No. 23-1039

In the Supreme Court of the United States

MARLEAN A. AMES,
Petitioner,

v.

OHIO DEPARTMENT OF YOUTH SERVICES,
Respondent.

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

BRIEF OF *AMICUS CURIAE* JOSH YOUNG IN SUPPORT OF PETITIONER

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December 16, 2024

QUESTION PRESENTED

Whether, in addition to pleading the other elements of Title VII, a majority-group plaintiff must show "background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority." App. 5a.

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IDENTITIES AND INTERESTS OF AMICUS CURIAE[1]

Josh Young is an individual who formerly served as a prison guard in Limon, Colorado. After being required to undergo and personally adopt the principles of aggressive "Equity, Diversity, and Inclusion Training," he resigned his position in the Limon Correctional Facility. *See Young v. Colorado Department of Corrections*, 94 F.4th 1242, 1244 (10th Cir. 2024) ("After resigning from the Department because of the training program, Mr. Young sued, asserting claims under Title VII and the Equal Protection Clause.").

When Mr. Young brought suit under Title VII against the Colorado Department of Corrections, that agency defended itself from liability by alleging that Mr. Young had not adequately stated a claim because of his race—Caucasian. *See* Defendants' Motion to Dismiss, *Young v. Colorado Department of Corrections*, No. 1:22-cv-00145-NYW-KLM, 2022 WL 19569770 (2022) ("This enhancement of the first prima facie element reflects courts' recognition that members of the majority group are not necessarily entitled to a presumption of discrimination.").

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[1] Per Supreme Court Rule 37.6, Amicus affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

The District Court, although it granted the motion to dismiss for other reasons, emphasized the continuing vitality of differential pleading standards for Caucasian plaintiffs in Title VII actions within the Tenth Circuit Court of Appeals. *See Young v. Colorado Dep't of Corrections*, No. 22-cv-00145-NYW-KLM, 2023 WL 1437894, at *4 (D. Colo. Feb. 1, 2023) ("In *Notari v. Denver Water Department*, 971 F.2d 585 (1992), the Tenth Circuit first recognized that when a plaintiff is tasked with establishing an inference of discrimination and 'is a member of a historically favored group, an inference of invidious intent is warranted only when 'background circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority.'") (emphasis added).

Mr. Young finds this differential treatment based on his race—which constitutes open race discrimination by the judiciary—fundamentally repugnant to the Constitution's promise of Equal Protection, the text of Title VII, and our country's

foundational principles of equality. He therefore submits this brief in support of Petitioner.[2]

SUMMARY OF THE ARGUMENT

Like the Petitioner, Ms. Ames, Amicus Josh Young suffered discrimination at the hands of his employer based on a protected characteristic. And there is little doubt that the Equal Protection Clause of the Fourteenth Amendment, properly construed, requires Courts to treat all parties before them in colorblind manner. Yet, some Courts are treating both parties and attorneys differently based solely on a person's race. It is therefore not enough for this Court to issue a modest, corrective opinion, merely stating that lower courts ought to do a better job of applying the text of Title VII, and ensuring that these courts do not add elements to a claim. Indeed, this Court has already done that. *See McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280 (1976) ("We therefore hold today that Title VII prohibits racial discrimination against the white petitioners in this case upon the same standards as would be applicable were they Negroes and Jackson white."); *Cf. Muldrow*

[2] To be clear, the Tenth Circuit affirmed the dismissal, without prejudice, of Mr. Young's complaint. *See* 94 F.4th 1251 ("While Mr. Young asserts that he experienced severe and pervasive harassment, … he does not allege specific facts that demonstrate how the training related to his actual workplace experience."). Mr. Young has subsequently filed a new action bolstering his allegations of discrimination under Title VII and 42 U.S.C. § 1981. *See Young v. Colorado Department of Corrections*, 23-cv-01688-NYW-SBP (D. Colo., Filed June 30, 2023).

v. City of St. Louis, Mo., 601 U.S. 346 (2024).

