20-1004

IN THE

Supreme Court of the United States

ROBERT COLLIER,

Petitioner,

-against-

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

Respondent.

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

BRIEF OF AMICUS CURIAE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF PETITIONER

SHERRILYN A. IFILL
DIRECTOR-COUNSEL
JANAI S. NELSON
SAMUEL SPITAL
RACHEL KLEINMAN
NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC
40 RECTOR STREET, 5TH FLOOR
New York, NY 10006

Counsel for Amicus Curiae NAACP Legal Defense & Educational Fund, Inc.

COTY MONTAG
JENNIFER A. HOLMES*
MAHOGANE REED
JASON BAILEY
NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
700 14TH STREET NW, SUITE 600
Washington, DC 20005
jholmes@naacpldf.org
(202) 682-1300

* Counsel of Record

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTEREST OF AMICUS CURIAE[1]

The NAACP Legal Defense and Educational Fund, Inc. ("LDF") is the nation's first and foremost civil rights legal organization. Since its founding in 1940, LDF has strived to secure equal justice under the law for all Americans and to break down barriers that prevent Black people from realizing their basic civil and human rights. Since its enactment, LDF has helped Americans vindicate their rights under Title VII of the Civil Rights Act of 1964 ("Title VII") to be free from discrimination on the basis of race and ethnicity. LDF has represented plaintiffs in cases such as *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Pullman-Standard v. Swint*, 456 U.S. 273 (1982); *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985); and *Lewis v. City of Chicago*, 560 U.S. 205 (2010). LDF has a strong interest in the proper application of Title VII to combat workplace discrimination.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Nearly every day when he was at work, Petitioner Robert Collier, a Black man, saw the word "nigger" carved into the wall of the elevator he took to the cafeteria in Parkland Memorial Hospital. Several times a week, when he retrieved tools from a storage room, Mr. Collier saw a pair of swastikas painted two feet high on the wall. He reported the racist slur and hate symbols to a supervisor and to human resources,

[1] Pursuant to Rule 37.2(a), Amicus Curiae certifies that all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least ten days prior to Amicus Curiae's deadline to file this brief. Pursuant to Rule 37.6, Amicus Curiae certifies that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

but Parkland did nothing to remove the graffiti for months. Mr. Collier found the graffiti "racist and offensive" and was "very upset[]" every time he saw it. He felt he had no choice but to "work on," but thoughts of the graffiti never "went away or out of [his] mind." The n-word remained on the elevator wall for at least six months until someone roughly scratched it out, and the swastikas were not painted over for 18 months. In addition, Mr. Collier was called "boy" by a white nurse on two occasions, and other Black co-workers were "very frequent[ly]" called "boy."

"No other word in the English language so powerfully or instantly calls to mind our country's long and brutal struggle to overcome racism and discrimination against African-Americans" as the n-word. *Ayissi-Etoh v. Fannie Mae*, 712 F.3d 572, 580 (D.C. Cir. 2013) (Kavanaugh, J., concurring). "[E]voking a history of racial violence, brutality, and subordination," *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1116 (9th Cir. 2004), the n-word is a powerful barb of hatred and bigotry with capacity to wound, and it did so in this case. The swastika is another incendiary "symbol[] of white supremacy," *United States v. Allen*, 341 F.3d 870, 885 (9th Cir. 2003), as is calling a Black man "boy," a practice that evokes a racist history of denying Black men full citizenship and dignity.[2]

Yet, the court below held that this conduct could not "alter the conditions of [Mr. Collier's] employment and create an abusive working environment" because it

[2] *See* Brief of Civil Rights Leaders as Amici Curiae in Support of Plaintiff-Appellant's Petition for Rehearing En Banc, *Hithon v. Tyson Foods, Inc.*, No. 08-16135-BB (11th Cir. Oct. 16, 2010), available at https://www.naacpldf.org/wp-content/uploads/Hithon-Brief.pdf (examining the pernicious social and historical context of white people's use of the word "boy" to a Black employee).

was "not sufficiently severe or pervasive." Pet. App. 11a (citation and quotations omitted). In fact, it was both.

