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* THE AMERICAN ALLIANCE FOR EQUAL RIGHTS IN SUPPORT OF PETITIONERS

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## INTEREST OF *AMICUS CURIAE*[1]

The American Alliance for Equal Rights is a non-profit membership organization founded in 2021. The Alliance is dedicated to protecting every American—of every race—from the poison of racial classifications. Consistent with that focus, the Alliance represents individuals who have been injured by discriminatory programs both inside and outside of government. *E.g.*, *American Alliance for Equal Rights v. Fearless Fund*, 103 F.4th 765 (11th Cir. 2024); *American Alliance for Equal Rights v. Ivey*, 2024 WL 1181451, at *1 (M.D. Ala. Mar. 19). The Alliance has a strong interest in this case because its members have been injured by—and will continue to be injured by—programs like the one here, which discriminate against certain groups because they're in the majority. Pet.Br.10-15.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* certifies that this brief was not authored in whole or in part by counsel for any party. Counsel further certifies that no person or entity other than *amicus curiae* or its counsel has made a monetary contribution to the preparation or submission of this brief.

## INTRODUCTION AND SUMMARY OF THE ARGUMENT

When Congress passed Title VII, it "codif[ied] a categorical rule of '*individual* equality.'" *SFFA v. Harvard*, 600 U.S. 181, 290 (2023) (Gorsuch, J., concurring) (emphasis added). Title VII implements that rule by banning "discriminat[ion] against any *individual* … because of such *individual's* race." 42 U.S.C. §2000e-2(a)(1) (emphasis added). Because of that ban, employers can't treat their employees as mere "components of a racial, religious, sexual, or national class." *City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702, 708 (1978).

But the "background-circumstances test" treats employees in just that way. That test imposes different standards on different racial groups; specifically, it bars some races from maintaining a Title VII claim unless the "background circumstances" of their case show that their employer discriminates "against the majority." *Parker v. Baltimore & O.R. Co.*, 652 F.2d 1012, 1017 (D.C. Cir. 1981).

Some courts have said that test applies only to white employees. *Id.* at 1016-17. Others have said it applies to whites *and* Asians. *E.g.*, *Telep v. Potter*, 2005 WL 2454103, at *6 (E.D. Va. Sept. 30). And still others have said it applies to anyone who isn't "'a member of an historically favored group,'" *Notari v. Denver Water Dep't*, 971 F.2d 585, 589 (10th Cir. 1992)—an amorphous category that could conceivably include anyone from Asia, India, Spain, and the Caucasus. *See* Pet.Br.40 (discussing these "'incoherent' and 'irrational'" categories). The result? For whites,

Asians, and any other "'historically favored group'" to bring a successful Title VII claim, *Notari*, 971 F.2d at 589, they must prove—over and above the traditional *prima facie* test—that their employer is the "unusual" defendant "'who discriminates against the majority,'" *Ames v. Ohio Dep't of Youth Servs.*, 87 F.4th 822, 825 (6th Cir. 2023) (*per curiam*).

That rule relies on one core assumption: that it's "unusual" for an employer—or anyone, for that matter—to discriminate "'against the majority.'" *Id.*; *accord Parker*, 652 F.2d at 1017. And that assumption is appropriate, courts have speculated, because discrimination against those races "'is relatively uncommon.'" *Mills v. Health Care Serv. Corp.*, 171 F.3d 450, 455 (7th Cir. 1999).

But that assumption is wrong. In recent years, "diversity" programs have become a common source of discrimination against white and Asian Americans. *See Harvard*, 600 U.S. at 258 (Thomas, J., concurring). Those programs have swept through seemingly every aspect of American society, including law firms, corporations, nonprofits, governments, and even the military. Despite their differences, all of those programs share a common theme: They discriminate against whites and often Asians "solely on account of the color of their skin." *See Fearless Fund*, 103 F.4th at 774.

The ubiquity of these racially discriminatory programs disproves *Ames*'s core assumption—*i.e.*, that anti-white and anti-Asian discrimination is "'unusual.'" 87 F.4th at 825. But even if that assumption were true, the test's scheme of racial classifications

would still be unconstitutional. This Court should reject the background-circumstances test and hold all Title VII plaintiffs to the same colorblind standard.

