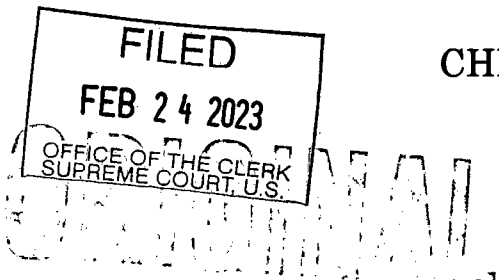
22-7448

No. _____

IN THE SUPREME COURT OF THE UNITED STATES



CHRISTOPHER SWINDELL

PETITIONER,

-v-

CACI NSS, INC., f/k/a L-3 National Security Solutions, Inc.; Quick Services, LLC

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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April 29, 2023

QUESTIONS PRESENTED

In *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993), this Court held that a workplace "permeated with discriminatory intimidation, ridicule, and insult can be sufficiently severe or pervasive to alter the conditions of the victim's employment," in violation of Title VII. Reporting such violations are protected activities under Title VII. 42 U.S.C. § 2000ff-6(f). The 4th Circuit, in *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 273 (4th Cir. 2015), held that "to demonstrate retaliation a plaintiff must show that she was terminated because she engaged in protected activity." Courts have traditionally held that "secretive surveillance of an employee may constitute an adverse employment action sufficient to support a claim of retaliation." *Kazcmarek v. County of Lackawanna Transit System*, 2017 WL 5499160 at 3 (M.D. Pa. 2017).

I. Whether four months of constant racist comments, including anti-black tropes, monkey-imagery, and direct references to white-nationalist symbols, some directed at, and others made in the presence of protected groups of employees (African Americans) are sufficient to constitute a hostile work environment under Title VII of the Civil Rights Act of 1964?

II. Whether secretive surveillance of an employee's home immediately after they engaged in a Title VII protected activity is an adverse retaliatory action that violates Title VII of the Civil Rights Act of 1964 and/or 42 U.S.C. § 1981?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as followed;

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IN THE SUPREME COURT OF THE UNITED STATES

CHRISTOPHER SWINDELL

PETITIONER,

-v-

CACI NSS, INC., f/k/a L-3 National Security Solutions, Inc.; Quick Services, LLC

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Christopher J. Swindell respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of the U.S. court of appeals respecting rehearing and rehearing en banc appears at Appendix C to the petition and is reported at 2022 U.S. App. LEXIS 27117. The unpublished opinion of the U.S. court of appeals appears at Appendix A to the petition and is reported at 2022 U.S. App. LEXIS 24434. The opinion of the U.S. district court appears at Appendix B to the petition and is reported at 2020 U.S. Dist. LEXIS 24056.

JURISDICTION

The judgment of the Fourth Circuit was issued on August 30, 2022. A timely petition for rehearing and rehearing en banc was denied by the Fourth Circuit on September 27, 2022, and a copy of the order denying rehearing and rehearing en banc appears at Appendix C. On December 22, 2022, the Honorable Chief Justice

John Roberts extended the time to file the petition for a writ of certiorari, which was granted to and including February 24, 2023, in application No. 22A563. On March 1, 2023, the clerk of this court granted 60 additional days to refile the petition with an updated appendix. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL, TREATY, STATUTORY, AND ADMINISTRATIVE LAW PROVISIONS

42 U.S. CODE § 1981 - EQUAL RIGHTS UNDER THE LAW

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

STATEMENT OF THE CASE

I. Mr. Swindell, an African American intelligence contractor was subjected to a hostile work environment in violation of Title VII due to constant racial harassment and discrimination from his white coworkers and training instructors.

Mr. Christopher Swindell served honorably in the United States Air Force (USAF) as a Geospatial Intelligence Analyst, from December 2009 to February 2015. J.A. 608. After receiving an honorable discharge from the USAF, Mr. Swindell was hired as an Intelligence contractor with Quick Services LLC (QSL), a sub-contractor of CACI NSS, f/k/a L-3 National Security Solutions, Inc. (L-3) J.A. 609. Neither L-3 nor QSL disputed their status as joint employers for purposes of their motions for summary judgement. J.A. 2050.

