No. 13-1403

In the Supreme Court of the United States

VICKY T. BENNETT,

Petitioner,

v.

CSX TRANSPORTATION, INCORPORATED,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

The parties agree on the standard for reviewing the sufficiency of the evidence supporting a jury verdict. The question presented is simply whether the Fourth Circuit applied that standard correctly in this case.

CORPORATE DISCLOSURE STATEMENT

Respondent CSX Transportation, Inc. is a subsidiary of CSX Corporation, which is publicly traded. No other publicly held company owns more than 10 percent of respondent's stock.

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RESPONDENT'S BRIEF IN OPPOSITION

This case does not satisfy any of the traditional criteria for this Court's review. The petition does not contend that the decision below conflicts with the decision of any other federal court of appeals or any state court of last resort. In fact, the parties agree that the court of appeals correctly identified the well-settled legal standard for reviewing the sufficiency of the evidence supporting a jury verdict. Nor does the petition seriously contend that the decision below addressed an important question of federal law that calls for resolution by this Court. On the contrary, the unpublished decision below is non-precedential and therefore has no prospective significance for any other case.[1]

Instead, the petition simply contends that the court of appeals reached the wrong outcome when applying settled legal standards to the facts of this case. As this Court's Rules admonish, however, "certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." S. Ct. R. 10. And even if mere error correction were sometimes an appropriate basis for review, it would not be in this case because there was no error here. The decision below is both thorough and correct. The petition for certiorari should therefore be denied.

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[1] Petitioner failed to provide the information required by Rule 14.1(d). The relevant information is as follows: The decision of the court of appeals, though designated as "UNPUBLISHED," is reported at 552 F. App'x 222; the decision of the district court denying CSXT's post-trial motions is reported at 907 F. Supp. 2d 694.

STATEMENT

Petitioner Vicky T. Bennett, an African-American woman, worked in the field for respondent CSX Transportation, Inc. (CSXT) as a conductor-trainee during a single week in August 2008. During that week, she experienced friction with two purported supervisors—with one over her multiple requests for scheduling changes, and with the other over her repeated requests for driving directions. At the end of that week, Bennett's car was subjected to racially offensive vandalism in CSXT's parking lot. Neither the police nor CSXT's investigators were able to identify the perpetrator or connect the crime to any CSXT employee (much less a supervisor).

After the incident, Bennett never returned to work at CSXT. She instead filed this lawsuit, contending among other things that CSXT was liable under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51 *et seq.*, for negligently failing to provide a reasonably safe place to work, and under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, for creating a racially and/or sexually hostile work environment.

On the Title VII claim, Bennett "appears to agree" that "without the vandalism incident, * * * she would have no hostile work environment claim." Pet. App. A12. Lacking any evidence that CSXT should have foreseen the vandalism or was negligent in failing to prevent it, Bennett invoked the doctrine that an employer is vicariously liable for harassment committed by a supervisor. Although the vandal was never identified, Bennett speculated that the vandalism must have been committed by one of two employees to whom she reported during her one week in the field—Ed Howze and James Gilbert. Indeed,

Bennett has conceded that her Title VII claim depends entirely on her theory that the vandalism must have been committed by Howze or Gilbert. See C.A. App. 890–891.

The jury returned a verdict for CSXT on the FELA claim, but for Bennett on the Title VII claim. Pet. App. A65–67. A unanimous panel of the Fourth Circuit reversed the verdict of liability on the Title VII claim, holding that the "evidence was insufficient to establish a reasonable probability that either Howze or Gilbert committed the vandalism." *Id.* at A15. The court of appeals explained that "the conclusion that Howze and Gilbert are the vandals, instead of someone else, was based on nothing more than speculation and conjecture." *Id.* at A17. That case-specific determination—which is manifestly correct—implicates none of the traditional bases for review by this Court.

A. Factual Background

1. Bennett's allegations of hostile environment[2]

CSXT hired Bennett as a conductor-trainee in June 2008. After a six-week training program, Bennett worked in the field for a single week beginning on August 18. She based her Title VII claim on three incidents that occurred during that week.

a. *Bennett's work schedule*

Bennett and four other trainees began their field work at CSXT's terminal in Rocky Mount, North

[2] The facts in this section are set forth in the light most favorable to the verdict and are drawn in large part from Bennett's testimony, which was hotly disputed by other witnesses.

Carolina. During an orientation class, trainmaster James Gilbert asked the trainees to review their initial work schedules. Bennett correctly identified a problem with her schedule: It did not provide ten hours of rest between two of her shifts, as required by the federal Hours of Service Act. Pet. App. A4; see 49 C.F.R. § 228.19(b)(1)–(2). Had Bennett attempted to work that schedule, CSXT's personnel management system would not have permitted her to clock in for the second assignment. C.A. App. 181.

Gilbert immediately changed Bennett's schedule to address that error, but Bennett was not satisfied. She made multiple additional requests for scheduling changes for her personal convenience. Gilbert twice more changed Bennett's schedule to accommodate her requests (C.A. App. 324–325), but he was unable to accommodate Bennett's request that he change her schedule a fourth time so that she could "get back home" sooner (*id.* at 325).