The Court should reverse the decision below.

## ARGUMENT

### I. Anti-white and anti-Asian discrimination is quite common in modern America.

For years, America's leading institutions have discriminated against some races in the name of "diversity." *See Price v. Valvoline, L.L.C.*, 88 F.4th 1062, 1068-69 (5th Cir. 2023) (Ho, J., concurring) (collecting examples). Many of the Nation's largest and most prestigious law firms, businesses, and nonprofits routinely discriminate against whites and Asians, operating "diversity" programs that reliably "lead to discrimination in the workplace." *See id.* Federal, state, and local bureaucracies have followed the same tack, repeatedly—and regrettably—preferring certain races over others. *E.g.*, *SFFA v. West Point*, 709 F. Supp. 3d 118 (S.D.N.Y. 2024); *SFFA v. Naval Academy*, 2024 WL 5003510, at *1 (D. Md. Dec. 6). And no matter the situation, the bottom line remains the same: These programs explicitly discriminate against whites and Asians—the very type of discrimination that's allegedly "'unusual.'" *See Ames*, 87 F.4th at 825.

#### A. Law firms routinely discriminate against whites and Asians.

In just the last few years, scores of law firms have established summer-associate programs that categorically exclude whites and Asians. Others have started racially segregated clubs for Blacks, Hispanics, and

other groups. And still others have hosted firmwide retreats—but only for some races. Although the beneficiaries of those programs often differ, their primary victims are always the same: white and Asian Americans.

Take Susman Godfrey, for instance. For years, that firm has run a race-based contest called the "Susman Godfrey Prize for Students of Color." *Susman Godfrey Announces Recipients of 2024 Susman Godfrey Prize for Students of Color* (May 10, 2024), perma.cc/2RPN-DSKD. And that contest has categorically barred Asian and white law students. *E.g.*, *Susman Godfrey Announces Recipients of 2023 Susman Godfrey Prize for Students of Color* (May 8, 2023), perma.cc/UQD4-P754 (only "open to students of color"); *Susman Godfrey Announces Recipients of 2022 Susman Godfrey Prize for Students of Color* (May 10, 2022), perma.cc/ZE94-XTY8 (only "students of color"); *Susman Godfrey Announces Recipients of Inaugural Susman Godfrey Prize for Students of Color* (May 6, 2021), perma.cc/32R7-KV4N (only "students of color").

Susman used to discriminate when it hired summer associates, too. The firm previously ran the Susman Godfrey "Diversity Fellowship for 1L Students." *Diversity* (archived Oct. 12, 2023), perma.cc/H7C5-PHH8. When advertising that fellowship, Susman bragged that only "women," "people of color," and a few other "underrepresented" groups could apply. *Id.* The result: Many Asian and white men couldn't participate—and all because they were the wrong race. *Id.*

Perkins Coie used to discriminate against Asians and whites, too. Before the Alliance sued, Perkins had a range of programming that was only for "lawyers of color." Dkt.7-1 at 4, *American Alliance for Equal Rights v. Perkins Coie*, 3:23-cv-01877 (N.D. Tex. Aug. 28, 2023). The firm had company-wide retreats that were only for "diverse attorneys." *Id*. It had racially segregated "affinity group[s]" and "diversity events." *Id*. at 19. And it hosted "dinners" that only some races could attend. *Id*.

Perkins also had scores of jobs that were largely off limits to white and Asian men. In 1991, the firm established its "1L Diversity Fellowship," which was open only to "underrepresented" attorneys—the firm's shorthand for "students of color, students who identify as LGBTQ+, and students with disabilities." *Id*. at 7. Years later, Perkins started a second diversity fellowship, which, once again, was open only to "students of color, students who identify as LGBTQ+, and students with disabilities." *Id*. at 8. And after that, the firm launched another race-based program—its "2L Diversity Fellowship"—which, just like the other two programs, was open only to "students of color" and a few other favored groups. *Id*. at 12. (After the Alliance sued, Perkins agreed to stop discriminating. Dkt.31 at 1-2.)

