

No. 21-1523

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**IN THE SUPREME COURT OF THE UNITED STATES**

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**WENDELL TABB,**

*Petitioner,*

v.

**BOARD OF EDUCATION OF DURHAM PUBLIC  
SCHOOLS,**

*Respondent.*

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On Petition for a Writ of Certiorari to the United  
States Court of Appeals for the Fourth Circuit

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**BRIEF IN OPPOSITION TO PETITION FOR A  
WRIT OF CERTIORARI**

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## **QUESTIONS PRESENTED**

1. Did the Court of Appeals properly interpret Title VII precedents as to comparators in race-based discrimination cases?
2. Did the Court of Appeals properly affirm the decision of the district court as to its finding that another employee of Respondent was a non-exempt employee under the Fair Labor Standards Act and was, thus, not a proper comparator?
3. Does Petitioner's newly raised question as to whether Respondent has violated the Constitution because of its treatment of exempt and non-exempt employees under the Fair Labor Standards Act merit review by this Court when no such constitutional claim has heretofore been raised?

## **PARTIES TO THE PROCEEDING**

All parties to the proceeding are set forth in the caption.

## **RELATED PROCEEDINGS**

Pursuant to Rule 24.1(d), the following proceedings are related to this case:

- *Tabb v. Board of Education of the Durham Public Schools*, No. 1:17CV730 (M.D.N.C.) (order entered Feb. 19, 2019).
- *Tabb v. Board of Education of the Durham Public Schools*, No. 1:17CV730, (M.D.N.C.) (order entered Sept. 28, 2020).
- *Tabb v. Board of Education of the Durham Public Schools*, No. 20-2174 (4th Cir.) (judgment entered March 2, 2022).

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## INTRODUCTION

Petitioner Wendell Tabb, a drama teacher and theater director with Respondent Durham (N.C.) Public Schools, appeals to this Court from a decision by the United States Court of Appeals for the Fourth Circuit which affirmed (a) the district court's dismissal pursuant to Fed. R. Civ. P. 12(b)(6) of Petitioner's claims alleging race-based discrimination under Title VII based on allegations that Respondent did not pay Petitioner a second salary supplement for his technical work on students' theatrical productions and (b) the district court's grant of summary judgment to Respondent as to Petitioner's Title VII claims alleging race-based discrimination based upon his failure to receive extra-duty pay and because of Respondent's denial of his extra staffing requests. *Tabb v. Board of Education of Durham Public Schools*, 29 F.4th 148 (4th Cir. 2022).

None of Petitioner's three Questions Presented involve issues which were raised or argued by Petitioner's counsel before the Court of Appeals, and one of Petitioner's Questions Presented puts forward an apparent constitutional claim that has not heretofore been raised before any court. As to the substance of the argument contained in the Petition for a Writ of Certiorari, Petitioner asserts that the lower courts did not properly interpret Title VII as to valid comparators, that the district court imposed a heightened pleading standard (an argument not made by Petitioner before the Court of Appeals), and Petitioner disputes numerous portions of Respondent's brief to the Court of Appeals.

For the reasons presented, Respondent

opposes a grant of the writ of certiorari in this case.

## **OPINIONS BELOW**

The Fourth Circuit's opinion is published at *Tabb v. Board of Education of Durham Public Schools*, 29 F.4th 148 (4th Cir. 2022). The two district court orders are unreported but available at *Tabb v. Board of Education of the Durham Public Schools*, No. 1:17CV730, 2020 WL 5768853 (M.D.N.C. Sept. 28, 2020), and *Tabb v. Board of Education of the Durham Public Schools*, No. 1:17CV730, 2019 WL 688655 (M.D.N.C. Feb. 19, 2019).

## **JURISDICTION**

The Fourth Circuit filed its opinion and judgment on March 3, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## **STATEMENT OF THE CASE**

Petitioner Wendell Tabb's case centers upon his claims that he was denied technical support staffing, extra-duty pay, and a second pay supplement based upon his race while working as a drama teacher at Hillside High School ("Hillside"), a constituent school of the Respondent Durham (N.C.) Public Schools.

At all relevant times, Petitioner Wendell Tabb was employed as a longtime and well-regarded drama teacher at Hillside High School. Petitioner received many awards as well as professional and community recognition for his work over the years. Petitioner had been employed at Hillside continuously since 1987. (Petitioner has recently retired from the Durham Public Schools.) Hillside High School has an International Baccalaureate magnet program.

Petitioner is an African American male. During his time at Hillside, Petitioner was the sole theater employee at Hillside. He taught theater classes and helped students to put on theatrical productions.

