No. 20-___

IN THE

Supreme Court of the United States

ROBERT COLLIER,

Petitioner,

v.

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

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Title VII of the Civil Rights Act of 1964 prohibits discriminatory conduct in the workplace that is "sufficiently severe or pervasive" to create a hostile work environment. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986). *Meritor* and *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993), stated that the "mere utterance" of an offensive epithet does not create a hostile work environment. But in *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998), the Court said that one "extremely serious" incident could be sufficient. Courts of appeals disagree as to whether a single use of a racial epithet is a "mere utterance" that can never support a hostile-work-environment claim or an "extremely serious" incident that can.

The questions presented are:

1. Whether an employee's exposure to the N-word in the workplace is severe enough to send his Title VII hostile-work-environment claim to a trier of fact.
2. Whether and in what circumstances racial epithets in the workplace are "extremely serious" incidents sufficient to create a hostile work environment under Title VII, rather than nonactionable "mere utterances."

RELATED PROCEEDINGS

Collier v. Dallas Cnty. Hosp. Dist., No. 3:17-CV-3362-D (N.D. Tex. Apr. 9, 2019)

Collier v. Dallas Cnty. Hosp. Dist., No. 19-10761 (5th Cir. Apr. 9, 2020), opinion revised and petition for reh'g denied, Sept. 30, 2020

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Robert Collier respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The revised opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. 1a) is available at 827 F. App'x 373. The original opinion of the Fifth Circuit (Pet. App. 47a) is available at 805 F. App'x 306. The opinion of the United States District Court for the Northern District of Texas (Pet. App. 12a) is available at 2019 WL 2394225. The Fifth Circuit's order denying rehearing and rehearing en banc (Pet. App. 58a) is unreported.

JURISDICTION

The Fifth Circuit entered its initial judgment on April 9, 2020 (Pet. App. 47a). On September 30, 2020, the Fifth Circuit issued a revised opinion (Pet. App. 1a) and denied petitioner's timely petition for rehearing en banc (Pet. App. 58a). On March 19, 2020, this Court extended the deadline to file any petition for a writ of certiorari due on or after that date to 150 days from the date of the lower-court judgment or any later order denying a timely petition for rehearing. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

Section 703 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, provides in relevant part:

> (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 … .

INTRODUCTION

Robert Collier worked as an operating room aide at Parkland Memorial Hospital in Dallas, Texas. His work environment was rife with racial discrimination. White nurses called Black workers "boy." Two large swastikas painted on the wall of a storage room remained uncovered for almost two years after employees reported them to hospital management. And of particular relevance to this petition, in an elevator regularly used by hospital employees, the N-word was carved into the wall. Despite Collier's multiple complaints to supervisors, his employer never did anything to remove the elevator graffiti, cover the swastikas, or otherwise address the anti-Black racism plaguing the workplace.

The N-word "sums up … all the bitter years of insult and struggle in America, [is] pure anathema to African-Americans, and [is] probably the most offensive word in English." *Ayissi-Etoh v. Fannie Mae*, 712 F.3d 572, 580 (D.C. Cir. 2013) (Kavanaugh, J., concurring) (quotation marks and citations omitted). But when Collier filed a Title VII suit alleging a hostile work environment at the hospital, the Fifth Circuit held, following its earlier precedent, that the

workplace use of the N-word was not "severe" enough to establish a hostile work environment. That decision reflects an entrenched circuit split over the meaning of this Court's hostile-work-environment precedent and allows egregious racial discrimination to persist in the workplace. This Court should grant review to resolve the conflict and reverse.[1]

STATEMENT OF THE CASE

Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of race with respect to "terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1). An employer discriminates in the terms and conditions of employment when it subjects its employees to a racially "intimidating, hostile, or offensive working environment." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986).

