Trigger warning: This brief contains the "N" Word for purpose of legal analysis and argument.

See Footnote 6 for relevant material.

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

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BRIEF OF *AMICI CURIAE* SOCIAL SCIENCE EXPERTS, RACE EQUITY SCHOLARS, LAW PROFESSORS, AND CIVIL RIGHTS ENTITIES IN SUPPORT OF PETITIONER

LISA HOLDER
LAW OFFICE OF LISA HOLDER
P.O. Box 65694
Los Angeles, CA 90065
(323) 683-6610

EJS of Counsel

EVA PATERSON
MONA TAWATAO
CHRISTINA ALVERNAZ
EQUAL JUSTICE SOCIETY
1939 Harrison St., Suite 818
Oakland, CA 94612
(415) 288-8703

KELLY M. DERMODY*
DANIEL M. HUTCHINSON
EVAN J. BALLAN
MICHELLE A. LAMY
JESSICA A. MOLDOVAN
NIGAR A. SHAIKH
LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
275 Battery St.
San Francisco, CA 94111
(415) 956-1000

**Counsel of Record*

Counsel for Amici Curiae Social Science Experts, Race Equity Scholars, Law Professors, and Civil Rights Entities

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INTEREST OF *AMICI CURIAE*[1]

Amici are social scientists, race equity scholars, law professors, and non-governmental civil rights entities whose research, publications, and advocacy work reflect their expertise in and dedication to analyzing and combating interpersonal and institutional race discrimination. *Amici* have studied extensively the effects of race and racism, particularly the effects of race-based language and conduct—including use of the slur "Nigger"[2]—in a wide variety of applicable contexts. *Amici* have collectively authored hundreds of peer-reviewed pieces and spent many thousands of hours studying these issues. *Amici* have a strong interest in sharing their expertise to combat race

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[1] Pursuant to Supreme Court Rule 37.2(a), *amici curiae* certify that all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least ten days prior to *amici curiae's* deadline to file. Pursuant to Rule 37.6, *amici curiae* certify that no counsel for any party authored this brief in whole or in part, and no counsel or party, nor any person or entity other than *amici curiae* and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

[2] It is with the knowledge of the trauma inflicted by this particular word that the undersigned, on behalf of *amici*, most reluctantly quote the full word herein and only for the purpose of exposing the sheer violence of the language laid bare. The word has been capitalized every time it is used in this brief, even if it was not capitalized in the source material.

discrimination and abuse in the workplace. A full list of organizational *amici* and additional *amici*, who (except where otherwise noted) join this brief in their individual capacities and not as representatives of any institutions with which they are affiliated, is set forth in the Appendix to this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

"It is beyond question that the use of the word 'Nigger' is highly offensive and demeaning, evoking a history of racial violence, brutality, and subordination," and when inflicted in the workplace, is "evocative of lynchings and racial hierarchy." *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1116 (9th Cir. 2004). This effect has been described as a "wounding power [that] may be derived from the physical violence and social castration that historically has accompanied its usage." Michele Goodwin, *Nigger and the Construction of Citizenship*, 76 Temp. L. Rev. 129, 203 (2003). In First Amendment analysis, "Nigger" has been characterized as "assaultive" and "a form of violence by speech." Charles Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 Duke L.J. 431, 452 n.87 (1990). And "[b]ecause the word's history is so intimately connected with violence and denigration, it can be inherently *threatening* in a way that other epithets are not." *Phillips v. Mega Concrete Constr., LLC*, No. 20-CV-658-JDP, 2021 WL 214653, at *3 (W.D. Wis. Jan. 21, 2021).[3]

African Americans may well—and often do—experience the word "Nigger" as bodily violence, like a "slap in the face" or a "knee on his neck."

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[3] Unless otherwise indicated, all internal alterations and quotations have been omitted and all emphasis has been supplied.

Shamsuddi v. Classic Staffing Servs., No. CV 19-3261, 2020 WL 7700184, at *2 (E.D. Pa. Dec. 28, 2020) (finding that an African American plaintiff whose supervisor called him "Nigger" in a voicemail stated a claim for hostile work environment under Title VII and other statutes); *see also* Lawrence, *supra*, at 452 ("The experience of being called 'Nigger' is like receiving a slap in the face . . . experienced as a blow . . . .").

The inextricable association between the word "Nigger" and violence persists and is reinforced because highly publicized horrific acts of racial violence against Black people, during or around which the word is wielded, span decades and continue. In 1955, the sheriff of the Mississippi town where 14-year-old Emmett Till was brutally slain greeted his mother, Mamie Till, with "hello Nigger" each day of the trial of the white men who murdered her son. Goodwin, *supra*, at 193. In 2020, one white man hunted down and murdered jogger Ahmaud Arbery—and called him a "fucking **Nigger**" as Arbery lay dying on the ground. Nathan Layne, *White Defendant Used Racial Slur After Shooting Ahmaud Arbery, Investigator Testifies*, Reuters (June 4, 2020), t.ly/OTxF.

Further, the "wounding power" of the word persists because Black people—the targets of the word—despite "centuries of investment in America," continue to experience collective marginalization. Goodwin, *supra*, at 193. The word "Nigger" is synonymous with lack of citizenship, inferior status, and degrading pejoratives, including "lazy, oversexed, aggressive, deadly . . . and immoral." *Id.*

at 189, 193. No amount of "success, intellectual acumen, . . . demonstrated loyalty to America," or heroism insulates or disqualifies Black people from infliction of the slur. *Id*. at 194.

This convergent historical trauma, physical violence, and powerlessness subsumed in "Nigger" form the social context for viewing and analyzing its usage in the workplace, and in turn, for determining the severity of workplace racial animus and harassment. As this Court has "emphasized, . . . the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances." *Oncale v. Sundowner Offshore Servs., Inc.,* 523 U.S. 75, 81-82 (1998) (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993)). In all harassment cases, "that inquiry requires careful consideration of both the social context in which particular behavior occurs and *is experienced by its target*" and "[c]ommon sense." *Id*.

