No. _____

In the
Supreme Court of the United States

MICHAEL A. CALDWELL AND ROBERT M. HAHN,
Petitioners,

v.

JOSEPH M. GASPER AND THE MICHIGAN STATE POLICE,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether opposition to an employer's "Diversity Initiative" (non-remedial race and gender preferences) constitutes protected activity under 42 USC § 1981 and Title VII of the Civil Rights Act of 1964.

PARTIES TO THE PROCEEDING

Petitioners are Captain Michael Caldwell and Inspector Robert M. Hahn, formerly of the Michigan State Police ("MSP").

Respondents are Joseph M. Gasper, Director of the MSP and the MSP. Gasper and the MSP were defendants in the District Court and appellees in the Court of Appeals.

Governor Gretchen Whitmer was also a defendant but was dismissed from the case by the District Court.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Caldwell & Hahn v. Gasper, et al.*, Nos. 22-1031/1032 (memorandum opinion issued November 1, 2022.
- *Hahn v. Gasper, et al*, No. 1:20-CV-403; *Caldwell v. Gasper, et al.*, No. 1:20-CV-411 (cases combined, order granting summary judgment filed December 27, 2021)

Petitioner Caldwell has filed a Michigan state court complaint in the Circuit Court for the County of Livingston, No. 21-31259 – CD, stayed by stipulation of the parties, February 16, 2022. This case was filed because the District Court denied Petitioner Caldwell's Motion to Amend to include allegations of retaliation which occurred after the close of discovery. Caldwell R 156.

There are no other proceedings in state or federal trial or appellate courts directly related to this case.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The unpublished opinion of the Sixth Circuit Court of Appeals (*"Opinion"*) **(App. A)** is reported at 2022 WL 16629161 (6th Cir. 2022). The District Court's unpublished opinion in Hahn is reported at 2021 WL 9666846. **(App. C)** The unpublished opinion in Caldwell, No. 1:20-cv-411 is not reported. **(App. C)** The Sixth Circuit Opinion addresses both cases. 2022 WL 16629161 at *2, fn. 2.

JURISDICTION

The judgment of the Court of Appeals was entered on November 1, 2022. Petitioners' Timely Motion for Rehearing En Banc was denied on December 1, 2022 **(App. B)**. Petitioners timely filed their appeals on January 12, 2022.

On December 1, 2022, the Court of Appeals denied Petitioners' Petition for Rehearing En Banc **(App. B)** which made their petition for certiorari due in this Court on or before March 1, 2023. This Court has jurisdiction under 28 USC § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. 42 USC § 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

2. 42 USC § 1981 states:

> 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.

3. Title VII of the Civil Rights Act of 1964, 42 USC § 2000(e)—3(a) states:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees … because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

I. STATEMENT OF THE CASE

A. Overview

Petitioner Michael A. Caldwell was a Captain in the Michigan State Police ("MSP") for the 7th District, which encompasses 19 counties in northern Michigan. Petitioner R. Michael Hahn was his Inspector and direct report. On March 13, 2020, the MSP demoted Caldwell and terminated Hahn because they opposed MSP's "Diversity Initiative" and advocated for the rights of White males in the MSP.

42 USC § 1981 and Title VII of the Civil Rights Act of 1964, 42 USC § 2000e-3(a) bar employers from discriminating against employes that oppose violations of those statutes. Employees are protected under these statutes if they oppose (1) an actual violation of the statute or (2) what they reasonably, in good faith, believe is an actual violation of the statute.

The lower courts held that Petitioners' opposition to Respondents' "Diversity Initiative" and advocacy for White males was not protected activity, but rather, "general complaints of unfairness."

Respondent Colonel Joseph M. Gasper explained the "Diversity Initiative" at a meeting of all command staff on October 8, 2019:

> **"We're way too White, and way too male."**
>
> **"I am going to diversify all ranks of the MSP."**
>
> He would be **setting aside 25% of the positions within the MSP for minorities and 20% for females.**

> **MSP members should not think of "Me," but rather of "Us," if denied a promotion for the sake of diversity. (**Sixth Circuit Opinion ("*Opinion*") at 7-8.)

