No. _____

In The
Supreme Court of the United States

JANICE HARGROVE WARREN,

Petitioner,

v.

MIKE KEMP,
in his official capacity as a Member of the Board
of the Pulaski County Special School District
and in his individual capacity, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

SARAH HOWARD JENKINS
Counsel of Record
ATTORNEY AT LAW
P.O. Box 242694
Little Rock, AR 72223
(501) 960-8835
sarah@shjenkinslaw.com
Counsel for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED FOR REVIEW

Under Title VII, 42 U.S.C. § 2000e-2, an employer who discriminates on compensation, terms, conditions, or privileges of employment because of race, religion, sex, or national origin engages in an unlawful employment practice. The Eighth Circuit held contrary to its precedent and the holdings of the Sixth and Eleventh Circuits that conditions of employment have nothing to do with facilities. Assuming discriminatory facilities are lawful, an employee who opposes her employer's provision of discriminatory facilities based on race or sex is shielded from retaliation pursuant to Title VII, 42 U.S.C. § 2000e-3, if she believes she is opposing an unlawful employment practice. Unlike the majority of its sister Circuits, contrary to Eighth Circuit precedent, and this Court's perspective in *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 126 S.Ct. 2405, 2414 (2006), the Eighth Circuit ruled that the test of the employee's belief is subjective, determined by the employee's testimony regarding her belief.

QUESTIONS PRESENTED

A. Is providing undisputedly inferior working conditions or facilities based on the race or sex of its employees an unlawful employment practice?

B. If providing inferior working conditions based on race or sex violates Title VII, is the employer only prohibited from discriminating concerning facilities affecting the core functions of the job, or are comparable privileges and benefits such as tools, equipment, breakrooms, and offices also within the scope of Title VII?

QUESTIONS PRESENTED FOR REVIEW
– Continued

C. Is opposing a policy that requires an employee to discriminate against third parties, as a term of the employment contract, a protected activity?

D. If an employee believes she is opposing an unlawful employment practice, is the test of her belief a subjective or an objective standard?

PARTIES TO THE PROCEEDING

Janice Hargrove Warren, Petitioner

v.

Mike Kemp, in his official capacity as a Member of the Board of the Pulaski County Special School District and in his individual capacity;

Linda Remele, in her official capacity as a Member of the Board of the Pulaski County Special School District and in her individual capacity;

Shelby Thomas, in his official capacity as a Member of the Board of the Pulaski County Special School District and in his individual capacity;

Alicia Gillen, in her official capacity as a Member of the Board of the Pulaski County Special School District and in her individual capacity;

Eli Keller, in his official capacity as a Member of the Board of the Pulaski County Special School District and in his individual capacity;

Brian Maune, in his official capacity as a Member of the Board of the Pulaski County Special School District and in his individual capacity;

The Pulaski County Special School District (PCSSD)

LIST OF ALL PROCEEDINGS

Eighth Circuit, United States Court of Appeals,
No. 22-2067 & No. 22-2169

> October 5, 2023, Order denying Appellee's Petition for Rehearing *En Banc* and by the Panel;

Eighth Circuit, United States Court of Appeals,
No. 22-2067 & No. 22-2169

> August 22, 2023, Judgment, vacating and remanding the Judgment of the District Court;

Eastern District of Arkansas, United States District Court,
4:19-cv-00655 BSM

> April 21, 2022, Order denying Appellant/Defendants' Motion for Judgment as a Matter of Law or to Alter or Amend the Judgment;

Eastern District of Arkansas, United States District Court
4:19-cv-00655 BSM

> March 10, 2022, Judgment for Plaintiff/Appellee/Petitioner

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OTHER AUTHORITIES

Janice Hargrove Warren respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit entered August 22, 2023, in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, App. 1-22) is published in the Federal Reporter at 79 F.4th 967 (8th Cir. 2023). The judgment of the District Court (App., *infra*, App. 33-35) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on August 22, 2023. The order of the Court of Appeals denying Appellee's Petition for Rehearing *En Banc* was entered on October 5, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title VII, § 703 (1964), 42 U.S.C. § 2000e-2:

> (a) Employer practices
>
> It shall be an unlawful employment practice for an employer –
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate

> against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Title VII, § 703 (1964), 42 U.S.C. § 2000e-2 (Pub. L. 88–352, title VII, § 703, July 2, 1964, 78 Stat. 255; Pub. L. 92–261, § 8(a), (b), Mar. 24, 1972, 86 Stat. 109; Pub. L. 102–166, title I, §§ 105(a), 106, 107(a), 108, Nov. 21, 1991, 105 Stat. 1074–1076).

Title VII, § 704 (1964), 42 U.S.C. § 2000e-3:

> (a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings
>
> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or

> because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Title VII, § 704 (1964), 42 U.S.C. § 2000e-3 (Pub. L. 88–352, title VII, § 704, July 2, 1964, 78 Stat. 257; Pub. L. 92–261, § 8(c), Mar. 24, 1972, 86 Stat. 109).

42 U.S.C. § 1981 (1991):

> (a) Statement of equal rights
>
> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
>
> (b) "Make and enforce contracts" defined
>
> For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

42 U.S.C. § 1981 (1991) (R.S. § 1977; Pub. L. 102–166, title I, § 101, Nov. 21, 1991, 105 Stat. 1071).

42 U.S.C. § 1983 (1996):

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

42 U.S.C. § 1983 (1996) (R.S. § 1979; Pub. L. 96–170, § 1, Dec. 29, 1979, 93 Stat. 1284; Pub. L. 104–317, title III, § 309(c), Oct. 19, 1996, 110 Stat. 3853).

INTRODUCTION

This case presents a clear division among the circuits on significant questions of federal employment law. Title VII prohibits intentional discrimination in the terms, conditions, and privileges of employment because of race, sex, religion, or national origin. The scope of this mandate includes the facilities, workplaces, or

working conditions provided to employees by their employer. Similarly, Section 1981 prohibits the impairment of the rights of citizens in the making, performing, or modifying of contracts, and the enjoyment of *all* benefits, privileges, terms, and conditions of the contractual relationship because of race. An employment contract's terms, conditions, benefits, and privileges include the facilities, workplaces, and working conditions.