The opinion below improperly discounts the severity of workplace use or presence of the n-word and other racial epithets for Black employees. In holding that no reasonable juror could find that the n-word, swastikas, and calling Black employees "boy" could create a hostile work environment, the Fifth Circuit adopted an overly restrictive interpretation of Title VII, essentially holding that words alone, even the most egregious racial epithets, are insufficiently severe to establish an actionable hostile work environment claim. This approach disregards the real-world impact of racial harassment on Black employees and, as a result, diminishes workplace protections against harassment and discrimination. The analysis ignores both Mr. Collier's subjective perception of the harm of the racist graffiti and the objective harm that a reasonable person in his position would experience. This inquiry must be informed by relevant "social context," including the unique history and impact of the n-word, widely considered the most abhorrent racial insult in the American lexicon. In concluding that the racial abuse Mr. Collier endured did not constitute a hostile work environment within the meaning of Title VII, the court below did not consider the totality of circumstances, including the social context relevant to the n-word that makes its usage a severe incident that can profoundly impact a reasonable person in Mr. Collier's position. Indeed, according to the factual record, Mr. Collier perceived the graffiti as abusive, and it weighed on his mind every

day on the job. This evidence was sufficient to raise a factual issue for a jury as to whether a hostile work environment existed.

Further, the Fifth Circuit's analysis is inconsistent with this Court's guidance that "isolated incidents," if "extremely serious" can be sufficiently severe to create an actionable hostile work environment claim. *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998). And the opinion adds to a growing circuit split between courts of appeal that recognize that a single use of the n-word can be severe enough to create an actionable hostile work environment claim and those that find such evidence insufficient unless accompanied by additional incidents. The practical impact is that in the Fifth Circuit and those that take a similar approach, Black workers and other employees of color face steeper legal hurdles and weakened workplace discrimination protections compared to their counterparts in other circuits.

Finally, the court below failed to recognize that the harassment endured by Mr. Collier was not only severe: it was also pervasive. A verbal slur "is heard once and vanishes in an instant, while graffiti remains visible until the employer acts to remove it." *Watson v. CEVA Logistics U.S., Inc.*, 619 F.3d 936, 943 (8th Cir. 2010) (citation and internal quotation marks omitted). Racist or hateful graffiti in the workplace results in repeated exposure to employees, causing a recurring impact and reminder of racial hostility in the workplace, as was the case here. The n-word and swastikas remained unaddressed by Parkland for a prolonged period, a circumstance courts have found may support a hostile work environment claim, even by virtue of employees' "mere awareness of its ongoing presence." *Id.* at 943-44. Although the

court below cited cases discussing that racist graffiti, especially when left unaddressed, could support a hostile work environment claim, it rejected Mr. Collier's claim without any analysis or citation to countervailing case law on this issue.

The errors of the opinion below weaken the protections of Title VII and discount important social and historical context that cannot be divorced from its analysis, ultimately depriving Black employees an equal opportunity to participate in economic life. This Court should grant review and reverse.

ARGUMENT

I. THE DECISION BELOW DISCOUNTED THE REAL-WORLD IMPACT RACIAL EPITHETS IN THE WORKPLACE HAVE ON BLACK EMPLOYEES.

A. Workplace Racial Epithets, Especially the N-word, Significantly Impact Black Employees and Other Employees of Color.

For more than five decades, Title VII has proscribed workplace discrimination on the basis of race and national origin, among other protected traits. *See* 42 U.S.C. § 2000e-2(a)(1). The Act's protections are comprehensive and promise 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). To that end, Title VII targets "the entire spectrum of disparate treatment" based on race, *id.* at 64, such that "[w]hen the workplace is permeated with discriminatory . . . insult that is sufficiently severe or pervasive to . . . create an abusive working environment, Title VII is violated." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (citations and internal quotation marks omitted); *see also Meritor*, 477 U.S. at 67 (setting forth "severe or pervasive" standard). This Court has long held that workplace abuse is

sufficiently "severe or pervasive" under Title VII where the victim "subjectively perceive[s] the environment to be abusive," and where "a reasonable person would find [the environment] hostile or abusive." *Harris*, 510 U.S. at 21.

Mr. Collier subjectively perceived his work environment to be hostile and abusive. Pet. 5. And no wonder. For six months, Mr. Collier saw the n-word etched into the wall of an elevator he used every day. Pet. 4–5. Mr. Collier describes being upset every time he saw the word, which his supervisors took no steps to remove even after Mr. Collier reported it. Pet. 5. The hostility did not stop there. Mr. Collier also reported to his supervisors that two swastikas were painted on the wall of a storage room he frequently used to access tools he needed for work; the swastikas remained on the wall for at least 18 months. Pet. 5. And white employees frequently referred to Mr. Collier and his Black colleagues as "boy." Pet. 6. All of these circumstances contributed to a work environment that Mr. Collier described as hostile for Black employees and abusive to him.