Mr. Swindell was the sole African American in his training class and immediately started hearing racist comments by his classmates and training instructors, which lasted throughout the entirety of training. J.A. 17. Additionally, Mr. Swindell noticed that when reviewing his near perfect work products, his training instructor, Marian Spencer seemed bothered, she however, praised Mr. Swindell's white classmates when they submitted inferior work products. J.A. 17. After completing training, Mr. Swindell was assigned to the Red Team where he was the only African American contractor on the 35-person team, and he continued to be subjected to disturbing racial comments by his co-workers. J.A. 617. Some of the racist comments were directed at Mr. Swindell and others were made in his presence. The primary instigator of the comments was Mr. Robert Harrison

(Robert), QSL's assistant site lead. Mr. Swindell compiled detailed notes of the comments, some of the more egregious comments are listed below.

1. During the week of March 9-19, 2015, a white training classmate stated, **"I know an older white woman who still calls black people coloreds. Who am I to tell her to stop calling them coloreds. She's been doing it for so long. She's just a harmless old white lady. Well, they are colored, aren't they?"** J.A. 270.

2. During that same week, Marian Spencer and Dick Holden, Mr. Swindell's two white training instructors had this conversation during class, **"Black people can't swim because of their body makeup or muscle mass/genetics." "I just thought they didn't like swimming."** J.A. 270.

3. Sometime between March 23 and April 3rd, a white training classmate stated, **"White Power, no offense Swindell."** J.A. 270.

4. During the week of April 9th, shortly after Mr. Swindell started working on the operations floor, a white co-worker asked Glen Gamble, the sole African American military member on the Red Team in the presence of Mr. Swindell, **"How many people in your family have been to college? I'm not just saying that because you are a black kid. Me and my brother were the first to go to college in my family."** J.A. 271.

5. On May 28th, Robert, QSL's assistant site lead stated, **"Chris, when I think of EBT (food stamps), I think of you."** Mr. Swindell responds, **"why is that?'** Robert responds, **"I don't know."** J.A. 1819.

6. On May 28th, Robert was speaking with Mr. Swindell and Meagan Welch, a white female co-worker and Robert stated, Meagan **"you couldn't take a black man's banana, you would slip and fall in your Va-Jay-Jay juice."** J.A. 271.

7. On May 28th, Glenn Gamble asked Mr. Robert Harrison, **"Do we humans have veins in our stomach?"** Robert responded, **"You wouldn't be able to see the veins in your stomach because you are black."** J.A. 271.

8. On May 28th, Robert asked Glenn Gamble, "**why can't black people swim?**" Glenn Gamble responded, **"I can't swim."** Robert then turned and asked Mr. Swindell, **"Can you swim?"** Mr. Swindell responded, **"Yes, I can swim."** J.A. 271.

9. On May 30th, a white co-worker told Mr. Swindell, **"You couldn't fit in Yemen because you are a bigger black guy and Africans are skinny."** J.A. 272.

10. During the week of June 1st, in a conversation about political sitcoms, Mr. Swindell stated, **"If I was on the House of Cards, I would be a politician."** A white co-worker, who was also the Non-Commissioned Officer in Charge replied, **"No, I would see you as the black guy who owns the rib joint."** J.A. 272.

Mr. Swindell reported these comments on several occasions to L-3, QSL, and military leadership, but the comments persisted. Mr. Malave pushed for bias training; however, he was told that Equal Opportunity (EO) training was not effective. J.A. 1124.

A. The District Court erred in finding that ten comments, which invoke the most odious anti-black racial stereotypes, including monkey-imagery are mere insensitive and offensive utterances that do not constitute a racially hostile work environment.