In the decision below, the Eighth Circuit held racial "disparity in the facilities had nothing to do with 'compensation, terms, conditions, conditions [sic], or privileges of employment'" under Title VII and, concomitantly, Section 1981. (App. at 12). The Eighth Circuit is wrong! Facilities, workplaces, and working conditions have everything to do with "'compensation, terms, conditions, conditions [sic], or privileges of employment'" under Federal employment law whether the question is raised in the context of sex, race, religion, or national origin.

The Eighth Circuit reached its conclusion without considering its precedent on the same question raised in the context of sex discrimination, *Wedow v. City of Kansas City*, 442 F.3d 661 (8th Cir. 2006) (discriminatory conditions of improperly fitting uniforms, inadequate bathrooms, showers, and changing facilities adversely impacted performance of the core functions of the job by female firefighters), or sister circuit opinions in *Equal Empl. Opportunity Commn. v. R.G. &. G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018), *aff'd sub nom. Bostock v. Clayton County, Georgia*,

140 S.Ct. 1731 (2020) (employer provided work attire for male but not its female sales personnel); *Robinson v. City of Fairfield*, 750 F.2d 1507, 1509 (11th Cir. 1985) (maintaining segregated dressing and lounge facilities for black and white employees that differed drastically in the quality of amenities held a discriminatory employment practice); *Harrington v. Vandalia-Butler Bd. of Educ.*, 585 F.2d 192, n.3, *cert. denied*, 441 U.S. 932, 99 S.Ct. 2053 (1979) (terms, conditions, or privileges of employment reach the actual working conditions of employees; vacating the district court's award of compensatory and punitive damages under pre-1991 Title VII amendments imposed on a school board for discriminating against a female teacher).

Because it held Title VII "had nothing to do with terms, conditions, or privileges of employment," the Eighth Circuit erroneously concluded that opposing discrimination in facilities was not a protected activity. (App. at 13). Moreover, in direct conflict with its precedent in *Sisco v. J. S. Alberici Const. Co.*, 655 F.2d 146, 150 (8th Cir. 1981) and eight sister circuits, and contrary to this Court's articulated and demonstrated preference for the use of an objective standard when resolving Title VII issues in *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 126 S.Ct. 2405 (2006) (Title VII's antiretaliation provision covers employer actions materially adverse to a reasonable employee) (citing *Pennsylvania State Police v. Suders*, 542 U.S. 129, 124 S.Ct. 2342 (2004) (constructive discharge doctrine); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21, 114 S.Ct. 367 (1993) (hostile work environment

doctrine)), the Eighth Circuit applied a subjective standard and determined that in the absence of personal testimony on her subjective belief, an employee does not establish a reasonable belief that she is opposing an unlawful employment practice. The Eighth Circuit continued, erroneously, "there is no other evidence from which a jury could infer that she [employee] had a good-faith belief that she believed she reported discrimination against employees." (App. at 13). But, see, Judge Kelley, dissenting, at App. 15-19, discussing the objective evidence presented during the seven-day trial.

The Eighth Circuit *ignored* substantial objective evidence introduced to the jury during the seven long days of trial. Like Dr. Warren, the jury viewed the video-comparison of Mills High and Robinson Middle that Warren provided to PCSSD's Board. The video graphically displayed the unequal and incomparable workplaces and established that the construction adversely impacted the performance of the core responsibilities of teaching and training students and the benefits and privileges of employment. (Plaintiff's Trial exh. 1, available at url as noted herein, n.1).[1] The jury saw the theater styled, raked monogrammed leather seats, a place for a large wall-mounted flat screen TV with internet access in Robinson's team room versus the flat concrete floor without chairs in Mills' team room that was one-third the size of Robinson's. (Plaintiff's Trial exh. 1 & exh. 35, p. 4) Here,

[1] To view the video, visit https://www.dropbox.com/scl/fi/fqn8h5w1oy1srd0b8et1d/Facilities.

coaches would preview plays and scouting videos of their opponents as part of their students' training.

Teachers at Mills share smaller classrooms without proper storage, thereby hindering their creation and management of a proper teaching and learning environment. Unlike a work assignment in predominately white communities with lavish conditions and stable workplaces, five teachers at Mills rotate in and out of small classrooms pushing their materials around on carts (Plaintiff's Trial Exh. 3, *Little Rock School District v. PCSSD*, 4:82-cv-0066-DPM (E.D. Ark. 2021), pp. 29-30) enduring the stress of not having a classroom, and increasing the demands on their time. Mills' indoor practice facility was a metal, tin building unlike the masonry brick walls of Robinson's huge indoor facility. Robinson's staff would be safer during storms. (Trial Tr., vol. 3, pp. 529-530, 535, 560-563). Mills' coaches and students walked a quarter of a mile through overgrown brush and rough terrain from the gym to the practice field. While at Robinson, the coaches simply raised, remotely, three huge doors to exit the gym like champions to the field house. (Plaintiff's Trial exh. 35, pp. 3-4). The construction debacle rivals the painful nightmare of the 1950s dual and racially inequitable educational systems and is an affront to the authority and power of a federal court of appeals reflected in the judgments and orders of the Eighth Circuit in *Little Rock Sch. Dist. v. Arkansas*, 664 F.3d 738, 753 (8th Cir. 2011) and *Little Rock Sch. Dist. v. Pulaski Cnty. Special Sch. Dist.*, 778 F.2d 404, 434-36 (8th Cir. 1985). As Judge Price Marshall described,

"[I]t was more of the same: unequal facilities based on race." (Plaintiff's Trial Exh. 3, *Little Rock School District v. PCSSD*, 4:82-cv-0066-DPM (E.D. Ark. 2021), at 29).

During construction, Mills' administrators were denied the opportunity to provide input on the construction, a benefit and a privilege enjoyed by their white counterparts at Robinson. (Plaintiff's Trial Exh. 35, pp. 3-5). Mills' black Athletic Director, unlike his Robinson counterpart, was denied access to the building plans, denied the privilege of providing input when he asked, and did not have an office in the newly constructed Mills facility. *Id.* Robinson's Athletic Director was invited, at least twice, to provide input on what he felt was important in the design and specific attributes of the facility. Robinson's Athletic Director had an office with a private restroom. *Id.* Mills was constructed with gypsum or sheetrock rather than masonry walls like Robinson and made Mills unsafe during severe Arkansas weather; at Mills, hallways were reduced, and ceilings lowered three feet. (Trial Tr., vol. 3, pp. 535, 556-570). The disparity in the facilities impaired the terms, conditions, and privileges of the predominately black administrators, teachers, and staff, all employees at Mills.

