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 U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR AMERICA FIRST LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

NICHOLAS R. BARRY
ANDREW J. BLOCK
America First Legal Foundation
611 Pennsylvania Ave. SE #231
Washington, DC 20003
(202) 964-3721

CHRISTOPHER E. MILLS
Counsel of Record
Spero Law LLC
557 East Bay Street #22251
Charleston, SC 29413
(843) 606-0640
cmills@spero.law

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INTEREST OF *AMICUS CURIAE*

America First Legal Foundation is a nonprofit organization dedicated to promoting the rule of law in the United States and defending individual rights guaranteed by law. America First Legal has a substantial interest in this case because it has filed dozens of complaints with the EEOC or lawsuits against companies, including CBS, IBM, Macy's, Starbucks, Kellogg's, Activision, and Major League Baseball, for unlawful race and sex-based discrimination in employment. See, *e.g.*, *Beneker* v. *CBS*, No. 2:24-cv-01659 (C.D. Cal. filed Feb. 29, 2024); *Dill* v. *Int'l Bus. Mach. Corp.*, No. 1:24-cv-852 (W.D. Mich. filed Aug. 20, 2024); *Vaughn* v. *CBS Broad., Inc.*, No. 2:24-cv-05570 (C.D. Cal. filed July 1, 2024); *Smith* v. *Ally Fin.*, No. 3:24-cv-00529 (W.D.N.C. filed June 6, 2024); *Wood* v. *Red Hat*, No. 2:24-cv-00237 (D. Idaho filed May 8, 2024); *Kascsak* v. *Expedia*, No. 23-cv-01373-DII (W.D. Tex. filed Nov. 9, 2023); *Harker* v. *META Platforms, Inc.*, No. 23-cv-07865 (S.D.N.Y. filed Sep. 5, 2023). These companies have illegally awarded jobs, special benefits, bonuses, and other career opportunities to minorities while openly excluding whites (and sometimes Asians), heterosexuals, and males. Where applied, the "background circumstances" rule is an atextual, unconstitutional, and arbitrary obstacle to the vindication of employees' nondiscrimination rights.*

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* Under Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF THE ARGUMENT

Title VII generally prohibits employment discrimination against any person because of their "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a). As this Court has said, "race" does not "refer only to the black race" or "sex" "only to the female." *Gen. Dynamics Land Sys., Inc.* v. *Cline*, 540 U.S. 581, 598 (2004). Rather, Title VII prohibits "[d]iscriminatory preference for any group, minority or majority." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971). This Court has gone on to say that the "focus" of Title VII's inquiry "should be on individuals, not groups." *Bostock* v. *Clayton Cnty.*, 590 U.S. 644, 658 (2020). The "statute works to protect individuals of both sexes"—and all races, religions, and national origins—"from discrimination, and does so equally." *Ibid.*

Except, a few circuits subject Title VII claimants from purported "majority" groups to a greater initial burden of showing discrimination based on a protected characteristic. As the decision below explains, "in addition to the usual [showing] for establishing a prima-facie case" of discrimination under Title VII, these courts require a member of a "majority" group to "show background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority." Pet. 5a (cleaned up).

This brief makes two points in support of Petitioner's argument that this "background circumstances" rule is unlawful. *First*, courts applying this rule "operate[] from the presumption that it is the unusual employer who discriminates against majority

employees." *Mills* v. *Health Care Serv. Corp.*, 171 F.3d 450, 456–57 (CA7 1999). But that presumption—as shown in *amicus*'s own ongoing cases—is highly suspect in this age of hiring based on "diversity, equity, and inclusion." Even if the presumption had any ongoing validity, the "background circumstances" rule atextually and unconstitutionally makes adjudication of individual cases turn on group stereotypes.

