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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

To reach a trier of fact on a hostile-work-environment claim under Title VII, plaintiffs must provide evidence that (among other things) their workplace was permeated with discriminatory intimidation, ridicule, and insult, that was sufficiently severe or pervasive to alter the conditions of their employment and created an abusive working environment. *E.g.*, *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). In determining whether workplace hostility has altered the conditions of employment, "all of the circumstances must be taken into consideration," including "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." *Id.*

The question presented is:

Whether Collier's evidence of two instances of racial graffiti and his being called "boy" spread over roughly three years of employment was sufficient to raise a triable hostile-work-environment claim where Collier conceded that the graffiti interfered with his work performance by only one percent (i.e., *not* unreasonably), there was no evidence suggesting the graffiti was directed specifically at him, and Collier never argued and had no evidence that the conduct at issue was physically threatening or humiliating.

CORPORATE DISCLOSURE STATEMENT

Respondent Dallas County Hospital District, doing business as Parkland Health & Hospital System ("Parkland"), is a governmental entity under the laws of the State of Texas.

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INTRODUCTION

Parkland does not dispute, and has never disputed, "that the term 'n—r' is racially offensive and universally condemned." Pet.App.44a.[1] "No word in the English language is as odious or loaded with as terrible a history." Pet.App.44a (internal quotation marks omitted). But neither Collier's petition nor his underlying hostile-work-environment claim hinges on whether this indisputably offensive racial epithet is offensive. *E.g.*, *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80–81 (1998).

Offensive workplace behavior does not, without more, give rise to a hostile work environment under Title VII. A "hostile work environment" is instead a work environment "so pervaded by *discrimination* that the terms and conditions of employment were altered." *Vance v. Ball State Univ.*, 570 U.S. 421, 427 (2013) (emphasis added). Determining whether such a discriminatory environment exists hinges on an "all circumstances" inquiry that examines "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." *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 270–71 (2001). This inquiry cannot occur in isolation. *Id.* Rather, in *all* harassment cases, the inquiry "requires careful consideration of the social context in which particular behavior occurs and is experienced by its target." *Oncale*, 523 U.S. at 81.

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[1] To avoid unnecessary repetition of an odious word, Parkland's brief limits use of the word to "the n-word" or similar euphemisms (e.g., "the word," "n—r," etc.). The word is spelled out in Parkland's brief only when quoting source material in which the word was already spelled out.

There are, however, limits to the kinds of conduct Title VII reaches. Title VII is emphatically not "a general civility code." *Oncale*, 523 U.S. at 81. To the contrary, "[c]onduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview." *Harris*, 510 U.S. at 21. Mere utterance of a racial epithet, for example, "does not sufficiently affect the conditions of employment to implicate Title VII," even if that epithet engenders offensive feelings in that employee. *Id.* (internal quotation marks and citations omitted); *Oncale*, 523 U.S. at 81. "[C]onduct must be *extreme* to amount to a change in the terms and conditions of employment," and thus amount to discrimination on the basis of race. *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998). Proof simply of conduct tinged with offensive racial connotations is therefore insufficient. *Oncale*, 523 U.S. at 81. Put simply, "Title VII does not prohibit all verbal or physical harassment in the workplace"; only conduct that amounts to discrimination based on race (among other categories). *Id.* at 80 (internal quotation marks omitted).

The dominant theme from these well-established and frequently litigated principles may be summed up in two words: context matters. *See, e.g.*, *Breeden*, 532 U.S. at 270–71. "This is not, and by its nature cannot be, a mathematically precise test." *Harris*, 510 U.S. at 22. Indeed, to preserve the highly contextualized and flexible nature of the inquiry, the Court has routinely eschewed litigants' requests to draw (or affirm) bright-line rules in this area. *See, e.g.*, *Faragher*, 524 U.S. at 791–92 (discussing the Court's rejection of three *per se* rules of liability or immunity from prior cases).

Despite the clarity of these prior decisions, Collier urges the Court to grant certiorari and reverse the underlying judgment against him in favor of the following bright-line rule: "a single workplace use of the N-word creates a hostile work environment." Pet.10. Several of Collier's amici urge the same result. *See, e.g.,* Amicus Br. of Howard Univ. at 4–7 ("any use"). And Collier seeks this relief despite the fact that he failed to raise this question to the district court or the Fifth Circuit panel below.

On this record, Collier's case is an especially poor candidate for certiorari for several reasons. Collier's assertions of an "entrenched circuit split" (Pet.3) cannot withstand even the slightest scrutiny. Despite Collier's contrary assertions, *no court* has adopted the bright-line position Collier urges in his petition (because this Court's decisions preclude it); and the circuit courts uniformly agree that a single workplace-incident involving a racial epithet may—in the proper context—give rise to a triable hostile-work-environment claim. Furthermore, neither the underlying record nor Collier's petition presents a strong case for certiorari. To the contrary, among other things, the record shows that Collier waived his question presented by failing to raise it before either the district court or the Fifth Circuit panel. The record also shows that the Fifth Circuit correctly affirmed the district court's judgment against Collier. Collier's petition should therefore be denied.

STATEMENT OF THE CASE

Parkland assumes the facts that follow as true, and views them in the light most favorable to Collier, as the law required Parkland to do when moving for,

and prevailing on, summary judgment below. *See Tolan v. Cotton*, 572 U.S. 650, 655–56 (2014) (per curiam).

A. Factual Background

Parkland employed Collier as an operating room aide for more than seven years, beginning in January 2009. Pet.App.2a. Collier's employment ended in July 2016 when he was terminated for insubordination. Pet.App.4a. Parkland concluded in its investigation that Collier failed to follow his supervisor's directive to work in his assigned area within the hospital thereby impacting patient care. *Id*. Collier's termination was lawful and non-discriminatory, Pet.App.6a–8a, a conclusion he does not challenge in his petition.

Before his termination, however, Collier says he observed the n-word scratched somewhere on one of the walls of an elevator he used at Parkland. Pet.App.42a; ROA.255–56.[2] Collier could not recall exactly when he saw this graffiti. His best recollection was it was some time "between 2013 and '15." ROA.255–56.

According to Collier, the word remained visible in the elevator for roughly six months until it was scratched out or painted over. Pet.App.42a; ROA.256.[3] Collier quantified the graffiti's effect on his work performance as one percent: "I'm not 100 percent. I'm 99 percent because of it." Pet.App.11a; ROA.256. Collier thought he orally reported the graffiti to Parkland's human resources group when he saw it but could not

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[2] "ROA.255" refers to the Fifth Circuit Record on Appeal and the page in the record where the citation may be found.