These facts also demonstrate that Mr. Collier faced racial harassment sufficiently severe to create an objectively hostile and abusive work environment. This Court has instructed that the objective severity of harassment should be judged from the perspective "of a reasonable person in the plaintiff's position" and after considering "all the circumstances," *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998) (quoting *Harris*, 510 U.S. at 23), including but not limited to "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it

unreasonably interferes with an employee's work performance." *Harris*, 510 U.S. at 23. "[T]hat inquiry requires careful consideration of the social context in which particular behavior occurs *and is experienced by the target*." *Oncale*, 523 U.S. at 82 (emphasis added). "[A]n appropriate sensitivity to social context[] will enable courts" to identify "conduct which a reasonable person *in the plaintiff's position* would find severely hostile or abusive." *Id*. at 83 (emphasis added).

Here, the "social context" would lead a reasonable person in the plaintiff's position—*i.e.*, a reasonable Black man forced to endure the n-word and swastika graffiti, which were not removed for months after he reported them to management, and being repeatedly called "boy"—to perceive his workplace as racially hostile and abusive. But the Fifth Circuit saw Mr. Collier's circumstances differently. According to the decision below, the circumstances described by Mr. Collier were not objectively severe enough to constitute a hostile work environment because "[t]he conduct that Collier complains of was not physically threatening, was not directed at him . . . and did not unreasonably interfere with his work performance." Pet. App. 11a. Under the Fifth Circuit's view, no reasonable person in Mr. Collier's position would find the above facts severe enough to create a hostile work environment.

The Fifth Circuit's cramped view of Title VII reflects a failure to acknowledge the unique history and impact of the n-word as a tool of oppression and subjugation. Though scholars believe the term was not originally used as a slur, the n-word garnered its now-familiar pejorative and abusive connotation over time, an evolution inextricable from the history of American slavery that gave way to racial terrorism

during the Reconstruction era and beyond. *See* Randall L. Kennedy, *Nigger: The Strange Career of a Troublesome Word* 4 (2002); Michele Goodwin, *Nigger and the Construction of Citizenship*, 76 Temp. L. Rev. 129, 138 (2003) (noting that the n-word's "history in America began with slavery" and that the slur "affected America's creation of citizenship, fueled white racial hatred, discriminatory laws, and social distinctions between the children born of white men and black women versus that of white men and women.").

The n-word was fashioned into a tool of white supremacy in the antebellum South. Indeed, historians note that in the American colonies, the n-word was initially synonymous with slave as a way to refer to enslaved Black laborers. Elizabeth S. Pryor, *The Etymology of Nigger: Resistance, Language, and the Politics of Freedom in the Antebellum North*, 36 J. of the Early Republic, 203, 205 (2016). However, as Black people attained their freedom and sought equal rights, the term "emerged as a weapon of racial containment" for the purpose of suppressing Black aspirations of economic, social, and physical mobility. *Id*. By the early 19th century, the n-word was exclusively employed "as a way of referring derogatorily, contemptuously, and often menacingly" to Black people. Randall L. Kennedy, *Who Can Say "Nigger" . . . And Other Considerations*, 26 J. Blacks in Higher Education 86, 87 (2000); *see also* Abigail L. Perdue & Gregory S. Parks, *The Nth Decree: Examining Intraracial Use of the N-Word in Employment Discrimination Cases*, 64 DePaul L. Rev. 65, 68 (2014). Given its historical roots, the n-word would be understood with particular significance in the states of the Fifth Circuit and other southern states.

Today, the n-word is considered "the most offensive and inflammatory racial slur in English" and is "regarded as a deliberate expression of contemptuous racism." *Nigger*, Usage, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/nigger #usage-1. To that end, the n-word has been described as "a linguistic extension of white supremacy" that has functioned throughout its history as a means to "help[] . . . perpetuate and reinforce the durable, insidious taint of presumed African-American inferiority," particularly when used by white people to refer to Black people. Jabari Asim, *The N Word: Who Can Say It, Who Shouldn't, and Why* 4 (2007); *see also* Leora F. Eisenstadt, *The N-Word at Work: Contextualizing Language in the Workplace*, 33 Berkeley J. Emp. & Lab. L. 299, 319–20 (2012) (explaining the harmful effects caused by white people when using the n-word).

