No. 20-1004

IN THE

Supreme Court of the United States

ROBERT COLLIER,
Petitioner,
v.
DALLAS COUNTY HOSPITAL DISTRICT, doing business as Parkland Health & Hospital System,
Respondent.

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

REPLY BRIEF FOR PETITIONER

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Given the gravity of the questions presented—and the petition's support from the Nation's foremost civil-rights organizations and scholars—Parkland does not seriously contest their importance. Instead, Parkland maintains that review should be denied for three reasons: first, that all circuits agree that a racially hostile environment of the kind to which Robert Collier was subjected for months on end is never sufficiently severe or pervasive to be considered by a jury; second, that Collier's first question presented regarding workplace use of the N-word was not properly raised below; and, third, that the Fifth Circuit correctly resolved Collier's claim—that is, Parkland maintains that unless someone in Collier's shoes is willing to subject himself to a work environment even more pervaded by severe and prolonged racial harassment, management is free to ignore it, and a court may never provide a remedy.

None of Parkland's assertions survives scrutiny, and review should be granted.

I. The conflict among the courts of appeals is real and significant.

Parkland's effort to negate the entrenched circuit split is mistaken in every detail. The Fifth Circuit recognized as much below. It acknowledged that "other courts of appeals have found instances where use of the N-word itself was sufficient to create a hostile work environment," Pet. App. 10a, and then contrasted that view with "our precedent" holding that much more extensive uses of the N-word and other odious racial epithets are not actionable, *id.* (citations omitted). *See* Pet. 10-16 (showing that in the Third

and Fourth Circuits, one use of a racial slur may be enough for an employee's hostile-work-environment claim to reach a jury, while in the Fifth, Sixth, Seventh, Eighth, and Tenth Circuits, an identical claim will never reach a finder of fact).

A. This Court need look no further than to the chasm between the Tenth and Fourth Circuits to appreciate that Parkland's claim of circuit harmony is wrong. In the Tenth Circuit—whose relevant precedents Parkland ignores—"there must be a steady barrage of opprobrious racial comments," "[i]nstead of sporadic racial slurs," to state a hostile-work-environment claim. *Bolden v. PRC Inc.*, 43 F.3d 545, 551 (10th Cir. 1994); *accord Lounds v. Lincare, Inc.*, 812 F.3d 1208, 1229 (10th Cir. 2015) (quoting *Bolden*, 43 F.3d at 551); *see* Pet. 14-15. By contrast, according to the en banc Fourth Circuit, a single use of a racial slur "can properly be deemed to be 'extremely serious'" and, thus, actionable under Title VII. *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 280-81 (4th Cir. 2015) (en banc) (quoting *Faragher v. City of Boca Raton*, 534 U.S. 775, 788 (1998)). Under *Boyer-Liberto*, "even a single incident in which [the N-word] or [a word] like it is directed at an employee may be severe enough to engender a hostile work environment." *Savage v. Maryland*, 896 F.3d 260, 277 (4th Cir. 2018) (quotation marks omitted); *see also* NAACP LDF Amicus 15-16.

B. Parkland's effort to undermine the circuit conflict is premised on a misuse of this Court's precedent. Parkland observes that the courts of appeals agree that "a single incident of harassment, if sufficiently severe, could give rise to a viable Title VII claim." *EEOC v. WC&M Enters.*, 496 F.3d 393, 400

(5th Cir. 2007); *see also Rodgers v. W.S. Life Ins. Co.*, 12 F.3d 668, 674 (7th Cir. 1993). There is no dispute that one "extremely serious" "isolated incident" of harassment may be enough to support a hostile-work-environment claim because this Court said so in *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998). But that general proposition does nothing to support Parkland's claim of circuit agreement as to whether a *single use of a racial epithet* can be an extremely serious isolated incident.

C. Parkland denies that the Fifth, Sixth, Seventh, Eighth, and Tenth Circuits categorically bar hostile-work-environment claims based on a single workplace use of a racial epithet. As support, Parkland identifies three decisions—two in the Fifth Circuit and one in the Seventh Circuit—that it characterizes as allowing such a claim to reach a jury. (Tellingly, Parkland doesn't even try to identify such a case from the Sixth, Eighth, or Tenth Circuits.) Even if Parkland were correct, that would only reconfigure, not eliminate, the circuit split. In any event, those three decisions do nothing of the sort.

In the Fifth Circuit cases, Black employees brought hostile-work-environment claims arising from extended incidents of racist *conduct*, not the use of a racial slur. *See Henry v. CorpCar Servs. Hous., Ltd.*, 625 F. App'x 607, 608-09 (5th Cir. 2015) ("[A] white woman in a black gorilla suit" "repeatedly referred in a suggestive manner to 'big black lips,' 'big black butt,' and bananas" in a performance that "coincided with Juneteeth."); *Allen v. Potter*, 152 F. App'x 379, 381 (5th Cir. 2005) ("[D]arker skinned African-American employees" "were required to work in a metal enclosure—a cage—for one and one half

hours" while "coworkers threw peanuts and bananas at them."). And the Seventh Circuit case, *Gates v. Board of Education of the City of Chicago*, 916 F.3d 631, 633-34 (7th Cir. 2019), involved multiple, highly offensive racial epithets.

