NO. 21-6173

SUPREME COURT OF THE UNITED STATES

ROTIMI SALU,
Petitioner,

MOTION FOR RECONSIDERATION OF DENIAL OF *CERTIORARI* PETITIONS OF GERARD M. LYNCH AND ROTIMI SALU

v.

RE: NOS. 21-6163 & 6173

NEW YORK STATE JUSTICE CENTER,
Respondent.

The Petitioners respectfully request that the Court reconsider its denial of their petitions for a writ of certiorari.

The undersigned—counsel to Petitioners Gerard Lynch and Mr. Rotimi Salu—is aware that there is an almost zero percent chance that the Court will grant this motion for reconsideration. Yet my hope (apart from a miracle) is that this submission will at least partially assist the Court in its thinking regarding affirmative action, implicit bias and the nation's civil rights and civil liberties jurisprudence.

By denying *certiorari* here, the result will be that thousands or tens of thousands of Americans[1] will be deprived of a basic due process right—the right to confront the State's evidence—in administrative proceedings. This Court need not engage in any form of

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[1] Many of whom are African-American. And most of whom are African-American as to the Respondent Justice Center's administrative adjudications.

"affirmative action" to secure this right for all Americans, and in so doing, African-Americans will be protected where disproportionately today they are not.

The undersigned is an experienced attorney who is fully aware that some hearsay evidence is reliable and thus should be admitted into evidence in agency fact-finding adjudications. I am an attorney (a Caucasian) who has often seen how implicit bias by judicial actors hurts African-Americans and other minorities.

Here, I ask the Court to accept my clients' two cases where this state agency routinely (in 95%+ of its adjudications) prosecutes its cases on hearsay evidence alone.[2] My argument in the N.Y.S. Court of Appeals below reveals that the New York State courts condone this constitutional abuse of workers (especially African-American healthcare workers) as a matter of apparent judicial expediency. Judicial expediency is the history of Jim Crow justice in America.

Two new developments warrant reconsideration

Two new developments warrant reconsideration here, as allowed by Rule 44 (2) of this Court's rules.[3]

1. Decision in *Hemphill v. New York* warrants reconsideration

First, this Court has just adjudicated *Hemphill v. New York*, No. 20-637, __US __ (Jan. 20, 2022), where it resoundingly affirmed an accused's right of confrontation in a criminal law context. The Court has thus reacquainted itself with a core principle of American jurisprudence, namely, the need for confrontation of accusers to ensure justice.[4] This is the basic right that the Justice Center has routinely denied to the healthcare workers it accuses of neglect or abuse.

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[2] The Court can readily see this by examining the Respondent Justice Center's website—available for all the world to see—systemic violation of due process in plain sight.

[3] Petitioners are also proceeding *in forma pauperis* under Rule 39.

[4] *See, e.g., Hemphill* at p. 8: "…examined the history of the confrontation right at common law … 'the

The Justice Center may be the most egregious denier of the right of confrontation in the nation. Yet it is certainly not alone. In administrative law contexts throughout the country, on every day of the work week, an administrative law judge (ALJ) is denying an American a fair hearing because this Court has not in recent years reiterated the right of accused individuals to confront their accusers in agency fact-finding adjudications. It is time for this Court to remind ALJs everywhere in these United States that due process requires confrontation when witness credibility is at issue, lest ALJ adjudications unfairly deprive the accused of liberty, property, or as in Messrs. Lynch and Salu's cases, a livelihood and a career.

In Mr. Lynch's and Mr. Salu's cases this Court has the opportunity to demonstrate that it is willing to protect the constitutional rights of the average worker, including the African-American worker, on the basis of the simple application of a core due process principle. No "affirmative action" is required here to protect all Americans, white or colored, even if incidentally people of color will be benefitted.[5]

2. Grant of Certiorari in the *Students for Fair Admissions* cases warrants reconsideration

The second new development is this Court's grant of certiorari in the *Students for Fair Admissions*[6] cases. Basically, the Lynch and Salu petitions for certiorari involve the opposite of the *Students for Fair Admissions* affirmative action cases. In the Lynch and Salu cases, this Court need not look at the race of the healthcare workers affected by a state bureaucracy's systemic violation of the right to confront the accuser. These can be viewed as simply "blue

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principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused.'"

[5] Minorities in particular are the employees whom ALJs too often are implicitly biased against. Mr. Lynch and Mr. Salu experienced this, even though race not specifically at issue in this case.

