No. 20-1004

IN THE
Supreme Court of the United States

ROBERT COLLIER,
Petitioner,

v.

DALLAS COUNTY HOSPITAL DISTRICT, doing business as Parkland Health & Hospital System,
Respondent.

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

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR AMICUS CURIAE THE HOWARD UNIVERSITY SCHOOL OF LAW HUMAN AND CIVIL RIGHTS CLINIC IN SUPPORT OF PETITIONER

Edward Williams
Counsel of Record
Tiffany R. Wright
HOWARD UNIVERSITY
SCHOOL OF LAW
2900 Van Ness Street NW
Washington, DC 20008
(202) 663-6487
Ed.Williams@wilmerhale.com

Counsel for Amicus Curiae

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE HOWARD UNIVERSITY SCHOOL OF LAW HUMAN AND CIVIL RIGHTS CLINIC[1]

This case presents an issue of special importance concerning Title VII's protections against racial discrimination in American workplaces. Given its historical advocacy for the rights of racial minorities, the Howard University School of Law Human and Civil Rights Clinic is well-suited to provide additional insight on the history and use of deeply engrained pejoratives leveled against Black employees and the continued need to ensure that Title VII's anti-discrimination protections remain robust.

Howard University School of Law is the nation's first historically Black law school. For more than 150 years since its founding during Reconstruction, the law school has worked to train "social engineers" devoted to the pursuit of human rights and racial justice. As part of this mission, the Howard University School of Law's Human and Civil Rights Clinic ("the Clinic") advocates on behalf of clients and communities fighting for the realization of civil rights guaranteed by the U.S. Constitution and remedial federal

---

[1] Petitioner has consented to the filing of this brief. Amicus requested consent from Respondent on January 27, 2021, and has not received a response. In accordance with Rule 37.2(a), Amicus is submitting this brief more than 10 days before its due date. Amicus submits this motion for leave to file out of an abundance of caution. No party, counsel for a party, or any person other than amicus curiae and their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

statutes. The Clinic therefore has a particular interest in eradicating racial hostility in the American workplace and ensuring that Title VII of the 1964 Civil Rights Act continues to provide robust protection against all types of employment discrimination on the basis of race.

The Clinic timely notified counsel of record for both parties that it intended to submit the attached brief more than 10 days prior to filing. Counsel for petitioner consented to the filing of this brief. Counsel for respondent did not respond to the Clinic's request. Therefore, pursuant to Supreme Court Rule 37.2(b), the Clinic respectfully moves this Court for leave to file the accompanying brief of amicus curiae in support of petitioner.

Respectfully submitted,

Edward Williams
Counsel of Record
Tiffany R. Wright
HOWARD UNIVERSITY
SCHOOL OF LAW
2900 Van Ness Street NW
Washington, DC 20008
(202) 663-6487
Ed.Williams@wilmerhale.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Other Authorities

INTRODUCTION AND SUMMARY OF ARGUMENT

"In every culture, certain things acquire meaning well beyond what outsiders can comprehend." *Virginia v. Black*, 538 U.S. 343, 388 (2003) (Thomas, J., dissenting). For Black Americans, this country's history of racial subjugation and violence is deeply embedded in certain words and symbols, including, as relevant here, "n*gger," "boy," and the swastika. The use of these words and symbols alone or in tandem with other hallmarks of discrimination instantly informs Black employees that, at the least, their presence is unwanted, or worse, they are in danger.

The Fifth Circuit's opinion in this case ignores this context. In doing so, the Fifth Circuit added its voice to the wrong side of a deeply entrenched split among the federal courts of appeal as to whether even a single use of pejoratives like "n*gger" and "boy," and symbols like swastikas can sufficiently establish an actionable hostile work environment claim under Title VII. The traumatic history embedded in these words and symbols leaves no doubt: Even a single invocation of just one of these words or symbols in the workplace can be so traumatic and so dehumanizing that it negatively changes the terms and conditions of employment. Robert Collier was subjected to all three.