The Fifth Circuit's holding that, as a matter of law, a single workplace infliction of the word "Nigger" is not actionable under Title VII ignores both the slur's historical and social context and this Court's requirement that this context be considered. *Amici* provide additional resources regarding the assaultive and wounding nature of the slur and its inherent propensity to land on its target as an act of violence. *Amici* submit that, with this context in mind, this Court should address the Circuit split surrounding an "isolated" use of the word in the workplace, and adopt as the uniform standard that

a single utterance of the word *can* constitute actionable discrimination in the workplace.

ARGUMENT

I. THE N-WORD CREATES A HOSTILE WORK ENVIRONMENT BECAUSE IT ALTERS THE TERMS AND CONDITIONS OF THE WORKPLACE.

In recognition of the uniquely important role of the workplace in the health and dignity of workers, Title VII prohibits employers from creating or tolerating an environment where harassment is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Harris,* 510 U.S. at 21 (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986)). To determine whether abusive conduct is "severe or pervasive," courts examine "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris*, 510 U.S. at 23. This Court has cautioned that frequency is not the determinative factor; rather, even an "isolated incident" can be sufficiently "severe" within the meaning of Title VII if it is "extremely serious." *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998). Also, the "conditions" of employment extend beyond its economic terms, such that "employees' psychological as well as economic fringes are statutorily entitled to protection from employer abuse." *Firefighters Institute for Racial Equity v.*

City of St. Louis, 549 F.2d 506, 514-15 (8th Cir. 1977) (quoting *Rogers v. E.E.O.C.*, 454 F.2d 234, 238 (5th Cir. 1971)).

There is broad agreement that exposure to racial epithets, where deemed "severe and pervasive," alters the terms and conditions of employment and is actionable discrimination under Title VII. *See, e.g.*, *Rodgers v. W.S. Life Ins. Co.*, 12 F.3d 668, 675 (7th Cir. 1993) (quoting *Meritor Sav. Bank,* 477 U.S. at 67); *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 185 (4th Cir. 2001) (same, quoting *Rodgers*, 12 F.3d at 675); *Richardson v. N.Y. State Dep't of Corr. Serv.*, 180 F.3d 426, 439 (2d Cir. 1999), *abrogated on other grounds*, *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006) (same, quoting *Rodgers*, 12 F.3d at 675)). And the consensus is that when the N-word is wielded in the workplace, its toxicity is magnified. In *Rodgers*, the Seventh Circuit opined that "no single act can more quickly alter the conditions of employment and create an abusive working environment than the use of an unambiguously racial epithet such as 'Nigger' by a supervisor in the presence of his subordinates." 12 F.3d at 675. Likewise, in *McGinest,* the Ninth Circuit concluded that use of the N-word in reference to a Black employee and the prevalence of racially charged graffiti at the workplace were "significant exacerbating factors in evaluating the severity of the racial hostility." 360 F.3d at 1116.

In the absence of definitive guidance from this Court, however, lower courts have split on whether a single utterance of (or limited exposure

to) the N-word at work can be severe enough to constitute a hostile work environment. The Third, Fourth, and D.C. Circuits agree that it can. *See Castleberry v. STI Grp.*, 863 F.3d 259, 264 (3d Cir. 2017) (holding that "one such instance" of the N-word "can suffice to state a claim"); *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 280 (4th Cir. 2015) (en banc) (holding that "a reasonable jury could find that . . . two uses of the 'porch monkey' epithet," which the court deemed as "odious" as the word "Nigger," "whether viewed as a single incident or as a pair of discrete instances of harassment—were severe enough to engender a hostile work environment"); *Ayissi-Etoh v. Fannie Mae*, 712 F.3d 572, 580 (D.C. Cir. 2013) (Kavanaugh, J., concurring) ("[B]eing called the [N]-word by a supervisor . . . suffices by itself to establish a racially hostile work environment."). In contrast, the Sixth, Seventh, Eighth, and Tenth Circuits—like the Fifth Circuit here—hold that an "isolated" use of the N-word is not serious enough to constitute actionable discrimination under Title VII. *See* Pet. at 12-16 (collecting cases).

The Third, Fourth, and D.C. Circuits' approach accords with the social science on the uniquely pernicious effects of the N-word at work, and *amici* respectfully urge this Court to adopt this approach.

A. Racist Acts and Invectives Cause Harm to Physical and Mental Health.

The physical, mental, and psychological harms linked to overt racism and other forms of racial bias are well established. Robert T. Carter et al., *A Meta-Analytic Review of Racial Discrimination: Relationships to Health and Culture*, 11 Race & Soc. Probs. 15, 23 (2019) (meta-analyses of 242 studies found racial discrimination was related to mental health effects of obsessive-compulsive behavior, stress, and hostility and anger and physical effects of high blood pressure and negative health).

Research analyzing a broad sample of studies on racism's physiological impact found that "direct encounters with discriminatory events contribute to negative health outcomes." Jules P. Harrell et al., *Physiological Responses to Racism and Discrimination: An Assessment of the Evidence*, 93 Am. J. Pub. Health 243, 243 (2003). One such study examined the relationship between cardiovascular reactivity and interpersonal mistreatment and discrimination in middle-aged Black and white American women. Max Guyll et al., *Discrimination and Unfair Treatment: Relationship to Cardiovascular Reactivity Among African American and European American Women*, 20 Health Psych. 315 (2001), https://doi.org/10.1037/0278-6133.20.5.315. The Black women, who attributed mistreatment to racial discrimination, exhibited greater average diastolic blood pressure reactivity. *Id.* These findings support the hypothesis that

racial discrimination is a chronic stressor that can negatively impact the cardiovascular health of African Americans.