Petitioner was primarily compensated based upon salary schedules established by the North Carolina General Assembly. Petitioner was compensated based upon his level of educational achievement, his years of experience, and certain certifications. In addition, Petitioner received a local supplement from Respondent based upon his years of experience and advanced degrees. Finally, Petitioner also received a "Performing Arts Supplement" from

Respondent for his work as a “Theater Director” to help support students’ extracurricular theatrical productions. Dating from at least the 2009-2010 school year, Petitioner received the maximum amount available as a Performing Arts Supplement under Respondent’s schedule which, by the end of his tenure, was a supplement in the amount of \$9,450. Petitioner was consistently the highest paid performing arts teacher in all of Respondent’s schools. He received over \$8000 more in total compensation compared to the next highest paid performing arts teacher for Respondent.

Petitioner was the only theater employee at Hillside. To help put on student productions, Petitioner as “Theater Director” worked to coordinate those productions. Petitioner regularly hired contractors to assist with sound, set production, and lighting for these productions. While Petitioner helped with “facility rentals” of Hillside by outside groups (for which he was compensated by the outside groups), Petitioner also assisted with other events for Respondent at Hillside.

As a long-time employee, Petitioner made many requests to Respondent and Hillside’s principals that they hire a second theater employee at Hillside who would teach technical theater and would oversee technical issues related to the production of student theatrical performances. Respondent’s high schools are provided with allotments of teachers based on the size of their student populations. Generally, Respondent does not allocate teachers to schools for specific positions or subjects. The decisions as to the assignment of teachers for specific positions or subjects are made by

the principals of the individual schools, who make decisions based upon mandatory core class needs as well as the school’s special purposes and needs. Respondent has never allocated a specific position in any of its high schools for a technical theater teacher. Respondent has six high schools with active drama programs, one of which is the Durham School of the Arts, which was excluded by the district court at the 12(b)(6) stage from consideration as a comparator for Petitioner’s staffing claims because it is a magnet school for the visual and performing arts. Of the remaining five schools, only one of those five had any technical theater employees during the years relevant to Petitioner’s complaint, from 2013 to 2017, while two of the schools hired a technical theater employee for at least some period of time after the institution of this action. Again, those decisions as to hiring were made by the principals of the respective high schools, and not Respondent.<sup>1</sup>

Petitioner’s amended complaint was filed on October 11, 2017, and Petitioner alleged violations of Title VII of the Civil Rights Act of 1964 (“Title VII”), 42 U.S.C. § 1981 (Section 1981”), and the Americans with Disabilities Act (“ADA”). Petitioner alleged that Respondent school board violated his rights under Title VII and Section 1981 by (1) failing to hire a Technical Theater Director at Hillside, (2) failing to pay Petitioner a “Theater Technical Director Supplement” for the technical work he was doing on

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<sup>1</sup> Respondent strongly disagrees with Petitioner’s assertion that “[i]t is for reasons related to race that Respondent limited Hillside’s discretion on how to use its enrollment-based allotments.” Brief of Petitioner at 5, *Tabb v. Durham Public Schools Board of Education*, No. 21-1523.

students' theatrical productions, (3) failing to pay Petitioner for the work he performed for school district events at Hillside, and (4) under the ADA, a retaliation claim for the failure to hire a Theater Technical Director and failure to pay him fairly because of a lawsuit he filed against Respondent in 2006 in connection to his disabled child.

Following Respondent's motion to dismiss, the district court dismissed the claims that Petitioner was not paid a Theater Technical Director Supplement in violation of Title VII and that Petitioner had stated a claim for retaliation under the ADA. *Tabb v. Board of Education of the Durham Public Schools*, No. 1:17CV730, 2019 WL 688655 (M.D.N.C. Feb. 19, 2019). The district court denied the remainder of Respondent's motion to dismiss.

After discovery and on Respondent's motion for summary judgment, the district court granted summary judgment to Respondent on Petitioner's Title VII race discrimination claims as to technical staffing and extra-duty pay. *Tabb v. Board of Education of the Durham Public Schools*, No. 1:17CV730, 2020 WL 5768853 (M.D.N.C. Sept. 28, 2020).

On appeal, the Fourth Circuit upheld the dismissal of Petitioner's Theater Technical Director Supplement claim and affirmed the district court's grant of summary judgment to Respondent as to Petitioner's other claims. *Tabb v. Board of Education of Durham Public Schools*, 29 F.4th 148 (4th Cir. 2022).<sup>2</sup>

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<sup>2</sup> On appeal, Petitioner did not challenge the district court's

As for Petitioner's claim that the school district's failure to pay him a Theater Technical Director Supplement was based upon race, the Court of Appeals affirmed the dismissal on the grounds that Petitioner failed to plausibly allege that the Respondent failed to pay him an additional supplement based upon race. *Tabb*, 29 F.4th at 156. In addition, the Court of Appeals observed that the complaint "did not allege that *any* performing arts teacher in the School System, regardless of the teacher's race, received more than one supplement." *Id.* (emphasis in original).