So this is no time for judicial minimalism. Instead, this Court should issue a broad and robust opinion calling into question every practice where courts treat litigants or their counsel differently based on race, and reiterate once again the principle that everyone is equal before the law.

ARGUMENT

Just last year, this Court made a bold statement on behalf of equality under the law in *Students for Fair Admissions, Inc. v. Pres. and Fellows of Harvard College*, 600 U.S. 181 (2023) (*SFFA*). In rejecting the University of North Carolina's racial preferences in its student admission process, the Court criticized UNC's chief argument in favor of "diversity": "[UNC] argues that race in itself 'says something about who you are.'" *Id.* at 220 (internal brackets omitted). In holding that affirmative action was unconstitutional, and by rejecting this argument, the Court made one of its clearest statements yet on racial equality: "We have time and again forcefully rejected the notion that government actors may intentionally allocate preference to those who may have little in common with one another but the color of their skin." *Id.* (internal quotation marks omitted).

The Court's statements in *SFFA* were not confined to schools, or even legislatures. Courts too play a role in upholding these principles. *See SFFA,* 600 U.S. at 206 (2023) ("And the Equal Protection Clause, we have accordingly held, applies without

regard to any differences of race, of color, or of nationality—it is universal in its application.") (emphasis added). And as the Chief Justice noted during oral argument in *SFFA*, we did not fight a civil war over oboe players. *See* Oral Argument Transcript of *Students for Fair Admissions v. Harvard*, 20-1199, 67:22 – 68:3-4 (Oct. 31, 2022) (Mr. Waxman: "Race … for some highly qualified applicants can be the determinative factor, just as being … an oboe player in a year in which the Harvard-Radcliffe orchestra needs an oboe player [can be]… Chief Justice Roberts: "Yeah. We did not fight a Civil War about oboe players.").[3]

Rather, this nation embarked on a dramatic Reconstruction effort after the Civil War in order to ensure that justice was blind. As this Court recently articulated:

> It must become the heritage of our Nation to rise above racial classifications that are so inconsistent with our commitment to the equal dignity of all persons. This imperative to purge racial prejudice from the administration of justice was given new force and direction by the ratification of the Civil War Amendments.

Pena-Rodriguez v. Colorado, 580 U.S. 206, 221 (2017)

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[3] https://www.supremecourt.gov/oral_arguments/argument_transcripts/2022/20-1199_bi7a.pdf

(emphasis added).

However, courts across the country are engaging in widespread efforts to treat the parties before them differently, depending on race. These instances, like the underlying issue in this case, betray the ideals of the nation. Amicus Mr. Young therefore asks the Court to issue a broad, sweeping ruling calling into question judicial efforts to treat the parties before them differently based on race. *See Batson v. Kentucky*, 476 U.S. 79, 87-88 (1986) ("Discrimination within the judicial system is most pernicious…"); *see also Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 628 (1991) ("Race discrimination within the courtroom raises serious questions as to the fairness of the proceedings conducted there.").

I. The Equal Protection Clause Demands a Color-Blind Judicial System.

The Constitution demands equality before the law, regardless of the race of the individual. Courts do the nation a disservice when they play a part in unequal treatment on account of race. *Edmondson*, 500 U.S. at 628 ("Few places are a more real expression of the constitutional authority of the government than a courtroom, where the law itself unfolds."); *see also SFFA*, 600 U.S. at 203 ("This Court played its own role in that ignoble history, allowing in *Plessy v. Ferguson* the separate but equal regime that would come to deface much of America."); *Plessy v. Ferguson*, 163 U.S. 537, 554 (1896) (Harlan, J., dissenting) ("In respect of civil rights, common to all

citizens, the constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights.") (emphasis added).

Yet as this case demonstrates, several appellate courts have read into Title VII a requirement where the pleading standards vary by the race of the litigant. This ignores the fundamental principle of the Equal Protection Clause—which requires every state actor to treat people as individuals, regardless of their membership in a crudely defined racial group. *See Miller v. Johnson*, 515 U.S. 900, 912 (1995) (citation omitted) ("Race-based assignments embody stereotypes that treat individuals as the product of their race."); *SFFA*, 600 U.S. at 291 (Gorsuch, J., concurring) ("Where do these boxes come from? Bureaucrats. A federal interagency commission devised this scheme of classifications in the 1970s to facilitate data collection."); *Castaneda v. Partida*, 430 U.S. 482, 504 (1977) (Marshall, J., concurring) ("[T]his Court has a solemn responsibility to avoid basing its decisions on broad generalizations concerning minority groups. If history has taught us anything, it is the danger of relying on such stereotypes.").