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of an employee's "race, color, religion, sex, or national origin." 3 U.S.C. § 411(a)(1). The act's protections are exhaustive and "affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986). The district court found that "no rational jury could find that Mr. Swindell's work environment was racially abusive or hostile because these comments were mere "insensitive, offensive

utterances." J.A. 2058. Plaintiff disagrees. In their Amicus Curiae brief in support of Mr. Swindell's appeal to the Fourth Circuit, the NAACP Legal Defense and Education Fund, Inc. (NAACP-LDF) argued that the district court adopted and applied a narrow and cramped view of Title VII protections which decontextualized and reduced some of the most pernicious and demeaning anti-black stereotypes by characterizing them as insensitive, offensive utterances. Brief of *Amicus Curiae* NAACP-LDF, p. 56 [App.D].

When Robert was speaking with Mr. Swindell and Meghan Welch, a white co-worker, he turned to her and stated that "she could not take a black man's banana and [she] would slip and fall in her va-jay-jay-juice." We assume that Robert was referring to the banana as a penis and the va-jay-jay juice a woman's arousal fluids. J.A. 271. This reference is not only sick and twisted, but dangerous. This unambiguous racist trope sexualizes the genital size of an African American male's penis, then inserts the animalistic imagery of a monkey, conjuring up images of "savage, bestial sexual predilection[s]." *Boyer*, 786 F.3d at 283. *See Walker v. Thompson*, 214 F.3d 615, 626 (5th Cir. 2000) (holding that the use of the word "monkey" to describe African Americans was similarly odious and "[t]o suggest that a human being's physical appearance is essentially a caricature of a jungle beast goes far beyond the merely unflattering; it is degrading and humiliating in the extreme." *See also Boyer,* 786 F.3d at 283 (holding that monkey-imagery is "acutely insulting to members of the African American community" and "is the stuff of which a racially hostile work environment is made.")

When a white co-worker made the comment "White Power, no offense Swindell," he used the intolerable language in the context of preferring to use white outlines on an imagery intelligence product rather than black outlines. J.A. 270. White nationalism and supremacist jokes are not merely offensive and insensitive, as they are rooted in an abhorrent ideology. The N-word and the term "white power" are both used to invoke fear in black people and dehumanize them, which is why demeaning comments and slurs that support the white supremacist ideology, even used jokingly, create a hostile work environment. In *Collins*, a court decided that "outrageous racially offensive comments" would lead to a "hostile work environment." *Collins v. Faurecia Interior Sys., Inc.*, 737 F. Supp. 2d 792 (E.D. Mich. 2010) (holding racially offensive comments like stereotypes and slurs made by white employees to black employees would make a work environment hostile).

When a co-worker made the comment that black people cannot swim because of their body makeup or muscle mass, it harkened back to the noxious theory that black people are genetically inferior to other races. *See McKinnie v. Conley*, 2006 U.S. Dist. Lexis 40124, at *12 (June 12, 2006) (holding that a reasonable jury could conclude that a swimming coach who mentioned that her dog did not like black people and that she observed that black children could not float to an African American employee could have subjected him to a racially hostile work environment.) Moreover, in their amicus brief filed in support of Mr. Swindell's appeal, the NAACP-LDF stated that these sorts of comments "invoked a stereotype that black people are inherently inferior, which has been used for over four

centuries to justify the most horrific abuses of African Americans." Brief of *Amicus Curiae* NAACP-LDF, p. 57 [App.D]. Similarly, when Robert stated that Mr. Swindell's mere presence reminded him of food stamps, his comment perpetuated a false stereotype that black people are lazy and generally dependent on government assistance. Promoting these types of stereotypes at work makes the environment hostile. *See Zarda v. Altitude Express, Inc.*, 883 F.3d.100, 156 (2d Cir. 2018) (holding that invidious stereotyping of members of racial, gender, national, or religious groups is at the heart of much employment discrimination.)

The district court minimized the effect of the comments by mentioning that only four of the ten comments were directed at Mr. Swindell, which is in direct conflict with this court's interpretation of Title VII protections. The NAACP LDF noted that "this Court has held that the idea that racial comments must be targeted at the plaintiff 'finds no support in the law.' *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 184 (4th Cir. 2001) (reversing grant of summary judgment where plaintiff's supervisor incessantly used 'racial slurs' in front of him, none of which were directed at [the] plaintiff)." Brief of *Amicus Curiae* NAACP-LDF, p. 60 [App. D]. If the district court's decision below is not corrected, African Americans in the Eastern District of North Carolina who are subjected to these same types of racist tropes in the future will not have redress under Title VII.