Second, courts applying the "background circumstances" rule have glossed over a necessary predicate—how to decide who is a member of a "majority" group. Instead, their assumption appears to be that "white men" are usually the appropriate recipients of a higher burden (*id.* at 456)—though below, the court placed the burden on a heterosexual woman. But, especially as the country diversifies, how to decide whether a person is part of the "majority"—and whether to use a locality, state, country, industry, supervisor, or other frame of reference—is far from obvious. It is still less obvious how courts are supposed to decide whether a person is, for example, a member of a "majority" religion—even after deciding the proper denominator, how can courts permissibly categorize religions and believers to decide who is in and who is out? And even if courts could answer all these questions, the result would be placing a higher burden on claimants depending on random variables like what county they live in or their industry—arbitrarily treating like cases differently.

The better answer is that Title VII protects all workers equally from unlawful discrimination. The Court should reverse.

ARGUMENT

I. The "background circumstances" rule's presumption that "majority" employees do not face discrimination is unlawful and defies reality.

The relatively few circuits that apply the "background circumstances" rule assume that "[i]nvidious racial discrimination against whites is relatively uncommon in our society," *Harding* v. *Gray*, 9 F.3d 150, 153 (CADC 1993), so "there is nothing inherently suspicious about an employer's decision to promote a minority applicant instead of a white applicant, or to fire a white employee." *Mastro* v. *Potomac Elec. Power Co.*, 447 F.3d 843, 851 (CADC 2006) (cleaned up). These courts thus apply a "presumption that it is the unusual employer who discriminates against majority employees." *Mills*, 171 F.3d at 456–57. This presumption is repeated through the relevant circuit decisions but almost never supported by any citation, with courts instead invoking "common sense" about "our present society." *Parker* v. *Baltimore & O.R. Co.*, 652 F.2d 1012, 1017 (CADC 1981). This presumption and the "background circumstances" rule contradict text, constitutional principles, and reality.

A. The rule lacks a footing in Title VII.

To start, nothing in Title VII's text supports a higher burden on "majority" employees who claim discrimination. Some courts have asserted that "[t]he 'background circumstances' requirement is not an additional hurdle for white plaintiffs." *Harding*, 9 F.3d at 154. That is plainly incorrect, as shown by the

decision below, which ordered dismissal *because of* the "background circumstances" rule. See App. 5a; see also, *e.g.*, *Livingston* v. *Roadway Exp., Inc.*, 802 F.2d 1250, 1253 (CA10 1986) (affirming dismissal because of failure to show "background facts"); C. Sullivan, *Circling Back to the Obvious*, 46 Wm. & Mary L. Rev. 1031, 1104 (2004) (explaining that a "majority" plaintiff "cannot get to the jury by the identical proof" that would suffice for a "minority" plaintiff); cf. *Mills*, 171 F.3d at 457 ("The only question is whether the plaintiff can show any background circumstances which give rise to an inference of discrimination.").

Title VII's text cannot support this higher burden for "majority" employees. The statute refers to categories—race, sex, religion—not groups within those categories. As discussed, this Court has repeatedly said that "[t]he principal focus of the statute is the protection of the individual employee, rather than the protection of the minority group as a whole." *Connecticut* v. *Teal*, 457 U.S. 440, 453–54 (1982). "Title VII does not permit" a victim of discrimination "to be told that he has not been wronged because other persons of his or her race or sex were hired." *Id.* at 455. Thus, nothing in Title VII supports the "background circumstances" rule.

B. The rule violates the Constitution.

Though the inconsistency between the "background circumstances" rule and the statutory text is a sufficient reason to reject the rule, the rule also violates the Constitution. As Judge Kethledge pointed out, "[i]f the statute had prescribed this rule expressly, [courts] would subject it to strict scrutiny" as to race and religion, and heightened scrutiny as to

sex under the Equal Protection Clause. Pet. 11a. This Court recently reiterated that "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color": "Eliminating racial discrimination means eliminating all of it." *Students for Fair Admissions, Inc.* v. *President & Fellows of Harvard Coll.*, 600 U.S. 181, 206 (2023) (cleaned up). The government "may never use race as a stereotype or negative." *Id.* at 213. The same is true of religion: "The government may not" "impose special disabilities on the basis of religious views or religious status." *Emp. Div., Dep't of Hum. Res. of Oregon* v. *Smith*, 494 U.S. 872, 877 (1990). And "gender classifications that rest on impermissible stereotypes violate the Equal Protection Clause." *J.E.B.* v. *Alabama ex rel. T.B.*, 511 U.S. 127, 140 n.11 (1994). Last, the Fourteenth Amendment extends to "all governmentally imposed discrimination," including in the "judicial" branch. *Palmore* v. *Sidoti*, 466 U.S. 429, 432 & n.1 (1984).