Petitioners seek a ruling from this Court that opposition to non-remedial racial and gender preferences dressed up as "diversity" is protected activity under 42 USC § 1981[1] and Title VII, 42 USC § 2000e-3(a). Petitioners also request a corollary ruling that such non-remedial preferences are a*ctual* violations of the statutes.

B. Statement of Facts

According to Colonel Gasper, the MSP is "way too White, and way too male." Consequently, the #1 priority of the Michigan State Police ("MSP") is not policing. It is not even public safety. The #1 priority of the MSP is "diversity" (HR Dir Stephanie Horton at 23, Caldwell R ("CR"), 142-5, PageID.1160; Caldwell at 95-96 CR. 142-2, PageID.1129)[2], which means race and gender balancing the MSP workforce so that it mirrors the population (Gasper at 21-22, CR. 142-6, Page ID.1172-1173) --- at the expense of White males.

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[1] Petitioners have brought § 1983 claims based on 42 USC § 1981. *Opinion* at *1, n.1.

[2] For citations to the appeals court docket, "Caldwell ECF No." refers to the docket in Caldwell's case, *Caldwell v Gasper*, No. 22-1031. The docket in Hahn's case, *Hahn v. Gasper*, No. 22-1032, in turn is referred to using "Hahn ECF No." For citations to the record before the district court, "CR" refers to the trial court docket in Caldwell's case, *Caldwell v Gasper*, No. 1:20-cv-411. The docket in Hahn's case, Hahn v. Gasper, No. 1:20-cv-403, in turn is referred to using "HR."

Because Petitioners opposed their racial and gender balancing, Respondents demoted Caldwell and fired his Inspector, Hahn. Both were 30-year, high level employees with exemplary, spotless records.

The Sixth Circuit held that Petitioners' opposition to Respondents' race and gender balancing was not protected activity. Rather, it was merely "general complaints about unfairness and dissatisfaction with the MSP's reaction to the public outcry over lack of diversity within the police force," not opposition to unlawful discrimination. *Opinion* at 15.

1. MSP's "Diversity Initiative"

Governor Gretchen Whitmer appointed Respondent Gasper Director of the MSP in January 2019 with a mandate to "diversify" the MSP workforce. "Equality" (equal opportunity) was no longer sufficient. "Equity" (equal outcomes) is what was required.

Whitmer and Gasper define "diversity" as matching the MSP workforce demographics with the state population, (Gasper at 21-22, R. 142-6, Page ID ## 1172-1173). The *Opinion* does not discuss this topic. Diversity would be the #1 Priority of the agency, (*Opinion* at 7, HR Dir Stephanie Horton at 23, R. 142-5, PageID.1160; Caldwell at 95-96, R. 142-2, PageID.1129).

To promote race and gender "diversity," Respondents impose race and gender quotas and discriminate against White males to achieve the quotas. That much was evident on October 8, 2019 when Gasper told his assembled command staff:

> **"We're way too White, and way too male."** (*Opinion* at 8; Gasper at 11, CR. 142-6, PageID.1171; Arnold at 10, R 142-7, PageID.1183; Zarotney at 8, CR. 142-4, PageID.156, Hawkins at 10-11, CR.142-8, PageID.1200.)
>
> **"I am going to diversify all ranks of the MSP"**. (Gasper at 12, CR.142-6, PageID.1171; Zarotney at 13, CR.142-4, PageID.1157, Arnold at 14, CR. 142-7, PageID.1184).
>
> He would be **setting aside 25% of the positions within the MSP for minorities and 20% for females**. (Caldwell Declaration, paras 7-10, CR. 142-14, PageID.1235-1236).[3]
>
> **MSP members should not think of "Me," but rather of "Us," if denied a promotion for the sake of diversity.** (*Opinion* at 7; Caldwell at 245, CR. 142-2, PageID.1150; McCormick at 206-207, CR. 142-9, PageID.1202-1203.)

To show he was serious, Gasper forced out four long-serving White males on the Executive Committee with impeccable service records and replaced them with two White females and two Black males. (Kelenske at 37-39, R. 142-10, PageID.1208-1209) Gasper cleared these selections with Governor

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[3] The *Opinion* does not discuss this topic despite Petitioners' reference to it in their Appellate Briefs. Caldwell ECF No. 23, p. 44; Hahn ECF No. 23, p. 42.