An employee establishes a hostile-work-environment claim by showing that his employer subjected him to discriminatory harassment that was "sufficiently severe or pervasive." *Meritor*, 477 U.S. at 67. The severe-or-pervasive standard requires courts to consider the totality of the circumstances, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's

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[1] As indicated, this case concerns the workplace use of a word often viewed as the most offensive word in the English language and as "pure anathema to African-Americans." *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 185 (4th Cir. 2001). For these reasons, like many courts, this petition generally uses the term "N-word" and spells it out only when it appears that way in the record or in cited authorities. *See, e.g.*, *Ayissi-Etoh v. Fannie Mae*, 712 F.3d 572 (D.C. Cir. 2013); Pet. App. 3a, 9a-10a.

work performance." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993). This standard is intended to separate unlawful harassment from "ordinary tribulations of the workplace," such as "simple teasing" and "offhand comments." *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998). Under it, a "mere offensive utterance" or an "offhand comment" cannot establish a hostile work environment, but an "extremely serious" incident may. *Id.*

Looking to this language, circuit courts are divided about whether the use of an odious racial epithet—such as the N-word—can establish a hostile-work-environment claim. In the Third and Fourth Circuits, a jury may find that a workplace use of the N-word is an "extremely serious" isolated incident that is sufficiently severe to violate Title VII; in the Fifth, Sixth, Seventh, Eighth, and Tenth Circuits, on the other hand, a single workplace use of the racial epithet is a non-actionable "mere utterance" that will never reach a factfinder.

I. Factual background

Petitioner Robert Collier worked as an operating room aide at respondent Dallas County Hospital District (Parkland) from 2009 to 2016. Pet. App. 13a. Throughout his employment, Collier—a Black man—repeatedly reported to Parkland management that Black employees were treated worse than other employees. *Id.* at 3a.

Of particular relevance here, despite Collier's objections, Parkland left "racially hostile graffiti" of "the word 'nigger'" etched into the wall of an elevator that Collier and other employees regularly used to access the cafeteria. Fifth Circuit Record on Appeal (ROA) 255-56; *see* Pet. App. 42a. When Collier first

saw the graffiti, he reported it to the Human Resources Department and to operating room Director Richard Stetzel. Pet. App. 42a; ROA 257. Although Stetzel assured Collier that he would investigate the incident, he never did. ROA 260, 1477-78. The marking remained in the elevator for "at least" six months. *Id.* at 256; Pet App. 42a. Collier saw the epithet whenever he used the elevator, and it upset him every time. ROA 255-56. He viewed the graffiti as "racist and offensive," *id.* at 243, and "always thought of" it, *id.* at 256. Collier felt that he had no choice but to see it because he was "working on a job that's hourly" and understood that he had to "work on." *Id.* Eventually, somebody roughly scratched out the epithet. Pet. App. 3a n.2; ROA 256. Collier believed that it was done by "some black person who was tired of seeing it," rather than by Parkland, because it "wasn't a professional job." ROA 256, 259.

In addition to the racist slur in the elevator, a pair of two-foot-tall swastikas were painted on the wall of a storage room at Parkland. Pet. App. 3a; ROA 259, 544. Collier worked in this part of the building several times a week and saw the swastikas throughout the day. Pet. App. 42a-43a; ROA 1539. Upset by the swastikas, Collier again complained to Stetzel and the Human Resources Department, and again Stetzel said he would investigate. Pet. App. 3a; ROA 260. But he never did. ROA 1478. Stetzel acknowledged that he knew about the swastikas, Pet App. 3a, and testified that he planned to cover them "at some point." ROA 543. But the swastikas remained on the walls, untouched, for nearly two years. Pet. App. 10a; ROA 1487.

Collier also complained to Stetzel that he was called "boy" by a white nurse. Pet. App. 3a; ROA 250. Collier testified that Black workers were "[v]ery frequent[ly]" called "boy" by white coworkers. ROA 842. These incidents were "very upsetting" to Collier and never "went away or out of [his] mind." *Id.* at 251.

II. Procedural background

After years working at Parkland, Collier was fired. Pet. App. 4a; ROA 495, 577. He then sued Parkland in the U.S. District Court for the Northern District of Texas, which had jurisdiction under 28 U.S.C. §§ 1331 and 1343.

Collier claimed, among other things, that Parkland created a racially hostile work environment in violation of Title VII. Pet. App 19a; ROA 17.[2] The district court granted Parkland's motion for summary judgment. Pet. App. 13a. As relevant here, the court held that the "incidents, individually or in combination with each other … were [not] sufficiently pervasive or severe" for a jury to find a hostile work environment. *Id.* at 43a. Although the district court acknowledged that the N-word is "racially offensive and universally condemned" and that swastikas "could be interpreted as offensive to Collier based on his African American race," it ruled that no reasonable jury could find that Parkland's conduct was sufficiently hostile or abusive because it was not directed at him and the effect on Collier's work performance was "marginal." *Id.* at 44a-46a.