In another study, Black college students viewed three scenarios: racist situations involving Black people; anger-provoking, nonracist situations; and neutral situations. Cheryl A. Armstead et al., *Relationship of Racial Stressors to Blood Pressure Responses and Anger Expression in Black College Students*, 8 Health Psych. 541, 541 (1989), https://doi.org/10.1037/0278-6133.8.5.541. Analysis done after each viewing revealed significantly increased blood pressure in response to racist stimuli, but not to anger-provoking or neutral stimuli. *Id.* at 552. The study concluded that racism was associated with increased blood pressure in Black people and posited, "[t]here may be a heightened sensitization and vigilance for racism," because "[r]acism is an aversive stimulus that threatens 'selfhood,' whereas mere anger does not have such deleterious effects." *Id.* at 553. High blood pressure or hypertension correlates with cardiovascular disease for which the mortality rate of African Americans is twice that of their Caucasian peers. Mary Dunklin, *High Blood Pressure Increasingly Deadly for Black People*, Am. Heart Ass'n (July 13, 2020), https://www.heart.org/en/news/2020/07/13/high-blood-pressure-increasingly-deadly-for-black-people.

Abusive and discriminatory speech in the workplace also harms mental health. Kerri Lynn Stone, *Decoding Civility*, 28 Berkeley J. Gender L. & Just. 185, 213-14 (2013). One study of hospital

employees found that Black employees were more likely to report frequent discrimination correlated with depressive symptoms "above and well beyond that of simple job strain or general social stress." *Id*. (citing Wizdom Powell Hammond et al., *Workplace Discrimination and Depressive Symptoms: A Study of Multi-Ethnic Hospital Employees*, 2 Race & Soc. Probs. 19 (2010)); *see also* Robert T. Carter, *Racism and Psychological and Emotional Injury: Recognizing and Assessing Race-Based Traumatic Stress*, 35 Counseling Psych. 85 (2007) (noting the psychological and emotional harm from language such as "Nigger" and "Boy").

Further, the negative mental health impacts of racist incidents can compound racism's physiological harm. A study based on in-depth interviews of African Americans concluded that incidents of race discrimination affect mental health "so profoundly" because "they are experiences of exclusion that trigger feelings of a 'defilement of self' . . . includ[ing] feelings of being over-scrutinized, overlooked, underappreciated, misunderstood, and disrespected." David R. Williams, *Stress and the Mental Health of Populations of Color: Advancing Our Understanding of Race-related Stressors*, 59 J. Health & Soc. Behav. 466, 469 (2018), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6532404/. This often triggers a state of heightened vigilance in the affected employee, further compounding the stress response. "Heightened vigilance" refers to a specific type of stress, namely "living in a state of psychological arousal in order to monitor, respond to, and attempt

to protect oneself from threats linked to potential experiences of discrimination and other dangers in one's immediate environment." *Id.* at 470. Research links this race-related heightened vigilance to hypertension, negative cardiovascular function, sleep difficulties, obesity, and depressive symptoms. *Id.* The cascade of harms is so severe that the American Psychological Association (APA) has concluded: "Quite literally, racism can kill." Naomi Torres-Mackie, *How Racist Messages Harm Physical and Mental Health*, Psych. Today (Aug. 9, 2019), www.psychologytoday.com/us/blog/underdog-psychology/201908/how-racist-messages-harm-physical-and-mental-health.

The word "Nigger" at work is particularly deleterious and triggering of hyper-vigilance syndrome. Historian Elizabeth Strouder-Prior describes her encounter with the N-word at work (in the classroom) as annihilating and immobilizing. *Why It's So Hard to Talk About the N-Word*, TEDx (Dec. 2019), https://www.ted.com/talks/elizabeth_stordeur_pryor_why_it_s_so_hard_to_talk_about_the_n_word. Strouder-Prior's immobilization is a bio-physical response on the spectrum of somatic responses to the N-word consistent with hyper-vigilance. "[W]hen a white person uses the term 'Nigger,' regardless of his conscious intentions, he is making a fundamental statement about his place in the world and . . . the place of African Americans . . . akin to . . . saying explicitly: 'I reject the concept of equality, I reject your humanity, I am more powerful than you, and because of that power, I can say anything I want, and you have no recourse.'"

Leora F. Eisenstadt, *The N-Word at Work: Contextualizing Language in the Workplace*, 33 Berkeley J. Emp. & Lab. L. 299, 319 (2012). Social science demonstrates that the word "typically renders the targeted listeners speechless and demoralized, and creates in them a feeling of helplessness that is met with anger, fear, or sadness." *Id.* at 319-20. The hyper-vigilance response leads to a constellation of dangerous health conditions for African American employees. *See supra* Section I.A.

The N-word is also uniquely harmful because it undermines dignity and self-esteem, moral characteristics that modern psychology embraces as fundamental human needs.[4] When used in the workplace, the N-word can trigger a self-demotion dynamic that manifests in the form of stereotype threat—a phenomenon that occurs when people placed in situations where negative stereotypes about groups to which they belong are at risk of being confirmed and experience apprehension, severe anxiety, poor recall, and poor performance. Chad E. Forbes & Jordan B. Leitner, *Stereotype Threat Engenders Neutral Attentional Bias Toward Negative Feedback to Undermine Performance,* 102 Biological Psych. 98 (2014), https://www.

[4] Within the last hundred years, a number of important figures in the development of modern psychology have embraced this notion (*e.g.*, Adler, 1930; Allport, 1937; Homey, 1937; James, 1890; Maslow, 1970; Murphy, 1947; Rank, 1959; Rogers, 1959; Sullivan, 1953).

sciencedirect.com/science/article/abs/pii/S0301051114001525. Studies show that the N-word at work triggers stereotype threat that impairs Black workers' performance in the workplace and other evaluative settings. Williams, *supra*, 470-71.