According to Bennett, her conversations with Gilbert about scheduling became "unpleasant," especially after she called the manager of conductor training, Lorenzo Wilkins, and asked him to intervene. Gilbert reminded Bennett that he, not Wilkins, was the contact person for any scheduling issues. Pet. App. A5. In response to Wilkins' inquiries, Gilbert wrote that his "experience with her in the past week has raised serious concerns with her ability to perform at the level this company requires." C.A. App. 979. He noted that "[s]he is the only [trainee] who has raised any concerns over their training schedule." *Ibid.*

b. *Directions to the Fayetteville Yard*

Later that week, Bennett traveled to an assignment in Fayetteville, North Carolina. Like all new hires, Bennett received written directions to the Fayetteville yard. C.A. App. 1007; see *id.* at 336–337, 397, 579. The night before her shift, however, Bennett called the trainmaster in Fayetteville, Ed Howze, to ask him for directions. Pet. App. A5.

The following morning, while en route, Bennett called Howze several more times to ask for directions. Pet. App. A5. She first called Howze on his cell phone at 5:50 a.m. and spoke with him for six minutes. C.A. App. 395, 582–583, 1069. Three minutes later, she called Howze again and spoke with him for another eleven minutes. *Id.* at 395–396, 583–584, 1069. Three minutes later, she called Howze yet again. *Id.* at 395, 586, 1069. Bennett contends that when she called for the third time, Howze told her to "'Open [b]oth [y]our [f]ucking [e]yes [l]ady and [y]ou [w]ill [s]ee.'" Pet. App. A5–6 (alterations by Fourth Circuit).[3]

Bennett ended the call by hanging up on Howze. C.A. App. 369, 586, 588. When Bennett arrived at the yard, Howze drove up and told her to have a seat in his truck. Pet. App. A6. Howze then drove with Bennett to her starting point and told her to show him how to get back to the rail yard, which she was unable to do because she had left her directions in her bag. *Ibid.* Upon returning to the rail yard, Howze told Bennett to get her belongings and "leave

[3] Howze denied using any profanity in his conversations with Bennett (C.A. App. 586–589), and another employee who overheard the call corroborated Howze's account (*id.* at 640–641).

my railroad." *Ibid.* Bennett reported this incident to Wilkins, who scheduled a meeting with Howze and Gilbert to discuss the difficulties she was having.

c. *Vandalism of Bennett's vehicle*

On August 25, 2008, Bennett worked a shift out of the Rocky Mount yard from midnight until noon. She parked her car several hundred feet away from the company office, outside the range of vision of the yardmaster seated in the watch tower. C.A. App. 206–208, 768–769. Many people have access to the lot where Bennett parked her car, including members of the public not affiliated with CSXT. *Id.* at 216, 292.

Sometime between 3:00 and 4:30 a.m., an unknown person vandalized Bennett's vehicle. The messages "Stay of[f] the railroad" and "Stupid nigga nigga" were spray-painted on Bennett's car. Pet. App. A7. The rear passenger-side window of the car was broken, and a black mannequin head was found inside with a rope around its neck. *Ibid.* A can of white spray paint was recovered at the scene, but no fingerprints were found on the spray-paint can or on Bennett's vehicle. C.A. App. 800.

Phone records indicate that Bennett made two brief outgoing calls to an unknown number around the time of the vandalism. C.A. App. 423–426; see *id.* at 1071. The first of these calls was placed at 1:29 a.m., and the second was at 3:28 a.m. Neither counsel for CSXT nor counsel for Bennett were able to determine the identity of the person Bennett called. *Id.* at 429–430. When questioned at trial, Bennett professed not to know whom she was calling

at these unusual times or why she placed the calls. *Id.* at 423–426.[4]

The vandalism was discovered by CSXT employees and was reported to Gilbert, the trainmaster on duty that night. Gilbert immediately called the CSXT Police, who in turn instructed him to call the Rocky Mount Police Department. C.A. App. 331–332. Before going off duty, Gilbert briefed both his boss and the trainmaster relieving him about the situation.

2. The investigation

Both the local police and CSXT's human resources department investigated the vandalism. CSXT's investigation was led by Ronald Stevens, the director of human resources, and Hillery Cunningham Shephard, a human resources manager, both of whom (like Bennett) are African-American. C.A. App. 803. Stevens and Shepard obtained statements from Bennett, Howze, Gilbert, Wilkins, and others and collected photographs of the vandalism. They interviewed at least eleven people—some multiple times—over the course of several days. See *id.* at 1017–1020.

Two days after the incident, CSXT employee James Bradley told investigators in a written statement that he saw "a light colored Dodge Charger or Magnum" next to Bennett's vehicle at around 3:09 a.m. C.A. App. 1074. Bradley had never seen this vehicle before. *Ibid.* When Bradley returned to the

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[4] Bennett placed these calls using her personal cell phone, even though both federal regulations and CSXT rules prohibit train and engine service employees from using cell phones while working on a train. See C.A. App. 272.

area around 4:30 a.m. and saw the vandalism, the Dodge car "was now gone." *Ibid.* During his subsequent deposition and at trial, Bradley also recalled seeing an unfamiliar man standing next to the vehicle, though he had not included that fact in his initial statement. *Id.* at 666–670, 676–679.[5]

3. Bennett's departure from CSXT

During the investigation of the vandalism, Bennett was given a paid leave of absence. Pet. App. A7. Bennett was scheduled to return to work in October 2008, but did not do so, stating that she was unable to work for medical reasons. *Ibid.* In late November 2008, Bennett's training class was furloughed due to economic conditions. *Ibid.* In July 2010, CSXT sent letters to Bennett and the rest of her training class recalling them to work, but Bennett never responded to her recall letter. *Ibid.*