Morrison Foerster had a similar program. For more than a decade, Morrison ran the "1L Fellowship for Excellence, Diversity, and Inclusion," which awarded hundreds of fellowships to law students nationwide. Dkt.19-2 at 5, 15, *American Alliance for Equal Rights v. Morrison & Foerster LLP*, 1:23-cv-23189 (S.D. Fla. Aug. 29, 2023). Only "racial/ethnic

minorit[ies]" could apply. *Id*. at 15. According to Morrison, its fellowship was only for attorneys who were "African American/Black, Latinx, Native Americans/Native Alaskans, and/or members of the LGBTQ+ community." *Id*. at 8. So Asian and white straight men couldn't apply. *Id*. at 8, 15. (The Alliance sued, and the firm said it would stop discriminating. Dkt.39 at 1-2.).

Winston & Strawn's "Diversity Scholarship Program" operated in a similar way. Like the other three law firms, Winston opened its program only to "historically underrepresented" law students—the firm's moniker for men who aren't straight, white, or Asian. Dkt.2-2 at 16, *American Alliance for Equal Rights v. Winston & Strawn*, 4:23-cv-04113 (S.D. Tex. Oct. 30, 2023). Winston also ran the "1L Leadership Council on Legal Diversity" fellowship, which, again, hired only "diverse" law students. *Id*. at 39. (The Alliance sued Winston last year, and the firm agreed to stop discriminating. Dkt.21 at 1-2.)

Unfortunately, none of those programs are outliers. Wachtell Lipton Rosen & Katz—one of the most prestigious law firms in New York[2]—previously ran a race-based summer program that was open only to "students from historically underrepresented groups." *1L Diversity Summer Associate Program* (archived Sept. 12, 2023), perma.cc/69WQ-V5EV. Sidley Austin,

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[2] *Best Law Firms for Mergers & Acquisitions* (archived Dec. 8, 2024), perma.cc/D6YC-FSCG.

one of the best law firms in the Midwest,[3] previously provided preferential mentorship opportunities to "[r]acial and ethnic minorities." *1L Diversity Mentorship Programs* (last visited Dec. 15, 2024), tinyurl.com/3d8v5e3y. Thompson Coburn, a top law firm in the great plains,[4] ran a summer program that "require[d]" applicants to be from an "underrepresented" "demographic group." *Thomas E. Eagleton Scholarship* (archived Sept. 11, 2023), perma.cc/MAD5-4CQA. And Akin Gump—one of the best law firms in the South[5]—used to run the "Strauss Diversity & Inclusion Scholars Program," which was open only to "diverse law students." *1L Summer Opportunities* (archived Sept. 11, 2023), perma.cc/8V7Q-A4WF.

Firms across the pacific west, the Rockies, and the mid-Atlantic have operated similar programs.[6] Same for firms in Florida, Texas, and the rest of the south and southeast.[7] And same for firms throughout the rest of the country: From Albany, to Chattanooga, to Mobile, to Manchester, firms have regrettably run programs that are open to "racial and ethnic minority

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[3] *Best Law Firms in Chicago* (archived Dec. 8, 2024), perma.cc/C47Z-87RN.

[4] *Best Law Firms in the Midwest* (archived Dec. 8, 2024), perma.cc/DTU7-GRRU.

[5] *Best Law Firms in Texas* (archived Dec. 8, 2024), perma.cc/2HJE-68KC.

[6] *E.g.*, *Fox Rothschild LLP* (archived Oct. 16, 2023), perma.cc/55B6-VHR9.

[7] *E.g.*, *Hunton Andrews Kurth LLP 1L Diversity Clerkship* 2 (archived Oct. 9, 2023), perma.cc/4QVM-8423.

groups"—and no one else. *E.g.*, *Announcing the Adams and Reese 1L Minority Fellowship* (Feb. 2, 2021), perma.cc/R2NN-LW2Q; *Diversity, Equity & Inclusion* (last visited Sept. 12, 2023), tinyurl.com/53kywucz.