[3] Despite what he asserts in his petition, Collier's belief that the graffiti was scratched out "by some black person who was tired of seeing it," Pet.5, was pure speculation and evidence of nothing, as he conceded during his deposition. *See* ROA.256.

recall to whom or exactly when he made this report. Pet.App.42a; ROA.257.[4]

Collier claims further that toward the end of 2015 a white coworker (a nurse) referred to him as "boy" on one occasion. Pet.App.3a. Collier referred to this incident as "very upsetting," ROA.249–50, but also noted that "[i]t didn't do anything physically." ROA.251. Collier also claims to have heard two other coworkers (also nurses) refer to other Black employees who held his same position as "boy." ROA.250–51.

The idea that Parkland "tolerated frequent use of the pejorative 'boy' toward its Black workers," Pet.23, is baseless and belied by Collier's own testimony. Collier testified, for example, that after he reported his coworker's behavior to his supervisor, he was assigned to a different area away from the offending coworker. ROA.264. It would be another 45 days or so, in fact, before Collier saw that coworker again. And when he did, Collier could not recall ever hearing that coworker refer to him as "boy" again. ROA.252.

Collier also reported that, during his last six months of employment, he saw two swastikas sketched on the wall of an unfinished storage room that Collier purports to have used once or twice a week. Pet.App.3a; ROA.258, 261, 263, 298, 344.[5] The

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[4] As shown in the record, Parkland received and investigated nearly one dozen complaints from Collier throughout his employment at Parkland. But neither Parkland's Compliance Department nor its Employee Relations department has any record of receiving a complaint from Collier regarding alleged offensive comments or any racial graffiti purportedly bearing the n-word. ROA.1167.

[5] Photos of the walls in question may be seen in the record at ROA.1559–61. As shown, "it wasn't a Nazi flag draped on the wall." ROA.543.

room was unfinished because it was under construction; Parkland was building a new hospital and the room was part of that project. ROA.546–48.

Collier described the graffiti, and the purported delay in its removal, as "nothing good," and "not motivational." ROA.263–64. Still, when explaining how it affected his job performance, if at all, Collier's explanation was the same as before: "it makes me 99 instead of 100," and "in no way physically limited me[.]" Pet.App.11a; ROA.263–64. After Collier's termination, Parkland painted over the supply room's walls. Pet.App.43a.

B. District Court Proceedings

After his termination, Collier exhausted his administrative remedies with the EEOC and then sued Parkland under Title VII. ROA.011. In his complaint, which he later amended, Collier raised three Title VII claims against Parkland (among others): race discrimination, retaliation, and race-based hostile work environment. Pt.App.4a.

After discovery concluded, Parkland moved for summary judgment on all of Collier's claims and prevailed. Pt.App.4a. The district court held that Collier had no evidence that Parkland had taken *any* discriminatory actions against him: whether a failure to promote him, Pet.App.27a–28a; to offer overtime, Pet.App.29a; or in terminating his employment for insubordination, Pet.App.30a–33a. Nor was there any evidence that Parkland's proffered reason for Collier's termination—insubordination at the expense of patient care—was retaliatory. *E.g.*, Pet.App.38a.

Applying the standards set forth in this Court's precedents, the district court also examined "the total-

ity of the circumstances," considered all of the summary judgment evidence Collier submitted in support of his hostile-work-environment claim—the two instances of racial graffiti and the alleged use of "boy"—and concluded that such evidence was insufficient as a matter of law to give rise to a triable hostile-work-environment claim. Pet.App.45a–46a.

The district court readily agreed that the n-word has no place in the contemporary workplace and is indisputably offensive, "noxious," and "anathema," especially to Black Americans. Pet.App.44a. The district court also assumed that a person of Collier's protected class would find offensive the swastikas shown in Collier's photos of the walls in question. But, looking to the record, the district court observed that Collier had no evidence that any of the racial graffiti was aimed specifically at him and had no evidence that any of these episodes unreasonably interfered with his work performance. Pet.App.42a–44a. Indeed, the district court accepted Collier's concessions that both instances of graffiti affected him "by only a marginal one percent." Pet.App.45a. The district court therefore concluded that, even if taken together, neither the two instances of racial graffiti nor Collier's being addressed as "boy" over the course of three years (2013 to 2016) sufficiently altered the terms and conditions of Collier's employment to create an abusive work environment. Pet.App.45a–46a.

At no point during any of these proceedings did Collier *ever* argue what he argues now: that "a single workplace use of the N-word suffices to bring a hostile-work-environment claim before the trier of fact." Pet.10; *see also* ROA.1424–56. Collier never cited *Castleberry v. STI Group*, 863 F.3d 259 (3d Cir. 2017), *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264

(4th Cir. 2015), or *Ayissi-Etoh v. Fannie Mae*, 712 F.3d 572 (D.C. Cir. 2013), to the district court, for example, nor even commended the reasoning of those decisions as grounds for raising a triable claim. ROA.1428–31. In fact, Collier did not even pursue any particular theory about why his claim was triable, i.e., that two instances of racial graffiti and a coworker's calling him "boy" were *either* pervasive *or* severe and therefore altered the terms and conditions of his employment. ROA.1442–46. Neither the word "pervasive" nor "severe" even appear in Collier's brief opposing summary judgment. *See, e.g.*, ROA.1424–56.

C. Proceedings Before the Fifth Circuit.

Collier timely appealed the district court's judgment. Pet.App.1a. On appeal to the panel, Collier limited his appeal to the dismissal of his retaliation and hostile-work-environment claims and thus abandoned his discrimination claims. *See* Pet.App.2a.

As in the district court, Collier did *not* argue on appeal that the district court erred simply because a single workplace use of the n-word sufficed to raise a triable hostile-work-environment claim. *See* Appellant's Br. 25–33. Collier did not argue that a single use of the n-word was itself physically threatening under *Harris*. *See id*. Nor did he argue that the facts underlying his claim were "humiliating" under *Harris*. *Id*. Nor did he cite such authorities as *Ayissi-Etoh* or urge the Fifth Circuit to adopt the reasoning of such decisions or to abrogate or review any of its prior decisions that Collier thought were wrongly decided. *Id*.