When it comes to presumptions about discrimination, this Court has warned that "[b]ecause of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group." *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998) (quoting *Castaneda* v. *Partida*, 430 U.S. 482, 499 (1977)). As Justice Marshall put it, "this 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." *Castaneda*, 430 U.S. at

504 (concurring opinion); see *Parents Involved in Cmty. Sch.* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701, 742 (2007) ("History should teach greater humility."). No more can courts legitimately presume that members of one group *will* discriminate against members of another.

Yet the "background circumstances" has been justified entirely based on a stereotype about expected group treatment of employees—and it has been applied only to disadvantage members of certain groups. This violates equal protection. "At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." *Miller* v. *Johnson*, 515 U.S. 900, 911 (1995) (cleaned up). By treating some employees as simple components of their group, the "background circumstances" rule is based on "the very stereotypical assumptions the Equal Protection Clause forbids." *Id.* at 914. And "[t]he community is harmed by the [courts'] participation in the perpetuation of invidious group stereotypes and the inevitable loss of confidence in our judicial system that state-sanctioned discrimination in the courtroom engenders." *J.E.B.*, 511 U.S. at 140. The "background circumstances" rule contradicts the Constitution.

C. The rule contradicts reality.

Last, the presumption underlying "background circumstances"—that "majority group" employees do not face discrimination in employment—is dubious in fact. Presumptions sometimes "have their place in statutory interpretation, but only to the extent that

they approximate reality." *Loper Bright Enters.* v. *Raimondo*, 144 S. Ct. 2244, 2265 (2024). Many employers are obsessed with DEI—diversity, equity, and inclusion. By 2021, "[m]ore than eight in 10 (83%) U.S. organizations" were already "implementing diversity, equity and inclusion initiatives," with "human resources policies" being "the most prevalent (74%) DEI activity."[1] More than half of organizations with a DEI policy have quantitative "metrics in place to measure DEI results"—metrics that almost always measure people by their group membership.

"[D]iversity has increasingly become a code word for discrimination." *Price* v. *Valvoline, LLC*, 88 F.4th 1062, 1068 (CA5 2023) (Ho, J., concurring). "[I]t is not at all unusual for major segments of society to base their actions on a person's membership in certain demographic groups, often to the detriment of the 'majority' and certain 'minority' persons sometimes deemed to be 'majority-adjacent.'" *Smyer* v. *Kroger Ltd. P'ship I*, No. 22-3692, 2024 WL 1007116, at *7 (CA6 Mar. 8, 2024) (Boggs, J., concurring). Many companies are "imbued with belief in 'diversity'" or otherwise "under pressure from affirmative action plans" to discriminate in favor of supposed "minority" employees. *Preston* v. *Wisconsin Health Fund*, 397 F.3d 539, 542 (CA7 2005) (Posner. J.). Favoring those employees "necessarily means disfavoring" employees in other groups. *Price*, 88 F.4th at 1068 (Ho, J., concurring).

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[1] *Majority of U.S. Employers Have Implemented DEI Initiatives in 2021*, L.A. Times (Dec. 15, 2021), https://perma.cc/8RR6-5Y9E.

