 (1993) (“Interested parties regularly flood the Supreme Court with briefs. . . .”); Bruce J. Ennis, Effective Amicus Briefs, 33 CATH. U. L. REV. 603, 603 (1984) (“[U]se [of amicus briefs] is steadily and dramatically increasing.”); John Howard, Retaliation, Reinstatement and Friends of the Court: Amicus Participation in Brook v. Roadway Express, Inc., 31 HOW. L.J. 241, 255 (1988) (“Amicus participation is no longer an exception, it is now the rule.”); Gregg Ivers & Karen O’Connor, Friends as Foes: The Amicus Curiae Participation and Effectiveness of the American Civil Liberties Union and Americans for Effective Law Enforcement in Criminal Cases, 1969-1982, 9 LAW & POL’Y 161, 172 (1987) (“[T]he judicial process is now witnessing the articulation of competing group interests to an ever increasing degree.”); Karen O’Connor & Lee Epstein, Amicus Curiae Participation in U.S. Supreme Court Litigation: An Appraisal of Hakman’s “Folklore,” 16 LAW & SOC’Y REV. 311, 318 (1981-1982) (“[A]micus curiae participation by private groups is now the norm rather than the exception.”). For further discussion of the expanding role of amici, see Michael K. Lowman, Comment, The Litigating Amicus Curiae: When Does the Party Begin After the Friends Leave?, 41 AM. U. L. REV. 1243, 1246 (1992) (explaining that district court amici sometimes are allowed “to actively engage in oral argument, to introduce physical evidence, to examine witnesses, to conduct discovery, and even to enforce previous court decisions upon party-participants to the litigation”).

Ennis, supra note 3, at 604.

In many instances amici briefs do not make "legal" arguments; that is, they tend not to discuss the facts of the case or to apply law to the case in a legally meaningful way. Instead, these briefs make policy arguments or promote unusual factual or legal theories. As Chief Judge Richard Posner recently wrote in an opinion denying a motion for leave to file a brief as amicus curiae: "The vast majority of amicus curiae briefs are filed by allies of litigants and duplicate the arguments made in the litigant's brief. Such amici briefs should not be allowed. They are an abuse."

Because these briefs cost the groups filing them considerable effort and resources, they are unlikely to be filed on a whim. Why do groups file these briefs? Several possible explanations exist for this surge in amici. First, the groups involved may believe (correctly or not) that their briefs affect the Supreme Court's decisions. Some observers believe amici briefs play an important role; even if the Court rejects the group's preferred position, an amicus brief may push the Court in the "right" direction. Second, the amici briefs may serve an internal function, such as enabling

(providing guidelines for making a request that the Family Law Section of the Michigan State Bar participate as amicus curiae in a particular matter).

6 Ryan v. Commodity Futures Trading Comm'n, 125 F.3d 1062, 1063 (7th Cir. 1997). See also Ferguson v. Brick, 649 S.W.2d 397 (Ark. 1983). Reacting to Chief Judge Posner's criticism of amici briefs in Ryan, Marc Fuller, the co-chair of the ATLA's Amicus Curiae Committee, argued that courts should "welcome rather than spurn" amici briefs. Julie Gannon Shoop, Too Many 'Friends': Appeals Judge Urges Limits on Amicus Briefs, 33 TRIAL, Dec. 1997, at 18 (quoting interview with Marc Fuller). He also argued that amici briefs help "level the playing field" for plaintiffs. Id. at 19. This defense, and the institutional commitment represented by the existence of the ATLA committee, support the view that amici believe their role is important.

7 See Caldeira & Wright, supra note 3, at 1112 (estimating that an amicus brief costs between $15,000 and $20,000 to produce). Even when groups do not pay lawyers but instead use their own counsel, they incur a substantial opportunity cost.

8 See, e.g., Ennis, supra note 3, at 603 ("Frequently, judicial rulings, and thus their precedential value, will be narrower or broader than the parties had urged, because of a persuasive amicus brief."); Ivers & O'Connor, supra note 3, at 167 ("It does seem fair to speculate, however, that perhaps a greater number of interest groups believe that amicus curiae participation may affect the outcome of a case."); Michael Rustad & Thomas Koenig, The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs, 72 N.C. L. REV. 91, 141 (1993) ("The judiciary is subject to a determined campaign by lobbyists to convince them that tort reform of punitive damages is vital."). One study suggested that lawyers' "enormous egos" initiated involvement. See STEPHEN L. WASBY, RACE RELATIONS IN AN AGE OF COMPLEXITY 31-32 (1995).

9 See Ennis, supra note 3, at 603 (arguing that amicus briefs are not "at best only icing on the cake. In reality, they are often the cake itself"); Leo Pfeffer, Amici in Church-State Litigation, 44 LAW & CONTEMP. PROBS. 83, 107-09 (arguing that amici briefs were key to the Court's opinions in two important cases).

10 See WASBY, supra note 8, at 31 ("If the ACLU would trim, the [Court's] ultimate position would be further off the mark." (quoting an ACLU attorney)).
the groups to raise funds or demonstrating to their membership that they are players in a significant policy debate. Third, interest groups may believe they have a comparative advantage in the courts. Fourth, amici briefs may serve as an important signal to the Court about which cases to accept for review, regardless of the merits of the amici's positions. Fifth, interest groups may not be able to afford direct participation (i.e., funding litigation) but want to make their voice heard. Finally, groups may participate because they feel they must defend a principle. More than one of these explanations, of course, may be true simultaneously.

This Article examines the amici briefs submitted in three recent Supreme Court Title VII cases and attempts both to explain why the amici participated and to evaluate the value of their participation. In order to do so, this Article examines the Court's decisions and the arguments made by the amici and parties in three major antidiscrimination cases from the 1997-1998 term: Oncale v. Sundowner Offshore Services, Inc., Burlington Industries, Inc. v. Ellerth, and Faragher v. City of Boca Raton.

This Article evaluates the amici's roles in these cases in several ways, relying largely on the briefs themselves. First, I compare the arguments raised by the amici

See WASBY, supra note 8, at 77.

See O'NEILL, supra note 3, at 19; Ivers & O'Connor, supra note 3, at 170. Even unfavorable rulings can produce revenue windfalls for interest groups. See, e.g., O'NEILL, supra note 3, at 226-27, 230-31; WASBY, supra note 8, at 31-32 (noting the role of Bowers v. Hardwick in promoting growth of Lambda's Legal Defense and Education Fund and ACLU fundraising appeals which relied on unfavorable civil rights rulings).

See WASBY, supra note 8, at xii (stating that much of literature is based on the notion that civil rights groups turn to the courts because their opinions are going to carry less weight in other "political" arenas or that the groups were effectively without power in those arenas).

See Caldeira & Wright, supra note 3, at 1111 ("The filing of an amicus brief, apart from the quality or persuasiveness of the arguments presented, provides the justices with an indication of the array of social forces at play in the litigation.").

See KAREN O'CONNOR, WOMEN'S ORGANIZATIONS' USE OF THE COURTS 100-15 (1980) (describing the role of funding in determining the decisions of women's groups to file amici briefs instead of directly participating in cases); O'NEILL, supra note 3, at 221-23; O'Connor & Epstein, supra note 3, at 313 (explaining that the "chief" reason for amicus participation is "a group's inability to fund major litigation from the trial stage").

See WASBY, supra note 8, at 31-32 ("[A] major reason [why public interest groups litigate cases] is that there are principles to defend.").


This method is open to criticism—if the briefs merely are exercises in public relations or fundraising, for example, perhaps a study of the groups' press campaigns or financial documents would have been more appropriate. See, for example, WASBY, supra note 8, for an excellent study of the influence of internal politics or civil rights litigation, and O'NEILL, supra note 3, for an in-depth analysis of the role of amici in the Bakke case. Such studies are
with those raised by the parties to determine whether the amici's arguments differ in substance, type of argument, or the type of authority cited. Second, I examine the impact of the amici briefs and determine whether the Supreme Court adopted their method of reasoning, cited, or otherwise relied on the amici briefs. Finally, I evaluate the collective role of the amici in the three cases.

I focus on the legal arguments, positions, and authorities because, as do perhaps a minority of legal academics, I believe law is something distinct from the policy preferences of interest groups or judges. Law demands legal analysis, and when individuals or groups hire lawyers (even if the lawyers are working pro bono) to file briefs with a court, they signal that they too believe the law matters. Thus, I interpret these signals as an invitation to take the amici at their word—that they wish to participate in a legal argument. I use the briefs as evidence to evaluate the kinds of arguments the amici indicate are legitimate legal arguments.

Finally, I find that amici exert relatively little obvious influence on the Court, at least in this small sample of cases. Despite this apparent lack of success, the amici clearly invested considerable resources in producing these briefs. As one commentator noted, there are other ways to attempt to influence the Supreme Court: "Those who have decided that the return on their efforts will be best maximized fascinating and critical to understanding interest groups, but they represent a different approach than that taken in this Article. Similarly, if one wishes to study organizational conflict over the positions advocated in briefs, focus on the briefs would be inadequate. See O'NEILL, supra note 3, at 7 (asserting that an amicus brief "represents the resolution of, and does not reflect the debate within, an organization").

As Professors Caldeira and Wright note in their study of the impact of amici on the selection of cases for review, "[b]ecause of the confidentiality of the conference and individual deliberations, we have no means of knowing with certainty how the justices view and value briefs amicus curiae prior to certiorari." Caldeira & Wright, supra note 3, at 1113. Until access to the justices' 1997-1998 Term papers is granted (something that will not happen for years, if at all), there can be no complete evaluation of the impact of the amici on the evolution of the justices' decisions in these cases. The only meaningful evaluation that currently can be conducted considers how the final opinions reflect the impact of the amici.

See RICHARD S. MARKOVITS, MATTERS OF PRINCIPLE 5-7 (1998) (describing the prevalence of the view that there are no internally-right answers to legal and constitutional issues).

O'Connor and Epstein suggest that the Supreme Court grants most requests to file amicus briefs because these briefs actually assist the justices in dealing with their workload by providing useful information. See Karen O'Connor & Lee Epstein, Court Rules and Workload: A Case Study of Rules Governing Amicus Curiae Participation, 8 JUST. SYS. J. 35, 35-36 (1983). While I disagree that the briefs in Oncale, Ellerth, and Faragher ultimately proved useful to the Court (or at least should not have been useful), my approach is in some respects similar to that of O'Connor and Epstein.

But see, e.g., Calkins, supra note 3, at 269 (noting that "amici played central roles" in three antitrust cases); Ennis, supra note 3, at 606-07 (citing three cases in which the amici made a difference).
before the judicial branch have several alternatives . . . [which include] sponsoring litigation, developing test cases, writing favorable law review articles [and] providing expert testimony . . . .” As others who have studied amici participation in the past have done,26 I suggest that the amici’s view of their own efforts is akin to that of groups lobbying before Congress. As they “lobby” the Court by marshalling policy arguments and factual claims not supported by the record, the amici play a role in, and are a symptom of, the decline of legal argument.

To the extent that law is more than a balancing of policy arguments—that is, to the extent that right answers to legal questions exist—many of the arguments advanced by amici in these cases are not part of legitimate legal argument. If law is merely the result of choices among competing policy judgments by an antidemocratic institution, we would be better advised to shift such decisions to more democratically accountable institutions. Moreover, if we believe nonrecord facts matter in the determination of the correct interpretation of statutes such as Title VII, we should shift the choice to institutions better able to amass and evaluate evidence, such as Congress and executive and independent agencies. This Article concludes, therefore, that the behavior of amici in these cases reveals a belief in an inappropriate judicial role.

Part I discusses the existing literature on the role of amici and the small public choice literature on the courts as policymakers. Part II discusses the different amici who participated in these cases. Part III briefly summarizes the three cases examined here. Parts IV, V, and VI examine the role of amici in Oncale, Ellerth, and Faragher. Finally, Part VII draws conclusions about the influence of amici on the definition of antidiscrimination law.

I. COURTS AND AMICI

A. Courts

Courts are relatively weak institutions in many respects. Their jurisdiction is limited to cases initiated by plaintiffs—unlike agencies and legislatures which may seek out new areas in which to act. The judicial budgets are relatively small—the federal government spends only a tiny fraction of its budget on the judicial branch.27

25 Howard, supra note 3, at 254.
27 See, e.g., Victor Williams, Keep the Federal Judiciary Out of the Budget Battle, CHRISTIAN SCI. MONITOR, Jan. 29, 1996, at 19, available in 1996 WL 5038927 (estimating that the judiciary receives less than 0.002% of the federal budget).
Rules of evidence limit the ability of courts to gather useful information (i.e., the hearsay rule).

Yet courts are also powerful institutions. They have a significant influence on the state of law through their interpretation of the common law, statutes, and constitutions. Even when the other branches possess the power to overrule the Court without resorting to constitutional amendments, opponents of Supreme Court opinions have found it quite difficult to overturn "bad" precedent—as illustrated by the lengthy struggle that ultimately led to the Civil Rights Act of 1991.  

Theoretically, the courts are not meant to act as a "super-legislature" by imposing their preferences through their decisions. In practice, however, it is difficult to counter the legal realist criticism that, at least some of the time, courts manage to sneak a little legislating into their decisions. This is particularly true of the Supreme Court, in which it appears that both constitutional and statutory interpretation sometimes are influenced more by personal preferences than by fidelity to a coherent theory of interpretation.

In Title VII opinions, the Court has given the impression that it is willing to act legislatively, at least when Congress arguably has been unclear. For example, the Court found that hostile environment sexual harassment constitutes discrimination under Title VII, although there is no provision in the statute that directly mentions sexual harassment. Including sexual harassment in Title VII's ban on sex discrimination may or may not be beneficial, but it certainly is difficult to see how a court committed to interpreting statutes found it there. The Court's willingness to make broad readings of Title VII means that those with interests affected by the interpretations of the statute can anticipate a wide range of possible outcomes. Such

29 See, e.g., WASBY, supra note 8, at 197 (recounting how a judge's former law clerk, appointed to a prisoner complaint case, "realized that the judge was 'interested in additional prisoner litigation' and 'persuaded his client to enlarge the case into a class action on behalf of all inmates,'" and how a federal judge lobbied NAACP officials to adopt "a more aggressive posture" in a case); Caldeira & Wright, supra note 3, at 1115 (summarizing evidence that biases are shown throughout case selection).
30 See, e.g., Richard A. Posner, What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does?), 3 SUP. CT. ECON. REV. 1, 40 (1993) ("When a really new case arises, the rules of the judicial game require the judge to act the part of a legislator and therefore vote his values, although the rules do not require and may even forbid him to acknowledge that this is what he is doing.").
31 Although he is arguing from a quite different policy perspective, Professor Stephen Plass makes a similar criticism when he contends that the Supreme Court "has demonstrated a willingness to act outside of constitutional constraints" in civil rights cases. Stephen A. Plass, The Foreign Amici Dilemma, 1995 BYU L. REV. 1189, 1195 (1995).
a broad range provides a much greater incentive to invest in the production of amici briefs than might a narrower range of possible interpretations. Similarly, the Court’s practice of making vague, general statements about key terms in Title VII gives potential amici an incentive to invest in persuading the Court to adopt their own interpretation of those terms in future cases.

B. The Development of the Role of Amici

Amici curiae have a long history in the American and English legal systems, which has been surveyed thoroughly elsewhere. Over time, this role has evolved from what Samuel Krislov calls “oral ‘Shephardizing,’ the bringing up of cases not known to the judge” into an institution characterized by “partisanship” and “advocacy.”

Amici can play a wide range of roles in the courts, and a number of factors influence the type of role they play in a given case. Particularly in the civil rights arena, in which relations between civil rights groups and the government “are characterized by division of labor, cooperation and conflict,” the government’s position may influence the role of amici. Interest groups may take the same “side” as the government, and when they do, they may cooperate to a greater or lesser extent with the government. Arguments may be made in parallel, or an amicus brief may cast the government’s position in a more moderate light. Conflict with the government may lead to more vigorous participation, and groups may intervene directly rather than rely on amicus participation to ensure the group’s goals are not shortchanged by the government.

Legal doctrine also influences the pool of amici and, hence, influences their roles: The decision in Roe v. Wade, for example, “spur[red] the development of pro-life organizations.” Doctrinal threats to organizations, whether substantive or

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34 Those seeking an expansive interpretation can hope for an exceptionally good outcome, while those seeking a narrow interpretation must fear the same.
35 See infra notes 172-84 and accompanying text.
37 Id. at 695.
38 Id. at 704. See also sources cited supra note 3.
39 WASBY, supra note 8, at 21; see also Ivers & O’Connor, supra note 3, at 165 (noting that the Nixon administration “formally endorsed” a pro-law enforcement amicus’s activities in 1971 and often invited the leader of the amicus group to the White House for bill signings).
40 See id. at 21-22.
41 See id. at 22.
42 Id. at 35; see also Ivers & O’Connor, supra note 3, at 164 (describing the rise of pro-law enforcement amicus group as, at least partially, a reaction to ACLU successes).
procedural (i.e., standing), motivate participation as well. Internal organizational politics, such as struggles between legal staffs and directors, also may affect the amici's roles. The Supreme Court's increased willingness, since the 1950s, to tackle public policy issues that it previously avoided also has encouraged more groups to participate as amici. Not only has the Court taken a more expansive view of its role than in earlier decades, but it also has done so in the context of interpreting an increasing number of federal statutes aimed at contentious social issues. As Professors Bradley and Gardner explain: "Unfortunately for the work load of the Court, these acts were often phrased in ambiguous language and included novel and complex legal concepts."

Amicus participation also offers a means of involvement when the control over litigation in a particular area is out of reach of a particular group. As Stephen Wasby notes, "litigating organizations must often respond to other litigators, independent of litigation they would like to undertake." Amici participation gives the brief writers freedom "to pursue a type of social commentary not available through a litigant's brief" and to shape positions "to ameliorate conflicts within their sponsoring organizations" in ways not possible if representing a party. For many attorneys, therefore, writing an amicus brief is more attractive than direct involvement in a case.

Organizations also choose amicus participation for varied reasons. Amici participation allows a group to spread its influence over a wider range of cases than would be possible if the group were to focus on direct litigation support. For example, the landmark 1971 Title VII case, Griggs v. Duke Power, cost $100,000 to litigate before the Supreme Court. Cases today are even more complex and can last for decades.

Political theory also offers a variety of justifications for amici. For example, some commentators argue that actions of amici, together with other forms of political action, can serve as democratic "institutional restraint[s]" on the Supreme Court.

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43 See WASBY, supra note 8, at 35. Professor O'Neill's analysis of amici participation in Bakke concluded that "[t]he survival needs of many organizations took precedence over the goals they were formed to achieve" in determining their role in Bakke. O'NEILL, supra note 3, at 63.

44 See, e.g., O'NEILL, supra note 3, at 114 (quoting one staff member's description of the ACLU Bakke brief as a "coup").

45 See Bradley & Gardner, supra note 3, at 81-82.

46 See id.

47 Id. at 81.

48 WASBY, supra note 8, at 45.

49 O'NEILL, supra note 3, at 144.


51 See WASBY, supra note 8, at 123.

52 See, e.g., id. at 127 (noting that many employment discrimination cases last up to 10 years).

53 See Plass, supra note 31, at 1195. Such restraints seem wrong both as a matter of
Others argue that an amicus can serve as "a mechanism fostering pluralistic decision making." In short, amici can play a variety of roles which can be classified into two broad categories: legal and lobbying. When amici play a legal role, they attempt to inform the Court of legal arguments or considerations not raised by the parties. For example, an amicus might be better placed than the parties to argue the parameters of a potential affirmative defense because the facts of a particular case make it clear that any reasonable formulation of the defense would or would not apply. When amici play a lobbying role, however, they attempt to persuade the Court that the law should follow a particular course. This course is chosen not based on statutory construction, but rather because the amici desire the law to follow that path. Thus, an amicus might argue that an affirmative defense ought to exist with respect to a particular statutory provision, not because of the legislative history or statutory language, but because liability would harm a class of employers and produce unemployment. Alternately, an amicus might follow the practical advice offered by a well-known litigator that amicus briefs should be crafted to catch the attention of "swing vote" justices. Such advice confirms the primacy of the lobbying role.

There are many ways to categorize amici. In this Article I will use one main distinction: interest versus expertise. Amici may have a direct interest in the subject matter of a case. For example, employers are interested in the interpretation of Title VII because they may be sued under the law. Similarly, plaintiffs' lawyers have a significant interest in the interpretation of the statute because it directly affects their ability to win cases for their clients. Interests may be larger than pocketbook issues, of course; both employers' and plaintiffs' counsel are likely to believe strongly in the justice of their positions. Issues also may relate indirectly to pocketbook interests—funding issues are often critical for many of the organizations involved in these cases. In theory, interest alone is not enough to justify amicus participation.

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O'NEILL, supra note 3, at 18.

Disputes may exist over the proper principles of statutory construction. Almost everyone, however, will concede that legitimate and illegitimate grounds exist, even if they disagree on the margins about which are which.

See Ennis, supra note 3, at 608-09.

See O'NEILL, supra note 3, at 62-63 (distinguishing amici based on advocacy goals—interest groups, minority-defense organizations, and public interest organizations—and scope, based on "the breadth and variety of arguments" used in the organization's internal debates over its position); WASBY, supra note 8, at 51 (relying on a distinction between membership-based groups and those with only contributors).

See WASBY, supra note 8, at 77 ("Resource mobilization and resource allocation are often related. Strategies undertaken are also a function of both the amount and types of
Most of the amici in these cases, however, appear to believe interest alone would justify their participation.\textsuperscript{60}

Second, amici may have expertise that relates to a question in a case. Human resource managers, for example, frequently deal with a wide range of matters affected by antidiscrimination law. They are in a position to provide insights, not only into how a particular interpretation might affect the subgroup of cases that courts experience, but also into the broader range of employer-employee and employee-employee interactions that occur in the workplace.\textsuperscript{61} Expertise can take other forms as well: Law professors who have extensive teaching and research experience in a particular field may be able to offer a critique of potential rules that provides a "big picture."

These interests and expertise may be mixed together in various combinations. A specialized bar association has an economic interest in creating rules that benefit it or its clients,\textsuperscript{62} as well as specialized knowledge acquired from its collective professional experience. Law professors may have both expertise and ideological preferences and/or professional interests in promoting the development of a subject which they enjoy teaching. Unsurprisingly, the amici in the cases studied in this Article do not provide clear examples of just one type of interest. Sorting out the interests presented by a group may be useful nonetheless, because the types of arguments made by the parties may suggest that a particular type of interest predominates.

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\textsuperscript{59} See Ryan v. Commodity Futures Trading Comm'n, 125 F.3d 1062, 1063 (1997). An amicus brief should normally be allowed when a party is not represented competently or is not represented at all, when the amicus has an interest in some other case that may be affected by the decision in the present case (though not enough affected to entitle the amicus to intervene and become a party in the present case), or when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide. \textit{Id.} See also Ferguson v. Brick, 649 S.W.2d 397, 399-400 (1983) ("[H]enceforth, we will deny permission to file a brief when the purpose is nothing more than to make a political endorsement of the basic brief.").