When used by white people, the n-word inflicts profound emotional and psychological harm on Black people because it "evok[es] a history of racial violence, brutality, and subordination." *McGinest*, 360 F.3d at 1116. As one commentator has aptly noted, the n-word "stands alone with its power to tear at one's insides." Andrew Hacker, *Two Nations: Black and White, Separate, Hostile, Unequal* 55 (1992). Indeed, use of the slur "typically renders the targeted listeners speechless and often demoralized, and creates in them a feeling of helplessness that is met with anger, fear, or sadness." Eisenstadt, *supra*. Although some in the Black community have attempted to reclaim the n-word when speaking to each other and in music, the word retains its harmful significance when used by a white person, given its history as a "tool of racial oppression." Perdue, *supra*, at 66. When used in the workplace, courts

have also found that use the can n-word creates an abusive work environment regardless of the race of the speaker. *See, e.g.*, *Weatherly v. Alabama State Univ.*, 728 F.3d 1263, 1269 (11th Cir. 2013) (affirming jury verdict in favor of Black plaintiffs on hostile work environment claims based on Black supervisor frequently berating them using the n-word); *Johnson v. Strive E. Harlem Emp't Grp.*, 990 F. Supp. 2d 435, 446 (S.D.N.Y. 2014) (same).

The n-word in the workplace is therefore more than simply an offensive utterance, but the kind of abuse or hostility that impacts the terms and conditions of employment for Black employees within the meaning of Title VII. There are ample studies demonstrating that workplace discrimination—including abusive and discriminatory language—has a profoundly negative impact on Black people and other people of color. As Professor Kerri Lynn Stone has explained, "[r]esearch studies show that workplace morale, as well as individual employees' psyche, productivity, and mental health, are all threatened by abusive, discriminatory workplace speech." Kerri Lynn Stone, *Decoding Civility*, 28 Berkeley J. Gender L. & Just. 185, 213–14 (2013). For example, one study found that Black hospital employees were more likely than other racial or ethnic groups to report frequent experiences of discrimination, and the frequency of their reporting correlated with suffering depressive symptoms "above and well beyond that of simple job strain or general social stress." *Id*.

Courts have acknowledged that the n-word is a slur that is "[f]ar more than a mere offensive utterance" and is "pure anathema to African-Americans." *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 185 (4th Cir. 2001) (quotations omitted). Thus,

"[g]iven American history," courts "recognize that the word 'nigger' can have a highly disturbing impact on the listener." *Hrobowski v. Worthington Steel Co.*, 358 F.3d 473, 477 (7th Cir. 2004). The harmful impact that the n-word specifically inflicts on Black people is best illustrated through the examples of Black employees who were subjected to the epithet at their workplaces.

Black workers often suffer stress, sadness, and humiliation after being subjected to a hostile work environment that includes hearing their supervisors or co-workers using the n-word and other racial epithets. *See, e.g., Smelter v. Southern Home Care Servs. Inc.*, 904 F.3d 1276, 1283 (11th Cir. 2018) (Black worker repeatedly testified that enduring co-workers' racist comments, including the n-word, was hurtful and stressful); *Equal Emp't Opportunity Comm'n v. L.A. Pipeline Constr. Inc.*, No. 2:08-cv-840, 2010 WL 2301292, at *16 (S.D. Ohio June 8, 2010) (Black laborers felt fear, hurt, stress and humiliation as a result of white supervisors and co-workers' use of the n-word and other racially offensive language). Some have likened being referred to as the n-word at work as a "slap in the face" and a "knee on [the] neck." *Shamsuddi v. Classic Staffing Servs.*, No. 19-3261, 2020 WL 7700184, at *2 (E.D. Pa. Dec. 28, 2020). Others have suffered discomfort and sleeplessness after being called the slur by co-workers. *See Nuness v. Simon and Schuster, Inc.*, 325 F. Supp. 3d 535, 541 (D.N.J. 2018) (Black employee "couldn't go to sleep" after being called a racial epithet by her co-worker). Even employers and supervisors who have been accused of discrimination admit to being "shocked" after hearing co-defendants direct the slur at Black employees, *see Robinson v. Perales*, 894 F.3d 818, 824 (7th Cir. 2018), and

acknowledge that no reasonable Black person would want to continue their employment after being subjected to it in the workplace, *Shamsuddi*, 2020 WL 7700184, at *2.