The jury heard detailed testimony about the adverse effects of the undisputed discriminatory construction on the administrators, teachers, and students from 1) the architect's project manager who supervised the construction of the discriminatory facility; 2) the Federal Court's expert serving in PCSSD's collateral 40 plus-year race discrimination lawsuit still

pending on the discriminatory construction that Dr. Warren opposed in this case; and 3) the school district's newly appointed Director of Operations.

This case checks off the criteria for review on Certiorari of significant recurring questions on federal employment discrimination and retaliation law. The facts here are undisputed. Clarity from this Court is needed. Resolution of the Questions Presented will provide direction to district courts and courts of appeals to ensure the equality of employment opportunities and prevent employer interference with employee efforts to advance the enforcement of Title VII's guarantees.

STATEMENT OF FACTS

Dr. Jerry Guess was appointed Superintendent of PCSSD after the State of Arkansas removed PCSSD's Board in June 2011. On February 14, 2022, State Commissioner of Education Johnny Key testified that Dr. Guess was delegated final authority both as Superintendent and the Board regarding all matters pertaining to the desegregation lawsuit that commenced in 1982. During Dr. Guess' tenure and with his knowledge and approval, Derek Scott (Scott), PCSSD's former Director of Operations, orchestrated a reduction of the $50,000,000 court-ordered construction of Mills in the predominately black section of the school district, to $37,000,000 and diverted funds from Mills to the Robinson Middle

School (Robinson Middle), a construction project in a predominately white area of the district, resulting in a $20,000,000 act of racial discrimination.

On March 10, 2016, the State released PCSSD from State control subject to the election of a new Board. The new Board assumed its seat in December 2016. Six months in its infancy, the Board terminated Dr. Guess as Superintendent and appointed Dr. Janice Warren, PCSSD's Assistant Superintendent for Equity and Pupil Services, Interim Superintendent. Dr. Warren, a black female, was PCSSD's first female superintendent in its 34-year history.

Less than 40 days into Dr. Warren's tenure as Interim Superintendent, an irate Mills parent called Dr. Warren and complained about the inequitable construction of Mills' athletic facility in the predominately black community compared with the Robinson Middle athletic facility in a predominately white community. Dr. Warren viewed video footage of the two projects[2] and toured Mills with its black Principal, black Athletic Director, and white Head Football Coach. As reported by Margie Powell, the Federal Court Expert for the desegregation lawsuit, Dr. Warren learned that Mills' black Athletic Director, unlike his Robinson Middle counterpart, was denied access to the building plans, denied the right to provide input by Scott, and did not have an office in the newly constructed Mills

[2] The video footage comparing Mills and Robinson Middle can be viewed at: https://www.dropbox.com/scl/fi/fqn8h5w1oy1srd0b8et1d/Facilities.

facility. Although the academic facilities were not at a stage to evaluate the resulting inequities from the substantially reduced project, there was a concern about the adverse impact of the discriminatory construction on the academic facilities. (Plaintiff's Trial Exhibit 6, p. 2, Supplemental Status Report). With counsel from Sam Jones, PCSSD's attorney, Dr. Warren undertook a proactive process of notifying, correcting, and minimizing as much as possible the twenty-million-dollar discriminatory act. She notified the Board and commenced monthly construction meetings with the PCSSD personnel overseeing construction, the architects, and the general contractor. Sam Jones notified the attorney for the Intervenors and made a supplement status report filing informing the court in the desegregation case.

The plans for Mills that Scott presented PCSSD's cabinet leaders were not followed and, as the former CFO Denise Palmer testified, could not be achieved with the budgeted funds. (Trial Tr., vol. 2, pp. 270-271, lines 1-10; p. 273, lines 2-9). At Mills, hallways were shrunk in width and three feet in height. *Little Rock Sch. Dist. v. Pulaski Cty. Special Sch. Dist*., No. 4:82-CV-866-DPM, 2021 WL 1823137 (E.D. Ark. May 6, 2021) (Plaintiff's Trial Exhibit 3, p. 27). Overall, the capacity was reduced from seven hundred fifty students to seven hundred. The walls at Mills were gypsum board unlike Robinson's concrete block walls that provided greater protection during severe weather; the classrooms at Robinson Middle are larger and every teacher has a classroom; at Mills five teachers rotate with other teachers to teach their classes. The

Robinson Middle entrance atrium is grander; the halls are wider with higher ceilings; its sports practice building is better. *Id*. (Plaintiff's Trial Exhibit 3, pp. 27 & 29). Margie Powell, the Federal Court Expert, testified that the female athletes did not have a separate locker room or toilets in the new sports complex. At Mills High, teenage boys and girls shared a trailer with a unisex bathroom with two stalls each on the practice field. (Plaintiff's Trial Exhibit 35, p. 4).

The jury viewed the video comparing the athletic facilities. The video revealed that the work environment for Mills' administrators, teachers, and staff and the learning atmosphere for students were markedly distinguishable from lavish for Robinson Middle to sparse for Mills.

THE RETALIATION

On September 9, 2017, the Arkansas Democrat-Gazette reported on the September 8, 2017, status hearing and the construction inequities, embarrassing the district. During a September 12, 2017, Board meeting, Dr. Linda Remele and Alicia Gillen, both white females, verbally attacked Dr. Warren about the supplemental filing Sam Jones made and criticized Dr. Warren for approving the painting of her office as Scott recommended before Dr. Warren moved into the Superintendent's office. Dr. Guess testified that Scott encouraged Dr. Guess to permit the repainting of the office well before Dr. Guess was terminated; Dr. Guess declined. Dr. Remele and Gillen told Warren that she was

only to "keep the ship afloat." The Board also decided to conduct a national search for a superintendent. After the September 12th meeting, Dr. Remele got into Dr. Warren's face and angrily told her, "We don't air our dirty laundry in public." Dr. Remele began preparing a list of "concerns" about Dr. Warren. This paper trail continued until November 14, 2017, when the Board received its first presentation by a national superintendent search firm.