Collier instead limited his hostile-work-environment appeal to three main arguments: (1) that he was not required to prove each of Parkland's actions were aimed at him directly (Appellant's Br. 26–27); (2) that

he was not required to prove psychological harm (*id.* at 28–32); and (3) that the *totality* of the events at issue (e.g., being called "boy" and the two instances of racial graffiti) were sufficient to justify letting the factfinder decide his claim (*id.* at 33). What is more, even after Parkland cited several Fifth Circuit decisions that the court later invoked to affirm the judgment against Collier, *see* Appellee's Br. 37 (collecting cases), Collier *still* did not cite *Ayissi-Etoh* or the other cases on which he now relies in his reply brief, or argue that those prior Fifth Circuit cases were wrongly decided. *See* Appellant's Reply at 9–12.

After briefing closed and the court heard oral argument, the Fifth Circuit affirmed the district court's judgment without dissent in an unpublished opinion. Pet.App.2a. In affirming dismissal of Collier's hostile-work-environment claim, the Fifth Circuit examined the record and held that under "the particular facts of this case," two instances of racial graffiti and Collier's being called "boy" between 2013 and 2016 was legally insufficient to justify taking Collier's hostile-work-environment claim to a jury. Pet.App.11a. This was so, the court held, because Collier had produced no evidence that the graffiti was aimed at him, had conceded that none of the events had interfered with his job (much less "unreasonably interfered"), and had failed generally to show that these events were "sufficiently severe *or* pervasive to alter the conditions of [his] employment and create an abusive working environment." Pet.App.11a (emphasis added, internal quotation marks omitted).

In affirming the judgment against Collier, the Fifth Circuit's opinion recognized that "other courts of appeals have found instances where the use of the N-

word itself was sufficient to create a hostile work environment," and then cited *Ayissi-Etoh v. Fannie Mae*, 712 F.3d 572, 580 (D.C. Cir. 2013) (Kavanaugh, J., concurring), among other authorities, Pet.App.10a, thus injecting an argument and authorities that no party had previously raised or cited to the court.

In alluding to these other decisions but adhering to its own precedent, the Fifth Circuit's panel opinion did not in any way reject those other courts' opinions. Far from it. The court had already held that "a single incident of harassment, if sufficiently severe, could give rise to a viable Title VII claim . . . ." *EEOC v. WC&M Enters., Inc.*, 496 F.3d 393, 400 (5th Cir. 2007). No, in this unpublished case, the Fifth Circuit merely favored passive virtue over prolixity:[6] that is, rather than distinguish and expound unnecessarily on cases from other circuit courts that supported arguments Collier had never made, the court simply applied its own precedents and resolved the appeal—something a panel opinion would be required to do in any event. *See* Pet.App.10a–11a. And, under that precedent, Collier lost. Pet.App.11a.

But Collier persisted. He petitioned the entire Fifth Circuit for panel rehearing *en banc*. *See* Appellant's Pet. for Panel Rehr'g *En Banc* (filed May 7, 2020) ("*En Banc* Pet."). Here, Collier could have preserved objections to the Fifth Circuit precedents the panel opinion cited when rejecting his arguments and asked the full Fifth Circuit to reconsider those prior precedents and thus reverse the panel's decision. But this he did not do. The only prior decision Collier

[6] Alexander M. Bickel, FOREWORD: THE PASSIVE VIRTUES, 75 Harv. L. Rev. 40 (1961) (advocating and expounding on techniques to avoid premature lawmaking in judicial decision-making).

asked the Fifth Circuit to reconsider was the panel decision affirming the judgment against him. *See En Banc* Pet. 9–16.

Not only that, Collier also raised two new arguments in his petition for rehearing: (1) that the underlying events were sufficiently "humiliating" to Collier to justify placing his hostile-work-environment claim before the fact finder (*En Banc* Pet. 10–11); and (2) that the graffiti's use of the n-word was itself sufficient to justify reversing the district court's judgment. *En Banc* Pet. 12 (citing *Ayissi-Etoh*, 712 F.3d at 580)). Parkland pointed out the impropriety of Collier's raising new arguments about the "humiliating" nature of the underlying events, Resp. to *En Banc* Pet. 11, prompting the Fifth Circuit panel to reissue and revise its opinion to expressly note Collier's waiver: "Collier does not argue that he felt humiliated by the graffiti, nor would the record support such an assertion." Pet.App.11a.[7] This was consistent with longstanding Fifth Circuit precedent "that a party who fails to make an argument before either the district court or the original panel waives it for purposes of *en banc* consideration." *Miller v. Tex. Tech Univ. Health Scis. Ctr.*, 421 F.3d 342, 349 (5th Cir. 2005). The Fifth Circuit then denied Collier's petition for rehearing without dissent. Pet.App.59a. Collier's petition for certiorari then ensued.

REASONS FOR DENYING THE PETITION

Collier asks the Court to review questions he did not present to the district court or Fifth Circuit panel below, based on a record poorly suited to the task, and

[7] The original panel opinion appears in the Petition Appendix at Pet.App.47a. But all citations to the Fifth Circuit's opinion made in this brief are to the revised opinion included in the Petition Appendix at Pet.App.1a.

under the guise of "an entrenched circuit split" that is more imagined than real and that can't withstand scrutiny. In fact, if surveying the circuits reveals anything, it is that, under "the particular facts of this case," Pet.App.10a, the Fifth Circuit's decision in this case is consistent with those other circuits' precedents and with this Court's precedents. The Fifth Circuit's decision was therefore correct: Collier failed, as a matter of law, to advance a triable hostile-work-environment claim under Title VII. Collier's petition should therefore be denied.

I. The Courts of Appeals Are Not "Intractably Divided" on Collier's Question Presented.

Collier's primary argument for petitioning for certiorari is a made-to-order circuit split that simply does not exist. As a threshold matter, Collier's assertions of a circuit split are baseless because no circuit court has sided with Collier's broadly stated position that a single workplace use of the n-word, "standing alone," suffices to raise a triable hostile-work-environment claim. Pet.12. Collier's further assertion that the Third and Fourth Circuits apply the law differently than the Fifth Circuit (and four others) collapses under the sheer weight of authority that flatly contradicts his position. In short, there is no circuit split that justifies granting Collier's petition or warrants this Court's review.

