**No. 02-1201**

IN THE

# Supreme Court of the United States

DIANA DUNCAN,
*Petitioner,*

--v.--

GENERAL MOTORS CORPORATION,
*Respondent.*

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

## MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* AND BRIEF OF NOW LEGAL DEFENSE AND EDUCATION FUND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER


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March 17, 2003

IN THE

**SUPREME COURT OF THE UNITED STATES**

Diana Duncan,

*Petitioner*,

v.

General Motors Corp.,

*Respondent.*

**MOTION FOR LEAVE TO FILE A BRIEF**

***AS AMICUS CURIAE***

NOW Legal Defense and Education Fund moves for leave, pursuant to Rule 37(2)(b) of the Rules of the Supreme Court of the United States, to file a brief as *amicus curiae* in support of Petitioner in order to place before the Court relevant matter that has not already been brought to its attention. The interests of the proposed *amicus* in this matter are set forth in the Statement of Interest herein. We file herewith a letter of consent from Petitioner's counsel the Lawyers Committee for Civil Rights Under Law. Respondent's counsel has informed us that it has been unable to reach Respondent to obtain its consent.

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WENDY R. WEISER

March 17, 2003

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## STATEMENT OF INTEREST OF *AMICUS CURIAE*

NOW Legal Defense and Education Fund ("NOW Legal Defense" or "*Amicus*") submits this brief as *amicus curiae* in support of Petitioner Diana Duncan.[1]

NOW Legal Defense is a leading national non-profit civil rights organization that for over thirty years has used the power of the law to define and defend women's rights. A major goal of NOW Legal Defense is the elimination of barriers that deny women economic opportunity, such as sexual harassment. NOW Legal Defense has litigated cases to secure full enforcement of laws prohibiting sexual harassment, including *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991), and has filed briefs in this Court as *amicus curiae* on leading sexual harassment cases, including *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998), *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998), and *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993). NOW Legal Defense is deeply concerned with the trend, exemplified by the decision below, in which courts substitute their own fact-finding for jury determinations of sexual harassment.

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[1] As stated in the motion to file this brief, a copy of Petitioner's letter of consent is filed herewith, but Respondent has not consented. Pursuant to Rule 37.6, counsel for *amicus curiae* certify that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae*, or its counsel, has made a monetary contribution to this brief's preparation or submission.

## SUMMARY OF THE ARGUMENT

The Eighth Circuit's decision in *Duncan v. General Motors Corp*., 300 F.3d 928 (8th Cir. 2002), is exemplary of a widespread problem in the lower courts: More and more, Courts of Appeals are reversing jury findings of fact in hostile work environment sexual harassment cases. The Eighth Circuit decision, and others like it, supplanted the jury's determination as to whether the harassing conduct at issue was sufficiently severe or pervasive to create a hostile work environment with that of the court, and it did so without providing any legal basis or standards for its decision. This Court should grant the petition for a writ of *certiorari* to reverse the trend of appellate courts usurping the role of juries in sexual harassment cases and to reaffirm that the existence of a hostile work environment is a question of fact for the jury.

The Court should reverse the Eighth Circuit's decision for several reasons. First, the decision below thwarts Congress's intent in the Civil Rights Act of 1991 to afford victims of workplace harassment a meaningful remedy in the form of damages. In enacting that law, Congress intended that juries would determine whether or not sexually harassing conduct created a hostile work environment, and explicitly provided for the right to a jury trial. Second, the decision below conflicts with this Court's precedents that the existence of a hostile work environment, and particularly the severity and pervasiveness of harassing conduct, are questions of fact for the jury. Indeed, juries are especially well suited to conduct the examination this Court has directed be undertaken in such cases, by considering all the facts and circumstances of the harassing conduct, the context in which it occurred, and how a reasonable person would respond. Third, by re-examining the facts in the record, the decision below undermines both the Seventh

Amendment right to a jury trial and judicial economy. The petition should therefore be granted.