In December 2017, the Board hired Ray and Associates to conduct the national search. Ray and Associates used its network of associates and contacted 1,177 potential applicants. Thirty-six people applied. These applicants were winnowed to ten top candidates. Nine of the top ten, five men and two women, were presented to the Board on March 27, 2018, six blacks and three whites. Dr. Warren was among the top nine. Each of the candidates submitted video presentations, answering three subjective questions. The Board selected three males as their finalists for interviews, James Harris and Eric Pruitt, two black males but both less qualified than the third, a white male, Charles McNulty. Dr. Warren was not selected; the voting matrix and other records of the Board's deliberations were destroyed by Ray and Associates as authorized by Dr. Remele. The finalists were scheduled for interviews on April 3, 2018. The day before the interview, Mr. Harris, one of the black males, withdrew. He could not qualify for the superintendent's certification; he lacked teaching experience. Only two candidates remained for interviews – McNulty, the white male, and

Pruitt, a black male who only had fifteen months experience as an associate superintendent without central office, administrative, experience. McNulty was the superior candidate of the three finalists; but Warren was the superior candidate of the nine candidates. The Board voted to hire Dr. McNulty.

Later, Dr. Warren filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) contending that as an applicant for the position of Superintendent she was discriminated against because of her race, sex, and in retaliation for having reported the racial disparity between the construction of Mills High and Robinson Middle. After receiving her right to sue letter, a lawsuit was commenced against PCSSD and six members of its Board (PCSSD) and tried to a jury of eight, seven whites and one black juror, four females and four males, in the Eastern District of Arkansas. On February 25, 2022, the jury returned a verdict in under three hours for the plaintiff on her claim of retaliation for the Superintendent's position, but in favor of PCSSD on her claims of race, sex, and the breach of contract claims. The jury assessed the damages of lost wages – $208,025.40; compensatory damages – $125,000.00; punitive damages – PCSSD – $273,000.00; punitive damages – Dr. Remele – $25,000.00; punitive damages – Alicia Gillen – $25,000.00. In response to the PCSSD's Motion for Directed Verdict, the District Court dismissed the punitive damage award against PCSSD. PCSSD's Motion for JNOV was denied and Dr. Warren's motion for equitable relief was granted in part and denied in part.

PCSSD timely filed a notice of appeal to the Eighth Circuit asserting that Dr. Warren did not engage in a protected activity and lacked a reasonable belief that she was opposing an unlawful employment practice because Dr. Warren was only concerned about Mills' students. PCSSD also reasserted arguments previously denied in their motion for summary judgment. Dr. Warren filed her cross-appeal arguing the District Court abused its discretion in failing to grant her additional back and front pay because PCSSD failed to satisfy its burden of proof on her alleged failure to mitigate her damages.

The Eighth Circuit: 1) reversed the District Court's judgment; 2) held the "disparity in the facilities had nothing to do with 'compensation, terms, conditions, conditions [sic], or privileges of employment'" under Title VII; and 3) disregarded Warren's argument below and on appeal that when Dr. Warren reported the discriminatory construction, she expressed opposition to and refused to engage in the unlawful employment practice of discriminating against black administrators, teachers, staff, and female and black students as a term and condition of her contract. (Appellee's Petition Rehearing *En Banc*, App. 53; Appellants' App., pp. 1051-1056, R. Doc. 188); Appellee/Cross-Appellant's Brief at 26-27).

Consequently, the Eighth Circuit erroneously concluded opposing discrimination in facilities was not a protected activity. Finally, the panel majority concluded that without personal testimony on her belief that PCSSD's construction was unlawful, Dr. Warren

did not establish she had a reasonable belief that she is opposing an unlawful employment practice.

REASONS FOR GRANTING THE PETITION

A. Discrimination in workplaces or facilities is a question that must be resolved consistently by the federal courts regardless of the employee's protected classification.

Until *Warren v. Kemp*, the majority of circuits addressing discrimination in workplaces, facilities, and working conditions as unlawful employment practices have done so in the context of sex discrimination. Here, there is unanimity on the question of an unlawful employment practice under Title VII regarding workplace, facilities, and working conditions. *Equal Empl. Opportunity Commn. v. R.G. & G.R. Harris Funeral Homes, Inc*., 884 F.3d 560 (6th Cir. 2018), *aff'd sub nom*. *Bostock v. Clayton County, Georgia*, 140 S.Ct. 1731 (2020) (employer providing work attire for male but not its female sales personnel discriminated on the basis of sex); *Wedow v. City of Kansas City*, 442 F.3d 661 (8th Cir. 2006) (discriminatory conditions of improperly fitting uniforms, inadequate bathrooms, showers, and changing facilities adversely impacted performance of the core functions of the job by female firefighter); *DeClue v. Central Illinois Light Co*., 223 F.3d 434 (7th Cir. 2000) (Posner writing for the majority and holding the electric company's failure to provide its sole female lineman with bathroom facilities did not constitute sexual harassment but would, if litigated under a

disparate impact theory, violate Title VII); *Lynch v. Freeman*, 817 F.2d 380 (6th Cir. 1987) (female construction worker established the disparate impact of her employer's practice of providing unsanitary portable toilets for employees violated Title VII, 703(a)(2), because female employees had greater susceptibility to disease and infection), see also *Harrington v. Vandalia-Butler Bd. of Educ.*, 585 F.2d 192, n.3 (6th Cir. 1978), *cert. denied*, 441 U.S. 932, 99 S.Ct. 2053 (1979) (vacating the district court's award of compensatory and punitive damages under unamended Title VII but noting the school board discriminated against a female physical education teacher in the conditions of her employment; the facilities she shared with students were neither equal nor comparable to the private and exclusive toilet, lockers, and shower facilities provided to male physical education teachers).

In contrast, when the question of whether the terms, conditions, benefits, and privileges protected by Title VII include workplaces, facilities, and working conditions was raised in the context of race, the Eighth and Eleventh Circuits conflict. In *Robinson v. City of Fairfield*, 750 F.2d 1507, 1509 (11th Cir. 1985), the Eleventh Circuit held the City's segregated dressing and lounge facilities for black and white employees that differed drastically in the quality of amenities was a discriminatory employment practice. See also *United States v. Jacksonville Terminal Co.*, 451 F.2d 418 (5th Cir. 1971) (racially segregated toilet, locker, and shower facilities held a vestige of pervasive

discrimination in the crafts and classes of employment and was indicative of racial discrimination).