A. No Circuit Court Has Held that a Single Work-Place Incident Involving the N-Word, "Standing Alone," Gives Rise to a Triable Hostile-Work-Environment Claim.

Collier's variously phrased question—whether a single workplace use of the n-word, "standing alone," suffices to bring a hostile-work-environment claim,

Pet.12[8]—lacks nuance and context. So do the supporting arguments of certain *amici*. *Amicus* Br. of Howard Univ. at 7 ("[T]he presence of [the n-word] 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."); *Amicus* Br. of Social Science Experts at 28 ("Even a single display [of the n-word] is so violent and so limiting of opportunities that it must be assessed by a fact finder on the merits as a potential violation of Title VII."). In trying to persuade the Court to grant his petition, Collier and his amici have claimed the backing of the Third and Fourth Circuits, and, on that basis, argue that certiorari is justified because the law of those two circuits clashes with that of the Fifth Circuit and others (e.g., the Seventh Circuit). *E.g.*, Pet.9–16. The reality, however, is that no circuit court has adopted Collier's or his amici's position.

No case makes that point more sharply than a recent case from the Fourth Circuit: *Savage v. Maryland*, 896 F.3d 260 (4th Cir. 2018). There a Black police officer was assigned to a criminal enforcement unit that worked with and was overseen by local prosecutors. *Id*. at 265. In preparation for an upcoming trial, the officer scheduled a meeting with a local prosecutor and presented documents that might be used in that upcoming trial. *Id*. at 266. As the prosecutor reviewed the materials presented, he began reading

[8] Collier's other phrasings of the question presented include "[w]hether an employee's exposure to the N-word in the workplace is severe enough to send his Title VII hostile-work-environment claim to a trier of fact," Pet.i; whether "a single workplace use of the N-word suffices to bring a hostile-work-environment claim before the trier of fact," Pet.10; and "whether the single use of a hateful racial epithet—such as the N-word— . . . may establish a hostile work environment and thus be presented to the trier of fact," Pet.18 (among still others).

them aloud and verbatim. *Id.* And that meant his reading the n-word "over and over again." *Id.* at 266 (internal quotation marks omitted). At some point, and likely aware of the impact of his actions, the prosecutor stopped reading to ask if he was offending anyone. *Id.* As it turns out, he was: a different Black employee got up and left. *Id.* Unphased, the prosecutor returned to his reading. *Id.* The plaintiff-officer remained to endure the rest. *Id.*

The prosecutor's use of the n-word "so freely and without care" in a meeting with two Black employees was "highly powerful and hurtful" and deeply offensive to the officer. *Id.* In fact, the officer reported having problems sleeping afterward. *Id.* Accordingly, the officer made a formal complaint against the prosecutor shortly after this incident and then later sued, alleging that the prosecutor's brazen use of the n-word during a work meeting amounted to a hostile work environment that resulted in discrimination based on race. *Id.*

If the law in the Fourth Circuit is as Collier says, Pet.10, the officer should have reached a jury on his hostile-work-environment claim. He didn't. The Fourth Circuit held instead that "no reasonable employee could believe that [the prosecutor] violated Title VII at the trial-preparation meeting to which the employee objected[.]" *Id.* at 265.

"[C]ontext matters," the court observed. *Id.* at 277 (citing *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 270–71 (2001)). And, in context, multiple workplace uses of the n-word at a work meeting did not suffice—as a matter of law—to raise a triable hostile-work-environment claim within the context of that case (i.e., because, as in *Breeden*, the materials from which the prosecutor read, even if gratuitously, were

materials the officer already reviewed as part of his job duties). 896 F.3d at 277–78. There is ample authority in the Third Circuit to the same effect. *See, e.g.*, *Lawrence v. F.C. Kerbeck & Sons*, 134 Fed. Appx. 570, 572 (3d Cir. 2005) (holding that a manager's single, isolated use of a "racially derogatory remark"[9] did not give rise to triable hostile-work-environment claim where the remark was made in anger during an argument and the employee admitted that he lacked regular contact with this manager and that the altercation was an isolated incident). These holdings simply cannot be squared with Collier's broad and meritless assertion that, in the Third and Fourth Circuits, "a single workplace use of the N-word suffices to bring a hostile-work-environment claim before the trier of fact." Pet.10.

What is more, as the Fourth Circuit's reasoning in *Savage* and the Third Circuit's reasoning in *Lawrence* further confirm, there is a straightforward reason that no circuit court has adopted Collier's bright-line rule: it contradicts this Court's precedents, which require consideration of the totality of the circumstances. *E.g.*, *Savage*, 896 F.3d at 276–78 (discussing *Breeden*); *see also Harris*, 510 U.S. at 21. Accordingly, there is no merit to Collier's various assertions about a circuit split over whether a single workplace use of the n-word suffices, standing alone, to bring a hostile-work-environment claim. Pet.12. There is no such split.

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[9] Although the Third Circuit's opinion in *Lawrence* does not specifically identify the remark at issue, the appellate record in *Lawrence* does: "you know, you got a big mouth, you motherf---ing n---er." Appellee's Br. at 6, *Lawrence v. F.C. Kerbeck & Sons*, 134 Fed. Appx. 570 (3d Cir. 2005) (No. 05-1242), 2005 WL 5940352, at *6 (internal quotation marks omitted).

B. The Circuit Courts Uniformly Agree that, Under this Court's Precedents, a Single Work-Place Use of the N-Word *May* Give Rise to a Triable Hostile-Work-Environment Claim Depending on the Totality of the Circumstances.

Collier's assertion that, unlike in the Third and Fourth Circuits, "Black employees in the Fifth, Sixth, Seventh, Eighth, and Tenth Circuits can *never* establish a hostile-work-environment claim based on a single workplace use of the N-word," Pet.21 (emphasis added), is wildly inaccurate. Even a modest amount of research would have shown that (1) each of those circuits has expressly rejected the rule Collier accuses them of adopting, (2) the Fifth Circuit has, in fact, sustained claims arising out of a single incident involving a racial epithet (as have other circuits), and (3) in addressing race-based hostile-work-environment claims like Collier's, the various circuit courts have applied this Court's precedents consistently while relying interchangeably on each other's precedents.