Whitmer (Lt. Col. Sands 6/24/21 at 21-25, R. 142-3, PageID.1154-1155). These facts are undisputed and are not discussed in the *Opinion*.

Respondents' "Diversity Initiative" extends to every aspect of employment, including **recruiting** (e.g., entrance exam is now pass/fail and White male trooper applicants are stonewalled (one roster contained no White males)) (Caldwell at 241, 245-246, R. 142-2, PageID.1149-1150), **promotions** (e.g. more experienced/credentialed White males are by-passed for promotion by less qualified, sometimes incompetent, minorities and females) (*Id*. at 100, PageID.1130), **training** (e.g., Gasper's office announced that nominations for troopers to attend the Great Lakes Homeland Security conference were to be based on "demographic diversity") (*Id*. at 250, PageID.1151), **compensation** (e.g., the only mandatory competency for evaluating command officers is facilitating "Diversity & Inclusion," which directly impacts "Pay for Performance" bonuses for the very command officers responsible for hiring new employees and promoting existing enlisted personnel.) (*Id*. at 12, Page ID.1125), and **discipline** (e.g., outrageous double standards in the imposition of discipline throughout all ranks of the MSP) (Caldwell R. 142, PageID.1116-1117; Hahn R. 145, PageID.1148-1149) These facts are undisputed.

Race and gender preferences have long been MSP standard operating procedure (albeit not this extensive). It has been discriminating against White males for decades in all aspects of employment. See e.g., *Herendeen v. MSP*, 39 F. Supp. 2d 899 (W.D.

Mich. 1999), *Cremonte v. MSP,* Michigan Court of Claims Case No. 95-15727-CM Opinion **(App. F)**

Similarly, the *Opinion* fails to consider, or at least discuss, the extensiveness or history of MSP preferences.

2. Petitioners' Protected Opposition Activity

Hahn and Caldwell opposed Gasper's "Diversity Initiative" on October 9, 2019, the day after it was announced. Their opposition included advocacy for White male members of the MSP and race and gender neutral employment practices. This opposition came at the Field Operations Bureau Meeting chaired by Gasper's direct report, Lt. Colonel Rick Arnold, and is captured in Petitioners' corroborated, undisputed declarations. (Hahn, CR. 142-12, Caldwell, CR. 142-14) They include:

1. Caldwell's statement that he was concerned about **how the "Diversity Initiative" was negatively affecting the White males under his command**, explaining that the term "White male" has taken on a negative connotation within the MSP lately and that the term is almost always used in a negative light.
2. Caldwell's statement that in the current departmental culture, **White males feel like they are being excluded from promotional opportunities because they are White males**.
3. Caldwell's rhetorical question **"When the Director publicly states the No. 1 priority**

of the department is to "diversify" the upper ranks of the MSP, how does that foster an atmosphere of inclusion for the members who are not identified as female or minority?" (Caldwell at 95-96, CR. 142-2, PageID.1129; Arnold at 27-31, CR. 142-7, PageID.1185-1186)

4. Petitioners' statements that:

   a. **recruiting and promotions should be based on merit only**;

   b. it was not the MSP's fault that it was a majority White male agency; and

   c. given that the MSP was a majority White male agency, it was statistically reasonable to expect that the majority of MSP members that have risen to the upper command echelon are White males. (Hahn Declaration, CR. 142-12, PageID.1225-1232; Caldwell Declaration, CR. 142-14, PageID.1234-1238; Arnold at 31-32, CR. 142-7, PageID.1186).

See *Opinion* at ECF No. 168, PageID.1515.

Petitioners' directly opposed Gasper's pronouncements with multiple references to discrimination against White males, particularly in hiring and promotions. *Id*. Contrary to the *Opinion*, these statements were not "vague, nonspecific charges of discrimination or general complaints of unfairness and mismanagement," *Id*. at p. 15, PageID.1522, but opposition to illegal (and unconstitutional) race and gender quotas and preferences.