## ARGUMENT

### I. THIS COURT SHOULD INTERVENE TO IMPEDE THE GROWING TREND OF COURTS USURPING THE FUNCTION OF JURIES IN SEXUAL HARASSMENT CASES

#### A. The Eighth Circuit Erroneously Removed the Issue of Whether a Hostile Work Environment Existed From the Jury

The Eighth Circuit in this case erroneously held, "as a matter of law," that the sexually harassing conduct the jury found to create a hostile work environment was not "so severe and extreme that a reasonable person would find that the terms or conditions of Duncan's employment had been altered." *Duncan*, 300 F.3d at 934. In reversing the jury's finding, the Eighth Circuit pointed to no legal error in the jury instructions or the litigation conduct. Instead, it characterized the defendant's proved behavior as "boorish, chauvinistic, and decidedly immature," and issued a conclusory statement that the facts presented at trial were insufficiently severe and pervasive to "meet the standard necessary for actionable sexual harassment." *Id.* In other words, under the guise of a legal ruling, the court merely substituted its own factual determination for that of the jury, and it did so without providing any reasoning or guidance for future cases.

As discussed below, the Eighth Circuit's decision to overturn the jury's finding of a hostile work environment contravenes Congress's intent to afford sexual harassment plaintiffs with jury trials for damages claims, this Court's sexual harassment decisions, and the Seventh Amendment right to trial by jury. As a result, the Court should grant a writ of *certiorari* and reverse the Eighth Circuit.

### B. The Problem of Courts Inappropriately Replacing Jurors as Fact-Finders in Sexual Harassment Cases is Widespread

The Eighth Circuit's decision is part of a growing trend of courts inappropriately replacing juries as fact-finders in sexual harassment cases. *See generally* Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 Cornell L. Rev. 548, 568, 574 (2001) (study of every reported federal court opinion in sexual harassment cases between 1986 and 1995 revealed that courts are increasingly disposing of such claims as a matter of law and that "the success rate of plaintiffs [on appeal] varies dramatically by circuit"); Eric Schnapper, *Some of Them Still Don't Get It: Hostile Work Environment Litigation in the Lower Courts*, 1999 U. Chi. Legal F. 277, 302-03 (1999) (discussing appellate court cases holding as a matter of law that conduct did not create hostile environment).

For example, in *Ocheltree v. Scollon Prods., Inc.*, 308 F.3d 351, 2002 U.S. App. LEXIS 21145 (4th Cir. 2002), the Fourth Circuit considered a sexual harassment case in which the plaintiff was the only woman working in a costume shop. The court set aside the jury's verdict for the plaintiff, despite evidence that her co-workers regularly mimed sexual acts with a mannequin in order to bother her and engaged in "sexually explicit" "discussions" that "were generally degrading, humiliating, and even insulting," *id.* at *15; and that the environment worsened after she complained about it, *id.* at *19—conduct the dissenting judge characterized as creating "an atmosphere suffused with degrading images of female sexuality," *id.* at *54. Likewise, numerous courts have overturned jury determinations that sexual harassment was sufficiently severe or pervasive to violate Title VII. *See*, *e.g.*, *Black v. Zaring Homes, Inc.*, 104

F.3d 822, 825, 826 (6th Cir. 1997) (reversing jury verdict that "sex-based," "offensive and inappropriate" comments that created "an atmosphere of a grade school level fascination with women's body parts combined with[] denigrating comments about women" constituted sexual harassment); *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 430-31 (7th Cir. 1995) (reversing jury verdict that male supervisor sexually harassed his female secretary, where, among other things, supervisor made a "grunting sound" at her; suggested that she "run around naked"; made a "gesture intended to suggest masturbation" and commented about his lonely hotel room when she asked whether he'd bought his wife a Valentine's card; said plaintiff made his office "hot" by stepping into it; and called plaintiff a "pretty girl" and said that he might "lose control" around "pretty girls").