\textsuperscript{60} See infra notes 64-127 and accompanying text.

\textsuperscript{61} See also Calkins, supra note 3, at 270 (describing amici's role as providing "a reality check").

\textsuperscript{62} In some cases, specialized bars may benefit from rules that do not benefit their clients. For example, defense attorneys benefit from the additional work provided by liberal antidiscrimination laws even if their clients would be better off with more restrictive statutes.
II. THE AMICI

A. Pro-Employer Amici

Of the four briefs filed in *Faragher* and two each in *Oncale* and *Ellerth*, six amici participated on the side of the employer. Table 1 provides a summary of this amici participation. Three employer-side amici participated in only one of these cases, one participated in two, and one participated in all three.\(^{63}\)

Table 1: Amici Participation

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<td>AFL-CIO</td>
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<td>Lawyers' Committee for Civil Rights Under Law/ACLU</td>
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<td>National Women's Law Center/ Equal Rights Advocates/ Women's Legal Defense Fund</td>
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<td>National Employment Lawyers Association</td>
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<td><strong>Pro-Defendant</strong></td>
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<td>Equal Employment Advisory Council</td>
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\(^{63}\) See infra Table 1: Amici Participation, at 835-36.
1. The Chamber of Commerce of the United States

The Chamber of Commerce of the United States ("CCUS") filed amici briefs in *Faragher* and *Ellerth*.

It stated its interest as stemming from its members' "vital interest" in the outcome of the cases in which it participated because most of its members are potential defendants in Title VII cases. An "important function" of the CCUS is "represent[ing] the interests of its members in the federal courts in cases addressing issues of widespread concern to the American business community." Although it could have claimed expertise in the matter, because some of its members presumably have been actual defendants in Title VII matters and because its members have significant experience as employers, the CCUS made no explicit expertise claim. It did note that it regularly appeared as amicus before the Court, including participation in employment discrimination cases.

2. The Equal Employment Advisory Council

The Equal Employment Advisory Council ("EEAC") filed amici briefs in all three cases. The EEAC is made up of "over 300 of the nation’s largest private

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sector corporations” and was organized in 1976 “to promote sound approaches to the elimination of employment discrimination.” Based on its directors’ and officers’ experience in personnel matters and antidiscrimination law, the EEAC claimed “a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment principles and requirements.” This understanding made the EEAC “well situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers.” In addition to this expertise, the EEAC noted that its members would be affected directly by the decision and, thus, the issues were “extremely important to the nationwide constituency that EEAC represents.” The EEAC is a repeat player in employment discrimination cases, filing numerous amici briefs in the U.S. Supreme Court, courts of appeals, and various state supreme courts.

In *Oncale, Ellerth*, and *Faragher*, the EEAC simultaneously was acting as a provider of information (offering “practical” expertise derived from its members’ experience with the implementation of antidiscrimination laws) and as an interest group (“brief[ing] the Court on the relevant concerns of the business community”).

3. The National Association of Manufacturers/The Manufacturers Alliance for Productivity and Innovation

The National Association of Manufacturers and the Manufacturers Alliance for Productivity and Innovation filed a joint brief in *Faragher*, neither participated in

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73 See EEAC Brief, *Faragher*, 1998 WL 32488, at *4 (citing cases in which the EEAC filed amici briefs, including three Supreme Court cases, four courts of appeals cases on the same issue, and an unspecified number of state court cases); EEAC Brief, *Oncale*, 1997 WL 634312, at *3-4 (citing cases in which the EEAC filed amici briefs and noting participation of the EEAC in EEOC rulemaking); EEAC Brief, *Ellerth*, 1998 WL 93294, at *3-4 (citing cases in which the EEAC participated).
76 See Brief Amici Curiae of the National Association of Manufacturers and
Oncale or Ellerth. The National Association of Manufacturers ("NAM") is a broad-based industrial trade association with a significant number of large employers as members. The Manufacturers Alliance for Productivity and Innovation ("MAPI") is a "nonprofit research organization supported by some 450 manufacturing companies from a broad range of industries." MAPI maintains "two standing Human Resource Committees" which keep the membership in touch with important legal developments concerning Title VII.

Both the NAM and the MAPI asserted interests in "maintaining work environments that are free from harassment," in "ensuring that the standard of employer liability for the unauthorized acts of employees is interpreted consistently with the text of Title VII," and in "clarify[ing] the standard of employer liability so that needless litigation can be avoided." Both groups thus asserted interests based on their status as representatives of entities affected by the law. Although neither explicitly claimed it, based on their members' experience, both also presumably could offer expertise on workplace issues.

4. The Society for Human Resource Management

The Society for Human Resource Management ("SHRM") filed an amicus brief only in Faragher. The SHRM is a professional association of human resource personnel, with 90,000 members around the world. The SHRM stated its interest in the case as "the orderly development of the law defining, in practical terms, the meaning of nondiscrimination and equal employment opportunity and, more specifically, the nature and scope of an employer's obligation to provide a workplace free from sexual harassment." In Faragher, the "SHRM's interest [was] to protect its members by supporting rules that encourage employers to initiate and maintain, and employees to use, procedures that address sexual harassment complaints."


77 See id. at *1.

78 Id.

79 Id. at *2.


81 See id. at *1-*2.

82 Id. at *2.

83 Id. The employee-petitioner's position in Faragher, the SHRM argued, "would encourage employees to bypass internally established mechanisms and prematurely seek judicial redress for most acts of alleged harassment by supervisors." Id. at *3.
5. The Texas Association of Business & Chambers of Commerce

The Texas Association of Business & Chambers of Commerce ("TAB&CC") filed an amicus brief in only one case, Oncale. The TAB&CC is a nonprofit corporation which represents more than 6,000 businesses, 10,000 individuals, and 300 chambers of commerce in Texas. The organization stated its interest was simply to combat the 

B. Pro-Employee Amici

Twenty-eight amici participated on the side of the employees through fourteen briefs in the three cases, with six amici participating in Faragher through four briefs, twenty-three in Oncale through six briefs, and six in Ellerth through four briefs. Twenty-two employee-side amici participated in only one case, four participated in two cases, and two participated in all three.

84 See Brief of Amicus Curiae Texas Association of Business & Chambers of Commerce in Support of Respondent, Oncale, 1997 WL 673838, at *1 [hereinafter TAB&CC Brief, Oncale].
85 See id.
86 Id.
87 Because the Fifth Circuit recently decided that same-sex sexual harassment was not covered by Title VII in Garcia v. Elf Atochem North America, 28 F.3d 446 (5th Cir. 1994), Texas employers likely did not have sufficient experience with the rule the TAB&CC opposed to bring any expertise to bear on the issue.
88 See supra Table 1: Amici Participation, at 835-36.
89 See id. These figures do not reflect that the National Organization of Women ("NOW") Legal Defense Fund also participated as counsel to a party in one case.
1. Feminist Groups

Five feminist groups participated in these cases. One (the National Women’s Law Center) participated as amici in all three cases. Another (the NOW Legal Defense and Education Fund) participated as amici in two and as employee counsel in one. Equal Rights Advocates participated in both Faragher and Ellerth. The Connecticut Women’s Education and Legal Fund and the Northwest Women’s Law Center only participated in Oncale.

In Oncale, five feminist groups (the NOW Legal Defense and Education Fund, the Women’s Legal Defense Fund, the National Women’s Law Center, the Connecticut Women’s Education and Legal Fund, and the Northwest Women’s Law Center) participated in a coalition with civil liberties groups and gay and lesbian rights groups. All five groups asserted interest and, at least implicitly, expertise-based claims.

In Ellerth, four feminist organizations filed a joint brief. All four groups asserted interest and, at least implicitly, expertise-based claims.

In Faragher, three groups (the National Women’s Law Center, Equal Rights Advocates, and the Women’s Legal Defense Fund) filed a joint brief. Although the three organizations made no explicit claim to expertise in the area, their long histories of involvement in employment discrimination matters entitled them to a claim at least

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91 See NWLC/ERA/WLDF Brief, Faragher, at *1; ERA/NOWLDEF/NSW&F/NWLC Brief, Ellerth, at *1; Lambda Coalition Brief, Oncale, at *1.

92 See ERA/NOWLDEF/NSW&F/NWLC Brief, Ellerth, at *1; Lambda Coalition Brief, Oncale, at *1.

93 See NWLC/ERA/WLDF Brief, Faragher, at *1; ERA/NOWLDEF/NSW&F/NWLC Brief, Ellerth, at *1.

94 See Lambda Coalition Brief, Oncale, at *1.

95 See id.

96 See ERA/NOWLDEF/NSW&F/NWLC Brief, Ellerth, at *1.
equal to those of amici making such a claim explicitly. The need for a coalition of feminist groups developed, in part, because of splits over litigation strategy in earlier cases.97

2. The AFL-CIO

The American Federation of Labor/Congress of Industrial Organizations ("AFL-CIO") filed an amicus brief in Ellerth98 and Faragher.99 The AFL-CIO made no explicit declaration of interest, other than to describe itself as a federation whose constituent unions have a membership of "approximately 13,000,000 working men and women."100 Its interests include the interests of its organizational members and their individual members in a harassment-free workplace, its institutional interest in ensuring that Title VII is interpreted consistent with the unions' interests,101 and its expertise from the experience of its member unions in arbitration proceedings.

3. The National Employment Lawyers Association

The National Employment Lawyers Association ("NELA") filed briefs in all three cases in support of the employees.102 The NELA is a specialized bar association

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97 See WASBY, supra note 8, at 50 (describing the formation of multiple feminist legal groups in 1960s and 1970s); see also O'Connor, supra note 15 (describing the differing roles of various organizations).


100 AFL-CIO Brief, Ellerth, 1998 WL 145348, at *1.

101 The involvement of unions with employment discrimination can be explained both as a (relatively late blooming) ideological commitment and as a means of securing legislation that reduces the differential between union and nonunion labor costs. In particular, labor unions often have been accused of fostering discriminatory practices, both directly and indirectly, through advocacy of seniority-based schemes that favored white employees. Regardless of whether such practices are motivated by discriminatory intent, they indicate a clear divergence between the interests of unions and those of civil rights organizations. See RAY MARSHALL ET AL., EMPLOYMENT DISCRIMINATION: THE IMPACT OF LEGAL AND ADMINISTRATIVE REMEDIES 26-60 (1978) (describing Title VII cases with regard to construction industry union hiring hall practices); William B. Gould, BLACK POWER IN THE UNIONS: THE IMPACT UPON COLLECTIVE BARGAINING RELATIONSHIPS, 79 YALE L.J. 46, passim (1969).

102 See Brief Amicus Curiae of the National Employment Lawyers Association in Support of Petitioner, Oncale, 1997 WL 458806 [hereinafter NELA Brief, Oncale]; Motion for Leave to File Brief Out of Time of the National Employment Lawyers Association, Faragher, 1998
of over 3,000 plaintiff's attorneys in the areas of labor, employment, and civil rights. Its asserted interest was protecting its members' clients "by helping to ensure that Title VII's goal of eradicating employment discrimination is fully realized." In addition, the NELA argued in *Oncale* that rules making employment discrimination cases hard to prove disadvantaged its members and members' clients.

As a specialized bar association, the NELA has an obvious interest in perpetuating and expanding the area of practice from which its members derive their income. The self-interest of its members also suggests that its interests include expanding the role of lawyers in interpreting antidiscrimination law.

4. Civil Liberties Groups

Three civil liberties groups participated in these cases: the Lawyers' Committee for Civil Rights Under Law participated in *Faragher*; the American Civil Liberties Union participated in *Faragher* and *Oncale*; and People for the American Way participated in *Oncale*.

The American Civil Liberties Union ("ACLU") is a nationwide, membership-based nonprofit organization with almost 300,000 members. It has been an active participant in Title VII cases before the Supreme Court. Unlike some interest groups, its involvement in cases often is determined through a decentralized decision-making process. In defining its interest, it stated that "[b]ecause the ACLU believes that an appropriate test for employer liability is critical to the effective enforcement of

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109 See WASBY, supra note 8, at 66; Motion for Leave to File a Brief as Amici Curiae and Brief for the Lawyers' Committee for Civil Rights Under Law and the American Civil Liberties Union as Amici Curiae in Support of Petitioner, *Faragher*, 1997 WL 800001, at *2 [hereinafter Lawyers' Committee/ACLU Brief, *Faragher*].
110 See WASBY, supra note 8, at 66-67.
Title VII—for women as well as for racial minorities—the ACLU has a substantial interest in the proper resolution of the case.¹¹¹

The Lawyers’ Committee for Civil Rights Under Law (“Lawyers’ Committee”) is an elite bar organization made up of bar leaders and law school deans which handles many discrimination cases.¹²

People for the American Way is “a nonpartisan citizens’ organization” founded in 1980 which aims “to promote and protect civil and constitutional rights.”¹³ It is “actively involved” in antidiscrimination law issues, including extension of coverage to gay men and lesbians “through such activities as supporting the enactment of civil rights legislation, participating in civil rights litigation, and conducting programs and studies directed at reducing problems of bias, injustice, and discrimination.”¹¹⁴ It sought to participate in *Oncale* “to help vindicate the important interests at stake.”¹¹⁵

All three groups thus made explicit interest group claims for the Court’s attention as well as implicit expertise claims based on their prior experience in litigating Title VII claims.

5. The Rutherford Institute

The Rutherford Institute filed an amicus brief only in *Ellerth.*¹¹⁶ The Institute is a nonprofit organization that provides “legal services nationwide in defense of civil and religious liberties.”¹¹⁷ Perhaps best known for its role in the Paula Jones sexual harassment suit against President Clinton,¹¹⁸ it has filed numerous amici briefs on a wide range of topics.¹¹⁹ The Institute’s role thus was akin, at least theoretically, to that of the ACLU, providing representation to an interest and providing expertise based on its frequent participation in such cases.
6. The American Trial Lawyers Association

The American Trial Lawyers Association ("ATLA") filed an amicus brief in only one case, Oncale. The ATLA is a specialized bar association of "approximately 50,000 attorneys who primarily represent plaintiffs in personal injury, civil rights and commercial law cases." Its formal statement of interest noted only that the ATLA believes that the "refusal of the United States Court of Appeals for the Fifth Circuit to recognize any claim for same-sex sexual harassment under Title VII . . . jeopardizes the national policy of nondiscrimination in employment and erodes the right of employees to be free from sexual and gender harassment in the workplace."

In addition to this ideological interest, the ATLA had a potential expertise claim, which it did not assert, based on its members' litigation experience. It also had a self-interest claim in its members' financial stake in promoting additional causes of action.

7. Coalition of Men's and Sexual Assault Groups

A coalition of fourteen groups concerned with issues surrounding men and sexual violence filed a joint brief authored by Professor Catharine MacKinnon ("MacKinnon Coalition"). Although it is difficult to summarize briefly the interests of a coalition made up of so many organizations, they all share similar organizational goals related to their views on sexuality. Thus, for example, the lead member of the coalition, the National Organization on Male Sexual Victimization, Inc. ("NOMSV"), "believes that sexual harassment, homophobia, and male privilege to engage in violent/aggressive behaviors are all norms that contribute to a social context that breeds sexual abuse." The groups also similarly define their interests in the case. NOMSV, for example, had an interest "because it involves the sexual victimization of a male, because NOMSV is intent on stopping such abusive incidents from occurring, and because NOMSV is committed to changing social norms that contribute to such incidents." These groups thus both assert expertise in the subject matter and an interest in the outcome.

120 See Amicus Curiae Brief of the Association of Trial Lawyers of America in Support of the Petitioner, Oncale, 1997 WL 453675 [hereinafter ATLA Brief, Oncale].
121 Id. at *2.
122 Id.
124 Id. at *1a.
125 Id.
8. Law Professors

A group of twenty-nine law professors "who teach employment law, discrimination law, women, gender, or race and the law" filed an amicus brief in *Oncale*. The law professors made an explicit expertise claim based on the inconsistent decisions of the courts of appeals, the professors' own studies of "the history and fundamental principles that underlie sexual harassment doctrine specifically, and discrimination law generally."

C. Summary

Amici participated more heavily on the employee-side in these three cases (twenty-eight to eight), although the disparity is less if one counts briefs rather than participants (fourteen to six). Amici also participated more heavily in *Oncale* than in *Ellerth* or *Faragher*; and participation in *Oncale* was much heavier on the side of the employee, whether counting briefs or amici, than in the other two cases.

The greater participation in *Oncale* by employee-side amici can be explained by two differences between it and the other cases. First, employers probably correctly perceive same-sex sexual harassment as a much less prevalent problem in the workplace than opposite-sex sexual harassment. Interest groups on the employee-side, however, most likely saw *Oncale* as an opportunity to expand the reach of Title VII in a symbolically important way. Moreover, as demonstrated by their briefs, these groups had significantly different strategies for pursuing the issue of same-sex harassment.

Second, *Ellerth* and *Faragher* raised issues that generally would have significant impacts on employers' liability for sexual harassment, while casting the issues in legal terms that made the issues appear less important to nonlawyers. The two sets of interest groups thus perceived the relative importance of the cases in opposite terms.

Although the amici in these cases could make some claim to expertise in workplace discrimination matters—whether from long experience representing one side or the other, from being sued themselves, or from academic study—most did not emphasize their expertise in formally stating their interest. They chose instead to emphasize their interests in promoting what they viewed as the appropriate legal rule in terms similar to that with which an interest group might approach a member of Congress.

One might ask why the Supreme Court should care what interest groups think about the appropriateness of a legal rule. Even if a group is concerned purely with

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127 Id. at *1a.
advocating a position that fits its policy preferences, why do the amici not make more
of an effort to hide their naked policy preferences behind at least a fig leaf of
expertise? What comes across clearly in the statements of interest is that these
groups believe that their views count because of who they "represent." The
prevalence of coalition briefs reinforces this impression—amassing multiple
"authors" behind a brief appears to give it additional weight, at least to those filing
the briefs. The groups' own statements of interest thus suggest that the amici saw
themselves primarily as lobbyists.

III. THE CASES

The Supreme Court has decided relatively few cases dealing directly with Title
VII.\textsuperscript{128} When it decided to consider three major cases in one term, the Court signaled
a significant change in its willingness to shape the interpretation of the statute. This
section briefly describes the significance and background of the three cases in which
the amici participated.

\textit{Oncale, Ellerth, and Faragher} are representative of the "new" civil rights cases.
Unlike pre-Civil Rights Act of 1964 cases, which involved "almost exclusively
constitutional litigation," after the 1964 Act the emphasis shifted to statutory
issues.\textsuperscript{129} This "watershed"\textsuperscript{130} produced several important changes in civil rights
litigation. First, the cases became much more complex legally because they involved
more than constitutional issues.\textsuperscript{131} Second, as the cases increasingly involved more
complex facts rather than facially discriminatory statutes, attention shifted to the
more subtle fact patterns.\textsuperscript{132} Third, the civil rights coalition itself became more
complex as women, Hispanics, gays and other groups began to assert their own
interests in addition to, and sometimes in opposition to, black civil rights
organizations.\textsuperscript{133} The new members' interests sometimes conflicted with those of
more traditional civil rights and civil liberties organizations. Moreover, "[n]o one
entity like the NAACP Legal Defense Fund [did in the early school desegregation
cases] could control litigation under Title VII" because so many organizations, as
well as the Justice Department, became involved.\textsuperscript{134}

\textsuperscript{128} The first case was \textit{Griggs v. Duke Power Co.}, 401 U.S. 424 (1971). See \textit{Wasby, supra}
note 8, at 17.
\textsuperscript{129} \textit{Wasby, supra} note 8, at xiv.
\textsuperscript{130} \textit{Id.} at xiv.
\textsuperscript{131} \textit{See id.} at xv.
\textsuperscript{132} \textit{See id.} at xv, 121-22.
\textsuperscript{133} \textit{See id.} at xv.
\textsuperscript{134} \textit{Id.} at 50.
A. Oncale v. Sundowner Offshore Services, Inc.

Title VII does not mention sexual orientation; indeed, it mentions sex only as a result of a historical fluke in which opponents of the Civil Rights Act of 1964 added it as a prohibited ground for discrimination in hopes of preventing the bill's passage. This quirk in the legislative history means that there is no substantive legislative history of the language regarding sex as a prohibited ground for discrimination. The courts of appeal thus have wrestled with the issue of how to apply the statute when both the harasser and the victim are of the same sex.

Most courts concluded that the statutory language barring discrimination "because of . . . sex" meant that any conduct that was sexual in nature could serve as the basis for a claim. The Fifth Circuit, however, barred all same-sex sexual harassment claims, and the Fourth Circuit disallowed claims in which both the harasser and victim were heterosexuals of the same sex.

The question before the Court in Oncale was which of these interpretations of the "because of . . . sex" language should be followed. The Court's choice essentially was unconstrained by legislative history and statutory language. Although all three circuit court interpretations contained flaws (amply discussed by the parties and amici), all were plausible interpretations of Title VII, and the Court could have chosen any one of the three without violating any evidence of congressional intent.

Oncale came before the Court after a panel of the Fifth Circuit affirmed a district court's grant of summary judgment in favor of the employer. The employee-petitioner had worked on an offshore oil rig where he alleged he was subjected to threats and acts of sexual abuse.

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135 See Catharine MacKinnon, Reflections on Sex Equality Under Law, 100 Yale L.J. 1281, 1283-84 (1991) ("[S]ex discrimination in private employment was forbidden under federal law only in a last minute joking 'us boys' attempt to defeat Title VII's prohibition on racial discrimination."). Even a recent revisionist attempt to argue that this position is incorrect concedes the floor debate involved the sponsor of the amendment opposing the law and a great deal of joking among the members. See Robert C. Bird, More Than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act, 3 WM. & MARY J. WOMEN & L. 137, 149-53 (1997).
137 See, e.g., Quick v. Donaldson Co., Inc., 90 F.3d 1372 (8th Cir. 1996) (allowing a claim by a male employee who repeatedly was subject to "bagging" by other employees, a process in which other men grabbed and squeezed the victim's testicles).
142 The Supreme Court opinion describes the alleged facts only in general terms "in the interest of both brevity and dignity." Id. at 1000. Briefly, other members of the oil rig crew forcibly subjected Oncale to a series of humiliating, sexual acts. These allegedly included
The employee-petitioner’s arguments were straightforward. Title VII says nothing about limiting the sex discrimination prohibition to persons of the opposite sex; because the harassment alleged by Oncale was sexual in nature, his claim should be covered by the statute. On the other side, the employer made an equally straightforward argument: No one in 1964 possibly could have imagined that same-sex sexual harassment was within the scope of Title VII and, therefore, Oncale’s claim could not be covered.

In a brief, unanimous opinion by Justice Scalia, the Supreme Court held that Title VII does not preclude actions in which both the alleged harasser and victim are of the same sex. The Court stressed that general limits on Title VII claims would restrict the reach of its holding, emphasizing that conditions must be severe under a reasonable person standard to support a sexual harassment claim.