3. Retaliation in Close Proximity to Protected Activity

Petitioners courageously opposed Respondents' "Diversity Initiative" and paid the price. Lt. Col Arnold initiated a bogus investigation of Petitioners ***within three weeks*** of their October 9, 2019 protected activity. Later, while they were under investigation, Respondents on March 9th, 2020, suspended Petitioners ***less than 24 hours after their last protected activity***, an email action memo from Hahn to Caldwell decrying the MSP's inaction on his report of inappropriate racial, ethnic, and gender remarks and double disciplinary standards for Black MSP members. Respondents were able to act so swiftly because they were surreptitiously monitoring Petitioners' emails. (Horton at 54-56, CR. 142-5, PageID.1166). Respondents demoted Caldwell and fired Hahn on March 13, 2020.

The suspicious timing alone created an issue of fact on causation and pretext and required denial of summary judgment. *Mickey v. Zeidler Tool and Die Co.*, 516 F.3d 516, 525 (6th Cir. 2008) (causation), *Briggs v. Univ. of Cincinnati*, 11 F.4th 498, 516 (6th Cir. 2021) (pretext). The *Opinion* fails to address this significant point.

4. Respondents' Knowledge of Protected Activity

Although the lower court declined to reach the issue of whether Respondents knew of Petitioners' protected activity, it stated in fn. 6, p. 12:

> Because we find that Plaintiff's did not engage in protected activity, we need not

> analyze whether Defendants were aware of Plaintiffs' protected activity. Even if Plaintiffs' conduct constituted protected activity, however, **Plaintiffs presented no circumstantial evidence, beyond their own speculation, that indicated that either Gasper or Kelenske had knowledge of their complaints. (**emphasis added)

No "circumstantial evidence, beyond their own speculation?" That is an incredible statement given that:

1. Gasper denied even knowing who decided the discipline (Gasper at 52-53, 55, 58, HR. 145-6, PageID.1179-1182), yet Respondents admitted in their Interrogatory Answers that Gasper participated in the decisions (CR: 142-31, PageID.1278-1290) and Gasper's Chief of Staff, Major Zarotney, testified that Gasper made the "ultimate" decisions to fire Hahn and demote Caldwell. (CR. 142-4, PageID.1159).

2. Caldwell was third in command, reporting to Lt. Col. Arnold, who reported to Gasper; Hahn reported to Caldwell.

3. Arnold testified that given Caldwell's rank, he would have expected that Gasper would make the decision on Caldwell's discipline. (CR. 142-7, PageID.1191; HR. 145-7, PageID1191.

4. Petitioners opposed the "Diversity Initiative" to Arnold on October 9, 2019, and Caldwell opposed it again to the MSP Equity and Inclusion Officer on December 12, 2019.

(Caldwell Decl., CR. 142-14, PageID.1237-1238)

5. Gasper testified that Arnold may or may not have reported Petitioners' opposition to the "Diversity Initiative." (Gasper at 34, 38, 46, CR. 142-6, PageID.1176-1178).

Yet, the lower court apparently assumed that because Gasper denied making the decision, Respondents win. That assumption ignores the above facts and case law that holds that knowledge of protected activity can be inferred from evidence of prior interactions of the decision-maker with individuals that have knowledge of the protected activity, in this case Arnold. See *Garrett v. Mercedes-Benz Fin. Servs. USA LLC*, 331 F. Supp. 3d 699, 715 (E.D. Mich. 2018) summarizing Sixth Circuit case law and *Mathews v. Massage Green LLC, et. al.*, 2016 WL 1242354, *15 (E.D. Mich. 2016).

Most important, the lower court ignored the timing of the last protected activity and the adverse actions. Hahn's 3-8-20 email to Caldwell decrying Respondents' double-disciplinary standards and dilatory EEO efforts (CR. 142-16, HR. 145-16) was followed in less than 24 hours by the suspensions, and 4 days after that, the firing and demotion. Respondents were able to act so swiftly because it is undisputed that the MSP were monitoring Petitioners' email. This fact alone required denial of Respondents' motion. *Mickey v. Zeidler Tool and Die,* 516 F.3d 516, 525 (6th Cir. 2008); *Scott v. Sunrise Healthcare Corp.*, 195 F.3d 938 (7th Cir. 1999) (Knowledge inferred from "adverse employment action on the heels of protected activity.")

If the Court grants cert, Petitioners will provide even further evidence that Respondents were well aware of their protected activity, as set forth in their Appellate and Reply briefs.

