No. 03-1600

In The
Supreme Court of the United States

DOMINIQUE K. GANTT,

Petitioner,

vs.

SECURITY, USA, INCORPORATED,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF OUT OF TIME; and BRIEF *AMICI CURIAE* THE FRIENDS OF DOMINIQUE K. GANTT IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF OUT OF TIME

Amici The National Association of Women Lawyers ("NAWL"), The National Center for Victims of Crime, The National Center on Domestic and Sexual Violence, The D.C. Employment Justice Center, The Maryland Crime Victims' Resource Center, Inc., and Peace at Work. *Amici* file this motion for leave to file *amicus curiae* brief out of time. While *amicus briefs* were due July 1, 2004, the opportunity to prepare this brief did not come to NAWL's attention until August 24, 2004. At that time, NAWL voluntarily agreed to draft the brief after consultation with the *amici* and with Petitioner Dominique K. Gantt's counsel.

It was not until August 29, 2004 that counsel of record (a member of NAWL's Amicus Committee and a fulltime practicing associate) volunteered to draft the brief on behalf of the *amici* within the constraints of existing commitments. Despite counsel's best efforts, given the work involved in preparing the brief, as well as commitments in counsel's regular practice, *amici* were unable to file until this date.

The *amici* have the full support and consent of Petitioner's counsel, and do not believe that any prejudice will result to Respondent from this delay.

The *amici* all share a common interest in protecting the rights of domestic violence victims, who are predominately women, and in ensuring that the employers of these victims fulfill their obligations to provide a safe, productive work environment that is free from threats of harassment.

Through this brief, the *amici* illustrate, within the bounds of applicable law, an employer's responsibility for the actions of those whose conduct creates a patently unsafe, hostile working environment resulting in both psychological and physical assaults of disastrous proportions. Absent such responsibility, domestic violence victims will have little to no recourse for such blatant violations of their constitutional rights.

Respectfully submitted,

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BRIEF *AMICI CURIAE*

This *amici curiae* brief is submitted in support of Petitioner Dominique K. Gantt.[1]

INTEREST OF *AMICI CURIAE*

The National Association of Women Lawyers ("NAWL"), headquartered in Chicago, is the oldest women's bar association in North America. Founded in 1899, the association promotes the interests of women and families, as well as women in the profession. The issue of domestic violence and its workplace consequences is of utmost importance to NAWL. The organization has a strong interest in protecting legal rights in the workplace environment for all victims of violence. Domestic Violence victims and survivors must be assured of compliance by their employers with court orders of protection and other safety measures taken by their employees against their abusers. The majority of domestic violence victims being female, this issue is of great concern to NAWL.

The National Center for Victims of Crime ("National Center"), a nonprofit organization headquartered in Washington, DC, is one of the nation's leading resource and advocacy organizations for all victims of crime. The mission of the National Center is to forge a national commitment to help victims of crime rebuild their lives.

[1] As required by Rule 37.6 of this Court, counsel for *amici* submits the following: no party or party's counsel authored this brief in whole or in part; no person or entity other than *amici*, their members, or their counsel, have made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief.

The National Center is dedicated to serving individuals, families and communities harmed by crime. Among other things, the National Center advocates laws and public policies that create resources and secure rights and protections for crime victims. The National Center has a particular interest in this brief due to its work and dedication to the interests of victims' domestic violence, stalking, sexual assault, and those who are victimized in the workplace.

The National Center on Domestic and Sexual Violence ("NCDSV") provides training, consulting and advocacy. At the local, state, regional and national levels, NCDSV promotes community collaboration as the model approach to problem solving for domestic and sexual violence issues. NCDSV collaborates with law enforcement, legal system agencies, advocacy organizations, social service agencies, the military and other community entities to integrate their efforts to end domestic and sexual violence. With funding from the Office on Violence Against Women (OVW), and in partnership with the Federal Law Enforcement Training Center, the National Sheriffs' Association and the National Center for Rural Law Enforcement, NCDSV trains law enforcement officers on their response to domestic and sexual violence. In addition, NCDSV's web site (www.ncdsv.org) is a resource on a variety of issues related to violence against women. NCDSV submits this statement of interest because our training and technical assistance supports professionals out in the field whose role is to help protect victims. Confidentiality is critical to the safety of victims when they are seeking assistance at any point in any system, and that's why we are supporting C.A. No. 03-1033: *Dominique K. Gantt v. Security, USA, Inc.*

The D.C. Employment Justice Center ("EJC") is a non-profit organization in Washington, D.C. The mission of the EJC is to secure, protect and promote workplace justice in the D.C. metropolitan area. The EJC seeks to address inequities in the employment arena through legal services, community education and organizing, and advocacy. The EJC has a particular interest in this brief because of the intersection between employment and domestic violence. One of the EJC's programs, the Program on Women's Employment Rights, focuses on employment-related issues that have a greater impact on women, including domestic violence. Studies have shown that 96% of employed domestic violence victims have problems at work because of the violence. In addition, many batterers harass and attack their victims in or near the workplace.