B. The North Carolina Equal Employment Opportunity Commission found that Plaintiff's employers L-3 and QSL violated Title VII and subjected Mr. Swindell to a racially hostile work environment, showing that a rational jury could find the same.

The Civil Rights Act of 1964 created the Equal Employment Opportunity Commission (EEOC), the federal enforcement bureau, which is "responsible for directing and furthering the implementation of the policy of the Government of the United States to provide equal opportunity in Federal employment for all employees or applicants for employment and to prohibit discrimination in employment because of race, color, religion, sex, national origin, handicap, or age." 42 U.S.C. § 2000e-4; 44 F.R. 1053.

The district court's theory that the racial harassment that Mr. Swindell endured could be debased to mere insensitive, offensive utterances are contradicted by the North Carolina (EEOC), which found that: (1) "[Mr. Swindell] was employed with the respondents as a Full Motion Video Analyst," (2) "[Mr. Swindell] contends that he was subjected to unwelcome racial comments by his coworkers," (3) "The evidence further shows that [Mr. Swindell] complained to several members of management about the racial harassment," (4) " Despite his complaints, the racial slurs continued," (5) "The respondent[s] failed to take immediate and appropriate action to ensure that the racially harassing behavior ceased," and (6) "Therefore, the evidence shows that [Mr. Swindell] was subjected to a racially hostile work environment because of his race, Black, in violation of title VII." J.A. 30, 32. The

North Carolina EEOC's findings establish that rational jurors could find the comments created a racially hostile work environment.

C. Defendants were aware of the racist comments but chose to overlook the harassment and discrimination.

Mr. Swindell's direct supervisor, Mr. Malave, a 21-year veteran of the United States Army, agreed that the racist remarks were offensive and attempted to stop the behavior. J.A. 659, 662. When Mr. Malave confronted Robert about the racist comments, Robert became defensive and stated, "if he and others were limited in what he and others could say in the workplace, it would lower morale." J.A. 663. Robert is plainly stating that the ability to make racist comments is essential to the workplace culture. Robert also told Mr. Malave that he "could claim that he was 'targeted,' too" because of Mr. Swindell's complaints. J.A. 663.

Mr. Malave desperately pushed for formal training on unlawful discrimination and harassment in the workplace based not only on Mr. Swindell's report, but also on "[his] own experience with several members of the Red Team." J.A. 664. Mr. Malave stated, "I continued to push for training for the next month, however, I received no response from my superiors, Mr. Moore and Mr. Byers." J.A. 665. Mr. Malave stated that later, Major Hale, the Troop Commander of the military, responded that he "did not feel that EEO training would be necessary or effective." J.A. 665. Mr. Malave was told by his boss Jim Moore, "that several employees on the Red Team, including Robert and others, had threatened to leave if [Mr. Malave] continued as their team leader. J.A. 668. Mr. Moore informed [Mr.

Malave] that rather than lose those employees, he had decided to reassign [him]. J.A. 668.

Mr. Malave believed that "[his] insistence that the racist environment reported by Mr. Swindell be addressed through formal EEO training to address the harassment was resented" and another reason for the decision to reassign and demote [him]. J.A. 668, 669. On July 27, 2015, Mr. Malave sent a letter to the Fort Bragg Inspector General's Office alleging constant violations to the Army EO Policy and Title VII, "expressed in the form of offensive jokes, slurs, epithets or name calling, ridicule or mockery, insults or put-downs which interfere[d] with [Mr. Swindell's] work performance and created a hostile work environment." J.A. 680.

Email correspondence between senior management dated July 16th shows that the key decision makers in QSL and L3 were aware of the ongoing issues with Robert, however, they decided not to act. J.A. 721-722. Specifically, Scott Byers, L-3's Deputy Program Manager emailed Jason Sawyer, QSL's Director of Operations that "[n]ot only in this situation but in many others, Rob Harrison seems to be a central name that keeps coming up. He keeps making inappropriate comments and then tries to explain them away." Jason responds to this email by stating, "I also agree that Rob has issues with his filter and that was one of the things I addressed with him at our meeting as you recall." J.A. 721-722.