### B. Businesses routinely engage in racial discrimination against majority groups.

Big business seemingly discriminates even more than big law. To date, America's largest airlines, technology companies, drug makers, banks, consulting firms, and job-search platforms all discriminate. Some run programs that are open only to Blacks. Others contract only with Latinos. And still others hire only Native American, Latino, and Black applicants. But no matter the program, one fact holds: whites and Asians can't apply.

Consider Merck & Co. That company—which is one of the five largest drug makers in the world[8]—ran a year-long job-training program that was open only to "African American/Black, Latino/Hispanic [and] Native American employees." *See* American Alliance for Equal Rights, *EEOC Charge No. 524-2025-00074: Merck & Co., Inc.* at 7 (Oct. 7, 2024). When asked if other employees could apply, Merck said, "No." *Id.* at 20. "Th[e] program," it stressed, "is for employees who identify as African American/Black, Latino/Hispanic or Native American, or two or more races." *Id.* So white and Asian employees couldn't participate. *Id.*

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[8] *Leading 10 biotech and pharmaceutical companies worldwide based on market capitalization as of 2024* (archived Dec. 8, 2024), perma.cc/UK35-HZF8.

(The Alliance asked the EEOC to investigate, and Merck ended the program.)

Job-search platforms like Jopwell discriminate, too. *See* Dkt.1 at 3, *American Alliance for Equal Rights v. Jopwell*, 1:24-cv-01142 (D. Del. Oct. 15, 2024). Jopwell partners with "some of the most prestigious companies" in America, helping organizations like "American Express, BlackRock, Google, and Johnson & Johnson" find future employees. *Id.* When Jopwell partners with those companies it promises racial exclusivity, offering those businesses the ability to selectively consider, interview, and hire only "'ethnic minorit[ies].'" *Id.* at 7. And that discrimination is by design: According to its founders, Jopwell was specifically created to "'match people of color (namely black, Latinx, and Native American) with great jobs and internships.'" *Id.* (cleaned up).

Jopwell achieves that goal by categorically banning Asians and whites from its platform. The "first question" on the company's FAQs page asks who's "eligible" to join Jopwell. *Id.* at 5. The company's answer: "'Black, Latinx, and Native American students and professionals.'" *Id.* Sadly, that answer is unsurprising: As Jopwell has repeatedly said, the company "'exclusively supports Black, Latinx and Native American talent.'" *Id.* at 2. So white and Asian job-seekers can't use the platform *at all*. *Id.* (The Alliance is suing Jopwell right now.)

Some companies discriminate in even more aggressive ways, harming traditionally "disfavored group[s]," *Parker,* 652 F.2d at 1017, in addition to traditionally favored ones. Take Southwest Airlines, for

example. For nearly twenty years, Southwest has run the ¡Lanzate! Program, which "provide[s] free flights to select Hispanic students." *American Alliance for Equal Rights v. Southwest Airlines Co.*, 2024 WL 5012055, at *1 & n.1 (N.D. Tex. Dec. 6). Since the program started, Southwest has "'required applicants to be Hispanic,'" categorically excluding anyone who is Black, Native American, Asian, or white. *Id.* (cleaned up). To apply, contestants must "'identify direct or parental ties to a specific country'" so Southwest can "'identify their Hispanic country of origin.'" *Id.* And if a contestant identifies a country that isn't sufficiently Hispanic—like China, Egypt, or Morrocco, for example—then Southwest will tell them to "list [their] country of ancestral Hispanic Origin" instead. *See* Dkt.29 at 38. (After the Alliance sued, Southwest "shuttered" the program. *Southwest Airlines Co.*, 2024 WL 5012055, at *1.)