That is the point. According to one prominent DEI advocate, "The only remedy to past discrimination is present discrimination. The only remedy to present discrimination is future discrimination."[2] This means, for instance, "treating, considering, or making a distinction in favor or against an individual based on that person's race"—including by "advancing non-White Americans."[3]

Amicus's own ongoing cases show this reality. See *supra* p. 1. For instance, Brian Beneker is a white, heterosexual male script coordinator and freelance scriptwriter who has regularly written episodes for CBS's "Seal Team" television series since 2017. CBS's CEO "set a goal that all writers rooms on the network's primetime series be staffed 40 percent BIPOC [Black, Indigenous, and people of color] in the 2021-22 season."[4] The next year, the goal increased to 50%.[5]

Unsurprisingly, Beneker—a white male—has repeatedly been denied a staff writer position with the show, while CBS hired and promoted individuals who lacked experience and screenwriting credits but were part of the favored hiring groups; that is, they were nonwhite, LGBTQ, or female. Beneker witnessed CBS hire several staff writers without experience who met

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[2] I. Kendi, *How To Be an Antiracist* 19 (2019).
[3] *Id.* at 19–20.
[4] L. Rice, *Altered Reality*, Entertainment Weekly (Feb. 2, 2022), https://perma.cc/CT7Q-9GF5.
[5] C. D'Zurilla, *CBS Announces Diversity Overhaul of Writers Rooms and Script-Development Program*, L.A. Times (July 13, 2020), https://perma.cc/29BK-YX43.

their DEI qualifications, despite telling Beneker that they could not hire him because the show had too many writers just months prior. CBS explained that these new writers "checked diversity boxes that Beneker did not." At one point, CBS even asked him whether another writer was Asian. Despite Beneker's success in writing for the series, he soon realized that he was ineligible for hiring in the writer's room because of the illegal, discriminatory sex and race requirements enforced by CBS.[6]

Beneker's ability to pursue his claim of employment discrimination will be impeded if the district court decides to impose the "background circumstances" rule on his case simply because of his race or sex. As Petitioner explains, there is no Ninth Circuit precedent on point, and some courts within the Ninth Circuit have applied the rule. Pet. 23–24. Applying the rule to Beneker's claim threatens his ability to obtain redress, even though the relevant "background" discriminatory policy is—as a matter of reality—expressly imposed against whites.

Another of *amicus*'s clients, Randall Dill, was an exemplary employee at IBM's consulting division and received stellar reviews from his clients. But he too is a white male, and IBM incentivizes its executives to engage in race and sex discrimination by having "executive compensation metrics that include a diversity modifier to reinforce our focus and continued accountability for improving the diverse

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[6] Third Am. Compl., *Beneker* v. *CBS Studios, Inc.*, No. 2:24-cv-01659-JFW-SSC, Doc. 45 (C.D. Cal. June 10, 2024).

representation of our workforce."[7] In July 2023, without notice or warning, Dill was placed on a Performance Improvement Plan tied to metrics outside his job description or control, only to be terminated a few months later. Dill fell within two of three disfavored categories—whites, Asians, and men.[8]

Because Dill's case is within the Sixth Circuit, one of IBM's dismissal arguments is that Dill did not "plead 'background circumstances' supporting an inference that [IBM] discriminates against the white, male majorities to which he belongs."[9] If an express racial balancing directive is not a damning background circumstance, it is hard to imagine what might be. But the point is that any presumption that adverse employment actions against minority employees are more "inherently suspicious" (*Harding*, 9 F.3d at 153) than the same actions against majority ones is no longer sound. A presumption's "current burdens must be justified by current needs," *Shelby Cnty.* v. *Holder*, 570 U.S. 529, 550 (2013) (cleaned up), but this presumption cannot be justified in 2024. The presumption is, at least for many large employers today, exactly backwards.

In sum, the "background circumstances" rule applies without textual or constitutional warrant to

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[7] Int'l Bus. Mach. Corp., *2022 Annual Report* 16 (2023), at https://perma.cc/5PX2-9L2W.

[8] Compl., *Dill* v. *Int'l Bus. Mach. Corp.*, No. 24-cv-00852, Doc. 1 (W.D. Mich. Aug. 20, 2024).