The deleterious physical and psychological impacts on Plaintiff-Appellant Brian Collier and other Black people targeted by the word "Nigger" at work track these research findings:

- Mr. Collier testified that the word "**Nigger**" carved into the elevator he took every day at work and other "very upsetting" incidents never "went away or out of [his] mind," ROA 241, 251, 256, indicating his daily anxiety and hypervigilance.

- Tyshanna Nuness testified that she "couldn't go to sleep" after being called a "Nigglet," "like a Pig Nigger," by her co-worker. *Nuness v. Simon & Schuster, Inc.*, 325 F. Supp. 3d 535, 541 (D.N.J. 2018).

- Contonius Gill testified of being called "Coon" and hearing "Nigger" and other racial slurs at his job as a tanker/truck driver: "This treatment at work left me depressed. I felt isolated, demeaned and dehumanized. I began having difficulty sleeping and I was filled with anxiety." *Meeting of June 20, 2016 Rebooting Workplace Harassment Prevention, EEOC v. A.C. Widenhouse, Inc.* (2016) (written testimony of Contonius Gill, Charging Party), https://www.eeoc.gov/

meetings/meeting-june-20-2016-rebooting-workplace-harassment-prevention/gill.

- Fred Gates, a school building engineer, took one month of sick leave for psychological distress, including violence-provoked thoughts about his supervisor and other higher-ups, after his supervisor racially harassed him and called him "Nigger" twice. *Gates v. Bd. of Educ. of the City of Chicago*, 916 F.3d 631, 634 (7th Cir. 2019).

- Brenda Smelter, a homecare worker, testified that enduring racist remarks culminating in being assailed with "Dumb Black Nigger" by her co-worker was "stressful and hurtful." *Smelter v. S. Home Care Servs. Inc.,* 904 F.3d 1276, 1285 (11th Cir. 2008).

- Edward Blackwell was one among a group of Black construction workers who testified that they felt "fear," "stress," "hurt," "saddened," upset," and "humiliation" when co-workers used the slur "Nigger," hung nooses and displayed the confederate flag on the worksite. *Equal Emp. Opportunity Comm'n v. L.A. Pipeline Constr. Inc.*, No. 2:08-cv-840, 2010 WL 2301292, at *2–5 (S.D. Ohio June 8, 2010).

These accounts accord with the substantial social science showing that the word "Nigger," when inflicted in the workplace, has great power to cause physical, moral, and psychological injury.

B. The N-word at Work Is Qualitatively Different than Its Use Elsewhere Because of the Unique Importance of the Workplace.

Because many Americans spend as much as one-third—or more—of their adult lives in the workplace and rely on their jobs for financial security and economic mobility, their workplace experiences can have an especially profound impact on their lives. Heather McLaughlin et al., *The Economic and Career Effects of Sexual Harassment on Working Women*, 31 Gender & Society 333 (2017). Research shows that the N-word's toxicity is amplified in the workplace due to the sheer amount of time employees spend there each day. *See, e.g.*, James W. Collins et al., *Very Low Birthweight in African American Infants: The Role of Maternal Exposure to Interpersonal Racial Discrimination,* 94 Am. J. Pub. Health 2132, 2135 (2004) (studying the mental and physical health effects of racism and finding that "lifetime exposure to racial discrimination" was "strongest" in the "place of employment").

C. Severity of the N-Word at Work Is Analogous to One Instance of Sexual Assault.

In Title VII harassment cases, severity matters. Courts routinely contemplate a spectrum of indignity to assess severity. In workplace sexual harassment cases, courts have differentiated between conduct that is less severe—of which a

single instance generally cannot give rise to liability—and more severe acts that, even in isolation, can alter the terms of the workplace and create a triable Title VII issue. *See, e.g.*, *Redd v. N.Y. Div. of Parole*, 678 F.3d 166, 175-76 (2d Cir. 2012) (recognizing that while isolated incidents "usually will not suffice to establish a hostile work environment . . . even a single episode of harassment can establish a hostile work environment if the incident is sufficiently 'severe'" (collecting cases)). Courts routinely find that a single instance of sexual assault constitutes a "severe" act while a single touch to the shoulder or hair may not. *See*, *e.g.*, *Perry v. Slensby*, 815 Fed. App'x 608, 610-11 (2d Cir. 2020) (single instance of shoulder touching and sexually inappropriate remarks not sufficiently severe); *Ferris v. Delta Air Lines, Inc.*, 277 F.3d 128, 136 (2d Cir. 2001) (explaining that a single instance can suffice when it is "sufficiently egregious" and finding episode of sexual assault sufficient).

Similarly, in the context of racial harassment, courts have recognized a spectrum of severity pegged to the offensiveness of the racial slur that is informed by the slur's historical weight. Like a single physical assault, a single encounter with the word "Nigger" at work may be "severe," while other slurs that do not convey the same historical burdens and weight of meaning may not be. *See, e.g.*, *Ayissi-Etoh*, 712 F.3d at 580 (Kavanaugh, J., concurring) (analogizing a single use of the N-word to "a single *physical* act—such as a physical assault—[which] can create a hostile work environment"). Simply

put: the N-word in the workplace bears no resemblance to an "incidental" comment or contact that would be insufficient to establish liability in a sex harassment case. It is of a kind with an assault that singularly and immediately, alters the terms of the workplace.

D. The N-Word at Work Is Never a "Mere Utterance" Because It Can Psychologically Eviscerate Black Workers.

The N-word cannot be dismissed as a workplace "microagression" or "mere utterance," divorced from its violent racial history of rape, torture, and lynching.[5] Nor can the N-word be downplayed as a "stray remark," because it wields enough power to cause a domino effect of psychological harm to the target's mental and physical health. The N-word at work transcends microaggression or mere utterance because it lands with violence on the body, mind, and soul and annihilates the wellbeing of the victim.