The Maryland Crime Victims' Resource Center, Inc. ("MCVRC") is a private non-profit organization incorporated under the laws of the State of Maryland whose mission is to ensure that victims of crime receive justice and that victims are treated with dignity and compassion through comprehensive victims' rights and services. MCVRC continues the missions of the Stephanie Roper Foundation, Inc. and the Stephanie Roper Committee, Inc. founded by Roberta and Vince Roper after the kidnapping, sexual assault, and murder of their daughter Stephanie. For over 22 years, MCVRC has advocated for policy changes to the justice system and has provided assistance to victims of crime. Those policy changes have included numerous statutory enactments and the adoption of Article 47 of the Maryland Declarations of Rights, which provides a fundamental change to the justice system to include the consideration of the rights of interested victims, the concomitant access to justice by those victims,

and that crime victims are treated appropriately within our justice systems.

Peace at Work is a North Carolina-based organization that seeks to protect workers from being victims of any form of violence. Peace at Work offers services and training to employers, supervisors, and employees on best practices for addressing violence in the workplace. Peace at Work recognizes the importance and value of employment to victims of domestic abuse. Firing a victim of domestic violence because of the violence is fundamentally wrong and may bring future risk to the workplace by discouraging disclosure from other employees.

SUMMARY OF ARGUMENT

Respondent Security, USA, Incorporated ("Respondent") has violated Petitioner Dominique K. Gantt's ("Gantt") constitutional rights. Respondent's liability stems from Title VII principles governing sexual harassment hostile work environment claims. Under these well-established standards, Gary Sheppard's kidnapping of Gantt from the workplace, and his subsequent violent six-hour sexual assault, rape, and torture constitutes actionable sexual harassment for which Respondent is liable.

Unquestionably, Gantt's kidnapping, rape, and torture resulted in Gantt being subjected to an actionable hostile work environment. Courts have routinely recognized that rape (and/or threats of rape) is conduct based on the victim's sex. Moreover, such conduct in the workplace is considered to be one of the severest forms of sexual harassment, as it irrevocably alters the victim's work environment.

Based on principles of employer liability for sexual harassment in the workplace set forth in *Faragher* and *Ellerth*, Respondent is vicariously liable for the actionable hostile work environment *created* by Gantt's supervisor, Sgt. Angela Claggett. Claggett knew of the order of protection secured by Gantt, which ordered Sheppard to stay away from Gantt's home and place or work, had personal knowledge of Sheppard's threats to Gantt, and had warned an employer for whom both Claggett and Sheppard worked of his risk of violence. Despite this knowledge, Claggett not only actively encouraged Sheppard to contact Gantt at the workplace, but facilitated Sheppard's unfettered access to Gantt. In so doing, Claggett used her supervisory authority over Gantt to place Gantt directly in harms way, as well as her authority over Gantt's coworkers to prevent them from calling the police in an attempt to prevent or stop Sheppard from abducting Gantt from the workplace. Claggett's actions knowingly created a hostile work environment to which Gantt was subjected, thereby violating the primary objective of Title VII as set forth by this Court – to avoid harm to the employee.

Alternatively, Respondent is liable for the actionable sexual harassment endured by Gantt as a result of Sheppard's (a non-employee) conduct because, unquestionably, Respondent knew (or should have known) of the strong likelihood that Gantt would be the victim of such a shocking assault. Gantt herself informed Respondent of the protective order and of her fears about Sheppard. Claggett knew of the protective order, knew what Sheppard was capable of, and had herself warned another employer for whom she and Sheppard both worked of Sheppard's violent tendencies. Despite this clear knowledge, Gantt was again and again placed in situations

where she was accessible to Sheppard through the affirmative acts of her own supervisor. As such, Respondent is liable for Gantt's ordeal.

ARGUMENT

GANTT'S KIDNAPPING, RAPE, AND TORTURE IS ACTIONABLE SEXUAL HARASSMENT AND, PURSUANT TO PRINCIPLES OF EMPLOYER LIABILITY UNDER TITLE VII, A VIOLATION OF THE EQUAL PROTECTION CLAUSE.