But it does not stop with Title VII. Courts also consider the race of a litigant or their counsel as a factor in other contexts.

II. Unfortunately, Courts Sometimes Fail to Live Up to the Promise of Equality Before the Law.

The court of history does not look kindly on efforts by courts to discriminate based on race. *See, e.g., People v. Hall*, 4 Cal. 399, 405 (1854) (rejecting the admissibility of Chinese witnesses and smearing Chinese individuals in offensive terms). But sadly, we have not yet stomped out every instance of differential treatment based on race in the judiciary. Yes, courts—which should know best the illegality of using race in decision-making—have unfortunately followed the trend of using race as a factor when deciding issues involving the litigants or the counsel before them.

A. Courts Sometimes Discriminate on the Basis of Race in Appointing Class Counsel Under Rule 23.

In 2013, the Center for Class Action Fairness asked this Court to review a then "unique" and "highly unusual practice" of requiring class-counsel to consider race and gender when staffing legal matters. *See Martin v. Blessing*, 571 U.S. 1040, 1040 (2013) (Alito, J., respecting denial of the petition); *see also* Petition for Certiorari, *Martin v. Blessing*, No. 13-169, 2 (Docketed August 6, 2013) ("Petitioner Martin seeks review of the district judge's requiring class counsel to staff the case to reflect the class on the basis of race and sex, which the Second Circuit held objectors to

lack standing to challenge.") (internal citation omitted).[4]

The Court declined to grant a writ of certiorari in the case, but Justice Alito commented that he was "hard-pressed to see any ground on which [the judge's] practice can be defended." *Id.* at 1041-42; *see id.* at 1041 ("Class certification orders that impose race- and sex-based staffing requirements on law firms appear to be part of Judge Baer's standard practice.").

Unfortunately, in the years since *Martin*, and despite Justice Alito's warning, this indefensible practice has become practically commonplace. In 2020, for instance, another judge concluded that the race and sex of potential class-counsel's lawyers "is a relevant factor for the Court," as "[f]or well over a decade now, the courts have emphasized the importance of diversity in their selection of counsel." *See City of Providence v. AbbVie Inc.*, 20-cv-5538 (LJL), 2020 WL 6049139, *6 (S.D.N.Y. Oct. 13, 2020).

In *City of Providence*, that court cited examples from district courts across the country where the judge had considered various factors relating to race, sex, or broad notions of diversity generally. *See id.* (*citing In re Robinhood Outage Litig.*, No. 20-cv-01626-JD, 2020 WL 7330596, *2 (N.D. Cal. July 14, 2020) ("The Court is concerned about a lack of diversity in the proposed lead counsel."); *SEC v.*

[4] https://sblog.s3.amazonaws.com/wp-content/uploads/2013/09/CCAF-Martin-Petition-as-Filed.pdf

Adams, 3:18-CV-252-CWR-FKB, 2018 WL 2465763, at *4 n.6 (collecting cases) (S.D. Miss. June 1, 2018); *In re Oil Spill by Oil Rig Deepwater Horizon,* 295 F.R.D. 112, 137-38 (E.D. La. 2013); *Public Employees' Ret. Sys. of Miss. v. Goldman Sachs Group, Inc.*, 280 F.R.D. 130, 142 n.6 (S.D.N.Y. 2012) (requiring counsel to submit "information respecting diversity in the class, so far as it is known, and in the trial team."); *In re Dynex Capital, Inc. Sec. Litig.*, No. 05 Civ. 1897(HB), 2011 WL 781215, at *9 (S.D.N.Y. Mar. 7, 2011); *In re J.P. Morgan Chase Cash Balance Litig.*, 242 F.R.D. 265, 277 (S.D.N.Y. 2007) ("I believe it is important to all concerned that there is evidence of diversity, in terms of race and gender, of any class counsel I appoint.")).