(1) Marked by violence and dehumanization, the word "n*gger" still carries with it the trauma that has accompanied it through slavery, Jim Crow, and modern-day hate crimes. (2) Similarly, the word "boy" when used by a superior to refer to a Black employee is a term of infantilization and subjugation—a fact

this Court recognized in *Ash v. Tyson Foods*, 546 U.S. 454 (2006). (3) And the swastika, no longer solely a symbol of anti-Semitism, carries with it the notions of white supremacy and white nationalism, which are unmistakably hostile to a Black employee.

This case presents a proper vehicle for this Court to finally declare—contrary to the Fifth Circuit's conclusion—that there is no legal barrier to a jury reaching the conclusion that a Black employee subjected to certain deeply engrained, historical pejoratives has been subjected to a hostile work environment under Title VII.

Collier's petition for a writ of certiorari should be granted.

ARGUMENT

I. *Any* Use Of The Word "N*gger"—Including A Single Use—In The Workplace Creates An Actionable Hostile Work Environment

N*gger is "*the* paradigmatic racial epithet." Gregory S. Parks & Shayne E. Jones, *"Nigger": A Critical Race Realist Analysis of the N-Word Within Hate Crimes Law*, 98 J. Crim. L. & Criminology 1305, 1316-17 (2008) (emphasis added) (citing Randall L. Kennedy, *Nigger: The Strange Career of a Troublesome Word* 4 n.2 (2002)). The word "n*gger" encapsulates the dehumanizing history of Black Americans from the first African captives that landed in Virginia to the emancipated slaves that navigated the Jim Crow South, through today. The word reinforces the racial hierarchy that drives the notion of Black inferiority, and "ranks as almost certainly the most offensive and

inflammatory racial slur in English, a term expressive of hatred and bigotry." *Nigger*, Merriam-Webster, tinyurl.com/1ot1fz8j (last visited Feb. 10, 2021); *see also Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1034 (9th Cir. 1998) (referring to n*gger as "the most noxious racial epithet in the contemporary American lexicon").

While the precise origins of the slur are undefined, there is no doubt that by the mid-nineteenth century, the term was "employed to impose contempt upon [Blacks] as an inferior race." Parks, *supra* at 1316 (quoting Hosea Easton, *A Treatise on the Intellectual Character, and Civil and Political Condition of the Colored People of the U. States; and the Prejudice Exercised Towards Them* 40 (Maxwell Whiteman ed., Boston, I. Knapp 1837)). Indeed, the term had so clearly taken on this meaning by the mid-nineteenth century that it was employed by white parents as a reprimand for their children. *Id.*

> A child would be reprimanded by an adult for being 'ignorant as a nigger,' for having 'no more credit than a nigger,' or for being 'worse than a little nigger.' Adults disciplined White children by telling them that if they misbehaved they would be made to sit with niggers, consigned to the 'nigger-seat,' or carried away by 'the old nigger.'

Id. The pervasive use of the slur has continued through the twentieth and twenty-first centuries. Today, when a Black person is called a "n*gger," it "usually incites emotional hurt and a range of other injurious feelings." Shaun R. Harper, *Niggers No*

More: A Critical Race Counternarrative on Black Male Student Achievement at Predominantly White Colleges and Universities, 22 Int'l J. of Qualitative Stud. in Educ. 697-712, 699 (Nov-Dec 2009) (citing Kennedy, *supra*).

Because the use of the word "n*gger" so often accompanies physical violence, a Black person who encounters the word "n*gger" may believe him or herself to be in real, immediate danger. Unfortunately, the examples of this nexus are legion: Emmett Till's murderers asked him if he was "the n*gger who did the talking" before he was carried off, tortured, and killed, William Bradford Huie, *The Shocking Story of Approved Killing in Mississippi*, t.ly/9lfQ (article originally appeared in January 1956 issue of Look Magazine); Rodney King was told "[w]e're going to kill you n*gger" as Los Angeles police officers attempted to make good on that promise, Phil Reeves, *'We're going to kill you, nigger,'* The Independent, Oct. 23, 2011, t.ly/tXKb; and recently, Ahmaud Arbery was called a "f*cking n*gger" by his murderers after being hunted down while out on a jog, Nathan Layne, *White Defendant Used Racial Slur After Shooting Ahmaud Arbery, investigator testifies*, Reuters, June 4, 2020, t.ly/OTxF;