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[2] Collier also brought several other race-discrimination claims against Parkland. *See* Pet. App. 19a. They are not pursued here.

The Fifth Circuit affirmed. It recognized that "other courts have found that the prolonged duration of racially offensive graffiti, especially once it has been reported, could militate in favor of a hostile-work-environment claim." Pet. App. 55a. The Fifth Circuit also acknowledged that "other courts of appeals have found instances where the use of the N-word itself was sufficient to create a hostile work environment." *Id.* at 56a. Nevertheless, citing three of its own precedents, the court of appeals explained that the conduct at Parkland was "insufficient to establish a hostile work environment under our precedent." *Id.* The Fifth Circuit thus affirmed the grant of summary judgment because the conduct at Parkland "was not physically threatening, was not directed at [Collier] (except for the nurse's comment), and did not unreasonably interfere with his work performance." *Id.* at 57a.

The Fifth Circuit denied Collier's timely petition for rehearing en banc, Pet. App. 59a, and reissued its initial opinion with minor changes, *id.* at 1a-11a.

REASONS FOR GRANTING THE WRIT

The courts of appeals are intractably divided on whether use of the N-word in the workplace can create a hostile work environment. In the Third and Fourth Circuits, a jury can find one use of the slur severe enough to establish a hostile work environment. The D.C. Circuit has suggested agreement with the view that one workplace use of the N-word—a word that "instantly calls to mind our country's long and brutal struggle to overcome racism and discrimination against African-Americans"—may alone establish a hostile-work-environment claim. *Ayissi-Etoh v. Fannie Mae*, 712 F.3d 572, 580 (D.C. Cir. 2013) (Kavanaugh, J., concurring); *see id.* at 577 (majority

opinion). In the Fifth, Sixth, Seventh, Eighth, and Tenth Circuits, on the other hand, the workplace use of a racial epithet by itself is invariably insufficient to place a hostile-work-environment claim before a jury.

Whether and in what circumstances the workplace use of the N-word (and similar abhorrent racial epithets) violates Title VII is an important and recurring issue that can be resolved only by this Court. The N-word is a singularly odious epithet that "reminds [Black Americans] of an unshakeable 'otherness,' an outsider status in the larger social, economic, and political dynamics of a given society." Michele Goodwin, *Nigger and the Construction of Citizenship*, 76 Temp. L. Rev. 129, 141 (2003). Regrettably, the word is frequently used in the workplace to demean Black employees. So long as the disagreement between the circuits persists, Black employees in a significant swath of the country will, at a minimum, be forced to endure its prolonged and repeated use before they are able to reach the trier of fact on a hostile-work-environment claim. This case presents a clean vehicle for this Court to address the issue, and it should do so now.

The court of appeals also got it wrong. The court incorrectly concluded that the workplace use of the N-word was not sufficiently severe to state a hostile-work-environment claim, and that Collier's months-long exposure to the elevator graffiti, the swastikas, and being called "boy" was not sufficient to send the case to a jury. This Court should grant review and reverse.

I. There is an entrenched circuit split stemming from a gap in this Court's Title VII precedent.

Title VII makes it unlawful for an employer to discriminate against an employee "with respect to his compensation, terms, conditions, or privileges of employment" on the basis of various characteristics, including race. 42 U.S.C. § 2000e-2(a)(1). This Court has recognized that an employer violates that provision when an employee is subjected to harassment that is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) (internal quotations and alterations omitted).

Elaborating on the severe-or-pervasive standard, this Court in *Harris v. Forklift Systems, Inc.*, explained that a "mere utterance of an … epithet which engenders offensive feelings in an employee does not sufficiently affect the conditions of employment." 510 U.S. 17, 21 (1993) (quoting *Meritor*, 477 U.S. at 67) (internal citation and quotation marks omitted). In *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998), however, the Court suggested that an isolated incident—if extremely serious—could be severe enough to "amount to [a] discriminatory change[] in the terms and conditions of employment" (quotation marks omitted).