This collection of cases demonstrates that the use of race and sex in the selection of class-counsel will not stop, unless higher courts like this one cause it to stop. Indeed, the body of precedent continues to grow.[5] Some courts acknowledge Justice Alito's statement in *Martin v. Blessing*, and yet still consider "diversity" as part of the decision over who to appoint as class counsel. *See In re Enzo Biochem Data Sec. Litig.*, CV

[5] *See, e.g., In re FICO Antitrust Litig.*, No. 1:20-CV-02114, 2021 WL 4478042, *3 (N.D. Ill. Sept. 30, 2021) ("[C]ourts have routinely recognized, over the past decade, the value of a legal team that is diverse across axes of gender, race, and other aspects of identity."); *see also* Amanda Bronstad, *MDL Judge Taps "Most Diverse Leadership Team Ever" in Data Breach Class Action*, Nat. L. J. (Mar. 3, 2021) (covering appointment in *In re Blackbaud, Inc., Customer Data Breach Litig.*, 3:20-mn-02972-JMC (D.S.C.)), partly based on diversity concerns).

23-4282 (GRB) (AYS), 2023 WL 6385387, at *2 (E.D.N.Y. Sept. 29, 2023) (acknowledging *Martin* but stating that "Furthermore, courts may consider whether the proposed counsel is sufficiently diverse to reflect the composition of the class.").[6] Note that *In re Enzo Biochem* was issued even after *SFFA*.

How could so many district courts build up this number of precedents for the proposition that race (and sex and "other aspects of identity) matters, when it comes to a court's decision-making? They have told us: by emphasizing the previously favorable statements about diversity in this Court's past opinions. As one court noted, "[a] commitment to diversity is not a commitment to quotas," *City of Providence*, 2020 WL 6049139 at *7 (citing *Grutter v. Bollinger,* 539 U.S. 306, 334 (2003), for the proposition that there is a compelling interest in promoting diversity, including based on race).

In short, while this Court has course-corrected after *Grutter* with SFFA, lower courts could still use clear and robust guidance on the issue of race.

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[6] The Hamilton Lincoln Law Institute is to be credited for collecting many of these examples and including them in its *SFFA* Amicus Brief. *See Brief of Hamilton Lincoln Law Institute as Amicus Curiae*, *Students for Fair Admissions, Inc. v. Pres. and Fellows of Harvard College*, 20-1199 (Mar. 31, 2021), https://www.supremecourt.gov/DocketPDF/20/20-1199/173488/20210331125456187_SFFA%20v%20Harvard%20amicus%20final.pdf.

B. Individual Judges Have Attempted to Use Race in Their Practice Standards or Standing Orders.

The trend toward considering race in the courtroom is not limited to the class action context. For instance, in 2020, in the Southern District of Illinois, three federal judges published Standing Orders stating that they would consider the race and sex of the attorney before them, in determining whether to grant a motion for oral argument. One representative Standing Order stated as follows:

> To that end, the Court adopts the following procedures regarding oral argument as to pending motions:
>
> 1. After a motion is fully briefed, as part of a Motion Requesting Oral Argument, a party may alert the Court that, if argument is granted, it intends to have a newer, female, or minority attorney argue the motion (or a portion of the motion).
>
> 2. If such a request is made, the Court will:
>
> A. Grant the request for oral argument on the motion if it is at all practicable to do so.
>
> B. Strongly consider allocating additional time for oral argument beyond what the Court may otherwise have allocated

were a newer, female, or minority attorney not arguing the motion.

C. Permit other more experienced counsel of record the ability to provide some assistance to the newer, female, or minority attorney who is arguing the motion, where appropriate during oral argument.