Other courts have deprived plaintiffs of the opportunity to have a jury decide their claims, granting summary judgment or approving directed verdicts despite substantial evidence of harassment. In *Mendoza v. Borden*, 195 F.3d 1238 (11th Cir. 1999), the en banc court upheld the district court's directed verdict on plaintiff's sexual harassment claim over the vigorous dissents of four judges. The jury had heard evidence that the highest ranking executive at the plant where the plaintiff worked constantly followed her around the facility; repeatedly "looked her up and down" in a sexual manner, sometimes pausing to "sniff" when his stare reached her groin area; intentionally rubbed his hip against hers while placing his hand on her shoulder; and responded to her complaint about his conduct with a sexually suggestive remark. *Id.* at 1242-43. The majority's holding that no jury could find this conduct to be sexual harassment prompted two lengthy dissents focused on the need to allow juries to make such determinations. *Id.* at 1269 (Tjoflat, J., dissenting); 1270

(Barkett, J., dissenting). *See also Morris v. Oldham County Fiscal Court*, 201 F.3d 784 (6th Cir. 2000) (affirming summary judgment despite evidence that supervisor told plaintiff she could improve her evaluation by performing sexual favors; frequently told sexual jokes; called plaintiff "Hot Lips"; commented about plaintiff's dress; and, after she complained and was transferred, repeatedly called her, made unauthorized visits to her work station, followed her home and spread nails on her driveway); *Kenyon v. Western Extrusions Corp.*, 2000 U.S. Dist. LEXIS 391, at *11, *18 (N.D. Tex. Jan. 6, 2000) (granting summary judgment despite fifty incidents of male supervisor "rubbing his genitals on [female plaintiff's] arm and shoulder, staring down her dress at her breasts, and touching and caressing her arm, shoulder, back, and hair in a sexual manner," on ground that plaintiff managed to perform her job despite harassment).[2]

Like the Eighth Circuit in this case, these courts often recite discrete incidents of harassing conduct, purged of contextual information, and then deem that conduct insufficiently severe or pervasive to be actionable under Title VII. Similarly, these courts fail to offer any legal framework for determining what conduct in what contexts would reasonably be viewed as severe or pervasive. This Court should intervene to halt the judicial usurpation of the jury function in hostile work environment cases.

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[2] As Judge Patricia Wald noted in connection with the increase in summary judgment rulings,

> Th[e] unseemly rush to summary judgment may cause the legal profession, and the public at large, to conclude that disfavored plaintiffs are apt to be hustled out of the courthouse. Indeed, the race and gender bias task forces of three different circuit courts have found that many attorneys believe this is often the fate of employment discrimination plaintiffs.

Patricia M. Wald, *Summary Judgment at Sixty*, 76 Tex. L. Rev. 1897, 1938 (1998).

## II. THE DECISION BELOW AND OTHERS LIKE IT THWART CONGRESSIONAL INTENT TO GIVE VICTIMS OF WORKPLACE SEXUAL HARASSMENT A MEANINGFUL REMEDY

### A. When Congress Enacted the Civil Rights Act of 1991, It Was Especially Concerned with Giving Victims of Sexual Harassment a Right to Seek Damages

One of Congress's primary purposes in enacting the Civil Rights Act of 1991, Pub. L. No. 102-166 (the "1991 Act"), was to give victims of workplace sexual harassment the right to present their claims to a jury and to obtain damages for violations of their rights. Because decisions like the one below severely curtail plaintiffs' access to the remedy and procedure Congress created, they are contrary to congressional intent.

Before the 1991 Act, victims of sexual harassment often lacked any real remedy for the discrimination they endured. This was true because Title VII then afforded only equitable remedies, *i.e.*, injunctive relief and back pay. *See* H.R. Rep. No. 102-40(I) (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 603 (hereinafter "1991 U.S.C.C.A.N. at --"). While the Title VII plaintiff who could prove discriminatory termination, or failure to hire or promote, was entitled to back pay, this remedy was useless to the harassment victim who continued working while enduring the abuse. Congress credited a federal court's observation that "'[t]here is little incentive for a plaintiff to bring a Title VII suit when the best that she can hope for is an order to her supervisor and to her employer to treat her with the dignity she deserves and the costs of bringing her suit.'" 1991 U.S.C.C.A.N. at 608 (quoting *Mitchell v. OsAir, Inc.*, 629 F. Supp. 636, 643 (N.D. Ohio 1986)). Moreover, because the general consensus of the lower courts was that back pay was

equitable in nature, the Title VII plaintiff had no right to a jury trial. H.R. Rep. No. 101-644 Pt. 2, at 66 (1990).