II. Mr. Swindell's home was surveilled after reporting racial harassment and discrimination, which was an adverse employment action that supports his claims of retaliation in violation of Title VII and 42 U.S.C. § 1981 and raises significant questions regarding the defendant's credibility.

Mr. Swindell first reported the racist comments on the Joint Special Operation Command's client survey during the week of May 20, 2015. J.A. 506-507. As the racist comments continued, Mr. Swindell decided to report the comments to Mr. Malave on the night of May 31, 2015. J.A. 508. On the same night, Mr. Malave asked Mr. Swindell to report the comments to Matt Craig, the government team Chief and Mr. Swindell complied. J.A. 508. Mr. Craig and Mr. Malave called a Red Team meeting where Mr. Malave told the contractors that they could not make racist comments at work. J.A. 508. Immediately following the meeting, Mr. Robert Harrison and Mr. Clark Hovland asked Mr. Swindell to come into an empty conference room, where Mr. Robert Harrison stated "you might want to come to us with any problems because you know you don't want this to get to Jason Sawyer...and we have been hearing things about your performance." J.A. 648. Mr. Swindell was not having any performance issues and took the comments as a threat to invent performance issues if he continued to report the racist comments. J.A. 649. On July 12, 2015, Mr. Swindell reported harassment, discrimination, and retaliation to Mr. Malave's replacement, Mr. Loori after being given a falsified performance improvement plan to sign. J.A. 509. On the evening of July 12th, Mr. Swindell called Mr. Sawyer, the Quick Services LLC director of operations, and reported racial discrimination, harassment, and retaliation. J.A. 509-512. Mr.

Swindell recorded the phone call. J.A. 653.

At the end of the call, Mr. Swindell conveyed to Mr. Sawyer that he was in distress because the racial harassment was taking a toll on him, and he needed to take two days of paid time off (PTO). J.A. 511. Mr. Sawyer advised Mr. Swindell to clear the days off with his shift leads and Mr. Swindell complied. J.A. 511. Mr. Sawyer responded by saying, "take care of yourself, take it easy and get some iced tea or drink a beer and relax...I'll dig into this and get it figured out and worked out." J.A. 215. Following Mr. Sawyer's suggestion, Mr. Swindell texted Mr. Felix Ulloa (Felix), the shift lead, that he would be taking PTO for the next two days for "serious issues that make [him] "feel uncomfortable in [his] work environment." J.A. 714. Felix responded, "Roger, that will put your leave on schedule." J.A. 714.

Approximately seven days after Mr. Swindell reported racial harassment, discrimination, and retaliation to Mr. Sawyer, L-3 and QSL conducted physical surveillance of Mr. Swindell's home, subsequently discussing the surveillance in an email thread. J.A. 719-722. On July 20, 2015, at 12:46 PM, Scott Byers emailed Jason Sawyer, James Moore, and Kendall Smalls, "Hearing rumors that Chris Swindell moved out of his apartment." J.A. 721. Twenty-two minutes later Jason responded, "Hmm. Told me he was on a family vacation. I asked [him] to email me a time we can have a conference call and he acknowledged." At 2:50 PM, Scott Byers responds to Jason Sawyer stating, "rgr his car was back this morning, but he did have Uhauls in front of his apartment a few days ago." J.A. 720. At 3:05 PM, James Moore responds to the email thread stating, "We need to quit speculating on what is

going on with him and just let QSL figure out his current disposition. We can't be tracking who is at his house and who is not. Jason, please report back to us on anything we 'need' to know about his current situation." J.A. 719. Notably in this email thread, Jason sawyer lied when he said that Mr. Swindell told him that he was going on vacation, which is contradicted by the recorded phone call transcript, which shows that Mr. Swindell told Mr. Sawyer that he needed to take PTO due to racial harassment and retaliation. J.A. 273-276.