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[5] A "microaggression"—a term coined in the 1970s by psychiatrist Chester M. Pierce—refers to a subtle or unintentional instance of discrimination against a member of a marginalized group. *Microaggression*, Oxford English Dictionary; *see also* Tori DeAngelis, *Unmasking "Racial Micro Aggressions"*, 40 Am. Psych. Ass'n 42 (2009), https://www.apa.org/monitor/2009/02/microaggression.

Linguistic scientists have even concluded that the N-word at work has the power to impose the mental condition of being enslaved upon Black workers. The N-word strips the target of status, control, authority, power, and agency to a degree that the target does not simply work for or with others but, instead, is subordinate to non-Black coworkers. Alexander Brown, *African American Enslavement, Speech Act Theory, and the Law*, 23 J. African Am. Studies 162 (2019).

E. The N-Word Pervades the Workplace with the Disease of Racism.

A singular use of the N-word at work is pervasive; like a contagion, it embeds and replicates the pathogenic racial subjugation-domination dynamic in the workplace culture. *See* Rebecca Gibian, *Why Words Matter: The Neuroscience of Hate Speech*, Inside Hook (Nov. 1, 2018), https://www.insidehook.com/daily_brief/news-opinion/words-matter-neuroscience-hate-speech (repeated exposure to hate speech can increase prejudice and desensitize individuals to verbal aggression).

Aside from the acute psychic and physical harm the N-word can have on its target, its collateral consequences are ongoing and pervasive: Racially discriminatory conduct, particularly when it goes unabated, can poison the work environment, validate and encourage additional hateful conduct, and create a chain reaction effect throughout the workplace. Racial slurs, particularly in an office

environment, are a means of enforcing and maintaining social hierarchy. "[A] key antecedent for those who use racial slurs is the desire for their dominant social group . . . to retain a dominant social position relative to members of subordinate groups." Ashleigh Shelby Rosette et al., *Why Do Racial Slurs Remain Prevalent in the Workplace? Integrating Theory on Intergroup Behavior*, 24 Org. Sci. 1402, 1403 (2013). "Racial slurs are used to reinforce divides between racial groups." *Id.* at 1405. Indeed, members of the socially dominant group tend to remain silent when they observe the use of racial slurs by other members of the same group against a target in a subordinate group. *Id.*

Moreover, when accepted in the workplace as shoptalk or "mere utterance," the N-word desensitizes bystanders, increasing the racial empathy gap that underwrites myriad terrible social outcomes for Black people. Americans are socialized to feel less empathy for Black people due to conditioning by hegemonic stereotypes. Jason Silverstein, *I Don't Feel Your Pain: A failure of empathy perpetuates racial disparities*, Slate (June 27, 2013), https://slate.com/technology/2013/06/racial-empathy-gap-people-dont-perceive-pain-in-other-races.html. Based on experimentation, neuroscientists conclude that exposure to hate speech increases prejudice through desensitization, and that dehumanizing the target may reduce empathy. *Id.*

The use of the N-word in the workplace thus has the institutional effect of replicating race-based social hierarchies, and at the interpersonal level, it

may empower office colleagues to engage in similar (or even escalated) harassing conduct. Ultimately, a single, isolated incident can be infectious, increasing the likelihood of subsequent racial slurs and other forms of discrimination. The Seventh Circuit in *Daniels v. Essex Group, Inc.*, 937 F.2d 1264 (7th Cir. 1991), described this very phenomenon. There, the unaddressed "racial taunts" ("Nigger jokes") against a Black employee by coworkers escalated over time to violent threats and a facsimile lynching of a black dummy marking "the outbreak of a more injurious strain of the virus of racism that had already infected the workplace." *Id.* at 1266, 1274-75.

African Americans are vulnerable to unique forms of workplace hostility and systemic industrial inequality. For example, Black women are more likely than white women to suffer workplace sexual harassment. *Black Women Disproportionately Experience Workplace Sexual Harassment, New NWLC Report Reveals,* Nat'l Women's Law Ctr. (Aug. 2, 2018), https://nwlc.org/press-releases/black-women-disproportionately-experience-workplace-sexual-harassment-new-nwlc-report-reveals/. Further, they are likely to be treated unfairly in promotions and training and discriminated against in advancement opportunities. Andie Kramer, *Recognizing Workplace Challenges Faced by Black Women Leaders,* Forbes (Jan. 7, 2020), https://www.forbes.com/sites/andiekramer/2020/01/07/recognizing-workplace-challenges-faced-by-black-women-leaders/.

Recognizing that African American workers suffer unique, outsized racialized harms is

consistent with Title VII's recognition of the importance of subjective experience in assessing harassment violations.

F. The Reasonableness of an Accuser's Perception of the N-Word Cannot Be Rejected as a Matter of Law.

Reasonableness in the context of Title VII N-word-based harassment must be assessed at trial because the weight and severity of the victim's encounter with the word is a complex, situational, fact-intensive experience appropriate for a fact-finder analysis, guided by experts. Melissa L. Breger, *Making the Invisible Visible: Exploring Implicit Bias, Judicial Diversity, and the Bench Trial*, 53 U. Rich. L. Rev. 1039 (2019). Nuanced matters of how racism affects individual plaintiffs, including whether their work environment was both subjectively and objectively hostile, may often be issues better decided by juries than by judges. The word "Nigger" carries the weight of a history inextricably bound with violence, and its weaponization in the workplace carries a spectrum of traumatic responses for which the quantum of harm necessarily requires an assessment by a fact-finder.