This Court's precedent therefore leaves open the question whether use of the N-word and other hateful epithets in the workplace is a non-actionable "mere utterance" or whether the trier of fact may hold that their use constitutes a hostile work environment. Not surprisingly, then, "[d]espite society's general abhorrence for and unease concerning the [N-word],

courts are split over whether it is a sufficient basis for a hostile work environment claim." David Roby, *Words that are Beyond Opprobrious: Racial Epithets and the Severity Element in Hostile Work Environment Claims*, 8 How. Scroll: Soc. Just. L. Rev. 37, 68 (2005). In the Third and Fourth Circuits, a jury can find the epithet severe enough to establish a hostile work environment. Conversely, in the Fifth, Sixth, Seventh, Eighth, and Tenth Circuits, that issue may not go to the jury: that is, the isolated use of a racial epithet—including the N-word—is not sufficiently severe as a matter of law to establish a hostile work environment.

A. The courts of appeals are intractably divided.

1. In the Third and Fourth Circuits, a reasonable jury may find that a single workplace use of the N-word creates a hostile work environment, and the D.C. Circuit has expressed agreement.

In two circuits, a single workplace use of the N-word suffices to bring a hostile-work-environment claim before the trier of fact.

Third Circuit. In *Castleberry v. STI Group*, 863 F.3d 259, 265 (3d Cir. 2017), the Third Circuit held that the workplace use of the N-word may be severe enough to state a hostile-work-environment claim under Title VII. There, two Black employees alleged, among other things, that that their supervisor warned them that they would be fired if they "nigger-rigged" a fence. *Id.* at 262. The Third Circuit framed the question as whether, under the severe-or-pervasive standard, a "supervisor's single use of the 'n-word' is adequately 'severe' and if one isolated incident is sufficient to state a claim under that standard." *Id.* at

264. Observing that the severity of the use of the N-word is ultimately a "context-specific" issue for a factfinder, the court held that "one such instance can suffice to state a claim." *Id.*

Fourth Circuit. The Fourth Circuit takes a similar approach. In *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 280 (4th Cir. 2015) (en banc), a Black employee maintained that her supervisor called her a "porch monkey." Noting that the slur "porch monkey" is "about as odious as the use of the word 'nigger,'" the Fourth Circuit explained that this was "the type of case contemplated in *Faragher* where the harassment, though perhaps 'isolated,' can properly be deemed to be 'extremely serious.'" *Id.* at 280-81. In so holding, the en banc court rejected "any notion" that its prior decisions "were meant to require more than a single incident of harassment in every viable hostile work environment case." *Id.* at 281.

D.C. Circuit. The D.C. Circuit has expressed support for the position espoused by the Third and Fourth Circuits, stopping just short of holding that a single racial epithet can alone be sufficient to create a hostile work environment. In *Ayissi-Etoh v. Fannie Mae*, 712 F.3d 572, 575 (D.C. Cir. 2013), a Black employee was called the N-word by a company vice president. The court reversed the district court's grant of summary judgment for the employer based on that comment, another racist statement, and that the employee was forced to continue working with the vice president. *Id.* at 577. But the court noted that the vice president's use of the N-word alone "might well have been sufficient to establish a hostile work environment." *Id.*

Concurring, then-Judge Kavanaugh went further, stating that use of the N-word "by itself would establish a hostile work environment." 712 F.3d at 579 (Kavanaugh, J., concurring). The employer's contrary argument, he stressed, was "wrong on the law and wrong on the application of the law." *Id.* Judge Kavanaugh explained that "saying that a single incident of workplace conduct *rarely* can create a hostile work environment is different from saying that a single incident *never* can create a hostile work environment." *Id.* "No other word in the English language," he observed, "so powerfully or instantly calls to mind our country's long and brutal struggle to overcome racism and discrimination against African-Americans." *Id.* at 580. Thus, "being called the n-word by a supervisor … suffices by itself to establish a racially hostile work environment." *Id.*

2. In the Eighth, Sixth, Seventh, Tenth, and Fifth Circuits, a single use of a racial epithet alone is not severe enough to establish a hostile work environment.

Workplace use of the N-word, standing alone, is always insufficient to establish a hostile work environment in five circuits.