Based on the foregoing, the detrimental impact of seeing the n-word etched on an elevator for months after it was reported to supervisors creates a hostile work environment to any reasonable Black employee in Mr. Collier's position. This is especially true when combined with the other forms of abuse Mr. Collier experienced—including the repeated use of the word "boy" to refer to Black employees and painted swastikas on the worksite.

B. The Decision Below Diminishes Title VII Workplace Protections Against Race Discrimination for Black Employees and Other Employees of Color.

The Fifth Circuit, as exemplified by the decision below, routinely applies a cramped reading of Title VII, holding that exposure to the n-word or other deplorable racial slurs is alone insufficient to create a hostile work environment under Title VII. In holding that Mr. Collier's hostile work environment claim was not actionable, the court below cited three Fifth Circuit precedents that "found that the oral utterance of the N-word and other racially derogatory terms, even in the presence of the plaintiff, *may* be insufficient to establish a hostile work environment." Pet. App. 10a-11a (emphasis added) (citing *Dailey v. Shintech, Inc.*, 629 F. App'x 638, 640, 644 (5th Cir. 2015); *Frazier v. Sabine River Auth.*, 509 F. App'x 370, 374 (5th Cir. 2013); *Vaughn v. Pool Offshore Co.*, 683 F.2d 922, 924-25 (5th Cir. 1982)). A survey of cases in the Fifth Circuit reveals that in practice, this standard operates more stringently; use of

the n-word and similar odious racial epithets is *almost never* sufficient to create a genuine issue of fact for the jury as to whether a hostile work environment existed. Myriad cases preclude Black employees' claims under this approach:

- A supervisor twice called a Black employee a "black little motherf----r" and said he would "kick is black a--." *Dailey*, 629 F. App'x at 640, 644.
- Co-workers used the n-word and referred to a Black neighborhood as "Negreet." *Frazier*, 509 F. App'x at 372.
- Colleagues referred to a customer as "nigger" in front of Black employee. *White v. GEICO*, 457 F. App'x 374, 380–81 (5th Cir. 2012).
- A supervisor berated a Black employee who requested a raise as acting "just like a damn nigger" and frequently used the n-word in the workplace. *Johnson v. TCB Const. Co.*, 334 F. App'x 666, 671 (5th Cir. 2009).
- A supervisor told Black employee "[n]iggers don't have no rights" after employee said she had a right express her opinion. *Smith v. Univ. of Tex. Health Sci. Ctr. at Houston*, 100 F. App'x 980, 982 (5th Cir. 2004).
- Supervisors and co-workers referred to a Black worker as "nigger," "coon," and "black boy." *Vaughn*, 683 F.2d at 923–24.

In these cases and more, the Fifth Circuit held as a matter of law that no reasonable juror could find that the virulently racist language at issue created a hostile work environment. *See, e.g.*, *Barkley v. Singing River Elec. Power Ass'n*, 433 F. App'x 254, 255 (5th Cir. 2011) (dismissing claim of Black employee whose co-workers referred to him as "nigger" and "black gorilla"); *Equal Emp't Opportunity Comm'n v. Nexion Health at Broadway, Inc.*, 199 F. App'x 351, 353–54 (5th Cir. 2006) (dismissing claim of Black employee called "nigger" three or four times a week by nursing home resident). The opinion below extends this unconscionable trend.

This approach fails to recognize the profound power and harm of the n-word and other racial epithets, foreclosing the possibility that these slurs can have a serious impact on Black employees and corrosive effect on the workplace, even if

deployed only sporadically. *See Section I.A., supra*; *see also Rodgers v. W.-S. Life Ins. Co.*, 12 F.3d 668, 675 (7th Cir. 1993) ("Perhaps no single act can more quickly alter the conditions of employment and create an abusive working environment, than the use of an unambiguously racial epithet such as 'nigger' by a supervisor in the presence of his subordinates.") (citation and internal quotation marks omitted). In this way, the standard embraced in the Fifth Circuit disregards the Court's guidance that isolated incidents—if "extremely serious"—could be severe enough to "amount to [a] discriminatory change[] in the terms and conditions of employment." *Faragher*, 524 U.S. at 788.