The rest of corporate America discriminates in the same way. America's largest search platform, Google, runs the "Black Founders Fund" and the "Latino Founders Fund," which exclude applicants who aren't sufficiently Black and Latino. *Black Founders Fund* (archived Feb. 6, 2024), perma.cc/TV99-BMRW; *Latino Founders Fund* (archived Feb. 6, 2024), perma.cc/6685-XPKS. America's largest bank—JP Morgan Chase & Co.—runs a "supplier diversity" program that's open only to "ethnic minorities" and a few other groups. *Supplier Diversity Program* (last visited Dec. 15, 2024), bit.ly/4iA6qCC. And America's top consulting firms—Bain & Company and McKinsey & Company—both run programs that exclude Asians

and whites. *E.g.*, Bain & Co., *Consulting Kickstart* (archived Jan. 23, 2024), perma.cc/XPW2-3K4T; McKinsey & Co., *McKinsey Supplier Diversity Program* (archived Feb. 7, 2024), perma.cc/S2G4-SR8C. In fact, there are even multi-million-dollar investment banks *whose entire business model* is predicated on that type of racial discrimination. *E.g.*, Collab Capital, *Who We Invest In* (archived Feb. 7, 2024), perma.cc/EVT4-M7RT ("We are laser-focused on investing in companies that have at least one founder who identifies as Black/African American."); VamosVentures, *About Us* (archived Feb. 7, 2024), perma.cc/TPY4-322C ("VamosVentures is an LA-based VC fund that provides capital and partnership to Latinx and diverse teams.").

### C. Nonprofits routinely engage in open racial discrimination against majority groups.

Nonprofits discriminate, too. Take the Fearless Fund, for example. Fearless is a multi-million-dollar "'venture capital fund that invests in women of color-led businesses.'" *Fearless Fund*, 103 F.4th at 769. In recent years, Fearless has worked with some of America's largest companies, including Bank of America, Costco, General Mills, JP Morgan Chase, and Mastercard. *Institutional Investors* (archived Dec. 5, 2024), perma.cc/7RMA-8CMR. Previously, Fearless's nonprofit arm—the Fearless Foundation—ran the Strivers Grant Contest, which awarded millions of dollars to hundreds of entrepreneurs nationwide. *Fearless Foundation* (archived Dec. 5, 2024), perma.cc/423R-XUZT.

The contest discriminated. "[T]he contest is open, by its own terms, only to 'black females.'" *Fearless Fund*, 103 F.4th at 769-70 (cleaned up); *accord id*. at 774 (same); *id.* at 777 (same); *id.* at 779 (same). To qualify for the contest, "a business must be at least '51% black woman owned.'" *Id*. at 769-70. So Fearless "categorically bars non-black applicants"—and it does so "*solely on account of the color of their skin*." *Id*. at 777, 774. (The Alliance sued, and the Eleventh Circuit said the contest was illegal. *Id*. at 780.)

Another nonprofit, Hidden Star, ran a similar contest. Hidden Star is a nationwide nonprofit that "has more than 300,000 members." Dkt.2-14 at 3, *American Alliance for Equal Rights v. Hidden Star*, 1:24-cv-00128 (W.D. Tex. Feb. 5, 2024). Hidden Star runs a contest—the Galaxy Grants program—that awards thousands of dollars to winning applicants.

But Asian and white men can't apply. Hidden Star's contest is "Exclusively for Minority or Women owned Businesses," so only "minority and women entrepreneurs" can compete in it. Dkt.2-16 at 2. The nonprofit's eligibility requirements reiterated that point, explaining that Hidden Star's program is "open only to … confirmable ethnic minorit[ies] [and] female[s]." Dkt.2-6 at 6. The nonprofit even "reserve[d] the right to confirm" an applicant's minority "status" before "making any award." *Id*. (The Alliance sued, and Hidden Star removed its race requirements. Dkt.9 at 1-3.)

Founders First discriminated in a similar way. Founders is a nationwide nonprofit that awards millions of dollars to companies across America. *Driving diverse-led business growth* 3 (last visited Dec. 15,

2024), bit.ly/3VqtREn. Its funders include the Rockfeller Foundation, the Ebay Foundation, US Bank, and JP Morgan. *Id*. at 10. Recently, the nonprofit ran "The Texas Grant awards" program, which offered $50,000 in grants to "Texas small businesses." *American Alliance for Equal Rights v. Founders First*, 2024 WL 3625684, at *1 (N.D. Tex. July 31).