See Standing Orders, *In re: Increasing Opportunities for Courtroom Advocacy*, (S.D. Ill. Jan. 17, 2020) (emphasis added).[7]

Some critics noted that the standing orders could mean that a party's counsel would receive additional oral argument time, if the attorney were not a white male. *See* Cross, *Oral-argument Affirmative Action?*, The Federalist Society Blog (Feb. 13, 2024) ("With its emphasis on sex and race, the Illinois judges' policy is a different beast. Perhaps the most troubling aspect of the policy is the suggestion, without explanation, that women and minorities may be entitled to extra time for oral argument simply because they are women and minorities.").[8]

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[7] https://media.aflegal.org/wp-content/uploads/2024/01/25214339/Merged-Exhibits.pdf?_ga=2.186220001.959298009.1706738075-990187681.1706651260

[8] https://fedsoc.org/commentary/fedsoc-blog/oral-argument-affirmative-action-nonprofit-s-ethics-complaint-against-three-federal-judges-raises-questions-on-the-judicial-role

A complaint was filed against these Standing Orders, and ultimately, the judges withdrew the portions of the orders referencing race and sex. *See U.S. District Court Judges Rescind Discriminatory Policies Following AFL's Judicial Complaint*, Mar. 22, 2024 (the judges "rescinded their standing orders favoring minority and female attorneys solely based on their race and sex, and apologized").[9] But the underlying question remained: why did 3 federal judges think that considerations of race and sex mattered?

Separately, in the District of Colorado, several judges initially proposed giving special consideration to "diverse" members of the bar who requested oral argument. *See Proposed Uniform Civil Practice Standards of the United States Magistrate Judges*, at 4 (Standard 4), Attorney Mentoring and Training ("The Court welcomes the participation of young, inexperienced, and diverse attorneys, in litigation, and the parties should advise the Court prior to any hearing (including in any request for oral argument) if a lawyer of four or fewer years of experience will be arguing the motion.") (emphasis added).[10]

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9 https://aflegal.org/huge-victory-u-s-district-court-judges-rescind-discriminatory-policies-following-afls-judicial-complaint/

10 https://www.facultyfederaladvocates.org/resources/DRAFT_Practice%20Standards_2.21.2024.pdf

Fortunately, after a period of public comment, this provision did not make it into the final written practice standards. Yet litigants could be forgiven for wondering whether these judges will apply the same standard informally, without writing it down for the public to see.

C. State Courts Like the Washington Supreme Court Have Announced That They Will Treat the Parties Before Them Differently Based on Race.

In Washington State, the State's Supreme Court has explicitly adopted race-conscious legal standards when applying the law. In the context of whether a seizure has occurred, for instance, the Washington Supreme Court has held that if a criminal defendant is "BIPOC," that racial status will be a factor in the analysis. *See State v. Sum*, 511 P.3d 92, ¶ 34 (Wash. 2022) ("In the third and final factor of our independent state law analysis, we must consider the current implications of recognizing (or failing to recognize) that race and ethnicity are relevant to the seizure analysis.").

In *Sum*, the question was whether the criminal defendant had been "seized" by law enforcement. The State conceded that race was a legitimate factor to consider in the analysis, and the Washington Supreme Court agreed and held the same. Because the defendant in the case was Asian, and therefore counted as "BIPOC"—or Black, Indigenous, or a

Person of Color—a different standard applied. *Id.* at ¶ 38 ("Based on the constitutional text, recent developments in this court's historical treatment of the rights of BIPOC, and the current implications of our decision, we hold as a matter of independent state law that race and ethnicity are relevant to the question of whether a person was seized by law enforcement.").

As pointed out in the wake of the decision, the Washington Supreme Court's new rule is entirely inadministrable:

> Separately, the court's decision is simply not administrable. Imagine a court trying to decide whether to apply the new rule. What if the criminal suspect is of mixed race? Or what if the police officer is of mixed race? What if there are multiple criminal suspects of different races? Will some of them be able to avoid criminal punishment, while others can be prosecuted under normal procedures? The potential irregularities are numerous.

Trachman & Kilcullen, *Washington State Supreme Court embraces race discrimination*, The Washington Times (June 22, 2022).[11] Yet as of today, there is no evidence that the Washington Supreme Court has

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[11] https://www.washingtontimes.com/news/2022/jun/22/washington-state-supreme-court-embraces-race-discr/

backed down even an inch on its commitment to differential treatment on the basis of race.