[6] *See, Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, No. 20-1199, and *Students for Fair Admissions, Inc. v. University of North Carolina*, et al., No. 21-707.

collar" (low or moderate salary) healthcare workers, even though Messrs. Lynch and Salu are, like the majority of workers prosecuted by the Justice Center, persons of color (African-American).

Thus, by granting certiorari in this case, the Court can examine how systemic denial of a constitutional right can, as it did here, fall disproportionately on a minority population. This will assist it in its *Students for Fair Admissions* decision-making.

Here the denial of the right of confrontation punishes the healthcare system's low and middle wage workers, who are mostly African-Americans and Hispanics. Here, without "affirmative action," this Court can protect the constitutional rights, and thus the employment, of a large number of healthcare workers, most of whom are persons of color. The Court need only apply a core principle of due process of law—one that is basic to American jurisprudence—the right to confront one's accuser.

Alternatively, the Court can turn a blind eye to injustice, turn a blind eye to human nature, and turn a blind eye to large scale systemic racial bias in action, by denying Messrs. Lynch and Salu's request for *certiorari*. The Court can keep its eyes shut to the reality of implicit bias (implicit bias has a scientifically demonstrated basis) by refusing to entertain Messrs. Lynch and. Salu's cases. In so doing, the Court will be keeping its head in the sand as to the realities African-American face in America—realities summarized in THE ATLANTIC'S cover page in June 2014:

"250 years of slavery.
90 years of Jim Crow.
60 years of separate but equal.
35 years of state-sanctioned redlining. ***"[7]

[7] THE ATLANTIC, April 2014, https://www.theatlantic.com/magazine/toc/2014/06/

If the Court has a sincere interest in individual liberty, equal protection of the law and due process, it should grant certiorari in this case. Unlike affirmative action, this is a case where conservative ideology coincides with liberal ideology—as it involves basic fairness in adjudicative hearings.

Recap of Basic Facts

In *Hemphill v. New York*, No. 20-637 (Jan. 20, 2022), this Court resoundingly affirmed the right of confrontation in a criminal case. The Court correctly viewed confrontation as necessary for fair adjudication. Yet the Sixth Amendment's Confrontation Clause is merely the formalization of the common law right that this Court has also long upheld in civil law contexts. The Petitioner Lynch and Salu's cases involve administrative proceedings where the refusal of the Justice Center to allow confrontation resulted in unfair adjudications resulting in the loss of careers and livelihoods.

The Court may ask itself: Well, are these cases where other evidence supports the finding? The answer is, first, no, and second, an examination of two or three years of Justice Center adjudications, all easily found on the Justice Center's website, reveals that it adjudicates over 95% of its contested cases on hearsay alone. This must be seen for what it is—a *per se* systemic violation of administrative respondents' due process right of confrontation. The impact appears disproportionately upon African-American .[8]

To very briefly summarize the facts of these two certiorari petitions: The petitioners are two African-American healthcare workers fired from their jobs due to the determination of a N.Y.S. agency—the "Justice Center"—which found that each committed a neglect, and one client an abuse, based SOLELY on unreliable hearsay evidence.

[8] Disparate impact is not an issue in this appeal.

a. Gerard Lynch was a substance abuse advisor accused by two drug addicts, in unsworn written statements, that he made a salacious comment and touched them on the upper buttocks. For this, he was determined to have sexually abused them and thus prohibited from working in any N.Y.S. facility supervised by the Justice Center.
b. Rotimi Salu is a young Penn State grad accused of "neglect" by momentarily taking his eyes off a teenager he was supervising, when he was attacked by another teen in a juvenile psych ward. This forced this upstanding young man out of his chosen field, it appears for "working while Black."

As an experienced lawyer, I fully understand that hearsay can sometimes be reliable. However, as petitioners Lynch and Salu demonstrated to the courts below, the Justice Center administratively adjudicates its cases on hearsay alone 95%+ of the time. This clearly evidences a denial of due process. The affected healthcare workers are mostly African-American and Hispanic workers.