Only some races could participate. When the Alliance sued, an FAQs page on Founders website asked: "'Can any company apply for this program?'" *Id.* at *3. The answer: "'*No*, the company *must* be diverse-led; meaning founders that are people of color, women,'" and the like. *Id*. Founders made the same point in the rest of its advertising, "repeatedly insist[ing]" in "press releases, quarterly reports, media interviews, and marketing materials" that "applicants *must* belong to one of its preferred demographic groups." *Id*. And worse yet, the nonprofit's application required contestants to "disclos[e]" their race, answer a series of "demographic questions," and send the company "a headshot." *Id*. at *4 (cleaned up). (The Alliance sued and stopped the program. *Id*. at *5.)

Scores of other nonprofits have similar racial bars. For years, Camelback Ventures—a nonprofit venture-capital fund—has said it won't work with straight white men,[9] because it believes whiteness is "[a] pa-

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[9] *Camelback Fellowship Application 101* (archived Dec. 8, 2024), perma.cc/63QG-8PZT.

thology" and that all white people are white "supremac[ists]."[10] Since 2021, the National Black Business Pitch has hosted a business-strategy competition that is open only "to Black-owned, founded, or controlled businesses." *About the Pitch* (archived Jan. 22, 2024), perma.cc/8M2P-YXTM; *accord Rules and Regulations* (archived Jan. 22, 2024), perma.cc/7Z6B-WY2X ("Participant must be a Black owner."). And recently, Wish Local—a shopping platform with more than 44 million monthly users[11]—started the Wish grant, which "will only be open to Black-owned stores." *Wish Local Empowerment Program* (archived Dec. 7, 2024), perma.cc/ZLA2-MN33.

### D. The government—both federal and state—routinely discriminates against whites and Asians.

The government regularly discriminates as well. The Smithsonian Institute—a "'federal agency'" entrusted to Congress in 1846[12]—used to run an internship program that was open only to "'Latina and Latino museum professionals,'" thus barring all Black, Asian, and white applicants. Dkt.1 at 2, *American Alliance for Equal Rights v. Zamanillo*, 1:24-cv-00509 (D.D.C. Feb. 22, 2024). Created in 1994, the Latino

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[10] *Where We Look For Mission Alignment* (archived Dec. 8, 2024), perma.cc/ZG23-RS89.

[11] *Wish Local* (archived Dec. 8, 2024), perma.cc/86PS-HNWR.

[12] *See Expeditions Unlimited v. Smithsonian*, 566 F.2d 289, 296 (D.C. Cir. 1977).

Museum Studies Program provides "hands-on training opportunities for Latina, Latino, Latinx-identifying undergraduate students"—and no one else. Dkt.3-3 at 20. The program's explicit goal is to "increas[e] the representation of Latina and Latino museum professionals in the field." *Id.* at 16. And to its staff, the program is just a way "'to work with young Latinas and Latinos.'" *Id.* at 26-27. (After the Alliance sued, the Smithsonian promised not to "'give preference or restrict selection based on race or ethnicity.'" Dkt.16 at 2.)

Many states—like Alabama, Minnesota, and Illinois—have codified similar race requirements. In Alabama, for example, the state's "Real Estate Appraisers Board" doesn't let whites and Asians compete for every board seat. Ala. Code §34-27A-4. Instead, Alabama law establishes a racial set-aside for a certain number of board seats; specifically, the state mandates that "no less than two of the nine board members shall be of a minority race." *Id.*; *accord Ivey*, 2024 WL 1181451, at *1. The Board also requires its membership to "reflect the racial … diversity of the state," Ala. Code §34-27A-4—a form of "outright racial balancing [that] is patently unconstitutional," *Harvard*, 600 U.S. at 223 (cleaned up).

Same for Minnesota. Minnesota's Board of Social Work lets whites and Asians compete for only ten of its 15 seats, reserving the remaining spots for Black, Latino, and Native American Minnesotans. Minn. Stat. §148E.025, subdiv. 2(e). Under state law, the Board of Social Work must appoint "at least five members" who are from "a community of color" or "an underrepresented community." *Id.* §148E.025, subdiv.

