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 EQUAL PROTECTION PROJECT IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Equal Protection Project (EPP) of the Legal Insurrection Foundation (LIF),[2] a Rhode Island tax-exempt 501(c)(3), is devoted to the fair treatment of all persons without regard to race or ethnicity. Our guiding principle is that there is no "good" form of racism. The remedy for racism never is more racism.

Since its creation in February 2023, EPP has filed more than forty civil rights complaints[3], in various fora, against governmental or federally funded entities that have engaged in racially discriminatory conduct in various forms, and its work is ongoing. EPP transparently updates the public on all of its activities at EPP's own website.[4] Of note, in approximately half of the cases brought by EPP, entities charged with racially discriminatory conduct have terminated discriminatory eligibility for various education-related programs as a result of EPP action.[5]

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1. This brief conforms to the Court's Rule 37, in that no counsel for a party authored this brief in whole or in part, and no person or entity other than *Amicus Curiae* the Equal Protection Project of the Legal Insurrection Foundation funded its preparation or submission.

2. https://legalinsurrectionfoundation.org/.

3. The Civil Rights Complaints EPP has filed involve over 130 individual racially discriminatory programs, as many of the entities against whom EPP has filed conduct various programs of a racially discriminatory nature.

4. https://equalprotect.org/.

5. https://legalinsurrection.com/2024/10/twenty-wins-and-counting-equal-protection-project-3q-2024-impact-report/.

Pertinent to our interest in this case, while EPP has, in fact, successfully prosecuted a case against an institution of higher learning engaged in racial discrimination against Black citizens,[6] most of the cases EPP has brought involve so-called "reverse discrimination," or racial discrimination against members of the majority or non-preferred minorities, *e.g.*, those of Asian descent. In fact, EPP has found that such racial discrimination against White and Asian citizens is ubiquitous in higher education, and damages American civil discourse and political life on a daily basis. The same is also true of discrimination against male and straight, or heterosexual, citizens. This is true even after this Court's 2023 *Students for Fair Admissions* opinion,[7] which declared that "[e]liminating . . . discrimination means eliminating all of it." EPP has found that numerous segments of society have not complied.

This case describes another such area, employment, where reverse discrimination is, unfortunately, alive and well.

EPP's experience in this area is directly applicable to the instant matter because in this case, the court below improperly required the heterosexual, and therefore

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6. *See* NYU "Permanently Discontinued" Discriminatory Whites-Only "Anti-Racist" Parent Program After Equal Protection Project Legal Challenge, available at https://legalinsurrection.com/2024/01/nyu-permanently-discontinued-discriminatory-whites-only-anti-racist-parent-program-after-equal-protection-project-legal-challenge/.

7. *Students for Fair Admissions v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 207 (2023).

"majority," Plaintiff (Petitioner here) to show "background circumstances to support the suspicion that the defendant is that *unusual* employer who discriminates against the majority." *Ames v. Ohio Dep't of Youth Servs.*, 87 F.4th 822, 825 (6th Cir. 2023)(emphasis added)(quoting *Arendale v. City of Memphis*, 519 F.3d 587, 603 (6th Cir. 2008) and citing *Murray v. Thistledown Racing Club, Inc.*, 770 F.2d 63, 67 (6th Cir. 1985)). But EPP's experience teaches that this type of discrimination is hardly "unusual." It is, in fact, in 2024, common, and in this case the lower court placed an elevated, and improper, burden on Petitioner to establish her *prima facie* case of discrimination. While EPP supports Petitioner's arguments, EPP submits this brief to address an area squarely in EPP's experience—the ubiquitousness of insidious "reverse discrimination."

EPP also wishes to emphasize that the legal basis for the Sixth Circuit's rule that a majority plaintiff show "background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority," *Ames*, 87 F.4th at 825, rests on exceedingly shaky legal grounds. Because of that, even if racial discrimination against so-called "majority" plaintiffs had not become common in 2024, this Court would be justified in overturning this specious ruling on this basis alone.