Three things are noteworthy about the Court’s opinion. First, the Court approached the issue as requiring it to determine whether there was a limitation either in Title VII or its earlier opinions that precluded same-sex claims, rather than as searching for a reason to include such claims. Given the legislative history of the inclusion of sex as a prohibited ground for discrimination and the lack of statutory language addressing any form of sexual harassment, it is clear, as the Court acknowledged, that same-sex harassment was “not the principal evil Congress was concerned with when it enacted Title VII.” But because “it is ultimately the provisions of our laws rather than the principal concerns of our legislatures by which we are governed,” the Court concluded that intent was irrelevant. The Court’s approach was thus classic Scalia—a simple reading of the statute was enough to resolve the issue.

Second, the Court did not address any of the broader sex-related themes raised in the legal literature and by several amici. Indeed, the Court seemed to go out of

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143 See Petitioner’s Brief, Oncale, 1997 WL 458826, at *9-*12.
144 See Respondent’s Brief, Oncale, 1997 WL 634147, at *10-*15.
145. See Oncale, 118 S. Ct. at 1001-02. Justice Thomas also filed a brief concurring opinion emphasizing the limited nature of the holding. See id. at 1003 (Thomas, J., concurring).
146 See id. at 1003.
147 See id. at 1002 (“We see no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII.”).
148 Id. at 1002.
149 Id.
151 See infra notes 254-61, 339-512 and accompanying text.
its way to avoid the word "gender," which has become something of a code word for a feminist theory-influenced approach to Title VII.

Third, the Court devoted almost a third of its short opinion to minimizing the danger that its holding would "transform Title VII into a general civility code for the American workplace." The Court argued that this concern, a prominent theme of the employer and one of its two amici, was misplaced because the risk of such an impact "is no greater for same-sex than for opposite-sex harassment, and is adequately met by careful attention to the requirements of the statute."

B. Burlington Industries, Inc. v. Ellerth

Before Oncale, Ellerth, and Faragher, courts interpreted Title VII to produce liability for sexual harassment under two theories: quid pro quo and hostile environment. Under the quid pro quo theory, an employee could bring a claim when an employer demanded sexual acts in return for some benefit (i.e., a raise). Under the hostile environment theory, an employee could bring a claim when an employer's actions created a change in the terms and conditions of employment. For example, an employee forced to endure constant sexual comments could bring a hostile work environment claim.

Although not mentioned in the statute, these terms found their way into Title VII jurisprudence in Meritor Savings Bank, FSB v. Vinson and numerous lower court opinions. The lower courts were split, however, on how to deal with unfulfilled sexual threats made by supervisors, as such claims did not appear to fit neatly into either of the two categories. The Supreme Court therefore granted certiorari in Burlington Industries, Inc. v. Ellerth to resolve the issue.

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152 Oncale, 118 S. Ct. at 1002.
153 See Respondent's Brief, Oncale, 1997 WL 634147, at *16-*22.
154 See, e.g., EEAC Brief, Oncale, 1997 WL 634312, at *6 ("A contrary rule effectively would convert Title VII from a focused mandate to end discrimination into an unmanageably broad code of working behavior.").
155 Oncale, 118 S. Ct. at 1002.
156 See, e.g., Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982) (noting plaintiff's claim that she was denied admission to a police academy because she refused to have sexual relations with her supervisor).
157 See Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986) ("[A] requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets." (quoting Henson v. City of Dundee, 682 F.2d 897, 902 (11th Cir. 1982))).
The employee in that case, Kimberly Ellerth, worked for Burlington Industries for fifteen months, ending her employment in May 1994.\(^{161}\) She first worked as a marketing assistant for roughly twelve months and then as a sales representative until her resignation.\(^{162}\) After Ellerth's resignation from Burlington, she wrote to her supervisor alleging that she had resigned because Theodore Slowik, the vice president in charge of her division, repeatedly had sexually harassed her.\(^{163}\)

Burlington successfully moved for summary judgment in the district court.\(^{164}\) On appeal, a panel of the Court of Appeals for the Seventh Circuit reversed, holding that Ellerth had presented enough evidence to justify either a quid pro quo or hostile environment claim.

The Seventh Circuit then granted rehearing en banc.\(^{166}\) On rehearing the Circuit produced eight separate signed opinions following a diverse group of theories about quid pro quo claims. A majority of the circuit judges found that Ellerth had waived her hostile environment claim and Ellerth did not appeal the district court's judgment on the constructive discharge claim.\(^{167}\) The wide range of approaches used by the judges of the en banc court mirrored the wide range of approaches to the issue taken by the lower courts.\(^{168}\)

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\(^{161}\) See id. at 2262.


\(^{163}\) See Ellerth, 118 S. Ct. at 2262. Briefly, Ellerth alleged that Slowik made repeated inappropriate sexual comments to her (e.g. asking her if she was “practicing” in preparation for starting a family), see Ellerth, 912 F. Supp. at 1106, inappropriately touched her (twice on the knee and once on the buttocks), see id. at 1107-08, and told her offensive sexual jokes, see id. at 1106-07. Ellerth alleged that Slowik hinted at a connection between her receptiveness to his behavior and her career by telling her, for example, “‘You know, Kim, I could make your life very hard or very easy at Burlington,’” Ellerth, 118 S. Ct. at 2262, and refusing to discuss a customer’s request with her “‘unless you want to tell me what you are wearing.’” Id. at 2262.

\(^{164}\) The district court found that Ellerth's failure to make use of Burlington's complaint procedure foreclosed her constructive discharge claim. See Ellerth, 912 F. Supp. at 1124. The district court also found that Ellerth could not prevail on a hostile work environment claim because Burlington lacked knowledge of the alleged harassment. See id. at 1118. Finally, the district court granted summary judgment on a quid pro quo theory, despite its belief that Ellerth had not made a quid pro quo claim, on the ground that such claims require actual adverse employment actions. See id. at 1121-23.

\(^{165}\) See Ellerth v. Burlington Indus., Inc., 102 F.3d 848 (7th Cir. 1996).

\(^{166}\) See Jansen, 123 F.3d 490.

\(^{167}\) See id. at 492-95.

\(^{168}\) Three judges (in Ellerth) joined Judge Flaum in an opinion that held that an unfulfilled threat was sufficient to violate Title VII because it altered the terms and conditions of employment. See Jansen, 123 F.3d at 495-504 (Flaum, J., concurring). Five judges wrote individually to disagree with the Flaum opinion. For purposes of this Article it is necessary
Like Oncale, Ellerth presented the Court with a fundamental issue in interpreting Title VII which the Court was free to resolve without many legislative history constraints. The dilemma caused by the quid pro quo/hostile environment distinction was a dilemma ultimately of the Court's own creation, as neither term has any basis in the statute. Indeed, the underlying issue of the nature of sexual harassment claims was itself the Court's own creation, because the statute does not mention sexual harassment.

The employer-petitioner's legal position focused on maintaining the distinction between quid pro quo and hostile environment theories.\(^{169}\) In contrast, the employee-
respondent opened her brief by denying that quid pro quo and hostile environment claims are separate and distinct: "The very language of the Question Presented posed by petitioner reflects a fundamental misconception regarding the nature of Title VII." Because the statute itself makes no reference to these theories, sexual harassment claims simply must meet the same statutory requirements as other claims—i.e., they must involve discrimination based on a prohibited ground, the discrimination must affect the plaintiff’s "compensation, terms, conditions, or privileges of employment," and "the discrimination must have been the act of an employer."  

In an opinion by Justice Kennedy, a six-justice majority of the Supreme Court set out a new rule for employer liability for supervisory acts. The majority began by recognizing that the distinction between the quid pro quo and hostile environment doctrines was “helpful, perhaps in making a rough demarcation between cases in which threats are carried out and those where they are not or are absent altogether," as the Restatement. Finally, the employer-petitioner argued that a majority of the circuits had adopted a position that precluded application of quid pro quo doctrine to unfulfilled threats. See Petitioner’s Brief, Ellerth, 1998 WL 90827, at *31-*35. Respondent’s Brief, Ellerth, 1998 WL 145325, at *11. Id. at *11-*12 (citing and quoting the statute, 42 U.S.C. § 2000e et. seq. (1994)). This argument had five main parts. First, the employee-respondent argued that sexual harassment by a supervisor is an action by the employer in which the harassing supervisor uses or is aided by his supervisory powers. See id. at *14-*25. This portion of the argument centered on an extended discussion of the “state action” doctrine under the Fourteenth Amendment because those cases “provide an established and familiar body of caselaw to which the courts should look in determining when the action of a supervisor or other worker is ‘employer’ action.” Id. at *17. Second, the employee-respondent argued that even unrealized threats constitute employer action. See id. at *25-*28. Again the brief resorted to creative analogies to make its argument. For example, the brief looked to criminal law cases involving the issue of whether a bank robber who brandishes but does not fire a weapon should receive an enhanced sentence for “using” a firearm. See id. at *26. Similarly, the brief compared the employer’s position to the “long discredited doctrine that proof of rape requires evidence that the victim had put up a sufficiently vigorous physical defense to sustain demonstrable injuries.” Id. at *27. Third, the employee-respondent argued that abuses of official power are employer action regardless of whether they produce “tangible” harm. See id. at *28-*31. This argument was built on logic, with the essence of the argument being that Title VII did not include such a distinction in the statute’s language. See id. at *30. Fourth, the employee-respondent argued that adoption of an anti-harassment policy would be insufficient to preclude liability on its own. See id. at *32-*42. Largely an argument from logic, this section of the brief also responded to arguments made by the pro-employer amici. See id. at *38-*39. Somewhat oddly, the brief also raised the issue of the sexual harassment charges against Sergeant Major of the Army Gene McKinney, going so far as to include a National Public Radio transcript as an appendix to the brief. See id. at *39-*40. Finally, the brief argued that summary judgment was inappropriate because material fact issues remained. See id. at *42-*44.

but beyond this are of limited utility." After defending its vague articulation of the terms in *Meritor*, the Court criticized the subsequent developments in the lower courts. In particular, the Court noted that the lower courts' use of the terms "encouraged Title VII plaintiffs to state their claims as *quid pro quo* claims, which in turn put expansive pressure on the definition." The Court then examined how unfulfilled threats fit within the hostile environment claim.

The Court found that "something more" than the supervisor's employment relationship was necessary because "[i]n a sense, most workplace tortfeasors are aided in accomplishing their tortious objective by the existence of the agency relation." To define that "something," the Court turned to the concept of a "tangible employment action," as discussed by Chief Judge Posner in his opinion below, and found that, when supervisors take such actions, the employer is vicariously liable. Adopting much of Judge Posner's rationale, the Court justified this vicarious liability by noting that such "company acts" depended both on the delegation of authority to the supervisor and characterization as official acts of the employer.

The Court went further than Judge Posner, however, by holding that harassment that does not culminate in a tangible employment action can be a violation of Title VII. Despite acknowledging there was "much confusion" among the lower courts about how to apply agency rules in these type of cases, the Court declined to create a clear rule. Instead, it created a vaguely defined affirmative defense for employers consisting of two elements: reasonable care in preventing and promptly correcting sexual harassment and unreasonable failure by the plaintiff to take advantage of preventive or corrective policies. Justice Ginsburg concurred in the judgment and the new rule. The dissenters criticized the majority opinion for "barely" attempting to

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173 *Id.* at 2264.
174 See *id.* ("In *Meritor*, the terms served a specific and limited purpose.").
175 *Id.* at 2264-65.
176 *Id.* at 2265.
177 *Id.* at 2268.
178 *Id.* at 2268-70.
179 See *id.* at 2269-70.
180 See *id.* at 2269.
181 *Id.*
182 See *id.* ("The aided in the agency relation standard, however, is a developing feature of agency law, and we hesitate to render a definitive explanation of our understanding of the standard in an area where other important considerations must affect our judgment.").
183 *See id.* at 2270.
184 See *id.* at 2271 (Ginsburg, J., concurring).
185 See *id.* at 2271-75 (Thomas, J., dissenting).
define the new rule, for a "whole-cloth creation that draws no support from the legal principles on which the Court claims it is based," and for "willful policymaking." The dissenters followed Chief Judge Posner's analysis from the opinions below relatively closely, citing it in several places.

C. Faragher v. City of Boca Raton

In *Faragher*, the Supreme Court addressed the question of when an employer can be held indirectly liable for hostile environment sexual harassment by a supervisor, a question left unresolved by its 1986 decision in *Meritor Savings Bank, FSB v. Vinson*. As the Court noted, the "Courts of Appeals have struggled to derive manageable standards to govern employer liability for hostile environment harassment perpetrated by supervisory employees. While following our admonition to find guidance in the common law of agency, as embodied in the Restatement, the Courts of Appeals have adopted different approaches." The problem the Court faced in *Faragher* ultimately was a statutory interpretation question made more difficult by Congress' failure to provide any evidence that it had considered the issue of employer liability for supervisory acts.

The primary statutory feature that demanded attention was the statute's use of the word "agent" in defining the word "employer." The Supreme Court's earlier refusal to give much guidance in *Meritor*, and its cryptic statements in that opinion about the role of the common law of agency, left the lower courts, the parties, and the amici struggling to find a conceptual anchor for their various approaches. Thus, although the question presented was one of statutory interpretation, it also was one in which the Supreme Court again had enormous freedom of action due to the vagueness of the statute and the *Meritor* opinion.

Beth Ann Faragher worked part-time as a lifeguard for the city of Boca Raton, Florida ("the City") from 1985 to 1990. After resigning her position to attend law school, Faragher sued the City and two of her immediate supervisors, Bill Terry and David Silverman, alleging that Terry and Silverman had created a "sexually hostile atmosphere... by repeatedly subjecting Faragher and other female lifeguards to 'uninvited and offensive touching,' by making lewd remarks, and by speaking of women in offensive terms." For example, Faragher alleged that Silverman told her

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185 Id. at 2271 (Thomas, J., dissenting).
186 Id. at 2273 (Thomas, J., dissenting).
187 Id. at 2274 (Thomas, J., dissenting).
188 Id. at 2272-73 (Thomas, J., dissenting).
192 See Faragher, 118 S. Ct. at 2279.
193 Id.
to "Date me or clean the toilets for a year." Both Terry and Silverman engaged in extensive crude and offensive conduct with the relatively few female lifeguards (four to six out of forty to fifty lifeguards).

The issue of liability for supervisory conduct was highlighted in this case because Boca Raton's lifeguards worked in a "paramilitary configuration"—a chain of command in which lifeguards reported to lieutenants and captains (including Silverman), who themselves reported to the Chief of the Marine Safety Division (Terry). Moreover, "[t]he lifeguards had no significant contact with higher city officials."

The facts also highlighted another crucial issue—the impact of employer efforts to control supervisory behavior. The City had a sexual harassment policy, which had been adopted in February 1986 and revised in May 1990. Many Marine Safety Section employees, including Terry, Silverman, and other lifeguards, were unaware of the policy, however, because it had not been circulated adequately. Further, important questions remained as to whether the employer could be liable if the harassed employee did not report the offensive conduct. Faragher never had complained to a city official with authority over Terry or Silverman about the behavior of the two men. The City first learned of the problem when, two months

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**Footnotes:**

195 *Id.*

196 *See id.* at 2281. For example:

Terry repeatedly touched the bodies of female employees without invitation, would put his arm around Faragher, with his hand on her buttocks, and once made contact with another female lifeguard in a motion of sexual stimulation. He made crudely demeaning references to women generally, and once commented disparagingly on Faragher's shape. During a job interview with a woman he hired as a lifeguard, Terry said that the female lifeguards had sex with their male counterparts and asked whether she would do the same.

Silverman behaved in similar ways. He once tackled Faragher and remarked that, but for a physical characteristic he found unattractive, he would readily have had sexual relations with her. Another time, he pantomimed an act of oral sex. Within earshot of the female lifeguards, Silverman 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.

*Id.* (citations omitted).

197 *Id.* at 2280.

198 *Id.* The lifeguards worked out of "a small one-story building containing an office, a meeting room, and a single, unisex locker room with a shower." *Id.* It was located at the beach, away from city hall. *See id.*

199 *See id.*

200 *See id.* at 2280-81.

201 *See id.* at 2281. She did speak with Robert Gordon, a lieutenant (and later captain), but regarded those comments not as a formal complaint, "but as conversations with a person she held in high esteem." *Id.* Gordon did not report the conversations. *See id.*
before Faragher resigned, a former lifeguard wrote to the City Personnel Director, Richard Bender, and complained about Terry and Silverman. Following an investigation, the City reprimanded Terry and Silverman, requiring them to choose between a forfeiture of annual leave or a suspension without pay.

Faragher prevailed on her Title VII claims in the district court in a bench trial. The court found that Terry’s and Silverman’s conduct was serious enough to constitute an abusive working environment. Turning to the question of the City’s liability, the district court put forth three justifications for holding the City liable for the conduct of Terry and Silverman: (1) the pervasiveness of the conduct; traditional agency principles; and (3) imputed knowledge to the City resulting from the combination of knowledge of the harassment by someone between the supervisors and Faragher in the chain of command, and the inaction of that individual. Based on these three theories, the district court awarded Faragher one dollar in nominal damages.

On appeal, a panel of the Eleventh Circuit reversed. The panel agreed that Terry’s and Silverman’s conduct created an “objectively abusive work environment,” but rejected the district court’s conclusion that the City was liable for their behavior. On rehearing en banc, the full Eleventh Circuit adopted the panel’s conclusion by a seven-to-five vote. The Supreme Court then granted certiorari.

The employee-petitioner urged the Court to adopt two theories of employer liability for supervisory conduct. First, the employee-petitioner argued that Restatement (Second) of Agency section 219(2)(d) provided an appropriate means for

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202 See id.
203 See id.
204 Faragher v. City of Boca Raton, 864 F. Supp. 1552 (S.D. Fla. 1994). Faragher obtained substantial relief on her other theories as well. See id. at 1568 (awarding $10,000 in compensatory damages and $500 in punitive damages to Faragher and $35,000 in compensatory damages and $2,000 in punitive damages to the other plaintiff, Nancy Ewanchew).
205 See id. at 1562-63.
206 See id. at 1563.
207 See id. at 1563-64.
208 See id. at 1564.
209 See id. at 1568.
210 See Faragher v. City of Boca Raton, 76 F.3d 1155 (11th Cir. 1996).
211 Id. at 1162.
212 See id. at 1164-65.
213 Faragher v. City of Boca Raton, 111 F.3d 1530 (11th Cir. 1997) (en banc).
215 This Article does not address the Petitioner’s Reply Brief, 1998 WL 66037, in detail because the rebuttal arguments are not of interest in comparing the amici with the parties.
evaluating employer liability. Second, the employee-petitioner urged that the employer’s “knowledge, both actual and constructive,” would create liability. At the Supreme Court, Faragher’s legal team included a lawyer from the National Organization for Women’s Legal Defense Fund, an organization which regularly participates as amicus in other Title VII cases and which was part of the feminist coalition in the other cases analyzed in this Article.

In addition to arguing for the straightforward application of the Restatement test, the petitioner’s brief included a substantial section devoted to justifying the analysis based on the structure of harassment. To do so, the brief first analogized

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216 Petitioner’s Brief, Faragher, 1997 WL 793076, at *19. The Restatement-based argument was almost entirely an argument from logic. After restating the Restatement provision in terms applicable to sexual harassment cases, the brief argued that “[i]n many cases, as here, the supervisor’s powers over the terms and conditions of the victim’s employment will facilitate that harassment because the victim reasonably believes that she is at risk of retaliation if she resists, objects to or complains about that harassment.” Id. at *21. To avoid turning the standard into strict liability, the employee-petitioner argued that the issue of whether the supervisor is aided in the harassment by his or her authority “is obviously a factual question to be addressed in light of the record in each specific case.” Id. at *21-*22. While a host of specific factors, such as the nature of the supervisory powers and the “proven efficacy of any anti-harassment program,” would play a role in resolving this question, “[i]n most cases, the question of fact will be whether the supervisor was aided in perpetrating the harassment by a reasonable fear on the part of the victim that she would face retaliation if she resisted, objected or complained to others.” Id. at *22. Applied to the record in this case, the employee-petitioner contended that this test was satisfied. See id. at *29-*30.

217 Id. at *30. The brief set out three ways in which the employer in this case had knowledge of the harassment. First, the employees had reported the harassment to Robert Gordon, another supervisor, and by imputing his knowledge to the city, the employer had actual knowledge. See id. at *30-*34. Second, the employer had constructive knowledge based on the pervasiveness of the conduct. See id. at *34-*36. Third, the employer had “constructive knowledge based on the absence of an effective policing mechanism.” Id. at *36-*41.

The brief’s actual knowledge argument was straightforward: Gordon knew of the harassment, Gordon was a supervisor, and so the employer therefore had knowledge. See id. at *31-*32. In response to the Eleventh Circuit’s “higher management” test, the brief merely noted that “[n]othing in agency law, however, requires notice only to ‘higher management;’ the most that is required is that the knowledge be on the part of someone with an obligation to act on that knowledge.” Id. at *31-*32. As supporting authority, the brief cited and briefly discussed an EEOC Policy Guideline, a Restatement comment, and a Title VII case. See id. at *32.

The brief devoted much less attention to the constructive notice claims. In making the pervasiveness constructive notice claim, the brief focused on recasting the issue as a factual question on which deference was due to the district court. See id. at *35-*36. In making the effective policing constructive notice claim, the brief largely quoted from a dissent below, see id. at *40-*41, and cited a series of academic and popular press articles on sexual harassment as evidence of the extent of the problem. See id. at *37 n.49.
environmental sexual harassment with quid pro quo harassment. For example, the brief noted:

If the supervisors in this case had threatened to dismiss Petitioner unless she permitted them to touch her buttocks or breasts, or to make crude remarks to her, that would have constituted quid pro quo sexual harassment, whether she had obeyed or had been fired for resisting. Hostile work environment cases involving supervisors differ from ordinary quid pro quo cases primarily in the explicitness with which the harassing supervisor exploits his supervisory power over the victim.\footnote{Id. at *23-*24 (footnotes omitted).}

The brief then gave an extended description of the sexual harassment theory, presenting it as "aided by the same victim fears as those triggered by explicit quid pro quo threats."\footnote{Id. at *24.} After describing the "broad discretionary powers" of supervisors in general, the brief then set forth the heart of its argument about supervisory power:

Sexual harassment is about power—the power of a harassing supervisor to inflict on a female subordinate conduct that he could not impose on any unwilling woman outside of the employment context. That power arises precisely because such a perpetrator is "aided in accomplishing the [harassment] by the existence of" his powers as a supervisor.

Indeed, the disproportionately large number of sexual harassment incidents involving supervisors reflects this critical aspect of the relationship between supervisors and subordinates. . . . The virtual non-existence of cases in which subordinates sexually harass their superiors reflects the fact that the actual or potential exercise of supervisory powers by the harassing supervisor often lies at the very heart of this misconduct.\footnote{Id. at *25-*26 (footnotes omitted).}

As support for these statements the brief cited both the facts of Title VII cases and other anecdotal materials.\footnote{See id. at *25-*26 nn.26-31.}
The employer-respondent’s brief contained three main arguments: the application of agency principles proposed by the employee-petitioner would lead to the equivalent of strict liability for employers, a result inconsistent with the holding in *Meritor*; a negligence standard is the appropriate standard for evaluating employer conduct; and, even if the negligence standard were applied, the employee-petitioner’s rules would not result in liability.