5. Respondents' Pretextual Explanation

Respondents, through their counsel, claimed for the first time in their summary judgment motions, that they demoted Caldwell and fired Hahn because they believed **(incorrectly)** that a *promotional* rating form known as a PD-11 was necessary to evaluate a single *transfer* applicant (Lt. Bush) and, incorrectly believing a PD-11 was necessary **(which it was not)**, directed the interviewer to alter the superfluous PD-11 which he erroneously completed. This, according to defense counsel, was to defeat Bush's right to a *transfer*. (Respondents' Brief at 24, CR. 137, PageID.947) Never mind that Bush had no "right" to a transfer. (Caldwell R. 142, PageID.1102, notes 38-41, PageID.1108.) Overwhelming evidence confirms that neither Petitioner believed that a PD-11 was necessary, Hahn R. 145, PageID.1140, n. 76-77, Caldwell R. 142, PageID.1108, n. 77-78, and in any event, it is undisputed that Caldwell had the right to deny the transfer. (Caldwell R. 142, PageID. 1102) In other words, Petitioners were disciplined harshly for believing that they were violating policy even though they weren't, and for doing what they had every right to do – deny a *transfer* for operational reasons.

The Sixth Circuit stated that "[e]ven if Plaintiff could demonstrate a prima facie case of retaliation, they have not presented sufficient evidence to show that Defendants' reason for the adverse action was pretextual," because they had an "honest belief" that

the reason was legitimate and non-retaliatory. (*Opinion*, p.16, ECF 173, PageID.1522)

Only the District Court advanced the "honest belief" argument. It did this sua sponte. Even on appeal, Respondents made no such argument. Nonetheless, the lower courts carried the water for Respondents on the pretext issue, asserting an argument not even Respondents deemed worthy.

Neither the District Court nor the Sixth Circuit should have considered the argument because Respondents waived it by not asserting it anywhere, ever. *Willard v. Huntington Ford, Inc.*, 952 F.2d 795, 812 (6th Cir. 2020), *Briggs v. Univ. of Cincinnati*, 11 F.4th 498, 514-515 (6th Cir. 2021) ("It was improper for the district court to sua sponte resolve this case on an element of the prima facie case that Briggs had not had the opportunity to litigate.")

Moreover, the "honest belief" rule was inapplicable because Petitioners established that Respondents' belief was not in fact "honest:"

1. Defendant Gasper denied making the disciplinary decisions, yet his Chief of Staff, Major Greg Zarotney, testified that he did and Defendants Interrogatory Answers identified Gasper as an individual that "participated" in the disciplinary decisions. Lt. Col. Kelenske testified that he was the sole decisionmaker. See Caldwell Brief at 17-21, CR. 142, PageID.1109-1113.

2. The purported decisionmaker, Kelenske, did not even know the basis for Hahn's discharge (he thought it was "lying" when he denied

telling the interviewer to use a PD-11). (Kelenske at 78-79, CR. 142-10, PageID.1214-1215) Not even the interviewer claimed this (Nemecek at 21, CR. 142-20, PageID.1255).

Finally, the holdings below ignored or dismissed other overwhelming evidence of pretext, including:

1. The close timing (less than 24 hours) between the last protected activity (action memo) and the suspensions. (CR. 142 -16, 142-27, 142-35);
2. Purported decision-maker Lt. Col. Kelenske's apology to Caldwell for the "shit sandwich" Respondents "served up," referring to the discipline. (Kelenske at 62-63, CR. 142-10, PageID.1212);
3. The district court affirmed that Petitioners' discipline was "heavy handed." (Summary Judgment Transcript at 3-4, CR. 172, PageID.1476-1477);
4. Respondents' shifting explanations (Compare Amended Statement of Charges CR. 142-35) with defense counsel's statement in their summary judgment briefs. (CR. 137, PageID.947);
5. Respondents only demoted a similarly situated employee (Captain Richard Michaud) who altered competitive interview scores to benefit a friend's son, lied about it and committed six Law Enforcement Information Network violations, which is a felony (Arnold at 58-70, CR. 142-7, PageID.1192-1195); and

6. Respondents attempted to conceal that Gasper was the decisionmaker. *Reeves v. Sanderson Plumbing Prods, Inc*, 530 U.S. 133, 151-152, 120 S. Ct. 2097 (2000), *Farrell v. Planters Lifesavers Co*, 206 F.3d 271, 285 (3d Cir. 2000), *Cullen v. Select Medical Corp.*, 779 F. App'x 929, 932 (3d Cir. 2019) and *Sabbrese v. Lowe's Home Center*, 320 F. Supp. 2d 311 (W.D. Pa. 2004) (Compare Kelenske testimony (Kelenske at 52, 55, 73, 98, 117, CR. 142-10, PageID.1210-1211, 1213, 1215, 1217) with Zarotney's (Zarotney at 46-47, CR. 142-4, PageID.1159) and Defendants' Answers to Interrogatories (CR. 142-31, PageID.1278-1280)).