Moreover, a collective decision-making body is more likely to overcome racialized blind spots that inhibit a nuanced appreciation for the unique pathology of the N-word. Understandably, the full impact and power of the word may be inaccessible to non-Black audiences; there is no analogy that

accurately captures the hatred baked into its etymology. But to some degree, non-Black people intuitively "get it": A 2019 Pew Research Institute study showed that seventy-two percent of white respondents believe that white people should be prohibited from uttering the N-word. Anna Brown, *Key Findings on Americans' Views of Race in 2019*, Pew Rsch. Ctr. (Apr. 9, 2019), https://www.pewresearch.org/fact-tank/2019/04/09/key-findings-on-americans-views-of-race-in-2019/. So while these blind spots are unavoidable in a racially complex society, given that harassment is a subjective standard, a jury is best equipped to adjudicate the impact of the word on an employee.[6]

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[6] Trends in judicial decision-making support this view. Full or partial summary judgment is issued in favor of the employer in employment discrimination cases over eighty percent of the time. Joseph A. Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. Ill. L. Rev. 1011, 1015 (2009). "[W]hite judges" grant summary judgment sixty-one percent of the time, while "minority judges" grant these motions at a rate of just thirty-eight percent. Jill D. Weinberg & Laura Beth Nielsen, *Examining Empathy: Discrimination, Experience, and Judicial Decisionmaking*, 85 S. Cal. L. Rev. 313, 338-39 (2012). This stark disparity shows how reasonable minds might differ on these matters, how racial identity or prior experiences of racism may implicitly or explicitly affect those assessments, and therefore why it is imperative for a jury of one's peers to decide them, rather than an individual judge. Further, recent studies show disparities in jurists' decisions based

II. THE N-WORD AT WORK IS DISCRIMINATION AKIN TO A DEMOTION.

A demotion on the basis of race is presumed Title VII discrimination. *See, e.g.*, *Cornwell v. Electra Cent. Credit Union*, 439 F.3d 1018, 1031 (9th Cir. 2006) (employee established prima facie discrimination claim through evidence that employer demoted employee because of his race); *Pace v. Southern Ry. Sys.*, 701 F.2d 1383, 1386 (11th Cir. 1983) (prima facie discrimination case requires proof of "adverse employment action . . . , *e.g.* discharge, demotion, failure to hire"); *Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 85 (2d Cir. 2015) ("[A]n employer discriminates against a plaintiff by taking an adverse employment action against him," which can include "a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, . . . or other indices unique to a particular situation.").

Given its violent historical context and the associated trauma to recipients, exposure to the N-

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solely on the defendant's race. Breger, *supra*, at 1053; *see also* Meagan Biwer, *Implicit Bias in the Judiciary: Confronting the Problem Through Normalization*, 7 Ind. J. L. & Soc. Equal. 264 (2019). In fact, in recognition of this subjectivity, federal courts across the nation have implemented implicit bias trainings. *See, e.g.*, *Federal and State Court Cooperation: Reducing Bias*, Fed. Jud. Ctr., https://www.fjc.gov/content/337735/reducing-bias (last visited Mar. 17, 2021).

word in the workplace is akin to a demotion and can constitute an adverse employment action.

A. The N-Word Is a Badge of Slavery that Deconstructs and Diminishes African American Workers.

The slur "Nigger" is especially poignant at work because it denies the humanity of Black people—let alone Black excellence, intelligence, and competence. African Americans subjected to the slur have been stereotyped as "emotionally shallow, simple-minded, sexually licentious, and prone to laziness." Adam M. Croom, *How to Do Things With Slurs: Studies in the Way of Derogatory Words,* 33 Language & Communication 177, 189 (2013), https://semanticsarchive.net/Archive/TI5NzIxN/How%20to%20do%20things%20with%20slurs%20Studies%20in%20the%20way%20of%20derogatory%20words.pdf. One scholar charts the properties that the word seeks to convey; a "Nigger" is: 1) African American; 2) prone to laziness; 3) subservient; 4) the recipient of poor treatment; 5) athletic and musical; 6) sexually liberal or licentious; 7) simple-minded; 8) a survivor, tough, impervious to pain, or prone to violence; 9) loud and excessively noisy. *Id.* at 199. Nearly all of these assigned properties of the N-word inform the construction of African Americans as workers or professionals, inherently shaping perceptions of Black employees, and reducing one's perceived merit, collegiality, work product, output, behavior, and worth. *Id.* Historian Strouder-Prior asserts that the N-word is an idea disguised as a word that conveys that African Americans are intellectually and biologically inferior. She

concludes that just uttering the word irreparably poisons the workplace. Strouder-Prior, *supra*, TEDx presentation.

B. Use of the N-Word Effectively Creates a Workplace Demotion.

When the N-word is used at work, it not only causes severe psychic trauma, but also primes employment decision makers towards anti-Black animus. This further diminishes opportunities for economic and career advancement, and constructively demotes Black workers.

Social psychologists Greenberg and Pyszczynski conducted a series of experiments that quantified the N-word's devaluation of Black employees among colleagues and peers. One experiment assessed the effect of hearing the word "Nigger" on those rendering evaluations of a targeted minority group member. Jeff Greenberg & Tom Pyszczynski, *The Effect of an Overheard Ethnic Slur on Evaluations of the Target: How to Spread a Social Disease,* 21 J. Experimental Social Psy. 61 (1985), https://arizona.pure.elsevier.com/en/publications/the-effect-of-an-overheard-ethnic-slur-on-evaluations-of-the-targ. The experiment was set up as follows: There were groups of six to eight participants, two or four of whom were white subjects, and four of whom were study team members embedded in the experiment to help conduct it. Participants were told they were there to evaluate debating skills. Two of the study team members, one of whom was Black, were always picked to engage in the debate that the others were

to evaluate. The Black debater either won or lost the debate. After the debate, one of the embedded non-debater study team members criticized the Black debater in a manner that either did or did not involve the slur "Nigger." *Id.* at 61, 65-67. The study revealed that when the Black debater lost the debate, *the ethnic slur also led to substantially lower evaluations of his skill*. *Id.* at 69-70.