Given its history, toxicity, and the trauma it instantaneously triggers, the word "n*gger" has no place *anywhere*, including the work environment. Several courts of appeal have recognized as much, reasoning that "no single act can more quickly alter the conditions of employment and create an abusive working environment . . . than the use of . . . 'nigger.'" *Richardson v. N.Y.S. Dep't of Corr. Serv.*, 180 F.3d

426, 439 (2d Cir. 1999) (internal quotations omitted) (quoting *Rodgers v. Western-Southern Life Ins. Co.*, 12 F.3d 668, 675 (7th Cir. 1993)); *see also McKnight v. General Motors Corp.*, 908 F.2d 104, 114 (7th Cir. 1990) (noting that the use of n*gger even in jest may be evidence of racial antipathy), *superseded by statute on other grounds as recognized in, Humphries v. CBOCS W., Inc.*, 474 F.3d 387, 391 (7th Cir. 2007).

The vitriolic effects of the slur, moreover, are not mitigated by its appearance in written form instead of being heard aurally. Indeed, an epithet's severity is often compounded in written form, for while a slur may be heard once, graffiti in the workplace may be observed multiple times by a single employee or seen by "tens or hundreds" of employees. *See* Jerome R. Watson & Richard W. Warren, I Heard it Through the Grapevine*: Evidentiary Challenges in Racially Hostile Work Environment Litigation*, 19 Labor Law. 381, 399-402 (Winter/Spring 2004) (collecting and discussing hostile work environment cases with racist graffiti at issue).

In short, the presence of "n*gger" in the workplace necessarily creates an actionable hostile work environment claim under Title VII because it is the most vile historical pejorative in the American lexicon.

II. Referring To Black Male Employees As "Boy" May Create An Actionable Hostile Work Environment

Historically, "boy" holds a similar place in the realm of racially motivated epithets as "n*gger." Brief for Civil Rights Leaders Hon. U.W. Clemon et al. as Amici Curiae in Support of Plaintiff-Appellant's

Petition for Rehearing En Banc at 5, *Ash v. Tyson*, 664 F.3d 883 (11th Cir. 2011) (No. 08-16135) ("If not a proxy for 'nigger,' it is at the very least a close cousin."). Like the word "n*gger," the history of the word "boy" is rooted in slavery and efforts to dehumanize Black Americans, specifically Black men. Slaveholders would often refer to their Black male slaves as "boys" in an effort to dehumanize them. *See* Frederick Douglass, *Narrative of the Life of Frederick Douglass, An American Slave* 92 (1845).

During the Jim Crow era, being called "boy" was described as "one of Jim Crow's ritual humiliations, braided into the racial etiquette of the post-slavery South. It was yet another way. . .that white people weaponized language to remind black folks of their place." Gene Demby, *When Boys Can't Be Boys*, NPR, Nov. 2, 2018, tinyurl.com/2f734ofh. Too often, like "n*gger," the word "boy" was accompanied by lynchings, beatings, "and other KKK retaliation for civil rights activities." *See* Steve Estes, *"I am a Man!": Race, Masculinity, and the 1968 Memphis Sanitation Strike*, 41 Lab. Hist. 153, 162 (2000) (hereinafter "Estes"). Thus, "boy" became a tool to intimidate Black men into following the orders of white people. *Id.*

Black men have fought this infantilization at every turn, most visibly during the civil rights movement, when protestors wore signs stating, "I am a man." *See* Estes, *I Am a Man!:* at 162. Those signs were a direct response to white people who referred to Black men as "boys" well into their older age. *Id.*; *see also* Dr. Martin Luther King, Jr., *Why We Can't Wait* 69 (1964) ("[W]hen your first name becomes 'nigger,'

your middle name becomes 'boy' (however old you are).").