2(e)(1)-(2). And in Minnesota, the phrase "underrepresented community" is specifically contrasted with "the majority" in that state: "Underrepresented community," according to Minnesota, "means a group that is not represented in the majority with respect to race, ethnicity, national origin," and so on. *Id.* §148E.010, subdiv. 20. So, by its plain terms, Minnesota law mandates anti-majority discrimination—the very type of discrimination that, according to *Ames*, is highly "'unusual.'" 87 F.4th at 825. (The Alliance is currently challenging Minnesota's race requirement. Dkt.1 ¶¶23-30, *American Alliance for Equal Rights v. Walz*, 0:24-cv-01748 (D. Minn. May 15, 2024).)

Illinois discriminates too. That state runs the "Minority Teachers of Illinois scholarship program," which awards college scholarships to "minority student[s]" and no one else. 110 ILCS §947/50(b). In Illinois, only "minority student[s]"—which include Blacks, Latinos, Native Americans, Asians, and Pacific Islanders, *id.* §947/50(a)(1)-(5)—are "[e]ligible" to apply for the scholarship and get the award. *Id.* §947/50(a). So white students can't participate. *Id.* (The Alliance sued Illinois, and the case is pending. *See American Alliance for Equal Rights v. Pritzker*, 3:24-cv-03299 (C.D. Ill. Oct. 22, 2024).)

### E. The service academies discriminate against white applicants.

The military isn't immune from the scourge of discrimination either. For decades, West Point has "consider[ed] race and ethnicity" in its admissions process. *West Point*, 709 F. Supp. 3d at 128. And it does so throughout its admissions process.

At the beginning of its process, West Point sets precise racial targets to fill its incoming class. "It attempts to balance the Corps" by setting "desired percentages of … blacks, Hispanics, and other minorities." Dkt.10-5 at 17, *SFFA v. West Point*, 7:23-cv-08262 (Sept. 19, 2023). And those percentages are precise: In 2023, West Point sought to admit exactly 171 African Americans, 138 Hispanics, and 61 Asians. Dkt.53-2 at 4.

To hit those apparent quotas, West Point considers race when offering "letters of assurance"—the University's version of early admissions. *See West Point*, 709 F. Supp. 3d at 127-28. When offering those letters, "West Point's Diversity Outreach Office conducts [its] review for African American, Hispanic, and Native American candidates, while regional teams conduct [their] review for other candidates." *Id*. at 128. And West Point applies different rules to different races. Dkt.53-2 at 4. According to its guidelines, "African-American[s]" can get a letter of assurance whenever their College Entrance Examination Rank is at or above 554 points—the same threshold for ultra-rare applicants like "Recruited Athletes." *Id*. "Hispanic-American[s]," on the other hand, can get a letter if they have a College Entrance Examination Rank of 554 points *and* a "Whole Candidate Score" of 5,600 points. *Id*. But white and Asian applicants—who can get a letter only if they are "Scholars"—must have a College Entrance Examination Rank of at least 650 points and a Whole Candidate Score of at least 6,801 points. *Id*.

If West Point still doesn't like the racial mix of its would-be incoming class, it can consider race once

more. "[A]t the end of the admissions cycle, if West Point has not reached its class size … the Admissions Office may consider race and ethnicity" to boost the number of "African American, Hispanic, and Native American candidates." *West Point*, 709 F. Supp. 3d at 129. And those race-based boosts are big. Dkt.53-2 at 3. Last year, West Point set strict targets for the number of "additional appointees," instructing admissions officers to reserve "100 additional appointees" for "African Americans" and "75 additional appointees" for "Hispanic Americans." *Id.*

The Naval Academy—commonly considered the best public school in the Nation—also discriminates against whites. *Naval Academy*, 2024 WL 5003510, at *18.[13] During the admissions cycle, senior members of the admissions office meet "almost every week" to discuss the incoming class's racial breakdown. Dkt.148 at 20. During those meetings, the Dean of the Academy receives a "Dean's Brief" from several members of the school's admissions office. *Id.* Each of those briefs has a chart "comparing the class … solely by race." *Id.* "Race is tracked in four columns: total minority, African American, Hispanic, and Asian/Native American." *Id.* (There's no "white" column.)