1. There is simply no basis for Collier's bare assertion that the Fifth Circuit (or any other circuit court) has barred Black employees from ever establishing—as a matter of law—that a single workplace incident involving a racial epithet may give rise to a triable hostile-work-environment claim. The Fifth Circuit's cases could not be clearer on that point: "a single incident of harassment, *if sufficiently severe*, could give rise to a viable Title VII claim as well as a continuous pattern of much less severe incidents of harassment."[10] *WC&M Enters.*, 496 F.3d at 400 (emphasis

[10] According to Westlaw, lower courts, including dozens within the Fifth Circuit, have cited *WC&M* for this proposition over 50 times.

added); *see also Okoli v. City Of Baltimore*, 648 F.3d 216, 220 (4th Cir. 2011) (citing *WC&M* with approval).

The Seventh Circuit too has spoken emphatically on this issue, including in a case Collier cites approvingly elsewhere in his brief. *E.g.*, *Rodgers v. W.S. Life Ins. Co.*, 12 F.3d 668, 674 (7th Cir. 1993) ("[T]here is neither a threshold 'magic number' of harassing incidents that gives rise, without more, to liability as a matter of law nor a number of incidents below which a plaintiff fails as a matter of law to state a claim."); *see also* Pet.23 (citing with approval *Rodgers*, 12 F.3d at 675). Accordingly, Collier's assertion that the Seventh Circuit "stresses the frequency of racial epithets in the workplace *above all else*," is baseless. Pet.14 (emphasis added).[11] Moreover, that venerable Seventh Circuit precedent is wholly consistent with Third and Fourth Circuit precedent (as shown above, *Ante*, at 12–15), and with this Court's precedents. *E.g., Harris*, 510 U.S. at 22 ("[Discerning a hostile-work-environment] is not, and by its nature cannot be, a mathematically precise test.").

[11] More than that, Collier's criticism of courts who analyze "the frequency of racial epithets [to] determine the viability of a hostile-work-environment claim," Pet.12–13, is quite odd. *Harris* expressly instructed lower courts to do so. 510 U.S. at 23. And the Third, Fourth, and D.C. Circuits do so routinely. *E.g.*, *Irani v. Palmetto Health*, 767 Fed. Appx. 399, 417 (4th Cir. 2019) (holding that an Indian employee referred to as "Achmed the terrorist" failed to raise a triable hostile-work-environment claim, as a matter of law, where all the employee could prove was "two comments over an 18 month period"); *Harris v. Wackenhut Servs., Inc.*, 419 Fed. Appx. 1, 1–2 (D.C. Cir. 2011) (holding that three racially motivated comments during a one-year period could not save plaintiff's hostile-work-environment claim from summary judgment); *Lawrence*, 134 Fed. Appx. at 572 (holding that a manager's one-time of use of the n-word, which he yelled at the Black plaintiff during an argument, did not give rise to a triable hostile-work-environment claim).

So too with the other circuits that Collier mischaracterizes as barring Black employees from ever pursuing claims based on a single incident. *See, e.g.*, *Tademy v. Union Pac. Corp.*, 614 F.3d 1132, 1145–46 (10th Cir. 2008) (holding there is no "magic number" of harassing incidents that a hostile-work-environment plaintiff must endure to reach a jury on her claim and citing with approval *Cerros v. Steel Techs., Inc.*, 288 F.3d 1040, 1047 (7th Cir. 2002), and *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 185 (4th Cir. 2001)); *Green v. Franklin Nat'l Bank of Minn.*, 459 F.3d 903, 910 (8th Cir. 2006) ("Frequency of harassment is a factor, but even infrequent conduct can be severe enough to be actionable."); *Johnson v. United Parcel Serv., Inc.*, 117 Fed. Appx. 444, 454 (6th Cir. 2004) (some epithets "even taken in isolation" may be more than a "mere offensive utterance"); *see also Moring v. Arkansas Dep't of Corr.*, 243 F.3d 452, 456 (8th Cir. 2001) ("[W]e are unaware of any rule of law holding that a single incident can never be sufficiently severe to be hostile-work-environment sexual harassment.").

Accordingly, the circuit courts are hardly "intractably divided," as Collier asserts. Pet.7. The circuit courts instead uniformly agree: a single incident involving the n-word *may* give rise to a viable hostile-work-environment claim, depending on the context.

2. Despite what Collier asserts in his petition, the Fifth Circuit has held on several occasions that a single workplace incident involving a racial epithet, or a very small number of them, may give rise to a triable hostile-work-environment claim. *See, e.g.*, *Henry v. CorpCar Services Houston, Ltd.*, 625 Fed. Appx. 607, 612 (5th Cir. 2015) (affirming a jury's hostile-work-environment claim based on a single incident of white

managers comparing Black employees to primates during a work meeting that the white managers purposely scheduled on Juneteenth); *Allen v. Potter*, 152 Fed. Appx. 379, 382–83 (5th Cir. 2005) (holding that employees raised genuine issues of fact as to the severity or pervasiveness of racial workplace harassment where the evidence showed the Black employees' co-workers hurled racial epithets while the Black employees worked in a cage for one and one-half hours). There is therefore no merit to Collier's suggestion that Black employees in the Fifth Circuit are somehow worse off in waging hostile-work-environment claims than those in the Third or Fourth Circuits.

3. It is that backdrop that makes Collier's various assertions about an "intractable divide" between circuits so meritless. Even with generous word limits, it is not possible to say even most of what might be said about Collier's (mis)characterization of roughly thirty years' worth of precedent from five active circuit courts on an issue as frequently litigated—and as fact-intensive—as race-based hostile-work-environment claims. Put simply, Collier's discussion of these circuits' precedents is incomplete and sorely lacking context.[12]

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[12] Collier's mischaracterization of the Sixth Circuit's decision in *Jackson v. Quanex Corp.*, 191 F.3d 647 (6th Cir. 1999) is an especially good example of the petition's badly distorted discussion of the precedents from Collier's five disfavored circuits. *Jackson* involved an especially egregious set of facts that preceded an especially egregious decision by a district court to vacate a jury's verdict for the employees. The galling facts that the jurors heard are summarized across six pages of the opinion and concern *multiple* instances of white coworkers and supervisors hurling racial slurs, including the n-word, against their Black coworkers, repeated instances of graffiti depicting a lynching and using violent and threatening phrases (e.g., "KKK is back") (among a mountain of other examples). *Id.* at 650–56. Despite all that evidence, the district court vacated the verdict on grounds

With added context, however, (including that provided above, *Ante*, at 12–18) it is evident that the Third, Fourth, Fifth, Sixth, Seventh, and other Circuits have developed a consistent view about when the use of a racial epithet in the workplace, including the n-word, may give rise to a triable hostile-work-environment claim. So consistent is that view, in fact, that cases Collier cites from his five disfavored circuits have their analog in Collier's two favored ones.