Reasons for Granting Certiorari

A. The Right to Face One's Accuser, Even if White

Thousands or tens of thousands of Americans are constitutionally injured when ALJs fall prey to their own prejudices and their implicit biases when adjudicating administrative matters. This is something that lawyers like me—solo practitioners—see in our day to day practice, in "small" cases taking place every day before governmental agencies. Cases often too small for an attorney to undertake on behalf of the aggrieved citizen.[9]

Yet vastly more minority American workers are denied their due process right of confrontation than are Asian-Americans denied admission to Ivy League colleges. Yet due process for workers is not a "culture wars" issue, and thus there are no *amicus curiae* briefs supporting the

[9] Messrs. Lynch and Salu are prime examples—both had been fired long before the Justice Center granted a hearing, and thus even if they won, the win would be a pyrrhic victory regarding as to the prior employer (though at least Mr. Lynch would be taken off the permanent exclusion list).

Petitioners here, in contrast to the plethora of pro-petitioners *amici* briefs[10] filed in support of the *Students for Fair Admissions* petitioners. But why?

One possible answer is that the Court is no longer a court of law, but instead has become an unelected, anti-majoritarian third branch of government intend on achieving political and ideological ends. The undersigned would prefer rejecting such answer. Granting certiorari in this case would provide evidence to the contrary. It would be evidence that the Court is willing to constitutionally stand up for the average American worker, even if of dark skin color.

Hearing Messrs. Lynch and Salu's case at the same time the Court considers the *Students for Fair Admissions* case will also allow the Court to examine both implicit bias and constitutional principle. For example, in this case, the Court might (and should) hold that due process requires confrontation when witness credibility is at issue. Likewise, it might (and should) hold that equal protection allows a college or university to consider that an applicant is an African-American from the ghetto, who has pulled himself or herself up by the bootstraps to such a degree that the candidate can succeed at, say, Harvard, and that by being given the chance to do so,[11] will benefit all concerned—the student, the student body and the larger society, including assisting in eliminating the badges of slavery that exist to this day.

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[10] The 32 *amici* briefs likely involve hundreds of thousands of dollars of legal work, paid for by partisans. In contrast, the undersigned is a solo practitioner who is pursuing this for Messrs. Lynch and Salu purely *pro bono*.

[11] *See, e.g.*, Paul Butler, *I once told a Supreme Court justice that affirmative action got me into Harvard and Yale. Today they wouldn't listen.* WASHINGTON POST (January 27, 2022), https://www.washingtonpost.com/opinions/2022/01/27/i-once-told-supreme-court-justice-that-affirmative-action-got-me-into-harvard-yale-today-they-wouldnt-listen/?utm_campaign=wp_week_in_ideas&utm_medium=email&utm_source=newsletter&wpisrc=nl_ideas (describing how affirmative action gave him a career, and his students insight into life for Blacks in America).

In contrast, granting a preference for admission solely based upon skin color, where the African-American applicant is not otherwise disadvantaged, may serve little or no sound societal purpose. *See.* John McWhorter, *It's Time to End Race-Based Affirmative Action*, NEW YORK TIMES (Jan. 28, 2022), https://www.nytimes.com/2022/01/28/opinion/affirmative-action.html (the author is apparently a "privileged" African-American).

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B. Affirmative (Color-Blind) Inaction

The public may correctly view this Honorable Court as essentially allowing dis-affirmative action against African-American Petitioners Salu and Lynch, where the systemic violation of law adversely affects thousands of healthcare workers, while at the same time granting certiorari in the *Students for Fair Admissions* college affirmative action cases to potentially do the same thing—allow dis-affirmative action maintaining African-Americans' lower-caste status in American society in order to use the civil rights statute against the very group of people it was designed to protect—African-Americans.

Dis-affirmative action is action that denies that slavery in America has had any long term consequences; denies that the Nadir Period in American history (1890-1941) ever existed; denies that *Brown v. Board of Education* eliminated racism; and denies that Petitioners Salu and Lynch would not have been administratively prosecuted had they been White. Dis-affirmative action will be to hold that academically superlative Asian American college applicants cannot be denied admission to Harvard because a lesser-achieving (academically) African-American is admitted, where the Asian-American is instead relegated to Yale or Columbia (but where the underprivileged African-American[12] from, say, an urban ghetto may be relegated to City College of New York or some other non-elite institution even though the candidate has just as much potential for success in the Ivy.[13]

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[12] As to wealthy and privileged African-Americans (a subgroup increasing in size), it may be imprudent to grant their children affirmative action. Yet in American society, this remains a small percentage. Denying the larger set of disadvantaged African-Americans affirmative action because a few have joined the elite is not a principled approach.