A. The District Court overlooked that conducting surveillance on an employee after they have engaged in Title VII protected activities is an adverse employment action and a form of retaliation.

To establish a prima facie claim of retaliation in violation of Title VII, 42 U.S.C. § 2000e-3(a), a plaintiff must show that (1) the employee engaged in protected activity; (2) the employer took adverse employment action against the employee; and (3) a causal connection existed between the protected activity and the adverse action." *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 365 (4th Cir. 1985). *See Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (holding that a materially adverse action is one that would "dissuade" a reasonable worker from" engaging in protected activity and exercising her legal rights.) As placing an employee under surveillance would dissuade a reasonable person from exercising her legal rights, such surveillance can be actionable. *Hubbell v. FedEx SmartPost, Inc.*, 933 F.3d 558, 570 (6th Cir. 2019).

Courts have consistently held that secretive surveillance of an employee may constitute an "adverse employment action" sufficient to support a claim of

retaliation. *Kazcmarek v. Cty. of Lackawanna Transit Sys.*, 2017 WL 5499160, at 7 (M.D. Pa. 2017). *See, e.g., Bind v. City of New York*, 2011 WL 4542897, at 10 (S.D.N.Y Sept. 20, 2011) (holding that even if an employee is unaware of surveillance, it could cause a reasonable employee to be subject to "significantly different responsibilities," which would be "more disruptive than a mere inconvenience or alteration of job responsibilities," and would "clearly [constitute] an adverse employment action"); *Fercello v. County of Ramsey*, 612 F.3d 1069, 1081 (8th Cir. 2010) ("[P]lacing an employee under constant surveillance could be evidence of retaliation."); *Cichonke v. Bristol Twp.*, 2015 WL 8764744, at 19 (E.D. Pa. Dec. 14, 2015) ([I]t is possible that a reasonable jury could find that such [surveillance] was an adverse employment action."); *Mendez v. Starwood Hotels & Resorts Worldwide, Inc.*, 746 F. Supp. 2d 575, 597 (S.D.N.Y. 2010) ("[T]here is nothing unreasonable about the jury's concluding that secret surveillance by an employer well might . . . dissuade a reasonable employee from continuing to" engage in a protected activity.)

When Mr. Swindell reported concerns about hearing racial comments on a government client survey, then to Mr. Malave, and finally to Mr. Loori and Mr. Sawyer on July 12th, 2015, those activities were protected under Title VII. 42 U.S.C. § 2000ff-6(f). Surveillance after reporting Title VII protected activities constitutes an adverse employment action against the employee. *Cichonke*, 2015 WL 8764744, at 19. Lastly, based on the defendants' emails from their official accounts, it is objectively provable that defendants surveilled Mr. Swindell's home, multiple times

at least seven days after he engaged in these protected activities, showing temporal proximity between the protected activity and the retaliatory surveillance.

B. Defendant's denials of physical surveillance are not credible.

First, Mr. Byers, the originator of the surveillance emails, stated in his deposition that he did not remember who told him that Mr. Swindell was moving out of his apartment. J.A. 1147. Note: Mr. Swindell never moved out of his apartment, as the moving truck was that of an unknown resident in the complex. Next, when asked who was providing him the information about Mr. Swindell's car movements, he responded "I don't remember the exact employee." J.A. 1148. The emails contained specific information about the goings on at Mr. Swindell's home, such as "Rgr, his car was back this morning." J.A. 720. The emails also show Mr. Byers knew Mr. Swindell's car was not present the night prior. J.A. 720. The second part of the email references U-hauls that were in front of the apartment "a few days ago." J.A. 720. This admission further proves that the surveillance started prior to the emails, just days after Mr. Swindell made his last complaint. When pressed on the issue Mr. Byers stated "[n]o one was ever told to watch Chris's apartment. More than likely someone on the team lived in the neighborhood, close by, a different apartment building or whatever." J.A. 1149. Mr. Byers initiated this email thread that included very specific information about the movements of Mr. Swindell on at least three separate occasions.

Mr. Swindell directly reported racial harassment, discrimination, and retaliation to Mr. Sawyer roughly seven days prior to the surveillance email thread.