Eighth Circuit. In *Gipson v. KAS Snacktime Co.*, 171 F.3d 574, 579-80 (8th Cir. 1999), the Eighth Circuit held that a Black employee did not establish a hostile-work-environment claim when his supervisor called him a "dumb nigger" and demanded the employee quit because the company "didn't need his 'kind.'" *See id.* at 577, 79. And in *Reedy v. Quebecor Printing Eagle, Inc.*, 333 F.3d 906, 909 (8th Cir. 2003), the Eighth Circuit indicated that the frequency of racial epithets determines the viability of a hostile-

work-environment claim. There, the court found multiple frequent uses of a racial epithet sufficient to withstand summary judgment, distinguishing *Woodland v. Joseph T. Ryerson & Son, Inc.*, 302 F.3d 839, 843-44 (8th Cir. 2002), in which "sporadic" uses of racial epithets, copies of racist poems, and racist graffiti were insufficient to send the case to the jury.

Sixth Circuit. So too in the Sixth Circuit, which holds that the single use of a workplace racial epithet is not sufficient to establish a hostile work environment. There, as in the Eighth Circuit, the frequency of racial epithets determines whether a hostile-work-environment claim may reach a jury. *See Jackson v. Quanex Corp.*, 191 F.3d 647, 662 (6th Cir. 1999) ("[A]n *abundance* of racial epithets and racially offensive graffiti … may constitute severe and pervasive harassment.") (emphasis added). In *Nicholson v. City of Clarksville, Tenn.*, 530 F. App'x 434, 443-44 (6th Cir. 2013), the court went further, holding that even multiple "isolated" uses of the N-word are not severe or pervasive enough to establish a hostile work environment.

And, in *Ladd v. Grand Trunk Western Railroad, Inc.*, 552 F.3d 495, 500-502, & 501 n.2 (6th Cir. 2009), the court noted that even if an employee could prove that she was called "a nigger and a lazy nigger"—along with being called a "black bitch"—that conduct would be insufficient to establish a hostile work environment. Similarly, in *Armstrong v. Whirlpool Corp.*, 363 F. App'x 317, 327 (6th Cir. 2010), the court found insufficient a "handful of uses of the n-word and its derivatives," "some racist jokes," and "a few references" to the Ku Klux Klan. *See also Reynolds v. FedEx Corp.*, 544 F. App'x 611, 616-17 (6th Cir. 2013)

(employee failed to establish a hostile work environment by asserting two specific instances of racist comments, including once being called a "scab nigger"). In sum, in the Sixth Circuit, "one specific incident of racial harassment, in the form of a single use of a racial epithet" is insufficient to state a hostile-work-environment claim. *Hibbler v. Reg'l Med. Ctr.*, 12 F. App'x 336, 339 (6th Cir. 2001).

Seventh Circuit. The Seventh Circuit also routinely rejects as a matter of law hostile-work-environment claims based on a single use of a hateful racial epithet. *See, e.g.*, *Peters v. Renaissance Hotel Operating Co.*, 307 F.3d 535, 552 (7th Cir. 2002) (a Black employee's exposure to the N-word in the workplace does not establish a hostile-work environment claim). Like the Eighth and Sixth Circuits, the Seventh Circuit stresses the frequency of racial epithets in the workplace above all else, differentiating between cases involving multiple instances of racist conduct—which may be actionable—from cases where "there was one isolated racial epithet"—which invariably are not. *Cerros v. Steel Techs., Inc.*, 288 F.3d 1040, 1047 (7th Cir. 2002); *see also Dandy v. UPS, Inc.*, 388 F.3d 263, 271-72 (7th Cir. 2004).

Tenth Circuit. Similarly, in the Tenth Circuit, "there must be a steady barrage of opprobrious racial comments" for a hostile-work-environment claim to reach a jury. *Bolden v. PRC Inc.*, 43 F.3d 545, 551 (10th Cir. 1994). In *Bolden*, the court affirmed a district court's grant of summary judgment for an employer where a Black employee alleged "infrequent" "racial jokes and slurs" in the workplace, *id.*, including the use of "terms such as 'honky' and 'nigger,'" *id.* at

549. The court explained that, under its precedent, allegations of "sporadic racial slurs" are not enough; rather, "[t]he plaintiff must show more than a few isolated incidents of racial enmity" to establish a hostile-work-environment claim. *Id.* at 551 (quotation marks omitted); *accord Lounds v. Lincare, Inc.*, 812 F.3d 1208, 1229 (10th Cir. 2015).