Today, as evidenced by this case, "boy" is still used to humiliate Black men in the workplace. This Court recognized as much in *Ash v. Tyson Foods*, 546 U.S. 454 (2006) (per curiam). There, two Black men brought a Title VII claim alleging that they were not promoted because of their race. *Id.* at 455. As evidence of discriminatory animus, petitioners offered that the hiring decision-maker had referred to the two men as "boy." *Id.* at 456. The court of appeals reasoned that "boy" without a preceding racial modifier, i.e., white or Black, was not evidence of discriminatory animus. *Id.* This Court rejected that reasoning noting that "[a]lthough it is true the disputed word will not always be evidence of racial animus, it does not follow that the term, standing alone, is always benign." *Id.* This Court added that "[t]he speaker's meaning may depend on various factors including context, inflection, tone of voice, local custom, and historical usage." *Id.*

The Fifth Circuit's decision below fails to heed *Ash*'s clear lesson that "boy" in certain contexts—like the one at issue here—may constitute the type of discriminatory animus that Title VII was enacted to eradicate from the American workplace. As this Court did in *Ash*, it should grant certiorari here to reverse the court of appeal's error. Doing so would bring the Fifth Circuit into alignment with several other courts that have already grasped *Ash*'s lesson. *See, e.g.*, *Tademy v. Union Pacific Corp.*, 614 F.3d 1132, 1142-46 (10th Cir. 2008) (District court erred in deciding no racial motive where a white employee placed a

tied rope over a workplace clock, specifically in light of the racist graffiti, and the manager's use of the word "boy" and other disparaging references.); *Armstrong v. Whirlpool Corp.*, 363 F. App'x 317, 322 (6th Cir. 2010) (finding that a supervisor addressing African-American men as "boys" supported a hostile environment claim); *White v. BFI Waste Servs., LLC*, 375 F.3d 288, 297 (4th Cir. 2004) (reversing summary judgment on a hostile work environment claim based on defendant's use of 'boy,' and other racially offensive language); *Bailey v. USF Holland, Inc.*, No. 3:05-0435, 2007 WL 470439, at *10 (M.D. Tenn. Feb. 8, 2007) (acknowledging that "boy" has been used "from the time of slavery" to refer to Black men "in a demeaning [and] insulting manner"), *aff'd*, 526 F.3d 880 (6th Cir. 2008); *McKenzie v. Citation Corp.*, No. 05-0138, 2007 WL 1424555, at *12 (S.D. Ala. May 11, 2007) ("'[B]oy' standing alone may be evidence of racial animus.").

III. The Presence Of A Swastika In The Workplace May Create An Actionable Hostile Work Environment

Traditionally, the swastika has been viewed as a symbol of anti-Semitism, but the swastika has taken on broader meanings in recent decades. Anti-Defamation League, Hate Symbols, tinyurl.com/ydowk88y (last visited Feb. 10, 2021). It has evolved into a general symbol of hate and white supremacy used to terrorize and intimidate numerous ethnic and racial minorities. *See* Laurie Goodstein, *Swastika is Deemed* Universal *Hate Symbol*, N.Y. Times, July 28, 2010, tinyurl.com/ylrt34kh (recognizing the swastika

is a symbol "used as an epithet against African Americans, Hispanics, and gays, as well as Jews").

White-supremacist hate groups have adopted the symbol as such. For example, in 2017, a "Unite the Right" (riotous) rally in Charlottesville, Virginia, saw white supremacists proudly flying flags with the swastika. *See Unrest in Virginia,* Time, tinyurl.com/1khksmd1 (last visited Feb. 10, 2021). The rioters present at the rally proclaimed white supremacy generally, which included animus against African Americans. *Id.*