B. Proceedings Below

1. Proceedings in the trial court

a. Pre-trial proceedings. Bennett initially filed suit against CSXT in the District of South Carolina (Pet. App. A7), alleging claims under FELA, Title VII, and state common law. Because Bennett's claims have no connection to South Carolina and Bennett is not a South Carolina resident, the case was transferred to the Eastern District of North Carolina. *Ibid.* The district court (Boyle, J.) awarded summary judgment to CSXT on the common-law

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[5] Bennett contended that Bradley embellished his story in exchange for favorable treatment by CSXT, but she did not argue that Bradley's initial statement that he had seen an unfamiliar car was unreliable. See Pet. App. A17–18.

claims (*id.* at A8) and conducted a jury trial on the FELA and Title VII claims.

b. The parties' theories. Bennett argued at trial that the vandal must have been Howze or Gilbert and that CSXT was vicariously liable for their actions. In support of this theory, Bennett pointed to the friction she experienced with each of them earlier in the week and postulated that the message written on her vehicle reflected their attitudes toward her.

CSXT argued that the vandalism could have been perpetrated by any number of other people—either another worker who was not one of Bennett's supervisors, or someone unconnected to the railroad who harbored a grudge against Bennett, or possibly even Bennett herself (with the assistance of a collaborator). Howze and Gilbert each testified that they were not involved in the vandalism and had no idea who was (C.A. App. 343, 604–605), and Bennett's evidence did nothing to rule out the possibility that others could have committed the crime.

c. CSXT's excluded evidence.[6] CSXT sought to introduce testimony from Dr. Charles Manning, an expert in the field of fire investigation. Manning would have testified that Bennett has filed a pattern of suspicious vandalism claims, frequently netting her a financial payout (often through insurance).

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[6] Needless to say, in determining that *Bennett's* evidence was insufficient, the court of appeals neither cited nor relied on evidence excluded by the district court. We mention the excluded evidence here only because it underscores why, as the Fourth Circuit held, mere speculation that one of Bennett's supervisors could have been the perpetrator is inadequate.

The proffered evidence would have shown that Bennett sought payment for three other alleged acts of vandalism between 2007 and 2010:

- In July 2007—before the events that precipitated this lawsuit—Bennett reported that her Chevrolet Suburban was stolen. When it was found, it had been destroyed by fire. No suspect was ever identified. Days later, Bennett filed an insurance claim reporting the loss of not only the car, but also $5,000 in cash, a laptop, and expensive catering equipment that she claimed had been inside the vehicle—none of which she had reported to the police. C.A. App. 859–861.[7]
- In April 2010, Bennett reported that someone had thrown a Molotov cocktail through the window of her home. An investigation by the Northampton County Sheriff's Department concluded, however, that the plastic jug allegedly thrown into Bennett's home could not have fit through the hole in her window. No suspect was ever identified. C.A. App. 861–862.
- Later that month, a fire destroyed one of the two buildings operated by a day-care business Bennett owned. An investigation found that the fire, which occurred in the middle of the night, was intentionally set from inside the building. No one was ever charged with the crime. Bennett's insur-

[7] This incident occurred shortly after Bennett's catering business suddenly lost a lucrative contract. C.A. App. 863, 866–867.

> ance claim, filed two weeks later, reported that she had also lost $5,000 of cash in the fire—a fact not previously reported to the police. Bennett received $185,000 from her insurance company on her claim. C.A. App. 862, 872.

In addition, Bennett reported in September 2008 that somebody burned a cross on her front lawn. See C.A. App. 781–782, 859, 866. That incident was investigated by the U.S. Department of Justice, the FBI, and the North Carolina State Bureau of Investigation. See *id.* at 780–782. The investigation was later discontinued due to lack of evidence and problems with the credibility of the complainant—*i.e.*, Bennett. *Id.* at 783–784.

At a minimum, this evidence tended to show that other people, unconnected to CSXT, have targeted Bennett with vandalism. Indeed, the district court recognized that the evidence was relevant to the theory "that the plaintiff did this" herself. C.A. App. 867–868. Nevertheless, the district court excluded the evidence on the grounds that "[c]haracter is not an issue" (*id.* at 873) and the evidence "would inflame the jury" (*ibid.*).

d. Jury charge and verdict. The district court ruled that, to impute liability to CSXT on the Title VII claim, the jury would have to find that Bennett was subjected to a hostile work environment *by her supervisors*. C.A. App. 888, 890–891, 937–939, 947, 950–951, 952–953; see also *id.* at 68 (verdict form). Bennett's counsel confirmed that her Title VII claim rested entirely on a theory of supervisor harassment:

> THE COURT: [Y]our case is that the supervisors * * * caused her to leave. And all of the circumstantial evidence that you have tried to put on had to do with binding the employer by its supervisors.
>
> MR. McLEOD: Correct, Your Honor.

Id. at 890–891.