Fifth Circuit. In the decision below, the Fifth Circuit—like the Eighth, Sixth, Seventh, and Tenth Circuits—held that workplace use of the N-word is insufficient to establish a hostile-work-environment claim under Title VII. *See supra* at 6-7; Pet. App. 10a-11a.

Pointing to then-Judge Kavanaugh's concurrence in *Ayissi-Etoh*, the Fifth Circuit observed that "other courts of appeals have found instances where the use of the N-word itself was sufficient to create a hostile work environment." Pet. App. 10a. But the court stated that, under its precedent, "the oral utterance of the N-word and other racially derogatory terms, even in the presence of the plaintiff, may be insufficient to establish a hostile work environment." *Id.* at 10a-11a (citing *Dailey v. Shintech, Inc.*, 629 F. App'x 638 (5th Cir. 2015), *Frazier v. Sabine River Auth. La.*, 509 F. App'x 370 (5th Cir. 2013), and *Vaughn v. Pool Offshore Co.*, 683 F.2d 922 (5th Cir. 1982)).

In each of its prior decisions on which the Fifth Circuit relied below, the workplace use of an odious racial epithet was insufficient to establish a hostile work environment. In *Vaughn*, the Fifth Circuit found that the use of the N-word—alongside "coon" and "black boy"—was not actionable under Title VII. 683 F.2d at 924-25. Similarly, in *Frazier*, a coworker's use of racial epithets, including saying the N-word to a

Black employee, was "isolated and not severe or pervasive enough to support a hostile work environment claim." 509 F. App'x at 374. And again, in *Dailey*, the Fifth Circuit held that no hostile work environment existed where a co-worker called a Black employee a "black little motherf—r" and threatened to "kick his black a—s." 629 F. App'x at 640, 644 (citing *Faragher*, 524 U.S. at 775).

3. Nearly every circuit has struggled with whether an isolated use of a racial epithet is sufficiently severe.

The questions presented have touched nearly every circuit, underscoring the need for this Court's guidance. Even courts that have not squarely embraced one side of the split or the other have grappled with whether an isolated racial epithet is sufficient to establish a hostile work environment. In *Daniel v. T & M. Protection Resources, LLC*, 689 F. App'x 1, 2 (2d Cir. 2017), for instance, the Second Circuit vacated a district-court holding that, as a matter of law, the isolated workplace use of the N-word is never actionable. The court declined to decide "whether the one-time use of the slur 'nigger' by a supervisor to a subordinate can, by itself, support a claim for a hostile work environment," but admonished the district court for "improperly rel[ying] on our precedents when it rejected this possibility as a matter of law." *Id.*

In *McGinest v. GTE Service Corp.*, 360 F.3d 1103, 1118 (9th Cir. 2004), the Ninth Circuit reversed a district court's grant of summary judgment for an employer on a hostile-work-environment claim where the employee was subjected to "racial insults, as well as more subtle taunts" and racist graffiti including the

N-word. *See id.* at 1115. The court highlighted the unique severity of the N-word, noting that the epithet "evok[es] a history of racial violence, brutality, and subordination" and describing the word as a "significant exacerbating factor[] in evaluating the severity of the racial hostility" directed at the employee. *Id.* at 1116. But the court based its reversal of the district court's grant of summary judgment on the entirety of the employee's allegations, "ranging in severity from being called racially derogatory names to experiencing a potentially life-threatening accident," and did not rule on whether a single use of the N-word would be sufficient to establish a hostile work environment. *Id.* at 1118.