Congress recognized that victims of race discrimination, on the other hand, could and did bring suits for money damages under 42 U.S.C. § 1981 ("Section 1981"), claims that were heard by juries. 1991 U.S.C.C.A.N. at 603, 610-11.[3] When Congress crafted what became the Civil Rights Act of 1991, one of its two central goals was to eliminate this discrepancy in the nation's anti-discrimination laws, that is, "to conform remedies for intentional gender and religious discrimination to those currently available to victims of intentional race discrimination." *Id.* at 602.[4] In the 1991 Act, Congress for the first time authorized Title VII plaintiffs who complained of intentional discrimination to seek compensatory and punitive damages in addition to equitable relief.

The inadequacy of equitable relief to redress sexual harassment was a driving force behind this expansion of Title VII remedies. Congress was acutely aware of the "terrible humiliation, pain and suffering, psychological harm and related medical problems" caused by sexual harassment, *id.* at 604, and the "woeful inadequacy of Title VII's [then-] current remedial scheme" to redress it, *id.* at 605. Congress explained the need for a damages

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[3] This Court ruled in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), that Section 1981's prohibition of race discrimination in the making of contracts did not authorize suits for race discrimination after a "contract" had been formed—that is, for racial harassment or other forms of discrimination that took place during the course of employment—but the *Patterson* ruling did not affect the damages remedy or the right to a jury trial afforded by Section 1981.

[4] The other central goal of the 1991 Act was to make statutory amendments necessary to overcome various Supreme Court rulings, including *Patterson*, that affected burdens of proof and the scope of anti-discrimination laws. 1991 U.S.C.C.A.N. at 552.

remedy by describing numerous cases in which victims who had suffered terribly from sexual harassment were awarded nominal damages or none at all, even by courts that clearly credited their accounts of abuse. *Id.* at 604-06 & nn.63-64; H.R. Rep. No. 102-40(II), at 25-27 (1991), *reprinted in* 1991 U.S.C.C.A.N. at 694, 718-21; *see also* S. Rep. No. 101-315, at 32 (1990) (quoting testimony of now-Justice Thomas supporting expansion of Title VII remedies to include compensatory and punitive damages).[5] Congress also recognized that the absence of a damages remedy itself led many courts to conclude that sexual harassment was not actionable under Title VII, because the statute could provide no relief to the plaintiff. 1991 U.S.C.C.A.N. at 606 n.64 (describing cases in which courts found sexual harassment but awarded no relief under Title VII). Thus, by authorizing damages—and the accompanying jury trial—the 1991 Act gave victims of sexual harassment their first meaningful remedy under Title VII.

[5] Over a two-year period, Congress amassed extensive evidence about the impact, cost, and extent of sexual harassment. *See, e.g.*, *Hearings on H.R. 1, The Civil Rights Act of 1991 Before the House Comm. on Educ. and Labor*, 102nd Cong. 77-131, 168-235, 581-629 (1991); *Joint Hearings on H.R. 4000, The Civil Rights Act of 1990, Before the House Comm. on Educ. and Labor and the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong. (1990) ("*1990 Hearings*"), vol. 1 at 230-356; vol. 2 at 2-76; vol. 3 at 2-81.

### B. Congress Intended Juries to Decide Sexual Harassment Claims

When it enacted the 1991 Act, Congress readily embraced the entry of jury trials into the evaluation of sexual harassment and other discrimination claims that a damages remedy would necessarily entail, declaring:

> The jury system is the cornerstone of our system of civil justice, as evidenced by the Seventh Amendment's guarantee. Just as they have for hundreds of years, juries are fully capable of determining *whether* an award of damages is appropriate and if so, how large it must be to compensate the plaintiff adequately and to deter future repetition of the prohibited conduct.

*Id.* at 610 (emphasis added).[6]

Congress recognized that sexual harassment claims sometimes presented thorny challenges of distinguishing between social interaction and actionable harassment—or, as one witness put it, "pinpoint[ing] the place at which the conduct becomes offensive"—and made clear that the jury was the appropriate body to sort through these issues. *1990 Hearings*, *supra* n.5, vol. 2, at 59; *id.* ("a jury of your peers can make a determination about whether you were too sensitive or whether you were properly offended and whether, in fact, you were damaged") (Rep. Miller); *id.* at 70 (under proposed legislation, "a jury of peers would determine that point along the continuum at which a person is harassed as opposed to just being kidded") (Rep. Poshard); *id.* at 72-73 (under proposed legislation, "the people who are smart enough to elect the members of Congress—that is, the people in most of our communities