D. Parkland mischaracterizes the petition as asking for a "bright-line rule" that "a single use of the N-word creates a hostile work environment." Opp. 3, 15.

As the petition explains (at 10-11), the Third and Fourth Circuits properly adhere to this Court's totality-of-the-circumstances test for hostile-work-environment claims. *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993). Under that approach, "the workplace use of the N-word *may* be severe enough to state a hostile-work-environment claim" because it "*can* properly be deemed to be 'extremely serious.'" Pet. 10, 11 (describing the law in the Third and Fourth Circuits and quoting *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 280-81 (4th Cir. 2015) (en banc)) (emphasis added). The D.C. Circuit has expressed agreement with the Third and Fourth Circuits, stating that a supervisor's use of the N-word by itself "might well have been sufficient to establish a hostile work environment." *Ayissi-Etoh v. Fannie Mae*, 712 F.3d 572, 577 (D.C. Cir. 2013). That flexible approach contrasts with the unyielding practice adopted by the Fifth, Sixth, Seventh, Eighth, and Tenth Circuits, where the workplace use of a racial epithet by itself is invariably insufficient to place a hostile-work-environment claim before a jury. *See* Pet. 12-16; NAACP LDF Amicus 12-15 (surveying Fifth Circuit cases). In other words, some circuits have established a bright-line rule, one in which a claim involving a

single racial epithet, no matter how severe and no matter the circumstances, may never reach a trier of fact.

II. Parkland's vehicle arguments are meritless.

Parkland nowhere disputes that the petition presents an excellent vehicle for this Court's review as that concept is normally understood. After all, the Fifth Circuit squarely held that Collier's racial hostile-work-environment claim failed as a matter of law; there are no antecedent questions or other impediments that could prevent this Court from reaching that claim; and the Court's resolution of the claim would be outcome-determinative. *See* Pet. 21.

Parkland has instead concocted two arguments concerning the purported inadequacy of Collier's litigation efforts below. Neither presents a genuine barrier to review because neither is accurate.

A. Parkland first says that Collier "waived" the first question presented by not properly raising it below. Opp. 22-25. That assertion runs headlong into reality. Collier maintained in the lower courts that he was subjected to a hostile work environment because the N-word was etched into an elevator wall for six months, that a pair of two-foot-high swastikas remained on Parkland's walls for up to two years, and that he and other Black employees were called "boy" by white Parkland staff. *See* Pet. 4-6. He reported all of this to Parkland management, which did nothing. *See id.*

That is *exactly* the claim considered by the Fifth Circuit, which rebuffed it in light of controlling circuit precedent. Pet. App. 56a-57a (initial panel opinion). In doing so, the Fifth Circuit specifically rejected the

position that the N-word graffiti alone could render Collier's claim viable (while observing that out-of-circuit authority holds otherwise). *Id.* Collier then did what litigants often do when they are told binding circuit law stands in their way: He urged en banc review, expressly noting that other circuits hold that a single use of a racial slur can be sufficiently serious to create a hostile work environment. CA5 Pet. for R'hrg. En Banc 11-12. The Fifth Circuit denied Collier's petition for rehearing en banc, Pet. App. 59a, and issued a nearly verbatim reprise of its initial opinion, *id.* at 1a-11a. The issues were fully presented and considered below and are properly presented here.

B. Parkland also maintains that review would be "immediately improvident" because "this Court has already decided Collier's questions presented against him." Opp. 25. This assertion is doubly wrong.

First, as the petition explains (at 18), because this Court has not confronted a hostile-work-environment claim involving racial epithets and has not clarified the relationship between a nonactionable "mere utterance" and an actionable "extremely serious" isolated incident, this case provides an excellent opportunity to decide unresolved issues that have vexed the lower courts. Stated somewhat differently, this argument repeats Parkland's mistaken assertion that this Court's hostile-work-environment precedents are so comprehensive and prescient as to resolve the first question presented here. Simply put, the circuit split on that question belies Parkland's assertion. *See supra* at 2.

Second, and relatedly, Parkland's argument ignores the petition's second question presented,

which asks more generally whether and in what circumstances the workplace presence of racial epithets constitutes a Title VII hostile work environment. That issue, which presents concerns uniquely tied to *racial* harassment, *see* Pet. 19-20; Howard Amicus 2-8; NAACP LDF Amicus 5-12, is not resolved by this Court's hostile-work-environment precedents, which have all involved workplace sexual harassment. *See, e.g.*, *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

III. The Fifth Circuit's decision is wrong.

Parkland's defense of the Fifth Circuit's ruling provides no basis for denying review.

A. The simple answer to Parkland's defense of the Fifth Circuit's ruling is that the parties' disagreement about whether Parkland's work environment was sufficiently hostile to state a claim under Title VII is to be expected, and that, given the undeniable importance of the questions presented and the entrenched division among the circuits, there will be time enough later for this Court to consider the parties' contrasting positions on the merits.