And, in *Adams v. Austal, U.S.A., L.L.C.*, 754 F.3d 1240, 1254-55 (11th Cir. 2014), the Eleventh Circuit addressed complaints of a racially hostile work environment brought by thirteen Black employees. The district court had granted summary judgment for the employer in all cases. The Eleventh Circuit reversed the grant of summary judgment in seven of those cases, distinguishing between different employees' hostile-work-environment claims based on, among other factors, the "frequency" "of the [racial] harassment" the employees endured. *Id.* at 1254. For example, the court held that an employee who was called the N-word and "boy" dozens of times at work and "saw racist graffiti 'all the time' in 'pretty much all of' the restrooms he used at work" established a hostile-work-environment claim, but an employee who saw racist graffiti daily and "heard people say the slur 'nigger,' but only a 'few times'" did not. *See id.*

B. The circuit split stems from a gap in this Court's precedent that only this Court can close.

This Court has never directly confronted a hostile-work-environment claim arising out of the workplace use of an odious racial epithet and has not clarified the relationship between a nonactionable "mere utterance" and an actionable "extremely serious" isolated incident. This Court's precedent, therefore, leaves open the question whether the single use of a hateful racial epithet—such as the N-word—is invariably a nonactionable "mere utterance" or whether it may establish a hostile work environment and thus be presented to the trier of fact.

To explain: In *Meritor*, the Court stated that a "mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee" does not violate Title VII. 477 U.S. at 67 (quoting *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971)). Then, in *Harris*, the Court instructed lower courts applying the severe-or-pervasive standard to consider whether workplace conduct is "physically threatening or humiliating, or a mere offensive utterance." 510 U.S. at 23. And in *Faragher*, the Court once again stated that mere offensive utterances do not create a hostile work environment, further remarking that "simple teasing" and "offhand comments" are not actionable. 524 U.S. at 787-88; *see also Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115 (2002) (observing in dicta that "a single act of harassment may not be actionable on its own").

But despite its discussion of nonactionable offensive statements, *Faragher* also stated that an "extremely serious" "isolated incident" could establish

a hostile work environment. 524 U.S. at 788. Therefore, *Faragher* distinguishes, without further elaboration, between nonactionable "mere offensive utterances" and isolated incidents that are severe enough to create a hostile work environment.

This Court's precedent thus leaves open whether the workplace use of a racial epithet is invariably a nonactionable "mere utterance" or whether it can constitute an extremely serious incident that creates a hostile work environment. That precedential gap is at the root of the circuit split and warrants this Court's attention.

II. The questions presented are important and recurring.

Whether the workplace use of the N-word is severe enough to establish a hostile work environment is an important and recurring question worthy of this Court's attention.

The N-word is "perhaps the most offensive and inflammatory racial slur in English." *Swinton v. Potomac Corp.*, 270 F.3d 794, 817 (9th Cir. 2001). It is "the most noxious racial epithet in the contemporary American lexicon." *Montiero v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1034 (9th Cir. 1998). The epithet is unlike any other offensive comment one might be subjected to in the workplace: "No other word in the English language so powerfully or instantly calls to mind our country's long and brutal struggle to overcome racism and discrimination against African-Americans." *Ayissi-Etoh v. Fannie Mae*, 712 F.3d 572, 580 (D.C. Cir. 2013) (Kavanaugh, J., concurring). "Far more than a 'mere offensive utterance,' the word 'nigger' is pure anathema to African-Americans." *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 185 (4th

Cir. 2001). The epithet "reminds [Black Americans] of an unshakeable 'otherness,' an outsider status in the larger social, economic, and political dynamics of a given society." Michele Goodwin, *Nigger and the Construction of Citizenship*, 76 Temp. L. Rev. 129, 141 (2003).

Unlike other offensive workplace comments that courts sometimes chalk up to "simple teasing," the N-word is not a "run-of-the-mill epithet entitled to cavalier treatment by employers or the courts." Darryll M. Halcomb Lewis, *The Creation of a Hostile Work Environment by a Workplace Supervisor's Single Use of The Epithet "Nigger"*, 53 Am. Bus. L.J. 383, 406 (2016). It is tied to "racial violence, brutality, and subordination." *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1116 (9th Cir. 2004); *see also* Goodwin, 76 Temp. L. Rev. at 203 ("The wounding power of 'nigger' may be derived from the physical violence … that historically has accompanied its usage."). It is "assaultive," "a form of violence by speech." Randall Kennedy, *Nigger: The Strange Career of a Troublesome Word* 79 (2002).

But despite—or, more likely, because of—the well-recognized wounding power of the N-word, it is used all too frequently in the workplace to demean Black employees. A simple search returns over one hundred circuit-level cases confronting the use of the N-word in the workplace and over a thousand from district courts.[3]

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[3] A Westlaw search conducted on January 11, 2020 for the term "nigger" together with "hostile work environment" since this Court decided *Faragher* produced 158 circuit-court decisions and another 1,380 district-court decisions.