SUMMARY OF ARGUMENT

Petitioner makes a compelling case that the opinions of the Sixth Circuit below[8] and the other Circuit Courts of Appeals that require a so-called "majority" plaintiff

8. *Ames*, 87 F.4th 822 (6th Cir. 2023).

to show "background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority" are seriously flawed. Brief for Petitioner Marlean A. Ames, No. 23-1039 at 25-26 (U.S. Dec. 9, 2024)("background circumstances" requirement "imposes not just 'a *different*' burden, but 'a higher burden of proof for plaintiffs[] who are members of majority classifications.'")(emphasis in original)(citation omitted)[hereinafter "Petitioner's Brief"]. Petitioner rightly points out that the holdings of the Eleventh and Third Circuits are far more persuasive. These courts have held that a showing of "background circumstances" is not required because "discrimination is discrimination no matter what the race, color, religion, sex, or national origin of the victim," *Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321, 1325 n.15 (11th Cir. 2011), and that requiring a show of "background circumstances" is an "arbitrary barrier which serves only to frustrate those who have legitimate Title VII claims." *Iadimarco v. Runyon*, 190 F.3d 151, 159 (3d Cir. 1999)).

EPP joins this argument and additionally pauses to point out that the "background circumstances" requirement has caused untold strife among the lower courts, including in the Sixth Circuit, and even in the opinion below. *Ames*, 87 F.4th at 817 ("The 'background circumstances' rule is not a gloss upon the 1964 Act, but a deep scratch across its surface. The statute expressly extends its protection to 'any individual'; but our interpretation treats some 'individuals' worse than others—in other words, it discriminates—on the very grounds that the statute forbids.")(Kethledge, J., concurring); *see also Pierce v. Commonwealth Life Ins. Co.*, 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."). Petitioner's other arguments; namely, that the "background circumstances" requirement is contrary to the plain text of Title VII and contrary to binding decisions of this Court, are persuasive, and EPP joins them in full. Petitioner's Brief at 26-35 (citing Title VII's text and noting that in *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 283 (1976), Justice Marshall wrote that Title VII prohibits all racial discrimination "'on the same terms' and [with] 'the same standards' for all.").

EPP argues additionally, however, that even if the "background circumstances" rule had been correct when invented by the D.C. Circuit in *Parker*,[9] it is no longer applicable or useful because discrimination against so-called "majority" citizens is no longer "unusual," but rather has become common. For example, of the over 40 cases of racial and sex discrimination EPP has filed civil rights complaints against since February 2023, most have entailed discrimination against "majority" parties. In fact, a recent addition to the EPP team, Professor Mark Perry,[10] has filed over 2,000 civil rights complaints in cases involving Title VI and Title IX race and sex discrimination, most of which involved discrimination against majority parties. As the organization Do No Harm, which advocates for "keeping identity politics out

9. *Parker v. Baltimore & Ohio R.R. Co.*, 652 F.2d 1012 (D.C. Cir. 1981).

10. https://legalinsurrection.com/2023/01/legendary-prof-mark-j-perry-explains-how-he-fights-politically-correct-campus-bigotry/.

of medical education, research, and clinical practice,"[11] has stated, "[a]lmost every U.S. medical school has at least one scholarship, fellowship, clerkship, award, special preference, or academic program that violates federal civil rights laws. Most of them involve favoritism toward students typically considered to be Underrepresented in Medicine (URiM)."[12]

In other words, these programs routinely discriminate against majority parties. In sum, what was once "unusual" has now become ubiquitous, making the "background circumstances" requirement an anachronism that must be relegated to the dustbin of judicial history.

Finally, even if the "background circumstances" rule had been correct when developed and even if its factual underpinnings were still applicable, its legal underpinnings are unsound in the extreme. Especially when contrasted against the plain text of Title VII, which harbors no animus towards the majority, or any other group, the D.C. Circuit's creation of the "background circumstances" requirement out of whole cloth requires a course correction. This provides yet another, independent basis on which this Court can and should eradicate the "background circumstances" requirement.

In short, this Court should make clear that the "background circumstances" requirement has no place in judicial discrimination jurisprudence. This is because the requirement places an undue burden on "majority" plaintiffs, conflicts with the text of Title VII and binding

11. https://donoharmmedicine.org/about/.

12. https://donoharmmedicine.org/story/mark-j-perry-ph-d/.

precedent of this Court, is an anachronism, and because the legal underpinnings of the requirement are weak and poorly supported.