[9] Def's Br. in Supp. of Mot. to Dismiss 1, *id.*, Doc. 11 (W.D. Mich. Oct. 23, 2024).

place an obstacle for plaintiffs who now often face discrimination. It is "unconscionable for the courts to erect this arbitrary barrier which serves only to frustrate those who have legitimate Title VII claims." *Collins* v. *Sch. Dist. of Kansas City, Mo.*, 727 F. Supp. 1318, 1322 (W.D. Mo. 1990).

II. Insuperable problems exist with the trigger for the "background circumstances" rule.

Beyond the "background circumstances" rule's incoherent and unlawful theoretical basis, its application suffers from the lack of any principled way to decide when it is triggered—and an arbitrariness that attends any choice. The central problem is how to decide who is the "majority" and who is the "minority." Surprisingly, courts have given this issue almost no attention, generally assuming that "white men" (and, as below, heterosexuals) are the majority, and everyone else the minority. *Mills*, 171 F.3d at 456. For instance, the D.C. Circuit has applied the "background circumstances" rule to a white plaintiff while acknowledging that "[o]f course whites are in the minority in the District of Columbia." *Bishopp* v. *D.C.*, 788 F.2d 781, 786 n.5 (CADC 1986). The court glossed over that problem on the unsatisfactory ground that "neither this court nor the Supreme Court has squarely addressed the issue whether minority status for purposes of a prima facie case could have a regional or local meaning." *Ibid.* This refusal to grapple with a necessary predicate to the rule—how to decide who the "majority" is—underscores the rule's deficiencies.

The apparent assumption that white, heterosexual males are always the "majority" falls apart on reflection. To decide the "majority," courts need a

frame of reference—by location, industry, employer, supervisors, or something else. Each of these frames will affect who is the majority. And which frame is chosen will arbitrarily affect the viability of Title VII plaintiffs' claims.

Take sex: women are the majority in the United States, though not in some states, but still in some counties within those states—see the map below.[10] Women dominate certain industries—like nursing and teaching—and are a tiny minority in others—like construction.[11] And, of course, within an industry, every company—and division within a company, decisionmaker within a division, or potential comparator employee—may have different sex breakdowns. Choosing one frame—say, the county level—will mean that the happenstance of a dividing county line results in two otherwise identical Title VII plaintiffs with otherwise identical claims being treated differently by courts.

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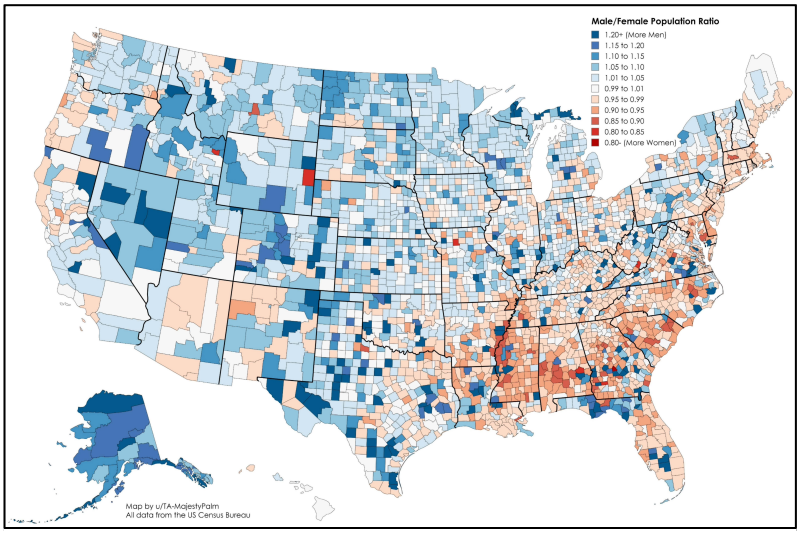
[10] See U.S. Census Bureau, *Age and Sex Composition: 2020*, at 2, 8 (May 2023), https://perma.cc/J2JA-9Z8P.