The jury returned a verdict for CSXT on the FELA negligence claim, but for Bennett on the Title VII claim, awarding her $150,000 in damages. Pet. App. A65–67. The district court later awarded Bennett $92,835 (plus interest) in back pay, $592,869 in front pay—equivalent to 27 years of a full conductor's salary—and $796,951.39 in attorneys' fees and costs. *Id.* at A43–64.

e. Post-trial proceedings. CSXT filed a timely post-trial motion arguing, in relevant part, that it was entitled to judgment as a matter of law because the evidence was insufficient to support employer liability on the Title VII claim. The district court acknowledged that "plaintiff did not present any direct evidence that Mr. Gilbert or Mr. Howze vandalized her car" (Pet. App. A32), but held that the jury could find "circumstantial evidence that members of defendant's management vandalized her vehicle and subjected her to a hostile work environment" (*id.* at A31–32). The court gave no hint, however, what that "circumstantial evidence" might be. See *ibid.*

2. Proceedings on appeal

Recognizing that the courts have an obligation to independently review the sufficiency of the evidence and to protect against "the mischance of speculation over legally unfounded claims" (*Brady* v. *S. Ry.*, 320

U.S. 476, 479–480 (1943)), a panel of the Fourth Circuit canvassed the record and unanimously held that, even viewing the evidence in the light most favorable to Bennett and drawing all inferences in her favor, there was insufficient evidence to sustain the verdict on the Title VII claim. Pet. App. A1–19.

At the outset, the court of appeals observed that Bennett "appears to agree" that "without the vandalism incident, * * * she would have no hostile work environment claim." Pet. App. A12; see, *e.g.*, *Clark Cnty. Sch. Dist.* v. *Breeden*, 532 U.S. 268, 271 (2001) (per curiam) ("'[O]ffhand comments[] and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'") (internal quotation marks omitted); *Faragher* v. *City of Boca Raton*, 524 U.S. 775, 788 (1998) (same). It explained that, accordingly, the critical question was whether there was sufficient evidence to find that Howze or Gilbert was probably the vandal. Pet. App. A11–18.

Turning to that question, the court acknowledged that circumstantial evidence can be used to prove discrimination claims, even in the absence of any direct evidence. Pet. App. A11. But after canvassing the evidence identified by Bennett, the court was "unpersuaded" that there was sufficient evidence "demonstrating that Howze and Gilbert vandalized Bennett's car and subjected her to a hostile work environment." *Id.* at A11–12.[8]

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[8] The reproduction of the quoted passage in the Petitioner's Appendix contains an evident error. In the appendix, this passage reads: "We are unpersuaded, however, that there *wasn't* 'ample [c]ircumstantial evidence * * *.'" Pet. App. A11 (emphasis added). In both the slip opinion (Doc. 63, at 12, *Bennett* v.

The court of appeals identified 17 items of evidence cited by Bennett in support of her claims (Pet. App. A13–14), considered those items of evidence "both individually and cumulatively" (*id.* at A18), and explained why "the conclusion that Howze and Gilbert are the vandals, instead of someone else, was based on nothing more than speculation and conjecture" (*id.* at A17):

- The bulk of Bennett's evidence does not point to Howze or Gilbert, because it "could just as easily be attributed to any other employee at CSX as [it] could be to Howze and/or Gilbert." Pet. App. A16. That the vandal knew when Bennett was working, was able to locate her car in the employee parking lot, and wanted her off the railroad "could also point as easily to Bennett's co-workers as [it] could to Howze and Gilbert." *Id.* at A17.
- That Howze or Gilbert might have "disliked" Bennett "do[es] not * * * reasonably lead to a conclusion that either of the men *probably criminally vandalized her vehicle*." Pet. App. A15 (emphasis added). Even if brief workplace friction were enough to constitute motive, motive alone does not prove that someone committed a serious crime—especially when the evidence does not negate the possibility that there could be other people with the motive and opportunity to have committed it.

CSX Transp., Inc., No. 12-2477 (4th Cir. Jan. 21, 2014)) and the reported opinion (*Bennett* v. *CSX Transp., Inc.*, 552 F. App'x 222, 227 (4th Cir. 2014) (per curiam)), the passage reads: "We are unpersuaded, however, that there *was* 'ample circumstantial evidence'" (emphasis added).

- Likewise, "the proximity of Bennett's car to Gilbert's office" when the vandalism occurred does not create a "probability that [he] committed the criminal act." Pet. App. A15–16. "Only sheer speculation on the jury's part could allow it to come to such a conclusion." *Id.* at A16.

- Most of the other evidence, the court of appeals observed, is "facially neutral"—that is, it does not bear at all on the question of *who* committed the vandalism. Pet. App. A16. "No reasonable jury would find from the fact that there were no other cars vandalized in the CSX[T] parking lot * * * or that the vandal did not take anything from [Bennett's] car as probative on the question as to whether Howze [or] Gilbert probably vandalized Bennett's car. The same goes for Bennett's statement that Gilbert never contacted her after the vandalism." *Ibid.* So too for Bennett's accusation that a different CSXT employee, Bradley, embellished his testimony at trial; even if true, this accusation "is of no import" to whether Howze or Gilbert committed the vandalism. *Id.* at A17–18. "Quite simply," all of this evidence is "of no consequence" to the central question in this case. *Id.* at A16.

- Finally, the court of appeals rejected Bennett's contention that because she "was not on the training schedule that Gilbert sent out on the night that the vandalism occurred," Gilbert "did not think that she would return to work after" that night and so must have known about the vandalism in advance. Pet.