ARGUMENT

I. Petitioner Ames correctly argues that requiring a so-called "majority" plaintiff to show "background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority" is grossly improper, conflicts with Title VII's text, and violates this Court's binding precedent.

EPP joins the argument of Petitioner that requiring a so-called "majority" plaintiff to show "background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority" is grossly improper, for three reasons.

First, although the "background circumstances" rule as first articulated and developed by the D.C. Circuit in *Parker*, 652 F.2d 1012, and *Harding v. Gray*, 9 F.3d 150 (D.C. Cir. 1993), was not "designed to disadvantage" majority plaintiffs, *id.* at 153, as it was adopted in the other circuit courts of appeals it came to do just that.

For example, in the court below, it was undisputed that Petitioner had established a *prima facie* case of discrimination, *but she failed to show additional, so-called "background circumstances.*" *Ames*, 87 F.4th at 827 ("nobody disputes that Ames has established the other elements of her prima-facie case, which would be enough to establish that case if she were a gay person")

(Kethledge, J., concurring). This additional burden applies *only to majority plaintiffs*, and is, therefore, the epitome of a system "designed to disadvantage" a majority plaintiff like Petitioner. Other examples abound. *See Hairsine v. James*, 517 F. Supp. 2d 301, 313 (D.D.C. 2007)(majority plaintiff's claim of race discrimination foundered for lack of background circumstances despite "no question that the record demonstrate[d] that [plaintiff] was qualified for the Head Deskperson and Group Chief positions"—positions that ultimately went to minority candidates); *Briggs v. Porter*, 463 F.3d 507, 517 (6th Cir. 2006)("[a] reverse-discrimination claim carries a different and more difficult prima facie burden" because majority plaintiffs bringing such claims must demonstrate "background circumstances"); *Katerinos v. U.S. Dep't of Treasury*, 368 F.3d 733, 736 (7th Cir. 2004)(majority plaintiff needed to show "background circumstances" as part of "his prima facie case," which was "a major hurdle."). Requiring majority plaintiffs to show *more than* other plaintiffs to establish a *prima facie* case of discrimination violates equal protection principles.

Far better, as Petitioner notes, and in EPP's view, are the opinions of the Eleventh and Third Circuit U.S. Courts of Appeals, who have held, respectively, that a showing of "background circumstances" is not required by majority plaintiffs because "discrimination is discrimination no matter what the race, color, religion, sex, or national origin of the victim," *Smith v. Lockheed-Martin Corp.*, 644 F.3d at 1325 n.15, and that requiring a showing of "background circumstances" by majority plaintiffs is "an 'arbitrary barrier which serves only to frustrate those who have legitimate Title VII claims.'" *Iadimarco*, 190 F.3d at 159.

EPP joins Petitioner's argument on this score and additionally pauses to point out that the "background circumstances" requirement has caused untold strife among the lower courts, including in the Sixth Circuit, and even in the opinion below. *Ames*, 87 F.4th at 817 ("The 'background circumstances' rule is not a gloss upon the 1964 Act, but a deep scratch across its surface. The statute expressly extends its protection to 'any individual'; but our interpretation treats some 'individuals' worse than others—in other words, it discriminates—on the very grounds that the statute forbids.")(Kethledge, J., concurring); *see also Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d at 801 n.7 ("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."); *Katerinos*, 368 F.3d at 736 ("background circumstances" requirement is a "major hurdle" for majority plaintiffs).

Second, it is clear that the "background circumstances" rule conflicts with Title VII's plain text. Title VII, of course, states that "[i]t shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge ***any individual***, or ***otherwise to discriminate against any individual*** with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1)(emphasis added). In light of this Court's repeated admonition that "[i]f the words are plain, they give meaning to the act, and it is neither the duty nor the privilege of the courts to enter speculative fields in search of a different meaning,"[13] it was

13. *Caminetti v. United States*, 242 U.S. 470, 490 (1917).

improper for the D.C. Circuit to invent the "background circumstances" requirement and for the several other courts of appeals that have followed it to do so.