J.A. 1035. Mr. Sawyer was on the email thread and acknowledged receiving the emails. J.A. 1035. When asked about the emails, Mr. Sawyer responded, "I didn't write it" and "I can't speak to why Mr. Byers sent that to me." J.A. 1036. When asked about what Mr. Byers was speculating about and why Mr. Byers was tracking Mr. Swindell's car, he responded, "I can't speak to that." J.A. 1036. When asked whether he was curious about the surveillance emails, he responded "No". J.A. 1038. In summary: Mr. Swindell informed Mr. Sawyer, director of operations at QSL, that he was the victim of racial harassment, discrimination, and retaliation on July 12, 2015. J.A. 509-512. Roughly one-week later Mr. Sawyer was party to an email thread discussing surveilling Mr. Swindell's home and Mr. Sawyer claims he was not even curious about why L-3 would be surveilling Mr. Swindell's home, an employee who roughly seven days prior to the email thread reported racial discrimination and retaliation and had to take PTO because of the severity of the harassment. J.A. 1038. Sawyer's claims lack credibility on their face.

The last email on the thread is from Mr. James Moore who instructs Mr. Byers that "we can't be tracking who is at his house and who is not." J.A. 719. This admission raises the stakes, as the other emails do not mention that the visitors entering and exiting Mr. Swindell's home were being tracked. When asked, who was watching Mr. Swindell's front door, Mr. Moore responded, "I don't know." J.A. 1321. When pressed, Mr. Moore then goes on to say that Mr. Byers himself was possibly the person surveilling Mr. Swindell's home. J.A. 1322. This raises questions, as Mr. Byers was instrumental in the termination of Mr. Swindell, and it is a stunning

admission that Mr. Moore believed that Scott Byers could have been the person surveilling Mr. Swindell's home. Mr. Byers said in his deposition that he could not recall who was feeding him the surveillance information. J.A. 1148. These emails speak volumes to the intentions and culpability of the defendants.

While employed with L-3/CACI NSS and Quick Services LLC, Mr. Swindell lived at 381 Gallery Drive Unit 104. J.A. 1717. This address is unique as it is in the Anderson Creek Club, a private 24-hour gated community, which is located roughly fifteen miles or 30 minutes away from the Joint Operations Command compound where Mr. Swindell worked at the Joint Intelligence Brigade. J.A. 654. The apartments at Anderson Creek were secluded deep within the gated community. J.A. 654. Due to the private nature of the community, knowledge about the activities at Mr. Swindell's home required intentional surveillance.

C. Defendant's credibility is further eroded by engineering pretext and falsifying documents after the fact.

Mr. Swindell"s upstairs neighbor, Justin Shaw, was a fellow intelligence contractor who also worked on the Red Team. J.A. 654. Mr. Felix Ulloa once told Mr. Swindell that the only people who lived in Anderson Creek Club were [himself] and Justin Shaw. J.A. 654. Shaw is the only employee who plausibly could have surveilled Mr. Swindell in his gated community. In his deposition, computer expert Mr. Schagane identified Justin Shaw as the creator of the contested mystery document covering supposed performance issues on July 21, 27 and 28th, which Mr. Swindell alleges was a pretext for his termination. J.A. 1582.

The defendants were surgically engineering pretext when Mr. Swindell was

at work and while he was at home with his family. The involvement of an employee for both surveillance and the creation of notes used to justify Mr. Swindell's termination is evidence that Defendant was manufacturing pretext. It also supports the allegation that Robert Harrison and Marian Spencer falsified a performance report dated May 30-31. J.A. 87. Robert listed himself as Mr. Swindell's supervisor. J.A. 87. Robert and Marian Spencer purported to provide "verbal counseling" to Swindell on his "deficiencies," including timeliness and errors in his work. J.A. 650. No such counseling took place. J.A. 650. Neither Mr. Swindell nor Mr. Malave learned of the existence of Robert Harrison's falsified document until after Mr. Swindell's termination. J.A. 650, 665.