> App. A14. The court noted that Bennett's conclusion does not follow from the evidence, given the undisputed fact that Gilbert was scheduled "to meet with [Bennett] the following day about her schedule and other matters" and presumably was waiting until after that meeting to plan her future schedule. *Id.* at A17. "Thus, no reasonable jury could infer from Bennett being left off the training schedule that Howze and/or Gilbert probably had vandalized Bennett's car." *Ibid.*

After considering all of this evidence "both individually and cumulatively," the court of appeals concluded that, even if there were "a possibility" that either Howze or Gilbert committed the vandalism—just as there is "a possibility" that any number of other people could have done it—the evidence presented here "failed to establish that there is a reasonable probability that they did so." Pet. App. A18. In short, any argument that "Howze and/or Gilbert vandalized Bennett's vehicle * * * was based purely on speculation and conjecture." *Id.* at A19.

Having held that the evidence was insufficient to allow a reasonable jury to conclude that Howze or Gilbert was more likely than not the vandal, the court of appeals did not reach the other errors raised by CSXT's appeal—the improper admission, over CSXT's objection, of the testimony of Bennett's expert on identifying workplace discrimination; the erroneous exclusion of CSXT's evidence pointing to other possible perpetrators; the legally excessive back- and front-pay awards; and the erroneous assumption that Howze and Gilbert qualify as "super-

visors" for purposes of Title VII.[9]

Bennett petitioned for rehearing en banc, which the full court denied. Pet. App. A68–69. No judge called for a vote on the petition. *Ibid.*

REASONS FOR DENYING THE PETITION

This case boils down to a simple question: whether Bennett presented sufficient evidence for a reasonable jury to find that the vandalism was more likely than not committed by Howze or Gilbert, instead of anyone else who might have a grudge against her (or someone acting under Bennett's direction). Conducting a thorough *de novo* review of the sufficiency of the evidence, as the lower courts routinely do, the court of appeals held that Bennett's evidence was insufficient to sustain a verdict in her favor. The court of appeals articulated and applied settled legal standards, and its decision does not conflict with any decision of this Court or any other

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[9] Under then-prevailing Fourth Circuit law, which held that an employee may be a supervisor even if he or she lacks the power to take tangible employment actions against the victim (see, *e.g.*, *Whitten* v. *Fred's, Inc.*, 601 F.3d 231, 243–245 (4th Cir. 2010)), this case was tried on the assumption that Gilbert and Howze were in fact supervisors. This Court later rejected that standard, however, holding that "an employee is a 'supervisor' for purposes of vicarious liability under Title VII" only "if he or she is empowered by the employer to take tangible employment actions against the victim." *Vance* v. *Ball State Univ.*, 133 S. Ct. 2434, 2439 (2013); see also *id.* at 2443–2446, 2448–2452. The evidence in the record suggests that Howze and Gilbert do not qualify as supervisors under *Vance* because, for example, trainmasters "don't have the authority" to fire crewmembers. C.A. App. 602. If Howze and Gilbert were not in fact supervisors under *Vance*, then CSXT could not be held vicariously liable for their actions, even if Bennett had proven that one of them was the vandal.

court. The decision below is fact-bound, articulates no new or different legal rules, and is non-precedential in any event. The petition does not offer any compelling basis to disturb the court of appeals' careful decision in this case.

A. The Court Of Appeals Articulated And Applied Settled Legal Standards, And Its Decision Does Not Conflict With Any Decision Of This Or Any Other Court.

1. The court of appeals invoked and applied the correct legal standard for granting judgment as a matter of law. The court recited the "well-settled" standard that "'[i]f a reasonable jury could reach only one conclusion based on the evidence[,] or if the verdict in favor of the non-moving party would necessarily be based on speculation and conjecture, judgment as a matter of law must be entered.'" Pet. App. A9 (quoting *Myrick* v. *Prime Ins. Syndicate, Inc.*, 395 F.3d 485, 489 (4th Cir. 2005)). The court also acknowledged the equally well-settled requirement that, "[w]hen considering such a motion [for judgment as a matter of law], the court construes the evidence in the light most favorable to the non-movant." *Id.* at A8–9; see, *e.g.*, *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("[O]n a motion * * * for a directed verdict[,] [t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.").

The court of appeals then correctly explained that, although this standard requires that all permissible inferences be drawn in favor of the non-movant, "[p]ermissible inferences must still be within the range of reasonable probability." Pet. App. A9 (quoting a line of prior cases). As this Court has put it, "[s]peculation cannot take over where the proofs

fail" and "there is no support for any further factual inference." *In re Sawyer*, 360 U.S. 622, 628 (1959); see also, *e.g.*, *Moore* v. *Chesapeake & Ohio Ry.*, 340 U.S. 573, 578 (1951) ("This would be speculation run riot. Speculation cannot supply the place of proof."). Thus, "[w]hen the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding * * * by judgment notwithstanding the verdict. By such direction * * * the result is saved from the mischance of speculation over legally unfounded claims." *Brady*, 320 U.S. at 479–480.