In a separate Washington case, that State's Supreme Court held that a party to a civil suit who was Caucasian would have a duty to dispel an allegation that racial motivations affected the conduct of the trial, if the verdict came out in favor of the Caucasian party.

While this Court denied certiorari, given the interlocutory nature of the case, the implications were once again obvious to Justice Alito here. *See Thompson v. Henderson*, 143 S. Ct. 2412, 2413 (2023) (Mem.) (Alito, J., statement respecting denial of certiorari) ("In sum, the opinion below, taken at face value, appears to mean that in any case between a white party and a black party, the attorney for the white party must either operate under special, crippling rules or expect to face an evidentiary hearing at which racism will be presumed and the attorney will bear the burden of somehow proving his or her innocence.").

Justice Alito appropriately described the impact of the judiciary treating individuals differently based on race: "It is not an exaggeration to say that our extraordinarily diverse population will not be able to live and work together harmoniously and productively if we depart from that principle and succumb to the growing tendency in many quarters to divide Americans up by race or ancestry." *Id.* at 2414; *accord Texas Dept. of Housing and Comm. Affair v.*

Inclusive Communities Project, Inc., 576 U.S. 519, 555 (2015) (Scalia, J., dissenting) ("Government action that classifies individuals on the basis of race is inherently suspect. That is no less true when judges are the ones doing the classifying.")..

D. Racial Discrimination in the Context of Pleading Standards Under Title VII is Longstanding and Widespread.

There is a certain irony in having the relevant pleading standards differ, based on race, regarding a claim under Title VII. But the irony started over 40 years ago. The D.C. Circuit initiated the "background requirements" test for a Caucasian plaintiff in *Parker v. Baltimore & Ohio Railroad Co.*, 652 F.2d 1012 (D.C. Cir. 1981). The Sixth, Seventh, Eighth, and Tenth Circuits soon followed. These Courts generally held that because discrimination was statistically less likely to occur against Caucasians or men, a heightened pleading standard applied. *See, e.g.*, *Parker*, 652 F.2d at 1017 (arguing that "it defies common sense … in our present society" to infer discrimination when a black employee is promoted over a white employee).

Then, in *Harding v. Gray*, 9 F.3d 150, 153 (D.C. Cir. 1993), the D.C. Circuit identified two specific categories of potential background circumstances: (1) "evidence indicating that the particular employer at issue has some reason or inclination to discriminate invidiously against" majority groups, and (2)

"evidence indicating that there is something 'fishy' about the facts of the case at hand that raises an inference of discrimination." *Id*. Finally, although *Harding* required a "majority-group" plaintiff to "show additional background circumstances" to "establish a prima facie case," it claimed that "[t]his requirement [was] not designed to disadvantage" such a plaintiff. *Id*. (internal quotation marks omitted).

Other Circuit Courts have tried to elaborate on why there would be different pleading standards, based on a plaintiff's race or sex. In *Notari v. Denver Water Dep't*, 971 F.2d 585, 589 (10th Cir. 1992), for instance, the Tenth Circuit stated: "The *McDonnell Douglas* presumption—that is, the presumption that unless otherwise explained, discrimination is more likely than not the reason for the challenged decision—is valid for a reverse discrimination claimant only when the requisite background circumstances exist."

Notably, in *Notari*, the Tenth Circuit cast the doctrine as one related to whether the plaintiff was a member of a historically "favored" or "disfavored." *Id.* at 589 ("[T]he presumptions in Title VII analysis that are valid when a plaintiff belongs to a disfavored group are not necessarily justified when the plaintiff is a member of an historically favored group.") (quoting *Livingston v. Roadway Express, Inc.*, 802 F.2d 1250, 1252 (10th Cir. 1986). And this "higher" burden has real bite; for instance, it led to the dismissal of one of the claims in a case because the plaintiff's facts fell "short of demonstrating

'background circumstances' sufficient to create an inference of reverse discrimination." *Adamson v. Multi Community Diversified Svcs., Inc.*, 514 F.3d 1136, 1149-50 (10th Cir. 2008).