Mr. Malave cast serious doubts on the authenticity of this document, stating "[b]ased on our procedures, it was our practice and procedure that any written counseling reports to members of the Red Team (including L-3 and subcontract employees) had to be issued by me." J.A. 665-666. "In addition, such reports had to be signed by the supervisor, as well as the employee." J.A. 666. "It was a normal part of my supervision and administration of the Red Team to review such reports and conduct the counseling on an L-3 counseling form. J.A. 666. Issuing the above report of May 30-31 without my involvement would have been a violation of our procedures." J.A. 666. "Based on these violations of our practice and procedure and that I had never been made aware of the form, and that it was not signed, I believe that the report may have been prepared after the fact." J.A. 666. Said document is included in the Appendix.

The defendants have produced additional falsities that can easily be dispelled. Felix stated in his deposition that Mr. Swindell was always placed with a team trainer because of performance issues. J.A. 87. The evidence shows that this is a blatant fabrication, as in Mr. Loori's May 31 counseling report, the proposed next steps were to assign Mr. Swindell a trainer. J.A. 704. It would defy common sense to assign Mr. Swindell a trainer if he was already accompanied by one. Further, the defendants hypothesized that Mr. Swindell had problems with touch-typing, however, in order to pass the intelligence course, an analyst must type 35 words per minute and Mr. Swindell passed with 41 words per minute. J.A. 86. The defendant points out that Mr. Swindell repeated the initial intelligence training. The defendants often neglect to mention that two of the three analysts in Mr. Swindell's class also had to repeat training and the third analyst was recommended with reservations. J.A. 550. Lastly, the defendants would have the court believe that the government was responsible for Mr. Swindell's termination. However, the government has expressly and repeatedly denied this assertion and stated that they did not have the authority to terminate a private contractor. J.A. 2087. Mr. Swindell's best evidence (surveillance) was ignored, and the defendant's pretext was accepted, which is why this case needs to be reviewed for accuracy and justice.

REASONS FOR GRANTING THE WRIT

By affirming the district court's ruling, the Fourth Circuit minimized the use of egregious racial stereotypes in the workplace, weakening protections under Title VII, ensuring that black employees will face steep hurdles when addressing racial

harassment, discrimination, retaliation, and unlawful surveillance. Surveillance of employees following complaints of discrimination is an issue lacking clear precedent from this Court. Surveillance, in and of itself, after reports of discrimination is a form of retaliation that can discourage others from raising complaints and a clear demonstration of bad faith on the part of employers. Moreover, this type of surveillance is prohibited under Title VII, and if it is not the national implications would be disastrous for the privacy rights of employees at there homes. This Court should make clear such behavior is unacceptable.

Having failed to address the surveillance of Mr. Swindell's home, both the District Court and the Fourth Circuit have left the question of whether surveillance after reports of racial discrimination, harassment, and retaliation are proof of further discrimination and retaliation. Because the District Court ruled on important issues of federal law that conflicts with Title VII and because the courts neglected to address Mr. Swindell's claims of unlawful surveillance, this court should grant certiorari.

The district court's decision is clearly erroneous and the fourth Circuit's unpublished and unreasoned opinion is equally as puzzling. We understand that erroneous factual findings are rarely granted review, however, this court's power is far reaching and can have positive implications for African Americans throughout the country, if it is made clear that racist language and surveillance of employees who engage in protected activities are prohibited. The lower court's decision will lead to confusion, injustice, and a lack of consistency in the application of the law. If

African Americans in the Eastern District of North Carolina must endure severe racial harassment, retaliation, and surveillance, without any redress of the law, then in this specific geographical location there is a gap in the uniformity and application of Title VII protections.

By reviewing the decision, the Supreme Court can reinforce that the legal system is fair, impartial, and uniform, no matter where you live. Unless this court reviews, we will never truly know why L-3 and QSL conducted surveillance on an employee who reported racial discrimination. Getting to the truth, is the best way to achieve justice. The United States Supreme Court is the only court that can correct this wrong.

CONCLUSION

For these reasons, we respectfully ask this court to grant certiorari and reverse.

Respectfully submitted,

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April 29, 2023