Accordingly, what in the Sixth Circuit is *Nicholson v. City of Clarksville, Tenn.*, 530 Fed. Appx. 434 (6th Cir. 2013), for example, is *Caver v. City of Trenton*, 420 F.3d 243 (3d Cir. 2005), in the Third Circuit. *Compare Nicholson*, 530 Fed. Appx. at 443 (holding that four isolated uses of epithets like the n-word and "boy" by coworkers over the course of two years was not actionable), *and Caver*, 420 F.3d at 263 (holding that neither racist graffiti and flyers placed around the department by unidentified individuals, nor racial epithets

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that "simple teasing, offhand comments, and isolated incidents ordinarily do not amount to discrimination." *Id.* at 662. Exasperated and "disturb[ed]" by the district court's decision, the Sixth Circuit distinguished the prior holdings the district court cited to justify its decision, and held that "an abundance of racial epithets and racially offensive graffiti *could hardly qualify as offhand or isolated*." *Id.* at 662 (emphasis added). "Rather," the court admonished, "such continuous conduct may constitute severe and pervasive harassment." *Id.*

In quoting that passage from *Jackson*, Collier spliced two of the opinion's sentences together but removed the portion emphasized above (*i.e.*, "could hardly qualify as offhand or isolated") while trying to prop up his incorrect assertions about the Sixth Circuit's purported boundary for what is actionable, "an abundance of racial epithets," according to Collier. Pet.13. That isn't a fair representation of that court's precedents, however. The Sixth Circuit's observation simply echoes this Court's decision in *Harris*: that the appalling conduct shown in *Jackson* "merely present[ed] some especially egregious examples of harassment," but did "not mark the boundary of what is actionable." 510 U.S. at 22.

and racially offensive comments that a Black employee's supervising officers made on the job, but did not direct at him, gave rise to a hostile-work-environment claim).

Gates v. Board of Education of the City of Chicago, 916 F.3d 631 (7th Cir. 2019) in the Seventh Circuit, is *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264 (4th Cir. 2015) in the Fourth Circuit. *Compare Gates*, 916 F.3d at 638–40 (holding that racial epithets hurled by a Black employee's supervisor at employee on three occasions over a six-month period of his four-year employment was sufficiently severe or pervasive to raise a triable hostile-work-environment claim), *and Boyer-Liberto*, 786 F.3d at 279–80 (citing Seventh Circuit precedent and holding that plaintiff had a triable hostile-work-environment claim where her supervisor employed racial epithets to cap explicit, angry threats made toward terminating employee's job, had berated the employee's job performance before threatening and directing racial epithets at her, and, when the employee attempted to report the harassment, threatened her again).

And what is *Collier v. Dallas County Hosp. Dist.*, 827 Fed. Appx. 373 (5th Cir. 2020) in the Fifth Circuit, is *Skipper v. Giant Food Inc.*, 68 Fed. Appx. 393 (4th Cir. 2003) in the Fourth Circuit. *Compare Collier*, 827 Fed. Appx. at 377–78 (holding that two instances of racial graffiti and the plaintiff's being called "boy" over the course of two to three years was not actionable), *and Skipper*, 68 Fed. Appx. at 398–99 (affirming dismissal of hostile-work-environment claim arising out of plaintiff's frequent on-the-job exposure to racist graffiti in warehouse trailers and restrooms, his hearing coworkers utter racial epithets but not at plaintiff,

and his having a manager follow him around while referring to the plaintiff by a racial slur).

Although many other examples could be cited, these cases sufficiently make the point. What drives different outcomes in different cases across circuits is *not* differences in the law applied, as Collier erroneously contends, but dispositive differences in the material facts to which the *same* law is applied. *E.g., Gates,* 916 F.3d at 638–40 (collecting cases and noting that although the plaintiff had sufficient evidence to reach a jury on his hostile-work-environment claim, the result would likely have been different had such conduct been perpetrated by a mere coworker); *Ayissi-Etoh*, 712 F.3d at 580 (holding that supervisor's use of n-word in situations where supervisor was exercising control over the terms of employment was sufficient to raise a triable hostile-work-environment claim). "[C]ontext matters." *Savage*, 896 F.3d at 277. And, in context, Collier's circuit split is a fiction that counsels against granting his petition.

II. This Is the Wrong Case to Decide Collier's Questions Presented.

The lack of a legitimate circuit split is not the only reason the Court should deny Collier's petition. Collier's case, and the record created below, show unequivocally that this case is ill-suited to resolve "whether an employee's exposure to the N-word in the workplace is severe enough to send his Title VII hostile-work-environment claim to a trier of fact." Pet.i.

A. Collier Waived His Questions Presented By Failing to Raise Them Adequately Below.

Arguments not raised in the district court or court of first appeal are forfeit. *E.g.*, *Sprietsma v. Mercury*

Marine, 537 U.S. 51, 56 n.4 (2002). And this Court does not entertain forfeited arguments. *E.g.*, *id.*; *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1978 (2016) (declining to entertain arguments that the government failed to raise below and therefore forfeited). Accordingly, this case is particularly ill suited to decide Collier's questions presented because the record shows unequivocally that he forfeited those issues when he failed to raise them below.

At no point in his arguments before the district court did Collier *ever* argue what he argues here. The word "severe" doesn't even appear in his summary judgment response. Nor did Collier do anything to suggest that a single use of the n-word was itself sufficient to raise a triable hostile-work-environment claim, or that the Fifth Circuit precedent that Parkland cited was somehow at odds with that of other circuits or this Court (not even in a footnote).

None of that changed on appeal either—at least, not *before* the panel issued its opinion affirming the district court's judgment while alluding to arguments and decisions from other circuits that Collier never previously cited but now includes in his petition (e.g., *Ayissi-Etoh*). Pet.App.11a. Neither his appellant's brief nor his reply brief argued the issues Collier argues now.