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[6] Congress recognized that, under the Seventh Amendment, parties to actions for compensatory and punitive damages were entitled to trial by jury. 1991 U.S.C.C.A.N. at 610 n.66.

who vote—[would make] a determination after hearing the facts on both sides that the defendant ... is in violation of our law") (Rep. Washington). Congress had solid evidence for trusting juries to be arbiters of sexual harassment claims, citing the testimony of Professor Theodore Eisenberg, which supported the reliability of jury decisions on civil rights claims. *See* 1991 U.S.C.C.A.N. at 608, 610-11; *see also 1990 Hearings*, vol. 2, at 140, 154-55 (testimony of Prof. Eisenberg).

Congress delineated the judiciary's role in Title VII damages actions in traditional terms, that is, as reviewers of jury damage awards, not as ultimate fact-finders: "Judges serve as an additional check: they can and do reduce awards which are disproportionate to the defendant's discriminatory conduct or the plaintiff's resulting loss." H.R. Rep., 1991 U.S.C.C.A.N. at 610. Congress underscored these points by rejecting, as a violation of the Seventh Amendment, a proposed substitute for the damages remedy that would have prohibited jury trials in Title VII cases while authorizing judges to award up to $150,000 in "equitable" relief in Title VII cases where "harassment" was found. *Id.* at 640-41.

## III. THE COURT SHOULD REAFFIRM THAT HOSTILE WORK ENVIRONMENT DETERMINATIONS ARE QUESTIONS OF FACT FOR JURIES

### A. The Decision Below Conflicts with This Court's Precedents

In deciding, as a matter of law, the issue of whether sexually harassing conduct is sufficiently severe or pervasive to create a hostile work environment, the Eighth Circuit contravened this Court's precedents that severity and pervasiveness is a question of fact for the jury.

From the time this Court first acknowledged that Title VII prohibits sexual harassment, including hostile work environment harassment, *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986), it recognized that the existence of sexual harassment is a question of fact. Quoting the EEOC regulations, the Court explained that

> the *trier of fact* must determine the existence of sexual harassment in light of "the record as a whole" and "the totality of circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred."

*Id.* at 69 (citation omitted and emphasis added).[7]

In *Harris*, a unanimous Court reaffirmed that sexual harassment violates Title VII when it creates an "environment [that] would reasonably be perceived, and is perceived, as hostile or abusive." 510 U.S. at 22. The Court noted that "whether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances." *Id.* at 23. In a concurring opinion, Justice Scalia explained that, under the Court's decision, "whether sex-related conduct engaged in (or permitted by) an employer is egregious enough to warrant an award of damages" is an issue of fact for the jury. *Id.* at 24; *cf. Oncale*, 523 U.S. at 80 (assuming that "trier of fact" would determine whether harassment is discriminatory).

Following this Court's precedents, numerous courts, including panels in the Eighth Circuit, recognize that the existence of a hostile work environment in a specific situation is "quintessentially" an issue of fact for the jury and that jury determinations in sexual harassment cases are entitled to deference. *See, e.g.*, *Raniola v. Bratton*, 243 F.3d 610, 621 (2d Cir. 2001) (vacating grant of

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[7] Because *Meritor* was decided prior to the 1991 Act, sexual harassment plaintiffs did not yet have a right to jury trial.

defendants' motion for judgment as a matter of law; "[v]iewing the evidence in its totality, we conclude that there was sufficient proof for a reasonable jury to find that Raniola's abuse was so severe and pervasive as to constitute a hostile work environment in violation of Title VII"); *O'Shea v. Yellow Tech. Servs., Inc.*, 185 F.3d 1093, 1098 (10th Cir. 1999) ("the severity and pervasiveness evaluation is particularly unsuited for summary judgment because it is 'quintessentially a question of fact'"); *Bales v. Wal-Mart Stores, Inc.*, 143 F.3d 1103, 1109 (8th Cir. 1998) (affirming jury verdict for plaintiff on hostile work environment claim, concluding "there was substantial credible evidence to support the jury's finding of severity and pervasiveness"); *Beardsley v. Webb*, 30 F.3d 524, 530 (4th Cir. 1994) (upholding denial of defendant's motion for judgment as a matter of law, holding that whether "'harassment was sufficiently severe or pervasive is quintessentially a question of fact'" that rested on jury's determination of "the credibility of the witnesses and the inferences the jury could reasonably draw from the facts") (citation omitted). In contrast, the decision below affords no deference to the jury's finding, and thus ignores this Court's precedents.