Black employees in the Fifth, Sixth, Seventh, Eighth, and Tenth Circuits can never establish a hostile-work-environment claim based on a single workplace use of the N-word. Rather, they must subject themselves to repeated harassment and racism—that is, to ongoing *discrimination*—at the hands of their employers and coworkers for months or even years before any claim can become viable. These employees will be asked to endure more racial abuse than Title VII tolerates unless this Court grants review and reverses. It should do so now.

III. This case presents an ideal vehicle for resolving the questions presented.

This case presents an ideal vehicle for this Court's review. Only Collier's hostile-work-environment claim is presented, and no antecedent issues or other impediments could prevent this Court from reaching it.

Collier's claim that his employer created a hostile work environment by allowing racist graffiti to exist in the workplace, including the N-word scratched into an elevator, is thus squarely presented, and resolution of the claim would be outcome-determinative. *See* Pet. App. 4a. The Fifth Circuit—acknowledging it was bound by its own precedent—held that this use of the N-word, taken alone or in conjunction with the other detestable conduct, was not sufficient to create a hostile work environment. *See id.* at 9a-11a. If this Court agrees, Collier's case would be over. But if this Court adopts the position embraced by the Third and Fourth Circuits, Collier's hostile-work-environment claim will survive summary judgment and be presented to the trier of fact.

IV. The Fifth Circuit's decision is wrong.

Title VII makes it unlawful to discriminate against an employee with respect to the "terms, conditions, or privileges of employment" because of race. 42 U.S.C. § 2000e-2(a)(1). As explained earlier, an employer violates Title VII when its workplace harassment is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986)). To determine whether a hostile work environment exists, courts look at all of the circumstances, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id.* at 23. As noted, this Court has suggested that "extremely serious" isolated incidents can amount to discriminatory changes in the terms and conditions of employment. *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998).

The Fifth Circuit held that Collier's exposure to the N-word carved into the elevator, the swastikas in the storage room, and being called "boy" was "not sufficiently severe or pervasive to alter the conditions of [his] employment and create an abusive working environment." Pet. App. 11a (quotation marks omitted). This conclusion is wrong.

The Fifth Circuit erred by affirming summary judgment for Parkland because, as the Third and Fourth Circuits have recognized, the workplace use of the N-word may be severe enough to create a hostile work environment and should be presented to the trier

of fact. Parkland created a hostile work environment by tolerating the presence of the epithet scratched into the side of the elevator that employees regularly used. Pet. App. 9a-10a. Collier found the etching "racist and offensive" and "always thought of" it. ROA 243, 256. But as an hourly employee who could not skip work, Collier had no choice but to continue doing his job despite the added burden of confronting the epithet. *Id.* at 256. Parkland's refusal to remove the racist graffiti forced Collier to confront the N-word countless times, even after it was reported to management. *See supra* at 4-5.

Introducing the N-word into Collier's workplace "alter[ed] the conditions of [his] employment." *Meritor*, 477 U.S. at 66; *see Ayissi-Etoh v. Fannie Mae*, 712 F.3d 572, 580 (D.C. Cir. 2013) (Kavanaugh, J., concurring). The brutality of the word makes it "[f]ar more than a 'mere offensive utterance.'" *See Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 185 (4th Cir. 2001). "Perhaps no single act can more quickly 'alter the conditions of employment and create an abusive working environment' than the use of an unambiguously racial epithet such as 'nigger.'" *Rodgers v. Western-Southern Life Ins. Co.*, 12 F.3d 668, 675 (7th Cir. 1993) (citation omitted). Collier's exposure to the slur in an employee elevator makes this "the type of case contemplated in *Faragher* where the harassment … can properly be deemed to be 'extremely serious'" and thus establishes a hostile work environment. *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 281 (4th Cir. 2015) (en banc).

And that Parkland also failed to remove two-foot-tall swastikas and tolerated frequent use of the pejorative "boy" toward its Black workers (including

Collier) renders the Fifth Circuit's decision all the more erroneous. *See supra* at 5-6.

CONCLUSION

The petition for a writ of certiorari should be granted.

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