Neuroscientific studies show that this peer devaluation effect also extends to evaluations of persons associated with the target of the racial slur. For example, in one study, participants, including an embedded non-participant posing as one, read a trial transcript and were asked for verdicts and attorney and defendant evaluations. Shari L. Kirkland, *The Effect of an Overheard Ethnic Slur on Defense Attorney Evaluations and Verdicts in a Mock Trial Situation* 16 (1985) (M.A. thesis, University of Arizona), https://repository.arizona.edu/bitstream/handle/10150/275372/azu_td_1326239_sip1_m.pdf?sequence=1. The participants were informed that the defendant was white, and that the defense attorney was either Black or white. *Id.* at 16-17. When the defense attorney was Black, the embedded participant either made no comment, a non-racial derogatory comment, or a derogatory comment that referred to the defense attorney as "Nigger." *Id.* at 19. The use of the slur "Nigger" led to devaluation of the defense attorney, thus replicating the effect found by Greenberg and Pyszczynski in a different setting. *Id.* at 30. In addition, participants offered especially negative evaluations and harsh verdicts for the

white defendant when they were told he was defended by the Black lawyer who was the target of the N-word. *Id.*

These studies empirically demonstrate the devaluation of performance and output caused by use of the N-word. In the workplace, its use reduces Black workers' economic and social mobility. Its presence constructively demotes Black workers and, thereby, fundamentally changes the terms and conditions of employment. Even a single display 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.

CONCLUSION

For these reasons, together with the reasons in the Petition, *amici curiae* respectfully ask this Court to grant certiorari and reverse.

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RESPECTFULLY SUBMITTED,

LISA HOLDER
LAW OFFICE OF LISA HOLDER
P.O. Box 65694
Los Angeles, CA 90065
(323) 683-6610

EJS of Counsel

EVA PATERSON
MONA TAWATAO
CHRISTINA ALVERNAZ
EQUAL JUSTICE SOCIETY
1939 Harrison St., Suite 818
Oakland, CA 94612
(415) 288-8703

KELLY M. DERMODY*
DANIEL M. HUTCHINSON
EVAN J. BALLAN
MICHELLE A. LAMY
JESSICA A. MOLDOVAN
NIGAR A. SHAIKH
LIEFF CABRASER HEIMANN
& BERNSTEIN, LLP
275 Battery St.
San Francisco, CA 94111
(415) 956-1000

**Counsel of Record*

Counsel for Amici Curiae Social Science Experts, Race Equity Scholars, Law Professors, and Civil Rights Entities

APPENDIX

INSTITUTIONAL *AMICI*

The Aoki Center for Critical Race and Nation Studies at UC Davis School of Law (Martin Luther King, Jr. Hall) fosters multi-disciplinary scholarship and practice that critically examines the law through the lens of race, ethnicity, indigeneity, citizenship, and class. By integrating legal scholarship with the research of academics in other disciplines and by connecting critical race theory to the world of practice and policy, the Aoki Center seeks to deepen our understanding of issues of race discrimination that have a significant impact on our culture and society**.**

The Center on Race, Law, and Justice at the Fordham Law School, founded in 2016, works to generate innovative responses to racial inequality and discrimination. It prioritizes law, data, and social science-informed interventions capable of creating concrete change in communities, institutions, and public policy in a number of areas in the domestic and global contexts. The Center maximizes real-world impact through cross-disciplinary collaborations, comparative analyses, and systemic interventions that push the boundaries of traditional approaches to race and inequality.

The Center on Race, Inequality, and the Law at New York University School of Law was created to confront the laws, policies, and practices that lead to the oppression and marginalization of people of color. Accordingly, the Center uses public

education, research, advocacy, and litigation to advance racial justice and dismantle structures and institutions that have been infected by racial bias and plagued by inequality. The Center further supports the vigorous enforcement of laws that protect individuals against attitudes, beliefs, and behaviors that evince racial animus and injure human dignity.

The Charles Hamilton Houston Institute for Race and Justice at Harvard Law School was launched in September 2005 by Charles J. Ogletree, Jr., Jesse Climenko Professor of Law. The Institute honors and continues the unfinished work of Charles Hamilton Houston, who engineered the multi-year legal strategy that led to the unanimous 1954 Supreme Court decision *Brown v. Board of Education*, repudiating the doctrine of "separate but equal" schools for Black and white children. Our long-term goal is to ensure that every member of our society enjoys equal access to the opportunities, responsibilities, and privileges of membership in the United States. This must include ensuring freedom from discrimination and appropriate redress when entities create or ignore work environments that foster or tolerate disparagement on the basis of race.

The Civil Rights Project at UCLA (CRP) at the University of California Los Angeles (UCLA) was founded in 1996 (originally at Harvard University) to create a new generation of research in social science and the law on civil rights and equal opportunity for racial and ethnic groups in the United States. CRP has commissioned over 400

studies, published more than 25 books and issued numerous reports from authors at universities and research centers across the country. Its research was cited in *Grutter v. Bollinger*, 539 U.S. 306 (2003) and *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007) (Breyer, J. dissenting).

The Fred T. Korematsu Center for Law and Equality is a non-profit organization based at the Seattle University School of Law. It works to advance justice through research, advocacy, and education. Inspired by the legacy of Fred Korematsu—who defied military orders during World War II that resulted in the unlawful incarceration of 120,000 Japanese Americans—the Korematsu Center works to advance social justice for all. It has a special interest in ensuring that minorities are able to participate fully in this nation's civic and economic life

The W. Haywood Burns Institute (BI) is a Black-led national, non-profit working to transform the administration of justice. The Burns Institute works to dismantle structural racism and build community-centered structural well-being. BI has worked in hundreds of jurisdictions nationally in support of local efforts to eliminate racial and ethnic disparities.