Interestingly, some courts have expressed doubts about the doctrine along the way. *See, e.g., Pierce v. Commonwealth Life Ins.*, 40 F.3d 796, 801 n.7 (6th Cir. 1994) ("We have serious misgivings about the soundness of a test which imposes a more onerous standard for plaintiffs who are white or male than for their non-white or female counterparts."); *Elson v. Colorado Mental Health Institute at Pueblo*, No. 09–cv–01375–MSK–CBS, 2011 WL 1103169, *5, n.6 (D. Colo. Mar. 24, 2011) ("The Court has some doubt both that Notari's reasoning remains sound nearly two decades after its issuance, … or that it is uniformly applicable in every case in which a white employee asserts race discrimination or a male employee claims sex discrimination.").

Unfortunately, doubts aside, the doctrine before the Court has metastasized across appellate courts and into numerous Title VII matters, where courts characterize cases as either "discrimination" or "reverse discrimination," depending on the immutable characteristics of the plaintiff. *Ames v. Ohio Dep't of Youth Services*, 87 F.4th 822, 828 (6th Cir. 2023) (Kethledge, J., concurring) ("Respectfully, our court and others have lost their bearings in adopting this rule. If the statute had prescribed this rule expressly, we would subject it to strict scrutiny (at least in cases

where plaintiffs are treated less favorably because of their race).").

III. District Courts Understand and Apply Relevant Pleading Standards Under Title VII.

Amicus Mr. Young suffered racial discrimination in his workplace when forced to undergo offensive and hateful Equity, Diversity, and Inclusion (EDI) training, and sought to remedy his injury through Title VII. *See Young*, 94 F.4th 1242, 1245 (10th Cir. 2024) ("[T]he racial subject matter and ideological messaging in the training is troubling on many levels."). And despite pleading direct evidence that the EDI training itself was racially hostile, his former employer still raised the issue of "background circumstances," and the District Court still went to lengths to articulate the vibrancy of that test. *Young*, 2023 WL 1437894, at *5 ("The Court respectfully disagrees with Mr. Young that the *Notari* line of cases has been 'impliedly abrogated' by *Elson* or *Bostock*.").

A. Josh's Experience of Racial Hostility

Josh Young's experience illustrates how courts may consider heightened burdens on "majority-group" plaintiffs asserting workplace discrimination claims. As detailed in the District Court's opinion in his case, Mr. Young was subjected to mandatory training that contained a glossary defining race as "a social construct that artificially groups people by skin tone and other physical traits," which "was created and

used to justify social and economic oppression of people of color by white people." *Young,* 2023 WL 1437894, at *2. The training materials went further, characterizing any potential objection by white employees as "white fragility," defined as "[d]iscomfort and defensiveness, often triggered by feelings of fear or guilt, on the part of a white person when confronted by information about racial inequality and injustice." *Id.*

The EDI trainings created what Mr. Young alleged was "a culture of suspicion and distrust" within the Department of Corrections. *Id.* at *4. A prison setting charged with racial undertones is already a challenging place to work, and Josh's "knowledge that his colleagues were being instructed in the same manner with the same trainings exacerbated the hostile environment." *Id.* Despite having demonstrated "superior performance" that earned him promotions to Housing Sergeant in 2019 and Visiting Sergeant in 2020, Mr. Young ultimately felt "harassed and intimidated to the point that he no longer felt comfortable working for the [Department]." *Id.*; *Young*, 94 F.4th at 1254 ("[T]he racial rhetoric contained in the Department of Public Health & Environment's online training materials echoes the racist views espoused by the co-workers and supervisors in *Lounds* and *Tademy*.").