Respondent Security, USA, Incorporated ("Respondent") is subject to the equal protection clause of the Constitution for the reasons aptly set forth in Petitioner Dominique K. Gantt's ("Gantt") petition for certiorari. Gantt's constitutional sexual harassment claim is evaluated pursuant to Title VII sexual harassment/employer liability standards to determine whether Respondent has violated Gantt's constitutional rights. *See, e.g.*, *Hildebrandt v. Ill. Dep't of Natural Res.*, 347 F.3d 1014, 1036-37 (7th Cir. 2003); *Beardsley v. Webb*, 30 F.3d 524, 529 (4th Cir. 1994); *Annis v. County of Westchester*, 36 F.3d 251, 254 (2d Cir. 1994); *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 897 (1st Cir. 1988).

According to Title VII's principles of employer liability, Respondent's utter failure in its obligation to avoid the heinous harm that Gantt endured as a direct result of her supervisor's own affirmative acts may render Respondent vicariously liable for a violation of Gantt's constitutional rights. Alternatively, Respondent may be held liable under a negligence standard as set forth in the United States Equal Employment Opportunity Commission's (EEOC)

regulation addressing employer liability for sexual harassment by non-employees. 29 C.F.R. § 1604.11(e).

1. Gantt Was Subjected to Actionable Sexual Harassment in the Workplace.

As an initial matter, it is well established that sexual harassment sufficient to create an actionable hostile work environment gives rise to a claim of sex discrimination under Title VII. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66 (1986). To rise to the level of actionable sexual harassment, conduct must be "sufficiently severe or pervasive as to alter the conditions of the victim's employment and to create an abusive working environment." *Meritor*, 477 U.S. at 57. Furthermore, whether a hostile working environment exists under Title VII "can be determined only by looking at all the circumstances, [including] 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." *Harris v. Forklift Sys.*, 510 U.S. 17, 23 (1993).

One cannot seriously doubt that Gantt was subjected to sufficiently severe conduct that rose to the level of actionable sexual harassment. "Rape is unquestioningly among the most severe forms of sexual harassment." *Little v. Windemere Relocation, Inc.*, 301 F.3d 958, 967 (9th Cir. 2001). Moreover, [b]eing raped . . . while on the job, irrevocably alters the conditions of the victim's work environment. It imports a profoundly serious level of abuse into a situation that, by law, must remain free of discrimination based on sex." *Id.*; *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1066 (9th Cir. 2002) ("The most extreme form of

offensive physical, sexual conduct – rape – clearly violates Title VII"); *Turnbull v. Topeka State Hosp.*, 255 F.3d 1238, 1243-44 (10th Cir. 2001) (holding single incident of violent sexual assault was "objectively abusive, dangerous and humiliating" such that plaintiff was subjected to sexually hostile work environment under Title VII).

Nor can one doubt that Gantt's assault and rape were based on her sex. *See Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 77 (1998) (holding threats of forcible rape, among other things, could form basis of same sex harassment claim); *Little*, 301 F.3d at 968 ("Being raped is, at a minimum, an act of discrimination based on sex."); *Hukkanen v. International Union of Operating Eng'rs, Hoisting & Portable Local No. 101*, 3 F.3d 281, 284 (8th Cir. 1993) (affirming lower court decision finding sexual harassment based on sex-related conduct, including "gun-enforced threat of rape"); *Brock v. United States*, 64 F.3d 1421, 1423 (9th Cir. 1995) ("Just as every murder is also a battery, every rape committed in the employment setting is also discrimination based on the employee's sex.")[2]

[2] Whether a man *could* also be the victim of a violent sexual assault or rape does not alter the fact that when such an action is actually threatened or carried out, the action at issue is unquestionably undertaken because of the victim's sex.

Moreover, even "conduct that affects both sexes may constitute sexual harassment if [the conduct] disproportionately affects [women]." *Turnbull*, 255 F.3d at 1244; *see also Crist v. Focus Homes*, 122 F.3d 1107, 1111 (8th Cir. 1997); ("[I]t may be argued that [the harasser] had no intent to target women, but a finding that his conduct disproportionately affected female staff could support a determination that the harassment was based on sex."); *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991) ("Men, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without a full appreciation of the

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2. Respondent is Vicariously Liable for Gantt's Sexual Harassment Because Claggett, Gantt's Supervisor, Facilitated Sheppard's Violent Sexual Assault and Rape of Gantt.