Worse still, even when he petitioned for rehearing *en banc*, and thus had the chance to have the Fifth Circuit reconsider the precedents the panel opinion applied when affirming the judgment, Collier passed on that chance too. He limited his arguments instead merely to the unpublished "panel opinion," and then argued for the first time that the Fifth Circuit should have remanded his claim for trial because (a) mere use of the n-word in racial graffiti was itself sufficient to

raise a triable claim, and (b) the events at issue were sufficiently "humiliating" to raise a triable claim (among other erroneous arguments).[13]

The Fifth Circuit took note of Collier's new argument, and Parkland's objection to it, and memorialized Collier's waiver of that argument in the revised panel opinion: "Collier does not argue that he felt humiliated by the graffiti, nor would the record support such an assertion." Pet.App.11a.

The Fifth Circuit's revision is proof positive of Collier's forfeiture of his questions presented. The gravamen of Collier's entire petition is that Black employees suffer humiliation almost as a matter of law—and thus have a triable hostile-work-environment claim under Title VII—whenever the n-word is used in the workplace. *E.g.*, Pet.10–12, 19–21. But as the Fifth Circuit noted in its decision, Collier never fairly advanced that argument below. Pet.App.11a. And longstanding (and unchallenged) Fifth Circuit precedent barred his effort to do so through his petition for rehearing. *Miller*, 421 F.3d at 349.

The fact that both the district court and the panel opinion were bound by Fifth Circuit precedent in rendering their respective decisions does not excuse Collier's failure to raise and thus preserve his challenge

[13] At least one of Collier's amici argued that workplace use of the n-word is akin to a physical assault. *Amicus* Br. of Social Science Experts 16–18 (analogizing workplace use of the n-word to an assault in a sexual harassment case). Collier's failure to say *anything* in his briefing below about the n-word's being akin to a physical assault is another form of waiver. This Court does not consider arguments raised by *amicus curiae* that, as here, the parties did not raise and that the lower courts did not address. *See, e.g.*, *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 226 n.4 (2013).

before those courts. Other litigants have done so successfully in similar situations before reaching this Court. *E.g.*, *Oncale*, 523 U.S. at 77; *see also Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 884–85 (2007). Collier is no, and has urged no, exception to that rule.

Having deprived the courts below—and Parkland—of a fair opportunity to brief and build a record actually addressing the questions Collier presents in his petition, he should not obtain review of those questions now. This Court is "a court of review, not of first view." *Brownback v. King*, 141 S. Ct. 740, 747 n.4 (2021). Collier presents no reason in his petition to depart from that well-worn principle. That is reason enough to deny Collier's petition.

B. Granting Collier's Petition Would Be Immediately Improvident Because Although This Court Has Already Decided Collier's Questions Presented Against Him, Collier Has Not Asked the Court to Overturn Those Prior Decisions.

A cursory comparison of this Court's precedents with the arguments Collier and his amici advance in support of Collier's petition reveal three clear conclusions that, taken together, make granting Collier's petition improvident.

1. As shown above (*Ante*, at 12–15), Collier and his *amici* urge the Court to grant certiorari and hold that workplace use of the n-word, "standing alone," is sufficient to raise a triable hostile-work-environment. Pet.12; Pet.23 (merely "[i]ntroducing the N-word into Collier's workplace alter[ed] the conditions of [his] employment"); *see also Amicus* Br. of Howard Univ. at 7

("[T]he presence of [the n-word] 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."); *Amicus* Br. of Social Science Experts at 28 ("Even a single display [of the n-word] is so violent and so limiting of opportunities that it must be assessed by a fact finder on the merits as a potential violation of Title VII."). Collier makes this argument under the guise of a purported "gap" in the Court's precedents: *Harris*, says Collier, established that the "mere utterance" of an epithet is insufficient, 510 U.S. at 21–22, while *Faragher* recognized that even "isolated incidents" could be actionable if "extremely serious." 527 U.S. at 788. Pet.17–19.[14]

2. But, as shown in *Savage*, Collier's "gap" doesn't exist. Quite the contrary. As even the Third and Fourth Circuits' cases confirm (*Ante*, at 13–15), the Court has left no doubt on this score: a single workplace use of a racial epithet does not, *standing alone*, give rise to a triable hostile-work-environment claim. *E.g.*, *Breeden*, 532 U.S. at 270–71; *Faragher*, 527 U.S. at 788–89; *Harris*, 510 U.S. at 21–22.

3. Because the Court has already rejected the definite rule Collier and his *amici* seek, *e.g.*, *Harris*, 510

[14] Considering how broadly and variously Collier and his *amici* phrased the rule over which they contend a split exists (e.g., a single workplace use of the n-word, standing alone, suffices to bring a hostile-work-environment claim, Pet.12), the exact scope of Collier's question presented is far from clear. But if Collier's only point is that a single workplace use of a racial epithet *may*, in some case and under some circumstances, give rise to a triable hostile-work-environment claim, then Collier's questions presented are even less compelling. This Court and numerous lower court decisions already provide that answer: a single workplace use of a racial epithet may give rise to a triable claim *depending on the circumstances* (e.g., if "extremely serious"). *Harris*, 524 U.S. at 81–82; *Ante*, at 16–22 (collecting cases).

U.S. at 21–22, granting Collier's petition will necessarily require the Court to reconsider its prior cases and overrule them at least in part. And that reality, standing alone, makes granting Collier's petition improvident: for Collier has not asked the Court to overturn *any* of its prior decisions in his questions presented, *see* Pet.i; and under this Court's Rule 14.1, overruling decades' old precedents is not an issue "fairly included" within the questions Collier did present. *See, e.g.*, *Chandris, Inc. v. Latsis*, 515 U.S. 347, 353 (1995); *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 30–31 (1993). Collier's petition would therefore be improvidently granted on arrival and should be denied on that basis.

C. The Court Should Wait for a Better Record with Thorough Briefing and Clear Decisions from the Lower Courts Before Deciding the Question Presented.

While workplace equality under Title VII is indisputably important, there is ample reason to doubt that this case and this record are the ones the Court should use to consider whether to stretch or reverse precedents that have been in place for nearly 30 years. Title VII is a weighty, every-day area of law. It governs and affects thousands of employers and millions of employees daily. Given that reality, the Court's development of this area of the law has always been preceded by a clear factual record, extensive briefing, and clear decisions by lower courts on the questions and issues presented (typically after a period of trial-and-error in the lower courts). *E.g.*, *Harris*, 510 U.S. at 20–21; *Vance*, 570 U.S. at 430–31. Accordingly, before the Court grants certiorari to consider whether a single workplace use of the n-word—standing alone—suffices to raise a triable hostile-work-environment claim

(Pet.12), it should ensure it has the aid of a strong and clear record, thorough briefing, and clearly reasoned decisions from lower courts that bear directly on the questions presented. This record provides none of that.