The more detailed answer is that undeniably racist epithets permeated the workplace for up to two years and Parkland knew about the work environment because one of its victims, Robert Collier, reported it. Yet, Parkland callously allowed that environment to continue to poison the workplace, altering the terms and conditions of Collier's employment.

B. Parkland's brief in opposition appears to raise three specific defenses of the result below. First, it says that circuit-court decisions finding hostile work environments and involving singular uses of odious racial epithets are distinguishable because, in those cases, *supervisors* were the perpetrators. Opp. 31 (citing *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 279-80 (4th Cir. 2015) (en banc); *Ayissi-Etoh v. Fannie Mae*, 712 F.3d 572, 577 (D.C. Cir. 2013)). To be sure, supervisory involvement in workplace harassment can be legally significant because it is generally sufficient to ascribe liability to the employer under agency principles. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998). But so, too, is what occurred here: Collier told management about the racist graffiti, giving Parkland actual knowledge of the harassment, and yet it did nothing, rendering Parkland liable. *See id.*; *see also* Pet. 4-5. And so, neither the Fifth Circuit nor Parkland disagrees that Parkland would be liable here if Collier's claim were otherwise actionable.

That said, supervisory involvement is simply a *factual* consideration for a trier of fact. Here, Parkland managers were told of the workplace graffiti and racially pejorative uses of "boy," and did not care enough to do anything about it (perhaps evidencing tacit support). Given the severity of the facts, and the other indicia of certworthiness, whether a reasonable worker in Collier's shoes would find Parkland's indifference more or less hostile than a supervisor's use of a racial epithet is, at most, something for this Court to consider during merits briefing, not something precluding review in the first place.

Second, Parkland repeatedly downplays the seriousness of Collier's hostile-work-environment claim because it involved only a few instances of racial harassment over an extended period. *See, e.g.*, Opp. 8, 9, 30-31. Even on its own terms, that response is hardly convincing at this stage given that some circuits maintain that a single racial epithet may be sufficiently serious to send a case to a jury. *See supra* at 2, 4-5.

But the more fundamental answer is that the N-word and the swastika appeared in the form of graffiti, which some courts have rightly viewed as an exacerbating factor, as the Fifth Circuit acknowledged. Pet. App. 9a ("[O]ther 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.") (citations omitted). Parkland's attempted justification—that the incidents extended "over the course of two to three years," Opp. 31—is not a valid excuse but the point. The N-word and swastika graffiti had "the potential to repeatedly injure or impact the employee for as long as it [was] left unaddressed, serving as a constant reminder of the racism and hostility to which the employee has been subjected at their place of work." NAACP LDF Amicus 17-18.

As for the severity of the N-word graffiti in particular, Parkland itself cannot bear to use the term, Opp. 1 n.1, acknowledging that, standing alone, the epithet is "indisputably offensive" and "universally condemned," *id.* at 1. Yet, it maintains that a court asked to enforce Title VII would invariably be required to look the other way when an employer tolerates not only the N-word but also the

swastikas and uses of the pejorative "boy" to refer to Black adult men like Collier. That position cries out for further scrutiny. *See* Howard Amicus 4-5.

Finally, Parkland belittles the seriousness of Robert Collier's plight, taking repeated aim at his statement that Parkland's hostile work environment undermined his workplace performance only "one percent." Opp. i, 4, 7, 31. That Collier remained a productive, dedicated worker despite the poisonous environment is hardly something that should count against him in litigation under a statute that "tolerates no racial discrimination." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973).

In any case, Parkland's telling seriously distorts the record. Despite his stoicism, Collier viewed the graffiti as "racist and offensive," and he "always thought of it," Pet. 5 (quoting ROA 243, 246). Being called "boy" never "went away or out of [Collier's] mind," *id.* at 6 (quoting ROA 251), rendering puzzling Parkland's assertion that Collier never claimed that he experienced humiliation, *see* Opp. i, 24. Collier soldiered on not because he was unaffected but because he was an hourly worker who needed his paycheck. *See* Pet. 5. In short, Collier endured a wounding, traumatic work environment that no worker should have to bear. *See* NAACP LDF Amicus 7-11, 13-15; Howard Amicus 2-9; Social Scientists Amicus 9-16.

C. Title VII provides not only retrospective monetary remedies for violations that have already occurred, but also injunctive relief to bring an end to ongoing discrimination. *See* 42 U.S.C. § 2000e-5(g). Parkland's position, therefore, is that, after its management repeatedly ignored Collier's complaints,

if Collier sued to enjoin the workplace presence of the N-word graffiti and the two-foot-high swastikas, and sought an order directing Parkland management to ban the racial epithet "boy," the court would have been powerless to do anything about it. Instead, as Parkland would have it, Collier would have had to either quit or endure the ongoing indignities and humiliation and then wait to sue until things got even worse—how much worse Parkland does not say.

More than a half century after Congress enacted legislation dedicated to "eliminating discrimination in employment," *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 71 (1977), Parkland's position cannot be right.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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