### B. Hostile Work Environment Claims are Particularly Suited to Jury Determinations

This Court has repeatedly "emphasized" that the existence of a hostile environment, and particularly the objective severity and pervasiveness of harassment, must be "judged from the perspective of a reasonable person in the plaintiff's position, considering 'all of the circumstances.'" *Oncale*, 523 U.S. at 81. *See also Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 270-71 (2001) ("whether an environment is sufficiently hostile or abusive must be judged by looking at all the circumstances") (citations omitted); *Harris*, 510 U.S. at

22 (same); *cf. Meritor*, 477 U.S. at 69 ("the trier of fact must determine the existence of sexual harassment in light of 'the record as a whole' and 'the totality of circumstances'") (citation omitted). These features of the sexual harassment determination—that the harassing conduct must be examined in light of the specific context in which it occurred, in light of all of the circumstances, and from the perspective of a "reasonable person" in the plaintiff's position—make it especially well-suited to a jury determination.

The totality of the circumstances inquiry is by its nature very fact intensive. As this Court acknowledged, "[t]his is not, and by its nature cannot be, a mathematically precise test." *Harris*, 510 U.S. at 22. Rather, it is "[c]ommon sense, and an appropriate sensitivity to social context" that "will enable courts and juries to distinguish between simple teasing … and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive." *Oncale*, 523 U.S. at 82. Not only are juries well-equipped with "common sense" and "sensitivity to social context," but they also have the benefit of hearing all the evidence necessary to determine the "real social impact of workplace behavior," which, this Court has noted, "often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed." *Id.* at 81-82.[8] Thus, it is appropriate for a jury to determine the predominantly fact-based issue of whether a hostile work environment was created. *See City of Monterey v. Del Monte Dunes at*

[8] The Eighth Circuit therefore erred by examining each incident of sexual harassment in isolation without considering the particular circumstances of Ms. Duncan's workplace context. *Duncan*, 300 F.3d at 935 (reducing Duncan's allegations to "four categories" of events and ignoring contextual facts).

*Monterey, Ltd.*, 526 U.S. 687, 720 (1999) (fact issues in actions at law are generally province of jury).

Moreover, Congress has required that juries be selected from "a fair cross section of the community," 28 U.S.C. § 1861, in order "to reflect the community's sense of justice" in deciding cases. H.R. Rep. No. 90-1076 (1968), *reprinted in* 1968 U.S.C.C.A.N. 1792, 1797, *quoted in Taylor v. Louisiana*, 419 U.S. 524, 529 n.7 (1975); *see also Theil v. Southern Pac. Co.*, 328 U.S. 217, 220 (1946). In the context of a hostile work environment sexual harassment case, the jury pool will include men and women familiar with contemporary workplace conduct and sexual norms.[9] *See* M. Isabel Medina, *A Matter of Fact: Hostile Environments and Summary Judgments*, 8 S. Cal. Rev. L. & Women's Stud. 311, 358 (1999) (juries possess "familiarity and direct involvement with workplace norms" and "a sense of workplace and community values critical to determining the fact issues posed by sexual harassment cases"). As such, a jury's view on what conduct is sufficiently severe and pervasive to create a hostile work environment is likely to approximate that of a "reasonable person."

Social science research shows a strong consistency in the types of behaviors individuals identify as sexually harassing. *See generally* Teresa M. Beiner, *Let the Jury*

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[9] There is reason to believe that the accuracy of a hostile work environment determination is enhanced by the presence of both men and women on the jury. *See* David N. Laband & Bernard F. Lentz, *The Effects of Sexual Harassment on Job Satisfaction, Earnings, and Turnover Among Female Lawyers*, 51 Indus. & Lab. Rel. Rev. 594 (1998) (noting difference in perceptions of male and female lawyers); Richard L. Wiener & Linda E. Hurt, *Social Sexual Conduct at Work: How Do Workers Know When It Is Harassment and When It Is Not?*, 34 Cal. W.L. Rev. 53, 66-67 (1997) ("empirical research supports the view that men and women workers hold divergent perspectives concerning what constitutes hostile work environment harassment").