Compared with the Eleventh Circuit, the Eighth Circuit in *Warren v. Kemp* ruled that terms and conditions of employment, 42 U.S.C. § 2000e-2(a), had nothing to do with facilities. *Warren v. Kemp*, at App. 12. Indeed, within the Eighth Circuit, a circuit panel split exists on the employer's duty not to discriminate in workplaces, facilities, and working conditions. One panel recognizes Title VII protection for female employees regarding workplaces, facilities, and working conditions in *Wedow*, 442 F.3d at 672. The other panel does not recognize an employer's duty to avoid discrimination in workplaces, facilities, and working conditions when the issue is race-based discrimination. *Warren v. Kemp*.

Although there is unanimity among the circuits on the question of unlawful practice under Title VII regarding workplaces, facilities, and working conditions based on sex, the scope of the employer's duty to not discriminate is in conflict. In the Eighth Circuit, Title VII only prohibits discrimination by the employer on conditions that adversely impact performance of the core functions of the job. In contrast, the Sixth, Seventh, and Eleventh Circuits prohibit discrimination in workplaces and facilities enjoyed as privileges and benefits of employment. See, e.g., *Robinson v. City of Fairfield*, 750 F.2d 1507, 1509 (11th Cir. 1985) (maintaining segregated dressing and lounge facilities for black and white employees that differed drastically in the quality of amenities held a discriminatory employment practice).

What is the scope of an employer's duty regarding workplaces, facilities, working conditions, tools, and equipment? Does the scope vary based on the protected classification of the employee challenging the practice? The circuits are divided. The scope of the employer's Title VII obligation is a critical issue when interpreting the substantive provision of Title VII, § 703, 42 U.S.C. 2000e-2(a) and construing the antiretaliation provision of Title VII, § 704, 42 U.S.C. 2000e-3(a). An employee who opposes employer conduct that is an unlawful employment practice is shielded from retaliatory conduct by the employer. This Court should resolve the conflict.

B. A term or condition or employment policy that requires an employee to discriminate against co-workers or third parties is an unlawful employment practice.

The EEOC interprets Title VII, § 703, 42 U.S.C. 2000e-2, as prohibiting terms and conditions or employment policies that require an employee to discriminate against others. Enforcement Guidance on Retaliation and Related Issues, Elements of Claims, ¶ II, § 2(e), Example 6 (August 25, 2016).

> Protected Opposition Refusal to Obey Order to Make Assignments Based on Race
>
> Plaintiff, who works for an employment agency referring individuals to fill temporary and permanent positions with corporate clients, is instructed by his manager not to refer any African Americans to a particular client per the client's request. Plaintiff tells the

> manager this would be discriminatory, and proceeds instead to refer employees to this client on an equal opportunity basis. Plaintiff's refusal to obey the order constitutes "opposition" to an unlawful employment practice.

Id. (citing *Foster v. Time Warner Entm't Co.*, 250 F.3d 1189, 1994 (8th Cir. 2001) (holding that customer service manager engaged in protected opposition activity where she repeatedly questioned her new supervisor about the impact of a revised sick leave policy on ADA accommodations previously granted to an employee with epilepsy whom she supervised, and then refused to implement the new policy by continuing to allow the employee to work flexible hours). See also *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 581 (6th Cir. 2000) (concluding that action taken by a university vice president in his capacity as an affirmative action official to respond to hiring decisions that he believed discriminated against women and minorities constituted protected opposition under Title VII); *E.E.O.C. v. HBE Corp.*, 135 F.3d 543, 554 (8th Cir. 1998) (supervisor who opposed the racially motivated termination of a co-worker engaged in a protected activity); *Moyo v. Gomez*, 32 F.3d 1382, 1385 (9th Cir.), *amended*, 40 F.3d 982 (9th Cir. 1994) (employee's refusing to carry out or otherwise protesting the defendants' alleged policy of denying showers to black inmates after work shifts, stated a retaliation claim based on an unlawful employment practice, the alleged practice of requiring Moyo, as a condition of his employment, to discriminate against black inmates); *Womack v. Munson*, 619 F.2d 1292, 1297 (8th Cir. 1980) (filing a lawsuit alleging a former

employer violated Title VII by requiring black employees to abuse black suspects is a protected activity).

1. The outcome of the appeal in this case would be different in the Sixth or Ninth Circuits or another panel of the Eighth Circuit.

Consistent with the EEOC's interpretation of Title VII, 42 U.S.C. 2000e-2, the Sixth and Ninth Circuits Courts of Appeals and two other panels of the Eighth Circuit recognize as an unlawful employment practice terms, conditions, and policies that require an employee to discriminate. *Foster*; *Johnson*; *E.E.O.C. v. HBE Corp*.; *Moyo*; and *Womack*. Had this case been appealed in the Sixth or Ninth Circuits or another panel in the Eighth Circuit, the outcome would be different in this case. The outcome in federal employment law litigation should not depend on geography. This Court must provide direction not only to the courts of appeals but also to the district courts to minimize confusion in employment law, produce consistency in construing Title VII, eliminate unnecessary cases on the overloaded appellate dockets, and increase efficiency in employment law litigation.

2. Warren opposed a policy that required her as superintendent to discriminate against the predominately black staff and female and black students.

Dr. Guess, PCSSD's Superintendent from March 2011 through July 18, 2017, was the final authority and

policymaker on all desegregation matters until January 2017. (Trial Tr., vol. 1, pp. 75-76). Dr. Guess knowingly constructed racially discriminatory facilities at Mills. Dr. Guess' decision and conduct established a policy of discriminating against black administrators, teachers, staff, and female and black students. Dr. Guess and, therefore, PCSSD engaged in racially discriminatory conduct. *St. Louis v. Praprotnik*, 485 U.S. 112, 108 S.Ct. 915 (1988) (only one with policymaking authority causes the particular constitutional violation).

Testimony from disinterested witnesses established the substantial and extensive inequity of the physical facilities as a workplace for educators and the shocking treatment of female athletes. High school girls were required to share a portable toilet with boys on the practice field – two units for girls and two for boys. The girls did not have a separate locker room in the athletic facility. There weren't any restrooms inside the locker rooms at Mills. (Trial Tr., vol. 2, pp. 218-219, 222-233; Plaintiff's Trial exh. 35, pp. 3-5). Boys and girls at Robinson had separate constructed restrooms on the practice field. (Plaintiff's Trial exh. 35, pp. 3-5).