In the seminal cases addressing the standard for employer liability in sexual harassment cases – *Faragher* and *Ellerth* – this Court stated, "[a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment *created by a supervisor* with immediate (or successively higher) authority over the employee." *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998) (emphasis added); *Burlington Indus. v. Ellerth*, 524 U.S. 742, 764 (1998) (emphasis added). Surely, Sgt. Angela Claggett (Claggett) (Gantt's immediate supervisor) *created* a hostile work environment for which Respondent may be held vicariously liable due to her facilitation of Gary Sheppard's ("Sheppard") unfettered access to Gantt, which resulted in significant emotional distress and physical injury to Gantt due to Sheppard's telephone contact and kidnapping of Gannt from the workplace, resulting in her six hour rape and torture.

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social setting or the underlying threat of violence that a woman may perceive.").

Statistics on workplace violence clearly demonstrate that women are in fact disproportionately affected by rape and sexual assault in the workplace. For example, the National Crime Victimization Survey on Violence in the Workplace conducted by the Bureau of Justice Statistics, in the Office of Justice Programs, U.S. Department of Justice reveals that the victims of 80% of all rapes and sexual assaults in the workplace are women. *See* Bureau of Justice Statistics, Special Report: *National Crime Victimization Survey, Violence in the Workplace, 1993-1999* (December 2001) available at http://www.ojp.usdoj.gov/bjs/pub/pdf/vw99.pdf

Respondent and Claggett were both well aware of the danger that Sheppard presented to Gantt, and of Gantt's concern for her personal safety. Gantt informed Respondent of the order of protection she obtained from the Circuit Court for Charles County, ordering Sheppard to stay away from Gantt at her home and place of work. Claggett knew of Sheppard's physical assault of Gantt, and also of his threats of future violence to Gantt. Indeed, Claggett apparently considered Sheppard's threats to be so credible that she warned another employer for whom she and Sheppard both worked of Sheppard's violent tendencies.

Despite this knowledge, Claggett (1) approached Gantt and attempted to arrange a meeting between Sheppard and Gantt, (2) transferred Sheppard's telephone call to Gantt from Claggett's assigned post in the workplace, (3) forced Gantt, under implied threat of having her employment terminated for insubordination, to work at an outside post where she would be easily accessible to Sheppard, and (4) instructed her subordinates not to inform the proper authorities of Sheppard's violent abduction of Gantt at gunpoint until approximately ten minutes has already passed after Sheppard left the facility with Gantt. That Claggett did not herself engage in the psychological and physical assaults should be of no consequence. Claggett in fact wielded her supervisory authority over Gantt to create a hostile work environment.

This conclusion is bolstered by a line of cases recognizing an employer may create an objectively hostile environment where an employee is knowingly placed in the presence of a harasser who has previously engaged in severe or pervasive harassment of an employee. *See, e.g.*, *Duggins v. Steak 'n Shake, Inc.*, 3 Fed. Appx. 302, 311 (6th

Cir. 2001) ("[W]hen an employee is forced to work for, or in close proximity to, someone who is harassing her outside the workplace, the employee may reasonably perceive the work environment to be hostile."); *Adusumilli v. City of Chicago*, 164 F.3d 353, 362 (7th Cir. 1998) (recognizing employer may create hostile work environment by assigning employee to work with alleged harasser after complaining of harassing conduct); *Lucero-Nelson v. Washington Metro. Area Transit Auth.*, 1 F. Supp. 2d 1, 7 (D.D.C. 1998) (holding that employer's knowledge of harasser's conduct prior to and subsequent to plaintiff's hiring and placement is actionable sexual harassment); *Cortes v. Maxus Exploration Co.*, 977 F.2d 195, 199 (5th Cir. 1992) (holding transfer of plaintiff back to harasser's department "created an abusive work environment" for which employer was liable); *Ellison*, 924 F.2d at 883 ("[I]n some cases the mere presence of an employee who has engaged in particularly severe or pervasive harassment can create a hostile working environment.")

Further supportive of this reasoning is this Court's pronouncement in *Faragher,* that "[a]lthough Title VII seeks to 'make persons whole for injuries suffered on account of unlawful employment discrimination,' [citation omitted], its 'primary objective,' like that of any statute meant to influence primary conduct, is not to provide redress but to avoid harm." *Faragher*, 524 U.S. at 805-06. Certainly holding an employer vicariously liable for a supervisor's knowingly placing an employee in harm's way comports with this "primary objective" – to avoid harm.[3]

[3] That "Gantt changed her shift to a less desirable schedule solely to avoid working under Claggett," *Pet. for Cert.*, p.6, may be akin to a

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This seems especially true where "the supervisor is clearly charged with maintaining a productive, safe work environment." *Id.* at 798.