The court of appeals also identified and applied the correct substantive legal standard for employer liability under Title VII. A Title VII plaintiff must prove that the offending conduct "was because of her sex or race," "was sufficiently severe or pervasive to alter the conditions of her employment," and "was imputable to her employer." Pet. App. A10 (quoting *Bonds* v. *Leavitt*, 629 F.3d 369, 385 (4th Cir. 2011)); see also *id.* at A12. Under this Court's precedents, the requirements for imputing liability to an employer depend on the status of the harasser. If the plaintiff is harassed by a coworker, the employer may be held liable if the plaintiff proves that the employer was negligent in failing to prevent the harassment. *Burlington Indus., Inc.* v. *Ellerth*, 524 U.S. 742, 758–759 (1988); accord *Faragher*, 524 U.S. at 789. Because Bennett lacked any evidence of negligence, however, she could hold CSXT liable only if the harasser was a supervisor with authority over her. *Ellerth*, 524 U.S. at 764–765; *Faragher*, 524 U.S. at 807. Thus, as the court of appeals explained, because Bennett proceeded only on a theory of supervisor harassment (see C.A. App. 890–891), the key

question was whether there was sufficient evidence demonstrating that one of Bennett's supervisors was responsible for the harassment (*e.g.*, Pet. App. A11–12, A18–19).

2. Bennett does not argue that there is any disagreement in the lower courts regarding these standards, much less that the decision below conflicts with any decision of any other court. On the contrary, courts routinely assess the sufficiency of the evidence by applying the same standards that the court of appeals applied here.[10] Indeed, Bennett all but admits that the relevant legal standards are well settled and thus seeks review only as "an exercise of this Court's supervisory power." Pet. 8 (quoting S. Ct. R. 10(a)). She contends that the court of appeals "failed to review the evidence in the light most favorable to her" (*id.* at 9) and that it improperly chose between competing inferences (*id.* at 9–13). These are self-evidently insubstantial grounds for exercising this Court's discretion to grant review. In any event, neither contention is correct.

Bennett's contention that the court of appeals refused to consider the evidence in the light most favorable to her is directly contradicted by that court's decision. The court explicitly stated that in "review[ing] the district court's denial of a motion for

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[10] See, *e.g.*, *Malone* v. *Lockheed Martin Corp.*, 610 F.3d 16, 19–20, 21–24 (1st Cir. 2010); *Greene* v. *B.F. Goodrich Avionics Sys., Inc.*, 409 F.3d 784, 793 (6th Cir. 2005); *Sip-Top, Inc.* v. *Ekco Grp., Inc.*, 86 F.3d 827, 830–833 (8th Cir. 1996); *Frankel* v. *Slotkin*, 984 F.2d 1328, 1335–1336 (2d Cir. 1993); *Love* v. *King*, 784 F.2d 708, 711 (5th Cir. 1986); *Radiation Dynamics, Inc.* v. *Goldmuntz*, 464 F.2d 876, 886–887 (2d Cir. 1972); *Gen. Motors Corp.* v. *Muncy*, 367 F.2d 493, 498 (5th Cir. 1966); *Commercial Standard Ins. Co* v. *Feaster*, 259 F.2d 210, 212 (10th Cir. 1958).

judgment as a matter of law * * * the court construes the evidence in the light most favorable to the non-movant." Pet. App. A8–9. The court buttressed that statement with a citation to a prior Fourth Circuit decision explaining that the court must "view[] the evidence in a light most favorable to the non-moving party (and in support of the jury's verdict)" and must "draw[] every legitimate inference in that party's favor." *Int'l Ground Transp.* v. *Mayor & City Council of Ocean City*, 475 F.3d 214, 218 (4th Cir. 2007) (cited at Pet. App. A9). Nothing in the court of appeals' decision supports Bennett's naked assertion that it refused to recognize that settled rule.

Equally unfounded is Bennett's contention that the court of appeals improperly chose between competing inferences. No such choice was presented here. Instead, the court explained, judgment as a matter of law was required because the evidence was insufficient to permit a non-speculative inference that one of the two supervisors committed the vandalism, and thus "the *only* verdict that a reasonable jury could have rendered on Bennett's hostile work environment claim is one in favor of CSX[T]." Pet. App. A18 (emphasis added). That follows from this Court's holding in *Brady* that judgment as a matter of law should be granted "[w]hen the evidence is such that[,] without weighing the credibility of the witnesses[,] there can be but one reasonable conclusion as to the verdict." 320 U.S. at 479.

Bennett therefore errs in relying (Pet. 9–13) on *Rogers* v. *Missouri Pacific Railroad*, 352 U.S. 500 (1957), and *Tennant* v. *Peoria & Pekin Union Railway*, 321 U.S. 29 (1944). Each of those cases involved a choice between competing inferences, not—as here—only a single supportable result. In *Rogers*,

"the jury could properly have reached the [lower] court's conclusion" that "the petitioner's conduct was the sole cause of his mishap," but "the probative facts also supported with reason the verdict favorable to the petitioner." 352 U.S. at 504. And in *Tennant*, the evidence "support[ed]" the "ultimate inference that [the plaintiff] would not have been [injured] but for" the defendant's negligence, but the lower court impermissibly deemed "other inferences which are suggested by the conflicting evidence" to be "more probable." 321 U.S. at 34. In each case, there were at least two permissible inferences from the evidence, and the lower court erred by weighing the evidence and choosing the inference that it believed to be more compelling. Here, in contrast, the court of appeals did not choose between two competing inferences, but instead canvassed the record and correctly concluded that the evidence was insufficient to permit the inference that Howze or Gilbert was the vandal.[11]