When Warren reported the discriminatory construction, she expressed opposition to and refused to engage in the unlawful employment practice of discriminating against black administrators, teachers, staff, and female and black students. Permitting or continuing the discriminatory construction would support Dr. Guess' discriminatory policy and discriminate against black employees and female and black

students as a condition of Dr. Warren's employment. Requiring an employee to discriminate is an unlawful employment practice. Dr. Warren engaged in a protected activity and is entitled to Title VII's shield against retaliation.

C. Conflicts among the circuits regarding the applicable standard for determining an employee's reasonable belief that the employer's conduct was unlawful under Title VII, § 704, 42 U.S.C. § 2000e-3(a) must be resolved.

Retaliation is widespread in employment in the United States. Claims of employer retaliation in 2022 were 51.6% of the 73,485 charges or 37,989 charges filed with the EEOC under all statutes. An astounding 38.7% of all charges filed were claims of retaliation under Title VII alone. See EEOC Charge Statistics FY 1997 through 2022, at https://www.eeoc.gov/data/charge-statistics-charges-filed-eeoc-fy-1997-through-fy-2022 (viewed on December 20, 2023).

Not all retaliation arising in an employment discrimination context is protected by the shield of Title VII's antiretaliation clause, 42 U.S.C. § 2000e-3a. Claims of Title VII race discrimination are often coupled with a Section 1981 retaliation claim. The circuits agree that the elements of a Title VII claim are the same for Section 1981. However, the scope of remedial relief is different; statutory caps limit compensatory and punitive damages under Title VII; and the standards for determining causation are distinguishable. 42

U.S.C. §§ 1981a(a)(1), 1981a(b)(3); *cf. Johnson v. REA, Inc.*, 421 U.S. 454, 460, 95 S.Ct. 1716 (1975); *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 133 S.Ct. 2517 (2013) (interpreting the 1991 amendments to Title VII as imposing a reduced causation standard of "motivating factor" for status-based discrimination under 2000e-2(a), the substantive provision of Title VII, and "but for" causation for the antiretaliation provision).

The elements of a retaliation claim under Title VII and Section 1981 are 1) the employee engaged in a protected activity; 2) the employee suffered an adverse consequence as a result of her protected activity; and 3) a causal relationship exists between the protected activity and the adverse consequence. See, e.g., *Butler v. Alabama Dept. of Transp*., 536 F.3d 1209 (11th Cir. 2008); *Higgins v. Gonzales*, 481 F.3d 578, 589 (8th Cir. 2007); *Munday v. Waste Management of North America, Inc*., 126 F.3d 239 (4th Cir. 1997); *Yee v. Hughes Aircraft Co*., 92 F.3d 1195 (9th Cir. 1996); *Drake v. City of Fort Collins*, 927 F.2d 1156 (10th Cir. 1991).

If the employee's conduct was not opposing an unlawful employment practice under Title VII, the employee is shielded from retaliation if she held a reasonable belief that the employer's conduct was unlawful under Title VII. In *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 121 S.Ct. 1508 (2001), this Court declined the opportunity to address the Ninth Circuit's interpretation of 42 U.S.C. § 2000e-3(a) as authorizing and shielding opposition of a lawful employment practice because the employee held a reasonable,

good faith belief that the practice was unlawful. *Id*., at 270. Moreover, this Court has not established a standard for determining an employee's required belief. This case provides the Court with an opportunity to resolve as a question of law the conflict among the circuits and even circuit panel splits on aspects of the "reasonable belief" standard, if a reasonable but mistaken belief is a permissible basis for satisfying the conditions of the antiretaliation provision of Title VII.

Inconsistent approaches to resolving the question of opposition and shifting analyses on reasonable belief exacerbate the problem for employers and employees alike. This Court's construction of the opposition clause and the role of reasonable belief is essential for providing clear direction to lower federal courts, uniformity in assessing reasonable belief, and consistency in enforcing the retaliation clause of Title VII and other employment-related protective statutes that are derivatives of Title VII. *See*, e.g., *Livingston v. Wyeth, Inc*., 520 F.3d 344 (4th Cir. 2008) (using Title VII jurisprudence as a basis for interpreting "reasonable belief" in Section 806 of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A(a)(I)).

Commencing an action in a particular geographical location should not limit or abrogate Title VII's remedial benefits. Employers with a national presence in multiple states should not be subject to inconsistent results for patterns of behavior that permeate their business practices nationwide. There are numerous conflicts among the circuits and, astonishingly, intra-circuit panel splits.

1. A claim of retaliation does not hinge upon a showing that the employer was in fact violating Title VII.

The circuits agree that employees alleging retaliation in status-based discrimination cases are not hindered by a failure to establish that the employer's conduct was a violation of Title VII. See *Boyer-Liberto v. Fontainebleau Corp*., 786 F.3d 264 (4th Cir. 2015); *Crumpacker v. Kansas Dept. of Human Resources*, 338 F.3d 1163, 2003 WL 21872550 (10th Cir. 2003); *Fine v. Ryan Int'l Airlines*, 305 F.3d 746, 752 (7th Cir. 2002); *Carter-Obayuwana v. Howard University*, 764 A.2d 779 (D.C. 2001); *Long v. Eastfield Coll*., 88 F.3d 300, 304 (5th Cir. 1996); *Sisco v. J.S. Alberici Const. Co., Inc*., 655 F.2d 146 (8th Cir. 1981); *Sias v. City Demonstration Agency*, 588 F.2d 692 (9th Cir. 1978).

A majority of circuits recognize that an employee who opposes a lawful employment practice but who had a good faith and reasonable belief that the practice opposed was unlawful is entitled to the shield of the antiretaliation provision of Title VII. Both elements are established with objective evidence of the circumstances: *Reznik v. inContact, Inc*., 18 F.4th 1257 (10th Cir. 2021); *Yazdian v. Conmed Endoscopic Techs., Inc*., 793 F.3d 634, 646 (6th Cir. 2015); *Fantini v. Salem State College*, 557 F.3d 22 (1st Cir. 2009); *Carter-Obayuwana v. Howard University*, 764 A.2d 779, n.19 (D.C. 2001); *Quinn v. Green Tree Credit Corp*., 159 F.3d 759, 769 (2d Cir. 1998); *Long v. Eastfield Coll*., 88 F.3d 300, 304 (5th Cir. 1996); *Fine v. Ryan Int'l Airlines*, 305 F.3d

746, 752 (7th Cir. 2002). Two circuits use an objective standard for proof of reasonable belief without specifically referencing good faith or honest belief. *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264 (4th Cir. 2015); *Sisco v. J.S. Alberici Const. Co., Inc.*, 655 F.2d 146 (8th Cir. 1981).