To begin with, the factual record here is neither strong nor clear. While Collier argues passionately in his petition, for example, about how workplace use of the n-word humiliates Black workers and therefore justifies his proposed rule (*e.g.*, Pet.19–21), "Collier [never] argue[d] that he felt humiliated by the graffiti, nor would the record support such an assertion." Pet.App.11a. And he conceded during his deposition (volunteered, in fact) that both episodes of racial graffiti had no appreciable effect on his job performance (Pet.App.11a; ROA.263–64)—a concession Collier entirely omitted from his petition.

Moreover, even assuming that no waiver resulted from Collier's failure to place before the district court and Fifth Circuit the issues he now raises in his petition, his delay has—at a minimum—stunted the legal development of the issues as they reach the Court. Because Collier waited until his petition for rehearing *en banc* to raise whether "a single workplace use of the N-word suffices to bring a hostile-work-environment claim," Pet.10, there has been virtually no briefing on that issue in, and therefore no decisions from, the lower courts on that issue. That is not a typical feature of cases that reach this Court on merits review and is yet another reason to deny Collier's petition. *See, e.g.*, *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1322 n.16 (2016) (refusing to consider issues that had not been thoroughly briefed before the Court or the court of first appeal).

Finally, the district court's and the Fifth Circuit's resolution of the mixed questions of law and fact inherent in Collier's hostile-work-environment claim do not fit the Court's pattern for granting review of such questions.[15] When this Court has decided to take up a case involving a mixed question, it has typically done so in three contexts: (1) lower courts reached opposite legal conclusions on the same or nearly the same facts, *e.g.*, *Oncale*, 523 U.S. at 78–79 (resolving circuit split on whether sex discrimination consisting of same-sex sexual harassment was actionable under Title VII); *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 147 (2012) (resolving circuit split on whether pharmaceutical salespeople were exempt under the FLSA); (2) lower courts have developed and imposed conflicting filters on what facts or evidence may be considered in the mixed question, *e.g.*, *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 117–18 (2002) (resolving circuit split where some courts were refusing to consider hostile conduct outside the statutory period); or (3) lower courts have developed and imposed their own threshold tests on how to apply some prior precedent of this Court. *E.g.*, *Vance*, 570 U.S. at 431–33 (discussing the various tests applied in lower courts after the Court left open the issue of who qualifies as a "supervisor" in *Faragher*).

Here, however, Collier has raised *nothing* that fits any of these molds. Collier has not cited, for example, a case where on virtually identical facts, a court in

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[15] As many lower courts have observed, "the existence of racial harassment in a hostile work environment involves an application of facts (the specific discriminatory conditions alleged by the plaintiff) to law (the standards governing the existence of racial harassment and hostile work environment discrimination)." *Rodgers*, 12 F.3d at 674; *cf. Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986).

some other circuit held a plaintiff like Collier had advanced a triable hostile-work-environment claim so as to fit the *Oncale* mold. Indeed, as shown above, the Fifth Circuit's decision in this case is entirely consistent with comparable decisions from other circuits (e.g., the Fourth Circuit's decision in *Smith*). Nor has Collier shown that, say, his preferred circuits apply a broader view of "the totality of the circumstances" than the five disfavored circuits; this Court already settled that question in *Morgan*. 536 U.S. at 116–18. And Collier has not identified any "home rule" that the Fifth Circuit applied in his case that other circuits don't, or have refused to, apply as in *Vance*. To the contrary, as shown already above (*Ante*, at 16–22), the various circuits apply the same law under *Harris*.

A thin record and stunted briefing are ill-suited for addressing the issues Collier raises and that bear on so important an area of law. Accordingly, to the extent Collier is correct that the questions presented are recurring (Pet.19), the Court should wait for a different case with stronger facts and a better record than the one Collier presents here.

III. The Fifth Circuit's Decision Is Correct.

Besides being splitless, waived, and improvident, Collier's grounds for seeking certiorari are meritless. The Fifth Circuit correctly affirmed judgment on Collier's hostile-work-environment claims not only "under [its] precedent," Pet.App.11a, but also the precedent of several circuits discussed above (*Ante*, at 12–22) and under this Court's decision in *Harris* and its progeny.

Under this record, the Fifth Circuit correctly held that Collier's being called "boy" and his exposure to two instances of racial graffiti—all at varying points

over the course of two or three years—are insufficient to establish a hostile work environment as a matter of law. Pet.App.11a (collecting cases). This conclusion is especially warranted given the following undisputed facts: there is no evidence the incidents occurred at the hands of a supervisor; Collier acknowledged that Parkland addressed the "boy" incident and that his co-worker never used the offending word again, ROA.264.; there is no evidence that any incident was "physically threatening"; there is no evidence that any of the graffiti was directed specifically at Collier; Collier never argued any episode was humiliating, Pet.App.11a; and Collier conceded that none of these incidents interfered with his work performance: "I'm not 100 percent. I'm 99 percent because of it." Pet.App.11a; ROA.256. That showing is legally insufficient to raise a triable hostile-work-environment claim under *any* circuit's precedents discussed above (including the Third and Fourth Circuits). *See, e.g., Skipper*, 68 Fed. Appx. at 398–99.

Collier's continued and *belated* reliance on *Ayissi-Etoh*, 712 F.3d 572 (D.C. Cir. 2013), or *Boyer-Liberto*, 786 F.3d 264 (among others) remains misplaced. Each is inapposite. Unlike those cases, Collier's case does not involve a supervisor's use of racial epithets in connection with employment decisions or during their assertions of authority over him. *Boyer-Liberto*, 786 F.3d at 279–80 (supervisor "employed racial epithets to cap explicit, angry threats that she was on the verge of utilizing her supervisory powers to terminate"); *Ayissi-Etoh*, 712 F.3d at 577 (supervisor "used a deeply offensive racial epithet [(the n-word)] when yelling at Ayissi–Etoh to get out of the office"). In short, unlike the employees in those cases, Collier has not shown a work environment that was "sufficiently

severe or pervasive to alter the conditions of [his] employment and create an abusive working environment." *Harris*, 510 U.S. at 21 (internal quotation marks omitted). There is nothing in this record that warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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