[11] See U.S. Dep't of Labor, *Occupations with the Largest Share of Women Workers* (Apr. 2024), https://perma.cc/EL26-5JKN; U.S. Dep't of Labor, *Occupations with the Smallest Share of Women Workers* (Apr. 2024), https://perma.cc/7TR9-2L4Y.

Male/Female Ratio by County:[12]



The same is true of race: are black employees in Detroit (about 78% black[13]) subject to a presumption of non-discrimination because they are in the "majority"? And with race, the underlying problems are more severe because there are more than two races—and even defining a particular race can be challenging. So before figuring out the right frame of reference, courts need to decide *how* to define races, how to handle places (or industries or employers) with only a plurality of a particular race, whether any races should be aggregated, and many other intractable

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[12] *Male/Female Ratio by US County*, Reddit (2024), https://tinyurl.com/47a75d4s (citing U.S. Census Bureau, *County Population by Characteristics: 2020-2023* (June 27, 2023), https://tinyurl.com/3rnjkvha).

[13] U.S. Census Bureau, *QuickFacts: Detroit City, Michigan*, https://perma.cc/XZR3-ZNZL.

questions. For instance, by 2022, in 152 counties "no racial group [wa]s more than half the population, up 33% since 2010."[14] Racial categories also tend to be "imprecise in many ways" and are often "overbroad" and "arbitrary." *Students for Fair Admissions*, 600 U.S. at 216; see *id.* at 291–93 (Gorsuch, J., concurring). Courts should not put themselves in this "sordid business" of "divvying us up by race." *League of United Latin Am. Citizens* v. *Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part, concurring in judgment in part, and dissenting in part).

These problems are worse still with religious claims. There, courts would have to decide both the plaintiff's religion and how the plaintiff's expression of religious beliefs compares with everyone else in whatever arbitrarily chosen frame of reference is being considered. Again, the map below suggests a diversity of religious beliefs across counties. While it would be easy to say "Christian = majority," it would also be wrong, even putting aside that the statement may not be true at all in many places or companies. For instance, as with all religions, not all "Christians" consider other self-proclaimed "Christians" to be "Christians." How are courts supposed to decide who is right? How are courts supposed to decide the actual religious beliefs of some "majority"? And how are they supposed to do all this without colliding with the First Amendment's prohibition on government

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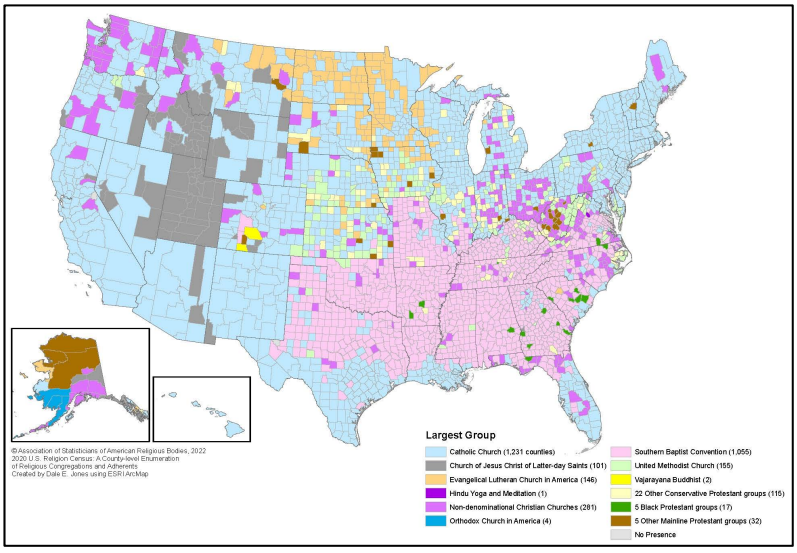
[14] T. Henderson, *More US Counties Lack a Clear Racial Majority (And People Are Getting Along Pretty Well)*, Stateline (Dec. 5, 2022), https://perma.cc/36JW-8RB6.