That persistent focus on race plays out across the Academy's admissions process. Like West Point, the Naval Academy's admissions policies "mandate that … race [be] taken into consideration" throughout

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[13] The District of Maryland recently held that "the Academy's admissions program withstands the strict scrutiny mandated by the *Harvard* case." *Id.* at *80.

the admissions cycle. *Naval Academy*, 2024 WL 5003510, at *18. At the beginning of its cycle, the Academy considers race "when offering letters of assurance." *Id*. Then it can consider race a second time when "deciding between two candidates with very close" admissions profiles. *Id*. Then it can consider race a third time when offering "Superintendent nominations." *Id*. And then it can consider race a fourth time when "extending offers to additional appointees." *Id*. At each of those steps, the Academy's system of preferences helps some races—like Blacks, Latinos, and Asians—and hurts everyone else. *See Harvard*, 600 U.S. at 218-19.

## II. The background-circumstances test is unconstitutional.

Even if the background-circumstances test wasn't factually flawed, it would still be fatally unconstitutional. Since the Reconstruction, this Court has repeatedly recognized that "the equal protection of the laws" guarantees "the protection of *equal laws*." *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (emphasis added); *see also, e.g.*, *Truax v. Corrigan*, 257 U.S. 312, 333-34 (1921); *Skinner v. State of Okl. ex rel. Williamson*, 316 U.S. 535, 541 (1942); *Romer v. Evans*, 517 U.S. 620, 633-34 (1996). The guarantee of "equal laws," this Court has stressed, is "universal in [its] application." *Yick Wo*, 118 U.S. at 369. It applies to "all persons." *Id*. And it promises that everyone, "whether colored or white, shall stand equal before the laws." *Strauder v. State of W. Virginia*, 100 U.S. 303, 307 (1879).

Consistent with that rule, this Court has long held that "*any* person, of whatever race, has the right to demand that *any* governmental actor … justify *any* racial classification" under "the strictest judicial scrutiny." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 224 (1995) (emphasis added); *accord Gratz v. Bollinger*, 539 U.S. 244, 270 (2003). That rule applies with full force here. *Harvard*, 600 U.S. at 229. And it forbids courts from interpreting Title VII in a way that "pick[s] winners and losers based on the color of their skin." *Id*.

The background-circumstances test flouts that basic rule. The test mandates "a different standard" for white and Asian plaintiffs who bring Title VII claims, *Mills*, 171 F.3d at 455; *Telep*, 2005 WL 2454103, at *6, requiring those plaintiffs to prove that their employer is the "unusual" defendant "who discriminates against the majority"—an "addition[al]" showing that no other race must make, *Ames*, 87 F.4th at 825. That test plainly "impose[s] different burdens on … different demographic groups." *Id*. at 827 (Kethledge, J., concurring). So interpreting Title VII in that way would render the statute unconstitutional. *See Harvard*, 600 U.S. at 206-07; *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 506 (1989).

Thankfully, the Court doesn't have to take that step. Instead, if it thinks Title VII is truly ambiguous, it could simply invoke constitutional avoidance—a practice it has done time and again in the race context. *E.g.*, *Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 540 (2015); *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 197 (2009); *Bartlett v. Strickland*, 556 U.S.

1, 21 (2009) (opinion of Kennedy, J.). And if the court proceeds in that way, it would simply have to hold that Title VII—which prohibits "discriminat[ion] against any individual," 42 U.S.C. §2000e-2(a)(1)—applies equally to all individuals, no matter their race, *Harvard*, 600 U.S. at 289-90 (Gorsuch, J., concurring); *Ames*, 87 F.4th at 827 (Kethledge, J., concurring).

## CONCLUSION

For these reasons, the Court should reverse the decision below.

Respectfully submitted,

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