This brief made a different type of argument from, and relied on a different set of authorities than, the employee-petitioner’s brief. Instead of focusing on the nature of the workplace and its relationship to sexual harassment, the employer-respondent devoted most of its analysis to an evaluation of pre-Title VII agency cases involving facts similar to those in sexual harassment cases. For example, the brief argued that “a proper application of agency principles to Title VII hostile environment sexual harassment should look to common law treatment of intentional or ‘wanton’ torts, particularly those that involve unwelcome touching or verbal abuse of a sexual nature.” From these cases, the brief drew the principle that such conduct is outside the scope of employment and, hence, not a basis for employer liability.

Even when courts did impose liability for similar conduct, the principle relied upon suggests “at most . . . a possible basis for vicarious liability in cases of quid pro quo sexual harassment, in which a supervisor’s harassment is directly linked with the supervisor’s performance of his assigned duties . . .” Similarly, in arguing that the common law concept of apparent authority was not appropriate for analysis of sexual harassment cases, the brief relied on non-Title VII authority drawn from agency law to illustrate the principles and demonstrate that they did not fit the circumstances of Title VII cases.

In short, the employer-respondent’s brief made an argument, primarily based on traditional legal authorities (i.e., case law and treatises), for selecting certain common law agency principles to import into Title VII. The brief rarely relied on policy

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222 The brief also set out a version of the facts that concentrated on minimizing the seriousness of the harassing conduct. *See Respondent’s Brief, Faragher, 1998 WL 32487, at *3, *2-*9* (noting that the employee-petitioner worked with the alleged harassers during her entire tenure, that she contacted one of them seeking to return to work at the beach, that she did not discuss sexual harassment with a female friend who was a lifeguard, and that she did not discourage her sister from applying for a job at the beach).

223 *See id.* at *19-*35.

224 *See id.* at *35-*41.

225 *See id.* at *41-*50.

226 *Id.* at *23.

227 *See id.* at *24.

228 *Id.* at *25.

229 *See id.* at *29-*30 (“The common-law agency principle of ‘apparent authority’ was not meant to apply to evident intentional torts that are unrelated to the agent’s responsibilities, and it should not now be utilized for a purpose that was never intended.”).
arguments or assertions about either the structure of the workplace or the nature of sexual harassment. In the oral argument, however, the Court transformed this position into a policy argument.

As it did in all three cases discussed in this Article, the government participated in *Faragher* as an amicus. The EEOC took the position that employers are liable "when a supervisor is aided in the harassment by his agency relationship or when the employer knew or should have known about the harassment and failed to take appropriate corrective action."

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230 An exception was the secondary argument that a negligence standard for employer knowledge "comports with the remedial goals of Title VII." *Id.* at *38.

231 The exchanges with the employer-respondent's attorney centered on pressing him to articulate the distinction that would place a racially motivated hiring decision within the scope of employment and the supervisors' conduct in this case outside it. See Transcript of Oral Argument, *Faragher*, 1998 WL 146704, *25*-*54. After a number of questions on the issue from several members of the Court, the following exchange occurred, which captures the result of the questioning:

QUESTION: Can—can you say what—what harm do you do to the fabric of the law—and I'm not saying you don't—but what harm do you do if you say the—the policing of the environment, the policing of the work environment for a high level supervisor, is precisely analogous to hiring and firing in respect to a hirer? And if you do the hiring wrong, even for personal motives, the company is liable because the hiring/firing decision is the company. And if you do the policing of the environment wrong, your company is liable, because the policing of the environment is a company responsibility. I think that's what Justice Stevens and everybody has been trying to get at—I think. And—and you're saying, Well, that would be somewhat novel. But there is an analogy, I take it, in the asbestos area. And is there other harm that would be occurring if—if—I mean, is—would the law be hurt? Is that very novel? Is it contrary to other? You see what I'm—I'm trying to get a—

MR. RISSETTO: We believe the objectives of Title VII would be hurt.

QUESTION: And that's because of your policy argument. . . . is that a problem with the liability assessment? Or is it a problem with the substantive standard?

. . .

MR. RISSETTO: I—I think it's related to the problem of liability, as a practical matter.

*Id.* at *48*-*49. Thus, at least in oral argument, the Court reduced the relatively textured legal argument presented in the employer-respondent's brief to a policy argument. This policy argument, moreover, was one the employer-respondent would have difficulty winning because the "bad" outcome of employees lying in wait to bring suits was, as one justice put it, "Then you sue and you recover $1." *Id.* at *50. That the events in this case occurred prior to the Civil Rights Act of 1991 was what precluded punitive damages in this case, making subsequent cases potentially more serious.

232 The EEOC also participated in the en banc panel below as an amicus. See *Faragher* v. City of Boca Raton, 111 F.3d 1530, 1532 (11th Cir. 1997).

By a seven-to-two majority, the Supreme Court overturned the Eleventh Circuit opinion and remanded for entry of judgment in favor of the employee-petitioner.234 In the majority opinion, the Supreme Court analyzed two of the three theories of employer liability rejected by the Eleventh Circuit, finding it had no need to consider the claim that the employer was liable by virtue of its knowledge of the harassment.235

The majority rejected the argument for employer liability (which was based on Restatement section 219(1)) that the harassing supervisors were acting within the scope of their employment. After noting that most of the lower courts had agreed that “harassment consisting of unwelcome remarks and touching is motivated solely by individual desires and serves no purpose of the employer,”236 the Court acknowledged that “[t]hese cases ostensibly stand in some tension with others arising outside Title VII, in which the scope of employment has been defined broadly enough to hold employers vicariously liable for intentional torts that were in no sense inspired by any purpose to serve the employer.”237

The majority found that this tension was more apparent than real, concluding that the key to understanding the scope of employment cases generally was not “a mechanical application of indefinite and malleable factors set forth in the Restatement, but rather an inquiry into the reasons that would support a conclusion that harassing behavior ought to be held within the scope of a supervisor’s employment, and the reasons for the opposite view.”238 Although the majority conceded that a case could be made for finding that the harassment was within the supervisors’ scope of employment because of the pervasiveness of sexual harassment in the workplace, the majority rejected this rationale for two reasons. “First, there 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.”239 Second, making the employer liable on this theory would call into question a well-established body of court of appeals case law holding that employers were not liable for coworkers’ harassing behavior.240 Because the same rationale would apply to making employers liable for acts of both supervisors and coworkers, the majority concluded that “[i]t is quite unlikely that these cases would escape efforts to render them obsolete if we were to hold that supervisors who engage in discriminatory harassment are necessarily acting within the scope of their employment.”241

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235 See id.
236 Id. at 2286-87.
237 Id. at 2287.
238 Id. at 2288.
239 Id.
240 See id.
241 Id. at 2289.
The Court next turned to the argument that, based on Restatement section 219(2)(d), employers could be held liable because the authority granted to the supervisor by his employer facilitated the supervisor's harassing behavior. The majority agreed with the employee-petitioner:

[1]n implementing Title VII it makes sense to hold an employer vicariously liable for some tortious conduct of a supervisor made possible by abuse of his supervisory authority, and that the aided-by-agency relation principle embodied in section 219(2)(d) of the Restatement provides an appropriate starting point for determining liability for the kind of harassment presented here.\textsuperscript{242}

The application of section 219(2)(d) was limited, the majority found, by the Court's rejection in Meritor of "automatic" liability for employers.\textsuperscript{243} The Faragher majority considered two ways to reconcile section 219(2)(d) with the holding in Meritor: "requiring proof of some affirmative invocation of that authority by the harassing supervisor" and recognizing "an affirmative defense to liability in some circumstances."\textsuperscript{244} The majority rejected the former as leading to a "temptation to litigate" and conflicting results.\textsuperscript{245} Instead, the Court created an affirmative defense "that the employer had exercised reasonable care to avoid harassment and to eliminate it when it might occur, and that the complaining employee had failed to act with like reasonable care to take advantage of the employer's safeguards and otherwise prevent harm that could have been avoided."\textsuperscript{246}

Applying its newly-created analysis, the majority in Faragher found that the record supported a judgment against the employer. The supervisors had sufficient authority over the lifeguards to meet the requirements of the new test. Moreover, the City was foreclosed from raising an affirmative defense because of its failure to disseminate its sexual harassment policy to the supervisors and lifeguards.\textsuperscript{247}

\textsuperscript{242} Id. at 2290.
\textsuperscript{243} See id. at 2291.
\textsuperscript{244} Id.
\textsuperscript{245} Id. at 2292.
\textsuperscript{246} Id.
\textsuperscript{247} See id. at 2293.

Unlike the employer of a small workforce, who might expect that sufficient care to prevent tortious behavior could be exercised informally, those responsible for city operations could not reasonably have thought that precautions against hostile environments in any one of many departments in far-flung locations could be effective without communicating some formal policy against harassment, with a sensible complaint procedure.

Id.
Justices Scalia and Thomas dissented in a brief opinion by Justice Thomas,\textsuperscript{248} which reiterated his dissent from Ellerth.\textsuperscript{249} In addition to repeating his conclusion from Ellerth that "absent an adverse employment consequence, an employer cannot be held vicariously liable if a supervisor creates a hostile work environment,"\textsuperscript{250} Justice Thomas also criticized the majority for not remanding the case on the negligence issue because "the District Court made no finding as to the City's negligence, and the Court of Appeals did not directly consider the issue."\textsuperscript{251}

IV. POSITIONS

The amici's positions provide a good starting point for examining their contributions to Oncale, Ellerth, and Faragher. Anecdotal evidence from other cases suggests that amici sometimes have an influence on the Court's decisions.\textsuperscript{252} Amici's positions can add something entirely new to a case. Ivers and O'Connor, for example, found that one of the amici they studied sometimes went beyond the goals of the party whose position the amicus supported to ask the Court to reconsider or modify earlier decisions.\textsuperscript{253}

The positions available to the amici differed significantly in each of the three cases. In Oncale, the positions were limited by the narrow scope of the possible outcomes: same-sex sexual harassment either was covered or it was not, with relatively little room for a more nuanced position. In Faragher and Ellerth, however, there were so many possible positions on the key issues that the amici could, and did, adopt quite different rationales even when reaching similar conclusions.

A. Oncale

The two "business" amici (the EEAC and the TAB&CC) took identical positions, arguing (as expected) that same-sex sexual harassment simply was not

\begin{footnotesize}
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\item \textsuperscript{248} See \textit{id.} at 2294 (Thomas, J., dissenting).
\item \textsuperscript{249} See \textit{id.}
\item \textsuperscript{250} \textit{Id.}
\item \textsuperscript{251} \textit{Id.}
\item \textsuperscript{252} See, e.g., Ennis, \textit{supra} note 3, at 607; Susan Hedman, \textit{Friends of the Earth and Friends of the Court: Assessing the Impact of Interest Group Amici Curiae in Environmental Cases Decided By The Supreme Court}, 10 VA. ENVTL. L.J. 187, 193-97 (1991); Ivers & O'Connor, \textit{supra} note 3, at 169-70 (finding that arguments advanced by two amici in criminal cases frequently were adopted in majority and dissenting opinions); Leo Pfeffer, \textit{Amicus in Church-State Litigation}, 44 LAW & CONTEMP. PROBS. 83 (1981).
\item \textsuperscript{253} See Ivers & O'Connor, \textit{supra} note 3, at 171.
\end{itemize}
\end{footnotesize}
covered by Title VII. The most remarkable feature of the positions taken in these briefs is the lack of participation by amici on the employer’s side.

The five employee-side amici briefs contained a slightly more varied set of positions. The NELA and the ATLA argued that Title VII covered same-sex sexual harassment regardless of the sexual orientation of the individuals involved. The legal position of the MacKinnon Coalition brief also was that Title VII should cover same-sex sexual harassment. Its position went beyond the legal issue, however, by advocating a distinctive view of sexual harassment as well. The twenty-nine law professors argued that Title VII covered “same[-]sex sexual harassment,” and so the case should be remanded for further factual development. Finally, the coalition of eleven gay rights, feminist, and civil liberties groups led by the Lambda Legal Defense and Education Fund filed a brief arguing that Title VII covered same-sex sexual harassment. It also argued that Oncale was an inappropriate case in which to consider whether Title VII’s ban on sex discrimination has implications for sexual orientation discrimination.

The Court’s decision in Oncale appears to have little or nothing to do with the positions taken by the amici. The Court adhered to the language of Title VII in its brief opinion and found that the acts alleged in the case fit within the “because... of sex” language. The Court not only did not discuss the broader theories, like those advanced by the MacKinnon Coalition, but also did not even use the term “gender.” (A key component of such theories lies in differentiating “sex” and “gender.”)

B. Ellerth

The amici’s positions in Ellerth were far more complicated and are harder to summarize than those in Oncale. Two employee-side amici, the NELA and the AFL-CIO, argued in slightly different ways that this particular case was a bad one in which to decide the issue in question. On the merits, however, despite the general


\[255\] See NELA Brief, Oncale, 1997 WL 458806, at *4; ATLA Brief, Oncale, 1997 WL 453675, at *2-*3.

\[256\] See MacKinnon Coalition Brief, Oncale, 1997 WL 47814, at *4-*5.

\[257\] See infra notes 314-15.


\[259\] See Lambda Coalition Brief, Oncale, 1997 WL 471805, at *25 n.19.


\[261\] See, e.g., Leslie Bender, Sex Discrimination or Gender Inequality?, 57 FORDHAM L. REV. 941, 946-49 (1989) (distinguishing the terms “sex” and “gender”).

\[262\] See NELA Brief, Ellerth, 1998 WL 145353, at *2, *6-*8 (arguing that the writ should be dismissed as improvidently granted); AFL-CIO Brief, Ellerth, 1998 WL 145348, at *4-*14 (arguing that the “Question Presented” by the Petitioner was irrelevant to the outcome.
agreement among all four briefs that employers had broad liability for supervisory sexual harassment, they emphasized quite different ways of achieving that outcome.

On the fundamental question of what to do about the quid pro quo/hostile environment dichotomy, for example, the four employee-side amici took quite different positions. The NELA and the feminist coalition accepted the two categories and focused their arguments on why unfulfilled threats qualified as quid pro quo harassment.263 The AFL-CIO and the Rutherford Institute, on the other hand, advocated new approaches to supervisory liability that transcended or ignored the dichotomy.264 Finally, the AFL-CIO devoted considerable effort to an argument that the “company act” doctrine proposed by Judge Posner, in his opinion in the en banc proceeding below, was particularly inappropriate.265

On the employer side, the two amici similarly were divided about the appropriate route to a common outcome. Both employer-side amici agreed that employers should have a defense based on the existence of sexual harassment policies.266 The EEAC position was straightforward:

Quid pro quo harassment by definition requires that a tangible job detriment or benefit be conditioned on the grant or denial of sexual favors. If either the quid or the quo is missing, sex-based conduct is not actionable unless it is sufficiently severe or pervasive to constitute a hostile environment.267

The CCUS brief, on the other hand, argued that the en banc Seventh Circuit’s and other lower courts’ “inflexible categorization” of sexual harassment cases into

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264 See AFL-CIO Brief, Ellerth, 1998 WL 145348, *18, *14-*21 (arguing that employers should be liable for supervisory acts under what it termed a “modern ‘scope of authority’ approach”); Rutherford Brief, Ellerth, 1998 WL 151471, at *4-*5 (arguing in favor of a strict liability standard for quid pro quo harassment, even absent tangible job detriment). The Institute’s position was exactly the same as its position in the Paula Jones case.


266 See EEAC Brief, Ellerth, 1998 WL 93294, at *7 (arguing that an employee’s failure to “take advantage of a well-communicated express policy against sexual harassment and an adequate procedure for resolving claims” should shield an employer from liability); CCUS Brief, Ellerth, 1998 WL 93296, at *23 (stating that an employer should be liable only if it knew or should have known about the conduct).

quid pro quo and hostile environment categories created "an unnecessary quandary."\footnote{CCUS Brief, \textit{Ellerth}, 1998 WL 93296, at *7.} Although assuming, for the purposes of the brief, that the categorization generally was valid,\footnote{See \textit{Id.} at *8 n.4.} the CCUS argued that unfulfilled threats require categorization as "a hybrid form of harassment, with aspects of both categories."\footnote{\textit{Id.} at *8. In this hybrid category, [a]n unfulfilled threat should be actionable, even if it constitutes an isolated incident, where the facts demonstrate that the threat was sufficiently severe or egregious to alter the terms and conditions of the plaintiff's employment. But as with other sexual misconduct that does not involve tangible job consequences, an employer should be liable for an unfulfilled threat only if negligent, i.e., only if it knew or should have known of the threat, and failed to take prompt remedial action. \textit{Id.}}

C. Faragher

The employee-side amici split in \textit{Faragher} on the appropriate standard for determining employer liability. The NELA took what it characterized as a "middle ground"\footnote{NELA Brief, \textit{Faragher}, 1998 WL 35180, at *5.} on the issue of supervisory liability, arguing that "employers may be vicariously liable for hostile work environment sexual harassment perpetrated by their supervisors."\footnote{\textit{Id.} at *6.} It argued vicarious liability should include liability for harassment committed within the supervisors' scope of employment, for when the employer/supervisor relationship aided the supervisor in carrying out the harassment, and for when the supervisor acted with apparent authority.\footnote{See \textit{id.} at *11-*13.} The NELA also advocated the need for extensive development of the record in this type of case.\footnote{See \textit{id.} at *11 (noting that a cited fact from this case "is precisely the type of empirical fact that is uncovered by a searching exam of the real life functioning of this city which is the methodology NELA advocates").}

The NWLC/ERA/WLDF brief argued that the key to application of agency law principles to Title VII was the supervisor's use of the employer's authority "implicitly or explicitly" to conduct the harassment.\footnote{NWLC/ERA/WLDF Brief, \textit{Faragher}, 1997 WL 800075, at *5.}

The Lawyers' Committee/ACLU brief asserted two main arguments. First, it took a different approach to the application of agency principles, emphasizing that Gordon's knowledge of the harassment and Terry and Silverman's knowledge of their own behavior was enough to justify imposing liability on the employer.\footnote{See Lawyers' Committee/ACLU Brief, \textit{Faragher}, 1998 WL 800001, at *16-*18, *26-*28.}
Second, the Lawyers' Committee/ACLU brief attacked the Eleventh Circuit's "higher management" notification requirement as inconsistent with Title VII.\textsuperscript{277} In addition, the Lawyers' Committee/ACLU briefly argued that liability also was justified under the "aided by" analysis\textsuperscript{278} and that constructive notice could not be prevented by the "remoteness" of the work site from the employer's headquarters.\textsuperscript{279}

The AFL-CIO advocated a position centered on Justice Stevens's concurring opinion in \textit{Meritor}.\textsuperscript{280} The AFL-CIO contended that when the common law of agency was "clear and uniform," Congress intended to follow it in applying Title VII. When the common law was not clear, however, "the better course is to consider the issue as a matter of Title VII substantive law."\textsuperscript{281} The solution under Title VII, according to the AFL-CIO brief, was to make employers liable for supervisory sexual harassment under the same standard as used to evaluate employers' liability in other areas of Title VII.\textsuperscript{282}

The employer-side amici naturally had different ideas about employer liability. What is most interesting is that, like the employee-side amici, they split on how to implement similar policy goals. The EEAC's argument centered on the narrow application of agency principles to determine employer liability for a supervisor's acts.\textsuperscript{283} The CCUS position was that the \textit{Restatement (Second) of Agency} was an inadequate basis for determining employer liability for supervisory harassment, and that the Court therefore must develop agency principles that "comport with Congress's twin objectives of deterring sexual harassment and providing compensation to victims."\textsuperscript{284} The principle suggested by the CCUS was a negligence approach, holding employers liable "if and only if [the employer] knew or should have known of the harassment but failed to take prompt remedial action."\textsuperscript{285} The SHRM's position primarily was one of opposition to the employee-petitioner's proposed rule. Although the SHRM brief concluded by requesting an affirmation of the Eleventh Circuit en banc decision, the brief rarely mentioned the specifics of the

\textsuperscript{277} Id. at *18.
\textsuperscript{278} Id. at *28-*29.
\textsuperscript{279} Id. at *29.
\textsuperscript{281} Id. at *5.
\textsuperscript{282} See id.
\textsuperscript{283} See EEAC Brief, \textit{Faragher}, 1998 WL 32488, at *7. First, the EEAC contended, employers should not be liable unless the supervisor used actual or apparent authority to harass or the employer was on notice of the harassment. \textit{See id.} Second, these circumstances must be interpreted narrowly: Sexual harassment is "virtually always" outside the scope of employment. \textit{Id.} Apparent authority claims must be based on an objectively reasonable view of apparent authority and are limited to instances in which the authority actually was used. \textit{See id.} at *11, *13. Third, only negligent employers can be liable in the absence of actual apparent authority. \textit{See id.} at *18.
\textsuperscript{285} \textit{Id.}
decision, focusing instead on defects in the employee-petitioner’s proposal. Finally, the NAM/MAPI brief argued that the distinction between hostile environment cases and quid pro quo cases must be maintained “to ensure that Meritor’s prohibition on strict liability for hostile environment claims cannot be circumvented by artful pleading or imprecise judicial analysis.” The NAM/MAPI also advocated a negligence standard for employer liability.

On the issue of the impact of employer policies forbidding sexual harassment, the feminist groups argued that while an employer’s establishment of a complaint mechanism and policy against sexual harassment would not immunize an employer from liability for a supervisor’s acts, failure to do so would create liability. The EEAC, on the other hand, argued that a “well-communicated express policy against sexual harassment, coupled with an adequate grievance procedure, should shield an employer from liability for sexual harassment.”

How did the various amici’s positions fare before the Supreme Court? The amici’s positions can be compared to those of the Court in four ways: (1) position on liability based on Restatement (Second) of Agency section 219(1); (2) position on liability based on Restatement (Second) of Agency section 219(2)(d); (3) position on whether a sexual harassment policy should constitute an affirmative defense; and (4) analysis of the nature of sexual harassment.

As noted above, the Court rejected the theory of liability based on the Restatement (Second) of Agency section 219(1). Among the pro-employee amici, the NELA advocated liability based on this principle, while among the pro-employer amici, the CCUS and the EEAC argued against liability based on section 219(1). The Court accepted, however, the section 219(2)(d) theory, a position

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286 See SHRM Brief, Faragher, 1998 WL 32502, at *ii. The SHRM brief cited the Eleventh Circuit en banc decision only twice. Once, the brief mentioned that the Eleventh Circuit en banc decision was consistent with two other cases it discussed in detail. See id. at *12. Once, it mentioned that lower court decision as recognizing that the pervasiveness of harassment should be a factor in determining supervisory liability. See id. at *17.

287 See SHRM Brief, Faragher, 1998 WL 32502, at *7 (summarizing the argument). Concluding its summary of the argument, the SHRM asked the Court to “reject each of the three rules proposed by Petitioner and adopt rules that encourage employees to take advantage of the existing avenues of relief provided by employers before seeking judicial relief.”