INDIVIDUAL *AMICI*

Catherine Simpson Bueker is a tenured Professor of Sociology at Emmanuel College in Boston, Massachusetts. She focuses on issues of race, ethnicity, and immigration and has published books, chapters, essays, and peer-reviewed articles on those topics. Her research has been read and cited hundreds of times, including in the National Academies of Sciences report, *The Integration of Immigrants into American Society* (2015). Her books include *From Immigrant to Naturalized Citizen* (LFB Press 2006) and *The Experiences of Women of Color in an Elite US Public School* (Palgrave MacMillan 2017). Her articles have appeared in the journals *The International Migration Review; Race, Ethnicity, and Education*; *The Journal of International Migration and Integration; and Contexts*, among others. She has also been a Visiting Scholar and Visiting Associate Professor at Harvard University. She holds a BA in American Studies from Cornell University and an MA and PhD in Sociology from Brown University.

Bennett Capers is a Professor of Law at Fordham Law School, where he is also the Director of the Center on Race, Law, and Justice. His research focuses on issues of race, gender, technology, and criminal justice, and he is a prolific writer on these topics. His articles and essays have been published or are forthcoming in the *California Law Review* (twice), *Columbia Law Review*, *Cornell Law Review*, *Fordham Law Review*, *Minnesota Law Review*, *New York University Law Review*, *Michigan Law Review*,

and *UCLA Law Review*, among others. In addition to co-editing the forthcoming *Critical Race Judgments: Rewritten U.S. Court Opinions on Race and Law* (Cambridge University Press) and *Feminist Judgments: Rewritten Criminal Law Opinions* (Cambridge University Press), he also has a forthcoming book about prosecutors, *The Prosecutor's Turn* (Metropolitan Books). He is an elected member of the American Law Institute, and a Director of Research for the Uniform Laws Commission. He has also served for several years as a Commissioner on the NYC Civilian Complaint Review Board.

Dr. Robert Carter, PhD. is Professor Emeritus of Psychology and Education at Columbia University. He is an expert on the stressful and traumatic effects of racism. He has authored 128 articles and 9 books, including Carter and Scheuermann, *Confronting Racism*, (Routledge 2020); and Carter and Pieterse, *Measuring the Effects of Racism* (Columbia University Press 2020). He is a fellow in the American Psychological Association and has earned several national awards.

Robert S. Chang is a Professor of Law and the Executive Director of the Fred T. Korematsu Center for Law and Equality at Seattle University School of Law.

Marjorie Florestal is a law professor with over a decade of experience in creating diverse and inclusive learning environments for students from all over the world. As a scholar, she has written on

issues of race, class, gender, immigration, and cross-cultural pedagogy. As a faculty leader, she has assessed campus climate and worked with students and institutions on diversity initiatives. Prior to academia, Professor Florestal served as a lawyer in the Clinton White House. She has lived, traveled, and worked in multiple countries, including Haiti, South Africa, Cape Verde, South Korea, Guatemala, and Hong Kong. Professor Florestal holds a JD from New York University School of Law. She also holds a Masters degree in Jungian psychology and is completing doctoral work in human development focusing on issues of racial trauma and healing.

Dr. Nicole Arlette Hirsch is a visiting scholar at UC Berkeley. Dr. Hirsch received her PhD in sociology from Harvard University and held a postdoctoral research fellowship at USC. She has expertise in the areas of racial justice, organizations, culture, and social change. Her work considers how individuals, groups, and organizations confront stigmatization, discrimination, and racism and build power through civic engagement in the United States and in Europe.

Christopher Hom is Associate Professor of Philosophy at Texas Tech University. He received his PhD in Philosophy from University of California, Irvine and has been a faculty fellow at University of California, Santa Cruz and at the Stanford Humanities Center. He works primarily in philosophy of language, philosophy of race, and metaethics. His most well-known publications

include "The Semantics of Racial Epithets" in *The Journal of Philosophy*, "A Puzzle about Pejoratives" in *Philosophical Studies*, and "Why the Negation Problem is Not a Problem for Expressivism" (with Jeremy Schwartz) in *Noûs*. He is currently working on a book on ideological language.

Jason Okonofua is an Assistant Professor in the Psychology Department at the University of California- Berkeley. As a social psychologist, his research emphasizes the ongoing interplay between processes that originate among teachers and students to examine causes for disproportionate discipline according to race. His research has been published in Psychological Science and the Proceedings of the National Academy of Sciences.

Dr. Alex Pieterse is the Associate Professor and Doctoral Training Director, Counseling Psychology at the University of Albany. Dr. Pieterse conducts research on health-related outcomes associated with the experience of racism, antiracism advocacy, race-related aspects of counseling psychology training, and the impact of self-awareness on the psychotherapy process. He is an associate editor for *The Counseling Psychologist* and co-author of *Measuring the Effects of Racism: Guidelines for the Assessment and Treatment of Race-Based Traumatic Stress Injury*, published by Columbia University press.

Dr. Jennifer Richeson is the Philip R. Allen Professor of Psychology at Yale University. Dr. Richeson's research examines multiple psychological

phenomena related to cultural diversity and how people reason about and respond to societal inequality and injustice, including the consequences of managing the threats associated with being the target of discrimination.

Suja A. Thomas is the Peer and Sarah Pedersen Professor of Law at the University of Illinois College of Law. Professor Thomas's book *The Missing American Jury: Restoring the Fundamental Constitutional Role of the Criminal, Civil, and Grand Juries* was published by Cambridge University Press. The book has been reviewed by federal judge William Young who asserted it is "akin to Tom Paine's Common Sense." Professor Thomas's second book *Unequal: How America's Courts Undermine Discrimination Law*, published by Oxford University Press, was discussed in the New York Times Magazine and reviewed by federal judge John McConnell. She has served as a Visiting Professor at the University of Chicago Law School and Vanderbilt Law School. Professor Thomas received her B.A. in mathematics from Northwestern University and her J.D. from NYU School of Law where she graduated with honors and was on the Law Review. After clerking, she practiced in New York City at the law firms of Cravath, Weil, Gotshal, and Vladeck.