When Mr. Young challenged these materials through formal channels, the Department refused to investigate his complaint, claiming it "did not establish reasonable cause to indicate the presence of

discrimination [or] discriminatory harassment." *Young*, 94 F.4th at 1248. He then brought suit alleging both a hostile work environment claim under Title VII, and an equal protection violation. *Id.*

The District Court held that Mr. Young was part of a "historically favored" group, because he was Caucasian. And although Mr. Young argued before the District Court that only the text of Title VII was relevant to its statutory interpretation, and that recent cases like *Bostock v. Clayton Cnty., Ga.,* 590 U.S. 644 (2020), had emphasized the importance of text, the District Court rejected those arguments, correctly noting that even the Tenth Circuit had applied the "background circumstances" test after *Bostock*. *See Young*, 2023 WL 1437894, at *5 ("Additionally, in 2021, a year after the *Bostock* decision was issued, the Tenth Circuit again reiterated that "because the plaintiff is male, a prima facie case of discrimination requires stronger proof than when the discrimination targets a female.") (quoting *Ibrahim v. All. for Sustainable Energy, LLC*, 994 F.3d 1193, 1201 (10th Cir. 2021)); *but see Bostock*, 590 U.S. at 653 ("Only the written word is the law, and all persons are entitled to its benefit.").

Of course, applying an additional pleading requirement onto "majority-group" plaintiffs' claims—one found nowhere in Title VII's text, and fundamentally (and ironically) at odds with the statute's guarantee of workplace equality—should be rejected by this Court. Mr. Young's case demonstrates why this Court must decisively reject the "background

circumstances" test. No plaintiff should face elevated burdens in challenging workplace discrimination simply because of their race. The Equal Protection Clause and Title VII demand even-handed application of anti-discrimination principles to all.

IV. The Court Should Issue a Broad and Sweeping Opinion.

This Court has made it clear that discrimination on the basis of race must come to an end, because it is noxious to our free Republic. *SFFA,* 600 U.S. at 220 ("One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities.") (quoting *Rice v. Cayetano*, 528 U.S. 495, 517 (2000).

It has also made clear that the Court's doctrines themselves generally apply equally to the litigants before the judiciary. *See Flowers v. Mississippi*, 588 U.S. 284, 301 (2019) ("[T]he Court has extended *Batson* in certain ways. A defendant of any race may raise a *Batson* claim, and a defendant may raise a *Batson* claim even if the defendant and the excluded juror are of different races.").

Eliminating the consideration of race of the litigants (or their counsel) from the judicial decision-making process is part and parcel of that process. *Pena-Rodriguez*, 580 U.S. at 222 ("The duty to confront racial animus in the justice system is not the legislature's alone."); *id.* at 223 ("The unmistakable

principle underlying these precedents is that discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice."). This case presents an opportunity for the Court to speak broadly about the dangers of using race as a factor in decision-making by the judiciary. *Schuette v. Coalition to Defend Affirmative Action*, 572 U.S. 291, 324 (2014) (Scalia, J., concurring) ("Whether done by a judge or a school board, such racial stereotyping is at odds with equal protection mandates.") (cleaned up).

CONCLUSION

In *Muldrow v. City of St. Louis, Missouri*, 601 U.S. 346 (2024), this Court articulated that Title VII's text stands on its own, and that courts may not add to its requirements through pleading standard. *Id.* at 355 ("To demand 'significance' is to add words—and significant words, as it were—to the statute Congress enacted. It is to impose a new requirement on a Title VII claimant, so that the law as applied demands something more of her than the law as written."). In this context, it should do the same, by rejecting the "background circumstances" test. *Cf.* at 358 ("[W]e will not add words to the law to achieve what some employers might think a desirable result.").

But the Court can and should go further in this case. This matter is the perfect vehicle to issue a broad and sweeping order that race cannot be considered by courts as a factor in decision-making in any way, such that litigants or their lawyers may be treated

differently based on race. "Eliminating racial discrimination means eliminating all of it." *SFFA*, 600 U.S. at 206; *Edmondson*, 500 U.S. at 628 ("Racial bias mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality.").

The Equal Protection Clause of the Fourteenth Amendment demands such a broad and sweeping order. As the Chief Justice previously noted, "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 748 (2007) (plurality opinion). That holds true in every aspect of American life, whether in education, employment, or interactions with the judiciary.

Respectfully submitted,

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December 16, 20244

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