The Court of Appeals likewise affirmed the grant of summary judgment to Respondent on the remaining Title VII and Section 1981 claims. The Court of Appeals held that Petitioner was not entitled to the hiring of a Technical Theater Director to assist him because it was not "part and parcel" of Petitioner's employment. *Id.* at 157 (*quoting Hishon v. King & Spaulding*, 467 U.S. 69, 75 (1984)). The Fourth Circuit concluded: "Nothing in the record supports a claim that the terms and conditions of a drama teacher's employment by the School System included the benefit of having the School Board or a school's principal hire other teachers to assist him or her." *Id.* The Court of Appeals also held that Petitioner's extra-duty pay claims should be dismissed because "Tabb did not provide a valid comparator for purposes of supporting this racial discrimination claim." *Id.* at 158.

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dismissal of his ADA retaliation claim.

## **REASONS FOR DENYING THE PETITION**

### **I. The Petition Contains Numerous Claims that Were Not Raised Before the Court of Appeals and Such Claims Have Been Forfeited.**

In both the Questions Presented and in the Statement of the Case, Petitioner makes numerous claims that were not briefed or argued before the U.S. Court of Appeals for the Fourth Circuit. Examples include Petitioner's claim that Respondent's treatment of exempt and non-exempt employees under the Fair Labor Standards Act gives rise to a constitutional claim, Brief of Petitioner at i, and that the district court applied a heightened pleading standard to the issue of comparators under Title VII. Brief of Petitioner at 6, *Tabb v. Durham Public Schools Board of Education*, No. 21-1523.

Issues not presented to an appellate court in briefs or at oral arguments are forfeited. "Ordinarily an appellate court does not give consideration to issues not raised below." *Hormel v. Helvering*, 312 U.S. 552, 556 (1941).

With no reasons presented by Petitioner as to why this Court should take up issues not raised before the Court of Appeals, and having failed to preserve these claims, this Petition should be denied.

### **II. The Petition Argues that the Lower Courts Decided this Case Incorrectly, But Petitioner Presents No Issues as to Existing Precedent under Title VII or As to Any Split Among the Circuits as to Those Precedents.**

In the Statement of the Case, Petitioner argues that the district court’s factual determinations were incorrect and that the Court of Appeals improperly applied law to the facts in this case. For example, Petitioner states that “[c]onsidering the evidence, a reasonable fact finder could conclude that Mr. Holley [a non-exempt employee per the district court and the Court of Appeals] and Petitioner were appropriate comparators . . . .” Brief of Petitioner at 13, *Tabb v. Durham Public Schools Board of Education*, No. 21-1523. Petitioner also maintains that at the motion to dismiss stage, the district court “misapplied relevant case law,” *id.* at 6, and that a possible comparator “was not properly considered on Respondent’s motion for summary judgment.” *Id.* at 12.

The Petitioner identifies no split among the Courts of Appeal as to the Title VII precedents at issue. See *Ford v. United States*, 484 U.S. 1034, 1035 (1988) (White, J., dissenting from denial of certiorari) (arguing that split among the circuits merited the grant of certiorari). Moreover, Petitioner’s brief argues that the district court and the Court of Appeals misapplied existing law to the facts of his case and does not argue for any reconsideration by this Court of its many precedents under Title VII.

Lacking a circuit split or legal issues which extend beyond this case, this Petition should be denied.

III. The Court of Appeals Decision Affirming the District Court was a Proper Interpretation of Title VII and the Federal Rules of Civil

Procedure and the Decision Does Not Merit Review By this Court.

The Court of Appeals held that the district court properly dismissed Petitioner's Title VII claim as to a Theater Technical Director Supplement and properly granted summary judgment as to the Title VII claims related to the request for staffing and extra-duty pay.

Affirming the dismissal of the supplement claim, the Court of Appeals held that Petitioner failed to allege in his amended complaint that "any performing arts teacher in the School System, regardless of the teacher's race, received more than one supplement." *Tabb*, 29 F.4th at 156 (emphasis in original).

With respect to summary judgment, the Court of Appeals affirmed the district court's decision that no evidence was presented that demonstrated that hiring staff to assist Petitioner was "part and parcel" of Petitioner's employment, *id.* at 157, and that there was no valid comparator presented to support Petitioner's extra-duty pay claim. *Id.* at 158.

Given that both the district court and the Court of Appeals agreed on these questions, that the Court of Appeals decision did not identify any novel questions of law, and that the Court of Appeals did not attempt to distinguish or reinterpret any of this Court's precedents, this Petition should be denied.

## CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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