"entanglement in religious issues"? *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru*, 591 U.S. 732, 761 (2020). The Religion Clauses forbid "extensive inquiry by civil courts into religious . . . polity," *Serbian E. Orthodox Diocese for U.S. of Am. & Canada* v. *Milivojevich*, 426 U.S. 696, 709 (1976), and "the judicial process is singularly ill equipped to resolve" "[i]ntrafaith differences." *Thomas* v. *Rev. Bd. of Indiana Emp. Sec. Div.*, 450 U.S. 707, 715 (1981). But there is no way to decide whether the "background circumstances" rule should apply to a claim of religious discrimination without resolving complex questions of religious faith and polity.

Largest Religious Group by County:[15]



[15] U.S. Religion Census, *Maps and Data Files for 2020* (June 23, 2023), https://perma.cc/39M2-4CCF.

Of course, on the view of those who believe that sex is a mutable, undefinable construct, it is equally unclear how to determine any particular person's sex or what constitutes a majority or minority. The Ninth Circuit, for instance, has suggested that "[t]he phrase 'biological sex' is" "imprecise," because "[a] person's sex encompasses the sum of several biological attributes, including sex chromosomes, certain genes, gonads, sex hormone levels, internal and external genitalia, other secondary sex characteristics, *and gender identity*," each of which may not "align[]." *Hecox* v. *Little*, 104 F.4th 1061, 1076 (CA9 2024) (emphasis added). The outgoing administration has likewise characterized "sex" as "a complicated biological concept" that includes "gender identity."[16] The administration even argued that "assert[ing] that a person's sex 'cannot be changed'" is so obviously false that it betrays "animus."[17] Hence its adoption of the vacuous phrase "sex assigned at birth." Pet. for Writ of Cert. 18, 19, 20, *United States* v. *Skrmetti*, No. 23-477 (U.S. Nov. 6, 2023). On this view, how to determine a person's (and all other persons') sex, along with the relevant majority/minority groups, would pose quite the dilemma.

Regardless, the underlying point remains: The "background circumstances" rule is incapable of principled adjudication and depends on an arbitrary trigger that has not been—and cannot be—adequately articulated. And what trigger is applied arbitrarily

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[16] U.S. Resp. in Opp. to Mot. for Summ. J. 2, *Boe* v. *Marshall*, No. 22-cv-184, Doc. 627 (M.D. Ala. July 1, 2024).
[17] *Id.* at 66.

discriminates between similarly situated Title VII plaintiffs seeking the same thing: equal treatment by their employers.

This case itself highlights some of these problems. The courts below did *not* apply the "background circumstances" rule to Marlean Ames's discrimination claim that she was terminated and "replaced by a male employee." Pet. 35a. The Ohio Department of Youth Services conceded that she "stated a prima-facie case as to this claim, because she was replaced by a man." Pet. 6a. As the district court said, "[i]t is undisputed, after all, that Ames is a member of a protected class" "*as a female*." Pet. 35a (emphasis added).

The assumption of the courts and parties below appears to be that "background circumstances" must not apply to this claim because females have minority status. But the U.S. Census estimated during the relevant time frame that about 200,000 more women than men lived in Ohio.[18] Likewise, females constitute a majority in Franklin County, where Ames was employed during the relevant time periods at the Department's Central Office in Columbus.[19] And one of the two decisionmakers for the demotion underlying this claim was a female. See Pet. 22a. It is not apparent why the "background circumstances" rule

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[18] U.S. Census Bureau, *Annual Estimates of the Resident Population by Sex, Race, and Hispanic Origin for Ohio: April 1, 2010 to July 1, 2019*, https://perma.cc/B3E7-PWU2.

[19] U.S. Census Bureau, *QuickFacts: Franklin County, Ohio*, https://perma.cc/86JX-F6TL.

would *not* apply to this claim—which only underscores the impossibility of deciding when it *does* apply.