As stated, Claggett knowingly placed Gantt in harm's way, and to further exacerbate matters, upon Gantt's return to the workplace after her nightmare she was "forced to work under Claggett, who maintained her rank of sergeant." *Pet. for Cert.*, p.6. To be forced to report to the same person who made your kidnapping, rape, and torture possible is unquestionably repugnant, given Respondent's knowledge of Claggett's role in Gantt's harassment.

3. Respondent is Liable for Gantt's Sexual Harassment Because Gantt Notified Respondent of the Specific Danger Sheppard Posed to Gantt in the Workplace.

Similarly, even if this case is viewed as one involving an employer's liability for harassment of employees in the workplace by non-employees, as provided for in the EEOC regulations on sexual harassment, 29 C.F.R. § 1604.11(e), Respondent would be liable for Gantt's sexual harassment.[4] Section 1604.11(e) provides as follows:

> An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the

tangible employment action, rendering unavailable to Respondent what has come to be known as the *Ellerth/Faragher* affirmative defense.

[4] Gantt has very aptly cited to the numerous decisions from federal courts that have considered and adopted the reasoning of the EEOC regulation for employer liability for the acts of non-employees.

> employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.

Courts have routinely applied this regulation in many cases that can only be described as having truly outrageous fact patterns and where employees were subjected to some of the most violent and traumatic assaults.

For example, in *Little*, Maureen Little was subjected to not one, but three rapes during the course of a single evening while in the performance of her job. 301 F.3d at 964. Little was a client service manager attempting to secure a very lucrative account for her employer. While working on this account, Little accepted the client's invitation to discuss the account over dinner. During dinner, Little became violently ill, passed out, and awoke while she was being raped by the client in his car. Little unsuccessfully attempted to escape, and was brought back to the client's apartment where he raped Little two more times before driving her back to her car. The court held the employer liable for the client's sexual harassment of Little because the employer "effectively condoned a rape" by failing to take any remedial action, including the employer's failure to remove Little from responsibility for harasser's account. 301 F.3d at 968.

Similarly, in *Turnbull*, Cynthia Turnbull was the victim of a violent sexual attack by a patient at a state-run inpatient mental health center. 255 F.3d at 1242-43. Turnbull, a psychologist, had held several therapy sessions

with a patient when he suddenly attacked her. "He knocked her to the ground, undressed her and digitally penetrated her, bit and choked her, and repeatedly threatened to kill her." *Id.* Finding the employer liable for the assault, the court found the employer's own defense to be the very basis for finding liability: "[T]he dangers were so obvious that employees knowingly assumed those risks through their continued employment." 255 F.3d at 1244. Since the risks were so obvious, the court held that it was reasonable to conclude the employer knew or should have known of the risk of harassment. Furthermore, it was also reasonable to conclude that Turnbull's employer failed to take "reasonable measures to make the workplace as safe as possible." 255 F.3d at 1245.

As in *Little* and *Turnbull*, Respondent failed to protect Gantt both before and after Sheppard's brutal attack. First, as demonstrated in Section 2, *supra*, there can be no doubt that Respondent knew (or should have known) of the potential likelihood that Gantt would be the victim of a violent sexual assault and/or rape if Sheppard were granted access to her while at her workplace. This is certainly not a case where neither Respondent nor Gantt anticipated a violent assault on Gantt by Sheppard. *See Hawkins v. Maximus, Inc.*, 99 C 0954, 2000 U.S. Dist. LEXIS 18884, at * 7 (N.D. Ill. Dec. 19, 2000) (holding employer not liable for rape which was characterized as "shocking escalation from what before had been merely a few uncomfortable moments" of which employee had informed employer). Nor is this a case where Gantt failed to make "a concerted effort" to inform Respondent of the risk to her person from Sheppard. *Silk v. City of Chicago*, 194 F.3d 788, 807 (7th Cir. 1999) (holding employer not liable for sexual harassment under negligence standard

where employee failed to make "a concerted effort" to inform employer of harassment). The danger to Gantt was so obvious and so clearly communicated to Respondent, that liability cannot be avoided.

Second, once Gantt returned to work after the attack, Gantt continued to report to Claggett, who maintained her same position and status with Respondent, despite her active role in Gantt's harassment. Indeed, it is Claggett's active role that makes this case even more egregious than *Little* and *Turnbull*. Gantt's own supervisor effectively participated in Gantt's harassment by not simply providing access to Gantt, but by promoting contact between Sheppard and Gantt. Based on these facts, Respondent cannot escape liability for Sheppard's conduct.

CONCLUSION

As argued by the Petitioner, and supported by the foregoing additional reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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