Of those circuits requiring a good faith subjective element established with objective evidence, one insists that the employee must "actually believe" the employer's conduct was unlawful. See, *Yazdian*, 793 F.3d at 646 (both the subjective and objective prongs are fact-dependent varying with the circumstances); *Briggs v. Univ. of Detroit-Mercy*, Case No. 14-1725 (6th Cir. May 12, 2015) (the Sixth Circuit uses objective evidence to determine the employee's subjective belief). In *Yazdian*, the employee complaining of a hostile work environment must *actually believe* that the conduct complained of constituted a violation of relevant law, and a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee would believe that the conduct complained of was unlawful. *See also Lockheed Martin Corp. v. Admin. Rev. Bd., U.S. Dep't of Lab.*, 717 F.3d 1121, 1132 (10th Cir. 2013) (addressing an appeal from the Administrative Review Board of the Department of Labor and observing that the Board's standard of belief requires an employee to "actually believe in the unlawfulness of the employer's actions and that belief must be objectively reasonable").

At the other end of the spectrum are two circuits that insist on a subjective, good faith standard that is

established with subjective evidence such as personal testimony. In the Eleventh Circuit, allegations of good faith or personal testimony regarding belief are sufficient to satisfy the good faith standard, but objective evidence must demonstrate that the employee's subjective good faith was reasonable. *Howard v. Walgreen Co.*, 605 F.3d 1239 (11th Cir. 2010); *Butler v. Alabama Dept. of Transp.*, 536 F.3d 1209 (11th Cir. 2008). In *Butler*, the employee did not testify about her belief, and no other evidence was introduced. Regardless, the court held that the employee's belief that a co-worker's racial slurs spoken away from the office in response to a potential car accident as the two co-workers drove to lunch constituted an unlawful employment practice was unreasonable. *Id.*, at 1213. The employee's belief must be objectively reasonable in light of the facts and record. *Id.* It is not enough for a plaintiff to allege that his belief was honest and bona fide. The allegations and record must also indicate that the belief, though perhaps mistaken, was objectively reasonable. Although the employee does not need to prove he opposed unlawful employer conduct, the "reasonableness of a plaintiff's belief that her employer 'engaged in an unlawful employment practice must be measured against existing substantive law.'" *Howard*, 605 F.3d at 1245.

The outlier among the circuits is the Eighth. Here, the employee must establish her reasonable belief subjectively, by testifying about her belief. *Warren v. Kemp*, 79 F.4th 967 (8th Cir. 2023). With this holding, the Eighth Circuit panel ignored substantial objective

evidence in the record and created a circuit panel split on the question of reasonable belief.

2. The reasonable belief standard applies to both opposition and participation cases.

Circuits are divided over the application of the reasonable belief standard for the second prong of the antiretaliation provision, participation. Four circuits require participation by employees in investigations or the filing of charges to be done with good faith and a reasonable belief that the employer engaged in unlawful conduct. *Cox v. Onondaga Cty. Sherriff's Dep't*, 760 F.3d 139, 148 (2d Cir. 2014); *Moore v. City of Philadelphia*, 461 F.3d 331, 341 (3d Cir. 2006), but see, Third Circuit Model Jury Instruction, Retaliation ¶ 5.1.7, lines 73-95, p. 57 (last updated June 2023) (citing *Slagle v. County of Clarion*, 435 F.3d 262 (3d Cir. 2006) in recognition of a *circuit split*. *Mattson v. Caterpillar, Inc*., 359 F.3d 885 (7th Cir. 2004).

However, five circuits recognize an absolute protection from retaliation for participation, filing a charge with the EEOC or other enforcement agencies or engaging in investigative activities. These circuits held that the reasonable belief standard only applies to opposition cases. *Ray v. Ropes & Gray LLP*, 799 F.3d 99 (1st Cir. 2015) (leaving unresolved whether the participation prong requires a subjective honestly held belief that the employer had engaged in unlawful activity); *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 582 (6th Cir. 2000); *Brower v. Runyon*, 178 F.3d 1002, 1006 (8th Cir. 1999); *Hashimoto v. Dalton*, 118 F.3d

671, 680 (9th Cir. 1997); *Long v. Eastfield College*, 88 F.3d 300 (5th Cir. 1996); *Benson v. Little Rock Hilton Inn*, 742 F.2d 414, 416-417 (8th Cir. 1984).

Finally, there is a split of authority on the question of whether reasonable belief is a question of law or one of fact. The Fourth Circuit holds that reasonable belief may be resolved as a question of law because the analysis is an objective one. *Jordan v. Alternative Resources Corp.*, 458 F.3d 332, 339 (4th Cir. 2006), *overruled on other grounds*, *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264 (4th Cir. 2015). In contrast, the Sixth Circuit in *Yazdian v. Conmed Endoscopic Techs., Inc.*, 793 F.3d 634, 646 (6th Cir. 2015), held the issue of objective reasonableness should only be decided as a matter of law when no reasonable person could believe that the facts known to the employee amounted to a violation or otherwise justified the employee's belief that illegal conduct was occurring. Likewise, the Fifth Circuit held that "where conduct is not unprotected as a matter of law, the fact finder must have an opportunity to hear evidence, to balance the competing considerations, and to reach a conclusion as to the reasonableness of the conduct." *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130 (5th Cir. 1981). Finally, in its Model Jury Instructions, the Eighth Circuit directs district courts to only include the question on the employee's reasonable belief if the evidence indicates a dispute as to fact on the question of the employee's

reasonable belief. Eighth Circuit, Model Civ. Jury Inst. 10.41, n.5 (2021).[3]

In *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 126 S.Ct. 2405 (2006), this Court declared that Title VII's antiretaliation provision's standard for judging harm suffered by employees when accessing Title VII's remedial mechanisms *must* be objective. *Id*., at 68 (employer's conduct must be materially adverse). This Court opined:

> It [an objective standard] avoids the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff's unusual subjective feelings. We have emphasized the need for objective standards in other Title VII contexts, and those same concerns animate our decision here. [citations omitted]
>
> We phrase the standard in general terms because the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters.