The courts below *did* apply the "background circumstances" rule to Ames's claim of sexual orientation discrimination, reasoning that she "is heterosexual" and "the relevant minority group" is "gay people"—making her part of the majority group. Pet. 5a. But Title VII prohibits discrimination based on sex. Only as a derivative of this prohibition has this Court considered the statute to prohibit discrimination based on sexual orientation. See *Bostock*, 590 U.S. at 660 ("[I]t is impossible to discriminate against a person for being homosexual . . . without discriminating against that individual based on sex."). In *Bostock*'s terms, denying Ames a promotion "for no reason other than the fact [s]he is attracted to men" "discriminates against h[er] for traits or actions it tolerates in h[er] []male colleague[s]." *Ibid.*

On this logic, the right majority/minority group classification would seem to be male/female. *Bostock* itself rejected the argument based on "ordinary conversation" that "[i]f asked by a friend (rather than a judge) why they were fired, even today's plaintiffs would likely respond that it was because they were gay or transgender, not because of sex." *Id.* at 666. According to the Court, "these conversational conventions do not control Title VII's legal analysis, which asks simply whether sex was a but-for cause." *Id.* at 666–67.

If that's right, then the same "conversational" description—that Ames was discriminated against because she is heterosexual—should not control the

underlying Title VII analysis. Title VII covers only "sex" and Ames is a woman, so the relevant groups seemingly should be male and female. And, notwithstanding the above, the courts below assumed that females have minority status and need not prove "background circumstances." See Pet. 6a. So it is unclear why they applied this heightened requirement to a claim that *must* sound in sex discrimination. And just as it is hard to escape the sense that the courts that apply this requirement are making it up, it is also hard to fault them: there are no neutral principles by which the majority/minority trigger for "background circumstances" can be decided.

Consider too *amicus*'s case on behalf of Randall Dill against IBM, discussed above. IBM has dozens of offices in the United States, all of which appear to be subject to its racial balancing directives. And many workers, like Dill, work remotely. If this Court were to approve the "background circumstances" rule, plaintiffs identically harmed by adverse employment decisions stemming from IBM's blanket policy would face different legal standards depending on the happenstance of their state, county, supervisor, or whatever frame of reference is arbitrarily chosen to analyze "majority" status.

Last, in some decisions applying "background circumstances," courts have premised the rule's application on the absence of "membership in an historically disfavored group." *Livingston*, 802 F.2d at 1252; see also *Parker*, 652 F.2d at 1017 ("[m]embership in a socially disfavored group"). But the interplay between majority-minority status and historically favored-disfavored status is neither

obvious nor explained. Are *all* "minority" groups (using whatever frame of reference) across race, sex, and religion historically disfavored? What about a majority group that becomes a minority group—has it been historically disfavored? What slice of history matters? What type of "disfavor" matters? And how are courts to decide the "artificially defined level" of disfavor that matters? *San Antonio Indep. Sch. Dist.* v. *Rodriguez*, 411 U.S. 1, 28 (1973).

As these questions suggest, the trigger inquiry might well be different if the "background circumstances" rule applies not based on majority status but on historically favored status. But the quandaries of applying this trigger would be even more severe than the majority/minority test explored above. Not only would courts need to decide what frame of reference matters to historical status—county, state, country, industry, institution—but they would also need "to take on the unseemly task of deciding which groups are 'socially favored' and which are 'socially disfavored.'" *Collins*, 727 F. Supp. at 1322.

So even if a test based on "historical favor" might make somewhat more sense in terms of presumptions about employment opportunities than bare majority/minority status—though it would misjudge cases involving, for example, the rise of DEI programs in the last few decades—it would be even less capable of neutral judicial resolution. The better approach is to simply apply Title VII's guarantee of equal treatment, no matter the identity of the plaintiff.

CONCLUSION

For these reasons, the Court should reverse and remand.

Respectfully submitted,

NICHOLAS R. BARRY
ANDREW J. BLOCK
America First Legal Foundation
611 Pennsylvania Ave. SE #231
Washington, DC 20003
(202) 964-3721

CHRISTOPHER E. MILLS
Counsel of Record
Spero Law LLC
557 East Bay Street #22251
Charleston, SC 29413
(843) 606-0640
cmills@spero.law

Counsel for *Amicus Curiae*

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