3. Finally, Bennett argues that the court of appeals erroneously "deconstructed the totality of the circumstances and assessed each piece of evidence individually on its own." Pet. 15–16. Once again,

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[11] *Rogers* and *Tennant* are inapposite for an additional reason. Both cases involved questions of proximate cause under FELA (see *Rogers*, 352 U.S. at 504–506; *Tennant*, 321 U.S. at 30, 33), which employs a "relaxed" standard for proximate cause. See *CSX Transp., Inc.* v. *McBride*, 131 S. Ct. 2630, 2636 (2011); see also *Rogers*, 352 U.S. at 509–510 (discussing "the special features of this [FELA] statutory negligence action that make it significantly different from ordinary common-law negligence"). No similar relaxed standard applies to the question whether Bennett adduced sufficient evidence that a supervisor perpetrated the vandalism of her vehicle.

that unsupported assertion is directly refuted by the decision below, in which the Fourth Circuit explicitly "reviewed [the] evidence both individually *and cumulatively*." Pet. App. A18 (emphasis added). The court of appeals thus recognized and applied that settled legal standard to the facts of this case.

B. The Court Of Appeals' Application Of Settled Legal Standards To The Facts Of This Case Was Correct.

At bottom, Bennett simply disagrees with the outcome reached by the court of appeals on the particular facts here. See, *e.g.*, Pet. 7 (arguing that the court of appeals was wrong "[i]n light of the evidence discussed herein"); *id.* at 8 (seeking "'an exercise of this Court's supervisory power'"); *id.* at 9 (arguing that "'[t]he evidence as a whole is susceptible of more than one reasonable inference'"); *id.* at 13 (invoking "[t]he preponderance of evidence in this case"); *id.* at 15 ("the evidence making up the totality of the circumstances is a plenty"); *id.* at 26 ("A proper review of the totality of the circumstances supports the jury's finding").

That unadorned plea for error correction does not warrant review by this Court. See S. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of * * * the misapplication of a properly stated rule of law."); Stephen M. Shapiro *et al.*, *Supreme Court Practice* § 5.12(c)(3) (10th ed. 2013). There is little reason for the Court to review an appellate court's application of settled legal standards to the unique evidentiary record in a particular case. And this case is a particularly poor candidate for this Court's intervention because the decision below is unpublished and non-precedential, and therefore will not affect the outcome of *any* other case.

Even if error correction were an appropriate basis for seeking review, however, review would not be warranted here because there was no error.

1. Contrary to Bennett's insistence, the court of appeals did not fail to consider any evidence (or to do so in the light most favorable to her) or refuse to draw any reasonable inferences in her favor. On the contrary, the court of appeals meticulously catalogued and addressed 17 items of evidence that Bennett had contended supported the finding that Howze or Gilbert—she never could say which one—perpetrated the vandalism (Pet. App. A13–14); it reviewed that evidence "both individually and cumulatively" (*id.* at A18); and it explained that "although Bennett demonstrated that there is a *possibility* that Howze and/or Gilbert vandalized her vehicle, she failed to establish that there is a *reasonable probability* that they did so" (*ibid.* (emphasis added)). "Thus," the court of appeals explained, "the only verdict that a reasonable jury could have rendered on Bennett's hostile environment claim is one in favor of CSX[T]." *Ibid.*

The bulk of Bennett's discussion of the evidence simply recounts the friction with Howze and Gilbert she experienced in the days preceding the vandalism. Pet. 17–19. That discussion is largely irrelevant, however, because—as the court of appeals noted—Bennett "appear[ed] to agree" in the lower court that "without the vandalism incident, * * * she would have no hostile work environment claim." Pet. App. A12. Even if Bennett was "treated * * * unfairly" in those earlier matters, simple "unfair[ness]" and "rude treatment" are not enough to sustain a Title VII claim. *Ibid.* Bennett does not contend otherwise in her petition, and even if she had done so, it would

be too late, given the position she took in the court of appeals.[12]

Most of the evidence Bennett cites does not support her accusations against Howze and Gilbert at all. She points principally to facts that, as the court of appeals put it, "could just as easily be attributed to any other employee at CSX[T] as they could be to Howze and/or Gilbert." Pet. App. A16. That the vandal wanted Bennett "to stay off the railroad"; that he or she knew where to find her car in the employee parking lot; that "the vandal used ballast [rock] * * * to break the window"; and that "the vandal did not take anything from her vehicle" (Pet. 21) do nothing to narrow the list of possible suspects to Howze or Gilbert—or, for that matter, to *any* railroad employee, as opposed to someone who already knew Bennett before she became employed by CSXT. Because the undisputed evidence was that many people, including members of the public, have access to the parking lot (C.A. App. 216, 292), anyone with a grudge against Bennett could have driven into the parking lot and vandalized her car.[13]

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[12] For this reason, Bennett's discussion of when a hostile work environment exists (Pet. 13–14) misses the mark. The parties largely agree that vandalism of the sort involved here could create a hostile work environment under Title VII, but that without the vandalism there was no hostile environment. Accordingly, the dispositive question is whether the evidence is sufficient to find that the vandalism was probably committed by a supervisor, and thus whether liability may be imputed to CSXT.

[13] Bennett asserts that, because the mannequin head was not mentioned in the police report, the vandal must have returned to the scene after the police left. Pet. 21. This ignores uncontradicted eyewitness testimony that the mannequin head was present before the police arrived. C.A. App. 765.