C. Proceedings Below

1. District Court

Petitioners filed their separate complaints on May 11, 2020. The District Court dismissed with prejudice the Equal Protection claims against Governor Gretchen Whitmer in her official capacity as well as the personal capacity Equal Protection claim against Whitmer and all state law claims without prejudice on August 6, 2020. (CR 18, Page.ID. 206).

Respondents moved for summary judgment and the District Court issued its Opinions and Orders Granting Respondents' Motions for Summary Judgment on December 27, 2021. **(Apps. C and D)**

Petitioners timely filed a Notice of Appeal on January 12, 2022.

2. The Court of Appeals

Petitioners waived their Equal Protection and Title VII discrimination claims, leaving only the retaliation claims on appeal.

On November 1, 2022, the Sixth Circuit affirmed the District Court's decision to grant Respondents' Motions for Summary Judgment **(App. A)** dismissing Petitioners' remaining retaliation claims. The Court affirmed, based on its findings that a) Petitioners did not engage in protected activity and b) they failed to demonstrate that the purported reasons for the adverse actions were pretextual.

On December 1, 2022, the Court of Appeals denied Petitioners' petitions for rehearing en banc **(App. B)** which made this petition due on or before March 1, 2023.

II. REASON FOR GRANTING THE WRIT

A. The Sixth Circuit Decided an Important Issue of Law that should be Decided by this Court: Whether Opposition to Non-remedial Racial and Gender Balancing of a Workforce for the Sake of Diversity is Protected Activity under 42 USC § 1981 and Title VII

1. Non-Remedial Race and Gender Balancing is Unlawful

Respondents are bent on racially balancing the MSP workforce. Their objective is to "have the demographics of the State Police match the population of the state." (Gasper at 21-22, CR. 142-6, PageID.1172-1173). Their means are illegal quotas

and racial and gender discrimination against White males to achieve those quotas.

"[O]utright racial balancing . . . is patently unconstitutional" and ". . . racial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it 'racial diversity.'" (citations omitted). *Fisher v. Univ of Tx*, 570 U.S. 297, 311, 133 S. Ct. 2411 (2013). See also *Threat v. City of Cleveland*, 6 F.4th 672, 677 (6th Cir. 2021) (Supervisor's admission that she "switched out a black captain for a white one to adjust the shift's racial makeup … counts as direct evidence of discrimination based on race."). As the Sixth Circuit said in *Middleton v. Flint*, 92 F.3d 396, 406 (6th Cir. 1996), cert. denied, 520 U.S. 1196, 117 S. Ct. 1552 (Memo) (1997), a discrimination case brought by White male Flint police officers, ". . . it is permissible to remedy discrimination. It is not permissible to remedy disparity…." See also *Messer v. Meno*, 130 F.3d 130 (5th Cir. 1997), cert. denied, 525 U.S. 1067, 119 S. Ct. 794 (Memo) (1999); *Schurr v. Resorts Intern'l Hotel*, 196 F.3d 486 (3d Cir. 1999); *Cunico v. Pueblo Dist. School No. 60*, 917 F.2d 431 (10th Cir. 1990).

This Court was poised to weigh in on non-remedial racial preferences in *Taxman v. Board of Education of Twp. Of Piscataway*, 91 F.3d 1549 (3d Cir. 1996) (en banc), cert. granted, 521 U.S. 1117, 117 S. Ct. 2506 (1997), cert. dismissed, 522 U.S. 1010, 118 S. Ct. 595 (1997), but civil rights groups and activists, fearing an

adverse ruling, persuaded the Piscataway Board to settle with Taxman.[4]

In the absence of recent past discrimination against minorities or women,[5] the desire for a race and gender balanced workforce does not override the statutory and equal protection rights of White males that have invested years in the MSP expecting advancement to be "determined by competitive examination and performance on that basis of merit, efficiency and fitness and not based on religious, racial or partisan considerations." Mich. Const., Art XI, § 5, Art. I, § 26, *Middleton*, supra, at 409, *Ricci v. DeStefano*, 557 U.S. 557, 579, 129 S. Ct. 2658 (2009).