The Fifth Circuit has only permitted hostile work environment claims based on racial epithets where there is a prolonged pattern of racist language that lasts for years. *See, e.g.*, *Walker v. Thompson*, 214 F.3d 615, 626 (5th Cir. 2000) (holding that a hostile work environment claim survived summary judgment where evidence demonstrated three years of racial epithets, including "nigger," "little black monkey," and comparisons to enslaved persons, leading to the resignation of three Black employees). But Black workers need not endure years of racial slurs that threaten to drive them from their jobs before they have an actionable claim under Title VII. *See Vance v. Ball State Univ.*, 570 U.S. 421, 452 (2013) ("To be actionable, charged behavior need not drive the victim from her job . . .") (Ginsburg, J., dissenting); *cf. Harris*, 510 U.S. at 22 ("Title VII comes into play before the harassing conduct leads to a nervous breakdown."). As the Court reiterated in *Faragher*, although "simple teasing, offhand comments, and isolated incidents" typically "will not amount to

discriminatory changes in the terms and conditions of employment," if they are "extremely serious," they may be sufficient. 524 U.S. at 788. The opinion below failed to recognize that workplace use of the n-word, "probably the most offensive word in English," is an extremely serious incident that meets this exception. *Ayissi-Etoh*, 712 F.3d at 580 (Kavanaugh, J., concurring). Compounding the harm to Black workers, the Sixth, Seventh, Eighth, and Tenth Circuits follow a similar approach, under which use of the n-word alone is not sufficient to sustain a hostile work environment claim. Pet. 12-16 (collecting cases).

As recognized in the opinion below, other circuits take a contrary position and "have found instances where the use of the N-word itself was sufficient to create a hostile work environment." Pet. App. 10a. As detailed in the Petition for a Writ of Certiorari ("Petition"), the Third, Fourth, and D.C. Circuits have recognized that "being called the n-word by a supervisor . . . suffices by itself to establish a racially hostile work environment." *Ayissi-Etoh*, 712 F.3d at 580 (Kavanaugh, J. concurring); *see also Castleberry v. STI*, 863 F.3d 259, 264 (3d Cir. 2017) (holding, in a case where a supervisor warned two Black employees that they would be fired if they "nigger-rigged" a fence, that "one such instance" of a supervisor's use of the n-word "can suffice to state a claim"); *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 280 (4th Cir. 2015) (en banc) (holding that a supervisor's calling a Black employee a "porch monkey," a slur "about as odious as the use of the word 'nigger,'" could create an actionable claim). In the view of these circuits, "a single, sufficiently severe incident," in particular, the n-word, "may create a hostile work environment actionable under .

. . Title VII." *Ayissi-Etoh*, 712 F.3d at 580-81; *see also Boyer-Liberto*, 786 F.3d at 281 (rejecting a standard that "require[s] more than a single incident of harassment in every viable hostile work environment case").

The real-world impact of this circuit split is that Black employees who face workplace racial harassment receive diminished Title VII protections in the Fifth Circuit and other circuits that adopt a similar approach. They risk being forced to endure harmful racial insults, including the n-word, while having no legal redress under Title VII. And because evidence of the use of the n-word and other racial slurs is insufficient to raise a genuine issue of fact that defeats summary judgment, many Black workers' hostile work environment claims will never proceed to a jury. *See, e.g.*, *supra* at 13 (collecting cases). "[W]hether harassment was sufficiently severe or pervasive is quintessentially a question of fact" better left for the jury, *Guessous v. Fairview Prop. Invs., LLC*, 828 F.3d 208, 227 (4th Cir. 2016) (citation omitted), but the standard embraced by the Fifth Circuit makes it more difficult for such claims to be heard by a jury. This undermines the ability of Black workers and other employees of color to use Title VII to combat racial slurs in the workplace. With avenues for legal redress narrowed, some workers will continue to endure unaddressed racial harassment, which "often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers." *Harris*, 510 U.S. at 22, ultimately limiting their economic opportunities.

II. RACIST GRAFFITI IN THE WORKPLACE, LIKE THAT TO WHICH MR. COLLIER WAS EXPOSED, CAN CONSTITUTE PERVASIVE CONDUCT AND IS SUFFICIENTLY SERIOUS TO ESTABLISH A TITLE VII VIOLATION.