Bennett also contends, in essence, that Gilbert disliked her. See Pet. 19–20. She focuses on a negative evaluation in which Gilbert expressed "serious concerns" about "her ability to work in this field safely and productively." *Id.* at 20 (quoting C.A. App. 979). Yet Bennett selectively omits the next sentence of the evaluation, in which Gilbert stated that he was "more than willing to correct the deficiencies" if she is "willing to get with the program." C.A. App. 979. In any event, the fact that Gilbert expressed concerns about Bennett's work performance does not prove that he was the probable culprit who vandalized her vehicle. As the court of appeals explained, even if Howze or Gilbert "disliked" Bennett, that fact alone does "not * * * reasonably lead to a conclusion that either of the men probably criminally vandalized her vehicle." Pet. App. A15.

The only evidence Bennett points to that the court of appeals did not expressly address involves a hat in *Howze's* office—note Bennett's switch from Gilbert to Howze here—depicting Nathan Bedford Forrest, whom Bennett asserts is a symbol of racial animus. Pet. 17. But the evidence about Howze's hat was admitted only for the limited purpose of impeaching Shephard, one of the CSXT employees who investigated the vandalism. See C.A. App. 171, 247–248, 829–830. During her direct examination, Shephard testified that she was unaware of any other complaints against Howze. *Id.* at 826. During a side-bar, the court then agreed to permit Bennett to cross-examine Shephard about the complaint relating to Howze's hat. *Id.* at 828. In the course of that side-bar, Bennett's counsel made clear, however, that "[w]e're not offering it into evidence, just impeachment." *Id.* at 829–830.

Even if the hat were before the jury as substantive evidence, moreover, and even if the jury reasonably could have deemed the hat to show that Howze harbored racial animus, that alone constitutes not an iota of proof that Howze was the vandal; nor could it overcome the uncontroverted testimony that Howze was asleep at home with his wife when the vandalism occurred (C.A. App. 604).

Most tellingly, Bennett remains unable to say *which* of her two suspects was responsible for the vandalism. She improperly mixes and matches the evidence of each man's involvement—contending that Howze, who was at home asleep when the vandalism occurred, was racially insensitive, and that Gilbert, for whom there is zero evidence of racial animus, had the opportunity to commit the crime. Bennett's evidence would be insufficient even if it concerned a single person; when divided between two different individuals, it falls far short of what would be needed for a reasonable jury to find that either man was probably the vandal.

2. Indeed, not only was the evidence insufficient to establish a "reasonable probability" that Gilbert or Howze was the vandal, there was no evidence *at all* connecting either man to the crime. No one ever saw either man near Bennett's vehicle. No one ever saw either man with spray paint, rope, or a mannequin head; nor was there testimony that either had purchased these items. No one saw either man with paint on his clothing or skin after the event. Neither man's fingerprints were recovered from Bennett's vehicle or the spray-paint can. There is no evidence that either man engaged in any suspicious activities or communications near the time of the vandalism.

Bennett's logic is simply that because Howze and Gilbert arguably disliked her, one of them must have been the culprit. That is the very sort of speculation in lieu of proof that this Court has repeatedly held to be insufficient to support a verdict. See, *e.g.*, *In re Sawyer*, 360 U.S. at 628; *Moore*, 340 U.S. at 578; *Brady*, 320 U.S. at 479–480.

Thus, Bennett is incorrect that "[t]he evidence as a whole is susceptible to more than one reasonable inference" (Pet. 9). Absent any evidence linking Howze or Gilbert to the vandalism, much less evidence sufficient to create a "reasonable probability" that either man was the vandal, the only permissible verdict was in favor of CSXT.

3. This case is not a referendum on whether "discrimination has * * * been eradicated in the United States" (Pet. 7). The court of appeals said nothing of the sort. It simply held that Bennett failed to present sufficient evidence that Gilbert or Howze committed the vandalism against her. That "history is replete with examples of Caucasians committing hate crimes against African-Americans," as Bennett puts it (*ibid.*), does not overcome the complete absence of proof that Howze or Gilbert was responsible for the vandalism against Bennett.[14]

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[14] Bennett criticizes the court of appeals' statement that, even if the jury could infer that Howze or Gilbert "disliked" Bennett, "we do not think such an inference could reasonably lead to a conclusion that either of the men probably criminally vandalized her vehicle," especially when doing so "'would jeopardize a well-paying, long-term career and open him[] up to criminal prosecution.'" Pet. App. A15; see Pet. 7, 22. That passage simply makes the commonsense observation that evidence of a possible motive, standing alone, is not enough to conclude that a particular person probably committed a crime. To the extent

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The decision below demonstrates that the court of appeals fulfilled its responsibility to protect against "the mischance of speculation over legally unfounded claims" (*Brady*, 320 U.S. at 479–480) by carefully and thoroughly reviewing the record before ultimately concluding that Bennett's evidence was insufficient to sustain a verdict in her favor. The panel's decision was careful, correct, consistent with this Court's precedents, and not in conflict with any decision of any other court. There is no basis for the Court to disturb the court of appeals' decision here.

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that Bennett objects to the particular phrasing of this point in the court of appeals' opinion, that is not a basis for granting review, as "[t]his Court * * * reviews judgments, not statements in opinions" (*Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956))—especially when the opinion below is unpublished and non-precedential.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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