This Court should establish that non-remedial race or gender preferences, even to promote "diversity," and regardless of the label, violate Title VII and 42 USC § 1981. This case is an excellent vehicle to do so. There is no statistical imbalance or past discrimination.

Any statistical imbalance was remedied long ago. In 1996, the Michigan Court of Claims, in *Cremonte v. MSP*, *supra*, **(App. F.)** held:

> Defendant's goal was to attain 13% minority representation in the personnel ranks. This goal has been achieved and

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[4] *"AFFIRMATIVE ACTION SETTLEMENT: Excerpts from Statement by School Board Lawyer on Lawsuit's settlement,"* New York times, Nov. 22, 1997, Section B, Page 4; Knecht, Eric, "One person's diversity is another person's discrimination - Piscataway v. Taxman and the fight to retain affirmative action in the 1990s," Honors thesis submitted to the History Department of Rutgers University, May 2010.

[5] See e.g., *U.S. v. Paradise*, 480 U.S. 149, 107 S.Ct. 1053 (1987).

> exceeded, yet Defendant continued to use the "augmentation certification" process for promotions. Defendant continues to consider race and gender in its promotional decisions. While the goal represents a legitimate interest, the continued use of "augmentation" after attaining that goal is not narrowly tailored. The race-based augmentation policy is an unconstitutional discrimination.

(R. 16-3, PageID.181-182). The *Cremonte* court made the same finding regarding MSP gender preferences. (*Id*. at 182).

MSP Director Gasper confirmed that remedying past discrimination is not part of the present day equation:

> Q. Is the State Police striving for diversity because, in the recent past, it has discriminated against minorities or females?
>
> **A. I don't believe we've ever discriminated against minorities or females.**
>
> ***
>
> Q. … Is there an operational need for a police agency, a statewide police agency such as the MSP, to have diversity?
>
> **A. Yeah, I think so. You know, diversity gives us the opportunity**

> **to have different perspectives. Different perspectives can, you know, assist us with decision making, with problem solving, you know, can provide innovation, you know, even to a point of inspiration. And that's, that's how we survived for 104 years through, through all that.**

(Gasper at 22-23, R. 142-6, PageID.1173).

This case is about good old-fashion discrimination dressed up as "diversity," not rectifying statistical imbalances caused by past discrimination.

2. Opposition to MSP "Diversity Initiative"

"[A] retaliation claim under the opposition clause requires only a reasonable belief that the employment practice was unlawful." *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1312–13 (6th Cir. 1989) ("A person opposing an apparently discriminatory practice does not bear the entire risk that it is in fact lawful; he or she must only have a good faith belief that the practice is unlawful."); *Montell v. Diversified Clinical Servs., Inc.*, 757 F.3d 497, 504–05 (6th Cir. 2014). The same rule applies under 42 USC § 1981. *Johnson v. University of Cincinnati*, 215 F.3d 561, 576, n. 6 (6th Cir. 2000), cert. denied 531 U.S. 1052, 121 S. Ct. 657 (Memo) (2000), citing *Sullivan v. Little Hunting Park, Inc.,* 396

U.S. 229, 231-237, 90 S. Ct. 400 (1969) and *Tetro v. Popham* 173 F.3d 988, 994 (6th Cir. 1999).

"When an employee communicates to her employer a belief that the employer has engaged in ... a form of employment discrimination, that communication" virtually always "constitutes the employee's opposition to the activity." *Crawford v. Metro. Gov't of Nashville & Davidson Cty., Tenn.*, 555 U.S. 271, 276, 129 S. Ct. 849 (2009) (adopting the EEOC's position in the EEOC Compliance Manual).