*Decide: The Gap Between What Judges and Reasonable People Believe is Sexually Harassing*, 75 S. Cal. L. Rev. 791, 827-38 (2002) (reviewing literature). Interestingly, many of the behaviors commonly identified as harassing are present in this case. For example, in a widely accepted 1994 study of thousands of federal employees, the U.S. Merit Systems Protection Board found that the majority of employees believed that pressure for dates, suggestive looks and gestures, and sexual teasing and jokes constituted sexual harassment, and an even greater majority believed that "suggestive letters, calls, [and] materials" constituted harassment. *Id.* at 835 (citation omitted). Studies also show that the public considers similar factors to those identified by this Court in determining the severity of sexual harassment. *Compare Harris*, 510 U.S. at 23 (relevant factors to the determination of whether a hostile work environment was created include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance"), *with* Beiner, 75 S. Cal. L. Rev. at 837 (reviewing social science findings that, in determining severity of harassment, individuals consider frequency, intensity and duration of conduct, and whether the harassment is targeted at a particular individual).

Commentators have noted that "at present a decided gap exists between what judges consider to be harassment and what the 'common person' who has been identified and studied by social scientists considers to be harassment." *Id.* at 841. The average person recognizes more types of conduct as sexually harassing than many courts acknowledge. *Id.* at 795. There is no reason to believe that judges have a better grasp than juries on whether a reasonable person would find harassing conduct objectively severe. *See Gallagher v. Delaney*,

139 F.3d 338, 343 (2d Cir. 1998) ("[w]hatever the early life of a federal judge, she or he usually lives in a narrow segment of the enormously broad American socio-economic spectrum, generally lacking the current real-life experience required in interpreting subtle sexual dynamics of the workplace"). Accordingly, appellate courts should defer to the jury's predominantly factual determination as to whether conduct creates a hostile work environment.

## IV. PERMITTING APPELLATE REDETERMINATION OF WHETHER HARASSMENT IS SEVERE OR PERVASIVE UNDERMINES THE SEVENTH AMENDMENT AND JUDICIAL ECONOMY

The Seventh Amendment prohibits "the indirect impairment of the right of trial by jury through judicial re-examination of factfindings of a jury." *Colgrove v. Battin, U.S. District Judge*, 413 U.S. 149, 152 n.6 (1973); U.S. Const. amend. VII ("no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law"). As Justice Scalia has observed, "the People of the several States" were "so fearful" of "the practice of federal appellate reexamination of facts found by a jury .... that they constitutionally prohibited it by means of the Seventh Amendment." *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 450 (1996) (Scalia, J., dissenting) (emphasis deleted).

The right to a jury trial is "at the heart of the Bill of Rights." Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 83 (1998). Thus, this Court has long held that "'[m]aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.'" *Chauffeurs, Teamsters*

*& Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 565 (1990) (quoting *Dimick* v. *Schiedt*, 293 U.S. 474, 486 (1935)) (additional citation omitted). Accordingly, this Court must closely examine the pattern of judicial usurpation of the jury trial right that is exemplified by the decision below.

In addition to undermining the Seventh Amendment, allowing courts to redetermine facts presented to juries is contrary to the efficient administration of justice. When a reviewing court re-examines the evidence in the record, it not only duplicates the work of the finder of fact, but also makes sexual harassment litigation needlessly time-consuming and expensive for the parties. As the Court noted in *Anderson v. City of Bessemer City*, 470 U.S. 564, 575 (1985), after the parties "concentrate their energies and resources on persuading" the fact-finder of their account of the facts, "requiring them to persuade three more judges at the appellate level is requiring too much." *Cf.* Fed. R. Civ. Proc. 1 (the Federal Rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action").

## CONCLUSION

For the foregoing reasons, as well as those stated in the Brief for Petitioner, this Court should grant the petition for a writ of *certiorari*.

Respectfully submitted,

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