An employee may establish a hostile work environment claim by showing that their employer subjected them to discriminatory harassment that was "sufficiently severe *or* pervasive." *Meritor*, 477 U.S. at 67 (emphasis added). As described above, the harassing conduct Mr. Collier endured was sufficiently severe to create a hostile work environment. Separately, the conduct—in particular, the racist and offensive graffiti to which he was exposed for 18 months without sufficient remedial action by his employer—was also pervasive enough to establish a Title VII violation. Pet 4-5. As with the severity prong, courts look to the totality of the circumstances when evaluating whether harassing conduct in the workplace is pervasive, examining, among other things, the frequency of the discriminatory conduct and whether it is humiliating. *Harris*, 510 U.S. at 23.

To an even greater degree than spoken slurs or epithets, racist graffiti in the workplace can be sufficiently pervasive to establish a hostile work environment claim, particularly when the graffiti is left unaddressed by the employer for a prolonged period of time. This is due to the special nature of graffiti: "the spoken word vanishes in an instant, while graffiti remains visible until the employer acts to remove it." Jerome R. Watson & Richard W. Warren, *"I Heard it through the Grapevine": Evidentiary Challenges in Racially Hostile Work Environment Litigation*, 19 Lab. Law 381, 399, 404 (2004). Unlike a slur that is heard once, graffiti has the potential to repeatedly injure or impact the employee for as long as it is left unaddressed,

serving as a constant reminder of the racism and hostility to which the employee has been subjected at their place of work. This distinguishes graffiti from nonactionable "mere utterances" that may not rise to the level of a Title VII violation.

The significant potential for prolonged, unaddressed racist graffiti to create a hostile work environment due to its pervasive nature has been recognized by various circuit courts of appeal. *See, e.g.*, *Adams v. Austal, U.S.A., L.L.C.*, 754 F.3d 1240, 1251–54 (11th Cir. 2014) (finding that being exposed to daily racist graffiti could raise disputed issues of material fact to defeat summary judgment); *May v. Chrysler Grp., Inc.*, 716 F.3d 963, 971–72 (7th Cir. 2013) (repeated instances of racist and vile graffiti were sufficient to affirm jury's finding of liability on employee's hostile work environment claim, given the employer's failure to promptly and adequately address it); *Watson*, 619 F.3d at 942–44 (racist graffiti present for years and unaddressed by employer raised a material question of fact as to whether employees were subjected to a racially hostile work environment); *McGinest*, 360 F.3d at 1116, 1120–21 (racist graffiti containing the n-word that regularly appeared in the workplace bathroom and was not adequately addressed by employer contributed to hostile work environment); *Reedy v. Quebecor Printing Eagle, Inc.*, 333 F.3d 906, 909–10 (8th Cir. 2003) (racist graffiti left unaddressed for five months was sufficiently pervasive for hostile work environment claim); *Danco, Inc. v. Wal-Mart Stores, Inc.*, 178 F.3d 8, 16–17 (1st Cir. 1999) (contractor established hostile work environment claim under 42 U.S.C. § 1981 by alleging that he had to see racist graffiti on parking lot every time he worked at that location); *Jackson v. Quanex Corp.*, 191 F.3d 647, 662–63 (6th Cir. 1999)

(abundance of racist graffiti unaddressed by employer constituted pervasive harassment); *Daniels v. Essex Grp., Inc.*, 937 F.2d 1264, 1274–75 (7th Cir. 1991) (graffiti referencing the Ku Klux Klan and n-word, which reappeared several times after being painted over, contributed to hostile work environment).

In *Watson*, the Eighth Circuit recognized the special nature of racist graffiti as distinct from a spoken racial slur, noting that graffiti can create a hostile work environment when employees are aware that it exists and that the employer has not addressed it. 619 F.3d at 943–44. At issue in the case was racist graffiti referencing the Ku Klux Klan and the n-word in the employees' locker room, a location visited daily by all employees. *Id.* at 937–38. One employee testified that the graffiti was left up for months, and possibly years, but management took no remedial action. *Id.* at 938. The court determined that a jury could reasonably conclude that the plaintiffs saw the graffiti on numerous occasions, and, importantly, "that their *mere awareness of its ongoing presence*—regardless of the exact number of times they remember seeing it—could contribute to a hostile work environment." *Id.* at 943–44 (emphasis added).