289 See id.


293 See NELA Brief, Faragher, 1998 WL 35180, at *8. The NWLC/ERA/WLDF brief did not address this issue.

advocated by the NWLC/ERA/WLDF and NELA briefs and opposed by the CCUS.295 Finally, the Court created an affirmative defense similar to that advocated by the SHRM, the EEAC, the CCUS, and to that opposed by the NWLC/ERA/WLDF.296

Understanding the role of the amici is difficult, because it is not known if the Court even read the briefs. Two influences seem likely, however. First, the City of Boca Raton was in a poor position to represent employers generally with respect to the affirmative defense issue. Its policy against sexual harassment had not been distributed adequately, so the facts of the case left it little incentive to pursue an affirmative defense. Indeed, as the Court noted, there was not even a sufficient factual or legal question about the adequacy of the city’s policy to require a remand for additional proceedings on the defense issue.297 Similarly, there was little need for the employee-petitioner to devote attention to the issue. The amici on both sides had at least the potential to illuminate the issues surrounding whether to create an affirmative defense and, if so, how to shape it. The Court did not take advantage of the amici’s expertise, but instead created a defense so vaguely formulated that the circuit courts already are having trouble implementing it.298

Second, the Court wrestled with reconciling the common law agency cases, Meritor, and Title VII under both the section 219(1) and 219(2)(d) theories. As the questions in the oral argument showed, both the petitioner and the respondent had serious weaknesses in their positions.299 Again, it is impossible to know if the Court even read the amici briefs, but the amici’s additional attention to these difficult problems might have assisted the Court.

Using the majority’s holdings and its analysis, one can examine whether the majority accepted the explicit and implicit arguments made in the briefs about the structure of the workplace and sexual harassment. As noted above, the amici had sharply differing positions on how sexual harassment occurs in the workplace and the role of supervisory power in facilitating harassment. The pro-employer amici, for example, either explicitly or implicitly endorsed a view of the workplace in which harassment is the exception rather than the rule, in which firms differ widely in allocating supervisory authority, and in which employers, because of their own


297 See Faragher, 118 S. Ct. at 2293-94.


interest in avoiding liability and promoting an efficient workforce, work hard to eradicate harassment. The pro-employee amici, on the other hand, saw harassment as widespread, built on power relationships common to most firms, and sure to be ignored by employers unless the threat of liability loomed over them.

As one might expect from an opinion authored by a middle-of-the-road justice like Justice Souter (who managed to unite the "liberals" like Breyer with all but the most conservative members, Thomas and Scalia), the opinion did not adopt a clear ideological position. In analyzing the section 219(1) issue, however, the majority acknowledged and rejected the position of Judge Barkett's dissenting opinion in the Eleventh Circuit en banc proceeding, a position which advocated a view of harassment similar to that of the NWLC/ERA/NWLDF brief. Similarly, in creating the affirmative defense, the majority accepted the argument that employers need an additional incentive other than their own self-interest to eradicate sexual harassment. More importantly, however, the majority also imposed a requirement on employees to make use of the avenues for reporting sexual harassment.

An employer may, for example, have provided a proven, effective mechanism for reporting and resolving complaints of sexual harassment, available to the employee without undue risk or expense. If the plaintiff unreasonably failed to avail herself of the employer's preventative or remedial apparatus, she should not recover damages that could have been avoided if she had done so. While the Court in Faragher did not go as far as some of the employer groups wished in creating a safe harbor, it reflects at least some ambivalence about the view of sexual harassment propounded by, for example, the NWLC/ERA/NWLDF brief.

It is difficult to find a clear indication of the influence of any of the amici on either the majority or dissenting opinions in Faragher. The Court did not adopt any of the legal theories advocated by the various amici. The majority's opinion, however, did move the law closer to two amici's positions. The AFL-CIO's argument that the quid pro quo/hostile environment classification was not useful is close to the majority's rejection of the classification's significance to this case, even if the Court did not adopt the "hybrid" analysis the AFL-CIO proposed. There also are similarities between the employer defense proposed by the EEAC and the defense adopted by the Court, although the Court did not go as far as the EEAC position in protecting employers.

301 See Faragher, 118 S. Ct. at 2288.
302 See id. at 2292.
303 Id.
D. Summary

In examining the three cases, it is difficult to discern a significant impact by any of the amici on the Court's final positions. No part of the Court's opinions appear to come directly from the amici briefs' analyses, as has occurred occasionally in the past. In areas in which the amici differed significantly from the parties, the Court did not move noticeably closer to the amici positions than to the parties' positions. The amici's contributions cannot be evaluated solely on the final legal positions of the Court, however, so this Article will now examine the amici's use of authority.

V. USES OF AUTHORITY

The amici briefs differed in the types, amounts, and uses of the authorities they cited. In particular, the briefs substantially differed in the degree of the amici's reliance on case authority. Table 2 provides the median, minimum, and maximum numbers of case citations for all amici and the amici on each side for the three cases. As these figures demonstrate, some amici cited a large number of cases while others cited only a few. Although one should hesitate to place too much weight on these figures, they do illustrate the substantial differences among the amici's approaches to legal argument.

Table 2: Case Authority Citations

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304 The Ivers and O'Connor study, which examined two amici's participation in a broad sample of Supreme Court criminal cases, found an influence but qualified its findings by noting that they did not examine whether the Court's holdings also were advocated by the parties. See Ivers & O'Connor, supra note 3, at 172.

305 See infra Table 2: Case Authority Citations.

306 See id.
Even more important than the number of citations, however, is how the amici used the authority. Some amici used cases simply as case authority—in other words, they primarily cited cases to support legal arguments. Of course, in arguing before the Supreme Court, much of the legal authority is not binding, as it would be to a lower court. Case authority also serves as important persuasive precedent.\(^\text{307}\) Much of the citation to case authority in the amici, however, was merely citation, without any detailed discussion of what the case authority meant to the case before the Court.\(^\text{308}\)

Other amici, however, cited cases primarily to illustrate facts that the amici asserted were true. For example, the cases cited by the SHRM in its brief in \textit{Faragher} often do not produce insights into the legal issues before the Court. Rather than providing a basis for legal argument, the cases primarily serve as the source of a collection of anecdotes about the dangers of allowing individuals access to the courts before exhausting internal remedies for sexual harassment.\(^\text{309}\) To the extent that the Court needed anecdotes from lower court opinions to support its decision (a questionable form of legal argument), a competent law clerk with access to Westlaw or LEXIS would have little trouble compiling a list of candidates for inclusion.


\(^{308}\) For example, although the EEAC brief in \textit{Oncale} acknowledged the existence of contrary circuit precedent, it did not analyze those opinions in any depth. See EEAC Brief, \textit{Oncale}, 1997 WL 634312, at *14 n.5 (discussing \textit{Doe v. City of Belleville, Ill.}, 119 F.3d 563 (7th Cir. 1997), vacated and remanded, 118 S. Ct. 1183 (1998), which held that male-on-male harassment was actionable). Similarly, the TAB&CC brief in \textit{Oncale} cited cases as authority for conclusions about Congressional intent and the implications of allowing same-sex harassment claims; case authority was not discussed or analyzed in any detail. In the Rutherford Institute brief in \textit{Ellerth}, all but a few cases simply were cited without discussion or with only a short parenthetical.

Other briefs cited cases as authority, but did not go beyond that. For example, although, as compared to some other amici, the NELA heavily relied on case law citations in its brief in *Faragher*, its citations primarily were just that—citations. In many instances, the NELA’s brief did not discuss authority, but simply cited it for blackletter propositions. On the few occasions that the NELA’s arguments required factual support, it suggested that the Court take judicial notice of the facts, or assumed them, or derived them from a law review article. The MacKinnon Coalition brief in *Oncale* rarely cited case authority as authority, but instead cited it to illustrate its theory. In the NWLC/ERA/WLDF brief in *Faragher*, case authority also was cited often as support for descriptive purposes or factual propositions rather than for legal propositions.

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310 See NELA Brief, *Faragher*, 1998 WL 35180, at *9 (quoting and citing Hunter v. Allis-Chalmers Corp., 797 F.2d 1417, 1422 (7th Cir. 1986) (acknowledging that corporations only can act through individuals)).

311 See NELA Brief, *Faragher*, 1998 WL 35180, at *10 (“[Judicial notice must be given to the breadth of delegated authority in a modern workplace.”)).

312 See id. at *5 (“NELA recognizes that many, if not most, employers covered by Title VII have written policies prohibiting discrimination in general and sexual harassment in particular.”).

313 See infra note 478.


315 See MacKinnon Coalition Brief, *Oncale*, 1997 WL 471814, at *9-*10 (citing cases to support claim that “[m]en sexually abuse those they have power over in society: first, women and children; then other men, typically on the basis of [various characteristics]”). But see id. at *26 (citing Valadez v. Uncle Julio’s of Ill., Inc., 895 F. Supp. 1008 (N.D. Ill. 1995) (illustrating claim that “[s]eparating sexuality from gender, hence harassment due to gender from harassment due to sexual orientation, is impracticable and would lead to anomalous results”)). Similarly, when it cited case authority, the SHRM brief in *Faragher* did so primarily to give examples of legal approaches consistent with the SHRM’s view of the appropriate role of personnel managers in handling sexual harassment complaints. See SHRM Brief, *Faragher*, 1998 WL 32502, at *9-*10 (discussing Perry v. Harris Chernin, Inc., 126 F.3d 1010 (7th Cir. 1997)); ERA/NOWLDEF/NPW&F/NWLC Brief, *Ellerth*, 1998 WL 145349, at *17 (“Other studies have shown that half of all harassers are the direct supervisors of the target.”) (citation omitted).

316 See NWLC/ERA/WLDF Brief, *Faragher*, 1997 WL 800075, at *13 n.15 (citing cases to support statement that in quid pro quo cases “courts generally hold employers liable for the supervisor’s wrongful conduct because he, ‘by definition, wields the employer’s authority to alter the terms and conditions of employment’”); id. at *14 n.17 (citing cases to support description of policy rationales used by courts in interpreting vicarious liability issues).

317 See id. at *22 n.38 (citing a case that cited a law review article to support its claim that “when an employer has no written grievance policy and procedure, ‘a victim of sexual harassment will reasonably perceive her only available options to be silently acquiescing in
On the other hand, although the AFL-CIO brief in *Ellerth* cited relatively few cases, what was striking about the authority the brief did cite was that the brief actually analyzed case law as case law rather than as factual examples or as support for policy arguments.\(^{319}\)

The most striking difference among the briefs, however, was their use of law review articles, social science articles and books, and other such materials.\(^{320}\) Amici briefs frequently take a "Brandeis brief" approach and, as at least one observer concludes: "Courts often rely on factual information, cases or analytical approaches provided only by an amicus."\(^{321}\) Several briefs made passing use of such material,\(^{322}\) and a few relied on it heavily.\(^{323}\) The SHRM brief, for example, cited material to

318 *See id.* at *15 n.22 (citing cases to support statement that "in light of the blurred character of the line separating quid pro quo from hostile environment harassment, it would be inappropriate to base the standard of employer liability on any categorization between the two").

319 The Lambda Coalition brief in *Oncale* also cited cases primarily as authority for particular interpretations of Title VII. More than any other brief, the Law Professors’ brief in *Oncale* discussed the cases cited and did what law professors are supposed to do—it analyzed them. Surprisingly, the Law Professors’ brief cited relatively few law review or other articles and books (only five), relying primarily on case authority instead. The CCUS brief in *Faragher* not only cited the most case authority (33 cases) of any pro-employer-respondent amici in *Faragher*, and more than all but one amici in that case, but the case authority primarily was from antidiscrimination cases with similar factual circumstances and legal issues. Unlike some of the other amici, the CCUS used case citations and quotations to make legal arguments rather than merely to illustrate factual points. For example, the CCUS argued that the *Restatement* concept of apparent authority was ill-suited to sexual harassment cases and cited several circuit court opinions as evidence of findings that sexual harassment was not within the job description of a supervisor. *See CCUS Brief, Faragher, 1998 WL 32508, at *13.*

320 Ivers & O’Connor found that one of the amici they studied in the criminal context consistently “used the ‘Brandeis Brief’ approach to augment its legal arguments.” Ivers & O’Connor, *supra* note 3, at 170 (citation omitted).

321 *Ennis, supra* note 3, at 603.

322 *See NAM/MAPI Brief, Faragher, 1998 WL 32489, at *15* (citing *Fact Finding Report: Commission on the Future of Worker-Management Relations* as general support for the following statement: “Imposing a higher standard of liability merely because an employee is designated as a ‘supervisor’ disregards the varied roles of individuals denominated as ‘supervisors’ in corporate America and fails to acknowledge that traditional labels such as ‘worker’ and ‘manager’ have diminished relevance in many American workplaces.”). The NAM/MAPI brief in *Faragher* similarly cites several law review articles and treatises but does so simply to indicate the source of an argument. *See NAM/MAPI Brief, Faragher, 1998 WL 32489, at *12, *22, *23* (citations omitted).

323 For example, the Lambda Coalition brief in *Oncale* cited 10 social science, psychological, or legal articles and books, relying on them more heavily than most of the other amici. *See Lambda Coalition Brief, Oncale, 1997 WL 47185, at *ix-*x (listing
support its factual assertions about the widespread extent of sexual harassment policies, the appropriate means of handling complaints, and the burden on the courts of handling additional sexual harassment cases. These materials included newspaper articles, the SHRM’s own publications, EEOC documents, and court statistics. The SHRM brief contained the most citations to such material of any of the amici briefs on the employer-respondent’s side of the case and more than all but one of the amici in general.

As a source of accurate information on human resource policies or the extent of sexual harassment, the SHRM brief falls short. Popular press accounts are unlikely sources of accurate, reliable information, and the SHRM survey of its members tells little about the universe of employers because the discussion of the results makes no mention of the bias introduced by the exclusive focus on employers of SHRM members.

Two other briefs relied heavily on nonlegal materials. The feminist coalition brief in Faragher cited thirty noncase, nonstatutory authorities, far more than any other amici in that case (the second largest number cited was only eight). Of those, a far greater percentage were citations of law review articles and social science journal articles than in the other briefs. The authorities were used to support claims about the nature of discrimination and women’s experience with sexual harassment in the workplace. The MacKinnon Coalition brief in Oncale cited the most

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328 See infra Table 3: Case Authority Correlation, Oncale, at 877; Table 4: Case Authority Correlation, Ellerth, at 877; Table 5: Case Authority Correlation, Faragher, at 878.

329 See id.

330 See NWLC/ERA/WLDF Brief, Faragher, 1997 WL 800075, at *12 n.14 (citing sources to support the statement that “[w]omen are particularly vulnerable to the abuse of authority by a sexually harassing supervisor because women hold a structurally inferior place in the workforce”).

331 See id. at *18 n.29 (citing sources in support of statement that “[h]arassment frequently causes social isolation at work, including loss of informal associations with co-workers and supervisors, lack of feedback and support, and loss of information networks”).
nonlegal materials of any brief in that case (fourteen law review articles and books). This nonlegal material was cited as authority for factual propositions about sexual harassment.332

Several scholars recently have criticized the presentation of social science in amicus briefs as "distorted for partisan purposes."333 For example, Professors Rustad and Koenig found that amici in three recent punitive damages cases distorted social science in several ways, including using studies financed by partisan sources, reporting means rather than medians, using percentiles without reporting absolute numbers, failing to disaggregate data, and relying on anecdotes and bold assertions "masquerading" as empirical data.334 The issue in these cases was not so much misleading presentation but questionable sources. Both the Rustad and Koenig study and this Article suggest the dangers of relying on amici for nonrecord facts.

One constructive role amici might play is to provide a conceptually different interpretation of a case. A crude measure of whether amici do so is to examine the authorities they cite. If amici generally cite the same authorities, they are less likely to provide a fundamentally different approach because they agree on the relevant sources of authority. If they cite completely different sets of cases, however, they are more likely to be engaged in different conceptual approaches. The following tables present correlations for the case authority cited by the amici in the three cases.335

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332 See MacKinnon Coalition Brief, Oncale, 1997 WL 471814, at *25 (citing nonlegal authority for the proposition that "[t]he gender of a person with whom one has sex, or is thought to have sex, is a powerful constituent of whether one is considered a woman or a man in society"). One peculiarity in the nonlegal material citations also is worth noting. The brief's author, Catharine MacKinnon, relied on her own work as authority for the proposition that "[s]exuality is gendered in societies of sex inequality." Id. at *18 (citing CATHERINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE and SEXUAL HARASSMENT OF WORKING WOMEN (1979)).


334 Rustad & Koenig, supra note 8, at 143-51.

335 See infra Table 3: Case Authority Correlation, Oncale, at 877; Table 4: Case Authority Correlation, Ellerth, at 877; Table 5: Case Authority Correlation, Faragher, at 878.
Table 3: Case Authority Correlation, *Oncale*

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<th>ATLA</th>
</tr>
</thead>
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Table 4: Case Authority Correlation, *Ellerth*

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<th></th>
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<th>EEOC</th>
<th>Rutherford Institute</th>
<th>NWLC/ERA/WLDF</th>
<th>AFL-CIO</th>
<th>NELA</th>
<th>Employee</th>
</tr>
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<tbody>
<tr>
<td>CCUS</td>
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</table>
An examination of the three tables above reveals that, at least in selecting cases upon which to rely, the amici in these cases did not view the cases in similar legal terms. If one compares pairs of amici briefs in the three cases, one finds that fewer than one-third of the brief-pairs in each has a citation correlation of 0.20 or higher, while almost half have a correlation of 0.10 or lower. In sum, the amici cited relatively little of the same authority. Additionally, eleven of the eighty-four brief-pairs have negative citation correlations, meaning that a case was less likely to be cited by one if it was cited by the other. The appearance of these patterns in all three cases suggests this is not simply a matter of disagreement over which line of cases to follow, but rather an absence of the kind of dialogue O’Neill suggested was a crucial part of legal argument.

In sum, the amici’s use of authority reveals three important things about these briefs. First, the types and uses of authority strongly suggest that the amici often view their role not as advocates of particular legal arguments, but rather as advocates...
of particular policy positions. Only in a few instances, primarily in debates over the appropriateness of the various Restatement sections in Faragher, did many of the amici focus on the law. Second, the heavy reliance on nonlegal authorities of questionable value reveals a disturbingly low level of social science that is considered relevant. An agency attempting to defend a rulemaking based on such evidence would be hard-pressed to defend itself, even under an arbitrary and capricious standard of review. Reliance on such evidence by a court, which lacks an agency’s presumed expertise in the subject matter, would be difficult to defend. Third, the wide divergence of authorities which the amici considered worth citing suggests that the amici did not see themselves as participating in the same conversation—their disagreements were not just on the proper legal role, but on the proper universe of means to resolve the issues.

VI. TYPES OF ARGUMENTS

A third means of evaluating the roles of the amici is to examine the types of arguments they made. These fall into several categories, and many amici made multiple types of arguments. Three main types of arguments appear in the amici briefs: (1) traditional legal arguments; (2) arguments based on assertions about the nature of sexual harassment in the workplace; and (3) policy arguments.

A. Patterns

Some of the amici made primarily traditional legal arguments. For example, in Oncale, the NELA made a straightforward legal argument about the meaning of Title VII’s ban on sex discrimination by analyzing the language of the statute, the case law under the statute generally, and the implications for future cases if the proposed rule was adopted.339 Several briefs also raised useful questions about the practical implications of various possible rules.340 Other briefs making significant legal arguments (but not limited to such arguments) included the ATLA341 and the EEAC342 briefs in Oncale, the EEAC,343 the CCUS,344 and the AFL-CIO345 briefs in

341 See id. at *4-*9.
342 See EEAC Brief, Oncale, 1997 WL 634312, at *12.
343 See EEAC Brief, Ellerth, 1998 WL 93294, at *11.
Ellerth, and the EEAC, the NELA, the CCUS, and the AFL-CIO briefs in Faragher. Traditional legal argument thus was the dominant (but not the only) form of argument in the briefs filed by five organizations: the NELA, the EEAC, the CCUS, the AFL-CIO, and the ATLA.

1. Oncale Amici Arguments

In Oncale, the NELA dealt with the issue of how to handle the “because of” language by turning the issue into a factual question (neatly serving its own more parochial interests at the same time by precluding summary judgment). It also carefully positioned the Fifth Circuit opinion as creating an “exception” to well-established Title VII jurisprudence. Similarly, the NELA argued that because Title VII allows for claims based on a member of one racial group discriminating against his own group’s members and does not distinguish between majority and minority groups, it must encompass same-sex discrimination. Turning to the consequences of the two possible rules, the NELA carefully examined ways to limit the impact of its preferred position in favor of allowing claims. The brief also set out multiple methods of possible proof in a same-sex case, showing how each might be accomplished under existing evidentiary rules. Finally, the NELA effectively dealt with the “feared horseplay effect,” noting that courts are constantly asked to distinguish valid from invalid claims.

In its brief, the ATLA argued that requiring proof of homosexuality in same-sex cases would produce practical proof problems. This argument took the form of a series of rhetorical questions about proof problems. The Lambda Coalition made a similar argument in its brief, raising the proof problems that the employer-petitioner’s approach suggested through a series of rhetorical questions.