[13] Informatively, Professor Paul Butler describes how affirmative action gave him a career, and his students insight into life for Blacks in America. *See*, Paul Butler, *I once told a Supreme Court justice that affirmative action got me into Harvard and Yale. Today they wouldn't listen*. WASHINGTON POST (January 27, 2022), https://www.washingtonpost.com/opinions/2022/01/27/i-once-told-supreme-court-justice-that-affirmative-action-got-me-into-harvard-yale-today-they-wouldnt-

Since most of this Courts' member attended Ivy League schools, they may have a personal interest in college and law school entrance policies. Yet, respectfully, there are far more average Americans (and far more African-Americans) denied the right of confrontation by administrative agencies in the nation, and by the Justice Center in New York State, than there are Asian Americans denied entry to the Ivy League college of their first choice.

Moreover, unlike college affirmative action cases, Petitioners Lynch's and Salu's cases involve clear constitutional violations which require a simply ruling by this Court for redress. By granting them certiorari, the Court can promptly advance justice and the rule of law in American.

C. Advocating for Justice

I am writing this motion as a Caucasian attorney working on this case *pro bono publico* with one reasonable objective: to convince at least some members on this Court that implicit bias DOES exist; that such bias has apparently systemically affected the Justice Center's decision-making (though this need not be a grounds for decision); and that attorneys who, like me, represent working class Americans see the impact of implicit bias in the flesh of our clients.

I also spent 29 years in the U.S. Army Reserves, with tours of duty in Germany, Iraq[14] and Afghanistan. In my observation, when society treats people with equality (as does the U.S. Army), individuals will succeed on their own merits. But where society is not color blind (and America most certainly is not color blind), racial discrimination will continue and thus keep African-Americans down, too many relegated to a lower caste. If this Court holds that courts and governmental actors

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listen/?utm_campaign=wp_week_in_ideas&utm_medium=email&utm_source=newsletter&wpisrc=nl_ideas.

[14] While serving on active duty in Iraq in 2005, I wrote Chief Justice Roberts to congratulate him on his becoming Chief Justice. As I recall, I expressed my hope that he would be a nonpartisan and, as promised, call "balls and strikes" on the Supreme Court.

must always be color blind in matters of diversity and social justice—or blind as to the systemic bias that underlies this case—the result will be Judges blind to racial injustice, past and present.

The Value of Dissent

After reading this motion, perhaps at least one Justice will dissent from the denial of certiorari. Dissents can be of vital importance to the eventual development of the law.[15] As a solo practitioner, I have almost no voice. Just my written submissions to this Court.

A Justice dissenting from this Court's allowing injustice will aid justice in the long arc of history.

Conclusion

In conclusion, based upon this Court's decision in *Hemphill*, it should easily hold that Petitioners Lynch and Salu were entitled to confront their accusers, because witness credibility was at issue. It can easily hold that a state agency (the Justice Center) that allows 95%+ of its administrative prosecutions to be based upon hearsay alone is systematically depriving its administrative accuseds of due process of law.

Considering Petitioners Salu and Lynch's cases at the same time this Court considers *Students for Fair Admissions* will be beneficial to the judicial decision-making. It may help lead to the Court holding in *Students for Fair Admissions* that equal protection allows for consideration of race ("affirmative action") when based upon the African-American applicant demonstrating his or her worthiness for Ivy League admission, thus benefiting African-Americans who continue to be burdened by our nation's long history of racism. Deciding here that due process requires confrontation will likewise benefit African-Americans harmed by the flip side of that coin-- implicit bias resulting in ALJs denying the right of confrontation when witness credibility is at issue.

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[15] *See, Lani Guinier, Foreword, Demosprudence Through Dissent*, 122 HARV. L. REV.6 (2008), https://harvardlawreview.org/wp-content/uploads/2020/10/122HarvLRev4.pdf.

Granting Petitioners certiorari will thus benefit the Court, the Petitioners, and the interests of justice in our land.

Respectfully submitted,

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Michael Diederich, Jr.
Counsel of Record for Petitioners
361 Route 210
Stony Point, NY 10980
(845) 942-0795
Mike@DiederichLaw.com

February 4, 2022

Rule 44 Certification

The undersigned Counsel of Record certifies that this motion for reconsideration is restricted to the grounds specified in Rule 44, and that it is presented in good faith and not for delay.

3 February 2022

/S/

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Michael Diederich, Jr.