The recognition of the uniquely pervasive impact of harassing graffiti has also been applied in cases alleging a hostile work environment due to sexual harassment. *See, e.g.*, *Petrosino v. Bell Atlantic*, 385 F.3d 210, 221–24 (2d Cir. 2004) (employee's repeated and constant exposure to sexual graffiti established hostile work environment claim); *Hurley v. Atlantic City Police Dep't*, 174 F.3d 95, 117 (3d Cir. 1999) (upholding jury finding of liability in sexual harassment case in part due to

pervasive and sexually explicit graffiti); *Harris v. L & L Wings, Inc.*, 132 F.3d 978, 982, 984–85 (4th Cir. 1997) (upholding finding of employer liability and punitive damages in part due to sexually explicit and lewd graffiti, which the employer failed to address).

In cases where courts have determined that racist graffiti did not create a hostile work environment, typically the graffiti at issue was displayed or seen for only a short period and the employer either was not aware of the graffiti or quickly addressed it. *See, e.g.*, *Jones v. City of Franklin*, 468 F. App'x 557, 567 (6th Cir. 2012) (firefighter's exposure to carving referencing the Ku Klux Klan in public restroom in city building was insufficient to establish hostile work environment, because exposure was brief, limited to one moment, and the employer was not informed); *Smith v. New Venture Gear, Inc.*, 320 F. App'x 33, 37 (2d Cir. 2009) (graffiti did not create hostile work environment, as various incidents were either remedied by or unknown to employer); *Woodard v. PHB Die Casting*, 255 F. App'x 608, 609–10 (3d Cir. 2007) (finding that one incident of racist graffiti, left unaddressed for three months, was insufficient to establish hostile work environment claim, but recognizing that employer's delay in remedying it was "serious").

Despite this repeated recognition by courts, that racist graffiti, especially when left unaddressed, can be actionable, the court below held that Mr. Collier had not created a triable issue of fact with respect to his hostile work environment claim. Pet. App. 11a. It did so even though, at the outset of its recitation of the applicable law, the Fifth Circuit discussed precedent acknowledging the exceptional effects of

unaddressed racist graffiti. *Id.* at 9a-10a. The court utterly failed to apply such precedent, instead summarily concluding that, despite Mr. Collier's prolonged exposure to racist graffiti, "[t]he conduct that Collier complains of was not physically threatening, was not directed at him . . . and did not unreasonably interfere with his work performance." Pet. App. 11a. No further discussion or analysis was dedicated to the pervasive nature of the graffiti to which Mr. Collier was exposed on a daily basis for a prolonged duration, or his employer's failure to remedy it for months even after Mr. Collier brought it to the employer's attention.

As set forth *supra* and described in the Petition, Mr. Collier was forced to endure prolonged exposure to not one but two separate examples of overtly racist graffiti. Pet. 4–5. For six months, Mr. Collier was faced with the n-word every time he used the elevator at his workplace. *Id.* When he complained to his supervisors nothing was done. *Id.* And, Mr. Collier had also to endure the visual assault of two swastikas painted on the wall of a frequently used storage room. *Id.* Again, despite Mr. Collier's complaints, those hateful, demeaning, and threatening symbols were allowed to remain in full view for 18 months until finally being painted over. *Id.* On these facts there can be no question that the treatment of which Mr. Collier complained with respect to the graffiti was both of a prolonged duration and unaddressed by his employer, and that thus, under the prevailing case law, was sufficiently pervasive and extremely serious to constitute an actionable claim of hostile work environment discrimination.

CONCLUSION

For these reasons, together with the reasons in the Petition, amicus curiae the NAACP Legal Defense and Educational Fund, Inc. respectfully asks this Court to grant certiorari and reverse.

Respectfully submitted,

SHERRILYN A. IFILL
DIRECTOR-COUNSEL
JANAI S. NELSON
SAMUEL SPITAL
RACHEL KLEINMAN
NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC
40 RECTOR STREET, 5TH FLOOR
New York, NY 10006

Counsel for Amicus Curiae
NAACP Legal Defense & Educational Fund, Inc.

COTY MONTAG
JENNIFER A. HOLMES*
MAHOGANE REED
JASON BAILEY
NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
700 14TH STREET NW, SUITE 600
Washington, DC 20005
jholmes@naacpldf.org
(202) 682-1300

* Counsel of Record

February 16, 2021