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351 See id. at *10-*14.
352 See id.
353 See id. at *14-*17.
354 See id. at *17-*20.
355 Id. at *14-*17.
357 See id. at *13 (“[A] what point does conduct equate to class membership? How would a plaintiff prove that the harasser is homosexual? Would the plaintiff have to offer an admission that the supervisor desired to engage in homosexual sex with members of the same sex?”).
358 See Lambda Coalition Brief, Oncale, 1997 WL 471805, at *17.
The ATLA also made the legal argument that the Fifth Circuit’s decision in Oncale, and the earlier circuit decisions on which it relied, were incorrect because they misinterpreted Title VII’s language.359 This argument centered on an analysis of the implications of excluding same-sex harassment for the statutory scheme and existing Title VII jurisprudence. It did not do so, however, in as sophisticated a way as the NELA brief. While the ATLA’s brief set out a straightforward analysis in support of its position, and the brief was structured primarily as a straightforward legal analysis, it did not grapple with the opposing case authority. Instead, it dismissed such authority as “unreasonably narrow, illogical and unprecedented.”360

While the EEAC brief made its point, that Title VII does not cover same-sex sexual harassment, its primary focus was on the statutory language. Because Title VII says conduct must be “because of” sex to constitute discrimination, the EEAC argued, same-sex harassment could not qualify. To bolster this argument, the EEAC added an analysis of case law to show that not every workplace act with “a sexual component” constituted gender-based discrimination.361 It also argued that sexual orientation was not covered, primarily by citing cases and failed legislation that were intended to add sexual orientation to the list of protected classes.362

2. Ellerth Amici Arguments

To make the argument that quid pro quo harassment claims require both the “quid” and the “quo,” the EEAC brief gave an extended analysis of existing Title VII case law. For example, the brief noted that both are elements of a quid pro quo claim and then cited Henson v. City of Dundee,363 as well as a number of other circuit court cases applying Henson.364 While demonstrating that several courts had taken this approach, the argument did not recognize that the issue in this case was whether the Supreme Court should adopt a rule similar to that in Henson or some alternative rule. An analysis of the case law showing that the concept of quid pro quo was embedded deeply in Title VII would have been more persuasive; simply stating that some lower courts had followed a particular rule would not compel the Supreme Court to make the same decision. Similarly, when the EEAC argued that unfulfilled threats were insufficient unless part of pervasive conduct, it justified its position by quoting and citing lower court opinions that agreed with that argument.365 When the brief turned

360 Id. at *8.
361 EEAC Brief, Oncale, 1997 WL 634312, at *12 (citing cases that held that use of the terms “bitch” or “sick bitch” did not qualify).
362 See id. at *16.
363 682 F.2d 897 (11th Cir. 1982).
364 See EEAC Brief, Ellerth, 1998 WL 93294, at *11.
365 See id. at *13-*14.
to the argument for a safe harbor interpretation of the impact of employer policies against harassment, it switched emphasis from analysis of case law to a focus on the Restatement (Second) of Agency and EEOC Policy Guidelines.\textsuperscript{366}

The CCUS analyzed existing Title VII case law in its brief and drew the conclusion that the distinction between quid pro quo and hostile environment cases was created "merely to broaden Title VII's reach regarding the conduct that will be actionable" but was being misapplied to govern "the circumstances under which an employer will be liable for that misconduct."\textsuperscript{367} This argument was based on a careful legal analysis of the rationales and facts of leading Title VII cases.\textsuperscript{368}

The AFL-CIO made impressive traditional legal arguments in support of its positions. In arguing the irrelevance of the employer-petitioner's "Question Presented," for example, the brief set out a thorough analysis of the district court's reliance on the quid pro quo and hostile environment categories.\textsuperscript{369} The analysis tied the district court's use of these citations to the case law and the record. It made a convincing claim that "[t]he distinction between 'quid pro quo' and 'hostile environment' patterns of proof, then, is at bottom a utilitarian means of summarizing two different ways plaintiffs seek to prove gender-based employment discrimination."\textsuperscript{370} Similarly, the AFL-CIO looked to traditional forms of legal argument to attack the Posner "company act" approach as inconsistent with Title VII and agency law.\textsuperscript{371} In the argument for its favored approach to employer liability rules, the brief summarized the AFL-CIO position from \textit{Faragher}, cross-referencing its brief in that case.

3. \textit{Faragher} Amici Arguments

The EEAC presented traditional legal arguments about the interpretation of agency law principles. In making its case, the EEAC consistently relied on two themes. First, the EEAC presented the case as solely one about the application of traditional agency principles. It did not, for example, acknowledge the uncertainty about the scope of the importation of agency principles rule created by \textit{Meritor}. Instead, the EEAC constantly strove to fit the case within traditional agency analysis, relying heavily on analysis of the Restatement (Second) of Agency provisions and comments to the Restatement. Second, the EEAC consistently presented the decision below as "reflect[ing] a consensus of the majority" of circuits and "representative of

\textsuperscript{366} See id. at *19-*25.
\textsuperscript{368} See id. at *9-*11.
\textsuperscript{370} Id. at *11-*12.
\textsuperscript{371} See id. at *22-*30.
the way in which the courts of appeals have extrapolated these principles to apply in environmental sexual harassment cases.\(^{372}\)

Focusing on the *Restatement (Second) of Agency* provisions, in its brief the EEAC first set out its central contention that the issue was whether the supervisor had actual or apparent authority to sexually harass the employee. As the EEAC correctly noted, it is rare that an employer would provide a supervisor with such authority, and hence harassment will “\[v\]irtually [a]lways” be outside the scope of employment.\(^{373}\)

To establish that proposition, the EEAC relied on the traditional agency test that compares actions to “serve the purposes” of the employer with those in which the employee is engaged in a “frolic of his own.”\(^{374}\) Cleverly playing on the natural distaste for harassing behavior, particularly for the egregious behavior in this case, the EEAC then argued that such behavior cannot serve the purposes of the employer because of the demoralizing effects on the victim.\(^{375}\) Moreover, the EEAC also relied on the traditional agency principle that acts expressly forbidden by the employer are not within the scope of employment.\(^{376}\)

Having eliminated actual authority, the most powerful claim an employee could assert, the EEAC then turned to apparent authority. Using the same narrow focus on the specific acts necessary for harassment, the EEAC again presented the lower court opinion as part of a consensus, noting that “[c]ourts using this theory, including the court below, have applied it very narrowly.”\(^{377}\) Again, by focusing on the harassment itself as the act in question (rather than, for example, the supervisor’s authority to order the individual to work with him or to work in an isolated area), the EEAC was able to turn the distastefulness of the harassing acts against the plaintiff. The widespread knowledge that sexual harassment is unlawful, and the breadth of the popular definition of sexual harassment, mean that “common sense dictates that a victim asserting a belief in a perpetrator’s authority to harass her must make some affirmative showing that her belief was reasonable under the circumstances.”\(^{378}\) Similarly, the EEAC relied on the agency law requirement of an affirmative act to create authority in order to argue that the absence of a policy forbidding sexual harassment was insufficient to create apparent authority.\(^{379}\)

The final limitation on the apparent authority attack was the EEAC’s claim that the apparent authority actually must be used to commit the harassment. The EEAC rejected the argument that use of the general power of a supervisor is enough, relying


\(^{373}\) *Id.* at *10.

\(^{374}\) *Id.* at *10-*11.

\(^{375}\) *See id.*

\(^{376}\) *See id.* at *12 (citing 1 *RESTATEMENT (SECOND) OF AGENCY* § 230 cmt. c (1959)).

\(^{377}\) *Id.* at *13.

\(^{378}\) *Id.* at *14.

\(^{379}\) *See id.* at *15.
instead on a *Restatement* comment that only a transaction “regular on its face” fits the *Restatement* test.³⁸⁰

The NELA argued that its preferred rule was consistent with the courts’ interpretation of other provisions of Title VII, consistent with Congressional intent,³⁸¹ and consistent with “time-honored” principles of common law.³⁸² Even when the NELA turned to public policy justifications in its brief, those were within the scope of traditional legal argument. Thus, the NELA did not simply argue that its preferred rule was “better” from a utilitarian (or other societal ordering) perspective, but instead that the rule would fit within “the modern view of respondeat superior” by serving the “three principal reasons for imposing vicarious liability.”³⁸³ Moreover, as one would expect from a group arguing for employee rights before a “conservative” Supreme Court, the NELA repeatedly presented its arguments as straightforward application of traditional legal principles.³⁸⁴

The CCUS argument focused on three points. First, the CCUS sought, more than any other pro-employer-respondent amici, to create an argument based on the Court’s previous holding in *Meritor*.³⁸⁵ Second, the CCUS attempted to distinguish the sexual harassment cases from the circumstances which would implicate the *Restatement* provisions.³⁸⁶ Third, the CCUS set forth an alternative framework for analyzing the problem of employer liability based on common law principles and the Court’s approach to analogous problems in other areas of antidiscrimination law.³⁸⁷

By focusing on *Meritor*, the CCUS brief laid the groundwork for distinguishing sexual harassment cases from other circumstances involving employer liability for supervisory acts by emphasizing that antidiscrimination law is different. This served two functions: It reinforced the Court’s freedom to develop doctrine in the area independently of the *Restatement* and provided a rationale for doing so.

In distinguishing Title VII from the *Restatement* approach, the CCUS took a straightforward approach in its brief. By placing the sections of the *Restatement* relied upon by the employee-petitioner and other amici into the broader context of other *Restatement* sections, drafters’ comments, and interpretations, the CCUS made

³⁸⁰ *Id.* at *17-*18 (citing 1 *RESTATEMENT (SECOND) OF AGENCY* § 219 cmt. e (1959)).

³⁸¹ *See* NELA Brief, *Faragher*, 1998 WL 35180, at *14-*15 (arguing that the NELA-supported rule is consistent with the Congressional goal of compensating victims of sexual harassment).

³⁸² *Id.* at *6.

³⁸³ *Id.* at *13.

³⁸⁴ *See* id. at *8 (“Based on the application of traditional agency principles the appellate court’s ruling is erroneous.”); *id.* at *21 (stating that the Court should adopt “a pragmatic, realistic, workable approach to the problem based upon time honored common law agency principles”).


³⁸⁶ *See* id. at *6-*14.

³⁸⁷ *See* id. at *14-*21.
a convincing case that the circumstances imagined by the Restatement sections were so sufficiently different from those in sexual harassment cases that it would not be an appropriate source of authority. In doing so, the CCUS grappled more directly with the interpretation of the Restatement sections put forward by the employee-petitioner and her amici than did the other employer-respondent amici.

The AFL-CIO made a traditional legal argument, building a case for its interpretation through examination of the statute and case law. Briefly, the argument was structured first to establish the issue as one of statutory interpretation, and then to set out the common law of agency as a means of assisting in the interpretation. The argument thus began with a short section examining the rationale for making sexual harassment illegal under Title VII. The brief then examined Title VII's requirement that discriminatory conduct be committed by "an employer" before it is illegal. The AFL-CIO extracted far more from the limited resource of the Court's opinion in *Meritor* than any of the other amici or the parties, setting forth a thorough, contextual argument built from examination of Title VII case law, the lower court opinions in *Meritor*, and Justice Marshall's concurrence. The brief concluded:

This Court, after considering the *Meritor* Court of Appeals' holding and the positions espoused by the parties and the amici, "declined the parties invitation to issue a definitive ruling on employer liability" because of "the state of the record in this case." Rather, this Court considered the employer liability question at the most general level, holding that "the Court of Appeals was wrong to entirely disregard agency principles and impose absolute responsibility on employers for the acts of their supervisors, regardless of the circumstances of a particular case."

Thus, the major point this Court made in *Meritor* regarding employer responsibility for the creation of a discriminatorily abusive workplace by a supervisory employee, as we understand it, is that the uncertainty within the common law of agency noted by the lower court there does not justify ignoring entirely the concepts developed over the years in determining the responsibility of employing entities for the acts of individuals invested

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388 See id. at *11-13.
389 See id. at *14.
391 Id. at *7-*12.
392 Id. at *9-*10 (emphasis omitted) (citing *Meritor* Sav. Bank, FSB v. Vinson, 477 U.S. 57, 73 (1986)).
with some, but not all, of the entity’s authority to set and enforce the terms and conditions on which employees work.\(^{393}\)

A third piece of the AFL-CIO’s argument was to place the factual question to be resolved in the legal context.\(^{394}\) Unlike many other amici, the AFL-CIO’s argument centered not on unsupported or poorly supported factual claims, but instead on the legal doctrines governing employers and their interaction with Title VII. Relying on employers’ ability to act only through their employees, the AFL-CIO built a solid case for its argument that Title VII required that the motive of the harassing employee be attributed to the employer, rather than requiring that the motive of the employer be established in a formal policy. In particular, the brief effectively used a wide range of Title VII authority to argue that Title VII cases implicitly state that when an employer representative engages in action authorized by the employer, the representative is the employer for Title VII purposes.\(^{395}\)

The final goal of the AFL-CIO was to use the confused state of agency common law to its advantage. When there was a consensus in the common law of agency, the AFL-CIO argued, it provided “general ‘guidance’” as envisioned by Meritor. But when it is unclear or “in flux,” it does not.\(^{396}\) Thus, because agency law regarding “the closely analogous question of employer tort liability for acts taken by employees to satisfy personal predilections or urges while otherwise performing authorized services for the employer” varies substantially from jurisdiction to jurisdiction, it does not provide “general guidance.”\(^{397}\)

4. Innovation in Amici Arguments

Even those amici that did not rely as heavily on traditional forms of legal argument often demonstrated substantial legal creativity when they did make such arguments. For example, although the TAB&CC in its brief in Oncale generally relied on a citation-proposition style of discussion, when the brief argued that interpreting Title VII to cover same-sex sexual harassment would be unfair to employers because employers could not have known the statute covered such conduct, it went beyond the proposition-citation style of argument.\(^{398}\) The TAB&CC relied on cases discussing the retroactivity of statutes\(^{399}\) and made a creative argument

\(^{393}\) Id. at *10.
\(^{394}\) See id. at *12-*17.
\(^{395}\) See id. at *13.
\(^{396}\) Id. at *19.
\(^{397}\) Id.
\(^{398}\) See TAB&CC Brief, Oncale, 1997 WL 673838, at *1-*3.
\(^{399}\) See id. at *2 (discussing Landgraf v. USI Film Products, 511 U.S. 244 (1994), which interpreted the Civil Rights Act of 1991).
that the petitioner's interpretation of Title VII "would be tantamount to passage of a new statute imposing additional potential liability on employers."400

Another creative argument was made by the Lawyers' Committee/ACLU in Faragher. The Lawyers' Committee/ACLU brief dealt with the "problem" of the Restatement texts by focusing on a different set of sections. Instead of concentrating on the problematic-for-employees authority and apparent authority sections, this brief centered its argument on the provisions governing when notice to an agent would be considered notice to the principal.401

In their brief in Ellerth, the feminist groups made a number of creative legal arguments. The brief contained interesting analogies to other areas of the law, including the law of criminal attempt, extortion, and blackmail, to justify its conclusion that unfulfilled threats constitute quid pro quo harassment.402 The brief also creatively examined other areas of discrimination law under Title VII, noting that the quid pro quo versus hostile environment distinction produces a lesser standard in sex discrimination cases than in race or religion cases.403 These arguments raised points not made in the parties' briefs and offered potentially useful legal assistance to the Court in making sense of Title VII.

In addition, despite the paucity of available legislative history materials about this issue, a number of the amici managed to construct arguments based on what was available. Some of these arguments were quite sophisticated; others were not.

In making its legal arguments, the Lawyers' Committee/ACLU made sophisticated arguments based on legislative history. In arguing that Meritor's analysis of the effect the inclusion of the word "agent" would have on Title VII's definition of employer, the brief suggested a limitation on employer liability. For example, the brief noted that subsequent interpretation of Title VII by the circuit courts of appeals had changed the impact of the Meritor language by finding that Title VII did not permit direct suits against individual supervisors.404 Similarly, in the argument that the Eleventh Circuit's holding (requiring a report to "higher" management in order to put the employer on notice) was an improper construction of Title VII, the Lawyers' Committee/ACLU marshaled an impressive argument based on rejected alternatives to the Civil Rights Act of 1991. It stated that the Eleventh Circuit "has impermissibly imposed on harassment victims a requirement that Congress has resoundingly declared should not be placed on them."405 Likewise, the NELA used a legislative history argument to credibly distinguish a line of cases cited by the employer-petitioner that required "tangible effects" in quid pro quo

400 Id.
403 See id. at *8-*11.
404 See Lawyers' Committee/ACLU Brief, Faragher, 1998 WL 800001, at *16-*17.
405 Id. at *24-*26.
cases, showing that the cases were made obsolete by the 1991 Civil Rights Act’s expansion of the remedies available under Title VII.\footnote{See NELA Brief, \textit{Ellerth}, 1998 WL 145353, at *7-*8.}

In contrast, the arguments in the TAB&CC \textit{Oncale} brief were based on a more simple concept: State the proposition, and then cite cases agreeing with the proposition. For example, the TAB&CC argued that same-sex harassment, which it equated to bi-sexual and homosexual sexual harassment, could not have been within the intent of Congress in passing the statute.\footnote{See TAB&CC Brief, \textit{Oncale}, 1997 WL 673838, *2-*3.} Unlike many legislative history arguments, which rely on Congressional records, this argument relied solely on case citations supporting the conclusion.\footnote{See id. (citing two circuit court opinions, three district court opinions, and Justice Scalia’s dissent in \textit{Romer v. Evans}, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting)).} Similarly, when the TAB&CC argued that the consequences of covering same-sex sexual harassment under Title VII would violate public policy by making the sexuality of the harasser and the victim an issue in the case, it simply stated that other courts had done the same.\footnote{See id. at *4.} The same approach was followed when the brief argued that the proof problems in resolving issues surrounding sexuality would be insurmountable.\footnote{See id. at *5.}

Similarly, the framework set forth by the CCUS as an alternative to the \textit{Restatement} framework was grounded in the common law concept of negligence. To make the case for this framework, the CCUS began by drawing on prior Title VII case law to demonstrate that “[t]here is no dispute that a cause of action for sexual harassment is essentially a tort claim.”\footnote{CCUS Brief, \textit{Faragher}, 1998 WL 32508, at *14.} Tort principles, however, counsel that both compensation for the victim and deterrence of the tort are valid goals. Because the CCUS did not want the Court to focus on compensation, which would require broad employer liability because individual supervisors are not generally liable for harassment claims, it needed to create a rationale for emphasizing the deterrence rationale.

To do so, it turned to the legislative history of Title VII and to an opinion in \textit{Ellerth} by Seventh Circuit Chief Judge Richard Posner to argue that the agency principles “applicable to tort cases as informed by the objectives of Title VII” should therefore be the basis for employer liability.\footnote{Id. at *15-*16 (footnote omitted).} The CCUS position on this issue was a difficult one to support. After all, as the CCUS conceded, Congress clearly had both deterrence and compensation in mind as the objectives for Title VII.\footnote{See id. at *16.} The argument thus rested on distinguishing sexual harassment claims from other forms of discrimination. To do so, the CCUS relied heavily on Posner’s individual opinion in \textit{Ellerth}. 

\footnotesize
\begin{itemize}
\item[^406]\textit{See NELA Brief, \textit{Ellerth}, 1998 WL 145353, at *7-*8.}
\item[^407]\textit{See TAB&CC Brief, \textit{Oncale}, 1997 WL 673838, *2-*3.}
\item[^408]\textit{See id. (citing two circuit court opinions, three district court opinions, and Justice Scalia’s dissent in \textit{Romer v. Evans}, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting)).}
\item[^409]\textit{See id. at *4.}
\item[^410]\textit{See id. at *5.}
\item[^411]\textit{CCUS Brief, \textit{Faragher}, 1998 WL 32508, at *14.}
\item[^412]\textit{Id. at *15-*16 (footnote omitted).}
\item[^413]\textit{See id. at *16.}
\end{itemize}
5. Arguments Based on Assumptions

Arguments based on claims about the nature of sexual harassment and/or the workplace also played a prominent role in the amici briefs. For example, the common theme uniting all of the SHRM’s arguments in its brief in *Faragher* was its claim that the rules proposed by the employee-petitioner would undercut the ability of human resource managers—the SHRM’s members—effectively to combat sexual harassment in the workplace.  

The SHRM’s style of argument can be seen clearly in its response to the employee-petitioner’s argument that employers should be charged “with knowledge [of sexual harassment] if any supervisor is made aware of the hostile environment and has a duty to disclose the information to the employer.” The employee-petitioner’s proposed legal rule was incorrect, the SHRM argued, because it ignored “the significance of employer adopted anti-harassment policies, which are encouraged and endorsed by the SHRM.” These policies placed responsibility for dealing with harassment complaints in the hands of specific individual employees rather than making it the responsibility of the entire supervisory staff. For example,  

[f]requently, these individuals are SHRM members or have been trained by SHRM members regarding topics such as how to recognize sexual harassment, complaint intake procedures, confidentiality protection, and effective listening techniques. Non-designated supervisors possess neither actual nor apparent authority to address harassment complaints on the employer’s behalf. Nor are they trained to do so.

The SHRM made similar arguments about the other legal rules proposed by the employee-petitioner.

Similarly, although flush with case citations, the argument advanced in the MacKinnon Coalition brief did not rely on case authority to make traditional legal

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415 Id. (citing Petitioner’s Brief, *Faragher*, 1997 WL 793076, at *31 (declaring that the characterization of the employee-petitioner’s argument is SHRM’s)).
416 Id. at *13.
417 Id. (footnote omitted).
418 See id. at *8-*13 (arguing that the employee-petitioner’s proposed rule requiring that even supervisory acts expressly prohibited by the employer can form the basis for liability should be rejected, because it would undercut the “incentive to adopt and enforce strong anti-harassment policies” provided by the alternative rules); id. at *15-*17 (arguing for rejection of the employee-petitioner’s proposed legal rule that employers should be charged with constructive knowledge of harassment pervasive enough to create an abusive work environment, on the grounds that it will reduce employees’ incentive to report abusive conduct).
arguments, but instead relied on a distinct theoretical perspective. For example, the MacKinnon Coalition began the argument with sections entitled “Male Dominance in Society Includes Sexual Dominance of Some Men Over Other Men as Well as Over Women” and “Denial of Sex and Gender in Male-on-Male Sexual Abuse Maintains Male Dominance.”

It then explored this theoretical perspective in depth, examining the implications for Title VII. Other briefs which relied heavily on this style of argument included the law professors’ in Oncale, the feminists’ in Faragher, and the Rutherford Institute’s in Ellerth.

The law professors masked their assumptions in their Oncale brief through a discussion of case law. Not surprisingly, the law professors produced a brief that read like a law review article (albeit without most of the footnotes). The brief traced the development of sexual harassment law, arguing that it evolved to prohibit conduct that reinforces sex stereotypes in the workplace. This argument was made through an exhaustive analysis of district and circuit court opinions starting with 1970s decisions and moving forward. For example, the professors noted that “on a deeper level” early cases “legitimized a view of workplace sexual harassment that regards the plaintiffs’ claims as private ‘gripes’ rather than discriminatory ‘grievances,’ and regards the defendants’ conduct as horseplay or locker room antics—normal and healthy manifestations of male sexuality that have simply gotten out of hand.” Feminist advocates like Catharine MacKinnon, however, successfully “reframed the problem of sexual harassment as a problem of sex-based power.”

The NWLC/ERA/WLDF’s primary mode of argument in their brief was logic. After a short review of Title VII’s purposes, the positions were set forth as the logical response to the brief’s characterization of the workplace and the structure of discrimination. Thus, for example, in arguing that absence of sexual harassment policies should be sufficient for liability while their presence should not be a shield, the NWLC/ERA/WLDF asserted: “Because of the pervasiveness of sexual harassment in the workplace, an employer that failed to put into place an effective

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420 See id. at *14-*30. Unlike others in this case, including notably the Lambda Coalition, this brief unambiguously concluded that discrimination based on homosexuality is prohibited by Title VII. See id. at *25-*28.
421 See Law Professors’ Brief, Oncale, 1997 WL 531305.
422 See NWLC/ERA/WLDF Brief, Faragher, 1997 WL 800075.
423 See Rutherford Brief, Ellerth, 1998 WL 151471.
424 See Law Professors’ Brief, Oncale, 1997 WL 531305.
425 See id. at *3-*4.
426 See Rutherford Brief, Ellerth, 1998 WL 151471, at *3-*16.
427 Id. at *6.
428 Id.
429 See NWLC/ERA/WLDF Brief, Faragher, 1997 WL 800075.
and meaningful procedure for handling employee complaints should have known of any sexual harassment that occurs, and is thus liable for failing to take appropriate action to end it.\textsuperscript{430} Similarly, the policy argument for the position also was stated in the context of how "most women endure sexual harassment rather than confront it and risk the economic and emotional peril of unemployment."\textsuperscript{431}

The Rutherford Institute argued in its \textit{Ellerth} brief that a strict liability rule was most consistent with the language and intent of Title VII.\textsuperscript{432} In making this argument, the Institute relied on a combination of factual assertions, logic, and illustrations drawn from case law.\textsuperscript{433} For example, the Institute argued that "[a]busive supervisors rarely exhibit isolated instances of either the ‘carrot’ or the ‘stick’ approach; typically, a combination of both are used, as the employee alternately submits and resists depending upon the severity of the consequences and the degree of control the supervisor wields."\textsuperscript{434} It also distinguished the employer-respondent and its amici’s arguments from case law that held a tangible detriment was necessary by noting that those cases predated the 1991 amendments to Title VII which expanded damages to include emotional distress.\textsuperscript{435}

Briefs that relied less heavily, but still significantly, on this style of argument included the Lambda Coalition’s,\textsuperscript{436} the ATLA’s\textsuperscript{437} and the EEAC’s\textsuperscript{438} in \textit{Oncale}, the CCUS’s,\textsuperscript{439} the NELA’s\textsuperscript{440} and the feminists’\textsuperscript{441} in \textit{Ellerth}, and the NELA’s,\textsuperscript{442} the CCUS’s,\textsuperscript{443} and the Lawyers’ Committee/ACLU’s\textsuperscript{444} in \textit{Faragher}.