Finally, the "background circumstances" requirement conflicts with binding precedent of this Court. For example, in *McDonald*, Justice Marshal made this plain:

> Title VII of the Civil Rights Act of 1964 prohibits the discharge of 'any individual' because of "such individual's race." Its terms are not limited to discrimination against members of any particular race . . . [W]e [have] described the Act as prohibiting (d) iscriminatory preference for Any (racial) group, Minority or Majority. Similarly the EEOC, whose interpretations are entitled to great deference, has consistently interpreted Title VII to proscribe racial discrimination in private employment against whites on the same terms as racial discrimination against nonwhites, holding that to proceed otherwise would 'constitute a derogation of the Commission's Congressional mandate to eliminate all practices which operate to disadvantage the employment opportunities of any group protected by Title VII, including Caucasians.'

417 U.S. at 278-79 (citations omitted). If discrimination against majority citizens is to be considered "on the same terms" as it is against minority citizens, the "background circumstances" requirement cannot be right and the Court should make clear that such a rule has no place in discrimination jurisprudence.

In sum, EPP joins Petitioner's arguments that the "background circumstances" rule places an improper burden on majority plaintiffs, and conflicts with Title VII's text and binding precedent of this Court.

II. Even if the D.C. Circuit correctly formulated the "background circumstances" rule in *Parker* in 1981, the world has changed, in that discrimination against majority citizens is no longer "unusual"; it is, in fact, ubiquitous.

In 1981, in *Parker v. Baltimore & Ohio Railroad Co.*, the D.C. Circuit first articulated the "background circumstances" requirement: "majority plaintiffs [may] rely on the *McDonnell Douglas* criteria to prove a prima facie case of intentionally disparate treatment when background circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority." 652 F.2d at 1017.

While discrimination against majority citizens may have been an "unusual" event in 1981, it no longer is. Rather, so-called "reverse discrimination" is commonplace, as EPP well knows. *See* EPP's Statement of Interest, *supra*.

EPP has direct experience with racial and sex discrimination in institutions of higher learning, having filed, as mentioned, civil rights complaints against over 40 schools involving over 130 individual racially discriminatory education and education-related programs, most of which entailed discrimination against majority parties. EPP pauses to illustrate three such representative cases.

First is EPP's civil rights complaint against the University of Illinois Urbana-Champaign ("UIUC"), in which EPP cited 42 UIUC scholarships that discriminated based on race or sex in violation of Title VI and Title IX, respectively.[14] 39 out of 42 of these scholarships discriminated against majority students. From EPP's Complaint:

> UIUC offers, administers, and promotes 42 scholarships that discriminate based on race, sex, or both. . . . Given the vast array of discriminatory scholarships, it is clear that UIUC has a systemic non-compliance with federal civil rights laws. We request that [the U.S. Department of Education's Office for Civil Rights] investigate UIUC for the multiple violations of federal civil rights laws (Title IX and Title VI) as set out below, and impose remedial and other relief[.][15]

Second is EPP's civil rights complaint against Indiana University (IU), in which IU's Indianapolis campus, the IU Kelley School of Business, and the IU McKinney School of Law all discriminated against majority students in 19 separate discriminatory scholarships.[16] From EPP's Complaint:

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14. https://equalprotect.org/case/equal-protection-project-v-university-of-illinois-urbana-champaign-uiuc/.

15. https://equalprotect.org/wp-content/uploads/2024/08/OCR-Complaint-Equal-Protection-Project-University-of-Illinois-Urbana-Champaign.pdf.

16. https://equalprotect.org/case/equal-protection-project-v-indiana-university/.

> We make this civil rights complaint against Indiana University, a public institution which offers, promotes, and administers at least 19 race-based scholarships at the Kelley School of Business, the IU Indianapolis campus and the McKinney School of Law. The number of discriminatory scholarships we are challenging and the number of IU institutions at which they are offered reflects a pervasive and systemic failure to comply with constitutional and statutory requirements at IU, warranting expedited investigation by OCR. . . . For some of the scholarships terms such as 'minorities' or variations on that term are used. It is clear from the context of the scholarships and the usage of such terms by Indiana University that these terms reflect a racial and/or ethnic descriptor that excludes whites.[17]

Finally, EPP brought a civil rights complaint against Missouri State University for a single discriminatory program.[18] From EPP's Complaint:

> We bring this civil rights complaint against the Missouri State University ("MSU"), a public institution, for engaging in racial- and gender-based discrimination through its sponsorship, promotion and hosting of a small business training 'boot camp' that limited participation

17. https://equalprotect.org/wp-content/uploads/2024/07/OCR-Complaint-Indiana-U.-Equal-Protection-Project.pdf.