For a Black employee, a swastika, like the word "n*gger" or being called "boy," indicates that his workplace is not safe or at least there are those with whom he is employed who view him as inferior. Understanding this, several courts have relied on the presence of a swastika in Title VII cases where Black petitioners allege discrimination on the basis of race *See e.g., Watson v. CEVA Logistics, U.S., Inc.*, 619 F.3d 936, 938-39 (8th Cir. 2010) (holding that a swastika, coupled with other pejoratives, created a question for the jury as to hostility); *Jackson v. Quanex Corp.*, 191 F.3d 647 (6th Cir. 1999) (holding that a swastika, coupled with "boy" and other epithets, can raise a question for the jury as to workplace hostility); *Mack v. ST Mobile Aerospace Eng'g, Inc.*, 195 Fed. App'x 829, 835 (11th Cir. 2006) (holding that a swastika, coupled with nooses and Confederate flags, was sufficient to raise a question for the jury).

The Fifth Circuit's decision below failed to properly consider the presence of the swastikas in its analysis of Collier's hostile work environment claim.

This Court should grant certiorari to reverse this error.

IV. The Court Should Grant Certiorari To Correct The Fifth Circuit's Legal Error

It was the province of the jury to determine whether the etching of "n*gger" and multiple swastikas into spaces frequented by Collier in addition to being called a "boy" by his superior, individually or in combination, sufficiently established a hostile work environment claim under Title VII. The Fifth Circuit took that question from the jury and concluded that these words and symbols could not constitute a hostile work environment claim as a matter of law. That was legal error and must be reversed.

Under *Meritor Savings Bank v. Vinson*, an actionable hostile work environment claim requires that the harassment be sufficiently "severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment." 477 U.S. 57, 67 (1986) (internal quotation marks omitted). The severity-based path to a hostile work environment claim requires a single incident that was so unusual and inappropriate that the conditions of the workplace were altered. Eric Schnapper, *Some of Them Still Don't Get It: Hostile Work Environment Litigation in the Lower Courts*, 1999 U. Chi. Legal F. 277, 326 (1999). With this in mind, isolated instances should amount to harassment if they are extremely serious and if they alter the conditions of employment. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998).

In applying this standard, several courts have concluded that a single use of certain epithets is

sufficient to establish a hostile work environment claim because of the gravity of the slur. *See Rodgers*, 12 F.3d at 675 ("[P]erhaps no single act can more quickly alter the conditions of employment" than "the use of an unambiguously racial epithet such as 'n----r' by a supervisor."); *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1116 (9th Cir. 2004); *Adams v. Austal, U.S.A., LLC*, 754 F.3d 1240, 1253-54 (11th Cir. 2014) (holding that the carving of "'porch monkeys'" "was an isolated act, [albeit] severe."); *Bailey v. Binyon*, 583 F. Supp. 923 (N.D. Il. 1984) ("[T]he use of the word 'n----r' automatically separates the person addressed from every non-black person; this is discrimination *per se*."); *Ayissi-Etoh v. Fannie Mae*, 712 F.3d 572, 577 (D.C. Cir. 2013). Indeed, then-Judge Kavanaugh has explained that "[a] single, sufficiently severe incident ... may suffice to create a hostile work environment." *Id.* at 579 (Kavanaugh, J., concurring) ("[S]aying that a single incident of workplace conduct *rarely* can create a hostile work environment is different from saying that a single incident *never* can create a hostile work environment.").

The Fifth Circuit has rejected these well-reasoned conclusions, effectively granting one free pass to those who would poison American workplaces with the venom of racism. If left to stand, the Fifth Circuit's decision allows Black employees to be on the receiving end of at least one "n*gger," one "boy," or one swastika. Indeed, under the Fifth Circuit's holding, that free pass would allow each of these pejoratives to exist simultaneously in a single workplace, with no resort to Title VII's protections. This Court should grant certiorari and reverse the Fifth Circuit's erroneous decision.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Edward Williams
Counsel of Record
Tiffany R. Wright
HOWARD UNIVERSITY
SCHOOL OF LAW
2900 Van Ness Street NW
Washington, DC 20008
(202) 663-6487
Ed.Williams@wilmerhale.com

February 12, 2021