The Lambda Coalition countered the employee-respondent’s attempt to limit Title VII to different-sex sexual harassment with an argument based on assumptions.\textsuperscript{445} While relying on case law generally, and \textit{Belleville} in particular, to bolster its statements, the brief relied much more heavily on psychological and legal books and articles to support claims about the nature of sexuality.\textsuperscript{446}

\begin{enumerate}
\item \textit{Id.} at *20.
\item \textit{Id.} at *26.
\item \textit{See} \textit{id}.
\item \textit{Id.} at *11.
\item \textit{See} \textit{id.} at *9.
\item \textit{See} Lambda Coalition Brief, \textit{Oncale}, 1997 WL 471805.
\item \textit{See} ATLA Brief, \textit{Oncale}, 1997 WL 453675.
\item \textit{See} EEAC Brief, \textit{Oncale}, 1997 WL 634312.
\item \textit{See} CCUS Brief, \textit{Ellerth}, 1998 WL 93296.
\item \textit{See} NELA Brief, \textit{Ellerth}, 1998 WL 145353.
\item \textit{See} NELA Brief, \textit{Faragher}, 1998 WL 35180.
\item \textit{See} CCUS Brief, \textit{Faragher}, 1998 WL 32508.
\item \textit{See} Lawyers’ Committee/ACLU Brief, \textit{Faragher}, 1997 WL 800001.
\item \textit{See} Lambda Coalition Brief, \textit{Oncale}, 1997 WL 471805.
\item \textit{See} \textit{id.} at *14 n.8 (citing sources to support the statement that self-defined gay men may sometimes act on attractions to women).
\end{enumerate}
Such arguments sometimes were made in terms of case law as well. For example, the Lambda Coalition argued that Title VII's "because of sex" language was satisfied whenever sexual harassment took place—"[o]vertly sexual conduct inevitably plays off the victim's sex and thus establishes sex as a substantial factor in the creation of such adverse working conditions." To make this argument, the brief primarily relied upon the Seventh Circuit's opinion in Doe v. City of Belleville, Illinois. Similarly, the Lambda Coalition argued that Title VII's use of the term "discriminate" means to use an enumerated characteristic as a factor in decision-making or in determining the conditions of employment, something the Lambda Coalition argued occurs whenever an employer engages in sexual conduct toward an employer. Although this argument also relied on analysis of prior Title VII case law, it is best characterized as one built around a particular view of sexuality.

The ATLA argued that the Fifth Circuit opinions were incorrect because they reflected a misunderstanding of the nature of sexual harassment. The ATLA simply asserted that "[s]exual harassment is certainly not limited to those occasions when the harasser is driven by sexual desire." Citations to law review articles, including student notes, and case law supported these claims.

In addition to the more prevalent legal arguments, the EEAC made two arguments that relied more on unsupported claims about sexuality and the workplace. First, it stated the obvious truth that "[s]ex is part of life," noting sexuality's importance to popular culture "as is regularly evidenced in books, magazines, movies, on television, and on the Internet." Despite its pervasiveness, however, the EEAC argued that "[m]ost employers today strive to maintain work environments in which employees treat one another with respect and refrain from the use of crude language or harassing behavior of any sort." In essence, the EEAC's implicit argument was that despite employers' best efforts, such behavior was an inevitable result of a mix of popular culture and biology. Second, the EEAC also argued that

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449 119 F.3d 563 (7th Cir. 1997), vacated and remanded, 118 S. Ct. 1183 (1998).
450 See Lambda Coalition Brief, Oncale, 1997 WL 471805, at *8-*10 ("Even the very same conduct, such as rape, uses and plays on an employee’s male or female sex differently, and relies upon each specific victim’s gender to demean and disadvantage him or her, individually, in the workplace.").
452 Id. at *12.
453 See id.
454 EEAC Brief, Oncale, 1997 WL 634312, at *11.
455 Id.
456 See id.
"right-minded employers certainly would deplore the type of behavior of which Oncale accuses his supervisor and co-workers."\(^{457}\)

The CCUS in its Ellerth brief heavily relied on a policy-based analysis of the inappropriateness of employer strict liability for supervisors' unfulfilled threats.\(^{458}\) After briefly discussing cases in which courts analyzed unfulfilled threats and concluding that the holdings in those cases were consistent with Meritor,\(^{459}\) the CCUS turned to an examination of the policy goals of Title VII.\(^{460}\) By doing so, it ventured into territory unsupported by authority or facts. For example, the CCUS described steps a "reasonable employer" would take to prevent supervisory sexual harassment, but then argued that employers will be motivated to take steps to curb such conduct only if they perceive there is a benefit to be gained from [taking such steps]. Most employers, of course, will consider it in their interest to eliminate sexual harassment and other forms of discrimination from the workplace in any event, if only because this type of misconduct leads to unhappy, and therefore less productive, workers. But because vigilant efforts to stamp out all discriminatory conduct can be costly, the additional financial incentive of avoiding liability will motivate employers to take even greater steps to ensure that they are not found negligent in their efforts to prevent sexual harassment if the liability avoided is greater than the added expense.\(^{461}\)

Similarly, arguing primarily from logic and unsupported factual assertions (although citing several cases as examples), the CCUS asserted that strict liability would prompt frivolous suits.\(^{462}\)

In arguing that unfulfilled threats were within quid pro quo harassment,\(^{463}\) the NELA made sweeping assertions upon which it based its analysis. For example, the NELA asserted:

Given the degree of authority that workplace supervisors have in our society, amicus submits that quid pro quo harassment must be deemed to have occurred when the supervisor makes a threat, whether or not that

\(^{457}\) Id. at *17.
\(^{458}\) See CCUS Brief, Ellerth, 1998 WL 93296, at *14-*20.
\(^{459}\) See id. at *15-*16.
\(^{460}\) See id. at *16-*17.
\(^{461}\) Id. at *17.
\(^{462}\) See id. at *19.
\(^{463}\) See NELA Brief, Ellerth, 1998 WL 145353, at *7-*12.
threat is actually carried out, and that the employer must be liable for that supervisor's conduct.

Moreover, from the point of view of the employee, once the threat is made, it is as good as carried out. Many women are afraid to speak out against their supervisor. The supervisor typically has more tenure with the company, more 'well placed' friends within the company and often is in a position that is more secure than that of the victim.\footnote{464}

The NELA also used negative examples drawn from case law to illustrate "the danger" of accepting the petitioner's position.\footnote{465} For example, the NELA described the D.C. Circuit decision in \textit{Gary v. Long},\footnote{466} in which a supervisor raped a subordinate,\footnote{467} as the apparently logical outcome of refusing to recognize unfulfilled threats as constituting quid pro quo harassment.\footnote{468}

Finally, the NELA contended that a two-page summary of a "recent government-commissioned survey of 20,000 women in the armed forces,"\footnote{469} proved that unfulfilled threats cause substantial harm.\footnote{470} According to the NELA, this study showed that women who received unfulfilled threats did not suffer significantly different consequences from women who received threats that were later acted upon.\footnote{471} This is an astounding claim, and one which, if true, would surely affect a legislature considering the issue. Nevertheless, the appropriateness of relying on unpublished research, government-commissioned or not, in a court proceeding is questionable. The armed forces context also might suggest important differences between the study and the workplace generally.

In their brief, the feminists also freely mixed more traditional legal analysis with analysis based upon "facts."\footnote{472} Thus, in arguing that there should be no distinction between quid pro quo and hostile environment claims under Title VII, the feminists both analyzed case law and agency principles,\footnote{473} and made unsupported factual

\begin{footnotes}
\item[464] \textit{Id.} at *8-*9 (footnote omitted); \textit{see id.} at *14-*15.
\item[465] \textit{Id.} at *17.
\item[466] 59 F.3d 1391 (D.C. Cir. 1995).
\item[467] \textit{See id.} at 1394.
\item[469] \textit{Id.} at *19.
\item[471] \textit{See id.} at *20.
\item[472] \textit{See ERA/NOWLDEF/NPW&F/NWLC Brief, Ellerth,} 1998 WL 145349.
\item[473] \textit{See id.} at *19-*27.
\end{footnotes}
claims such as “Ellerth’s experience is typical of women harassed by their supervisors.” The ease with which the feminist coalition brief moved back and forth between these two types of argument suggests its authors saw little distinction between them.

The NELA’s style of argument about the liability of employers for supervisory conduct differed depending on whether the harassing supervisor was assumed to be acting within the scope of his employment. In arguing that employers were liable for harassment in the scope of employment, the NELA cited little authority or documentary evidence. When arguing that the employer could be liable even when the harassing supervisor was acting outside the scope of his authority, the NELA turned to a list of cases holding employers liable when the supervisor used his authority to manipulate the employee into a situation in which the harassment took place. In addition, the NELA relied heavily (and unusually for this brief) on a lengthy quote from a law review article to establish the parameters of the employment relationship.

The CCUS devoted considerable effort to contrasting its approach with that advocated by the Solicitor General. In doing so, the CCUS relied on its claimed knowledge of the workplace to undercut the EEOC position. For example, the CCUS argued that the EEOC position was based on “supervisors’ purported ‘authority’ under agency law.” Responding to that, the CCUS questioned: “But that begs the question: authority to do what? Supervisors typically have authority to assign work to their subordinates, to evaluate their performance, and sometimes to hire and to fire them. As discussed above, however, supervisors rarely have actual or apparent authority to sexually harass their subordinates.

This argument is based on bootstrapping from undocumented facts, as well as from acceptance of the CCUS position on the meaning of apparent authority. No party or amici to the case contended that supervisors have either real or apparent authority to engage in sexual harassment in other than extremely rare cases; the argument over the application of the agency law concept centered on whether the scope of normal supervisory authority created space within which supervisors are able to engage in sexual harassment and whether that mattered under Title VII law. Moreover, the issue of just what authority supervisors “typically” have hardly can be

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474 Id. at *19.
475 See NELA Brief, Faragher, 1998 WL 35180.
476 See id. at *9-*11.
477 See id. at *13.
478 See id. at *12 (quoting David B. Oppenheimer, Exacerbating the Exasperating: Title VII Liability of Employers for Sexual Harassment Committed By Their Supervisors, 81 CORNELL L. REV. 66, 89 (1995)).
480 Id. at *19.
481 Id.
the subject of judicial notice—supervisory relationships are likely to differ in different workplaces based on the structure of the work unit, the type of work, whether a union is present, the workplace culture, and so forth. Similarly, the conclusion of the argument relies on the assertion that “[m]ost responsible American employers have heeded Meritor's admonition and have adopted strong policies against sexual harassment.”

The CCUS offered several facts based on amici's “experience representing clients in numerous cases.” For example, in arguing that imputing Gordon's knowledge to the city was reasonable, the CCUS asserted that it was the amici’s experience that

the fear of retaliation is both so frequent and so intense that a discriminatory situation may fester long before a victim summons enough courage to complain. The fear of retaliation is particularly strong in cases involving intentional racial or sexual discrimination, because the intensity of the wrongdoer's reaction is in our experience related to the degree to which the conduct is shameful.

Similarly, the CCUS asserted that imputing supervisory knowledge to employers was reasonable because employers “generally expect” and employees “usually assume” that supervisors will report such information to higher management.

Some groups made unsupported claims about the record as well. For example, in support of its claim in Ellerth that certiorari had been granted improvidently, the NELA simply listed facts (without record citations) which it alleged demonstrated that Ellerth had suffered actual harm. These “facts” were hardly clear in the record—the employer-petitioner, for example, had argued that the district court had dismissed the constructive discharge claim and the employee had failed to appeal that dismissal. Similarly, the NELA argued that the employee had defeated the motion for summary judgment by reciting facts, again without record citations.

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482 Id. at *23.
483 Id. at *18.
484 Id.
485 Id. at *23.
486 See id. at *7.
487 See id. (stating that the listed facts included work-related requests which had been denied, constructive discharge, delayed promotion, and abusive work environment).
488 See Petitioner's Brief, Ellerth, 1998 WL 90827, at *6-*7.
489 See NELA Brief, Ellerth, 1998 WL 145353, at *22-*27.
6. Policy Arguments

Explicit policy arguments generally were minor parts of briefs, although the Rutherford Institute\textsuperscript{490} and the NAM/MAPI\textsuperscript{491} briefs relied quite heavily upon them. The Institute argued that most of the lower courts were following a strict liability standard for quid pro quo sexual harassment by supervisors.\textsuperscript{492} While conceding that the circuit courts’ rationales for respondeat superior liability in Title VII cases varied, the Institute contended that “[p]roof of tangible job detriment has generally been required by the Circuit Courts only where the issue before the court is whether threats and conduct of a supervisor may be attributed to the employer under agency principles,” not when other rationales were used.\textsuperscript{493} Without explaining why, the Institute then concluded that “the more workable rule” would be to “assume strict liability for the employer where the harassing employee had authority to alter the terms and conditions of the employee’s workplace . . . .”\textsuperscript{494} Similarly, the Institute set out a short, one paragraph policy argument that a strict liability rule would “bring order and predictability to Title VII jurisprudence.”\textsuperscript{495} This argument was simply a statement of the Institute’s preference, unsupported by any form of argument.\textsuperscript{496}

Except to support its initial analysis of the requirements of Meritor,\textsuperscript{497} the NAM/MAPI relied heavily on policy arguments, rarely relying on case or statutory authority to support its position except by way of example.\textsuperscript{498} Even when discussing Meritor, the NAM/MAPI relied primarily on assertions rather than on analysis.\textsuperscript{499} After arguing that the lower courts “have had considerable difficulty defining the limits of quid pro quo sexual harassment claims,”\textsuperscript{500} the NAM/MAPI then proceeded to a virtually authority-free discussion of the importance of the quid pro quo/hostile environment distinction.\textsuperscript{501}

The NAM/MAPI also presented a short attack on the EEOC’s position in its amicus brief.\textsuperscript{502} Again, the NAM/MAPI relied on little authority, instead simply

\textsuperscript{490} See Rutherford Brief, Ellerth, 1998 WL 151471.
\textsuperscript{491} See NAM/MAPI Brief, Faragher, 1998 WL 32489.
\textsuperscript{492} See Rutherford Brief, Ellerth, 1998 WL 151471, at *12-*15.
\textsuperscript{493} Id. at *15.
\textsuperscript{494} Id.
\textsuperscript{495} Id. at *16.
\textsuperscript{496} See id.
\textsuperscript{497} See NAM/MAPI Brief, Faragher, 1998 WL 32489, at *7-*13, *15-*18.
\textsuperscript{498} See id. at *13-*15, *19-*29.
\textsuperscript{499} See id. at *8 (“Similarly, although not evident from the statutory text, the distinction between ‘quid pro quo’ and ‘hostile environment’ sexual harassment is an accepted part of Title VII analysis.”).
\textsuperscript{500} Id. at *10.
\textsuperscript{501} See id. at *13-*15.
\textsuperscript{502} See id. at *25-*29.
stating "legitimate employer interests." For example, it asserted that "the non-litigation driven interests of employers—such as the desire to foster a productive working environment that is conducive to attracting and retaining skilled workers in a shrinking labor pool—would provide sufficient incentives for employers to take all reasonable steps to eradicate harassment from the workplace." This position is indeed logically compelling, if one accepts the predicate facts, although it leaves open the question of why Title VII exists at all and is utterly without support.

7. Arguments Aimed Outside the Court

In their brief in *Faragher*, the Lawyers' Committee/ACLU relied heavily on a form of argument that largely appeared to be directed to an audience other than the Court. Alone among the amici, the Lawyers' Committee/ACLU devoted almost half its text to setting forth a statement of the case. Seven of the fifteen pages of the Westlaw printout of the substantive portions of the brief (i.e., not including the table of cases, digest, etc.) were taken up by the statement of facts. In the argument sections, the Lawyers' Committee/ACLU incorporated traditional types of statutory interpretation arguments, drawing on legislative history and case interpretation.

The facts "argument" is interesting because of its uniqueness in these cases. The Court clearly did not need assistance with the facts of the case, something the parties were capable of providing. The statement of facts focuses on the offensive language used by the supervisors, quoting at length from trial testimony about their use of offensive epithets to refer to women and other boorish behavior. Almost none of these facts concerned the legal issue in the case—the question of whether the employer should be liable for the acts of the supervisors—because only a few of the facts set forth related to the impact of the supervisory relationship on the harassment. This argument, therefore, seems clearly aimed at an audience other than the Court, such as the media or the organizations' membership.

The Lawyers' Committee/ACLU also presented several cursory arguments. For example, at the end of the brief, the organizations asserted that the remoteness of the

503 Id. at *26.
504 Id. at *27.
505 See id.
507 See id.
508 See id. at *16-*29.
509 See id. at *3-*15.
510 See id. The testimony by the employees that they could not avoid the supervisors because the supervisors controlled whether the supervisors would share a lifeguard hut with the employees, for example, was relevant to this issue. See id. at *6-*7. It was discussed only at the end of the statement of facts, however, and was not discussed in as much detail as the behavior. See id.
work site should not shield the employer from liability. This argument consisted of just slightly more than 100 words, the vast majority of which were a description of the Eleventh Circuit’s position.\textsuperscript{511} The “argument” asserted was that “Title VII simply cannot be read as tolerating two different standards of conduct, depending on whether it occurred at headquarters or in the field, but this will be the inevitable result of barring constructive notice at all but an employer’s central site.”\textsuperscript{512} Such a compressed argument, essentially a simple statement of position, served little purpose beyond casting the organizations’ “vote” for a particular interpretation, as a form of interest group lobbying, creating a sound bite for news organizations, or documenting the organization’s participation on a particular sub-issue.

B. \textit{Individual Briefs}

The briefs raised several issues that deserve particular attention. One such issue is whether there are differences between the amici who participated in only one case and those that asserted a broader interest by participating in two or three.

Consider the Rutherford Institute’s brief. It is impossible to avoid the relationship between this brief in \textit{Ellerth} and \textit{Jones v. Clinton}.\textsuperscript{513} At the time this brief was filed, March 30, 1998, the \textit{Jones} case had not been dismissed yet.\textsuperscript{514} The motion to dismiss—centered on President Clinton’s legal claim that, even if Paula Jones’ allegation that Clinton solicited oral sex from her was true, the allegation was not actionable under Title VII because she had suffered no tangible job detriment—had long since been filed.\textsuperscript{515} As Jones’s lawyers, the Institute clearly was aware of the importance of the issue to that case. Indeed, given the types of cases in which the Institute most frequently participates,\textsuperscript{516} its interest in this issue is difficult to explain otherwise.

The Institute’s brief offered relatively little that was new in terms of arguments or positions. The employee-respondent, for example, articulated essentially all of the arguments made by the Institute and did so in a manner more closely tied to the facts

\begin{itemize}
\item \textsuperscript{511} See id. at *29.
\item \textsuperscript{512} Id.
\item \textsuperscript{513} 990 F. Supp. 657 (E.D. Ark. 1998).
\item \textsuperscript{514} See id. at 662. The case was dismissed on April 1, 1998.
\item \textsuperscript{515} See id. at 678-79.
\item \textsuperscript{516} According to its web page, the Rutherford Institute’s “attorneys fight for the constitutional and human rights of men, women and children who are discriminated against or persecuted for their beliefs.” The Rutherford Institute, \textit{About The Rutherford Institute} (visited Mar. 25, 1999) <http://www.rutherford.org/about-main.asp>. The Rutherford Institute also makes “[l]egal research resources . . . available to assist attorneys involved in constitutional litigation.” The Rutherford Institute, \textit{Need Help Now?} (visited Mar. 25, 1999) <http://www.rutherford.org/need-main.asp>.
\end{itemize}
of Ellerth. Other than as a potential signal to the more conservative members of the Court that the issue was important for Jones v. Clinton, something of which they hardly could have been unaware, the brief simply represented an assertion of a position already made by others which was not based on any particular expertise.

One can imagine a brief from the Institute that would have offered something new to Ellerth. With its focus on religious discrimination cases, the Institute might have discussed how vicarious liability principles affect either religious employees with discrimination claims or religious employers facing claims based on supervisory conduct. Although there may have been implications of resolution of the vicarious liability issue for such cases, the Institute did not discuss such issues.

The Texas Association of Business brief, a short six pages, was a straightforward statement that Texas employers were opposed to the rule proposed by the petitioner-employee. It did not include creative legal arguments, additional information about employers’ experience, or any other information. Like the Rutherford brief, the TAB&CC brief merely was an interest group's “vote” for a particular position.

The SHRM brief presents almost an idealized version of both the membership-appeal and lobbying amici briefs. Short, devoid of legal arguments, and filled with ‘helpful’ factoids and anecdotes, the brief could be provided to nonlawyers to demonstrate the value of the organization’s participation in the case. On the lobbying front, it made a concise, clear statement of the argument that the law should promote employers who have the type of policies the SHRM advocates, although it left unsaid why such policies are preferable to alternatives. Combining both approaches in a remarkable passage in the introduction, the brief asserted that the type of policies the SHRM advocates would be undercut by the employee-petitioner’s proposed legal rules because employees would simply sue rather than report sexual harassment. “Moreover, if these policies provide little or no protection from liability to employers, one must ask: Will employers be less inclined to heed the encouragement of SHRM professionals on their staff to adopt and maintain them?”

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517 See Respondent’s Brief, Ellerth, 1998 WL 145325.
518 See TAB&CC Brief, Oncale, 1997 WL 673838.
Implicit but unstated was the logical next question: Will employers be less likely to hire SHRM members under the rules advocated by the employee-petitioner?