18. https://equalprotect.org/case/missouri-state-university-diverse-and-women-owned-business-boot-camp/.

> to individuals who identify as 'BIPOC'—an acronym for non-white individuals who are 'Black, Indigenous and Persons of Color'—or who are female. White males, and white males alone, were excluded from eligibility.[19]

These examples all serve to show that even if the "background circumstances" rule had some validity when it was invented in 1981, in that discrimination against majority parties was "unusual" then, it no longer is. The "background circumstances" rule, therefore, has outlived whatever purpose it may have once had and should be stricken from this Court's discrimination jurisprudence.

III. The "background circumstances" requirement rests on shaky legal footing, and fails as a guiding principle on that basis alone.

The D.C. Circuit's *Parker* case is widely cited as being the starting point of the "background circumstances" rule. *See*, *e.g.*, *Murray v. Thistledown Racing Club, Inc.*, 770 F.2d at 67 (citing *Parker* as the origin of the "background circumstances" requirement); *Mills v. Health Care Serv. Corp.*, 171 F.3d 450, 457 (7th Cir. 1999)(same); *Hammer v. Ashcroft*, 383 F.3d 722, 724 (8th Cir. 2004)(same); *Notari v. Denver Water Dep't*, 971 F.2d 585, 589 (10th Cir. 1992) (same). But *Parker* cited only one case as authority for the rule that it invented out of whole cloth, and that case specifically disclaimed anything like the "background circumstances" requirement.

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19. https://legalinsurrection.com/wp-content/uploads/2023/09/OCR-Complaint-Missouri-State-University.pdf.

From *Parker*:

> This court has allowed majority plaintiffs to rely on the *McDonnell Douglas* criteria to prove a prima facie case of intentionally disparate treatment when background circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority.

652 F.2d at 1017 (citing *Daye v. Harris*, 655 F.2d 258 (D.C. Cir. 1981) as authority for the background circumstances requirement).

But did *Daye* specifically say that majority plaintiffs were required to show background circumstances sufficient to "support the suspicion that the defendant is that unusual employer who discriminates against the majority?" It did not.

What *Daye* did say is the opposite. Citing a then-recent Title VII case entitled *Bundy v. Jackson*, 641 F.2d 934, 951 (D.C. Cir. 1981), *Daye* held only that:

> to make out a prima facie case the plaintiff must show that she belongs to a protected group, that she was qualified for and applied for a promotion, that she was considered for and denied the promotion, and that other employees of similar qualifications who were not members of the protected group were indeed promoted at the time the plaintiff's request for promotion was denied.

655 F.2d at 262 n.11 (citing *Bundy*, 641 F.2d at 951). In fact, *Daye* expressly disclaimed any requirement that a majority plaintiff show "background circumstances" when it held "[t]hat [Daye] is white is no impediment to this suit; white employees are protected by Title VII." *Id.* (citing *McDonald*, 423 U.S. 923, which expressly held that Title VII protects all plaintiffs against discrimination equally).

Especially when contrasted with the text of Title VII, which does not distinguish between majority and minority plaintiffs, there was no basis for the court in *Parker*, based on the only authority cited, i.e. *Daye*, to invent the "background circumstances" rule as a necessary requirement for majority plaintiffs to make out a *prima facie* case of discrimination.

For this reason, the "background circumstances" rule rests on exceedingly thin legal grounds and should be rejected on this basis alone.

CONCLUSION

We urge this Honorable Court to reverse the Court below because of its improper reliance on the improper, outmoded, and insufficiently supported "background circumstances" requirement. This requirement places an undue burden on majority plaintiffs, is contrary to Title VII's plain text and binding precedent of this Court, has outlived whatever validity it may have once had due to the

ubiquitousness of anti-majority discrimination, and rests on weak legal grounds.

Respectfully submitted,

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