Burlington v. White, 548 U.S. at 68-69. Other "Title VII" contexts include 1) identifying a class of relationships for which third-party retaliations are unlawful, *Thompson v. N. Am. Stainless, LP.*, 562 U.S. 170, 131 S.Ct. 863 (2011); 2) determining the effect of constructive discharge doctrine when raised in a sexual harassment-retaliatory context, *Pennsylvania State Police v. Suders*, 542 U.S. 129, 141, 124 S.Ct. 2342 (2004) (an objective inquiry); and 3) assessing the presence of a

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[3] See, link, *infra*, n.4 for link to available Model Civ. Jury Instructions and Pattern Jury Instructions.

hostile work environment, *Harris v. Forklift Systems, Inc*., 510 U.S. 17, 21, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993). The applicable standard for judging harm as well as belief should be an objective one.

Seventeen years after this Court's declaration of a preference for objective standards for Title VII remedial mechanisms, the Eighth Circuit required subjective evidence, Warren's testimony about her belief, to determine if Warren had a reasonable belief that PCSSD had engaged in an unlawful employment practice when PCSSD committed a $20,000,000 act of discrimination constructing Mills High School in the predominately black section of the school district. Because Warren did not testify about what she believed, the Eighth Circuit, ignoring the objective evidence of Warren's belief, reversed the District Court, stripping Warren of her judgment and jury verdict.

1. The Context

While Dr. Warren served as PCSSD's Interim Superintendent, an irate parent of a Mills athlete called Dr. Warren and criticized her and the district for the racial discrimination apparent in two ongoing construction projects, one is a predominately black section another in a predominately white area of the district. Dr. Warren requested a video from the IT department comparing the construction projects. She was shocked by what she saw. She physically toured the facilities. She launched weekly meetings with the architect, general contractor, and PCSSD employees involved in the construction. From these facts, their view of the video,

and the testimony of disinterested witnesses, the jury could infer, if necessary, that Warren believed the discriminatory act adversely impacted the working conditions of the predominately black staff, administrators, teachers, cafeteria workers, and the rights of female athletes and black students at the high school. Context matters!

But, the Eighth Circuit complained, the jury was not required by the District Court's instruction to determine if Warren held a reasonable belief. *Warren v. Kemp* (App. at 13). Adhering to the Eighth Circuit's Model Jury Instructions, the District Court omitted the question regarding Warren's reasonable belief. The Model Jury Instructions promulgated by the Eighth Circuit directs: "Submit this paragraph [addressing the Plaintiff's reasonable belief][4] only if there is evidence to support a factual dispute as to whether the plaintiff was complaining of or opposing discrimination in good faith." Eighth Circuit, Model Civ. Jury Inst. 10.41, n.5 (2021). PCSSD has only objected to and argued below and before the Court of Appeals that Dr. Warren's reporting of the discriminatory construction of facilities was not a protected activity as a matter of law. See, Jury Instruction Conference (App. at 74-83). Furthermore, PCSSD did not object to the instruction and, thereby, waived any objection regarding the omission of an instruction on Warren's good faith,

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[4] "*Second*, the plaintiff reasonably believed that [(he) (she) (name of third party)] was being (harassed/discriminated against) on the basis of (race)." Eighth Circuit, Model Civ. Jury Inst. 10.41, n.5 (2021), at p. 22, https://www.dropbox.com/scl/fo/drquzukc2np8vy8ivws94/h?rlkey=cm32t4qunwcldzsh2v5j08vtk&dl=0.

reasonable belief. *Id*.; see also *Warren v. Kemp*, Judge Kelly, dissenting and observing the absence of PCSSD's objection to the instruction for other reasons (App. at 21-22).

Before the holding in *Warren v. Kemp*, the prevailing Eighth Circuit law on "reasonable belief" was articulated in *Sisco v. J. S. Alberici Const. Co*., 655 F.2d 146, 150 (8th Cir. 1981). The white employee in *Sisco* believed his employer, when seeking to comply with an affirmative action plan, engaged in race-based discrimination. His subjective belief that his termination was racial discrimination was not determinative. Because of the objective circumstances surrounding Sisco's termination in 1974, the court reasoned that it could not, as a matter of law, say that Sisco's belief was unreasonable or in bad faith. *Id*., at 150. Now, contrary to the prevailing circuit law and this Court's observation in *Burlington v. White*, the Eighth Circuit in *Warren v. Kemp* required subjective evidence of Warren's good faith, reasonable belief (App. at 13). The panel's holding created a circuit panel split on the issue of reasonable belief.

As prevailing law required, Warren did not testify about her subjective belief during the trial. But, she introduced substantial evidence of the differences in the construction projects through disinterested third parties, the architect's project manager, the Federal Court's expert, PCSSD's former CFO, and PCSSD's newly hired Executive Director of Operations. Because she reported the discriminatory construction to PCSSD's lawyer, the Board, and the Federal Court supervising PCSSD's 36-year desegregation lawsuit, Dr. Warren alleged PCSSD retaliated by not interviewing or hiring

her as the district's permanent superintendent. From the objective evidence of the circumstances surrounding Dr. Warren's reporting of the discriminatory construction, nothing more is necessary to establish Dr. Warren's good faith reasonable belief for a majority of the circuits.

CONCLUSION

This case provides the Court with questions of law for resolving numerous conflicts among the circuits on substantial questions that are often litigated across the nation when employees assert claims of retaliation in employment discrimination cases, Title VII, § 704, 42 U.S.C. § 2000e-3(a), and 42 U.S.C. § 1981. This Court's review is also warranted because the resolution below is incorrect. The Petition for Writ of Certiorari should be granted.

Respectfully submitted this 3rd day of January 2024,

SARAH HOWARD JENKINS
Counsel of Record
ATTORNEY AT LAW
P.O. Box 242694
Little Rock, AR 72223
(501) 960-8835
sarah@shjenkinslaw.com
Counsel for Petitioner