Lobbying from a more theoretically-based perspective, the MacKinnon Coalition brief in *Oncale* offered a unique perspective on sexual harassment law, albeit one that had little to do with the traditional forms of legal argument. Rather than proposing an interpretation because it made legal sense, the brief redefined legal analysis to mean analysis consistent with the brief's theory of sexual harassment, and then developed a legal position from that theory. In contrast, despite the obvious importance of sexual orientation issues to many of the organizations in the Lambda Coalition, the arguments, authorities, and structure of the Lambda Coalition brief in *Oncale* minimize the importance of those issues. Rather than presenting a theory of how sexual orientation might influence the conduct or experience of harassment, the brief focused on making the issue a narrow legal question.

The differences between the briefs of the Lambda Coalition, the MacKinnon Coalition, and the law professors in *Oncale* provide a dramatic confirmation of the increasing complexity of the civil rights coalitions described by Wasby. Even if sending a political message were a legitimate function of amici briefs, what is the message sent by three briefs from (at least) nominal allies with such diverse approaches? Should the Court count votes—and if so, how should the local groups that joined in the MacKinnon Coalition be compared to the national organizations in the Lambda Coalition? Do law professors "count" at all? If so, do the twenty-nine who joined together outweigh the greater prestige of Catharine MacKinnon, author of the MacKinnon Coalition brief? Organizations lobbying Congress know the currency by which their weight is determined: votes and contributions. For all its flaws, that process provides a means of evaluation missing from the amici’s lobbying.

It is also important to consider some of the repeat players. Two repeat players, the EEAC and the NELA, had similar interests in the cases, although from opposite sides. Both organizations represent members whose professional activities and ultimate financial well-being are linked to Title VII issues. Two other repeat players, the CCUS and the AFL-CIO, also share similar (but opposing) interests which are more indirect. The CCUS represents potential defendants, while the AFL-CIO is concerned with the impact of Title VII on the structure of the workplace. Finally,


524 See WASBY, supra note 8, at 46-51.


one interest group coalition participated in all three cases—the (slightly shifting) feminist coalition.527

The EEAC participated in all three cases on the employers’ sides. In *Oncale*, the legal argument in the EEAC brief was straightforward: Title VII uses specific language ("because of . . . sex") that precludes same-sex discrimination claims, a conclusion bolstered by failed efforts to amend Title VII specifically to include sexual orientation claims.528 So far, this is not too different from the employer-respondent’s analysis. Contrary legal authority is dismissed, while favorable legal authority is highlighted.

The main addition offered by the EEAC brief is a moral story defending employers: *This* employer’s employees behaved badly toward *this* employee, but “right-minded” employers would not tolerate this type of conduct.529 The extraordinarily reprehensible nature of the conduct alleged in this case (and only alleged, because the case was decided on summary judgment below) could make it difficult to separate the conduct and the legal rule at stake. The EEAC brief attempted to reframe the issue by bringing into the picture claims about the behavior of the majority of employers.530 The concluding paragraph of the brief exemplifies this approach by providing possible explanations for the behavior of *Oncale*’s tormentors: they may have been “mean spirited,” found it “perversely amusing” to torment him, or been “socially arrested individuals who lacked the capacity to cope in acceptable ways with the boredom and isolation of life on an offshore oil rig.”531 Such conduct would be “deplore[d]” by “most right-minded employers” and be grounds for “severe discipline or discharge” under “most employers’ standards of workplace conduct.”532 Separating the legal principle from the specific employer thus appears to be the main function of this brief. While useful for the general public, Supreme Court justices should be able to see such distinctions on their own. (If they cannot, it is unlikely an amicus brief is going to open their eyes.)

In *Faragher*, on the other hand, the EEAC brief provided a thorough and persuasive analysis of the text and comments of the most relevant *Restatement (Second) of Agency* provisions.533 It avoided undocumented factual assertions and set forth a coherent view of the law of agency. It did not, however, grapple with the central question of just how much the law of agency matters in determining employer

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529 See id. at *6-*7.
530 See id. at *17-*18.
531 Id. at *17.
532 Id.
liability for supervisory harassment under Title VII, because it did not address the question, left open by *Meritor*, of which agency principles govern.

In *Ellerth*, both the EEAC position and the style of its argument represent the organization’s members’ substantial interest in the pre-decision status quo, with a slight tweak to gain a safe harbor. Many employers have learned to live with Title VII, the EEOC, and discrimination suits, if not to welcome them. It is clear that human relations executives, the EEAC’s membership, have done so with respect to the pre-*Ellerth* levels of liability. Preserving the existing framework therefore seemed essential. Both the EEAC brief’s position and argument seem less assertive and detailed than that of the employer-respondent. The EEAC primarily described the law as it existed in at least some circuits. The failure to acknowledge, much less grapple with, the doctrinal uncertainty that existed before this case is surprising.

Next consider the NELA briefs. In *Oncale*, the NELA relied almost entirely on traditional legal arguments about statutory structure. While expanding Title VII to cover same-sex harassment obviously would benefit the NELA’s members, and at least some potential clients, the number of such claims surely is much smaller than the number of opposite-sex sexual harassment claims. The success or failure of the same-sex theory would have no impact on that larger and financially more important group of cases. The NELA’s direct stake in *Oncale*, therefore, was relatively small.

In *Faragher*, the NELA’s members’ self-interest (to prevent employers from securing a safe harbor through promulgation of an antiharassment policy) was substantial. Given the realities of Title VII litigation, one of the primary goals for lawyers representing employees is to prevent cases from being resolved on legal issues before trial. Creating a fact-intensive question, one requiring a “searching” factual inquiry, is an almost guaranteed means of preventing summary judgment. The NELA’s position in this case thus is in line with what one would expect, but its means of argument is not. A group of lawyers, however, might expect a different class of argument from a nonlawyer interest group, even if the primary function of the brief for the organization was to reinforce member support. Lawyers, after all, can be expected to know at least something about the amicus process and/or to be

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535 See id. at *8-*16.
536 See id. at *8-*16.
537 See supra notes 350-55 and accompanying text.
538 Even if the NELA members’ support for antidiscrimination law was motivated entirely by a disinterested objective analysis that antidiscrimination law is in society’s best interests, they cannot continue their efforts to eradicate discrimination if employers can hide behind simple safe harbor provisions. Thus, it is not necessary to impute selfish motives to the NELA membership to provide them with an incentive to secure a broad interpretation of Title VII.
appropriately skeptical of the value of amici briefs that merely articulate policy arguments.\textsuperscript{540} The sparse nature of the legal arguments in the NELA’s \textit{Faragher} brief, particularly when compared to its brief in \textit{Oncale}, therefore is a bit surprising.

In \textit{Ellerth}, the NELA relied almost entirely on policy arguments with little grounding in either the record or other supporting evidence.\textsuperscript{541} Again, its direct interest was substantial, yet it avoided legal analysis. For example, the discussion of a study by Fitzgerald, Bergman, and Hulin\textsuperscript{542} is almost bizarre—to attempt to persuade the Court by discussing a social science study of unclear value\textsuperscript{543} is an odd way to address a question of legal interpretation.

The two interest groups with the most direct interests in the cases both relied on different approaches in the three cases—using legal arguments in one, policy arguments in another, and so forth. Read together, these organizations’ briefs do not present a consistent view of their role as amici.

The CCUS and the AFL-CIO had somewhat less direct interests in the three cases. Their interests also were more complex—both organizations are coalitions of organizations whose own interests in the details of Title VII law are likely to differ.\textsuperscript{544}

Two features of the CCUS \textit{Faragher} brief stand out. First, although in their brief the CCUS made a greater attempt than some of the other amici to present its argument in terms of legal argument, it consistently relied on unsubstantiated factual assertions and policy preferences to support its position.\textsuperscript{545} The legal authorities and arguments functioned more as vehicles for expressing policy preferences than as legal arguments about the proper structure of Title VII. The CCUS presented a picture of the workplace quite different from that presented by the employee-petitioner and her amici. This picture was based on the CCUS’s assertions about employer behavior, presumably supported by the organization’s experience with its members. Second, the CCUS’s endorsement of Chief Judge Posner’s analysis belied its attempts to characterize its legal arguments as straightforward applications of the common law concepts of negligence and tort law agency principles. In sum, the CCUS essentially presented a purely interest group lobbying position, but made much more effort at presenting that position as a legal argument than did many of the other amici briefs.

\textsuperscript{540} It is the filing of the brief, rather than the content of the brief, that matters in this context. Thus, if the primary use of the brief is for a news release announcing its filing, to entice news organizations to ask the group for comments when the decision appears, or to be listed in fundraising materials, its content becomes irrelevant.


\textsuperscript{542} See id. at *19-*20.

\textsuperscript{543} The value of the study is unclear in the brief because the brief provides no information by which to evaluate the quality of the study. I do not intend any disparagement of the study itself.


\textsuperscript{545} See CCUS Brief, \textit{Faragher}, 1998 WL 32508.
In *Ellerth*, the CCUS brief supporting the employer-petitioner overlapped to a surprising degree with the employee-respondent's brief. While the employer-petitioner's brief centered around the distinction between quid pro quo and hostile environment theories of liability, the CCUS brief only grudgingly conceded the existence of those theories. This difference allowed the CCUS brief to offer the Court a different rationale for the employer, although the brief's lack of analysis regarding how its standard would be implemented in this case undercut its support for the employer-petitioner.

One striking feature of the brief was the difference in the methods of argument in different sections of the brief. The CCUS's analysis of current Title VII law and discussion of when liability might exist for supervisory acts was based on the traditional legal building blocks of case analysis. In between those sections, however, the CCUS turned to almost pure policy analysis, with only minimal reference to case law. This difference reflects both the relative lack of evidence of congressional intent and the Court's own tendency toward cryptic language in prior Title VII opinions like *Meritor*. The shift in analysis goes beyond this difference, however, as the brief does not provide authority for its claims about the structure of the workplace, employer incentives, and so forth.

These claims are central to not only the "micro" question of how employers behave, but also to justification of the interpretations of the case law made in the other sections. The CCUS's contention that there is a difference between conduct and employer liability, akin to the CCUS's position in *Faragher* concerning the relationship between supervisory authority and harassment, rests in large part on its claim that supervisory misconduct must take both the employer's and the employee's interests into consideration.

Finally, by posing the issue as one of a choice between strict liability and negligence and the impact of that choice on employer incentives, the CCUS curiously neglects the extensive literature on this point in the legal and economic literature concerning tort law.

In its brief in *Faragher*, the AFL-CIO provided the Court with a careful, nuanced legal argument for a solution to the problem created by the Court's vagueness in *Meritor*. Unlike many of the other amici on both sides, the brief did not make an explicit policy argument but instead developed its position as a legal matter.

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547 See supra note 319.
548 See STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW (1987). If it were only my own biases suggesting that this analysis is fundamental to understanding the difference in tort standards, I would be merely whining that the CCUS neglected to write the brief I thought they should. More than that is at stake here, however, because the CCUS brief defines the issue in terms of those incentives. To neglect that literature therefore is puzzling.
Moreover, despite its ability to make a credible claim of expertise in the workplace, the AFL-CIO did not attempt to bring its knowledge of the implementation of the law into consideration.

In *Ellerth*, the AFL-CIO position was similar to the NELA’s on the relationship of the issue presented to the actual case. Its argument was that the decision in this case did not require a resolution of the vicarious liability issue (which the employer-petitioner presented as central), thus leaving the question open for the Court to address in *Faragher*. Because the facts in *Faragher* were much better, from the employee’s point of view, this argument made a great deal of sense.

The attention devoted by the AFL-CIO to Chief Judge Posner’s “company act” doctrine is noteworthy. The AFL-CIO spent relatively little time discussing the various Seventh Circuit en banc opinions. Giving seven pages to critiquing an opinion that got only one vote below suggests that the AFL-CIO either saw Posner’s position as particularly dangerous, or the Supreme Court as particularly susceptible to his argument.

In their arguments and authority, the feminist briefs attempted to present a coherent world-view rather than a legal argument. For example, in *Faragher*, consistent with much feminist writing about the need to contextualize legal argument, the feminists’ primary focus was on placing the legal issue within the three organizations’ view of how the structure of the workplace produces discriminatory conduct. Such briefs can provide a different perspective on the law, a potentially valuable role for amici. At the same time, however, the feminists’ approach is troubling because the perspective largely is built from authority of dubious value. Law review articles, for example, are a particularly bad source of facts about how the world works because they generally are not based on actual data collected by authors trained in social or other sciences, nor are they subject to peer or other forms of review.

The factual allegations about the structure of sexual harassment and the workplace in general are disturbing for several reasons. The material cited often is inadequate—citing a nearly ten-year-old study from *Working Woman* magazine is not the same as citing a rigorously conducted, peer-reviewed study published in a social science journal. Moreover, by couching their perspective argument in quasi legal terms, the feminist organizations undercut any ability to provide a “different voice.” Feminist legal scholarship has provided alternative means of interpreting Title VII, ones with which this author disagrees. These briefs, however, neither

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551 See id. at *29.
553 See, e.g., KRISTIN BUMILLER, THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION
guide the Supreme Court to that literature nor express a means of interpretation consistent with it. This deficiency may have reflected an express pragmatic judgment that any influence the briefs might have at the Court would be lost if they centered on feminist legal theory, or it may reflect an implicit pragmatism caused by the three organizations’ reliance on lawyers rather than on the victims of discrimination to shape their arguments.

C. Summary

Some lessons can be drawn from the types of arguments made by the amici in these cases. First, the amici did not appear to view their role as articulating legal arguments—even when they made more traditional forms of legal arguments, they did not do so consistently throughout the cases or even within the same brief. This review of the arguments thus confirms the prevalence of the lobbying view of the amicus process.

Second, the amici appear to be engaged not in a dialogue over the issues, but in attempts to capture the result by framing the issues in different ways. While disagreement over the proper way to frame the issues is a vital part of legal arguments, the amici asserted their claims as the result of underlying unsubstantiated factual claims and only rarely as a dispute over the legal issues themselves.

Third, in his book on *Regents of the University of California v. Bakke*, Timothy O’Neill examined the fifty-one amici briefs submitted by the one hundred seventeen amici in that case to determine whether “litigation did serve as the schoolmaster in a vital natural seminar.” The process of creating organizational positions in *Bakke* required, according to O’Neill, that organizations “mobilize their intellectual reserves” to teach their members and themselves about the difficult choices that case posed. The process of amici participation, as much as the amici briefs themselves, thus served an important political function.

By contrast, in these cases the principles at stake involved narrow statutory interpretation, not the broad constitutional deliberation over conflicting fundamental values present in *Bakke*. Many of the amici in these cases appear to have extended the grand scale approach of cases like *Bakke* to these more mundane matters. Does this matter? Yes. The amici’s nonlegal arguments reduce their own effectiveness.

The successful litigant—as an individual or an organization—must be prepared to make the opponent’s case at least as well as the opponent can.

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555 O’NEILL, supra note 3, at 3. He also found, however, that few of the *Bakke* amici “aspired to or achieved any degree of originality in their arguments.” *Id.* at 89.
556 *Id.* at 4-5.
By understanding the strengths and weaknesses of the opposition, the individual and organization can discover the strengths and shortcomings of their own positions. The advocacy process is dialectical, prompting the arguments and counterarguments, evidence and counterevidence necessary for learning.\textsuperscript{557}

Even amici briefs that merely duplicate the parties’ briefs are worth rejecting.

The bane of lawyers is prolixity and duplication . . . . In an era of heavy judicial caseloads and public impatience with the delays and expense of litigation, we judges should be assiduous to bar the gates to amicus curiae briefs that fail to present convincing reasons why the parties’ briefs do not give us all the help we need for deciding the appeal.\textsuperscript{558}

Some commentators believe that amici play a useful role when they articulate a position for which a party “lack[s] credibility” or is “unable to make the argument for political or tactical reasons.” Bruce Ennis, for example, notes that billboard owners who leased their billboards to both commercial and political clients obtained amicus support from the ACLU to emphasize the political speech aspects of the case: “The billboard owners . . . were not in a position to argue credibly on behalf of political speech because they did not themselves engage in political speech; they simply leased billboard space, primarily to commercial speakers.”\textsuperscript{560}

The ACLU may have been in a better position to argue political speech issues because of its expertise. It is simply incorrect, however, to argue that the billboard owners could not make the argument “credibly,” unless Ennis means that the ACLU’s “vote” on the issue was important because it was the ACLU, rather than a mere property owner, making the argument.

VII. CONCLUSION

The participation by amici in these cases suggests that at least these amici believe that their appropriate role involves lobbying the Court based on undocumented interest group assertions and poor quality social science evidence. Because many of these amici are repeat players before the Court, it is difficult to dismiss their beliefs, as revealed by their actions, as simply mistaken.

\textsuperscript{557} Id. at 17.
\textsuperscript{558} Ryan v. Commodity Futures Trading Comm’n, 125 F.3d 1062, 1064 (7th Cir. 1997).
\textsuperscript{559} Ennis, supra note 3, at 606-07.
\textsuperscript{560} See id. at 607.
\textsuperscript{561} Id.
Although part of the motivation for filing these briefs is likely their impact on an outside audience—whether citing the briefs in fundraising materials or using them to gain media attention for the groups' positions—that alone seems to be an insufficient explanation. Many of the interest groups have sophisticated members who surely understand the limited role of amici, and even those who do not can rely on “random” successes on the merits only occasionally. Given the isolation of the justices, imposed both by the structure of the judiciary and the lack of “real world” experience of many of the justices, the amici’s arguments may have some impact on their view of how businesses operate or the prevalence of sexual harassment in the workplace. The courts, in general, are terrible places to do social science research on such issues, and the Supreme Court is in perhaps the worst position of all to evaluate claims made about the content of such research. If amici briefs are serving such a function, their influence is not positive.

This Article began by noting that amici often could claim to be able to provide expertise on issues before the Court, which offers a stronger basis for their participation than the naked interest claims most relied upon. Such claims must be crafted carefully to avoid the problem of introducing the questionable nonrecord “facts” described in this Article. To the extent there is a legitimate role for expertise-based amici participation, it rests with expertise in interpreting legal materials rather than with any claim to be a pseudo-expert witness.

The pernicious influences of the current state of amici practice are larger, however. Participation by one amicus, even if motivated solely by nonlegal considerations, can prompt creation of new organizations dedicated to providing an alternative viewpoint.\textsuperscript{62}

Even on their own terms, amicus participation is not an unmitigated good. Professor Wasby reports that civil rights groups themselves argued that “[o]ne reason ‘Title VII law fell apart’ . . . is that ‘too many lawyers brought cases.’”\textsuperscript{55} The shift to amici practice undermines efforts to shape the law by spreading organizational resources widely and thinly. Moreover, by bringing groups into the case late in the procedural history, the chance for the early involvement “vital for making a good record and for properly framing issues and preserving them for appeal” is lost.\textsuperscript{64}

This loss can be seen clearly in Ellerth, in which the case’s posture prompted one

\textsuperscript{562} See Ivers & O'Connor, supra note 3, at 164 (describing the organization of Americans for Effective Law Enforcement, created by a criminal procedure professor to counter the ACLU’s influence).

\textsuperscript{563} WASBY, supra note 8, at 158 (citing JACK GREENBERG, LITIGATION FOR SOCIAL CHANGE: METHODS, LIMITS AND ROLE IN DEMOCRACY 32 (1973)).

\textsuperscript{564} WASBY, supra note 8, at 158. See also Calkins, supra note 3, at 311 (stating that one cost of amici’s participation in the antitrust cases studied was that the Supreme Court “was obliged to address important issues, arguments, and authorities raised by amici very late in the proceedings”).
amicus to argue that the certiorari petition should be dismissed. The shift from direct involvement to amici participation therefore has negative implications even for those who sympathize with particular amici’s aims.

In part, the rise of the amici reflects the overall decline in legal argument. As Professor Richard Markovits argues in his recent book *Matters of Principle*, many individuals involved in the law no longer believe in “internal-to-law right answers” to legal (and moral) questions. As a result, they substitute “external-to-law” policy analyses in their teaching, scholarship, practice, and decision-making. The rise of amici is also rooted in the inappropriate use of the law to resolve social conflicts over issues which are difficult to fit within legal language.

One cause of these problems may be the failure of Congress and the courts to engage in quality legal work themselves. Poorly drafted statutes and court opinions that avoid the legal questions, both issues in some of these cases, provide extensive room for lobbying. It is hard, therefore, to blame the amici for accepting the invitation to lobby issued by Congress and the Supreme Court.

The “remedy” is twofold. First, the Court should make clear its use or nonuse of amici briefs. If the rising tide of amici briefs is truly a waste of paper, the Court should say so in its opinions. If the briefs rest unread in the justices’ chambers, they should so note, if only in a footnote reading: “While we appreciate the efforts of amici in this case, we found it unnecessary to consult their briefs because the briefs of the parties adequately illuminated the issues.” Such an unambiguous signal would serve to correct erroneous but good faith beliefs that these briefs are important. If amici briefs are read but unheeded, the Court should make that clear as well—a footnote could note that “we reject the arguments of such and such amici in this case because these arguments fail to address the legal issues before us, providing us instead with policy arguments and unsubstantiated nonrecord information we cannot consider.” This might serve to encourage more appropriate filings in the future, and would discourage those engaging in lobbying from touting their “participation” in Supreme Court cases.

Second, scholars should subject amici briefs to criticism. Given their ready availability on Westlaw and LEXIS, they easily are accessible for analysis. When amici make poor quality policy arguments or rely on shoddy evidence, scholars

566 See *Markovits*, supra note 22, at 5-7.
567 Id. at 1-11.
568 See, e.g., Ryan v. Commodity Futures Trading Comm’n, 125 F.3d 1062, 1064 (7th Cir. 1997) (“The amicus brief does not tell us anything we don’t know already. It adds nothing to the already amply proportioned brief of the petitioner.”).
should say so. The awareness that one’s brief is being subjected to scholarly attention could exert a positive influence on future filings.

Beyond issues concerning only amici briefs, the Court should curtail the opportunities for judicial policy-making by addressing the larger problem of congressional dereliction of duty in statutory drafting. When presented with an incoherent statute, the Court should refuse to construct a statute for Congress and return the problem to Congress. This could be accomplished in several ways. For example, as advocated by then-Justice Rehnquist in two 1980s cases involving Occupational Safety and Health Administration ("OSHA") regulations, the Court could find that statutes which provide unclear directions to agencies are unconstitutional under the nondelegation doctrine. Alternately, the Court could adopt a rule declaring that it would deal with a lack of statutory direction by explicitly assuming the construction most likely to create action by the political branches if the Court is incorrect. For example, if the Court confronted the issue of employer liability for supervisory sexual harassment under Title VII, it could adopt either the rule that employers are strictly liable (assuming it thought that employers were likely to be able to exert pressure upon Congress for a change) or that employers are never liable (assuming it thought that civil rights organizations more likely were able to exert pressure). Regardless of the rule, the Court should state explicitly that it is adopting such an approach in an effort to force congressional action to rectify the earlier congressional omission.

In the meantime, however, amici briefs will continue to pour into courts as various interest groups seek to lobby courts to gain what they cannot or choose not to seek from the political branches. Such lobbying impoverishes legal discourse and, thus, impoverishes us all.

569 See, e.g., Rustad & Koenig, supra note 8, at 143-51 (criticizing amicus briefs for relying on "Junk Social Science").