As set forth above, Petitioners unequivocally opposed Respondents' "Diversity Initiative." Specifically, they advocated for the rights of White males that were the target of the "Diversity Initiative." The employer action they opposed was not just an arguable violation of the statutes. Respondents' "Diversity Initiative" was a knowing, flagrant violation of both 42 USC § 1981 and Title VII. Petitioners engaged in protected activity by advocating for White males and Respondents fired Hahn and demoted Caldwell because of their opposition activity.

Ironically, the Sixth Circuit held that a Black Vice President for Human Resources engaged in protected opposition activity in circumstances nearly identical to the instant case. In *Johnson v. University of Cincinnati*, *supra*, Judge Clay held that Johnson's "advocacy on behalf of women and minorities" was protected activity. *Id*. at 580. The advocacy included Johnson's opposition to the University President's racial balancing ("We already have two Black Vice Presidents. I can't bring in a Black provost."). Like

Petitioners, Johnson advocated that "… we get the best person available …." *Id.* at 577, n. 7.

Change the race and gender of the key persons in *Johnson* and there is no principled difference between *Johnson* and this case. Johnson is Black, Petitioners are White. Johnson advocated for minorities and women and race and gender-neutral employment decisions. Petitioners advocated for the same. Why should the result be any different? Because Petitioners are White? Because the people they sought to protect are White males? What then?

3. It is important now, more than ever, for this Court to make clear that non-remedial preferences are illegal, regardless of the employer's label, e.g., "Diversity" or "Diversity, Equity and Inclusion"

In the absence of a ruling by this Court barring non-remedial preferences, many of the country's major employers have blatantly ignored the Title VII and 42 USC § 1981 guarantees of equal opportunity, in favor of "Equity," the latest buzzword for equal outcomes via preferences.

Pfizer and American Express are recent examples of the many employers that are openly discriminating against White males in the name of diversity.[6] The

[6] See Tyler O'Neil, *Pfizer sets race-based hiring goals in the name of fighting 'systemic racism,' 'gender equity challenges'*, FOX BUSINESS (September 10, 2021, 11:36 AM), https://www.foxbusiness.com/politics/pfizer-race-hiring-systemic-racism-gender-equity; Mike Julianelle, *Aiming for Equity: Assessing Pfizer's Ongoing Commitment to Diversity and Inclusion*, PFIZER NEWS (August 6, 2021),

ABA, the oldest and most prestigious lawyer organization, gives awards to corporate attorneys that do so.[7]

Yet many courts, as the Sixth Circuit did in this case, enable rogue employers by applying double standards. "Equal opportunity" has given way to "Equity," which really means discrimination against White males. This departure from the law, or judicial nullification, has greatly contributed to the divisiveness in the country today.

This Court should restore the equal opportunities guaranteed by Title VII and 42 USC § 1981 and protect those who oppose rogue employers' insistence on discriminating against White males under the cloak of "diversity."

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https://www.pfizer.com/news/articles/aiming_for_equity_assessing_pfizer_s_ongoing_commitment_to_diversity_and_inclusion; Tyler O'Neil, *American Express engages in 'reverse discrimination' against White people, current and former employees say*, FOX BUSINESS (September 9, 2021, 7:15 AM), https://www.foxbusiness.com/politics/american-express-reverse-discrimination-white-people-former-employee

[7] Spirit of Excellence Award – Brad Smith, Putting His Money Where His Mouth Is, ABA Journal, August 2010, p. 56; Spirit of Excellence Award – Ray Ocampo – Tireless Advocate for Diversity, ABA Journal, August 2010, p. 54.; See also Debra Cassens Weiss, *Coca-Cola never adopted diversity plan for law firms; group that threatened suit targets other companies*, ABA JOURNAL, (March 30, 2022, 8:39 AM), https://www.abajournal.com/news/article/coca-cola-never-adopted-diversity-plan-for-law-firms-group-that-threatened-suit-targets-other-companies

III. CONCLUSION

The year is 2023. There is no basis in law or common sense to apply different standards to Whites or males than to minorities or women. This is particularly true for the MSP. There is no claim, let alone evidence, of statistical imbalance or discrimination against minorities or females. MSP's only history of discrimination is against White males.

Petitioners swore an oath to uphold the Constitution. They honored their oath by opposing Respondents' unabashed race and gender balancing. For this Respondents fired Hahn and demoted Caldwell. The Court should grant this petition.

Respectfully submitted,

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